

CRIMINAL JUSTICE (SCOTLAND) ACT 2016

EXPLANATORY NOTES

OVERVIEW OF THE ACT

Part 6 - Miscellaneous

Chapter 1 – Publication of prosecutorial test

Section 97 – Publication of prosecutorial test

247. This section obliges the Lord Advocate to publish the matters which are considered by a prosecutor when deciding whether to commence, and thereafter continue with, criminal proceedings. This is sometimes known as the prosecutorial test.

Chapter 2 - Support for Vulnerable Persons

Section 98– Meaning of appropriate adult support

248. **Section 98** provides for the purposes of this Chapter a definition of “appropriate adult services.”
249. Subsection (1)(a) provides that “appropriate adult support” means the support as currently set out in section 42 of the Act (i.e. communication support to those who are unable to effectively understand or communicate as a result of a mental disorder).
250. Subsection (1)(b) provides that Scottish Ministers may specify by regulations, the availability of such other support for vulnerable persons. Subsection (2) provides for matters which the Scottish Ministers may consider specifying when making regulations under subsection 1(b) for the purposes of providing such other support to vulnerable persons. Subsection (2) provides flexibility should appropriate adult support be made available to others (for example, the roll-out of such services to non-suspects who are nevertheless connected to a criminal investigation (for example victims and witnesses).
251. Subsection (3) provides definitions for “vulnerable person” and “mental disorder” for the purposes of this Chapter which are consistent with the definitions in section 42 of the Act.
252. Subsection (4) provides that Scottish Ministers may by regulations amend the definitions of “vulnerable person” and “mental disorder” in subsection (3) in order that they remain consistent with the definitions in section 42 of the Act. Section 42 of the Act, can be modified by the provisions of section 61 of the Act, and accordingly subsection (4) makes provision for that consistency to be maintained.

Section 99 - Responsibility for ensuring availability of appropriate adults

253. **Section 99** provides that Scottish Ministers may by regulations confer on a person the function of ensuring that appropriate adult support is available to those who require it and how that support may or must be discharged by the person upon whom that function has been conferred.

254. **Section 99** will allow Scottish Ministers to specify that such a person be responsible for ensuring those services are available throughout Scotland, or if required, just in different parts of Scotland. This will allow flexibility, should it be required, where a different person may have responsibility in one area of Scotland if they are best placed to discharge that function.

Section 100 - Assessment of quality of appropriate adult support

255. **Section 100** provides that Scottish Ministers may by regulations confer upon a person the function of assessing the quality, including the delivery, of appropriate adult services and how that function is carried out.
256. **Section 100(b)** provides that Scottish Ministers may by regulations specify how the function in relation to assessing the quality, including the delivery, of appropriate adult services may or must be discharged by the person upon whom that function has been conferred.

Section 101 - Training for appropriate adults

257. **Section 101** provides that Scottish Ministers may by regulations confer upon a person functions relating to training for appropriate adults. Section 101(a) provides that training may be provided to persons who are to provide appropriate adult services (or who wish to provide those services) and to provide training to such persons who may require to interact with those who require appropriate adult support. For example, such training may be provided to those persons who are required to conduct interviews in the course of a criminal investigation with a person who requires the support of an appropriate adult.
258. **Section 101(b)** provides that Scottish Ministers may by regulations specify how the function in relation to training may or must be discharged by the person upon whom that function has been conferred. Section 101(b) will allow the Scottish Ministers to make provisions, as to co-operation or co-ordination between such a person and the person upon whom the function of carrying out assessments has been conferred by virtue of section 100. Section 101(b) will also allow such training to take into account matters such as best practice.
259. **Section 102 - Recommendations from quality assessor and training provider.** Section 102 provides that a person on whom functions have been conferred by sections 100 or 101 (i.e. to provide oversight or training functions) can make recommendations to the provider of appropriate adult services or to the Scottish Ministers in their use of their subordinate legislation making power under section 61 and the provisions under this Chapter.
260. Subsection (2) provides that the providers of appropriate adult services must have regard to any recommendations made in relation to them.

Section 103 - Duty to ensure quality assessment takes place

261. **Section 103** places a duty on the Scottish Ministers to ensure that where a person has responsibility to ensure that appropriate adult services are available, there must be a person in place for the purposes of assessing those services.
262. The effect of section 103 is to ensure that if a person has been required to provide appropriate adult services, then there is oversight of that person in place at all times.

Section 104 - Elaboration of regulation-making powers under this Chapter

263. **Section 104** expands the detail in relation to the regulation making powers under this Chapter, which may be exercised by the Scottish Ministers, in relation to appropriate adult services.

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264. Subsection (1) provides that where a function is conferred upon a person it can be imposed on more than one person for the purposes of discharging that function.
265. Subsection (2) provides that the functions, or certain aspects of the functions, can be contracted out for the purposes of delivery of those functions (for example to third sector bodies) for the purposes of the delivery of those functions.
266. Subsection (3) provides regulation of the powers of Scottish Ministers in relation to any regulations made under this Chapter. It also provides that regulations under this Chapter may modify this, or any other, enactment and may make different provision for different purposes.

Section 105 - Procedure for making regulations under this Chapter

267. **Section 105** sets out the procedures to be applied to any regulations made by the Scottish Ministers under this Chapter.
268. Subsection (1) provides that any regulations made by the Scottish Ministers under this Chapter will be scrutinised by the Scottish Parliament in accordance with the affirmative procedure. Subsection (2) provides that the Scottish Ministers are required to consult publicly before any such regulations under this Chapter are laid before the Scottish Parliament.

Section 106 - Other powers of Ministers unaffected

269. **Section 106** clarifies that none of the powers enabling the Scottish Ministers to confer function(s) on person(s) imply that these are the only powers enabling them to do so.
270. The effect of section 106 is to ensure that the powers under this new Chapter do not exclude the use of current provisions or impliedly revoke any existing powers (such as powers to confer functions on local authorities).

Chapter 3 - Notification if parent of under 18 imprisoned

Section 107 – Child’s named person to be notified

271. **Section 107** requires the Scottish Ministers (in discharge of their functions through the Scottish Prison Service) to ask prisoners whether they are a parent or guardian of a child, if they are liable to maintain or have care of a child or have parental responsibilities in relation to a child. If this is the case, that person must be asked for information that will help SPS identify the child’s named person service provider (in terms of Part 4 of the Children and Young People (Scotland) Act 2014. If a prisoner is a parent or guardian of a child, if they are liable to maintain or have care of a child or have parental responsibilities in relation to a child the Scottish Ministers must then notify the child’s named person service provider of the person’s imprisonment.

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).

Chapter 5 – Authorisation under Part III of the Police Act 1997

Section 112 – Authorisation of persons other than constables

291. **Section 112** allows directly employed staff of the Police Investigations and Review Commissioner, who have been designated by the Commissioner to take charge or assist in investigations, to make property interference applications to the Commissioner for authorisation under Part III of the Police Act 1997. It also allows the Commissioner to designate a member of directly employed staff to authorise property interference in the Commissioner’s absence if the matter is urgent.

Chapter 6 – Police Negotiating Board for Scotland

Section 113 – Establishment and functions

292. **Section 113(1)** inserts a new Chapter 8A into the Police and Fire Reform (Scotland) Act 2012 (“the 2012 Act”) to provide for a Police Negotiating Board for Scotland (“PNBS”).
293. New section 55A provides for the PNBS to be established, and introduces a new schedule 2A into the 2012 Act to make further provision about it. New schedule 2A is set out in schedule 3 to the Act.
294. New section 55B provides that the PNBS may make representations to the Scottish Ministers about pay, allowances and expenses, public holidays and leave, the issue, use and return of police clothing and equipment, and hours of duty, in relation to constables (other than special constables) and cadets. Such representations may be made about draft regulations or draft determinations on these issues, or generally. The Scottish Ministers may, after consultation with the chairperson, require the PNBS to make representations about these matters within a set time period which may be extended by the Scottish Ministers.
295. New section 55C provides that the PNBS may also make representations to the Scottish Ministers about other matters relating to the governance, administration and conditions of service of constables (other than special constables) and police cadets including draft regulations on such matters.
296. New section 55D creates a mechanism for the Scottish Ministers to be required to take all reasonable steps appearing to them to be necessary for giving effect to representations in certain circumstances. The circumstances are that the representations are made under new section 55B(1), and that they are in terms settled through arbitration in accordance with the PNBS constitution and that they concern a “qualifying case”,

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to be specified by the Scottish Ministers in regulations made under new schedule 2A, paragraphs 4(6) and 4C.

297. New section 55E requires the PNBS to produce an annual report on how it has carried out its functions which is to be given to the Scottish Ministers and published. The reporting year for the annual report will be defined in the PNBS's constitution.
298. [Section 113\(2\)](#) amends section 54 of the 2012 Act to require the Scottish Ministers to consult the PNBS before making regulations about the matters mentioned in new section 55B(4).
299. [Section 113\(3\)](#) amends section 125 of the 2012 Act to provide that certain regulations made under new schedule 2A of the 2012 Act. will be scrutinised by the Scottish Parliament in accordance with affirmative procedure.

Section 114 – Consequential and transitional

300. [Section 114](#) makes consequential provision in connection with the establishment of the PNBS. The Freedom of Information (Scotland) Act 2002 will apply to the PNBS and the appointment of the chairperson of the PNBS will be in accordance with the Public Appointments and Public Bodies etc. (Scotland) Act 2003. Section 87A also makes transitional provision. When the PNBS provisions come into force the chairman of the PNBS's predecessor body, the Police Negotiating Board for the United Kingdom ("PNBUK"), will become the chairperson of the PNBS, and any current agreements involving the PNBUK will be regarded as agreements of the PNBS.