

CRIMINAL JUSTICE (SCOTLAND) ACT 2016

EXPLANATORY NOTES

OVERVIEW OF THE ACT

4. The Act seeks to support the aims set out in the Policy Memorandum by introducing reforms to modernise and enhance the efficiency of the Scottish criminal justice system. The provisions in the Act take forward a range of the Scottish Government's key justice priorities.
5. Some of the Act's provisions were developed from the recommendations of two independent reviews:
 - Lord Carloway's review of criminal law and practice (<http://www.gov.scot/About/Review/CarlowayReview>)
 - Sheriff Principal Bowen's review of sheriff and jury procedure (<http://www.gov.scot/Publications/2010/06/10093251/0>)
6. The Scottish Government consulted on the implementation of both reviews. A further consultation was also carried while the Bill for the Act was before the Parliament on whether additional safeguards would be required if the requirement for corroboration in criminal prosecutions were abolished. The corroboration reform, however, was not part of the final Act. Further information about the consultations can be found in the Policy Memorandum which accompanied the Bill for the Act when it was introduced in the Scottish Parliament.
7. The Act is in seven Parts, and has three schedules.
8. **Part 1** (Arrest and custody) includes provisions on the powers of the police to arrest, hold in custody and question a person who is suspected of committing an offence. This part also provides for the rights of such persons in custody, makes specific provision for vulnerable adults and children, and obliges the Lord Advocate to issue a code of practice about investigative functions. Schedules 1 and 2 are connected to Part 1.
9. **Part 2** (Police procedures) includes provisions about searches of persons not in police custody. It includes limitations on when such a search can be carried out, and makes provision for there to be a code of practice about such searches. It makes provision for police to have the power to search a person, in certain circumstances and for the purpose of preventing harm, before the person is being taken from one place to another. This part also makes provisions that allow regulations to be laid that will give the police the power to search persons in certain circumstances relating to the consumption of alcohol by children, should this power be considered necessary after a public consultation.
10. **Part 3** (Solemn procedure) makes a number of amendments to the solemn procedure set out in the 1995 Act. These include imposing a duty on parties in criminal proceedings to communicate, and increasing the length of time for which an accused person can be remanded before having to be brought to trial from 110 to 140 days.
11. **Part 4** (Sentencing) increases the maximum sentence for handling offensive weapons offences, places a specific duty on the court to consider whether it is appropriate to

punish an offender for committing an offence while on early release, and increases the flexibility for different levels of court to consider imposing a punishment on such offenders.

12. **Part 5** (Appeals and SCCRC) amends the 1995 Act to make changes to appeal procedures in the High Court and adjusts how the Appeal Court will consider Scottish Criminal Case Review Commission referrals.
13. **Part 6** (Miscellaneous) requires the Lord Advocate to publish details of the test used by prosecutors to decide whether to bring a prosecution and makes provision about the use of technology, such as live television links in criminal procedure. Part 6 also defines appropriate adult support and allows regulations to be laid to further specify such support. By way of regulations Scottish Ministers may also confer on a person the functions of ensuring that persons are available to provide appropriate adult support, overseeing service delivery quality and standards, and providing training in relation to appropriate adult services. Part 6 also makes an amendment to the Police Act 1997 and, together with schedule 3, establishes and sets out the functions for a Police Negotiating Board for Scotland. It also makes provision for the notification of a child's named person if a parent of a child under 18 is sent to prison.
14. **Part 7** contains general and ancillary provisions.

Part 1 – Arrest and Custody

Chapter 1 – Arrest by police

Arrest without warrant

Section 1 – Power of a constable

15. **Section 1** sets out new powers of a police constable to arrest, without a warrant, a person suspected of having committed or to be committing an offence in Scotland. (Note, however, that the arrest regime under section 41(1) of the Terrorism Act 2000 is unaffected by this Act (see section 59)).
16. **Section 1(1)** provides that a constable (defined in section 62) who has reasonable grounds to suspect that a person has committed or is committing an offence may arrest that person without a warrant.
17. **Section 1(2)** qualifies the power of a constable to arrest a person without warrant for having committed an offence which is not punishable by imprisonment. Not only must a constable have reasonable grounds for suspecting the person, the constable must also be satisfied that the “interests of justice” would not be met if the person was not immediately arrested for the offence. Section 1(3) sets out factors that may be relevant in applying the “interests of justice” test referred to in section 1(2).
18. **Section 1(4)** provides clarity that an offence is only to be considered as not punishable by imprisonment in terms of subsection (2) if, as a matter of general application, a person, when convicted, cannot be sentenced to imprisonment. This means that the power operates even where the particular person arrested may not be imprisoned (due, most likely, to the person's age).

Section 2 – Exercise of the power

19. **Section 2** sets out how the power of arrest set out in section 1 can be exercised.
20. **Section 2(1)** provides that a person may be arrested under section 1 multiple times for the same offence (e.g. a person may be arrested, questioned and released and subsequently arrested again if, for example, further evidence comes to light).

21. **Section 2(2)** clarifies that the power to arrest again does not apply to persons who have been “officially accused” (defined in section 63) of having committed the offence or an offence arising from the same circumstances. For example, where the police have a warrant to arrest a person, they cannot use the power of arrest to do so.
22. **Section 2(3)** creates a requirement that a constable who is not in uniform must show his or her identification, as soon as reasonably practicable, when requested to do so by a person being arrested.

Procedure following arrest

Section 3 – Information to be given on arrest

23. **Section 3** specifies the information which must be provided by a constable, as soon as is reasonably practicable, to an arrested person. The information will normally be provided immediately upon arrest.

Section 4 – Arrested person to be taken to police station

24. **Section 4** sets out the requirement on a constable to take an arrested person to a police station as soon as is reasonably practicable after arrest (if not arrested there). By virtue of section 45 a constable may use reasonable force when doing so.
25. **Section 4(2)** provides circumstances as to when the duty to take the person to the police station can cease to apply prior to arrival at a police station. It further provides that the person must in those circumstances be released from custody.
26. **Section 4(3)** also clarifies that the requirement to take the person to the police station will also cease to apply if, before arriving at a police station, that person is released under the provisions contained within section 25(2) or 28(3A) of the 1995 Act.

Section 5 – Information to be given at police station

27. **Section 5** sets out the information that must be provided to a person taken to a police station under arrest and to those arrested whilst at a police station.
28. In particular, section 5(2) and (3) set out various matters that the arrested person must be informed of, as soon as reasonably practicable, e.g. their right not to say anything other than to provide information relating to their name, address etc.; their rights to have intimation sent, and to have access, to solicitors and, where appropriate, persons such as parents or other persons capable of giving support; and their rights under Articles 3 and 4 of Directive 2012/13/EU of the European Parliament and of the Council, including, for example, a letter of rights which contains basic information to assist persons in understanding their rights.

Section 6 – Information to be recorded by police

29. **Section 6** details the information which must be recorded by a constable when a person is arrested under section 1.
30. **Section 6(1)** provides a list of the information to be recorded in respect of all arrests.
31. **Section 6(2)(a)** requires a constable who has released a person from custody under section 4(2) to record the reasons why that constable formed the opinion that there are no reasonable grounds for suspecting that the person committed the offence for which they were arrested. Section 6(2)(b) to (5) specifies the information that must be recorded in relation to a person arrested and held in police custody (defined in section 64) but not officially charged with an offence e.g. the time the person is informed of his right to silence under section 5 and right of intimation to another person and a solicitor under sections 38 and 43; the timing and outcome of a police decision on whether to authorise

their continued custody; the time and outcome of any review of continued custody; the time a person is released from custody on conditions or charged.

Chapter 2 – Custody: person not officially accused

Keeping person in custody

Section 7 – Authorisation for keeping in custody

32. **Section 7(1)** sets out the procedure for keeping a person in custody where the person has been not been arrested under a warrant or charged with an offence by a constable.
33. **Section 7(2)** provides that authorisation to keep the person in custody must be sought as soon as reasonably practicable after the person is arrested at a police station or arrives at a police station following arrest.
34. **Sections 7(3) and (4)** provide that authorisation to keep a person in custody may only be given by a constable of the rank of sergeant or above who has not been involved in the investigation in connection with which the person is in custody and if the test set out in section 14 is met. **Section 7(5)** provides that if authorisation is refused then the person can continue to be held in custody only if charged with an offence or the person is detained under section 28(1A) of the 1995 Act. **Section 28(1A)** allows for the detention of an arrested person in connection with a breach of bail conditions.

Section 8 – Information to be given on authorisation

35. **Section 8** provides that at the time when authorisation is given to keep a person in custody under section 7, the person must be informed of the reason they are being kept in custody and that they may only be kept in custody without charge for a period of 12 hours. That person must also be informed when authorisation is given under section 7 that a further extension of 12 hours may be authorised under section 11.

Section 9 – 12 hour limit: general rule

36. **Section 9** provides that a person may not continue to be held in custody after a continuous period of 12 hours unless that person is then charged with an offence by a constable or authorisation has been given to extend that arrest for a further 12 hours under section 11. The period of 12 hours begins at the point when authorisation to keep a person in custody is given by a constable in accordance with section 7. After the expiry of 12 hours, if the person is not charged, they must be released, perhaps conditionally, if appropriate (see section 16). A person may also be detained in custody beyond 12 hours without charge where they are held for a bail review court hearing under section 28(1A) of the 1995 Act.

Section 10 – 12 hour limit: previous period

37. Where a person is held in custody on more than one occasion for the same or a related offence, section 10 provides that the 12 hour maximum period of custody (set out in section 9) is reduced by any earlier period during which the person was held in custody for that offence.

Section 11 – Authorisation for keeping in custody beyond 12 hour limit

38. **Section 11(1)** contains provisions to allow for an extension of the time in which a person may be kept in police custody for a further 12 hours after the initial 12 hours ends.
39. **Section 11(2)** provides that the authorisation to extend that custody must be given by a constable of the rank of inspector or above who has not been involved in the investigation in connection with which the person is in custody. Authorisation to extend custody may only be given if the tests set out in section 11(3)(a) and (b) are met. Further,

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

for a person under 18 years of age authorisation must be given by an officer of the rank of Chief Inspector or above who has not been involved in the investigation in connection with which the person is in custody.

40. **Section 11(4)** places a duty on the authorising constable to, where practicable, allow the person or if the person wishes, the person's solicitor, to make representations either orally or in writing, and to have regard to any such representations.
41. **Section 11(5)** clarifies that any authorisation to extend beyond the initial 12 hours is deemed to have been withdrawn if the person is released prior to those initial 12 hours elapsing.
42. **Section 11(6)** and (7) provide that after the expiry of the further 12 hours the person can only continue to be held in police custody if charged; but permits a person to be detained beyond 12 hours when they are held for a bail review under section 28(1A) of the 1995 Act.

Section 12 – Information to be given on authorisation under section 11

43. **Section 12** specifies the information which must be provided by a constable to an arrested person when authorisation to extend the arrest under section 11 is granted. This information will be given as soon as reasonably practicable after authorisation is given.

Section 13 – Custody review

44. **Section 13(1)** and (2) provide that where a person has been held in police custody for a continuous period of six hours and has not been charged with an offence, a decision must be made on whether to continue to keep that person in custody. That decision must be made as soon as reasonably practicable after the expiry of the period of six hours which started when the authorisation under section 7 was given. In making that decision, the test set out in section 14 is applied (referred to below). Under section 13(3) the decision must be made by a constable of the rank of inspector or above, who has not been involved in the investigation in connection with which the person is in custody. If the test set out in section 14 is not met, the person may continue to be held in custody only if they are charged with an offence or the person is held under section 28(1A) of the 1995 Act for a bail review. This section also provides that where an arrest has been extended under 11, and if the person remains in custody, that there must be a further 6 hour review after this extension period has begun.

Section 14 – Test for sections 7, 11 and 13

45. **Section 14** sets out the test for keeping a person in custody under sections 7(4) and 11(3)(b), and reviewing continuation of that period of custody after six hours under section 13(2).
46. **Section 14(1)** provides that the test is that there are reasonable grounds for suspecting that the person has committed an offence and keeping the person in custody is necessary and proportionate for the purposes of bringing the person before a court or otherwise dealing with the person under the law. In considering what is "necessary and proportionate" regard may be had to (among others) the factors detailed in section 14(2).

Section 15 – Medical treatment

47. **Sections 15(1)** and (2) apply to a person who is taken into police custody having been arrested without a warrant, has not been charged with an offence and is at a hospital for the purpose of receiving medical treatment. They provide that authority to keep a person in custody may be given as though section 7 applies in the hospital as it does in a police station. For the purpose of calculating the 12 hour maximum period of custody set out in sections 9 and 11, account will be taken of any time during which a person is at a hospital or travelling to or from one and is being questioned by a

constable (section 15(5) to (6)). The same rules apply in calculating any previous period of custody (section 10(3)).

Investigative liberation

Section 16 – Release on conditions

48. **Section 16** applies where: a person is in police custody by virtue of the authorisation under section 7 (that is, where a person has been arrested without warrant and not charged, including a case where authorisation has been reviewed and continued under section 13), a constable has reasonable grounds to suspect that the person has committed a relevant offence and the period of 28 days calculated in accordance with section 17(1) (a) has not expired. As explained further below, the effect of section 16 is to enable the police to release such persons from police custody on conditions which may be applied for a maximum period of 28 days following the conditions being imposed. It follows, that a person could not be released again on investigative liberation if arrested again after those 28 days have expired. The meaning of “relevant offence” is given in subsection (6).
49. Subsection (2) provides that a constable of the rank of sergeant or above (subsection (5)) may authorise the release of a person from custody on any condition which is necessary and proportionate for the purpose of ensuring the proper conduct of the investigation into a relevant offence. The meaning of “relevant offence” is given in subsection (6).
50. **Section 16(4)** ensures that any condition imposed is treated as a liberation condition for the purposes of schedule 1. This means that a breach of any condition may be penalised by a fine or a prison sentence as outlined in schedule 1 and, a breach which would be an offence were the person not subject to liberation conditions may be taken into account in sentencing for that offence.

Section 17 – Conditions ceasing to apply

51. **Section 17** provides when conditions imposed on a person under section 16(2) cease to apply: namely, (under section 18) if the condition is removed by the police by notice, if the person is arrested in connection with a relevant offence (“relevant offence” as defined by section 17(2)), if the person is officially accused of committing a relevant offence, at the end of the 28 day period or (under section 19) if the condition is removed as a result of an application for review made to a sheriff against the conditions.

Section 18 – Modification or removal of conditions

52. **Section 18** enables a constable, by notice, to modify or remove any condition imposed by the police under section 16(2). A modified condition may be more or less onerous than the condition originally set. Under section 18(2) a notice about the modification or removal of a condition must be given in writing to the person who is subject to it and must specify the time from which the condition is modified or removed. Any modification or removal of a condition requires to be approved by a constable of the rank of an inspector or above. This power gives the police the flexibility to adjust conditions in light of changed circumstances.
53. **Section 18(3)** provides that a constable of the rank of inspector or above must keep under review whether or not there are reasonable grounds for suspecting that a person who is subject to a condition imposed under section 16(2) has committed a relevant offence (as defined in section 18(8)), and whether the condition imposed remains necessary and proportionate for the purpose of ensuring the proper conduct of the investigation into a relevant offence. If the inspector is no longer satisfied that there are reasonable grounds for suspecting that a person who is subject to a condition has committed a relevant offence, the person must be given notice of the removal of the condition. If no longer satisfied that a condition is necessary and proportionate, again the person must be given notice that the condition is being modified or removed.

54. **Section 18(6)** provides that any such notice must be given in writing to the person as soon as practicable. The notice must specify the time from which the condition is modified or removed and the time at which the duty to give the notice arose, i.e. the time at which the decision is made by an appropriate constable to remove or modify the condition.

Section 19 – Review of conditions

55. **Section 19(1)** provides that a person who is subject to a condition imposed under section 16(2) may make an application for review to a sheriff.
56. **Section 19(2)** requires the sheriff to give the procurator fiscal an opportunity to make representations before the review is determined.
57. **Section 19(3)** provides that where the sheriff is not satisfied that the condition imposed is necessary and proportionate, the sheriff may remove it or impose an alternative condition which the sheriff considers to be necessary and proportionate for that purpose.
58. **Section 19(4)** provides that a condition imposed on review by the sheriff under section 19(3) is to be regarded as having been imposed by a constable under section 16(2). This provides that the conditions set by the sheriff have the same effect and are to be taken as having taken effect when set by the police, i.e. the 28 day period is calculated from the date on which the police conditions were set. Conditions imposed by the sheriff can be modified or removed under section 18(1) in the same manner as police conditions.

Chapter 3 – Custody: person officially accused

Person to be brought before court

Section 20 – Information to be given if sexual offence

59. **Section 20(1)** contains the criteria that are to be applied to establish whether a person falls within this section. The person must have been arrested in respect of a warrant for a sexual offence to which section 288C of the 1995 Act applies or, if arrested without warrant and since being arrested, have been charged by a constable for a sexual offence to which section 288C of the 1995 Act applies.
60. **Section 20(2)** contains the information that a person who falls within the criteria contained within subsection (1) must be given. The person must be informed that certain hearings in the course of their case may only be conducted by a lawyer. The person must also be given notice that it is in their interests to engage the professional assistance of a solicitor at, or for the purposes of those hearings, and if the person does not engage the assistance of a solicitor then the court will do so.

Section 21 – Person to be brought before court

61. **Sections 21(1) and (2)** provide that, wherever practicable, persons kept in custody after being arrested under a warrant or arrested without a warrant and subsequently charged with an offence by a constable, must be brought before a court by the end of the next court day. For example, a person arrested at 11pm on a Tuesday and charged with an offence at 2am on the Wednesday would be due in court not later than the end of the court's sitting on the Thursday.
62. **Section 21(3)** provides for persons to be considered to be brought before a court if appearing by television link.

Section 22 – Under 18s to be kept in a place of safety prior to court

63. **Section 22** provides that persons under 16 and those aged 16 and 17 subject to compulsory supervision orders who are being brought to court in accordance with

section 21(2) are only kept in a police station in the circumstances prescribed in subsection (3) and a constable of the rank of inspector or above has certified accordingly.

Section 23 – Notice to parent that under 18 to be brought before court

64. **Section 23** makes provision for circumstances where a person who is under 16 or is aged 16 or over and subject to a supervision order is to be brought before a court in accordance with section 21(2) or released from police custody on an undertaking given under section 25(2)(a). It provides that a parent of that person (if one can be found) must be informed (a) of the court before which the person is to be brought, (b) of the date on which the person is to be brought before the court, (c) of the general nature of the offence which the person has been officially accused of committing and (d) that the parent's attendance at the court may be required under section 42 of the 1995 Act. The requirement to give such information may be dispensed with if a constable believes that it would be detrimental to the wellbeing of the person being brought before the court or released on undertaking (subsection(3)).

Section 24 – Notice to local authority that under 18 to be brought before court

65. **Section 24** sets out the circumstances when a local authority has to be advised of the following information: the court before which the person is to be brought, the date the person is to be brought before the court and the general nature of the offence which the person has been officially accused of committing. There are two sets of circumstances which require the local authority to be notified. Firstly, where a person who is (i) under 16 years, (ii) 16 or 17 years of age and subject to either a compulsory supervision order or an interim compulsory supervision order or (iii) believed to be 16 or 17 years of age and has declined the right to have intimation sent under section 38 is brought before a court in accordance with section 21(2). Secondly, where a person is under 16 or 17 years and subject to compulsory supervision is released from police custody on an undertaking given under section 25(2)(a).
66. Subsection (5) defines "appropriate local authority" as the local authority in the area where the court sits.

Police liberation

Section 25 – Liberation by police

67. **Section 25(1)** and (2) provide that where a person is in custody having been charged with an offence, the police may: release that person on an undertaking under section 26, release the person without an undertaking or refuse to release. (Note the provisions do not apply where a person is in custody by virtue of a warrant granted under section 37(1)). It is also relevant to note that under section 50 a constable must take every precaution to ensure that a person is not unreasonably or unnecessarily held in police custody.
68. **Section 25(3)** provides that where a person is in police custody on a warrant as contained within sub-section (1)(b), the person will not be allowed to be released without an undertaking as provided for in sub-section (2)(b).
69. **Section 25(4)** provides that a constable will not be liable to any claim because of a refusal to release a person from custody under subsection (2)(c).

Section 26 – Release on undertaking

70. Again, in considering whether to release a person on an undertaking the police will be mindful of their obligations under section 50 of the Act (duty not to detain unnecessarily). Section 26(1) provides for a person to be released from police custody on an undertaking given under section 25(2)(a) only if they sign that undertaking.

71. **Section 26(2)** specifies the terms of an undertaking and section 26(3) provides for the conditions and the further conditions which may be imposed. With regard to those further conditions, these are illustrated by subsection (4), with paragraph (a) setting out the type of further conditions that only a constable of the rank of inspector or above may impose. Any other condition may be imposed by a constable of the rank of sergeant or above.
72. **Section 26(6)** provides that the requirement imposed by an undertaking to attend at court and comply with conditions are to be taken to be liberation conditions for the purposes of schedule 1 on breach of liberation conditions. This means that a breach of any condition may be penalised by a fine or a prison sentence as outlined in schedule 1 and a breach which would be an offence were the person not subject to liberation conditions may be taken into account in sentencing for that offence.

Section 27 – Modification of undertaking

73. **Section 27(1)** enables the procurator fiscal by notice (effected as set out in section 27(3)) to modify an undertaking given under section 25(2)(a), either by changing the time or place of the court hearing or removing or altering a condition in the undertaking. The manner of citation may be effected, for example, by delivering the notice personally or leaving it at the person's home.

Section 28 – Rescission of undertaking

74. **Section 28(1)** enables the procurator fiscal to rescind an undertaking under section 25(2) (a) regardless of whether the person who gave it is to be prosecuted.
75. **Section 28(2)** clarifies that the rescission takes effect at the end of the day the notice is sent to the person who gave the undertaking.
76. **Section 28(3)** provides that notice under subsection (1) must be effected in a manner by which citation may be effected under section 141 of the 1995 Act.
77. **Section 28(4)** provides a constable with a power of arrest if the constable has reasonable grounds for believing that the person is likely to fail to comply with the terms of an undertaking as contained within section 25(2)(a).
78. **Section 28(5)** provides that, when a person is arrested under subsection (4) or is arrested otherwise than in accordance with the undertaking, as in subsection (6), the undertaking is rescinded and the person is deemed to be in custody, as if charged with the original offence for which an undertaking was given.
79. **Section 28(7)** provides that reference contained within subsections (4) and (6)(b) regarding the terms of the undertaking also refer to any undertaking modified by notice made under section 27(1) or by a sheriff under section 30(3)(b).

Section 29– Expiry of Undertaking

80. **Section 29(1)** provides that an undertaking under section 25(2)(a) is deemed to have expired in two circumstances: either at the end of the day when the person was required to have appeared at court, or at the end of the day when a person appears at court having been arrested on a warrant for failing to appear as required by the terms of the undertaking.
81. **Section 29(2)** has the effect that; an undertaking expires if a person has been arrested under a warrant and appears in court because they have not attended court as required, then the undertaking expires at the end of the day of that court appearance.
82. **Section 29(3)** explains that the references in subsection (1)(a) and (2)(a) to the terms of the undertaking include those modified by the procurator fiscal under section 27(1)

Section 30 – Review of undertaking

83. **Section 30(1)** enables a person subject to an undertaking to apply to the sheriff for review.
84. **Section 30(2)** provides that the sheriff must provide the procurator fiscal with an opportunity to make representations with regard to the review. **Section 30(3)** provides that the sheriff may either remove a condition or impose any alternative condition that the sheriff considers to be necessary and proportionate.

Chapter 4 – Police interview

Rights of suspects

Section 31 – Information to be given before interview

85. **Section 31** applies to a person who is either in police custody (defined in section 64) or has voluntarily attended a police station, or other place, for the purpose of being interviewed by the police.
86. It requires a constable to inform a person suspected of committing an offence of their rights at the most one hour before any interview commences. These rights are:
- the right to be informed of the general nature of that offence,
 - the right not to say anything other than to provide the person's name, address, date of birth, place of birth and nationality;
 - the right to have a solicitor present during any interview; and
 - if the person is being held in police custody, the rights detailed in Chapter 5, namely: the right to have another person informed that the person is in custody, the right to have a solicitor informed that the person is in custody and the person's right of access to a solicitor whilst in custody.
87. Subsection (3) provides that if a person has already exercised their right to have another person or solicitor informed of their custody, then the police are not required to inform the person of these rights a second time.
88. For the purpose of this section, a constable is not to be regarded as interviewing a person about an offence merely by asking for the person's name, address, date of birth, place of birth and nationality. As such, a constable does not have to inform the person of their rights, as detailed at subsection (2), before asking the person for these details.
89. Subsection (5) provides that, if a person is being interviewed as authorised by section 35 of the Act (which permits the court to authorise a constable to question someone who has been officially accused of an offence), the person must be told before the start of the interview about any conditions attached by the court when authorising the questioning. This will always include a specified period of time for which questioning is authorised, and may also include conditions imposed by the court to ensure that allowing the questioning is not unfair.

Section 32 – Right to have solicitor present

90. This section provides for the right of a person reasonably suspected of committing an offence to have a solicitor present during police interview. It applies to a person who is either in police custody or has voluntarily attended a police station, or other place, for the purpose of being interviewed by a constable.
91. **Section 32(3)** provides that unless a person has consented to be interviewed without a solicitor present, a constable must not start to interview the person about the alleged

offence until a solicitor is present and must not deny the solicitor access to the person at any time during interview.

92. Under subsection (4), a constable may in exceptional circumstances start to interview the person without a solicitor present if satisfied it is necessary to interview the person without delay in the interests of the investigation or prevention of crime, or the apprehension of offenders. This is a high test and may only be authorised by a constable of the rank of sergeant or above who has not been involved in the investigation of the offence about which the person is to be interviewed. If a solicitor becomes available during such time as the police are interviewing a person, the solicitor must be allowed access to that person.
93. For the purpose of this section, a constable is not to be regarded as interviewing a person about an offence merely by asking for the person's name, address, date of birth, place of birth and nationality. As such, a constable does not have to wait for a solicitor to be present before asking a person for these details.
94. Subsection (7)(a) and (b) provides for a record to be made of the time at which a person consents to be interviewed without a solicitor present and any reason the person gives for waiving the right to have a solicitor present. A person may revoke their consent at any time and in such a case the police must record the time at which a person requests that intimation is sent to a solicitor and the time that intimation is sent (section 6(2)(d) and (e)).

Section 33 – Consent to interview without solicitor

95. Subsection (2)(a) provides that a person under 16 years of age may not consent to be interviewed without a solicitor present.
96. Subsection (2)(b) provides that a person aged 16 or 17 and subject to a compulsory supervision order or an interim compulsory supervision order made under the Children's Hearings (Scotland) Act 2011 may not consent to be interviewed without a solicitor present.
97. Subsection (2)(c) provides that a person aged 16 years and over and, owing to a mental disorder (as defined in subsection (6)(a)), is considered by a constable to be unable to understand sufficiently what is happening or to communicate effectively with the police, may not consent to be interviewed without a solicitor present.
98. Subsections (3), (4) and (5) provide that a person who is 16 or 17 years of age and not subject to a compulsory supervision order or interim compulsory supervision order or suffering from a mental disorder may consent to be interviewed without a solicitor present with the agreement of a "relevant person". If the person aged 16 or 17 years is in police custody, a "relevant person" means any person who could by virtue of section 40(2) visit the person. If the person aged 16 or 17 is not in police custody, a "relevant person" means a person who is at least 18 years of age and is reasonably named by the 16 or 17 year old.

Person not officially accused

Section 34 – Questioning following arrest

99. **Section 34** enables a constable to question a person following arrest provided the person has not been officially accused of the offence (i.e. charged with the offence by the police or where a prosecutor has started proceedings in relation to the offence), or an offence arising from the same circumstances. The person has the right, however, not to answer any questions but must provide the police with their name, address, date of birth, place of birth and nationality.

100. Subsection (3) makes clear that the provisions of this section do not imply a limit on the ability of the police to question a person about other matters (including offences) unrelated to the offence for which they were arrested.
101. Under subsection (5), the use, in evidence, of any answers given by a person during questioning is subject to the laws on admissibility.

Person officially accused

Section 35 – Authorisation for questioning

102. **Section 35** introduces a regime to allow the court to authorise a constable to question an accused person after the person has been officially accused of an offence or offences.
103. Subsection (1) confirms that the court may authorise a constable to carry out questioning once this stage has been reached. There is no provision for any other person, such as a prosecutor, to be so authorised.
104. Subsections (2) and (3) set out the circumstances in which the court can allow this questioning to take place. These provisions are designed to ensure that this power is exercised proportionately, having regard both to the rights of the accused person and to the public interest in gathering evidence in respect of an alleged criminal offence.
105. Thus subsection (2) provides that the court needs to be satisfied that the proposed questioning is in the interests of justice.
106. Subsection (3) sets out further factors which the court must take into account when deciding whether or not to authorise an application for questioning.
107. Subsection (5) applies where a court has granted an application to authorise questioning after the case has called in court, either having been commenced by means of a warrant, or where the accused has appeared in court. In those circumstances, subsection (4) gives the accused person the right to be heard by the court before any decision on the application is made. The person can be represented by a solicitor for these purposes, if the person wishes. It follows that the person has no similar right to be heard in respect of an application about a case which has not yet called in court.
108. Subsection (6) applies where the court has decided to grant the application and authorise questioning. In that event, subsection (6)(a) provides that the court must specify the length of time during which a constable may question the accused person. Subsection (6)(b) allows, but does not require, a court to place other conditions on the questioning to ensure that it is not unfair to the accused person. This might, for example, mean a restriction on the subject matter about which the accused person can properly be questioned.
109. Subsection (7) provides that there is no right of appeal against the decision of a court either to grant or refuse authorisation, or against any conditions imposed by the court under subsection (6)(b).
110. Subsection (8) defines the word “court” for the purposes of this section.

Section 36 – Authorisation: further provision

111. **Section 36** makes further provision in respect of questioning after a person has been officially accused of an offence.
112. Subsection (1) sets out who may make an application for authorisation. Where the case against the accused person has called in court in terms of section 35(5), subsection (1)(a) provides that the application must be made by a prosecutor; otherwise the application should be made by a constable (subsection (1)(b)). In the former case, though, even if the application is granted, the questioning will be carried out by a constable, in terms of section 35(1); the prosecutor’s limited right to question an accused person at the

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

inception of solemn proceedings only (generally known as “judicial examination”) is abolished by section 78 of this Act.

113. Subsection (2) defines “prosecutor” for the purposes of subsection (1).
114. Subsection (3)(a) gives the High Court of Justiciary the power to prescribe, in an Act of Adjournal, the form in which a written application seeking authorisation must be made; and a written application should closely follow that form. Subsection (3)(b), by requiring an applicant to include details of any previous applications for authorisation to question the accused person, either about the same offence, or about another offence arising out of the same circumstances, will ensure that the court has information about any such previous applications.
115. Subsection (4) sets out when authorisation to question the accused person comes to an end: either when the period stipulated by the court under section 35(6)(a) expires; or, when the trial of the accused person starts. Subsection (5) defines when a trial is deemed to have started for this section.
116. Subsection (6) defines “authorisation” and “offence” for the purposes of this section.

Section 37 – Arrest to facilitate questioning

117. Where the police wish to question someone who has been officially accused of an offence, section 37 provides that it will be open to the court to grant a warrant for the arrest of the accused person so the person can be detained for the purposes of questioning.
118. Subsection (1) provides that, when granting authorisation for questioning, a court can grant a warrant for the accused person’s arrest if it is expedient to do so.
119. Subsection (2) protects the accused person from indefinite detention, by requiring that if the court grants an application for a warrant it must put a time limit on the period for which the person can be detained to be questioned. Subsection (3) makes provision as to when the accused person’s detention, under a warrant granted in terms of this section, must come to an end.
120. Subsection (4) clarifies when an accused person’s detention under a warrant granted in terms of this section starts, making it possible to determine when the period specified in section 37(3)(a) has expired.
121. Subsections (5)(a) and (b) put it beyond doubt that a warrant under this section does not operate to recall or affect the operation of any bail order that the accused person might be on, whether in the same proceedings or not. While the accused person is in custody, having been detained and arrested on the warrant, subsection 24(5)(b) of the 1995 Act, which makes it a condition of bail that the accused does not commit an offence while on bail, remains in force. This means that if the person commits an offence while detained in custody under a warrant granted in terms of this section, it would be a breach of that condition of bail. Once the accused person’s detention ends, the bail order applies in full, including any conditions attached to that order.
122. Similarly, subsection (5)(c) makes it clear that, where an accused person has been liberated on an undertaking in terms of section 25(2)(a) of this Act, the terms and conditions of the undertaking remain in force where a warrant is granted for the accused person, and continue in force after arrest and detention on that warrant.

Chapter 5 – Rights of suspects in police custody

Intimation and access to another person

Section 38 – Right to have intimation sent to other person

123. Section 38 affords a person in police custody the right to have someone else informed that the person is in police custody and where they are being held in custody.
124. This intimation must be sent as soon as reasonably practicable after the person arrives at a police station unless a delay is considered necessary in the interests of the investigation or prevention of crime, the apprehension of offenders or safeguarding and promoting the wellbeing of the person (subsection (5)). Authorisation to delay intimation must be given by a constable of the rank of sergeant or above who has not been involved in the investigation in connection with which the person is in custody. Where such a delay is required, it should be for no longer than necessary (subsection (4)(b)). The sending of intimation may be delayed by virtue of subsection (5)(c) only for so long as necessary to ascertain whether a local authority will arrange for someone to visit the person in custody under section 41(2)
125. If a constable believes that the person in police custody is under 16 years of age, under subsections (2)(a) and (3)(a), a parent must be informed, regardless of whether the person requests that intimation be sent. The definition of a parent for this section and section 39 includes a guardian and any other person who has the care of the person (subsection (8)).

Section 39 – Right to have intimation sent: under 18s

126. Under this section, if a constable believes that a person in police custody is under 18 years of age, the person sent intimation under section 38 must be asked to attend at the police station or other place where the person is being held (subsection (2)). For those under 16 years this means a parent of the person and for those aged 16 and 17 years, an adult named by them (section 38(3)). The requirement in subsection (2) does not apply if a constable believes that the person in police custody is 16 or 17 years of age and has requested that the person notified under section 38 should not be asked to attend (subsection (3)).
127. If a constable believes that a person in police custody is under 18 years of age and finds that the person to whom intimation is to be sent is not contactable within a reasonable time or claims to be unable or unwilling to attend in a reasonable time, or a local authority has advised against sending intimation to that person, then intimation must be sent to another appropriate person. An “appropriate person” for these purposes might be a parent or guardian or carer or a duty social worker from the local authority.
128. Where the person in police custody is believed to be under 16, attempts to send intimation must continue until an “appropriate person” is contacted and agrees to attend at the police station or other place the person is being held within a reasonable time. For these purposes, an “appropriate person” means a person the police consider appropriate having regard to the views of the person in police custody.
129. Where the person in police custody is believed to be 16 or 17 years of age, attempts to send intimation must continue until an “appropriate person” is contacted and agrees to attend at the police station or other place the person is being held within a reasonable time or the person in custody requests that, for the time being, no further attempts be made. For these purposes an “appropriate person” means an adult who is named by the person in custody and to whom a constable is willing to send intimation without delay.
130. Subsection (8) provides that, where the police delay sending intimation by virtue of section 38(5)(a) or (b) (which allows the police to delay sending intimation where the person to be contacted is someone the police fear will compromise the investigation

or the apprehension of offenders), they must endeavour to contact another appropriate person in accordance with subsection (4)(a).

Section 40 – Right of under 18s to have access to other person

131. **Section 40** provides for children under 18 years of age in police custody to have access to another person.
132. Under subsection (1) all children under 16 years of age in police custody must have access, in the first instance, to any parent (defined in subsection (6) to include guardians and carers) to provide support. Subsection (1)(b) ensures that where a parent is not available, the child has access to another appropriate adult sent intimation under section 38, subject to the caveats in section 40(4).
133. Subsection (2) provides similar rights of access for those aged 16 or 17 years. However, in this case the adult granted access to the 16 or 17 year old does not have to be their parent (in line with section 38, which allows this age group to request that intimation be sent under that section to an adult other than their parent). As explained in section 39, intimation may be sent to more than one person. Subsection (3) provides that access need not be permitted to more than one person, subject to the caveats in section 40(4). Authorisation to restrict access under this section may only be given by a constable of the rank of sergeant or above who has not been involved in the investigation in connection with which the person is in custody.

Section 41 – Social work involvement in relation to under 18s

134. **Section 41** makes provision for a local authority to be notified of the fact that a person is in police custody (and where the person is being held), where a constable believes that the person may be subject to a supervision order or has delayed intimation by virtue of section 38(5)(c). Following intimation under subsection (1), a local authority may arrange for someone to visit the person in custody if that person is subject to a supervision order or the local authority believes the person to be under 16 years of age and arranging a visit would best safeguard and promote the person's wellbeing. The local authority must be satisfied the visit will be made within a reasonable time before arranging the visit (subsection (3)).
135. Where a local authority arranges for someone to visit the person in custody, sections 38 and 40 cease to have effect (subsection(4)(a)) until such time as the local authority confirms that the person in custody is over 16 years and subject to a supervision order. Sections 38 and 40 will then apply as if a constable believes the person to be under 16 years of age (subsection (7)). The person who the local authority arranges to visit the person in custody must be permitted access to that person (subsection (4)(b)) unless, in exceptional circumstances, such access would affect the investigation or prevention of crime, the apprehension of offenders or the wellbeing of the person in custody (subsection (5)).
136. Where a local authority choose not to arrange a visit or could not do so within a reasonable time, the authority may advise a constable that the person to whom intimation is to be sent under section 38(3) should not be sent intimation if the authority has grounds to believe that such intimation may be detrimental to the person in custody and may give advice as to who might be an appropriate person to a constable who is considering the matter under section 39(7). The constable must have regard to any such advice (section 41(9)). Authorisation to restrict access under this section may only be given by a constable of the rank of sergeant or above who has not been involved in the investigation in connection with which the person is in custody.

Vulnerable persons

Section 42 – Support for vulnerable persons

137. **Section 42** makes provision to identify vulnerable adults in police custody and to provide them with support to assist communication between them and the police. In practice, this support is provided by an appropriate adult though this term is not used in the Act.
138. To ensure support is provided as soon as is reasonably practicable, subsections (1), (2) and (4) provide that, where a police constable (who may have been advised that a person is vulnerable following an initial assessment by the police custody and security officer, who is a uniformed non-warranted officer, whose duties include attending to the wellbeing of a person in their custody) considers that a person in police custody is age 16 or over and is unable, because of a mental disorder, to understand what is happening or to communicate effectively, they must make sure that an appropriate adult is told where the person is being held, (this is not always at the police station and could be, for example, at a hospital) and that they require the support of an appropriate adult.
139. Subsection (3) provides that the role of the appropriate adult is to assist a vulnerable person to understand what is happening and to facilitate effective communication between the vulnerable person and the police.
140. Subsection (5) explains that “mental disorder” is as defined in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (i.e. “any mental illness, personality disorder, learning disability however caused or manifested”). It also explains that references to the police are to constables or members of police staff as provided for in section 99 of the Police and Fire Reform (Scotland) Act 2012. This ensures that a constable can delegate certain tasks, such as intimation to an appropriate adult, to a civilian member of police staff.

Intimation and access to a solicitor

Section 43 – Right to have intimation sent to solicitor

141. **Section 43** affords a person in police custody the right to have a solicitor informed, as soon as reasonably practicable after a request is made by the person in police custody, that the person is being held in police custody, where they are being held and that the professional assistance of a solicitor is required. If the person has been officially accused of an offence (i.e. charged with the offence by the police or where a prosecutor has started proceedings in relation to the offence), the person has the right to have a solicitor informed whether they are to be released from custody or, if not, of the court before which the person is to be brought and the day on which the person will be brought before court.

Section 44 – Right to consultation with solicitor

142. **Section 44** provides for the right of a person in police custody to have a private consultation with a solicitor at any time. For the purposes of this section, a consultation is defined by subsection (4) as a consultation by such means as considered appropriate, for example, by telephone.
143. Under subsection (2) the police can delay the exercise of this right only so far as necessary in the interest of the investigation or prevention of crime, or the apprehension of offenders. Authorisation to delay the right to consultation may only be given by a constable of the rank of sergeant or above who has not been involved in the investigation in connection with which the person is in custody.

Chapter 6 – Police powers and duties

Powers of police

Section 45 – Use of reasonable force

144. **Section 45** enables a constable to use reasonable force to effect an arrest and when taking a person in custody to any place.

Section 46 – Common law power of entry

145. **Section 46** makes clear that any existing powers of a constable to enter any premises for any purposes are not affected by this Act. Those powers remain.

Section 47 – Common law power of search etc.

146. **Section 47(1)** similarly preserves any existing powers of a constable in relation to a person arrested and charged, for example, to search them, seize items in their possession and place them in an identification parade (this list is not exhaustive).

Section 48 – Power of search etc. on arrest

147. **Section 48** makes clear that the powers described in section 47(2) which can be exercised by a constable in relation to a person after arrest and charge can also be exercised between a person's arrest and the person being charged.

Section 49 – Taking drunk persons to designated place

148. **Section 49(1)** allows the police to take a person who is deemed to be drunk to a designated place (as designated by the Scottish Ministers) to be cared for instead of arresting the person for an offence. By using this power it does not, however, require the person to remain unwillingly at such a place nor does it prevent a constable from subsequently arresting the person.

Duties of police

Section 50 – Duty not to detain unnecessarily

149. **Section 50** provides that a constable must ensure that a person is not unreasonably or unnecessarily held in police custody.

Section 51 – Duty to consider child's wellbeing

150. **Section 51** states that in making decisions to arrest a child (defined for this section in subsection (3) as a person under 18 years of age), hold a child in police custody, interview a child about an offence which the child is suspected of committing, or charge a child with an offence, a constable must treat the need to safeguard and promote the well-being of the child as a primary consideration. This does not mean that the interests of the child are the only consideration or that they are, in all cases, the most important consideration. For example, the need to protect others may prevail.

Section 52 – Duties in relation to children in custody

151. **Section 52** states that a child who is in police custody at a police station should, so far as practicable, be prevented from associating with any adult who is officially accused of committing an offence unless a constable believes it would be detrimental to the child's wellbeing to prevent them from associating with that particular adult (subsection (2)).

Section 53 – Duty to inform Principal Reporter if child not being prosecuted

152. **Section 53** applies where a person is being kept in a place of safety (as defined in subsection (5)) in accordance with section 22(2) when it has been decided not to prosecute the person for any relevant offence (as defined in subsection (4)) but a constable has reasonable grounds for suspecting that the person has committed a relevant offence. The Principal Reporter must be informed as soon as reasonably practicable that the person is being kept in a place of safety until the Principal Reporter makes a direction under section 65(2) of the Children’s Hearings (Scotland) Act 2011.

Chapter 7 – General

Common law and enactments

Section 54 – Abolition of pre-enactment powers of arrest

153. **Section 54** provides that the only power of arrest which the police have to bring a person into police custody comes from Section 1 of this Act and Section 41(1) of the Terrorism Act 2000.

Section 55 – Abolition of requirement for constable to charge

154. **Section 55** provides that a constable does not have to charge a suspect with a crime at any time and abolishes any rule of law that requires such a charge to be made.

Section 56 – Consequential modification

155. **Section 56** introduces schedule 2 to the Act which contains details of changes to existing legislation as a consequence of Part 1. Paragraph 313 provides further detail in regard to Schedule 2.

Code of practice about investigative function

Section 57 – Code of practice about investigative functions

156. **Section 57** requires the Lord Advocate to issue a code of practice on the matters set out in subsection (1) and to keep such a code of practice under review.
157. **Section 57(3)** sets out that the code will apply to the Police Service of Scotland and such other bodies specified in the code who report offences to the procurator fiscal.
158. **Section 57(4)** contains a requirement for the Lord Advocate to publicly consult on the code and subsection (5) identifies the persons or groups that the Lord Advocate is required to consult when preparing the code.
159. **Section 57(6)** obliges the Lord Advocate to lay a copy of the code of practice before the Scottish Parliament.
160. **Section 57(7) and (8)** contain provisions relating to the legal status of the code and the effect of a breach of the code of practice.

Disapplication of Part

Section 58 – Disapplication in relation to service offences

161. **Section 58** clarifies that service offences are not included in this Part. Service offences are those offences committed by service personnel under the Armed Forces Act 2006.

Section 59 – Disapplication in relation to terrorism offences

162. **Section 59** provides that Part 1 of the Act, dealing with arrest and custody, does not apply to persons arrested under section 41(1) of the Terrorism Act 2000.

Powers to modify Part

Section 60 – Further provision about application of Part

163. **Section 60** provides that the Scottish Ministers may by regulations modify Part 1 to either provide that some or all of it applies to persons to whom it otherwise does not apply because of sections 58 and 59, or to dis-apply some or all of it so that it does not operate in relation to people who have been arrested otherwise than under section 1.

Section 61 – Further provision about vulnerable persons

164. **Section 61** allows the Scottish Ministers to modify, by regulations, the provisions which provide that those aged over 16 and who have a mental disorder are unable to consent to being interviewed without a solicitor being present.
165. **Section 61** allows the modification of the description of vulnerable persons in relation to whom support is to be sought, and allows modification of the definition of the type of support to be sought for vulnerable persons as currently set out under section 33. The Scottish Ministers will also be able to specify, for the purposes of section 42, those persons to be considered suitable for providing the support mentioned in section 42, including by reference to training, qualifications and experience.
166. **Section 61** also enables the Scottish Ministers to modify those provisions in sections 33 and 42 which provide definitions of certain relevant terms, in particular references to the police and the term “mental disorder”.
167. The effect of Section 61 is to allow the Scottish Ministers to alter the conditions under which sections 33 and 42 apply and the nature of the support referred to in section 42, and to make further provisions about that support.

Interpretation of Part

Section 62 – Meaning of constable

168. **Section 62** defines the meaning of constable for the purposes of this Part.

Section 63 – Meaning of officially accused

169. **Section 63** defines the meaning of the term “officially accused” for the purposes of this Part.

Section 64 – Meaning of police custody

170. **Section 64** defines the meaning of police custody for the purposes of this Part.

Part 2 – Search by Police

Chapter 1 – Search of person not in police custody

Lawfulness of search by constable

Section 65 – Limitation on what enables search

171. **Section 65** provides that, where a person is not in police custody, it is unlawful for a search to be carried out by a police constable without express statutory authority, or

without express authority conferred by a warrant. This provision will have the effect of ending the practice of ‘consensual’ stop and search.

Section 66 – Cases involving removal of person

172. **Section 66** provides express statutory authority for constables to search a person in the circumstances where the police have a power under statute or warrant to transport a person from one place to another, or consider it necessary for the person’s care and protection to transport a person from one place to another. The search is for the purpose of safeguarding that person’s, or any other person’s, safety and well-being.

Section 67 – Public safety at premises or events

173. **Section 67** provides express statutory authority for the police to search people as a condition of entry at relevant premises and events, for the purposes of ensuring the health, safety or security of people there. This is subject to specific conditions: the premises or event must be open to members of the public, entrance must be controlled by the occupier or organiser, (so this will not apply to public marches or demonstrations), the occupier or organiser must have imposed a condition of entry that the person consents to being searched and the person must inform the constable that they consent to being searched.

Section 68 – Duty to consider child’s wellbeing

174. **Section 68** imposes a duty on a constable, when deciding whether to search a child (a person under 18) who is not in police custody, to treat the wellbeing of the child as a primary consideration.

Miscellaneous and definitions

Section 69 – Publication of information by police

175. **Section 69** imposes an obligation on Police Scotland to publish certain information on stop and search annually.

Section 70 – Provisions about possession of alcohol

176. **Section 70** allows regulations to be laid that would provide a power for the police to search children under 18 for alcohol and to search a person who is 18 or over where that person is suspected of possessing alcohol which they have supplied or intend to supply to a child. Before laying regulations, the Scottish Ministers must carry out a public consultation and send a copy of the proposed regulations to certain people. If Ministers decide to make regulations they will be subject to affirmative procedure, together with an obligation on Ministers to give reasons for making the regulations and present a summary of the consultation responses received. This section is subject to a “sunset clause” in section 71.

Section 71 – Matters as to effect of sections 65, 66 and 70

177. **Section 71** provides further detail about the commencement of certain provisions. The provisions in section 65 and 66 are required to commence on the same date that the code of practice required by section 73 first comes into effect. In addition, if no regulations are laid under the provisions in section 70 within two years of the date that the code of practice first comes into effect, the power to make regulations in section 70 will lapse, this is known as a sunset clause.

Chapter 2 – Code of practice

Making and status of code

Section 73 – Contents of code of practice

178. **Section 73** provides that Scottish Ministers must make a code of practice about the carrying out of searches and what the code must set out. The code of practice will only apply to the functions exercisable by police constables.

Section 74 – Review of code of practice

179. **Section 74** contains provisions regarding subsequent reviews and revision of the code of practice. It allows Ministers to revise the code in light of a review. The Scottish Ministers must review the code within two years of it first coming into effect. Thereafter the code must be reviewed at least every four years. When deciding when to conduct a review, Ministers must have regard to representations made by the Scottish Police Authority, the Chief Constable, or Her Majesty's Inspectorate of Constabulary in Scotland (HMICS).

Section 75 – Legal status of code of practice

180. **Section 75** provides for the legal status of the code of practice. A court or tribunal in civil or criminal proceedings must take into account the code of practice (including, therefore, any breach of the code) when determining any questions arising in the proceedings to which the code is relevant.

Procedure applying to code

Section 76 – Consultation on code of practice

181. **Section 76** makes provisions about consultation on the code of practice. Before making a code of practice, the Scottish Ministers must consult publicly on a draft code. Subsection (2) provides that a number of persons or organisations must be consulted when preparing a draft for public consultation.

Section 77 – Bringing code of practice into effect

182. **Section 77** makes provision for bringing the code of practice into effect. A code of practice or any revised code of practice will be brought into effect on a date to be appointed by regulations. The regulations will be subject to affirmative procedure, and the code to which the regulations relate must be laid before the Parliament at the same time.

Part 3 – Solemn Procedure

Section 78 – Proceedings on petition

183. **Section 78** changes the procedure to be followed at what are usually the first court appearances of a person being prosecuted under solemn procedure, when the person appears on petition.
184. The purpose of these provisions is to abolish the procedure (commonly known as judicial examination) whereby the prosecutor can, at the commencement of a case being prosecuted under solemn procedure, question the accused in the presence of the sheriff. In addition, section 78 removes the rarely-used option for the accused to make a declaration – broadly, a statement of his or her position in respect of the charge or charges on the petition – at that stage in proceedings.

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

185. Subsection (1) inserts a provision into the 1995 Act which removes the accused's common-law right to be given the opportunity to make a declaration at the commencement of a case being prosecuted under solemn procedure.
186. Subsection (2) both removes from statute various provisions which relate to declarations, and abolishes the procedure known as judicial examination.
187. Subsection (2)(a) removes, from the 1995 Act, provisions which govern the making of declarations, and the right of the prosecutor to question the accused on extra-judicial confessions.
188. Subsection (2)(b) removes from the 1995 Act three sections which enable and regulate procedure at judicial examinations. By so doing, it abolishes the procedure.
189. Subsections (2)(c), (2)(d), and (2)(e) remove from the 1995 Act various provisions in respect of any records made of a judicial examination. These changes are consequential to the abolition of the judicial examination procedure by subsection (2)(b).

Section 79 – Pre-trial time limits

190. **Sections 79 to 81** make changes to the procedure followed in proceedings on indictment in the sheriff court.
191. **Section 80** introduces a requirement on the prosecution and the defence to communicate and to lodge a written record of their state of preparation in advance of the first diet.
192. **Section 81** provides that the arrangement by which a sheriff court indictment assigns dates for both the first diet and the trial ceases to have effect. Instead the court will appoint a trial diet at the first diet, or at a continuation of it, having ascertained the parties' state of preparation.
193. **Section 79** makes changes to the time limits prescribed in section 65 of the 1995 Act which are intended to allow time for the procedure set out in section 80. In particular the period during which the accused can be remanded in custody pending a first diet and trial are brought in line with the corresponding High Court limits to reflect the altered pre-trial procedure.
194. Subsection (2) amends section 65 of the 1995 Act to set out revised time limits for various procedural steps in proceedings on indictment in the sheriff court.
195. The amendments made by subsection (2)(a) and (b) prevent the accused being tried on indictment in the sheriff court where the first diet is not commenced within 11 months of the first appearance on petition. That period can be extended by the court under section 65(3) of the 1995 Act. The 12-month period within which the trial must be commenced, as specified in section 65(1)(b) of the 1995 Act is unaffected. The amended provisions mirror the equivalent arrangements for proceedings in the High Court.
196. Subsection (2)(c) amends the provisions in section 65(4) of the 1995 Act concerning the periods during which the accused person who is committed until liberated in due course of law (i.e. imprisoned to await the outcome of a trial) can be detained by virtue of that committal where an indictment has been served in respect of the sheriff court. The effect of the amendment is that the accused person must be liberated after 110 days, if no first diet has been held, and 140 days if such a diet has been held, unless the trial begins within that period. These periods can be extended by the court under section 65(5) of the 1995 Act. Again, the amended provisions mirror High Court procedure. To assist in the calculation of the time period, subsection (2)(d) amends section 65(9) of the 1995 Act to provide that the first diet in the sheriff and jury court shall be taken to commence when it is called.
197. Subsection (3) amends section 66(6) of the 1995 Act to replace the arrangements whereby an accused person to be tried on indictment in the sheriff court is given notice of the first diet and trial diet at the same time as being served with the indictment.

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

Instead, the accused will be given notice only of the first diet and the date of the trial diet will be fixed at the first diet. The period within which the first diet must take place will be increased from 15 clear days from the service of the indictment to 29 clear days; this change makes the sheriff court practice consistent with High Court practice.

198. Subsection (4) amends section 72C(4) of the 1995 Act for consistency with the amendment made by subsection (3). Section 72C(4) is a provision in similar terms to section 66(6), it deals with the situation where a fresh indictment has to be served on an accused because a preliminary hearing before the High Court either did not take place when it was supposed to, or was deserted for the time being without another hearing being appointed.

Section 80 – Duty of parties to communicate

199. **Section 80** amends the 1995 Act to impose a duty on the prosecution and the defence, in cases indicted to the sheriff court, to communicate and to prepare a written record of their state of preparation.
200. Subsection (2) amends section 71 of the 1995 Act by inserting a new subsection (1ZA) which requires the court to have regard to the written record when ascertaining the parties' state of preparation at the first diet.
201. Subsection (3) inserts a new section 71C into the 1995 Act. Subsection (2) of this new section requires the prosecutor and the accused's legal representative (as defined in subsections (8) and (9)) to communicate and jointly prepare a written record of the state of preparation of their respective cases. The requirement arises where the accused is indicted to the sheriff court and is represented by a solicitor (new section 71C(1)).
202. Subsection (3) of the new section 71C provides that the period within which the communication must take place, and within which the written record of the state of preparation must be prepared is the period beginning with the service of the indictment and ending 14 days later.
203. Subsection (4) of the new section 71C provides for the form, content, and arrangements for lodging of the written record, to be prescribed under an Act of Adjournal. Subsection (5) provides that the record must include a statement of how the communication required by this new section took place. Subsection (5) gives examples of the means by which the communication may take place, but the examples are not exhaustive of the means that might be employed.
204. **Section 80(4)** of the Act amends section 75 of the 1995 Act to include a reference to the period mentioned in section 71C. This ensures that, where the 14 day period referred to in section 71C(3) ends on a weekend or on a court holiday, it is extended to include the next day that is not a Saturday, Sunday or court holiday.

Section 81 – First diets

205. **Section 81** deals with the procedure at first diets in proceedings on indictment in the sheriff court.
206. Subsection (2) amends section 66 of the 1995 Act. Subsection (2)(a) requires the notice served on the accused with the indictment to include a warning to the accused that the first diet may proceed in his or her absence and that a trial diet may be fixed in his or her absence. This is distinct from the intimation that requires to be given by virtue of section 66(6AA) where the accused is a body corporate. However, even if the notice does not contain this warning, the amendment to section 66(6B) of the 1995 Act made by subsection (2)(b) ensures that the validity of the notice, and other procedure against the accused, is not invalidated by the omission.
207. Subsection (3) amends section 71 of the 1995 Act. The amendments provided for in subsection (3)(a), (b) and (d) are consequential on the new arrangements whereby

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

the trial diet is appointed at the first diet (see discussion below of new section 71B). Subsection (3)(c) ensures that the requirement in section 71(6) that the accused should be called upon to plead at the first diet does not prevent the first diet proceeding in the absence of the accused. Subsection (3)(e) extends to the new section 71B discussed below the definition of the word “court” in section 71 of the 1995 Act, so that in the new section 71B references to the court will be understood as references to the sheriff court only.

208. Subsection (4) inserts a new section 71B into the 1995 Act, to deal with appointment of a trial diet at the first diet.
209. Subsection (1) of the new section 71B provides that, having taken the steps and examined the issues required at the first diet, the court only then goes on to appoint a trial. The appointing of a trial has to be in accordance with subsections (3) to (7), which are discussed below. Subsection (2) requires the accused to appear at the trial diet.
210. Subsections (3) and (4) of the new section 71B apply when a case is subject to the requirement that the trial must commence within 12 months of the accused’s first appearance on petition. If the court considers that the case would be likely to be ready to proceed to trial within the 12 months (which may not be 12 months from the petition appearance, because the period can be extended under section 65(3) of the 1995 Act) the court must, subject to subsections (5) to (7) appoint a trial within the 12 month period. If the court does not think the case will be ready to proceed within the 12 months, the prosecutor must be given an opportunity to seek an extension of the 12 month period. If an extension is granted the court must, again subject to subsections (5) to (7), appoint a trial within the 12 month period as extended. If the period is not extended the court may desert the first diet (either permanently or for the time being only) and if the accused is being held in custody pending trial, the accused must be liberated.
211. Subsections (5) to (7) of the new section 71B apply where, in addition to the court being required to appoint a trial diet within the 12 month period under subsection (3) or (4), the accused has been committed until liberated in due course of law (i.e. imprisoned to await the outcome of a trial) and cannot be detained by reason of that committal for more than 140 days without being put on trial. In that event, as well as appointing a trial diet within the 12 month period, the court must appoint a trial within the 140 day period if it is satisfied that the case will be ready to go to trial within that period. If the court is not satisfied about that, the prosecutor must be given an opportunity to apply for an extension of the 140 day period. If an extension is granted the court must appoint a trial for a date within the 140 day period as extended (as well as within the 12 month period). If the period is not extended the accused is entitled to be admitted to bail. In that event, subsection (8) requires the court to give the prosecutor an opportunity to be heard before admitting the accused to bail.
212. Where the court has appointed a trial diet for an accused on bail (other than in the circumstances where the accused has been bailed as described in the previous paragraph) subsection (9) of the new section 71B requires that the court must review the accused’s bail conditions and empowers it, if it considers it appropriate, to set different conditions.
213. Subsection (10) of the new section 71B defines the 12 month and 140 day time limits with reference to the applicable provisions of section 65 of the 1995 Act.
214. Subsection (5) of section 81 amends section 76(3) the 1995 Act which makes provision for the situation where a diet fixed as a result of an intimation given by the accused under section 76(1) of the 1995 Act (that he intends to plead guilty) does not result in pleas being accepted in respect of all charges. The amendment allows the court to postpone a first diet where a case has been indicted to the sheriff court on the same basis as the power to postpone a preliminary hearing where the case has been indicted to the High Court.

215. Subsection (6) inserts a new section 83B into the 1995 Act applying to jury trials in the sheriff court. The section allows trials that have not yet been commenced to be continued from sitting day to sitting day, up to a maximum number of sitting days after the day originally appointed for the trial, the maximum being set by Act of Adjournal. Failure to commence the trial by the end of the last sitting day permitted results in the indictment falling and proceedings against the accused coming to an end.

Section 82 – Preliminary hearings

216. **Section 82** reverses the effect of amendments to section 72A of the 1995 Act Criminal effected by section 7(3) of the Vulnerable Witnesses (Scotland) Act 2004. The amendments, which relate to proceedings in the High Court, were mistakenly applied after the section to which they related was repealed by the Criminal Procedure (Amendment) (Scotland) Act 2004, and replaced with another section with the same number.

Section 83 – Plea of guilty

217. **Section 83** repeals that part of section 77(1) of the 1995 Act which requires that the accused pleading guilty to an indictment should sign a copy of the plea. Section 70(7) of the 1995 Act, which provides for an exception to the signing requirement where the accused pleading guilty is an organisation, is thereby rendered obsolete and is also repealed.

Part 4 – Sentencing

Maximum term for weapons offences

Section 84 – Maximum term for weapons offences

218. The Criminal Law (Consolidation) (Scotland) Act 1995 provides for the following offences:
- carrying an offensive weapon in a public place (section 47);
 - possessing an article with a blade or point in a public place (section 49);
 - possessing an article with a blade or point (or weapons) on school premises (section 49A);
 - having an offensive weapon etc. in prison (section 49C).
219. **Section 84** of the Act increases the maximum penalty for each of those offences from 4 to 5 years.

Prisoners on early release

Section 85 – Sentencing under the 1995 Act

220. **Section 85** of the Act inserts a new section 200A into the 1995 Act. New section 200A(1) of the 1995 Act provides that when the court is dealing with a person who has been found to have committed an offence that is capable of being punishable with imprisonment (except where the offence is such that the court is required to impose a life sentence), the court must so far as is reasonably practicable ascertain whether the person was on early release from a previous sentence at the time the offence was committed.
221. Part I of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (“the 1993 Act”), Part II of the Criminal Justice Act 1991 or Part 12 of the Criminal Justice Act 2003 provide for the operation of release from custody of a prisoner prior to the end of a prisoner’s sentence. The operation of these provisions is commonly known as “early

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

release” arrangements. For the purposes of new section 200A, new section 200A(3) provides that a person is on early release if they are not in custody as a result of the operation of Part I of the 1993 Act, Part II of the Criminal Justice Act 1991 or Part 12 of the Criminal Justice Act 2003.

222. Section 16 of the 1993 Act provides the court with a power to be able to punish a person who commits an offence while on early release. This power is separate and additional to the normal powers of the court to sentence the person for having committed the offence. These powers are commonly known as section 16 orders and can be seen as a punishment on a person for having abused the trust placed in them by committing an offence while on early release.
223. New section 200A(2) provides that where the court has determined under new section 200A(1) that a person was on early release at the time the offence was committed, the court must consider making a section 16 order.
224. New section 200A(2) also provides that in the case where the court dealing with the offence is inferior to the court which imposed the previous sentence from which the person was released early, an inferior court must consider making a reference to the court which imposed the previous sentence so that they can consider making a section 16 order. This is subject to the new powers being given to inferior courts to make section 16 orders contained in section 73(4) of the Act.

Section 86 – Sentencing under the 1993 Act

225. Where an offence (“the new offence”) has been committed while a person was on early release, section 16(2) of the 1993 Act provides that a Scottish court may, instead of or in addition to imposing a sentence for plea or finding of guilt, order that a person may be returned to prison for a period of time. This period can be up to a maximum length equal to the period of time between the date on which the new offence was committed and the date of the expiry of their previous sentence. Section 16(2)(b) of the 1993 Act provides that where the court dealing with the new offence is inferior to the court which imposed the sentence from which the person was released early, the inferior court cannot directly impose a section 16 order and can only refer the case to the higher court for consideration to be given as to whether a section 16 order should be imposed.
226. **Section 86(2)** of the Act adjusts section 16(1) of the 1993 Act so that prisoners released early under Part 12 of the Criminal Justice Act 2003 can have section 16 orders imposed upon them.
227. **Section 86(4)** of the Act inserts new section 16(2A) into the 1993 Act. New section 16(2A) provides new discretion for courts dealing with persons who have committed offences while on early release from a previous sentence imposed by a higher court. The effect of the new discretion is that inferior courts will be able to consider making a section 16 order in such cases.
228. The powers of inferior courts to impose section 16 orders are restricted to those cases where the maximum length of a section 16 order does not exceed the sentencing powers of the court in respect of common law offences. Section 7(6) of the 1995 Act provides that a Justice of the Peace court can impose a custodial sentence for common law offences of up to 60 days. Section 5(2) of the 1995 Act provides a sheriff summary court can impose a custodial sentence for a common law offence of up to 12 months. Section 3(3) of the 1995 Act provides a sheriff solemn court can impose a custodial sentence for a common law offence of up to 5 years.
229. New section 16(2A)(b)(i) provides that a Justice of the Peace court will be able to impose a section 16 order in cases where the maximum length of a section 16 order does not exceed 60 days.

230. New section 16(2A)(b)(ii) provides that a sheriff court sitting summarily (i.e. without a jury) will be able to impose a section 16 order in cases where the maximum length of a section 16 order does not exceed 12 months.
231. New section 16(2A)(b)(iii) provides that a sheriff court sitting as a court of solemn jurisdiction (i.e. with a jury) will be able to impose a section 16 order in cases where the maximum length of a section 16 order does not exceed 5 years.
232. **Section 86(3)** makes consequential changes to section 16(2) reflecting the insertion of new section 16(2A) into the 1993 Act.

Part 5 – Appeals and Scrc

Appeals

Section 87 – Preliminary pleas in summary cases

233. Section 174 of the 1995 Act allows for decisions disposing of certain objections and denials in summary proceedings, including objections to the competency and relevancy of the complaint, to be appealed to the High Court where the first instance court gives permission for the appeal. Section 87 of the Act amends section 174 of the 1995 Act by removing the requirement to obtain permission for an appeal by the prosecutor against a decision that has resulted in the dismissal of the complaint, or any part of it.

Section 88 – Preliminary diets in solemn cases

234. Section 74 of the 1995 Act allows for decisions taken at first diets and preliminary hearings to be appealed to the High Court where the first instance court gives permission for the appeal. Section 88 of the Act amends section 74 of the 1995 Act by removing the requirement to obtain permission for an appeal by the prosecutor against a decision that has resulted in the dismissal of the indictment, or any part of it.

Section 89 – Extending certain time limits: summary

235. **Section 89** amends section 181 of the 1995 Act so as to make further provision concerning applications to extend certain time limits that apply in relation to appeals from summary proceedings.
236. Subsection (2) inserts provisions prescribing the test to be applied by the High Court when determining an application to extend the period within which a convicted person may apply for a stated case. Subsections (3) and (4) omit the provisions under which the respondent in relation to an application under section 181(1) of the 1995 Act may insist on a hearing. Subsection (5) inserts section 181(5) which requires the court to give reasons in writing for a decision to extend a period on an application under section 181(1).
237. By virtue of section 186(8) of the 1995 Act, the amendments effected by section 89 of the Act also have effect in relation to certain applications to extend the period allowed for the lodging of a note of appeal under section 186.

Section 90 – Extending certain time limits: solemn

238. **Section 90** makes provision concerning applications to the High Court under section 111(2) of the 1995 Act, applications to extend the period within which a convicted person may lodge intimation of intention to appeal, or a note of appeal.
239. Subsections (3) to (6) amend section 111. Subsection (3) inserts provisions prescribing the test to be applied by the High Court when determining an application under section 111(2) when it is received after the expiry of the period to which it relates. Subsection (4) amends section 111(2A) so as to extend to every application under section 111(2) the requirement on the applicant to state reasons for the failure to comply

with the applicable time limit and to state the proposed grounds of appeal. Subsection (6) inserts section 111(4) which provides that applications under section 111(2) are to be dealt with in chambers and, unless the court otherwise directs, without parties being present. Subsections (1) and (5) contain amendments that are consequential to this change. Subsection (6) also inserts section 111(5) which requires the court to give reasons in writing for a decision to extend a period.

Section 91 – Certain lateness not excusable

240. **Section 91** amends section 300A of the 1995 Act by inserting a new subsection (7A). Section 300A gives courts a general power to excuse failures to comply with procedural requirements. The amendment precludes a failure to timeously lodge certain documents from being excused under section 300A. The documents in question are those which the High Court can permit being lodged late by applying the tests that are to be amended by sections 89 and 90 of the Act (i.e. documents used to initiate appeals from, respectively, summary and solemn proceedings).

Section 92 – Advocation in solemn proceedings

241. **Section 92** inserts section 130A into the 1995 Act, which provides that it is not competent for a decision taken at a first diet or preliminary hearing to be appealed to the High Court by bill of advocation. The provision excludes bill of advocation as a competent method of appealing a decision that could be appealed under the procedure provided for in section 74 of the 1995 Act.

Section 93 – Advocation in summary proceedings

242. **Section 93** inserts section 191B into the 1995 Act. The new section applies to decisions disposing of certain objections and denials which require to be stated before a plea is tendered in summary proceedings, including objections to the competency or relevancy of a complaint. Such decisions can be appealed to the High Court under the procedure provided for in section 174 of the 1995 Act. The new section provides that such decisions cannot also be competently appealed by way of bill of advocation.

Section 94 – Finality of appeal proceedings

243. **Section 94** amends section 124(2) of the 1995 Act (as amended by section 36(11) of the Scotland Act 2012) by removing references to section 288ZB of the 1995 Act.

SCCRC

Section 96 – References by SCCRC

244. **Section 96** of the Act amends the 1995 Act to adjust how the High Court considers cases referred to it by the Scottish Criminal Cases Review Commission (“the SCCRC”) and to adjust the definition of the “interests of justice” test applied by the SCCRC in deciding whether to refer a case to the High Court.
245. **Section 96(4)** of the Act repeals section 194C(2) of the 1995 Act so that the SCCRC are no longer required to explicitly consider the need for finality and certainty in criminal proceedings as part of how they assess “interests of justice” when deciding whether to refer a case to the High Court.
246. **Section 96(5)** of the Act repeals section 194DA of the 1995 Act so that the High Court will no longer have the power to reject a SCCRC reference on the basis of applying an interests of justice test. Section 96(2) of the Act makes a consequential change to section 194B of the 1995 Act.

Part 6 - Miscellaneous

Chapter 1 – Publication of prosecutorial test

Section 97 – Publication of prosecutorial test

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

Chapter 2 - Support for Vulnerable Persons

Section 98– Meaning of appropriate adult support

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

Section 99 - Responsibility for ensuring availability of appropriate adults

253. **Section 99** provides that Scottish Ministers may by regulations confer on a person the function of ensuring that appropriate adult support is available to those who require it and how that support may or must be discharged by the person upon whom that function has been conferred.
254. **Section 99** will allow Scottish Ministers to specify that such a person be responsible for ensuring those services are available throughout Scotland, or if required, just in different parts of Scotland. This will allow flexibility, should it be required, where a different person may have responsibility in one area of Scotland if they are best placed to discharge that function.

Section 100 - Assessment of quality of appropriate adult support

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

services may or must be discharged by the person upon whom that function has been conferred.

Section 101 - Training for appropriate adults

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

Section 103 - Duty to ensure quality assessment takes place

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

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

263. **Section 104** expands the detail in relation to the regulation making powers under this Chapter, which may be exercised by the Scottish Ministers, in relation to appropriate adult services.
264. Subsection (1) provides that where a function is conferred upon a person it can be imposed on more than one person for the purposes of discharging that function.
265. Subsection (2) provides that the functions, or certain aspects of the functions, can be contracted out for the purposes of delivery of those functions (for example to third sector bodies) for the purposes of the delivery of those functions.
266. Subsection (3) provides regulation of the powers of Scottish Ministers in relation to any regulations made under this Chapter. It also provides that regulations under this Chapter may modify this, or any other, enactment and may make different provision for different purposes.

Section 105 - Procedure for making regulations under this Chapter

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

Section 106 - Other powers of Ministers unaffected

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

Chapter 3 - Notification if parent of under 18 imprisoned

Section 107 – Child’s named person to be notified

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

Chapter 4 – Statements and procedure

Statements by accused

Section 109 – Statements by accused

272. **Section 109** inserts new section 261ZA into the 1995 Act. New section 261ZA will modify the common-law rule on the admissibility of hearsay evidence in criminal proceedings, as it applies to certain types of statement made by an accused.
273. Section 261ZA(1) and (2) provides that evidence of a statement made by an accused in certain circumstances is not inadmissible as evidence of a fact contained in the statement on account of the evidence being hearsay. The provision applies to a statement made by the accused in the course of being questioned (whether as a suspect or not) by a constable or another official investigating an offence.
274. The provision modifies the law relating to hearsay. As explained by the High Court of Justiciary in *Morrison v HM Advocate* 1991 SLT 57, “The general rule is that hearsay, that is evidence of what another person has said, is inadmissible as evidence of the facts contained in the statement”. That general rule is subject to exceptions. The existing common-law exceptions (discussed in *McCutcheon v HM Advocate* 2002 SLT 27) allow for a statement made by the accused to be admitted as evidence of a fact contained in the statement if it is inculpatory of the accused (e.g. a confession) or “mixed” (e.g. a statement in which the accused puts himself or herself at the locus at the time the offence was committed, but does so in the context of proffering an innocent explanation for why the accused was there). The common-law does not, however, allow evidence

of a statement made by the accused to be admitted as evidence of a fact asserted in the statement if the statement is purely exculpatory of the accused.

275. Subject to subsection (3), section 261ZA extends the exceptions by dispensing with the distinctions between inculpatory, exculpatory and mixed statements. The effect is that any statement made by an accused person to a constable or another official investigating an offence is excepted from the general rule that hearsay evidence is not admissible as evidence of a fact contained in the statement, regardless of whether it is inculpatory, exculpatory or “mixed”.
276. By virtue of subsection (3), section 261ZA does not affect the admissibility of evidence of a statement made by an accused as evidence in relation to a co-accused. Section 261 of the 1995 Act lays down special rules which apply before hearsay evidence of a statement by one accused can be admitted in evidence in relation to another accused. Those rules will continue to apply before evidence of a statement made by accused A can be treated as evidence of fact in the case for or against accused B.
277. New section 261ZA is restricted in its effect to superseding objections to the admissibility of evidence based on its hearsay quality. The provision does not override any other objections to the admissibility of evidence of a statement, such as objections to its admissibility based on the fairness of the circumstances in which the statement was made, or based on the content of the statement (for example, section 274 of the 1995 Act, which concerns the admissibility of evidence relating to the sexual history or character of a complainer in a sexual offence case, will still apply).

Use of technology

Section 110 – Live television links

278. Subsection (1) of section 110 inserts sections 288H to 288K into the 1995 Act. The new sections (discussed in greater detail in the following paragraphs) make provision for the participation of detained persons in hearings by means of live television link from the place of detention.
279. Subsection (2) repeals enactments in consequence of the new sections of the 1995 Act inserted by subsection (1). Specifically, paragraph (a) repeals section 117(6) of the 1995 Act, which requires an appellant in an appeal from solemn proceedings to appear before the court in ordinary civilian clothes. Paragraph (b) repeals section 80 of the Criminal Justice (Scotland) Act 2003, which allowed certain court appearances to be conducted by means of live television link, and is rendered obsolete by the wider reaching new sections inserted by this section.

Inserted section 288H – Participation through live television link

280. Subsection (1) requires a detained person to participate in a “specified hearing” (defined by inserted section 288L) by means of live TV link where the court has determined that the hearing should proceed in that manner. Before so determining, subsection (2) requires the court to give the parties an opportunity to make representations on the use of the TV link in the hearing. The court can only allow the hearing to proceed by TV link if satisfied that it is not contrary to the interests of justice to do so.
281. Subsection (3) gives the court the power to require a detained person to appear by TV link from the place where the person is in custody for the sole purpose of considering whether to make a determination on the use of TV links in the specified hearing itself.
282. Where a detained person participates in a hearing by means of a TV link, the effect of subsection (4) is that the place of detention is deemed part of the court room, so that the hearing is deemed to take place in the presence of the detained person.

Inserted section 288I – Evidence and personal appearance

283. Subsection (1) precludes evidence as to a charge against the detained person on a complaint or indictment being led at a hearing in which the detained person is participating by means of a TV link. It would therefore not be possible for a trial in which evidence is being led to proceed with the accused participating by TV link.
284. Subsection (2) gives the court the power to revoke, before or during a hearing, a determination (under section 288H(1)) that the accused is to participate at the hearing by TV link and subsection (2)(b) requires that the court exercise the power to revoke the determination if it considers that it is in the interests of justice for the detained person to appear in person. The court might consider revocation of its previous determination if, for example, a technical issue arises with the link itself, or when further information comes to light during the substantive hearing which, in the view of the court, makes it no longer appropriate to proceed by way of TV link.
285. In the event that the court decides not to proceed with the appearance of the accused by TV link, or revokes an earlier determination to allow proceedings via TV link, practical difficulties might arise – the accused may well need to be brought to court, which might not be readily achievable on the same day, so postponement of the hearing could be necessary. Subsection (3) allows the court, in these circumstances, to postpone the hearing to a later day. The effect of a postponement under this section is detailed in inserted section 288IA.

Inserted section 288J– Effect of postponement

286. Subsection (1) provides that, where a case is postponed to the next day under section 288I, that day and any intervening weekend days or court holidays do not count towards any time limits – such as, for example, those for detaining a person in custody pending a first diet or preliminary hearing in the case. However, this provision does not apply where the accused is in police custody under section 21(2) of this Act, which requires an accused, if practicable, to be brought before a court before the end of the first day on which the court is sitting following the accused’s arrest; or as soon as practicable thereafter.
287. The effect of this is that when a postponement is regarded as necessary for an accused in police custody, the accused still has a right to submit that the section 21 requirements have not been complied with, even if the postponement had become unavoidable by the time it was granted. It would then be up to the court to decide if the circumstances provide sufficient justification for the delay. Nonetheless, a postponement in such a situation remains competent, as subsection (2) makes clear.

Inserted section 288K – Specified hearings

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

Inserted section 288L – Defined terms

289. This section defines certain terms used within sections 288H to 288K. The expression “detained person” is defined so that the person is imprisoned or lawfully detained at a location in Scotland. The concept of lawful detention is a broad one: it includes detention at a police station pending first appearance at court, detention in hospital by virtue of an assessment order or a treatment order imposed under the 1995 Act, detention

in hospital under the Mental Health (Care and Treatment) (Scotland) Act 2003, or a young person's detention in local authority secure accommodation.

Section 111 – Electronic proceedings

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

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

Section 112 – Authorisation of persons other than constables

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

Chapter 6 – Police Negotiating Board for Scotland

Section 113 – Establishment and functions

292. **Section 113(1)** inserts a new Chapter 8A into the Police and Fire Reform (Scotland) Act 2012 ("the 2012 Act") to provide for a Police Negotiating Board for Scotland ("PNBS").
293. New section 55A provides for the PNBS to be established, and introduces a new schedule 2A into the 2012 Act to make further provision about it. New schedule 2A is set out in schedule 3 to the Act.
294. New section 55B provides that the PNBS may make representations to the Scottish Ministers about pay, allowances and expenses, public holidays and leave, the issue, use and return of police clothing and equipment, and hours of duty, in relation to constables (other than special constables) and cadets. Such representations may be made about draft regulations or draft determinations on these issues, or generally. The Scottish Ministers may, after consultation with the chairperson, require the PNBS to make representations about these matters within a set time period which may be extended by the Scottish Ministers.
295. New section 55C provides that the PNBS may also make representations to the Scottish Ministers about other matters relating to the governance, administration and conditions of service of constables (other than special constables) and police cadets including draft regulations on such matters.
296. New section 55D creates a mechanism for the Scottish Ministers to be required to take all reasonable steps appearing to them to be necessary for giving effect to representations in certain circumstances. The circumstances are that the representations are made under new section 55B(1), and that they are in terms settled through arbitration in accordance with the PNBS constitution and that they concern a "qualifying case", to be specified by the Scottish Ministers in regulations made under new schedule 2A, paragraphs 4(6) and 4C.
297. New section 55E requires the PNBS to produce an annual report on how it has carried out its functions which is to be given to the Scottish Ministers and published. The reporting year for the annual report will be defined in the PNBS's constitution.

298. **Section 113(2)** amends section 54 of the 2012 Act to require the Scottish Ministers to consult the PNBS before making regulations about the matters mentioned in new section 55B(4).
299. **Section 113(3)** amends section 125 of the 2012 Act to provide that certain regulations made under new schedule 2A of the 2012 Act. will be scrutinised by the Scottish Parliament in accordance with affirmative procedure.

Section 114 – Consequential and transitional

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

Schedule 1 – Breach of Liberation Condition

Paragraph 1 – Offence of breaching condition

301. **Paragraph 1(1)** sets out the circumstances in which a person breaches a liberation condition and thereby commits an offence. A "liberation condition" includes investigative liberation conditions imposed before charge under section 16 (2) or requirements imposed by an undertaking given after charge under section 26(3).
302. **Paragraph 1(2)** provides that paragraph 1(1) does not apply when a person breaches a liberation condition by reason of committing an offence. Such breaches are dealt with in accordance with paragraph 3. An example of a breach of condition which may, of itself, not constitute a separate offence is a condition not to enter a particular street. If the person subject to the condition is subsequently found in that street, then a breach of liberation has occurred, but not a separate offence. If the condition was that the person was not to approach a particular witness in the case and the person does contact the witness then not only has a breach of condition occurred, but a more serious offence (attempting to defeat the ends of justice) may have taken place.
303. **Paragraph 1(3)** provides that a complaint may be amended to add an additional charge of an offence of breaching a liberation condition at any time before the trial of an accused for either the original offence (see paragraph 1(4)) or an offence arising from the same circumstances as that offence.

Paragraph 2 – Sentencing for the offence

304. **Paragraph 2(1)** sets out the penalties applicable to a person convicted of an offence of breaching a liberation condition under paragraph 1.
305. Sub-paragraphs 2(2) and (3) provide that such a penalty may be imposed in addition to any other penalty that may be imposed, even if the total exceeds the maximum penalty for the original offence. The penalties may run consecutively, subject to section 204A of the 1995 Act which concerns restriction on consecutive sentences for released prisoners. The provisions put beyond doubt that the penalty imposed for breach of the condition can be imposed on top of the penalty for original offence, even where the penalty imposed for the original offence represents the maximum penalty applicable in the circumstances.
306. Sub-paragraphs (5) and (6) provide that where a court finds a person guilty of breaching a liberation condition, or the person pleads guilty to that offence, the person may be

sent for sentence at any court which is considering the original offence (as defined in subsection (5)).

Paragraph 3 – Breach by committing offence

307. **Paragraph 3** applies where a person breaches a liberation condition by committing an offence and the fact that the offence was committed whilst the person was subject to a liberation condition is specified in the complaint or indictment. This is distinct from failing to comply with a condition and applies where the person is being prosecuted for the offence committed while on liberation conditions.
308. **Paragraph 3(2)** requires the court, in determining the penalty for the offence, which constituted the breach of condition, to have regard to the matters specified.
309. **Paragraphs 3(3) and (4)** enable the court to increase the maximum penalty otherwise specified for the offence. This provision effectively displaces the maximum penalty, allowing the court to add to the penalty to take account of the fact that a breach of conditions has occurred as a consequence of the commission of an offence.
310. **Paragraph 3(5)** requires the court to explain the reasons for the penalty imposed for the offence, whether it imposes an increased penalty or not.

Paragraph 4 – Matters for paragraph 3(2)(b)

311. Where a person breaches an investigative liberation condition by committing an offence, the court must have regard to the matters specified in paragraph 4 in determining the penalty.

Paragraph 5 – Matters for paragraph 3(2)(c)

312. Where a person breaches the terms of an undertaking, as defined in paragraph 7(c), (other than the requirement to appear to court), by committing an offence, the court must have regard to the matters specified in paragraph 5 in determining the penalty.

Paragraph 6 – Evidential presumptions

313. In proceedings relating to an offence under paragraph 1 (breach of liberation conditions), the evidential presumptions set out in paragraph 6 apply.

Schedule 2 – Modifications in Connection With Part 1

314. **Schedule 2** makes amendments to existing legislation as a consequence of specific elements of the Act. Part 1 makes provision for the repeal of various enactments conferring a power to arrest without warrant, which are affected by the new power of arrest for the police set out in section 1 of the Act. Part 2 makes provision for the repeal of enactments affected by the new arrangements for police custody and access to legal advice set out in Part 1 of the Act.

Schedule 3 – Police Negotiating Board for Scotland

315. **Schedule 3** inserts schedule 2A into the Police and Fire Reform (Scotland) Act 2012. Paragraph 1 establishes that the PNBS is not a Crown servant and has no Crown status, immunity or privilege. Paragraph 2 sets out the membership of the PNBS. It is to consist of a chair appointed by the Scottish Ministers, and other persons representing the Scottish Ministers, the Scottish Police Authority, the chief constable, constables (other than special constables) and police cadets. Paragraph 3 allows a temporary chairperson to be appointed if the chairperson is unavailable. Under paragraph 4, MPs, MSPs, MEPs, government Ministers and civil servants will be disqualified from being the chair or deputy chair of the PNBS to ensure that the chair and deputy chair are independent.

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

316. **Paragraph 5** provides that the Scottish Ministers are to prepare the constitution for the PNBS, after consulting the other persons to be represented on it. They must keep the constitution under review and may from time to time revise it. The constitution or any revision of it must be brought into effect by regulations. This paragraph also sets out what the constitution may include. It must regulate the procedure by which the PNBS reaches agreement on representations to the Scottish Ministers, and if the PNBS is in dispute about what representations are to be made to the Scottish Ministers under section 55B(1) the constitution may provide for the dispute to be submitted to arbitration either by agreement within the PNBS or on the authority of the chairperson where there is no such agreement. The constitution may limit how often within a reporting year and in what circumstances a dispute on representations may be submitted to arbitration. Paragraphs 6 and 7 provide for the application of the Arbitration (Scotland) Act 2010 (“the 2010 Act”) to PNBS arbitrations, including a power to disapply or modify the mandatory arbitration rules set out in the 2010 Act. Paragraph 8 enables regulations giving effect to the PNBS constitution to specify, for the purposes of section 55CA, “qualifying cases” where the Scottish Ministers will be required to take all reasonable steps appearing to them to be necessary to give effect to section 55B(1) representations in terms settled through arbitration in accordance with the PNBS constitution.
317. **Paragraph 9** provides that the Scottish Ministers may pay remuneration to the chairperson of the PNBS, and expenses to its members. They must also pay such expenses as are necessary to enable the PNBS to carry out its functions.