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

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

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part Three: Criminal Justice

Powers in relation to suspects and witnesses

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

171. This section amends section 13 of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") (which gives police constables certain powers in relation to suspects and witnesses). Section 13(1)(a) of the 1995 Act empowers a constable to require persons whom they suspect of committing an offence to tell them their name and address. Subsection (3) inserts a new section 13(1A) into the 1995 Act which enables a constable to require a suspect or a potential witness to an offence also to provide details of their nationality, date of birth, and such details of their place of birth as the constable considers necessary or expedient for establishing the person's identity. A failure to provide this information without reasonable excuse is an offence.

172. Subsection (6) amends section 14 of the 1995 Act. Section 14(9) of that Act provides that a person who has been detained is under no obligation to also provide any information to the police, other than their name and address. The amendments made by subsection (6) will put a person under an obligation also to inform the police of their nationality, date of birth, and such details of their place of birth as the constable considers necessary or expedient for establishing that person's identity. It will not be an offence if a person does not provide this information to the police.

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

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

174. This section amends section 13 of the 1995 Act to give police officers the power to take fingerprints to verify the identity of someone suspected of having committed an offence and to establish if that person has committed any other offences. Constables will be able to use this power in any place, enabling them to take fingerprints outside a police station. The power will be used by officers to confirm the identity of a suspect by checking these fingerprints against records in existing databases. Subsection (2) of this section requires that fingerprints taken for these purposes must be destroyed as soon as they have been used. They cannot be retained by the police.

175. Subsection (6) amends section 13(6) of the 1995 Act and provides that it will be an offence for a person to refuse to allow a constable to take fingerprints. Subsection (8) inserts a new section 13(8) into the 1995 Act which provides that a device which is used

for taking fingerprints must be approved by an order made by the Scottish Ministers. Such an order will not be subject to any parliamentary procedures.

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

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

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

177. This section inserts a new section 18A into the 1995 Act to allow the police to retain, for a period of time, DNA samples taken from people who have been arrested or detained, and also any information (such as a DNA profile) derived from those samples, provided that criminal proceedings have been raised against them for certain offences.

178. Subsection (2) of section 18A specifies that DNA samples and information deriving from these samples can only be retained where criminal proceedings in respect of a relevant sexual or violent offence (as defined in section 18A(11)) have been instituted against the person who is arrested or detained, and these proceedings did not result in a criminal conviction or an order for absolute discharge under section 246(3) of the 1995 Act (an order for absolute discharge is pronounced when a court is satisfied that the accused committed the offence but considers that it is inexpedient to punish them.). Therefore, DNA samples and information deriving from these samples can be kept if the relevant criminal proceedings are instituted, even if these are subsequently dropped or if a person is brought to trial but is acquitted by the court.

179. In cases where the new provisions apply, the police are empowered to retain the sample and information following the conclusion of the proceedings, until the date set for the destruction of the sample and information. The destruction date is initially set at 3 years following the conclusion of proceedings. However, within the last 3 months before the set destruction date, a relevant chief constable may apply to a sheriff, on summary application, for an extension. Where a sheriff upholds such an application, a new destruction date will be set, not more than 2 years later than the previous one. A relevant chief constable is defined in section 18A(11). The chief constable of the police force which took the sample, or a chief constable of a police force in the area in which the individual from whom the sample was taken now resides, can apply to the court to extend the time for which samples can be retained.

180. The provisions leave it open to chief constables to apply sequentially for more than one two-year extension period to the destruction date for the sample and information from a particular individual. If a relevant chief constable does not apply to a sheriff before the date of destruction elapses, the samples and any information which is retained must be destroyed.

181. Subsection (8) of section 18A provides that a decision by a sheriff to retain the sample (and any information) for a further two years, or to destroy this data, can be appealed to a sheriff principal, whose decision is final. An appeal must be lodged within 21 days of the sheriff's decision.

182. Subsections (3), (9) and (10) of section 18A provide that the police must destroy the sample and information by the set destruction date. However, if on that date there is an outstanding application to the sheriff for an extension or an outstanding appeal against a decision of a sheriff which orders that the sample must be destroyed, or if the period for beginning any such appeal has not yet elapsed, the sample and information must be destroyed as soon as possible after timescales for beginning an appeal have elapsed without a challenge being brought, or after the due legal processes have been concluded, if their conclusion is that there is no extension to the destruction date.

Arrested persons: drug testing and reference for assessment

Section 84 – Testing of arrested persons for Class A drugs

183. Section 84 inserts new sections 20A and 20B into the Criminal Procedure (Scotland) Act 1995.

184. Section 20A provides that the police may test a person for a relevant Class A drug if he or she has been arrested under suspicion of committing a relevant offence. The relevant offences are listed in subsection (8). A person who has been arrested under suspicion of committing any other offence which is not a relevant offence can also be tested at the discretion of a senior police officer if he or she believes that misuse of a Class A drug caused or contributed to the offence. Subsection (8) provides that the Class A drugs that will be tested for are cocaine and diamorphine (heroin). Subsection (2) provides that the police cannot test a person for a relevant Class A drug if that person has already given a sample for testing after they have been brought to a police station. However, subsection (5) sets out that a further sample can be taken if the original is not suitable for analysis, was insufficient or was destroyed during the testing process.

185. Subsection (3) sets out the conditions which must be met before a person is tested for a relevant Class A drug. A sample must also be taken or provided within 6 hours of that person being brought to a police station. To allow for the policy to be rolled out to particular parts of Scotland and in stages, a sample can only be taken if the Scottish Ministers have made an order by statutory instrument which states that mandatory drugs tests can be carried out in the area in which the police station is located. Such an order will be subject to negative resolution procedure of the Parliament.

186. Subsection (7) makes it an offence for an arrestee to refuse to comply with a drugs test under these powers if required to do so. The maximum penalties for committing this offence are set out in subsection (6). A constable is required to warn a person of this fact under subsection (4). When a person has been arrested for an offence (other than a relevant offence), a constable must also inform that person that a senior police officer has authorised him or her to take a sample, or to require that person to provide a sample. A person must also be told of the reasons why a senior police officer suspects that a Class A drug has been taken.

187. Section 20B supplements section 20A of the 1995 Act. Subsections (4) and (5) set out procedures which must be followed if a senior police officer decides that a person should be tested for a class A drug. Subsection (7) imposes a requirement to destroy a sample which has been taken under section 20A. Subsection (8) provides an exception to this, allowing retention of a sample for the purposes of prosecution under section 88 of this 2006 Act (for failing to attend and stay for the duration of assessments) – in this case the sample needs to be retained to be produced in court, but must be destroyed as soon as possible once it is not longer needed for any proceedings. Subsection (9) also sets down what the information gathered through a mandatory drugs test can be used for. Subsection (10) provides that the Scottish Ministers can add to or vary the lists of trigger offences and of relevant Class A drugs. Such an order will be made by statutory instrument and will be subject to affirmative resolution procedure.

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

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

Section 86 – Requirements under section 85: supplementary

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

Section 87 – Date, time and place of assessment

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

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

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

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

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

Section 90 – Interpretation of sections 85 to 88

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

Offenders assisting investigations and prosecutions

Section 91 – Assistance by offender: reduction in sentence

194. This section provides that the court, when sentencing accused persons who plead guilty in proceedings on indictment before that court and who have entered into a written agreement with a prosecutor (an “assistance agreement”) to provide assistance in relation to any investigation or prosecution, must take account of the nature and extent of that assistance.

195. Subsection (3) requires the court, if it passes a lower sentence on account of the assistance, to state that it has done so and what the sentence would otherwise have been. Subsection (5) provides that the court does not have to make such a statement if it would not be in the public interest (in which case the court must provide a written notice to the prosecutor and the accused that it has passed a lower sentence on account of the assistance and stating what the sentence would otherwise have been).

196. Subsection (4) provides that if the court, taking into account assistance given or offered under an assistance agreement, does not pass a lower sentence it must state its reasons for doing so. Subsection (6) makes similar provision to subsection (5): the court does not have to state why it did not reduce the sentence if it would not be in the public

interest (in which case the court must provide a written notice to the prosecutor and the accused stating its reasons for not passing a discounted sentence).

197. Subsection (7) clarifies that this section applies also to offences for which there is a minimum sentence and also where the sentence is fixed by law, in determining the minimum period of imprisonment that a person must serve. Subsection (8) provides that the court's decision to take into account the assistance provided or offered by a person does not affect any other power it may have to take any other matters into account when determining that person's sentence, punishment part or other minimum term of imprisonment. Subsection (9) clarifies the meaning of certain references and includes provision allowing the assistance agreement to be made using electronic communications.

Section 92 – Assistance by offender: review of sentence

198. This section provides that where an offender has been sentenced, following conviction of an offence on indictment, and one of the conditions in subsection (2) applies, a prosecutor may refer the case back to the court for review, if the offender is still serving the sentence and the prosecutor considers it is in the interests of justice to do so. The conditions in subsection (2) are:

- that the offender received a discounted sentence on account of having entered into an assistance agreement with the prosecutor but then fails to give assistance in accordance with the agreement;
- that the offender received a discounted sentence on account of having entered into an assistance agreement with the prosecutor and then gives or offers to give further assistance in pursuance of another assistance agreement;
- that the offender did not receive a discounted sentence but then subsequently enters into an assistance agreement with the prosecutor.

199. Subsection (3) ensures that where a person was convicted of an offence for which the sentence was fixed by law, they must have pleaded guilty if their sentence is to be referred back to court for a review under this section. Subsection (4) provides that the prosecutor may refer a case falling under this section back to the court which passed the sentence or, if the sentence was passed on appeal, that it is referred back to the court of first instance, if the offender is still serving the sentence and the prosecutor thinks that it is in the interests of justice to do so.

200. Subsection (5) provides that a person is still serving a sentence for the purposes of subsection (4)(a) if they have been released from prison early (whether on licence or unconditionally) under Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993. Accordingly, a person could, for example, be recalled to court to face the consequences of reneging on an assistance agreement in circumstances where they have been released on licence into the community. Subsection (15) makes clear that where an offender has entered into an assistance agreement and has been fined, that fine, where it has not been paid in full, may be referred to a court for review if any of the conditions set out in section 92(2) subsequently apply.

201. Subsection (6) provides that, where possible, any case which has been referred back under this section is to be considered by the judge who passed the sentence or, if the sentence was passed on appeal, by the judge who heard the case at first instance.

202. Subsection (7) gives the court a power to substitute a greater sentence where it considers the person has failed to provide the agreed assistance (not exceeding the sentence it could have passed but for the assistance agreement). Where a person has entered into an assistance agreement for the first time or a further assistance agreement, subsection (9) gives the court a power to take that into account and to reduce the individual's sentence accordingly. Subsection (11) gives a right of appeal to the offender (with leave of the

High Court) and to the prosecutor in respect of any decision of the court in reviewing the sentence.

203. Subsection (12) requires the court, in passing a lesser sentence under subsection (9) or on appeal under subsection (11), to state that it has done so in consequence of further assistance or assistance given or offered for the first time. Subsection (13) provides that the court need not make such a statement where it does not consider it to be in the public interest, but in those circumstances it must give written notice of the fact that it has passed a lesser sentence on account of the assistance, to the offender and the prosecutor.

Section 93 – Proceedings under section 92: exclusion of public

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

Section 94 – Section 92: further provision

205. Subsections (1) and (2) provide an order-making power for the Scottish Ministers to make provision in relation to the procedure to be followed in proceedings for sentence review under section 92. An order may apply with modifications the provisions governing appeals from solemn proceedings set out in Part VIII of the Criminal Procedure (Scotland) Act 1995 or modify that Part of the Act. Any such order is to be made by negative resolution procedure in the Scottish Parliament.

206. Subsections (3) and (4) provide an order-making power for the Scottish Ministers to make provision as to how a period served in custody, a period during which a person is released on license under Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993, or a period during which a person is on unconditional release under Part 1 of the 1993 Act, are to affect the calculation of periods of time under the 1993 Act as they apply to a revised sentence imposed under either section 92(7), (9) or (12) of the Act. In making any such order the Scottish Ministers may modify the 1993 Act. Any such order is to be made by negative resolution procedure in the Scottish Parliament.

Section 95 – Sentencing: consideration of undisclosed information

207. This section provides that when a person has been convicted of any offence, the court in sentencing that person can take into account information contained in a report, including a report provided electronically, from a constable or other officer of an organisation which has the function of investigating offences, about assistance given by that person in relation to another criminal investigation or prosecution. This section applies to assistance provided otherwise than under an assistance agreement with the prosecutor.

208. With the agreement of the offender, the information will be made available by the prosecutor to the offender, his or her counsel or solicitor and the court. However, if the offender does not wish to disclose the information to his or her solicitor or counsel then it may be provided by the prosecutor only to the offender and the court. Where the court takes the information about assistance into account, it must not disclose the existence of the report or whether it has passed a lesser sentence on account of the assistance given.

Section 96 – Appeals etc.: undisclosed information

209. This section provides that confidentiality of undisclosed information should apply in all forms of appeal/reference back to the High Court. Subsection (1) sets out the review

proceedings to which this section applies and covers all forms of review available in the High Court.

210. Subsection (2) makes clear that the section applies to the preliminary consideration by a judge of the High Court as to whether leave to appeal should be granted.

211. Subsection (3) concerns the case of any offender who has been sentenced in a court of first instance with the benefit of undisclosed information (sometimes known as "text" information), and who then appeals against the conviction, conviction and sentence or sentence alone. It confirms that the High Court and the Clerk of Justiciary must not disclose to any person other than the prosecutor, the offender and (with his or her consent) the offender's counsel or solicitor the existence or content of that information. It also provides that the High Court and Clerk of Justiciary must not disclose to any person whether the information given resulted in a lower sentence in the first instance court.

212. Subsection (4) provides for cases which do not fall within subsection (3). It is designed to cover the case of an aggrieved co-accused who has not given "text" information when his or her fellow accused has done so. As a result the co-accused may receive a heavier sentence than the offender sentenced with the benefit of "text" information. When such a person appeals, it is possible that the "text" information given by his or her fellow accused or knowledge of its existence may become available to the High Court. Subsection (4) therefore provides that where, in any situation not covered by subsection (3), the High Court or the Clerk of Justiciary becomes aware of "text" information, it should not disclose to any person the existence or content of that information or its impact on sentence.

213. Subsection (5) makes clear that provisions in the 1995 Act which require disclosure of information in various circumstances (for example, in relation to disclosure of the first instance judge's written report in respect of a case to an appellant or his solicitor) do not apply in such a way as to enforce disclosure of "text" information which would be in breach of the restrictions on disclosure placed on the High Court and Clerk of Justiciary as set out in subsections (3) and (4). In relation to "text" information, therefore, the specific prohibitions in subsections (3) and (4) take precedence over the specified provisions requiring disclosure in the 1995 Act. Subsection (6) clarifies that these limitations on disclosure do not apply to prevent any disclosure to the Crown Agent or the Scottish Criminal Cases Review Commission. It does, however, impose on the Crown Agent and SCCRC a prohibition on further disclosure of the existence or content of the "text" information and its impact on sentence, albeit placing beyond doubt that this does not block disclosure by either body to the High Court.

214. Subsection (7) provides that the High Court in considering an appeal has the same powers to clear the court of all but the parties, their representatives and an officer of the court and to prohibit the publication of information about the proceedings as the judges reconsidering a sentence discount under section 92 as set out in section 93. This is without prejudice to any other power which the court has to exclude any person from the court or to prohibit publication about the case.

215. Subsection (8) introduces a new order-making power under which Scottish Ministers may make further provision to ensure that this section is given full effect. This may include provision modifying the 1995 Act. The order-making power is subject to negative resolution procedure in the Scottish Parliament.

Conditional immunity from prosecution

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

216. This section allows the prosecutor to grant a person conditional immunity from prosecution by giving that person a notice in writing known as a conditional immunity

notice. If a conditional immunity notice is given to a person, that person may not be prosecuted for the offence or any offence of a description specified in the notice, and any proceedings for those offences which have already commenced when the notice is given must be discontinued.

217. Subsection (3) provides that the notice must specify conditions to which its application is subject, and it may specify the circumstances in which it does or does not apply. If a conditional immunity notice ceases to have effect, the prosecutor must give notice to the person by the issue of a written cessation notice as provided for in subsection (4). The cessation notice must state when and why immunity ceased.

218. Where a cessation notice is issued and the person is to be subject to criminal proceedings, subsection (5) provides that, if the person was given the conditional immunity notice after his or her first appearance on petition in respect of the offence, that person is to be treated as not having appeared on petition and accordingly, the time limits in section 65(1) of the Criminal Procedure (Scotland) Act 1995 apply from the first appearance of the person on petition after the giving of a cessation notice. Subsection (6) provides that other statutory time limits for the bringing of a prosecution will run from the date the cessation notice is issued if the conditional immunity notice was issued within the original time limit for bringing the prosecution. Similarly, subsection (7) provides that where proceedings timeously commenced are discontinued following the issuing of a conditional immunity notice and a cessation notice is subsequently issued, the statutory time limit for bringing the prosecution is to run again from the date the cessation notice is issued.

219. Subsection (8) applies in circumstances where a conditional immunity notice has ceased to have effect and proceedings are taken against the person to whom the conditional immunity notice was given. In those circumstances this subsection provides that the fact that communication has taken place between the prosecutor or anyone else and the person to whom the notice was given does not constitute a ground on which a court can decide that proceedings should not have been brought or continued.

220. Subsections (9) and (10) make provision in relation to notification by the person given a conditional immunity notice of any change of address for the purposes of giving a cessation notice. The procedure for giving a conditional immunity notice and cessation notice is set out in subsections (11) and (12). Subsection (13) makes provision for the use of electronic communications in the giving of notices under this section.

Enforcement of Sea Fisheries (Shellfish) Act 1967

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

221. This section makes provision relating to the enforcement of restrictions imposed by, or regulations made by, an order under section 1 of the Sea Fisheries (Shellfish) Act 1967 (a "regulating order").

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

223. Subsection (3) amends section 15 of the Sea Fisheries Act 1968 to make it clear that the references in sections 3 (effect of grant of right of regulating a fishery), 4A and 4B of the Sea Fisheries (Shellfish) Act 1967 to restrictions imposed by, or regulations made by, an order under section 1 of that Act include references to restrictions imposed by, or regulations made by, the grantees of the order with the consent of the Scottish Ministers.