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The *Youth Justice and Criminal Evidence Bill* [HL]

Bill 74 of 1998-99

This paper seeks to provide some background to the *Youth Justice and Criminal Evidence Bill*, which has completed its passage through the House of Lords and is due to be debated on second reading in the House of Commons on Thursday 15 April 1998. The Bill is intended to provide a new sentencing disposal for the youth court - referral to a youth offender panel - and to make a number of changes to the law concerning the giving of evidence in criminal proceedings.

This paper should be read in conjunction with the Explanatory Notes published with the Bill, which set out the Government's objectives in introducing this legislation.

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Summary of main points

The first part of this paper discusses Part I of the *Youth Justice and Criminal Evidence Bill*, which aims to provide the youth courts with a new sentence - referral to a youth offender panel - which will be available for young offenders convicted for the first time. Proposals for the new sentence were outlined in the November 1997 White Paper *No More Excuses* (CM 3809) which set out proposals many of which were implemented in the *Crime and Disorder Act 1998* (see Research Paper 98/43). The primary aim of the youth offender panel will be to prevent re-offending. It will work with the offender to agree a programme of behaviour (a "contract") for the young offender to follow. A young offender who fails to comply with the programme may be referred back to the court for re-sentencing. This will also be the outcome where agreement cannot be reached between the offender and the panel. In most cases, an offender's parents or guardians, or a local authority representative where the offender is in local authority care, will be required to attend meetings of the panel with the offender.

The paper goes on to discuss the provisions in Part II of the Bill concerning the use of “special measures directions” and particularly the measures concerning video-taped evidence. It then considers provisions intended to prevent the cross-examination of witnesses by unrepresented defendants in certain types of criminal case, new measures concerning the use made of sexual history evidence in trials involving rape and other sexual offences, and changes to the current restrictions on press reporting of criminal cases. These measures arise out of the report of an interdepartmental working group on vulnerable and intimidated witnesses, entitled *Speaking up for Justice*, which was published by the Home Office in June 1998.

This paper does not consider the provisions in the Bill which deal with the competence and compellability of witnesses or which seek to amend the law concerning inferences which may be drawn from a person's silence or the use which may be made of a person's answers given under compulsion.

Part I of the Bill extends to England and Wales only. The provisions of Chapter IV of Part II concerning reporting restrictions are intended to be enforceable in all parts of the United Kingdom. The provisions of Clause 58 concerning restrictions on the use of answers given by persons subject to compulsion, and Clause 59 concerning the application of Part II to service courts, extend to Scotland and Northern Ireland. Other than this, however, the provisions of Part II of the Bill extend only to England and Wales. From 1 July 1999 the Scottish criminal justice system will be a matter for the Scottish Parliament.

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I Youth Offender Panels

A. Non-prosecution of young offenders

In England and Wales, offenders aged between 10 and 17 years are generally tried in youth courts, although in certain circumstances, depending on the nature of the offence they are alleged to have committed they may be tried in adult magistrates' courts or in the Crown Court by a judge and jury.

In Scotland it is rare for offenders under the age of 16 to be prosecuted and criminal proceedings may only be brought against them where the Lord Advocate has instructed that this be done. Most children under 16 who have committed offences are instead brought before a Children's Hearing, consisting of three lay people appointed from a Panel nominated by the Secretary of State, which decides, often with the child and his or her parents, whether compulsory measures of care are needed and if so, what form they should take. The decision whether or not a child should come before a Hearing is made by an official known as the reporter to the Children's Hearing. If the child or the parents do not accept the grounds for referral for a hearing, the case goes to the sheriff for proof to establish the grounds. If the sheriff finds the grounds established he or she sends the case back to the reporter so that a Children's Hearing can be arranged. The sheriff also hears appeals against decisions made by a Children's Hearing.

The Childrens' Hearing system was introduced in Scotland in 1971 under the *Social Work (Scotland) Act 1968.* These provisions were based on the recommendations of the Kilbrandon Report published in 1964[1]. Provisions in the *Children and Young Persons Act 1969* which were intended to limit the prosecution of young offenders in England and Wales were never brought into force and were eventually repealed by the *Children Act 1989*.

There have been several studies of the Children's Hearings system. A Scottish Office fact-sheet on *Children's Hearings*, published in August 1997, lists the major studies and reviews of research[2]. A study of decision-making at Children's Hearings, commissioned by the Scottish Office as part of a programme of research evaluating the operation of the Hearing system, was published in 1998.

In July 1997 the Government set up a working group to investigate delays in the Children Hearing System. The group reported in February 1998 and has since been charged with overseeing the implementation of its recommendations[3].

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[1] *Report of the Committee on Children and Young Persons, Scotland* Cmnd 3065

[2] See Appendix B to Factsheet 7 *Children's Hearings* (Scottish Office Information Directorate)(August 1997) at http://www.scotland.gov.uk/library/documents/children.htm

[3] HC Deb Vol 307 c199-200 24.2.1998

B. "Restorative Justice"

In recent years there has been increasing interest in the use of procedures for the resolution of personal disputes and conflicts which do not require the involvement of lawyers or recourse to the courts. These procedures, such as mediation and arbitration, are seen by some as providing opportunities for disputes to be resolved in a less adversarial, less intimidating and more cost-effective way. Although the procedures are most often advocated as alternatives to civil proceedings, criminologists such as Martin Wright[4] refer to the use of mediation and reparation following acts of criminal wrongdoing in this country in previous centuries and its current, apparently successful use in a number of other countries. An example of current use which is often mentioned is that of Family Group Conferences and Community Group Conferences in New Zealand and Australia. These Conferences are an extension of traditional forms of mediation and reparation used by the Maori to deal with problems caused by young people within their community.

Martin Wright considers that theoretical support for the concept of "restorative justice"[5], can be found in the theories of criminal justice developed by the American criminologist John Braithwaite, which suggest that shaming and reintegration into the community can be a more effective sanction than punishment. With Philip Pettit[6] Braithwaite has also sought to develop a "republican" philosophy of criminal justice emphasising the importance of rectification rather than mere retribution as an aim in sentencing. Victim/offender mediation is also seen by some as being a "communitarian" approach to criminal justice[7], particularly when it takes the form of Family or Community Group Conferences.

In a Written Answer to a question from Mr Beith on 18 March 1998 about whether the Government had made any assessment of the advantages of introducing elements of the Scottish Children's Hearing system into England and Wales Alun Michael, who was then a Home Office minister, said[8]

> In developing proposals for reform of the Youth Court in England and Wales, which are set out in the White Paper "No More Excuses: a new approach to tackling youth crime in England and Wales" (Cmnd 3809), we considered the available information about the youth justice systems in other jurisdictions,

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[4] Martin Wright, *Justice for Victims and Offenders: A Restorative Response to Crime* (1996)

[5] or "relational justice", as some other commentators who emphasise the importance of relationships as a "reform dynamic" in criminal justice prefer to call it - see Jonathan Burnside & Nicola Baker ed. *Relational Justice: Repairing the Breach* (1994)

[6] John Braithwaite, Crime, Shame and Reintegration (1989); John Braithwaite & Philip Pettit, *Not Just Deserts: A Republican Theory of Justice* (1990)

[7] See Martin Wright, *Justice for Victims and Offenders: A Restorative Response to Crime* (1996) p.165-166

[8] HC Deb Vol 308 c632-3, 18.3.1998

including the civil Children's Hearing system in Scotland and family group conferencing approaches in New Zealand. The proposals for reforming the Youth Court, which are set out in chapter 9 of the White Paper, aim to reflect best practice from these different approaches in a way which is consistent with the youth court arrangements in England and Wales. In particular, our longer term proposals for a youth panel which would be responsible for agreeing a "contract", which would be overseen by the Youth Court, with certain young offenders (those appearing before the Youth Court for the first time and who plead guilty) provide an opportunity for a restorative approach to be introduced. These contracts would ensure that the young person made amends to the victim or the community at large and would tackle the causes of the offending behaviour. Experience in Scotland, in New Zealand and elsewhere has informed our consideration of how best to deal with young offenders in England and Wales and the development of the proposals set out in "No More Excuses" and in the Crime and Disorder Bill.

C. Current sentencing options for courts dealing with young offenders

The principal sentences available to courts dealing with offenders under the age of 18 are summarised in the following table[9]:

Principal sentences currently available for offenders aged under 18

Age at last birthday	**Under 14**	**14**	**15**	**16**	**17**
Discharge	*	*	*	*	*
Fine	*	*	*	*	*
Compensation Order	*	*	*	*	*
Deprivation of property	*	*	*	*	*
Probation				*	*
Community Service Order				*	*
Combination Order				*	*
Curfew Order	#@	#@	#@	#	#
Supervision Order	*	*	*	*	*
Attendance Centre Order	*	*	*	*	*
Secure training order	*	*			
Detention under CYPA 1933, s.53(2) & (3)	A	B	B	B	B
Detention in a Young Offender Institution			C	C	C

* = the order is available.
# = available only to courts notified of availability.

[9] Adapted from a more comprehensive table distributed with the August 17,1998 issue of *Current Sentencing Practice News.*

@ = maximum period three months.
A = available if the offender is convicted on indictment of an offence punishable with at least 14 years' imprisonment, or of indecent assault (if indecent assault on a male, only where the offence was committed on or after October 1, 1997).
B = available if the offender is convicted on indictment of an offence punishable with at least 14 years' imprisonment, or of indecent assault (if indecent assault on a male, only where the offence was committed on or after October 1, 1997), causing death by dangerous driving or causing death by careless driving while affected by alcohol.
C = minimum term is 2 months, maximum is 2 years.

Secure training orders and detention in a Young Offender Institution for offenders under 18 will be replaced by detention and training orders when sections 73-79 of the *Crime & Disorder Act 1998* are implemented. The Home Office guide to the 1998 Act describes the availability of these orders as follows:

> The orders are available for:
>
> - 15-17 year olds, for any imprisonable offence sufficiently serious to justify custody under section 1 of the Criminal Justice Act 1991;
> - 12-14 year olds, who are, in the opinion of the court, persistent offenders, for offences serious enough to justify custody under the 1991 Act; and
> - 10 and 11 year olds, for persistent offending and only then when the court considers that only custody is sufficient to protect the public from further offending. The power to introduce the detention and training order for this age group is at the discretion of the Home Secretary. The intention is to use this power only if it proves necessary or desirable to do so.
>
> Crown Courts and magistrates' courts can impose detention and training orders of 4, 6, 8, 10, 12, 18 and 24 months provided they do not exceed the adult maximum.

Arrangements for the implementation of those provisions of the 1998 Act dealing with detention and training orders are summarised in the Home Office guidance as follows:

> These provisions will be implemented for 12 to 17 year olds in Summer 1999. The orders will not have retrospective effect. The order will be extended to 10 and 11 year olds only if it should prove necessary or desirable, to include them.

The *Crime and Disorder Act 1998* abolished the rebuttable presumption that a child between the ages of 10 and 14 is doli incapax (incapable of distinguishing between acts which are merely naughty or mischievous and those which are seriously wrong). This is intended to enable all children aged between 10 and 17 to be treated in a similar way.

The 1998 Act also made a number of new measures available to the police and the courts in dealing with young offenders. The background to and details of these changes are considered in Library research paper 98/43 on *The Crime and Disorder Bill [HL][Bill 167 of 1997-98]: Youth Justice, Criminal Procedure and Sentencing.*

Sections 65 and 66 of the *Crime and Disorder Act 1998* introduce a new reprimand and final warning scheme to replace the system of police cautions for young offenders. The Home Office guide to the 1998 Act notes that:

> **Section 65** provides that a first offence can be met with a reprimand, a final warning or criminal charges depending on its seriousness. Following one reprimand, any further offence will lead to a warning or a charge. Any further offending following a warning will normally result in a charge being brought. There is provision for a second warning to be given only in the limited circumstances where the latest offence is not serious and more than two years have passed since the first warning was given.
>
> Before a police officer can issue a reprimand or warning, four criteria must be met:
>
> there must be sufficient evidence;
> the young person must admit the crime;
> he or she must have no previous convictions; and
> it must be determined that it is not in the public interest for the offender to be prosecuted.
>
> The Home Secretary can issue guidance to the police on the circumstances in which it is be appropriate to issue a reprimand or warning; who gives them; and what form they are to be given and recorded.

After receiving a warning a young offender will be referred to a youth offending team, which will assess the offender to determine whether a rehabilitation programme, aimed at preventing re-offending, is appropriate and in most cases, provide such a programme. The Home Office intends to provide youth offending teams with guidance on the content of rehabilitation programmes[10]

Youth offending teams were established under section 39 of the *Crime and Disorder Act 1998.* They consist of at least one of each of the following:

(a) a probation officer;
(b) a social worker of a local authority social services department;
(c) a police officer;
(d) a person nominated by a health authority any part of whose area lies within the local authority's area;
(e) a person nominated by the chief education officer appointed by the local authority under section 532 of the *Education Act 1996.*

[10] Home Office *Crime & Disorder Act 1998: Introductory Guide* p.18

They may also include any other people the local authority considers appropriate after consulting the local chief of police, a probation committee or health authority.

The duties of youth offending teams are to co-ordinate the provision of youth justice services for all those in the care of their local authority who need them; and to carry out functions assigned to them in youth justice plans formulated by local authorities under section 40(1) of the *Crime and Disorder Act 1998*. Unlike referral to a youth offender panel under the *Youth Justice and Criminal Evidence Bill*, failure by a young offender who has been given a final warning to participate in a rehabilitation programme arranged by a youth offending team will not trigger referral to a court. Such a failure may, however, be cited in subsequent criminal proceedings in the same way as a conviction.

Pilot schemes for the new system of reprimands and warnings began in a number of areas on 30 September 1998. The pilot schemes will last for 18 months, after which the Government intends to implement the new system nation-wide in the course of 2000-2001[11].

The 1998 Act provides courts with powers to make a number of additional orders in respect of young offenders. These orders were summarised in Home Office Press Notice of 1 October 1998 as follows[12]:

- parenting orders - to help and support parents to control the behaviour of their children. It will require parents to attend counselling and guidance sessions;

- child safety orders - to protect children under ten who are at risk of becoming involved in crime. It could require a child to be at home at certain times or to stay away from certain people or places;

- reparation orders - to make young offenders face up to their crimes and the consequences of their actions. It could involve writing a letter of apology, apologising in person, cleaning graffiti or repairing criminal damage;

- action plan orders - a short intensive programme of community- based intervention combining punishment, rehabilitation and reparation;

Like the reprimand and final warning scheme, these new orders are being piloted for 18 months from 30 September 1998, with a view to national implementation in 2000-2001.

[11] ibid.

[12] "New powers to tackle youth crime available from today" - Home Office 1.10.1998

D. Youth Justice and Criminal Evidence Bill Part I

The *Crime and Disorder Act 1998* also contained a number of other provisions intended to improve procedures and reduce delays in the criminal justice system. These had previously been set out in the White Paper *No More Excuses: A New Approach to Tackling Youth Crime in England and Wales*[13], which was published in November 1997. Having summarised the Government's proposals for reform of the youth court the White Paper went on to say:

> But more radical action is needed to maximise the impact of the youth court on young offenders, making it as effective as possible at tackling offending behaviour, especially for young people appearing before the court for the first time.
>
> The Government considers that it will be necessary to reshape the criminal justice system in England and Wales to produce more constructive regimes with young offenders. Its proposals for reform build on principles underlying the concept of restorative justice:
>
> - **restoration**: young offenders apologising to their victims and making amends for the harm they have done;
> - **reintegration**: young offenders paying their debt to society, putting their crime behind them and rejoining the law-abiding community; and
> - **responsibility**: young offenders - and their parents - facing the consequences of their offending behaviour and taking responsibility for preventing further offending
>
> The new approach is intended to:
>
> ensure that the most serious offences continue to be dealt with in a criminal court to provide punishment, protect the public and prevent re-offending;
>
> provide an opportunity for less serious offending to be dealt with in a new non-criminal panel, enforced by a criminal court;
>
> involve young people more effectively in decisions about them - encouraging them to admit their guilt and face up to the consequences of their behaviour;
>
> involve the victim in the proceedings, but only with their active consent; and
>
> focus on preventing offending.

[13] CM 3809

The White Paper went on to describe the Government's proposals concerning the creation of a non-criminal panel to deal with less serious offending by young people in some detail.

Part I of the *Youth Justice and Criminal Evidence Bill* is designed to implement these proposals by creating a new sentence of referral to a youth offender panel. The *Explanatory Notes* state that this option is available for young people convicted for the first time and its primary aim is to prevent re-offending. They go on to say that the youth offender panel will work with the young offender to establish a programme of behaviour for the young offender to follow, which will be guided by the three principle of 'restorative justice' - restoration, reintegration and responsibility - referred to in the White Paper.

Clause 1 of the Bill is designed to enable a youth court or other magistrates' court dealing with an offender under the age of 18 to order him or her to be referred to a youth offender panel. This power is not intended to be available where the offence is one for which the sentence is fixed by law, where the court is proposing to impose a custodial sentence on the offender or make a hospital order, or where the court is proposing to discharge him absolutely in respect of the offence. The Explanatory Notes comment that a referral order is intended to be the main disposal for young offenders who have not previously been convicted.

The introduction of powers enabling courts in England and Wales to refer young offenders who are not persistent or serious offenders to youth offender panels received cross-party support in the House of Lords, except where compulsory referrals were concerned. As originally drafted, Clause 1 (2) and (3) were intended to provide that where referral to a youth offender panel was available to the court it should be mandatory where the "compulsory referral conditions" set out in Clause 2(1) of the Bill were satisfied, that is, where the offender

> (a) pleaded guilty to the offence and to any associated offence;
> (b) has never been convicted by or before a court in the United Kingdom of any offence other than the offence and any associated offence; and
> (c) has never been bound over in criminal proceedings in England and Wales or Northern Ireland to keep the peace or to be of good behaviour.

A discretionary power to refer offenders to the youth offender panel was also to have been available where referral was available to the court and the "discretionary referral conditions" set out in Clause 2(2) were satisfied. These were that:

> (a) the offender is being dealt with by the court for the offence and one or more associated offences;
> (b) although he pleaded guilty to at least one of the offences mentioned in paragraph (a), he also pleaded not guilty to at least one of them;
> (c) he has never been convicted by or before a court in the United Kingdom of any offence other than the offences mentioned in paragraph (a); and

> (d) he has never been bound over in criminal proceedings in England and Wales or Northern Ireland to keep the peace or to be of good behaviour.

However during the debate on the Bill's Third Reading in the House of Lords the Conservative peer Lord Windlesham moved an amendment designed to remove the mandatory provision in Clause 1(2) and replace it with a discretionary power. The amendment was opposed by the Government, but was agreed to on a division[14].

In moving his amendment removing the mandatory requirement to refer young offenders to a youth offender panel Lord Windlesham expressed support for referral orders as a new form of sentence which, he thought, offered some hope of preventing a cycle of re-offending. He added[15]:

> There is therefore only one matter which divides noble Lords who support this group of amendments and the Government who I anticipate will not. It does not relate to the merits of the proposed new disposal in any way. It relates to the central question of whether it should be a mandatory or discretionary decision by the magistrates' courts.
>
> The arguments against mandatory sentencing are well known and will need to be repeated often if the gradual slide down the slippery slope of the past few years is to be resisted. Mandatory sentencing is one of the most fundamental changes of direction in criminal policy for a long time; and it is of the greatest importance. It should be on the facts of each case and the characteristics of the individual offender before the court that magistrates, like judges, decide on the type and severity of the disposal at the conclusion of a trial. The fact that a referral order differs from a sentence in a conventional sense does not alter its nature as a compulsory disposal. As the Bill is drafted, no discretion is left with the magistrates.

He went on to say:

> This is an example of how a blanket provision, allowing only for minutely prescribed statutory exceptions, leaves no power in the hands of the magistrates' court to use its own judgment, or its common sense, in deciding whether or not a young person is suitable for this promising new disposal.
>
> I conclude with this observation. There is a tendency of which many of us in this House are aware--it is to be seen in the recent Crime and Disorder Act as well--for the Government, having worked so diligently and thoroughly in developing imaginative new policies on criminal justice, to insist that every provision should be implemented in one specific way. Such a desire for total control is not necessary; indeed, it is potentially dangerous. It introduces undesirable rigidity into the administration of justice. It diminishes the responsibility of sentencers

[14] HL Deb Vol 598 c1154-1170, 23.3.1999
[15] ibid. c1154-6

> and sooner or later it is inevitable that some hard cases will result. Why is that? Because human behaviour will fail to fit into a predetermined pattern.

A number of other peers supported Lord Windlesham's view, welcoming the new referral order and the concept of restorative justice while expressing general opposition to mandatory sentences. They included the Conservative former Home Office minister Lord Carlisle of Bucklow[16], the Liberal Democrat peer Lord Thomas of Gresford[17], the chairman of the 1991-93 Royal Commission on Criminal Justice, Viscount Runciman of Doxford[18] and the former Lord Chief Justice, Lord Lane [19]. The Conservative spokesman in the House of Lords, Lord Cope, who noted that the same point had been discussed on amendments he had moved earlier in the Bill's passage through the House of Lords[20], also supported Lord Windlesham's amendment[21].

The Home Office minister, Lord Williams of Mostyn, disagreed with the view that the proposed scheme was too rigid or inflexible or that it could lead to injustice. He said[22]:

> Perhaps we may spend a moment looking at the scheme. The scheme in fact requires in most circumstances--not where a custodial sentence is appropriate and not where an absolute discharge is right and just, but in most circumstances--the youth court to deal with those under 18 who are a particular category of offender: they are first-time offenders who have pleaded guilty. Notoriously, as the noble Lord, Lord Warner, was indicating, that is the class of offender, attention to which is likely to be most productive, to use his phrase, in preventing re-offending.
>
> They have not become accustomed to crime. They have not been playing the system, because they have pleaded guilty. I take entirely the point that was made by the noble Earl, Lord Mar and Kellie, that this is a distinct category of young offender, as regards whom our purpose must be to have an intervention at the earliest possible stage. I come back to the objection, putting it in inverted commas, "in principle", which I mentioned a moment or two ago. The point of this referral system is to afford abundant flexibility: indeed, I suggest, accurately I believe, more flexibility than the courts have at present.

He added:

> Is it in fact taking away all discretion from the court? No, it is not. If one looks at Clause 3(1)(c), the length of the period is for the determining or sentencing court;

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[16] ibid. c1155-1156
[17] ibid. c1156-1157
[18] ibid. c1163
[19] ibid c.1159
[20] HL Deb Vol 596 c373-377, 18.1.1999; HL Deb Vol 597 c1576-1583, 2.3.1999
[21] ibid. c1163-1165
[22] ibid c1165-1167

> namely, the youth magistrates' court. It is a period of from three to 12 months, so that flexibility and lack of rigidity is there even at the earlier stage.

Lord Williams of Mostyn concluded his speech by saying[23]:

> Simply to say that mandatory sentences are wrong without looking at this very careful construction is, if not conservative, extremely blinkered.

As the Bill currently stands there are therefore no conditions under which referral to a youth offender panel must be made, although the "compulsory referral conditions", under which referral to a youth offender panel was to have been mandatory, and the "discretionary referral conditions" under which it was to have been discretionary remain in Clauses 1 and 2 of the Bill.

Commenting that the terminology of Clauses 1 and 2 the Bill reflects the original intention that there should be circumstances in which the referral order was a mandatory disposal, the *Explanatory Notes* go on to say that that the drafting of Clauses 1 and 2 is now under review. It is not entirely clear from this whether the Government intends to restore the original mandatory requirement or replace it with a discretionary power of referral to a youth offender panel.

On the implementation of referrals to the youth offender panel the *Explanatory Notes* say[24]:

> The intention is to pilot the new provisions in selected areas across the country. It may be that in the light of the experience of the pilots, or following full implementation across the country, it will appear that there are other categories of young offender who could also benefit from the availability of this new sentence.

Clause 2(3) accordingly seeks to enable the Secretary of State to make regulations, which will be subject to the affirmative procedure, altering the categories of offender to whom the compulsory or discretionary referral conditions might apply. Clause 2(4) provides that reference may be made in such regulations to such matters as the Secretary of State considers appropriate, including:

> (a) the offender's age;
> (b) how the offender has pleaded;
> (c) the offence (or offences) of which the offender has been convicted;
> (d) the offender's previous convictions (if any);
> (e) how (if at all) the offender has been previously punished or otherwise dealt with by any court; and

[23] ibid. c1167-1168
[24] paragraph. 39

> (f) any characteristics or behaviour of, or circumstances relating to, any person who has at any time been charged in the same proceedings as the offender (whether or not in respect of the same offence).

The general administrative arrangements for the making of referral orders are set out in Clause 3. Amongst other things it is intended that the order should specify the youth offending team responsible for implementing the order and set out the period of time for which any youth offender contract drawn up between the offender and the youth offending panel will have effect. This will have to be between 3 and 12 months. Of the time period the *Explanatory Notes* say[25]:

> It will be set by the court on the basis of the seriousness of the offence to ensure that the sentence is proportionate to the offence. Where referral is being ordered for two or more offences, the court will make a referral order for each offence. However, each order will be supervised by the same youth offender panel (subsection (5)) and there can only be one youth offender contract. Although the period specified in each order may be of a different length, the total time for which any youth offender contract has effect will not exceed 12 months (subsection (6)).

When a referral order is made it is intended that it should constitute the entire sentence for the offence of which the offender has been convicted and any associated offences with which the court is dealing. **Clause 4** seeks to prevent a court which makes a referral order from imposing additional penalties, such as a fine, a community sentence under the *Criminal Justice Act 1991*, a reparation order under section 67 of the *Crime and Disorder Act 1998* or a conditional discharge. It also seeks to prevent courts which make referral orders binding over the young offenders concerned or their parents, or making parenting orders under section 8 of the *Crime and Disorder Act 1998*. The court will be able to order an absolute discharge in respect of an associated offence. It will also be able to make certain ancillary orders, such as orders for costs, compensation, forfeiture of items used in committing the offence, exclusion from football matches and so on[26].

Clause 5 is concerned with the circumstances in which parents or guardians of a young offender or, in appropriate cases, a representative of a local authority which is looking after the young offender, may or must be required to attend meetings of the youth offender panel to which the young offender has been referred. It is intended that for those offenders under the age of 16 at least one parent or guardian should be required to attend all youth offender meetings. Where the offender is (within the meaning of the *Children Act 1989*) a child being looked after by a local authority a representative of that authority may be required to attend. The court will have discretionary powers to require parents or guardians of young offenders aged 16 or over to attend meetings of the youth offender panel where this is considered appropriate.

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[25] paragraph 42
[26] see *Explanatory Notes* p.8 paragraph 44

The court will not have to make an order requiring a person to attend meetings of the youth offender panel

a) if it is satisfied that it would be unreasonable to do so, or
b) to an extent which the court is satisfied would be unreasonable.

The *Explanatory Notes* [paragraph 48] recognise that there will be limited circumstances in which it would be unreasonable to expect the parent or guardian's attendance (for example, in the case of serious ill health).

Arrangements governing the establishment of youth offender panels are set out in **Clause 6.** The *Explanatory Notes* summarise its provisions as follows:

> 50. Arrangements for the panel and its meetings will be the responsibility of the youth offending team. The panel will include a member of the youth offending team and at least two other members. It is intended that these other members will be directly recruited from the community by the youth offending team in accordance with qualification criteria to be set out in regulations to be issued by the Secretary of State under negative resolution procedure (which offers both Houses of Parliament an opportunity to object to the criteria chosen).
>
> 51. National standards will be devised, and issued in the form of guidance from the Secretary of State, to ensure that the first meeting between the offender and the panel charged with dealing with him takes place promptly following the making of the order.

Clause 7 is concerned with attendance at youth offender panel meetings. The youth offending team will be required to notify the offender and any parent, guardian, or local authority representative who has been required to attend the youth offender panel with the offender, of the time and place at which they are required to attend each meeting of the panel established for the offender. If the offender fails to attend any part of such a meeting the panel may adjourn it, or end the meeting and refer the offender back to the court that made the referral order. The *Explanatory Notes* comment [paragraph 48] that parents, guardians or representatives who fail to attend the meeting against the order of the court without good reason may be brought before the court for contempt, under section 63 of the *Magistrates' Courts Act 1980.*

With the panel's agreement the offender will also be able to choose one person aged 18 or over to accompany him or her to any meeting of the panel. The Explanatory Notes refer to such a person as an adult "supporter" invited by the offender. There is no specific provision for young offenders to be legally represented at panel meetings. This has been criticised by the Magistrates Association, which feels that such representation should be provided in view of the wide-ranging powers panels will have over the offenders who come before them.

Clause 7(4) seeks to permit the panel to allow to attend any such meeting:

> (a) any person who appears to the panel to be a victim of, or otherwise affected by, the offence, or any of the offences, in respect of which the offender was referred to the panel;
> (b) any person who appears to the panel to be someone capable of having a good influence on the offender.

Of the possible presence of victims at panel meetings the *Explanatory Notes* [paragraph 55] say:

> It is intended that the youth offender panel should consult the victims of the young offender's offending as to whether they also wish to attend. This might include anyone affected by the offence or, where appropriate, a representative of the community at large.

Clause 8 is intended to provide for the drawing up of a programme of behaviour, or "contract", with which the young offender agrees to comply. The purpose of the first meeting of the panel established for an offender will be to reach agreement with the offender on a programme of behaviour, the aim (or principal aim) of which will be the prevention of re-offending by the offender (reflecting the aim of the youth justice system set out in section 37 of the *Crime and Disorder Act 1998*).

As well as provisions enabling the offender's compliance with the programme to be supervised and recorded, the terms of the programme or contract may in particular include any of the following provisions set out in **Clause 8(2)**:

- the offender making financial or other reparation to, or attending mediation sessions with, any person who appears to the panel to be a victim of, or otherwise affected by the offence (but only with that person's consent);
- the offender carrying out unpaid work or service for or in the community;
- the offender being at home at specified times; or attending school or other educational establishments or at a place of work;
- the offender participating in specified activities, such as those designed to address offending behaviour
- the offender presenting himself to particular persons at specified times and places;
- the offender staying away from specified places or persons, or both.

The programme may not provide for the electronic monitoring of the offender's whereabouts or for the imposition of any physical restriction on the offender's

movements. The *Explanatory Notes* state that this is because a referral order is not a custodial sentence[27].

Once a programme, or contract, has been agreed between the offender and the panel it must be set out in writing in language capable of being readily understood by, or explained to, the offender. It should then be signed by both a member of the youth offender panel and the offender, who should be given a copy.

The contract will take effect from the date on which it is agreed and last for the period specified by the court in its referral order, unless it is subsequently extended by the court following a further offence, under provisions set out in paragraphs 11 and 12 of **Schedule 1**, or is revoked by a court after an offender has been referred back to the court by the youth offender panel, under provisions set out in paragraph 5(2) and 14(2) of **Schedule 1**.

Clause 10 is intended to enable the first meeting of the panel to be reconvened if there is no agreement between the panel and the offender. If, however it appears to the panel at the first meeting or at any further meeting that there is no prospect of agreement being reached within a reasonable period, or if the offender refuses to sign the record of the agreement as required by **Clause 8** and this refusal appears to the panel to be unreasonable, the panel will have to refer the offender back to the court that made the referral order.

Clause 11 is designed to enable youth offender panels to hold progress meetings to review the offender's progress and any other matter arising in connection with the contract. A progress meeting will have to be held where the offender:

> a) requests a variation in the terms of the contract; or
>
> b) requests that his case to be referred back to the appropriate court with a view to the order being revoked, on the grounds of a change in his circumstances, such as his being taken abroad, which makes compliance with the contract impracticable; or
>
> c) where it appears to the panel that the offender is in breach of the terms of the contract.

Where the panel discusses an apparent breach of the agreement with the offender the panel and offender may agree to continue with the contract, or the panel may decide to end the meeting and refer the case back to the court. Similarly if a variation of the contract is agreed but the offender unreasonably fails to sign the record of this agreement as required the panel may end the meeting and refer the case back to the court. The panel may also end the meting and refer the case back to the court if it is satisfied that there is

[27] paragraph 58

or soon will be a change in the offender's circumstances that will make his compliance with the contract impracticable.

Clause 12 seeks to enable the youth offender panel to call a final meeting before the end of the period specified in the referral order at which the offender's overall compliance with the contract may be reviewed. If the panel considers that the contract has been successfully completed the referral order will be discharged from the end of the referral period. If the panel considers that the contract has not been satisfactorily completed the young offender will be referred back to the court for re-sentencing.

Detailed provisions concerning the options available where a young offender is referred back to the court by the young offender panel are set out in **Clause 13** and **Schedule 1.** They are summarised in paragraphs 73-80 of the Explanatory Notes.

Clause 14 is designed to add to the functions of youth offending teams, which were created by section 39 of the *Crime and Disorder Act 1998*, by including their specific new responsibilities in relation to referral orders.

The introduction of powers enabling courts in England and Wales to refer young offenders who are not persistent or serious offenders to youth offender panels received cross-party support in the House of Lords, except where compulsory referrals were concerned. The powers have also been welcomed by pressure groups and other organisations interested in youth justice. In its briefing on the Bill the law reform pressure group JUSTICE expressed concern about the resource implications for youth offending teams. The briefing said:

> They will be inundated with referrals as numbers in court spiral; and the financial investment required will not only be used on offending that research shows is likely to cease in any event, but will detract from the finance available for cases further up the spectrum.

The JUSTICE briefing added:

> In New Zealand a special branch of police - the youth aid section - divert 80% of cases informally, either by taking no further action, or by agreeing restorative and rehabilitative measures with offender and, possibly, victim. In New South Wales about 50% are diverted in similar fashion. No further action is taken in roughly 60% of cases in Austria, and in 60+% in Scotland

The *Explanatory Notes* make the following comments about the financial effects of Part I of the Bill:

> 211. Referrals to youth offender panels will save the Probation Service around £5.1 million, but will impose costs of around £0.5 million because of loss of revenue from fines.

> 212. Clause 6 will result in some increased recruitment and training costs, which will be met by the Comprehensive Spending Review settlement for pilot youth justice schemes in 2000/2001 and 2001/2002.
>
> 213. Part I of the Bill is intended to reduce offending by young people and thereby reduce the costs of the youth justice system in the longer term.

A table from the White paper *No More Excuse*[28]*s* setting out how a young offender would experience the new system introduced by the *Crime and Disorder Act 1998* and Part I of the *Youth Justice and Criminal Evidence Bill* is set out in an appendix to this paper.

[28] CM 3809

II Evidence in Criminal Cases: Special Measures for Vulnerable or Intimidated Witnesses

Article 6 of the European Convention on Human Rights, which is concerned with the right to a fair trial, provides that:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
> (b) to have adequate time and facilities for the preparation of his defence;
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

The courts in England and Wales operate on the principle that court business should generally be conducted openly. A witness' name and address is therefore usually given before he or she begins to give evidence. A court may, in exceptional circumstances, permit a witness to give evidence incognito, as one aspect of its power to control its own proceedings in the interests of due administration of justice by sitting in private if necessary. Under Section 11 of the *Contempt of Court Act 1981* the court may in certain circumstances prohibit the publication of a name and address or other matter if it appears to the court to be necessary for the purpose for which this protection was given. The courts have emphasised, however, that the power provided for under Section 11 is to be strictly confined and used only in exceptional and limited circumstances.

Section 39 of the *Children and Young Persons Act 1933* allows a court to prohibit the reporting of the name, address, school or other particulars identifying children and young persons under the age of seventeen who are involved in proceedings before that court as

defendants, complainants or witnesses. Section 49 of the *Children and Young Persons Act 1933* prohibits the publication of details likely to identify any child or young person involved in the youth court, whether as defendants or witnesses. This restriction only applies once the criminal process has been activated in a particular case. Section 49 of the 1933 Act was amended by section 45 of the *Crime (Sentences) Act 1997,* which gives a court discretion to dispense with these provisions if it is satisfied that it is in the public interest to do so in relation to a child or young person who has been convicted of an offence. Sections 39 and 49 of the 1933 Act were extended by section 57 of the *Children and Young Persons Act 1963* to prohibit the reporting in Scotland of proceedings in England and Wales, but neither section prohibits such reporting in Northern Ireland.

Section 4 of the *Sexual Offences (Amendment) Act 1976* provides for the anonymity of male and female complainants in cases of rape and related offences. The *Sexual Offences (Amendment) Act 1992* extended this protection to complainants in cases involving a much wider range of sexual offences, listed in Section 2 of the Act.

In some circumstances courts may permit screens to be erected to protect the identity of witnesses, or to shield them from the defendant. In *R v X and others*[29] the Court of Appeal approved the erection of a screen in a courtroom to prevent young children seeing, or being seen by, the defendants. The purpose of the screen was to prevent the children from being intimidated by their surroundings, and the jury had been told by the judge at the start of the trial that they should not allow the mere presence of the screen to prejudice them against the defendants in any way. In *R v Schaub and Cooper (Joey)*[30] the Court of Appeal held that it was permissible to make use of a screen or other similar protective device in the case of any witness if it was otherwise impossible to do justice but added that, in the case of an adult witness, such a course should be adopted only in the most exceptional cases and certainly not for every prosecution for a sexual offence.

Section 32A of the *Criminal Justice Act 1988,* which was added to that Act by the *Criminal Justice Act 1991,* allows a video recording of an interview with a child witness of certain sexual and violent offences to be used, where it relates to any matter in issue in the proceedings, in trials at the Crown Court or a youth court. Under Section 32A a video is only admissible where:

a) the child is not the accused;
b) rules of court requiring disclosure of the circumstances in which the recording was made have been properly complied with; and
c) the child is available for cross-examination.

This last requirement has caused some controversy. The provisions in the *Criminal Justice Act 1991* concerning children's evidence were designed to implement some of the

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[29] (1990) 91 Cr App R36
[30] *Times* 3.12.1993

recommendations of the *Report of the Advisory Group on Video Evidence*[31] (the Pigot Report). However, the report's conclusion that[32]

> children who came within the ambit of our proposals,.... ought never to be required to appear in public as witnesses in the Crown Court, whether in open court or protected by screens or closed circuit television, unless they wish to do so

has not been enacted. The report's recommendation that child witnesses be examined and cross-examined at a preliminary out-of-court hearing before the trial itself[33], rather than in proceedings before the full court, also remains unimplemented. In a Written Answer to a Question from Mr Nicholas Brown on June 6th 1995 the former Home Office minister, David Maclean, gave the previous Government's view of pre-trial cross-examination of child witnesses as being that it would remain under consideration, but that the Government was not yet persuaded that such a system would be in the best interests of a child witness.[34].

The Pigot Report also recommended that once the changes it proposed concerning the treatment of respect of child witnesses had been made, their extension to vulnerable witnesses who were adults should enjoy made a high priority[35]. A general extension of this kind has not yet taken place.

In January 1997 David Maclean announced that, following the publication of Home Office research on *Witnesses with Learning Disabilities*[36] an interdepartmental group, which had been set up following the trial and conviction of Ralston Edwards to look at the issue of cross-examination of rape and other vulnerable victims by the accused, would also be asked to review court procedures for people with learning disabilities[37]. This work does not appear to have been completed before the May 1997 General Election.

The Labour Party manifesto for the 1997 General Election stated that:

> Greater protection will be provided for victims in rape and serious sexual offence trials and for those subject to intimidation, including witnesses.

In June 1997 the Home Secretary, Jack Straw, announced the establishment of an interdepartmental working group to review current arrangements for assisting and protecting witnesses and identify measures at all stages of the criminal justice process which would improve the treatment of vulnerable witnesses and those likely to be subject

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[31] Home Office, December 1989
[32] *Report of the Advisory Group on Video Evidence.* Home Office December 1989 para 2.26
[33] ibid. paras 2.25-2.38 & p69-70
[34] HC Deb Vol 564 c129-130 (W) 6.6.1995
[35] *Report of the Advisory Group on Video Evidence.* Home Office December 1989 para 3.15
[36] Andrew Sanders, Jane Creaton, Sophia Bird, Leanne Weber, *Witnesses with Learning Disabilities*, Home Office Research Findings No.44, (December 1996)
[37] "Procedure for vulnerable witnesses to be reviewed" - Home Office 23.1.1997

to intimidation. The report of the working group, *Speaking Up for Justice*, was published by the Home Office in June 1998. A similar working group, chaired by the Scottish Office, was established in Scotland and its report, *Towards a Just Conclusion*, was published in November 1998. In Northern Ireland, the Northern Ireland Office published a consultation paper *Vulnerable or Intimidated Witnesses* in October 1998 and in January 1999 published a further consultation paper *Vulnerable or Intimidated Witnesses: Administrative Arrangements*[38].

The proposals in Part II of the *Youth Justice and Criminal Evidence Bill* are based on the recommendations set out in the Home Office report *Speaking Up for Justice*. The provisions of Chapter IV of Part II concerning reporting restrictions are intended to be enforceable in all parts of the United Kingdom[39] and the provisions of Clause 58 concerning restrictions on the use of answers given by persons subject to compulsion, and Clause 59 concerning the application of Part II to service courts, extend to Scotland and Northern Ireland. Other than this, however, the provisions of Part II of the Bill extend only to England and Wales. From 1 July 1999 the Scottish criminal justice system will be a matter for the Scottish Parliament.

A. Special measures directions

Chapter I of Part II of the Bill (**Clauses 16** to **32**) is designed to implement some of the recommendations set out in the Home Office report *Speaking Up for Justice* concerning measures which might be taken to help witnesses (other than the defendant) who might have difficulty giving evidence in criminal proceedings or who might be reluctant to do so. The Clauses seek to permit "special measures directions" to be given in cases involving certain types of vulnerable and intimidated witness. The *Explanatory Notes* set out the Government's intentions in relation to these Clauses as follows:

> 19. The first Chapter sets out who is eligible to apply for special measures to help them give their evidence in court. There are three categories: children under the age of 17; those suffering from a mental or physical disorder, or having a disability or impairment, that is likely to affect their evidence; and those whose evidence is likely to be affected by particular fear or distress in connection with giving evidence in the proceedings.
>
> 20. It is for the court to determine whether a witness falls into any of these categories, although a witness alleged to be the victim of a sexual offence will initially be presumed to need assistance in giving evidence. The court must also determine whether making certain special measures available to an eligible witness is likely to improve the quality of the evidence given by the witness.

[38] DEP 99/226

[39] See paragraph 210 of the *Explanatory Notes*

21. Both the prosecution and defence will be able to apply, normally before the trial, for the court to make a special measures direction authorising the use of special measures to help a witness they are calling to give evidence. The court may also decide to make a direction even though no such application has been made.

The special measures that a court will be able to authorise, once the Secretary of State has notified a court that it can make them available for the purposes of the Bill, are:

- Screens, to ensure that a witness does not see the defendant.
- Allowing an interview with a witness which has been video-recorded before the trial to be shown at trial as the witness's evidence. The Bill creates a presumption that young witnesses will give their main evidence in this way.
- Allowing a witness to give evidence from outside the court by live television link. The Bill creates a presumption that young witnesses will give any further evidence in this way.
- Clearing members of the press and public from the court so that evidence can be given in private.
- Not wearing the court dress of wigs and gowns.
- Allowing a witness to be cross-examined before the trial about their evidence and a video recording of that cross-examination to be shown at trial instead of calling the witness.
- Allowing an approved intermediary to help a witness communicate with legal representatives and the court.
- Allowing a witness to use communication aids.

As far as the cross-examination of witnesses on video is concerned the Home Office report *Speaking up for Justice*, which recommended the measure, commented that[40]:

> **8.55** *Pigot*[41] recommended, in the case of children, that a video-recorded preliminary hearing should be held in informal surroundings out of court, as soon as practicable after the video interview had been admitted as evidence. The child witness would be shown the video and asked to adopt the account which it contains and expand upon any aspects which the prosecution wishes to explore. The defence should then have the opportunity to cross-examine the child, but with the accused observing only by CCTV or two way mirror. (Pigot Recommendation 4). The jury would be shown both the video interview and the

[40] Home Office *Speaking Up for Justice* (June 1998) p.56-57
[41] *Report of the Advisory Group on Video Evidence* Home Office December 1989

video and cross-examination. Any further cross-examination of the child would take place under the same conditions.

8.56 This recommendation has not been implemented. It has been argued that pre-trial cross-examination would not remove the need for further cross-examination by the defence at the trial and might add to the child's distress in having to go through the cross-examination on more than on occasion. However, the recently published Utting Report[42] recommends its implementation in respect of children.

8.57 *Sanders*[43] argues that the introduction of videoed pre-trial cross-examination in combination with videoed evidence in chief would enable the questioning of the victim to take place at an early stage, while the evidence is still fresh in their mind and reduce the stress of waiting for a court appearance. This measure avoids the need for the witness to appear in court and "avoid the difficult and sometimes humiliating process of being questioned and cross-examined in open court". But *Sanders* does recognise the problem of the risk of recall for further cross-examination which would add to the distress of the witness. For example this could result in the witness being cross-examined about inconsistencies between the evidence given on the videoed-evidence in chief and the videoed cross-examination. In addition, new disclosure provisions introduced in April 1997 by the Criminal Procedures and Investigations Act 1996 might result in the defence waiting until it has reviewed material disclosed by the prosecution under both primary and secondary disclosure, viewed the original video recording, and taken instructions before being able to come back for cross-examination. This might result in the defence only being in a position to cross-examine shortly before the trial. Also as with the listing of that there may be problems in finding suitable times for all parties to come together for the pre-trial cross-examination.

Conclusion

Of the two possible benefits arising from introducing videoed pre-trial cross-examination, the Working Group considered that the main one was enabling the witness to give evidence away from the court room. The Group recognised that it might not be possible to arrange for the cross-examination to take place early in the process, thus benefiting from freshness of memory. While recognising the difficulties, the Working Group considered that there may be some adult vulnerable witnesses who would be assisted by such a measure. To limit the possibility of further cross-examination after a videoed pre-trial cross-examination, the Working Group proposes that the law should be amended to provide that there should be a rebuttable presumption that there will be no further cross-examination unless certain criteria are met.

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[42] *"People like us" The Report of the Review of the Safeguards For Children Living Away From Home* Department of Health and the Welsh Office (1997)

[43] *Witnesses with Learning Disabilities* - Home Office Research Findings No.44 December 1996

The working group accordingly recommended that video recorded pre-trial cross-examination should be available for use in appropriate cases where the witness's statement had been recorded on video and the witness could particularly benefit from cross-examination outside the court room. The working group added that in such cases, any further cross-examination should also be conducted on video away from the court room. Once video recorded pre-trial cross-examination had taken place, the working group felt that there should be a rebuttable presumption that no further cross-examination would be permitted unless new material came to light after the initial cross-examination, which could not have been ascertained with reasonable diligence by the party seeking to re-open cross-examination and which was likely to be material to the overall evidence given by the witness.

Clause 26 seeks to enable a video-recorded interview to take the place of a witness's evidence in chief, both at trial and for the purposes of committal proceedings. **Clause 27** is designed to provide that, where the court has already allowed a video-recording to be admitted as the witness's main evidence, the witness may be cross-examined before trial and the cross-examination, and any subsequent re-examination recorded on video for use at trial.

In its briefing on the Bill the children's charity NSPCC welcomes **Clause 27**. Noting that this provision was at the heart of the outstanding recommendations from the Pigot Report the NSPCC briefing goes on to say:

> The NSPCC has been calling for the implementation of these remaining recommendations for a number of years and more recently, "The Children's Safeguards Review" led by Sir William Utting, called on the Government to implement the remaining recommendations of the Pigot Report. We are concerned that the Bill is drafted to include only a partial implementation of this recommendation of the Pigot Report. The proposed legislation will fail to ensure that children will not be required to appear at the trial unless they want to. As presently drafted, this legislation will offer this protection to only a very few children.

In their briefings on the Bill the Law Society, the law reform pressure group JUSTICE and the civil liberties pressure group LIBERTY have all expressed concern about Clause 27. The JUSTICE briefing states:

> JUSTICE is concerned about pre-trial video-recorded cross-examination. We accept the desirability of cross-examining vulnerable and intimidated witnesses on video outside court; but fear that if this were effected pre-trial the defence may be prejudiced by not being able to ensure that all these issues were addressed. We note the provision for re-opening cross-examination, and anticipate that there may be many applications to do so, thus causing possible distress and confusion to witnesses.

In its briefing Liberty suggests that Clause 27 should be deleted. It states that:

> The European Convention on Human Rights Article 6(3)(d)[44] provides for examination of witnesses for and against the defence under the same conditions.
>
> Effective cross-examination of a witness is dependent on the evidence of other witnesses which is only put to proof and therefore fully available at trial. Therefore it is not possible to fully or effectively cross-examine any witness before the commencement of the trial, as any such cross-examination is dependent on the trial events. In addition, despite the disclosure provisions and timetables laid down by the Criminal Procedure and Investigations Act[45] the reality is that often evidence only becomes available at or close to the trial. To allow for cross-examination of a witness prior to trial places that witness's evidence in a different position to that of other witnesses and is potentially unfair to a defendant. Cross-examination at trial of a witness of necessary can take place by video link so that the witness is unable to see any but the judge and legal representatives, which affords the same protections as pre-recorded cross-examination.
>
> The possibility of allowing re-cross-examination of the witness to take place at a later date if necessary only illustrates the practical difficulties of the suggestion and should it occur would increase trauma to the witness by making them undergo cross examination on two separate occasions instead of one as at present.

In its briefing the Law Society says that it is also unable to support the proposals in Clause 27 enabling video-recorded pre-trial cross-examination and adds:

> Whilst it is agreed that it should be possible for vulnerable and intimidates witnesses to be cross-examined outside the courtroom, the Society maintains that this would only be feasible during the course of the trial and should be conducted by video link instead.

Responding during the committee stage of the Bill in the House of Lords to comments by the Liberal Democrat peer Lord Thomas of Gresford about **Clause 27** the Home Office minister Lord Williams of Mostyn said[46]:

> Unless we start, we shall get nowhere. Of course, there will be some difficulties. Of course, the inertia of the judicial machine will continue. Apparently, to the outside observer, it regards itself as more important than those fundamentally concerned with it; namely, the complainants, the public and the defendants. I am not pretending--I never have--that this Bill provides a perfect remedy in every circumstance, but there are many cases where endless disclosure, primary and secondary, is not required. There are many cases in which disclosure is not fundamentally important. In those cases, which may be a minority--nevertheless, an important minority--after all this time we ought to begin to get on with the

[44] see the opening paragraphs of this part of this paper
[45] 1996
[46] HL Deb Vol 596 c1376-1377, 1.2.1999

> protection of victims in our system, whether they are complainant witnesses, child witnesses, witnesses under disability or simply the terrorised witnesses. I remind your Lordships yet again that there is already a provision for the admissibility in evidence, without cross-examination in some circumstances, of statements made by those who are too terrorised or too afraid to come to court.

Lord Mostyn added[47]:

> In many cases--I have never pretended differently--the defence is unlikely to be ready or willing to cross-examine witnesses until shortly before a trial begins. It would be wrong for any procedure or any judge to attempt, coercively, to interfere. I stress the words, "until shortly before a trial begins". If the average is 10 months--that means that some cases take longer than 10 months--that is, a standing, continuing reproach to our judicial system. There is no reason why the judicial system should not be taken firmly by the neck and shaken. I do not mean the judges; I mean the whole system which, for far too long, has been polluted by interference on a delaying basis by those who are well versed in it. I speak as a game-keeper who was formerly a poacher, but now retired.
>
> If we try, we can make improvements. They will not be 100 per cent. appropriate for every child complainant, every child witness or every adult who may be under a disability. There are two alternatives: either we begin with this enormous effort of will and determination or we do nothing. I am too young to want to do nothing.
>
> As the noble Viscount said, it is perfectly true that this will be an inappropriate help in many cases, but it will be better that what we offer at present. It will be a start to doing away with uncertainty. The noble Lord, Lord Cope, was quite right; indeed, it entirely coincides with my experience. Nine months or 10 months is a lifetime to a child. What is even worse is the constant nagging, on going to bed every night, of not knowing whether or not they will have to give evidence and when the court date will be. At least certainty is better than that; we owe it to people. The noble Lord, Lord Thomas, is quite right to say that we must not confine ourselves to children because many other people have the oppressive fears that we have colluded in for far too long.
>
> There are some cases where we could get the video recording of evidence in chief fairly closely followed by cross-examination. However, as the noble Lord, Lord Thomas, said, that would be very difficult in fraud cases; indeed, it could also be difficult in some murder cases. But in quite a number of other cases it would be perfectly straightforward.
>
> Given the will and determination that noble Lords have shown they abundantly share in the context of the Crime and Disorder Bill, we must bend our minds and wills to the training of those who participate in the system. It can be made to work. After all, the listing system is quasi-judicial, but it is not beyond our wit, intelligence and, perhaps more importantly, imagination to list cases in an

[47] ibid

> appropriate way to ensure, as criminal justice is now beginning to do, that priority cases get true priority. There is no difficulty in that respect, except the lack of will and determination.

Clause 31 aims to enable a judge, on a trial on indictment where evidence has been given in accordance with a special measures direction, to warn the jury, that the making available of special measures should not prejudice the conclusions they might draw about the defendant. The *Explanatory Notes* comment that:

> This will be particularly relevant where, for example, intimidated witnesses are screened from the defendant: this must not be taken as justifying a conclusion tat the defendant is dangerous.

B. Protection of witnesses from cross-examination by the accused in person

Defendants in criminal proceedings are generally entitled to represent themselves and cross-examine witnesses, unless the witnesses are children and the defendants have been charged with offences involving sex, violence or cruelty[48]. Trial judges have discretionary powers to prevent any cross-examination which they consider to be unnecessary, improper or oppressive.

Concern has been expressed about the cross-examination of witnesses by unrepresented defendants, following two trials of defendants charged with rape - that of Ralston Edwards in August 1996 and that of Milton Brown in November 1997- and a stalking case in September 1996 involving a defendant called Dennis Chambers in September 1996 and Milton Brown. All of these cases were widely reported in the media. The Home Office report *Speaking up for Justice* commented that:

> evidence suggests that only a small number of defendants are unrepresented but a number of recent cases which have been given publicity are a cause for concern and it may be that such publicity may be seeking to influence other defendants to cross-examine in person.

The recent outcry in Scotland over the trial of William Austin, who cross-examined the victim of an indecent assault with which he was charged and subsequently convicted, might be thought to bear out the concern expressed in the Home Office report that publicity might influence other defendants to cross-examine their alleged victims. The Scottish Office report *Towards a Just Conclusion,* which was published in November 1998, had earlier stated that[49]:

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[48] under an exception provided by section 34A of the *Criminal Justice Act 1988*, which was inserted by section 55(7) of the *Criminal Justice Act 1991*

[49] Scottish Office *Towards a Just Conclusion* (November 1998) paragraph 5.17

> A particular shortcoming in England and Wales which has caused serious concern is the aggressive cross-examination of victims in sexual offences cases by unrepresented accused persons. No instances of similar difficulties in Scotland were brought to the attention of the Group and it appeared that the differences in procedure and rules of evidence between England and Wales and Scotland - and in particular the interpretation of the common law duty of the court to prevent inappropriate cross-examination (…) - mean that such cases are unlikely to occur in Scotland. The research recommended by the Group (see recommendation 17) should bring to light evidence of any shortcomings in the present arrangement.

Following the trial of William Austin the Scottish Office minister, Henry McLeish, is reported to have ordered a review of ways in which victims of alleged sexual assault might be protected from being traumatised by giving evidence in Scottish courts[50]. From 1 July 1999 this will of course be a matter for the Scottish Parliament.

As far as England and Wales is concerned on May 6th 1998 in the case of *R v. Brown (Milton)*[51] the Court of Appeal gave advice to judges on the conduct of trials in which defendants, particularly those accused of rape or other serious sexual offences, dispense with legal representatives and cross-examined complainants themselves. The judgment of the court was given by the Lord Chief Justice, Lord Bingham. A Lord Chancellor's Department press notice of 6 May 1998 set out the Court's advice as follows[52]:

> The Lord Chief Justice said:
>
> 'The trial judge's duty is to ensure to the utmost of his ability that the defendant, even if unrepresented, or perhaps particularly if unrepresented, has a fair trial. Every defendant is not guilty until proved to be so. Where, for example, a defendant is accused of rape, the trial cannot be conducted on the assumption that he is a rapist and the complainant a victim, since the whole purpose of the proceeding is to establish whether that is so or not.'
>
> Lord Bingham continued:
>
> 'The trial judge is, however, obliged to have regard not only to the need to ensure a fair trial for the defendant but also to the reasonable interests of other parties to the court process, in particular witnesses, and among witnesses particularly those who are obliged to re-live by describing in the witness box an ordeal to which they say they have been subject. It is the clear duty of the trial judge to do everything he can, consistently with giving the defendant a fair trial, to minimise the trauma suffered by other participants. Furthermore, a trial is not fair if a

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[50] "Sex assault victims to get court protection" - *Scotsman* 17.2.1999

[51] R v. Brown (Milton) - *Times Law Report* 7.5.1998

[52] "Defendants in rape trials cross-questioning witnesses: Court of Appeal offers trial guidance to trial judges" - Lord Chancellors Department 6.5.1998

defendant, by choosing to represent himself, gains the advantage he would not have had if represented, of abusing the rules in relation to relevance and repetition which apply when witnesses are questioned.'

Judges did not, Lord Bingham said, lack the power to protect witnesses and control questioning; they were the masters of proceedings in their own courts. They were not obliged to give unrepresented defendants free reign to ask whatever questions, at whatever length, they wished.

The Court indicated how judges should control questioning:

It would often be desirable for the judge to discuss the course of proceedings with the defendant in the absence of the jury before the cross-examination of the complainant. The judge could then elicit the general nature of the defence and identify the specific points in the complainant,s evidence with which the defendant took issue, and any points he wanted to put to her. If the defendant intended to call witnesses in his own defence, then the substance of their evidence could be elicited so that the complainant,s observations on it might, so far as relevant, be invited.

It would almost always be desirable in the first instance to allow a defendant to put questions to a complainant. But it should be made clear in advance that the defendant would be required, having put a point, to move on, and if he failed to do so the judge should intervene and ensure that he did.

If the defendant proved unwilling or unable to comply with the judge's instructions the judge should, if necessary in order to save the complainant from avoidable distress, stop further questioning by the defendant or take over the questioning of the complainant himself.

If the defendant sought by his dress, bearing, manner or questions to dominate, intimidate or humiliate the complainant, or if it was reasonably apprehended that he would seek to do so, the judge should not hesitate to order the erection of a screen, in addition to
controlling questioning in the way indicated above.

The Lord Chief Justice said:

'The exercise of these powers will always call for the exercise of a very careful judgment, since the judge must not only ensure that the defendant has a fair trial but also (which is not necessarily the same thing) that the jury feel he has had a fair trial.

'If, however, exercising the best judgment they reasonably can in circumstances which are always difficult, judges intervene to ensure that witnesses are not subjected to inappropriate pressure, they should clearly understand that this court will be very slow indeed, in the absence of clear evidence of injustice, to disturb any resulting conviction. Where judges, responsible for the conduct of proceedings before them, make decisions with due regard to the interests of all involved they will continue, as in the past, to be supported by this court.'

The Court of Appeal's judgment in *R v. Brown (Milton)* was given in the month before the publication of *Speaking up for Justice*, the report of the Home Office working group and did not form part of the report's discussion of the current law and practice concerning cross-examination by unrepresented defendants. Amongst other things the report recommended that[53]:

- there should be a mandatory prohibition on unrepresented defendants personally cross-examining the complainant in cases of rape and sexual assault

- in the case of other witnesses and other offences, especially those where intimidation is a factor such as stalking, the Court should have discretion to impose a prohibition on defendant cross-examination.

- where an unrepresented defendant is prohibited from personal cross-examination he should be granted legal aid, without means testing, to obtain legal representation for cross-examination purposes only.

Noting the defendant's right under Article 6(3) of the European Convention on Human Rights[54] "to defend himself in person or through legal assistance of his own choosing", "to examine or have examined witnesses against him" and to "obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him" the report noted[55] that in its judgement in the case of *Croissant v. Germany*[56] the European Court of Human Rights held that q requirement of German law that a defendant must be legally represented was compatible with Article 6 of the European Convention.

Clause 33 of the *Youth Justice and Criminal Evidence Bill* is designed to impose a mandatory prohibition on defendants charged with rape or other sexual offences set out in **Clause 60** cross-examining in person in any criminal proceedings a witness who is the complainant. It also extends this prohibition to any other offence with which the defendant is charged in the proceedings. The following sexual offences are listed in Clause 60:

> (a) rape or burglary with intent to rape;
> (b) an offence under any of sections 2 to 12 and 14 to 17 of the Sexual Offences Act 1956 (unlawful intercourse, indecent assault, forcible abduction etc.);
> (c) an offence under section 128 of the Mental Health Act 1959 (unlawful intercourse with person receiving treatment for mental disorder by member of hospital staff etc.);

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[53] see Home Office, *Speaking up for Justice* (June 1998) p.64-67
[54] set out at the beginning of this section of this paper
[55] Home Office, *Speaking up for Justice* (June 1998) p.64 paragraph 9.34
[56] judgement of the court dated 25 September 1992, Series A Volume 237

(d) an offence under section 1 of the Indecency with Children Act 1960 (indecent conduct towards child under 14);
(e) an offence under section 54 of the Criminal Law Act 1977 (incitement of child under 16 to commit incest).

Clause 34 is intended to replace and extend the provision in section 34A of the *Criminal Justice Act 1988* which currently prevent unrepresented defendants from cross-examining child witnesses (including witnesses charged with offences in the proceedings) in certain cases. It seeks to impose a mandatory prohibition on unrepresented defendants cross-examining in person children who are the alleged victims or witnesses to the commission of offences of kidnapping, false imprisonment or abduction, as well as of offences currently covered by section 34A. The full list of offences which will be covered by this provision is set out in Clause 34(3) as follows:

(a) any offence under-

(i) the Sexual Offences Act 1956,
(ii) the Indecency with Children Act 1960,
(iii) the Sexual Offences Act 1976,
(iv) section 54 of the Criminal Law Act 1977, or
(v) the Protection of Children Act 1978;

(b) kidnapping, false imprisonment or an offence under section 1 or 2 of the Child Abduction Act 1984;

(c) any offence under section 1 of the Children and Young Persons Act 1933;

(d) any offence (not within any of the preceding paragraphs) which involves an assault on, or injury or a threat of injury to, any person.

Where the offences listed in paragraph (a) are concerned the definition of "child " for the purposes of the prohibition on cross-examination extends to a person under the age of 17, while for the offences listed in paragraphs (b), (c) or (d) the definition of "child" refers to a person under the age of 14.

The absolute prohibition in Clause 33 on personal cross-examination by defendants of complainants in cases involving charges of rape and other sexual offences would cover cases such as those in which Ralston Edwards and Milton Brown were involved. The absolute prohibition does not, however, extend to stalking cases such as that involving Dennis Chambers, for which reliance would have to be placed on Clause 35. **Clause 35** is intended to give the courts a discretionary power to issue directions prohibiting unrepresented defendants from cross-examining witnesses, in cases other than those covered by Clauses 33 and 34. A direction may be given, following an application by the prosecution or on the court's own motion, if the court is satisfied that the witness's circumstances and the case merit it and that a prohibition would not be contrary to the interests of justice. **Clause 36** is designed to ensure that a direction is binding unless and until the court decides that it should be discharged in the interests of justice. The court

will have to give reasons for its decisions concerning the making, refusal or discharge of directions.

Under **Clause 37** it is intended that where an accused has been prevented from cross-examining a witness in person by virtue of Clauses 33, 34 or 35 the court should invite him to arrange for a legal representative to act for him for the purpose of cross-examining the witness and require him to notify the court, by the end of a specified period, about whether a legal representative is to act for him for that purpose. If the accused notifies the court that no legal representative is to act for him for the purpose of cross-examining a witness, or fails to notify the court within the specified period and it appears to the court that no legal representative is to act for the accused, the court will be required to consider whether it is necessary for the witness to be cross-examined. If the court decides that the witness should be cross-examined it will be required to choose and appoint a qualified legal representative to cross-examine the witness in the interests of the accused. **Clause 37(5)** provides that a person so appointed will not be responsible to the accused, although he or she will of course be cross-examining the witness in the interests of the accused. Rules of court will cover matters such as the means whereby a legal representative appointed by the court would be given evidence or other material relating to the proceedings so that he or she could examine it.

In a case where a court has appointed a legal representative to act in the interests of the defendant Clause 38 seeks to require the judge to give the jury whatever warning he considers necessary to ensure that it does not draw prejudicial inferences from the fact that the defendant has been prevented from cross-examining in person, or from the fact that the cross-examination was carried out by the court-appointed legal representative and not by the accused's own representative.

Clause 39 seeks to amend section 19(3) of the *Prosecution of Offences Act 1985* and section 21(3) of the *Legal Aid Act 1988* to provide for the payment of legal representatives appointed by defendants or by courts under Clause 37 of the Bill. The intended effect of these amendments is described in the *Explanatory Notes* as follows:

> Where a defendant is banned from personally cross-examining, he will be able to apply for legal aid on the same means-tested basis as other defendants in criminal cases. Court-appointed legal representatives will be paid from central funds rather than from legal aid.
>
> 139. Following the implementation of the Access to Justice Bill, representatives under this Chapter will be funded under the new arrangements for legal representation in criminal proceedings. In other words, defendants eligible for legal representation would be represented by a lawyer contracted by the Criminal Defence Service. When the court appointed its own lawyer, it could appoint either a Criminal Defence Service lawyer or another salaried defender with rights of audience in the court.

The mandatory nature of the prohibition in Clause 33 on personal cross-examination of complainants by defendants charged with sexual offences provoked considerable

controversy in the House of Lords. During the debate in committee in the House of Lords an amendment designed to give the courts discretion to allow cross-examination by defendants was moved by the Liberal Democrat peer Lord Thomas of Gresford. Another amendment tabled by the Labour peer Baroness Mallalieu and the Lord Chief Justice, Lord Bingham of Cornhill, was intended to delay the implementation of Clause 33. Lord Thomas said[57]:

> The consequences of a conviction for rape or a serious sexual offence are a long term of imprisonment, intolerable persecution from other prisoners within the prison, registration as a sex offender, restrictions after completion of sentence and serious public opprobrium that may last for the rest of that person's life. It might be thought that miscarriages of justice should be avoided because of the consequences for a person convicted of a sexual offence. In principle, there should be no less a burden on the prosecution to prove guilt than in any other category of case.
>
> The trial cannot be conducted on the basis that the defendant is a rapist and that the complainant is a victim since the whole purpose of the trial is to determine whether that be the case. The defendant has a basic right to defend himself and to present his own case in the way he considers best. He may have reasons to distrust lawyers and, in certain situations, he may be in the best position to conduct cross-examination.

He went on[58]:

> Unless the defendant's case is put to the complainant, the jury has no means of evaluating the evidence which has been brought forward. The suggestion of these provisions is that the court should appoint a barrister, but a court-appointed barrister will, in practice, be in a virtually impossible situation. He will not be acting for the defendant, who may refuse, in the circumstances, to speak to him at all. He will not be entitled to see the defendant's proof, if there is one. The defendant's case may be entirely different from that which appears in his original interview as part of the prosecution case. Should he give evidence and should his case, in giving evidence, be quite different from the interview--the information which the court-appointed barrister has--there will obviously be a necessity for the complainant to be recalled to be cross-examined again.
>
> But there is no way in which the trial judge could prevent a defendant who wished to represent himself, and who had had a court-appointed lawyer thrust upon him, from addressing the jury on the basis that he had not had a fair trial. He would be perfectly entitled to say to the jury, "I did not want that man. He has not asked the questions that I wanted to be asked. He has no instructions from me and my trial is therefore unfair". Should the jury agree with that as a proposition--and

[57] HL Deb Vol 596 c1387, 1.2.1999
[58] ibid.

> a jury might well do so--then the defendant might be acquitted in a case where he should not be acquitted.

Referring to the guidance given to trial judges by the Court of Appeal in the case of *R v. Brown (Milton)* referred to earlier in this section of this paper Lord Thomas said[59]:

> It is for the Minister to explain whether he believes that these measures which the Lord Chief Justice set out in that judgment are inadequate. In my judgement, it would not be satisfactory, if the purpose of this provision is to do something rather than nothing, to use the phrase of the noble Lord, Lord Williams of Mostyn, earlier this evening. It is not enough that this provision should go in as window dressing if there is already adequate provision in the judgment in the Brown case to cover the position of a complainant.
>
> The position taken by myself, although not for the moment by my party, in Amendment No. 90 is to leave the control of the proceeding in the hands of the trial judge, who can evaluate the particular situation in the case. Perhaps I may make a general point. It seems to me that, over the past few years, Parliament has interfered with the discretion of judges not simply in matters of sentencing--and this is an obvious example--but in the exercise of their general discretion to control and run their courts. I believe that the provisions in Clause 33 are unnecessary.

Baroness Mallalieu also cautioned against the presumption that a witness is a victim, saying:[60]

> The purpose of a contested trial is to determine whether or not that is so. The accused may instead be the victim of a false allegation. We must indeed find ways, as this Bill does, in which we can enable a witness to give evidence more easily so that the court can better determine where the truth lies. But in framing changes in criminal legislation it is easy to fall into the trap of assuming guilt on the part of the accused. Some witnesses may need more help. We are all agreed about that and other parts of the Bill provide for it. However, that does not mean that those who are or may be falsely accused need fewer safeguards or to have their rights eroded. And we must be vigilant to see that that does not happen, despite our best intentions, in these provisions.

She went on to suggest that the provisions of Clause 33 and those in Clause 34 concerning child witnesses should not be bracketed together, saying[61]:

> Children need special protection in our courts. They are without exception under a disability by reason of age. I have no objection to the extension of that protection; indeed, I welcome it. They are less well able to give evidence; they

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[59] ibid. c1388
[60] ibid. c1389
[61] ibid.

> may require specialist cross-examination to elicit the truth; and the courts rightly take special powers to ensure that justice is done. However, adult victims of sexual offences do not form a category of people giving evidence under a disability. They come from every background and every level of education. Most, but not all, are women. Some are robust, others are not. They are not under a disability as of class and it is patronising to treat them as though they are.

The Lord Chief Justice, Lord Bingham of Cornhill, began his speech by saying[62]:

> Your Lordships are all agreed that Clause 33 is directed towards an abuse--but it is an abuse that has only been demonstrated to occur on two occasions; no one has so far unearthed any other examples. Following these two very highly publicised cases, everyone feared that there would be copycat examples. There have not been. Your Lordships know that in the second case the Court of Appeal did all that it possibly could to strengthen the arm of judges, and to make it plain to all concerned that they had the power to stamp on this abuse. There has been no further example.

He went on to say:

> I believe that I take words out of the mouth of the Minister when I say that no one can cross-examine efficaciously and professionally without instructions. That is true. These are not technical points; nor are they an example of judges defending their turf or of amour propre. These questions are related directly to the administration of justice. Those of us who hope that it will not be necessary to bring this provision into force do so because we believe that it opens the door to the risk of unjust convictions. We believe that the jury will not have heard the complainant appropriately cross-examined. It also opens the door to the risk of unjust acquittal for the reason given by the noble Lord, Lord Wigoder; namely, that the jury may feel that the defendant has not had a chance.
>
> It is no answer to say that in order to find himself in this situation the defendant needs to be awkward, truculent and stupid. He may be so, but it is not a crime under the laws of this country to be awkward, truculent and stupid, and certainly not a crime for which he may be sent to prison for many years on end.
>
> I have never suggested in this House or anywhere that the provision is contrary to the European convention. The argument of the noble Lord, Lord Lester, is one that I readily accept. But it is not so long since what gripped the popular press and rightly engaged the attention of your Lordships was the series of unjust convictions which were a blemish not simply on the criminal justice system but on our national life. This House must act at all costs to avert the risk of miscarriages of justice. It is for that reason that I, in company with the noble Baroness and the noble Lord, believe it to be urgently important that this

[62] ibid. c1400

> provision should not be brought into force unless and until it is clearly shown by practical experience to be needed.

In his speech during the debate on the amendment the Home Office minister Lord Williams of Mostyn said[63]:

> What perhaps has not been grasped tonight is the very powerful deterrent--my noble friend Lady Kennedy made this point--that the possibility of being cross-examined by a defendant can have on witnesses considering those agonising circumstances described by the noble Earl, Lord Russell, as to whether they can face giving evidence in court. I recognise--I have said it often enough in this House--that not all defendants are guilty, but they have then to contemplate the moral burden of dreadful wrong going unpunished because a system is skewed against them.
>
> The noble and learned Lord the Lord Chief Justice said that it was not a question of judicial amour propre. I entirely accept that. I have never suggested it, nor to my knowledge has any member of this Government. He said that there had been no other cases. I respectfully dissent from that view. There is abundant material to show that there have been many other cases; not cases which have gone to the Court of Appeal Criminal Division, but cases of women who simply cannot bear the prospect of being cross-examined by their alleged criminal violator.
>
> The noble and learned Lord the Lord Chief Justice said that we must avoid the risk of miscarriages at all costs. I do not believe that he and I can agree on that. I do not believe that "at all costs" falls into the equation here. The trial process should not be about allowing witnesses, particularly in this specific class of case, to be abused by defendants who want to take the opportunity to cross-examine, badger, humiliate or intimidate the alleged victim. And it is a crime of violence. It is sexual, physical violence on the occasion of the attack; brutal humiliation and verbal violence in the court setting. They are not, qualitatively, enormously different in some ways. The slightest chance that that can happen in the future, no matter how controlled the questioning, is putting women off coming to court at all. They ask police officers, they ask the CPS, "Is it still a prospect?" and the honest police officer, trained in this class of work, and the honourable servant of the Crown Prosecution Service have to say that it is a possibility--because it is.

He went on[64]:

> Of course the witness's evidence must be tested and of course the defendant's unique knowledge of a witness can help to uncover a false complaint, but that can be done fairly; it can be done properly; it can be done in the defendant's interests by a legal representative, properly instructed, who will stick to the issues at trial and is going to be professionally bound by obligations which make judicial

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[63] ibid. c1405
[64] ibid c1406

> control of the trial efficient, expeditious and fair. The prohibition does not curtail the freedom of a defendant to choose what defence should be put forward, or what questions within the proper limits should be asked of a witness. It does stop him taking the opportunity of further humiliation.

Lord Williams concluded his speech by saying[65]:

> The guidance of the Lord Chief Justice in the two leading cases was of course extremely important in setting down what judges have to do and what judges can do to control the proceedings. There was the emphasis that judges should step in to stop irrelevant, repetitive or humiliating questions, and that in certain circumstances the defendant can be stopped from questioning altogether.
>
> I simply say this. That was the law long before those two cases were tried; whether by way of obligation on a member of the Bar or an unrepresented defendant, that was the law. These cases did have enormous publicity. Yet women who are in the position of the students of the noble Earl, Lord Russell, are not going to be satisfied on the next occasion when he gives them the moral tutor's guidance, "Ah, all will be well with you because we have got two guideline decisions from the Court of Appeal, Criminal Division". I am sorry to say that life is not like that.
>
> We have thought carefully about this. We tried to balance the two rights and the two possible great wrongs of which the noble Earl spoke. It has not been an easy decision for any of us. Many of those concerned in making the decision have a lot of experience in one way or another of practice in various courts. It was not something we rushed into; we thought about it very carefully. The more I have listened to the arguments this evening--arguments which spanned the whole spectrum of possible debate--I regret to say to some Members of the Committee, the more abundantly I am sure we have come to the right conclusion, which, in the nature of things, is a compromise; but it is a right, just and proper one.

Lord Thomas subsequently withdrew his amendment[66] and Baroness Mallalieu did not move the amendment she and Lord Bingham had tabled.[67] There was further discussion of Clause 33 during the debate on the third reading of the Bill in the House of Lords when an amendment designed to provide the courts with discretion to allow cross-examination in it be unfair to the defendant not to do so was moved by the former law lord Lord Ackner[68]. In the debate on this amendment the Conservative spokesman Lord Cope, while noting that he spoke for himself and that this was not a party matter but a matter of conscience, said[69]:

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[65] ibid c1407
[66] ibid. c1408
[67] ibid. c.1410
[68] HL Deb Vol 598 c1148-1208, 23.3.1999
[69] ibid. c1202

> I believe that if the Bill is unamended there will be fewer miscarriages of justice resulting from the failure of the victim to give evidence. One may describe that as lack of access to justice rather than a miscarriage of justice. Whatever way one looks at it, it is certainly a failure of justice. I do not claim that this clause by itself, or that the Bill as a whole with the other provisions relating to screens, video and other forms of protection, will completely end the reluctance of victims to give evidence--there are many other reasons for that reluctance--but I believe that it will help. In that way it will reduce the number of miscarriages of justice. For that reason, and speaking only for myself, I shall vote against the amendment.

The Home Office minister said that on behalf of the Government he did not accept the amendment[70], which was subsequently disagreed to on a division.

C. Sexual history evidence

Chapter III of Part II of the Bill (clauses 40 to 42) is intended to amend the law on the circumstances in which the defence in sexual offences trials can use evidence about the alleged victim's previous sexual behaviour. These provisions would apply only to England and Wales.

1. Current law

Section 2(1) of the *Sexual Offences (Amendment) Act 1976* provides that, in a trial for rape, no evidence may be adduced and no question asked in cross-examination about the complainant's previous sexual experience with anyone other than the defendant, except by leave of the judge. By section 2(2):

> the judge shall not give leave in pursuance of the preceding subsection for any evidence or question except on the application made to him in the absence of the jury by or on behalf of a defendant; and on such an application the judge shall give leave if and only if he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked.

Section 2 was introduced to give effect to the report of the Heilbron Committee in 1975,[71] which declared that the extent of a woman's sexual experience with third parties does not have anything to do with whether she would be likely to lie when giving evidence, and is only rarely likely to be relevant to issues directly before the jury. The report accordingly argued that there should be some restrictions on the admission of evidence of the complainant's sexual history, unless such evidence would be crucial to the jury's deliberations, for example where there was a striking similarity between the sexual

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[70] ibid. c1204

[71] Report of the Advisory Group on the Law of Rape, Cmnd 6352, December 1975

behaviour of the complainant on a previous occasion and her[72] alleged behaviour on the occasion in question.[73] It recommended that the trial judge's decision should be guided by and based on principles set out in legislation,[74] and although the Bill as originally introduced in Parliament contained detailed rules about the admissibility of evidence of this type, it was subsequently amended, so section 2 of the *1967 Act* gives no such guidance.

The Lord Chief Justice in his 1982 judgment *R v Viola*[75] set out guidelines which are binding on all trial judges. When applications to cross-examine are made, the first question the judge has to ask himself is whether the questions proposed to be put are relevant both according to the ordinary common law rules of evidence and to the case as it is being put. If they are not so relevant, that is the end of the matter. If the questions merely seek to establish that the complainant has had sexual experience with other men outside marriage, so as to suggest that for that reason she ought not to be believed on oath, the judge, save perhaps in exceptional cases, should exclude them. But if the questions are relevant to an issue in the trial in the light of the way the case is being run, for instance relevant to the issue of consent, as opposed merely to credit (i.e credibility), they are likely to be admitted, because to exclude a relevant question on an issue in the trial as the case is being run will usually mean that the jury is being prevented from hearing something which, if they did hear it, might cause them to change their minds about the evidence given by the complainant. However, the existence of a 'grey area' between relevance to credit and relevance to an issue in the case was recognised:

> On one hand evidence of sexual promiscuity may be so strong or so closely contemporaneous in time to the event in issue so as to come near to, or indeed to reach the border between mere credit and an issue in the case. Conversely, the relevance of the evidence to an issue in the case may be so slight as to lead the judge to the conclusion that he is far from satisfied that the exclusion of the evidence or the question from the consideration of the jury would be unfair to the defendant.[76]

It has been suggested on a number of occasions that the interpretation of section 2 by the courts has been inappropriate, and that the section has been used to admit evidence which would have been excluded at common law.[77] Professor Birch has recommended that the courts adopt a test analogous to similar fact evidence, admitting references to a complainant's previous sexual history only where it is of such probative value that it

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72 At that time, the offence of rape could only be committed on a woman.

73 Paras 134-138

74 para 137

75 [1982] 3 All ER 73

76 at p77

77 see for example Barry Hill and Karen Fletcher-Rogers, *Sexually Related Offences*, 1997 para 2-172; Aileen McColgan, *Common Law and the Relevance of Sexual History Evidence*, Oxford Journal of Legal Studies vol 16 No 2, Summer 1996; Jennifer Temkin, *Sexual History Evidence - the Ravishment of Section 2*, [1993] Criminal Law Review pp3-20.

would be an affront to common sense to exclude it.[78] However, one study has suggested that, for the most part, the courts and lawyers do not differentiate a great deal between the questioning of rape complainants and other types of complainants and witnesses; and that the perceived problems in rape trials are a result of the shortcomings of the adversarial criminal trial process in general.[79]

The operation of section 2 was considered by the Criminal Law Revision Committee in its 1984 report on *Sexual Offences*:

> 2.87 From the memoranda which we have received and from television programmes and articles in the Press and legal journals it seems that some people, and in particular some women's organisations, think that these statutory provisions are proving ineffective for the protection of complainants because many judges, it is alleged, grant leave to cross examine about a complainant's previous experience on being asked to do so.[80] Critics do not seem to appreciate that a complainant's previous sexual experience may be relevant to the issue of consent […] The frequency with which leave is granted is no indication of the strength of the applications. Experienced advocates do not make applications unless they are reasonably sure that they will be granted. It is bad forensic tactics to make applications which are likely to be refused.
>
> 2.88 The Policy Advisory Committee were concerned - as we were - by the criticism that leave to cross-examine a complainant on her previous sexual history was being given too readily. We both wished to discover what the practice of the courts actually was. To this end our Chairman invited the Recorder of London to discuss this problem of giving leave to cross-examine with the circuit judges who sit regularly at the Central Criminal Court, because it had been suggested in the Press and in a television programme that leave to cross-examine had been given too freely at that court. The Policy Advisory Committee asked the Chairman of the Criminal Bar Association, who is now one of our Members, to make enquiries amongst members of the Bar practising both in London and on the circuits as to the way section 2 was applied. There was general agreement that it was applied sensibly and that most defending counsel did not make applications under that section unless they had good grounds for doing so. The few complaints about the way in which the section worked were directed more to unfairness to defendants than to unfairness to complainants: it was said that occasionally applications were refused when they ought to have been allowed. The Bar, so it seems, would not want there to be any further restrictions on the cross-examination of complainants.

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78 [1990] Crim LR at p719

79 David Brereton, *How Different are Rape Trials? A Comparison of the Cross-Examination of Complainants in Rape and Assault Trials,* British Journal of Criminology vol 37 no 2 Spring 1997.

80 see, for example, Adler, *Rape - the Intention of Parliament and the Practice of the Courts* (1982) 45 MLR 664. For an article defending the law and the practice of the courte, see Elliott, *Rape Complainants' Sexual Experience with Third Parties,* [1984] Crim LR, 4

> 2.89 We were satisfied that the evidence before us did not disclose any grounds for concern that either the letter or the spirit of section 2 of the 1976 Act was being disregarded. This is what we would have expected, because the way section 2 should be applied has been considered in a number of cases in the Court of Appeal and has now been settled by a judgment of the Lord Chief Justice delivered in May 1982 *(R v Viola* (1982) 75 Cr. App. R. 125) […]
>
> 2.90 Judges will follow these precepts, even if they have not done so in the past, and the Court of Appeal will try to ensure that they do. We do not think that complainants require any further protection and any attempt to give them some would probably result in unfairness to defendants. We recommend that section 2 of the 1976 Act should be retained in its present form, with one modification. The restrictions on evidence and cross-examination in section 2 apply only to a complainant's previous sexual experience with a man other than the defendant. The Scottish Law Commission have recently looked at the subject of evidence in cases of rape and of other sexual offences and have recommended that a provision broadly along the lines of section 2 be introduced for Scotland.[81] Their provision, however, would apply also to a complainant's previous sexual experience with the defendant. In practice evidence as to such experience will nearly always be relevant to an issue and would, therefore, hardly ever be excluded by the judge. The case for extending the restrictions in section 2 of the 1976 Act is for this reason not particularly strong but we see advantage in the law in England and Wales keeping in line with the law in Scotland in this respect. Accordingly, we recommend that the restrictions in section 2 should be extended to apply to the complainant's previous sexual experience with the defendant.[82]

The statutory rule in the *1976 Act* applies only to rape trials, as it followed from the recommendations of an advisory group on rape;[83] but the common law has built up a set of rules which still restrict the use of sexual history evidence in trials for indecent assault and other sexual offences, as well as providing a baseline in rape trials.[84] The basic common law rule in all cases is that no evidence is admissible unless it is relevant to the proceedings. In sexual offence cases, the complainant may be cross-examined as to his or her sexual history in some circumstances and contradictory evidence may be called by the defence where the matters relate to a fact in issue, such as consent. However, contradictory evidence may not be called where the matters are collateral or go only to credit. The complainant can always be cross-examined about previous sexual intercourse with the defendant as it has been seen as directly affecting the issue of consent on the occasion complained of;[85] and also about her history of sexual intercourse with other men (although here answers under cross-examination are normally final and cannot therefore

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81 Report of the Scottish Law Commission on Evidence in Cases of Rape and other Sexual Offences, Scot. Law Com. No. 78

82 15th Report, Cmnd 9213, April 1984, paras 2.87-2.90

83 Report of the Advisory Group on the Law of Rape (the 'Heilbron Report'), Cmnd 6352, December 1975

84 section 2(4) of the *1976 Act* provides that the common law limitations continue to apply to rape cases and that section 2 imposes additional restrictions in such cases.

85 *R v Riley* [1887] 18 QBD 481

be the subject of rebuttal evidence).[86] In the past evidence that the complainant was 'of notorious bad character' or a prostitute has frequently been admitted under the common law.[87]

2. Background to the current Bill

During the passage of the Bill which became the *Criminal Procedure and Investigations Act 1996*, Tessa Jowell tabled an unsuccessful amendment which would have replaced section 2(1) and (2) of the *1976 Act* with provisions based largely on the New South Wales legislation on sexual history evidence.[88]

Lord Goodhart tabled an amendment to the *Crime and Disorder Bill 1997-98* on 19 March 1998, part of which was intended to extend the provisions of section 2 of the *1976 Act* to trials for all the sexual offences listed in Schedule 2 of the *Sexual Offences Act 1956*. The government rejected the amendment on the grounds that the interdepartmental working group on the treatment of vulnerable or intimidated witnesses in the criminal justice system was due to report on this issue shortly.[89]

The working group's report, entitled *Speaking up for Justice*, was published by the Home Office in June 1998. It concluded, in respect of sexual history evidence, that 'there is overwhelming evidence that the present practice in the courts is unsatisfactory and that the existing law is not achieving its purpose.'[90] The evidence on which this conclusion appears to be based consists of 'some research evidence that the practice of the courts in interpreting the provision is widely variable and that it frequently is at variance with the intention of section 2 [and] research evidence that indicates that sexual history evidence is introduced in up to 75% of applications for the admission of sexual history evidence in rape trials'.[91] No reference is supplied for the first piece of research (although a summary of some existing research is given on pp174-5 of the Report); and the second piece referred to is a 1987 study of 80 rape cases heard in one year (1978-79) at the Central Criminal Court in London.[92] This took place when only a very limited amount of guidance from the courts on the provisions of the *1976 Act* had emerged. Of the 80 cases studied, 45 were contested and went to trial; applications for permission to introduce evidence of the complainant's previous sexual experience were made in 18 of these cases on behalf of 29 defendants; and it was in 75% of these applications (ie. presumably in

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86 *R v Holmes* [1871] LR 1 CCR 334; *R v Ahmed* [1994] Crim LR 669

87 eg *R v Barker (1829)* 3 C&P 589; *R v Tissington* (1843) 1 Cox 48; *R v Greatbanks* (1959) Crim LR 450; *R v Clarke* (1817) 2 Stark 241; *R v Clay* (1851) 5 Cox 146; *R v Riley* (1887) 18 QBD 481

88 HC Deb 23 June 1996. The proposed amendment is set out at Appendix C to Chapter 9 of *Speaking up for Justice*, Home Office, June 1998

89 HL Deb 19 March 1998 cc854-62

90 para. 9.64

91 paras 9.63-9.64

92 Zsuzsanna Adler, *Rape on Trial*, 1987

relation to 22 defendants and rather fewer than 18 incidents) that the application was successful.[93]

3. Chapter III of the Bill

Clause 40 of the *Youth Justice and Criminal Evidence Bill* sets out the restrictions which are intended to apply on the admissibility of evidence or cross-examination about the complainant's sexual history in certain cases. The provisions would be more restrictive than those of the *1976 Act*, although it has been suggested that they go no further than the current practice of the courts.[94] Lord Cope of Berkeley, the Conservative spokesman in the House of Lords, felt that the underlying question was whether Parliament can, in framing legislation of this sort, judge better what is in the interests of justice than can the court at the time.[95]

Clause 42 is designed to provide the procedure for hearing applications for leave to use evidence of the complainant's sexual behaviour. This would be in private, as under the *1976 Act*, but additional rules are proposed as to the recording of the decision and the extent of any leave granted, which mirror to some extent those in the current Canadian legislation.

During the debates on the Bill in the Lords, a number of lawyers in the House of Lords, including the Lord Chief Justice (Lord Bingham of Cornhill), the former law lord Lord Ackner, the Labour peer Baroness Mallalieu and the Liberal Democrat peer Lord Thomas of Gresford argued that in their experience the current provisions of the *1976 Act*, together with the guidance given by the courts, were sufficient, and that to tighten the legislative restrictions further could result in the exclusion of relevant evidence.[96] An amendment intended to delete the whole of clause 40, however, was defeated on division by 143 votes to 56.[97]

Other peers felt the proposals would not go far enough;[98] but the government felt that it had got the parliamentary structure right, by excluding not all evidence of previous sexual behaviour but only irrelevant evidence.[99] The Liberal Democrat lawyer Lord Lester of

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93 p73

94 Lord Thomas of Gresford, HL Deb 15 December 1998 c1299

95 HL Deb 8 February 1999 cc56-7

96 see HL Deb 15 December 1998 cc1271-2 (Lord Bingham of Cornhill); HL Deb 8 February 1999 cc42-3 and cc62-3, 8 March 1999 cc12-6 and 23 March 1999 cc1208-11 (Lord Ackner); HL Deb 8 February 1999 cc43-46 and 8 March 1999 cc16-21 and 37-8 (Baroness Mallalieu); HL Deb 8 February 1999 cc49-51 and 8 March 1999 cc18-21 (Lord Thomas of Gresford)

97 HL Deb 8 March 1999 c38

98 HL Deb 8 February 1999 cc51-2 and 23 March 1999 cc1211-2 (Lord Desai); HL Deb 8 February 1999 cc 52-3 (Baroness Ludford)

99 HL Deb 15 December 1998 c1238 and 8 February 1999 c61 (Lord Williams of Mostyn)

Herne Hill supported the proposed provisions, being of the opinion that they were 'well structured, carefully balanced and fair to both the accused and the witness'.[100]

The provisions of Chapter III would apply when a person is being tried for a 'sexual offence'. This is defined for these purposes by clause 60 of the Bill to include:

- Rape or burglary with intent to rape
- Indecent assault on a male or a female
- Assault with intent to commit buggery
- Abduction of a woman by force
- Procurement of a woman by threats or false pretences
- Administering drugs to obtain or facilitate intercourse
- Intercourse with or procurement of a 'defective'
- Intercourse with a girl under 13 or between 13 and 16
- Buggery of a male or a female (or an animal)
- Incest

It would also include offences consisting of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, any of the above offences. This list includes a number of offences where the complainant's consent is irrelevant to the offence and does not have to be proved or disproved. The Secretary of State would be given the power, under clause 41(2), to make an order (subject to the affirmative resolution procedure) adding offences to or removing them from this list.

Section 2 of the *1976 Act* applies only to rape, attempted rape, aiding, abetting, counselling and procuring rape or attempted rape, incitement to rape, conspiracy to rape and burglary with intent to rape;[101] although the Court of Appeal has held that it may also be taken into account to restrict cross-examination in cases other than rape where sexual intercourse is alleged.[102]

The restriction in clause 40 would apply to evidence of any sexual behaviour or other sexual experience of the complainant (whether or not involving any accused or other person) other than anything alleged to have taken place as part of the event which is the subject matter of the charge against the accused [clause 41(1)(c)]. Section 2 of the *1976 Act* uses the term 'sexual experience', which also clearly goes beyond sexual intercourse, but which is by contrast limited by the Act to sexual experience with a person other than the defendant charged with a rape offence. The Explanatory Notes to the Bill explain that the Government do not intend evidence suggesting that the complainant has a history of making unproved allegations of sexual offences to fall within the definition of evidence about sexual behaviour [para. 145].

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[100] HL Deb 8 February 1998 cc47-8; and see HL Deb 8 March 1999 cc21-4

[101] as section 7 of the *1976 Act* defines 'rape offence' for the purposes of the Act

[102] *R v Funderburk* [1990] 2 All ER 482 (unlawful sexual intercourse with a 13-year-old girl)

The provision in section 2(2) of the *1976 Act* that the judge shall give leave if and only if he is satisfied that 'it would be unfair to that defendant to refuse to allowed the evidence to be adduced or the question to be asked' would be replaced under **clause 40(2)(b)**. The new test would be whether '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'. Lord Thomas of Gresford felt that the test of whether the conviction or conclusion is unsafe belongs to the Court of Appeal and that it would be wrong to introduce the concept of whether something is rendered unsafe into the discretion of the trial judge. He suggested that the phrase used in existing legislation and expanded upon by the Court of Appeal, that the judge must consider whether there is unfairness to the accused, is a better test.[103]

However, a further restriction would be imposed under **clause 40(2)(a)**, which provides that leave would only be granted if, in addition to the above test, one of the following four situations also applies:

1. *The evidence relates to an issue in the case which is not an issue of consent* [**clause 40(3)(a)**]

This would allow sufficiently relevant sexual history evidence to be brought if it relates to, for example, whether the act alleged actually took place, or whether it was committed by the accused or by another person. In addition, 'issue of consent' is defined by clause 41(b) to include only issues as to whether the complainant in fact consented, and not issues as to whether the accused believed, however unreasonably, that the complainant consented. This restrictive definition would mean that sexual history evidence could also be used where the defence argued that he had had an honest belief in the complainant's consent.

The distinction between actual consent and genuine but mistaken belief in consent arises from the definition of rape which is now included in section 1 of the *Sexual Offences Act 1956*.[104] This provides that a man commits rape if (i) he has sexual intercourse with a person (whether vaginal or anal) who at the time of the intercourse does not consent to it; and either (ii) he knew that the person did not consent to the intercourse or (iii) he was reckless as to whether that person consented to it. These last two aspects, which relate to a defendant's state of knowledge, were added to section 1 of the 1956 Act by section 1 of the *Sexual Offences (Amendment) Act 1976*. The 1976 amendment followed the 1975 decision of the House of Lords in *DPP v Morgan*, that when a defendant had had sexual intercourse without the complainant's consent, but had genuinely believed that she had consented, he was not to be convicted of rape even if the jury were satisfied that he had

[103] HL Deb 8 February 1999 c51

[104] as substituted by section 142 of the *Criminal Justice and Public Order Act 1994*

no reasonable grounds for that belief.[105] However, section 1(2) of the *1976 Act* provides that the jury should have regard to the presence or absence of reasonable grounds for such a belief.

Concerns have been voiced from many quarters about this aspect of the definition,[106] and the Law Commission has suggested that it could be changed.[107] An amendment to the substantive law of rape is beyond the scope of the present Bill, but the government has stated that this is one of the issues that will be addressed by the group currently reviewing the whole of the sexual offences legislation .[108]

Distinguishing between consent and a genuine but mistaken belief in consent can often be difficult. Evidence relating to either is currently subject to section 2 of the *1967 Act*. During the debates on the current Bill, Lord Thomas of Gresford suggested that:

> in almost every case where the defence is one of consent, there will be an additional defence that, even if the complainant did not consent, the defendant reasonably believed that she did consent. The two defences almost invariably run together. Indeed I cannot imagine a situation where they could not run together.[109]

The Home Office Minister Lord Williams of Mostyn recognised that:

> too often the issue of consent or belief in consent are hopelessly intermingled. We have tried to point out that these are different aspects of relevance: belief in consent is one; consent is another. They are not the same and they should be approached as conceptually different.[110]

Not all of the sexual offences which would be included within the ambit of this clause involve issues of consent.

2. *The issue being argued is whether the complainant in fact consented, and the evidence or questioning relates to behaviour at or about the same time as the alleged offence* [**clause 40(3)(b)(i)**]

The Bill as originally drafted referred to behaviour within 24 hours of the alleged offence, but following considerable opposition to any fixed timescale, which is necessarily

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105 [1975] 2 All ER 347

106 see eg Lord Cope of Berkeley at HL Deb 8 February 1999 cc56-7 and 8 March 1999 cc28-31; and Lord Desai at HL Deb 23 March 1999 cc1211-2. Lord Goodhart moved an unsuccessful amendment to the *Crime and Disorder Bill 1997-98*, which was intended to alter the definition of rape to refer to 'reasonable grounds' for belief in consent - HL Deb 19 March 1998 cc854-62

107 Law Commission consultation paper no 139, *Consent in the Criminal Law*, 1995, Part 7

108 Lord Williams of Mostyn, HL Deb 23 March 1999 c1217

109 HL Deb 8 February 1998 c51

110 HL Deb 23 March 1999 c1220

arbitrary,[111] the Government introduced an amendment on Report to remove the reference to a 24-hour period and replace it with 'at or about the same time as'.[112] The Explanatory Notes to the Bill state that the government nevertheless intend 'at or about the same time' to be interpreted no more widely than 24 hours before or after the offence [para. 143] However, it would be for the courts to develop an interpretation of such a provision.

3. *The issue is whether the complainant in fact consented, and the evidence or questioning relates to behaviour that is extremely similar to the defence's version of the complainant's behaviour at the time of the alleged offence and cannot reasonably be explained as a coincidence* [**clause 40(3)(b)(ii)**]

This provision was added to the Bill as the result of a government amendment on Report,[113] following Baroness Mallalieu's suggestion of a hypothetical example in which she considered that it would be unreasonable to exclude such evidence.[114]:

> A prosecution is mounted against the defendant, the allegation being that he has met the complainant at a party, followed her to her home, climbed in through an upstairs balcony and raped her. The defendant says that at the party where he agrees they met, she invited him to re-enact the balcony scene from Romeo and Juliet. He says that he indeed followed her home, climbed in and consensual sex took place between them. Subsequently, but prior to the trial, evidence comes into the possession of the defence that the week before, and again the week after but outside the 24-hour period, the same lady met another young man at a party, on each occasion inviting him back to her house in identical circumstances, where consensual sex has taken place with each young man on each occasion. The evidence goes to the issue of consent, not to whether the defendant thought that she consented because he was wholly unaware of either of those incidents at the time of the act in relation to which he is charged.
>
> The evidence does not appear to me to rebut the evidence of the Crown that the complainant did not consent on the night in question or explain that evidence. Yet that evidence might be thought, I venture to suggest by most right thinking people, to put a very different light on the events which would be highly relevant to the jury's verdict. To reach the right verdict, the jury might well be assisted by having the full picture.

The Bill had not originally made any reference to such 'extremely similar' behaviour (although this was one of the exceptions to the general rule of non-admissibility recommended by the Heilbron Report in 1975),[115] as the government were of the opinion that a complainants' previous sexual history is 'simply not relevant to the question of whether there was consent on the occasion in point'.[116] The government's view of how

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[111] see eg HL Deb 15 December 1998 c1299 (Lord Thomas of Gresford); HL Deb 8 February 1999 cc54-6 (Lord Bingham of Cornhill); *ibid* cc56-7 (Lord Cope of Berkeley)

[112] see HL Deb 8 March 1999 cc34-7

[113] *ibid*

[114] HL Deb 8 February 1999 cc45-6

[115] Report of the Advisory Group on the Law of Rape, Cmnd 6352, December 1975 - see above

[116] the Home Office Minister Lord Williams of Mostyn, HL Deb 15 December 1998 cc1238-9

this provision should operate was set out by the Home Office minister, Lord Williams of Mostyn during the debate on third reading in the House of Lords.[117]:

> The term "strikingly similar" does not include evidence of a general approach towards consensual sex such as a predilection for one night stands, or for having consensual sex on a first date. Still less does it include the fact that the complainant has previously consented to sex with people of the same race as the defendant, or has previously had sex in a car, for example, before alleging that she was raped in a car. Such behaviour could reasonably be explained as coincidental, as it falls within the usual range of behaviour that people display. Behaviour that can be admitted under subsection (3)(b)(ii) must be the sort of behaviour that is so unusual that it would be wholly unreasonable to explain it as coincidental.
>
> For example, supposing a complainant alleged gang rape, and a co-accused in the case claimed consent. If the defence could produce specific, factual evidence that the complainant had previously engaged in consensual group sex under similar circumstances, this might be relevant to the jury's determination of whether she consented to the events that she is now claiming she did not consent to. The complainant's previous involvement in sexual activity of this nature should only be introduced where it is so unusual that it might affect the jury's view of the complainant's behaviour at the time of the events in question.

Lord Mostyn went on to discuss the treatment of this subject in certain other jurisdictions[118] and the Government's view of these alternative arrangements[119]:

> We have considered other models, as I mentioned briefly on our earlier visits to this territory. We have considered the legislation in Scotland, Canada and New South Wales. The wording of the Scottish legislation places little emphasis on relevance or probative value. Research done for the Scottish Office in 1992 concluded that the "interests of justice" gateway in that legislation--which allowed evidence to be introduced without a specific statutory constraint on how it could be considered relevant or its probative value--meant that sexual behaviour evidence was admitted much more often than had been intended. Some practitioners who were questioned said that the inclusion of the gateway made the legislation "a waste of time".
>
> The New South Wales legislation provides a list of circumstances where sexual behaviour evidence can be admitted. We did not consider that an exclusive list of circumstances was appropriate. In Clause 40 we have introduced a framework setting out how sexual behaviour evidence could be considered relevant to an issue in the case.
>
> We briefly discussed Canada on the previous occasion. The noble Lord, Lord Lester of Herne Hill, brought to your Lordships' attention the challenge in the case of Seaboyer. Following that challenge, Canada established a complete ban on the use of the complainant's sexual behaviour to suggest that she would have been "more likely to have consented to the sexual activity that forms the subject matter of the charge" or

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[117] HL Deb 23 March 1999 cc1218-9
[118] ibid.
[119] ibid.

that she "is less worthy of belief" In other words, a ban on sexual behaviour evidence being used in relation to consent or credibility.

All other sexual behaviour evidence is covered by a relevance test: that it relates to an issue in the trial; it must also be of a specific instance of sexual activity; and it must have significant enough probative value that that value is not substantially outweighed by the danger of prejudicing the jury or the court if it is introduced.

Lord Williams went on to say[120]:

We decided not to require the court to weigh probative value against the risk of prejudice and to use the test in subsection (2)(b) of Clause 40--that a refusal of leave to introduce the evidence might have the result of rendering unsafe a conclusion of the jury or the court on any relevant issue in the case. We chose deliberately to do that because, having redrawn the law on relevance in Clause 40, it seemed preferable to us to require the courts to consider only the significance of relevant evidence, and to admit it even if there was a risk that it would prejudice the court against the complainant.

Another aspect of our legislation reflecting the Canadian experience is that both cover evidence of sexual behaviour between the complainant and any other person, including the defendant. We believe it is appropriate to put all sexual behaviour on the same footing, whoever it is with. Behaviour with the defendant may sometimes be irrelevant; behaviour with someone other than the defendant may sometimes be relevant.

We believe that the only way to achieve a more consistent application of the law across the board is to create a statutory framework of relevance. I believe that that is what we have done in Clause 40. Under subsections (3) or (5) the relevance test must be passed and then Clause 40(2)(b) introduces the question of the refusal of leave in the way that I discussed earlier.

Clause 40(4) is intended to provide that, in any of the three situations above, the court can disallow any sexual history evidence if it considers that the actual purpose of the defence in bringing such evidence is to undermine or diminish the complainant's credibility.

4. *The prosecution has adduced evidence about any sexual behaviour of the complainant and the defence evidence is intended only to rebut or explain the prosecution evidence* [**clause 40(5)**]

In some circumstances the prosecution might wish to bring evidence that, for instance, the complainant has no sexual experience at all, or none of a specific nature. This provision is intended to allow the defence to rebut any such proposition.

[120] ibid.

D. Reporting restrictions

The current restrictions on press reporting of criminal cases are summarised at page 24 of this paper. In its report *Speaking up for Justice*, published by the Home Office the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System made the following recommendations about press reporting of criminal cases[121]:

- The court should have power to order that the press and media should not report details likely to lead to the identification of a witness in cases where press reporting is likely to exacerbate witness intimidation. These restrictions should apply to English and Welsh criminal proceedings reported in England, Wales, Scotland and Northern Ireland and procedures should enable an application for such a restriction to be made to the court at any time from the point of complaint through to the trial

- The existing restrictions on reporting the identity of complainants in cases of rape and other serious sexual offences which are the subject of proceedings in England and Wales should be extended to apply to the reporting of such proceedings in Scotland and Northern Ireland.

- The existing restrictions on reporting the identity of juveniles should make it clear that these apply from the point of complaint and should be extended to apply to the reporting of English and Welsh proceedings in Northern Ireland.

The provisions in Chapter IV of Part II of the Bill (Clauses 43-51) and further amendments to the current legislation on reporting restrictions set out in Schedule 2, are designed to implement these recommendations and make a number of other changes.

The provisions in this Chapter of the Bill were substantially amended during the report stage[122] and third reading of the Bill in the House of Lords, following concerns expressed by journalists and broadcasters that the Clauses as originally drafted would unduly hamper news reporting where children were involved. It was suggested that they might, for example have prevented the reporting of incidents such as the shootings at Dunblane Primary School and the attack on nursery nurse Lisa Potts and the children in her charge, or the murders of Rachel Nickell, the headmaster Philip Lawrence, and Lin Russell and her daughter Megan[123].

Clause 43 seeks to ensure that where a criminal investigation has begun into an alleged offence against the law of England and Wales or Northern Ireland, no information enabling the identification:

- of any person suspected of committing the offence;

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[121] Home Office, *Speaking up for Justice* (June 1998) p.52

[122] HL Deb Vol 598 c53-74, 8.3.1999; HL Deb Vol 598 c1222-1234, 23.3.1999

[123] eg. "Clause for concern over press freedom" - *Western Mail* 15.2.1999; "New bill shows its clause" - *Guardian* 22.2.1999; "Home office rethinks after broadcasters' action" - *Broadcast* 5.3.1999

- of the person against whom the alleged offence was committed; or

- of an alleged witness to the offence

is reported by the media if that person is less than 18 years old. It is designed to impose a mandatory restriction on the reporting of such information. The restriction should last until the person reaches the age of 18, or until a court makes an order under Clause 43(6) dispensing with the restriction, being satisfied that it would be in the interests of justice to do so. The court will have to consider the welfare of the young person concerned when making a decision whether or not to dispense with the regulations to any extent. Clause 43(1), which was inserted by a Government amendment during the Bill's report stage in the House of Lords[124] aims to provide a right of appeal against the decision of a court in response to an application to dispense with the reporting restrictions. Reporting restrictions under Clause 43 will also be dispensed with where the offence becomes the subject of criminal proceedings, as at that point restrictions under Clause 44, or under section 49 of the *Children and Young Persons Act 1933* (summarised at page 24 of this paper) will apply.

Once proceedings have started **Clause 44** is designed to give courts discretionary powers to impose prohibitions on reporting information leading to the identification of witnesses, victims or defendants under the age of 18. The power is available in respect of a wider range of witnesses than that available under Clause 43, as it extends to witnesses other than those who witnessed the commission of the offence. It will not apply in youth courts or in any other proceedings that are already covered by the automatic reporting restrictions imposed by section 49 of the *Children and Young Persons Act 1933*. If they are applied, the restrictions will last until the person reaches the age of 18, unless the court decides at some point to relax them. The Clause is intended to replace section 39 of the *Children and Young Persons Act 1933* (summarised at page 24 of this paper) and extend it to criminal proceedings in Northern Ireland and courts-martial. Section 39 is not being repealed, but is to be amended by paragraph 2 of Schedule 2 of the Bill so that it will in future relate only to civil proceedings involving children and young people.

Clause 45 aims to give the courts discretionary powers to give reporting directions imposing restrictions on the reporting of information leading to the identification of adult witnesses involved in criminal proceedings, if the court considers that:

> (a) that the quality of evidence given by the witness, or
> (b) the level of co-operation given by the witness to any party to the proceedings in connection with that party's preparation of its case,

[124] HL Deb Vol 598 c58-59, 8.3.1999

> is likely to be diminished by reason of fear or distress on the part of the witness in connection with being identified by members of the public as a witness in the proceedings.

It is intended that courts should be able to revoke a direction under this Clause. They will also have powers partially to disapply the restrictions if they are satisfied that such a move is necessary in the interests of justice, or that the restrictions are substantial and unreasonable and that it would be in the public interest to relax them. The *Explanatory Notes*[125] comment that while witnesses qualifying for restrictions will be suffering the type of fear or distress that might make also make them eligible for special measures under Chapter I of this Part of the Bill, it is not intended that everyone eligible through fear or distress for special measures should also be considered eligible for the protection of a reporting direction.

Clause 46 is designed to prevent the reporting, until the end of court proceedings, of matters relating to special measures directions given by the courts under Chapter I of Part II of the Bill, or directions under Clause 35 prohibiting the defendant from cross-examining any particular witness. Courts will have discretionary powers to lift these restrictions, but if the defendant makes representations against it doing so, the court will have to consider whether lifting the restriction would be in the interests of justice.

Under **Clause 48** it will be an offence, punishable by a fine of up to £5,000, for a publication to include any matter in contravention of a reporting restriction under Clause 43, or a direction under Clause 44 or 45, or to include a report which contravenes Clause 46. "Publication" is defined in **Clause 61** as follows:

> "publication" includes any speech, writing, relevant programme or other communication in whatever form, which is addressed to the public at large or any section of the public (and for this purpose every relevant programme shall be taken to be so addressed), but does not include an indictment or other document prepared for use in particular legal proceedings;

Where the publication is a newspaper or periodical any proprietor, editor or publisher will be liable to prosecution. Where the publication is a programme, any body corporate or Scottish partnership engaged in providing the programme service in which the programme is included, and any person having functions in relation to the programme corresponding to those of a newspaper editor will be liable. With any other type of publication, any person publishing it will be liable. Prosecution for such an offence will require the consent of the Attorney General.

A person charged with an offence under Clause 48 will have a defence under **Clause 49** if at the time of the alleged offence he or she was not aware, and neither suspected nor had

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[125] p29 para 169

reason to suspect, that the publication included something protected by a reporting restriction.

A number of additional defences were added by Government amendments introduced during the Bill's report stage in the House of Lords[126]. Where the identification of a person under 18 is concerned, a person will have a defence if he can prove that, at the time of the alleged offence, he was unaware and neither suspected, nor had reason to suspect, that the criminal investigation in question had begun. If the offence involves reporting information about a suspected victim or witness to an offence other than a sexual offence, there will be a further defence if the person charged can show to the court's satisfaction that the public interest demanded publication of the information and that the reporting restriction concerned was therefore substantial and unreasonable. **Clause 51**, which was added by a Government amendment moved during the third reading debate on the Bill in the House of Lords[127], sets out a list of factors which the courts will be required to take into account in making an assessment of where the public interest lies in such cases. This defence will not be available where the information relates to the child or young person who is alleged to have committed the offence or to a witness to the commission of a sexual offence.

Clause 49 also seeks to provide a defence for a person charged with an offence under Clause 43 where that person can show that written consent was obtained to the publication of the information concerned. It will not apply where the person protected by the restriction is the person alleged to have committed the offence nor will it apply where the person is a witness to the commission of a sexual offence who is under the age of 16. Young people protected by restrictions who are aged 16 or 17 will be able to give consent themselves. Where a young person is under 16, someone with appropriate responsibility for the young person's welfare ("an appropriate person") will be able to give consent. A person who is under investigation in connection with the offence in respect of which the reporting restriction has been made will not be an appropriate person for this purpose. Where consent is given by the appropriate person he or she will first have to be given written notice drawing his attention to the need to consider the young person's welfare. The defence of written consent will not be available where the notice of consent has been revoked at any reasonable point before publication by anyone else with responsibility for the child or the child himself.

Where a reporting direction has been made under Clause 45(2) in relation to an adult witness written and a person is charged with an offence under Clause 48 for contravening that direction it will similarly be a defence that the witness in respect of whom the direction gave written consent.

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[126] HL Deb Vol 598 c73-74
[127] HL Deb Vol 598 c1231, 23.3.1998

A person charged with an offence will not be able to rely on the defence of written consent if it is proved that consent was obtained through interference with the peace or comfort of the person giving the consent or the child protected by the restriction.

The *Explanatory Notes*[128] suggest that the distinction made in the availability of certain of the defences in Clause 49 between the reporting of information about children and young people who are alleged to have committed offences and those who are alleged to have been victims of or witnesses to criminal offences, turns the restriction in the latter type of case from a ban into a presumption against publishing such information.

[128] p27-28 para.159

Appendix: How a young offender would experience the youth justice system

How a young offender would experience the new system?
PRE-COURT INTERVENTIONS
Police reprimand **or** **Final Warning** ➢ Referral to Youth Offending Team for intervention programme
FIRST COURT APPEARANCE
Grave crimes ➢ Dealt with by the Crown Court **Other crimes, guilty plea** ➢ Referral to a youth panel for up to 12 months. ➢ Contract would be drawn up, including reparation and other activities. ➢ Failure to agree or complete a contract would mean returning to the youth court to be sentenced for the original offence. ➢ Young offender would usually not be named if the contract was completed. **Other crimes, not guilty plea** ➢ Dealt with by the youth court. ➢ Conditional discharge generally not available if within two years of a Final Warning. ➢ Young offender would usually be named if convicted.
FURTHER COURT APPEARANCES
Grave crimes ➢ Dealt with by the Crown Court **Other crimes** ➢ Dealt with by the youth court ➢ Conditional discharge not generally available if within two years of a Final Warning. ➢ Young offender would usually be named if he or she pleaded not guilty and was subsequently convicted. ➢ Persistent young offenders would be fast tracked through the system.

Source: *No More Excuses* CM 3809 Home Office November 1997