

# **CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of this Act.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

### **COMMENTARY ON SECTIONS**

#### **PART 1 - SENTENCING**

##### **Sections 1 - 13 - The Scottish Sentencing Council**

3. Sections 1–13 and Schedule 1 set out the provisions for the establishment of a Scottish Sentencing Council (“the Council”), which will produce sentencing guidelines for Scotland.
4. Section 1 establishes the name of the Council and its status as a body corporate.
5. Section 2 sets out the objectives of the Council, which it must seek to achieve when carrying out its functions. These are to promote consistency in sentencing, assist the development of sentencing policy and support transparency in sentencing by promoting greater awareness and understanding of sentencing policy and practice.
6. Section 3 relates to the sentencing guidelines to be produced by the Council for the approval of the High Court of Justiciary and what they may be about. Subsection (5) requires the Council, on preparing guidelines, also to prepare an assessment of the costs and benefits of the guideline and the projected impacts on the criminal justice system. Subsection (6) requires the Council to review any published sentencing guidelines from time to time, and after such a review, they may submit revised guidelines to the High Court for approval.
7. Section 4 sets out the consultation procedure for the Council, ahead of submitting the guidelines to the High Court of Justiciary for approval. The Council must publish a draft of the proposed guidelines and the assessment of costs and benefits for comment before submitting them to the High Court. There is a requirement on the Council to consult the Scottish Ministers and the Lord Advocate, as well as such other persons as the Council considers appropriate before submitting the guidelines to the High Court for approval.

8. Section 5 sets out the role of the High Court in the approval of sentencing guidelines. The High Court may approve or reject the guidelines in whole or in part and it may modify them. If it modifies or rejects them, it must state its reasons for doing so. It remains for the Council to publish the guidelines and the assessments referred to in section 3(5) once the High Court has approved them.

9. Section 6 details the effect of the guidelines on the courts. A court must have regard to any guidelines which are applicable in a case and must state its reasons if it chooses to depart from the guidelines. The guidelines that are applicable are those in force and applicable to the case at the time the court is sentencing the offender.

10. When the High Court is dealing with an appeal and is passing a different sentence under relevant provisions in the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”), then it must have regard to the guidelines that are applicable at the time that it is considering the appeal. The provisions in the 1995 Act are as follows:

- Section 118(3) relates to the power of the High Court to quash a sentence and pass another one of equal measure when dealing with an appeal against conviction;
- Section 118(4)(b) relates to the power of the High Court to pass a greater or lesser sentence when dealing with an appeal against conviction;
- Section 118(4A)(b) relates to cases where a court has imposed a sentence other than a mandatory sentence and the High Court opts to pass a different sentence, but one that is still not the mandatory sentence;
- Section 118(4A)(c)(ii) relates to the High Court’s decision to set aside a decision and any sentence that departs from the mandatory sentence for drugs offences made under section 205B of the 1995 Act, and instead impose the mandatory minimum sentence or greater;
- Section 189(1)(b) relates to the power of the High Court, in an appeal against sentence in summary proceedings to quash the sentence and substitute another, whether more or less severe.

11. Section 6(6) is intended to prevent the revision of sentencing guidelines from becoming a ground for appeal referral by the Scottish Criminal Cases Review Commission. The Commission often deals with cases in which a significant period of time has lapsed between the original conviction and the appeal.

12. Section 6(7) requires the Lord Advocate to have regard to applicable sentencing guidelines when deciding whether to appeal a sentence.

13. Section 6(8) requires the prosecutor to have regard to applicable sentencing guidelines when deciding whether to appeal a sentence.

14. Section 7 gives the Scottish Ministers the power to request that the Council prepares or reviews sentencing guidelines on any matter. While the Council must have regard to the request, it is not bound to comply with it. It must however, provide reasons for its decision not to comply.

15. Section 8(1) provides the High Court of Justiciary with the power to request that the Council prepare, for the Courts approval, sentencing guidelines on any matter, or undertake a review of any sentencing guidelines published by the Council on any matter.

16. Section 8(2) places a requirement for the High Court to state its reasons for making a requirement under subsection (1).

17. Section 8(3) places a requirement on the Council to comply with a requirement made under subsection (1), and in doing so, must have regard to the High Courts reasons for making the requirement.

18. Section 9 places a requirement upon the Sentencing Council to publish opinions of the High Court pronounced under sections 118(7) or 189(7) of the 1995 Act, and a requirement upon the Scottish Court Service to provide the Council with a copy of any opinion as soon as possible after it has been pronounced. The section does not affect any powers or responsibilities of the Scottish Court Service to publish opinions of the High Court.

19. Section 10 provides that the Scottish Court Service must provide the Council with information it may reasonably require in the form in which it requires.

20. Section 11 provides the Council with the power to publish and provide information and guidance on sentencing and conduct research into sentencing.

21. Section 12 relates to the business plan of the Council and sets out the requirements for the plan. It requires the Council to submit a 3 year plan to the Scottish Ministers describing how it plans to carry out its functions. The Council must consult the persons specified in section 12(6) in preparing the business plan. Scottish Ministers must lay the plan before Parliament and the Council must publish it. It may also be revised at any time during its three years.

22. Section 13 relates to the annual report which the Council must submit to the Scottish Ministers and sets out the requirements for the content of the report. Each report must be laid before the Scottish Parliament by the Scottish Ministers and published thereafter by the Council.

#### **Section 14 – Community payback orders**

23. Section 14 inserts new sections 227A to 227ZN into the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) to establish community payback orders.

24. Section 227A(1) makes provision for the court to impose a community payback order (CPO) on an offender, who has committed an offence which would otherwise be punishable by imprisonment. Subsection (2) sets out the nine different requirements that can be included in a CPO. Subsection (3) provides that subsection (4) applies where an offender is (a) convicted of an offence punishable by a fine (whether or not it is also punishable by imprisonment) and (b) where the offence is also punishable by imprisonment but the court has decided not to impose a custodial sentence or a CPO under subsection (1) above. Subsection (4) provides that the court may impose a CPO under this subsection instead of, or as well as imposing a fine, and may impose one or more of the following requirements in such an order: an offender supervision

requirement, a level 1 unpaid work or other activity requirement and a conduct requirement. Subsections (5) and (6) set out the restrictions on requirements a justice of the peace court may impose. Subsection (7) gives the Scottish Ministers the power to amend by order the list of requirements that can be imposed by a justice of the peace court. Subsection (8) provides that such an order is subject to the affirmative resolution procedure. Subsection (9) defines “court” and “imprisonment.”

25. Section 227B sets out the general procedures, which a court must apply before imposing a CPO. Subsection (2) provides that the court must not impose the order unless it considers that the offence or combination of offences was serious enough to warrant a CPO being imposed. Subsection (3) provides that before the court imposes a CPO with 2 or more requirements, it must consider whether the requirements are compatible with each other. Subsection (4) provides that before making a CPO, the court must obtain and take account of a report from a local authority officer. Subsection (5) provides that the form of the report and the information to be contained in it may be specified by an Act of Adjournal. Subsection (6) provides that a report is not required if a CPO only imposes a level 1 unpaid work or other activity requirement or if it is imposed under section 227M(2) for fine default. However, where a CPO is imposed on a 16 or 17 year old, sections 227G(2)(a) and 227M(3) require that an offender supervision requirement must also be imposed, in recognition of the potential vulnerability of the offender. A report would therefore be required where a CPO is imposed on a 16 or 17 year old under section 227A (1) or (4) as a first instance disposal, but not where it is imposed under section 227M for fine default. Subsection (7) sets out who should receive a copy of the report. Subsection (8) provides that before imposing the order, the court must explain to the offender in ordinary language the purpose and effect of the CPO, the consequences for the offender should he/she fail to comply with its terms and the arrangements for periodic review, where applicable. Subsection (9) requires the offender to confirm that he/she understands and is willing to comply with all the requirements which form the CPO and subsection (10) sets out the circumstances where a CPO may be imposed without the consent of the offender.

26. Section 227C(2) sets out the generic requirements which need to feature in a CPO. These include the need to identify the area where the offender will reside and for the relevant local authority to nominate a responsible officer within 2 days of receiving a copy of the order. The order will indicate the need for the offender to comply with any instructions given by the responsible officer and notify the officer of any change of address and any times at which the offender usually works or attends school. Where the order imposes an unpaid work or other activity requirement, it will require the offender to undertake the type of work or other activity instructed by the responsible officer for the number of hours specified in the order. Subsection (3) sets out the duties of the responsible officer including matters of compliance by the offender. Subsection (4) provides that references in the 1995 Act to a responsible officer in relation to CPOs are to an officer nominated by virtue of subsection (2)(b). Subsection (5) provides that in calculating the period of 2 days for the local authority to nominate a responsible officer, no account will be taken of Saturdays and Sundays or local or public holidays.

27. Section 227D makes further provision in relation to the CPO. Subsection (1) provides that a CPO is to be regarded as a sentence of the court. Subsection (2) provides that the court must give reasons for imposing the CPO in open court. Subsection (3) provides that the court in imposing a CPO is not prevented from taking other actions e.g. imposing a fine or other sentence (other than imprisonment) that it would be entitled to make in respect of the offence. Subsections (4) and (5) indicate the arrangements to be followed by the clerk of the court with

regard to those who should receive copies of the order and how they should be given. Subsection (6) provides for the form of the order to be set out in an Act of Adjournal.

28. Section 227E provides that the court in deciding on the requirements, which will form a CPO, should so far as possible avoid any conflict with the offender's religious beliefs, or interference with the offender's times of work or attendance at school or any other educational establishment.

29. Section 227F sets out that Scottish Ministers may, by order, provide for payment of offenders' travelling or other expenses to enable them to comply with the requirements imposed on them by the CPO. Such an order is subject to the negative resolution procedure.

30. Section 227G (1) sets out that as part of an offender supervision requirement and for the period specified the offender must attend as instructed for appointments with the responsible officer or his/her nominee. This indicates that the purpose of the requirement is to engage with the offender to support their rehabilitation. Subsection (2) details the circumstances under which a court must impose an offender supervision requirement. Subsection (2)(a) provides that an offender supervision requirement must be imposed on an offender under 18 years of age (at the time the order is imposed). Subsection (2)(b) provides that an offender supervision requirement must be included in a CPO where certain other specified requirements are included. Subsection (3) provides that an offender supervision requirement must be imposed for at least 6 months and not exceed 3 years. Although as noted in subsection (4), section 227ZE(4) provides that the minimum period of 6 months does not apply if the offender supervision requirement is imposed purely as a result of the imposition of a restricted movement requirement under subsection 227ZC(7)(d). Subsection (5) sets out the maximum duration of an offender supervision requirement when it is imposed on a person aged 16 or 17 along with only a level 1 unpaid work or other activity requirement.

31. Section 227H defines a compensation requirement as where an offender must pay compensation for any relevant matter in favour of a relevant person. Subsection (2) sets out what the "relevant matters" are and who a "relevant person" is. The compensation can be paid (subsection (3)) by a lump sum or in instalments as determined by the court. Subsection (4)(a) and (b) provide that where compensation must be paid in full by the offender no later than 18 months after the CPO is imposed or not later than 2 months before the end of the supervision period, whichever is earlier. Subsection (5) sets out the further provisions of the 1995 Act which apply to a compensation requirement as if the references in them to a compensation order also included a compensation requirement.

32. Section 227I(1) defines an unpaid work or other activity requirement. Subsection (2) sets out that it is for the responsible officer to determine if the offender will undertake "other activity" as well as unpaid work; and subsection (3) that it is for the responsible officer to determine the nature of the unpaid work and any other activity which the offender is to carry out. Subsection (4) specifies the minimum and maximum number of hours that may constitute an unpaid work or other activity requirement. Subsections (5) and (6) provide for two levels of unpaid work and other activity, to be known as level 1 and level 2, and defines the range of hours within these levels. Subsections (7), (8) and (9) provide that the Scottish Ministers may, by order and within a defined range, amend this section to vary the minimum and maximum hours of unpaid work or other activity that an offender can be required to perform.

33. Section 227J sets out further provisions in relation to an unpaid work and other activity requirement. Subsection (1) restricts the court to imposing this requirement only on an offender aged 16 years or over. Subsection (2) provides that this requirement can only be imposed by the court if the court considers the offender to be suitable to perform unpaid work. Subsection (3) provides that subsection (2) does not apply where the court is considering imposing a CPO imposing only a level 1 unpaid work or other activity requirement, or if the CPO would be imposed under s.227M(2) as an alternative to imprisonment following fine default. Subsection (4) provides for the Scottish Ministers to make regulations that could in future allow justice of the peace courts to impose a level 2 unpaid work and activity requirement and subsection (5) provides that such regulations would be subject to the affirmative resolution procedure.

34. Section 227K(1) provides for the split between unpaid work or other activity to be determined by the responsible officer subject to limits set out in subsection (2) on the maximum number of hours of other activity that can count towards the requirement. Subsection (3) and (4) provide the Scottish Ministers with powers to vary the limits specified in subsection (2) by order made by affirmative resolution of the Scottish Parliament.

35. Section 227L sets out the maximum time limit for completion of levels 1 and 2 unpaid work or other activity requirement, as three months or six months respectively, unless a longer period is specified by the court in the requirement.

36. Section 227M (1) provides that section 227M applies where the offender has defaulted on a fine and the offender is not serving a sentence of imprisonment and the court would, apart from this section, have imposed a period of imprisonment. Subsection (2) provides that where the amount of the default does not exceed level 2 on the standard scale (at present £500), the court must impose a CPO with a level 1 unpaid work and other activity requirement. Where the fine does exceed level 2, the court may impose such a CPO. Subsection (3) sets out that where, in these circumstances, the court is imposing a CPO on a person aged 16 or 17; it must also impose an offender supervision requirement. Subsection (4) limits the number of hours in the requirement to 50 where the amount of the default does not exceed level 1 on the standard scale (at present £200).

37. Subsection (5) provides that the fine or remaining instalment is discharged when the offender completes the hours of unpaid work and other activity requirement imposed by the court. Subsection (6) provides for discharge of the order where the offender, after its imposition, pays in full the amount of the fine outstanding. Subsection (7) provides that under the circumstances described in the section, a level 1 unpaid work and other activity requirement cannot be imposed on an offender under the age of 16; that the court can direct that it be concurrent with any existing requirement; can direct that where it is to be served concurrently, hours of unpaid work undertaken after the new requirement is imposed count for the purposes of compliance with that requirement and the existing requirement; and that the new requirement cannot be imposed where the maximum number of hours that can be imposed is less than 20. Subsection (8) provides that the High Court is not included in references in this section to "court".

38. Section 227N(1)(a) and (b) indicates that this section applies to situations where a court is considering imposing an unpaid work and other activity requirement on an offender already subject to one or more existing such requirements. Subsection (2) gives the court discretion to

direct that the new requirement can be concurrent to any existing requirement(s). Where a concurrent requirement is made, subsection (3) sets out that the hours of unpaid work and other activity undertaken in respect of the new requirement also count towards any existing requirements.

39. Subsections (4) and (5) provide that where an order is to be imposed consecutively with another order (or orders) the maximum number of hours of unpaid work or other activity that can be imposed as part of the order is 300 less the net balance of actual hours outstanding on existing requirements. Where the existing requirements are concurrent, the hours outstanding on these requirements must only be counted once in determining the net balance (subsection (6)). Subsection (7) specifies that a court cannot impose a new unpaid work and activity requirement where the maximum number of hours' that can be imposed is less than 20.

40. Section 227O gives the Scottish Ministers the power to make rules in relation to the undertaking of unpaid work and other activities. Such rules may include provision in relation to a daily maximum number of hours of work or other activity, calculations of time undertaken, and record keeping. The rules may confer functions on responsible officers and make provision for how responsible officers should exercise their functions. The Rule would be made subject to the negative resolution procedure.

41. Section 227P(1) defines a "programme requirement" as where the offender must participate in a specified programme at the place specified and on the specified number of days. Subsection (2) provides a definition of "programme". Subsection (3) prevents the court from making a programme requirement unless it is recommended by a local authority officer as being suitable for the offender to take part in. If the cooperation of someone other than the offender would be necessary to ensure the compliance of an offender with the proposed programme requirement, subsection (4) provides that the court can only impose the requirement if that other person consents. Subsection (5) specifies that the court cannot impose a programme requirement requiring the offender to participate in a specified programme which would extend beyond the last day of the accompanying offender supervision requirement. If the offender is subject to a programme requirement, subsection (6) requires the offender to comply with any instructions given by the person in charge of the programme. Subsection (7) defines "specified" as specified in the requirement.

42. Section 227Q(1) defines a "residence requirement" as where the offender must reside at a specified place for a specified period. If the specified place is to be a hostel or institution, subsection (2) restricts the court from imposing the requirement unless it has been recommended by a local authority officer. Subsection (3) stipulates that the specified period must not be longer than the period specified in the supervision requirement. "Specified" means specified in the requirement (subsection (4)).

43. Section 227R(1) provides a definition, including the purpose, of a mental health treatment requirement. Subsection (2) indicates that subject to certain specified types of treatment listed in subsection (3) the nature of the treatment is not to be specified. Before imposing a mental health requirement subsection (4) requires the court to be satisfied on the basis of written or oral evidence submitted by appropriately qualified individuals that three conditions (A – C) have been met. Subsection (5) sets out the considerations in relation to Condition A in that the offender must be suffering from a mental condition, which requires and

may be susceptible to treatment and that other specified orders are not appropriate. Condition B is set out in subsection (6) and requires the proposed treatment to be appropriate for the offender. Condition C is set out in subsection (7) and requires that arrangements must have been made for the proposed treatment. Subsection (8) requires that the period for which the offender must submit to the treatment should be no longer than the specified period in the offender supervision requirement to be imposed at the same time as the mental health treatment requirement. Subsection (9) defines the specified treatment or specified period as being the treatment or period specified by the court in the requirement.

44. Section 227S(1) provides that proof of signature or qualifications is unnecessary when an approved medical practitioner submits a report in evidence in relation to a mental health treatment requirement. Subsections (2) and (3) state that the offender and his/her solicitor must receive a copy of the report of the medical evidence and the case may be adjourned to give the offender further time to consider the report. Where the offender is being detained in hospital or remanded to custody, subsections (4) and (5) make provision for an examination of the offender by an approved medical practitioner for the purposes of challenging the evidence to be presented in court. Subsection (6) provides for any such examination to be undertaken in private.

45. Section 227T(1) to (3) enable the practitioner under whose direction the treatment is being carried out to make arrangements where appropriate for the offender to receive a different kind of treatment or to receive it at a different place. Subsection (4) states that the treatment to be provided must be of a kind which could have been specified in the original requirement. An exception is set out in subsection (5) which allows for the offender to receive treatment as a residential patient in an institution or place which it might not have been possible to specify for that purpose in the original requirement. Subsection (6) requires the agreement of the offender and the responsible officer to the proposed changes, for the agreement of a registered medical practitioner or registered psychologist to accept the offender as a patient and where the offender is to be a resident patient for him/her to be received as such. Subsection (7) requires the court to be informed of changes under this section and for the newly arranged treatment to be regarded as required under the CPO.

46. Section 227U(1) specifies the definition and purpose of a drug treatment requirement. Subsection (2) indicates that subject to certain specified types of treatment listed in subsection (3) the nature of the treatment is not to be specified. The person who treats or directs the treatment of the offender (subsection 4) must be appropriately qualified or experienced. Subsection (5) states that the period for which the drug treatment requirement is imposed must not be longer than the period of the accompanying supervision requirement. Subsection (6) requires the court to satisfy itself before imposing a drug treatment requirement that a) the offender is dependent on, or has a propensity to misuse, controlled drugs, b) his/her condition may be treatable and c) arrangements have been or can be made for the offender's treatment. Subsection (7) defines "specified".

47. Section 227V(1) specifies the definition and purpose of an alcohol treatment requirement. Subsection (2) indicates that subject to certain specified types of treatment listed in subsection (3) the nature of the treatment is not to be specified. The person who treats or directs the treatment of the offender (subsection 4) must be appropriately qualified or experienced. Subsection (5) states that the specified period must not be longer than the period of the supervision requirement. Subsection (6) requires the court to satisfy itself before imposing an



alcohol treatment requirement that a) the offender is dependent on alcohol, b) his/her condition may be treatable and c) arrangements have been or can be made for the offender's treatment. Subsection (7) defines "specified".

48. Section 227W defines a "conduct requirement" as where for the specified period, the offender must, do, or refrain from doing specified things. Subsection (2) provides that a conduct requirement may only be imposed if the court considers it is necessary to promote the offender's good behaviour or prevent further offending. Subsection (3) provides that the conduct requirement cannot be longer than 3 years. Subsections (4) (a) and (b) provide that the specified things must not include anything that could be required by imposing one of the other requirements available as part of the CPO, or anything which would be inconsistent with the rules relating to other available requirements. Subsection (5) explains that "specified" in relation to the conduct requirement means specified in the requirement.

49. Section 227 X sets out the arrangements for periodic review of a CPO.

50. When the court makes a CPO, section 227X(1) provides that it may be reviewed at the time or times stated in the Order. Such reviews are to be referred to as "progress reviews" (subsection 2). Subsection (3) allows progress reviews to be carried out by the court which made the CPO or by the appropriate court (which is defined in 227ZN) and subsection (4) allows the court to determine how it will carry out the review. Subsection (5) requires the responsible officer to provide the court with a written report about the offender's compliance before a progress review takes place and subsection (6) requires the offender to attend each such review. Where the offender fails to attend the progress review, subsection (7) provides for the court to (a) issue a citation for the offender's attendance or (b) a warrant for his/her arrest. Subsection (8) defines the citation provisions. Subsections (9) explains that subsections (10) and (11) apply where in the course of carrying out a progress review the court is given reason to think that the offender has failed to comply with the CPO. Subsection (10) sets out that the court must provide the offender with written details of the alleged failure, inform the offender that he/she is entitled to be legally represented and that he/she does not need to answer the allegation before having the opportunity to take legal advice or indicating that he/she does not wish to take legal advice. The court must then (subsection (11)(a)), if it is the appropriate court, appoint another hearing for consideration of the alleged breach, or if it is not the appropriate court (b) refer the alleged breach to the appropriate court. Subsection (12) allows the court to vary, revoke or discharge the CPO in light of a progress review. (Under 227Z, one of the variations it could make would be to schedule a further progress review.)

51. Section 227Y provides for application by the offender or the responsible officer to vary, revoke or discharge a CPO.

52. Section 227Z sets out rules where a court proposes to vary, revoke or discharge a CPO. Subsection (2) provides that the court can only revoke, vary or discharge the order where it is in the interests of justice to do so, having regard to the circumstances which have arisen since the start of the order (except under (3) where the order is being varied as a result of a breach of the order). Subsection (4) and (5) set out the options available to the court in considering variation of the order. Subsections (6) provides that where the court proposes to extend the number of hours specified in an unpaid work or other activity requirement the new number of hours cannot be longer than the overall maximum period or limit allowable for such a requirement. Rules for

calculating the maximum are set out in subsections (7) and (8) and are along the same lines as in 227N. Subsection (9) similarly places a limit on the amount by which a compensation requirement can be varied. Subsection (10) provides that where the court varies a restricted movement requirement, a copy of the variation order must be provided to the person responsible for monitoring the offender's compliance. Subsection (11) allows the court when revoking an order to deal with the offender as it could if the order had not been made. This means that where the CPO was originally imposed at first instance as an alternative to imprisonment, the court can, after revoking the CPO, decide to impose a custodial sentence. Subsection (12) provides that where the court revokes a CPO which was imposed in respect of fine default the reference to the offence for which the order was imposed was a reference to the failure to pay a fine or fines for which the CPO was imposed. This means that in this case too the court will also have the option of imposing a custodial sentence after revoking the CPO. Where the court proposes to vary, revoke or discharge the order, other than on the application of the offender, subsection (13) provides that it must normally issue a citation requiring the offender to appear before the court (except where the offender is required to appear in connection with a progress review, or in connection with a breach of an order). Where the offender fails to appear as cited, subsection (14) allows a warrant for his/her arrest to be issued by the court. Subsection (15) defines the unified citation provisions.

53. Section 227ZA applies where the court is considering varying a CPO, subsection (2) requires the court to first obtain a report from the responsible officer about the offender and the offender's circumstances. Subsection (3) provides that the form of the report and the information to be contained in it may be prescribed by Act of Adjournment. Subsection (4) provides that such a report is not required where the court is considering varying a CPO which only imposes a level 1 unpaid work or other activity requirement or where the CPO has been imposed as a mandatory alternative to imprisonment following fine default. Subsection (5) sets out who is to be provided with a copy of the report. Subsection (6) requires that when varying the order the court must explain in ordinary language to the offender (a) the purpose and effect of each of the proposed varied requirements, (b) the consequences of non-compliance and (c) any arrangements or variation to arrangements for progress reviews. Subsection (7) requires confirmation from the offender that he or she understands the variations and is willing to comply with each of them.

54. Where the variation would impose a new requirement, subsection (8) sets out that (a) the court cannot impose the new requirement if it could not have been imposed when the order was originally made; and (b) where a new requirement is permissible the court must undertake the necessary steps before imposing the requirement that would have applied had it been imposed at the outset. Subsection (9) explains that subsection (8)(a) does not prevent the imposition of a restricted movement requirement in respect of breach of a CPO. (This is required since a restricted movement requirement cannot be imposed at first instance.) Subsection (10) provides that the effect of existing unpaid work or other activity requirements need not be taken into account when deciding whether an unpaid work or other activity requirement could have been imposed at first instance. Subsection (11) reinforces the need for the court to ensure that any variation to a requirement could have been imposed at the point of imposition of the order. Subsection (12) sets out the procedures for providing the offender and local authority with a copy of the CPO, as varied.

55. Section 227ZB applies to situations where the offender (a) proposes to change, or has changed, address to a different local authority from that specified in the order and (b) where the court is considering varying the order to specify the new area where the offender resides or will reside. Subsection (2) requires the court to be satisfied that arrangements have been or can be made in the new locality for the offender to comply with the CPO before varying the order. Where (subsection (3)) the court considers that a requirement imposed by the order cannot be complied with if the offender resides in a new locality, the court must not vary the order to specify the new locality unless it also varies the order to (a) revoke or discharge the requirement concerned, or (b) substitute another requirement that can be complied with. Subsection (4) requires the court to vary the order so that the new local authority is required to nominate one of its officers to be the responsible officer for the order.

56. Section 227ZC details the procedures and powers of the court in dealing with cases where the offender has failed to comply with the terms and conditions of a CPO and is considered to be in breach of the order. Subsections (1) to (4) set out the procedures for bringing cases to court, including issue of citations and warrants as required. Subsection (5) indicates the steps the court must take before considering the alleged breach. As set out in subsection (6), however, these steps need not be taken again if they have already been carried out as part of, or following, a progress review. Subsection (7) sets out the options available to the court in dealing with cases where breach of an order has been admitted or proven. These include imposing a fine not exceeding level 3 on the standard scale; revoking the order (where it was imposed under section 227A(1) and dealing with the offence in such a way as it could have dealt with the offender had the order not been imposed); where it was imposed under section 227A(4) revoking the order and imposing a term of imprisonment of up to 60 days in the justice of the peace courts and up to 3 months in any other case; varying the order to impose a new requirement; varying, revoking or discharging any requirement; or, imposing a fine (not exceeding level 3 on the standard scale) and vary the order. Subsection (8) sets out the options available to the court in dealing with a breach of a community payback order imposed under section 227M(2) in respect of failure to pay a fine. These include revoking the order and imposing on the offender a period of imprisonment not exceeding 60 days (where the court is a justice of the peace court) or 3 months in any other case; or varying the number of hours specified in the level 1 unpaid work or other activity requirement and varying the specified period in an offender supervision requirement as it relates to the requirement. Subsection (9) provides that where the court revokes a CPO and deals with the offender as it might have done had it not imposed a CPO and where for the same offence the offender was also sentenced to a concurrent Drug Treatment and Testing Order (DTTO) or a Restriction of Liberty Order (RLO) the court must also revoke the DTTO or RLO. Where the court is satisfied that the offender has breached a requirement imposed by the order, but had a reasonable excuse for the failure, subsection (10) provides that it can (subject to section 227Z(2)) vary the order to impose a new requirement, vary any requirement or revoke or discharge any requirement imposed by the order. Subsection (11) explains that subsections (7)(b), (c) and (9) are subject to the powers of drugs courts to deal with breach of CPOs.

57. Section 227ZD details supplementary requirements in respect of evidence and penalties related to dealing with breaches of CPOs. Subsection (1) provides that evidence of one witness is sufficient to establish that an offender has breached a requirement of a CPO. Subsections (2) and (3) detail the evidence required to prove a breach of a CPO with a compensation requirement. Subsection (4) provides for the court in dealing with cases of alleged breach to obtain a report from the responsible officer on the offender's compliance during the order.

58. Section 227ZE(1) provides that the courts may impose a restricted movement requirement (RMR), when varying a CPO under section 227ZC(7)(d). Subsection (2) requires the court, when imposing a RMR under section 227ZC(7)(d), to vary the order to include an offender supervision requirement unless such a requirement is already imposed by the order. Subsection (3) requires the offender supervision requirement to be at least the same duration as the RMR and where such a requirement is already imposed by the order but is not long enough, it must be varied to the minimum duration. Subsection (4) provides that the minimum period for which an offender supervision requirement can be imposed under section 227G(3) does not apply for the purposes of subsection (2). Subsection (5) requires the court to give a copy of the order imposing the RMR to the person responsible for monitoring compliance with the requirement. Subsection (6) requires the person responsible for monitoring compliance with the RMR to report any failures to comply with requirement by the offender to the offender's responsible officer. Subsection (7) provides that the responsible officer must report such a failure to the court once such a report has been received.

59. Section 227ZF describes the effect of a RMR. Subsection (1) defines a RMR as a requirement which restricts the offender's movements as specified. Subsection (2) provides that the RMR may require an offender to remain at a specified address, and/or away from a specified address during certain specified times or periods. Subsection (3) provides that the court must ensure that the duration of the RMR, either alone or taken together with any other requirement or order to which the offender is already subject, is limited to a maximum of 12 hours in any one day. Subsection (4) provides a definition of "other relevant requirement or order. Subsection (5) provides that the RMR takes effect from the day specified on the order and has effect for the period specified in the order. Subsection (6) provides that the RMR must have a duration not less than 14 days and not more than 12 months. Subsections (7) and (8) provide that where an RMR is being imposed for breach of a CPO on an offender under the age of 18 or where the only requirement imposed by the CPO was a level 1 unpaid work or other requirement, the specified period of the RMR should be no more than 60 days in the justice of the peace courts, and no more than 3 months in any other court. Subsection (9) requires the court to specify the method of compliance and the person responsible for monitoring that compliance on the RMR. Subsections (10) and (11) provide for the Scottish Ministers to prescribe by regulation, made under the affirmative procedure, changes to the restrictions set out in subsections (3) and (6b)). Subsection (12) defines "specified" for the purposes of the section.

60. Section 227ZG replicates some of the provisions of section 245A of the 1995 Act in respect of requirements placed on the court. Subsection (1) requires the court to be satisfied that compliance with the RMR can be monitored in the way specified in the order – which will be by way of remote (electronic) monitoring. Failure to be satisfied means that the RMR cannot be imposed. Subsections (2) and (3) require the court to obtain a report from a local authority officer, about the specified address and the views of the people staying at that address who are likely to be affected by the enforced presence of the offender. Subsection (3) provides for the court to hear from the report writer if required before imposing the RMR

61. Section 227ZH provides for the court to vary the terms of the RMR to change the specified address. Before agreeing to the variation the court must consider a report as detailed in section 227ZG above, and may hear from the report writer, if required, before making the variation.

62. Section 227ZI applies section 245C of the 1995 Act (remote monitoring of compliance with restriction of liberty orders) to remote monitoring requirements. In particular this provides for the Scottish Ministers to make arrangements, including contractual arrangements, to remotely monitor compliance with RMRs and to specify by regulation the devices which may be used in remote monitoring. It also provides that an offender made subject to an RMR will be required to wear a device to enable such remote monitoring and should not tamper with or damage the devices used for remote monitoring.

63. Section 227ZJ makes various provisions with respect to the functions of the Scottish Ministers, replicating some provisions from section 245A and 245B of the 1995 Act.

64. Subsections (1) to (3) provide for the Scottish Ministers to prescribe by regulations the court or classes of courts which may impose RMRs, the method of monitoring which may be used to monitor compliance with the RMR and the class of offender who may be made subject to an RMR. These regulations are subject to negative resolution procedure.

65. Subsections (4) and (5) require the Scottish Ministers to determine the person or persons responsible for monitoring compliance with the RMR and provides for different persons to be determined for different methods of monitoring. In practice, this is likely to be the company contracted to provide the remote monitoring service as referred to in section 227ZG.

66. Subsections (6) to (8) require the Scottish Ministers to advise the court of who is responsible for monitoring compliance with the RMR, enabling the court to specify this on the order. These subsections also require Scottish Ministers to advise the courts if there is any change in the persons responsible for monitoring compliance, and for those courts to subsequently vary the RMR to specify the new responsible persons, to send a copy of the varied order to the new responsible person, to the responsible officer and to notify the offender of the variation.

67. Section 227ZK details the documentary evidence required in order to establish in any proceedings (most likely in breach proceedings) whether the offender has complied with the RMR. It provides that a document produced by the device specified by virtue of section 245C of the 1995 Act, (in practice the remote monitoring system) and certificated by a person nominated by the Scottish Ministers that the statement provides information on the presence or otherwise of the offender at the specified address at the date and times shown on that document, is sufficient evidence of the facts.

68. Section 227ZL(1) requires local authorities to consult prescribed persons annually about the nature of the unpaid work and other activities to be undertaken as part of a CPO within their areas. Subsection (2) defines “prescribed persons” as such persons or class or classes of persons as prescribed by Scottish Ministers by regulations. A statutory instrument containing such regulations will be subject to negative resolution procedure (subsection (3)).

69. Section 227ZM requires that as soon as practicable after the end of each reporting year, each local authority must prepare a report on the operation of community payback orders within their area during that year and send a copy to the Scottish Ministers. Subsection (2) provides that Scottish Ministers may issue directions to local authorities about the content of their reports and that local authorities must comply with any such instructions. Subsection (3) provides that

as soon as practicable after the end of each reporting year, Scottish Ministers must lay before the Scottish parliament and publish a report that collates and summarises the data included in the various reports under subsection (1). Subsection (4) clarifies that “reporting year” means, in this section, the period of 12 months beginning on the day this section comes into force, or any subsequent 12 months period beginning on the anniversary of that day.

70. Section 227ZN provides definition of the term “the appropriate court” as used in relation to the provisions for the CPO.

### **Section 15 – Non-harassment orders**

71. Section 234A of the Criminal Procedure (Scotland) Act 1995 (“the Act”), enables a prosecutor to apply for a non-harassment order against a person convicted of an offence involving harassment towards a victim. This section makes changes to the Act to make it less onerous for prosecutors to apply for an order.

72. Subsection (a) changes the test in section 234A(1) of the Act so that an order may be applied for where a person is convicted of an offence involving misconduct towards a victim. Misconduct is defined (as per the substituted definition at subsection (d)) as including “conduct that causes alarm or distress”. This is a lower threshold than the existing reference to ‘harassment’ of the victim and will remove the need for the accused to have been convicted of an offence which in itself involved conduct on more than one occasion. It will allow criminal non-harassment orders to be considered in a greater number of cases.

73. Subsection (b) makes an associated change so that an order can be made to prevent harassment rather than merely any ‘further harassment’ therefore giving the court powers to protect victims at an earlier stage.

74. Subsection (c) inserts new subsections (2A), (2B) and (2C) into section 234A. New subsection (2A)(a) allows the court to have regard to information on other offences which involved misconduct towards the victim which the offender has been convicted of or has accepted a fixed penalty or compensation offer or work order for under sections 302(1), 302A(1) and 303ZA(6) of the 1995 Act.

75. New subsection (2A)(b) sets out the way in which the information can be given to the court and will allow the court to see the relevant details of previous convictions (rather than simply a list of previous convictions as they currently do) when deliberating on an application for a non-harassment order. This is to enable a court to have fuller details of the past offending behaviour of a person.

76. New subsection (2B) limits the court’s right to have regard to this information in accordance with the existing rules on previous convictions, offers or orders set out in sections 101, 101A (solemn proceedings) and 166 and 166A (summary proceedings) of the 1995 Act. New subsection (2C) requires the court to give the offender the opportunity to respond to the application for a non-harassment order.

77. Subsection (d) substitutes a new subsection (7) relating to definitions.

## **Section 16 - Short periods of detention**

78. Section 169 of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) permits summary courts to detain offenders at court or a police station until 8pm in lieu of imprisonment, so long as the offender can get home that day. As this section is not used and has been redundant for some time, section 16(2) repeals section 169 of the 1995 Act.

79. Section 206(1) of the 1995 Act provides that a summary court cannot impose imprisonment for a period of less than five days. The time period for imposing imprisonment is being extended by section 16(3)(a) from less than “five days” to less than “fifteen days”. Subsections (2) to (6) of section 206 of the 1995 Act permit summary courts to sentence an offender to be detained in a certified police cell or similar place for up to four days. As there are no such certified police cells in Scotland, and have not been any for some time, subsections (2) to (6) are redundant and are therefore being repealed by section 16(3)(b).

## **Section 17 – Presumption against short periods of imprisonment**

80. Section 204 of the Criminal Procedure (Scotland) Act 1995 deals with restrictions on passing sentences of imprisonment or detention. Section 17 inserts at subsection (3A) of section 204 a presumption against the courts passing sentences of imprisonment of 3 months or less unless the court considers that no other method of dealing with the person is appropriate. Subsection (3B)) provides that where a court imposes a sentence of 3 months or less it must give its reasons for the opinion that no other method of dealing with the offender is appropriate and that those reasons are to be entered in the record of proceedings. Provision is made at subsection (3C) for the number of months specified in subsection (3A) to be changed by Scottish Ministers. Subsection (3D) specifies that the number of months cannot be changed unless a draft of the Scottish Statutory Instrument is laid before and approved by the Scottish Parliament.

## **Section 18 - Amendments of Custodial Sentences and Weapons (Scotland) Act 2007**

81. Part 2 of the Custodial Sentences and Weapons (Scotland) Act 2007 (“2007 Act”) deals with the confinement and release of prisoners. These provisions of the 2007 Act have not yet been commenced. Section 18 makes amendments to a number of statutory provisions in the 2007 Act to change the framework relating to the release of prisoners from custody.

82. Subsections (2) and (3) repeal the provisions providing for custody-only sentences and prisoners in the 2007 Act and make provision for a new type of sentence called a short-term custody and community sentence. A short-term custody and community sentence is a sentence of imprisonment for less than the period prescribed in an order made by the Scottish Ministers. A custody and community sentence is a sentence of imprisonment for at the least the period prescribed by the Scottish Ministers in an order. For example a short-term custody and community sentence may be a sentence of imprisonment for less than one year and a custody and community sentence a sentence of imprisonment for a year or more. A prisoner serving a short-term custody and community sentence (a “short-term custody and community prisoner”) is released after he or she has served one-half of his or her sentence of imprisonment and is released on licence for the remainder of the sentence. Subsection (2) also makes provision for the order making power prescribing the period sentence of imprisonment that determines a short-term custody and community sentence and a custody and community sentence is subject to the affirmative resolution procedure.

83. Subsection (4) makes a consequential amendment to the chapter title in Chapter 3 of Part 2 of the 2007 Act so that it refers to short-term custody and community prisoners.

84. Subsection (5) amends section 29 of the 2007 Act to require the Scottish Ministers to include supervision conditions in a prisoner's licence where the prisoner being released (other than one liable to removal from the United Kingdom) falls into the following categories: a life prisoner; a custody and community prisoner; a short-term custody and community prisoner released on compassionate grounds, a short-term custody and community prisoner subject to an extended sentence, a short-term custody and community prisoner who is a sex offender and is serving 6 months or more, or short-term custody and community prisoner who is a child.

85. Subsection (6) inserts a new provision relating to the licence conditions to which a short-term custody and community prisoner is to be subject to. The Scottish Ministers must include the standard conditions in the licence. The Scottish Ministers must also include the supervision conditions in the licence if the prisoner is a person to whom section 29(1) of the 2007 Act applies i.e. a prisoner released on compassionate grounds; a prisoner serving an extended sentence; a sex offender serving 6 months or more; or a child sentenced to detention. The Scottish Ministers may include other licence conditions if they consider this appropriate.

86. Subsection (7) inserts a new provision for the assessment of conditions for short-term community licences (the licence that a short-term custody and community prisoner is released on). The Scottish Ministers and local authorities are required to put in place joint working arrangements in relation the assessment and management of the risks posed by short-term custody and community prisoners. In deciding whether to include non-mandatory supervision conditions in a short-term community licence for a particular prisoner, the Scottish Ministers and the appropriate local authority must jointly assess whether any of such conditions are appropriate.

87. The appropriate local authority is defined as either the local authority in whose area the offender resided immediately prior to being sentenced or the local authority in whose area the offender intends to reside in upon his or her release on licence.

88. Subsection (8) amends section 47 of the 2007 Act to provide that Scottish Ministers may release, on a curfew licence, a short-term custody and community prisoner who is serving a sentence of 3 months or more and is of a description to be specified by the Ministers by order. Such an order is subject to the affirmative resolution procedure. Section 47(3) of the 2007 Act provides that the curfew licence must include a curfew condition, which is described in section 48 of the 2007 Act.

89. Subsection (8)(c) amends section 47 of the 2007 Act to specify the period during which a short-term custody and community prisoner may be released on a curfew licence. The Scottish Ministers may only release a short-term custody and community prisoner on curfew licence after the later of: the day on which the prisoner has served one-quarter or four weeks of the sentence (whichever is the greater), or the day falling 166 days before the expiry of one-half of the sentence. In addition, release must be before the day falling 14 days before the expiry of one-half of the sentence. So the window for release on curfew licence is between 166 days and 14 days before the expiry of one-half of the sentence so long as the prisoner has served at least one-



quarter (or 4 weeks if this is more than one quarter) of his or her sentence at the proposed time of release.

90. Subsection (8)(e) amends section 47(8) of the 2007 Act to provide that a curfew licence for a short-term custody and community prisoner remains in force until the expiry of the first half of that prisoner's sentence.

91. Paragraphs 2 to 5 of Schedule 3 make consequential amendments to sections 34, 35, 36, 37, 40 and 42 of the 2007 Act.

92. Paragraph 6 of Schedule 3 inserts a new section 42A into the 2007 Act. Section 42A applies where the Parole Board considers under section 42(3) of the 2007 Act that it is in the public interest that a recalled short-term custody and community prisoner be confined. The parole Board are required to provide the prisoner with the reasons for its determination in writing. If there is less than 4 months of the prisoner's sentence remaining, the prisoner must remain in custody for the remainder of the sentence. If there are between 4 months and 2 years of the prisoner's sentence remaining, the Board must fix a date when it will next review the prisoner's case within the period mentioned in section 42A(5). Section 42A(5) specifies that the period begins 4 months after the date of the determination and ends on the expiry of the prisoner's sentence. Subparagraph (6) provides that if no date is set under section 42A(4) the prisoner must remain in prison to the end of the sentence.

93. Section 42A(7) of the 2007 Act provides that if at least 2 years remain of the short-term custody and community prisoner's sentence then the Parole Board must, subject to section 26, fix a date for when it will next hear the prisoner's case within the period mentioned in section 42A(8). Section 42A(8) provides that the period begins 4 months after the date of the determination and ends immediately before the second anniversary of the determination. Section 42A(9) requires Scottish Ministers to refer the case to the Parole Board before any date set by the Parole Board under section 42A(4) or (7).

94. Paragraphs 7 to 14 of Schedule 3 make consequential amendments to sections 45, 46, 51, 55, 56 and Schedules 2 and 3 of the 2007 Act. Paragraphs 15 to 17 make minor consequential amendments to sections 167 and 210A of the Criminal Procedure (Scotland) Act 1995.

### **Section 19 – Early removal of certain short-term prisoners from the United Kingdom**

95. This section substitutes a new version of Schedule 6 to the Custodial Sentences and Weapons (Scotland) Act 2007 ("2007 Act"). The Schedule contains transitory amendments to Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("1993 Act"), which will have effect until the 1993 Act is repealed by the 2007 Act. Paragraph 3(a) replicates the effect of the existing version of Schedule 6.

96. Paragraph 4 inserts three new sections, 9A to 9C, into the 1993 Act. Inserted section 9A provides for a definition of prisoners who are eligible for but not liable to removal from the UK. In order to be eligible for removal, a prisoner must be able to satisfy the Scottish Ministers that he or she has the settled intention of residing permanently outside the UK if removed from prison. If satisfied, the Scottish Ministers may release the prisoner from prison using the power under inserted section 9B.

97. Inserted section 9B provides the Scottish Ministers with a discretionary power to release short-term prisoners who are liable to or eligible for removal from the UK. This power may be exercised at any time during the 180 day period before the prisoner will have served one-half of their sentence, provided that the prisoner has already served at least one-quarter of his or her sentence. This corresponds to the existing time limits for Home Detention Curfew in the 1993 Act (inserted by the Management of Offenders etc. (Scotland) Act 2005). The Scottish Ministers also have the power to amend the 180 day period, up or down, by means of an order subject to approval by the Scottish Parliament.

98. Inserted section 9B(3) sets out conditions that must be satisfied before a prisoner can be removed from prison under the powers conferred by this section. If a prisoner removed under this section remains in the UK but has not been returned to prison, subsection 9B(4) enables the Scottish Ministers to exercise their duties and powers under sections 1(1), 1AA or 3 of the 1993 Act in relation to the prisoner as if the prisoner were in prison (i.e. duty to release the prisoner after serving one half of the sentence, and the power to release on compassionate grounds).

99. Inserted section 9C provides for the detention and/or further removal of a person who re-enters the UK within a certain time after being released from prison under section 9B.

100. Paragraph 5 makes amendments to the International Criminal Court (Scotland) Act 2001. The amendments to section 24 of the 2001 Act prevent sections 9A, 9B and 9C of the 1993 Act from being applied to international criminal court prisoners.

## **Section 20 - Reports about supervised persons**

101. This section amends section 203 of the Criminal Procedure (Scotland) Act 1995 to provide that where a local authority officer makes a report to the court to assist in deciding on the most appropriate sentence, a copy requires to be given to the offender, the offender's solicitor (if any) and the prosecutor.

## **Section 21 – Detention of children convicted on indictment**

102. Section 208 of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) relates to the detention of children convicted on indictment. Section 21 amends section 208 of the 1995 Act to require (subsection (2)) that where the court imposes a sentence of detention on a child, the court must state its reasons for its opinion that no other method of dealing with the child is appropriate and have those reasons entered in the record of proceedings.

## **Section 22 – Pre-sentencing reports about organisations**

103. This section inserts a new section 203A in the Criminal Procedure (Scotland) Act 1995 and will apply when an organisation is convicted of an offence. This will allow the court to order a pre-sentencing background report into the financial affairs and structural arrangements of an organisation before dealing with the organisation in respect of the offence. The power will be available both in summary and solemn cases.

104. The report will be prepared by a person appointed by the court and will be referred to as the ‘reporter’. The court may also issue directions to the reporter about the information contained in the report, particular matters to be covered in the report and the time by which the report is to be submitted to the court. This will also enable the court to make an order requiring the organisation to provide access to its books, documents etc. and to provide assistance when necessary. Failure to comply with this order could be treated as contempt of court.

105. The reporter’s costs in preparing the report will be paid by the clerk of court in the first instance. However, the court may order the organisation to reimburse to the clerk all or a part of those costs. An order to pay the costs of the report to the court may be enforced by civil diligence as if it were a fine.

106. On receipt of the report, the clerk of the court must provide a copy to the organisation, the organisation’s solicitor (if any) and the prosecutor. The court must also have regard to the report in deciding how to deal with the organisation in respect of the offence. If the court decides to impose a fine, the court must, in determining the amount of the fine, have regard to the report and the cost of the report, if the organisation has to reimburse the clerk of the court for its preparation. If the court decides to fine the organisation and to seek reimbursement for preparing the report, any payment by the organisation will be first applied to the preparation of the report.

107. If the court makes a compensation order in respect of the offence, any payment will first be made in satisfaction of the compensation order before consideration of payment for the preparation of the report or a fine.

108. ‘Organisation’ will have the same meaning as in section 307(1) (interpretation) of the Criminal Procedure (Scotland) Act 1995. This includes, among others, bodies corporate, partnerships and government departments.

### **Section 23 - Extended sentences for certain sexual offences**

109. Under the provisions of section 210A of the Criminal Procedure (Scotland) Act 1995 (as inserted by section 86(1) of the Crime and Disorder Act 1998), the court is able to impose an “extended sentence” on an offender who is convicted of a relevant sexual or violent offence and receives a determinate sentence of imprisonment of any length in respect of a sexual offence or a sentence of 4 years or more in respect of a violent offence.

110. Imposition of an extended sentence provides for an additional period of supervision on licence in the community over and above that which would normally have been the case. An extended sentence may only be passed in indictment cases and if the court is of the opinion that the period of supervision on licence, which the offender would otherwise be subject to, would not be adequate for the protection of the public from serious harm from the offender.

111. An extended sentence is defined, by subsection (2) of section 210A, as being the aggregate of the term of imprisonment which the court would otherwise have passed (“the custodial term”) and a further period, known as the “extension period”, for which the offender is to be on licence (and which is in addition to any licence period attributable to the “custodial term”). The extension period shall not exceed 10 years (though subsection (5) provides that the

total length of an extended sentence shall not exceed any statutory maximum for a particular offence).

112. The following example demonstrates how the extended sentence arrangements currently work in practice: A sex offender sentenced to 3 years custodial term and 3 years extension period would be released after serving 18 months in prison but will be on licence for the balance of the custodial period i.e. 18 months plus a further 3 years = 4 years and six months in total on licence.

113. Subsection (10) of section 210A provides a definition of “sexual offence”, which takes the form of listed offences, either under statute or at common law. It also defines “violent offence”.

114. The new provision will allow courts in appropriate circumstances, to impose an extended sentence where a person is convicted of an offence which discloses, in the court’s opinion, a significant sexual aspect to the offender’s behaviour but which is not otherwise covered by the current definitions of “sexual offence” and “violent offence”.

115. Schedule 3 to the Sexual Offences Act 2003, lists at paragraphs 36-59 the sexual offences in Scotland in relation to which the sex offender notification requirements under that Act apply. Paragraph 60 includes “an offence in Scotland other than those mentioned in paragraphs 36 to 59 if the Court, in imposing sentence or otherwise disposing of the case, determines for the purposes of this paragraph that there was a significant sexual aspect to the offender’s behaviour in committing the offence”.

116. The new provision will remedy the current absence of a power for the courts to impose an extended sentence in such cases by adding a further “catch all” category to the list of offences in subsection (10) of section 210A, but this will be dependent on the offender being subject, by virtue of Schedule 3 to the Sexual Offences Act 2003, to the notification requirements of Part 2 of that Act.

## **Section 24 - Effect of probation and absolute discharge**

117. This section makes amendments to a number of statutory provisions in order to remove unnecessary references to probation orders and to ensure that probation orders and orders for absolute discharge are treated appropriately in the Licensing (Scotland) Act 2005 (“the 2005 Act”).

118. Subsection (1) amends section 1(4) of the Rehabilitation of Offenders Act 1974 to update references to statutory provisions which have now been consolidated twice. There is no change to the effect of the sections, and the amendment simply makes the section easier to read.

119. Subsections (2) and (3) remove redundant references to probation orders in sections 49(6) and 58(3) of the Civic Government (Scotland) Act 1982.

120. Subsection (4) inserts a new subsection (2A) into section 96 of the 2005 Act. This will ensure that the court can make an exclusion order when dealing with a person who has been convicted of a violent offence and placed on probation. It displaces section 247(1) of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”), which would otherwise provide that the person would not be treated as having been convicted.

121. Subsection (5) inserts new subsections (5) and (6) into section 129 of the 2005 Act and specifies a number of provisions to which sections 247(1) and (2) of the 1995 Act do not apply. The purpose is to ensure that where a person has been found guilty of an offence and a probation order or order for absolute discharge has been imposed, the person is treated as having been convicted for the purposes of these provisions of the 2005 Act.

### **Section 25 - Offences aggravated by racial or religious prejudice**

122. Section 96 of the Crime and Disorder Act 1998 (“the 1998 Act”) created a statutory aggravation relating to race requiring that the court shall, on convicting a person of an offence, take the aggravation into account in determining the appropriate sentence.

123. In a similar vein, section 74 of the Criminal Justice (Scotland) Act 2003 (“the 2003 Act”) created a statutory aggravation relating to religion requiring that the court shall, on convicting a person of an offence, take the aggravation into account in determining the appropriate sentence.

124. This section amends both the 1998 Act and the 2003 Act to require that the courts record how an aggravation has affected a sentence (if at all) and to ensure consistency between the statutory provisions.

125. Subsection (1) substitutes subsection (5) of section 96 of the 1998 Act. This requires that, where an aggravation relating to prejudice is proved, the court must also explain how the aggravation has affected the sentence (if at all – and if not, then the reasons for this) and record the conviction in a manner which shows that the offence was aggravated by prejudice related to race.

126. Subsection (2)(a) inserts a new subsection (2A) into section 74 of the 2003 Act. This provides that the aggravation can apply even if prejudice relating to religion is not the sole motivation for the offence. This is already the case for racial aggravations and therefore ensures consistency between the two provisions.

127. Subsection (2)(b) replaces subsections (3) and (4) of section 74 of the 2003 Act with subsection (4A), which requires that, where an aggravation relating to prejudice is proved, the court must explain how the aggravation has affected the sentence (if at all – and if not, then the reasons for this) and record the conviction in a manner which shows that the offence was aggravated by prejudice related to religion.

### **Section 26- Voluntary intoxication by alcohol: effect in sentencing**

128. This section provides that, at the point of sentence, a court must not consider it an mitigating factor that the offender was voluntarily intoxicated at the time the offence was committed.

### **Section 27- Mutual recognition of judgements and probation decisions**

129. Section 24A(1) enables the Scottish Ministers to make provision, by way of affirmative Order, for and in connection with the implementation of the EU Framework Decision on the mutual recognition of judgements and probation decisions (in so far as within the legislative competence of the Scottish Parliament).

130. Subsection (2) allows for such provision to confer functions on Scottish Ministers or other persons. Subsection (3) provides that an order made under subsection (1) may modify any primary or secondary legislation. Subsection (4) provides details of the specific Framework Decision this section relates to.

## **PART 2 - CRIMINAL LAW**

### **Section 28 – Involvement in serious organised crime**

131. Section 28(1) makes it an offence for a person to agree with at least one other person to become involved in the commission of serious organised crime including when a person agrees to do something when he or she knows, or ought reasonably to have known or suspected that such an act would further serious organised crime. The effect is that those who conspire to commit serious organised crime, as defined, are guilty of an offence.

132. Section 28(3) defines serious organised crime for the purpose of this section and sections 29, 30 and 31 as crime involving two or more people acting together for the principal purpose of committing or conspiring to commit one or more serious offences.

133. A “serious offence” is also defined in subsection (3). It is an indictable offence that is committed with the intention of obtaining a material benefit, for any person or an act of violence committed, or a threat made for the purpose of obtaining such benefit at some time in the future. “Material benefit” for these purposes is a right in or interest in any property.

134. Section 28(4) provides that this offence will attract a maximum penalty on indictment of 10 years imprisonment, an unlimited fine or both. In summary proceedings the available penalties are a maximum of 12 months imprisonment or a fine not exceeding the statutory maximum or both.

### **Section 29 – Offences aggravated by connection with serious organised crime**

135. Section 29 makes provision about a statutory aggravation which applies in cases where an accused commits an offence connected with serious organised crime. Subsection (1) provides that section 29 applies where an indictment or complaint libels or specifies that an offence is

aggravated by a connection with serious organised crime and it is subsequently proved that the offence is aggravated in that way.

136. Section 29(2) explains the circumstances in which an offence can be regarded to have been aggravated by a connection with serious organised crime. This relies on proof that the accused was motivated, in whole or in part, by the objective of committing or conspiring to commit serious organised crime. In terms of subsection (3), it is not material to the matter of establishing the accused's motivation whether or not the accused actually enabled a person to commit serious organised crime (as defined in section 28(2)).

137. Section 29(4) specifies that the normal rules on corroboration in criminal proceedings do not apply to establishing the aggravation. Evidence from a single source is sufficient proof.

138. Section 29(5) sets out the steps the court must take when it is libelled in an indictment or specified in a complaint that an offence is aggravated by a connection with serious organised crime and proved that the offence is so aggravated. In addition to a number of formal matters, the court must take the aggravation into account in determining the appropriate sentence.

### **Section 30 – Directing serious organised crime**

139. Section 30(1) makes it an offence to direct another person to commit a serious offence (as defined in section 28(2)) or an offence aggravated by a connection with serious organised crime under section 29.

140. Section 30(2) provides that a person also commits an offence where the direction he or she gives is to direct a further person to commit a serious offence or an offence aggravated by a connection with serious organised crime.

141. Section 30(3) and (5) set out what constitutes direction for the purposes of subsections (1) and (2). First, by virtue of section 30(3), the accused must have done something, or a series of things, to direct another person to commit an offence. Second, the accused must have intended that the thing or things done will persuade that person to commit an offence. And third, the accused must intend that the direction will result in a person committing or enable a person to commit serious organised crime. Section 30(5) provides that “directing” a person to commit an offence includes, but is not limited to, “inciting” a person to commit an offence.

142. By virtue of section 30(4), any person directing a person to commit an offence mentioned in section 30(1) will be deemed to have done so regardless of whether that offence was in fact committed.

143. Section 30(6) deals with penalties. The penalty for the offences in subsections (1) and (2) when tried on indictment is a maximum of 14 years imprisonment, a fine or both. On summary conviction, the available penalties are a maximum of 12 months imprisonment, a fine not exceeding the statutory maximum or both.

### **Section 31 – Failure to report serious organised crime**

144. Section 31 places certain classes of individual under a duty to report to the police any knowledge or suspicion of another person's involvement in serious organised crime. It is an offence for an individual under such a duty to fail to disclose that knowledge or suspicion.

145. Subsections (1) and (2) describe the circumstances in which section 31 applies. Subsection (1) provides that this section applies where a person knows or suspects that another person has committed an offence under section 28 or 30 or an offence aggravated under section 29 in cases where that knowledge or suspicion arises from information obtained in one of two sets of circumstances, namely: (a) in the course of a person's trade, profession, business or employment or (b) as a result of a close personal relationship between the person holding the knowledge or suspicion and the person who has allegedly committed the offences. By virtue of subsection (2), section 31 only applies by virtue of a close personal relationship where the person holding the knowledge or suspicion has obtained material benefit as a result of the commission of serious organised crime by the alleged offender.

146. Section 31(3) describes the offence. It provides that where this section applies it is an offence to fail to disclose to a constable any knowledge or suspicion described above and the information on which that is based.

147. Section 31(4) provides that it will be a defence to prove that the accused had a reasonable excuse for failing to disclose a knowledge or suspicion or the information on which it is based.

148. Subsections (5) and (6) provide that disclosure is not required by a professional legal adviser in relation to information they have received in privileged circumstances and set out what is meant by "privileged circumstances".

149. Section 31(7) makes it clear that the reference to a constable in subsection (3) includes a reference to a police member of the Scottish Crime and Drug Enforcement Agency.

150. The penalty for failing to report serious organised crime is stated in subsection (8) to be a maximum of five years imprisonment, a fine or both in proceedings tried on indictment or a maximum of 12 months imprisonment or a fine not exceeding the statutory maximum or both on summary conviction.

### **Section 32 – Genocide, crimes against humanity and war crimes: UK residents**

### **Section 33 – Genocide, crimes against humanity and war crimes: retrospective application**

151. Sections 32 and 33 of this Act amend the International Criminal Court (Scotland) Act 2001 ("the 2001 Act") in respect of the offences of genocide, crimes against humanity and war crimes. These sections match changes made to the International Criminal Court Act 2001 for England and Wales and Northern Ireland by the Coroners and Justice Act 2009.

152. Section 32 inserts a new section 8A into the 2001 Act to make supplemental provision about UK residents. Such residents are liable under the 2001 Act for offences committed abroad if they are resident at the time of committing the crime or subsequently become resident. New



section 8A makes additional provision in respect of UK residents in two ways. First, subsection (2) lists a number of categories of person who are to be treated as being resident in the UK for the specific purposes of Part 1 of the 2001 Act to the extent this would not otherwise be the case. The specific categories are listed in paragraphs (a) to (j). Secondly, subsection (3) of new section 8A provides a non-exhaustive list of considerations a court must take into account in determining whether a person is resident in the UK.

153. Section 33 inserts a new section 9A into the 2001 Act. The new section 9A provides for the retrospective application of the offences of genocide, crimes against humanity and war crimes and related offences to things done on or after 1 January 1991. That is the date from which the International Criminal Tribunal for the former Yugoslavia had jurisdiction to try offences under the Tribunal's Statute adopted by the United Nations Security Council.

154. New section 9A has the effect of applying certain offences to acts committed on or after 1 January 1991. Those offences are genocide, crimes against humanity, war crimes, conduct ancillary to such offences committed outside the jurisdiction, offences ancillary to those offences and offences based on the responsibility of commanders and other superiors for such offences. With the exception of genocide and some of the categories of war crimes, the retrospective application of these offences is subject to a requirement that, at the time of its commission, the act constituting the offence amounted in the circumstances to a criminal offence under international law.

155. The effect of this requirement is to allow the courts to apply these offences in the 2001 Act to the extent that they were recognised in international law during the relevant period. So, for example, if a particular offence was recognised in international law at the time of the relevant conduct but in a narrower form than that of the offence set out in the 2001 Act, the defendant may still be convicted of the offence provided that his or her conduct met the elements of the offence as recognised at the relevant time in international law. The international law requirement ensures that the provisions comply with the principles enshrined in Article 7 of the European Convention of Human Rights. The requirement does not apply to genocide and certain categories of war crimes as it is beyond dispute that those offences (and all their constituent elements) were fully recognised in international law in 1991. The requirement is necessary for the other offences as, whilst the vast majority of them were recognised in international law during the relevant period, a small number may have been recognised in a narrower form than that provided for in the 2001 Act and a very small number of offences may not have been sufficiently recognised at all. In addition, international law developed during the period in question.

156. Section 33 also inserts a new section 9B into the 2001 Act. The new section 9B modifies the penalties applicable for the period of retrospection (1 January 1991 to either 1 September or 17 December 2001) in respect of certain specific offences. The 2001 Act provides for a maximum sentence of 30 years' imprisonment (other than where murder is involved). The same will generally apply for offences committed from 1 January 1991.

157. However for genocide and grave breaches of the Geneva Conventions (a category of war crimes), both of which were already offences in domestic law in 1991, a maximum penalty of 14 years' imprisonment applies instead of 30 years' (other than where murder is involved). New section 9B(2) ensures that a higher penalty cannot be imposed for such offences than existed in

domestic law at the time of their commission and consequently ensures compliance with Article 7 of the European Convention of Human Rights. The two different dates in 2001 are necessary because the International Criminal Court Act 2001 raised the penalty throughout the UK for grave breaches of the Geneva Conventions from 1 September 2001, with the International Criminal Court (Scotland) Act 2001 coming into force later in the year on 17 December 2001.

### **Section 34 – Articles banned in prison**

158. This section amends section 41 of the Prisons (Scotland) Act 1989 (“the 1989 Act”) to create additional specific offences in relation to the introduction, use and possession of a personal communication device (including a mobile telephone and any component part of a mobile telephone) in prisons. In addition, it provides a definition of “proscribed article” and “personal communication device”, for the purpose of this section, and inserts further provisions which define the maximum penalty that can be imposed for the introduction, use or possession of personal communication device in a prison, and provide limited circumstances where it is not an offence to have committed such an act.

159. Subsection (1)(a) substitutes section 41(1) of the 1989 Act, and provides that it is an offence for a person to introduce or attempt to introduce a “proscribed article” in a prison, without a reasonable excuse. It also provides that the maximum penalty that can be imposed for introducing or attempting to introduce a proscribed article (other than a personal communication device) into a prison is, on summary conviction, a period of imprisonment not exceeding 30 days, or a fine not exceeding level 3 on the standard scale (or both).

160. Subsections (1)(b)-(e) make minor consequential amendments to sections 41(2), 41(2A), 41(2B) and 41(3) of the 1989 Act.

161. Subsection (1)(f) inserts two new subsections after section 41(9). The new subsection (9A) provides a definition of “proscribed article” and the new subsection (9B) provides a definition of what a personal communication device includes.

162. Subsection (1)(g) updates the definition of “offensive weapon” in section 41(10) of the 1989 Act, by substituting the reference to the Prevention of Crime Act 1953 with a reference to the definition contained in section 47 of the Criminal Law (Consolidation)(Scotland) Act 1995.

163. Subsection (2) inserts two new sections after section 41 of the 1989 Act in relation to personal communication devices; sections 41ZA and 41ZB.

164. The new sections 41ZA(1)-(3) provides that it is an offence for a person to: Give a personal communication device to a prisoner while the prisoner is inside a prison; transmit or intentionally receive any communication by means of a personal communication device in a prison; or be in possession of a personal communication device while inside a prison.

165. Offences in section 41ZA(1)-(3) are, on indictment, a period of imprisonment not exceeding two years, or a fine, or both; or, in summary proceedings, a period of imprisonment not exceeding 12 months, or to a fine not exceeding the statutory maximum, or both.

166. The new section 41ZB provides a number of exceptions in relation to communication devices. In particular, subsections (1) and (2) of section 41AB provide that it will not be an offence to introduce, use or possess a personal communication device in a designated area of a prison, or where the person has received written authorisation from the governor, director of a prison, or the Scottish Ministers.

167. Subsections (3) and (4) of section 41ZB provide that it will not be an offence for a prison officer (or other prison official) to introduce, use or possess a personal communication device if the device is one supplied to the person specifically for use in the course of the person's official duties at the prison, or the person is acting in accordance with those duties.

168. Subsection (5) of section 41ZB provides that no offence is committed by a person, other than a prisoner, where there is a reasonable excuse for the possession. A prisoner would not have a reasonable excuse, given that personal communication devices are not permitted in prisons and they are asked as part of the reception process whether or not they have any proscribed articles on their possession.

169. Subsections (6) and (7) of section 41ZB provide that it is a defence for a person accused of introducing, using or possessing a personal communication device in a prison to show that the person reasonably believed that the person was acting with authorisation or in circumstances where there was an overriding public interest which justified the person's actions. For example, where an individual from the emergency service had to access the prison with a communication device, in an emergency situation, and there was insufficient time for the individual to receive written authorisation.

170. Subsection (8) of section 41ZB provides the circumstances where written authorisation is given. In particular it provides that written authorisation should be provided in favour of a specified person (or person of a specified description), or for a specified purpose. Written authorisation is given either by the governor or director of the prison (in relation to activities at that prison), or the Scottish Ministers (in relation to activities at a prison specified in the authorisation).

171. Subsection (9) of section 41ZB provides the definition of a designated part of a prison, where it is not an offence to introduce, use or possess a personal communication device. This is necessary because it is not illegal to use or possess a personal communication device in the community. It is not the intention to penalise a person for entering an administrative area or other designated area of a prison with a personal communication device. It should only be an offence to introduce, use or possess a personal communication device beyond the designated part of a prison i.e. in the secure part of the establishment.

172. Subsection (10) of section 41ZB provides that prison officers or other prison officials who are crown servants or agents do not benefit from Crown immunity in relation to an offence of introducing, using or possessing a personal communication device in a prison. This is to ensure that the personal communication devices are only permitted in prisons in limited circumstances e.g. with authorisation.

### **Section 35 - Sale and hire of crossbows to persons under 18**

173. The Crossbows Act 1987 controls the sale and hire of crossbows and this section introduces new provisions to that Act. Subsection (3) introduces a new section 1A to achieve consistency with the proof of age provisions of the Licensing (Scotland) Act 2005 by clarifying the defences a person charged with selling an article to someone underage can rely upon. Subsection (4) introduces a new section 3A which has the effect of legalising an attempt to purchase or hire a crossbow by a young person, where the young person is acting as part of an authorised test purchasing scheme. It also makes provision to ensure the safety of young people participating in such a scheme. These provisions bring the Act into line with the test purchasing provisions of the Licensing (Scotland) Act 2005.

### **Section 36 - Sale and hire of knives and certain other articles to persons under 18**

174. Section 141A of the Criminal Justice Act 1988 controls the sale of knives and certain articles with a blade or point to under 18s. Subsections (2) and (3) amend the Act to close a gap in the law relating to the hiring of a knife or bladed article to an under 18. Subsection (4) amends the proof of age provisions of section 141A to ensure consistency with the Licensing (Scotland) Act 2005 by clarifying the defences a person charged with selling an article to someone underage can rely upon.

### **Section 37– Offensive weapons etc.**

175. Section 37 amends the Criminal Law (Consolidation) (Scotland) Act 1995 (“the 1995 Act”). Section 47 of the 1995 Act sets out an offence relating to the possession of an offensive weapon in a public place; section 49 sets out an offence relating to the possession of a knife in a public place; section 49A sets out an offence relating the possession of an offensive weapon or a knife on school premises and section 49C sets out an offence relating to the possession of an offensive weapon or a knife in certain prisons.

176. Section 37 amends the definition of “public place” in sections 47 and 49 of the 1995 Act so that a public place means any place other than domestic premises, school premises or prisons. “Domestic premises” specifically excludes the common parts of a shared property. This means that the offences in sections 47 and 49 of the 1995 Act may be committed by possession of an offensive weapon or a knife on the common parts of shared properties such as common landings in tenement blocks of flats.

177. Sections 47, 49, 49A and 49C of the 1995 Act do not currently provide the same defences to the offences created by those provisions. A person charged with an offence under section 47 of the 1995 Act is provided with a defence if they can prove they had “lawful authority or reasonable excuse” for carrying an offensive weapon in a public place. By contrast, someone charged with an offence under section 49 is provided with a defence if they can prove that they had “good reason or lawful authority” for carrying a knife in a public place.

178. Section 37 amends the statutory defences available to those charged with an offence under sections 47, 49, 49A, and 49C so that the same defence is applicable to each offence. That defence is that the person is able to show that they had a reasonable excuse or lawful authority to be in possession of the offensive weapon or knife, as the case may be.

179. The penalties for offences relating to obstruction or concealment detailed in sections 48(2) and 50(4) differ. The maximum penalty under section 48(2) is a level 4 fine while the maximum penalty under section 50(4) is a level 3 fine. Section 37 increases the maximum penalty under section 50(4) of the 1995 Act to a level 4 fine in order to align that provision with the similar offence under section 48(2) of the 1995 Act.

### **Section 38 – Threatening or abusive behaviour**

180. This section creates an offence of engaging in ‘threatening or abusive behaviour’. Subsection (1) provides that it is an offence for a person to behave in a threatening or abusive manner where that behaviour would be likely to cause a reasonable person to suffer fear or alarm and he or she either intends by the behaviour to cause fear or alarm or is reckless as to whether the behaviour would cause fear or alarm.

181. Subsection (2) provides a defence for a person who has been charged with an offence of threatening or abusive behaviour to show that the behaviour was, in the particular circumstances, reasonable.

182. Subsection (3) provides, for the avoidance of doubt, that this section applies to behaviour of any kind, including things said or otherwise communicated as well as things done, and that it applies both in respect of behaviour consisting of a single act and behaviour consisting of a course of conduct (e.g. the repeated sending of threatening texts or emails or repeatedly following them from their home or place of work).

183. Subsection (4) provides that the maximum penalty on conviction on indictment is imprisonment for a term not exceeding 5 years or a fine or both. The maximum penalty on summary conviction is imprisonment for a term not exceeding 1 year or a fine not exceeding the statutory maximum or both

### **Section 39 – Offence of stalking**

184. This section creates an offence of ‘stalking’. Subsection (1) provides that a person (A) who stalks another person (B) commits an offence. Subsection (2) sets out what the elements of stalking are: that A stalks B where he engages in a course of conduct and either subsection (3) or subsection (4) applies and A’s course of conduct causes B to suffer fear or alarm.

185. Subsection (3) applies where A engages in a course of conduct with the intention of causing B to suffer fear or alarm.

186. Subsection (4) applies where A engages in a course of conduct which he knows, or ought in all the circumstances to know would be likely to cause B to suffer fear or alarm.

187. Subsection (5) provides for three defences to the offence. The first is that A’s actions were authorised by virtue of any enactment or rule of law. The second is that A engaged in the conduct for the purpose of preventing or detecting crime. The third is that the course of action was, in the particular circumstances, reasonable.

188. Subsection (6) provides for a definition of ‘conduct’ necessary for stalking. It provides that, for the purpose of the offence of ‘stalking’, a ‘course of conduct’ involves conduct on at least two occasions. A definition of ‘conduct’ is provided at subsection (6). It defines ‘conduct’ as any of the following:

- following B or any other person;
- contacting, or attempting to contact, B or any other person by any means;
- publishing any statement or other material which either relates to, or purports to relate to B or to any other person, or purports to originate from B or from any other person (for example, publishing on the internet derogatory or defaming material relating to B or to a third person such as B’s partner or child);
- monitoring the use by B or by any other person of the internet, email or any other form of electronic communication (for example, by installing spyware on their computer to enable their emails or internet use to be tracked);
- entering any premises (for example, B’s home or place of work, or the home or place of work of a member of B’s family);
- loitering in any place (whether public or private);
- interfering with any property in the possession of B or of any other person;
- giving anything to B or to any other person or leaving anything where it may be found by, given to or brought to the attention of B or any other person;
- watching or spying upon B or any other person; or
- acting in any other way that a reasonable person would expect would cause B to suffer fear or alarm.

189. Subsection (7) provides that the maximum penalty on conviction on indictment is imprisonment for a term not exceeding 5 years or a fine or both, and the maximum penalty on summary conviction is imprisonment for a term not 1 year or a fine not exceeding the statutory maximum or both.

190. Subsection (8) and (9) together provide that, where, in the trial of a person charged with the offence of stalking, the court or jury is not satisfied that the accused committed the offence, but is satisfied that the accused committed an offence under section 38(1) of ‘threatening or abusive behaviour’, the jury or, as the case may be, the court, may acquit the accused of the charge and instead find the accused guilty of an offence under section 38(1).

#### **Section 40 - Certain sexual offences by non-natural persons**

191. This section makes amendments to the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005. Subsection (2) broadens the range of penalties available for offences under sections 9(4)(b), 9(5)(b), 10(2)(b), 11(2)(b) and 12(2)(b) of the 2005 Act to include an unlimited fine. Consequently, a person found guilty of an offence on indictment under sections 9 to 12 of the 2005 Act, may be liable to an unlimited fine and/or imprisonment for up to 7 years in the case of offences to which section 9(4)(b) relate or, for the other relevant offences, for up to 14 years.

192. Subsection (3) inserts a new section 14A into the 2005 Act. Inserted section 14A provides that, where an offence under sections 10, 11 or 12 of the 2005 Act is committed by a body corporate (such as a company), a Scottish partnership, or an unincorporated association, certain officers of the body or other persons purporting to act in such a capacity may in certain circumstances be held to have committed the offence and will be liable to prosecution as well as the body.

#### **Section 41 - Indecent images of children**

193. This section extends the provisions of sections 52 and 52A of the Civic Government (Scotland) Act 1982 (“the 1982 Act”) to make it an offence to take, make, distribute, show, publish or possess etc. derivatives of indecent photographs or pseudo-photographs such as line traced and computer traced images. It also extends Schedule 1 to the Criminal Procedure (Scotland) Act 1995 (Offences Against Children Under the Age of 17 Years to which Special Provisions Apply) to include pseudo-photographs and amends Schedule 3 to the Sexual Offences Act 2003 (Sexual offences for the purposes of Part 2 of that Act) in relation to derivatives of indecent photographs or pseudo-photographs.

194. Subsection (1)(a)(i) amends section 52(2C)(b) of the 1982 Act to make clear that indecent pseudo-photographs include data capable of conversion into a pseudo-photograph only where that conversion would result in an indecent image.

195. Subsection (1)(a)(ii) amends section 52 of the 1982 Act by the insertion of new subsections (9) and (10). Section 52(9) extends the definition of “photograph” to cover derivatives of photographs or pseudo-photographs or combinations of these. For example, it includes a computer tracing which is neither a photograph nor a pseudo-photograph but is derived from one. Section 52(10) provides that subsection 52(2B) applies to such derivatives in the same way that it applies to pseudo-photographs.

196. Subsection (2) amends paragraph 2B of Schedule 1 to the Criminal Procedure (Scotland) Act 1995, which lists offences against children under the age of 17 to which special provisions apply. Paragraph 2B, which concerns offences under sections 52 and 52A of the Civic Government (Scotland) Act 1982, is amended to include offences involving indecent pseudo-photographs, as well as indecent photographs of a child under the age of 17 years.

197. Subsection (3) amends Schedule 3 to the Sexual Offences Act 2003, which lists sexual offences for the purposes of Part 2 of that Act. Part 2 of the 2003 Act makes provision for relevant offenders to be subject to the notification requirements set out in that Part of that Act

198. Subsection (3)(a) amends paragraph 44 of Schedule 3 to the Sexual Offences Act 2003 which relates to offences under section 170 of the Customs and Excise Management Act 1979 (concerning the penalty for the fraudulent evasion of duty etc.) in relation to goods which are prohibited from being imported where they included indecent photographs of children under 16. So as to provide consistency with the entries in the Schedule relating to offences in the Civic Government (Scotland) Act 1982 concerning the making, possessing and distribution of such indecent images, the entry is amended to provide that it applies only where the offender is 18 or over, or is or has been sentenced to at least 12 months imprisonment, or where the court considers it appropriate that the sex offender notification requirements should apply. While this

will limit the automatic application of the notification requirements, the provisions outlined in the preceding paragraphs concerning Sexual Offences Prevention Orders will mean that the restriction does not apply in relation to applications for Sexual Offences Prevention Orders. Paragraph 44 of Schedule 3 to the Sexual Offences Act 2003 is also amended to include reference to pseudo-photographs of children under 16.

199. Subsection (3)(b) amends the interpretative provision in paragraph 97(b) of Schedule 3 to the 2003 Act to extend the meaning of indecent photographs and pseudo-photographs for that Act to include derivatives of such photographs and pseudo-photographs (by applying definitions in the 1982 Act which include the amendments made by subsection (1)(a)(ii), above).

## **Section 42 - Extreme pornography**

200. This section creates a new offence of possession of extreme pornography and increases the maximum penalty for the sale etc. of obscene material of that nature. It inserts new sections 51A to 51C into the Civic Government (Scotland) Act 1982, amends section 51 of that Act and inserts new paragraph 44A into Schedule 3 to the Sexual Offences Act 2003.

201. Subsection (1) amends section 51(3) of the 1982 Act to increase the maximum penalty, on conviction on indictment, from 3 to 5 years imprisonment for the offence of displaying, publishing, selling, distributing or possessing etc. with a view to selling or distributing obscene material, where that material contains an extreme pornographic image.

202. Subsection (2) inserts new sections 51A “Extreme pornography”, 51B “Exception to section 51A offence” and 51C “Defences to section 51A offence” into the 1982 Act.

203. New section 51A creates an offence of possession of an extreme pornographic image, defines such images and specifies the maximum penalty which may be imposed for the offence.

204. Subsection (2) provides that an extreme pornographic image must be “obscene”, “pornographic” and “extreme”. The test of “obscene” means that the material must be of such a nature that it would fall within the category of the material whose sale etc. is already prohibited under section 51 of the 1982 Act.

205. Subsection (3) defines a “pornographic” image as one which must reasonably be assumed to have been made solely or principally for the purpose of sexual arousal. Therefore, an image is not pornographic if it can reasonably be assumed that the image has been made principally for another purpose e.g. educational purposes.

206. Subsection (4) provides that where an image forms part of a series of images which can provide a context, then that context and the image itself must be taken into account when determining whether the image is pornographic and reference may also be had to any sounds accompanying the image.

207. Subsection (5) sets out an example of how subsection (4) can work. Where an image forms an integral part of a narrative (e.g. a story), the whole story will be considered for the purposes of determining whether the image in question is pornographic. This could lead to the



conclusion that an image is not pornographic, notwithstanding that when considered on its own, the opposite conclusion would be reached. Subsection (5) is only one example of how subsection (4) may operate. The reference to “context” in subsection (4) not only covers a narrative, it can also, for example, include a series of images which do not tell a story, but which have a recurring theme. In addition, subsection (4) may operate so as to have the opposite effect to that described in subsection (5)(b): examination of an image’s context could lead to the conclusion that an image *is* pornographic.

208. Subsection (6) provides that an image is extreme if it depicts in an explicit and realistic way any of the acts set out in subsection (6)(a) to (e). The terms “explicit” and “realistic” require that the act depicted in the image must be clearly seen, lifelike and convincing and appear to a reasonable person to be real. It is not required that the act itself is real.

209. Subsection (7) provides that where an image is an integral part of a narrative, the context provided by that narrative may be taken into account in determining whether an image is extreme in terms of subsection (6). In addition, any description or sound accompanying the image can similarly be taken into account.

210. New section 51B makes provision to exclude images in unaltered classified works and defines the circumstances in which such images are not excluded.

211. Subsections (1) and (2) provide that possession of an excluded image is not an offence under section 51A and define an excluded image.

212. Subsection (3) provides that an image extracted from a classified work for the purposes of sexual arousal is not an excluded image.

213. Subsection (4) provides that in determining whether an image has been extracted for the purpose of sexual arousal, account may be taken of the storage, description, accompanying sound and context of the image.

214. Subsection (5) defines terms used in this section including “classified work” and thereby “excluded image” in subsection (2).

215. New section 51C makes provisions for defences to the offence of possession of extreme pornography. It replicates defences provided for possession of indecent images of children under section 52A of the 1982 Act and makes specific provision in relation to extreme images.

216. Subsection (1) provides that the onus is on the accused to prove the matters specified in subsections (2), (3) and (4) in order to use one or more of the defences. The Crown must prove the essential elements of the offence beyond reasonable doubt.

217. Subsection (2) provides that it is a defence for a person to prove that: (a) he/she had a legitimate reason for possession of the image, (b) he/she had no knowledge of the image and no awareness as to the nature of the image or (c) the image was unsolicited and disposed of promptly.

218. Subsection (3) provides a defence for those who directly participated in the act depicted in an extreme pornographic image and can prove the circumstances set out in subsection (4). When read with subsections (4) and (5) this subsection limits the defence to those who directly participate in simulated acts and retain the images for their own private use. The defence does not extend to a person who films or watches an act depicted in an image but who does not participate directly.

219. Subsection (4) provides that a direct participant must be able to demonstrate that the act depicted in the image was simulated i.e. that it did not actually:

- take or threaten a person's life;
- result in nor was it likely to result in severe injury;
- involve non-consensual activity;
- feature a human corpse;
- feature an animal or carcase.

220. Subsection (5) provides that the defence in subsection (3) is not available if the image in question is shown, given or offered for sale to any person who was not a direct participant in the act depicted in the image.

221. Subsection (6) provides that the terms "image" and "extreme pornographic" image are to be construed in accordance with section 51A.

222. Subsection (3) inserts paragraph 44A into Schedule 3 to the Sexual Offences Act 2003, which lists the offences conviction of which leads to an offender being made subject to the sex offender notification requirement contained at Part 2 of the 2003 Act. It provides that a person convicted of the offence of possession of extreme pornography who is 18 years of age or over at the time of the offence, and is sentenced to a term of imprisonment of more than 12 months, may be made subject to the sex offender notification requirements where the court considers it appropriate.

### **Section 43 – Voyeurism: additional forms of conduct**

223. Section 43 amends the voyeurism offence in the Sexual Offences (Scotland) Act 2009 to include additional forms of conduct.

224. Subsection (2)(a) inserts two new subsections into the voyeurism offence at section 9 of that Act: subsections (4A) and (4B) which provide for additional forms of conduct constituting the offence of voyeurism.

225. New subsection (4A) provides that the voyeurism offence is committed where a person (A) operates equipment beneath another person (B)'s clothing, with the intention of enabling A or another person (C) to observe B's genitals or buttocks (whether exposed or covered with underwear) or the underwear covering B's genitals or buttocks in circumstances where the genitals, buttocks or underwear would not otherwise be visible, without B's consent and without any reasonable belief that B consents. The offence is committed where A acts for the purpose of causing B humiliation, alarm or distress, or for the purpose of obtaining sexual gratification (whether for A or C).

226. New subsection (4B) provides that the voyeurism offence is committed where a person (A) records an image beneath another person (B)'s clothing of B's genitals or buttocks (whether exposed or covered with underwear) or the underwear covering B's genitals or buttocks, without B's consent and without any reasonable belief that B consents, and in circumstances where B's genitals, buttocks or underwear would not otherwise be visible, with the intention that A or another person will look at the image. The offence is committed where A acts for the purpose of causing B humiliation, alarm or distress, or for the purpose of obtaining sexual gratification (whether for A or for a third person).

227. Subsections (2)(b), (c) and (3) make consequential changes to sections 9 and 10 of the 2009 Act as a result of the insertion of new subsections (4A) and (4B).

228. Subsection (4) makes equivalent changes to the offence of 'voyeurism towards a young child' at section 26 of the 2009 Act but there is no reference to consent as children under the age of 13 are deemed to lack the capacity to consent to sexual activity.

229. Subsection (5) makes equivalent changes to the offence of 'voyeurism towards an older child' at section 36 of the 2009 Act without reference to consent, as it is an offence for a person over the age of 16 to engage in voyeuristic conduct towards a child under 16, regardless of whether the child consents.

#### **Section 44 – Sexual offences: defences in relation to offences against older children**

230. This section amends section 39 of the Sexual Offences (Scotland) Act 2009 so as to provide that the defence of 'proximity of age' provided for at section 39(4) shall apply in respect of the offence at section 30(2)(e) .

#### **Section 45 – Penalties for offences of brothel-keeping and living on the earnings of prostitution**

231. This section amends sections 11 and 13 of the Criminal Law (Consolidation) (Scotland) Act 1995 ("the 1995 Act") to increase the maximum penalties for offences under sections 11(1)(a) (living on the earnings of prostitution), 11(5) (brothel-keeping) and 13(9) (living on the earnings of male prostitution).

232. Subsection (2) of this section amends section 11(1) of the 1995 Act by deleting the reference to existing penalties which apply and inserting a new subsection (1A) that increases the maximum penalty for an offence under section 11(1)(a), on conviction on indictment, to imprisonment for a period not exceeding 7 years, a fine or both. The penalty on summary conviction for this offence changes to imprisonment for a period not exceeding 12 months, a fine not exceeding the statutory maximum or both.

233. The change to the term of imprisonment for the offence under section 11(1)(b) of the 1995 Act is to conform with the provisions of section 45 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 which increased the sentencing powers of the sheriff court from 6 months to 12 months for statutory offences triable both summarily and on indictment. While there is no specific provision for a fine to be imposed for an offence under section 11(1)(b), section 199 of the Criminal Procedure (Scotland) Act 1995 allows for a fine to be substituted instead of imprisonment.

234. Section 11(4) of the 1995 Act is amended to reflect the penalties at new subsection (1A).

235. The penalties provided for in section 11(6), for an offence under section 11(5) of the 1995 Act, are replaced by a new subsection (6) which increases the maximum penalty that applies on conviction on indictment to imprisonment for a period not exceeding 7 years, to a fine or both. The penalty on summary conviction for this offence changes to imprisonment for a period not exceeding 12 months, a fine not exceeding the statutory maximum or both. This is replicated for the maximum penalties which apply in respect of offences under section 13(9) of the 1995 Act.

### **Section 46 - People trafficking**

236. Trafficking for the purposes of prostitution or for the making or production of obscene or indecent material is an offence under the provisions of section 22 of the Criminal Justice (Scotland) Act 2003, (the “2003 Act”) including where it is believed that another person is likely to exercise such control or to so involve the individual.

237. Section 46 amends section 22 of the 2003 Act by:

- aligning the wording of section 22 of the 2003 Act with that now contained in the Sexual Offences Act 2003 by amending section 22(1)(a) to extend its scope so that it refers to facilitating “entry into” the UK as well as the “arrival in” the UK to reflect the changes made by the UK Borders Act 2007;
- creating a new offence (under section 22(1A)) which covers the trafficking of persons into, within or out of a country other than the UK;
- amending section 22(2), which explains what is meant by a person exercising control over prostitution by an individual, so that it applies to the new offence;
- substituting a new section 22(4) to provide that the offences in sections 22(1) and (1A) apply to anything done in or outwith the UK;
- replacing section 22(5) to provide greater certainty in statute to clarify that the sheriff court has jurisdiction, under both solemn and summary procedure, for any offence to which section 22 applies;
- amending section 22(6) by extending the extra-territorial effect by providing that the offences in sections 22(1) and (1A) apply to UK nationals, persons habitually resident in Scotland and UK corporate bodies.

238. Similar changes are made to the offences relating to trafficking for purposes other than sexual exploitation in sections 4 and 5 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (“the 2004 Act”) by amending:

- section 4(1) by extending its scope so that it refers to “entry into” the UK as well as the “arrival in” the UK to again reflect changes made by the UK Borders Act;

- section 4(2) to remove the requirement that a person who arranges or facilitates the travel of an individual within the UK intending to exploit that individual (or believes that someone else is likely to do so) has a belief that an offence under section 4(1) may have been committed; and
  - creation of a new offence under section 4 as set out in new section 4(3A) which covers the trafficking of persons into, within or out of a country other than the UK regardless of where the exploitation is to occur.
239. The definition of exploitation in section 4(4) of the 2004 Act is expanded in several ways:
- The existing reference in section 4(4)(b) to exploitation which would involve offences under the UK human tissue legislation is expanded to ensure that it applies to such conduct wherever it takes place.
  - A new paragraph (ba) is added to cover exploitation involving removal of body parts which would amount to an offence other than under the human tissue legislation (which deals principally with removal of organs for transplantation). For these purposes body parts comprise all parts of the body including blood.
  - The existing paragraph (d) in section 4(4) is replaced by a new paragraph (d) to make an equivalent change to that made for other parts of the UK in section 54 of the Borders, Citizenship and Immigration Act 2009, to cover the use or attempted use of a person for the provision of services or the provision or acquisition of benefits of any kind, where the person is chosen on the grounds of ill-health, disability, youth or family relationship. This will ensure the offence captures those cases where the role of the person being exploited is entirely passive, and where the person is being used as a tool by which others can gain a benefit of any kind.
  - Section 5 of the 2004 Act is amended to make clear that the offences in section 4(1), (2), (3) and (3A) apply to anything done in or outwith the UK and that the extra-territorial effect is extended by providing that these offences apply to UK nationals, persons habitually resident in Scotland and UK corporate bodies. New subsections (2A) and (2B) have been added to this section of the 2004 Act in order to confirm that the sheriff court has jurisdiction, under both solemn and summary procedure, for any offence to which section 4 applies.

### **Section 47 - Slavery, servitude and forced or compulsory labour**

240. This section introduces a new statutory offence of holding someone in slavery or servitude, or requiring a person to perform forced or compulsory labour. The offence has been introduced in response to the case of *Siliadin v France*<sup>1</sup> (where the European Court of Human Rights held that there had been a violation of Article 4 of the European Convention on Human Rights which covers the exploitative behaviours of slavery, servitude and forced or compulsory labour).

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<sup>1</sup> [http://www.coe.int/t/dghl/monitoring/trafficking/docs/echr/SILIADIN\\_v\\_FR.pdf](http://www.coe.int/t/dghl/monitoring/trafficking/docs/echr/SILIADIN_v_FR.pdf)

241. Subsection (2) provides that the offence must be interpreted in accordance with Article 4 of the European Convention on Human Rights which prohibits these exploitative behaviours and sets out the circumstances in which where such behaviour would not fall under the term “forced or compulsory labour” e.g. work required while subject to a term of imprisonment, military service, etc.

242. The maximum penalties for an offence under this section are provided for in subsection (3), namely:

- on conviction on indictment, to imprisonment for a period not exceeding 14 years, to a fine or both;
- on summary conviction for this offence increases to imprisonment for a period not exceeding 12 months, to a fine not exceeding the statutory maximum or both.

### **Section 48 - Alternative charges for fraud and embezzlement**

243. Paragraph 8 of Schedule 3 to the Criminal Procedure (Scotland) Act 1995 can be applied in certain cases where the evidence led in court would not support a conviction on the basis of the offence as charged but would permit conviction of a different offence. It permits this application of an alternative charge in certain offences involving dishonest appropriation of property. For example, in terms of paragraph 8(2) of Schedule 3 an accused person charged with theft may instead be convicted of reset if the evidence led would not support conviction of theft but would support conviction of reset.

244. The amendments to Schedule 3 extend this principle to cover fraud and embezzlement. As a result of these changes, it will be possible for an accused charged with “breach of trust and embezzlement” to instead be convicted of “falsehood, fraud and wilful imposition”. Similarly, an accused charged with “falsehood, fraud and wilful imposition” may be convicted instead of “breach of trust and embezzlement”.

### **Section 49 – Articles for use in fraud**

245. Section 49 provides for two new criminal offences relating to fraud.

246. Section 49(1) makes it an offence for a person to possess or have within their control an article for use in, or in connection with, the commission of fraud. It will have to be established that the accused possessed or had control of the article and that the article was to be used in the course of or in connection with fraud. Section 49(2) provides that an offence under subsection (1) can be tried both in summary proceedings (where the maximum penalty will be a custodial sentence not exceeding 12 months and/or a fine not exceeding the statutory maximum) and on indictment (where the maximum penalty will be a custodial sentence of up to 5 years and/or an unlimited fine).

247. Section 49(3) makes it an offence to make, adapt, supply or offer to supply an article knowing either that the article is designed or adapted for use in, or in connection with, the commission of fraud; or intending the article to be used in, or in connection with, the commission of fraud. Section 49(4) provides that an offence under subsection (3) can be tried both in summary proceedings (where the maximum penalty will be a custodial sentence not

exceeding 12 months and/or a fine not exceeding the statutory maximum) and on indictment (where the maximum penalty will be a custodial sentence not exceeding 10 years and/or an unlimited fine).

248. Section 49(5) provides that an ‘article’ within this new section includes a program or data held in electronic form. Therefore, the definition of ‘article’ includes more than simply a physical object and could include, for example, such a thing as a list of credit card numbers held on a computer.

### **Section 50 - Conspiracy to commit offences outwith Scotland**

249. Section 11A of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) provides that conspiracy in Scotland to commit an offence outwith the United Kingdom is in itself an offence, provided that the criminal purpose being conspired would constitute an offence in the place where it was intended to be carried out. However, section 11A of the 1995 Act does not cover conspiracies formed in Scotland to commit an offence in England, Wales or Northern Ireland. Section 50 of this Act amends the scope of section 11A of the 1995 Act to cover conspiracy in Scotland to commit an offence in other parts of the United Kingdom.

### **Section 51 – Abolition of offences of sedition and leasing-making**

250. Section 51 abolishes the common law offences of sedition and leasing-making. This follows amendments made in section 73 of the Coroners and Justice Act 2009 (c.25) to abolish the common law offences of sedition, seditious libel, defamatory libel and obscene libel, which applied in the rest of the UK.

251. Paragraphs 1 and 2 of Schedule 7 to the Act repeal the Libel Act 1792 (c.60) and the Criminal Libel Act 1819 (c.8) in their entirety.

252. Paragraphs 6, 19, 64 and 72 of Schedule 7 to the Act provide for consequential amendments to the Defamation Acts of 1952 and 1996, the Trade Union and Labour Relations (Consolidation) Act 1992 and the Legal Deposit Libraries Act 2003. These remove references that are made redundant either by the abolition of the offence of sedition in Scotland or the abolition of the various forms of criminal libel in the rest of the United Kingdom.

## **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 advocacy 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* (6<sup>th</sup> 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 labelled 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 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 (4)(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.

## **PART 4 - EVIDENCE**

### **Section 84 – Admissibility of prior statements of witnesses: abolition of competence test**

410. This section clarifies that the abolition of the competency test for all witnesses – brought into effect by section 24 of the Vulnerable Witnesses (Scotland) Act 2004 Act (“the 2004 Act”) - also applies to evidence given by a prior statement made before 1 April 2005. Section 24 removed the court's entitlement to ask questions of witnesses to establish that they had a sufficient understanding of the truth, understood the duty to tell the truth and had the ability to give coherent testimony.

411. Where a prior statement made before the coming into force of section 24 of the 2004 Act is sought to be admitted as evidence in a case under section 260 of the Criminal Procedure (Scotland) Act 1995, then for the purposes of subsection 2(c) of section 260, section 24 is taken to have been in force at the time the statement was made. This means that the court, when deciding whether to admit the statement, should not take any steps to establish whether the witness understood the matters set out in section 24 at the time the statement was made.

### **Section 85 – Witness statements: use during trial**

412. Section 85 creates a power for the court to allow a witness to refer to his statement during the giving of evidence subject to the witness statement having been made available to the Crown and to the defence in advance of the trial. Subsection (3) extends the applicability of section 262 (construction of sections on hearsay) of the 1995 Act to witness statements. Within that, subsection (3)(c) disapplies the meanings of “criminal proceedings” and “made” to witness statements.

### **Section 86 - Spouse or civil partner of accused a compellable witness**

413. This section makes provision for the spouse or civil partner of an accused to be a competent and compellable witness. This section amends section 264 of the 1995 Act and repeals section 130 of the Civil Partnership Act 2004. The common law provisions regarding the spouse as a witness will also be overturned.

414. This section provides that the spouse or civil partner of an accused is a competent and compellable witness for the prosecution, accused or co-accused in the proceedings against the accused. Currently the law provides that a spouse is a competent witness in all circumstances. However, s/he is a compellable witness for the prosecution or a co-accused only where s/he is compellable at common law. In respect of the common law, a spouse is only compellable where the accused is charged with an offence against him or her. The operation of the common law rule is not restricted to offences of personal injury, but extends to false accusation and to

offences against property, including theft and even the forgery of the spouse's signature on a cheque.

415. It does not extend to damage to property of which the spouse is only a tenant, unless perhaps if s/he is liable to pay for the repair of the damage. If a spouse of an accused is the victim of the crime with which the accused is charged then their marital status is of no consequence. A spouse and an unmarried partner would be a compellable witness for the prosecution in such a case.

416. It is only where the spouse is not the victim that s/he can decline to give evidence for the prosecution. If the spouse of an accused is called as a Crown witness, in circumstances in which s/he is not compellable against her husband or wife, s/he has the option of declining to give evidence. But if s/he elects to give evidence against the accused, s/he cannot decline to answer questions which incriminate the spouse. An unmarried partner cannot decline to give evidence in any circumstances.

417. By the 2004 Act, a civil partner is not a compellable witness for the prosecutor or a co-accused. Persons in a registered civil partnership are, accordingly, never compellable against each other.

418. This provision of the Act will provide that the spouse and civil partner of an accused will be competent and compellable witnesses for the prosecution, accused or co-accused in any proceedings against the accused. In effect they will be treated no differently to any other witness. It will also take away the common law right of an accused's spouse to refuse to give evidence of matrimonial communications.

### **Section 87 – Special measures for child witnesses and other vulnerable witnesses**

419. This section amends sections 271-271M of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") to allow the special measures (listed at section 271H) that are available for vulnerable witness to be used in "any relevant criminal proceedings in the High Court or the sheriff court", as defined in subsection 2(b)(ii).

420. Subsections (3)-(9) replace all references to "trial" in sections 271-271M with references to the relevant criminal proceedings. This allows the special measures to be used in proceedings other than trials.

421. Subsection (10) makes consequential amendment to section 288E (5) of the 1995 Act.

### **Section 88 – Child witnesses in proceedings for people trafficking offences**

422. This section raises the age of automatic entitlement to standard special measures when giving evidence in human trafficking cases from up to age 16 to up to age 18. The special measures are those listed in sections 271H of the Criminal Procedure (Scotland) Act 1995. Human trafficking cases means offences committed under section 22 of the Criminal Justice (Scotland) Act 2003 (Traffic in prostitution etc) or section 4 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 (trafficking people for exploitation). All witnesses (in

human trafficking cases or otherwise) can be considered on application for further (non-standard) special measures.

### **Section 89 – Amendment of Criminal Justice (Scotland) Act 2003**

423. Section 89 repeals section 15A of the Criminal Justice (Scotland) Act 2003. This section allowed the special measures to be used in relation to proofs in relation to victim statements. This section is no longer necessary now that the special measures may be used in any hearing in relevant criminal proceedings.

### **Section 90 - Witness anonymity orders**

424. Subsection (1) inserts new sections 271N to 271Z into the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) and provides courts with an order-making power to secure anonymity for witnesses when giving evidence in court.

425. Section 271N(1) sets out what a witness anonymity order is and defines the order in such a way as to grant the court a wide discretion as to how the court protects the anonymity of a witness in any particular case.

426. Section 271N(2) refers to procedures detailed at sections 271P, 271Q and 271R which deal with how applications should be made and the conditions (set out in section 271S) the court needs to consider when considering whether to make an order.

427. Sections 271N(3) and (4) lists the kinds of measures the court may use to secure the witness’s anonymity. The list is only illustrative; the court may employ other measures if it thinks fit. Technological developments and the practical arrangements in the court may affect such decisions.

428. Section 271N(5) provides that the court may not make a witness anonymity order which prevents the judge or jury either from seeing the witness or from hearing the witness’s natural voice. The judge and jury must always be able to see and hear the witness.

429. Section 271P(1) provides that applications for a witness anonymity order may be made by the accused as well as prosecutors. This reflects the position in the case of *R v Davis* [2008] UKHL 36, where the Court of Appeal allowed a defence witness as well as prosecution witnesses to give evidence anonymously.

430. Section 271P(2) provides that, where an application for a witness anonymity order is made by the prosecutor, the identity of witnesses may be withheld from the accused before and during the making of the application. This ensures that the operation of the legislation is not impeded by procedural challenges to the power of the prosecution to withhold this information pending the court’s determination of the application for the witness anonymity order.

431. Section 271P(2) therefore provides that prosecutors are under no obligation to disclose the witness’s identity to the accused at the application stage but must inform the court of the identity of the witness. Similar provision is made for the accused in the new section 271P(3),



except that the accused must always disclose the identity of the witness to the prosecutor and the court but do not have to disclose it to any other defendant.

432. Section 271P(2) also enables the court to direct that it should not be informed of the identity of the witness. This provides for the possibility that, whilst in the vast majority of cases the court will require to be informed of the witness's identity, there may be rare cases (particularly national security related cases) the court can direct that it not be informed of the witness's identity.

433. Sections 271P(4) and (5) provide that where the prosecutor or the accused proposes to make an application for a witness anonymity order, information that might identify the witness must be taken out of any relevant information which is disclosed before the application has been determined. Section 271P(6) provides that, before the determination of an application, a witness must be referred to by a pseudonym in any list, application or notice. These sections reflect the reality that anonymity cannot be reinstated once lost. Sections 271P(7) and (8) define respectively "relevant information" and "relevant, list, application or notice".

434. Sections 271P(9) and (10) set out two basic principles. Subsection (9) states that every party to the proceedings must be given the opportunity to be heard on an application for a witness anonymity order. However, it may be necessary in the course of making the application to reveal some or all of the information to which the application relates: for example, the name and address of the witness who is fearful of being identified. So subsection (10) provides that the court has the power to hear any party without an accused or the accused's legal representative being present. This reflects the existing practice, by which prosecution applications were expected to be made in the absence of any other parties in the case, with the accused able to make representations later at a hearing with the prosecution (and possibly other accused) present. It is expected that defence applications will be permitted without other accused being present but will always be made in the presence of the prosecution.

435. Section 271Q provides, and sets out the timescales, for the making and determination of applications for a witness anonymity order in proceedings on indictment and in summary proceedings. While it is likely that most anonymity orders will be sought and considered in solemn proceedings, they are also available in summary proceedings. For example, such orders may be sought in summary proceedings in relation to undercover police officers making test purchases of drugs, for example at music festivals.

436. In solemn proceedings, under section 271Q(1), the making of a witness anonymity order is to be treated as a preliminary issue in terms of sections 79 and 87A of the 1995 Act. This is to ensure that decisions can normally be made at the preliminary hearing or first diet. Similarly, section 271Q(2) aims to ensure that notice of an application is given in summary proceedings before the intermediate diet, or, if this has not been fixed, before the trial begins (that is, the first witness for the prosecution is sworn).

437. Sections 271Q(7) and (8) allows for motions and applications to be made under sections 268, 269 and 270 of the 1995 Act which deal with new witnesses being led after the commencement of a trial.

438. Section 271R requires four conditions to be met before a court can make a witness anonymity order. They are described as conditions A, B, C and D.

439. Section 271R(3) sets out condition A, which is that the measures to be specified in the order are necessary for one of two reasons. The first is to protect the safety of the witness or another person or to prevent serious damage to property. There is no requirement for any actual threat to the witness or any other person but the application for an order should bring out evidence of/grounds for believing that a threat exists. The second is to prevent real harm to the public interest. This will include, but will not be restricted to, the public interest in police or security service undercover officers being able to carry out future operations, whether or not they are fearful in any particular case.

440. Section 271R(4) sets out condition B, which is that the effect of the order would be consistent with the accused receiving a fair trial. Thus the grant of the order must be compliant with Article 6 of the ECHR.

441. Section 271R(5) sets out condition C, which is that the witness's testimony is such that in the interests of justice the witness ought to testify. New section 271Q(6) sets out condition D which provides that either the witness would not testify if the order was not made or there would be real harm to the public interest if the witness were to testify without an order being made. Such harm might, for example, arise as a result of the identity of a member of the security services being made public but it can also apply to other witnesses where the interest of justice require that they are able to give evidence anonymously in a case. This public interest element should be brought out in the application for an order.

442. Section 271R(7) specifies that in determining for the purposes of condition A whether the order is necessary to protect the safety of the witness, another person or prevent damage to property, the court must have regard to:-

- the witness's reasonable fear of death or injury either to himself or herself or to another person (for example "we'll get your kids", or "we'll get your friends"), or
- reasonable fear that there would be serious damage to property, (for example "we'll firebomb your house").

Although not explicitly defined in the section, "injury" is not restricted to physical injury, but could also include serious harm to a person's mental health; and "serious damage to property" can include serious financial or economic loss.

443. Section 271S(1) requires the court to have regard to the considerations set out in the new section 271S(2) when deciding whether to make an order. The court must also have regard to any other factors it considers relevant.

444. The considerations in section 271S(2) are the accused's general right to know the identity of a witness, the extent to which credibility of the witness is relevant in assessing the evidence he or she gives, whether the witness's evidence might be material in implicating the accused, whether the witness's evidence can be properly tested without knowing the witness's identity, whether the witness has a tendency or any motive to be dishonest and whether alternative means could be used to protect the witness's identity.

445. Section 271T requires the judge to direct the jury in a trial on indictment in such way as he/she considers appropriate, to ensure that the fact that the order was made is not detrimental to the accused.

446. Section 271U(1), (2), (3) and (6) provide for the court that has made an order to discharge or vary it in those proceedings, either on an application by a party to the proceedings or on its own initiative. This power may be used where, for example, a witness who previously gave evidence anonymously is content for the anonymity to be lifted.

447. Section 271U(4) the court must give every party to the proceedings an opportunity to be heard before determining an application for variation or discharge of an order or before varying or discharging an order on its own initiative. Section 271U(5) allows the court to discharge or vary an order in the absence of the accused or their representative if the circumstances of the case mean this would be appropriate.

448. Subsection 271V(1) sets out the various grounds for making an appeal to the High Court in relation to witness anonymity orders. An appeal can be made by the prosecutor or the accused.

449. Section 271V(2) inserts a requirement to seek leave to appeal against the granting of an order so as to prevent spurious appeals being raised. Section 271V(4) clarifies that the period between lodging an appeal and its determination does not count towards any time limit applying in the case. It allows the court to postpone, adjourn (or further adjourn) the trial diet and/or to extend any time limit applying to the case.

450. Section 271W provides that the High Court, having considered an appeal, must overturn the granting of a witness anonymity order by the court hearing the relevant trial if it decides that the decision to grant the order was wrong in law. Once this decision has been taken the trial can continue but without the witness who was the subject of the order giving their evidence anonymously.

451. Section 271X enables the High Court, having considered an appeal, to reverse the decision of a court which has refused an application for a witness anonymity order, if it concludes that the decision of the judge in that court was wrong in law. The High Court must then order that appropriate measures should be taken to preserve the anonymity of the relevant witness when he or she is giving their evidence.

452. Sections 271Y(1) and (2) enable the High Court, having considered an appeal, to reverse the decision of a court that has varied the way in which the witness anonymity order has been applied if it concludes that the decision of the judge in that court was wrong according to the law. Section 271Y(3) provides that the High Court can decide that other variations to the order are justified under the relevant terms of the law as set out at 271R and 271S.

453. Section 271Z(1) enables the High Court, having considered an appeal, to reverse the decision of a court that has refused an application made by either the prosecutor or the accused to vary or disallow a witness anonymity order if it concludes that the decision of the judge in that court was wrong according to the law. Thereafter subsections Z(2) and (3) provide for the High

Court to disallow an order or vary it depending on the case, and allows it make an additional variation to the order as it deems appropriate and under the relevant terms of the law as set out at 271R and 271S.

454. Subsection (2) makes consequential provision to sections 79 (preliminary pleas and preliminary issues) and 148 (intermediate diet) of the 1995 Act.

455. Subsections (3) and (4) provide that witness anonymity orders made under an existing rule of law in a trial or a hearing that starts before the day the new provisions come into effect are not affected by the coming into force of these provisions.

### **Section 91 - Television link evidence**

456. This section provides that section 273 of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) will be amended to allow witnesses to give evidence from abroad via live television link in all criminal proceedings in the High Court or sheriff court.

457. A new section 273A is inserted into the 1995 Act that allows witnesses to give evidence via live television link from outwith Scotland, but within the United Kingdom, from an acceptable location within the United Kingdom, thereby relieving them of the requirement to travel to Scotland and give their evidence in the Scottish court.

### **Section 92 – European evidence warrants**

458. This section provides an Order-making power to facilitate implementation of the Council of the European Union Framework Decision 2008/978/JHA of December 2008 on the European Evidence Warrant (EEW) for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters. Any order will be subject to the affirmative procedure, and may confer functions on the Scottish Ministers and the Lord Advocate to provide evidence requested by other Member States and to obtain evidence held by other Member States to assist with criminal investigations or proceedings. The power will permit the creation of new offences and penalties (subject to the limits set out in subsection (5)).

## **PART 5 - CRIMINAL JUSTICE**

### **Section 93 – Lists of jurors**

459. This section makes amendments to sections 84 and 85 of the Criminal Procedure (Scotland) Act 1995. Subsection (2)(b) makes provision to allow jurors to be selected for service in criminal trials in the sheriff court not only from the sheriff court district in which a trial is being held, but also, at the discretion of the sheriff principal, from any other district or districts in that sheriffdom. The amendments in subsection (3) ensure that, once the list of jurors has been prepared, any jurors on the list who reside outside the sheriff court district where the trial is to be held are cited by the clerk for the district in which the trial is to take place.

460. This section also makes an amendment to the Criminal Procedure (Scotland) Act 1995 to allow the clerks of court to use lists of jurors for trials other than those for which they were originally required. This second change is achieved in subsection (2)(d) by the repeal of section 84(7) of the 1995 Act, which links lists of jurors with particular trials.

### **Section 94 - Upper age limit for jurors**

461. This section provides that there shall be no upper age limit for jurors serving on criminal juries in Scotland.

462. This involves amendment to section 1 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 introducing a new subsection (1A) in respect of criminal proceedings. This amendment will allow individuals over 65 years of age to be cited for jury service on criminal trials in Scotland. The upper age limit for jurors serving on civil trials remains unchanged at 65 years of age.

### **Section 95 – Excusal from jury service**

463. Some of those who may be listed for jury service may be entitled to excusal as of right. They fall into categories set out in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (c.55) in Schedule 1, Part III. This section makes changes to the 1980 Act to ensure that people who are listed for jury service who wish to apply for excusal as of right do so within 7 days of receiving the first notice that they may have to serve, unless they are 71 or over or serving military personnel.

464. The first step in the citation process is that the sheriff principal may require any person in one of his sheriff court districts who appears to be qualified for jury service to confirm their personal details in writing (under section 3(2) of the Jurors (Scotland) Act 1825). At the same time they are notified that they may be called for jury service, and they are asked to advise of any holiday dates and confirm whether they are ineligible for or disqualified from service. The earliest opportunity to seek excusal as of right would be on receipt of this notice. Subsection (3) introduces a new section, section 1A, into the 1980 Act which requires someone who wishes to be excused from jury service as of right to apply for that excusal within 7 days of receiving this notice, unless they are over 71 or serving military personnel.

465. A new section 1A requires to be created as the 1980 Act applies both to civil and criminal juries, whereas this Act is concerned only with matters of criminal justice. Section 1A therefore refers to criminal proceedings only. Subsection (2) makes other amendments restricting the effect of section 1(2) and (3) of the 1980 Act, which sets out the circumstances where potential jurors can currently apply for excusal as of right, to civil proceedings only.

466. A requirement to apply for excusal as of right within 7 days of receipt of the revival notice could be operationally difficult and hard to apply for people in the forces, particularly where they are serving in remote places. The requirement is therefore disapplied for people who are listed in Group C of Part III of Schedule 1 of the 1980 Act, who are currently full-time serving members of the armed forces, the Women's Royal Naval Service, Queen Alexandra's Royal Naval Nursing Service or any Voluntary Aid Detachment serving with the Royal Navy by the new section 1A(2) of the 1980 Act, which is inserted by subsection (3). Not only does the 7

day requirement not apply, but the individual concerned is also not required to apply for excusal personally: his or her commanding officer may do so where the officer considers it would be prejudicial to the efficiency of the force for that person to be absent from duty.

467. Similarly it may not be fair or practicable to enforce a requirement to apply for excusal as of right within 7 days for those who have attained the age of 71. This requirement is therefore disappplied in the case of those in the relevant paragraph of Group F of Part III of Schedule 1 to the 1980 Act (see Section 96 below), who are those who have attained the age of 71. Instead persons in this category have not yet been formally cited they may apply for excusal by written notice to the sheriff principal at any time. Where they have been formally cited they may apply for excusal by written notice to the clerk of court at any time up to the date on which that person is first cited to attend, or by attending at court in compliance with the citation and applying for excusal at that point. In any of these cases such persons shall be entitled to excusal as of right.

468. Since most categories of individuals entitled to be excused as of right are being required to seek excusal within 7 days of receipt of the revisal notice, the change in subsection (4) applies the offence of falsely claiming to be excusable as of right from jury service, which is contained in section 3(1)(a) of the 1980 Act, to that earlier stage of the citation process.

### **Section 96 - Persons excusable from jury service**

469. This section makes two changes to paragraph (a) of Schedule 1, Part III, Group F of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980. The first concerns the period of entitlement to excusal from criminal jury service in Scotland. This section makes provision to reduce the exemption period from 5 to 2 years for individuals who attend court but who are not subsequently balloted to sit on a jury. Currently the system makes no distinction between those who attend at court as required but do not then get picked from the ballot to serve, and those who attend and are selected by ballot to form part of a jury in a case.

470. It is not the intention that this should be a retrospective change; rather it will apply from the commencement date of this section of the legislation. This subsection has no impact on the power that a judge has, for example following particularly long or difficult trials, to direct that jurors be excused from service for any period up to and including excusal for life.

471. The second change adds persons who have attained the age of 71 to the categories of people who are excusable as of right from jury service. Thus, although following the changes made by section 68 there is no upper age limit to serve as a juror in a criminal trial, if someone who is over 71 is notified that they may be called for jury service or they are cited, he or she does not have to serve but may claim excusal as of right. They may do so at any time up to the first day of the trial to which they are cited, by applying in writing, or by personal application at the trial itself, as provided for by section 95. A person aged 71 or over therefore, would only have to undertake jury service if he or she wished.

472. Those who have not reached the age of 71 would not be made excusable of right by this section, and the effect of the change in section 94 therefore is that those between 65 and 70 years of age who are called to perform jury service in criminal proceedings would have to serve from the commencement of this provision. The upper age limit for service as a juror in a civil trial of 65 years, and the respective provisions relating to excusal as of right, remain unchanged.

## **Section 97 - Data matching for detection of fraud etc.**

473. Section 73 of, and Schedule 7 to, the Serious Crime Act 2007 provided the national audit agencies in England, Wales and Northern Ireland with the power to match data, and provides statutory provision for an existing data-matching scheme known as the National Fraud Initiative. The National Fraud Initiative is a UK-wide data matching scheme conducted for the purpose of assisting in the prevention and detection of fraud.

474. Section 97 of this Act amends the Public Finance and Accountability (Scotland) Act 2000 ("the 2000 Act") to provide equivalent provisions enabling the National Fraud Initiative to be carried out in Scotland on a statutory basis. The main amendment consists of the insertion by section 97(3) of this Act of a new Part 2A (Data Matching) into the 2000 Act consisting of sections 26A to 26G.

475. Section 26A(1) provides for Audit Scotland to carry out data matching exercises or to arrange for another organisation to do this on its behalf. Subsection (2) defines what a data matching exercise is. It involves the comparison of sets of data, for example, the taking of two local authority payroll databases and matching them. Matching exercises may identify fraudulent activity as having taken place. Subsection (3) defines the purposes for which a data matching exercise can be exercised. These purposes are assisting in the prevention and detection of fraud, assisting in the prevention and detection of crime other than fraud, and assisting in the apprehension and prosecution of offenders. Subsection (4) provides that data matching may not be used to identify patterns and trends in an individual's characteristics or behaviour which suggest nothing more than his potential to commit fraud in future. This is designed to prevent the Audit Scotland from creating individual "profiles" of future fraudsters.

476. Section 26B(1) provides that a person may disclose data to Audit Scotland for the purposes of a data matching exercise. This could include private sector bodies such as mortgage providers who wish to be part of the exercise. There is no compulsion on any of these bodies to take part in a data matching exercise. Subsection (2) provides that the disclosure of information does not breach (a) any duty of confidentiality owed by a person making the disclosure or (b) any other restriction on the disclosure of information, however imposed. Subsection (3) provides that nothing relating to voluntary provision of data authorises any disclosure which (a) contravenes the Data Protection Act 1998, or (b) is prohibited by Part 1 of the Regulation of Investigatory Powers Act 2000, or (c) allows the disclosure of data comprising or including patient data. Subsection (4) defines patient data as meaning data relating to an individual which is held for medical purposes and from which the individual can be identified. Subsection (5) defines medical purposes. Subsection (6) provides that this section does not limit the circumstances in which data may be disclosed apart from this section. Subsection (7) provides that data matching exercises may include data disclosed by a person outside Scotland.

477. Section 26C(1) enables Audit Scotland to require the disclosure of information to conduct a data matching exercise. Subsection (2) sets out which persons may be required to disclose data under subsection (1). They are those bodies whose accounts are subject to audit by the Auditor General, or are sent to him for auditing, local authorities, Licensing Boards and their officers, office-holders or members. Subsection (5) creates an offence and accompanying penalty for non-compliance with this requirement.

478. Section 26D sets out the circumstances in which information relating to a data matching exercise, including the results of such an exercise, may be disclosed by or on behalf of Audit Scotland, and the persons and bodies to whom the data may be disclosed. Subsection (6) imposes special restrictions on the disclosure of information if it includes patient data (as defined in subsection (7)). Subsection (8) places restrictions on the further disclosure of information disclosed under subsection (2) and allows the further disclosure in certain specified circumstances. Subsection (9) creates an offence of disclosing information where the disclosure is made other than as authorised by subsections (2) and (8), and sets out the penalty.

479. Section 26E(1) makes clear that Audit Scotland will be able to publish a report on its data matching exercises notwithstanding the limitation on disclosure as is provided under section 26D. Subsection (2) provides that a report that is published under section 26E may not include information relating to a particular person if (a) the person is the subject of any data included in the data matching exercise; (b) the person can be identified from the information; and (c) the data is not otherwise in the public domain. Subsection (3) provides that Audit Scotland may publish a report in such a manner as it considers appropriate for bringing it to the attention of those members of the public who may be interested. Subsection (5) preserves the existing powers of an auditor to publish information under Part 2 of the 2000 Act or Part 7 of the Local Government (Scotland) Act 1973.

480. Section 26F(1) provides that Audit Scotland must prepare and keep under review a code of data matching practice. Subsection (2) sets out that all those involved in this process must have regard to the code of data matching practice. Subsection (3) requires Audit Scotland to consult all those bodies or office holders who must provide data, the Information Commissioner, and such other bodies as Audit Scotland thinks appropriate before preparing or altering the code of data matching. Subsection (4) places a duty on Audit Scotland to publish the code from time to time.

481. Section 26G(1) provides a power for the Scottish Ministers to add public bodies to those listed in new section 26C(2) by order. The Scottish Ministers may also, by that subsection, modify the application of Part 2A to any body so added, and may remove bodies from section 26C(2). Subsection (2) provides that any order made under section 26G can include any incidental, consequential, supplemental or transitional provision the Scottish Ministers think fit. Subsection (3) defines the meaning of public body. Subsection (4) provides that a public body, whose functions are both public and private in nature, is a public body only to the extent of its functions which are public in nature.

482. Section 97(2) amends section 11 of the 2000 Act to allow Audit Scotland to impose, by Statute, reasonable charges in respect of the exercise of its functions in connection with a data matching exercise, and for these charges to be imposed on those who supply data for a data matching exercise and/or those who receive the results of such an exercise.

## **Section 98 - Sharing information with anti-fraud organisations**

483. The Serious Crime Act 2007 (“the 2007 Act”) allows public authorities (within the meaning of section 6 of the Human Rights Act 1998) throughout the UK to disclose information as a member of a specified anti-fraud organisation for the purposes of preventing fraud or a particular kind of fraud.



484. Sections 68 to 72 of the 2007 Act provide the framework for the scheme. The information may be information of any kind, including personal and documentary information. Sections 68(5) and (6), 69(3) and 71(4) of the 2007 Act provide that the information sharing scheme, by which certain information may be shared for the purposes of preventing fraud, shall extend to reserved information but not to information the subject matter of which is devolved (“devolved information”) held by public authorities with devolved functions (“Scottish public authorities”). By repealing these sections of the 2007 Act (by virtue of section 98 of this Act), Scottish public authorities will be permitted to disclose devolved information, for the purposes of the prevention of fraud or a particular kind of fraud, to a specified anti-fraud organisation.

485. Section 68(5) and (6) of the 2007 Act, excludes Scottish public authorities from the information sharing scheme in respect of devolved information. Section 98 of this Act repeals sections 68(5) and (6) of the 2007 Act and as a result will allow Scottish public authorities to disclose and share such devolved information with anti-fraud organisations in the same way as public authorities may do in relation to reserved information.

486. Section 69(1) of the 2007 Act makes it an offence for a person to further disclose protected information which had been disclosed by a public authority member of an anti-fraud organisation or otherwise in accordance with any arrangements made by such an organisation. “Protected information” is any revenue and customs information disclosed by HM Revenue and Customs which reveals the identity of the person to whom the information relates, and specified information disclosed by other public authorities. Section 69(3) provides that this offence does not apply where the original disclosure was by a relevant public authority (i.e. an authority not covered by section 68) and related to devolved matters. As the power in section 68 is being extended to cover devolved information of Scottish public authorities, this exclusion can be removed and the offence in section 69(1) will apply to all protected information.

487. Section 71 of the 2007 Act provides that the Secretary of State must prepare, and keep under review, a code of practice with respect of the disclosure, for the purposes of preventing fraud or a particular type of fraud, of information by public authorities. Section 98 of this Act repeals section 71(4) of the 2007 Act so that the code of practice will apply for disclosures of devolved information made for the purposes of the prevention of fraud by Scottish public authorities. Section 71(4) of the 2007 Act provides that this does not apply in relation to disclosures, relating to devolved information, by Scottish public authorities. This section of the Act also repeals, in part, section 71(6) of the 2007 Act to remove the now redundant definition of “relevant public authority”.

### **Section 99 - Closure of premises associated with human exploitation etc.**

488. This section makes amendments to the Antisocial Behaviour etc. (Scotland) Act 2004 and provides for the closure of premises associated with the commission of “exploitation offences” such as human trafficking and child sexual abuse. Subsection (1) inserts new subsections (3A) and (3B) into section 26 of the 2004 Act. The inserted subsections (3A) and (3B) set out the grounds on which a senior police officer may authorise the service of a closure notice in cases involving an exploitation offence.

489. Subsection (2) amends the provisions in section 27 of the 2004 Act to take account of the form and service of a closure notice in cases involving an exploitation offence.

490. Subsection (3) makes amendments to section 30 of the 2004 Act and inserts new subsections (2A) and (3A). The inserted subsection (2A) sets out the conditions that must be met before the sheriff can make a closure order in respect of premises associated with the commission of an exploitation offence. The inserted subsection (3A) provides that, in determining whether or not to make a closure order, a sheriff shall have regard to any vulnerability of a victim of an exploitation offence.

491. Subsection (4) inserts new subsections (1A) and (3A) into section 32 of the 2004 Act. The inserted subsection (1A) enables a sheriff to extend the duration of a closure order for a period not exceeding the maximum period where it is necessary to prevent the commission of an exploitation offence. The inserted subsection (3A) sets out the conditions which must be satisfied before a senior police officer can make an application to extend the period for which a closure order has effect in cases involving an exploitation offence.

492. Subsection (5) amends section 33 of the 2004 Act in order to provide for the revocation of a closure order, following an application, in cases involving an exploitation offence.

493. Subsection (6) amends section 36 of the 2004 Act in order to provide for the making of appeals in respect of closure orders which have been given an extension in cases involving an exploitation offence.

494. Subsection (7) inserts a new section 40A into the 2004 Act and sets out the offences which may be considered as exploitation offences for the closure of premises under the 2004 Act.

### **Section 100 - Sexual offences prevention orders**

495. Section 100 makes a number of amendments to the provisions of the Sexual Offences Act 2003 (“the 2003 Act”) which relate to sexual offences prevention orders (SOPOs).

496. Subsections (1) and (2)(a) make provision concerning the criteria which currently exist in some cases before a person may become subject to the notification requirements under the 2003 Act, and before a SOPO can be made. Courts in Scotland can make a SOPO when dealing with an offender for an offence listed in Schedule 3 to the 2003 Act. For some offences listed in Schedule 3 there are conditions, which are based on the sentence or age of the persons involved in the offence, in place which currently limit the application of the scheme which provides for the making of a SOPO. Section 141 of the Criminal Justice and Immigration Act 2008 amended the 2003 Act for England and Wales and Northern Ireland to provide that these conditions do not restrict the making of a SOPO in cases where the conditions are not met. Section 100(1) and (2)(a) extends the application of the amendment made by section 141 of the 2008 Act so that it applies in Scotland.

497. Subsection (2)(b) corrects a minor error in section 109 of the 2003 Act. It ensures that section 107(2) will apply in applications for interim SOPOs. That section of the 2003 Act provides that prohibitions may be included in an order are those necessary for the purpose of protecting the public or any particular members of the public from serious sexual harm from the defendant, applies to interim SOPOs as well as full SOPOs.

498. Subsection (2)(c) inserts new section 111A into the Sexual Offences Act 2003. New subsections 111A(2)-(3) have effect of extending the permitted content of a SOPO, and an interim SOPO, so that the court can impose requirements as well as such other terms in the order, whether prohibitions, restrictions, or other terms, as it considers appropriate so as to protect the public by preventing, restricting or disrupting the involvement of the subject of the order in sexual crime.

499. Subsection (2)(d) amends section 112 of the Sexual Offences Act 2003 to provide that a SOPO may be made at the instance of the court or on the motion of the prosecutor.

### **Section 101 - Foreign travel orders**

500. This section amends the provisions on foreign travel orders (“FTO”) in Part 2 of the Sexual Offences Act 2003 (“the 2003 Act”).

501. Subsections (2) and (3) amend sections 115 and 116 of the 2003 Act by increasing the age of a child from under 16 to under 18. The effect of subsection (2) is that a court can impose a FTO on a qualifying offender if that offender is considered to pose a risk to a child who is outside the United Kingdom who is aged under 18.

502. The effect of subsection (3) is that it alters the criteria determining which sex offenders are to be regarded as “qualifying offenders”. A qualifying offender is a sex offender against whom a court may impose a FTO, provided all the other criteria set out in sections 114 to 116 of the 2003 Act are met. The amendment means that those who have committed certain sexual offences against children under 18, rather than offences against children under 16 will be regarded as “qualifying offenders”.

503. Subsection (4) amends section 117 of the 2003 Act to increase the maximum duration of any FTO specified in section 117(2), from six months to five years. Therefore, a court has the discretion to impose a FTO on a qualifying offender for any period of time up to a maximum of five years.

504. Subsection (5) inserts a new section 117B into the 2003 Act to require offenders who are subject to a FTO imposed under section 117(2)(c), that prohibits them from travelling anywhere in the world, to surrender their passports at a police station in Scotland specified in the order. Such offenders must also surrender any new passports which they acquire throughout the duration of a FTO.

505. This new section also requires the police to return any passport as soon as reasonably practicable after the relevant FTO has ceased, unless that passport is a foreign passport or a passport issued by an international organisation and it has been returned by the police to the authorities outside the United Kingdom which issued the passport.

506. Subsection (6) amends section 122 of the 2003 Act to create new offences in Scots law of failing to comply with a requirement to surrender a passport in Scotland, by virtue of section 117B(2), and in England, Wales, and Northern Ireland by virtue of section 117A(2) of the 2003 Act. Section 117A of the 2003 Act was inserted by section 25 of the Policing and Crime Act

2009. Subsection (6) also makes clear that the sheriff court has jurisdiction to deal with those offences. This means a person who fails to surrender a passport in England, Wales and Northern Ireland can be prosecuted for this offence if that person comes to Scotland.

### **Section 102 – Sex offender notification requirements**

507. Section 102 amends provisions in Part 2 of the Sexual Offences Act 2003 (“the 2003 Act”) which concern the sex offender notification requirements. Subsection (2) gives the Scottish Ministers the power to bring forward regulations which set out how frequently an offender, who does not have a sole or main residence in the United Kingdom, must verify their details to the police. The Scottish Ministers cannot make regulations which allow this class of sex offenders to verify their information to the police at intervals which are less than once a year. Subsection (6) provides that the powers conferred on the Scottish Ministers to make an order or regulations under sections 83, 84, 85, 86, 87 or 130 of the 2003 Act can make different provision for different purposes and include supplementary, incidental, consequential, transitional, transitory or saving provisions. As a consequence, subsections (3) to (5) repeal sections 86(4), 87(6) and 96(4) of the 2003 Act.

### **Section 103 - Risk of sexual harm orders**

508. Section 103 amends provisions of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 which concern risk of sexual harm orders. The amendments are similar to those provided by section 100 of this Act for SOPOs and have the effect of extending the permitted content of a risk of sexual harm order so that the court can impose requirements on persons who are made subject to such orders. Previously, like SOPOs, risk of sexual harm orders could only impose prohibitions on such persons.

### **Section 104 - Risk of sexual harm orders: spent convictions**

509. This section inserts a new paragraph (bc) into section 7(2) of the Rehabilitation of Offenders Act 1974. It provides that nothing in section 4(1) of that Act is to affect the determination of any issue or prevent the admission or requirement of any evidence relating to a person’s previous convictions or to circumstances ancillary thereto in any proceedings under sections 2, 4, 5 and in any appeal under section 6 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (proceedings in relation to Risk of Sexual Harm Orders).

510. This provision therefore allows evidence of previous convictions which are spent for the purposes of the Rehabilitation of Offenders Act 1974 to be led in proceedings for Risk of Sexual Harm Orders in Scotland.

### **Section 105 – Obtaining information from outwith United Kingdom**

511. Prior to this section of the Act being commenced, the Scottish Criminal Cases Review Commission (SCCRC) cannot issue, or apply for, a letter to request assistance from outwith the United Kingdom because its investigations are not within the scope of the Crime (International Co-operation) Act 2003 (“the 2003 Act”).

512. Section 105 of this Act creates a bespoke power for the SCCRC to apply to a judge of the High Court to request assistance in obtaining information from outwith the United Kingdom for the purposes of carrying out its functions.

513. Section 7 of the 2003 Act sets out the authorities which may make requests for assistance, and in which circumstances and form requests may be made. Section 8 of the 2003 Act deals with requests for assistance from the United Kingdom and sets out to which authorities requests may be sent. Section 9 of the 2003 Act sets out what may be done with the evidence obtained in relation to a request for assistance from abroad under section 7 of this Act.

514. Section 105 of this Act inserts new section 194IA into the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). Subsection (4) of inserted section 194IA applies section 8 of the 2003 Act to requests for assistance from abroad by the SCCRC in the same way as it applies to section 7 of the 2003 Act, so that, requests for assistance are sent to a foreign court or authority designated by government of that country, or Interpol or EuroJust in cases of urgency.

515. Subsection (5) of inserted section 194IA applies provisions of section 9 of the 2003 Act to requests for assistance from abroad by the SCCRC in the same way as they apply to section 7 of the 2003 Act. The effect is that information may not without the consent of the appropriate overseas authority be used for any purpose other than that specified in the request and when information is no longer required for that purpose (or any other purpose for which consent has been obtained) it must be returned to the appropriate overseas authority, unless that authority indicates that it need not be returned.

### **Section 106 – Grant of authorisations for surveillance**

516. This section amends the Regulation of Investigatory Powers (Scotland) Act 2000 (“the 2000 Act”) in relation to surveillance operations, including joint surveillance operations.

517. Subsection (2) amends section 10 (authorisations for intrusive surveillance) of the 2000 Act. Previously, the persons who may grant authorisations for the carrying out of intrusive surveillance were the chief constable of a police force and the Director General of the SCDEA. Section 10 is amended so as to include the Deputy Director General of the SCDEA as a person who may grant an authorisation for intrusive surveillance.

518. Subsection (3) inserts a new section 10A into the 2000 Act which makes provision about who may grant authorisations for the use of directed surveillance, Covert Human Intelligence Sources (“CHIS”) and intrusive surveillance in a joint surveillance operation. Subsection (8) inserts a definition of “joint surveillance operation” into section 31 of the 2000 Act; such an operation is one involving at least two police forces in Scotland working together, or at least one police force in Scotland and the Scottish Crime and Drug Enforcement Agency (“the SCDEA”) working together.

519. The new section 10A of the 2000 Act provides that the persons who are designated for the purpose of granting an authorisation for directed surveillance, CHIS and intrusive surveillance in a joint surveillance operation are the same people who are designated for the purposes of sections 6, 7 and 10 of the 2000 Act. In terms of an order made by the Scottish

Ministers under section 8(1)<sup>2</sup> of that Act, to grant authorisations for directed surveillance and CHIS where the operation is not a joint surveillance operation: in relation to the SCDEA, that person is an officer of the rank of at least Superintendent or Grade PO7 Authorising Officer (Inspector in an urgent case); in relation to a police force that person is an officer of the rank of at least Superintendent (Inspector in an urgent case). The authorisation level for intrusive surveillance is a chief constable of a Scottish police force, the Director General of the SCDEA and, as is explained above, the Deputy Director of the SCDEA

520. Subsections (4) and (5) make consequential amendments as a result of the addition of the Deputy Director General of the SCDEA as a person who may grant authorisations for the carrying out of intrusive surveillance (including a joint surveillance operation). Subsection (4) amends section 11(3) of the 2000 Act so as to make it clear that the Deputy Director General of the SCDEA can only grant an authorisation for the carrying out of intrusive surveillance where the application is made by a police member of that Agency. Subsection (5) amends section 12A(1) of the 2000 Act so as to include the Deputy Director General of the SCDEA within the ambit of that section which deals with the grant of authorisations for intrusive surveillance in cases of urgency. Subsection (6) adds the rank of the Deputy Director General of the SCDEA to the definition in section 14 of the 2000 Act of the ‘most senior relevant person’ to whom a Surveillance Commissioner must make a report should he or she decide not to approve an intrusive surveillance authorisation. Subsection (7) amends section 16 of the 2000 Act to add the rank of Deputy Director General of the SCDEA to the list of ranks who may appeal to the Chief Surveillance Commissioner about a decision made by a Surveillance Commissioner.

### **Section 107 – Authorisations to interfere with property etc.**

521. This section amends section 93 of the Police Act 1997 (“the 1997 Act”) so as to make equivalent amendments in relation to authorisations for interference with property as those which have been made by virtue of section 106 in relation to authorisations for surveillance.

522. Subsection (2)(a) inserts subsections (3B) to (3E) into section 93 of the 1997 Act. Subsections (3B) to (3C) make provision about authorisations to interfere with property where there is a joint operation. Subsection (3E) defines a “joint operation” in the same way as it is defined for the purposes of the 2000 Act.

523. These provisions when read together ensure that in the case of a joint operation, the chief constable of a Scottish police force involved in the operation may authorise the persons mentioned in subsection (3D) to take action under section 93(1) of the 1997 Act. The persons mentioned in subsection (3D) are constables of any of the police forces involved in the joint operation (including action which might be outwith the area of operation of the constable’s own force) and if the SCDEA is involved in the operation, a police member of that Agency.

524. Similarly, where the SCDEA is involved in the joint operation, the Director General or the Deputy Director General of the SCDEA may authorise the persons mentioned in subsection (3D) to take action under section 93(1) to interfere with property.

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<sup>2</sup> That Order is currently the Regulation of Investigatory Powers (Prescription of Offices, Ranks and Positions)(Scotland) Order 2000 (S.S.I. 2000/343) (as amended by the Regulation of Investigatory Powers (Prescription of Offices, Ranks and Positions) (Scotland) Amendment Order 2009 (S.S.I. 466/2006))

525. As the 1997 Act extends to England and Wales also, subsection (3C)(a)(i) is designed to ensure that the amendments will only catch Scottish police forces.

526. Subsection (2)(b) amends subsection (5)(j) of section 93 of the 1997 Act so as to include the Deputy Director General of the SCDEA alongside the Director General as an “authorising officer” who may authorise interference with property. Subsection (2)(c) includes the rank of Deputy Director General of the SCDEA at section 93(6)(cc) of the Police Act. This is to define the area for which the Deputy Director General can approve authorisations for property interference.

527. Subsection (3)(c) inserts subsections (6) and (7) into section 94 (authorisation given in the absence of authorising officer) of the 1997 Act. These two new provisions read together make it clear that where the SCDEA is the lead Agency in a joint operation and the Director General or the Deputy Director General are not available then an application for an authorisation to interfere with property may be made to the chief constable of one of the forces involved in the joint operation.

528. Subsection (3)(a) and (b) make amendments consequential upon the insertion of new subsections (6) and (7) into section 94 of the 1997 Act.

### **Section 108 - Amendments of Part 5 of Police Act 1997**

529. This section amends Part 5 of the Police Act 1997 (c.50) (“the 1997 Act”). The 1997 Act is the legislation under which criminal record certificates (basic, standard and enhanced disclosures) are issued for recruitment and other purposes. The day to day functions of the Scottish Ministers under Part 5 of the 1997 Act are carried out by Disclosure Scotland, an executive agency of the Scottish Government.

530. Section 108 makes three amendments to the 1997 Act: the first makes provision for sex offender notification requirements to be included on enhanced criminal record certificates; the second provides an order making power to amend 5 definitions used in Part 5 of the 1997 Act; and the third clarifies the power to charge fees in connection with registration in the register of registered persons kept under section 120 of the 1997 Act.

531. Section 108(2) makes provision for the fact that a person is subject to notification requirements under Part 2 of the Sexual Offences Act 2003 (c.42) (“the 2003 Act”) to be included on enhanced criminal record certificates (commonly referred to as “enhanced disclosure”) issued under section 113B of the 1997 Act.

532. Section 112 of the 1997 Act makes provision as to criminal convictions certificates (commonly referred to as “basic disclosure”). Section 113A of the 1997 Act makes provision as to criminal record certificates (commonly referred to as “standard disclosures”). Section 78 of the Protection of Vulnerable Groups (Scotland) Act 2007 (“the 2007 Act”) will, when commenced, amend sections 112 and 113A of the 1997 Act to make provision for notification requirements under Part 2 of the 2003 Act to be included in basic and standard disclosures.

533. Section 49 of the 2007 Act makes provision for notification requirements under Part 2 of the 2003 Act to be included in scheme record disclosures under the 2007 Act.

534. Section 108(2) brings provision for enhanced disclosure into line with that for basic, standard and scheme record disclosures, correcting an anomaly in the 1997 Act and reflecting the long-standing policy intention.

535. Section 108(3) inserts a new section 113BA into Part 5 of the 1997 Act that will enable Scottish Ministers, by order, to amend the definitions of the expressions: “criminal conviction certificate” (basic disclosure) in section 112(2); “central records” in sections 112(3) and 113A(6); “criminal record certificate” (standard disclosure) in section 113A(3); “relevant matter” in section 113A(6); and “enhanced criminal record certificate” (enhanced disclosure) in section 113B(3).

536. Section 113BA(2) restricts the use of the order making power. An order can only be made to enable certificates to include information held outside the United Kingdom, or in connection with enabling that to be done. Section 113BA(3) provides that any order will be a class 1 instrument, i.e. it cannot be made unless it has been laid in draft and approved by resolution of the Scottish Parliament.

537. It is intended that the order making power will be used to enable disclosure certificates to include relevant information from outside the United Kingdom (e.g. information relating to convictions for offences outside the United Kingdom) where that information is provided to the Scottish Ministers on the basis that it may be used for recruitment purposes.

538. The third amendment to the 1997 Act is at section 108(4) and the effect is to insert two new subsections into section 120ZB.

539. An application for either a standard or an enhanced disclosure certificate must be countersigned by a person whose name is listed in the register kept by Scottish Ministers under section 120 of the 1997 Act. Section 120ZB, inserted into the 1997 Act by section 81 of the Protection of Vulnerable Groups (Scotland) Act 2007, allows regulations to be made about this registration.

540. Section 120ZB(2A) clarifies the fee charging power in section 120ZB(2)(a). It provides that, in particular Ministers may charge fees in respect of applications to be listed in the register, this will allow fees for registration itself and for the nomination of counter-signatories. Different fees may be charged in different circumstances, annual or recurring fees may be charged and fees may be charged in advance or arrears.

541. It is intended that the power will be used to provide different fees for different situations. For example, a different charge is likely to be made for inclusion in the register as compared with an application from a registered person to have another counter-signatory added to act on behalf of them.

542. Lastly, section 120ZB(2B) will enable Ministers to disregard an application for inclusion in the register if the fee for that application is not paid.



## **Section 109 – Spent alternatives to prosecution: Rehabilitation of Offenders Act 1974**

543. This section inserts two new sections (8B and 9B) and a new Schedule 3 into the Rehabilitation of Offenders Act 1974 (“the 1974 Act”). The 1974 Act provides protection to people who are convicted of a criminal offence and receive a prison sentence of 2.5 years or less. After a certain period of time, which varies according to the length of sentence passed, these convictions become “spent” and the offender is considered to be rehabilitated. The amendment will extend the protection under the 1974 Act to include individuals who have been given an alternative to prosecution (ATP) in respect of an offence in Scotland. It also provides protection to individuals who have been given anything corresponding to an ATP in respect of an offence under the law of a country or territory outside Scotland.

The new section 8B(1) of the 1974 Act defines an ATP for the purposes of these provisions. In Scotland a person has been given an ATP in respect of an offence in the following circumstances:

- they have been given a warning by a constable or a procurator fiscal;
- they have accepted or are deemed to have accepted a conditional offer to pay a fixed penalty issued under section 302 of the 1995 Act or a compensation offer issued under section 302A of the 1995 Act, and this includes, by implication, acceptance or deemed acceptance of a combined fixed penalty and compensation offer which can be made under section 302B of the 1995 Act;
- they have had a work order made against them under section 303ZA of the 1995 Act, which offers the individual the opportunity of undertaking unpaid work;
- they have been given a fixed penalty notice under section 129 of the Antisocial Behaviour etc. (Scotland) Act 2004; or
- they have accepted an offer from a procurator fiscal to undertake an activity or treatment or to receive services.

544. The definition of an ATP includes any disposal made in a jurisdiction outside Scotland which corresponds with one of the Scottish ATP’s contained within this list.

545. The new section 9B of the 1974 Act is essentially replicating section 9 of the 1974 Act (unauthorised disclosure of spent convictions) but makes provision for the unauthorised disclosure of ATP’s. Section 9 of the 1974 Act provides some protection for the rehabilitated offender and there are criminal sanctions where an individual discloses information outwith the course of their duties or improperly obtains information on spent convictions. Under the new section 9B, an individual found guilty of disclosing information which relates to a person being given an ATP which has become spent outwith the course of their official duties will be liable on summary conviction to a fine not exceeding level 4 on the standard scale. Where a person improperly obtains information which concerns a person being given an ATP in terms of subsection (8) they will be liable on summary conviction to a fine not exceeding level 5 on the standard scale, or to imprisonment for a term not exceeding 6 months, or to both.

546. The new section 9B(6) of the 1974 Act provides the Scottish Ministers the power to make an Order to except the disclosure of information on ATP’s which originates from an official record in particular cases or classes of cases from the offence of unauthorised disclosure. There

is a similar power in section 9(5) of the 1974 Act in relation to the unauthorised disclosure of spent convictions. This power will be subject to the affirmative procedure.

547. The new Schedule 3 to the 1974 Act essentially mirrors the provisions in sections 4, 5, 6 and 7 of the 1974 Act with appropriate modifications to apply them to ATP's. Paragraph 1 of the new Schedule 3 defines when an ATP becomes spent. Warnings issued by a procurator fiscal or a constable or a fixed penalty notice issued under section 129 of the Antisocial Behaviour etc. (Scotland) Act 2004 all become spent at the time they are given. All other ATP's will become spent after 3 months.

548. Sub-paragraphs (5) and (6) of paragraph 1 of the new Schedule 3 to the 1974 Act explain what will happen to the rehabilitation period if an individual is subsequently prosecuted and convicted of the offence for which the ATP was given. If a person is given an ATP (other than a fiscal or police warning ) in respect of an offence and is then prosecuted and convicted of the offence, the rehabilitation period for the ATP will end at the same time as the rehabilitation period for the offence. Further to this, with the exception of fixed penalty notices issued under section 129 of the Antisocial Behaviour etc. (Scotland) Act 2004, if the conviction occurs after the end of the 3 month rehabilitation period, the ATP will be treated as not being spent until the rehabilitation period for the offence ends. This can arise, for example, where a person is subsequently prosecuted as they accepted an ATP, but then fail to adhere to its terms.

549. Paragraph 2 of the new Schedule 3 to the 1974 Act provides a definition of "ancillary circumstances" in relation to an ATP. Paragraph 3 sets out what protection is afforded to persons in relation to their spent ATP's and any ancillary circumstances in civil proceedings. Paragraph 4 provides that if a person who has a spent ATP is asked a question seeking specific information other than during court proceedings that may lead to the disclosure of the ATP or any ancillary circumstances, they are not required to answer it. Under paragraph 5, any obligation imposed by a rule of law or provisions in an agreement or arrangement to disclose information does not extend to spent ATP's and ancillary circumstances, and a person cannot be dismissed or excluded from any office, profession, occupation or employment, or be prejudiced in any way as a result of having a spent ATP or for failing to disclose this information.

550. Paragraph 6(a) of the new Schedule 3 to the 1974 Act provides the Scottish Ministers the power to make an Order to exclude or modify the application of the provision in paragraph 4 (2) and (3) that a person is not required to acknowledge the existence of a spent ATP or ancillary circumstances when they are asked for information other than during court proceedings and must not be prejudiced for their failure to provide this information. This will mirror the order making power in section 4(4)(a) of the 1974 Act. Orders made under that provision have specified various offices and types of employment where the employer can ask questions about spent convictions. Paragraph 6(b) of the new Schedule 3 provides the Scottish Ministers the power to provide for exceptions to the provision in paragraph 5 that a person is not required to disclose a spent ATP or ancillary circumstances under a rule or law or agreement. Therefore where excepted in an order, the obligation imposed on a person will extend to requiring disclosure of an ATP. This will mirror the order making power in section 4(4)(b) of the 1974 Act.

551. Paragraph 8 of the new Schedule 3 to the 1974 Act provides for limitations on the effect of rehabilitation under the 1974 Act for an ATP in a similar way to section 7 of that Act for convictions, and sets out the circumstances where the protection under certain provisions of the

1974 Act will not apply. For example, previous convictions, spent or otherwise, must be disclosed in criminal proceedings. This paragraph also gives power to the Scottish Ministers, by the application of section 7(4) of the 1974 Act to Schedule 3, to exclude the application of paragraph 3 of that Schedule in relation to any specified proceedings, by order. This power will be subject to the affirmative procedure.

### **Section 110 – Medical services in prison**

552. Section 110 amends the Prisons (Scotland) Act 1989 and the Criminal Justice and Public Order Act 1994 so as to remove the duty on the Scottish Ministers to provide medical services in state run Scottish Prisons and the duty on the contractor to provide these services in contracted out prisons. As a result, the responsibility for providing medical services in all prisons falls to NHS Health Boards under general health legislation.

553. The intention is that subordinate legislation could be used, if considered necessary, to introduce specific provision required to ensure that primary health care services in prisons are equivalent to those available outside prisons. The relevant powers to introduce any such subordinate legislation are found in general health legislation with no further powers being created in section 110 of this Act for this purpose.

554. The amendments made by section 110 require the Scottish Ministers and directors of contracted-out prisons to designate one or more medical officers for each prison, and limits who can be designated as a medical officer. The amendments have the effect that medical officers will no longer be deemed to be prison officers. The other amendments made by section 110 ensure that medical officers designated under these new powers have much the same status within the prison as medical officers appointed under current powers do, for example in relation to searches and restrictions on the disclosure of information.

### **Section 111 - Assistance for victim support**

555. This section allows the Scottish Ministers to make grants for the purposes of the provision of assistance to victims, witnesses or other persons affected by a criminal offence. This extends the power to make grants under section 10 of the Social Work (Scotland) Act 1968, which permits grants to be made to national organisations or innovative projects, but which excludes grants to local authorities.

### **Section 112 - Public defence solicitors**

556. This section amends section 28A of the Legal Aid (Scotland) Act 1986 ("the 1986 Act") to place the Public Defence Solicitors Office ("the PDSO") on a permanent footing. The PDSO was established in 1998 to provide criminal defence services from solicitors employed by the Scottish Legal Aid Board ('the Board') on a trial basis.

557. Section 28A of the 1986 Act currently provides for regulations to be made for the purpose of carrying out a feasibility study. It also provides for the laying of a report before Parliament by 31 December 2008. The report was laid on 23 December 2008 [SG/2008/259]. This section removes these provisions as the PDSO is to be permanent.

558. Regulations have been made under section 28A of the 1986 Act<sup>3</sup>. These regulations make provision for the employment of solicitors by the Board to provide criminal legal assistance.

### **Section 113 - Compensation for miscarriages of justice**

559. The Scottish Government operates two schemes for the payment of compensation as a result of a miscarriage of justice. The statutory scheme under section 133 of the Criminal Justice Act 1988 (“the 1988 Act”) provides for compensation to be paid in certain circumstances. The decision as to whether compensation is payable is for Scottish Ministers but the amount of the award is quantified solely by an independent assessor. An ex gratia scheme covering other types of cases has also operated for a number of years with successful cases treated in the same way as statutory ones by the assessor.

560. Subsection (1)(a) inserts a new subsection (1A) into section 133 of the 1988 Act which gives Scottish Ministers an order-making power to specify further sets of circumstances in which compensation may be payable. This power will be used to replace the existing ex gratia scheme by placing it on a statutory footing with the existing statutory scheme. It is intended to correspond to the existing ex gratia criteria. The seriousness of the offence for which the individual was charged or detained, but not convicted, will be taken account of when assessing compensation (subsection (1)(c)). This is consistent with the way the assessor takes into account the seriousness of the offence when assessing compensation under the statutory scheme where the individual had been convicted.

561. Subsection (1)(b) inserts subsections (2AA) and (2AB), that impose a time limit of 3 years for applications to be made for compensation. It also allows a discretionary power for the Scottish Ministers to waive that time limit where it is in the interests of justice to do so, or where there are exceptional circumstances. The 3 year time limit is consistent with civil limitation periods for personal injury claims.

562. Subsection (1)(d) inserts subsection (4B), that requires the Independent Assessors have particular regard to any guidance issued by the Scottish Ministers. However, it is not intended for the guidance to impinge on the independence of the assessor when making a decision on the quantum of a claim but is designed to promote consistency in decision making.

563. Section 133(5) of the 1988 Act states that a conviction being “reversed” (one of the criteria for eligibility for compensation) shall be taken to mean as referring to a conviction being quashed in certain circumstances. Section 188 of the Criminal Procedure (Scotland) Act 1995 allows for a conviction and sentence or both to be set aside by way of a minute from the prosecutor to the court without an appeal being heard but in such circumstances this would not entitle a successful appellant to seek compensation for a miscarriage of justice. Subsection (1)(e) amends section 133(5) of the 1988 Act to make appropriate changes to the 1988 Act to allow someone who has had their conviction set aside by way of section 188(1)(b) of the 1995 Act to be considered for compensation.

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<sup>3</sup> The Scottish Legal Aid Board (Employment of Solicitors to Provide Criminal Legal Assistance) Regulations 1998 (SI 1998/1938) as amended by the Scottish Legal Aid Board (Employment of Solicitors to Provide Criminal Legal Assistance) Amendment Regulations 2008 (SSI 2003/511)

564. Subsection (1)(f) inserts new subsection (6A), which makes an amendment to the 1988 Act so that those persons who are subject to a probation order or discharged absolutely are eligible to seek compensation in accordance with the Act. The order-making power in this section is exercisable by statutory instrument subject to annulment in pursuance of a resolution of the Scottish Parliament.

565. Subsection (2) removes a redundant reference to the Criminal Injuries Compensation Board in Schedule 12 to the 1988 Act.

### **Section 114 - Financial reporting orders**

566. The Serious Organised Crime and Police Act 2005 (“the 2005 Act”) introduced the use of Financial Reporting Orders (FRO). Those persons subject to an FRO are required to report their financial dealings over a specified period of time as directed by the court. In Scotland they can only be applied when someone is convicted of the common law offence of fraud or an offence specified in Schedule 4 to the Proceeds of Crime Act 2002.

567. Section 114 amends section 77 of the 2005 Act by inserting a new subsection (4A). The inserted subsection (4A) sets out the two ways in which an FRO can be made. It makes it clear that either a prosecutor may apply to the court to make an FRO or the court may make such an order at its own instance.

### **Section 115 - Compensation orders**

568. Under section 249 of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”), where a person is convicted of an offence, the court may make an order requiring him to pay compensation for any personal injury, loss or damage caused directly or indirectly, or alarm or distress caused directly, to the victim.

569. A court cannot make a compensation order in respect of loss suffered in consequence of the death of any person; or injury loss or damage due to an accident involving a motor vehicle on the road, except where the damage is treated as having arisen out of the theft of the car by the convicted person.

570. The maximum amount which may be awarded under a compensation order by a sheriff or stipendiary magistrate in summary proceedings is £10,000 (“the prescribed sum”). The maximum amount which can be awarded by a Justice of the Peace is an amount not exceeding level 4 on the standard scale (£2,500). In solemn proceedings there is no limit on the amount which may be awarded.

571. Subsection (1)(a)(i) amends section 249(1) of the 1995 Act. This allows courts to make compensation orders in relation to deaths or road accidents, subject to the following amendments.

572. Subsection (1)(a)(ii) amends section 249(1) to clarify that a compensation order must be paid in favour of the victim.

573. Subsection (1)(b) inserts a new subsection (1B) into section 249, which provides that compensation may be paid to a victim or a person who is liable for funeral expenses. A new subsection (1C) is also inserted, which defines a victim as either the person who has suffered injury, loss or damage, or a relative who has suffered a bereavement caused by an offence being committed. “Relative” has the same meaning as in Schedule 1 of the Damages (Scotland) Act 1976.

574. Subsection (1)(c) inserts new subsections (3A), (3B) and (3C) into section 249. Subsection (3A) allows a compensation order to be made in cases where a road accident has been caused by an uninsured driver, provided no other type of compensation is payable. Subsection (3B) provides that where a compensation order is made following damage to a stolen vehicle or an accident with an uninsured driver, then that compensation may include some or all of the cost of the loss of preferential insurance rates. Subsection (3C) provides that a compensation order may be made in respect of loss suffered as a result of bereavement and funeral expenses in connection with a person’s death, except where the death was as a result of a road accident.

575. Subsection (1)(d) amends subsection (4) of section 249. This provides that unless subsections (3) – (3C) allow a compensation order to be made, then compensation orders shall not be made in respect of loss relating to a death or, injury, loss or damage relating to a road accident.

576. In some exceptional cases, statute provides that summary courts may impose a maximum fine, the amount of which exceeds “the prescribed sum” (i.e. the statutory maximum) of £10,000 set out by section 225(8) of the 1995 Act. Subsection (1)(f) inserts a new subsection (8A) into section 249 of the 1995 Act. Section (8A) allows the sheriff, in cases where an exceptionally high fine may be imposed, to make a compensation order up to the same amount.

577. Subsection (2) amends section 251 of the 1995 Act. It repeals paragraph (a) of subsection (1) of section 251 and removes the power of the court to reduce or discharge the compensation order when the injury, loss or damage has been held in civil proceedings to be less than it was taken to be for the purposes of the compensation order. This removes any explicit link with civil proceedings.

578. Subsection (2)(b) inserts a new subsection (1A) into section 251 of the 1995 Act. Subsection (1A) allows the court to review the compensation order at any time before it has been fully complied with and gives the court the power to increase the order if materially new information about the means of the offender has become available or the offender’s financial circumstances have improved.

## **PART 6 - DISCLOSURE**

579. This Part of the Act makes provision in relation to the disclosure of evidence in criminal proceedings. It is a long established rule in the Scottish legal system that the Crown has an obligation to give the accused notice of the case against him, i.e. to tell him what charges he faces and what evidence the Crown intends to bring to prove the charges. Any *exculpatory* material should be identified and disclosed to the accused/defence. Disclosure has, until now, been carried out on a common law basis. A series of high profile decisions of the Judicial

Committee of the Privy Council including the cases of *Holland and Sinclair*, whilst refining that duty also gave rise to some uncertainty about the exact requirements of the duty of disclosure.

580. Following these decisions Lord Coulsfield was invited to carry out a review on the law and practice of disclosure of evidence in the Scottish criminal justice system, which was published in August 2007. He recommended that disclosure would benefit from having a statutory framework. The provisions in the Act seek to give effect to that recommendation and build on other recommendations made to clarify the law and practice in disclosure in criminal proceedings.

### **Section 116 - Meaning of “information”**

581. This section defines what the term “information” covers where it is used in the provisions, including appellate matters. It covers material of any kind which is given to or obtained by the prosecutor in connection with the proceedings. In appellate proceedings the definition of “information” includes material given to or obtained by the prosecutor in connection with the appellate proceedings and the earlier proceedings to which the appellate proceedings relate.

### **Section 117 – Provision of information to prosecutor: solemn cases**

582. This section applies to solemn cases. It creates a duty on the investigating agency, (as defined in subsection (4) and not simply restricted to the police), to provide the prosecutor with details of all the information that may be relevant to the case for or against the accused as soon as practicable after the accused’s first appearance in court in respect of the proceedings. “Information” includes information that the agency is aware of which was obtained by another agency. If the prosecutor requires the information itself, rather than just the details, the investigating agency must provide it as soon as is practicable.

### **Section 118 – Continuing duty to provide information: solemn cases**

583. This section provides for a continuing duty on the investigating agency in solemn cases to submit to the prosecutor as soon as practicable after becoming aware of further information, the details of such information obtained during the course of the investigation that may be relevant to the case for or against the accused. This duty follows on from the initial duty to disclose under s.117. Upon receipt of these details, if the prosecutor requires the information itself, rather than only the details of it, the investigating agency must provide it as soon as practicable. Subsection (5) sets out the circumstances in which the proceedings are deemed to have been concluded, thus ending the investigating agency’s duty.

### **Section 119 – Provision of information to prosecutor: summary cases**

584. This section applies where a plea of not guilty is recorded against an accused charged on a summary complaint and sets out the duties of the investigating agency in such circumstances. The investigating agency is required to inform the prosecutor as soon as practicable after the recording of the plea of the existence of all the information that may be relevant to the case for or against the accused that the agency is aware of that was obtained in the course of the investigation of the matter. The agency must provide to the prosecutor any such information that the prosecutor then requests.

### **Section 120 – Continuing duty of investigating agency: summary cases**

585. This section provides for a continuing duty on the investigating agency in summary cases to inform the prosecutor of the existence of further information as soon as practicable after becoming aware of it i.e information that may be relevant to the case for or against the accused, obtained during the course of the investigation. Upon receipt of this, if the prosecutor requires the information itself the investigating agency must provide it as soon as practicable. This duty continues until proceedings against the accused are concluded. Subsection (5) sets out the circumstances in which the proceedings are deemed to have been concluded.

### **Section 121 – Prosecutor’s duty to disclose information**

586. This section sets out the test by which information has to be disclosed to the accused under the statutory scheme in both solemn and summary cases. It provides that, where the accused appears for the first time in solemn proceedings, or where a plea of not guilty is recorded against the accused charged on summary complaint, the prosecutor has a duty to review all of the information of which the prosecutor is aware which may be relevant to the case for or against the accused. The prosecutor must then disclose to the accused any such information to which subsection (3) applies.

587. Subsection (3) sets out the rules which determine whether the information must be disclosed by the prosecutor. If subsection (3) applies to any of that information then the prosecutor must disclose all such information to the accused. If subsection (3) does not apply to any of that information, then the prosecutor need not disclose that information to the accused.

### **Section 122 – Disclosure of other information: solemn cases**

588. This section applies to solemn cases only. Having complied with the duty to disclose under s.121, the prosecutor is then obliged to disclose to the accused the details of any other information which may be relevant to the case for or against the accused.

589. Subsection (3) provides that the prosecutor is not required to disclose the details of any “sensitive” information under this section.

590. Subsection (4) sets out the meaning of “sensitive” in relation to an item of information.

### **Section 123 – Continuing duty of prosecutor**

591. This section confirms that in cases where the disclosure statutory scheme applies (both summary and solemn), the prosecutor has an ongoing duty to review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware. Having done so the prosecutor must disclose to the accused any such information to which section 121(3) applies.

592. Subsection (3) applies to solemn cases only and sets out that having complied with the duty to review and disclose the information falling under section 121 the prosecutor must also disclose details of any other information of which he or she is aware that may be relevant to the



case for or against the accused. Again this additional duty does not apply to “sensitive” information.

593. Subsection (6) defines when a case is deemed to have been concluded.

### **Section 124 – Defence statements: solemn proceedings**

594. This section provides that defence statements shall be mandatory in all solemn cases and provides the timings for lodging of such statements. Subsection (2) sets out that as soon as practicable after the prosecutor receives a copy of the defence statement, the prosecutor must review all of the information which may be relevant to the case for or against the accused of which he is aware. Having done so the prosecutor must then disclose to the accused any information which falls to be disclosed under s.121(3).

595. Subsection (3) amends the Criminal Procedure (Scotland) Act 1995 by inserting a new section 70A. That section provides that the accused must lodge a defence statement at least 14 days before the first diet in sheriff and jury proceedings, and the preliminary hearing in High Court proceedings. The information that the defence statement must contain is specified in subsection (9) of new section 70A of the Criminal Procedure (Scotland) Act 1995.

596. The new section 70A also provides that, at least 7 days before the trial diet, the accused must lodge a further statement. This statement must set out whether there has or has not been a material change in circumstances since the defence statement was lodged. If a material change has occurred, the statement must set out the details of that change and what the new position is. Further material changes must similarly be detailed in subsequent statements. Any defence statements must be lodged before the trial diet unless on cause shown the court allows otherwise. Subsection (8) requires the accused to send a copy of any defence statement to the prosecutor and any co-accused.

597. Subsection (4) amends section 78 of the Criminal Procedure (Scotland) Act 1995 by providing that where a defence statement is lodged and the defence consists of or includes a special defence the requirement under section 78 of that Act to lodge and intimate such a defence does not apply.

### **Section 125 – Defence statements: summary proceedings**

598. Unlike solemn proceedings, an accused is not obliged to lodge a defence statement in summary proceedings. This section enables him to do so however, should he wish, where a plea of not guilty is recorded against him. Importantly though, such statements require to be lodged before the accused can seek recourse to the court under section 128 to recover information he considers material to the case in terms of section 121 but which the prosecutor has not disclosed. The accused may lodge defence statements in summary cases at any time following the plea of not guilty until the conclusion of the proceedings. Subsection (6) defines when proceedings are to be taken to be concluded.

599. Subsection (2) sets out what a defence statement shall contain. Subsection (3) provides that as soon as practicable after lodging a defence statement the accused must send a copy of the statement to the prosecutor and any co-accused.

600. Under subsection (4) the prosecutor must, as soon as practicable after receiving the defence statement, review all the information that may be relevant to the case for or against the accused for the purposes of determining whether the section 121 disclosure test is satisfied. Any such information should then be disclosed.

601. Subsection (7) inserts a new provision into section 149B of the Criminal Procedure (Scotland) Act 1995 which under certain circumstances removes the requirement upon the accused to lodge notice of a special defence in terms of that section where a defence statement which sets out the special defence has already been lodged.

### **Section 126 – Change in circumstances following lodging of defence statement: summary proceedings**

602. This section provides a continuing duty upon the accused where a defence statement in a summary case has been lodged at least 14 days before the trial diet. Under subsection (2) where there has been no material change in circumstances in respect of the accused's defence since the statement was lodged a further statement must be lodged at least 7 days before the trial stating that fact. If such a material change has taken place a defence statement must be lodged to that effect before the trial diet begins unless on cause shown the court allows it to be lodged during the trial diet. The accused is required to send a copy of such statements to the prosecutor and any co-accused and subsection (6) provides the duties of the prosecutor upon receiving such a statement.

### **Section 127 – Sections 121 to 126: no need to disclose same information more than once**

603. This section provides that the prosecutor only needs to disclose information once to the accused in relation to the same matter.

### **Section 128 – Application by accused for ruling on disclosure**

604. The purpose of this section is to provide the accused with an opportunity in both summary and solemn cases to recover information from the prosecutor where the accused considers that the prosecutor has failed to disclose information which meets the disclosure test in section 121. The section allows the accused to apply to the court for a ruling on the matter. Subsection (1)(a) provides that such an application is only possible if the accused has already lodged a defence statement in the case. It is a mechanism by which the accused can contest the prosecutor's decision not to disclose information in response to their lodging a defence statement, where the accused considers that the information meets the section 121 test.

605. Subsection (3) provides the content of the accused's written application to the court.

606. Subsections (4) to (7) provide the duties of the court upon receipt of such an application including the disposals available to the court. Under subsection (8) it is provided that except where it is impracticable to do so the justice of the peace, sheriff or judge who is presiding or will preside at the trial must deal with the application.

### **Section 129 – Review of ruling under section 128**

607. This section allows the accused to apply to the court to review its earlier ruling in terms of section 128. Such an application can be made if the accused becomes aware of further information following the ruling and considers that had this further information been available to the court at the earlier hearing, the court would have made a ruling to disclose the original information.

608. Subsection (3) provides the content of the accused's written application to the court.

609. Subsections (4) to (7) provide the duties of the court upon receipt of such an application including the disposals available to the court. Under subsection (8) unless it is impracticable to do so the justice of the peace, sheriff or judge who is presiding or will preside at the trial must deal with the application.

### **Section 130 – Appeals against rulings under section 128**

610. This section provides the prosecutor or the accused with a right to appeal to the High Court against a ruling made under section 128. The appeal must be made within 7 days of the ruling being made. Subsection (2) provides that the court of first instance or the High Court may, where an appeal is brought, postpone any trial diet that has been appointed for such period as it thinks appropriate, or adjourn any hearing for such period as it thinks appropriate, or direct that any period of postponement or adjournment is not to count towards any time limit applying in the case. Subsection (3) provides that the High Court may affirm the ruling or remit the case back to the court of first instance with such directions as the High Court thinks appropriate. Under subsection (4) it is provided that the section does not affect any other right of appeal which any party may have in relation to a section 128 ruling.

### **Section 131 – Effect of guilty plea**

611. This section provides that where the prosecutor is required to disclose information to an accused, but before doing so a plea of guilty is recorded against the accused, that the prosecutor need not comply with the requirement in so far as it relates to the disclosure of information which would have been likely to have formed part of the prosecution case. If the accused withdraws the plea of guilty then this provision ceases to apply.

### **Section 132 – Sections 133 to 140: Interpretation**

612. This section defines the terms “appellant” and “appellate proceedings” where they appear in sections 133 to 140. The definition of “appellate proceedings” lists all those proceedings which that term covers in those provisions. It covers the full range of appellate proceedings that might be raised by an appellant following his conviction where he seeks to bring his conviction under review alleging any miscarriage of justice, or in sentence appeals where he alleges a miscarriage of justice based on the existence and significance of evidence not heard in the original proceedings.

### **Section 133 – Duty to disclose after conclusion of proceedings at first instance**

613. This section applies in cases where an appeal is taken against the verdict in the first instance proceedings. Subsection (2) requires the prosecutor to review the information of which he is aware that relates to the grounds of appeal and to disclose to the appellant that information that is specified in subsection (3). The definition of relevant act in subsection (5) specifies the trigger point for this duty, with reference to each individual type of appeal that is listed in the definition provision. The effect of this is that the duty requires to be complied with only when certain specified events have taken place. Subsection (4) provides that the prosecutor is not required to disclose anything that has already been disclosed to the appellant.

### **Section 134 – Continuing duty of prosecutor**

614. This section sets out the continuing nature of the prosecutor's duty of disclosure in appellate proceedings, requiring the prosecutor to review information held that relates to the grounds of appeal in the appellate proceedings and to disclose information that meets the tests set out in section 133(3). Subsection (3) provides that the prosecutor is not required to disclose anything that has already been disclosed to the appellant. Subsections (4) and (5) set out the start and end points of the duty. They provide that the duty is brought to an end by the conclusion of the appeal, whether that conclusion be a final disposal or determination by the court or the abandonment of the appeal.

### **Section 135 – Application to prosecutor for further disclosure**

615. This section enables an appellant to apply to the prosecutor to seek the disclosure of information which has not already been disclosed to him in terms of section 133(2). Its effect is to enable such an application to be made to the prosecutor, setting out, by reference to the grounds of appeal, the nature of the information that the appellant wishes the prosecutor to disclose and the reasons why he considers that disclosure by the prosecutor is necessary. The provision places a duty on the prosecutor, as soon as practicable after receiving such an application to review any information which he is aware of that relates to the request and disclose to the appellant any information which meets the tests set out in subsection (3) of section 133 which has not previously been disclosed.

### **Section 136 – Further duty of prosecutor: conviction upheld on appeal**

616. This section sets out the prosecutor's duty of disclosure in cases where the accused's conviction is upheld following his appeal. It provides that, if, after the conclusion of the appeal, the prosecutor becomes aware of information that should have previously been disclosed then the prosecutor must, as soon as practicable after becoming aware of it, disclose the information. Subsection (3) provides that the prosecutor is not required to disclose anything that has already been disclosed. Subsection (4) provides that the section does not place a requirement on the prosecutor to proactively review the information of which he or she is aware.

### **Section 137 – Further duty of prosecutor: convicted persons**

617. This section sets out the prosecutor's duty of disclosure in cases where the accused is convicted and does not appeal that conviction. It provides that, if, after the conclusion of the proceedings the prosecutor becomes aware of information that should have been disclosed in

terms of sections 121 or 123 then, as soon as practicable after becoming aware of it, the prosecutor must disclose it to the convicted person. Subsection (3) provides that, if the convicted person appeals, then this section does not apply as the disclosure duties during an appeal are provided elsewhere. Subsection (4) provides that the prosecutor is not required to disclose anything that has already been disclosed. Subsection (5) provides that the section does not place a requirement on the prosecutor to proactively review the information of which he or she is aware.

### **Section 138 – Further duty of prosecutor: appeal against acquittal**

618. This section provides that, where an accused person is acquitted and the prosecutor appeals against that acquittal then, if after lodging his appeal the prosecutor becomes aware of information that relates to the appeal and which meets the test in section 133 then, as soon as practicable thereafter, the prosecutor must disclose that information to the acquitted person. Subsection (3) provides that the prosecutor is not required to disclose anything that has already been disclosed. Subsection (4) provides that this duty is brought to an end by the disposal of the appeal by the High Court and subsection (5) makes it clear that there is no requirement on the prosecutor to proactively review the information of which he or she is aware.

### **Section 139 – Application by appellant for ruling on disclosure**

619. This section allows an appellant to contest a prosecutor's decision not to disclose an item of information in response to a request for further disclosure in terms of section 135. The basis upon which the appellant would do so would be that the prosecutor had failed to disclose information that satisfies the prosecutor's duty to disclose in appellate proceedings. The section allows the accused to apply to the court for a ruling on the matter.

620. Subsection (3) provides the content of the accused's written application to the court.

621. Subsections (4) to (7) provide the duties of the court upon receipt of such an application including the appointment of a hearing and the disposals available to the court. By subsection (9) it is provided that except where it is impracticable to do so the application should be assigned to the judges who are to hear the appellant's appeal.

### **Section 140 – Review of ruling under section 139**

622. This section allows the appellant to apply to the court to review its earlier ruling in terms of section 139. Such an application can be made if the appellant becomes aware of further information following the ruling and considers that had this further information been available to the court at the earlier hearing, the court would have made a ruling to disclose the requested information.

623. Subsection (3) provides the content of the accused's written application to the court.

624. Subsections (4) to (7) provide the duties of the court upon receipt of such an application including the appointment of a hearing and the disposals available to the court. By subsection (8) it is provided that except where it is impracticable to do so the application should be assigned to the judges who ruled upon the original application.

## **Sections 141 to 145 overview**

625. Occasionally there will be circumstances where the prosecutor has a duty to disclose information but is unable to do so due to the risks involved to the public interest in making such information available to the accused. The remedy for the prosecutor in such a situation is to seek authority from the court to prevent the disclosure of the information. This is known as the s.145 order. Lord Coulsfield recognised that at times such risks may arise by the mere fact of the accused's presence at any hearing discussing the application to withhold the information. Furthermore the accused's knowledge that such a hearing is going to take place to discuss the withholding of information, even if he will not be present at such a hearing, may be enough to create the risk to the public interest. Lord Coulsfield envisaged therefore a scheme where the rights of the accused could be safeguarded in such circumstances whilst managing the potential risks to the public interest. The provisions are designed to give effect to this.

626. There are therefore 3 orders in this scheme. The order restricting or preventing disclosure of the information, s.145 order; the order for non notification of the s.145 hearing i.e. the accused is not told that a s.145 hearing is taking place and finally the exclusion order i.e. the accused is not allowed to attend the s.145 hearing

### **Section 141 – Application for section 145 order**

627. This section imposes a duty upon the prosecutor to apply to the court for an order prohibiting disclosure of information which he would otherwise require to disclose where such disclosure would be likely to cause a real risk of substantial harm or damage to the public interest. The order sought from the court is referred to as a 'section 145 order'.

### **Section 142 – Application for non-notification order or exclusion order**

628. Section 142 sets out the additional order(s) the prosecutor should consider where he has applied for an order preventing or partially preventing disclosure in terms of s.145. Subsection (2) provides that where the s.145 order relates to solemn proceedings the prosecutor may also apply to the court for a non-notification order and an exclusion order or simply an exclusion order alone. This also applies to proceedings which take place after the conclusion of the first instance proceedings.

629. Subsection (3) provides that if the s.145 order relates to summary proceedings the prosecutor may in addition apply for an exclusion order (but not a non notification order). Again, this also applies to proceedings which take place after the conclusion of the first instance proceedings.

630. Subsection (4) explains the effect of a non-notification order i.e. that it is an order prohibiting notice being given to the accused of the making of the applications for non-notification, exclusion and s.145 orders and also the decisions of the court in relation to any of those applications.

631. Subsection (5) explains the effect of an exclusion order i.e. that it is an order prohibiting the accused from attending or making representations in proceedings relating to the application for a s.145 order.

632. Subsections (6) and (7) set out the order in which the court must consider each application. Before making a decision on whether a s.145 order should be granted the court must first make a decision in relation to any applications for non-notification and/or exclusion. This has the effect of ensuring that the court first considers whether any application for non-notification (if applied for) should be granted, then considers whether any application for exclusion should be granted (if applied for) and only then can consider whether the application for the s.145 order should be made.

### **Section 143 – Application for non-notification order and exclusion order**

633. This section applies where the prosecutor has made an application for both a non-notification order and an exclusion order. An application for both orders can only be made in solemn cases, s.142(2).

634. Subsection (2) requires the court, first, to fix a hearing to determine whether a “non-notification” order should be made.

635. Subsections (3) and (4) provide that, where an application is made for “non notification” and exclusion orders the accused will not be notified of either the making of such applications or of the hearing appointed to consider the applications. The accused will not be present nor represented at the hearing. (Although his interests may be represented by Special Counsel if one is appointed by the court, s.150 refers).

636. Subsection (5) provides that the court may make a “non-notification” order if the requirements set out in subsection (6) are met. The court has to consider whether knowledge of the very existence of the application for a s.145 order would be likely to cause a real risk of substantial harm or damage to the public interest.

637. Subsection (7) provides that if the court makes a “non-notification” order, the court must also grant the application for an exclusion order.

638. Subsection (8) provides that, if the court refuses to make a “non-notification” order, the court will then appoint a hearing to determine the application for an exclusion order. Subsection (10) allows the prosecutor to apply to the court to exclude the accused from the hearing on the exclusion order. As there is no longer a “non notification” order in operation it is not possible to make this application in advance of the hearing. Such a motion requires to be made to the court on the day the exclusion order calls in the presence of the accused, rather than in advance of the hearing on the exclusion order. If the court agrees to the motion at that stage the accused can then be excluded by the court.

639. Subsection (9) provides that the prosecutor and if not excluded the accused, have the opportunity to be heard on the application for the exclusion order. The court may make the order if satisfied that the requirements set out in s.144 are met.

640. Subsection (11) makes provision in relation to the interpretation in sections 143-145 of references to the consideration of the accused receiving a ‘fair trial’. Where the trial is ongoing the reference relates to that trial. In the case of appellate proceedings however the reference

relates to the original trial which is now the subject of the appeal. The court therefore has to consider whether the accused would have received a fair trial at the time of the original trial if the information had not been disclosed.

#### **Section 144 – Application for exclusion order**

641. Where the prosecutor makes an application for an exclusion order only the court must appoint a hearing to consider it. This is applicable to both solemn and summary procedure.

642. Subsection (3) provides that the Court may exclude the accused from the hearing. Such a motion requires to be made to the court on the day the exclusion order calls in the presence of the accused, rather than in advance of the hearing on the exclusion order. If the court agrees to the motion at that stage the accused can then be excluded by the court.

643. Having heard the prosecutor and the accused, if not excluded, on the application for the exclusion order and the section 145 order the Court may make the exclusion order providing the conditions set out in subsection (5) are met. There are two conditions. First, that disclosure to the accused of the nature of the information would be likely to cause a real risk of substantial harm or damage to the public interest. And second that, having regard to all the circumstances, the making of an exclusion order would be consistent with the accused's receiving a fair trial.

#### **Section 145 – Application for section 145 order: determination**

644. This section deals with the determination of an application by the prosecutor to apply for an order which would result in the information in question either not being disclosed to the accused or disclosed in a partial or restricted manner.

645. Subsection (2) provides that the court must consider the information that the application relates to and give the prosecutor and the accused (if not excluded) the opportunity to make representations to the court. The court must then engage in a two-step process. First, it must determine (depending on whether the application is made by virtue of subsection (2) or (3) of section 141) whether the conditions in subsection (3) or (4) are met. Second, if it determines that the conditions in either of those subsections are met then it must go on to determine whether subsection (5) applies.

646. Subsection (5) provides that the court must consider whether the information could be disclosed or partly disclosed in such a way as to provide the accused with something rather than nothing and still achieve the correct balance between public and private interests. When the prosecutor makes this application during appellate proceedings or after conviction but in the absence of any live appellate proceedings the court will be asked to consider the question of whether or not, despite the trial being concluded, withholding the item of information *would have been consistent with the accused receiving a fair trial*. The intention is that the court requires to put itself back to the time of the trial and assess the evidence that is before the court for and against the accused in order to determine whether this particular information, which is the subject of the application is central to the accused receiving a fair trial. The effect of this may be that the court will require to reconsider the record of evidence from the original trial to determine this issue.



647. Subsection (8) provides for ways in which the court might decide that information could be disclosed e.g. by provision of redacted or edited information or summaries of the information.

### **Section 146 – Order preventing or restricting disclosure: application by Secretary of State**

648. Sections 146 to 149 establish a system, similar to that available to the prosecutor, to enable applications to be made to the court by a Minister of the UK Government (a “Secretary of State”) for orders prohibiting the disclosure of information which the prosecutor is either required to disclose or proposes to disclose. This recognises that there may be public interest issues which arise in criminal proceedings in which Secretaries of State may have an interest.

649. Section 146 enables the Secretary of State to apply to the court before which the criminal proceedings are taking place for an order preventing or restricting the disclosure of information which the prosecutor would otherwise be required to disclose or which the prosecutor, otherwise, intends to disclose. Subsection (6) provides that the court must consider the information that the application relates to and give the prosecutor and, unless excluded, the accused the opportunity to make representations to the court. The Secretary of State is, also, entitled to be heard.

650. Under subsections (7) and (8) the court must consider whether, if the item of information were to be disclosed, there would be real risk of substantial harm or damage to the public interest, whether withholding the item of information would be consistent with the accused’s receiving a fair trial and whether the only way of protecting the public interest is by making such an order. The court must then engage in a two-step process. First, it must determine (depending on whether the application is made by virtue of subsection (2) or subsection (3) or (4)) whether the conditions in subsection (7) or (8) are met. Second, if it determines that the conditions in either of those subsections are met then it must go on to determine whether subsection (9) applies.

651. The intention is that the court requires to put itself back to the time of the trial and assess the evidence that is before the court for and against the accused in order to determine whether this particular information, which is the subject of the application is central to the accused receiving a fair trial. The effect of this may be that the court will require to reconsider the record of evidence from the original trial to determine this issue.

652. Subsections (10) and (11) enable the court to make an order requiring the information to be disclosed, in the manner specified in the order (i.e. in whole or in part), if its disclosure would not cause a real risk of substantial harm or damage to the public interest and the disclosure (or partial disclosure) would be consistent with the accused receiving a fair trial.

653. Subsection (14) makes provision in relation to the interpretation in sections 146-149 of references to the consideration of the accused receiving a ‘fair trial’. Where the trial is ongoing the reference obviously relates to that trial. In the case of the appellant proceedings however the reference relates to the original trial which is now the subject of the appeal. The court therefore has to consider whether the accused would have received a fair trial at the time of the original trial if the information had not been disclosed.

### **Section 147 – Application for ancillary orders: Secretary of State**

654. This section allows the Secretary of State to apply to the court for ancillary orders where an application for an order is made under section 146. It sets out the procedure by which the Secretary of State may apply for a non-attendance order or a restricted notification order. These orders are similar in purpose to the “non notification” order and exclusion order which the prosecutor can apply for where an application is made for a section 145 order.

655. Subsections (2) provides that the Secretary of State may in solemn proceedings apply for both a restricted notification order and a non-attendance order or for just a non attendance order on it own. In accordance with subsection (3) he may only apply for a non-attendance order in summary proceedings. Both subsections include proceedings which take place after the conclusion of the first instance proceedings.

656. Subsection (4) explains the effect of a restricted notification order. It is an order prohibiting notice being given to the accused of both the making of any application for an order under section 146 or for a restricted notification order or non-attendance order.

657. Subsection (5) explains the effect of a non-attendance order. It is an order prohibiting the accused from attending or making representations in proceedings relating to the determination of any application under section 146 for an order preventing or restricting disclosure.

658. Subsection (7) sets out the order in which the court must consider each application mirroring the provision in section 142. It provides that the court must consider any application for ancillary orders before determining the application for the order under section 146.

### **Section 148 – Application for restricted notification order and non-attendance order**

659. This section sets out the procedure to be followed where the Secretary of State has made an application in solemn proceedings for both a restricted notification order and a non-attendance order. Subsection (2) requires the court to fix a hearing to determine whether a restricted notification order should be made.

660. Subsections (3) and (4) provide that where an application for a restricted notification order is made, the accused will not be notified of either the making of the applications or of the hearing, nor will he be represented or appear at the hearing. However, it is possible that Special Counsel may be appointed by the court. Subsection (5) provides that the prosecutor and the Secretary of State will be entitled to be heard and further provides that the court may make a restricted notification order if the conditions set out in subsection (6) are met. Again this requires the court to consider the balance between the real risk of harm or damage to the public interest and fairness to the accused.

661. Subsection (7) provides that if the court makes a restricted notification order it must also grant the application for a non-attendance order. If the court refuses to make a restricted notification order it must then appoint a hearing to determine the application for a “non-attendance” order, subsection (8). The accused may be excluded from such a hearing by virtue of subsection (10). However as there is no longer a restricted notification order in operation it is not possible to make this application in advance of the hearing. Such a motion requires to be

made to the court on the day the exclusion order calls in the presence of the accused, rather than in advance of the hearing on the non attendance order. If the court agrees to the motion at that stage the accused can then be excluded by the court.

### **Section 149 - Application for non-attendance order**

662. This section sets out the procedure to be followed where the Secretary of State applies for a non-attendance order alone (i.e. without a restricted notification order) seeking to exclude the accused from attending, and making representations, at the hearing on the order preventing or restricting disclosure. This provision is applicable to both solemn and summary procedure. Subsection (2) provides that the court must appoint a hearing on receiving an application for a non-attendance order. Subsections (4) and (5) provide that at that hearing the Secretary of State, the prosecutor and the accused (unless excluded following application being made by the Secretary of State) will be entitled to make representations, after which, the court may make a non-attendance order if it is satisfied that the conditions are met namely the balance between a fair trial and the real risk of harm or damage to the public interest.

### **Section 150 – Special counsel**

663. Sections 150 to 152 provide for the appointment of and the role of Special Counsel. Section 150 gives a power to the court in considering an application for various orders to appoint special counsel to represent the interests of the accused in respect of the determination of the application at a hearing or any review or appeal thereon. It is not anticipated that such appointments will be a common occurrence. The appointments only relate to the orders specified in the section and do not extend beyond that. For example, it is not anticipated that special counsel would be present during the trial itself to represent the interests of the accused in respect of the information that was the subject of the application

664. Subsection (3) sets out the test for such an appointment, namely that is necessary to ensure that the accused receives a fair trial.

665. Subsections (4) to (6) provide that the prosecutor, or, as the case may be, the Secretary of State and, in limited circumstances, the accused, are able to make representation to the court before the court decides whether to appoint special counsel.

666. Subsections (7) to (9) makes provision for appeal against the decision of the court not to appoint special counsel.

### **Section 151 – Persons eligible for appointment as special counsel**

667. This section provides that only solicitors or advocates may be appointed as special counsel.

## **Section 152 – Role of special counsel**

668. This section regulates the role and functions of special counsel and the interaction between special counsel and the accused and/or his representatives. Subsection (1) sets out the duty of special counsel which is to act in the best interests of the accused insofar as ensuring that the accused receives a fair trial.

669. Subsection (2) provides that special counsel is entitled to see the confidential information concerned but must not disclose any of that information to the accused or his representatives. Subsection (3) prohibits communication with the accused in “non notification” and restricted notification cases. In any other case communication is only possible with the permission of the court, subsection (4). Both the prosecutor and where appropriate the Secretary of State must have been given an opportunity to be heard on any request to communicate with the accused, subsection (5).

## **Section 153 - Appeals**

670. This section provides the prosecutor, the accused, the Secretary of State and Special Counsel, where appointed, with a right of appeal against the orders specified in the section. All appeals are to be to the High Court of Justiciary and subsection (6) provides that they must be lodged not later than seven days after the decision being appealed against. The section further specifies who is entitled to make representations to the court in respect of the appeals.

## **Section 154 – Prohibition on disclosure pending determination of certain appeals**

671. This section provides that where the prosecutor or Secretary of State appeals in terms of section 153, the information to which the appeal relates should not be disclosed until the appeal has been concluded.

## **Section 155 – Review of section 145 order**

672. This section entitles the prosecutor or the accused to apply to the court to seek review of a section 145 order. This would be on the basis that they have become aware of information which was not available at the time the order was made.

673. Subsections (1) and (2) provide that such an application for review can be made only where the court has made a section 145 order, where the prosecutor or accused becomes aware of information that was unavailable to the court at the time of making that order and that the prosecutor or accused considers that the section 145 order should be revisited in light of this new information. Where appointed, special counsel may also make the application.

674. Subsection (3) provides who can attend the review hearing. Subject to subsection (4), the same parties as were heard in relation to the section 145 order will have the opportunity to make representations.

675. In terms of subsection (4), where there was a non-notification order in place and the court is satisfied that the grounds for non-notification remain, the court may make an order prohibiting the accused from being notified of the application for review, thus having the same effect as a non-notification order.

676. Similarly, in terms of subsection (5), where there was an exclusion order in place and the court is satisfied that the grounds for exclusion remain, the court may make an order excluding the accused from the review.

677. Subsection (6) provides that if the court on reviewing the order in light of the new information is satisfied that the grounds for the section 145 order no longer remain, the court may recall the order, or make an order for partial disclosure.

678. Subsections (8) and (9) have the effect of allowing applications for review at any time following the making of the section 145 order until the conclusion of the proceedings, as defined in subsection (9).

#### **Section 156 – Review of section 146 order**

679. This section mirrors section 155 which provides for reviews of section 145 orders sought by the prosecutor.

680. Subsections (1) and (2) provide that such an application for review can be made only where the court has made a section 146 order and where the Secretary of State, prosecutor or accused becomes aware of information that was unavailable to the court at the time of making that order and that the prosecutor or accused considers that the section 146 order should be revisited in light of this new information. Where appointed, special counsel may also make the application.

681. Subsection (3) provides who can attend the review hearing. Subject to subsection (4), the same parties as were heard in relation to the section 146 order will have the opportunity to make representations.

682. In terms of subsection (4), where there was a restricted notification order in place and the court is satisfied that the grounds for making it remain, the court may make an order prohibiting the accused from being notified of the application for review, thus having the same effect as a non-notification order.

683. Similarly, in terms of subsection (5), where there was a “non attendance” order in place and the court is satisfied that the grounds for that remain, the court may make an order excluding the accused from the review.

684. Subsection (6) provides that if the court on reviewing the order in light of the new information is satisfied that the grounds for the section 146 order no longer remain, the court may recall the order, or make an order for partial disclosure.

685. Subsection (8) has the effect of allowing applications for review at any time following the making of the section 146 order until the conclusion of the proceedings against the accused.

### **Section 157 – Review by court of section 145 and 146 orders**

686. Section 157 provides that the court is under a duty to keep under review each order made under sections 145 and 146 and consider whether they remain appropriate whilst the proceedings are ongoing.

687. Subsection (3) provides that, where the court considers that the orders might no longer be appropriate, the court must appoint a hearing to review the matter.

### **Section 158 – Applications and reviews: general provisions**

688. This section sets out the procedure for dealing with applications, appeals and reviews of the section 145 and 146 orders and ancillary orders thereto. Subsections (3) and (4) provide that such matters must where practicable be assigned to the judge assigned to the trial or appeal to which the application relates. Where proceedings are not live the matter should where practicable be assigned to the judge who presided at the trial. The same sheriff or judge who made the section 145 or section 146 order and performed the balancing exercise is then best placed to consider any review of that order in light of the information. Subsection (5) provides that the accused is not entitled to see or be made aware of the contents of the application for such orders.

### **Section 159 – Exemptions from disclosure**

689. This section sets out the information which is exempt from the statutory scheme for disclosure. Information, the disclosure of which is prohibited by section 17 of the Regulation of Investigatory Powers Act 2000, must not be disclosed.

### **Section 160 – Means of disclosure**

690. This section provides that the prosecutor may disclose information by any means including allowing the information to be viewed by the accused at a reasonable time and in a reasonable place. The provision is designed to make clear that the means of disclosure is entirely a matter for the prosecutor's discretion. It will ensure that it is open to the Crown to fulfil its disclosure obligations through provision of a narrative detailing the information.

691. Subsections (4) to (7) address the disclosure of statements. In summary proceedings the prosecutor need not disclose the statements themselves and is only obliged to disclose the information within the statements which meet the disclosure test. In both summary and solemn proceedings the same is true for precognitions, victim statements and statements given by a person whom the prosecutor does not intend to call to give evidence.

692. Subsections (6) and (7) provide that in solemn proceedings, the prosecutor must disclose a copy of the statement of a witness whom he intends to lead in evidence, or a statement of a witness that the prosecutor intends to have admitted in terms of section 259 of the 1995 Act. 'Copy' should be read as meaning a typescript version of the statement rather than a photocopy

of the actual manuscript version. In summary proceedings, subsections (4) and (5) provide that such statements need not be disclosed to the accused.

### **Section 161 – Redaction of non-disclosable information by prosecutor**

693. This section applies where the prosecutor has a document or other piece of information in his possession that satisfies the disclosure test but which also contains information in relation to which there is no duty to disclose. It provides that the prosecutor is able to redact, edit or obscure the non-disclosable part of the information.

### **Section 162 – Confidentiality of disclosed information**

694. This section covers disclosed information and restricts how the accused and others may use information that has been disclosed to him. The restrictions are set out in subsections (2) and (4). These prevent the accused and all other persons to whom the information has been disclosed, whether by the prosecutor or any other person, from using or sharing disclosed information with anyone else in any way except where subsection (3) applies. By subsection (5) if the accused discloses information to a person in a way other than in accordance with the restrictions then the person to whom the information has been disclosed must not use or disclose the information or anything recorded in it. Subsection (6) provides that the restriction does not apply to information already in the public domain at the time of the use or disclosure.

695. Subsections (3) and (7) make provision to ensure that, notwithstanding the overall restriction, the accused may use the information disclosed to him for certain specified purposes connected with the preparation and presentation of his case or appeal and with a view to taking an appeal, which include references to the SCCRC, petitions to the *nobile officium* and applications to the European Court of Human Rights.

696. Subsection (9) ensures that other legislation is given effect to, for example Data Protection Act 1998 and any other statutory scheme which creates prohibitions or obligations of confidentiality.

### **Section 163 – Contravention of section 162**

697. This section makes it an offence for a person to knowingly use or to disclose information in contravention of section 162. The section provides that the maximum sentence on conviction in summary proceedings is 12 months imprisonment or a fine not exceeding the statutory maximum or both and, on conviction on indictment, 2 years imprisonment or a fine or both.

### **Section 164 – Code of practice**

698. Subsections (1) and (4) require the Lord Advocate to prepare a code of practice containing guidance about Part 6 of the Act and lay it and any revisions to the code before Parliament.

699. Subsections (2) and (3) specify those persons who must have regard to the code namely police, prosecutors and any other persons whom the Scottish Ministers prescribe, who carry out functions in relation to the investigation of crime or sudden deaths.

## **Section 165 – Acts of Adjournal**

700. This section provides for the High Court to make such rules as it considers necessary or expedient for the purposes of, in consequences of, to give full effect to these provisions.

## **Section 166 – Abolition of common law rules about disclosure**

701. The purpose of this section is to ensure that the statutory provisions on disclosure will displace the current common law rules on disclosure but only to the extent that they are replaced by, or are inconsistent with, the provisions of Part 6.

702. Subsection (3) provides that sections 128 and 139 do not affect any right of an accused or an appellant to seek the disclosure, or recovery, of information by or from the prosecutor under a procedure other than the proposed new statutory procedure set out in those provisions.

703. Subsections (4) to (7) clarify the interaction between the provisions in Part 6 and the existing common law remedies that are available allowing persons to recover information. If the court has ruled that information does not meet the tests set out in either section 121 or section 133 then the accused/appellant cannot then seek the recovery of the information through another remedy on substantially the same grounds. Equally a person cannot rely on the new ruling on materiality provisions to seek information when he has already sought that information on substantially the same grounds by a common law remedy and been unsuccessful in doing so.

## **PART 7 - MENTAL DISORDER AND UNFITNESS FOR TRIAL**

### **Section 168 - Criminal responsibility of persons with mental disorder**

704. Sections 168 to 171 and associated minor amendments in Schedule 7 implement the Scottish Law Commission's Report on Insanity and Diminished Responsibility, published in 2004. The provisions directly reflect the draft Bill contained in the Commission's Report, with changes only to reflect the incorporation of the provisions within the larger Criminal Justice and Licensing (Scotland) Act, to deal with changes to the law since the Commission's Report, and to correct some minor errors and omissions.

705. Section 168 introduces a new statutory defence to replace the common law defence of insanity. It does so by inserting a new section 51A into the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"). It provides for a special defence in respect of persons who lack criminal responsibility by reason of their mental disorder at the time of the offence with which they are charged.

706. Subsection (1) sets out the test for the new statutory defence. It provides that there are two elements to the test. The first is the presence of a mental disorder suffered by the accused at the time of the conduct constituting the offence. Secondly, the mental disorder must have a specific effect on the accused for the defence to be available. This effect is the inability of the accused to appreciate either the nature or wrongfulness of the conduct constituting the offence. 'Nature' and 'wrongfulness' are alternative concepts and the defence may be established by proving lack of appreciation in respect of only one of them. The concept of appreciation is wider than that of mere knowledge. Failure to appreciate the nature of conduct would not therefore be



precluded by knowledge of the physical attributes of the conduct. Similarly the defence may be available to an accused who knew that his conduct was in breach of legal or moral norms but who had reasons for believing that he was nonetheless right to do what he did.

707. Subsection (2) provides that the special defence does not apply to a person who at the time of the conduct constituting the offence had a mental disorder which consisted of a psychopathic personality disorder alone. The exclusion in this subsection applies only to psychopathic personality disorder. Other forms of personality disorder may give rise to the defence provided that the effect on the accused satisfies the test in subsection (1) above. The defence would also be available where psychopathic personality disorder co-existed with another mental disorder (including other personality disorders) provided that the effect of the other mental disorder falls within the test in subsection (1).

708. Under the common law insanity is classified as a special defence. Subsection (3) provides for a similar rule in relation to the new statutory defence based on mental disorder. The main effect of the characterisation of a defence as a special defence is in relation to various procedural requirements under the 1995 Act (e.g. section 78(1) (giving of notice), section 89 (reading of the defence to the jury)).

709. Subsection (4) deals with who can raise the defence and with the relevant standard of proof. It provides that the special defence can be raised only by the person charged with the offence. It cannot be raised by the Crown or by the court of its own accord. This provision is in contrast to the common law defence, which can be raised by the Crown. The subsection also provides that the standard of proof on an accused person who states the defence is the balance of probabilities. This rule corresponds with that for the common law defence of insanity (*HM Advocate v Mitchell* 1951 JC 53).

710. Section 168 introduces a statutory version of the plea of diminished responsibility in place of the common law plea. It does so by inserting a new section 51B into the 1995 Act. The test for the statutory plea is modelled on the common law as set out in *Galbraith v HM Advocate* 2002 JC 1, subject to some variations noted below.

711. Subsection (1) provides that a plea of diminished responsibility is applicable in cases of murder but not in respect of any other crime or offence. The effect of the plea, if proved, is that a person who would otherwise be convicted of murder is to be convicted instead of culpable homicide. The main difference between the two outcomes is that the court has a discretion in sentencing a person convicted of culpable homicide which it lacks in a murder case (a person convicted of murder must be given a sentence of life imprisonment as required by section 205(1) of the 1995 Act). The test for the plea is based on that laid down in *Galbraith v HM Advocate*, namely at the time of the killing the accused must have been suffering from an abnormality of mind which substantially impaired his ability to determine or control his conduct. Comments by the Court in the *Galbraith* case on this part of the common law test will be of use in interpreting the statutory test.

712. Subsection (2) makes two significant changes to the law on the plea of diminished responsibility. At common law the plea is not available where the relevant abnormality of mind falls within the scope of the insanity defence. The position is different under this Act where the accused's condition at the time of an unlawful killing falls within the definitions of both the

defence based on mental disorder and diminished responsibility. In this situation, the accused has the option of advancing either the defence or the plea. Secondly the subsection allows for diminished responsibility to be based on the condition of psychopathic personality disorder. At common law this condition cannot be used as a basis for the plea (*Carraher v HM Advocate* 1946 JC 108). The subsection makes clear that this exclusion does not apply to the statutory test for diminished responsibility.

713. Subsection (3) clarifies the effect which a state of intoxication has on the availability of diminished responsibility. In the first place, the provision re-states the rule laid down in *Brennan v HM Advocate* 1977 JC 38 that a person who kills whilst in state of intoxication cannot found a plea of diminished responsibility on that condition. Secondly, it states that the presence of intoxication does not preclude diminished responsibility provided that there is a basis for the plea independently of the intoxication.

714. Subsection (4) deals with the burden and standard of proof in relation to a plea of diminished responsibility. The subsection follows the same approach as that for the defence based on mental disorder. Only the accused can raise the plea, and if raised the accused has to prove diminished responsibility on the balance of probabilities. The rule is in substance the same as the common law rule (*HM Advocate v Braithwaite* 1945 JC 55).

### **Section 169 - Acquittal involving mental disorder: procedure**

715. Section 169 inserts a new section 53E into the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). The new section deals with the procedure where an accused is acquitted by reason of mental disorder.

716. Subsection (1) of the new section 53E replaces the existing statutory procedure under section 54(6) of the 1995 Act for acquittal involving mental disorder. Under section 54(6) of the 1995 Act (before its repeal by this Act), where the defence of insanity is raised in a solemn case, there must be a verdict returned by the jury. A consequence of section 54(6) is that a jury requires to be empanelled and directed to return a verdict even where the Crown accepts a plea of insanity. This subsection provides for a different procedure for the statutory defence based on mental disorder. Where the Crown accepts a plea by the accused based on the defence, the court is to declare that the accused has been acquitted by reason of the special defence. This provision assimilates the procedure for solemn and summary cases. A declaration setting out the special nature of the acquittal is necessary in order to trigger the provisions in Part VI of the 1995 Act which deal with disposals.

717. Subsections (2) and (3) of the new section 53E provide for the situation where the Crown has not accepted a plea by the accused of the defence based on mental disorder. The defence does not become an issue for the court or jury to consider unless there has been evidence to support it. If the defence falls to be considered, in solemn cases the court must direct the jury to make a finding whether or not they accept that the defence has been established. Where the jury find that the defence has been established they must also declare whether their verdict of acquittal is based on the defence. A similar procedure applies in summary cases, where the court must state whether it finds that the defence has been established. If it has, the court must also declare whether the accused has been acquitted on that ground. The purpose of the declaration, in both solemn and summary cases, is to deal with the possibility that a jury might acquit the

accused on some other ground. In this situation, even if the defence has been proved, the acquittal is not a special one triggering the disposal provisions of Part VI of the 1995 Act.

### **Section 170 - Unfitness for trial**

718. Subsection (1) inserts a new section 53F into the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). The new section replaces the existing common law rule on insanity as a plea in bar of trial, with a new statutory plea of unfitness based on the mental or physical condition of the accused.

719. Subsection (1) of the new section 53F sets out a general test for the new statutory plea of unfitness for trial. The effect of the provision is that a person is unfit for trial if he cannot effectively participate in the proceedings because of his mental or physical condition.

720. This Act does not change the common law rule that the issue of an accused’s fitness for trial may be raised by the accused, the Crown, or by the court. However, this subsection makes clear that the appropriate standard of proof for a finding of unfitness for trial is on the balance of probabilities.

721. Subsection (2) of the new section 53F lists various inabilities which if proved in respect of the accused indicate his unfitness for trial. The list in paragraph (a) is illustrative, and not exhaustive, of the types of inabilities which constitute lack of ability to participate effectively in proceedings. Paragraph (b) provides that other factors may be relevant to making a determination.

722. Subsection (3) of the new section 53F applies to the statutory plea a common rule laid down in *Russell v HM Advocate* 1946 JC 37. It makes clear that a person is not unfit for trial simply because he cannot remember what happened at the time of the offence with which he is charged. However the rule does not apply where the accused is suffering from problems affecting memory of events at the time of the trial itself.

723. Subsection (4) of the new section 53F explains the meaning of “the court” when used in the new section 53F.

724. Subsection (2) of section 170 amends the title of section 54 of the 1995 Act and introduces some amendments to that section.

725. Subsection (2)(a)(i) repeals part of section 54(1) of the 1995 Act. Section 54(1) of the 1995 Act contained a requirement that various court orders must be based on the evidence of two medical practitioners, one of whom must have been approved as having special expertise in mental health. The effect of subsection 2(a)(i) is that this requirement does not apply to a finding by a court that a person is unfit for trial.

726. Subsections (2)(b) and (c) amend section 54 to reflect the names for the new defence and plea in bar of trial. References to insanity as a plea in bar are changed to refer to unfitness for trial.

727. Subsection (3) of section 170 repeals subsection (6) of section 54 of the 1995 Act. That provision dealt with procedure on insanity as a defence. The repeal follows on from the introduction by section 169 of this Act of the new statutory defence based on the accused's mental disorder. By placing the defence in provisions separate from section 54, the definition of "court" in section 54(8) no longer applies to the procedure relating to the defence. The effect is to make clear that the provisions for recording an acquittal based on the defence apply to proceedings in the district/justice of the peace courts.

728. Subsection (3) of section 170 also repeals subsection (7) of section 54 of the 1995 Act. The effect is that the procedure in summary cases for the giving of notice of a plea of unfitness for trial is governed by the general rules for intimation of pleas in bar (see section 144 of the 1995 Act).

### **Section 171 – Abolition of common law rules**

729. The effect of section 171 is to abolish any existing common law rules regarding the special defence of insanity, the plea of diminished responsibility and the plea of insanity in bar of trial.

## **PART 8 - LICENSING UNDER CIVIC GOVERNMENT (SCOTLAND) ACT 1982**

730. Part 8 of the Act makes various changes to the general licensing provisions of the Civic Government (Scotland) 1982 Act and to its specific provisions on metal dealers, market operators, public entertainment, late hours catering, and taxis and private hire cars.

### **Section 172 - Conditions to which licences under 1982 Act are to be subject**

731. This section amends the 1982 Act to provide powers for mandatory and standard conditions to be imposed on licences issued under the 1982 Act and makes consequential amendments.

732. As amended, section 3A of the 1982 Act allows the Scottish Ministers to make an order setting out mandatory licence conditions that licences issued under the 1982 Act, included deemed licences, are to be subject. Such an order is subject to the affirmative resolution procedure.

733. As amended, section 3B of the allows a licensing authority to determine standard conditions. Licences issued under the 1982 Act by that authority will be subject to those standard conditions. The standard conditions must not be inconsistent with any mandatory conditions Licensing authorities have a duty (section 3B(4)) to publish standard conditions determined by them. The standard conditions apply to deemed grants or renewals of licences (i.e. grant or renewal of licences where the authority has failed to reach a decision on an application within the statutory period allowed).

734. For both mandatory and standard conditions, different sets of conditions can be determined for different types of licence (e.g. boat-hire licences or street traders' licences under sections 38 and 39 of the 1982 Act respectively).

735. Section 172(6) amends Schedule 1 to the 1982 Act to enable licensing authorities, when granting or renewing licences under the 1982 Act to impose further conditions, as well as omit or vary any of the standard conditions applicable to licences.

### **Section 173 - Licensing: powers of entry and inspection for civilian employees**

736. Section 5 of the 1982 Act empowers a constable or authorised officer to enter and inspect premises to ensure compliance with licence conditions. This section extends these powers to civilian staff employed by the police (under the provisions of section 9 of the Police (Scotland) Act 1967) and makes consequential amendments to other parts of the 1982 Act.

### **Section 174 – Licensing of taxis and private hire cars**

737. Subsection (2) amends section 13(3) of the 1982 Act to provide that an applicant for a taxi or private hire car driver's licence must have held throughout the period of 12 months immediately prior to the date of the application a licence authorising the person to drive a motor car issued under Part III of the Road Traffic Act 1988 or a licence which would at the time of the application entitle the person to such a licence without taking a test, not being a provisional licence.

738. Subsection (3) inserts new subsections (2) to (4E) into section 17 which provide that a licensing authority must fix scales for the fares and other charges referred to in subsection (1) within 18 months beginning with the date on which the scales came into effect. Subsection (3) provides that in fixing the scales under subsection (2) a licensing authority may alter the fares or other charges or fix fares or other charges at the same rates. Subsection (4) provides that the licensing authority review the scales in accordance with subsection (4A) before fixing scales under subsection (2). Subsection (4A)(a) provides that a licensing authority, in carrying out a review, consult with persons or organisations appearing to be representative of taxi operators in the area. Subsections (4A)(b) and (c) set out procedures for consultation and notification of the licensing authority's proposals and subsection (d) provides that they consider any representations received thereon. Subsection (4C) sets out the duty to give notice as to the effect of the fare scales fixed and subsection (4D) contains the notification requirements. Subsection (4E) provides that after fixing scales, the licensing authority must notify all operators of taxis within their area and the persons and organisations consulted under subsection (4A)(a). Section 17(5)(a) is amended to extend the period provided for notification of a licensing authority's decision from 5 days to 7 days.

739. Subsection (4) amends section 18(1) and introduces a new section 18(1A) to extend the right of appeal against the decision by a licensing authority in regard to the fixing of taxi fare scales or review to persons or bodies representative of taxi operators in the licensing area.

740. Subsection (5) inserts a new section 18A(1) which provides that following the fixing of scales the licensing authority must determine the date upon which the scales are to come into effect and publish them in accordance with the terms of section 18A(3) to (5). Section 18A(2) provides that the revised scales may not come into effect earlier than 7 days after the date on which they were published. Sections 18A(3) to (5) set out the notification procedures and the timescale to be followed. Section 18(9) is repealed in consequence.

### **Section 175 – Licensing of street trading: food hygiene certificates**

741. Section 175 amends section 39 (street traders’ licences) of the 1982 Act to amend the requirements of the certificate that must accompany certain applications for a street trader’s licence. The effect is to provide that the certificate must state that the vehicle, kiosk or moveable stall complies with any requirements set out in an order made by the Scottish Ministers. This will enable the requirements set out in the certificate to be amended following any changes in food safety legislation.

### **Section 176 – Licensing of public entertainment**

742. Subsection (2) repeals the words “on payment of money or money’s worth” from section 41(2) of the 1982 Act. This allows licensing authorities to require large-scale public entertainments that are free to enter to be licensed. Authorities retain discretion as to whether events such as gala days or school fetes should be licensed.

743. Subsection (2) also updates some references to gambling legislation for premises that are exempt from the public entertainment licensing provisions (sections 41(2)(d) and (e) of the 1982 Act refer). It also allows the Scottish Ministers, by order, to add other premises to the list of premises that are exempt from requiring a public entertainment licence. Such an order will be subject to the negative resolution procedure.

### **Section 177 - Licensing of late night catering**

744. Under section 42 of the 1982 Act, premises providing meals and refreshments between 11pm and 5am require to be licensed, where licensing authorities have opted to have a late night catering licensing regime. This section replaces the references to “meals or refreshments” with “food”, thus bringing late-night grocers and 24-hour stores within the scope of the provisions. It will continue to be for licensing authorities to determine which classes of premises actually require to be licensed.

### **Section 178 - Applications for licences**

745. This section amends Schedules 1 and 2 to the 1982 Act.

746. It amends Schedule 1 to require individuals applying for licences under the 1982 Act to provide details of their date and place of birth on the application forms. Subsection 2(c) and (d) ensures that an applicant’s date and place of birth are not included within the notices required for display and publication for the purposes of a licence application under Part 2 of the 1982 Act.

747. Section 178 also amends various time limits of the application process to: make representations; provide reasons for decisions; give notice of hearings; and for licensing authorities to consider licence renewal applications received after the expiry date as renewals, rather than new applications.

748. Subsection (3)(e) amends paragraph 9(3) of Schedule 2 to the 1982 Act to reflect the position of the United Kingdom as a member state of the European Union and its obligations under EC law.

## **PART 9 - ALCOHOL LICENSING**

### **Section 179 - Premises licence applications: statements about disabled access etc.**

749. This section amends section 20(2)(b) of the Licensing (Scotland) Act 2005 (asp 16), to require applicants for a premises licence to provide a “disabled access and facilities statement”, in a form set out by Scottish Ministers, to the Licensing Board along with the licence application.

750. That statement is to contain information about disabled access to the subject premises and the facilities or any other provision available to aid the use of the premises by disabled people.

751. Failure to provide this statement is not a ground for refusing an application. Rather, it would mean the premises licence application would be incomplete. The application could not therefore be considered by the Licensing Board as it would not be a valid application under section 20(2). A premises application which is accompanied by the statement would require to be determined by the Licensing Board in the normal way according to section 23 of the 2005 Act.

### **Section 180 - Premises licence applications: notification requirements**

752. This section amends the list of those to whom the Licensing Board must send a copy of an application when undertaking its obligations under section 21(1) of the Licensing (Scotland) Act 2005. Previously a copy of the application was required to accompany each notice issued under section 21(1) of the 2005 Act. The section also removes the chief constable’s obligation to provide the Board with antisocial behaviour reports. A Licensing Board’s ability to request such reports is now provided for under section 24A of the Licensing (Scotland) Act 2005, inserted by section 183 of the Act.

### **Section 181 - Premises licence applications: modification of layout plans**

753. This section amends section 23(7) of the Licensing (Scotland) Act 2005 concerning the determination of an application for a premises licence. Section 23(7) provided that a Licensing Board could propose a modification to the operating plan in circumstances where the Licensing Board would otherwise refuse the application. The Licensing Board would grant the license if the applicant agreed to the proposed modification.

754. This section extends section 23(7) so that a Licensing Board can also propose a modification to the layout plan, which is required to accompany the application under section 20(2)(b) of the Licensing (Scotland) Act 2005. The Licensing Board may propose a modification to the layout plan in circumstances where the Licensing Board would otherwise refuse the application. The Licensing Board grants the license if the applicant agrees to the proposed modification. The amendment allows the Licensing Board to propose modifications to either the operating plan or the layout plan, or both if necessary.

## **Section 182 – Review of premises licences: notification of determinations**

755. Section 182 inserts section 39A into the Licensing (Scotland) Act 2005. Section 39A(1) and (2) requires a Licensing Board to provide notification of the outcome of a premises licence review to the premises licence holder and, if applicable, the person who applied for the premises licence review.

756. Section 39A(3) and (4) set out when a premises licence holder and the applicant for a premises licence review may require a statement of reasons for a Licensing Board's decision on a premises licence review. If a request is made in accordance with section 39A(3) or (4) then section 39A(5) requires a Licensing Board to issue a statement of reasons for its decision on the premises licence review to the premises licence holder and, if applicable, the person who applied for the premises licence review.

757. Section 39A(6) enables Scottish Ministers to prescribe the form and timing of such a statement of reasons.

## **Section 183 - Premises licence applications: antisocial behaviour reports**

758. This section amends the Licensing (Scotland) Act 2005 requirements concerning a chief constable's obligation to provide the Licensing Board with an antisocial behaviour report. The effect is that it is no longer necessary for the chief constable to provide a report in respect of every application. Instead, a report will only be required if the Licensing Board requests one. In addition the chief constable may choose to forward a report for the Board's consideration.

## **Section 184 – Premises licences: connected persons and interested parties**

759. Section 184 inserts a new section 40A into the Licensing (Scotland) Act 2005. Section 40A(1) imposes a duty on a premises licence holder to notify the appropriate Licensing Board if a person becomes or ceases to be a connected person or interested party. The Licensing Board is required to give a copy of the notice to the chief constable.

760. The notification must set out the interested party or connected person's name, address and date of birth. The notification must be made within one month of the person becoming or ceasing to be an interested party or connected person.

761. Failure by a premises licence holder to supply this notice to the Licensing Board is an offence which may incur a fine not exceeding level 2 on the standard scale.

762. Subsection (3) amends section 48 of the 2005 Act to require a premises licence holder to inform the appropriate Licensing Board of changes in the names and addresses of connected persons or interested parties. Subsection (3) also provides that these details, together with any changes to the name and address of the premises licence holder or premises manager, are forwarded to the chief constable.

763. The meaning of "connected person" is set out in section 147(3) of the 2005 Act. Section 184 amends section 147 of the 2005 Act to insert the meaning given to "interested parties". A person is an interested party in relation to licensed premises if they are neither the premises



licence holder or premises manager but has an interest in the premises either as owner or tenant or have managerial control over the premises or the business taking place on the premises.

### **Section 185 – Provisional premises licences: duration**

764. This section amends section 45(6) of the Licensing (Scotland) Act 2005 to provide that the provisional period, in which the premises licence must be confirmed, is increased from 2 years to 4 years. The 4 year period begins with the date of issue of the provisional premises licence.

### **Section 186 – Premises licence applications: food hygiene certificates**

765. Section 186 amends section 50 of the Licensing (Scotland) Act 2005 to amend the requirements of a food hygiene certificate. The effect is to provide that a food hygiene certificate must state that premises comply with any requirements set out in an order made by the Scottish Ministers. This will enable the requirements specified in the certificate to be amended following any changes in food safety legislation.

### **Section 187 – Provision of copies of licences to chief constable**

766. This section amends the Licensing (Scotland) Act 2005 to require Licensing Boards to provide copies of following licences to the police: the granting of a premises licence under section 26 of the 2005 Act, the granting of a temporary premises licence under section 47 of the 2005 Act, the issuing of a new summary of a premises licence under section 49 of the 2005 Act and the granting of an occasional licence under section 56 of the 2005 Act.

### **Section 188 – Sale of alcohol to trade**

767. This section amends sections 63 and 117 of the Licensing (Scotland) Act to enable the trade, as defined by section 147(2) of the 2005 Act, to purchase alcohol from a premises which hold a premises licence or occasional licence without committing an offence. Previously the trade would only have been able to purchase from premises which supplied trade only. This means that, for example, a restaurant owner may purchase alcohol from a supermarket for their restaurant without committing an offence.

### **Section 189 - Occasional licences**

768. This section amends section 57 of and Schedule 1 to the 2005 Act. It reduces the length of time a Licensing Board is required to wait for comments from the Chief Constable and the Licensing Standards Officer in respect of an application for an occasional licence from 21 days to a period of not less than 24 hours. This applies where the Licensing Board is satisfied that the application requires to be dealt with quickly. Subsection (3) extends the ability to delegate approval of occasional licences applications to the Clerk of the Board or a member of support staff where no objections or representations are lodged.

### **Section 190 – Extended hours applications: notification period**

769. This section amends section 69 of the Licensing (Scotland) Act 2005 to reduce the length of time a Licensing Board is required to wait for comments from the Chief Constable and the Licensing Standards Officer in respect of an application for an extended hours application. The period is reduced from 21 days to a period of not less than 24 hours where the Licensing Board is satisfied that the application requires to be dealt with quickly.

### **Section 191 - Extended hours application: variation of conditions**

770. This section inserts a new section 70A into the Licensing (Scotland) Act 2005. Where a Licensing Board has granted an application for extended hours in respect of a premises licence, section 70A enables the Licensing Board to vary the licence conditions of the premises licence for the duration of the extended hours and the period of licensed hours that the extension applies to. For example if a premises was ordinarily open on a Saturday from 11am until 11pm and applied to extend its licence to 2am on that day, a Licensing Board would be able to vary conditions, for example, requiring door supervisors or use of plastic drinking vessels for the whole period, 11am on Saturday until 2am on Sunday, or any part of that period, not just for the extended period after 11pm.

### **Section 192 - Personal licences**

771. Under section 76(3) of the Licensing (Scotland) Act 2005 a personal licence is not valid if at the time it is issued the individual to whom it is issued already holds a personal licence. The 2005 Act does not prevent an applicant making a second application and a Licensing Board must grant such an application as the 2005 Act does not enable a Board to refuse an application on the grounds that an applicant already holds one.

772. This section amends the 2005 Act to enable a Licensing Board to refuse the application or hold a hearing to decide whether or not to grant the application, if the applicant already holds a personal licence or if a previous personal licence held by the applicant had been surrendered or expired in the previous three years before a new application was made.

773. The section also makes it a criminal offence not to surrender a void personal licence or attempt to use a void licence as a valid licence. The maximum penalty for this offence is a level 3 fine.

### **Section 193 - Emergency closure orders**

774. This section changes the rank of the constable who may request or order a closure order for licensed premises and its subsequent extension or termination under sections 97 to 99 of the Licensing (Scotland) Act 2005. The change is from a constable of or above the rank of superintendent to a constable of or above the rank of inspector.

## **Section 194 – Appeals**

775. This section amends section 131(2) of the Licensing (Scotland) Act 2005 to remove the requirement that an appeal under section 131 is to be made by way of stated case. The effect of this is that as section 131 is silent as to the format of the appeal, the general rules on appeals contained in Part 2 of the Act of Sederunt (Summary Applications, Statutory Applications and Appeals Etc. Rules) 1999 currently apply for the purposes of appeals under section 131 of the 2005 Act.

## **Section 195 - Liability for offences**

776. Subsection (2) repeals the word “knowingly” from certain offences in the Licensing (Scotland) Act 2005. Where criminal conduct has been allowed to take place in terms of the listed offences, an offence will be committed whether or not the person involved has knowledge of the conduct taking place.

777. Subsection (3) inserts new sections 141A and 141B into the 2005 Act. New section 141A provides a defence to certain offences where the person accused had no knowledge that the offence was being committed and exercised all due diligence to prevent the offence being committed.

778. New section 141B provides that if a person commits certain offences whilst acting as the employee or agent of a premises licence holder or an interested party. The premises licence holder or, if applicable, that interested party is also guilty of that offence.

779. A defence of due diligence is available to the premises licence holder and interested party. Proceedings may be taken against the premises licence holder or interested party even if they are not taken against the employee or agent.

## **Section 196 – False statements in applications: offence**

780. This section inserts a new section 134A into the Licensing (Scotland) Act 2005. This provides for a new offence that is committed by any person who makes a false statement on an application made under the 2005 Act. This offence would be committed if a person applied for a second personal licence, which a personal licence holder may wish to have as a backup as their original licence being suspended or revoked for improper conduct, as the personal licence form specifically asks if the applicant already hold a licence. The maximum penalty for committing this offence is a level 3 fine.

## **Section 197 - Powers of Licensing Standards Officers**

781. This section amends section 15 of the Licensing (Scotland) Act 2005 Act to widen the powers available to Licensing Standards Officers (“LSOs”) when investigating the activities being carried out on licensed premises.

782. Section 15(2) of the 2005 Act provides LSOs with powers to enter and carry out an inspection of the premises. Section 197(3) amends section 15(2) of the 2005 Act to allow LSOs to take copies of documents and to seize and remove any substances, articles or documents found on the premises.

783. Where LSOs exercise any of their powers under section 15 of the 2005 Act then section 15(3), as amended by section 197(4), amends section 15(3) to allow the LSOs to require an explanation from the licence holder, the premises manager or any member of staff working on the premises at the time the powers are exercised.

784. Section 197(5) makes further amendments to section 15 of the 2005 Act. It provides that the LSOs' power to take copies of documents includes the power to request certain documents stored in electronic form. It provides that a person may refuse to produce a document required by an LSO on the grounds of confidentiality of communications. It also allows a person to refuse to provide information or explanation or produce any documents to an LSO if this would incriminate that person or their spouse or civil partner.

785. Section 197(6) inserts new subsections into section 15 of the 2005 Act. These allow Ministers to make regulations on the procedure to be followed in the exercise of an LSO's powers and on the treatment of items seized by an LSO. Such regulations may include provision on the treatment of items seized and about compensation for anything seized. Section 197(8) provides that where an LSO seizes any item from the premises then the LSO must leave a notice on the premises specifying what was seized and why those items were seized.

### **Section 198 – Further modifications of 2005 Act**

786. See schedule 6.

## **PART 10 - MISCELLANEOUS**

### **Section 199 - Annual report on Criminal Justice (Terrorism and Conspiracy) Act 1998**

787. The Criminal Justice (Terrorism and Conspiracy) Act 1998 ("the 1998 Act") was passed following emergency parliamentary procedure in the wake of the Omagh bombing in August 1998.

788. There were 2 main parts in the 1998 Act. Sections 1 to 4 made provision about procedure and forfeiture in relation to offences concerning proscribed organisations. Sections 5 to 7 concern conspiracy to commit offences outside the United Kingdom.

789. Section 8 requires that a statutory report on the working of the Act be laid before both Houses of Parliament on an annual basis. Although the section is drafted in such a way so as it applies generally to the working of the Act as a whole, it is understood that the requirement was directed principally at the terrorism provisions in sections 1 to 4, which have now been repealed.

790. Section 8 is now considered redundant. It has been repealed for England, Wales and Northern Ireland by the Criminal Justice and Immigration Act 2008. This section repeals section 8 of the 1998 Act as it applies to Scotland. The effect is that the section will be repealed UK wide.

## **Section 200 – Modification of references to “Act”, “enactment” etc. in certain Acts of Parliament**

791. The Interpretation Act 1978 defines a number of commonly-used terms so that separate definitions do not have to be provided in each piece of legislation by the UK Parliament. As amended by the Scotland Act 1998, it provides definitions of “Act” and “enactment” which exclude Acts of the Scottish Parliament and instruments made under such Acts.

792. There are a large number of references to “Act” and “enactment” in pre-devolution criminal law and procedure statutes. For example section 307 of the Criminal Procedure (Scotland) Act 1995 defines “crime” as “any crime or offence at common law or under any Act of Parliament whenever passed”. At the time the Criminal Procedure (Scotland) Act 1995 was passed, the reference would have included all primary legislation, but now it only includes Westminster Acts and not Acts of the Scottish Parliament.

793. Section 200 of this Act provides a solution specifically for the Criminal Procedure (Scotland) Act 1995, the Criminal Law (Consolidation) (Scotland) Act 1995 and the licensing provisions of the Civic Government (Scotland) Act 1982, the main pre-devolution statutes that are dealt with in this Act. Each reference to “Act” or “enactment” has been extended to apply to Scottish legislation and checked to ensure that that extension is appropriate.

794. Subsection (1) modifies the definition of “enactment” to include Acts of the Scottish Parliament and Scottish statutory instruments within the licensing provisions contained in the Civic Government (Scotland) Act 1982. Subsection (2) modifies the definition of “enactment” to include Acts of the Scottish Parliament and Scottish statutory instruments in the Criminal Law (Consolidation) (Scotland) Act 1995. Subsection (3) similarly modifies the definition of “crime”, “enactment” and “statute” within section 307(1) of the Criminal Procedure (Scotland) Act 1995 so that references to Acts of the Scottish Parliament are included within these definitions.

## **PART 11 - GENERAL**

### **Section 201 - Orders and regulations**

795. This section regulates the powers of the Scottish Ministers contained in the Act to make regulations and orders. It provides for these powers to be exercisable by statutory instrument, and provides standard powers for instruments to include ancillary provisions and to make different provisions for different purposes. It also provides for the level of Parliamentary procedure to which any instrument is to be subject. In particular, section 201(4)(d) provides that any order brought forward under the powers contained in section 204 which modifies any enactment (which could be through either textual or non textual amendment) will be subject to affirmative resolution procedure.

### **Section 202 – Interpretation**

796. This section provides short references for three enactments referred to frequently throughout the Act.

### **Section 203 - Modification of enactments**

797. This section introduces Schedule 7 which makes modifications to certain enactments.

### **Section 204 – Ancillary provision**

798. This section allows the Scottish Ministers by order to make supplementary, incidental or consequential provisions in connection with any provision of the Act.

### **Section 205 -Transitional provision etc.**

799. This section allows the Scottish Ministers by order to make transitory, transitional or savings provisions in connection with the coming into force of any provision of the Act.

### **Section 206 – Short title and commencement**

800. This section provides for commencement of the majority of the Bill to be made by order. Sections 201, 202, 204, 205 and 206 will commence upon Royal Assent.

### **Schedule 1 – The Scottish Sentencing Council**

801. Schedule 1 provides for the membership of the Council. It sets out the procedures for the appointment of members and membership of the Council.

802. It also contains detailed provisions on the procedure of the Council, ancillary process and powers to delegated functions.

803. Paragraph 13 places the Council on the list of authorities subject to investigation by the Scottish Public Services Ombudsman. Paragraph 14 places the Council under the requirements of the Freedom of Information (Scotland) Act 2002.

### **Schedule 2 – Community Payback Orders: consequential modifications**

804. Schedule 2 details those amendments to primary legislation as a consequence of the introduction of the community payback order (section 14 of this Act) which will replace probation orders, supervised attendance orders and community service orders.

### **Part 1 - The 1995 Act**

805. Part 1 of Schedule 2 amends the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”).

806. Paragraphs 2, 3, 7, 8, 12 and 26 repeal references to probation order and/or community service order in sections 52H(3) (early termination of an assessment order), 52R(3) (termination of a treatment order), 106(1) (right of appeal), 108(1) and (2) (Lord Advocate's right of appeal), 175 (right of appeal) and 246 (admonition and absolute discharge) of the 1995 Act as a consequence of section 14 of this Bill which replaces these orders with community payback orders. There is no requirement to replace these references with community payback order as a community payback order is a sentence following conviction and so is covered under other provisions in the specified sections. Paragraphs 7, 9, 12, 13, 14 and 15 insert new subsections, which provides for an appeal against any disposal imposed as a consequence of breaching a CPO, into sections 106(1) (right of appeal), 118(4) (disposal of appeals against sentence), 175 (right of appeal), 186 (appeals against sentence only), 187(1) (leave to appeal against sentence) and 189(5) (disposal of appeal against sentence).

807. Paragraph 11 amends section 173(2) (quorum of High Court in relation to appeals) to provide for the same quorum to apply in appeals against any disposal imposed as a consequence of breaching a CPO.

808. Paragraphs 4, 5, 6, 10, 16, 19, 24 and 27 replace references to probation order, community service order and/or supervised attendance order in sections 53(12)(a) (interim compulsion orders), 57A(15)(a) (compulsion orders), 58(8) (order for hospital admission or guardianship), 121A(4) (suspension of certain sentences pending determination of appeal), 193A(4) (suspension of certain sentences pending determination of appeal), 234J (concurrent drug treatment and testing and probation orders), 245J (breach of certain orders: adjourning hearing and remanding in custody etc) and 249(2) (compensation order against convicted person) of the 1995 Act with references to community payback order and relevant sections as a consequence of section 14 of this Bill.

809. Paragraphs 4 and 5 also add restriction of liberty orders and drug treatment and testing orders to the list of orders in sections 53(12)(a) and 57A(15)(a) which cannot be imposed at the same time as an interim compulsion order or a compulsion order. Paragraph 19 also amends section 234J(3) to ensure that the relevant local authority responsible for supervising the offender is provided with a copy of all concurrent orders.

810. Paragraph 17 repeals sections 228 to 234 of the 1995 Act which relate to probation orders.

811. Paragraph 18 amends a typographical error in section 234H(1) (disposal on revocation of a drug treatment and testing order) of the 1995 Act and amends subsection (3) to replace the reference to probation order with community payback order and to make it clear that in cases where a community payback order or restriction of liberty order have been imposed concurrently with a drug treatment and testing order for the same offence and that drug treatment and testing order has been revoked, the court must also revoke the concurrent community payback order or restriction of liberty order.

812. Paragraph 20 repeals sections 235 to 245 of the 1995 Act which relate to supervised attendance orders and community service orders. Paragraph 29 repeals schedules 6 and 7 of the 1995 Act which relate to probation orders and supervised attendance orders. These provisions

are being replaced by the provisions in section 14 of this Bill which introduce the community payback order.

813. Paragraph 25 repeals sections 245K to 245Q of the 1995 Act. These provisions relate to community reparation orders (CROs). CROs were introduced as a court disposal specifically aimed at dealing with low level anti social behaviour such as vandalism by means of requiring offenders to carry out unpaid community work for periods up to 100 hours. The orders were trailed on a pilot basis and an independent evaluation of the pilots determined that for a range of reasons the CRO had not achieved the original objectives. Following a decision by Scottish Ministers provisions for CRO ceased in December 2007. The community payback order, introduced by section 14 of this Bill, replaces the CRO.

814. Paragraphs 21, 22 and 23 amend sections 245A, 245D and 245G of the 1995 Act which relate to restriction of liberty orders (RLOs).

815. Paragraph 21 amends section 245A(2) by inserting subsection (2A) which requires a court, when imposing a RLO, to have due regard to any other relevant order or requirement (either another RLO or a restricted movement requirement imposed as a sanction for breaching a community payback order) already imposed to ensure that the offender is not required, either by the RLO being imposed or the RLO taken together with any other requirement, to be restricted to a specified place or places for more than 12 hours in any day. A definition of other relevant order or requirement is also inserted as section 245A(2B).

816. Paragraph 22 amends section 245D which relates to the combination of RLOs with other orders. References to probation order are replaced with community payback order in sections 245D (1)(b), (2), (3), (4), (7) and (9). Subsection (4)(b) is amended to ensure that the relevant local authority responsible for supervising the offender is provided with a copy of all concurrent orders imposed for the same offence. Subsection (6) is repealed since a court will no longer be able to make a probation order.

817. Section 245D(7) is also amended by paragraph 22(7) to make it clear that a RLO may be imposed concurrently with a community payback order or a drug treatment or testing order but cannot be imposed concurrently with both these orders.

818. Paragraph 23 amends 245G of the 1995 Act to provide that the court, when revoking a restriction of liberty order which has been imposed concurrently with a community payback order or drug treatment and testing order for the same offence, must also revoke the concurrent community payback order or drug treatment and testing order.

819. Paragraph 28 inserts definitions of the various requirements referred to in section 14 of this Bill into section 307 (interpretation) of the 1995 Act. Paragraph 28 also repeals certain definitions which no longer apply as a consequence of section 14.



Part 2 – Other enactments

*Paragraph 30 – The Firearms Act 1968 (c.27)*

820. Paragraph 30 replaces references to probation order in sections 21(3ZA) (possession of firearms by persons previously convicted of crime) and 52(1A) (forfeiture and disposal of firearms: cancellation of certificate by convicting court) with references to community payback order as a consequence of section 14 of this Bill.

*Paragraph 31 – The Social Work (Scotland) Act 1968 (c.49).*

821. Section 27(1)(b)(iii) and (iv) of the Social Work (Scotland) Act 1968 provide that every local authority must supervise, and provide advice, guidance and assistance to offenders subject to: a community service order; a probation order which includes an unpaid work requirement; or a supervised attendance order. Paragraph 31(2) amends section 27(1)(b)(iii) replacing the references to probation order and community service order with community payback order imposing an unpaid work and other activity requirement. Section 27(1)(b)(iv) is repealed. Section 27(1)(b)(va) which refers to community reparation orders, is also repealed since the provisions in the 1995 Act relating to CROs are repealed.

822. Section 86 of the 1968 Act details the process to be followed in respect of the provision of accommodation and when determining the ordinary residence of a person subject to local authority supervision. Paragraph 31(3) inserts a reference to community payback order into subsection (3).

*Paragraph 32 – The Rehabilitation of Offenders Act 1974 (c.53).*

823. Paragraph 32(2) removes reference to probation order in respect of the rehabilitation period for particular sentences in the Rehabilitation of Offenders Act 1974. A community payback order is designated a sentence (unlike a probation order) and so is covered under the general provisions and does not need to be specifically referred to.

824. Paragraph 32(3) also removes references to probation orders in respect of the rehabilitation period applicable to a conviction in section 6(3) of the 1974 Act.

*Paragraph 33 - The Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (c.55).*

825. Schedule 1, part 2 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 lists those persons who are disqualified from jury service. Paragraph (bb) is amended to substitute community payback order for probation order in sub-paragraph (i). Sub-paragraph (iii) which refers to community service orders is repealed.

*Paragraph 34 – The Local Government and Planning (Scotland) Act 1982 (c.43).*

826. Section 24 of the Local Government and Planning (Scotland) Act 1982 refers to councils' functions in relation to the provision of gardening assistance for the disabled and the elderly. Subsection (3) is amended to replace references to instructions given under the Community Service by Offenders (Scotland) Act 1978 in respect of community service orders with references to determinations made under section 227A of the Criminal Procedure Scotland Act in respect of community payback orders with unpaid work and other activity requirement.

*Paragraph 35 – The 1982 Act*

827. Section 49 of the Civic Government (Scotland) Act 1982, which relates to persons found guilty of permitting any creature in his charge to cause danger or injury to any other person who is in a public place or to give such person reasonable cause for alarm or annoyance is amended by paragraph 35 to remove the reference to probation order in subsection (6). There is no requirement to replace this reference with community payback order as a community payback order is a sentence following conviction.

828. Section 58(3) of the 1982 Act (convicted thief in possession of a tool or object of which it may reasonably be inferred that he intended to commit theft or has committed theft) is amended to repeal references to probation order. There is no requirement to replace this reference with community payback order as a community payback order is a sentence following conviction.

*Paragraph 36 – The Foster Children (Scotland) Act 1984 (c.56).*

829. Paragraph 36 replaces references to probation order with community payback order in section 2(3) of the Foster Children (Scotland) Act 1984 which lists the circumstances in which a child is not considered to be a foster child under the terms of section 1 of the 1984 Act.

*Paragraph 37 – The Road Traffic Offenders Act 1988 (c.53).*

830. References to probation order in section 46(3)(b) of the Road Traffic Offenders Act 1998 are repealed. As a community payback order is considered to be a sentence, following a conviction, there is no requirement to refer specifically to this.

*Paragraph 38 – The Jobseekers Act 1995 (c.18).*

831. Paragraph 38 repeals the reference to probation order in section 20D(5) of the Jobseekers Act 1995 (as inserted by section 25(2) of the Welfare Reform Act 2009) (jobseeker's allowance: sanctions for violent conduct). There is no requirement to replace this reference with community payback order as a community payback order is a sentence following conviction.

*Paragraph 39 – The Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (c.40).*

832. Paragraph 13 of Schedule 3, Part 2 of the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995, which relates solely to supervised attendance orders, is repealed as a consequence of section 14 of this Bill which replaces supervised attendance orders with community payback orders.

*Paragraph 40 – The Proceeds of Crime (Scotland) Act 1995 (c.43).*

833. Paragraph 32 repeals references to probation order in sections 25(9) and 26(9) of the Proceeds of Crime (Scotland) Act 1995. As imposition of a community payback order is considered a sentence, and action in respect of sentences is specifically provided for, there is no requirement to replace the references to probation with community payback order.

*Paragraph 41 – The Crime and Punishment (Scotland) Act 1997 (c.48).*

834. Section 26 of the Crime and Punishment (Scotland) Act 1997 which relates to evidence requirements in respect of offences committed whilst the offender is subject to a probation order or a community service order is repealed.

835. Paragraph 21, sub-paragraphs (27) to (29) of Schedule 1 to the 1997 Act, which also relate to probation orders, are repealed.

*Paragraph 42 – The Crime and Disorder Act 1998 (c.37).*

836. Paragraphs 1 and 2 of Schedule 6, Part 1 of the Crime and Disorder Act 1998 relate to imposition of drug treatment and testing orders or restriction of liberty orders concurrently with probation orders, and amend the relevant provisions in the Criminal Procedure (Scotland) Act 1995 to enable these combinations to be imposed. Paragraph 42 repeals these provisions as probation orders will be replaced by community payback orders and provisions relating to orders which may be imposed concurrently are contained in section 14 of this Bill.

*Paragraph 43 – The Powers of Criminal Courts (Sentencing) Act 2000 (c.6).*

837. Paragraphs 176 to 178 of the Powers of Criminal Courts (Sentencing) Act 2000 amend sections 234 (probation orders), 242 and 244 (community service orders) of the Criminal Procedure (Scotland) Act 1995. These sections are repealed as a consequence of section 14 of this Bill which replaces probation orders and community service orders with community payback orders.

*Paragraph 44 – The Criminal Justice and Court Services Act 2000 (c.43).*

838. Paragraph 36 repeals the reference to 234(1)(a) of the Criminal Procedure (Scotland) Act 1995 in Schedule 7, paragraph 4(2) of the Criminal Justice and Court Services Act 2000. Section 234 of the 1995 Act refers to probation orders and is repealed as a consequence of section 14 of this Bill which replaces probation orders and community service orders with community payback orders.

*Paragraph 45 – The Social Security Fraud Act 2001 (c.11).*

839. Section 6C of the Social Security Fraud Act 2001 relates to loss of benefit in the case of a conviction. Paragraph 45(2) removes reference to probation order as a consequence of section 14 of this Act. There is no requirement to replace this reference with community payback order as a community payback order is a sentence following conviction.

840. Section 7 relates to loss of benefit as a consequence of benefit offences. Subsection (9)(b) defines conviction as including the imposition of a probation order by a Scottish court. Paragraph 45(3) repeals the reference to probation order. As in the paragraph above, there is no requirement to replace this reference with community payback order.

*Paragraph 46 – The Justice (Northern Ireland) Act 2002 (c.26).*

841. Paragraph 46 repeals Schedule 4, paragraph 37 of the Justice (Northern Ireland) Act 2002. Paragraph 37 of the 2002 Act amends section 244 of the Criminal Procedure (Scotland) Act 1995 (relating to community service orders). Section 244 is repealed as a consequence of section 14 of this Act which replaces community service orders with community payback orders.

*Paragraph 47 – The Criminal Justice (Scotland) Act 2003 (asp 7).*

842. Paragraph 47 amends sections 42, 46, 50 and 60 of the Criminal Justice (Scotland) Act 2003. Section 42 relates to drugs courts and the amendments to this section replace references to probation order and community service order with community payback order and replace references in the Criminal Procedure (Scotland) Act 1995 which relate to probation orders with corresponding references relating to community payback orders. Section 46 provides for remote monitoring as a condition of a probation order and this provision is repealed as a consequence of the repeal of probation orders in their entirety. Section 50(1), (2) and (4), which relate solely to supervised attendance orders, are also repealed as a consequence of section 14 of this Bill which replaces the provisions relating to supervised attendance orders. Section 60(1)(a), (b), (e) and (f) and subsections (3) and (4) are repealed. These relate solely to procedures relating probation orders, community service orders and supervised attendance orders, all of which are replaced by community payback orders.

*Paragraph 48 – The Mental Health (Care and Treatment) (Scotland) Act 2003 (asp. 13).*

843. Paragraph 48 repeals section 135 of and paragraph 8(15) of Schedule 4 to the Mental Health (Care and Treatment) (Scotland) Act 2003. Section 135 and paragraph 8(15) amend section 230 of the Criminal Procedure (Scotland) Act 1995 in respect of probation for treatment of a mental disorder. Section 230 is repealed as a consequence of section 14 of this Bill which replaces probation orders with community payback orders. Section 14 also provides for mental health treatment requirements as part of a community payback order.

*Paragraph 49 – The Criminal Justice Act 2003 (c.44).*

844. Paragraph 49 repeals paragraphs 69 to 27 of Schedule 32 of the Criminal Justice Act 2003. Schedule 32 of the 2003 Act amends primary legislation which relates to sentencing. Paragraphs 69 to 72 amend sections 234, 242 and 244 of the Criminal Procedure (Scotland) Act which relate to probation orders and community service orders. Sections 234, 242 and 244 are repealed as a consequence of section 14 of this Act which replaces probation orders and community service orders with community payback orders.

*Paragraph 50 – The Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8).*

845. Section 120 of the Antisocial Behaviour etc. (Scotland) Act 2004 relates solely to community reparation orders (CROs). Paragraph 50 repeals section 120 and Schedule 4, paragraph 5, sub-paragraphs (3), (5), (6) and (11) of the 2004 Act (which amend provisions in the Criminal Procedure (Scotland) Act 1995 (the 1995 Act) relating to CROs, supervised attendance orders and community service orders). Provisions in the 1995 Act relating to supervised attendance orders and community service orders are repealed as a consequence of section 14 of this Bill which replaces supervised attendance orders and community service orders with community payback orders.

*Paragraph 51 – The Management of Offenders etc. (Scotland) Act 2005 (asp 14).*

846. Paragraph 51 amends section 10 of the Management of Offenders etc (Scotland) Act which deals with the arrangements for assessing and managing risk posed by certain offenders. In subsection (1)(b) references to probation order are replaced by references to community payback order imposing an offender supervision requirement (either alone or with any other requirement). Paragraph 51(3) also repeals section 12 (probation progress review).

*Paragraph 52 – The Criminal Proceedings etc. (Reform) (Scotland) Act 2007 (asp 6).*

847. Paragraph 52 repeals sections 49(4), 57 and paragraph 26(l) and (n) of the schedule. Section 49(4) provides for a compensation requirement to be imposed as part of a probation order, section 57 relates specifically to breach of probation orders and community service orders and paragraph 26(l) and (n) of the schedule relate to community service orders and community reparation orders respectively. The relevant sections of the Criminal Procedure (Scotland) Act 1995 which provide for probation orders, community service orders and community reparation orders are repealed as a consequence of section 14 of this Act. Section 14 provides for a compensation requirement to be imposed as part of a community payback order and for the process to be followed in the event of breach of a community payback order, replacing those provisions which are being repealed.

*Paragraph 53 – The Criminal Justice and Immigration Act 2008 (c.4).*

848. Paragraph 53 repeals paragraphs 43 to 46 of Schedule 4, Part 1 of the Criminal Justice and Immigration Act 2008. These provisions detail the effect of the Criminal Procedure (Scotland) Act 1995 in respect of the 2008 Act and relate specifically to sections 234 (probation orders), 242 and 244 (community service orders). These sections are repealed as a consequence of section 14 of this Act which introduces the community payback order which replaces probation orders and community service orders.

**Schedule 3 – Short-term custody and community sentences: consequential amendments**

849. See section 18 above.

**Schedule 4 – Convictions by Courts in other EU Member States: modifications of enactments**

**Part 1 – The 1995 Act**

**Part 2 – Other enactments**

850. Schedule 4 outlines a number of amendments to legislation to allow courts to take account of previous convictions in other European Union Member States. The amendments seek 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.

851. The amendments add references to convictions or sentences issued by courts in other Member States of the EU to the following existing provisions:

852. Part 1 of the schedule, comprising paragraphs 1 to 8, makes amendments to the 1995 Act.

853. Paragraph 2 amends section 23C, which concerns grounds for refusing bail. This provision previously permitted previous convictions from courts outside Scotland to be taken into account the amendment simply maintains that position, but it is necessary to ensure this provision is consistent with the change to the general definition of a previous conviction in section 307(5).

854. Paragraph 3 amends section 27 which sets out the consequences where an individual is charged with an offence, granted bail and breaches their bail conditions by committing a further offence. The section provides that the accused will not be charged separately for breaching the bail conditions, but certain factors will be taken into account by the court in determining the sentence/ disposal for the subsequent offence and this includes any previous conviction of the accused for failing to comply with a condition imposed on bail. The amendment allows the court to consider any conviction for an offence committed in another EU Member State which is considered by the court to be equivalent to the offence of failing to comply with a condition imposed on bail.

855. Paragraph 4 amends section 202, which provides that where the accused has been given a deferred sentence and is subsequently convicted of a separate offence during the period of deferment, the court can issue a warrant for the accused's arrest or issue a citation requiring the accused to appear before the court in relation to the deferred sentence. The amendment will ensure that where a person is given a deferred sentence in Scotland and then commits a further offence in another EU Member State, the conviction for the subsequent offence can be taken into account under this provision.

856. Paragraph 5 amends section 204, which sets out restrictions on imposing a custodial sentence, for example where the accused is not legally represented and has not been previously sentenced, to ensure that the references in that section to a person having been previously sentenced to imprisonment or detention will include equivalent previous sentences from another EU Member State.

857. Paragraph 6 amends section 205B, which provides that where an accused is given a third conviction for certain offences relating to drug trafficking he shall be sentenced to a minimum period of imprisonment unless the court considers it would be unjust to do so in all the circumstances. The amendment requires the court to take into account any conviction for an offence committed in another EU Member State where the offence is considered by the court to be equivalent to an offence of class A drug trafficking.

858. Paragraph 7 amends section 275A, which concerns the disclosure of previous convictions relating to sexual offences in certain circumstances, to ensure that the prosecutor can place before the court a previous conviction from another EU Member State for an offence which is equivalent to the sexual offences listed in section 288C.

859. Paragraph 8 amends section 307 - the interpretation section - to ensure that where the term "previous conviction" or "previous sentence" appears in the 1995 Act, it will include a conviction or sentence handed down by a court in any other Member State of the EU, rather than limiting this definition to disposals within the United Kingdom, unless the context of the

provision requires otherwise. The definition of conviction in subsection (1) is taken from Article 2 of the Council Framework Decision (2008/675/JHA).

860. Part 2 of the schedule, comprising paragraphs 9 to 13, make amendments to a range of other enactments that refer to previous convictions or previous sentences.

861. Paragraph 9 amends section 58 of the Civic Government (Scotland) Act 1982. This section provides that a person commits an offence where they possess or have recently possessed a tool or object where it can be reasonably inferred that they intend to commit or have committed an act of theft, the accused cannot demonstrate that possession was not for that purpose, and the accused holds 2 previous convictions for theft. The amendment allows the court to consider any conviction for an offence committed in another EU Member State that is considered by the court to be equivalent to theft.

862. Paragraph 10 amends section 27 - the interpretation section for Part I - of the Prisoners and Criminal Proceedings (Scotland) Act 1993 to ensure that any reference in Part I of that Act to “previous conviction” will include convictions from any part of the UK or another EU Member State.

863. Paragraph 11 amends section 9 of the Criminal Law (Consolidation) (Scotland) Act 1995. This will ensure that the defence to a charge of permitting a girl to use premises for intercourse that the alleged offender considered the victim to be 16 years or more, cannot apply where the offender has a previous conviction from another EU Member State for a sexual offence which is defined in section 39(5)(aa) of the Sexual Offences (Scotland) Act 2009.

864. Paragraph 12 amends section 4 of the Custodial Sentences and Weapons (Scotland) Act 2007 to provide that any reference to “previous conviction” in Part 2 of that Act includes a previous conviction in any part of the UK or another EU Member State.

865. Paragraph 13 amends section 39 of the Sexual Offences (Scotland) Act 2009. This will ensure that the defence to a charge in proceedings, where the offence was allegedly committed against an older child, that the accused reasonably believed that the victim was 16 years or more at the time the conduct took place, cannot be used where the accused has a previous conviction from another EU Member State for a sexual offence which is equivalent to the offences listed in schedule 1 of that Act.

#### **Schedule 5 – Witness anonymity orders: transitional**

866. This Schedule deals with appeals on the granting of witness anonymity orders made under common law powers prior to the provisions under 271N to 271T coming into effect. The High Court can only quash a conviction if, as a result of an order made under common law, the accused did not receive a fair trial. It cannot quash a conviction simply on the basis that the trial court had no power to make a witness anonymity order under common law.

## **Schedule 6 – Further modifications of 2005 Act**

867. Schedule 6 amends the powers of the police to object to the granting of licenses for the sale of alcohol under the Licensing (Scotland) Act 2005.

868. Section 22 of the 2005 Act allows any person to object to an application for a premises licence, but subsection (2) only allows the chief constable to object on the ground that there is reason to believe that the applicant is involved in serious organised crime and that refusal of the application is necessary for the purpose of the crime prevention objective (section 4(2)). Schedule 6 amends the 2005 Act to allow the chief constable to object to a premises licence applications on the grounds of any of the licensing objectives, listed in section 4 of the 2005 Act.

869. Under section 24 of the 2005 Act the chief constable may recommend that an application for a premises licence be refused if necessary for the purpose of the crime prevention objective, but only where the chief constable is given notice of any relevant or foreign offence. Paragraph 6 of Schedule 6 amends this so that the chief constable may recommend that an application be refused if this is necessary for the purpose of any of the licensing objectives.

870. Under section 33 of the 2005 Act the chief constable may recommend that an application for transfer of a premises licence be refused if necessary for the purpose of the crime prevention objective, but only where the chief constable is given notice of any relevant or foreign offence. Paragraph 7 of Schedule 6 amends this so that the chief constable may recommend that an application be refused if this is necessary for the purpose of any of the licensing objectives.

871. In respect of occasional licences, section 57(2) allows the chief constable to recommend the refusal of an application only on the grounds of the crime prevention objective. Paragraph 9 amends this so the chief constable can recommend the refusal of an application on the grounds of any of the licensing objectives.

872. Under section 73 of the 2005 Act which provides for personal licences application to be notified to the chief constable, the chief constable may not object to the application but may recommend that an application for a personal licence be refused if necessary for the purposes of the crime prevention objective, but only where the chief constable is giving notice of any relevant or foreign offence. Paragraph 12 amends this so the chief constable can recommend the refusal of an application on the grounds of any of the licensing objectives.

873. Paragraph 16 inserts a new section 84A into the Licensing (Scotland) Act 2005 to enable the chief constable to report a personal licence holder to the Licensing Board for actions which are inconsistent with any of the licensing objectives. Where this done the Licensing Board must then hold a hearing to consider what action if any should be taken against the personal licence holder as allowed by section 84(7) of the 2005 Act.



## **Schedule 7 – Modification of enactments**

*Paragraphs 1, 2, 6, 19, 64, 72 – The Libel Act 1792 (para 1), The Criminal Libel Act 1819 (para 2), The Defamation Act 1952 (para 6), The Trade Union and Labour Relations (Consolidation) Act 1992 (para 19), The Defamation Act 1996 (para 64) and The Legal Deposit Libraries Act 2003 (para 72)*

874. See section 51 above.

*Paragraph 3 – The False Oaths (Scotland) Act 1933*

875. Sections 44 to 46 of the Criminal Law (Consolidation) (Scotland) Act 1995 (“the 1995 Act”) re-enact most of the False Oaths (Scotland) Act 1933 (“the 1933 Act”). Schedule 5 to the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 which lists the repeals undertaken in the consolidation exercise does not include a reference to the 1933 Act. This is an error and should have been included at the time of the consolidation exercise was carried out. This paragraph repeals the 1933 Act in full. Consequential amendments are required where reference is made to the 1933 Act, or a provision of that Act, in other pieces of legislation, substituting a reference to the new provisions in the 1995 Act. Paragraphs 11, 69 and 77 of Schedule 7 make the necessary consequential amendments.

*Paragraph 4 – The Public Records (Scotland) Act 1937*

876. Paragraph 4 amends section 14 of the Public Records (Scotland) Act 1937. Paragraph 4(a) puts beyond any doubt that references to “court records” in that Act include the Scottish Land Court as well as all the ordinary courts. Paragraph 4(b) provides that any question as to whether or not a document is part of the records of a particular court is to be determined by either the Lord President or the Lord Justice General.

*Paragraph 5 – The Law Officers Act 1944*

877. Paragraph 5 updates a cross-reference in section 2 of the Law Officers Act 1944. Following the passage of the Criminal Procedure (Scotland) Act 1995 the correct provision dealing with demission of office by the Law Officers is section 287 of the 1995 Act rather than the provisions currently mentioned in the 1944 Act which previously did so.

*Paragraphs 7 to 10 – The Rehabilitation of Offenders Act 1974*

878. Paragraph 8 amends section 1(4)(b) of the Rehabilitation of Offenders Act 1974 (“the 1974 Act”) to change the reference of “insanity” in that Act to refer to the new defence created by the new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 168 of this Act.

879. Paragraph 9 substitutes “Schedule 1” for “the Schedule” in section 6(6)(bb) of the 1974 Act. This change is necessary because section 109 of this Act inserts a Schedule 3 into the 1974 Act. In addition, the Criminal Justice and Immigration Act 2008 which made similar amendments to the 1974 Act for cautions in England and Wales inserted a Schedule 2 into the 1974 Act.

880. Paragraph 10 renumbers the Schedule after section 11 of the 1974 Act to “Schedule 1” to reflect the introduction of further Schedules to that Act, as referred to in the previous subparagraph.

*Paragraph 11 – The Evidence (Proceedings in Other Jurisdictions) Act 1975*

881. This amendment is consequential on the repeal of the False Oaths (Scotland) Act 1933 by paragraph 3.

*Paragraphs 12–14 - The 1982 Act*

882. Section 52(7) of the Civic Government (Scotland) Act 1982 (“the 1982 Act”) provided that offences of taking, permitting to be taken, or making of any indecent photograph or pseudo-photograph (section 52(1)(a) of the 1982 Act) were to be included in the list of offences contained in Schedule 1 to the Criminal Procedure (Scotland) Act 1975 (“the 1975 Act”). Schedule 1 to the 1975 Act listed offences against children under the age of 17 years, to which special provisions applied. Section 52(7) of the 1982 Act also provided that section 52(1)(a) offences were included in Schedule 1 to the 1975 Act for the purposes of Part III of the Social Work (Scotland) Act 1968, which has since been repealed.

883. Schedule 1 to the 1975 Act has since become Schedule 1 to the Criminal Procedure (Scotland) Act 1995, and was later amended by the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 to insert the offences under sections 52 and 52A of the 1982 Act in relation to an indecent photograph of a child under the age of 17 years. As section 52(7) has been overtaken by subsequent legislation, this subsection is repealed.

884. Paragraph 13 repeals a minor amendment made to section 52(7) of the Civic Government (Scotland) Act 1982 by the Criminal Justice Act 1988, consequential on the repeal of section 52(7) by paragraph 6 of this schedule.

885. Paragraph 14 corrects a minor error in section 64 of the 1982 Act, which provides for appeals against orders in relation to public processions.

*Paragraph 16 – The Legal Aid (Scotland) Act 1986*

886. Paragraph 16 amends section 22 of the Legal Aid (Scotland) Act 1986 which deals with the availability of criminal legal aid so as to substitute reference to the new defence and plea of unfitness for trial (as provided for in sections 168 to 171 of this Act) in place of the references to cases involving “insanity”.

*Paragraph 17 – The Criminal Justice (Scotland) Act 1987*

*Paragraph 18 – The Criminal Justice Act 1988*

*Paragraph 20 – The Criminal Justice and Public Order Act 1994*

887. Sections 27 to 30 of the Criminal Law (Consolidation)(Scotland) Act 1995 provide for special investigating powers to be exercised by a nominee of the Lord Advocate in the event of a direction being given when a suspected offence may involve serious or complex fraud. They re-enact sections 51 to 54 of the Criminal Justice (Scotland) Act 1987 (“the 1987 Act”). Schedule 5 to the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 lists the provisions

which were repealed as part of the consolidation exercise. However, the schedule does not include sections 51 to 54 of the 1987 Act. This is an error and should have been included at the time of the consolidation exercise. Paragraph 17 repeals sections 51 to 54 of the 1987 Act, and paragraphs 18 and 20 repeal amendments made to those sections by the Criminal Justice Act 1988 and the Criminal Justice and Public Order Act 1994.

*Paragraphs 21, 22 and 23 – The Criminal Law (Consolidation) (Scotland) Act 1995*

888. Section 16 of the Criminal Law (Consolidation) (Scotland) Act 1995 allows any parent, relative, guardian or person acting in the best interests of a woman or girl to ask for a warrant authorising a named constable to enter a specified place and search for that woman or girl where they believe she is unlawfully being held for immoral purposes. If the woman or girl is found she will be delivered to her parents or guardians.

889. There is also a right afforded to the person requesting the warrant to accompany the constable when the warrant is executed. This is an outmoded provision and in practical terms the police already have the common law power to request warrants for circumstances such as this. Paragraph 22 repeals section 16. The power has not been used for many years, and is repealed as it is considered to be redundant.

890. Part II of the Criminal Law (Consolidation) (Scotland) Act 1995 makes provision for sporting events and specifically makes provision regarding the control of alcohol, fireworks and flares at sporting grounds and sporting events. Paragraph 23 substitutes “it” for “in” section 23 (interpretation of part 2) to correct a typographical error. The relevant provision was originally section 77 of the Criminal Justice (Scotland) Act 1980 where the text was correct.

*Paragraph 24 – The Criminal Procedure(Consequential Provisions) (Scotland) Act 1995*

891. Paragraph 24 repeals a provision in the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 that is made redundant by the provisions on extreme pornography in section 42 of this Act.

*Paragraphs 25-62 – The 1995 Act*

892. Paragraph 26 inserts new section 5A into the 1995 Act providing that it is competent for a sheriff to sign certain documents at any place in Scotland. As this is currently provided for under section 9A of the 1995 Act, this amendment has no effect on existing practice. However, new section 5A will become necessary upon the full repeal of section 9A (by paragraph 9(7) of the Schedule to the Criminal Proceedings etc. (Reform) (Scotland) Act 2007). Separate provision as to the signing of documents by justices of the peace and stipendiary magistrates is made in section 62 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007.

893. Paragraph 27 amends section 10A of the 1995 Act and is consequential upon section 61 of the Act. It confers jurisdiction upon both the JP court and the procurator fiscal of the relevant court where proceedings have been initiated in or transferred to another JP court.

894. Paragraph 28 amends subsections (3) and (4) of section 11 of the 1995 Act to provide that where applicable the offences referred to within the 1995 provisions may be triable by either solemn or summary procedure. Section 11 gives jurisdiction to the Scottish courts to try certain

specified offences which are committed outside Scotland by certain specified individuals. Subsection (3) makes provision concerning the jurisdiction of the sheriff court in the taking of proceedings in relation to these offences. Subsection (4) makes provision concerning the taking of proceedings in Scotland in relation to certain specified criminal behaviour taking place in Scotland concerning property which has been stolen outwith Scotland but within the United Kingdom.

895. Paragraphs 29, 36, 44, 45, 54, 55 and 56 substitute references to specific types of hearings (such as trials and victim statement proofs) with “any relevant hearing” in sections 17A, 35, 66, 71, 140, 144 and 146 of the 1995 Act. These are consequential upon section 69, which extends the prohibitions on an accused conducting his own defence contained in sections 288C, 288E and 288F of the 1995 Act to any relevant hearings.

896. Paragraph 30 amends section 18(8)(c) of the 1995 Act. The amendment to section 18(8)(c) removes the reference to “impressions” and replaces the reference to “prints” with “relevant physical data”. Since the meaning of “prints” is limited to fingerprints, its replacement with “relevant physical data” ensures there is no doubt that palm prints and other kinds of relevant physical data, as defined in section 18(7A) of the 1995 Act, are included for the purpose of section 18(8)(c). The power to take samples, information derived from samples and relevant physical data under authority of a warrant remains.

897. Paragraph 31 removes the obsolete reference to “impressions” in section 19(1)(b) of the 1995 Act.

898. Paragraphs 32, 37, 38, 39, 40, 42, 43, 51 and 57-58 all concern the change in references to “insanity” and “insanity as a plea in bar” in the 1995 Act. References in the 1995 Act to “insanity” as a defence are changed to refer to the defence created by the new section 51A of the 1995 Act, as inserted by section 168 of this Act. References to “insanity as a plea in bar” are changed to refer to unfitness for trial.

899. Paragraph 33 repeals section 20 of the 1995 Act in consequence of new section 19C (inserted by section 82).

900. Paragraph 34 repeals parts of section 22 of the 1995 Act, in consequence of the amendments made by section 55 of this Act.

901. Paragraph 35 amends section 23A of the 1995 Act, which provides that bail can be granted notwithstanding that an accused is in custody for another offence. The amendment inserts a reference to bail granted pending a Crown appeal under new section 107A (2)(b), which is being inserted into the 1995 Act by section 74 of this Act.

902. Paragraph 41 amends section 61 of the 1995 Act. Section 61 of the 1995 Act contains a requirement that various court orders must be based on the evidence of two medical practitioners, one of whom must have been approved as having special expertise in mental health. The effect of these amendments is that this requirement does not apply to a finding by a court that a person is unfit for trial.

903. Paragraph 46 amends section 78(2) of the 1995 Act so as to provide that diminished responsibility is treated as if it were a special defence for the purpose of giving advance notice (see 1995 Act, section 78(1)). The plea is not treated as if it were a special defence for any other purpose (eg disclosure to the jury under section 89(1)).

904. Paragraph 49 removes a superfluous word from section 90D of the 1995 Act.

905. Paragraph 50 substitutes a new subsection (4) into section 102A of the 1995 Act. The effect of this is to remove from that subsection a reference to section 27(1)(a) of the 1995 Act which has no application in the context of the section 102A provision.

906. Paragraph 52 is consequential upon section 61 of this Act. The effect is to ensure time limits for transferred and related cases apply also to relevant cases in JP courts.

907. Paragraph 53 makes an amendment to section 137B of the 1995 Act. Where a sheriff has made an order allowing the transfer of, or initiation of proceedings in, another sheriff court paragraph 53 provides that any other sheriff of the same sheriffdom may revoke or vary that order.

908. Paragraph 60 amends section 254 to make clear that the term “article” includes animal. A consequential rearrangement of section 254 is made.

909. Paragraph 61 inserts new subsection (4AA) into section 258. This clarifies that where an objection to a notice of uncontroversial evidence has been lodged in summary proceedings, this may be challenged at any time prior to an intermediate diet.

910. Paragraph 62 amends section 307 of the 1995 Act (which defines certain terms for the purposes of the 1995 Act) so as to provide that the meaning of "unfit for trial" is given in the new section 53F (as provided for by section 170 of this Act).

*Paragraph 63 – The Offensive Weapons Act 1996*

911. Paragraph 63 is consequential on the amendment of section 47(4) of the Criminal Law (Consolidation) (Scotland) Act 1995 made by section 37 of this Act.

*Paragraphs 65 to 68 – The Crime and Punishment (Scotland) Act 1997*

912. Paragraph 66 amends section 9 the Crime and Punishment (Scotland) Act 1997. Section 9 of the 1997 Act refers to "section 57(2)(a) of the 1995 Act (disposal where accused insane)." The effect is to substitute references to “insane” with a reference to the new statutory defence and plea in bar of trial which is contained in section 168 of this Act.

913. Paragraphs 67 and 68 repeal provisions in the Crime and Punishment (Scotland) Act 1997 that are made redundant by the changes to summary court sentencing powers contained in the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 and by the provisions on remand and committal of children and young persons (contained in section 64 of this Act).

*Paragraph 69 – The Terrorism Act 2000*

914. This amendment is consequential on the repeal of the False Oaths (Scotland) Act 1933 by paragraph 3.

*Paragraph 70 – The Protection of Children (Scotland) Act 2003*

915. Paragraph 70 amends section 10 of the Protection of Children (Scotland) Act 2003 so as to substitute reference to the special defence created by the new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 168 of this Act, in place of the reference to acquittal on the ground of “insanity”.

*Paragraph 71 – The Criminal Justice (Scotland) Act 2003*

916. Paragraph 71 amends the Criminal Justice (Scotland) Act 2003 to adjust a reference in section 3 of that Act to section 57 of the 1995 Act to take account of the change of the title of section 57 by paragraph 38 of this Schedule.

*Paragraph 73 – The Sexual Offences Act 2003*

917. Paragraph 73 amends section 135 of the Sexual Offences Act 2003 so that references in Part 2 of that Act (notification and orders) to a person being found not guilty of an offence by reason of insanity include reference to a person acquitted by reason of the defence created by the new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 168 of this Act.

*Paragraph 74 – The Criminal Procedure (Amendment) (Scotland) Act 2004*

918. Paragraph 74 is consequential to sections 59 and 69 of this Act. Subsection (4) of section 4, section 17 and paragraph 55 of the schedule to the Criminal Procedure (Amendment) (Scotland) Act 2004 are repealed.

*Paragraph 75 – The Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005*

919. Paragraph 75 amends section 8 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005, which deals with persons who breach Risk of Sexual Harm Orders. It adds reference to a person acquitted of an offence of breaching a risk of sexual harm order by reason of the defence created by the new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 168 of this Act alongside references to a person being found not guilty of such an offence by reason of insanity.

*Paragraph 76 – The Management of Offenders etc. (Scotland) Act 2005*

920. Paragraph 76 amends section 10 of the Management of Offenders etc. (Scotland) Act 2005 so that references to persons acquitted on the ground of insanity and persons found to be insane in bar of trial are updated to reflect the new equivalents established by sections 168 to 171 of this Act.

*Paragraph 77 – Serious Organised Crime and Police Act 2005*

921. This amendment is consequential on the repeal of the False Oaths (Scotland) Act 1933 by paragraph 3.

*Paragraphs 78-83 - The Criminal Proceedings etc (Reform) (Scotland) Act 2007*

922. Paragraphs 79 and 83 remove unnecessary references from section 7 of, and the Schedule to, the 2007 Act, in consequence of the amendments made by section 55 of this Act.

923. Section 74(6) of the 2007 Act states that a Stipendiary Magistrate may exercise judicial and signing functions in the same manner as a Justice of the Peace (JP). Section 76(2) of that Act states that a member of a local authority may also exercise signing functions in the same manner as a JP.

924. Paragraphs 80-82 clarify the position by replacing the reference to Stipendiary Magistrates acting “in the same manner” as a JP with a new section 74A which states that a Stipendiary Magistrate may exercise the same judicial and signing functions as a JP as if the magistrate was a JP. It also clarifies that a member of a local authority may exercise the same signing functions as a JP.

*Paragraph 84 – The Protection of Vulnerable Groups (Scotland) Act 2007*

925. Paragraph 84 amends section 32 of the Protection of Vulnerable Groups (Scotland) Act 2007 so as to substitute reference to the special defence created by the new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 168 of this Act, in place of the reference to acquittal on the ground of “insanity”.

*Paragraph 85 – The Counter-Terrorism Act 2008*

926. Paragraph 85 amends section 45 of the Counter-Terrorism Act 2008 so as to substitute reference to the special defence created by the new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 168 of this act, in place of the reference to acquittal on the ground of “insanity” and to update a reference to section 55 of the Criminal Procedure (Scotland) Act 1995.

*Paragraph 86 – The Sexual Offences (Scotland) Act 2009*

927. Paragraph 86 amends section 55(7) of the Sexual Offences (Scotland) Act 2009 to provide greater certainty in statute to clarify that these offences may be triable by either solemn or summary procedure. Section 55(7) of the 2009 Act gives the sheriff court jurisdiction to try certain specified offences committed outwith the United Kingdom by persons to whom section 55 of the 2009 Act applies.

*Paragraph 87 – The Coroners and Justice Act 2009*

928. Paragraph 87 amends section 156 of the Coroners and Justice Act so as to substitute references to the special defence created by the new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 168 of this Act, in place of the references to acquittal on the ground of “insanity”.

## Parliamentary History

929. The table below set out, for each stage of the proceedings in the Scottish Parliament on the Bill for the Act, the dates on which the proceedings at that stage took place, the reference to the Official Report of those proceedings, the dates on which Committee reports and other papers relating to the Bill were published.

<b>Proceedings and Reports</b>	<b>Reference</b>
<b>Introduction</b>	-
5 March 2009	Bill as Introduced  <a href="http://www.scottish.parliament.uk/s3/bills/24-CrimJustLc/b24s3-introd.pdf">http://www.scottish.parliament.uk/s3/bills/24-CrimJustLc/b24s3-introd.pdf</a>
<b>Stage 1</b>	-
(a) Justice Committee	-
14 <sup>th</sup> Meeting, 12 May 2009	Col 1759  <a href="http://www.scottish.parliament.uk/s3/committees/justice/or-09/ju09-1402.htm#Col1759">http://www.scottish.parliament.uk/s3/committees/justice/or-09/ju09-1402.htm#Col1759</a>
15 <sup>th</sup> Meeting, 19 May 2009	Col 1815  <a href="http://www.scottish.parliament.uk/s3/committees/justice/or-09/ju09-1502.htm#Col1815">http://www.scottish.parliament.uk/s3/committees/justice/or-09/ju09-1502.htm#Col1815</a>
16 <sup>th</sup> Meeting, 26 May 2009	Col 1902  <a href="http://www.scottish.parliament.uk/s3/committees/justice/or-09/ju09-1602.htm#Col1902">http://www.scottish.parliament.uk/s3/committees/justice/or-09/ju09-1602.htm#Col1902</a>
17 <sup>th</sup> Meeting, 2 June 2009	Col 1976  <a href="http://www.scottish.parliament.uk/s3/committees/justice/or-09/ju09-1702.htm#Col1976">http://www.scottish.parliament.uk/s3/committees/justice/or-09/ju09-1702.htm#Col1976</a>



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

<b>Proceedings and Reports</b>	<b>Reference</b>
19 <sup>th</sup> Meeting, 9 June 2009	Col 2033  <a href="http://www.scottish.parliament.uk/s3/committees/justice/or-09/ju09-1902.htm#Col2033">http://www.scottish.parliament.uk/s3/committees/justice/or-09/ju09-1902.htm#Col2033</a>
20 <sup>th</sup> Meeting, 16 June 2009	Col 2096  <a href="http://www.scottish.parliament.uk/s3/committees/justice/or-09/ju09-2002.htm#Col2096">http://www.scottish.parliament.uk/s3/committees/justice/or-09/ju09-2002.htm#Col2096</a>
21 <sup>st</sup> Meeting, 23 June 2009	Col 2157  <a href="http://www.scottish.parliament.uk/s3/committees/justice/or-09/ju09-2102.htm#Col2157">http://www.scottish.parliament.uk/s3/committees/justice/or-09/ju09-2102.htm#Col2157</a>
22 <sup>nd</sup> Meeting, 1 September 2009	Col 2225  <a href="http://www.scottish.parliament.uk/s3/committees/justice/or-09/ju09-2202.htm#Col2225">http://www.scottish.parliament.uk/s3/committees/justice/or-09/ju09-2202.htm#Col2225</a>
(b) Finance Committee	-
7 <sup>th</sup> Meeting, 10 March 2009	Col 1009  <a href="http://www.scottish.parliament.uk/s3/committees/finance/or-09/fi09-0702.htm#Col1009">http://www.scottish.parliament.uk/s3/committees/finance/or-09/fi09-0702.htm#Col1009</a>
9 <sup>th</sup> Meeting, 21 April 2009	Col 1049  <a href="http://www.scottish.parliament.uk/s3/committees/finance/or-09/fi09-0902.htm#Col1049">http://www.scottish.parliament.uk/s3/committees/finance/or-09/fi09-0902.htm#Col1049</a>

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which received Royal Assent 6 August 2010*

<b>Proceedings and Reports</b>	<b>Reference</b>
(c) Subordinate Legislation Committee	-
15 <sup>th</sup> Meeting, 5 <sup>th</sup> May 2009	Col 565  <a href="http://www.scottish.parliament.uk/s3/committees/subleg/or-09/su09-1502.htm#Col565">http://www.scottish.parliament.uk/s3/committees/subleg/or-09/su09-1502.htm#Col565</a>
18 <sup>th</sup> Meeting, 26 <sup>th</sup> May 2009	Col 600  <a href="http://www.scottish.parliament.uk/s3/committees/subleg/or-09/su09-1802.htm#Col600">http://www.scottish.parliament.uk/s3/committees/subleg/or-09/su09-1802.htm#Col600</a>
Report to Justice Committee	Report on Criminal Justice and Licensing (Scotland) Bill  <a href="http://www.scottish.parliament.uk/s3/committees/subleg/reports-09/sur09-CriminalJusticeLicensing.htm">http://www.scottish.parliament.uk/s3/committees/subleg/reports-09/sur09-CriminalJusticeLicensing.htm</a>
(d) Consideration by the Parliament	-
Stage 1 debate, 26 November 2009	Col 21574  <a href="http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-09/sor1126-02.htm#Col21574#Col21574">http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-09/sor1126-02.htm#Col21574#Col21574</a>
<b>Stage 2</b>	-
(a) Justice Committee	
8 <sup>th</sup> Meeting, 2 March 2010	Col 2686  <a href="http://www.scottish.parliament.uk/s3/committees/justice/or-10/ju10-0802.htm#Col2686">http://www.scottish.parliament.uk/s3/committees/justice/or-10/ju10-0802.htm#Col2686</a>

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

<b>Proceedings and Reports</b>	<b>Reference</b>
10 <sup>th</sup> Meeting, 16 March 2010	Col 2726  <a href="http://www.scottish.parliament.uk/s3/committees/justice/or-10/ju10-1002.htm#Col2726">http://www.scottish.parliament.uk/s3/committees/justice/or-10/ju10-1002.htm#Col2726</a>
12 <sup>th</sup> Meeting, 13 April 2010	Col 2833  <a href="http://www.scottish.parliament.uk/s3/committees/justice/or-10/ju10-1202.htm#Col2833">http://www.scottish.parliament.uk/s3/committees/justice/or-10/ju10-1202.htm#Col2833</a>  Col 2834  <a href="http://www.scottish.parliament.uk/s3/committees/justice/or-10/ju10-1202.htm#Col2834">http://www.scottish.parliament.uk/s3/committees/justice/or-10/ju10-1202.htm#Col2834</a>
13 <sup>th</sup> Meeting, 20 April 2010	Col 2898  <a href="http://www.scottish.parliament.uk/s3/committees/justice/or-10/ju10-1302.htm#Col2898">http://www.scottish.parliament.uk/s3/committees/justice/or-10/ju10-1302.htm#Col2898</a>
14 <sup>th</sup> Meeting, 27 April 2010	Col 2954  <a href="http://www.scottish.parliament.uk/s3/committees/justice/or-10/ju10-1402.htm#Col2954">http://www.scottish.parliament.uk/s3/committees/justice/or-10/ju10-1402.htm#Col2954</a>
15 <sup>th</sup> Meeting, 4 May 2010	Col 3051  <a href="http://www.scottish.parliament.uk/s3/committees/justice/or-10/ju10-1502.htm#Col3051">http://www.scottish.parliament.uk/s3/committees/justice/or-10/ju10-1502.htm#Col3051</a>
16 <sup>th</sup> Meeting, 11 May 2010	Col 3112  <a href="http://www.scottish.parliament.uk/s3/committees/justice/or-10/ju10-1602.htm#Col3112">http://www.scottish.parliament.uk/s3/committees/justice/or-10/ju10-1602.htm#Col3112</a>
Bill as amended at Stage 2	<a href="http://www.scottish.parliament.uk/s3/bills/24-CrimJustLc/b24as3-amend.pdf">http://www.scottish.parliament.uk/s3/bills/24-CrimJustLc/b24as3-amend.pdf</a>

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

<b>Proceedings and Reports</b>	<b>Reference</b>
(b) Subordinate Legislation Committee	-
39 <sup>th</sup> Report (2010) Session 3	<a href="http://www.scottish.parliament.uk/s3/committees/subleg/reports-10/sur10-39.htm">http://www.scottish.parliament.uk/s3/committees/subleg/reports-10/sur10-39.htm</a>
<b>Stage 3</b>	
Consideration by the Parliament	-
Stage 3 Debate, 30 June 2010	Col 21875  <a href="http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-10/sor0630-02.htm#Col27815#Col27815">http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-10/sor0630-02.htm#Col27815#Col27815</a>
Bill passed, 30 June 2010	<a href="http://www.scottish.parliament.uk/s3/bills/24-CrimJustLc/b24bs3-aspassed.pdf">http://www.scottish.parliament.uk/s3/bills/24-CrimJustLc/b24bs3-aspassed.pdf</a>
Royal Assent – The Bill Received Royal Assent on 6 August 2010	<a href="http://www.opsi.gov.uk/legislation/scotland/acts2010/pdf/asp_20100013_en.pdf">http://www.opsi.gov.uk/legislation/scotland/acts2010/pdf/asp_20100013_en.pdf</a>

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