

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

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## **EXPLANATORY NOTES**

### **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

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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 Adjournment. 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

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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

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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 Adjournal. 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 to 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.