

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

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part Three: Criminal Justice

Offenders assisting investigations and prosecutions

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

*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*

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.