These notes relate to the Criminal Justice (Scotland) Act 2016 (asp 1) which received Royal Assent on 13 January 2016

CRIMINAL JUSTICE (SCOTLAND) ACT 2016

EXPLANATORY NOTES

OVERVIEW OF THE ACT

Part 6 - Miscellaneous

Chapter 4 – Statements and procedure

Statements by accused

Section 109 – Statements by accused

272. Section 109 inserts new section 261ZA into the 1995 Act. New section 261ZA will modify the common-law rule on the admissibility of hearsay evidence in criminal proceedings, as it applies to certain types of statement made by an accused.

273. Section 261ZA(1) and (2) provides that evidence of a statement made by an accused in certain circumstances is not inadmissible as evidence of a fact contained in the statement on account of the evidence being hearsay. The provision applies to a statement made by the accused in the course of being questioned (whether as a suspect or not) by a constable or another official investigating an offence.

274. The provision modifies the law relating to hearsay. As explained by the High Court of Justiciary in *Morrison v HM Advocate* 1991 SLT 57, "The general rule is that hearsay, that is evidence of what another person has said, is inadmissible as evidence of the facts contained in the statement". That general rule is subject to exceptions. The existing common-law exceptions (discussed in *McCutheon v HM Advocate* 2002 SLT 27) allow for a statement made by the accused to be admitted as evidence of a fact contained in the statement if it is inculpatory of the accused (e.g. a confession) or "mixed" (e.g. a statement in which the accused puts himself or herself at the locus at the time the offence was committed, but does so in the context of proffering an innocent explanation for why the accused was there). The common-law does not, however, allow evidence of a statement made by the accused to be admitted as evidence of a fact asserted in the statement if the statement is purely exculpatory of the accused.

275. Subject to subsection (3), section 261ZA extends the exceptions by dispensing with the distinctions between inculpatory, exculpatory and mixed statements. The effect is that any statement made by an accused person to a constable or another official investigating an offence is excepted from the general rule that hearsay evidence is not admissible as evidence of a fact contained in the statement, regardless of whether it is inculpatory, exculpatory or "mixed".

276. By virtue of subsection (3), section 261ZA does not affect the admissibility of evidence of a statement made by an accused as evidence in relation to a co-accused. Section 261 of the 1995 Act lays down special rules which apply before hearsay evidence of a statement by one accused can be admitted in evidence in relation to another accused. Those rules will continue to apply before evidence of a statement made by accused A can be treated as evidence of fact in the case for or against accused B.

277. New section 261ZA is restricted in its effect to superseding objections to the admissibility of evidence based on its hearsay quality. The provision does not override any other objections to the admissibility of evidence of a statement, such as objections to its admissibility based on the fairness of the circumstances in which the statement was made, or based on the content of the statement (for example, section 274 of the 1995 Act, which concerns the admissibility of evidence relating to the sexual history or character of a complainer in a sexual offence case, will still apply).

Use of technology

Section 110 – Live television links

278. Subsection (1) of section 110 inserts sections 288H to 288K into the 1995 Act. The new sections (discussed in greater detail in the following paragraphs) make provision for the participation of detained persons in hearings by means of live television link from the place of detention.

279. Subsection (2) repeals enactments in consequence of the new sections of the 1995 Act inserted by subsection (1). Specifically, paragraph (a) repeals section 117(6) of the 1995 Act, which requires an appellant in an appeal from solemn proceedings to appear before the court in ordinary civilian clothes. Paragraph (b) repeals section 80 of the Criminal Justice (Scotland) Act 2003, which allowed certain court appearances to be conducted by means of live television link, and is rendered obsolete by the wider reaching new sections inserted by this section.

Inserted section 288H – Participation through live television link

280. Subsection (1) requires a detained person to participate in a "specified hearing" (defined by inserted section 288L) by means of live TV link where the court has determined that the hearing should proceed in that manner. Before so determining, subsection (2) requires the court to give the parties an opportunity to make representations on the use of the TV link in the hearing. The court can only allow the hearing to proceed by TV link if satisfied that it is not contrary to the interests of justice to do so.

281. Subsection (3) gives the court the power to require a detained person to appear by TV link from the place where the person is in custody for the sole purpose of considering whether to make a determination on the use of TV links in the specified hearing itself.

282. Where a detained person participates in a hearing by means of a TV link, the effect of subsection (4) is that the place of detention is deemed part of the court room, so that the hearing is deemed to take place in the presence of the detained person.

Inserted section 288I – Evidence and personal appearance

283. Subsection (1) precludes evidence as to a charge against the detained person on a complaint or indictment being led at a hearing in which the detained person is participating by means of a TV link. It would therefore not be possible for a trial in which evidence is being led to proceed with the accused participating by TV link.

284. Subsection (2) gives the court the power to revoke, before or during a hearing, a determination (under section 288H(1)) that the accused is to participate at the hearing by TV link and subsection (2)(b) requires that the court exercise the power to revoke the determination if it considers that it is in the interests of justice for the detained person to appear in person. The court might consider revocation of its previous determination if, for example, a technical issue arises with the link itself, or when further information comes to light during the substantive hearing which, in the view of the court, makes it no longer appropriate to proceed by way of TV link.

285. In the event that the court decides not to proceed with the appearance of the accused by TV link, or revokes an earlier determination to allow proceedings via TV link, practical

difficulties might arise – the accused may well need to be brought to court, which might not be readily achievable on the same day, so postponement of the hearing could be necessary. Subsection (3) allows the court, in these circumstances, to postpone the hearing to a later day. The effect of a postponement under this section is detailed in inserted section 288IA.

Inserted section 288J– Effect of postponement

286. Subsection (1) provides that, where a case is postponed to the next day under section 288I, that day and any intervening weekend days or court holidays do not count towards any time limits – such as, for example, those for detaining a person in custody pending a first diet or preliminary hearing in the case. However, this provision does not apply where the accused is in police custody under section 21(2) of this Act, which requires an accused, if practicable, to be brought before a court before the end of the first day on which the court is sitting following the accused's arrest; or as soon as practicable thereafter.

287. The effect of this is that when a postponement is regarded as necessary for an accused in police custody, the accused still has a right to submit that the section 21 requirements have not been complied with, even if the postponement had become unavoidable by the time it was granted. It would then be up to the court to decide if the circumstances provide sufficient justification for the delay. Nonetheless, a postponement in such a situation remains competent, as subsection (2) makes clear.

Inserted section 288K – Specified hearings

288. Subsection (1) confers on the Lord Justice General the function of specifying the categories of hearings, such as the first appearance, at which a detained person may participate by live television link. Hearings may be specified by reference to the venues at which hearings take place (subsection (2)(a)), particular places of detention (subsection (2)(b)), or the types of cases or proceedings in which TV links can be used (subsection (2)(c)). Under subsection (3)(a) the Lord Justice General can vary or revoke any earlier directions and make different provision for different purposes (subsection (3)(b)).

Inserted section 288L – Defined terms

289. This section defines certain terms used within sections 288H to 288K. The expression "detained person" is defined so that the person is imprisoned or lawfully detained at a location in Scotland. The concept of lawful detention is a broad one: it includes detention at a police station pending first appearance at court, detention in hospital by virtue of an assessment order or a treatment order imposed under the 1995 Act, detention in hospital under the Mental Health (Care and Treatment) (Scotland) Act 2003, or a young person's detention in local authority secure accommodation.

Section 111 – Electronic proceedings

290. Section 111 inserts subsection 305(1A) into the 1995 Act. It provides that the power of the High Court to regulate criminal procedure through Acts of Adjournal includes the power to make provision in respect of electronic proceedings. This might include, for example, constituting or keeping any document (or copy), serving or conveying any document (or copy) or signing or otherwise authenticating any document (or copy).