

# 1 Introduction to the law of evidence

## CHAPTER OVERVIEW

1.1 Introduction	1	1.4.2 Circumstantial evidence	5
1.2 What is evidence?	2	1.4.3 Real evidence	6
1.3 Terminology	2	1.4.4 Documentary evidence	6
1.3.1 Facts in issue	2	1.4.5 Testimony	7
1.3.2 Relevant facts	4	1.4.6 Hearsay evidence	7
1.3.3 Collateral facts	4	1.4.7 Original evidence	7
1.3.4 Formal admissions	4	1.5 Issues of criminal procedure	7
1.3.5 Judicial notice	4	1.6 Impact of the Human Rights Act 1998	9
1.4 Categories of evidence	5	1.7 Reforms	10
1.4.1 Direct evidence	5		

## 1.1 INTRODUCTION

This book is concerned with the law of evidence which governs the presentation of evidence in criminal and civil proceedings. Rules of evidence transcend all aspects of the trial stage of proceedings. They govern who has to prove what in a trial (the burden of proof) and the level to which those facts have to be proved (the standard of proof). They govern what evidence can go before the court (by the rules relating to relevance and admissibility), the format in which it is presented to the tribunal of fact and the reasons why it may be adduced (i.e. what the evidence goes towards proving or disproving). They ensure that members of the tribunal of fact are provided with guidance (usually by way of a direction from the judge) as to how they should approach their deliberations and what certain evidence may go to prove or disprove. The law of evidence provides rules as to who can be called as a witness (and by which party in proceedings) to give evidence (competence) and who must give evidence if called to do so (compellability). The rules of evidence also dictate the type of questions which may be asked of a particular witness depending upon the party calling them. The law provides safeguards for the protection of vulnerable witnesses in order to maximise the quality of their evidence. The law safeguards against miscarriages of justice by providing rules of evidence and discretionary powers to exclude certain types of evidence or evidence which has been improperly obtained.

## 2 Introduction to the law of evidence

### 1.2 WHAT IS EVIDENCE?

Evidence is information which may be used to prove the existence of a fact in issue or a collateral fact or to disprove a fact in issue or collateral fact. These terms will be explored in paragraphs 1.3.1 and 1.3.3 below.

There are many different types of evidence including the testimony from a witness given in the witness box, forensic evidence, the evidence of identification, evidence in documentary form, and objects (e.g. a weapon). These are merely examples of types of evidence and they do not provide a definition of what evidence is or its purpose.

Before evidence is relied upon by the tribunal of fact (the jury), that evidence must pass three hurdles:

- the evidence must be relevant
- the evidence must be admissible
- the tribunal of fact must consider the evidence to have weight.

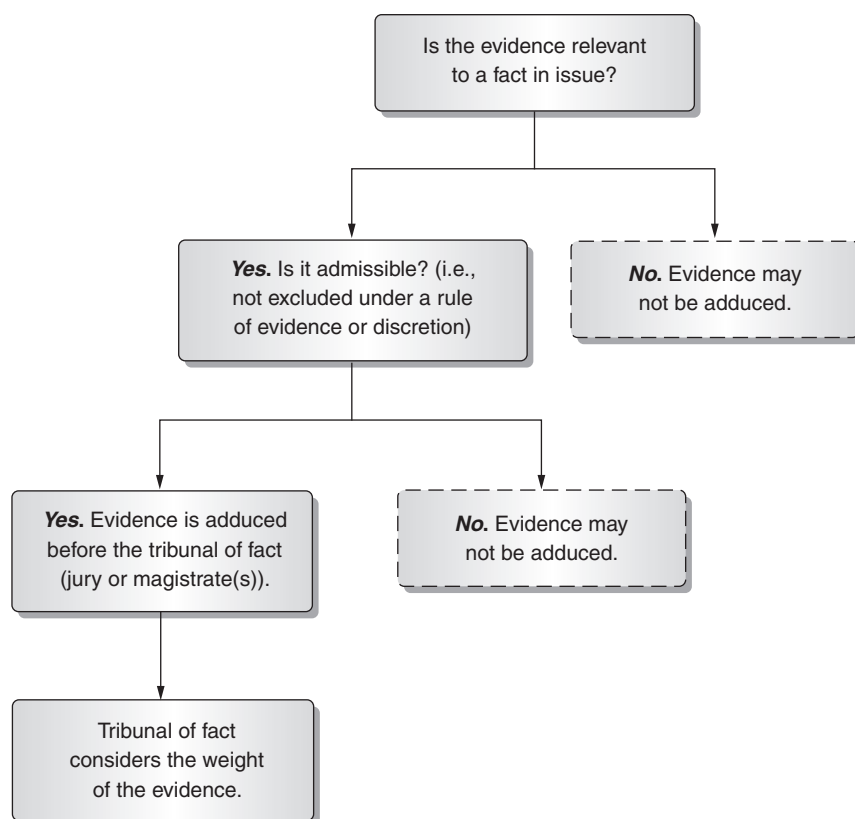
These issues of relevance, admissibility and weight will be considered in more detail in Chapter 2. For now it suffices to state that relevance is a question of law for the judge to determine. In order to be admissible, the evidence must be relevant to a fact in issue or collateral issue. Irrelevant evidence will never be admissible. However, just because evidence is relevant, it does not mean that it is automatically admissible. Admissibility is also a question of law for the judge to determine. The rules of evidence largely govern the admissibility of evidence and the bulk of this book is about the admissibility of certain types of evidence. If evidence is ruled inadmissible by an exclusionary rule of law or judicial discretion to exclude evidence, the jury will not see or hear about the evidence. If evidence is ruled admissible, it will then be placed before the jury. The jury will then consider the weight (or cogency) of the evidence (see Figure 1.1).

### 1.3 TERMINOLOGY

This paragraph explains some of the key terms that will appear throughout the book and with which you need to become familiar.

#### 1.3.1 Facts in issue

A fact in issue (or material fact or *factum propandum*) in a case is a fact which it is necessary for the prosecution (in criminal proceedings) or claimant (in civil proceedings) to prove if it is to succeed with its case. In a criminal trial, the burden of proof is usually on the prosecution, so the prosecution must prove the elements of the offence that the defendant is accused of as well as disprove the defence that he raises. Thus, the facts in issue in a criminal case are all of the elements of the offence and defence that are in dispute as well as the identity of the defendant (i.e. that the defendant in the dock was the person to commit the crime). If the defendant was charged with criminal damage, the prosecution would need to prove that the defendant



**Figure 1.1** Relevance, admissibility, weight

intentionally or recklessly destroyed or damaged property belonging to another without lawful excuse.<sup>1</sup> If the defendant raised the defence of lawful excuse, then the facts in issue would be:

- that the defendant destroyed or damaged property belonging to another;
- that the defendant had no lawful excuse;
- that the defendant intended to destroy or damage the property or was reckless about such destruction or damage.

The prosecution might rely on direct evidence to prove the facts in issue (e.g. witness testimony to the effect that the witness saw the defendant strike the property in question with a hammer).

In a civil action for negligence, the facts in issue would essentially be the disputed factual elements of negligence:

- that the defendant breached the duty of care that he owed the injured party;<sup>2</sup>
- that the breach caused the injury.

<sup>1</sup> s. 1(1), Criminal Damage Act 1971.

<sup>2</sup> The question of whether he owed that duty of care is a question of law rather than fact and thus not a fact in issue.

#### 4 Introduction to the law of evidence

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##### 1.3.2 Relevant facts

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A relevant fact (or *factum probans*) is a fact which is not a fact in issue, but is a fact which tends to prove or disprove a fact in issue. For instance, in a criminal case a relevant fact would be the existence or (non-existence) of a motive of the defendant. The existence of a motive is not a fact in issue because it is not a requisite element of any criminal offence (i.e. it does not form part of the *actus reus* or *mens rea* elements of a criminal offence), but it is a relevant fact because motive tends to prove a fact in issue (i.e. that the defendant performed the *actus reus* of the offence charged with the necessary *mens rea*). Evidence of a relevant fact is circumstantial evidence.

##### 1.3.3 Collateral facts

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A collateral fact is a fact which is not a fact in issue but is ancillary to a fact in issue. Examples of collateral facts include facts which affect the competence or credibility of a witness or facts which affect the cogency of a piece of evidence. Where there are conditions precedent to the admissibility of another piece of evidence, those conditions are collateral facts. For example, under the 'best' evidence rule<sup>3</sup> a condition precedent to adducing a copy of a document in evidence is proof of the (collateral) fact that the original document is not available.

##### 1.3.4 Formal admissions

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Where the parties in criminal or civil proceedings agree about the existence of a fact in issue, they may make formal admissions<sup>4</sup> regarding that fact. A fact which is formally admitted in evidence becomes conclusively proved and ceases to be a fact in issue. Thus, the party who would otherwise bear the burden of proving that fact is relieved from doing so.

##### 1.3.5 Judicial notice

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Judicial notice<sup>5</sup> may be taken with respect to a fact which means that the fact is deemed by the judge to have been conclusively established, such that no proof of that fact is required. A judge may judicially note a fact which is of common knowledge without enquiry or he may conduct an enquiry into the matter before doing so by consulting authoritative texts. One example of a fact judicially noted is the ruling that a fortnight is too short a period for human gestation.<sup>6</sup>

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<sup>3</sup> See documentary evidence at paragraph 1.4.4 below.

<sup>4</sup> Formal admissions are covered in more detail in Chapter 3.

<sup>5</sup> This is covered in more detail in Chapter 3.

<sup>6</sup> *R v. Luffe* (1807) 8 East 193.

## 1.4 CATEGORIES OF EVIDENCE

The different categories of evidence that you will come across in your study of the law of evidence are outlined below. It is important to note that there is a degree of overlap between them, so they are not mutually exclusive.

### 1.4.1 Direct evidence

Direct evidence is evidence which directly proves or disproves a fact in issue. An obvious example of direct evidence might be the oral testimony of a witness given under oath. A witness is only permitted to give evidence as to what they directly perceived (saw, heard, smelt, etc.); the opinion of a witness is not admissible evidence.<sup>7</sup> Thus, in a murder case if a witness gives evidence to the effect that he saw the defendant stab the victim, this constitutes direct evidence of a fact in issue (whether the defendant caused the death of the victim).

### 1.4.2 Circumstantial evidence

By contrast, circumstantial evidence does not directly prove or disprove a fact in issue. Circumstantial evidence is evidence of a relevant fact from which the existence or non-existence of a fact in issue can be inferred. Examples of circumstantial evidence include: evidence of the defendant's motive, evidence of opportunity (i.e. the defendant's presence at a place at a particular time), evidence of forensic identification (i.e. forensic evidence of a bodily sample or fingerprints found at the scene of the crime that matches similar samples from the defendant), evidence of the possession of incriminating objects (such as a jemmy or paraphernalia associated with the supply of drugs), evidence of the defendant's silence in interview or at trial, evidence of the defendant's preparation to perform a particular act, evidence of the defendant's bad character (such as his propensity to commit certain types of offences), etc.

From each of these examples of circumstantial evidence a relevant fact can be inferred. Thus, from evidence that the defendant was present at a particular place at a particular time, it can be inferred that the defendant had the opportunity to commit the offence. This, of course, is not direct evidence that the defendant did in fact commit the offence and in that sense one piece of circumstantial evidence does not carry as much weight as direct evidence. However, the cumulative effect of a number of separate pieces of circumstantial evidence is to increase the weight of that evidence. This is often expressed through the use of the 'rope analogy': imagine each piece of circumstantial evidence as a strand of a rope. One strand on its own is weak and insufficient to carry a weight, but several strands together increase the strength of the rope which may then carry more weight. In *R v. Exall and others*,<sup>8</sup> Pollock CB approves the rope analogy.

<sup>7</sup> See Chapters 9 and 10 on witnesses and witness testimony and Chapter 12 on opinion evidence.

<sup>8</sup> (1866) 176 ER 850 at 853.

## 6 Introduction to the law of evidence

### *R V. EXALL AND OTHERS* (1866) 176 ER 850 **Pollock CB**

[at 853]

It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength.

Thus it may be in circumstantial evidence – there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole, taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of.

#### 1.4.3 Real evidence

Real evidence is evidence which is adduced in court for the tribunal of fact to physically inspect or evidence that the tribunal of fact has directly perceived. Thus, where a witness gives evidence in the witness box, any evidence as to the appearance or demeanour of a witness is real evidence. Similarly, where the jury are shown photographs of the victim's injuries or are played CCTV footage of the offence in court, these are forms of real evidence perceived by the jury. Where a physical object is adduced in court as evidence which tends to prove or disprove a fact in issue, that object is real evidence. Examples of real evidence include a weapon alleged to have been used in committing an offence or the clothing that the victim was to have been wearing at the time of the offence. In a criminal trial on indictment, such objects would be passed to the jury for inspection and they would be asked to draw inferences from that visual inspection. For instance, they might be asked to infer from the weight and shape of the weapon that the defendant intended serious injury or that the tears in a victim's clothing were due to a struggle. A document shown to the jury may be real evidence, but it is also documentary evidence and will be subject to the rules of hearsay (see below).

#### 1.4.4 Documentary evidence

Any written document which is adduced in court as evidence which tends to prove or disprove a fact in issue is documentary evidence. A witness statement is a form of documentary evidence, as are a police officer's notes in his notebook. Other examples of documentary evidence might include documents such as bank statements, receipts, a written contract or a letter. Where documentary evidence is being adduced to prove the truth of its contents, it is technically hearsay evidence and thus is inadmissible. The provisions governing the admissibility of documentary evidence are found under ss. 114(1)(a) and 117, Criminal Justice Act 2003. The admissibility of documentary hearsay will be considered in Chapter 7.

The 'best' evidence rule once provided that only the best evidence was admissible in court. Primary evidence is the 'best' or the highest kind of evidence which can be adduced, such as the

original of a document. By contrast, secondary evidence is an inferior kind of evidence, such as the copy of a document. Thus, if documentary evidence was to be adduced, the original had to be used. However, this rule is of limited significance today; in *Garton v. Hunter*, Lord Denning MR stated that:

That old rule has gone by the board long ago. The only remaining instance of it that I know is that if an original document is available in your hands, you must produce it. You cannot give secondary evidence by producing a copy. Nowadays we do not confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes only to weight, and not to admissibility.<sup>9</sup>

#### 1.4.5 Testimony

Testimony refers to the evidence given by a witness from the witness box in court or in a witness statement which is read to the court. The subject of witnesses and witness testimony will be explored in Chapters 9 and 10.

#### 1.4.6 Hearsay evidence

Hearsay is an out-of-court statement which is adduced to prove truth of its contents. In criminal proceedings, hearsay is generally inadmissible unless it falls under a paragraph within s. 114(1), Criminal Justice Act 2003. In civil proceedings, hearsay is generally admissible: s. 1(1), Civil Evidence Act 1995. Hearsay evidence will be covered in Chapter 7.

#### 1.4.7 Original evidence

Original evidence is really the direct opposite to hearsay evidence in the sense that it is an out-of-court statement which is adduced not to prove its truth, but to prove that the statement was made. Original evidence is not subject to the rules relating to hearsay evidence, and thus is admissible.

### 1.5 ISSUES OF CRIMINAL PROCEDURE

Since the study of evidence is inherently linked to the trial,<sup>10</sup> it is useful at this stage to consider briefly some issues of criminal procedure. The subject of civil procedure is not considered here because the rules of evidence are generally more complicated within the criminal justice system. Civil evidence is largely admissible because the tribunal of law and tribunal of fact in a civil trial are the same and usually is a professionally trained lawyer. However, the law of criminal evidence contains more rules regarding the admissibility of certain types of evidence; this is

<sup>9</sup> [1969] 2 QB 37 at 44.

<sup>10</sup> The adversarial nature of the criminal trial will be considered in Chapter 2.

## 8 Introduction to the law of evidence

because the tribunal of fact in a criminal case is often a lay tribunal (the jury in the Crown Court or a lay bench of three justices of the peace in the magistrates' court).<sup>11</sup>

All criminal cases begin life with a first appearance in the magistrates' court. At an early stage in proceedings, cases will be allocated to a court based upon the classification of the offence that the defendant has been charged with. All indictable only offences will be sent to the Crown Court under s. 51, Crime and Disorder Act 1998. Summary only offences will remain in the magistrates' court for trial and mode of trial proceedings will take place to determine the venue for trial for either way offences.

The prosecution is subject to duties of pre-trial disclosure of evidence. The concept of pre-trial disclosure supports the defendant's right to a fair trial under Article 6, European Convention on Human Rights by ensuring that the defendant is aware of the evidence against him before trial. The prosecution is subject to duties of disclosure according to which they must disclose to the defence all material which they intend to rely on at court<sup>12</sup> as well as any unused material which might reasonably be considered capable of undermining the prosecution case or assisting the defence.<sup>13</sup> The defence will<sup>14</sup> then serve a defence statement on the prosecution and the prosecution will then serve any further unused material on the defence under its continuing duty of disclosure.<sup>15</sup> (See Figure 1.2.)

Potential applications regarding the admissibility of evidence at trial should be identified early and these applications will be made prior to trial. Examples of potential applications might include applications as to the admissibility of the bad character of the defendant or a non-defendant, the admissibility of hearsay evidence, or for the use of special measures when a vulnerable witness is giving evidence.

When the trial begins<sup>16</sup> the prosecutor will open the case with a speech to the jury and will then call its first witness, who is usually the victim. The prosecution will conduct an examination-in-chief of the witness before tendering the witness to the defence for cross-examination. This will be repeated for each prosecution witness until the prosecution has called all of its witnesses. This is the end of the prosecution case and the 'half-time' period in a trial. At this stage, the defence may choose to make a submission of no case to answer. If successful, the judge will direct the jury to acquit the defendant and the case is over. If this submission fails, the case will continue with the defence case. In a Crown Court trial the defence is only allowed to deliver an opening speech if it is calling a witness as to fact other than the defendant. The defence will then call its witnesses, starting with the defendant. The defence will conduct an examination-in-chief of the witness before tendering the witness to the prosecution for cross-examination. This will be repeated for each defence witness until the defence has called all of its witnesses. This signifies the end of the defence case and by this stage all of the evidence that will be relied upon in the trial has been adduced. The prosecution will then deliver a closing speech and then the defence will do the same. Finally, the judge will sum up the evidence to the

11 The exception here is the district judge who also sits alone in the magistrates' court.

12 Advance Information (disclosure of 'used' material) under Part 21, Criminal Procedure Rules.

13 Initial disclosure of 'unused' material under s. 3, Criminal Procedure and Investigations Act 1996 (CPIA 1996).

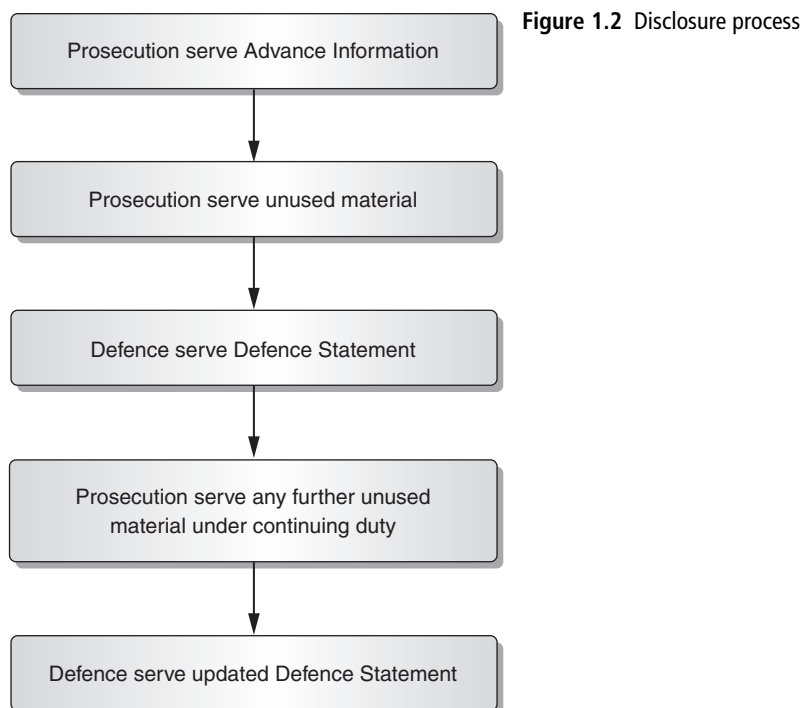
14 The defence must serve a defence statement if the trial is taking place in the Crown Court (s. 5, CPIA 1996).

However, service of a defence statement is optional for a summary trial (s. 6, CPIA 1996).

15 See s. 7A, CPIA 1996.

16 This paragraph focuses on the procedure in a Crown Court trial.





members of the jury and direct them on matters of law before they retire to consider their verdict.

## 1.6 IMPACT OF THE HUMAN RIGHTS ACT 1998

When the Human Rights Act 1998 came into force on 2 October 2000, the Articles under the European Convention on Human Rights became directly enforceable in our domestic courts. This meant that a defendant could now challenge proceedings on the grounds that the police, prosecution or the courts were in violation of his human rights. Under s. 3(1), HRA 1998 the courts are required to interpret legislation ‘so far as it is possible to do so . . . in a way which is compatible with the Convention rights’. The courts have stretched this obligation of interpretation in relation to the compatibility of reverse onuses with Article 6(2). Where the court decides that a ‘provision is incompatible with a Convention right, it may make a declaration of that incompatibility’ under s. 4(2).

The Convention rights are now invoked daily in the criminal courts. They have had a significant impact upon the rules of criminal procedure and evidence. The most relevant Convention right for the purposes of the law of evidence is Article 6, loosely known as the right to a fair trial. Article 6 is actually made up of a number of different rights that are concerned with providing the defendant with a fair trial. Article 6(1) provides for the right to ‘a fair and public hearing within a reasonable time by an independent and impartial tribunal’.

## 10 Introduction to the law of evidence

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Article 6(2) governs the presumption of innocence. Article 6(3) lays down a number of minimum rights, namely:

- (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 the 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.

You will come across references to Article 6 in various chapters in the book. In Chapter 3, consideration will be given to the way in which the courts have interpreted statutes which appear to place the burden of proof on the defendant in order to ensure compatibility with the Convention right under Article 6(2). Issues relating to Article 6 also arise in relation to the admissibility of hearsay where a witness is unavailable to give evidence,<sup>17</sup> the right to silence<sup>18</sup> and illegally or improperly obtained evidence.<sup>19</sup>

## 1.7 REFORMS

The law of evidence has been subject to significant reforms over the past 25 years. In 1986 the Police and Criminal Evidence Act 1984 ('PACE Act 1984') came into force. Not only did this Act reform police practices and provide guidance on all aspects of police conduct during the investigative stages of proceedings in the form of Codes of Practice, but the Act provided important provisions governing the exclusion of confession and other improperly obtained evidence.<sup>20</sup>

The Criminal Justice and Public Order Act 1994 had a great impact on the right to silence at the police station or at trial, providing that 'such inferences as appear proper' can be drawn against a defendant in certain circumstances.<sup>21</sup> The Youth Justice and Criminal Evidence Act 1999 provided a new statutory framework to improve the quality of the evidence of vulnerable or intimidated witnesses. The 1999 Act provides for special measures (such as the use of a screen, live link or the removal of wigs and gowns) to be used where eligible witnesses give evidence.

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<sup>17</sup> See Chapter 7 on hearsay.

<sup>18</sup> See Chapter 4 on silence.

<sup>19</sup> See Chapter 6 on illegally and improperly obtained evidence.

<sup>20</sup> Sections 76 and 78. See Chapter 5 on confession evidence and Chapter 6 on illegally and improperly obtained evidence.

<sup>21</sup> See Chapter 4.