

*These notes relate to the Police, Public Order and Criminal Justice (Scotland) Act 2006 (asp 10) (asp 10) which received Royal Assent on 4 July 2006*

# **POLICE, PUBLIC ORDER AND CRIMINAL JUSTICE (SCOTLAND) ACT 2006 (ASP 10)**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### **Part 1: Police**

##### ***Chapter 1: the Scottish Police Services Authority***

#### **The Scottish Police Services Authority**

##### ***Section 1 – Establishment of the Scottish Police Services Authority***

8. This section establishes the Scottish Police Services Authority (“the Authority”) and gives effect to schedule 1 which sets out matters including the constitution, membership and staff of the Authority.

##### ***Section 2 – Duty to establish and maintain the Agency***

9. This section places a duty on the Authority to establish and maintain an organisation to be known as the Scottish Crime and Drug Enforcement Agency (“the Agency”) which will replace the Scottish Drug Enforcement Agency (SDEA).
10. Subsection (2) sets out the core functions of the Agency. These are to prevent and detect serious organised crime, to contribute to the reduction of such crime and to the mitigation of its consequences and to gather, store and analyse information in connection with the above. In effect the purpose of the Agency is to reduce serious organised crime and the harm it causes. The function of mitigating the consequences of serious organised crime acknowledges that the prosecution of organised criminals is only one of the strategies that may be employed to tackle organised criminality.
11. Sub-section (3) enables the Agency to share, with specified organisations, information which it has gathered and stored for the purposes of carrying out its core functions. The specified organisations include other UK police forces, the Serious Organised Crime Agency (SOCA) and other law enforcement agencies.

##### ***Section 3 – Duty to provide the police support services***

12. Section 3 provides that in addition to establishing and maintaining the Agency, the Authority must provide the ‘police support services’ set out in subsection (2). These include all the common police services currently established and provided by the Scottish Ministers under section 36 of the Police (Scotland) Act 1967, namely the Scottish Police College, the Scottish Criminal Record Office and the Scottish Police Information Strategy; and also the police forensic science services. The Authority will also carry out the functions of the Scottish Ministers which are delegated to it by the Scottish Ministers under Part V of the Police Act 1997 in relation to issuing criminal record certificates.

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13. Subsections (3) and (4) give the Authority flexibility in the ways in which it provides these services, so that it may establish organisations, may collaborate with other bodies, and may do anything incidental or ancillary to the provision of these services.
14. Subsections (5) and (6) make it clear that in all its activities the Authority must act in a way which is calculated to promote the efficiency and effectiveness of the police, having regard also to the contribution its services make to the efficiency and effectiveness of the wider criminal justice system.
15. Subsection (8) amends section 121 of the Police Act 1997 to provide that the functions of the Scottish Ministers under that Act in relation to the issuing of criminal record certificates (other than making regulations and orders) will be able to be carried out by the Authority.

#### ***Section 4 – Strategic priorities of the Authority***

16. This section gives the Scottish Ministers the right to determine strategic priorities for the Authority, after consulting the Authority, the Director General of the Agency, and people who represent the interests of chief constables, unitary police authorities and joint police boards. In practice here and elsewhere in this Chapter, this will mean the Association of Chief Police Officers in Scotland (ACPOS) and the Scottish Police Authorities Conveners Forum (SPACF). Subsection (3) requires the Scottish Ministers to publish any such strategic priorities which they make. As an example, a strategic priority may be to promote the efficiency and effectiveness of the police in Scotland.

#### ***Section 5 – Objectives of the Authority***

17. This section requires the Authority to determine its objectives and keep them under review. These objectives must be consistent with any strategic priorities determined by the Scottish Ministers.

#### ***Section 6 – Annual plans of the Authority***

18. This section requires the Authority to submit a draft 'annual plan' to the Scottish Ministers at least 3 months before the beginning of each financial year. The annual plan must include:
  - any strategic priorities determined by the Scottish Ministers and any directions issued by the Scottish Ministers;
  - the objectives which the Authority has determined for itself, and how it intends to meet them;
  - a statement of the financial resources that will be available to the Authority over the course of that year and how the Authority intends to allocate the funding.
19. Subsection (4) requires the Authority to consult people who represent the interests of chief constables, unitary police authorities and joint police boards and any other appropriate organisations in preparing its annual plan. Subsection (5) requires the Scottish Ministers to approve the plan either as submitted or with such modifications as they consider appropriate within 2 months of the plan being submitted to them. Subsections (6) and (7) require the Authority to publish the plan once approved by Scottish Ministers and to send it to specified persons and bodies.

#### ***Section 7 – Annual reports of the Authority***

20. This section requires the Authority to publish an annual report at the end of each financial year. The report must give an account of the Authority's activities for that year and must describe the extent to which the objectives (if necessary, as modified) have been implemented.

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21. Subsection (4) places a duty on the Authority to send a copy of the report to specified persons, including the Scottish Ministers. The Scottish Ministers must lay a copy of the report before the Scottish Parliament (subsection (5)).

***Section 8 – Provision of information to the Scottish Ministers***

22. This section gives the Authority a duty to comply with any reasonable request for information from the Scottish Ministers.

***Section 9 – Liability for wrongful acts of certain persons seconded to the Authority***

23. This section establishes that liability in respect of any wrongful acts committed by persons on secondment to the Authority rests with the Authority rather than the chief constable of the seconding force. (This includes support staff members of the Agency but not police members of the Agency for which separate arrangements are made under section 22.) This liability provision is consistent with the current position for constables seconded on central service under section 38 of the Police (Scotland) Act 1967 to common police services provided by the Scottish Ministers under section 36 of that Act - where section 38(3B) provides that the Scottish Ministers are liable in reparation for wrongful acts or omissions of those constables.
24. Neither this section nor section 22 makes any provision in respect of employees of the Authority, including employees who are also members of the Agency because, as the employer, the Authority will be vicariously liable for any unlawful acts committed by its employees in the course of their employment.

***Section 10 – Grants***

25. This section establishes that the Authority and the Agency are to be funded by grants from the Scottish Ministers. Subsection (2) requires the Scottish Ministers to specify the amount of grant which is to be used for the purposes of the Agency, and subsections (3) and (5) empower the Scottish Ministers to set other terms and conditions around the use of the funding. However, subsection (4) provides that the Scottish Ministers cannot impose terms and conditions which would impinge on the operational independence of the Agency. Subsection (7) requires the Scottish Ministers to consult the Authority, the Director General of the Agency, and people who represent the interests of chief constables, unitary police authorities and joint police boards before making such grants.

***Section 11 – Charges by the Authority and other receipts***

26. This section empowers the Authority to charge for any goods or services it or the Agency provides (for example, for training provided to non-Scottish forces or for disclosure certificates), and requires that such income should be payable to the Scottish Ministers unless they decide otherwise in respect of any part of this income.

**The Scottish Crime and Drug Enforcement Agency**

***Section 12 – Members of the Agency***

27. This section sets out who will be members of the Agency. The members will comprise a Director General (subsection (1)(a)), Deputy Director General (subsection (1)(b)), persons appointed as police members whether on secondment from Scottish or other UK police forces or directly recruited by the Authority and allocated to the Agency (subsection (1)(c)) and support staff members appointed by the Authority, (subsection (1)(d)).
28. Subsection (2) gives effect to schedule 2 which sets out the provisions in relation to membership of the Agency.

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### ***Section 13 – Strategic priorities of the Agency***

29. This section gives the Scottish Ministers the power to set strategic priorities for the Agency. Such priorities may, for example, cover the disruption of serious organised crime networks. These strategic priorities are to be set in consultation with the Authority, the Director General of the Agency, persons representing the interests of the chief constable of each Scottish police force and persons representing the interests of unitary police authorities and joint police boards.
30. Subsection (2) provides that the Scottish Ministers cannot determine strategic priorities which would impinge on the operational independence of the Agency.

### ***Section 14 – Annual plans of the Agency***

31. This section requires the Director General of the Agency to prepare an 'annual plan' at least 3 months before the beginning of each financial year setting out how the Agency intends to carry out its functions and submit it to the Authority. The annual plan must include:
  - the strategic priorities set by the Scottish Ministers (subsection (2)(a));
  - details of any directions made by the Scottish Ministers under section 30 (subsection (2)(b));
  - a statement of the financial resources that will be available to the Agency over the course of that year (subsection (2)(c));
  - a statement of how the Director General intends to allocate the funding (subsection (2)(d)).
32. Subsection (3) requires the Authority to approve the plan either as submitted or with modifications as it considers appropriate within 2 months of the plan being submitted to it. Subsection (4) ensures that the Authority cannot make any modifications which would impinge on the operational independence of the Agency. Subsection (5) makes it clear that it is the Director General's responsibility to publish and circulate the annual plan once it has been approved. Circulation must include those persons listed at subsection (6).

### ***Section 15 – Annual reports of the Agency***

33. This section requires the Director General of the Agency to publish an annual report at the end of each financial year. The report must include a report on the carrying out of the Agency's functions during that year and an assessment of the extent to which the annual plan has been implemented (subsection (2)).
34. Subsection (3) places a duty on the Director General of the Agency to ensure that a copy of the report is sent to specified persons. Copies of the report sent to the Scottish Ministers must be laid before the Scottish Parliament (subsection (4)).

### ***Section 16 – General functions of Director General of the Agency***

35. This section provides that in carrying out his or her functions the Director General must have regard to the Agency's annual plan but the Director General will be responsible for directing and controlling the Agency. This is to ensure the Director General's formal autonomy in operational matters.

### ***Section 17 – Powers of the Agency***

36. This section sets out the powers of the Agency. These are similar to the powers of the Serious and Organised Crime Agency (SOCA) under the Serious Organised Crime and Police Act 2005.

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37. The powers include acting on request in support of certain other bodies in the pursuit of their functions; and co-operating with other bodies, including overseas agencies, in pursuit of the Agency's functions.
38. Subsection (3) gives the Agency the power to provide assistance in response to requests made by bodies operating abroad. Requests by overseas authorities to obtain evidence under section 13 of the Crime (International Co-operation) Act 2003 are excluded from this provision (section 17(4)).

***Section 18 – Scottish Ministers' power to modify section 17***

39. This section provides the Scottish Ministers with a power by order made by statutory instrument to modify section 17 to add, remove or amend the powers of the Agency provided for in section 17. The Scottish Ministers must consult before exercising this power. An order under section 18 is subject to affirmative resolution procedure.

***Section 19 – Disclosure of information by the Agency***

40. This section provides that the Agency may disclose information to any person or body for any of the "permitted purposes" set out in subsection (2)(a) to (e). Under subsection (2)(f) the Scottish Ministers will be able to add to the list of disclosure purposes by order. Subsection (3) disapplies any statutory or other restriction on the disclosure of information, in respect of any disclosure made by the Agency for a permitted purpose. However, this provision does not override any statutory restrictions or obligation in legislation which is reserved within the meaning of the Scotland Act 1998. This means that information must be disclosed in accordance with the Data Protection Act 1998 (and any other restrictions in other reserved legislation) insofar as that legislation applies to the information.
41. Subsections (4) and (5) place restrictions on the onward disclosure of information that has been disclosed by the Agency. In the case of information disclosed by the Agency to a person or body, it provides that this information may only be passed on, with the consent of the Agency, for a purpose connected with the functions of that person or body, for the purpose for which the information was originally disclosed by the Agency, or for any other of the permitted purposes listed in subsection (2).

***Section 20 – Disclosure of information to the Agency***

42. This section enables any person to disclose information to the Agency where the aim is to assist the Agency in the pursuit of any of its functions. Subsection (2) disapplies any statutory or other restriction on the disclosure of information, in respect of any disclosure made to the Agency in this regard. However, this provision does not override any statutory restrictions or obligation in legislation which is reserved within the meaning of the Scotland Act 1998. This means that information must be disclosed in accordance with the Data Protection Act 1998 (and any other restrictions in other reserved legislation) insofar as that legislation applies to the information.

***Section 21 – Direction by Director General of Agency***

43. This section provides that the functions of the Deputy Director General and police members of the Agency are subject to the direction of the Director General. Subsection (2) provides that in giving such directions the Director General must comply with any instructions given by the Lord Advocate or procurator fiscal in relation to the investigation of offences in Scotland or any instructions given by the Lord Advocate in relation to reporting for the purposes of prosecution of alleged offences. This provision is modelled on section 17 of the Police (Scotland) Act 1967 which makes similar provision in relation to police constables and chief constables.

***Section 22 – Liability for wrongful acts of police members of the Agency***

44. This section establishes that it is the Director General of the Agency who is liable in respect of any unlawful conduct by police members of the Agency. This includes both constables who are seconded to the Agency from police forces (via the Authority) and constables of the Agency who are directly recruited. This is a change from the current position in respect of constables seconded to the Operational and Intelligence Group of the SDEA as in those circumstances it is the chief constable of the seconded officer's home police force who remains liable for any wrongful acts. It will however bring the Authority/Agency model in line with the current police authority/chief constable model whereby a chief constable is liable in reparation for the acts or omissions of constables in his or her force (see section 39 of the 1967 Act).
45. Subsection (2) makes it clear that whilst vicariously liable for wrongful acts of police members the Director General of the Agency is not personally liable and provides that it will be the Authority which is responsible for paying any awards due under this section, subject to the restrictions set out. Again, this is in line with the police authority/chief constable model in section 39(2) of the 1967 Act.

***Section 23 – Regulations relating to the Agency***

46. This section introduces a power for the Scottish Ministers to make regulations in respect of the Agency, similar to those contained in section 26 of the Police (Scotland) Act 1967. This is intended to bring the Agency into line with police forces as regards the framework that applies to the appointment and regulation of police constables.
47. The regulations may cover such issues as pay and allowances, rank structure and promotion.

**The police support services**

***Section 24 – The police support services: modification by order***

48. This section gives the Scottish Ministers the power by order made by statutory instrument to add new services, or amend or remove existing services, from the list of police support services to be provided by the Authority. Before exercising this power the Scottish Ministers must consult the Authority, people who represent the interests of chief constables, unitary police authorities and joint police boards and any other appropriate organisation.

***Section 25 – Use of the police support services***

49. This section empowers the Scottish Ministers, in the interests of the efficiency and effectiveness of the police, to make regulations requiring all police forces (or a selection of them) to make use of particular police support services. The purpose of such regulations would be to avoid inefficient duplication of effort which might result if, for example, some police forces used databases provided by the Authority while others chose to develop their own. This is not an entirely new power as the Scottish Ministers currently have a similar power under section 36(2) of the 1967 Act to make regulations requiring police forces to use common police services provided and maintained under section 36 of the 1967 Act.
50. Subsection (4) requires the Scottish Ministers to consult the Authority, people who represent the interests of chief constables, unitary police authorities and joint police boards and any other appropriate organisations before using this power.

## **Inspections**

### ***Section 26 – Inspections of the Authority’s services and the Agency***

51. This section requires the inspectors of constabulary appointed under section 33 of the Police (Scotland) Act 1967 (i.e. Her Majesty’s Inspectorate of Constabulary (HMIC)) to carry out periodic inspections of the Authority and the Agency and to publish the reports of these inspections. HMIC already have this duty in respect of police forces.

### ***Section 27 – Inspections of the Authority at request of the Scottish Ministers***

52. This section gives the Scottish Ministers the power to require HMIC to carry out an inspection, and publish a report, on the Authority (including the Agency) or any of its functions or activities. The Scottish Ministers already have this power in respect of inspections of police forces.

### ***Section 28 – Reports on inspections: powers of the Scottish Ministers***

### ***Section 29 – Revision of inadequate action plan***

53. These sections give the Scottish Ministers powers by which to secure remedial action if a report by HMIC advises that any part of the Authority or the Agency is, or is likely to become, inefficient or ineffective. The powers broadly mirror those which the Scottish Ministers have in respect of police forces. In such circumstances the Scottish Ministers are empowered to require the Authority to submit an action plan setting out its proposed remedial measures (or alternatively to modify an existing action plan if there is one) within a deadline of between 4 and 12 weeks. Under section 29, if the Scottish Ministers consider the action plan inadequate they may inform the Authority of that fact and their reasons. In that event the Authority must consider whether to revise the action plan.

## **Miscellaneous and general**

### ***Section 30 – Directions***

54. This section gives the Scottish Ministers power to make directions to the Authority and/or the Agency on any matter other than the operational matters of the Agency.

### ***Section 31 – Transfer of staff, property etc.***

55. This section gives effect to schedule 3 which is concerned with the transfer of staff and property etc. from the existing common police services to the Authority, and the Agency.

### ***Section 32 – Interpretation of Chapter 1***

56. This section provides definitions for various key terms used in this Chapter of the Act.

## ***Chapter 2: Complaints and Misconduct***

### **The Police Complaints Commissioner for Scotland**

### ***Section 33 – The Police Complaints Commissioner for Scotland***

57. This section establishes a Police Complaints Commissioner for Scotland, to be appointed by the Scottish Ministers. More detail on the position of Commissioner is laid out at schedule 4.

## **Supervision of complaints**

### ***Section 34 – “Relevant complaint” and “person serving with the police”***

58. This section provides a definition of the kind of complaints that the Commissioner will be able to consider for review. A person can make a general complaint about one of the bodies listed in subsection (2) or about an act or omission by a person who is serving with the police. Subsection (7) sets out what is meant by serving with the police.
59. Subsection (6) sets out who can make a complaint which may be reviewed by the Commissioner. The section further provides that a complaint need not identify an individual police officer who is the subject of it, in order to be eligible for review by the Commissioner. Subsection (3) specifically provides that the Commissioner will not have jurisdiction to deal with complaints made against the police which contain allegations of criminal behaviour. Overseeing the investigation of criminal complaints will continue to be the responsibility of the area procurator fiscal. The Commissioner will also not review complaints about any matter which is related to a person’s employment or service with the police force, even if that person is no longer serving with the police. On the other hand, subsection (4) provides that the Commissioner will be able to review complaints made about off-duty behaviour of any person serving with the police.

### ***Section 35 – Examination of manner of handling of complaint***

60. This section outlines the manner in which the Commissioner can review the way in which a complaint against the police has been handled. Such a review can be requested either by the complainer (for example, if dissatisfied with the way their complaint has been handled) or by the police organisation concerned (for example, if it believes it has gone as far as it can to resolve the complaint and considers there is merit in the Commissioner looking at the matter). The Commissioner may only carry out a review requested by a police organisation if satisfied that the organisation has already taken reasonable steps to deal with the complaint itself.
61. Subsection (3) places the Commissioner under a duty to inform the complainer and any person who is serving with the police who may be the subject of a complaint, about the outcome of a review and what action the Commissioner proposes to take. The Commissioner is also required to produce a report of the complaint handling review and send this to the appropriate authority in relation to the complaint (as defined in section 41). Subsection (5) enables the Scottish Ministers to make regulations which set out exceptions to this duty but only in certain circumstances.
62. The section goes on to lay out the process through which, following a review, the Commissioner can direct that a complaint be reconsidered. The Commissioner can direct either the appropriate authority in relation to the complaint, or another relevant authority (as defined in section 47) to reconsider the complaint. The authority which reconsiders the complaint is known as the reconsidering authority. There may be occasions when the Commissioner decides, in light of the circumstances of the complaint, that it is more appropriate that a different police force or another relevant authority considers how that complaint was handled, rather than the force or authority which initially received the complaint.
63. Subsection (10) provides that where a relevant complaint has led to police disciplinary procedures being invoked (as set out in any regulations made under section 26(2A)(a) of the Police (Scotland) Act 1967), the Commissioner’s power to intervene and issue a reconsideration direction is limited to the application of those disciplinary procedures. This means that if the Commissioner considers that these procedures have not been adhered to following a complaint made by a member of the public, he or she can issue a direction for the appropriate authority in relation to the complaint to reconsider the application of those procedures; but he or she cannot direct that appropriate authority to reach a different disciplinary conclusion or outcome.



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64. Subsection (11)(b) allows the Commissioner directly to supervise any reconsideration process should he or she choose to do so.

***Section 36 – Duty of Commissioner not to proceed with certain complaint handling reviews***

65. This section places a duty on the Commissioner to discontinue, or not proceed with, a complaint handling review under certain circumstances. There will be circumstances where it will not be appropriate for a review of a complaint to be pursued by the Commissioner, for example if a complainer has made complaints of a vexatious nature or if allegations of a criminal nature come to light. Subsection (3) provides that these circumstances will be specified in regulations made by the Scottish Ministers and subject to negative resolution procedure. Subsection (4) outlines the process that must be followed by the Commissioner should a complaint handling review be discontinued or not proceeded with.

***Section 37 – Appointment of person to reconsider complaint***

66. This section explains how someone is appointed to carry out the reconsideration of a complaint against the police. This person will be appointed by the reconsidering authority which is charged with reconsidering the complaint, but if the Commissioner is directly supervising the reconsideration process, the appointment would be subject to approval by the Commissioner.

***Section 38 – Reconsideration of complaint: duties to keep persons informed***

67. This section places a duty on the reconsidering authority or the Commissioner (if he or she decides to supervise the reconsideration of a complaint), to keep the complainer, the appropriate authority in relation to the complaint, and any person who may be the subject of a complaint, informed of the progress of any reconsideration. This section also sets out that the reconsidering authority or the Commissioner (as appropriate) must inform these persons of what action may be taken following the reconsideration of the complaint and the outcome of the process. Subsection (5) places a duty on any person charged with carrying out a reconsideration to provide the Commissioner with any information that he or she requires to carry out his or her functions.

***Section 39 – Power of Commissioner to discontinue reconsideration***

68. This section gives the Commissioner the power to discontinue the reconsideration of any complaint in certain circumstances. Subsection (2) provides that these circumstances will be specified in regulations made by the Scottish Ministers and subject to negative resolution procedure. Subsection (3) outlines the process that must be followed by the Commissioner should the reconsideration of a complaint be discontinued.

***Section 40 – Final reports on reconsideration***

69. This section places a duty on anyone appointed to carry out a reconsideration, upon its completion, to submit a report to the Commissioner. A copy of that report must also be passed to the appropriate authority in relation to the complaint and, where different, the reconsidering authority.

***Section 41 – Appropriate authority in relation to a complaint***

70. This section describes which police organisation is the appropriate authority for a complaint, depending on the person or the organisation in respect of whom the complaint is made.

## **Other functions**

### ***Section 42 – General functions of the Commissioner***

71. This section sets out the general functions of the Commissioner, which are mainly to ensure that each relevant authority has in place effective and efficient complaints handling systems. The Commissioner can also provide advice and make recommendations on how those systems and procedures can be improved or modified.

### ***Section 43 – Reports to the Scottish Ministers***

72. This section places a duty on the Commissioner to provide an annual report on the carrying out of his or her functions to the Scottish Ministers, each relevant authority and HMIC. The Commissioner must also provide reports on anything within his or her remit that the Scottish Ministers might require, and can also provide reports to the Scottish Ministers on anything which he or she considers appropriate.
73. Subsection (5) places a duty on the Scottish Ministers to lay before Parliament and publish all annual reports produced by the Commissioner. The Scottish Ministers must also publish and lay before Parliament any other reports which they receive from the Commissioner but only if they think it is appropriate to do so.

### ***Section 44 – Provision of information to the Commissioner***

74. This section places a duty on relevant authorities to provide, at the request of the Commissioner, information and documents required in order to carry out the Commissioner's functions.

### ***Section 45 – Power of Commissioner to issue guidance***

75. This section allows the Commissioner to issue guidance regarding the handling of complaints or any other matter specified within this Chapter of the Act. Subsection (2) requires the Commissioner to consult relevant persons and organisations before issuing guidance. Subsection (3) places a duty on those issued with guidance by the Commissioner to have regard to the terms of that guidance.

### ***Section 46 – Disclosure of information by and to the Commissioner***

76. This section enables the Commissioner to pass information to others and receive information from others when such information is necessary either for the Commissioner to fulfil his or her functions or for another public body or office-holder to fulfil their functions.
77. Subsections (2) and (3) place restrictions on the onward disclosure of information which the Commissioner gives to any body or office holder. Any body or office-holder that wants to disclose information which the Commissioner has given them can do so only if they have obtained the consent of the Commissioner, and the disclosure of this information is for a purpose connected with the body's or the office-holder's functions.

## **Supplementary**

### ***Section 47 – Interpretation of Chapter 2***

78. This section provides definitions for various key terms used in this Chapter of the Act.

## ***Chapter 3: Other Provisions***

### ***Section 48 – Allowances payable to special constables***

79. This section amends section 3 of the Police (Scotland) Act 1967 to clarify the basis upon which certain allowances to be known as periodic payments can be paid to

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special constables. Special constables are volunteer police officers who do not receive a salary but may receive various allowances. This section will allow special constables to receive periodic payments in recognition of their commitment to serve for a set number of hours, as set out in regulations made by the Scottish Ministers.

***Section 49 – Appointments of assistant inspectors of constabulary and staff officers***

80. This section amends section 34 of the Police (Scotland) Act 1967 so as to remove the current restrictions on the appointment of staff officers to the inspectors of constabulary. At present, only constables from Scottish forces can be appointed as staff officers. The amendment makes clear that any person is eligible to be appointed and that these appointments will be made by the chief inspector of constabulary.

***Section 50 – Constables engaged on service outside their force***

81. This section amends section 38A of the Police (Scotland) Act 1967.
82. Subsection (2) amends section 38A of the 1967 Act to ensure that constables engaged on certain types of relevant service can still be represented by the Police Federation of their home force.
83. Subsection (3) makes provision to allow the Scottish Ministers, by order made by statutory instrument subject to negative resolution procedure, to add to the types of service undertaken by constables which can be regarded as relevant service for the purposes of the 1967 Act. This is to allow flexibility for the future as new bodies are created in which Scottish constables may be engaged on periods of temporary service. Some examples of the types of service currently listed as being relevant service are, for example, service with the Independent Police Complaints Commission for England and Wales, service under the International Development Act 2002 and service with the Scottish Ministers in connection with their functions under the Proceeds of Crime (Scotland) Act 2002. Providing such constables to be on relevant service within the meaning of section 38A ensures that they retain relevant rights in respect of pay and pension and can continue to be promoted in their police force as if they were still serving in it.

**Part 2: Public Order Etc.**

***Chapter 1: Football Banning Orders***

**Making and content of orders**

***Section 51 – Making of order on conviction of a football-related offence***

84. This section sets out the arrangements under which a court may impose a football banning order on an individual convicted of an offence, instead of or in addition to any sentence the court could impose for the offence. The court must be satisfied that the offence involved engaging in violence or disorder as defined in section 56 and that it related to a football match. The court must also be satisfied that there are reasonable grounds to believe that making the order would help to prevent violence or disorder at or in connection with any football matches.
85. Subsection (5) provides that where a court does not impose a football banning order but is satisfied that the offence involved violence or disorder and related to a football match then the court may declare that to be the case. This declaration will then be recorded.
86. Under subsection (6) an offence will automatically be regarded as related to a football match if it is committed at the match or on the way to or from a football match. As an example, where football fans who are attending different matches engage in violence or disorder with each other on the way to their respective matches the offences would be regarded as being related to a football match. The definition of a football match

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includes matches on television. For example a person may be watching the match in a pub, wearing football colours, where a fight breaks out in the pub during or after the match.

87. In addition an offence will be regarded as relating to a match if it appears from all the circumstances that the offence was motivated wholly or partly by a football match. In other words, the court will need to find some link between the behaviour and a football match. This could include, for example, where groups of rival supporters do not go to a football match but instead meet at a different place for a pre-arranged fight.

***Section 52 – Making of order on application to the sheriff***

88. This section empowers the police to make a summary application to a sheriff court for a football banning order to be imposed against an individual, and sets out the arrangements under which a court may impose a football banning order following such an application. Firstly, the court must be satisfied that the person against whom the order is sought has contributed to violence or disorder in the United Kingdom or elsewhere. As with section 51, violence or disorder is defined in section 56. The second test that the court will apply is in line with the test for a banning order on conviction, namely whether there are reasonable grounds to believe that making the order would help to prevent violence or disorder at or in connection with any football matches. This section also sets out matters which the sheriff may take into account in deciding whether or not to impose a banning order.

***Section 53 – Content of order***

89. This section sets out the effect of a banning order. Certain requirements of the order are mandatory and other requirements are at the discretion of the court. The order prohibits the person from attending any regulated football match (defined in section 55) and requires the person to report at a police station in accordance with the reporting requirements in this Chapter of the Act (see, for example, section 61) in connection with certain regulated football matches. The order must also require the person subject to the order to report initially to a police station within 5 days of the order being made, and to notify certain prescribed information to the football banning orders authority within 7 days of the occurrence of any events that are relevant to the order. (Schedule 5 sets out the list of events that require such notice and the information that must be provided: for example within 7 days of a change of address the person would be required to notify their new address to the football banning orders authority.)
90. Unless there are exceptional circumstances the order must also require the surrender of the person's passport when relevant overseas matches are to be played. These exceptional circumstances might be that the person's employment means he/she needs to travel frequently (for example, an airline pilot). The banning order may, in addition to these mandatory conditions, require the individual to comply with any additional requirements which the court considers would help prevent violence or disorder at or in connection with football matches. This could include prohibiting the person from football matches that are not regulated matches, such as junior league matches if this was thought to be necessary.
91. Subsection (7) sets out the maximum lengths of time a banning order may last, depending on the circumstances in which the order was imposed.

***Section 54 – Section 53: supplementary***

92. This section gives effect to schedule 5 (relevant events and prescribed information), defines the meaning of the term imprisonment for the purpose of section 53(7)(a) and makes clear that banning orders start on the day which the order is imposed by a court.

***Section 55 – “Football matches” and “regulated football matches”***

93. This section defines football matches and regulated football matches for the purposes of this Chapter and empowers the Scottish Ministers to add matches to or remove matches from the list of regulated football matches by order made by statutory instrument subject to negative resolution procedure. It also makes clear that this Chapter applies to football matches both that are played and that are intended to be played.

***Section 56 – “Violence” and “disorder”***

94. This section defines “violence” and specifies certain things which are to be included within “disorder” for the purposes of this Chapter.

**Variation, termination, information and appeals**

***Section 57 – Variation of certain requirements of order***

95. This section empowers courts to impose or omit a requirement of an order imposed by a court to surrender a passport if there are exceptional circumstances. It also empowers the courts to impose, replace or omit any additional requirements imposed by the court under section 53(4). Both the criminal and civil courts can do this, on the application of either a chief constable as specified in subsection (5) or the person subject to the order who would need to show that there had been a relevant change in circumstances which meant that the requirements were no longer necessary. This section also empowers civil courts to omit the requirement to surrender a passport imposed by the civil court or to impose this requirement if it was not imposed when the order was first made. The civil court can also do this on the application of the chief constable who applied for the order.
96. For orders imposed on conviction it will be the court that made the order which has power to change the requirements. For orders imposed on application to a sheriff it will be a sheriff sitting in the original sheriff court district who can vary the order, although a sheriff court will also have power to transfer proceedings to another sheriff court district if appropriate.

***Section 58 – Termination of order***

97. This section empowers the courts to terminate a banning order which has had effect for at least two thirds of its length, under certain circumstances, on the application of the person subject to the order; and sets out the arrangements for this.

***Section 59 – Information about making, varying or terminating order etc.***

98. This section specifies those to whom the court must provide copies of the banning order or orders that vary or terminate an order. It sets out the arrangements for providing copies of banning orders where the individual subject to a banning order is in custody. It also provides for the Scottish Ministers to prescribe, by order made by statutory instrument subject to negative resolution procedure, additional persons who must be provided with a copy of the order.

***Section 60 – Appeals***

99. Subsection (1) provides that a football banning order made by a criminal court and any variation or termination of such an order is to be treated as a sentence for the purposes of any appeal, thereby attracting the appeals procedure in the Criminal Procedure (Scotland) Act 1995.
100. Subsections (2) and (3) provide that where a football banning order made by a criminal court is quashed on appeal, and unless it was specified by the court that the order was quashed on the grounds that the court erred in holding that the offence was one to which

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section 51(4) applied, the High Court of Justiciary may declare that the offence involved violence or disorder and was related to a football match.

101. Subsections (4)-(8) set out the appeals procedure in respect of football banning orders imposed by the civil courts and the time limits that apply. An appeal can be made on a point of fact or law.

## **Enforcement of order in relation to foreign matches**

### ***Section 61 – Foreign matches: reporting and other requirements***

102. This section sets out the role and functions of the football banning orders authority and, in following the football banning orders authority's direction, certain constables, in relation to matches played outwith the United Kingdom. Specifically, it requires the football banning orders authority to issue notices to those persons subject to banning orders. These notices require the person to report to a police station and surrender their passport if they have one, or declare that they do not have one, if they do not. The football banning orders authority must issue such a notice when it is of the opinion that requiring the person to report is likely to reduce the risk of violence or disorder at or in connection with the overseas match.
103. Subsection (6) enables the football banning orders authority to establish criteria for determining whether to impose a notice requiring a person to report and surrender their passport. The criteria may be used for determining whether notices should be imposed in individual cases or on particular groups of people. For example, it might be reasonable to establish criteria that all supporters of a particular team subject to banning orders should be required to report and surrender their passport when that team is playing abroad, especially if there has been recent trouble aboard involving supporters of that team.

### ***Section 62 – Notices under section 61(4): further provision***

104. This section provides that individuals subject to banning orders may not be required to surrender their passport under section 61(4) except in the control period in relation to a match or tournament played outwith the United Kingdom. It also defines what the control period is. For a regulated football match outside the United Kingdom it is the period beginning 5 days before the day of the match and ending when the match is finished or cancelled. For certain external tournaments it may also be appropriate for a block control period to apply so that the person is required to report and surrender their passport for the whole of the external tournament. The block period will apply 5 days before the day of the first match in the tournament (excluding qualifying games) and finish on the day on which the last football match is played. The Scottish Ministers will require to prescribe by order made by statutory instrument subject to negative resolution procedure the external tournaments that should be subject to a block control period. These could be tournaments such as the European Championships and the World Cup.
105. Subsection (2) requires the police to return the passport to the individual as soon as is reasonably practicable after the control period ends.

### ***Section 63 – Sections 61 and 62: guidance***

106. This section requires the football banning orders authority to have regard to any guidance issued by the Scottish Ministers that relates to their functions under sections 61 and 62, when carrying out those functions.

### ***Section 64 – Exemption from notice served under section 61(4)***

107. This section provides that persons who are subject to a football banning order may apply for an order disapplying any notice issued to them under section 61(4) that requires them to report to a police station and surrender their passport, or declare that they do not have

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a passport, in connection with a particular regulated football match outside the United Kingdom. The applicant will require to show to the football banning orders authority's or, as the case may be, the constable's satisfaction that there are circumstances which justify them being so exempted and that because of those circumstances the applicant would not attend the match or matches if so exempted; for example, if they need to attend a family funeral abroad during the control period.

108. Where the application is made during a control period, the constable responsible for a police station may make the order but must refer the issue to the football banning orders authority unless this is not reasonably practicable. Otherwise, the application will be made to the football banning orders authority. Where a constable makes an order disapplying any notice issued under section 61(4), the constable must give written notice of this fact to the authority as soon as is reasonably practicable.
109. The ability for a person to apply for an order disapplying the reporting and passport surrender provisions is included to take account of articles 1 and 2 of Council Directive [73/148/EEC](#) of 21 May 1973 in relation to freedom of movement, and also the comments of the court in the case of **Gough & Anor v Chief Constable of Derbyshire** [2002] WWCA CIV 351 – 20th March 2002 in the context of the equivalent legislation for England and Wales in the Football Spectators Act 1989. The court was satisfied that whilst restraints could be imposed on persons leaving the country on the grounds of public policy, in order to ensure that the scheme was proportionate under the European Convention on Human Rights, exemptions should be permitted where the reason for going abroad was other than attendance at the regulated match.

**Section 65 – Section 64: supplementary**

110. This section requires the football banning orders authority and the constable to have regard to any guidance issued by the Scottish Ministers, which they shall publish from time to time, when taking decisions under section 64. It also provides for the appeals process against the decision of the football banning orders authority or the constable on their decisions to refuse to grant an exemption under section 64.

**Section 66 – Suspension of reporting requirements**

111. This section suspends the requirements for a person subject to a banning order to report to a police station and surrender their passport during any period where the person is not resident in Scotland. It also suspends certain requirements of banning orders from taking effect where the person subject to a banning order is in custody. It provides that, if the person was prevented from reporting initially to a police station because he or she was in custody, they must report to a police station within 5 days beginning with the date of their release if, when they are released, their banning order has more than 5 days to run.

**Miscellaneous and general**

**Section 67 – Service of documents**

112. This section sets out the methods by which a document to be served under this Chapter can be served on a person who is subject to a banning order.

**Section 68 – Offences under this Chapter**

113. Subsection (1) makes it an offence to fail to comply with (a) any requirements of a banning order; (b) a requirement imposed by a constable under section 61(1) for giving effect to an order in relation to regulated football matches outside the United Kingdom and (c) a requirement imposed by the football banning orders authority under section 61(4) to report to a police station at particular times and, if required, to surrender their passport or make a declaration that they do not have a passport.

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114. Subsection (2) provides that a person charged with an offence under subsection (1) will have a defence if they can prove that they had a reasonable excuse for breaching the requirements imposed by a banning order or a notice issued under a banning order.
115. Subsection (3) provides that the punishment on summary conviction for breaching any requirements of a banning order or failing to comply with a requirement imposed by a constable under section 61(4) is imprisonment for up to 6 months, a fine of up to level 5 (£5,000) or both.
116. Subsection (4) provides that the punishment on summary conviction for failing to comply with a requirement imposed by the football banning orders authority under section 61(1) is a fine not exceeding level 2 on the standard scale (£500).
117. Subsection (5) makes it an offence to provide false or misleading information in support of an application for exemption from the reporting and passport surrender requirements. That offence is punishable by summary conviction with a fine of up to level 3 on the standard scale (£1,000).

### ***Section 69 – Interpretation of Chapter 1***

118. This section sets out who is the football banning orders authority and defines passport for the purposes of this Chapter. The first football banning orders authority will be the chief constable of Strathclyde Police who will establish a team to administer the orders on behalf of all Scottish forces. This section also provides that Ministers may by order made by statutory instrument subject to negative resolution procedure appoint a different authority to take on the role and functions of the football banning orders authority.

## ***Chapter Two: Public Processions***

### ***Section 70 – Notification of public processions***

119. This section makes amendments to section 62 of the Civic Government (Scotland) Act 1982 (“the 1982 Act”). The section extends the notice period before which the procession organiser must notify the local authority of their intention to process from 7 days to 28 days, to give local authorities and the police more time to consider applications; removes the ability of local authorities to grant exemptions from the requirement to notify them of a procession; and provides that section 62 does not apply to funeral processions organised by funeral directors. It also provides that the Scottish Ministers can prescribe, by order made by statutory instrument subject to negative resolution procedure, other processions to be exempt from the notification requirements. This section also allows local authorities to waive the 28-day notification requirement in exceptional circumstances.

### ***Section 71 – Powers and duties of local authorities***

120. This section makes amendments to section 63 of the 1982 Act. It enables local authorities to consider a wider range of issues when deciding whether a procession should take place or if conditions should be placed on it, such as the risk of damage to property or disruption to the life of the community and whether the procession would place an excessive burden on the police. This section makes it clear that local authorities can impose conditions on funeral processions and any processions which are specified in an order made by the Scottish Ministers under section 62(11B)(b) of the 1982 Act. Processions which are specified in such an order can also be prohibited by local authority). This section also requires local authorities to maintain lists of processions held and prohibited in their areas and make them available to the public, and provide any information about processions to any member of the public who requests it.



***Section 72 – Minor amendments of 1982 Act***

121. This section makes some minor amendments to the 1982 Act including the addition of a new section 65A to require local authorities to have regard to guidance issued by the Scottish Ministers when carrying out their functions under Part V of the 1982 Act which contains the law on public processions in Scotland.
122. Annex A contains a copy of Part V of the 1982 Act as amended by this Act.

***Chapter Three: Other Provisions***

**Offensive Weapons**

***Section 73 – Increase in maximum term of imprisonment for certain offences***

123. This section amends sections 49(1)(a) (penalty on summary conviction for offence of possessing an article with a blade or point in a public place) and 49A(5)(a)(i) (penalty on summary conviction for offence of possessing an article with a blade or point on school premises) of the Criminal Law (Consolidation) (Scotland) Act 1995 by increasing the maximum term of imprisonment on summary conviction from 6 to 12 months. It also amends section 49(1)(b) (penalty on indictment for offence of possessing an article with a blade or point in a public place) and section 49A(5)(a)(ii) (penalty on indictment for offence of possessing an article with a blade or point on school premises) of the Criminal Law (Consolidation) (Scotland) Act 1995 by increasing the maximum term of imprisonment for these offences from 2 to 4 years.

***Section 74 – Amendment of requirements for exercise of certain powers of arrest***

124. This section amends the following sections of the Criminal Law (Consolidation) (Scotland) Act 1995:
- section 47(3) (power of constable to arrest without warrant person suspected of possessing an offensive weapon in a public place);
  - section 48(3) (power of constable to arrest without warrant person suspected of obstructing search for offensive weapon); and
  - section 50(3) (power of constable to arrest without warrant person suspected of contravening section 49(1) or 49A(1) or (2)).

These amendments widen constables' powers of arrest in relation to offences under:

- section 47(1) (offence of carrying offensive weapon in a public place);
- section 48(2) (offences of obstructing a constable or concealing an offensive weapon from a constable);
- section 49(1) (offence of having in public place article with blade or point); and
- section 49A(1) and (2) (offence of having article with blade or point (or offensive weapon) on school premises).

***Section 75 – Sale of knives and articles with blade or point to young persons***

125. This section amends section 141A(1) of the Criminal Justice Act 1988 (offence of sale of knives and certain articles with blade or point to persons under sixteen) by increasing the minimum age of persons to whom such items (other than knives designed for domestic use) may be sold, from 16 to 18 years. The amendment also makes clear that swords are included in the list of items to which this provision applies.

## **Fireworks**

### ***Section 76 – Possession of prohibited fireworks: powers of search and arrest***

126. This section amends the Fireworks Act 2003 to give police powers of search, seizure and arrest without warrant in relation to possession offences created by regulations under that Act. Sections 3 and 5 of the 2003 Act enable regulations to make provision prohibiting the possession of fireworks by persons of a specified age and provision prohibiting the possession of fireworks of a specified description including by persons of a specified description. At present, the [Fireworks Regulations 2004 \(2004/1836\)](#) provide that subject to regulation 6 of those regulations no person under the age of 18 years shall possess an adult firework in a public place and no person shall possess a firework classified as category 4 under Part 1 of BS 7114, which are generally the largest and most powerful fireworks.
127. The new provision sets out the powers of a constable in relation to searching, detaining or arresting a person when the constable has reasonable grounds to believe that the person is committing an offence in relation to the possession of fireworks, as well as powers of seizure.

## **Control of Sex Offenders**

### ***Section 77 – Powers to take data and samples from persons subject to notification requirements***

128. [Section 77](#) amends the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) by inserting new sections 19AA and 19AB into that Act. The new sections allow the police to take relevant physical data (primarily fingerprints and palm prints), or any DNA samples from persons subject to the notification requirements of Part 2 of the Sexual Offences Act 2003 (“the 2003 Act”), a risk of sexual harm order (RSHO) under section 2 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act (“the 2005 Act”) or section 123 of the 2003 Act, if a DNA sample or data from these individuals is not already held on the database, or if such material has been lost or destroyed. This section also amends section 87 of the 2003 Act so that the police can also take a DNA sample as well as any relevant physical data from a registered sex offender who attends a police station to notify their details to the police.
129. Subsection (1) of section 19AA provides that these arrangements only apply to persons subject to the notification requirements or RSHOs.
130. Subsection (2) of section 19AA provides that the police will be able to take samples or data from any person who was subject to the notification requirements or a RSHO at the time the provisions commence, as well as from an individual who becomes subject to notification requirements or RSHO after commencement. The police will not be able to take samples or data from any person who may have been subject to the notification requirements or RSHO before the date of commencement, if that person was no longer subject to the notification requirements or a RSHO at that date.
131. Subsection (3) of section 19AA provides that a constable, or police custody and security officer (at a constable’s direction) can take any samples or data by certain means specified in section 18(6) and (6A) of the 1995 Act. Any samples which are retained from a registered sex offender can be retained indefinitely.
132. Subsection (4) of section 19AA enables the police to take samples or data from a person who is subject to a RSHO made under section 123 of the 2003 Act, if they reasonably believe that that person is resident in Scotland. The police will therefore be able to take and retain fingerprints and DNA samples from individuals who are subject to RSHOs (or who become subject to RSHOs) made in England, Wales or Northern Ireland, if these people move to Scotland.

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133. Subsection (5) of section 19AA provides that the police must not exercise their powers under this section, if samples or data have already been taken from a sex offender who is subject to the notification requirements, or a person who is subject to a RSHO, under sections 19(2) or 19A(2) of the 1995 Act. However, if any samples or data which have previously been taken under sections 19(2) or 19A(2) of the 1995 Act have been lost or destroyed, the police will be able to use their powers under this section to take further samples or data.
134. Subsection (6) of section 19AA provides that the police can take further samples or data under this section, if the data and samples that were initially taken in exercise of the power in this section have been lost or destroyed, or were not suitable or sufficient for analysis.
135. Subsection (7) of section 19AA provides that the police may only take samples or data under this section at a police station, prison, hospital or any other place where a person is held in legal custody.
136. Subsection (8) of section 19AA provides that the police can only exercise their power to take samples or data in a police station when a person has been required to come to the station so their samples and data can be taken, or if a person to whom this section applies, is held in custody in a police station after being arrested or detained for any offence. This means that in appropriate circumstances, the police can exercise their powers under section 19AA to take samples and data from any relevant person who is brought into custody, without having to ask that person to return to the station on another occasion for that specific purpose.
137. Subsection (9) of section 19AA provides that the police must give a relevant person at least seven days notice of the requirement to attend a police station to provide samples or data. Any such notice which the police issue to a person who is subject to a RSHO must warn that person that they will commit an offence if they fail, without reasonable excuse, to comply with the requirements under this section.
138. Subsection (10) of section 19AA provides that if a relevant person is required to attend a police station to give samples or data under subsection (8) because a previous sample has either been lost or destroyed or is deemed unsuitable for the purposes of analysis, then these circumstances shall be explained to the person.
139. Subsection (11) of section 19AA provides that if a relevant person is in a police station due to having been arrested or detained for an offence, and a sample is to be taken from that person under this section, then this shall be explained to the person.
140. Subsection (12) of section 19AA confers a power of arrest on the police if a relevant person fails to comply with the obligations to attend a police station within the requested timeframe.
141. Subsection (13) of section 19AA ensures that any of the powers which are exercised in this section are without prejudice to the exercise of any powers in section 18 of the 1995 Act. If the police have taken any samples or data from an individual under section 19AA of the 1995 Act, they will still be able to take samples or data under section 18 of the 1995 Act and use these for investigating an offence, if an individual is arrested or detained under suspicion of having committed an imprisonable offence.
142. Subsection (1) of section 19AB provides that the arrangements under this section only apply to persons who are subject to risk of sexual harm orders (RSHO) under section 2 of the 2005 Act or section 123 of the 2003 Act.
143. Subsection (2) of section 19AB provides that a person subject to a RSHO will commit an offence if they do not comply with a notice issued by the police under section 19AA(8) (a) of the 1995 Act, or if they attend the police station but refuse to provide (or allow to be taken) a required sample or data. However, an offence will not be committed where the person has a "reasonable excuse."

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144. Subsections (4), and (6) of section 19AB provide that any samples or data taken from a person subject to a RSHO under section 19AA(3) shall be destroyed as soon as possible following the expiry of the RSHO, unless prior to the duty to destroy such samples or data the individual in question is convicted of an offence or becomes subject to the notification requirements of the 2003 Act. In such circumstances, the samples and data will be retained indefinitely.
145. Subsection (5) provides that an RSHO shall not be deemed to have expired for the purpose of sections 19AA and 19AB of the 1995 Act, if it is suspended pending the outcome of an appeal under section 6(2) of the 2005 Act or any corresponding power exercised in the other UK jurisdictions.
146. Subsections (3) and (4) of section 77 make consequential amendments to sections 19 and 19A of the 1995 Act. These changes mean that the police will not be able to exercise their powers to take data and samples from a relevant person under those sections, if the police have already taken this material under section 19AA of the 1995 Act. However, the police will be able to exercise their powers under sections 19 or 19A of the 1995 Act, if any samples or data which have been taken under section 19AA, have been lost or destroyed.
147. Subsection (5) of section 77 amends section 19B of the 1995 Act to enable the police to use reasonable force in exercising the powers in section 19AA, but only when taking samples or data from a person who is subject to the notification requirements of the 2003 Act. The police cannot use reasonable force to take samples and data from a person who is subject to a RSHO.
148. Subsection (7) of section 77 amends section 87 of the 2003 Act by replacing subsections (4) and (5) with a new subsection (5A) which operates alongside the notification requirements provided for in sections 83(1), 84(1) or 85(1) of the 2003 Act. The police will be able to take samples or data from a relevant sex offender when he or she attends a police station to notify their details to the police. This will enable the police to obtain samples or data from these offenders without having to give them notice to return to a police station so this information can be obtained. Any samples and prints taken under section 87(5A) can be retained indefinitely.
149. Subsection (8) of section 77 inserts a definition of “relevant physical data” into section 88 of the 2003 Act. This definition has the same meaning as that in section 18(7A) of the 1995 Act.
150. Subsection (9) of section 77 amends section 91(1)(a) of the 2003 Act to make it an offence for a relevant sex offender to fail to provide or to allow to be taken from them any sample or data.

***Section 78 – Sex offender notification requirements***

151. **Section 78** amends the 2003 Act to require relevant sex offenders in Scotland to provide the police with details of their passports in order to comply with the notification requirements of Part 2 of the 2003 Act. This is achieved by amending sections 83, 84, 87, 91, and 138 of the 2003 Act, which contain the statutory powers governing the notification requirements. The amendment to section 83 also confers power on the Scottish Ministers to make regulations subject to affirmative resolution procedure which prescribe further information that sex offenders are required to provide to the police.
152. Subsection (2) amends section 83 of the 2003 Act to:
- insert subsection (5)(h) which provides that relevant sex offenders are required to provide details of their passports to the police in order to comply with the notification requirements;

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- insert subsection (5)(i) which allows the Scottish Ministers to make regulations, subject to affirmative resolution procedure, requiring those who are subject to the notification requirements to notify other relevant information about themselves or their personal details as are prescribed in the regulations;
  - insert subsection (5A) which provides the details of the passport that are required to be provided. This includes the passport number, and dates of issue and expiry.
153. Subsection (3) amends section 83 of the 2003 Act to insert a subsection (8) to provide a definition of a passport. The definition includes passports issued by countries and authorities outside the UK. This means that a relevant sex offender may have to provide the police with details of all passports which he or she holds.
154. Subsection (5) amends section 84 of the 2003 Act to insert subsections (e), and (f), which provide that a relevant sex offender has 3 days to notify the police if he or she has lost or ceases to have a passport, or if a new passport is obtained. A new subsection (g) is also inserted in consequence of the new power in section 83(5)(i) to prescribe further notification requirements. The power allows Ministers to prescribe by regulations, subject to affirmative resolution procedure, the events in relation to any information prescribed under section 83(5)(i) that will require to be notified under this section.
155. Subsection (7) amends section 87 of the 2003 Act to insert subsection (5B) which states that when notifying details under the 2003 Act, if requested to do so, a relevant sex offender must produce his or her passport to the police so that it may be examined.
156. Subsection (8) amends section 91 of the 2003 Act to provide that a person commits an offence if he or she fails to comply with section 87(5B).
157. Subsection (9) amends section 138 of the 2003 Act to provide that regulations made under sections 83(5)(i) and 84(1)(g) will be subject to the Scottish Parliament's affirmative resolution procedure.

***Section 79 – Information about release: power to require giving of specified information***

158. **Section 79** amends section 96 of the 2003 Act. The Scottish Ministers may make regulations under section 96 which require any person who is responsible for a relevant sex offender to inform any person who is specified in the regulations of any occasion when that offender is transferred or released from an institution. New subsection (2A) provides that any regulations made by the Scottish Ministers under section 96 may set out what information about a relevant sex offender a responsible person is required to provide to any specified person. The regulations may also set out when a responsible person is required to give to a specified person a photograph of any part of the relevant sex offender (so that, for example, photographs may be taken of distinguishing features such as a tattoo, as well as of an offender's face).
159. New subsection (2B) provides that the meaning of "photograph" in the section is the same as the meaning in section 88(2) of the 2003 Act.
160. Subsection (3) allows the regulations made under section 96 of the 2003 Act to prescribe different and specific types of information for different purposes.

***Section 80 – Police powers of entry to and examination of relevant offender's home address***

161. **Section 80** amends the 2003 Act by inserting a new section 96A that provides that the police can apply to a sheriff to obtain a warrant to enter, examine and search the premises of sex offenders who are subject to the notification requirements under Part 2 of the 2003 Act.

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162. Subsection (1) of section 96A of the 2003 Act gives a sheriff power to issue such a warrant, on application of a senior police officer, to enter and search the premises of a relevant sex offender and if necessary to use reasonable force, if he or she is satisfied that the necessary conditions are met.
163. Under subsection (2) of section 96A the application for a warrant to enter, examine, and search will only be granted if the sheriff is satisfied that:
- the address has been notified as the relevant sex offender’s home address or an address at which the relevant sex offender resides or is regularly found;
  - the relevant sex offender is living in the community and is not in legal custody, prison, detained in hospital or outside the UK (subsection (4));
  - a warrant would assist the police in carrying out a risk assessment as to the likelihood of a relevant sex offender committing another sexual offence (subsection (3)); and
  - the police have previously tried to gain access to the said premises on more than one occasion but have failed to do so.
164. Subsection (5) provides that the sheriff will not need to determine the application for a warrant, without the need to hear from the relevant sex offender or anyone with an interest in the premises.
165. Subsection (6) provides that the warrant to enter, examine, and search premises does not allow the police to seize and retain anything which they find in the premises.
166. Subsection (7) states that the police must execute the warrant at a reasonable hour.
167. Subsection (8) provides that the warrant will expire after one month from the date when the warrant is granted. The police will not be able to execute the warrant after this date.
168. Subsection (9) provides that the warrant can only be executed on one occasion.
169. Subsection (10) provides that the powers described above will not prejudice any other police powers to enter, examine, search, and seize (which are contained in other legislation or in common law) in the normal way if they believe there is evidence to support the fact that an offence may have been committed.
170. Subsection (11) provides definitions for various terms.

### **Part Three: Criminal Justice**

#### **Powers in relation to suspects and witnesses**

##### ***Section 81 – Power to require giving of certain information in addition to name and address***

171. This section amends section 13 of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) (which gives police constables certain powers in relation to suspects and witnesses). Section 13(1)(a) of the 1995 Act empowers a constable to require persons whom they suspect of committing an offence to tell them their name and address. Subsection (3) inserts a new section 13(1A) into the 1995 Act which enables a constable to require a suspect or a potential witness to an offence also to provide details of their nationality, date of birth, and such details of their place of birth as the constable considers necessary or expedient for establishing the person’s identity. A failure to provide this information without reasonable excuse is an offence.
172. Subsection (6) amends section 14 of the 1995 Act. Section 14(9) of that Act provides that a person who has been detained is under no obligation to also provide any information to the police, other than their name and address. The amendments made

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by subsection (6) will put a person under an obligation also to inform the police of their nationality, date of birth, and such details of their place of birth as the constable considers necessary or expedient for establishing that person's identity. It will not be an offence if a person does not provide this information to the police.

173. A revised version of section 13 and 14 of the 1995 Act, as amended by this Act is contained at Annex B.

***Section 82 – Power to take fingerprints to establish identity of suspect***

174. This section amends section 13 of the 1995 Act to give police officers the power to take fingerprints to verify the identity of someone suspected of having committed an offence and to establish if that person has committed any other offences. Constables will be able to use this power in any place, enabling them to take fingerprints outside a police station. The power will be used by officers to confirm the identity of a suspect by checking these fingerprints against records in existing databases. Subsection (2) of this section requires that fingerprints taken for these purposes must be destroyed as soon as they have been used. They cannot be retained by the police.
175. Subsection (6) amends section 13(6) of the 1995 Act and provides that it will be an offence for a person to refuse to allow a constable to take fingerprints. Subsection (8) inserts a new section 13(8) into the 1995 Act which provides that a device which is used for taking fingerprints must be approved by an order made by the Scottish Ministers. Such an order will not be subject to any parliamentary procedures.
176. A revised version of section 13 of the 1995 Act, as amended by this Act is contained at Annex B.

**Retention of samples etc.: prosecutions for sexual and violent offences**

***Section 83 – Retention of samples etc.: prosecutions for sexual and violent offences***

177. This section inserts a new section 18A into the 1995 Act to allow the police to retain, for a period of time, DNA samples taken from people who have been arrested or detained, and also any information (such as a DNA profile) derived from those samples, provided that criminal proceedings have been raised against them for certain offences.
178. Subsection (2) of section 18A specifies that DNA samples and information deriving from these samples can only be retained where criminal proceedings in respect of a relevant sexual or violent offence (as defined in section 18A(11)) have been instituted against the person who is arrested or detained, and these proceedings did not result in a criminal conviction or an order for absolute discharge under section 246(3) of the 1995 Act (an order for absolute discharge is pronounced when a court is satisfied that the accused committed the offence but considers that it is inexpedient to punish them.). Therefore, DNA samples and information deriving from these samples can be kept if the relevant criminal proceedings are instituted, even if these are subsequently dropped or if a person is brought to trial but is acquitted by the court.
179. In cases where the new provisions apply, the police are empowered to retain the sample and information following the conclusion of the proceedings, until the date set for the destruction of the sample and information. The destruction date is initially set at 3 years following the conclusion of proceedings. However, within the last 3 months before the set destruction date, a relevant chief constable may apply to a sheriff, on summary application, for an extension. Where a sheriff upholds such an application, a new destruction date will be set, not more than 2 years later than the previous one. A relevant chief constable is defined in section 18A(11). The chief constable of the police force which took the sample, or a chief constable of a police force in the area in which the individual from whom the sample was taken now resides, can apply to the court to extend the time for which samples can be retained.

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180. The provisions leave it open to chief constables to apply sequentially for more than one two-year extension period to the destruction date for the sample and information from a particular individual. If a relevant chief constable does not apply to a sheriff before the date of destruction elapses, the samples and any information which is retained must be destroyed.
181. Subsection (8) of section 18A provides that a decision by a sheriff to retain the sample (and any information) for a further two years, or to destroy this data, can be appealed to a sheriff principal, whose decision is final. An appeal must be lodged within 21 days of the sheriff's decision.
182. Subsections (3), (9) and (10) of section 18A provide that the police must destroy the sample and information by the set destruction date. However, if on that date there is an outstanding application to the sheriff for an extension or an outstanding appeal against a decision of a sheriff which orders that the sample must be destroyed, or if the period for beginning any such appeal has not yet elapsed, the sample and information must be destroyed as soon as possible after timescales for beginning an appeal have elapsed without a challenge being brought, or after the due legal processes have been concluded, if their conclusion is that there is no extension to the destruction date.

**Arrested persons: drug testing and reference for assessment**

***Section 84 – Testing of arrested persons for Class A drugs***

183. **Section 84** inserts new sections 20A and 20B into the Criminal Procedure (Scotland) Act 1995.
184. Section 20A provides that the police may test a person for a relevant Class A drug if he or she has been arrested under suspicion of committing a relevant offence. The relevant offences are listed in subsection (8). A person who has been arrested under suspicion of committing any other offence which is not a relevant offence can also be tested at the discretion of a senior police officer if he or she believes that misuse of a Class A drug caused or contributed to the offence. Subsection (8) provides that the Class A drugs that will be tested for are cocaine and diamorphine (heroin). Subsection (2) provides that the police cannot test a person for a relevant Class A drug if that person has already given a sample for testing after they have been brought to a police station. However, subsection (5) sets out that a further sample can be taken if the original is not suitable for analysis, was insufficient or was destroyed during the testing process.
185. Subsection (3) sets out the conditions which must be met before a person is tested for a relevant Class A drug. A sample must also be taken or provided within 6 hours of that person being brought to a police station. To allow for the policy to be rolled out to particular parts of Scotland and in stages, a sample can only be taken if the Scottish Ministers have made an order by statutory instrument which states that mandatory drugs tests can be carried out in the area in which the police station is located. Such an order will be subject to negative resolution procedure of the Parliament.
186. Subsection (7) makes it an offence for an arrestee to refuse to comply with a drugs test under these powers if required to do so. The maximum penalties for committing this offence are set out in subsection (6). A constable is required to warn a person of this fact under subsection (4). When a person has been arrested for an offence (other than a relevant offence), a constable must also inform that person that a senior police officer has authorised him or her to take a sample, or to require that person to provide a sample. A person must also be told of the reasons why a senior police officer suspects that a Class A drug has been taken.
187. Section 20B supplements section 20A of the 1995 Act. Subsections (4) and (5) set out procedures which must be followed if a senior police officer decides that a person should be tested for a class A drug. Subsection (7) imposes a requirement to destroy a sample which has been taken under section 20A. Subsection (8) provides an exception



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to this, allowing retention of a sample for the purposes of prosecution under section 88 of this 2006 Act (for failing to attend and stay for the duration of assessments) – in this case the sample needs to be retained to be produced in court, but must be destroyed as soon as possible once it is not longer needed for any proceedings. Subsection (9) also sets down what the information gathered through a mandatory drugs test can be used for. Subsection (10) provides that the Scottish Ministers can add to or vary the lists of trigger offences and of relevant Class A drugs. Such an order will be made by statutory instrument and will be subject to affirmative resolution procedure.

***Section 85 – Assessment following positive test under section 20A of the 1995 Act***

188. This section provides that an individual who has tested positive for a relevant Class A drug will be required to attend a drugs assessment with a suitably qualified drugs assessor. A person will be required to remain at that assessment for its duration. Section 85 also provides that the purpose of the drugs assessment is to establish whether or not the person is dependent on or has a propensity to misuse Class A drugs and whether or not they may benefit from assistance or treatment.

***Section 86 – Requirements under section 85: supplementary***

189. This section sets out the duties which are imposed on the police when a person is required to attend a mandatory assessment into their drug misuse. A constable must inform a person where the assessment will take place and advise them that they are required to attend that place within 7 days and during certain times in order to obtain details of their appointment. A constable is also required to inform a person that a failure to attend the assessment centre to obtain details of their appointment, attend the assessment or remain there for its duration will constitute an offence (subsection (3)). These duties must be carried out before the person who is required to attend the assessment is released from custody.

***Section 87 – Date, time and place of assessment***

190. This section sets out the requirements on a drugs assessor when a person reports to the assessment location to receive details of their appointment. The drugs assessor is required to notify the person in writing of the date, time and place of the drugs assessment. Subsection (3) provides that a drugs assessor is required to provide the person with written notice of any change to the date, time or place of the assessment. The notification must be given to the person or sent by registered post or recorded delivery, and should also warn the person that they are liable to prosecution if they do not attend and remain for the duration of the assessment.

***Section 88 – Failure to comply with requirements under sections 85 and 86***

191. Subsection (2) provides that a person will have committed an offence if they fail to attend the assessment location to obtain details of their appointment, or fail to attend or to stay for the duration of a drugs assessment. A drugs assessor must notify the police if an offence has been committed.

***Section 89 – Guidance for the purposes of sections 85 to 88***

192. This section sets out that constables and drugs assessors carrying out functions under these powers must have regard to any guidance issued by the Scottish Ministers.

***Section 90 – Interpretation of sections 85 to 88***

193. This section sets out certain definitions of terms used in sections 85 to 88.

## **Offenders assisting investigations and prosecutions**

### ***Section 91 – Assistance by offender: reduction in sentence***

194. This section provides that the court, when sentencing accused persons who plead guilty in proceedings on indictment before that court and who have entered into a written agreement with a prosecutor (an “assistance agreement”) to provide assistance in relation to any investigation or prosecution, must take account of the nature and extent of that assistance.
195. Subsection (3) requires the court, if it passes a lower sentence on account of the assistance, to state that it has done so and what the sentence would otherwise have been. Subsection (5) provides that the court does not have to make such a statement if it would not be in the public interest (in which case the court must provide a written notice to the prosecutor and the accused that it has passed a lower sentence on account of the assistance and stating what the sentence would otherwise have been).
196. Subsection (4) provides that if the court, taking into account assistance given or offered under an assistance agreement, does not pass a lower sentence it must state its reasons for doing so. Subsection (6) makes similar provision to subsection (5): the court does not have to state why it did not reduce the sentence if it would not be in the public interest (in which case the court must provide a written notice to the prosecutor and the accused stating its reasons for not passing a discounted sentence).
197. Subsection (7) clarifies that this section applies also to offences for which there is a minimum sentence and also where the sentence is fixed by law, in determining the minimum period of imprisonment that a person must serve. Subsection (8) provides that the court's decision to take into account the assistance provided or offered by a person does not affect any other power it may have to take any other matters into account when determining that person's sentence, punishment part or other minimum term of imprisonment. Subsection (9) clarifies the meaning of certain references and includes provision allowing the assistance agreement to be made using electronic communications.

### ***Section 92 – Assistance by offender: review of sentence***

198. This section provides that where an offender has been sentenced, following conviction of an offence on indictment, and one of the conditions in subsection (2) applies, a prosecutor may refer the case back to the court for review, if the offender is still serving the sentence and the prosecutor considers it is in the interests of justice to do so. The conditions in subsection (2) are:
- that the offender received a discounted sentence on account of having entered into an assistance agreement with the prosecutor but then fails to give assistance in accordance with the agreement;
  - that the offender received a discounted sentence on account of having entered into an assistance agreement with the prosecutor and then gives or offers to give further assistance in pursuance of another assistance agreement;
  - that the offender did not receive a discounted sentence but then subsequently enters into an assistance agreement with the prosecutor.
199. Subsection (3) ensures that where a person was convicted of an offence for which the sentence was fixed by law, they must have pleaded guilty if their sentence is to be referred back to court for a review under this section. Subsection (4) provides that the prosecutor may refer a case falling under this section back to the court which passed the sentence or, if the sentence was passed on appeal, that it is referred back to the court of first instance, if the offender is still serving the sentence and the prosecutor thinks that it is in the interests of justice to do so.

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200. Subsection (5) provides that a person is still serving a sentence for the purposes of subsection (4)(a) if they have been released from prison early (whether on licence or unconditionally) under Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993. Accordingly, a person could, for example, be recalled to court to face the consequences of renegeing on an assistance agreement in circumstances where they have been released on licence into the community. Subsection (15) makes clear that where an offender has entered into an assistance agreement and has been fined, that fine, where it has not been paid in full, may be referred to a court for review if any of the conditions set out in section 92(2) subsequently apply.
201. Subsection (6) provides that, where possible, any case which has been referred back under this section is to be considered by the judge who passed the sentence or, if the sentence was passed on appeal, by the judge who heard the case at first instance.
202. Subsection (7) gives the court a power to substitute a greater sentence where it considers the person has failed to provide the agreed assistance (not exceeding the sentence it could have passed but for the assistance agreement). Where a person has entered into an assistance agreement for the first time or a further assistance agreement, subsection (9) gives the court a power to take that into account and to reduce the individual's sentence accordingly. Subsection (11) gives a right of appeal to the offender (with leave of the High Court) and to the prosecutor in respect of any decision of the court in reviewing the sentence.
203. Subsection (12) requires the court, in passing a lesser sentence under subsection (9) or on appeal under subsection (11), to state that it has done so in consequence of further assistance or assistance given or offered for the first time. Subsection (13) provides that the court need not make such a statement where it does not consider it to be in the public interest, but in those circumstances it must give written notice of the fact that it has passed a lesser sentence on account of the assistance, to the offender and the prosecutor.

***Section 93 – Proceedings under section 92: exclusion of public***

204. This section provides that a court, in dealing with proceedings in respect of a sentence review under section 92, can make an order to exclude people from the court who, in its opinion, do not have a sufficiently direct interest in the proceedings to justify their presence, and to prohibit publication of any matter relating to the proceedings. The court may only make such an order if it considers that it is necessary to protect the safety of any person and that it is in the interests of justice. The court cannot, however, exclude the judge, an officer of the court, the prosecutor and the other party to the proceedings as well as counsel or solicitor for that other party.

***Section 94 – Section 92: further provision***

205. Subsections (1) and (2) provide an order-making power for the Scottish Ministers to make provision in relation to the procedure to be followed in proceedings for sentence review under section 92. An order may apply with modifications the provisions governing appeals from solemn proceedings set out in Part VIII of the Criminal Procedure (Scotland) Act 1995 or modify that Part of the Act. Any such order is to be made by negative resolution procedure in the Scottish Parliament.
206. Subsections (3) and (4) provide an order-making power for the Scottish Ministers to make provision as to how a period served in custody, a period during which a person is released on license under Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993, or a period during which a person is on unconditional release under Part 1 of the 1993 Act, are to affect the calculation of periods of time under the 1993 Act as they apply to a revised sentence imposed under either section 92(7), (9) or (12) of the Act. In making any such order the Scottish Ministers may modify the 1993 Act. Any such order is to be made by negative resolution procedure in the Scottish Parliament.

**Section 95 – Sentencing: consideration of undisclosed information**

207. This section provides that when a person has been convicted of any offence, the court in sentencing that person can take into account information contained in a report, including a report provided electronically, from a constable or other officer of an organisation which has the function of investigating offences, about assistance given by that person in relation to another criminal investigation or prosecution. This section applies to assistance provided otherwise than under an assistance agreement with the prosecutor.
208. With the agreement of the offender, the information will be made available by the prosecutor to the offender, his or her counsel or solicitor and the court. However, if the offender does not wish to disclose the information to his or her solicitor or counsel then it may be provided by the prosecutor only to the offender and the court. Where the court takes the information about assistance into account, it must not disclose the existence of the report or whether it has passed a lesser sentence on account of the assistance given.

**Section 96 – Appeals etc.: undisclosed information**

209. This section provides that confidentiality of undisclosed information should apply in all forms of appeal/reference back to the High Court. Subsection (1) sets out the review proceedings to which this section applies and covers all forms of review available in the High Court.
210. Subsection (2) makes clear that the section applies to the preliminary consideration by a judge of the High Court as to whether leave to appeal should be granted.
211. Subsection (3) concerns the case of any offender who has been sentenced in a court of first instance with the benefit of undisclosed information (sometimes known as “text” information), and who then appeals against the conviction, conviction and sentence or sentence alone. It confirms that the High Court and the Clerk of Justiciary must not disclose to any person other than the prosecutor, the offender and (with his or her consent) the offender’s counsel or solicitor the existence or content of that information. It also provides that the High Court and Clerk of Justiciary must not disclose to any person whether the information given resulted in a lower sentence in the first instance court.
212. Subsection (4) provides for cases which do not fall within subsection (3). It is designed to cover the case of an aggrieved co-accused who has not given “text” information when his or her fellow accused has done so. As a result the co-accused may receive a heavier sentence than the offender sentenced with the benefit of “text” information. When such a person appeals, it is possible that the “text” information given by his or her fellow accused or knowledge of its existence may become available to the High Court. Subsection (4) therefore provides that where, in any situation not covered by subsection (3), the High Court or the Clerk of Justiciary becomes aware of “text” information, it should not disclose to any person the existence or content of that information or its impact on sentence.
213. Subsection (5) makes clear that provisions in the 1995 Act which require disclosure of information in various circumstances (for example, in relation to disclosure of the first instance judge’s written report in respect of a case to an appellant or his solicitor) do not apply in such a way as to enforce disclosure of “text” information which would be in breach of the restrictions on disclosure placed on the High Court and Clerk of Justiciary as set out in subsections (3) and (4). In relation to “text” information, therefore, the specific prohibitions in subsections (3) and (4) take precedence over the specified provisions requiring disclosure in the 1995 Act. Subsection (6) clarifies that these limitations on disclosure do not apply to prevent any disclosure to the Crown Agent or the Scottish Criminal Cases Review Commission. It does, however, impose on the Crown Agent and SCCRC a prohibition on further disclosure of the existence or content of the “text” information and its impact on sentence, albeit placing beyond doubt that this does not block disclosure by either body to the High Court.

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214. Subsection (7) provides that the High Court in considering an appeal has the same powers to clear the court of all but the parties, their representatives and an officer of the court and to prohibit the publication of information about the proceedings as the judges reconsidering a sentence discount under section 92 as set out in section 93. This is without prejudice to any other power which the court has to exclude any person from the court or to prohibit publication about the case.
215. Subsection (8) introduces a new order-making power under which Scottish Ministers may make further provision to ensure that this section is given full effect. This may include provision modifying the 1995 Act. The order-making power is subject to negative resolution procedure in the Scottish Parliament.

## **Conditional immunity from prosecution**

### ***Section 97 – Investigation and prosecution of crime: conditional immunity from prosecution***

216. This section allows the prosecutor to grant a person conditional immunity from prosecution by giving that person a notice in writing known as a conditional immunity notice. If a conditional immunity notice is given to a person, that person may not be prosecuted for the offence or any offence of a description specified in the notice, and any proceedings for those offences which have already commenced when the notice is given must be discontinued.
217. Subsection (3) provides that the notice must specify conditions to which its application is subject, and it may specify the circumstances in which it does or does not apply. If a conditional immunity notice ceases to have effect, the prosecutor must give notice to the person by the issue of a written cessation notice as provided for in subsection (4). The cessation notice must state when and why immunity ceased.
218. Where a cessation notice is issued and the person is to be subject to criminal proceedings, subsection (5) provides that, if the person was given the conditional immunity notice after his or her first appearance on petition in respect of the offence, that person is to be treated as not having appeared on petition and accordingly, the time limits in section 65(1) of the Criminal Procedure (Scotland) Act 1995 apply from the first appearance of the person on petition after the giving of a cessation notice. Subsection (6) provides that other statutory time limits for the bringing of a prosecution will run from the date the cessation notice is issued if the conditional immunity notice was issued within the original time limit for bringing the prosecution. Similarly, subsection (7) provides that where proceedings timeously commenced are discontinued following the issuing of a conditional immunity notice and a cessation notice is subsequently issued, the statutory time limit for bringing the prosecution is to run again from the date the cessation notice is issued.
219. Subsection (8) applies in circumstances where a conditional immunity notice has ceased to have effect and proceedings are taken against the person to whom the conditional immunity notice was given. In those circumstances this subsection provides that the fact that communication has taken place between the prosecutor or anyone else and the person to whom the notice was given does not constitute a ground on which a court can decide that proceedings should not have been brought or continued.
220. Subsections (9) and (10) make provision in relation to notification by the person given a conditional immunity notice of any change of address for the purposes of giving a cessation notice. The procedure for giving a conditional immunity notice and cessation notice is set out in subsections (11) and (12). Subsection (13) makes provision for the use of electronic communications in the giving of notices under this section.

## **Enforcement of Sea Fisheries (Shellfish) Act 1967**

### ***Section 98 – Enforcement of Sea Fisheries (Shellfish) Act 1967***

221. This section makes provision relating to the enforcement of restrictions imposed by, or regulations made by, an order under section 1 of the Sea Fisheries (Shellfish) Act 1967 (a “regulating order”).
222. Subsection (1) amends the Sea Fisheries (Shellfish) Act 1967 to insert new sections 4A to 4D, setting out the powers exercisable by British sea-fishery officers (principally officers of the Scottish Fisheries Protection Agency (SFPA)) for the purpose of enforcing restrictions and regulations made by or under a regulating order, together with supplementary provisions. These powers are similar to those already available to SFPA for the enforcement of other fisheries legislation such as the Inshore Fishing (Scotland) Act 1984 and orders for the enforcement of Community restrictions and obligations made under section 30(2) of the Fisheries Act 1981. Section 7(2) and (3) of the Sea Fisheries Act 1968 gives the Scottish Ministers power to appoint any person as a British sea-fishery officer, and to limit this appointment by reference to particular matters, to a particular area or to a particular order or class of order. In appropriate circumstances, the Scottish Ministers may appoint officers employed by the grantees of regulating orders to be British sea-fishery officers for the purposes of enforcing their respective orders, giving them access to these new enforcement powers.
223. Subsection (3) amends section 15 of the Sea Fisheries Act 1968 to make it clear that the references in sections 3 (effect of grant of right of regulating a fishery), 4A and 4B of the Sea Fisheries (Shellfish) Act 1967 to restrictions imposed by, or regulations made by, an order under section 1 of that Act include references to restrictions imposed by, or regulations made by, the grantees of the order with the consent of the Scottish Ministers.

## **Part Four: General**

### ***Section 100 – Equal opportunities***

224. This section requires all persons (including organisations) who carry out their functions under this Act to do so in a way which encourages equal opportunities and, in particular, the observance of the equal opportunities requirements. “Equal opportunities” means the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions. “Equal opportunity requirements” means the requirements of the law for the time being relating to equal opportunities.

### ***Section 103 – Subordinate legislation***

225. This section provides that the powers to make orders and regulations that the Act confers on the Scottish Ministers are exercisable by statutory instrument, and sets out the parliamentary procedure which these statutory instruments are, in each case, subject to.

### ***Schedule 1: the Scottish Police Services Authority***

226. **Paragraph 2** establishes that the Authority is independent of the Crown.
227. **Paragraph 3** sets out the membership of the Authority. Appointments are to be made by the Scottish Ministers. There are three different categories of member: police force members, who must be serving chief constables in a Scottish force; police authority members, who must be conveners of unitary police authorities or joint police boards; and lay members, who cannot be police officers or members of local authorities. The Board of the Authority will be appointed by the Scottish Ministers and must normally

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comprise between 7-10 people including a lay convener and, in addition, at least 2 of each category of member. However, under sub-paragraph (5), the requirement for there to be at least 2 members in each category falls if, in the opinion of the Scottish Ministers, adherence to this requirement would prevent or impede the effective working of the Board (for example, if it were not possible to find more than one police authority/board convener or more than one chief police officer willing to serve on the Board). Sub-paragraph (8) provides that the requirement for there to be at least 2 members from each category also falls if those responsible for nominating members fail to comply with a request for nominations from the Scottish Ministers within a reasonable time. Police authority and police force members may be appointed by Scottish Ministers only if they are nominated for appointment by their representative bodies. Constables of police forces in the United Kingdom and Islands, members of local authorities and members of the Authority's staff are disqualified from appointment as a lay member of the Authority.

228. Under sub-paragraphs (11) and (12), the Scottish Ministers may vary the overall size of the Board by order made by statutory instrument subject to negative resolution procedure, after having consulted the Authority and people who represent the interests of chief constables, unitary police authorities and joint police boards.
229. [Paragraph 4](#) requires the members of the Board of the Authority to elect one of their number to be the deputy convener.
230. [Paragraph 5](#) provides that each member may be appointed for such period as the Scottish Ministers may determine and may be re-appointed for a single further term also for such period as the Scottish Ministers determine. It also makes provision for resignations from the Board and establishes that a police member or local authority member ceases to be a member of the Board if they cease to be a chief constable or a police authority/board convener, respectively.
231. [Paragraph 6](#) empowers the Scottish Ministers to remove a member of the Board in any of a number of specified circumstances.
232. [Paragraph 7](#) imposes a duty on every member of the Board to ensure that the Authority is run efficiently and effectively.
233. Under paragraph 8, the Scottish Ministers may determine rates of remuneration, allowances, expenses, pensions and gratuities which shall be payable by the Authority to present or former lay members of the Board, including the convener. Such payments may include compensation where a person ceases to be the convener or a lay member other than on the completion of his or her term of appointment, but only if the Scottish Ministers consider that there are special circumstances which make it right to do so. Sub-paragraph (7) establishes that no remuneration, allowances or expenses can be made to police or local authority members of the Board.
234. [Paragraph 9](#) requires there to be a Chief Executive who will report to the Board of the Authority. The Scottish Ministers will appoint the first holder of this post, after consulting people who represent the interests of chief constables, unitary police authorities and joint police boards, and also the convener of the Authority (if by then there has been an appointment to that post). Subsequent Chief Executives are to be appointed by the Board of the Authority subject to the approval of the Scottish Ministers. The Scottish Ministers will also determine the remuneration, allowances, expenses, pensions and gratuities which shall be payable by the Authority to the Chief Executive.
235. [Paragraph 10](#) sets out provisions about the staffing of the Authority. The Authority's staff may be employees or may be police constables or other persons on secondment.
236. [Paragraph 10](#) provides that police constables on secondment to the Authority (other than those appointed as members of the Agency – see paragraph 7 of schedule 2) will be on relevant service under section 38A(1)(bd) of the Police (Scotland) 1967 Act. Schedule 6

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paragraph 1(4) and (5) makes the relevant consequential amendments to the provisions of the 1967 Act to set up the “relevant service” status of the seconded officers. In particular and in line with equivalent provisions in the 1967 Act for constables who are on “relevant” service with other bodies, the amendments provide that the constables continue to be constables during the period of their secondment and are treated for particular purposes as constables of their home force. The seconded constables are responsible to the Authority and their pay and conditions are to be set by the Authority, subject to the approval of the Scottish Ministers. Seconded persons who fall within sub-paragraph (4) (e.g. other UK police officers) are appointed on terms and conditions determined by the Authority and are under the direction and control of the Authority. Sub-paragraph (9) provides that in making any determination as to terms and conditions of seconded constables or persons the Authority can refer to regulations made under section 26 of the 1967 Act or section 23 of this Act.

237. Sub-paragraph (10) provides an order-making power for the Scottish Ministers to apply and modify provisions of the Police (Scotland) Act 1967 and any regulations made under it to constables seconded to the Authority who are not police members of the Agency. Before making any such order which is in respect of matters mentioned in section 61(1) of the Police Act 1996 the Scottish Ministers must send a draft to the Police Advisory Board for Scotland and consider any representations made by them.
238. [Paragraph 11](#) empowers the Authority to arrange pension schemes for its staff, other than the Chief Executive or the Director General or Deputy Director General of the Agency, for whom specific provision is made elsewhere in schedules 1 and 2.
239. [Paragraph 12](#) empowers the Board of the Authority to set up committees, and the committees to establish sub-committees. Each committee and sub-committee must be chaired by a member of the Board of the Authority, but may include people who are not members of the Board. Such people may be paid remuneration, allowances and expenses unless they are police officers or members of local authorities.
240. [Paragraph 13](#) empowers the Authority to decide on procedural matters, including the quorum, for the Board, its committees and sub-committees. Determinations of the quorum can only be made at a meeting of the Board attended by the convener and at least 4 other members of the Board.
241. [Paragraph 14](#) entitles the Board of the Authority to delegate functions either to committees or to staff, and the committees to delegate to either sub-committees or staff. The sole exception is the function of issuing criminal record certificates under Part V of the Police Act 1997. This function cannot be delegated to a committee or sub-committee.
242. [Paragraph 15](#) gives the Authority flexibility in the way it carries out its functions, by empowering it to do anything which appears necessary or expedient or conducive to these functions. In particular, it may enter into contracts and may, subject to the consent of the Scottish Ministers, acquire or dispose of property (including accepting gifts or loans), borrow money or form companies (either alone or together with another party).
243. [Paragraph 16](#) requires the Authority to keep accounts both for itself and for the Agency, and to prepare a statement of accounts at the end of each financial year, whose form and content must meet any specification issued by the Scottish Ministers. The Authority must send a copy of the accounts to the Scottish Ministers who must in turn send a copy to be audited by the Auditor General of Scotland.

***Schedule 2: Membership of the Scottish Crime and Drug Enforcement Agency***

244. [Section 12\(1\)\(a\)](#) provides for the appointment of a Director General and sub-paragraphs (1) and (2) of paragraph 1 of this schedule provide that the first Director General should be the Director of the SDEA in post when the Act comes into force and that the continuation of the current Director’s appointment should be until the expiry of



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the existing term. Subsequent Director Generals will be appointed by the Authority and sub-paragraph (3)(b) provides that the Director General may hold office for a term of three years and sub-paragraph (4) enables this term to be extended by the Authority by a single period not exceeding three years. Sub-paragraph (5) provides that a member of the Authority may not hold the office of Director General and sub-paragraph (6) makes it clear that only persons who already hold the rank of Deputy Chief Constable or who are eligible to apply for a post of that rank and satisfy any requirements Scottish Ministers may set out in regulations may be appointed to the post of Director General. An appointment to the post is deemed to be a promotion to the rank of Deputy Chief Constable by virtue of sub-paragraph (7). Sub-paragraph (8) gives the Scottish Ministers the power to change the rank of the Director General's post by order made by statutory instrument subject to negative resolution procedure.

245. [Section 12\(1\)\(b\)](#) provides for the appointment of a Deputy Director General and sub-paragraphs (1) and (2) of paragraph 2 provide that the first Deputy Director General should be the Deputy Director of the SDEA in post when the Act comes into force and that the continuation of the current Deputy Director's appointment should be until the expiry of the existing term. Subsequent Deputy Director Generals will be appointed by the Authority and sub-paragraph (3)(b) provides that the Deputy Director General may hold office for a term of three years and sub-paragraph (4) enables this term to be extended by the Authority by a single period not exceeding three years. Sub-paragraph (5) provides that a member of the Authority may not hold the office of Deputy Director General and sub-paragraph (6) makes it clear that only persons who already hold the rank of Assistant Chief Constable or who are eligible to apply for a post of that rank and satisfy any requirements Scottish Ministers may set out in regulations may be appointed to the post of Deputy Director General. An appointment to the post is deemed to be a promotion to the rank of Assistant Chief Constable by virtue of sub-paragraph (7). Sub-paragraph (8) gives the Scottish Ministers the power to change the rank of the Deputy Director General's post by order made by statutory instrument subject to negative resolution procedure.
246. [Paragraph 3](#) sets out the circumstances in which the appointment of the Director General or the Deputy Director General can be terminated or suspended. Sub-paragraph (1) gives the Authority the power to dismiss the Director General or Deputy Director General or require them to resign or retire on the grounds of efficiency, effectiveness or misconduct.
247. [Paragraph 4](#) sets out the common appointment provisions in relation to both the Director General and Deputy Director General. These are that the post holders are appointed subject to such terms and conditions as Scottish Ministers may specify and on appointment become members of staff of the Authority. If the Director General or Deputy Director General is seconded from a Scottish police force they will be engaged on relevant service within the meaning of the Police (Scotland) Act 1967. If they are not so seconded they will on appointment be appointed to the office of constable of the Agency and will require to make a declaration as determined by Scottish Ministers in a similar manner to the directly recruited police members. Sub-paragraph (1) ensures that in setting the terms and conditions of appointment for the Director General and Deputy Director General of the Agency and determining their remuneration, the Authority is subject to any order which is made by Scottish Ministers under paragraph 9(1) of schedule 2.
248. [Paragraph 6](#) provides that the Deputy Director General may carry out the functions of the Director General during any absence, incapacity or suspension from duty or during any vacancy in the office of Director General.
249. [Paragraph 7](#) sets out that police members of the Agency will be appointed by the Authority after consultation with the Director General and may either be a secondee in accordance with paragraph 10(2) or 10(3) of schedule 1 or someone who is appointed to a police rank in the Agency in line with the Agency's qualification for appointment

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regulations. Sub-paragraph (3) provides that a constable who is seconded will be on relevant service for the purposes of section 38A(1)(be) of the 1967 Act and will remain a member of staff of the Authority. Sub-paragraph (4) provides that a person who is seconded to the Authority from those police forces listed at schedule 1, paragraph 10(4) and appointed to the Agency will remain a member of staff of the Authority, will be appointed to the office of constable of the Agency and will require on appointment to make a declaration concerning the proper discharge of the duties of the office of constable.

250. Sub-paragraph (5) makes special provision for the police members of the Agency who are directly recruited. In particular these members are appointed to the office of constable of the Agency and they must make a similar declaration to that made by Scottish constables on appointment under section 16 of the 1967 Act. Sub-paragraph (6) provides that the directly recruited constables will have all the powers and privileges of a constable throughout Scotland. Sub-paragraph (7) ensures that in setting the terms and conditions of appointment for police members of the Agency, the Authority is subject to any order which is made by Scottish Ministers under paragraph 9(1) of schedule 2.
251. [Paragraph 8](#) makes provision for the Authority to appoint support staff members to the Agency. The support staff members will be employees of the Authority and continue to be members of staff of the Authority, notwithstanding that they are also members of the Agency.
252. Under paragraph 9, the Scottish Ministers will have power by order made by statutory instrument to apply appropriate provisions of the 1967 Act or subordinate legislation made under it to the Director General, Deputy Director General and police members of the Agency. Sub-paragraph (2) provides that before making any such an order in respect of matters mentioned in section 61(1) of the Police Act 1996, Scottish Ministers must circulate a draft to the Police Advisory Board for Scotland and consider any comments they may make on the draft.

***Schedule 3: Transfers of Staff and Property***

253. [Paragraphs 2 – 4](#) set out the arrangements for the transfer to the Authority and the Agency of constables and other (“support”) staff working in the existing common services and parts of the Scottish police forces whose functions are to be taken on by those organisations.
254. Under paragraph 2, the Scottish Ministers may make a “staff transfer order” to effect this transfer. Such an order will provide for the transfer of constables who are currently on secondment to the common services and support staff on secondment from police authorities or joint police boards to the Authority; and for the transfer of staff on central service from the Scottish Ministers to the Authority. The order will also specify which constables and support staff transferred will also become members of the Agency.
255. Once the Scottish Ministers have made a staff transfer order, sub-paragraphs (4)-(8) provide for duties to be placed on the former “employer” (including police authority or joint police board for constables of a police force) of transferred staff, to set out the detail of their own staff transfer arrangements including the terms and conditions for the constables who are to be seconded to the Authority.
256. [Paragraph 3](#) requires the Scottish Ministers to consult the Authority and, where relevant, the Director General of the Agency before making a staff transfer order. Likewise, sub-paragraph (2) requires police authorities and joint police boards to consult the Authority and, where relevant, the Director General of the Agency before making a scheme in connection with transfer of their staff.
257. [Paragraph 4](#) makes a number of provisions concerning employees of police authorities or joint police boards who are subject to a staff transfer order. Sub-paragraphs (2)-(4) establish that contract rights and obligations transfer from the former employer to the

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Authority on the transfer date. Sub-paragraph (5) provides that employed staff may object in advance of their contract being transferred to the Authority, in which case their contract is terminated at the end of the day before the intended transfer day. This termination will not be treated as dismissal of a person. Sub-paragraph (7) provides that an employee can only terminate their contract of employment by virtue of the staff transfer if they can show that the change of employer was both significant and detrimental.

258. Paragraph 6 makes similar provision in respect of transfer to the Authority of property, rights and liabilities (including rights and liabilities that may arise from ongoing legal proceedings). This transfer will be effected by a transfer scheme made by the Scottish Ministers after consultation with the Authority and those police authorities or joint police boards with property, rights or liabilities to be transferred.

***Schedule 4: the Police Complaints Commissioner for Scotland***

259. Paragraph 1 outlines the status of Commissioner, confirming that the Commissioner is not a servant or agent of the Crown and does not therefore have the status, immunities or privileges of such.
260. Paragraph 2 provides for cases in which someone would be disqualified from holding the post of Commissioner. This would include someone who was an MP, MSP, MEP or member of the House of Lords, current and former police officers and police staff and employees of the Serious Organised Crime Agency and its predecessors.
261. Paragraphs 2 to 5 lay out the terms and conditions of appointment for the position of Commissioner, the reasons for which a Commissioner can be removed from office, and arrangements regarding the salary, allowances and pensions.
262. Paragraph 6 allows the Scottish Ministers to appoint an acting Commissioner to carry out the functions of the Commissioner should the position fall vacant. The paragraph also sets out why someone might be disqualified from being appointed acting Commissioner and details regarding the terms and conditions of such an appointment.
263. Paragraph 7 allows the Commissioner to appoint staff and set the terms and conditions for those staff, including the making of pension contributions. The Commissioner can also make arrangements for the payment of pensions, etc. to anyone who ceases to be a member of staff, including as compensation for loss of employment.
264. Paragraph 8 allows the Commissioner to do anything which appears necessary in order to carry out the Commissioner's functions. This includes entering into contracts.
265. Paragraphs 9 and 10 allow the Scottish Ministers to pay the salary and allowances of the Commissioner (or an acting Commissioner) and any other sums that they consider necessary to allow the Commissioner to carry out his or her functions. Duties are placed on the Commissioner who must keep proper records, prepare annual accounts and send a copy of those accounts to the Auditor General for Scotland for auditing.
266. Paragraph 11 places a duty on the Commissioner to provide the Scottish Ministers with any information and documents they consider necessary to satisfy themselves that the functions of the Commissioner are being carried out efficiently and effectively.

***Schedule 5: Section 53(2)(B): Relevant Events Etc.***

267. This schedule sets out the relevant events and the corresponding prescribed information that must be provided when each relevant event occurs for the purposes of section 53(2) (b), and also provides definitions of the terms used.

**Schedule 6: Modifications of Enactments**

268. Part 1 of the schedule makes consequential amendments to various Acts. It amends the relevant service provisions in sections 38 and 38A of the Police (Scotland) Act 1967 that relate to the status of the seconded officers to the Authority and the Agency. It changes two out-of-date references to the Royal Ulster Constabulary, which become references to the Police Service of Northern Ireland. It makes a number of minor typographical corrections to existing provisions of the 1967 Act and also a minor typographical correction to the Criminal Justice Act 1988. It also provides for a tidying up repeal of those sections of the 1967 Act and the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 which refer to two-tier penalties for assaulting a police officer. Two-tier penalties were abolished in 1982 but provisions were not removed from these Acts, despite having no residual effect.
269. **Paragraph 4** corrects an error in section 18 of the Criminal Procedure (Scotland) Act 1995 following its amendment by section 56 of the Criminal Justice (Scotland) 2003. At the time section 18(6) was amended in 2003, consequential amendments should also have been made to subsections (3) and (4). The amendment addresses this and provides that saliva samples taken under section 18(6A) of the 1995 Act must be destroyed if a person is not subsequently convicted of an offence nor receives an order under section 246(3) of the 1995 Act. (As noted in the notes to section 83 above, the police will be able to retain saliva samples and other DNA samples for a certain period of time, provided the circumstances set out in new section 18A of the 1995 Act apply.)
270. **Paragraph 5** makes consequential amendments to sections 59 – 63 of the Police Act 1996 in respect of the Scottish Police Federation, the Police Negotiating Board for the United Kingdom and the Police Advisory Board for Scotland to take account of the establishment of the Scottish Police Services Authority and the Scottish Crime and Drug Enforcement Agency. The main purpose of these amendments is to extend the jurisdiction of the various bodies to include the Authority and the Agency; and to ensure that constables seconded to the Authority and police members of the Agency are treated in the same way as constables serving in police forces.
271. **Paragraphs 6, 8 and 9** make consequential amendments to Part III of the Police Act 1997, the Regulation of Investigatory Powers Act 2000 and the Regulation of Investigatory Powers (Scotland) Act 2000 to take account of the creation of the Scottish Crime and Drug Enforcement Agency (SCDEA) to replace the SDEA, and also to provide the Director General of the SCDEA with the powers to authorise the use of intrusive surveillance and property interference in relation to SCDEA operations. They also amend the rules for granting authorisations in both pieces of legislation to reflect the re-introduction of the rank of Deputy Chief Constable (DCC) by the Criminal Justice (Scotland) Act 2003.
272. **Paragraph 7** adds the Authority to the list of devolved public bodies to which the Ethical Standards in Public Life (Scotland) Act 2000 applies.
273. **Paragraph 10** adds the Police Complaints Commissioner for Scotland (PCCS) to the list of bodies over which the Scottish Public Services Ombudsman has jurisdiction. This means that the Ombudsman will be able to review any complaints of maladministration or service failure made against the Police Complaints Commissioner. This paragraph also amends the Scottish Public Services Ombudsman Act 2002 to ensure that the PCCS is the only body with responsibility for non-criminal complaints made against police organisations.
274. **Paragraph 11** adds the Police Complaints Commissioner for Scotland and the Scottish Police Services Authority (the latter only in respect of information relating to the services they provide under section 3(2)) to the list of Scottish public authorities to which the Freedom of Information (Scotland) Act 2002 applies.

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275. [Paragraph 12](#) adds the Authority to the list of specified authorities to which the Public Appointments and Public Bodies (Scotland) Act 2003 applies.
276. [Paragraph 13](#) substitutes references to the SDEA within the Serious Organised Crime and Police Act 2005 with references to SCDEA and in addition ensures that those previously covered by the protection of witness provisions in the Serious Organised Crime and Police Act 2005 i.e. the Director of SDEA and those under his or her direction and control, continue to be covered as well as adding the Director General of the SCDEA and those under his or her direction and control.
277. [Part 2](#) of schedule 6 makes an amendment to subordinate legislation under the Regulation of Investigatory Powers (Scotland) Act 2000, consequential on the changes to that Act that are made by paragraph 9 of part 1 of schedule 6.