

# **MANAGEMENT OF OFFENDERS ETC. (SCOTLAND) ACT 2005**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These Explanatory Notes have been prepared by the Scottish Executive to assist the reader of the Management of Offenders etc. (Scotland) Act 2005. They do not form part of the Act and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section, or a part of a section, does not seem to require any explanation or comment, none is given.

### **Integrated Management Of Offenders**

3. Sections 1-9 introduce a number of provisions which have the effect of reforming the planning and co-ordination of offender management services in Scotland. The provisions establish new functions and duties on the principal agencies associated with offender management, namely local authorities and Scottish Ministers (in practice the Scottish Prison Service). As the Scottish Prison Service is an Executive Agency of the Scottish Executive, any functions that will in practice be undertaken by it have to be conferred on Scottish Ministers.
4. The Act provides for the establishment of community justice authorities by the Scottish Ministers. The number and boundaries of each community justice authority will be established by order following consultation with local authorities. It is however anticipated that most of the community justice authorities will cover the geographical area of more than one local authority. Community justice authorities will be responsible for the planning, co-ordination and monitoring of the delivery of community offender services, that is, those offender services delivered by local authorities. Delivery of services remains the responsibility of each local authority. However, the Act is drafted to allow community justice authorities scope to deliver such services, on behalf of local authorities, if the local authorities so choose, or to deliver the services in place of the local authorities if Scottish Ministers provide by order. The Act also allows community justice authorities to deliver certain functions relating to the rehabilitation of prisoners that are currently delivered by Scottish Ministers through the Scottish Prison Service.
5. The more integrated planning of offender services should be achieved through the preparation of an area plan that will be presented to Scottish Ministers. The document itself will represent a joint plan, showing how the community justice authority, the relevant local authorities and the Scottish Ministers (in practice the Scottish Prison Service) will work within the boundaries of the community justice authority area to ensure offender services are delivered in a consistent and coherent way. Community justice authorities will be placed under an additional duty consulting with local bodies to ensure that other organisations involved with offender management services are able to contribute to plan development.

6. In submitting the area plan to Scottish Ministers for approval, the community justice authority will be able to refer to guidance and performance targets provided by Scottish Ministers. Scottish Ministers will be assisted in the production of guidance and targets by a non-statutory national advisory body which the Executive will establish during 2005-06 and which will allow key criminal justice bodies a high level input into the development of strategic shared objectives for the management of offenders. As the national body is advisory in nature, no reference to it is made in the Act.

7. Scottish Ministers recognise that many other agencies have a role in offender management and that it is important that these bodies both cooperate and contribute to the improved framework for offender management. Relevant agencies are not identified in the Act but will be through an order to allow consultation on this matter and also to prevent the need to amend primary legislation should any body change its name or cease to exist or a new relevant body comes into existence.

8. The co-ordination and monitoring duties of the community justice authority will be supported by a chief officer. Staff transfer from local authorities to a community justice authority is not required under the provisions within the Act although the authorities will have the power to employ staff. However, community justice authorities are obliged to employ a chief officer to be accountable both to the community justice authority and to Scottish Ministers for the delivery of community justice authority duties. The chief officer will be expected to report on the compliance of local authorities, the Scottish Prison Service and other agencies with duties prescribed under the terms of the Act. These functions are provided for in the Act.

9. Scottish Ministers will also require new powers to develop guidance for plans and performance targets, to approve or reject submitted plans and to take appropriate steps should parties fail to meet their obligations. Ministerial powers of intervention are not specifically required with regard to the Scottish Prison Service given its status as an Executive Agency and further powers are not required in the Act. For community justice authorities, powers do require to be specified in the Act. The model of intervention powers taken in the Act follows those recently accepted by the Parliament in the School Education (Ministerial Powers and Independent Schools)(Scotland) Act 2004. This allows for a staged and proportionate approach to intervention, allowing the opportunity for community justice authorities to respond to any claim of failure on their part. Scottish Ministers will only be able to issue directions if they have first issued guidance and the authority has either failed to comply or is unlikely to do so. Scottish Ministers will then be required to give notice to the community justice authority of their intention to issue directions. The community justice authority will have a right of appeal to the Sheriff against any directions issued. The Act contains powers for addressing performance of individual local authorities by giving the relevant community justice authority power to issue mandatory directions. There is no requirement on the community justice authority to give the local authority notice of the intention to issue such directions nor is there a right of appeal to the Sheriff.

#### *Section 1 – Duty to co-operate*

10. Section 1 imposes an obligation on Scottish Ministers, community justice authorities and local authorities to co-operate with one another in the carrying out of their respective functions. This general duty extends to local authorities co-operating with each other in the delivery of services.

*Section 2 – Co-operation for purposes of inspections*

11. Section 2 gives the specified statutory persons a power to co-operate with one another for the purposes of inspections regarding the delivery of services to relevant persons, as defined in section 1 of the Act. The provision includes a general power to amend the list of inspectors by Order made through affirmative procedure.

*Section 3 – Community justice authorities*

12. This section sets out the nature, functions and duties of community justice authorities.

13. Subsection (1) provides an order-making power for Scottish Ministers to establish community justice authorities and to specify the areas covered by each community justice authority. In so doing the Executive intends to consult with local government and others in determining the number and boundaries of community justice authorities. While community justice authorities will typically cover a number of local authority areas, the Act does not preclude a community justice authority covering the area of one local authority.

14. Subsection (2) clarifies the status of community justice authorities. They are not crown bodies and consequently employees of community justice authorities are not civil servants.

15. The intention of subsection (3) is to confirm that the order made under subsection (1) may set out membership of the community justice authority, the number of members for each constituent local authority, the method and weighting of voting within the community justice authority and other detailed issues relating to the constitution of community justice authorities. It also enables the order to specify that local authorities are obliged to make available services and facilities to the community justice authority to support its work.

16. Provisions in subsection (3) are subject to conditions described in subsection (4). This subsection specifies that membership of community justice authorities is restricted to local government elected members who have been nominated by their own local authority where that local authority forms all or part of the community justice authority.

17. Subsection (5) sets out specific functions of the community justice authorities.

18. Subsection (5)(a) introduces a duty on community justice authorities to prepare and submit a plan for the management of relevant persons (as defined in section 1(2)) in the community justice authority area. In so doing, the community justice authority is obliged to consult with Scottish Ministers (in the exercise of their prisons functions), local authorities (lying within the community justice authority area), partner bodies (defined in subsection (23)) and others as Scottish Ministers may specify prior to submission to Scottish Ministers. The wording “at such intervals as the Scottish Ministers may determine” introduces flexibility on timing of preparation and submission of plans. References to “plan” in the Act mean the draft plan, whilst references to “area plan” mean the plan as approved by Scottish Ministers. Currently Criminal Justice Social Work groupings work to a 3 year planning cycle and thus the Act allows this cycle to continue, or for a different cycle to be established should that be deemed more appropriate. Scottish Ministers would intend only to determine these cycles following consultation with community justice authorities.

19. Subsection (5)(b) establishes a duty on community justice authorities to monitor the performance of constituent local authorities and Scottish Ministers (in exercise of their functions under the Prisons (Scotland) Act 1989 (c.45)), in delivering services detailed in the area plan. The mechanism for achieving this monitoring is set out later in section 4.
20. Subsection (5)(c)(i) provides community justice authorities with a power of intervention should it consider that the performance of a local authority does not meet requirements described within the area plan. Specifically the subsection enables the community justice authority to issue directions to the failing authority. Subsection (5)(c)(ii) enables the community justice authority to make recommendations to Scottish Ministers where it considers that the exercise of Scottish Ministers' powers under the Prisons (Scotland) Act 1989 (c.45) in compliance with the area plan is unsatisfactory.
21. Subsection (5)(d) places a duty on the community justice authority to share and promote best practice in offender management in reducing reoffending across the community justice authority area. The effect of this provision will be to support the sharing of local good practice and thus of quality enhancement in service delivery across its area.
22. Subsection (5)(e) provides the community justice authority with the power to distribute monies for community justice social work services (as listed under section 27A(1)) (grants in respect of community service facilities) and section 27B(1) (grants in respect of hostel accommodation for persons under supervision) of the Social Work (Scotland) Act 1968 (c.49). The intention is that decisions on the distribution of funds should take account of the services and programmes described in the area plans, so as to support the delivery of the plan.
23. Subsection (5)(f) sets out a new duty on community justice authorities to establish an information sharing process so that all relevant data about offenders can be shared between local authorities and other organisations party to arrangements for offender management. The Act does not detail how this should be done as local authorities are best placed to develop these mechanisms with local partners.
24. Subsection (5)(g) requires the community justice authorities to report to Scottish Ministers after the end of each financial year on the exercise of their functions. Subsection (9) requires the community justice authority to publish this report.
25. Subsection (6) allows community justice authorities to set conditions on grants paid to local authorities through section 3(5)(e) of the Act. Subsection (7) makes it clear that any conditions that community justice authorities attach to grants to local authorities, are subject to conditions set by Scottish Ministers.
26. Subsection (10) ensures that when the responsible authorities (for the purposes of section 10 of the Act) have prepared a report on the discharge of their functions under section 10 (i.e. the establishment and implementation of the joint arrangements for assessing and managing risks posed by certain offenders) and submitted it to the community justice authority for the area of that local authority, (in accordance with section 11(2)(c)) the community justice authority should submit this to Scottish Ministers.
27. Subsection (11) enables Scottish Ministers to amend subsection (5), to add, alter or remove functions of the community justice authority. This general power allows Scottish Ministers to alter the remit of community justice authorities without requiring an amendment by primary legislation where a change in remit is deemed appropriate. Any alterations would be made by order. It is intended that this power would be used in

consultation with community justice authorities where functions are added by this means, they would be compatible with the nature of the role of community justice authorities set out in this subsection.

28. Subsection (12) enables any order made under subsection (11) to prescribe different provisions for different community justice authorities. Thus the power is precise and allows Scottish Ministers to vary the functions of individual community justice authorities where this is deemed necessary.

29. Subsection (13) provides that Scottish Ministers should inspect and assess the arrangements for the management of offenders by the community justice authorities, and the delivery of those services by local authorities. The intention here is to ensure that Scottish Ministers establish an objective means of assessing performance in order to be assured that performance is satisfactory and in line with the agreed area plan.

30. Subsection (14) provides Scottish Ministers with a power to provide guidance, or directions, in relation to the exercise of any functions under section 3 (community justice authorities) or any actings under section 3 (further provision as respects community justice authorities) of the Act. Scottish Ministers intend to draw up this guidance in discussion with the national advisory body described in the opening section of these notes. Powers of direction that could be used, for example, to ensure that all community justice authorities' annual reports contain certain common features.

31. Subsections (15), (16) and (17) limit the scope of the powers of direction contained in section 3(14). These provisions:

- restrict the use of directions to occasions where guidance is not being complied with, or where it is not likely to be complied with;
- restrict the powers of direction so that directions can only be issued following written notice of Scottish Ministers' intention to issue a direction;
- include a Ministerial duty to consider any representations made to them within 7 days of issue of written notice;
- provide the community justice authority with the right of appeal to the sheriff, against the terms of the directions; and
- impose an obligation on Scottish Ministers to report to Parliament following the issue of directions.

32. Subsection (18) places a duty on local authorities to carry out its criminal justice social work duties, specified in section 27 of the Social Work (Scotland) Act 1968, in compliance as far as is possible with the area plan. This duty is necessary to ensure that the area plan is delivered consistently across the community justice authority area and that local authorities are bound to the contents of the area plan.

33. The effect of subsection (19) when read with subsection (24) is to place a similar duty on Scottish Ministers in respect of their functions under the Prisons (Scotland) Act 1989 (c.45).

34. Subsection (20)(a) obliges local authorities to comply with any directions issued by the community justice authority under subsection (5)(c). This duty is required to provide the community justice authority with recourse should a local authority fail to meet its obligations under the terms of the area plan.

35. Subsection (20)(b) places similar obligation on community justice authorities where directions have been issued by Scottish Ministers under subsection (14)(b).

36. Subsection (21) enables Scottish Ministers to approve submitted plans, or to direct the submitting community justice authority to revise the plan before submission. Scottish Ministers will expect plans to follow guidance issued under subsection (14) and to meet the consultation requirements within subsection (5)(a)(i). Scottish Ministers may seek views from the national advisory body in assessing submitted plans.

37. Subsection (22) indicates that a resubmitted plan is also subject to the provisions under subsection (21). This provision is necessary to clarify that a resubmitted plan will not be automatically approved by Scottish Ministers.

38. Subsection (23) defines the term “appropriate local authority” for the purposes of section 3 as a local authority the area of which is comprised within the area of a community justice authority. This definition precludes any single local authority from being subdivided by a community justice authority boundary. It would be impractical for a single local authority to be subject to more than one area plan operating in different parts of the local authority area. It also ensures that only elected members from local authorities within a community justice authority can be a member of the community justice authority under subsection (4).

39. Subsection (23) also defines the term “partner bodies” as such persons as for the time being designated by Scottish Ministers as such by order. Partner bodies could include police, Crown Office, local health boards and voluntary groups working with offenders. It is expected that this will be a dynamic group which may change over time and thus definition in primary legislation is undesirable. Establishing the identity of partner organisations by order also allows for a period of consultation with stakeholders on this issue.

40. Subsection (24) identifies those references to Scottish Ministers within section 3 of the Act which refer to Scottish Ministers exercising their functions under the Prisons (Scotland) Act 1989 (c.45) and which therefore will in practice will be exercised by the Scottish Prison Service.

41. Subsection (25) describes the Parliamentary procedure to which orders under this section are subject. Thus orders made under subsection (1) and (11) must be approved by a resolution of the Parliament (“affirmative procedure”) while an order made under subsection (23) will be subject to annulment in pursuance of a resolution of the Parliament (“negative procedure”).

#### *Section 4 – Further provisions as respects community justice authorities*

42. This section provides community justice authorities with the necessary means required to carry out the functions described in Section 3.

43. Subsection (1) provides a general power for the community justice authority to take action for the purpose of meeting its functions. Specifically this subsection also provides the power for community justice authorities to enter contracts. This power is necessary, for example, to allow the community justice authority to deliver services on behalf of its member authorities should they so wish. It also allows the authority to employ staff. Subsection (1) is subject to Ministerial directions issued under subsection 3(14).

44. Subsection (2) places a duty on a community justice authority to employ a chief officer. It may employ such other staff as it deems necessary to enable the authority to carry out its functions. The staff will be employed by the community justice authority and not by any of the constituent local authorities to provide a degree of independence to facilitate objectivity in the monitoring and reporting functions of the chief officer.

45. Subsection (3) enables the community justice authority to set conditions of employment for its staff. As the functions of the office are related to the management and co-ordination of services, no statutory requirement to hold a social work qualification is placed on the post of chief officer.

46. Subsection (4) provides further powers to the community justice authorities to make or arrange payments in respect of its employees or former employees for the purpose of payments to pension funds, payment of allowances and gratuities as it deems appropriate. Subsection (5) allows these payments to include compensation for loss of employment or reduction in remuneration. These are standard provisions relating to the terms and conditions of employment.

47. Subsection (6) provides that the Scottish Ministers may meet the expenditure of the community justice authority. Additional resources have been made available for community justice authorities by the Executive, as stated in the Financial Memorandum for this Act. Subsection (6) recognizes that community justice authority expenditure may also be met from other sources, for example, European Union funding or local authority funding transferred with functions to the community justice authority under section 8 of the Act.

*Section 5 – Special duties of chief officer of community justice authority*

48. This section establishes duties on the chief officer of the community justice authority to report to Scottish Ministers where the chief officer believes there to have been failures by a community justice authority, an appropriate local authority or Scottish Ministers in exercising their functions under the Prisons (Scotland) Act 1989.

49. Subsection (2) gives the chief officer responsibility for reporting to Scottish Ministers when required to do so by Scottish Ministers on the activities and performance of community justice authorities, local authorities, partner bodies and Scottish Ministers (in effect the Scottish Prison Service) as to the effect their compliance with the area plan. The phrase “without prejudice to section 3(5)(g)(ii)” has the effect of enabling the chief officer to report to Scottish Ministers outwith the annual reporting cycle if he or she deems this necessary.

50. Subsection (4) clarifies that the reference to the chief officer reporting on activities of Scottish Ministers in this section is a reference to Scottish Ministers in exercise of their functions under the Prisons (Scotland) Act 1989 (c.45).

*Section 6 – Power of Scottish Ministers to require action by community justice authority: failure by that authority*

51. This section enables Scottish Ministers to intervene should a community justice authority fail to adequately exercise its functions and duties. The model followed is similar to that recently accepted by the Parliament in the School Education (Ministerial Powers and Independent Schools) (Scotland) Act 2004 and allows for a staged and proportional approach to intervention.

52. Subsection (1)(a) provides the trigger mechanism for Scottish Ministers to exercise their powers. Powers are triggered where a failure of the community justice authority is reported to Scottish Ministers by a person mentioned in subsection (2).

53. Subsection (1)(b) applies the procedure laid down in section 6 only to cases where Scottish Ministers would in due course be justified in issuing an enforcement direction. The procedure would not therefore be used in trivial cases.

54. Subsection (2) identifies those bodies who may report to Scottish Ministers on the failure of the community justice authority.

55. Subsection (3) explains that a preliminary notice is one which informs the community justice authority of the apparent failures and requires a written response to the notice within a given time period. Subsection (4) establishes that the written response can state that the community justice authority is not so failing (or so failed) in carrying out its functions, giving reasons supporting that statement. Alternatively the written response may acknowledge the failure and provide reasons why an enforcement direction should not be issued to them. Subsection (5) obliges a community justice authority to explain in the written response to a preliminary notice what remedial measures it has taken or will take to address failures, or the reasons why no remedial action is necessary. Thus a community justice authority has by statute an opportunity to refute or remedy failures before an enforcement direction is issued.

56. Where the period for submission of a written response in subsection (2) has elapsed and it still appears to Scottish Ministers that the community justice authority is failing or has failed to exercise its duties and believes the issue of an enforcement direction is justified, Scottish Ministers may so do under subsection (6). This wording enables Scottish Ministers to intervene when either a written response has not been submitted in the required time, or the written response does not adequately address the identified failures. There is a statutory obligation on the community justice authority to comply with an enforcement direction in terms of subsection (8).

57. Subsections (9) and (10) respectively allow Scottish Ministers to revoke or alter an enforcement direction and issue recommendations to the community justice authority as well as or instead of an enforcement direction. The flexibility of these provisions allows Scottish Ministers to adjust the nature of their direction to take into account changes in circumstances which might make previous directions no longer relevant.

58. Subsection (11) requires Scottish Ministers to prepare and lay a report before the Parliament when Scottish Ministers make use of the power to issue, vary or revoke an enforcement direction. This provision thus builds in Parliamentary scrutiny of decisions by Scottish Ministers to issue enforcement directions.

*Section 7 – Power of Scottish Ministers to require action by community justice authority: failure by local authority*

59. This section supplements section 6 (power of Scottish Ministers to require action following failure by a community justice authority) and section 3(5)(c) which enables community justice authorities to issue directions to local authorities within the area of a community justice authority. This section enables Scottish Ministers to compel action through a community justice authority should individual local authorities fail to satisfactorily exercise their functions under section 27 of the Social Work (Scotland) Act 1968 in relation to “relevant persons” as defined in section 1(2)(b).

60. Subsection (1) mirrors the trigger mechanism described in section 6(1) as regards failure of a community justice authority. Subsection (1)(a) clarifies that a failure by a local authority under section 27 of the Social Work (Scotland) Act 1968 may be in relation to relevant persons as a group, or as individuals, provided that the person making a report considers that such a failure to be symptomatic of some general failure. This proviso means that an individual complaint will not cause these powers to be exercised unless the reporter considers that the complainant has identified an underlying, systematic fault in the exercise of local authority functions. The Scottish Ministers are given the power to issue a preliminary notice to the relevant community justice authority.

61. Subsection (2) states that sections 6(3) through to 6(11) are also applied where a failure is deemed to occur at a local authority level. Thus sections 6 and 7 provide Scottish Ministers with trigger mechanisms and stages of intervention should failure occur at either local authority or community justice authority level.

62. Subsections (3) and (4) clarify for the purposes of this section the use of the term “authority” as a reference to either a community justice authority or a local authority.

#### *Section 8 – Transfer of functions to community justice authority*

63. This section provides that community justice authorities may be given the power to deliver criminal justice social work services (under sections 27(1), 27(1A), 27ZA or 27B of the Social Work (Scotland) Act 1968 (c.49)).

64. Those functions of the Scottish Ministers, exercised through the Scottish Prison Service, relating to the preparation of offenders for release can also be transferred to a community justice authority. These are functions under the Prisons (Scotland) Act 1989. The effect is that certain functions, such as prison based social work, could in future be transferred to a community justice.

65. Subsection (2) enables Scottish Ministers to transfer, by Order, responsibility for the exercise of functions referred to in subsection (1) from all local authorities in a community justice authority area, or from Scottish Ministers themselves to the relevant community justice authority. This is however subject to different arrangements regarding Islands authorities specified in subsection (7) and described in paragraph 69 below.

66. Subsection (3) also provides for the community justice authority and a number of local authorities, but not necessarily all, within a community justice area to agree that a function may be exercised by a community justice authority on behalf of the local authorities. Subsection (3) imposes a statutory duty on community justice authorities to consult with those not party to a joint determination that functions should be exercised by a community justice authority on behalf of local authorities.

67. Subsection (4) allows Scottish Ministers and a community justice authority to jointly agree that functions of Scottish Ministers under the Prisons (Scotland) Act 1989 (c.45) which pertain to the preparation of offenders for release from imprisonment or detention in custody, are to be exercised by the community justice authority on behalf of Scottish Ministers.

68. Subsections (6) and (7) regulate the Ministerial power to lay an order for the statutory transfer of a function from local authorities to a community justice authority under subsection (2). Specifically under subsection (6), such an order may not be laid unless Scottish Ministers have consulted with and obtained the agreement of the community justice authority and local authorities whose areas lie within the area of that community

justice authority, subject to subsection (7). Similarly, an order transferring a function from Scottish Ministers to the community justice authority cannot be laid without the agreement of the community justice authority to undertake that function.

69. Subsection (7) provides a means by which a function proposed to be transferred by order to the relevant community justice authority, shall remain exercisable by any of the Island local authorities if they choose to retain the function. In such cases, the order would be redrafted to reflect this. Subsection (7)(b) enables Scottish Ministers, where any Island authority has opted out of function transfer, to lay an order transferring a function from the remaining local authorities within a community justice authority area without requiring the consent of that island authority.

*Section 9 – Transfer of property to community justice authority*

70. Subsection (1) contains provision for the transfer of property from local authorities or Scottish Ministers to a community justice authority to facilitate discharge of that authority's function.

71. Subsection (2) provides for the appropriate transfer of property, following a revocation of a Section 8 transfer order, from a community justice authority to the body which assumes responsibility for that function where the property in question is wholly or mainly used for the purpose of exercising of the function.

72. Subsection (3) provides that such transfers of property under subsection (1) or (2) will not trigger any rights of pre-emption or other similar rights.

73. Subsection (4) clarifies that rights and liabilities pertaining to the property, other than those covered by section 8(3) (right of pre-emption and similar rights), transfer with the property.

*Section 10-11 – Assessing and managing risks posed by certain sexual offenders*

74. Sections 10 and 11 contain provisions which require the police, local authorities and the Scottish Ministers (in practice the Scottish Prison Service) to establish joint arrangements for the assessment and management of risk posed by sex offenders, certain violent offenders and those offenders considered to be a continuing risk to the public. Health Boards are also included as a responsible authority tasked with establishing joint arrangements with the other responsible authorities (i.e. police, local authorities and the Scottish Prison Service) for the assessment and management of risk posed by “mentally disordered offenders” who also fall within the categories of offender specified in subsection 10(1).

*Section 10 – Arrangements for Assessing and managing risks posed by certain offenders*

75. Subsection (1) requires the responsible authorities, in the area of a local authority, to establish joint arrangements for the assessment and management of risks posed by certain offenders as defined in that subsection. The categories of offender covered by this section are those subject to the sex offender notification requirements under Part 2 of the Sexual Offences Act 2003, those convicted on indictment of an offence inferring personal violence who are subject to a probation order, or who are or will be on release from prison, subject to supervision in the community, and those considered by virtue of their conviction to pose a continuing risk to the public. The arrangements also apply to individuals acquitted on grounds of insanity or found to be insane following proceedings taken on indictment. The provisions of subsection (11) identify the categories for whom the Health service is a responsible authority, namely those acquitted in proceedings on indictment on

the grounds of insanity and subject to a restriction order and those for whom a plea, in bar of trial on grounds of insanity, is successfully made, who are subject to any of the orders or directions specified in that subsection.

76. Subsection (2) clarifies that it is immaterial where the offences are committed for the purpose of identifying which authorities are to be responsible for making the relevant arrangements. The test for establishing such responsibility is whether the person poses a risk in the local authority area.

77. Subsection (3) gives Scottish Ministers the power to make an order, by statutory instrument, requiring other agencies to cooperate with the responsible authorities in establishing and implementing the arrangements for the relevant group of offenders.

78. Subsection (4) of the Act imposes a duty on any persons specified in the Order made under subsection (3) to cooperate. The responsible authorities also have a duty to cooperate with one another.

79. In addition, subsection (5) provides that the responsible authorities and the persons specified under subsection (3) must draw up a Memorandum setting out the ways in which they are to cooperate with each other. The purpose of this requirement is to enable the practicalities of co-operation, including the sharing of information, to be determined according to what suits local circumstances. The Memorandum will make clear the purpose of the duty, the principles upon which cooperation will take place, the activities involved in co-operating and the systems and procedures which support them and the partners to the agreement.

80. Subsection (6) allows Scottish Ministers to issue guidance to responsible authorities on the discharge of the functions conferred upon them.

81. Subsection (7) defines the responsible authorities in sections 10 and 11 for the area of a local authority namely the police, the local authority, Health Boards or Special Health Boards (for the purposes specified in subsection (11) only) and Scottish Ministers. In practice by virtue of subsection (14) the responsibilities of Scottish Ministers apply to the functions exercised on their behalf by the Scottish Prison Service.

82. Subsection (8) enables Scottish Ministers to amend by statutory instrument the definition of “responsible authorities” in subsection (7).

83. Subsection (9) provides that the Scottish Statutory Instrument (SSI) made under subsection (3) is made under negative procedure and the SSI made under subsection (8) is made under affirmative procedure.

84. Subsection (10) enables Scottish Ministers to make different provision in the order made under subsection (3) for different purposes and for different areas.

85. Subsection (11) provides that Health Boards are responsible authorities only as regards those persons who are subject to any of the orders or directions specified in this subsection. They will also require to fall into the categories specified in subsection (1).

86. However, subsection (12) also provides that Health Boards have a duty to cooperate with the other responsible authorities and with each other and with any persons specified in an order made under subsection (3) in respect of those offenders who are **not** “mentally disordered”, that is covered by the provisions of subsection (11), but fall into the categories specified in subsection (1).

87. Subsection (13) defines Health Boards and Special Health Boards

88. Subsection (14) provides that the reference to Scottish Ministers in sections 10 and 11 is to Scottish Ministers exercising their functions under the Prisons (Scotland) Act 1989, in practice exercising their functions through the Scottish Prison Service.

*Section 11 – Review of Arrangements*

89. Subsection (1) requires the responsible authorities to keep the effectiveness of the arrangements under review and to amend those arrangements where necessary.

90. Subsection (2) requires the responsible authorities to jointly prepare an annual report on the operation of the provisions under section 10, publish the report in the area of the local authority and submit the report to the relevant community justice authority. Section 3 (10) requires the community justice authority to submit that report to the Scottish Ministers.

91. Subsection (3) provides that the report must contain details of the arrangements established by the responsible authorities, and such information that Scottish Ministers have specified should be included in the report.

*Section 12 – Probation Progress Reviews*

92. Section 12 inserts a new section 229A into the Criminal Procedure (Scotland) Act 1995 and makes a minor amendment to section 232 of that Act. The broad aim is to provide courts with the power to hold progress review hearings for those with a probation order, should they consider that to be appropriate in a particular case. The amendment is in response to a High Court decision in August 2005, James McLaughlin v Procurator Fiscal, Stirling, which held that the court had no power to order a review hearing.

93. If a court orders a probation review hearing the officer responsible for the probationer's supervision must submit a written report on the probationer's progress to the court in advance of the hearing. The probationer is required to attend, on pain of arrest, and the supervising officer and prosecutor are entitled to take part. If, having considered all the information presented to it, the court is minded to amend the probation order it must explain the proposed amendment to the probationer in ordinary language and may only make the change if the probationer agrees to comply. Further review hearings may be set, if thought appropriate.

94. Subsection (3) applies the powers of sanction set out in section 232(2) of the 1995 Act to probation review hearings. The effect is to apply the existing powers of the court where a probationer has failed to comply with the terms of the order, namely the power to impose a fine, to sentence the offender, to vary a requirement of the order and to make a community service order, to the review hearing situation.

*Section 13 – Scheme of accreditation and procedure etc. of the Risk Management Authority*

95. Section 13 amends provisions in the Criminal Justice (Scotland) Act 2003 to ensure that functions of the Risk Management Authority can be delegated to committees, board members and staff (section 13(3)), and that the accreditation scheme to be made under section 11 of that Act can provide for decisions on accreditation and on appeals to be taken by separate committees of the RMA (section 13(2)). Without this amendment it would not be clear whether powers can be conferred on or delegated to committees of the RMA or to members of its staff. By virtue of section 24, this section comes into force on Royal Assent.

*Section 14 – Orders after assessment of risk*

96. Section 14 amends section 210F of the Criminal Procedure (Scotland) Act 1995 (as inserted by section 1 of the Criminal Justice (Scotland) Act 2003) to ensure that the disposals available to the High Court when dealing with high risk mentally disordered offenders convicted of sexual or violent offences are in accordance with the policy set out at the time of the passage of the 2003 Act. Section 210F requires a court, in certain circumstances, to make an Order for Lifelong Restriction, a sentence intended for high risk violent and sexual offenders who meet the risk criteria set out in section 210E. If, following a risk assessment, the court is of the view that the risk criteria are met, it has no option but to make an Order for Lifelong Restriction. However there may be circumstances where a high risk mentally disordered offender who meets the risk criteria is also suffering from a mental disorder that meets the criteria for a compulsion order under section 57A of the Act (inserted by section 133 of the Mental Health (Care and Treatment) (Scotland) Act 2003) In these circumstances, the Court should be able to impose a mental health disposal. The amendment made by section 14 therefore ensures that where a mentally disordered offender meets both the risk criteria for an OLR and the criteria for a compulsion order the court should have the choice between these two disposals.

*Section 15 – Amendment of Prisoners and Criminal Proceedings (Scotland) Act 1993*

97. This section amends the Prisoners and Criminal Proceedings (Scotland) Act 1993 (the 1993 Act) to provide that short-term sex offenders (those sentenced to 6 months or more but less than 4 years) shall, on release at the half-way point of sentence, be subject to licence conditions – including electronic monitoring if considered appropriate - and supervision for the remainder of their sentence. The provisions in the 1993 Act dealing with licence conditions, supervision, revocation of licence and recall to custody will apply to these offenders. Scottish Ministers will set the licence conditions. Local Authorities will be responsible for supervising these offenders in the same way as is provided currently for all prisoners who are sentenced to imprisonment for 4 years or more, prisoners receiving extended sentences and life sentence prisoners released on life licence. Failure to comply with licence conditions can result in recall to custody by Scottish Ministers in cases of urgency or on the recommendation of the Parole Board for Scotland. The Board will determine suitability for re-release on licence. The oral hearings arrangements will apply to these offenders. The new arrangements will apply to those relevant offenders who will be released on or after the date when the arrangements come into force early next year.

98. This section also amends Part 1 of the 1993 Act to:

- provide a new power to release prisoners on licence (Home Detention Curfew), and prescribe the limits on this power, including the period during which a prisoner is eligible for release on Home Detention Curfew licence and the categories of prisoner that are excluded from consideration;
- set out the conditions which must or may be included in the licence, including a curfew condition;
- provide for the revocation of the licence and recall to custody where the prisoner fails to comply with the conditions of the Home Detention Curfew licence, and for an appeal to the Parole Board; and
- provide for the application or otherwise of various sections of the 1993 Act to the new type of licence.

99. Subsection (2) amends section 1(1) of the 1993 Act so that it no longer applies to those offenders covered by new section 1AA of the 1993 Act (as inserted by subsection (3) of section 15). In practice this will mean that this group of prisoners will no longer be released unconditionally.

100. Subsection (3) inserts new section 1AA into the 1993 Act. The effect of this new section is to end unconditional release of short term sex offenders serving sentences of between 6 months and 4 years; to make these offenders subject to licence conditions and supervision for the duration of their sentence; to apply the appropriate existing provisions in the 1993 Act dealing with revocation of licence and recall to custody; and to modify the single terming arrangements in the 1993 Act to ensure that where single terming applies, this group of prisoners will still be subject to an appropriate period on licence following release.

- Subsection (1) provides that on reaching the half way point of their sentence Scottish Ministers are to release relevant prisoners on licence.
- Subsection (2) defines the prisoners to whom the provisions contained in section 1AA apply. These are short term prisoners sentenced to terms of imprisonment of 6 months or more whose conviction means that they are subject to the notification requirements of Part 2 of the Sexual Offences Act 2003.
- Subject to subsection (4), subsection (3) provides that subsections (1) and (2) (requiring short term sex offenders to be released on licence and to be subject to supervision) are applied in respect of a relevant offence that has been committed at any time.
- Subsection (4) disapplies the provisions of new section 1AA to any prisoner who has been released under the provisions in the 1993 Act in relation to a relevant sentence before the coming into force of section 15(3) of the Act.
- Subsection (5) applies section 17 of the 1993 Act (revocation of licence) to the prisoners to whom section 1AA will apply as it applies to long term prisoners. In practice this means that these short term prisoners when released on licence will be subject to revocation of this licence and recall to custody for breach of licence conditions.
- Subject to the provisions dealing with single terming in subsections (7) and (8), subsection (6) provides that when a relevant offender is released on licence, and unless that licence is revoked, it will remain in place for the remainder of the sentence.
- Subsection (7) deals with situations in which the provisions of section 27(5) of the 1993 Act apply. They state that two or more sentences are to be treated, in certain cases, as a single term. Subsection (7) provides that, in such cases, the licence will remain in force until the “relevant period”, as defined in subsection (8), has expired.

101. Subsections (4) to (14) introduce a new discretionary power to release prisoners on what is commonly known as Home Detention Curfew. This will allow the Scottish Prison Service, on behalf of the Scottish Ministers, to release prisoners on licence a short time before they would be eligible for automatic release or, in the case of long-term prisoners, (i.e. those serving a sentence of 4 or more years), for release on licence on the direction of

the Parole Board. The length of the Home Detention Curfew period varies according to the sentence length, but cannot be less than 14 days nor more than 135 days. The prisoner must be serving a sentence of at least 3 months, and must spend at least 4 weeks in custody. Certain classes of prisoner are excluded entirely. Release on Home Detention Curfew will be subject to a curfew condition and other standard conditions, and further conditions may also be added on a case-by-case basis. The curfew condition will require the offender to remain at a specified place for at least 9 hours each day, and compliance with this is to be monitored remotely using electronic tagging technology. Decisions on whether to release a prisoner on Home Detention Curfew, and on the conditions to be imposed in the licence, are to have regard to considerations of:

- protecting the public at large;
- preventing reoffending by the prisoner; and
- securing the successful reintegration of the prisoner into the community.

102. Failure to comply with any of the conditions, including the curfew condition, may result in the revocation of the licence and the recall of the prisoner to custody. The Act provides a right for the prisoner to appeal to the Parole Board (by submitting representations to the Scottish Ministers), which may direct the Scottish Ministers to cancel the revocation.

103. The provisions are inserted into the Prisoners and Criminal Proceedings (Scotland) Act 1993, which contains most existing provisions on the release of prisoners on licence. A number of minor amendments are made to the 1993 Act to ensure that its provisions apply appropriately to release on Home Detention Curfew. A number of related amendments are contained in section 21 (further amendments and repeal)

104. Subsection (5) inserts a new section 3AA into the 1993 Act, subsection (1) of which provides a new discretionary power for the Scottish Ministers to release prisoners on licence. This power will apply to two groups of prisoners:

- short-term prisoners serving a sentence of at least 3 months and under 4 years. Such prisoners are eligible to be released automatically and unconditionally once they have served one half of their sentence (section 1(1) of the 1993 Act); and
- long-term prisoners. Such prisoners are eligible to be released on licence once they have served two-thirds of their sentence, and the Parole Board may direct their release on licence at any point after they have served one-half of their sentences. The new power will apply for long-term prisoners only where the Parole Board has made a recommendation that the prisoner is to be released at half-sentence. Other long-term prisoners will be eligible for consideration for parole, and section 40 of the Criminal Justice (Scotland) Act 2003 allows the Parole Board to include a remote monitoring condition in the licence to ensure compliance with other licence conditions.

105. The new section 3AA does not specify how the discretion is to be used. It is intended that the decision on whether to release a particular prisoner on Home Detention Curfew would be taken by the Prison Governor on behalf of the Scottish Ministers and would be informed by an assessment by prison and local authority criminal justice social work staff. Section 3AA(4) provides that the power is to be exercised having regard to considerations of:

*These notes refer to the Management of Offenders etc (Scotland) Act 2005 (asp 14)  
which received Royal Assent on 8 December 2005*

- protecting the public at large;
- preventing reoffending by the prisoner; and
- securing the successful reintegration of the prisoner into the community.

106. Subsections 3AA(2) and (3) limit the period during which the new power can be exercised. It can only be exercised once the prisoner has served one quarter of his sentence, or four weeks of his sentence (whichever is longer) and within 135 days of the point when he would have served half of the sentence. This 135 day period is expressed in subsection (3) as 121 days because the power cannot be used within 14 days before the prisoner would have been released. This is necessary to prevent the very short licence periods that could otherwise arise where a sentence is backdated following a period on remand, or where the prisoner has been returned to custody and again becomes eligible for Home Detention Curfew. The net effect of these provisions is that the maximum length of the period on Home Detention Curfew for short-term prisoners is as set out in the table below:

<b>Sentence Length</b>	<b>Period to be served</b>	<b>Length of Home Detention Curfew</b>
3 months or more but less than 4 months	4 weeks	Between 15 and 30 days (depending on the length of sentence)
4 months but less than 18 months	One quarter of sentence	Up to one quarter of sentence
More than 18 months	Half sentence less 135 days (approx 4.5 months)	Up to 135 days (approx 4.5 months)

107. Section 3AA(5) provides for a number of exclusions from the new power. These cover situations where the prisoner may be considered as a high risk, where special post-release arrangements are already in place or where the prisoner has failed to comply with a previous licence. The specific exclusions listed are for:

- Prisoners subject to extended sentence under section 210A of the Criminal Procedure (Scotland) Act 1995. Extended sentences may be imposed by the courts for serious violent or sexual offences, where they consider that the period for which the offender would otherwise be subject to a licence would not be adequate for the purpose of protecting the public from serious harm from the offender
- Prisoners subject to a supervised release order under section 209 of the 1995 Act. Such orders are imposed where the court considers that it is necessary to do so to protect the public from serious harm from the offender on his release
- Prisoners subject to a hospital direction imposed under section 59A of the 1995 Act, or a transfer for treatment direction under the Mental Health (Care and Treatment) (Scotland) Act 2003. Hospital directions can be made where the offender is suffering from mental disorder or it is necessary for the health or safety of that person or for the protection of other persons that he should receive such treatment and the criteria in the 1995 Act are met.
- Prisoners subject to the notification requirements of Part 2 of the Sexual Offences Act 2003. This includes prisoners who have committed one of a wide

range of sexual offences, and those subject to Sexual Offences Protection Orders and Risk of Sexual Harm Orders. This exclusion applies irrespective of the current offence for which the prisoner is in custody – for example a person in custody for a non-sexual offence but who is on the register because of previous offences would be excluded.

- Prisoners liable to removal from the United Kingdom. For example, under section 3(6) of the Immigration Act 1971, a person who is not a British citizen shall also be liable to deportation from the United Kingdom if, after he has attained the age of seventeen, he is convicted of an offence for which he is punishable with imprisonment and on his conviction is recommended for deportation by virtue of the 1971 Act. Such persons would normally be deported immediately on completion of the custodial sentence.
- Prisoners who have previously been released on licence but who have been recalled to prison or have received a further sentence of imprisonment. An exception is made for those recalled from Home Detention Curfew licence because they can no longer be monitored at the place specified in the licence.
- Prisoners who have been released during the currency of their sentence but who have been returned to custody under section 16(2) or (4) of the 1993 Act. That section allows courts, when dealing with a subsequent offence punishable by imprisonment, to reinvoke any unexpired portion of the original sentence.

108. Section 3AA(6) provides an order-making power to adjust the parameters of the release power by altering the minimum sentence length, the minimum period that must be served in custody, and the period during which the power can be exercised. It also allows the list of exceptions to be added to or amended. The power is subject to the affirmative resolution procedure. Section 27(2) of the 1993 Act already provides a power which would allow the minimum proportion of the sentence specified in section 3AA(2)(a) to be adjusted.

109. As the power to release prisoners on Home Detention Curfew licence is being inserted into the Prisoners and Criminal Proceedings (Scotland) Act 1993, it is necessary to ensure that the other provisions of that Act apply appropriately to this new form of licence. In general, the 1993 Act will apply to Home Detention Curfew licence as it applies to other forms of licence such as parole, but subsections (2), (4), (9) and (10) of section 15 disapply sections 1A, 5, 12B and 17 of the 1993 Act. Those sections deal with the combination of licences where a person is serving more than one sentence, imprisonment of fine defaulters and revocation of licences.

110. Subsection (7) amends section 9(3) of the Prisoners and Criminal Proceedings (Scotland) Act 1993, which defines persons liable to removal from the United Kingdom. The amendments update the section to take account of powers contained in the Immigration and Asylum Act 1999 and to correct a reference in the existing section 9(3)(d). As noted above, persons who are liable to removal from the United Kingdom are not to be eligible for Home Detention Curfew.

111. Subsection (8) disapplies section 11 of the 1993 Act in relation to release on Home Detention Curfew and provides instead that a Home Detention Curfew licence remains in force until the prisoner would otherwise fall to be released under section 1, i.e. once he has served one half of his sentence. This provision ensures that the Home Detention Curfew licence does not survive beyond the half-way point of the sentence as this would conflict

with the parole licence in the case of long term prisoners, and would mean that a short term prisoner was subject to restrictions at a time when they would normally be released unconditionally.

112. Subsections (9) and (10) deal with the conditions which are to be included in a Home Detention Curfew licence. They do this by modifying the existing section 12 (conditions in licence) and adding new sections 12AA and 12AB into the 1993 Act.

113. Section 12AA provides for the conditions to be included in a Home Detention Curfew licence. The licence must include a curfew condition (as set out in section 12AB) and a set of “standard conditions”. The standard conditions are to be prescribed by the Scottish Ministers by order. Subsection (5) provides that different standard conditions can be prescribed for different classes of prisoner. For short-term prisoners, it is proposed that the standard conditions should initially:

- be of good behaviour and keep the peace; and
- not commit any offence and not take any action which would jeopardise the objectives of your release on licence (i.e. protect the public, prevent reoffending and secure successful reintegration into the community).

114. For long-term prisoners, the standard conditions would correspond to the usual conditions imposed as part of parole licences. These are to:

- report forthwith to officer in charge of the office at [name of office];
- be under the supervision of such officer to be nominated for this purpose from time to time by the Chief Social Work Officer of [named local authority];
- comply with such requirements as that officer may specify for the purposes of supervision;
- keep in touch with supervising officer in accordance with that officer’s instructions;
- inform supervising officer if changes place of residence, gains or loses employment;
- be of good behaviour and keep the peace; and
- not travel outside Great Britain without prior permission of the supervising officer.

115. These standard conditions will be prescribed by the Scottish Ministers by order; subject to negative resolution procedure (section 45 of the 1993 Act is amended to provide for this).

116. Section 12 of the 1993 Act allows the Scottish Ministers to specify conditions to be included in a licence, and will apply to Home Detention Curfew licences. Subsection (7) modifies its effect, so that a condition requiring the offender to be subject to local authority supervision is optional rather than mandatory, and disapplies a requirement to follow the recommendations of the Parole Board in setting or changing conditions. In practice, any additional conditions will be determined as part of the assessment process. Section 12 will therefore allow Scottish Ministers to specify additional conditions on a case-by-case basis and to vary these conditions. In doing so, and in specifying the standard conditions, the Scottish Ministers will be required to have regard to the following

considerations, as they are in determining whether to release a prisoner on Home Detention Curfew:

- protection of the public;
- prevention of reoffending; and
- securing the successful re-integration of the offender into the community.

117. For long-term prisoners, the new section 12(4A) also ensures that the conditions of the Home Detention Curfew licence are aligned with those of the subsequent parole licence, by requiring the Scottish Ministers to have regard to the recommendations of the Parole Board.

118. Section 12AB (inserted by subsection (10) of section 15), sets out the arrangements for the curfew condition, which must be included in the Home Detention Curfew licence. The curfew condition requires the released person to remain at a specified place for specified periods. Subsection (2) provides that the curfew may specify different places or different periods for different days, and requires that the total period should be not less than 9 hours each day. Subsection (2) allows flexibility for the curfew to fit round e.g. employment or training or family commitments. The flexibility also allows the curfew condition to be used to support other conditions, e.g. attendance at training or rehabilitation projects. Special provision is made for the first and last days as they will normally only contain part of a curfew period. The flexibility also allows the curfew condition to be used to support other conditions, e.g. attendance at training or rehabilitation projects. Section 12AB also allows the curfew condition to include a requirement for the released person to stay away from a particular place, again for a specified time or period. This is based on similar provision made for Restriction of Liberty Orders, where the courts occasionally include a condition requiring an offender to keep away from a particular address.

119. The curfew condition will be remotely monitored using tagging devices, as is currently done for Restriction of Liberty Orders and similar movement restriction conditions in other forms of court order or release on licence. Subsections (3) to (7) of the new section 12AB provide for the management of the remote monitoring, and make similar provision to that made for Restriction of Liberty Orders in sections 245B and 245C of the Criminal Procedure (Scotland) Act 1995. Subsection (3) applies section 245C of the 1995 Act. That section permits Scottish Ministers to make arrangements, including contractual arrangements, for remote monitoring; requires offenders to wear or carry devices to enable the remote monitoring; and provides for regulations to specify the devices which may be used.

120. Subsection (13) inserts a new section 17A into the 1993 Act. This section provides for the recall of prisoners that have been released under new section 3AA where they have failed to comply with any of the conditions in the Home Detention Curfew licence or can no longer be remotely monitored at the specified place. In such cases, the Scottish Ministers may revoke the Home Detention Curfew licence and recall the person to prison. The prisoner is then liable to be detained in pursuance of his sentence, but will be eligible for automatic release (if a short term prisoner) or consideration for parole (if a long term prisoner) under section 1 of the 1993 Act once he has served one-half of his sentence. In practice, long term prisoners released and recalled from Home Detention Curfew will be referred back to the Parole Board so they can consider whether their earlier recommendation for release at the half way stage is still appropriate, or whether the recall

from Home Detention Curfew represents an adverse development which would justify cancelling that recommendation. Once the person is returned to prison, following recall from Home Detention Curfew, he must be informed of the reasons for the revocation of the licence and of his right to make representations to the Scottish Ministers. Where a person makes representations, the Scottish Ministers are required to refer the case to the Parole Board. The Parole Board may then direct that the revocation be upheld or cancelled. Section 20 of the 1993 Act will permit the Parole Board Rules to be adapted to provide for the appeal process.

121. Section 17A(6) provides that where a person's licence has been revoked and he is at large, he shall be deemed to be unlawfully at large. Section 40 of the Prisons (Scotland) Act 1989 provides that a person who is unlawfully at large may be detained by a constable without a warrant, and also provides that unless otherwise directed by Scottish Ministers, no account shall be taken for the purposes of sentence calculation, of the period during which the prisoner was unlawfully at large.

122. A further consequence of revocation and recall under this section resulting from failure to comply with the licence conditions is that the prisoner is no longer eligible for release on Home Detention Curfew – see section 3AA(5)(f). Where the prisoner can no longer be monitored at the specified address, and the licence is revoked because of this rather than a breach of the licence conditions, the prisoner remains eligible for Home Detention Curfew if a suitable address can be found.

123. Subsection (14) amends section 45 of the 1993 Act, which governs the making of rules and orders. The result is that any order made under section 12AA(3) (specification of standard conditions) will be subject to annulment in pursuance of a resolution of the Scottish Parliament, and any order under section 3AA(6) (adjusting time limits, proportions of sentence, exclusions etc.) will have to be laid in draft and approved by the Scottish Parliament before being made (i.e. draft affirmative procedure).

#### *Section 16 – Testing prisoners for drugs*

124. Section 16 amends section 41B of the Prisons (Scotland) Act 1989 so as to enable the Scottish Prison Service to test prisoners for controlled drugs by means of saliva samples in addition to the existing power to require urine samples.

125. The amendment also re-defines what is regarded as an “intimate sample”. This includes blood, semen or any other tissue fluid as well as pubic hair and material from a body orifice other than the mouth, but no longer includes saliva or oral fluid. Intimate samples may not be taken for the purposes of drug testing.

#### *Section 17 – Notification requirements where sentence of imprisonment for public protection is imposed in England and Wales*

126. Section 17 amends section 82 of the Sexual Offences Act 2003 (“the 2003 Act”) to take account of persons aged 18 or over who are punished by a sentence of imprisonment for public protection, as provided for by section 225 of the Criminal Justice Act 2003 in England and Wales. Such offenders will be subject to the notification requirements of the 2003 Act for an indefinite period. At present, no express provision for this type of sentence is made in section 82 which means that the notification period is 5 years. The indefinite notification requirements of the 2003 Act will apply when the offender is in Scotland.

127. Subsection (2) provides that the amendment made by section 17 comes into force when the Act receives Royal Assent.

*Section 18 – Offender’s failure to comply with notification requirements: jurisdiction of Scottish courts*

128. Section 18 substitutes a new version of section 91(4) of the Sexual Offences Act 2003 (“the 2003 Act”) to enable proceedings for an offence under section 91 to be commenced in a wider range of situations.

129. Section 91 contains a number of offences relating to failure to comply with sex offender notification requirements. Under new section 91(4)(a), proceedings can be commenced in any court having jurisdiction in any place where the accused resides, is found, or was last known to reside. Under new subsection (4)(b), proceedings can be commenced in the court which convicted the accused of the offence to which the notification requirement relates. Under new subsection (4)(c), proceedings can be commenced in the court which has made a Sexual Offences Prevention Order (SOPO) under section 104(1)(b) of the 2003 Act in respect of the accused if that person is subject to the sex offender notification requirements by virtue of the SOPO. At present, section 91(4) only allows for proceedings to be commenced in any court having jurisdiction in any place where the person charged with the offence resided or was found.

*Section 19 – Objection to content or finding of risk assessment report: conduct of proceedings*

130. The Criminal Justice (Scotland) Act 2003 establishes the Order for Lifelong Restriction (OLR) as a new High Court disposal for high risk sexual and violent offenders. Before an OLR can be imposed, the court first makes a Risk Assessment Order under which a risk assessment is prepared by an assessor accredited by the Risk Management Authority. The offender may also instruct his own risk assessment, and has the opportunity to challenge the report prepared for the court. The procedure for objections to reports is contained in section 210C(7) of the Criminal Procedure (Scotland) Act 1995, and both the offender and prosecutor may cite witnesses. In practice, we expect that the witnesses called to give evidence in these proceedings will normally be the authors of the risk assessment reports themselves, but it is possible that witnesses to the offences referred to in the reports may be called.

131. The Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 and the Vulnerable Witnesses (Scotland) Act 2004 provide a range of measures designed to protect the complainer in sexual offence cases and vulnerable witnesses, including prohibitions on the accused conducting his own defence, restrictions on evidence relating to the complainer in sexual offence cases, and special measures such as television links, evidence on commission, use of screens etc. However these special protections apply only to the trial itself and to proceedings on victim statements. As things stand, they would not apply to the court proceedings under section 210C(7) dealing with objections to the content of risk assessments. There is therefore a risk, for example, that an offender could use these proceedings to try to cross-examine a vulnerable witness, even though he may have been prevented from doing this during the trial itself.

132. Section 19 inserts a new section 210EA into the Criminal Procedure (Scotland) Act 1995. This new section applies sections 271 to 271M, 274 to 275C and 288C to 288F of that Act so that the protections they provide in court proceedings will also apply to proceedings under section 210C(7). Subsection (4) ensures that where these protections

were available during the trial for a particular witness, they will continue to apply during the later proceedings. Subsection (3) takes account of the fact that the risk assessments may include information about offences other than the one which gave rise to the trial, for example if the offender has a history of sexual offending, and ensures that the protections apply to these witnesses by extending the definitions of “accused”, “alleged” offence and “complainer” appropriately. Subsection (2) provides that, for the purposes of calculating the ages of witnesses in determining whether certain special measures apply, their age at the date of commencement of proceedings in the original trial is to be used.

*Section 20 – Recovery of criminal injuries compensation from offenders*

133. This section has the effect of extending section 57 of the Domestic Violence, Crimes and Victims Act 2004 to Scotland. That section permits the provision of a general power for recovery by the Criminal Injuries Compensation Authority of sums paid to victims of crime from the perpetrator of those crimes. Section 57 does this by inserting new sections 7A to 7D into the Criminal Injuries Compensation Act 1995.

134. The power of recovery is to be contained in Regulations, made under those inserted sections. Section 7A permits the recovery of compensation; section 7B provides for procedural provision for putting the perpetrator on notice that the Criminal Injuries Compensation Authority is minded to take recovery proceedings; section 7C makes provision for review of decisions to recover sums paid out; and section 7D provides for the means by which sums sought to be re-paid are recovered by the Criminal Injuries Compensation Authority.

135. This section of the Act extends section 57 (and thereby inserted sections 7A to 7D of the Criminal Injuries Compensation Act 1995) to Scotland and makes necessary amendments to the operation of the inserted sections, in their application to Scotland.

136. These amendments are the conferring of the powers to make subordinate legislation on the Scottish Ministers rather than the Secretary of State and the insertion of a provision relating to Scottish Parliamentary procedure. There is also a necessary amendment to the law of prescription and limitation in Scotland, to mirror an amendment made to an equivalent statute applying only to England & Wales.

*Section 21 – Further amendments and repeal*

137. This section makes a number of amendments connected with the provisions in section 1 to 20 of this Act. Amendments in relation to Home Detention Curfew provisions relate to enactments concerned with cross-border transfer of prisoners, repatriation of prisoners, the International Criminal Court, and remote monitoring of prisoners released on licence.

138. Subsection (1)(a)(i) amends section 27(1) of the Social Work (Scotland) Act 1968 to take account of any transfer of functions from local authorities to a community justice authority under section 8 of this Act.

139. Subsection (1)(a)(ii) and (1)(b) amend section 27(1) of the Social Work (Scotland) Act 1968. That section sets out the duties of local authorities in respect of criminal justice social work services. The amendments ensure that it is a duty to provide any background reports requested by Scottish Ministers in relation to the release of prisoners under Part 1 of the 1993 Act, including release on Home Detention Curfew. The amendments also ensure that references to “enactment” include Acts of the Scottish Parliament to ensure that the section covers persons under supervision as a result of an Act of the Scottish

Parliament. Section 27A of the 1968 Act then allows the Scottish Ministers to make grants to local authorities in respect of their expenditure in providing a service for the purposes set out in section 27(1).

140. Subsection (1)(b) amends the Social Work (Scotland) Act 1968 in such a way as to allow the Scottish Ministers to amend by order local authority functions specified in section 27(1) of that Act. This enables alterations to be made to the list of functions local authorities may undertake without primary legislation being required. The order is made by affirmative resolution procedure by virtue of the amendment to section 90 of the 1968 Act introduced by subsection (4).

141. Subsection (2) introduces amendments to Section 27A of the Social Work (Scotland) Act 1968 to enable Scottish Ministers to provide funds to the community justice authority while retaining the power to provide funds directly to local authorities for the purposes of providing services under section 27 of that Act for complying with area plans or for other similar purposes that Scottish Ministers may prescribe. Provision is added to enable Scottish Ministers to attach such conditions to the payment of grant as they think fit.

142. Subsection (3) introduces similar amendments, as in subsection (2), to Section 27B of the Social Work (Scotland) Act 1968.

143. Subsection (5) amends the Schedule to the Repatriation of Prisoners Act 1984. Prisoners repatriated to Scotland are eligible for early release, and the Schedule make provision about the calculation of appropriate parts of the sentence. The amendments ensure that these provisions apply appropriately to consideration for release on Home Detention Curfew and to the new arrangements for the release of certain sexual offenders, both provided for in section 15 of the Act.

144. Subsection (6) enables Scottish Ministers to make provision in the Rules, made under section 39 of the Prisons (Scotland) Act 1989, for the appointment of members of Prison Visiting Committees and Visiting Committees of Legalised Police Cells by specified community justice authorities or local authorities (or a combination of the two), in place of the existing arrangements whereby appointment is by specified local authorities.

145. Subsection (7) corrects a provision contained in section 32 of the Criminal Justice (Scotland) Act 2003 which will, when commenced, insert a new subsection into section 27 of the Prisoners and Criminal Proceedings (Scotland) Act 1993. The new subsection defines “wholly concurrent” and “partly concurrent” terms of imprisonment or detention.

146. Subsection (8) amends Schedule 1 to the Crime (Sentences) Act 1997. That Schedule deals with the transfer of prisoners and those subject to supervision between England and Wales, Scotland and Northern Ireland. Many of these transfers are “restricted” transfers, that is the prisoner remains subject to the law on early release as it applies in the sending jurisdiction. The amendments made here are to the provisions dealing with restricted transfers from Scotland to England and Wales and to Northern Ireland, and ensure that when necessary arrangements are in place with the corresponding jurisdictions, such prisoners will be eligible to be considered for release on Home Detention Curfew by the Scottish Ministers to an address in that jurisdiction to which they have been transferred, (it is noted that Northern Ireland currently has no system in place to carry out the remote monitoring of offenders released from custody). A minor error in paragraph 11(2) of the schedule is also corrected. The amendments also deal with the new

arrangements for the release of certain sexual offenders provided for in section 15 of the Act, to ensure that new section 1AA of the Prisoners and Criminal Proceedings (Scotland) Act 1993 applies as appropriate

147. Subsections (9), (11), and (12) bring in minor amendments to ensure that references to “community justice authority” are compatible with local government references in existing legislation.

148. Section 24 of the International Criminal Court (Scotland) Act 2001 disapplies various provisions about release of prisoners in relation to persons detained in Scottish prisons serving a sentence imposed by the International Criminal Court. Subsection (10) adds sections 1AA and 3AA to the list, so that ICC prisoners are not eligible for Home Detention Curfew or release under section 1AA (release of certain sexual offenders).

149. Section 7 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 makes special provision about the early release of children sentenced to detention following conviction on indictment. Although similar to the arrangements for release of adult prisoners, the Parole Board may recommend/direct the release of the child at any time, and all such releases are on licence. Given the existence of this early release provision, Home Detention Curfew is not available for section 7 cases. Section 40(1) of the Criminal Justice (Scotland) Act 2003 provides for the inclusion of remote monitoring conditions in licences under Part I of the 1993 Act (parole, non-parole, compassionate) However subsection (1) currently provides that such conditions can only be included if the person has reached the age of 16 at the point of release. It therefore prevents remote monitoring from being used for children released under section 7 of the 1993 Act. Subsection (13) amends subsection (1) of the 2003 Act to remove this age limit. Similar age limits in respect of Restriction of Liberty Orders were removed by section 121 of the Antisocial Behaviour etc. (Scotland) Act 2004.

## PARLIAMENTARY HISTORY

150. The following list sets out, for each Stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which the proceedings at that Stage took place, the references to the Official Report of those proceedings and hyperlinks to those references. The table also sets out the date on which the Committee Report was published, the reference to that report and a hyperlink to it.

<b>Pre-legislative scrutiny</b>	
<i>Justice 2 Committee</i>	
5th Meeting, 2005	22 February 2005, Private Meeting
<b>Introduction</b>	4 March 2005
<b>Bill (as Introduced)</b>	<a href="#">SP Bill 39, Session 2 (2005)</a>
<b>Preliminary discussion</b>	
<i>(a) Justice 2 Committee</i>	
8th Meeting, 2005	15 March 2005, Private Meeting
<i>(b) Finance Committee</i>	
9th Meeting, 2005	15 March 2005, Private Meeting
<b>Stage 1</b>	
<i>(a) Justice 2 Committee</i>	
11th meeting, 2005	<a href="#">12 April 2005, Col 1472-1500</a>
12th meeting, 2005	<a href="#">19 April 2005, Col 1508-1545</a>
14th meeting, 2005	<a href="#">3 May 2005, Col 1547-1598</a>
15th meeting, 2005	<a href="#">10 May 2005, Col 1603-1632</a>
17th meeting, 2005	24 May 2005, Private Meeting

*These notes refer to the Management of Offenders etc (Scotland) Act 2005 (asp 14)  
which received Royal Assent on 8 December 2005*

18th meeting, 2005	31 May 2005, Private Meeting
10th Report, 2005	<a href="#">SP Paper 372, Stage 1 Report (8 June 2005)</a>
<i>(b) Finance Committee</i>	
10th meeting, 2005	<a href="#">12 April 2005, Col 2449-2459</a>
11th meeting, 2005	19 April 2005, Private Meeting
12th meeting	26 April 2005, Private Meeting
<i>(c) Subordinate Legislation Committee</i>	
14 <sup>th</sup> meeting, 2005	<a href="#">3 May 2005, Col 1005-1011</a>
15th meeting, 2005	<a href="#">10 May 2005, Col 1018</a>
<i>(d) Consideration by the Parliament</i>	
16 June 2005	<a href="#">16 June 2005, Col 18003-18044 and 18134-18137</a>
<b>Pre-Stage 2</b>	
<i>Justice 2 Committee</i>	
20th meeting 2005	<a href="#">18 September 2005, Col 1653</a>
<b>Stage 2</b>	
<i>Justice 2 Committee</i>	
22nd meeting, 2005	<a href="#">20 September 2005, Col 1663-1676</a>
23rd meeting, 2005	<a href="#">27 September 2005, Col 1679-1696</a>
<b>Bill (as amended at Stage 2)</b>	<a href="#">SP Bill 39A, Session 2 (2005)</a>
<b>After Stage 2</b>	
<i>(a) Finance Committee</i>	
22nd meeting, 2005	<a href="#">25 October 2005, Col 2943-2944</a>
<i>(b) Subordinate Legislation Committee</i>	
28th meeting, 2005	<a href="#">25 October 2005, Col 1237-1239</a>
29th meeting, 2005	<a href="#">1 November 2005, Col 1277-1278</a>
37th Report, 2005	<a href="#">SP Paper 441, Report on the Bill as amended at Stage 2 (3 November 2005)</a>
<b>Stage 3</b>	
<i>Consideration by the Parliament</i>	
3 November, 2005	<a href="#">3 November 2005, Col 20360-20404 and 20416-20418</a>
<b>Bill (as Passed)</b>	<a href="#">SP Bill 39B, Session 2 (2005)</a>
<b>Royal Assent</b>	8 December 2005

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