These notes relate to the Criminal Justice and Licensing (Scotland) Act 2010 (asp 13) which received Royal Assent on 6 August 2010

CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3
- Criminal Procedure

Section 52
– Prosecution of children

253. Section 52 implements in part the Scottish Law Commission's Report on Age of Criminal Responsibility, published in 2002.

254. This section implements Recommendation 2 of the Scottish Law Commission's Report by inserting a new section 41A into the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") prohibiting the prosecution of any child under the age of 12. The age limit applies at the commencement of the prosecution. In addition to the SLC's recommendation, subsection (2) prevents persons over the age of 12 being prosecuted for an offence they committed under that age.

255. The prosecution of children between 12 and 16 would remain subject to the existing statutory provisions, requirements of the European Convention on Human Rights, and the current practices and directions of the Lord Advocate and the Crown Office. The main statutory provision limiting prosecution of children under 16 is section 42(1). This provides that no child under 16 is to be prosecuted except on the instructions of the Lord Advocate or at his instance and that any prosecution is to take place in the High Court or a sheriff court. Subsection (3) makes consequential amendments to section 42 so that it will apply to children aged between 12 and 16.

256. Subsection (4) makes a consequential amendment to section 234AA(2)(b), which provides that the criminal courts can make an Antisocial Behaviour Order only where at the time when he committed the offence, the offender was at least 12 years of age. In light of the limit on prosecution established by section 41A, this provision is no longer necessary and is repealed.

257. The existing rule in section 41 of the 1995 Act that it shall be conclusively presumed that no child under the age of eight years can be guilty of any offence is retained.

Section 53
– Offences: liability of partners

258. Section 53 of the Act provides that where a partnership is guilty of a "corporate offence" that has been committed with the consent or connivance of a partner or attributable to the partner's neglect that partner will also be guilty of the offence. "Corporate offences"

are those where in similar circumstances statute provides for individual liability for directors of a body corporate.

259. The effect is to put partners of partnerships (including those who purport to be partners of partnerships) in the same position as directors of bodies corporate in relation to statutory criminal offences. Similar provision has already been made under the Limited Liability Partnerships (Scotland) Regulations 2001 in relation to partners of Limited Liability Partnerships, so these are excluded from the operation of section 53. As some statutes have already made provision for individual liability of partners, subsection (4) disapplies the new provisions where such provision has already been made.

Section 54
– Witness statements

260. Section 54
allows the Crown at any point, both before commencement and during the trial, to provide to any witness who is likely to be cited a copy of their statement or to give a witness access to it at a reasonable time and place. "Statement" is defined at section 54(3) with reference to section 262 of the Criminal Procedure (Scotland) Act 1995.

Section 55
- Breach of undertaking

261. Under section 22 (liberation on undertaking) of the 1995 Act an accused person can be released by the police on the undertaking that they will appear at court at a later date and that they will comply with certain conditions. The conditions which can be attached to a police undertaking are the same as those which can be applied to a bail order granted by a court and include, for example, a requirement not to commit further offences.

262. Section 55
adds new sections 22ZA and 22ZB to the 1995 Act. It makes provision in relation to offences committed while a person is subject to a police undertaking. These provisions are broadly similar to those that apply where an accused person commits an offence while liberated on bail.

263. Section 22ZA(1) provides that a person commits an offence where they fail to appear at court as required under an undertaking and also where they fail to comply with a condition attached to that undertaking. Subsection (2) provides for the applicable penalty levels for section 22ZA(1) offences. Subsections (3) (read with subsection (4)) provides that where a person subject to an undertaking commits a further offence, the fact that they have breached the undertaking is not to be treated as a separate offence, but is to be taken account of (along with the other listed factors in subsection (4)) by the court in determining the sentence for the further offence.

264. Subsections (5) to (7) of section 22ZA build upon subsections (3) and (4). They allow the court to consider any previous offence committed in another EU jurisdiction that is considered by the court to be equivalent (in that jurisdiction) to an offence of failing to comply with a condition attached to an undertaking.

265. Section 22ZB makes provision for evidential and procedural matters in relation to offences committed or dealt with under section 22ZA.

Section 56
- Grant of warrants for execution by constables and police members of SCDEA

266. Section 56
clarifies the law on the scope of a sheriff's jurisdiction to grant a warrant at common law to police members of the SCDEA and constables from a police force not within the area of the sheriff's jurisdiction.

267. This section provides that a sheriff or justice of the peace does not lack power or jurisdiction to grant a warrant for execution by a constable or a police member of the Scottish Crime and Drug Enforcement Agency simply on the basis that the constable or police member is not a constable of a police force for a police area which is within the sheriff's or justice's sheriffdom.

Section 57
- Bail review applications

268. The prosecutor or the accused can apply for review of a decision to grant, or to refuse to grant, an application for bail or for review of the conditions attached to the grant of bail, e.g. for a change of address.

269. This section amends sections 30 and 31 of the 1995 Act to remove the requirement to hold a hearing in circumstances where an application for review is made but only when the other party consents to, and the court considers it appropriate to grant, the application. Section 30 is also amended to make it clear that an application for review by the accused must be intimated to the prosecutor.

Section 58
- Bail condition for identification procedures etc.

270. Section 58
introduces a new standard bail condition. This new condition provides that whenever reasonably instructed by a constable to do so, a person released on bail should participate in an identification parade or other identification procedure, and allow any print, impression or sample to be taken from him or her. Although such a condition is not currently a standard condition, under section 24(4)(b) of the 1995 Act, the court may currently impose a further condition to this effect.

Section 59
- Bail conditions: remote monitoring requirements

271. Section 59
repeals sections 24A to 24E of the Criminal Procedure (Scotland) Act 1995. Those provisions enable the court to impose an electronically monitored movement restriction as a condition of bail (electronic tagging) as a direct alternative to custodial remand in certain circumstances. This repeal will ensure that the court cannot impose an electronically monitored movement restriction condition as a condition of a bail order.

Section 60
- Prosecution on indictment: Scottish Law Officers

272. This section amends the procedures contained in the 1995 Act for the raising of indictments in name of the Lord Advocate.

273. Section 287 of the 1995 Act sets out transitional arrangements concerning the raising of prosecutions on indictment for the situation where a Lord Advocate resigns or dies and where there is a gap in time before a new Lord Advocate is appointed. In this case indictments are raised in the name of the Solicitor General. Section 287 makes provision for circumstances where both offices of the Lord Advocate and Solicitor General are vacant, to include where both Law Officers demit office on the same day.

274. Section 64 of the 1995 Act, as existing prior to amendment by this Act, provides that all prosecutions before the High Court of Justiciary or before the Sheriff sitting with a jury shall proceed in name of Her Majesty's Advocate.

275. Subsection (
2

) amends section 64 of the 1995 Act (and subsection (5) amends Schedule 2 to the 1995 Act) to provide that indictments are to be libelled at the instance of "Her Majesty's Advocate", removing any requirement for the individual Lord Advocate to be named, personally. Subsection (4)(a)(i) makes a consequential amendment to section 287(1) of the 1995 Act in relation to the continuation of indictments raised by the Lord Advocate during any period where there is no Lord Advocate in office.

276. Subsection (4)(b) makes a similar amendment to subsection 287(2) of the 1995 Act with regard to indictments raised, where there is no Lord Advocate in office. It allows indictments to be raised at the instance of the Lord Advocate or the Solicitor General where that office is vacant.

277. Subsection (4)(a)(ii) makes clear that section 287(1) of the 1995 Act applies where the holder of the office of Lord Advocate has died or demitted office and subsection (4)(a)(iii) makes clear that indictments raised by a Lord Advocate can, where the circumstances set out in section 287(1) of the 1995 Act apply, be taken up by the Solicitor General. This is to ensure the continuity of criminal proceedings in Scotland where there is a vacancy in office of the Scottish Law Officer/s.

278. Subsection (4)(c), where it inserts new subsection (2A) in section 287, provides that indictments raised by the Solicitor General may be signed by that Law Officer. It also provides, by the insertion of new subsections (2C) and (2D) in that section, that during any period where both offices of the Scottish Law Officers are vacant, regardless of the cause of those vacancies, that it shall be lawful for indictments to be raised at the instance of Her Majesty's Advocate. It provides, by the insertion of subsection (2B) in that section, that where an indictment is raised at the instance of the Solicitor General, that indictment continues to be valid even if that person has since died or left office, and ensures that such indictments can continue to be taken up and proceeded with by either the person's successor as Solicitor General or by the Lord Advocate. This mirrors existing provision in section 287(1) of the 1995 Act. Subsection (4)(d) makes provision that ensures that indictments raised by a Solicitor General can be taken up and proceeded with by advocates depute and procurators fiscal, notwithstanding any vacancy in the office of the Solicitor General. Subsection (4)(d) also includes provision allowing indictments which have been raised at the instance of the Lord Advocate where there is no Lord Advocate or Solicitor General in post to be taken up and proceeded with by advocates depute or procurators fiscal.

Section 61
-Transfer of justice of the peace court cases

279. This section introduces new provisions into the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") relating to the jurisdiction of the JP court in relation to the commencement and transfer of proceedings. Three new sections, 137CA, 137CB and 137CC, are inserted. The purpose is to make provision for JP courts similar to that which exists for the transfer of sheriff court cases under section 137A to 137C of the 1995 Act. It should be noted that consequential amendment to section 10A of the 1995 Act is made in Schedule 7 to this Act.

280. Section 137CA provides that where an accused person has been cited to a diet, or where citation has not taken place but proceedings have been commenced against an accused in a JP court, the prosecutor may apply to a justice to transfer the proceedings to another JP court in the same sheriffdom.

281. Subsections (1) and (2) of section 137CB provide that where the clerk of a JP court informs the prosecutor that due to unforeseen circumstances it is not practicable for that JP court or any other JP court in the sheriffdom to proceed with some or all of the cases due to call at a diet, the prosecutor may apply to the sheriff principal to transfer the proceedings to a JP court in another sheriffdom.

282. Subsections (3) and (4) provide that where an accused person has been cited to a diet, or where proceedings have been commenced against an accused person in a JP court, the prosecutor can apply to a justice to transfer the proceedings to a JP court in another sheriffdom, if there are proceedings against the accused in a JP court in that sheriffdom.

283. Subsections (5) and (6) provide that where it is intended to take proceedings against an accused person in a JP court, and there are proceedings against the accused in a JP court in another sheriffdom, the prosecutor may apply to a justice for authority to take proceedings against the accused in a JP court in the other sheriffdom.

284. Subsection (7) provides that where an application is made under subsection (2), a sheriff principal may only make the order with the consent of the sheriff principal of the other sheriffdom. Subsection (9) permits the sheriff principal who has made an order under subsection (7) to revoke or vary it, with the consent of the sheriff principal of the receiving sheriffdom.

285. Subsection (8) provides that where an application is made under subsection (4) or (6), the justice is to make the order sought if s/he considers it expedient and if a justice of the other sheriffdom consents. Subsection (10) provides that a justice who has made an order under subsection (8) (or any justice of the same sheriffdom) may revoke or vary that order, if a justice of the receiving sheriffdom consents.

286. Subsections (1) & (2) provide that where there are exceptional circumstances leading to an unusually high number of accused persons appearing from custody for a first calling in JP courts, and it is unlikely that those courts would be able to deal with all these cases, the prosecutor may apply to the sheriff principal for authority to take proceedings against some or all of the accused in a JP court in another sheriffdom. The sheriff principal may order that the proceedings are to be maintained at the receiving JP court, or at the original court. Under subsection (4), the order may be made in relation to a particular period of time, or particular circumstances.

Section 62
– Additional charge where bail etc. breached

287. This section amends sections 27 (breach of bail conditions: offences) and 150 (failure of accused to appear) of the 1995 Act.

288. The effect of these amendments is to allow a complaint to be amended to include an additional charge covering an offence committed as a result of breaching bail conditions or an offence committed in respect of a failure to appear at a diet. A similar provision to allow amendment of a complaint to include a charge of breaching an undertaking is to be found in section 22ZB(10).

Section 63
– Dockets and charges in sex cases

289. This section inserts three new sections, 288BA, 288BB and 288BC into the Criminal Procedure (Scotland) Act 1995.

290. New section 288BA provides a statutory basis for the use by the prosecution of a ‘docket’ to inform the defence of the prosecution’s intention to lead evidence in sexual offence cases of an offence not charged.

291. Subsection (1) provides that an indictment or complaint may include a docket which specifies an act or omission connected with a sexual offence charged in the indictment or complaint. Subsection (2) provides that an act or omission is connected with the offence if it is specifiable by way of reference to a sexual offence and relates to the same event as the offence, or a series of events of which that offence is also part.

292. Subsection (3) provides that the docket is to be in the form of a note apart from the offence charged.

293. Subsection (4) provides that a docket may specify an act or omission even where, if it were instead charged as an offence, it could not competently be dealt with by the court in which the indictment or complaint is proceeding (e.g. a docket which states that evidence will be led that the accused raped the complainer, though the indictment is not being tried in the High Court).

294. Subsection (5) provides that where such a docket is included in an indictment or complaint, the accused is deemed to have been given fair notice of the intention to lead evidence of the act or omission specified in the docket, and the evidence is admissible as relevant.

295. Subsection (6) provides that any offence under the Sexual Offences (Scotland) Act 2009 and any other offence involving a significant sexual element shall be considered to be a 'sexual offence' for the purpose of this section.

296. New subsection 288BB provides that it shall be competent for the Crown to libel more than one statutory sexual offence under the Sexual Offences (Scotland) Act 2009 in a single charge (e.g. rape at section 1 of the 2009 Act and sexual assault at section 3 of that Act), and to libel one or more statutory offences under that Act and one or more common law offences together in a single charge (e.g. assault at common law and rape at section 1 of the 2009 Act).

297. Subsection (1) provides that an indictment or complaint may include a charge framed in the manner set out in subsections (2) or (3) or both.

298. Subsection (2) provides that a charge may be framed so as to comprise the specification of more than one sexual offence. Subsection (3) provides that it may specify in addition to a sexual offence, any other act or omission and may do so in any manner except by way of reference to a statutory offence.

299. Subsection (4) provides that, where an indictment or complaint is framed as mentioned in subsection (2) or (3) or both, it is to be regarded as a single, yet cumulative charge. Subsection (5) provides that the references to a 'sexual offence' in this section are to an offence under the Sexual Offences (Scotland) Act 2009.

300. New subsection 288BC provides that it shall be competent for the Crown to libel the charges of 'assault with intent to rape' and 'abduction with intent to rape' by reference to the statutory offence of rape at section 1 of the Sexual Offences (Scotland) Act 2009 or, as the case may be, rape of a young child under section 18 of that Act.

301. Subsections (1) and (2) provide that any specification in the charge that the offence is with intent to rape may be given by reference to the statutory offence of rape as respects a qualifying offence charged in an indictment or complaint.

302. Subsection (3)(a) provides that the reference to 'qualifying offences' in subsection (1) is to an offence of assault or abduction, and includes attempt, conspiracy or incitement to commit these offences. Subsection (3)(b) provides that the reference to the statutory offence of rape is to the offence of rape at section 1 of the Sexual Offences (Scotland) Act 2009 or, as the case may be, to the offence of rape of a young child at section 18 of the Act.

Section 64
- Remand and committal of children and young persons

303. This section repeals the provisions contained in section 51 of the Criminal Procedure (Scotland) Act 1995, which allow for the remand of children aged 14 and 15 years to prison.

304. Where a child under the age of 16 years is not released on bail or ordained to appear he shall instead be remanded to the local authority to be detained either in secure accommodation or a suitable place of safety.

Sections 65-68
- Prosecution of organisations

305. Sections 65 to 68
deal with procedural matters in relation to the prosecution of organisations.

306. Section 70 of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") deals with proceedings on indictment against bodies corporate. It provides for how the indictment is served, appearance by a representative for certain purposes, and the recovery of fines. It does not make provision about partnerships or other unincorporated associations. In contrast, section 143 of the same Act, which deals with summary procedure, specifically provides for how proceedings may be brought against partnerships, associations, and bodies of trustees as well as bodies corporate.

307. Sections 65 to 68
of this Act clarify and extend these procedural provisions by extending them to apply to "organisations", as defined in the new definition inserted in the 1995 Act by section 65.

308. Section 66
amends section 70 of the 1995 Act to provide for:

- how indictments may be served on different sorts of organisation;
- how organisations may appear by a representative (defined in section 70(8) and (9)) for the purpose of stating objections to the competency or relevancy of the indictment or proceedings, tendering a plea of guilty or not guilty, making a statement in mitigation of sentence;
- the trial to proceed and the case be disposed of where an organisation does not appear either by a representative or by counsel or solicitor; and
- the recovery of fines.

309. Section 67
similarly amends section 143 of the 1995 Act to provide for:

- summary proceedings to be taken against an organisation in its corporate capacity or against an individual representative of the organisation;
- how organisations may appear by a representative for the purpose of stating objections to the competency or relevancy of the complaint or proceedings, tendering a plea of guilty or not guilty, making a statement in mitigation of sentence;
- the case to proceed and the case be disposed of where an organisation does not appear either by a representative or by counsel or solicitor; and
- recovery of fines.

310. Section 68
amends section 141(2)(b) of the 1995 Act to provide that an organisation (other than a body of trustees) may be cited in summary proceedings if the citation is left at its ordinary place of business with a partner, director, secretary or other official or if it is cited in the same manner as if the proceedings were in a civil court. Section 141(2)(c) already deals with citation of bodies of trustees.

Section 69
– Prohibition of personal conduct of case by accused in certain proceedings

311. This section extends the existing prohibitions in sections 288C, 288E and 288F of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"), that prevent an accused person conducting their own defence in certain cases, to any relevant hearing in the proceedings. Previously, the prohibitions only applied to preliminary hearings, trials

and victim statement proofs. "Relevant hearing" means any hearing in the course of proceedings at, or for the purposes of, which a witness is to give evidence.

312. Subsection (2) amends section 288C of the 1995 Act to ensure that, in proceedings in respect of a sexual offence specified in 288C(2), an accused is prohibited from conducting his case in person at or for any relevant hearing in the course of the proceedings. It also repeals section 288C(8).

313. Subsection (3) amends section 288D of the 1995 Act so that an accused must be notified that his case, at or for any relevant hearing, must be conducted by a lawyer.

314. Subsection (4) amends section 288E of the 1995 Act so that, in proceedings in respect of an offence specified in section 288E(2)(a), an accused is prohibited from conducting his case in person at or for any relevant hearing where a child witness under the age of 12 is to give evidence. It also repeals section 288E(8).

315. Subsection (5) amends section 288F of the 1995 Act so that an accused, in proceedings in respect of any offence involving a vulnerable witness (other than proceedings to which sections 288C or 288E apply), is prohibited from conducting his case in person at or for any relevant hearing where that witness is to give evidence. It repeals subsection (6) of that section of the 1995 Act which defines "victim statement proof".

Section 70
- Disclosure of convictions and non-court disposals

316. This section makes provision relating to the circumstances in which convictions and non-court disposals may be disclosed to the court in summary and solemn proceedings. Two new sections, 101A and 166A, are introduced to the 1995 Act and amendment is made to the existing provisions of the 1995 Act in relation to the disclosure of non-court disposals.

317. Subsections (1) and (2) of section 101A provide that when considering sentence in solemn proceedings the court may have regard to convictions or non-court disposals acquired after the date of the offence with which the accused is charged, but before the date of conviction.

318. Subsection (3) of section 101A specifies the non-court disposals which are referred to in subsection (2). These are:

- fixed penalties under section 302(1);
- compensation offers under section 302A(1); and
- work orders under section 303ZA(6) of the 1995 Act.

319. A fixed penalty or compensation offer may be disclosed only if it has been accepted (or deemed to have been accepted) before the date of conviction. Only a work order that has been completed before the date of conviction may be disclosed to the court.

320. Subsection (4) of section 101A requires the prosecutor to provide the court with a notice of the conviction or non-court disposal.

321. Subsection (5) of section 101A allows the court to consider convictions acquired on or after the date of the offence in other EU jurisdictions.

322. Section 70(2) substitutes a new section 166A into the 1995 Act. The previous version of section 166A, inserted by section 12 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007, allowed the court in deciding on the disposal of a case in summary proceedings to have regard to any convictions acquired between the date of the offence and the date of conviction. The effect of new section 166A is to expand that provision to include non-court disposals. This is in the same manner as the provision for solemn proceedings under new section 101A discussed above.

323. Subsections (3) and (4) make amendments to section 302 and section 302A of the 1995 Act. Those sections provide for the offer of a procurator fiscal fixed penalty or compensation offer respectively. The amendments extend the provisions relating to the information to be provided to an alleged offender when an offer of these disposals is made. Subsections (3) & (4) provide that an offer of a fixed penalty or compensation offer must state that if it is accepted, or deemed to have been accepted, that fact may be disclosed to a court in any proceedings to which the alleged offender is (or is liable to become) subject at that time.

324. Amendments to section 303ZA of the 1995 Act under subsection (5) make provision relating to the information that must be included in an offer of a work order.

325. In addition to the information listed in section 303ZA the offer must also state that:

- if it is refused, or not completed, that fact may be disclosed in any proceedings for the offence in question;
- if it is completed, that fact may be disclosed in any proceedings for an offence committed within two years of the date of completion;
- if it is completed, that fact may be disclosed in any proceedings to which the alleged offender is (or is liable to become) subject at that time.

Section 71
- Convictions by courts in other EU member States

326. Section 71 introduces schedule 4, which details a range of amendments to the 1995 Act and to other enactments to implement the Council of the European Union Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings. The effect will be that previous convictions issued by other Member States of the European Union will be treated in the same way as previous convictions handed down by a court in Scotland throughout the criminal proceedings: at the pre-trial stage, at the trial, and at the time of sentencing. Section 71(2) includes an Order-making power to enable the Scottish Ministers to make any further amendments to legislation which are required to fully implement the Framework Decision. Provision in section 201(4) means that any order will be subject to the affirmative resolution procedure in the Scottish Parliament.

Section 72
– Time limits for lodging certain appeals

327. Section 74 of the 1995 Act makes provision in solemn criminal cases to allow for appeals to be taken in respect of certain decisions made by a court at either a first diet or a preliminary hearing. Section 174 of the 1995 Act makes provision for the procedure to be followed at the "first diet" of a summary criminal case. Both sections provide for appeals to be made against certain decisions of the court and stipulate that any appeal must be lodged no later than two days after the decision. Subsections (2) and (3) of section 72 amend sections 74 and 174 of the 1995 Act respectively, by extending the time limit for lodging these appeals from 2 days to 7 days.

Section 73

– Submissions as to sufficiency of evidence

328. This section inserts sections 97A, 97B 97C and 97D into the Criminal Procedure (Scotland) Act 1995. New section 97A effectively creates a statutory replacement for what is termed a "common law submission". Under the common law a submission to the court may be made by the defence at the end of all evidence in a case. If successful, it typically results in a direction, in the course of the judge's charge to the jury, that the jury should not convict on a particular charge, or should consider only a reduced charge. This direction may be focused on the basis that the evidence in the case is insufficient in law to justify a conviction. It is made in the context of the judge's role in determining questions of law, which comes before the ultimate assessment of questions of fact by the jury.

329. At present, an accused may make a submission as of right only after the Crown speech to the jury, although the Crown commonly consents to a submission being made at the close of the evidence. Where a submission is made after the Crown speech, the Crown does not have a right of reply, on the basis that at that stage the prosecutor is *functus officio* (prevented from taking the matter further as a result of having fulfilled his or her official duties).

330. Subsection (1) of section 97A gives the accused the right to make certain submissions immediately after the close of the evidence or after the prosecutor has addressed the jury. Subsection (2)(a) permits such a submission to contend that the evidence is insufficient in law to justify the accused's being convicted of the offence (or of any other offence of which the accused could be convicted under the indictment). The meaning of "insufficient in law" is the same as in section 97 of the 1995 Act and is a test of technical sufficiency rather than a test as to the quality of the evidence (section 97 permits an accused to submit that there is "no case to answer" at the end of the prosecution evidence, whereas section 97A focused on the situation at the end of all evidence in the case, including that for the defence. Accordingly, a submission under subsection 2(a) will most commonly succeed where there is an absence of corroboration or in the rare circumstance (such as arose in *HMA v Purcell* 2008 SLT 44) where the indictment is irrelevant and the judge could not permit the jury to convict regardless of the evidence. Subsection (2)(b) permits a submission to be made that there is no evidence to support some part of the circumstances set forth in the indictment; for example, to support the allegation of the use of a weapon in a charge of assault.

331. Section 97B applies where the accused makes a submission under section 97A(2)(a) that the evidence is insufficient in law to justify the accused's being convicted of the indicted offence or of any other offence of which the accused could be convicted under the indictment.

332. Subsection (2) makes provision for where the judge is satisfied that the evidence is insufficient in law to justify a conviction for the indicted offence. It ensures that the trial will proceed only where the judge is satisfied that the evidence is sufficient in law to justify the accused's being convicted of a related offence or where another offence is libelled in the indictment which has not itself been subject to a submission under section 97A(2). When the judge is satisfied that the accused may be convicted of a related offence, the judge must direct that the indictment be amended to reflect this.

333. Subsection (3) provides for the continuation of the trial where the judge rejects a submission under section 97A(2)(a).

334. Subsection (5) ensures that the judge or the clerk of court will check and confirm that an amendment to the indictment under subsection (2)(b) has been properly made.

335. Section 97C makes similar provision to 97B, but instead of dealing with an outright acquittal of an indicted offence due to lack of evidence it covers the situation where the indictment is to be amended to reflect a lack of evidence on part, but not all, of the charge.

336. Section 97D makes explicit provision to ensure that it will not be competent for the defence to make a common law submission to the effect that no reasonable jury, properly directed on the evidence led in the case, could convict on a particular charge.

Section 74
– Prosecutor's right of appeal

337. The Crown is not able under the existing law to challenge a decision by a judge that brings a solemn criminal case to an end. The existing rights of appeal available to the Crown are highly restricted. The prosecution may be able to use a bill of advocation in relation to some aspects of the trial process, although this is normally confined to procedural errors in the preliminary stages of a case. The Crown may also appeal against sentence under section 108 of the Criminal Procedure (Scotland) Act 1995. This can be on a number of grounds, including that the disposal of the case was unduly lenient. The other option available to the Crown is not technically an appeal, but a reference made by the Lord Advocate under section 123 of the 1995 Act where the Crown wish the High Court to consider a particular point of law that arose in a criminal case. This has no effect on the disposal of the case that led to the reference.

338. Section 107A gives the Crown a right of appeal against certain decisions by a judge that bring a criminal case to an end without a decision by a jury. These are rulings of no case to answer under section 97 and decisions under section 97B(2)(a) (a decision that the evidence is insufficient in law to convict the accused - the statutory replacement for a common law submission). The section also creates a right of appeal in relation to certain directions for the indictment to be amended. Section 107B provides the Crown with a right of appeal against certain findings relating to the admissibility of prosecution evidence. None of these changes create rights of appeal in relation to a decision by a jury.

339. Section 107A(1)(a) creates a right of appeal in relation to a decision by a judge under section 97 that, at the close of the evidence for the prosecution, the evidence led is insufficient in law to justify the accused being convicted of the offence charged and any other offence that the accused could have been convicted of under the indictment. Paragraph (a) of subsection (1) also provides a right of appeal in relation to a decision taken under section 97B(2)(a), to acquit the accused of the indicted offence on the grounds that the evidence is insufficient in law to justify the conviction of the accused for that offence.

340. Paragraph (b) of subsection (1) creates a right of appeal in relation to a direction made under section 97B(2)(b). This is a direction for the indictment to be amended and is given where the judge is satisfied that the evidence is sufficient in law to justify the accused being convicted of a related offence. Paragraph (b) also provides a right of appeal against a decision under section 97C(2) directing an amendment to the indictment to reflect a decision that there is no evidence to support some part of the circumstances set out in the indictment.

341. Subsections (2) to (6) make provision for time limits where a prosecutor wishes to exercise the Crown right of appeal set out in subsection (1).

342. Subsections (2) and (3) cover the position where a judge has made an acquittal or direction of a type specified in subsection (1). The subsections permit the prosecutor to respond to the acquittal or direction by seeking an adjournment of up to two days in order to consider whether to bring an appeal. Where the adjournment is sought in respect of an acquittal, this must be granted unless the court considers that there are no arguable grounds of appeal. Where the adjournment is sought in respect of a direction, this must be granted unless the court considers that it would not be in the interests of justice to do so.

343. Subsection (5) sets out the timing for a prosecutor to bring an appeal under section 107A. It requires the prosecutor to take immediate action if it is wished to appeal

an acquittal or direction of a kind listed in subsection (1). The prosecutor will have to either immediately intimate an intention to appeal or seek an adjournment under subsection (1A) or (1B). Where an adjournment is sought, any subsequent intimation of appeal would have to be made immediately after the period of adjournment or immediately after the refusal of the request for an adjournment.

344. The intimation under subsection (5) is only of an intention to appeal. Section 76(1) of this Act amends section 110(1) of the 1995 Act to provide that there is usually an overall deadline of 7 days from the making of the decision being appealed for the lodging of the note of appeal.

345. Subsection (7) of section 107A requires the court, where the prosecution has intimated an intention to appeal (or where there is an adjournment under subsection (2) for the prosecution to consider making an appeal) to suspend the effect of the acquittal. This will allow the court to grant bail without there appearing to be two contradictory orders in operation.

346. Section 4(2) of the Contempt of Court Act 1981 allows a court, where it appears to be necessary in order to avoid a substantial risk of prejudice to the administration of justice in the proceedings or in any other proceedings which are pending or imminent, to order that the publication of any report of the proceedings be postponed for such period as the court thinks necessary. Subsection (7)(a) of section 107A allows the court, where the prosecution has intimated an intention to appeal (or where there is an adjournment under subsection (2) for the prosecution to consider making an appeal) to make an order under section 4(2) of the Contempt of Court Act 1981. This will avoid the risk of prejudice to any further proceedings.

347. Subsection (7)(b) permits the court to order the detention of an acquitted person in custody or admit him to bail pending the hearing of the prosecution appeal. Subsection (8) ensures that detention can only occur where there are arguable grounds of appeal.

348. Most rulings on the admissibility of evidence are made at preliminary diets or preliminary hearings. However, some evidential questions may still arise during the course of a trial, for example where an unexpected development occurs in the course of oral evidence. If a challenge to admissibility of evidence is successful and the accused is acquitted, it could be maintained that a ruling on admissibility had been fatal to the entire prosecution.

349. Section 107B gives the prosecutor a right of appeal against findings made during the course of the trial that evidence which the prosecution seeks to lead is inadmissible. Subsection (2) establishes that the leave of the trial court is required in all appeal cases involving a finding that evidence is inadmissible. Subsection (3) requires any motion for leave to appeal to be made before the close of the Crown case. Subsection (4) sets out the factors to be taken into account by the court in determining whether or not to grant leave to appeal.

350. Subsection (1) of section 107C allows the High Court, in considering an appeal under section 107A or 107B, to review not only the decision appealed against but any earlier decisions which may have a bearing on the decision appealed against. So, for example, where an acquittal under section 97 is appealed, the High Court will be able to review not only the trial judge's decision that the evidence led by the prosecution was insufficient in law to justify the conviction of the accused, but also an earlier finding by that judge that an element of prosecution evidence was inadmissible. Subsection (2) provides that the test to be applied by the High Court in considering an appeal under section 107A or 107B is whether the trial judge's decision was wrong in law.

351. If a Crown appeal (under either section 107A or 107B) is successful, then the Crown may seek to continue the prosecution. It is likely that in the majority of cases the continuation of the existing trial would not be a realistic possibility because of the delay that would necessarily be incurred during the appeal process. Proceeding with the case

in those circumstances would therefore require the Crown to raise a fresh prosecution. However, in some instances it may be considered practicable for the appeal to be heard and determined during an adjournment of the trial, allowing the trial to continue if the appeal is upheld. Such an appeal is defined as an "expedited appeal" in subsection (3) of section 107D.

352. Section 107D makes provision for expedited appeals to be heard and determined during an adjournment of the trial. Subsection (1) and (2) provide for the court to take steps to determine whether it would be practicable to continue the existing trial following the appeal. After hearing the views of both the Crown and the accused, the Court will decide whether the appeal should be heard during an adjournment of the trial.

353. Subsection (6) means that where an appeal against an acquittal under section 97 or 97B(2)(a) is successful; the High Court will quash the acquittal and direct that the trial is to continue in respect of the offence.

354. Section 107E makes provision for appeals against an acquittal that are not subject to the expedited appeal procedure provided for by section 107D. It applies to acquittals arising under section 97 or section 97B(2)(a) or as a consequence of a ruling that evidence that the prosecution sought to lead was inadmissible under section 107B(1). This section will apply where it would not be practicable to continue the existing trial whilst the appeal against conviction is being considered. Subsection (1) limits section 107E to appeals against an acquittal. Non expedited appeals that are *not* against an acquittal are dealt with under section 107F.

355. The effect of subsections (1)(c) and (2) are that where the High Court (sitting as a court of appeal) determines that the acquittal was wrong in law, it shall quash the acquittal. Subsection (3) provides for the High Court to grant authority for a new prosecution in accordance with section 119 of the Criminal Procedure (Scotland) Act 1995 for the same or any similar offence arising from the same facts. The High Court will not grant authority to bring a new prosecution where it considers that doing so would be contrary to the interests of justice.

356. Subsection (4) provides that if no motion is made for authority to bring a new prosecution, or if the High Court refuses such a motion, the High Court shall itself acquit the accused of the offence in question.

357. Section 107F makes provision for appeals made under section 107A or 107B that are not appeals against an acquittal and that are not subject to the expedited appeal procedure provided for by section 107D. This section will apply where it would not be practicable to continue the existing trial whilst the appeal against conviction was being considered. As non expedited appeals against an acquittal are dealt with under section 107E, the practical effect of subsection (1) is to limit section 107F to non-expedited appeals against:

- a direction to amend the indictment to cover a related offence (where the judge is satisfied that the evidence is insufficient in law to justify the accused's being convicted of the indicted offence) (section 97B(2)(b));
- a direction to amend the indictment (where the judge has ruled that there is no evidence to support some part of the circumstances set out in the indictment) (section 97C(2);
- a finding that prosecution evidence is inadmissible.

358. Because the appeal in question is not being expedited, the trial is unable to continue in relation to any offence to which the appeal relates. Subsection (2) of section 107F therefore provides for the court to desert the diet in relation to that charge (or those charges) *pro loco et tempore* and, under subsection (3), the trial shall proceed only in relation to any other charges remaining on the indictment. The ordinary consequence of desertion *pro loco et tempore* is that the Crown is free to bring a fresh indictment

(see Renton & Brown, *Criminal Procedure* (6th edn, R 22: Apr 2005) paragraph 18-21). Subsection (4) ensures that a trial will not continue in circumstances where a Crown appeal has been brought in relation to one aspect of the case and it is thought that no purpose would be served in continuing with the rest of the case. This might arise where an appeal is made in relation to a judicial decision affecting some but not all of the charges on the indictment.

359. Subsection (5) provides for the High Court to grant authority for a new prosecution in accordance with section 119 of the Criminal Procedure (Scotland) Act 1995 for the same or any similar offence arising from the same facts. The High Court (sitting as a court of appeal) will not grant authority to bring a new prosecution where it considers that doing so would be contrary to the interests of justice.

Section 75
– Power of High Court in appeal under section 107A of 1995 Act

360. This section amends section 104 of the 1995 Act to make a number of powers available to the High Court for use in connection with appeals under sections 107A and 107B. Section 104 already confers powers upon the High Court when hearing appeals under section 106(1) or 108 of that Act, including power to order the production of documents, to hear evidence etc.

Section 76
– Further amendment of the 1995 Act

361. This section makes a number of amendments to the 1995 Act. The amendments made by subsections (1) to (3) relate to the lodging of notes of appeal and the provision of the trial judge's report. Subsection (4) makes amendments concerned with the procedure following the granting of the High Court's authority to bring further proceedings following a successful Crown appeal.

362. Section 110 of the 1995 Act makes provision for notes of appeal. Subsection (1) of that section contains time limits for lodging such notes and provides for the transmission of copies of notes to the court and to the parties concerned in the appeal. Subsection (3) of that section requires that a note of appeal identify the proceedings, contain a full statement of the ground of appeal, and be in as nearly as may be the form prescribed by Act of Adjournal. Subsection (4) of that section provides that, except by leave of the High Court on cause shown, it shall not be competent for an appellant to found any aspect of his appeal on a ground not contained in the note of appeal.

363. Subsection (1) of section 76 inserts new paragraphs (c), (d) and (e) into section 110(1) of the 1995 Act. Paragraphs (c) and (d) make provision for appeals which have not been expedited using the procedure in section 107D. They provide an overall deadline of 7 days for the lodging of an appeal. In relation to appeals against an acquittal or direction made under section 107A(1), the 7 day period runs from the day of intimation by the acquittal or direction. In relation to appeals under section 107B(1), the seven day period runs from the granting of leave. Paragraph (e) makes provision for expedited appeals and requires the lodging of the appeal to be as soon as practicable after a decision under section 107D(2) that an appeal be expedited. An effect of these paragraphs is that subsections (3) and (4) (of section 110 of the 1995 Act) apply to Crown appeals as they do to appeals by a convicted person under section 106 and by the Lord Advocate against disposal under section 108. (Note, however, that while the time limits for appeals by convicted persons may be extended under either section 110(2) or 111(2), the time limit imposed upon a Crown appeal by inserted paragraphs (c) and (d) of section 110(1) cannot be extended).

364. Section 113 of the 1995 Act requires the trial judge, on receiving the copy note of appeal sent to him under section 110(1), to furnish the Clerk of Justiciary with a written report giving the judge's opinion on the case generally and on the grounds contained in the note of appeal. It is appropriate that such a note should be provided to assist the High

Court in considering a Crown appeal; but in an expedited appeal, where the appeal is to be heard during an adjournment of the trial, it will often be impractical to require a full report.

365. Subsections (2) and (3) of section 76 of this Act address these points. The effect of subsection (2), together with subsection (1), is to apply section 113 of the 1995 Act to non-expedited appeals: in any such appeal, the trial judge will be required to provide a full report. Subsection (3) inserts a new section 113A into the 1995 Act, permitting the trial judge in an expedited appeal to furnish the Clerk of Justiciary with such written observations as he or she thinks fit. However the High Court may hear and determine an appeal without any written observations.

366. Subsection (4) of section 76 makes amendments to ensure section 119 of the 1995 Act (provision where High Court authorises new prosecution) applies to Crown appeals. Paragraph (a) inserts reference to new prosecutions authorised under section 107E(3) and section 107F(5) in relation to non expedited appeals arising under section 107A or 107B.

367. Paragraph (b) replaces subsection (2) of section 119 of the 1995 Act. New subsection (2)(a) reproduces the existing law which states that a new prosecution granted where a conviction is quashed under section 118 of the 1995 Act (following a successful appeal by the defence) may not proceed upon the basis of a more serious charge than that on which the accused was convicted in the earlier proceedings.

368. New subsection (2)(b) provides, where a new prosecution is granted after a successful appeal against an acquittal under section 107A or 107B, that a new prosecution may not proceed upon the basis of a more serious charge than that on which the accused was acquitted in the earlier proceedings.

369. New subsection (2)(c) places a similar restriction in relation to a new prosecution authorised under section 107F(5) resulting from an appeal against a direction as to sufficiency, admissibility or lack of evidence. By virtue of this subsection a new indictment may not contain a more serious charge than that libelled in the original proceedings.

370. Where a successful appeal under section 107A has resulted in a new prosecution, new subsection 2A of section 119 of the 1995 Act (inserted by paragraph (c)) ensures that the circumstances set out in the new indictment are not to be inconsistent with any direction made by a trial judge to amend the old indictment under section 97B(2)(b) or 97C(2). A direction under those provisions would have been to either include a related offence within the indictment (the judge having ruled that the evidence was insufficient in law to justify a conviction under the indicted offence) or to reflect a ruling that that there was no evidence to support some part of the circumstances set out in the indictment. However, this requirement does not apply if the High Court determines that the direction under section 97B(2)(b) or 97C(2) was wrong in law.

371. Subsection (
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)(d) amends subsection (9) of section 119 of the 1995 Act. The effect of this amendment is that where two months elapse following the date upon which the High Court grants authority under section 107E(3) or section 107F(5) and no new prosecution has been brought, the order granting authority to bring a new prosecution shall have the effect, for all purposes, of an acquittal.

Sections 77-82
- Retention and use of samples etc.

372. Sections 77 to 82
contain provisions on the retention and use of samples.

373. The law on police powers to take, retain and use DNA, fingerprints and other forensic data (such as palm prints) is predominantly set out in sections 18-20 of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"). In general, samples and records of forensic data must be destroyed once the decision is taken not to prosecute an individual for the offence the samples and records were collected in connection with, or, if the individual is prosecuted, when the proceedings end without a conviction. If the individual is found guilty of the offence, the samples and records of their forensic data can be retained indefinitely.

374. Section 18A of the 1995 Act allows an exception to this general rule where criminal proceedings have been instituted against an individual for an offence, but end without a conviction. This only applies to criminal proceedings for a list of serious sexual or violent offences set out in section 19A(6) of the 1995 Act. In these circumstances, DNA samples and records can be retained by the police for at least three years. At the end of that time, the Chief Constable can apply to a sheriff for these samples and records to be kept for up to a further two years and this process can be repeated at the end of each extended period.

375. Section 77
amends sections 18 and 18A of the 1995 Act, extending this exception to cover the retention of "relevant physical data" (which is defined in section 18(7A) of the 1995 Act as fingerprints, palm prints, prints or impressions of another external part of the body, and records of skin on an external part of the body) as well as DNA records.

376. Section 77(2)(a)
amends section 18(3) of the 1995 Act which concerns the destruction of forensic data taken from people who are not convicted or against whom no criminal proceedings are raised. Section 77(2)(a) inserts a reference to the new sections 18B to 18F of the 1995 Act introduced by sections 78 to 80. It means that forensic data taken under section 18 of the 1995 Act does not have to be destroyed following a decision not to raise criminal proceedings if the criteria in section 18B or 18C (provisions relating to the retention of forensic data where fiscal offers under sections 302 to 303ZA of the 1995 Act are accepted), section 18D (provisions relating to the retention of forensic data taken or provided in connection with certain fixed penalty offences) and section 18E or 18F (provisions relating to the retention of forensic data from children who are referred to a children's hearing) are met.

377. The definition of "relevant physical data" in section 18(7A) of the 1995 Act (mainly fingerprints and palm prints) applies throughout sections 18A to 19C of the 1995 Act. Section 77(2)(b) and (c) modifies the definition of "relevant physical data" in section 18(7A)(d) for the purpose of section 19C of the 1995 (inserted by section 82). This is to make it clear that when forensic data is obtained from outside Scotland a record of a person's skin on an external body part constitutes "relevant physical data". This modification is made because law enforcement agencies outside Scotland could not take a record of a person's skin on an external body part by a device approved by Scottish Ministers.

378. Section 77(3)(a)
,(b)(c) and (e) amends section 18A of the 1995 Act so that this section applies to relevant physical data, as well as to samples and information derived from samples which are taken under section 18 of the Act.

379. Section 77(3)(d)
amends section 18A of the 1995 Act, providing for the sheriff principal to have the specific power to grant an order amending or further amending the destruction date of a DNA sample, profile or other types of forensic data (fingerprints etc) if he overturns the decision of a sheriff to refuse an application by a chief constable to extend the period of retention.

380. Section 77(3)(f)

modifies the definitions of terms used in section 18A. Section 77(3)(f) and (g) modify the definition of a relevant sexual offence in section 18A of the 1995 Act to replace the offence "shameless indecency" with "public indecency". The change provides that public indecency is only a relevant sexual offence if it is apparent from the charge in the criminal proceedings which are raised that there was a sexual element to the behaviour.

381. Section 78
inserts new sections 18B and 18C into the 1995 Act. New section 18B provides that DNA samples, relevant physical data and information derived from a sample taken from individuals who are arrested or detained for an offence do not have to be destroyed for a specified time if that person is issued with and subsequently accepts a relevant offer issued under sections 302 to 303ZA of the 1995 Act. A definition of "relevant offer" is found in section 18B(3). An acceptance of a "relevant offer" is not a conviction but is classed as an alternative to prosecution for an offence.

382. New section 18B(5) sets out what the date of destruction is and is dependent on the type of offences for which a relevant offer is issued. A relevant offer can be issued in relation to more than one offence. Where the procurator fiscal disposal only relates to offences which are not relevant sexual or relevant violent offences, the data must be destroyed within two years of the date on which the disposal was issued. That period cannot be extended.

383. Where the procurator fiscal disposal relates only to a relevant sexual or relevant violent offence, as defined by reference to the list of sexual and violent offences set out in section 19A(6) of the 1995 Act, the forensic data can be retained for at least three years from the date on which the offer was issued. A fiscal disposal can be issued in relation to a number of offences. Where a disposal is issued in respect of a mixture of offences (i.e. some of the offences are relevant sexual or relevant violent offences and some are not), the forensic data can be retained for at least three years from the date on which the measure was issued.

384. Relevant offers are not convictions; they are alternatives to prosecution for an offence. This means that if an individual were to refuse to accept a relevant offer their forensic data can be retained in accordance with section 18(3) of the 1995 Act until the procurator fiscal decides whether or not to raise criminal proceedings against that person. If the procurator fiscal decides not to raise criminal proceedings and does not issue a further relevant offer, the person's forensic data must then be destroyed as soon as possible. If however, the procurator fiscal decided to raise criminal proceedings following the refusal to accept a fixed penalty notice under the 2004 Act, that person's forensic data can be retained indefinitely under section 18(3) of the 1995 Act if they are subsequently prosecuted and convicted of the offence in court.

385. New section 18C provides for the extension of the retention period beyond three years where the procurator fiscal offer was issued, and accepted, in relation to a relevant sexual or relevant violent offence. The police can apply to a sheriff to have the retention period extended for a further period of two years, on a rolling basis. The decision of a sheriff can be appealed to the sheriff principal by both parties. The sheriff principal's decision on the application will be final.

386. Section 79
inserts new section 18D into the 1995 Act. This section provides that DNA samples, relevant physical data and information derived from a sample taken from individuals who are arrested or detained for a fixed penalty offence (as defined by section 18D(6)) do not have to be destroyed if that person is issued with and subsequently accepts a fixed penalty notice issued under section 129 of the Antisocial Behaviour "etc" (Scotland) Act 2004 ("the 2004 Act") or pays the sum which become due under section 131(5) of the 2004 Act. Forensic data can only be retained under new section 18D of the 1995 Act when a police constable has arrested or detained a person under section 14(1) of the 1995 Act before he or she issued a fixed penalty notice. The forensic data must be destroyed no later than two years from the date on which the fixed penalty notice was

issued. Unlike the provisions in sections 18B and 18C of the 1995 Act, in section 18D there is no provision for an extension of the retention period.

387. Section 18D(3) provides that if there is more than one fixed penalty notice issued in connection with other fixed penalty offences arising out of the same incident then the data must be destroyed no later than two years from the date of the later notice.

388. Fixed penalty notices are not convictions; they are alternatives to prosecution for an offence. This means that if an individual were to refuse to accept a fixed penalty notice, their forensic data can be retained in accordance with section 18(3) of the 1995 Act until the fiscal decides whether or not to raise criminal proceedings against that person. If the procurator fiscal decides not to raise criminal proceedings and does not issue a fiscal alternative to prosecution under section 302 to 303ZA of the 1995 Act, the person's forensic data must then be destroyed as soon as possible. If however, the procurator fiscal decided to raise criminal proceedings following the refusal to accept a fixed penalty notice under the 2004 Act, that person's forensic data can be retained indefinitely under section 18(3) of the 1995 Act if they are subsequently prosecuted and convicted of the offence in court.

389. Section 80
inserts new sections 18E and 18F into the 1995 Act. These introduce a similar exception to the normal rules governing retention of DNA, fingerprint and other physical data to that described above in relation to section 77, covering certain cases dealt with by the children's hearings System. This applies where a child is referred to a children's hearing on the grounds that they have committed one of a list of specified serious violent or sexual offences and has had DNA, fingerprint or other physical data taken from them under section 18 of the 1995 (upon his/her arrest or detention). The list of relevant offences will be drawn from the lists of sexual or violent offences in section 19A(6) of the 1995 Act, and set out in secondary legislation, which will need to be approved by the Scottish Parliament. The secondary legislation can specify relevant violent offences by reference to differing levels of severity. The definition of "relevant sexual offence" is modified by section 80(12) to include public indecency if it is apparent from the ground of referral to the children's hearing that there was a sexual aspect to the behaviour of the child.

390. If the child and relevant person (a parent or person with control over the child) accepts that he or she has committed one of the relevant offences, or a sheriff establishes that they have done so, DNA, fingerprint or other physical data does not have to be destroyed for at least three years.

391. Section 18F of the 1995 Act provides that the Chief Constable can apply to a sheriff for an extension of up to two years at the end of this time, and this process can be repeated at the end of each extended period. The decision of the sheriff can be appealed to the sheriff principal by both the chief constable (if the application is refused by the sheriff) or by the person whose forensic data is retained (if the sheriff grants the application). Section 18F(5) provides that if the sheriff principal allows the appeal, he or she may make an order amending or further amending the destruction date. The decision of the sheriff principal is final. The sheriff principal must not specify a destruction date more than 2 years later than the previous date.

392. Section 18F(9) provides for forensic data to be destroyed as soon as possible after the period in which an appeal may be brought has elapsed or after an appeal is withdrawn or determined and results in no further extension.

393. If a child is referred to a children's hearing on the grounds of having committed a relevant offence and refuses to accept that such an offence was committed, any DNA, fingerprints and other physical data which has been taken from that child under section 18 of the 1995 Act must be destroyed. This also applies where the commission of a relevant offence by the child is not established by a sheriff, to whom a children's

hearing refers the case to establish the facts or who reviews the case under section 85 of the Children (Scotland) Act 1995.

394. Section 81
amends and extends the list of relevant sexual and relevant violent offences in section 19A(6) of the 1995 Act. The term "shameless indecency" is replaced with the offence of "public indecency" in the list of relevant sexual offences. The offence of public indecency will only be a "relevant sexual offence" if a court makes a finding under paragraph 60 of Schedule 3 to the Sexual Offences Act 2003 that there was a significant sexual aspect to the behaviour. Section 81 also adds sections 47(1), 49(1), 49A(1) and (2) and 49C(1) of the Criminal Law (Consolidation) (Scotland) Act 1995 (offences involving the carrying of an offensive weapon or articles with a point or blade in a public place) to the list of "relevant violent offences" in section 19A(6) of the 1995 Act.

395. The police have the power to take forensic data in section 19A(2) of the 1995 Act from any person who has been convicted of a relevant sexual or a relevant violent offence. They will therefore be able to exercise these powers in relation to a person who has been convicted of these additional offences. Section 18A of the 1995 Act provides that any forensic data which is taken from a person under section 18 does not have to be destroyed for at least 3 years if a person is proceeded against for a relevant sexual or relevant violent offence as set out in section 19A(6) of the 1995 Act. Provided the criteria of section 18A are met, a person may have their forensic data retained for at least 3 years if they are proceeded against for one of these additional offences.

396. Section 82
inserts a new section 19C into the 1995 Act, setting out the general purposes for which DNA and fingerprint information can be used. This makes it clear that the police can use the DNA and fingerprint information – including data taken from, or provided by, a person from outwith Scotland, provided it is held by a police force in Scotland, the Scottish Police Services Authority (SPSA) or a person acting on behalf of a police force in Scotland or the SPSA - as a tool to help prevent, detect and investigate crime, including cross-border crime, and prosecute crime in court. It also allows the information to be used to establish the identity of a deceased person and also a person from whom DNA samples, relevant physical data and information from samples comes from, as there may be a need to identify a person from a body or body part where no criminal activity is suspected: for example, following a natural disaster. These purposes apply whether the crime or incident occurs or is being investigated in Scotland, elsewhere in the UK or abroad, enabling the police to assist with investigations and prosecutions wherever they take place.

397. New section 19C(4) and (5) of the 1995 Act provides that any forensic data which is provided to a police force in Scotland, the SPSA or a person acting on behalf of such a force or the SPSA can be used for the purposes set out in section 19C(2) but also that this information can be checked against other relevant physical data, samples or information derived from samples which are held by a police force or the SPSA. Forensic data provided by other jurisdictions can also be checked against Scottish data held on the relevant databases.

398. The terms of section 19C(6) of the 1995 Act introduced by section 82 mean that forensic data collected in Scotland can be used for the investigation of a crime or suspected crime and the conduct of a prosecution in a country or territory outside Scotland including England, Wales and Northern Ireland.

399. Section 20 of the 1995 Act (use of prints, samples etc) is superseded by new section 19C. The repeal of section 20 is provided for in schedule 7 of the Bill.

400. At present, police use common law powers in relation to the use of fingerprints and DNA in criminal investigations and prosecutions. The powers in new section 19C aim to provide clarity on the purpose for which samples and records of forensic data

can be used. They are without prejudice to existing powers at common law. New section 19C(2) contains safeguards in relation to the use of the data.

401. Section 82(2)
amends section 56 of the Criminal Justice (Scotland) Act 2003 ("the 2003 Act") which concerns the retention of samples or relevant physical data when given voluntarily. Section 56 applies to DNA samples, information derived from samples and relevant physical data. Section 82(2) removes references to "information derived from relevant physical data" found in section 56 of the 2003 Act. As there is no identifiable information which is classed as "information derived from relevant physical data", removing this phrase removes any doubt as to what it is intended to catch.

402. Section 82(2)(b)
provides that any forensic data taken from people under section 56 of the 2003 Act can be held or used for the prevention or detection of crime, the investigation of an offence or conduct of a prosecution or the identification of a person or a deceased person. This includes cross-border crime.

Section 83
- Referrals from Scottish Criminal Cases Review Commission: grounds for appeal

403. The Scottish Criminal Cases Review Commission was established by section 194A of the 1995 Act, inserted by the Crime and Punishment (Scotland) Act 1997.

404. Section 194B(1) of the 1995 Act sets out the Commission's power to refer a person's conviction or sentence to the High Court. Where the Commission makes a reference to the High Court, the Commission is required to give the Court a statement of their reasons for making the reference, in accordance with section 194D(4).

405. The High Court is then required to consider the matter referred as if it were an appeal under Part 8 (appeals from solemn proceedings) or Part 10 (appeals from summary proceedings) of the 1995 Act.

406. Section 194C of the 1995 Act sets out the grounds on which the Commission can make a reference to the High Court. These are that the Commission believe that a miscarriage of justice may have occurred, and that it is in the interests of justice that a reference should be made.

407. The effect of a reference by the Commission is that there is no need for the applicant to seek leave to appeal under section 107 of the 1995 Act (for solemn appeals) and section 180 (for summary appeals). Where the Commission has made a reference to the High Court there is nothing to limit the appellant from raising grounds of appeal that are not related to the reasons that the Commission made the reference. Section 194D is being amended so that where the Commission make a reference, an appeal arising from this reference can only be based on grounds relating to one or more of the reasons given by the Commission in its statement of reasons.

408. The new subsection (4A) being inserted into section 194D of the 1995 Act will require that the grounds for appeal arising from an SCCRC reference must relate to one or more of the reasons contained in the Commission's statement of reasons. However, the statement of reasons produced by the Commission will commonly set out not only the reasons why it is making a referral but also the other possible grounds it has considered and has decided not to refer on. The inclusion of the words "for making a reference" in this subsection will avoid any risk of an appeal being founded on something the Commission has said in the statement of reasons which is not a reason for referral.

409. If the appellant seeks to make a case based on grounds of appeal that are not related to the reasons contained for the Commission's reference, then this will only be possible if leave is given by the High Court in the interests of justice.