These notes relate to the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 (asp 6) which received Royal Assent on 22 February 2007

CRIMINAL PROCEEDINGS ETC. (REFORM) (SCOTLAND) ACT 2007

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by the Parliament.

2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

3. All references to "the 1995 Act" in these notes relate to the Criminal Procedure (Scotland) Act 1995 (c. 46) unless otherwise stated.

Part 1 - Bail

Section 1 – Determination of questions of bail

4. This section inserts into the 1995 Act three new sections setting out the legislative framework for bail decisions. At present, the substantive law on bail is still largely common law. Statute determines whether a crime is bailable, when bail may be applied for and the standard conditions on which bail may be granted but not the general right to bail or the reasons for refusal (the Lord Justice-Clerk Wheatley in *Smith v M 1982 JC 67*).

5. The provisions set out in statute the current common law by setting out a general entitlement to bail, the circumstances in which bail may be refused and a non-exhaustive list of the considerations that will be relevant to the court in its assessment of whether the circumstances in which bail may be refused are applicable in any particular case.

New Section 23B

6. New section 23B relates to the role of the court in determining questions of bail for an accused person at the pre-conviction stage.

7. Subsection (1) makes it clear that bail is to be granted except where certain grounds for refusing bail (set out in more detail in new section 23C and section 23D) apply and where the court having regard to the public interest considers there is good reason to refuse bail. This reflects the position in relation to detention of an accused person set out in Article 5 of the European Convention on Human Rights, the general principles of Scots common law and the case law of the European Court of Human Rights. For example, *McIntosh v McGlinchey 1921 JC 75* provides that bail must be granted unless "in the exercise of its discretionary right of refusal and looking to the public interest and securing the ends of justice, there is good reason why bail should not be granted". See

also *Young v HMA, 1988 SCCR 517* and *Smirnova v Russia application No 46133/99 and 48183/99 July 24th 2003.*

8. Subsection (2) makes it clear that in determining the question of bail, the court must consider whether the public interest could be secured by the imposition of bail conditions rather than detention. In applying the 'public interest' test the court will take into account the interests of justice, since it must be in the broader public interest that individual court decisions reflect the interests of justice.

9. Subsection (3) makes it clear that references to the public interest include reference to the interests of public safety.

10. Subsection (4) provides that the prosecutor and the accused have the right to make submissions to the court on the question of bail pre-conviction.

11. Subsection (5) makes clear that the decision on bail (and the imposition of bail conditions) is for the court and the court alone, and that the attitude of the prosecutor (who has a right to be heard and who can oppose bail) does not restrict the exercise of the court's discretion. This provision reverses the currently understood position in Scots law set out in *Spiers v Maxwell 1989 SLT (N) 282* and the more recent decision by the High Court of Justiciary in *M.A.R v Dyer, 4 November 2005* where the court concluded that if the prosecutor did not oppose bail it should be granted.

12. If the prosecutor does not oppose bail the court will have only limited information about the accused recorded on the petition or complaint, although they will be able to see from the terms of the complaint alleged bail aggravations and any bail breaches with which the accused is charged. Subsections (6) and (7) therefore place beyond doubt the right of the court to seek information relevant to the bail decision of the prosecutor or the accused's legal representative. Examples of relevant information might be the accused's previous convictions, which would show whether s/he has previously breached bail. Subsection (7) gives those parties the right to decide whether or not to offer any opinion on the risks attached to the bail decision. This is designed to give them discretion where they wish to express an opinion, but to ensure that they cannot be pressed into giving one where they do not wish to do so, risk being a matter for the court to determine.

New Section 23C

13. New section 23C sets out the grounds for refusal of bail. These reflect the grounds recognised under Scots common law and ECHR case law. In each case the grounds for refusal apply only where there is a 'substantial risk' of an adverse outcome; the ECHR case law makes clear that a risk must be identifiable and supported by evidence (for example, evidence relating to the previous conduct of the accused).

14. The grounds listed are that a person might, if granted bail;

- Abscond;
- Fail to appear at a future court hearing;
- Commit further offences;
- Interfere with witnesses or otherwise obstruct the course of justice.

15. Subsection (1)(d) gives the court the right to refuse bail on the grounds of 'any other substantial factor which appears to the court to justify keeping the person in custody.' This is designed to ensure that the court has sufficiently flexible discretion, but exercise of that discretion will be constrained (as it already is) by ECHR case law. Other factors recognised by ECHR case law, although they will rarely be applicable, include the preservation of public order and the protection of the accused. These factors might, for example, apply where individuals on serious terrorism charges appear before the court.

16. Subsection (2) gives an illustrative and non – exhaustive list of material considerations to which the court must, where they exist and are relevant, have regard when taking the bail decision. The considerations identified are;

- The nature and seriousness of the alleged offences;
- The probable disposal of the case if the individual were convicted (a strong likelihood of a serious custodial sentence, for example, would be relevant here);
- Whether the individual was on bail, or was subject to other court orders or sentences, when the offences with which they are charged were allegedly committed;
- The individual's character and antecedents, including the nature of any previous convictions (including convictions from outside Scotland) and of any previous breaches of court orders or the terms of any release on licence or parole; and
- The individual's associations and community ties (for example whether there is a secure potential bail address and family support for the accused).

17. These reflect the considerations already taken into account under Scots common law. The subsection makes it clear that the court can also take any other material considerations which it identifies into account.

New Section 23D

18. Section 23D sets out particular serious types of cases in relation to which bail is to be granted only in exceptional circumstances. A similar exceptional circumstances test operates in England and Wales under section 25 of the Criminal Justice and Public Order Act 1994. Section 23D reflects the fact that under article 5(3) of the ECHR, detention would usually be justified when someone with a previous conviction for a grave offence is charged with a second such crime on the basis that this demonstrates a need to prevent further offences whilst on bail. It would therefore only be exceptionally that detention was not justified under the Convention. Subsections (2) and (3) apply:

- Where an individual is on a serious charge (to be heard before a jury) of a violent or sexual offence and has a previous serious conviction for a violent or sexual offence; and
- Where an individual is on a serious charge of drug trafficking and has a previous serious conviction for drug trafficking.

19. The section also defines the terms 'drug trafficking offence' 'sexual offence' and 'violent offence'. The definition of drug trafficking covers a wide range of drug related offences, including production and supply of controlled drugs, and any involvement in or offer to supply and possession with intent to supply such drugs. Sexual offence is defined by reference to section 210A(10) and (11) of the 1995 Act which does not include prostitution.

20. The court is also entitled to take into account convictions for similar serious offences in England, Wales, Northern Ireland and any other state of the European Union. The court is specifically given discretion to determine whether a conviction in another jurisdiction is equivalent to a conviction on indictment in Scotland for one of the offence types listed.

21. Subsection (7) makes it clear that this section is without prejudice to the wider factors and considerations to be taken into account in relation to every bail decision which are set out in new Section 23C.

Section 2 – Bail and bail conditions

22. This section makes a series of changes to sections 24 and 25 of the 1995 Act.

23. Subsection (1)(a) inserts new subsections into section 24 of the 1995 Act. Section 24(2A) provides that where the court grants or refuses bail, it must state its reasons for that decision. This will apply to any bail decision in the 1995 Act. At present there is no formal requirement for judges to give reasons. Strasbourg case law makes clear that when a court considers it appropriate to detain a person it must set out the reasons for their decision – see *Vehbi Selcuk v Turkey 2006, application No 00021768/02*

24. Section 24(2B) of the 1995 Act provides that when a court, in solemn or summary proceedings, grants bail to a person accused of a sexual offence, without imposing any further ("special") conditions, it must explain why it did not consider such conditions necessary. Examples of further conditions might involve a requirement not to contact named persons or enter a particular house, street, or area; or to attend a named police office at defined intervals (perhaps weekly). This is a non-exhaustive list.

25. Subsection (1)(b) amends section 24(4)(b)(ii) so that the court can attach additional conditions to a bail order to facilitate an identification parade or other identification procedure.

26. Subsection (1)(c) adds an additional standard bail condition to the list at section 24(5) that requires the accused not to cause alarm or distress to witnesses. At present, the only standard condition relating to witnesses requires the accused not to "interfere with witnesses". This condition will not always deal adequately with the sort of behaviour that can be of concern as it may require the accused to threaten or intimidate the witness in some way specifically intended to deter them from giving evidence rather than general abuse *per se*. This provision therefore makes clear for the avoidance of doubt that in relation to witnesses, all behaviour which causes or is likely to cause alarm or distress is prohibited.

27. Subsection (2) amends section 25 of the 1995 Act. Subsection (2)(a) creates new subsection (A1), which provides that when bail is granted to an accused who is present in court, the implications of the conditions of bail and the consequences of their breach, should be explained by the court to the accused. New subsections (B1) and (C1) further provide that in all cases the bail conditions and consequences of bail breach should be given to the accused in written form, whether as part of the bail order or in another document.

28. The court must also explain the need to seek the court's consent in certain circumstances to a change in the 'domicile of citation'. This will be the address contained in the bail order and is the address at which formal communications relating to the case will be sent to the accused. This need not be the address at which s/he normally resides – it may, for example, be care of his or her solicitor. Under the law as it stands the accused may ask the court to alter his or her domicile of citation, but is under no obligation to do so if s/he moves house.

29. However, subsection (2)(c) inserts into section 25 of the 1995 Act two new subsections providing that where the domicile of citation is the accused's normal place of residence, and the accused moves house, the accused must within 7 days apply to the court for consent to alter the domicile of citation accordingly. Failure so to do is an offence, and penalties for that offence are prescribed.

Section 3 – Breach of bail conditions

30. This section amends sections 27 and 28 of the 1995 Act which set out the powers and penalties at the disposal of the court when bail is breached.

31. Subsection (1)(a) increases the custodial penalty available in the sheriff summary court for failure to appear at a hearing or breaching a condition of bail from 3 to 12 months.

32. Subsection (1)(b) inserts a new subsection (4B) to bring the offence under section 27(1)(a) of the 1995 Act of failure to appear in line with the provision which already exist in

relation to offences on bail under section 27(3). Where the defence does not challenge the prosecution assertion that the individual;

- was on bail;
- was subject to particular bail conditions;
- failed to appear at a diet; or
- was given due notice of a diet

that assertion shall be held to be admitted, and the prosecution is not separately required to prove the assertion.

33. Subsection (1)(c) relates to the situation in which an offence has been committed while on bail, and the court is therefore required under section 27 to have regard to that fact when sentencing after conviction. In such cases, section 27 allows the court to impose an aggravated sentence reflecting the breach of trust involved, and section 27(5) makes clear that such a sentence can exceed the maximum penalty for the offence committed currently available.

34. At present the judge who imposes an aggravated sentence under this section must explain the nature and extent of the difference from the sentence which the accused would have received had s/he not been on bail. But where the judge decides not to add any element to the sentence reflecting the bail breach, there is no obligation to explain why. Subsection (1)(c) creates such an obligation, providing that where the judge decides not to increase the sentence to reflect the bail breach, an explanation must be given.

35. Subsection (1)(d) increases the maximum custodial penalty for offences of failure to appear/breach of bail in solemn cases from 2 to 5 years. Subsection 1(e) amends section 27(9). At present, section 27(9) allows the court to impose a penalty for the section 27(2) offence of failure to appear or to comply with a bail condition in addition to the penalty for the original offence and regardless of whether the total of the two penalties would exceed the maximum penalty that the court is competent to impose for the original offence. The amendment alters this discretion by requiring the court in all cases to impose a section 27(2) penalty in addition to any penalty for the original offence. Subsection (1)(f) makes further provision by inserting a new section 27(9A) which makes it clear that the reference to a section 27(2) penalty being imposed "in addition" to the penalty for the original offence means that the court is required to impose consecutive sentences where the penalties are imprisonment or detention. This will apply whether or not the sentences relate to the same complaint or indictment and whether or not they are imposed at different times. New section 27(9B) makes it clear that this obligation is subject to the usual restriction in section 204A of the 1995 Act where a court is prevented from imposing a sentence that is consecutive to any sentence from which the person has already been released.

36. Subsection (2) amends section 28 of the 1995 Act. At present, section 28 gives a constable power to arrest without warrant an accused who has been released on bail where the constable has reasonable grounds for suspecting that the accused has broken, is breaking, or is likely to break any condition imposed. The accused is brought before a court and after hearing parties, the court may recall the bail order, release the accused or vary the bail order.

37. However, where there has been a bail breach, an accused will not necessarily be arrested under section 28. It would be possible for the accused to be arrested without warrant for the section 27(1) offence of breaching bail (the police have powers to arrest without warrant for statutory offences punishable by imprisonment). Alternatively, the accused may have been arrested for committing a separate substantive offence (whether common law or statutory). It may be discovered later that the circumstances of the offence show that the accused also breached a bail condition. Alternatively a police

officer may arrest a person known to have an outstanding warrant. It may subsequently be discovered that the place the person was seen is one which that person is prohibited from entering in terms of a bail order. In all these cases proceedings under section 28 are barred because the arrest was for something else.

38. Subsection (2) is therefore directed at widening out the existing section 28 powers to ensure that a person can be detained and brought before a court under section 28 for breaching bail even although the person was arrested for a breach of bail under section 27 or was arrested in relation to a separate substantive offence and it turns out that the circumstances of that offence show that the person was breaching bail. The amendment ensures that whenever the police arrest someone in these circumstances they may detain them in custody and make use of the provisions set out in section 28(2) – (6) of the 1995 Act to bring that individual to court for the court to consider recalling or altering the bail order.

Section 4 – Bail review and appeal

39. This section makes a number of amendments to sections 30 and 32 of the 1995 Act which relate to the processes by which bail decisions may be reviewed or appealed.

40. Subsection (1) amends section 30 of the 1995 Act. Subsection (1)(a) inserts a new subsection (1A) into section 30 of the 1995 Act, placing beyond doubt the right of an accused who has accepted their bail conditions to seek a review. Subsection (1)(b) clarifies the evidence which will be required when an individual seeks a review of the decision to refuse bail, or of the bail conditions imposed. At present the individual does not have to put any new information before the court; in future, the court which reviews the original decision will only be able to grant bail, or alter an existing bail order, where there is a material change in the person's circumstances or the person puts before the court material information which was not available to the court which made the original order.

41. Subsection (2) makes a series of alterations to section 32 of the 1995 Act which, as read with section 24(7) deals with appeals against bail decisions and the conditions imposed. At present there is no requirement on the judge who made the original decision on bail to provide the appeal court with a reasoned account of why that decision was made. These changes alter that position.

42. New subsection (3A) provides that the notice of appeal should be lodged with the clerk of the court from which the appeal is to be taken. The clerk of that court is, in turn, obliged by subsection (3B) to send a copy to the judge who took the original decision, with a request for a report of the judge's reasons. The clerk must also send the notice of appeal to the Clerk of Justiciary. The Clerk of Justiciary must, on receipt of the notice of appeal, in terms of subsection (3F), fix a diet for the bail appeal hearing without delay.

43. Meantime, subsections (3C), (3E) and (3G) require the judge whose decision is being appealed to provide the clerk of court with a report of the reasons for the decision. That report must be sent by the clerk to the Clerk of Justiciary, and in turn the Clerk of Justiciary must send a copy of the report to the accused or his solicitor, and to the Crown Agent.

44. Subsection (3H) covers what happens if the judge's report is not produced in time for the hearing – bail appeals are heard within days and there may be circumstances (for example, judicial illness) where the report is not available. To avoid undue inflexibility these provisions therefore give the High Court sitting as a bail appeal court power to hear the appeal without the judge's report if that report is not available, as well as power to insist that it be produced within a given time. These amendments are based on similar requirements that are imposed in relation to appeals in general in section 113 of the 1995 Act. In line with the practice for general appeals, subsection (3I) provides that the judge's report is to be available only to the High Court and the parties to the case but with scope for an Act of Adjournal to prescribe other persons who may get access.

Section 5: Attitude of prosecutor after conviction

45. Section 5 introduces new section 32A into the 1995 Act.

46. Subsection (1) of new section 32A confirms that following conviction where a question of bail is being considered by the court (including consideration of bail conditions), the prosecutor and the convicted person have a right to make submissions on the question of bail post-conviction. The traditional position has been that the Crown will not make submissions at this stage.

47. Notwithstanding this right, subsection (2) confirms that the court's discretion in relation to determining the question of bail is not restricted in any way by the attitude of the prosecutor. This is in keeping with other similar provisions in the Act.

48. Subsection (3) refers to section 245J of the 1995 Act. Section 245J details how the court decides questions of bail where a probationer or offender appears before it in respect of an apparent failure to comply with a requirement of a court disposal such as a probation order or a drug treatment and testing order. These orders will all by their nature be made after a plea of guilty or a finding of guilt. Currently under section 245J the prosecutor has the right to be heard in relation to any appeal of the court's decision on bail but not its initial determination. This amendment both clarifies that the Crown does not have a right to be heard in connection with initial bail applications under section 245J, and removes the requirement for the Crown to be heard in relation to any bail appeal arising out of that section.

Section 6 – Time for dealing with applications

49. Subsection (1) amends section 22A of the 1995 Act to provide that when an accused first appears in court from custody, a decision must be taken on his admittance to or refusal of bail by the end of the following day. At present that decision must be taken within 24 hours, which has to be interpreted literally. This means that a case which called at 14.20 on Wednesday and was continued overnight would have to be dealt with by 14.20 on the Thursday even if there were priority cases to be called that day. The change gives a little more flexibility while still ensuring that the court can only keep someone in custody for one night before taking a substantive decision on whether to grant or refuse bail.

50. Similar changes are made by subsections (2) and (3) in respect of the procedure where an accused seeks bail at any hearing other than the first one in the case (section 23 of the 1995 Act) and where bail is sought pending the hearing of a stated case (section 177 of the 1995 Act).

51. And, in respect of all three procedures, the Act is amended to clarify that for these purposes Saturdays, Sundays and court holidays are not to be regarded as the following day, unless the court is sitting on one of those days.

52. Subsections (4), (5) and (6) bring the process for appealing against the refusal of bail (under sections 200(9), 201(4) or 245J) into line with the other instances of this nature in the 1995 Act. Section 200(9) covers remand for inquiry into the physical or mental condition of the accused; section 201(4) covers adjournment before sentence; and section 245J covers breach of certain court orders (such as probation and community service orders). These amendments provide that an appeal in relation to bail must be lodged with the clerk of the court from which the appeal is taken. Provision is made that the clerk of court must in turn send the note of appeal to the Clerk of Justiciary.

Part 2 - Proceedings

Police functions

Section 7: Liberation on undertaking

53. Section 22 of the 1995 Act makes provision for suspected offenders to be released from custody on the undertaking that they will appear in court on a specified day. The use of undertakings is currently limited to cases in which the suspected offender has been arrested and is consequently held at a police station. It is only open to an officer in charge of the police station to liberate the arrested person on such an undertaking. Section 22 only applies to offences which can be tried summarily.

54. Section 7(2)(a) removes the need for a suspected offender to be arrested before being released on an undertaking. Provision is now made to allow the officer who charged the person to release that person on undertaking; the need for this to be done by an officer in charge of a police station is removed. Similar provisions is made for persons who have been arrested under section 21 (Schedule 1 offences: power of constable to take offender into custody) and section 135 (Warrants of apprehension and search) of the 1995 Act.

55. Section 7(2)(b) inserts a number of provisions into section 22 of the 1995 Act. Section 22(1A) will now allow for the arresting officer to liberate a person on an undertaking. The officer in charge of the police station retains the power to liberate a person on undertaking. Section 22(1B) permits liberation on undertaking of an accused who has been apprehended under a summary warrant. This can be done by the apprehending officer, or the officer in charge of a police station. The section provides that the person undertakes to appear at a specified court on a specified date and time and under specified conditions.

56. Section 22(1D) allows additional conditions to be imposed upon the person who signs the undertaking. These are both conditions in similar terms as a standard bail order, and further conditions considered to be necessary to secure compliance with those conditions. The latter, however, must be authorised by a police officer of the rank of inspector or above, in terms of new section 22(1E).

57. Section 22(1F) of the 1995 Act provides that the procurator fiscal is not bound by the terms of the undertaking and may rescind the undertaking, or vary the date, time and court to which the person is to attend. The procurator fiscal may also revoke or relax any of the conditions which have been imposed in relation to the undertaking.

58. Section 22(1G) of the 1995 Act sets out the lifespan of conditions attached to an undertaking. If not rescinded, they expire at the end of the day on which the accused's case is due to call in court; alternatively, if a warrant is granted, they expire at the end of the day on which the accused appears in court in answer to the warrant. It follows that in every circumstance other than where a warrant is granted the conditions fall at the end of the day on which the undertaking is due to call. The court can, of course, consider anew the imposition of bail conditions if the accused appears in answer to an undertaking.

59. The maximum penalty for a breach of the undertaking when prosecuted in the sheriff court is increased from 3 months imprisonment to 12 months imprisonment by amending section 22(2)(b)(ii) of the 1995 Act. New subsection (4A), as inserted, provides that, unless challenged by a preliminary objection, an accused who breaches an undertaking by failing to appear or by contravening a particular condition will be held to have admitted the failure to appear or breach of condition

60. Section 7(3) makes a minor amendment to section 135 of the 1995 Act. This amendment makes it clear that the accused who is apprehended on a warrant, and released on

undertaking, does not require to be brought before a court in the course of the first day after apprehension.

Summary procedure

Section 8: Manner of citation

61. This section amends section 141 of the 1995 Act which relates to the citation of accused persons and witnesses in summary proceedings. The section will, in future, provide for citation in person to be carried out by persons other than an officer of law; for citation by ordinary post and for citation by electronic means.

62. Paragraph (a) substitutes a new section 141(1) of the 1995 Act, which provides that personal service may be effected on an accused or a witness by an officer of law or other person.

63. Paragraph (b) provides for citation of the accused by ordinary post.

64. Paragraph (c) inserts a new subsection (3A) into section 141, and provides that citation of witnesses and accused shall be effective if sent by the prosecutor by electronic means to either the home or business email address of the witness or the accused.

65. Paragraph (d) amends subsection (5) of section 141 to allow production of an electronic communication which purports to be made by or on behalf of the accused to be admissible as proof of citation for the purposes of section 141(4). This applies where it can be inferred from the contents of the communication that the accused has read the citation.

66. Paragraph (e) inserts a new subsection (5ZA) into section 141. It provides that where an electronic communication bears to come from the accused's email address and it can be inferred that the electronic citation referred to in subsection (3A) has come to the accused's knowledge, that shall be admissible as evidence that s/he received the citation.

67. Paragraph (f) provides for electronic citation of witnesses by the solicitor acting for the accused.

68. Paragraph (g) inserts a new subsection (5B) and provides that where a witness who has been cited by electronic means fails to attend, a warrant for the apprehension of the witness will not be granted unless the court is satisfied that the witness received the citation or that the contents were brought to the witness's attention. This is in line with the provisions for accused persons in terms of section 141(4) of the 1995 Act as amended by section 14(1) of this Act.

69. Paragraph (h) provides that any period of notice of any citation effected by electronic means shall be calculated from the end of the day on which the citation was sent.

70. Paragraph (i) inserts new subsections (7A) & (7B) into section 141 of the 1995 Act. Those subsections provide for proof of service by electronic means and set out a definition of electronic citation.

Section 9: Procedure at first calling

71. This section gives prosecutors and courts additional flexibility in the conduct of hearings which are calling in court following the accused being cited to appear (sometimes referred to as "diet courts").

72. Section 9 amends section 144 of the 1995 Act and introduces new procedures in relation to the first calling of summary complaints. The clerk of court and prosecutor are given additional powers to allow the first calling to be dealt with, in certain circumstances, without the involvement of a judge.

73. Subsection (1)(b) inserts new subsections (3ZA) & (3ZB) into section 144 of the 1995 Act. It provides that, where written intimation is received from an accused and the prosecutor is not satisfied that the intimation was made or authorised by the accused (or that the terms of the plea are not clear) the case may be continued to another date. The clerk of court may authorise that continuation without the need for the sheriff, magistrate or justice to sit in court. Where the plea tendered is one of not guilty the clerk of court may fix a date for trial and, where appropriate, a date for an intermediate diet. Again, the clerk may exercise this function of the court without the need for the sheriff, magistrate or justice to sit in court.

74. Subsection (2) amends section 145A of the Act to allow the clerk of court to adjourn the case in the circumstances set out in section 145A(2) of the Act. The clerk may exercise this power without the need for the sheriff, magistrate or justice to sit in court.

Section 10: Intimation of diets etc.

75. This section introduces a safeguard in relation to the accused's right to fair trial by making provision that will mean that the accused is informed of the consequences of non-attendance. This section is introduced as a consequence of the provisions found in section 14 of the Act which deal with proceedings in absence.

76. The section amends section 146 of the 1995 Act by inserting two new subsections (3ZA) and (3ZB). These subsections provide that when adjourning a case for trial the court shall intimate the diet of trial, and any intermediate diet, to the accused and inform the accused that should s/he fail to appear at any diet in the proceedings the court may hear and dispose of the case in his/her absence.

Section 11: Pre-trial time limits

77. This section amends section 147 of the 1995 Act. Section 147 now provides that the sheriff may on cause shown extend the period of 40 days in which the accused must be brought to trial where s/he is detained in custody. New subsections (2A) and (2B) provide that parties must be given an opportunity to be heard on any motion to extend the time limit but, where parties are agreed as to the extension, it provides that the sheriff may dispose of the application without hearing the parties.

Section 12: Disclosure of convictions

78. This section amends the 1995 Act in relation to the disclosure of previous convictions in summary proceedings by inserting two new sections into that Act.

New section 166A

79. Section 166A as inserted into the 1995 Act provides that the court may take account of any convictions acquired by the accused between the date of the offence before the court and the date of conviction. The prosecutor is required to provide a notice of such convictions to the court. Either the accused must admit these convictions or they must be proved by the prosecutor. Presently only convictions acquired by an accused prior to the date of the offence on the complaint can be taken into account by the court.

New Section 166B

80. Subsection (1) of section 166B borrows from and extends the existing provisions of section 166 of the 1995 Act. It provides that a complaint may contain, and evidence may be led in respect of charges, notwithstanding that the charges, or evidence, may disclose the fact that the accused has previous convictions. The prosecutor presently in proceedings is restricted as to how s/he may make it known to the court that the accused has been previously convicted. The prosecutor may only lead evidence of previous convictions where that fact is evidence of the charge before the court or ask questions

of the accused as a witness to show that s/he has been previously convicted where s/he has given evidence that s/he is of good character.

81. Subsection (2) provides details of when previous convictions may be disclosed on complaints (where the offences relate to the same occasion, are of a similar character or form part of a course of conduct). This is a fundamental change in procedure. Presently where an accused is charged with a series of offences and one or more of these offences is due to the fact that the accused has a previous conviction it is necessary to separate those charges which disclose the conviction from the other related charges. The most common scenario is where an accused is charged with a motoring offence and it is discovered that the accused has been previously convicted and disqualified from driving. The charge of driving whilst disqualified presently requires to be included in a separate complaint from the other charges (for instance careless or drunk driving) and where the accused pleads not guilty to the charges two separate trials are required. This provision will allow all the charges to be included in one complaint and evidence in respect of all the charges to be led at one trial.

Section 13: Complaints triable together

82. This section inserts a new section 152A into the 1995 Act and provides that where the accused is appearing for trial on two or more complaints on the same day the prosecutor may apply to the court to have all the charges tried together, notwithstanding that they are on separate complaints. The court, if it considers it expedient to do so, is to try the charges together. However, for further proceedings including sentence the complaints are to be treated separately. This provision will allow a court where there is more than one complaint against an accused for trial on the same day to conjoin the complaints to allow evidence in respect of all the charges to be led and the verdict returned in the one trial. Presently a separate trial in respect of each complaint is required with a separate verdict on each complaint being returned.

Section 14: Proceedings in absence of accused

83. This section amends sections 141, 145A and 150 of the 1995 Act, and inserts a new section 150A into that Act. The purpose is to extend the present provisions for proceedings at diets where the accused fails to appear. The section expands on the current provisions dealing with trials in absence found in section 150(5) of the 1995 Act. The amendments are minor and are consequential to the substantive change in relation to proceedings in absence against the accused.

84. Subsections (1) & (2) are consequential amendments upon subsection (3).

85. Subsection (3)(a) inserts a new subsection (3C) into section 150. It deals with the situation at an intermediate diet where the accused fails to appear and the court grants a warrant to apprehend the accused. In those circumstances the effect of section 150(3A) has the effect of discharging the trial diet *unless* the court grants an order to differing effect under section 150(3B). Section 150(3C) is added to confirm that an order under section 150(3B) (i.e. an order *not* to discharge the trial diet where the accused has failed to appear and a warrant to apprehend the accused has been granted) may be made for the purpose of having a trial in absence or for any other purpose. An order under section 150(3C) can be made on the application of the prosecutor or of the court's own accord.

86. Subsections (5) to (7) of section 150, which outline the circumstances in which proceedings can currently take place in the absence of an accused in summary cases, are repealed and replaced by section 150A.

Subsection (4) - new section 150A of the 1995 Act

87. Subsections (1) to (3) of the new section 150A allow for a court to hear any diet, except a diet of first calling, in the absence of the accused. In most instances this will be on

the motion of the prosecutor; however, where the accused is absent from a diet set for sentencing, for example, where the case has been adjourned for a social enquiry report following conviction of the accused, the court may proceed to pass sentence of its own accord. Two requirements are imposed by new section 150A. These are: firstly, the court must be satisfied that the accused was duly cited to the hearing or that s/he received intimation of the hearing; and, secondly, that it is in the interests of justice to proceed in the accused's absence. This includes leading evidence and returning a verdict.

88. Subsections (4) to (7) of new section 150A provide that the court may allow any solicitor acting for the accused to continue to act if the court is satisfied that the solicitor has authority to act. The court may appoint a solicitor to act on behalf of the accused if it considers it to be in the interests of justice to do so. Subsection (8) of new section 150A provides for exceptions to these provisions. Subsection (10) of the new section 150A provides that the court may not impose a custodial sentence in the absence of the accused. Nor will the court be able to impose a sentence on the accused which requires the accused's consent (e.g. probation and community service orders).

Section 15: Failure of accused to appear

89. This section changes the penalties available in cases where the accused fails to attend court and how that failure is proved.

90. Paragraph (a) amends section 150(8) of the 1995 Act, and increases the penalty for failure to appear at a summary diet, to which an accused person has been given due notice, from 3 months to 12 months. This increase applies only to failure to appear in the sheriff court. There is no change to the penalties available to the district court.

91. Paragraph (b) amends section 150(9) of the 1995 Act and has the effect of compelling the court to impose a penalty for failure to appear. It provides that any penalty for failure to appear shall be in addition to any other penalty imposed at that time even if the total of the two penalties exceeds the maximum sentence for that offence.

92. Paragraph (c) inserts new subsections (9A) to (9C) into section 150. New subsection (9A) provides that any custodial sentence for failure to appear must, if imposed at the same time as another sentence, be served consecutive to the other sentence and, where imposed at a different time, take effect consecutively to the sentence imposed for the original offence. New subsection (9C) provides that, in relation to a charge of failing to appear, unless this is challenged by a preliminary objection, the fact that the accused failed to appear after having been given due notice will be held as admitted.

Section 16: Obstructive witnesses

93. This section introduces new provisions for dealing with obstructive witnesses. The purpose is to bring the procedures in summary procedure into line with those in solemn procedure by substituting a new section 156 and inserting four new sections, 156A to 156D, into the 1995 Act. Previous requirements for a witness to pay sums of money as security for his or her appearance are repealed.

94. New subsections (1) & (2) of section 156 as substituted provide that where a witness has been cited to appear at a diet and deliberately and obstructively fails to do so, the court, on the motion of any of the parties, may grant a warrant to apprehend the witness. Subsection (3) provides that where the court is satisfied by evidence on oath that a witness will not attend unless compelled to do so the court may grant a warrant for the apprehension of that witness.

95. Subsection (4) of new section 156 provides that where a witness fails to attend after being duly cited the fact that s/he failed to appear will be presumed to be deliberate and obstructive unless there is evidence to the contrary.

96. Subsection (5) provides that any application for the apprehension of a witness may be made orally or in writing and may be disposed of in open court or in chambers.

97. Subsection (7) provides that officers of law may apprehend the witness and bring him to court and outlines the powers available to them in executing the warrant.

98. Subsection (8) provides that this procedure is the only competent way of applying for a warrant for the apprehension of a witness in summary proceedings.

99. Subsection (9) refers to section 135(3) of the 1995 Act which, as discussed above in relation to section 6 of this Act, makes provision for persons arrested on warrant to be brought to court.

New section 156A

100. Section 156A as inserted provides for orders which the court may make in relation to any witness apprehended under a warrant granted under section 156.

101. Subsection (1) provides that where a witness has been apprehended and brought before a court the court may detain the witness in custody until the conclusion of the diet at which the witness is to give evidence, release the witness on bail, or liberate the witness.

102. Subsection (2) provides that an order detaining the witness or an order placing the witness on bail may only be made if the court is satisfied that such a course of action is necessary to secure the attendance of the witness and that it is appropriate to do so. Subsection (3) provides that the court shall state the reasons for making an order under section 156A(1).

103. Subsection (4) provides that, notwithstanding these powers, the court may deal with the witness for any contempt of court which the court considers to have been committed and dispose of the case accordingly.

104. Subsection (5) provides that where the witness has been ordered to be detained in custody the court, if it decides to excuse the witness from the diet at which s/he was to give evidence, may recall the order and liberate the witness.

105. Subsections (6) & (7) provide that the court, when granting the witness bail, may impose such conditions, other than a requirement to deposit a sum of money, as the court considers necessary to secure the attendance of the witness.

106. Subsection (8) applies with modifications to section 25 (Bail conditions: supplementary) of the 1995 Act to orders made under section 156A(1)(b) (i.e. where the court releases an apprehended witness on bail). Section 25, amongst other things, provides that the requirement of an accused to give details of his address at which s/he may be cited to attend court when liberated on bail. This requirement will apply to a witness liberated under these provisions.

New section 156B

107. Section 156B as inserted makes provision for dealing with witnesses who are liberated on bail and who breach that bail. The penalties for a witness who breaches conditions of bail are similar to those for an accused who breaches bail.

108. Subsections (1) & (2) provide that if a witness who has been released on bail fails to attend at court or breaches any other condition of bail the witness is guilty of an offence. The penalties differ depending on whether the bail order was issued by the justice of the peace court (JP court) or the sheriff court, and are the same as for a standard breach of bail.

109. Subsection (3) provides that, in proceedings for breach of bail, the fact that the witness was on bail, or was subject to a particular condition of bail, or that s/he failed to appear

at a diet to which s/he had been cited, shall be held to be admitted unless challenged by a preliminary objection.

110. Subsection (4) provides that the provisions of section 28 (Breach of bail conditions: arrest of offender, etc) of the 1995 Act which relate to the breaching of bail by an accused shall apply with modifications to a witness who is in breach of bail under these provisions.

New section 156C

111. Section 156C as inserted provides for the review of orders detaining the witness in custody or releasing the witness on bail.

112. Subsection (1) provides that where the court has made an order to detain the witness in custody it may, on the application of the witness and on cause shown, recall that order and release the witness on bail or liberate the witness. Parties to the case and the witness will be given an opportunity to be heard on the application.

113. Subsection (2) provides that where the witness has been liberated on bail the witness, or the party who made the application to apprehend the witness, may apply to the court to review the conditions imposed when making the bail order and to make a new bail order. The court has power to make a new order to liberate the witness on bail and impose different conditions. Subsection (3) provides that court may only review a bail order if the circumstances of the witness have changed or if material information is presented to the court which was not available at the time that the original order was granted.

114. Subsection (4) provides for time limits in which applications for a review may be made.

115. Subsection (5) outlines the procedure the court must follow upon the receipt of any application for a review.

116. Subsection (6) preserves rights of appeal against decisions taken under section 156A(1).

New section 156D

117. Section 156D as inserted provides for appeals against any of the orders granted by the court in relation to a witness apprehended on a warrant.

118. Subsections (1) & (2) provide that the witness, the accused or the prosecutor may appeal to the High Court against any order detaining the witness in custody or liberating the witness or (where the witness has been granted bail) against that bail order, any of the conditions specified in the order or both.

119. Subsections (3) & (4) provide for the intimation and hearing of the appeal.

120. Subsection (5) applies the provision relating to the remand or committal of an accused person under the age of 21 years to a witness under that age.

Section 17: Prosecution of companies etc.

121. This section makes provision in respect of the prosecution of companies. It amends section 143 of the 1995 Act.

122. Section 143 as amended provides that bodies corporate may be represented by a representative. It defines a representative and how that representative proves to the court that s/he has authority to represent the body corporate.

123. The section further provides that if the body corporate fails to appear or be represented at a diet to which it has been cited or had due intimation of the court may proceed to hear and dispose of the case. In proceeding in the absence of a representative the court must satisfy itself that citation or intimation have been effected on the body corporate and that it would be in the interests of justice to proceed. The provisions relating to

proceedings in the absence of a company representative are comparable to those made in section 150A of the 1995 Act (inserted by section 14 of this Act) which deals with proceedings in the absence of an individual accused.

Preparation for summary trial

Section 18: Intermediate diets

124. This section amends section 148 of the 1995 Act which relates to intermediate diets, the purpose of which is to allow the court to ascertain if the parties to a case are adequately prepared to proceed to trial on the date assigned.

125. Paragraph (a) inserts a new paragraph (ba) into subsection (1) of section 148. This provides that the court at the intermediate diet should ascertain from parties the number of witnesses that are required to attend the trial. This is intended to ensure that the parties to a case have given proper consideration to which witnesses they wish to call at the trial before the intermediate diet. This should, in turn, reduce the number of witnesses who are called to the trial and are subsequently not required to give evidence.

126. Paragraph (b) amends subsection (2)(a) of section 148. The present position is that discharge of the trial diet is mandatory where, at the intermediate diet, the court considers that it is unlikely that the trial will proceed on the appointed day. The amendment to subsection 2(a) changes that position by making the discharge in these circumstances discretionary.

127. Paragraph (d) replaces subsection (4) of section 148. Currently the court 'may' at the intermediate diet ask the prosecutor and the accused questions to ascertain the state of preparation of their cases. The new subsection (4) provides that the court 'shall' ask such questions.

Section 19: Notice of defences

128. This section makes new provision in relation to the notification by the accused of a special defence or a notice calculated to exculpate the accused by incriminating a co-accused. The section substitutes the existing sections 149 (Alibi) and 149A (Notice of defence plea of consent) of the 1995 Act with a new section 149B.

New Section 149B

129. Subsections (1) & (2) provide that where the accused intends to insist on a special defence, a defence which incriminates a co-accused, a defence of automatism or coercion or a defence of consent in certain sexual offences, the accused must intimate that intention to the prosecutor in advance. Failure to so intimate will make it incompetent to found on that defence in court unless the court, on cause shown, allows the accused so to do. Currently, under the provisions of section 149, a defence of alibi may be founded upon at any time up until the first witness is sworn. A plea of consent in relation to certain sexual offences requires to be notified no less than 10 days prior to the trail diet.

130. Subsection (3) explains the meaning of consent for the purposes of subsection (2)(d).

131. Subsection (5) provides that intimation of any such defence must be given before an intermediate diet where such a diet is to be held or, where no such diet is to be held, no later than 10 days before the trial diet.

132. Subsection (6) sets out the particulars that must be provided when intimating such a defence. Details of any witnesses to be called to speak to it must be given. Additionally, if a defence of alibi is to be relied upon details as to time and place must also be given.

133. Subsections (7) & (8) provide that where a notice of defence is intimated to the prosecutor, the prosecutor is entitled to an adjournment of the case whether or not

the notice was given timeously and whether or not the adjournment could have been requested at an earlier diet.

Section 20: Proof of uncontroversial matters

134. This section modifies the existing provisions which set down the procedure for dealing with evidence which is not thought to be in contention. This provision is designed to, as far as possible, bring the summary provisions in this regard into line with the equivalent provisions applicable to solemn cases. The relevant solemn provisions were introduced as part of the Criminal Procedure (Amendment) (Scotland) Act 2004.

135. Subsection (1) inserts a new subsection (5) into section 257 of the 1995 Act which provides that the parties to a case in summary proceedings are to seek to ensure that any steps which can be taken to (i) identify evidence capable of agreement and (ii) seek agreement of that evidence with the other party are taken before any intermediate diet which is to be held in the case. This provision is designed, so far as possible, to bring the summary provisions into line with the equivalent provisions applicable to solemn cases.

136. Subsection (2) amends section 258 of the 1995 Act to provide that the relevant diet by which a notice of uncontroversial evidence must be served on the parties to the proceedings is to be the intermediate diet where one has been fixed. Where one has not been fixed the trial diet becomes the relevant diet.

137. The changes to sections 258(2) and 258(2A) and insertion of section 258(2ZA) mean that any notice of uncontroversial evidence must be served on parties to the proceedings not less than 7 days prior to the intermediate diet. Any subsequent objection to that notice must be served by the conclusion of the day on which that intermediate diet was held. Where an intermediate diet has not been set down the notice of uncontroversial evidence must be intimated within 14 days of a trial diet.

138. The reference to 'solemn proceedings' in subsection (4A) is repealed, thus all cases will be covered by the procedure in that subsection. This means that where a notice of uncontroversial evidence has been challenged, the court has the power to direct that that challenge is to be disregarded. The effect would be to allow the notice to be admitted as evidence notwithstanding the challenge.

139. Time limits are fixed in that subsection for an application to a court to have a challenge disregarded.

Section 21: Service of documents through solicitor etc.

140. This section introduces a new requirement on solicitors engaged by an accused for the purposes of the accused's defence at trial to intimate that fact to the procurator fiscal and the court. The purpose of the requirement is to enable documents, other than the complaint, to be served on an accused through that person's solicitor. A similar requirement already exists for solemn cases – see sections 72F and 72G of the 1995 Act.

New Section 148C

141. Subsection (1) as inserted provides that where a solicitor is engaged to act for an accused for the purpose of his defence at a trial the solicitor is required to intimate this fact in writing to the procurator fiscal and the court. The duty applies at a later stage than in solemn proceedings. In terms of section 72F, the duty in solemn proceedings applies wherever a solicitor is engaged for the purpose of the defence of the accused at any part of the proceedings. The provision made for summary proceedings reflects the fact that, at a first calling, the accused may not yet have contacted the solicitor of his choice for the trial, particularly where the accused is represented by the duty solicitor under the Legal Aid Scheme.

142. Subsection (2) provides that the solicitor is deemed to have complied with subsection (1) in circumstances where s/he has (1) appeared at the first calling of the

case and tendered a plea on behalf of the accused or intimated in writing a plea on behalf of the accused and (2) at the same time has notified the court and the prosecutor that s/he is also engaged by the accused for the purposes of the accused's defence at trial. The notification under subsection (2) can be given orally or in writing, whereas notification under subsection (1) must be in writing.

143. The effect of subsection (3) is that any solicitor who has intimated that s/he is acting for the accused must intimate if s/he is no longer acting for the accused for any reason.

New Section 148D

144. This section provides that where a solicitor who, by the operation of the provisions in sections 148C and 148D, is known to be acting for the accused it is possible to serve any material in relation to the proceedings on the solicitor rather than the accused, with the exception of the initial complaint which commences the proceedings.

Transfer of summary cases

Section 22: Transfer of proceedings

145. This section introduces new provisions extending the jurisdiction of the sheriff court in relation to the commencement and transfer of proceedings, including proceedings initiated in the JP court. The purpose is to increase the flexibility of the provisions relating to the transfer of business between different courts and (in certain cases) different sheriffdoms. It should be noted that paragraph 11 of the schedule to this Act introduces a new section 10A to the 1995 Act for purposes associated with this section.

146. Subsection (1) amends section 137A(1) of the 1995 Act and inserts a new subsection (1A). The effect of these amendments is that, where accused persons have been cited in summary proceedings to a diet or where citation has not taken place but summary proceedings have been commenced against an accused in a sheriff court, the prosecutor may apply to the sheriff to transfer the proceedings to another sheriff court in the same sheriffdom.

147. Subsection (2) amends section 137B of the 1995 Act by substituting a new subsection (1) and inserting five new subsections (1A), (1B), (1C), (2A) and (4). Subsection (1) as substituted provides that where a sheriff clerk informs the prosecutor that due to unforeseen circumstances it is not practicable for that sheriff court or any sheriff court within the sheriffdom to proceed with any of the summary cases to call at a diet, the prosecutor may apply to the sheriff principal for authority to transfer the proceedings to another sheriff court outwith the sheriffdom, and for an adjournment to that court.

148. Subsections (1A) & (1B) as inserted provide that where an accused has been cited to a diet in summary proceedings or summary proceedings have been commenced against an accused in a sheriff court the prosecutor may apply to the sheriff for an order for authority to transfer the proceedings to another sheriff court in another sheriffdom where there are other proceedings against the accused in that court.

149. Subsection (1C) as inserted provides that where the prosecutor intends to take summary proceedings against an accused in the sheriff court the prosecutor may apply for an order to the sheriff for authority to take those proceedings against the accused in another sheriffdom where there are other summary proceedings against that accused in that sheriffdom.

150. Subsection (2A) as inserted provides that where an application is made under section (1A) or (1C) the sheriff to whom the application is made is to make the order if s/he considers it expedient, and a sheriff of the receiving sheriffdom consents. Subsection (4) as inserted provides that the sheriff who made the order under subsection (2A) may

revoke or vary the order transferring the proceedings if the sheriff of the receiving court consents.

151. Subsection (3) inserts a new section 137C into the 1995 Act. It provides that summary proceedings against an accused appearing from custody may be initiated outwith the sheriffdom where the proceedings would normally be commenced.

New section 137C

152. Subsections (1) & (2) as inserted provide that where there are exceptional circumstances leading to an unusually high number of accused appearing from custody under summary procedure, and it is unlikely that the sheriff courts in the sheriffdom will be able to deal with all these cases, the prosecutor may apply to the sheriff principal for an order that proceedings may be taken against some or all of the accused at another sheriff court in another sheriffdom. Proceedings can be maintained there or at the original court or be transferred to any of the sheriff courts in the sheriffdom where the offences are alleged to have taken place

153. Subsections (3) & (4) provide that the sheriff principal may only make the order if the sheriff principal from the receiving court agrees, and that the order may be for a particular period of time or to deal with a particular set of circumstances.

New Section 137D

154. Section 137D as inserted provides that a sheriff may order that proceedings in a JP court may be transferred to the sheriff court if there are proceedings outstanding for sentence there.

155. Section 137D as inserted provides that the prosecutor may apply to the sheriff to transfer cases awaiting sentence at a JP court to the sheriff court where there are outstanding cases for sentence. If the sheriff considers it expedient to make that order s/he will be limited to the sentencing power of the JP for any cases which were heard before a JP.

Section 23: Time bar for transferred and related cases

156. This section amends the law on time bar as it relates to transferred cases. It inserts a new section 136A into the 1995 Act.

New Section 136A

157. The section provides that where proceedings have been transferred from one sheriff court to another and those proceedings are contained in a new complaint, the date of commencement of proceedings in relation to the charges, including those at the court to which the proceedings have been transferred, is to be taken as the date on which proceedings on the complaints originally commenced.

Other provisions

Section 24: Reports about supervised persons

158. This section introduces new provisions into section 203 of the 1995 Act in relation to the requirement that the court requests a report from the local authority in certain cases by inserting new subsections (1A) and (1B) into the section.

159. Subsection (1) of section 203 provides that where an offender who is the subject of a statutory supervision requirement is due to be sentenced for a further offence the court must request a report from the local authority on the offender. Subsection (1A) as inserted provides that where a report on the character of the offender has been provided in respect of that offender in the three months prior to conviction the court need not request a further report, but can still do so if it considers it necessary.

160. Section (1B) as inserted provides that where the court considers that a report from the local authority would not be of material assistance when considering the disposal of the case the court need not request such a report.

Section 25: Summary appeal time limit

161. This section amends some of the time limits applicable to summary appeals.

162. Subsection (1) amends section 180 of the 1995 Act by inserting a new section (4A) which provides that the High Court may, on the application of the appellant, extend the 14 day period in which the appellant may apply to the High Court for review of the single judge's decision to refuse to grant leave to appeal. The provision is retrospective and applies to appeals where leave was refused and the 14 day period expired before the implementation of this section. There is currently no provision which allows for this 14 day period to be extended.

163. Subsections (2) and (4) amend the provisions of sections 186 (appeals against sentence only) and 194 (computation of time). Currently, where an appeal is lodged under section 186 the clerk of court will within 2 weeks of the passing of the sentence, disposal or order, send to the Clerk of Justiciary the note of appeal which has been lodged by the convicted person together with a report from the judge who sentenced the convicted person or disposed of the case. The clerk of court also requires to send the judge's report to the respondent and appellant. That two week period may be extended by the sheriff principal of the sheriffdom in which the judgement was pronounced. There are, currently, three grounds for granting such an extension under section 186(5) of the 1995 Act: the judge is temporarily absent from duty for any reason; the judge is a part-time sheriff; or the judge is a justice of the peace. Section 186(5) is amended so that the sheriff principal may allow an extension of the 14 day period on cause shown. A similar amendment is made to section 194(2) of the 1995 Act. Section 194(2) allows the sheriff principal to grant an extension of time limits in the same circumstances as specified in section 186(5) where an appeal by stated case is being prepared, adjusted and signed in terms of section 178 and 179 of the 1995 Act. Section 194(2) is amended to allow for the extension of time limits to be granted by the sheriff principal on cause shown.

164. Subsection (3) amends section 187 (leave to appeal against sentence) of the 1995 Act by inserting a new section (3A) to provide that the High Court may, on the application of the appellant, on cause shown, extend the 14 day period in which the appellant may apply to the High Court for review of the single judge's decision to refuse to grant leave to appeal. The provision is retrospective and applies to appeals where the 14 day period expired before the implementation of this section. There is currently no provision which allows for this 14 day period to be extended.

Solemn cases

Section 26: Pre-trial time limits

165. Section 65(1) of the 1995 Act provides that an accused shall not be tried on indictment for any offence unless, where an indictment has been served on the accused in High Court cases, a preliminary hearing is commenced within the period of 11 months. It also provides that, in any solemn case, the trial must be commenced within the period of 12 months of the first appearance of the accused on petition in respect of the offence. Section 65(3) details the circumstances in which the court may extend these time limits. Section 65(3)(a) provides that, in High Court cases where the indictment has been served on the accused, a single judge of that court can, on cause shown, extend both the 11 and 12 month periods. In terms of section 65(3)(b), in any other case, the sheriff may, on cause shown, extend *only* the period of 12 months. This section amends section 65(3)(b) and provides that the sheriff may extend either or both of the periods of 11 and 12 months in High Court cases where the indictment has not been served.

Section 27: Obstructive witnesses

166. This section amends certain provisions relating to witnesses on bail in solemn proceedings as a result of the changes introduced by this Act (see note on section 16 for similar provisions applying to summary proceedings – the aim is to ensure consistency between summary and solemn proceedings).

167. Subsection (2) inserts a new subsection (2A) into section 90C of the 1995 Act and provides that, in proceedings for breach of bail, the fact that the witness was on bail, or was subject to a particular condition of bail, or that s/he failed to appear at a diet to which s/he had been cited, shall be held to be admitted unless challenged by a preliminary objection.

Section 28: Proceedings against bodies corporate

168. This section amends the provisions relating to the prosecution of bodies corporate found in section 70 of the 1995 Act. A definition of "representative" is inserted into section 70(8). The way in which a person proves that they are able to act as representative of a company is also changed and inserted as subsection (9). These changes bring both the solemn and summary provisions on this matter into line (see note on section 17 for similar provisions applying to summary proceedings).

Section 29: Jury Citation

169. This section inserts new provisions into section 85 of the 1995 Act relating to the citation of jurors.

170. New subsection (4A) of section 85 provides that citation of a juror may be effected by electronic citation sent by or on behalf of the sheriff clerk by means of electronic communication to the home or business address of the juror.

171. New subsection (4B) of section 85 provides that citation of a juror under subsection (4A) is a legal citation if the sheriff clerk possesses a legible version of an electronic communication which is signed by electronic signature by the person who signed the citation, includes the citation and bears to have been sent to the home or business email address of the juror being cited.

172. New subsection (4C) provides a definition of 'electronic citation' for the purposes of subsection (4A).

Section 30: Duty to seek agreement of evidence

173. This section amends subsection (4) of section 257 of the 1995 Act and provides that the duty provided under subsection (1) (to seek and secure agreement of evidence capable of being agreed in advance of the trial) is extended to all proceedings on indictment. Currently that subsection relates only to proceedings in the High Court It also provides a deadline by which the duty is to be complied with (before the preliminary hearing in High Court cases and before the first diet in sheriff court cases).

Section 31: Petition proceedings outwith sheriffdom

174. This section inserts a new section 34A into the 1995 Act. Section 22(3) of this Act provides for proceedings under summary procedure, in exceptional circumstances, to be initiated in sheriff courts outwith the sheriffdom where the alleged offence took place. This section makes equivalent provision in respect of an accused appearing on petition under solemn procedure. Jurisdiction for subsequent indictments is not affected by this section.

Section 32: Failure of accused to appear.

New section 102A

175. Section 32 inserts a new section 102A into the 1995 Act which provides for an offence where an accused fails to appear, introduces a statutory procedure for the granting of warrants to apprehend in solemn proceedings and details the procedure to be followed if the accused is apprehended.

176. Subsection (1) makes it an offence for an accused to fail to appear at a diet on indictment of which the accused has been given due notice. If convicted of this offence on indictment, the accused will be liable to a fine, or imprisonment for a period not exceeding five years or to both.

177. Subsection (2) provides that the court may, where the accused fails to appear at any diet on indictment of which he has had due notice (apart from a diet which the accused is not required to attend), grant a warrant to apprehend the accused.

178. Subsection (3) provides that it is not competent in any proceedings on indictment for the court to grant a warrant for the apprehension of the accused where the accused fails to appear at a diet otherwise than in accordance with subsection (2). Currently (other than the provisions of section 71(4) of the 1995 Act) there is no statutory authority for the granting of a warrant to apprehend on indictment. The warrant is issued at common law. The provision in section 71(4) of the 1995 Act is repealed by paragraph 12(2) of the schedule to this Act.

179. Subsection (4) provides that it remains competent for a court to grant a warrant on a petition under section 34 of the 1995 Act in respect of an offence of failing to appear at a diet under subsection (1) of this section, or an offence under section 27(1)(a) of the 1995 Act, where the offence relates to the same failure to appear (whether or not a warrant was granted under section 102A(2)).

180. Subsections (5) & (6) make clear that the effect of the court granting a warrant to apprehend an accused under subsection (2) is that the indictment falls as respects that accused unless the court makes an order to a different effect.

181. Subsection (7) sets out the circumstances in which the court can make an order under subsection (6). The court may do so on the motion of the prosecutor for the purpose of proceeding with a trial in the absence of the accused. Where it is for any other purpose, the court may make such an order on the motion of the prosecutor, or of its own accord.

182. Subsection (8) makes provision for the form of a warrant granted under subsection (2) to be prescribed by Act of Adjournal.

183. Subsection (9) sets out the authority conferred by a warrant granted under section 102A.

184. Subsection (10) provides that where an accused is apprehended under a warrant granted under this section the accused must, wherever practicable, be brought before a relevant court not later than in the course of the first day on which that court is sitting after the accused is taken into custody.

185. Subsection (11) provides that where the accused is brought before a court in pursuance of a warrant granted under section 102A, the court is required to make an order either detaining the accused in custody until liberated in due course of law or releasing the accused on bail.

186. Subsection (12) provides that the court must have regard to the terms of the indictment in respect of which the warrant was granted, even where the indictment has fallen in terms of subsection (5), when making an order in accordance with subsection (11).

187. Subsection (13) provides that any period of time previously spent in custody as regards the case (prior to an order being made under subsection (11)) does not count towards any applicable custody time limit set out in section 65(4) of the 1995 Act.

188. Subsection (14) clarifies the meaning of the references in subsection (13) to the accused's detention in custody.

189. Subsection (15) provides that it is competent for an indictment to be amended to include an additional charge of an offence under subsection (1) (failing to appear at a diet of proceedings on indictment of which the accused has been given due notice).

190. Subsection (16) defines references to "the court" where they appear in section 102A.

Miscellaneous

Section 33: Apprehension warrants

New section 297A

191. This section inserts a new section 297A into the 1995 Act which sets out the procedure for the operation of apprehension warrants in all criminal proceedings. Subsection (1) provides that the section applies where a person has been apprehended under a warrant granted under the 1995 Act.

192. Subsection (2) allows for a person to be re-apprehended under a warrant where the person has been apprehended under the warrant but absconds from police custody.

193. Subsection (3) provides that where it is not practicable to bring a person apprehended on a warrant before a court as soon as is required by a provision in the 1995 Act, that person should be brought before a court as soon as practicable after the reason making it impracticable for the person to appear before the court no longer prevails.

194. Subsection (4) provides that where a warrant is granted in solemn proceedings and the impracticability referred to in subsection (3) arises because the person needs medical treatment or care, that person may be released under the warrant. Subsection (5) provides that a person released under subsection (4) may be re-apprehended under the original warrant.

195. Subsection (6) provides that subsection (3) does not affect the operation of section 22(1B) of the 1995 Act, which relates to warrants granted in summary proceedings.

196. Subsection (7) clarifies that nothing in this section prevents a court from granting a fresh warrant for the apprehension of the person.

197. Subsection (8) clarifies that section 297A applies to petition warrants granted under section 34 of the 1995 Act, solemn warrants granted under the new section 102A and section 90A of the 1995 Act, and summary warrants granted under section 135 and 156 of the 1995 Act.

Section 34: Participation of accused in identification procedures

New section 267B

198. Section 34 inserts a new section 267B into the 1995 Act which provides that the court may make an order, on the application of the prosecutor, requiring the accused to attend at an identification parade or other identification procedure.

199. Subsections (1) and (2) provide that a court may, at any stage after the commencement of proceedings, on the application of the prosecutor, make an order requiring the accused person to participate in an identification parade or other procedure.

200. Subsection (3) provides that the court must allow the accused, where the accused is present, to make representations in respect of the application. It also gives the court a discretion (where it considers that it is appropriate to do so) to fix a hearing to allow the accused to make such representations if the accused is not present.

201. Subsection (4) provides that where the accused is not present, the clerk of court will notify the accused of any order made under subsection (1) . Subsection (5) outlines the manner in which that notice may be given.

202. Subsection (6) provides that a written execution signed by the clerk of court which is produced in court will be sufficient evidence of the fact that the clerk effected notice of the order on the accused.

203. Subsection (7) provides that where notice under subsection (4) is effected by registered post or recorded delivery the relevant post office receipt requires to be produced along with the execution of service.

204. Subsection (8) makes it an offence for a person, without reasonable excuse, to fail to comply with an order made under subsection (1). The offence is triable summarily only, regardless of whether the order which has allegedly been breached was imposed in respect of a summary or solemn case. A person will be liable on conviction to a fine not exceeding level 3 on the standard scale or to imprisonment for a period not exceeding 12 months, or to both.

205. Subsection (9) provides for references to section 141 of the 1995 act, in section 267B, to be read with such modifications as are necessary for its application in relation to that section.

206. Subsection (10) defines references to "the court" for the purposes of section 267B.

Section 35: Evidence on commission

207. Section 35 seeks to clarify the role of commissioner and that of the presiding judge when evidence is being taken on commission, whether this be by way of special measures for vulnerable witnesses or otherwise.

208. Subsections (1) and (2) amend sections 66 and 140 of the 1995 Act which relate respectively to the service of the indictment (in solemn proceedings) and citation of the accused (in summary proceedings). These amendments provide, in each case, that where an accused is charged with committing a sexual offence, the accused must be given notice that s/he must be represented by a lawyer not only at any trial but also in any proceedings where evidence is taken on commission. They further provide that where an accused does not appoint a solicitor the court will appoint one.

209. Subsection (3) amends section 271I of the 1995 Act, which provides for the special measure for vulnerable witnesses of taking evidence by a commissioner.

210. The new section 271I(1A) as inserted provides that commissioner proceedings may take place by live television link. Section 271I(3)(a) of the 1995 Act is also amended by subsection (3) and makes consequential provision about restrictions on where the accused may be during such proceedings.

211. Subsection (3)(c) adds further provision to section 271I, and applies sections 274, 275, 275B (except subsection (2)(b)), 275C, 288C, 288E and 288F of the 1995 Act. Sections 274 and 275 contain certain prohibitions on the leading of evidence, and on questioning, which relates to the sexual history of the complainer in cases of certain sexual offences. In addition, section 275B provides the timescales under which an application regarding leading evidence must be made. Section 275C relates to expert evidence as to subsequent behaviour of the complainer in certain cases. Section 288C, 288E and 288F prohibit the accused from conducting his or her own defence in certain cases. Subsection (3)(c) provides that the protections available to witnesses in court

proceedings as set out in the named sections apply equally in commissioner proceedings when used as a special measure in respect of vulnerable witnesses. This subsection also provides that the commissioner shall be a judge or a sheriff. This is so that s/he has the power to rule on questions of admissibility of evidence and whether certain questions may be asked of the witness.

212. Subsection (4) amends section 272 of the 1995 Act in relation to the taking of evidence on commission generally. It provides that the protections set out in sections 274, 275, 275B (except subsection (2)(b)), 275C, and 288C of the 1995 Act apply to commissioner proceedings as they do to trial proceedings. As above, it also provides that the commissioner shall be a judge or a sheriff.

213. Section 275A(1) of the 1995 Act places a duty on the prosecutor to disclose any relevant previous convictions of the accused to the presiding judge where the court allows questioning or evidence which would normally be prohibited in terms of section 274 of the Act. Subsection (5) amends section 275A(1) of the 1995 Act and provides that where a commissioner has allowed evidence or questioning normally prohibited in terms of section 274 the prosecutor is still under a duty to lay any relevant previous convictions before the presiding judge during the course of the actual trial.

214. Subsection (6) amends section 288D of the 1995 Act and provides that the power of the court to appoint a solicitor where an accused is prohibited from conducting his own defence and has failed to appoint a solicitor is extended to ensure that the power to appoint a solicitor to act at proceedings before a commissioner remains with the court.

Section 36: Victim notification scheme

215. Section 36 amends section 16 of the Criminal Justice (Scotland) Act 2003 to confer upon the current carers of children under the age of 14 in cases where the victim of a crime has died, the right, on the child's behalf to;

- receive from Scottish Ministers certain information regarding the victim's assailant's release into the community
- receive certain information regarding Parole Board review hearings and licence conditions from the Parole Board.
- make representations to the Parole Board prior to a decision being taken on the release (and the licence conditions) of the offender and, in certain circumstances where decisions upon licence conditions are taken by the Scottish Ministers to make representations to the Scottish Ministers prior to a decision being taken by them on licence conditions and to receive certain information concerning licence conditions from the Scottish Ministers

These rights remain with the current carers until the child attains the age of 14 years when the rights transfer to the child in his or her own right.

Section 37: Recovery of documents

New section 301A

216. This section introduces power to the sheriff court to grant orders for commission and diligence for the recovery of documents or for the production of documents. New section 301A is inserted into the 1995 Act. Orders for commission and diligence are more regularly used in civil proceedings; however, they are not unknown in the criminal context. Commission and diligence is a means of recovering documents which are required in respect of a litigation and are held in the hands of third parties. Currently the power to grant commission and diligence for the recovery of documents in criminal cases is only enjoyed by the High Court of Justiciary (*H.M. Advocate v. Ashrif* 1988 S.L.T. 567 refers). As a result a separate application has to be made to the High Court

of Justiciary if commission and diligence is required during the course of a case in the sheriff or district court.

217. Although in practice little distinction may be made between the two orders, an order for the production of documents appears to be the most appropriate remedy when documents are sought by the accused and they are in the hands of the Crown (*McLeod v. H.M. Advocate (No. 2)* 1998 S.L.T. 233; *Maan v. H.M. Advocate* 2001 S.L.T. 408). The position in relation to a sheriff's power to grant an order for the production of documents is less clear than for commission and diligence. The provisions of section 37 of the Act resolve any uncertainty in that regard.

218. Subsections (1), (2) and (3) confer a power on the sheriff court to grant orders for commission and diligence for the recovery of documents and orders for the production of documents. Sheriff courts are given this power in relation to: solemn proceedings in that sheriff court; and summary proceedings both in that court and in any JP court in that sheriff court's district.

219. Under subsection (4) applications for such orders cannot be made, in relation to solemn proceedings, until the indictment has been served on the accused, or s/he has been cited to answer an indictment; or in relation to summary proceedings until the accused has answered the complaint.

220. Subsection (5) provides that the grant or refusal to grant the application can be appealed to the High Court.

221. The available case law on the subject deals only with cases where the accused has sought to recover documents. There are other methods open to the prosecutor or police for the recovery of information during the investigation of alleged offences. To that end it is envisaged that it will invariably be the accused who applies to the court for these orders. Subsection (7) enables the prosecutor to be heard at any application for an order under subsection (1) or at an appeal under subsection (5) whether or not the prosecutor is a party to the application or appeal. Therefore, where the accused seeks documents from another individual or organisation the prosecutor will have a right to make representations in relation to whether or not that order should be granted. By virtue of the fact that a third-party haver (i.e. the holder of the documents which are sought) will be a party to the application it would be competent for that haver to raise any objection to the granting of the application.

222. Subsection (8) provides that the powers of the High Court to grant the orders mentioned in subsection (3) are restricted to orders in connection with proceedings in the High Court. This is analogous to the position in civil proceedings where sheriffs deal with applications for commission and diligence relating to cases which are before that court and Court of Session judges deal with applications for commission and diligence in cases before that court.

Section 38: Intimation to respondent of certain applications to the High Court

New section 298A

223. Section 38 inserts a new section 298A into the 1995 Act and provides that bills of suspension and advocation (forms of criminal appeal) and petitions to the nobile officium (a form of appeal to the High Court where no other remedy is available to the appellant) may be intimated by serving a copy of it by a variety of means rather than having to serve personally the original document on the other party. Service may be made in the same manner as citation under section 141 of the 1995 Act (which sets out the ways in which the accused and witnesses may be cited to appear in court in summary proceedings). Currently service of bills and petitions is largely regulated by common law.

Section 39 : Refixing diets

New sections 75B and 137ZA

224. Section 39 inserts a new section 75B into the 1995 Act (in relation to solemn proceedings) and a new section 137ZA (in relation to summary proceedings). These sections provide that the court may independently refix any diet which has been fixed for a non-sitting day without the need to hear from the prosecutor or the accused on the matter. Where the diet relates to a trial diet either party to the case is entitled to an adjournment of the new diet fixed if they can satisfy the court that it is not practicable for that party to proceed with the case on the new date.

Section 40: Power of court to excuse procedural irregularities

New section 300A

225. This section inserts section 300A into the 1995 Act and creates a new power for the court to relieve any party to a criminal case from failure to comply with certain procedural requirements. This power applies to summary and solemn cases. The power can be exercised whether the requirements are set out in statute (such as the 1995 Act) or whether they form part of the common law. An example of where this provision may be used would be where an accused appears on a number of complaints at different times and, in order that the complaints may be dealt with at the same time, the complaints are continued to the same date. On that date the complaints are dealt with, with the exception of one which was inadvertently missed from the court list. This was not discovered until the next day. As the complaint did not call on the date it was continued, the proceedings were deemed to have fallen at midnight on the date of the continuation. This provision would allow the prosecutor to apply to the court to seek an excusal of that irregularity and have the case called.

226. Subsection (1) sets out the circumstances in which the court can excuse a procedural irregularity. The irregularity must fall within the kinds described in subsection (5), and must also relate to the current criminal proceedings before the court. The court can exercise its power only where the conditions set out in subsection (4) apply.

227. Subsection (2) provides that the High Court, in appeal proceedings, can also excuse a procedural irregularity which occurred in the original proceedings which are the subject of the appeal. Subsection (3) provides that the application may be at the instance of the prosecutor or the accused and that the other party is to be given the opportunity to be heard.

228. Subsection (4) lists certain conditions of which the court must be satisfied before excusing a procedural irregularity under subsection (1). A procedural irregularity must have arisen from a mistake or an oversight, or another excusable reason, and the court must be satisfied in the circumstances of the case that its excusal would be in the interests of justice.

229. Subsection (5) describes the procedural failures that are covered by the court's power to excuse. Paragraphs (a) to (d) of subsection (5) list specific types of irregularity. The list is not intended to be exhaustive – paragraph (e) states that any other procedural requirement not complied with by the court, the prosecutor or the accused may be excused by the court, subject to the exclusions set out in subsections (6) and (7).

230. Subsection (6) expressly excludes irregularities arising from a period of detention of an accused person in custody which exceeds the relevant time limits contained in the 1995 Act. Therefore, for example, a failure on the part of the Crown to commence proceedings within the 40 day time limit in section 147 where the accused is being held in custody could not be excused under new section 300A. However, the general power in section 300A is without prejudice to any statutory provision that allows the court to extend a time limit (subsection (11)). Accordingly, in the above example, section 147(2)

would continue to apply and an application could therefore be made under that provision for an extension of the time limit.

231. Subsection (7) expressly excludes irregularities relating to the admissibility or sufficiency of evidence, or any other evidential factor. For example the fact that evidence had been ruled as inadmissible because it was irrelevant could not be excused. Nor could a lack of corroboration (in terms of sufficiency of evidence) be excused.

232. Subsection (8) sets out the powers available to the court where it decides to excuse a procedural irregularity under subsection (1). Following an excusal, the court can make an order, as is necessary or expedient, for the purpose of restoring or facilitating the continuation of the proceedings as if the irregularity had never occurred, or protecting the rights of the parties to the case.

233. Subsections (11) & (12) make it clear that section 300A is to operate without prejudice to other parts of the 1995 Act which empower the court to cure defects in proceedings by, for example, allowing the court to alter a diet, extend a particular time period or limit, or any rule of law which allows departure from directory requirements to be excused.

Section 41: Electronic proceedings

234. This section makes provision to allow for procedures such as initiation of proceedings and signing requirements in the summary courts to be carried out electronically. New sections 303B and 308A are inserted into the 1995 Act.

New section 303B – Electronic summary proceedings.

235. Section 138 of the 1995 Act provides that all summary proceedings must be instituted by a complaint which is signed by the procurator fiscal. The form and content of such a complaint is detailed in schedules 3 and 5 to the 1995 Act and rule 16.1 of the Act of Adjournal (Criminal Procedure Rules) 1996. Subsection (1) of new section 303B provides that proceedings may be initiated by electronic complaint and where this is the case the requirement for a signature by the procurator fiscal is satisfied by an electronic signature. Subsection (1)(c) specifies that an electronic signature will also be valid on other complaints as well as electronic complaints. So, for instance, a printed copy of a complaint which has been signed electronically can be regarded as having been validly signed. Electronic signature attracts the definition which is given to it in section 7(2) of the Electronic Communications Act 2000 (c.7).

236. Subsection (2) of the new section provides that any reference in the Act to a complaint includes a reference to an electronic complaint unless otherwise required.

237. Subsection (3) of the new section provides that where proceedings were initiated by electronic complaint that complaint shall be held to be the principal version of the complaint in the event of any conflict between that complaint and any other document.

238. Subsection (4) of new section 303B provides that a juror's citation may be satisfied by an electronic signature of or on behalf of the sheriff clerk as required by .section 85(4) of the 1995 Act.

239. Subsection (5) of the new section provides that a certificate produced by the prosecutor stating the period of time to be disregarded in calculating the date of commencement of proceedings (for the purposes of calculating time-bar in a case) where an offer from the prosecutor of a fixed penalty, compensation offer or work order has not been accepted or is recalled may be authenticated by an electronic signature. This relates to the provision in section 136B of the 1995 Act, which is introduced by section 54 of this Act – the certificate is referred to in the new section 136B(2).

240. Subsection (6) of the new section provides that the signing of postal citations of accused persons may be satisfied by electronic signature. Currently under section 141(3)(a) of the 1995 act these citations must be physically signed by the prosecutor.

241. Subsection (7) of the new section provides that where amendments are made to an electronic complaint authentication by the clerk of court by means of an electronic signature shall be sufficient.

242. Subsection (8) of the new section refers to section 172(2) of the 1995 Act which relates to the signing of warrants (other than warrants of apprehension or search), orders of court and sentences. New subsection (8) provides that the requirement to sign such items may be satisfied by means of an electronic signature of the clerk of court.

243. Subsection (9) of the new section provides that an electronic signature shall be sufficient authentication on a statement of uncontroversial evidence.

244. Subsection (10) of the new section provides that an electronic signature will be sufficient authentication where corrections of errors have been made in summary proceedings.

New section 308A – Expressions relating to electronic complaints

245. Section 41(2) of the Act inserts a new section 308A into the 1995 Act. This section provides definitions of the terms used in relation to electronic proceedings.

246. Subsections (1) & (2) give definitions of electronic complaint, electronic communication and electronic signature. Subsections (3) & (4) provide that Scottish ministers may by order modify the meaning of electronic signature.

Section 42 – Further provision for summary cases.

247. Subsections (1) (2) and (3) of section 42 provide that the Scottish Ministers may, by order, make provision for the purpose of or in connection with using electronic complaints, keeping the record of proceedings in electronic form, allowing validity and formality requirements to be satisfied by electronic means and using electronic communication. Such an order may relate to the availability and authentication of documents and records to specified persons or classes of persons, the authentication of documents and records and the use of electronic signatures in documents and records.

248. Subsection (4) provides that the terms ‘electronic complaint and ‘electronic communication’ are to be given the definition contained in new section 308A of the 1995 Act (inserted by section 41(2) of the Act).

Part 3 – Penalties

Sentencing powers

Section 43: Common law offences

249. This section amends section 5(2)(d) of the 1995 Act by increasing the maximum sentence of imprisonment which can be imposed by a sheriff for a common law offence in a summary case from 3 months to 12 months. At present, section 5(3) of the 1995 Act provides that the maximum sentence of imprisonment for a second or subsequent offence involving violence or dishonesty is 6 months. This provision is repealed meaning that, in future, all common law offences will be punishable with a maximum custodial sentence of 12 months on summary conviction. The sentencing powers of the district court are unaffected.

Section 44: Particular statutory offences

250. This section increases the maximum prison sentence for certain statutory offences. These offences attract a maximum sentence in excess of the present common law maximum, but below the proposed new common law maximum of 12 months. They are triable summarily only, so the penalties would not be altered by the provisions of section 45 of this Act. Subsection (1) increases the maximum prison sentence for offences under section 41 of the Police (Scotland) Act 1967 from 9 to 12 months, and amends that Act accordingly. That section covers assaulting or otherwise impeding police officers in the course of their duty.

251. Subsection (2) extends existing powers to impose maximum custodial sentences of 6 months on summary conviction for offences related to the transposition of Council Directive 92/43/EC on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive"). Section 26A of the Wildlife and Countryside Act 1981 ("the 1981 Act") currently provides that regulations made under section 2(2) of the European Communities Act, which give effect to the Habitats Directive, may provide for a maximum prison sentence on summary conviction of 6 months. Such regulations would otherwise only be able to impose a maximum sentence of 3 months.

252. However, the power under section 26A of the 1981 Act refers only to the Directive as it was then amended by the Act of Accession to the European Union of Austria, Finland and Sweden and by Council Directive 97/62. That reference to the Directive does not take account of a subsequent amendment to the Habitats Directive (by the Act of Accession of the Czech Republic etc in 2003). The effect of this is that section 26A of the 1981 Act does not enable the imposition of maximum 6 month custodial sentences in relation to offences related to that later amendment of the Habitats Directive. Subsection (2) ensures that the 6 month maximum can apply in respect of all offences related to the Habitats Directive and that, in the event of any future amendment of the Directive, section 26A of the 1981 Act will continue to apply to the Directive as amended.

253. Subsection (3) increases the maximum sentence under section 37 of the Antisocial Behaviour (Scotland) Act 2004 to 12 months or a fine not exceeding the prescribed sum or both and abolishes the distinction in the maximum penalty between a first offence and a second or subsequent offence. Section 37 contains offences relating to premises which are subject to a closure order.

254. Subsection (4) increases the maximum sentence under the Emergency Workers (Scotland) Act 2005, section 6, from 9 to 12 months or a fine not exceeding the prescribed sum or both. That section covers the offences created by that Act of assaulting or impeding emergency or health workers in the course of their duty.

255. Subsection (5) increases the maximum prison sentence under section 39 of the Fire (Scotland) Act 2005 from 9 to 12 months or a fine not exceeding level 4 on the standard scale or both. That section covers assaulting or impeding those performing certain functions under that Act.

Section 45: Other statutory offences

256. This section brings the maximum summary prison sentences for certain statutory offences into line with the new maximum sentence for common law offences set out in section 43 of the Act.

257. Subsection (1), read with subsections (6), (7) and (8) set out the new maximum, and define the penalty provisions that will be altered. Offences which will be affected are those which can be tried under either solemn or summary procedure (sometimes referred to as "triable either way") and attract maximum prison sentences of less than 12 months on summary conviction. The new maximum summary penalty for such offences will be 12 months.

258. The effect of subsection (2) is that the statutes which create the affected offences are to be read subject to the amended summary sentencing limit.

259. Subsection (3) allows the Scottish Ministers to amend the maximum period of imprisonment specified in the statutory offences to which subsections (1) and (2) apply. This means that, in due course, textual amendment of the relevant statutes can take place, avoiding ongoing reliance on the general amendment. Subsection (4) provides that the maximum period of imprisonment provided for in a relevant power is to be read as a period of 12 months. Subsection (5) allows the Scottish Ministers to amend certain provisions in enactments that contain powers to create offences. Where an enactment provides for the creation of offences punishable on both solemn and summary conviction, the maximum summary penalty may, by order, be increased to 12 months.

Section 46: JP court: power to increase penalties

260. This section gives powers to the Scottish Ministers to amend the maximum penalties available to the JP court. Ministers will be able to make similar changes which would apply to any remaining district courts by virtue of section 64(5) of the Act.

261. Subsection (1) empowers Ministers to amend, by order, the maximum period of imprisonment, fine, or amount of caution available to JP courts for either common law offences or statutory offences, as specified in section 7(6) or (7) of the 1995 Act.

262. Subsection (2) empowers Ministers to amend the maximum penalty available to JP courts in respect of an offence set out in another statute.

263. Subsection (3) caps these powers. The effect of subsection (3) is that an order could empower the JP court to impose imprisonment for up to 6 months (but could also increase the limit to a period that is higher than the current maximum of 60 days but lower than 6 months).

Section 47: Fine Level

264. This section provides that the maximum level of fine that may be imposed on summary conviction in respect of a statutory "triable either way offence" where the maximum penalty on summary conviction is currently expressed by reference to 'level 5 on the standard scale' is to be £10,000 in future.

265. Subsection (1) (read with the definitions provided in subsections (6), (7) and (8)), provides that the maximum fine that may be imposed on a person following summary conviction of a "triable either way" offence for which the current maximum is referred to as level 5 on the standard scale shall be the statutory maximum.

266. The effect of subsection (2) is that the statutes which create the affected offences are to be read subject to the amended maximum financial penalty (the reference to "level 5" as the maximum fine imposable on summary conviction in a "triable either way" offence is to be read as a reference to "the statutory maximum" by virtue of this provision).

267. Subsection (3) allows the Scottish Ministers, by order, to amend the maximum level of fine specified in the statutory offences to which subsections (1) and (2) apply. This means that, in due course, textual amendment of the relevant statutes can take place, avoiding ongoing reliance on the general amendment.

268. The effect of subsection (4) is that any reference in a 'relevant power' which expresses the maximum level of fine that may be imposed on summary conviction for a "triable either way" offence as level 5 on the standard scale is to be read as a reference to the statutory maximum. 'Relevant power' is defined in subsection (7).

269. Subsection (5) allows the Scottish Ministers, by order, to amend the specification of the maximum fine level in a relevant power so as to increase the maximum to the statutory

maximum. This means that, in due course, textual amendment of relevant powers can take place, ensuring that those powers make clear the level of penalty that may be set in any offence created under them, avoiding ongoing reliance on the general amendment.

270. Subsections (6) to (8) provide definitions for the purposes of subsections (1) to (5).

Section 48: Prescribed sum

271. This section increases the prescribed sum from £5,000 to £10,000. The prescribed sum is the maximum amount the sheriff may impose for a common law offence and certain statutory offences under summary procedure.

Section 49: Compensation orders

272. This section amends section 249 of the 1995 Act. That section prescribes and limits the circumstances in which a court can impose a compensation order on an offender. The purpose of the amendment is to extend the power of the court to impose compensation orders.

273. This section is also relevant to the operation of the new alternative to prosecution introduced in section 50 of this Act – the compensation offer – as prosecutors are empowered to issue compensation offers in circumstances where a court could, on conviction, impose a compensation order.

274. The introduction of section 249(1)(b) of the 1995 Act permits compensation to be ordered by a court, or offered by a prosecutor, in circumstances where alarm or distress have been caused directly by the actions complained of. Currently, section 249(1) limits compensation orders to circumstances where personal injury, loss or damage is caused either directly or indirectly.

Penalties as alternative to prosecution

Section 50: Fixed penalty and compensation offers

275. This section provides considerable changes in procedures relating to existing alternatives to prosecution, and introduces a new alternative to prosecution, to be known as the compensation offer. It makes significant amendments to sections 302 and 303 of the 1995 Act, and introduces a number of new sections to that Act. Sections 302 and 303 deal with conditional offers of a fixed penalty by prosecutors (generally known as "fiscal fines").

Conditional offers – changes to procedures etc

276. Subsection (1)(a) amends section 302(2) of the 1995 Act, which covers the information which requires to be provided to the alleged offender in a conditional offer. The amendments take account of the revised procedure introduced by this Act. It is also made clear that an offer letter can stipulate that the whole penalty is to be paid in a single instalment.

277. Subsection (1)(c) inserts subsections (4A) - (4C) into section 302 of the 1995 Act. This effects a change to the way in which fixed penalties are administered. Acceptance of a conditional offer of a fixed penalty will now be either by making any payment in respect of the offer, or by taking no action in respect of the offer. Currently, an offer of a fixed penalty requires the suspected offender to take positive steps to accept it. The terms of these new subsections render subsections (5) and (6) of section 302 redundant, and these are repealed by subsection (1)(d) of this section.

278. Subsection (1)(b) makes a consequential amendment to section 302(4) of the 1995 Act, to oblige the clerk of court to notify the procurator fiscal whether or not the conditional offer has been rejected.

279. Subsections (1)(e), (f) and (g) amend the maximum level of a conditional offer from level 1 on the standard scale (presently £200) to £300. The Scottish Ministers are given power to further increase the maximum by order, subject to affirmative procedure.

280. Subsection (1)(h) inserts new subsections (8A) and (8B) into section 302 of the 1995 Act. Subsection (8A) raises a rebuttable presumption that the alleged offender has received a conditional offer if it is sent to: the address given by the alleged offender in relation to a recall application under section 302C(1) (see paragraphs 291 to 296 below); or to any address which the alleged offender has given to the clerk of court or the procurator fiscal in respect of that offer. Subsection (8B), in turn, raises a presumption in relation to the operation of section 141(4) of the 1995 Act, which covers the citation of accused persons to court. It provides that citation of the accused will be presumed to have been successfully effected if sent to the same address at which it can be proved the accused received a conditional offer, or at another address given by the accused in connection with that offer.

281. Subsection (1)(i) amends section 302(9) of the 1995 Act. It extends the range of offences for which conditional offers can be made. At present a conditional offer can be made in respect of any offence which can be tried in the district court. Subject to the exclusion of certain road traffic offences set out in section 302(9) of the 1995 Act, it will now be competent to make a conditional offer in relation to any offence which can be tried summarily.

New section 302A - compensation offer

282. Section 50(2) introduces three new sections into the 1995 Act (sections 302A to 302C). The first of these sections, 302A, creates compensation offers by the procurator fiscal and provides a mechanism for their operation. Many of the procedures are identical to, or similar to, those made for the operation of the new system which will apply to conditional offers of a fixed penalty.

283. A procurator fiscal is permitted by section 302A(1) to send a compensation offer to an alleged offender where it seems that a relevant offence has been committed. A relevant offence is defined in section 302A(13) as an offence which can be tried summarily, and for which a court could competently make a compensation order (section 49 and paragraphs 272 to 274 above refer). The offer document is required by section 302A(2) to give the accused similar information to that given in a conditional offer of a "fiscal fine". This includes provision that the prosecutor can stipulate that payment of the whole amount is to be made in one instalment.

284. Section 302A(3) provides that a compensation offer can be made in respect of more than one relevant offence. Section 302A(4) obliges the clerk of court to advise the procurator fiscal whether notice has been given that the offer has been rejected. Sections 302A(5) and (6) provide that acceptance of an offer is deemed either if payment is made to the offer, or if the alleged offender takes no action to expressly reject it.

285. Section 302A(7) provides that if a compensation offer is accepted no prosecution can take place, and no conviction will be recorded.

286. Section 302A(8) and (9) provide that the maximum amount of a compensation offer is to be set by the Scottish Ministers, but that it is not to exceed level 5 on the standard scale (presently £5000).

287. Sections 302A(10) and 302A(11) make provision for presumption of service of further compensation offers and in respect of citations served in terms of section 141(4) of the 1995 Act. These are the same as those described at paragraph 280 above.

New section 302B – combined fixed penalty and compensation offer

288. Section 302B makes provision to allow prosecutors to make a conditional offer combining elements of both a fine and compensation. Any such offer will be regarded as a "combined offer".

289. Section 302B(3) sets out the additional information which requires to be provided in a combined offer, which in terms of section 302B(2) requires to be in a single notice.

290. Section 302B(4) provides that acceptance of part of any such offer will be regarded as applying to the whole offer. This guards against the possibility that, faced with two separate offers of a fine and compensation for the same incident, the alleged offender will accept one and reject the other.

New section 302C – recall of fixed penalty or compensation offer

291. Section 302C provides a mechanism for recalling a "fiscal fine" offer or compensation offer. Section 302C(1) provides that the alleged offender can make a request for recall where s/he has taken no action in respect of the offer and it is deemed to have been accepted.

292. Section 302C(2) provides that recall of deemed acceptance can be sought where the alleged offender claims that s/he did not receive the offer; or where the offer was received but the alleged offender claims that it was not practicable because of exceptional circumstances for notice of refusal of the offer to be given. In both cases the alleged offender must also claim that the offer would have been refused.

293. Section 302C(3) provides that where the alleged offender wishes to apply to have the deemed acceptance recalled, s/he must apply to the clerk of court within certain time limits. However, section 302C(4) permits the clerk to consider a request for recall outwith those time limits on cause shown. In terms of section 302C(5), on receipt of an application for recall the clerk of court may either uphold or recall the offer.

294. Section 302C(6) gives the alleged offender the right to apply to the court which is specified in the offer for review of the clerk of court's decision, and section 302C(7) gives the court power, in turn, to confirm or quash the clerk's decision. Section 302C(8) provides that the court's decision is final.

295. The clerk of court is obliged by section 302C(9) to inform the procurator fiscal of a request for recall, an application for review of the clerk's decision, and any decision taken either by the clerk or the court in connection with the application.

296. Section 302C(10) provides that for the purposes of considering an application for recall the procurator fiscal can certify when the offer was sent.

Further provisions on enforcement

297. Section 50(3) makes further provision in relation to enforcement of alternatives to prosecution, and amends section 303 of the 1995 Act accordingly.

298. Subsection (3)(a) provides that, where an alternative to prosecution has been accepted, any outstanding amount is to be treated for enforcement purposes as if it were a fine imposed by the court.

299. Subsection (3)(b) provides that no action is to be taken to enforce a "fiscal fine" or compensation offer where acceptance has been deemed by the alleged offender's lack of action, unless a notice is sent to the alleged offender explaining that enforcement action is to be taken, and outlining the recall procedure. Action can only be taken once any application for recall has been dealt with.

Section 51: Work orders

New section 303ZA – Work orders

300. This section inserts a new section 303ZA into the 1995 Act. It creates a new alternative to prosecution – the "work order" (which has also been referred to as the "fine on time" or "community fiscal fine").

301. Section 303ZA(1) empowers a procurator fiscal to make a 'work offer' to an alleged offender who appears to have committed a relevant offence (defined in section 303ZA(16) as one which is triable summarily). This offer will give the alleged offender the option of performing a period of unpaid work where a monetary penalty such as a "fiscal fine" or a compensation offer are not deemed appropriate.

302. Section 303ZA(2) sets the minimum (10 hours) and maximum (50 hours) number of hours work that can be offered under a work offer. Section 303ZA(3) outlines the information which will require to be contained on the notice of offer. In many ways this is similar to the information which requires to be on the notice of offer of the two other alternatives to prosecution which are described above. The circumstances of the alleged offence, the amount of work which will require to be completed, the date by which the work will require to be completed, and the consequences of acceptance and completion of the offer all require to be in the offer.

303. Section 303ZA(4) permits the work offer to be made in respect of more than one offence, and subsection (5) provides details on what the alleged offender requires to do to accept the offer. Unlike the new system for "fiscal fines" and compensation offers, the work offer requires to be positively accepted by the alleged offender.

304. Section 303ZA(6) provides that if the offer is accepted, the procurator fiscal can then make a work order against the alleged offender. On doing so, the procurator fiscal must send a notice to the alleged offender that a work order has been made, containing details of the amount of work to be carried out and details of the person who is to supervise performance of the order (section 303ZA(7)). Section 303ZA(8) obliges the procurator fiscal to advise the supervising local authority of the imposition of an order.

305. Section 303ZA(9), (10) and (11) deal with the manner in which the supervising officer's duties are to be discharged. The officer is to determine the nature, time and place of the work to be done, and give directions to the alleged offender regarding its performance. The officer is also to provide the procurator fiscal with details of the performance of the order. The purpose of this last provision is to allow the procurator fiscal to consider whether, in the event that the order is not completed satisfactorily, further action is appropriate. The officer is under a duty, as far as practicable, not to direct the alleged offender to carry out work which would hamper the alleged offender's attendance at work or education, or which would conflict with the alleged offender's religious beliefs.

306. Section 303ZA(12) provides that where the alleged offender completes the work required in the order s/he will not face prosecution for the alleged offence. In the event that the entire order is not completed satisfactorily, the procurator fiscal will have the option of prosecuting the alleged offender for the alleged offence giving rise to the work order, even if some work has been carried out under the order.

307. Section 303ZA(13) and (14) give the Scottish Ministers a regulation-making power to make specific provision in relation to specific aspects of work orders as set out in subsection (9). In particular the Scottish Ministers may specify what kind of work may or may not be undertaken.

308. Section 303ZA(15) makes provision for citation of the alleged offender in subsequent prosecution. The position is similar to that for "fiscal fines" and compensation offers. Citation will be presumed to have taken place if it is effected at the address at which the alleged offender is proved to have received an offer, or any other address provided by the alleged offender.

Section 52: Setting aside of offers and orders

New section 303ZB – Setting aside of offers and orders

309. This section inserts section 303ZB into the 1995 Act. It formalises the power of the procurator fiscal to set aside an offer of an alternative to prosecution of the types listed in section 303ZB(1).

310. Section 303ZB(2) provides that the procurator fiscal can set aside an offer of such an alternative to prosecution where s/he is satisfied that the offer should have not been made, on the basis of information which comes to his/her attention after the making of the offer.

311. Section 303ZB(3) confirms that this power applies even if the offer has been accepted or deemed to have been accepted.

312. Section 303ZB(4) obliges the procurator fiscal when exercising this power to advise the alleged offender that the offer has been set aside and that any liability to conviction for the alleged offence is discharged.

Section 53: Disclosure of previous offers

313. This section amends section 69 (notice of previous convictions), section 101 (previous convictions: solemn proceedings), and section 166 (previous convictions: summary proceedings) of the 1995 Act, and makes provisions governing the circumstances in which an offer of an alternative to prosecution can be disclosed to the court. To all intents and purposes the amendments to each section have an identical effect.

314. The primary purpose of these amendments is to allow the prosecutor to include in any notice of previous convictions, whether in a solemn or summary case, details of an alternative to prosecution which has been accepted (completed in the case of a work order) by the alleged offender in the two years preceding the date of the new offence under consideration.

315. In the case of the financial alternatives to prosecution – the "fiscal fine" and the compensation offer – the procurator fiscal can disclose details of these alternative disposals to the court whether the offer has been accepted by payment having been made, or whether acceptance has been deemed by the alleged offender taking no action in respect of the offer.

316. It is not intended that accepted "fiscal fines" or compensation offers, or completed work orders, should be regarded as criminal convictions for this or any other purpose. The relevant sections of the 1995 Act are all amended to make it clear that accepted alternatives to prosecution are to be regarded as "alternative disposals" for the purposes of this part of the Act.

317. In addition, the statute will now explicitly permit prosecutors, on conviction for an offence where an offer of an alternative to prosecution was made, to advise the court of the terms of any such offer.

Section 54: Time bar where offer made

New section 136B – time limits where fixed penalty offer etc. made

318. This section inserts a new section 136B into the 1995 Act. The purpose of this section is to alter the operation of time bar in statutory cases where an alternative to prosecution has been offered. It is intended that this will avoid the situation where the time spent in offering an alternative which is then declined makes it difficult or impossible to take proceedings within statutory time limits.

319. Section 136B applies to conditional offers, compensation offers and work offers. Section 136B(1) provides that in connection with conditional offers and compensation offers, for the purpose of calculation of any period of time bar, the period between the date of any offer of an alternative, and the date of refusal of the offer or date of recall of deemed acceptance, is to be disregarded.

320. In the case of work offers, section 136B(1)(c) provides that the period between the date of the offer and the last date for acceptance of the offer is to be disregarded where the offer is refused. In addition, where the offer is accepted but not completed the time between the date of the offer and the date specified for completion of the order is to be disregarded.

321. Section 136B(2) provides that a prosecutor can certify the period of time which is to be disregarded for these purposes.

Enforcement of fines etc.

Section 55: Fines enforcement officers and their functions

322. This section amends the 1995 Act to include new sections 226A to 226I. These introduce new arrangements for the enforcement of fines and other financial penalties, including provision for the appointment of fines enforcement officers, who will provide information and advice to the offender in relation to payment of the fine and will also have new sanctions to use against offenders who default in payment of their fines or penalties.

New Section 226A – Fines enforcement officers

323. Subsection (1) makes provision for a new post of fines enforcement officer (FEO). FEOs will undertake a number of enforcement related duties previously undertaken by the courts, such as dealing with applications for further time to pay. They will also be responsible for a range of enforcement activity. The FEO will be an officer of the Scottish Court Service (SCS), an agency of the Scottish Executive.

324. Subsection (2) sets out the core functions of FEOs. These are

- to provide information and advice to offenders about payment of fines or penalties, and
- to secure compliance with the terms of an enforcement order made under section 226B.

325. Subsections (3) and (4) provide that where an offender is subject to more than one enforcement order the FEO must have regard to the total amount outstanding and, where there is an enforcement order in another sheriff court district from that in which the offender resides, the FEO for the district in which the offender resides may assume responsibility for the functions of the order. This is to ensure that only one FEO has responsibility for exercising functions under an enforcement order.

326. Subsections (5) and (6) provide that where an FEO takes responsibility for an enforcement order under subsection (4) that fact must be notified both to the offender and to any FEO for the district in which the enforcement order was made.

327. Subsection (7) empowers the Scottish Ministers to make further provision by regulation as to FEOs and their functions. In due course, this could be used to give FEOs additional functions or to modify the exercise of existing functions. The regulations will be subject to affirmative procedure.

New Section 226B – Enforcement orders

328. Subsections (1) and (2) give the court discretion to make an enforcement order in relation to a fine. The expectation is that the court will make an enforcement order when considering whether to grant time to pay under section 214 or 215 of the 1995 Act. However, the court is not required to make an order if it does not consider that an order would be appropriate.

329. Subsection (7) provides that an enforcement order may be made by the court in the absence of the offender in relation to the payment of certain penalties, on the application of the clerk of court. Those penalties are detailed in subsections (4), (5) and (6). Subsection (7) applies where the offender:

- has accepted or is deemed to have accepted a fixed penalty offer or compensation offer as an alternative to prosecution under section 302(1) or 302A(1) of the 1995 Act (subsection (4));
- is liable to pay a fixed penalty under section 54 or section 62 of the Road Traffic Offenders Act 1988 which has been registered under section 71 of that Act, or is liable to pay (by virtue of section 131(5) of the Antisocial Behaviour etc. (Scotland) Act 2004) a fixed penalty notice issued under section 129 of that Act (subsection (5));
- is the subject of a transfer of fine order in respect of a fine imposed in England and Wales in relation to which a collection order has been made (subsection (6)).

330. The enforcement order, a copy of which will be sent to all offenders, imposes a statutory requirement to pay the fine or penalty as specified in the order. The order will also contain certain information, as set out in subsection (8), including:

- details of the fine or penalty;
- the arrangements for making payment (including the time for payment and, if applicable, the number of instalments permitted by the court);
- contact details of the fines enforcement officer; and
- information about the effect of the order in the event that the offender defaults on payment of the fine.

331. The sanctions for non – compliance, as detailed in new sections 226D, 226E and 226F include seizure of an offender's motor vehicle; a deduction from benefits order; earnings arrestment; and arrestment of an offender's bank or building society account. The enforcement order empowers the FEO to apply these sanctions, subject to the provisions of sections 226D to 226F.

332. Subsections (9) & (10) prohibit the court (when making or intending to make an enforcement order) from imposing an alternative period of imprisonment or dealing with applications for further time to pay for as long as an enforcement order has effect. The order will cease to have effect if the penalty is fully paid or the court decides to revoke the order.

New Section 226C – Variation for further time to pay

333. One of the core functions of the FEO (section 226A(2)(a)) is to provide information and advice to offenders as regards payment. The FEO will make contact with the offender following the making of an enforcement order and will set out the date or dates by which payment is due.

334. However, section 226C empowers the FEO to vary the arrangements for payment. Subsection (3) provides that an application to vary arrangements may be made orally or in writing. The FEO will, as provided in subsection (4), notify the offender of the

decision to grant or refuse the application. Section 226H allows an offender to apply to a court for a review of a decision of a FEO regarding the variation of an enforcement order.

New Section 226D – Seizure of vehicles

335. This section empowers a FEO to issue a 'seizure order' to immobilise and impound an offender's motor vehicle. Subsection (4) requires the FEO to notify the offender when a seizure order has been carried out. Subsection (11) prohibits the seizure of a vehicle used by or primarily for carrying disabled persons.

336. Subsections (5) and (6) set out the process to be followed where the fine or penalty remains unpaid following seizure of a motor vehicle, and the powers available to the court. These include making an order for the sale of the vehicle, and applying the proceeds towards the unpaid fine or penalty.

337. Subsection (7) provides that where a third party claims to own a vehicle which has been seized and not yet disposed of, that third party may have the seizure order set aside if it can satisfy the FEO (or subsequently the sheriff) that their claim of ownership is valid. Subsection (8) makes clear that the provision in subsection (7) does not preclude any other proceedings for the recovery of the vehicle.

338. Regulations may be made under subsection (12) in order to provide greater detail about seizure orders, including the circumstances in which they may and may not be made. Subsection (13) provides examples of what the regulations may cover.

New Section 226E - Deduction from Benefits

339. Section 226E enables the FEO to request the court to make an application for a deduction from benefits to be made from an offender, for the purpose of obtaining payment of a fine or penalty.

New Section 226F – Powers of Diligence

340. Section 226F provides that, when making an enforcement order, the court must also grant warrant for civil diligence. This warrant will authorise the FEO to execute arrestment of earnings and funds in bank accounts. The purpose is to obtain the amount of the penalty which has not been paid. The diligence powers of the FEO are subject to regulations which the Scottish Ministers may make about the circumstances in which diligence powers may be exercised and the application of other law relating to diligence. The intention is that any existing and new legislation relating to diligence (such as the Debtors (Scotland) Act 1987 and relevant provisions of the Bankruptcy and Diligence (Scotland) Act 2007) will apply to FEOs when they exercise diligence powers, subject to such modifications as may be necessary.

New Section 226G – Reference of case to court

341. Subsections (1) and (2) make provision for any outstanding fine to be referred back to the court. Referral can take place where the FEO has formed the view that the fine or penalty, or the unpaid balance, is unlikely to be paid or where, for any other reason, the FEO considers it appropriate (for example, where the offender has failed to co-operate with the FEO). In these circumstances the FEO will, as outlined in subsections (3) and (4), provide a report to the court on the circumstances of the case.

342. Subsections (5) to (9) provide details of the procedure to be followed by the court on receipt of a report and reference from the FEO. This will involve an enquiry, in the offender's presence, into the reasons for failure to pay the fine and penalty. The court is given a range of disposal options following such an enquiry. These include revoking the enforcement order and dealing with the offender as if the order had not been made. This could mean imposing a period of imprisonment.

New Section 226H – Review of actions of FEO

343. This section provides that an offender may apply to the court for a review of a decision of a FEO in relation to an application for variation for further time to pay, or an order to immobilise and impound the offender's motor vehicle. The application must be made within 7 days of being notified of the decision relating to further time to pay or the making of a seizure order. When determining the application, the court can confirm, alter or quash the decision of the FEO or make any other order that it considers appropriate.

New Section 226I - Enforcement of fines etc.: Interpretation

344. This section sets out certain definitions for terms used in sections 226A to 226H, and describes the penalties to which these provisions apply. There is an order making power to allow additional penalties to be added to the definition of "relevant penalty". This would have the effect of increasing the range of penalties for which the FEO could have responsibility.

Section 56: Recognition of EU financial penalties

345. Section 56 entitles Scottish Ministers to make provision, by means of an order subject to the affirmative procedure, implementing any obligation created by or arising under the council Framework decision on the application of the principle of mutual recognition to financial penalties in so far as they have effect in or as regards Scotland. The purpose of the Decision (2005/214/JHA of 24 February 2005) is to allow financial penalties imposed in criminal proceedings to be transferred to other member states for enforcement – improving enforceability of fines across the EU.

Breach of post-conviction orders

Section 57: Probation and community service orders

346. The purpose of this section is to provide that those who are in alleged breach of a probation or community service order will be provided with a copy of the report to the court detailing the grounds of the alleged breach. Service of the copy report is to be in accordance with provisions in the Act of Adjournal, and provision is made for postal service.

347. Subsection (1) makes the change for probation orders; and subsection (2) extends it to community service orders. Sections 232 and 239 of the 1995 Act are amended accordingly.

Section 58: Restriction of liberty orders

348. The purpose of this section is to permit breach of a restriction of liberty order to be proved by the evidence of one witness. This provision brings proof of breach of such orders into line with proof of the breach of probation, community service, drug treatment and testing, and supervised attendance orders. Section 245F of the 1995 Act is amended accordingly.

Part 4 – Jp Courts and Jps

Establishing JP courts etc.

Section 59: Establishing JP courts

349. This section imposes a general duty on the Scottish Ministers to make provision for summary criminal courts. The Scottish Ministers are also given the power to establish JP courts by order, with reference to particular sheriff court districts. It is intended that JP courts will eventually replace district courts and will be established on a phased basis,

sheriffdom by sheriffdom, for the purpose of delivering a unified summary criminal courts administration under the administration of SCS.

350. Before making an order establishing JP courts, the Scottish Ministers must consult the sheriff principal for the relevant sheriffdom. There is a presumption that there will be at least one JP court established for each sheriff court district, except where Scottish Ministers determine that a JP court is not necessary. Currently there are no district courts in the sheriff court districts of Lerwick, Orkney and Lochmaddy. It is not anticipated that any JP courts will be established in these districts.

351. Subsection (5) requires Scottish Ministers, in deciding whether a JP court is necessary, to take account of the amount of summary criminal business and the capacity of other JP or sheriff courts in the sheriffdom.

352. Subsection (6) provides that, where JP courts have been established, Scottish Ministers may subsequently, by order, provide for the relocation or disestablishment of a JP court. Subsection (7) provides that, before making such an order, Scottish Ministers must consult the sheriff principal for the relevant sheriffdom.

Section 60: Making provision for JP courts

353. This section imposes a duty on Scottish Ministers to make provision for the organisation and administration for JP courts. The Scottish Ministers are also responsible for providing suitable and sufficient premises and facilities.

354. In making such provision, the Scottish Ministers may require local authorities to let or sub-let their premises to the Scottish Ministers for the purposes of the JP court, or to make their premises available for use as a JP court (e.g. through a licence arrangement). The level of rent that is payable, and the other terms of any lease, will be subject to agreement. Any dispute that the parties are unable to resolve is to be determined by an arbiter (subsection (6)). These provisions should be read in conjunction with section 65 which confers a power on the Scottish Ministers to transfer property that is used for or in connection with a district court.

Section 61: Administration of JP courts

355. This section places the responsibility for the efficient administration of JP courts in the sheriffdom on the sheriff principal. In exercising this responsibility, the sheriff principal may issue administrative directions to those involved in the administration of JP courts (other than the Scottish Ministers). The Scottish Ministers may also issue administrative directions for the purpose of ensuring the efficient administration of JP courts, subject to prior consultation with the sheriff principal.

Section 62: Area and territorial jurisdiction of JP courts

356. The territorial jurisdiction of JP courts is set out in subsection (1), which provides that a JP court may try offences committed within the sheriff court district in which it is located, or in any other sheriff court district within the sheriffdom. This is similar to the territorial jurisdiction of the sheriff court. Further provision relating to the jurisdiction of JP courts is contained in sections 9 and 10 of the 1995 Act, as modified by paragraphs 9 and 10 of the schedule to this Act.

357. Subsection (4) provides that a JP or stipendiary magistrate may exercise their judicial functions at any place within the sheriffdom where s/he is appointed. Subsection (5) further provides that a JP or stipendiary magistrate may sign, at any place in Scotland, a warrant, judgement, interlocutor or other document relating to criminal proceedings within the sheriffdom where s/he is appointed. Subsection (6) makes it clear that a JP or stipendiary magistrate may exercise signing functions, as defined in subsection 76(6) of the Act, within Scotland.

358. Subsection (7) is a transitional provision. It ensures that, after a JP or stipendiary magistrate has been appointed for a sheriffdom (in terms of section 67 of the Act), s/he may continue to work within any remaining district court that lies wholly or partly within the sheriffdom.

Section 63: Constitution and powers etc. of JP courts

359. Section 63(1) makes clear that the JP court has competence, subject to the provisions in sections 6 and 7 of the 1995 Act, to deal with summary proceedings in respect of offences. Section 7(1) of the 1995 Act provides that district courts have the power to deal with common law offences. That subsection is repealed by paragraph 9(2) of the schedule to this Act. The revised subsection 7(3) of the 1995 Act, which is inserted by the same paragraph of the schedule, instead makes it clear that district courts have the power to try any common law or statutory offences which are triable summarily.

360. Section 6(2) of the 1995 Act provides that a district court may be constituted by one or more JPs. Some district courts sit with benches of 3 JPs, in others only 1 JP presides. Section 6(2) is modified in the schedule to the Act and, as modified, will allow the JP court to be constituted by one or more JPs. However, section 63(2) provides the Scottish Ministers with the power to amend section 6(2) of the 1995 Act, by order, to provide that a JP court may be constituted by one JP only.

361. This section also makes provision relating to the staff of JP courts, including clerks of court. The clerk of a JP court will be a solicitor or advocate, and will provide legal advice to the court. Clerks of court and other staff will be appointed and employed by Scottish Ministers (in practice they will be employees of the SCS).

Section 64: Abolition of district courts

362. This section sets out the process for the disestablishment of district courts. The intention is that all of the district courts in a particular sheriffdom will be disestablished at the same time as JP courts are established in a sheriffdom under section 59 of the Act. The Scottish Ministers must consult the relevant sheriff principal and local authority before making an order to disestablish a district court.

363. The existing legislation governing the operation of district courts is the District Courts (Scotland) Act 1975. Subsection (4) provides for this legislation to be repealed by the Scottish Ministers by order. The intention is that the legislation relating to the operation of the district courts will be repealed for a particular sheriffdom at the same time as the district courts are disestablished and the JP courts are established. The parts of the legislation relating to the lay justice system (for example the provisions on the appointment and removal of justices of the peace) will be repealed across the country at the same time.

364. Subsections (5) to (8) contain transitional provisions for remaining district courts. Legislation relating to JP courts (including the provisions in this Act relating to matters such as the sentencing powers of the JP court) may be applied to district courts pending their disestablishment.

Section 65: Transfer of staff and property

365. This section provides that the Scottish Ministers must make a scheme for the transfer of the employment of certain members of district court staff to the Scottish Administration. Such a scheme may be referred to in an order made under section 64(1) of the Act. The scheme may apply to some or all staff who work in the district court that is being disestablished. It may, by way of example, apply only to staff that spend more than a particular proportion of their working time on district court duties. Subsection (4) makes it clear that the Transfer of Undertakings (Protection of Employment) Regulations 2006 (S.I. 2006/246) will apply to staff transferred under this section.

366. Subsections (5) to (8) make provision for the transfer to, and vesting in, Scottish Ministers of district court properties and liabilities when district courts are disestablished under section 64(1). Subsection (6) reflects that fact that the Scottish Ministers are not required to transfer all district court properties to themselves. Some properties may remain with the local authority, depending on the circumstances of each case. Subsection (8) provides that a certificate issued by Scottish Ministers is conclusive evidence of the transfer of any such property or liability.

Section 66: Transitional arrangements for proceedings

367. This section makes provision for the transfer of both continuing and recently completed district court proceedings, including related records, productions and other documents, to the appropriate JP court. Recently completed proceedings are proceedings that have been completed not more than 5 years before the date on which the district court in question is disestablished.

368. The sheriff principal for the sheriffdom in which the district court is located will determine the relevant JP court to which proceedings and records should be transferred.

Appointment of JPs etc.

Section 67: Appointment of JPs

369. This section provides for the appointment of justices of the peace.

370. Subsection (1) makes it clear that JPs will be appointed by Scottish Ministers on behalf of and in the name of the Queen. This provision is essentially the same as the existing provision which provides for the appointment of JPs – section 9(1) of the District Courts (Scotland) Act 1975 (the 1975 Act).

371. Subsection (2) indicates that JPs are to be appointed to a sheriffdom. This provision should be read alongside section 62(4) which makes it clear that they will be able to perform judicial functions in any part of the sheriffdom to which they are appointed. Under sections 9(1) and 26(1) of the 1975 Act, JPs are currently able to perform judicial functions within the local authority area to which they are appointed. The Act therefore has the effect of widening the geographical area within which JPs can act.

372. Subsection (3) states that a JP's appointment is for a term of five years. Under the 1975 Act, there was no limit to the length of a JP's appointment (although all "full justices", who were eligible to sit on the bench, had to become "signing justices" on the supplemental list when they reached the age of 70, and therefore ceased to be able to sit on the bench).

373. Subsection (5) requires the Scottish Ministers to comply with any order that they make as to procedure and consultation for appointing JPs. This provision reflects the terms of section 9(8A) of the 1975 Act, which was inserted into the 1975 Act by the Bail, Judicial Appointments etc (Scotland) Act 2000. No regulations have been made under section 9(8A) of the 1975 Act. An order under this subsection is likely to make it clear that candidates will be recommended to Scottish Ministers for appointment as JPs, prior to their first five year appointment, by Justice of the Peace Advisory Committees (JPAC), chaired by the sheriff principal of the relevant sheriffdom.

374. Further to subsection (6)(a), each JPAC will have a mixture of lay members and JPs. The order is also likely to make it clear that each JPAC should agree protocols with the Judicial Appointments Board for Scotland, setting out how it will recruit JPs. These protocols are likely to deal with matters such as the way in which JP vacancies should be publicly advertised.

375. Subsections (7) and (8) deal with existing justices of the peace. Subsection (7) makes provision for their appointment to be terminated on a date specified by order. However, the effect of subsections (7)(b) and (8) is that any full JPs who have been placed on the

court rota during the 12 months before that specified date are to be appointed as a JP under subsection (1) unless they decline their appointment. This provision will ensure that all existing JPs who sit on the bench become subject to the new arrangements for JPs set out in this part of the Act. The intention is that the Executive will write to all current full JPs several months before their appointment is due to be terminated. It will explain that their appointment will cease on a given date, but state that they will be appointed as JPs providing they have been, or will be, placed on the court rota during the twelve months prior to that date and that they agree to meet certain conditions (these are dealt with in the next section). JPs who agree to this will return a form to the Executive, and will be reappointed as JPs. Their new appointments will start on the day that their old appointments cease.

Section 68: Conditions of office

376. This section sets out the conditions which may be attached to the appointment of justices of the peace.

377. Subsection (1) states that somebody is not to be appointed as a JP unless they ordinarily live in, or within 15 miles of, the sheriffdom to which they are being appointed. This subsection only applies to a JP's first appointment. A JP who moved outside of the sheriffdom during the course of their five year appointment, but who still undertook duties on the bench within the sheriffdom to which they were appointed, would be eligible for reappointment at the end of five years, but could be subject to a recommendation against reappointment made by the sheriff principal in terms of section 70(3)(c).

378. The effect of subsection (1) is slightly different to that of sections 9(3) and 9(4) of the 1975 Act. These provisions of the 1975 Act prevent a JP from holding office, or acting as a JP, unless they live in or within 15 miles of their local authority area. They also allow Scottish Ministers to waive this requirement if they consider it to be in the public interest to do so. The new provisions remove this element of discretion at the time of a JP's appointment.

379. Subsection (2) states that the appointment of JPs shall be made subject to conditions relating to training, appraisal and their availability to meet the business needs of the relevant part of their sheriffdom. The intention is that JPs will need to accept these conditions prior to being appointed. Subsection (3) makes it clear that the sheriff principal will assess the likely court business in their sheriffdom. The sheriff principal's assessment will be referred to when setting conditions on JPs' required availability.

380. Subsections (4) and (5) require the Scottish Ministers to pay allowances to JPs according to a scheme devised by them. These allowances are likely to cover reimbursement for expenses incurred in fulfilling the duties of a JP, and also reimbursement for any loss of earnings as a result of undertaking a JP's duties. Under section 17(6) of the 1975 Act, allowances to JPs are currently paid by local authorities.

Section 69: Training and appraisal of JPs

381. This section allows Ministers to make provision by order in relation to the training and appraisal of JPs and future JPs. It also allows them to establish committees which will have responsibility for key functions relating to training and appraisal.

382. Under the 1975 Act, Scottish Ministers have the power to make schemes and provide courses for the instruction of justices of the peace. They do not however have any powers relating to appraisal.

383. In practice, the Executive envisages that the training and appraisal of JPs will come under the overall oversight of the Lord President. That is the reason for the provisions at subsection (2) and (4).

384. It is likely that candidates, having undergone a recruitment process, will be required to undergo a mandatory induction scheme before being recommended to Ministers for appointment as JPs. The Executive currently envisages that the content of this scheme will be drawn up or approved by the Judicial Studies Committee, a non-statutory body which organises training courses for the Scottish judiciary. The scheme would then be issued or approved by the Lord President.

385. The Executive also envisages that all existing JPs will be required to undertake a minimum amount of ongoing training each year, including being required to undertake refresher training within two years of taking up their new five year appointments. Again, it is likely that the Judicial Studies Committee would draw up or approve these ongoing training requirements, which would then be issued or approved by the Lord President.

386. With regard to appraisal, the Executive envisages that JPs will be appraised against a competence framework which would be drawn up or approved by the Judicial Studies Committee. This competence framework would then be approved by the Lord President.

387. Subsection (3) allows the order in relation to training and appraisal to include the power to establish committees. These committees will have the power to devise or adopt appropriate training and appraisal courses and systems; to ensure that these courses or systems are delivered or used; and to provide advice about training and appraisal. The composition and functions of these committees will be set out in more detail in the draft order. It is likely that groups in each sheriffdom, mainly or entirely composed of JPs, will be given responsibilities relating to the delivery of appraisal and training within the sheriffdom. In doing so, they will effectively assume the responsibilities for training that justices' committees currently have under section 16(1)(c) of the 1975 Act.

Section 70: Reappointment of JPs

388. Subsection (1) makes it clear that a JP is eligible for reappointment on the expiry of his or her five year appointment. A JP who has resigned from office is also eligible to be reappointed.

389. The effect of subsection (2) is that a JP whose five year appointment has finished shall be reappointed unless certain circumstances apply. The subsection also sets out what those circumstances are.

390. Subsection (2)(d) makes it clear that a JP shall not be reappointed if the sheriff principal for the JP's sheriffdom recommends to Scottish Ministers that the JP should not be reappointed. Subsection (3) sets out the grounds on which the sheriff principal may make such a recommendation. They are that the JP has inadequately performed the functions of a JP; that the JP has, without good reason, failed to meet requirements under section 68(2) relating to training, appraisal or availability to meet the business needs of the relevant part of their sheriffdom; that the JP no longer lives within fifteen miles of the sheriffdom to which they are appointed; or on such other ground as the sheriff principal considers relevant (one example of this might be if the JP had been convicted of a number of motor offences during the previous five years).

391. The provision at subsection (3)(a) relating to inadequate performance of the functions of a JP is intended to allow a sheriff principal to recommend against reappointment if, for example, a JP’s appraisals had demonstrated that the JP was not performing adequately.

Section 71: Removal of JPs

392. This section deals with the circumstances in which a JP can be removed from office. At present, section 9A of the 1975 Act deals with the removal of a full JP from office.

393. In keeping with the existing law, subsections (1) and (2) provide that a JP may only be removed from office during the five year term of appointment by order of a tribunal appointed by the Lord President of the Court of Session.

394. Subsection (6) makes it clear that a tribunal appointed by the Lord President of the Court of Session can order a JP's removal on only a limited number of specified grounds. Subsection (6) also states that the tribunal's investigations are to be carried out at the instance of the sheriff principal for the sheriffdom to which the JP is appointed. This represents a change from section 9A(2) of the 1975 Act, which provides that the tribunal's investigation is to be carried out at the request of the Scottish Ministers.

395. The combined effect of subsection (4)(a), subsection (5) and subsection (6) is to ensure that the sheriff principal who chairs the tribunal and sheriff principal who requests the tribunal's investigation will be different persons. Under section 9A(2) and (4) of the 1975 Act, tribunals are requested by Scottish Ministers and chaired (unless the Lord President decides otherwise) by the sheriff principal of the JP's sheriffdom. Under subsections (4)(a) and (6) of this section, tribunals will be instigated by the sheriff principal of the sheriffdom to which the JP is appointed, and chaired by a different sheriff principal.

396. Subsection (6)(b) states that a possible ground for removing a JP is that the JP has inadequately performed the functions of a JP. As with the provision at section 70(3)(a), it is anticipated that the tribunal may make this finding if, for example, a JP's appraisals had demonstrated that the JP was not performing adequately as a JP. It is envisaged that "inadequate performance" will constitute a lower test than that of "inability" as a ground for removal.

397. Subsections (7) and (8) allow the Scottish Ministers to make provision by order regarding the tribunal. It is likely that orders regarding the conduct of the tribunal will be similar to the existing Justices of the Peace (Tribunal) Regulations (Scotland) 2001**,** although they will take account of the differences, as outlined above, between the provisions of this Act and those of the 1975 Act which relate to tribunals.

398. Subsection (7)(b) allows any order made by Scottish Ministers to authorise a specific body or class of persons to recommend to a sheriff principal that s/he instigate the establishment of a tribunal. This means that, for example, any committee established to oversee the appraisal of JPs in a sheriffdom under section 69(3) of this Act could also be authorised to recommend to a sheriff principal the instigation of a tribunal in order to investigate whether someone has inadequately performed their functions as a JP.

399. Subsection (9) makes it clear that anybody who is removed from office as a JP is ineligible for reappointment as a JP. This provision reflects the terms of section 9A(10) of the 1975 Act.

Section 72: Disqualification of solicitors who are JPs

400. This section disqualifies a solicitor who is a JP from acting in any proceedings in a JP court in the sheriffdom to which they have been appointed as a JP. Subsection (2) extends this disqualification to the solicitor's staff and – where the solicitor is a partner of a law firm – to any other partner or member of staff of the partnership. This provision reflects the terms of section 13 of the 1975 Act.

Section 73: Disqualification where sequestration or bankruptcy

401. This section mirrors section 13A of the 1975 Act. It prevents someone from being appointed as a JP or, if they have been appointed, from acting as a JP, if their estate has been sequestrated in Scotland or if the person has been adjudged bankrupt outside Scotland. The disqualification ceases, however, if the circumstances set out in subsections (2) and (3) apply.

402. Under section 70(2)(c) of this Act, a JP whose estate has been sequestrated in Scotland, or who has been adjudged bankrupt, may not be reappointed as a JP at the end of their five year term of appointment.

Section 74: Appointment of stipendiary magistrates

403. This section provides for the appointment of stipendiary magistrates. It will replace section 5 of the 1975 Act. Stipendiary magistrates differ from lay justices because they are professional judges who must have been a solicitor or advocate for at least five years. Although all local authorities, with the approval of Scottish Ministers, currently have the power to appoint stipendiary magistrates, only Glasgow City Council currently does so. Stipendiary magistrates have the same criminal jurisdiction as a sheriff when sitting summarily, which means that they can sentence people for up to three months in custody (or six or nine months under certain circumstances) and fine them up to £5,000. Under the provisions of sections 43 to 45 of this Act, they will be able to sentence people to a year's imprisonment, and fine them £10,000. Justices of the peace can sentence people to two months' imprisonment and fine them £2,500.

404. Subsection (1) states that stipendiary magistrates are to be appointed by Scottish Ministers on behalf of and in the name of the Queen. Under the 1975 Act, stipendiary magistrates are appointed by a local authority, subject to the approval of Scottish Ministers.

405. Subsection (2) states that a stipendiary magistrate will be appointed for a sheriffdom. A stipendiary magistrate will be able to sit in any JP court within the sheriffdom to which they are appointed (section 62(4) of the Act).

406. Subsection (3) makes it clear that the appointment of a stipendiary magistrate is to be conditional upon Scottish Ministers approving the decision to make such an appointment, on the advice of the sheriff principal for that sheriffdom.

407. Subsection (6) makes it clear that a stipendiary magistrate may exercise the same judicial and signing functions as a JP, and may use the title of office of JP in discharging those functions. This means, for example, that a stipendiary magistrate is able to sign any documents for which a JP's signature would be competent. Stipendiary magistrates will continue to have the same jurisdiction as a sheriff sitting summarily (see section 7(5) of the 1995 Act, as amended by paragraph 9 of the schedule to this Act).

408. Subsections (7) and (8) bring the appointment terms of full-time stipendiary magistrates into line with those of other full-time professional members of the judiciary in Scotland, by providing for them to be appointed until the age of 70. Under the 1975 Act, retirement for stipendiary magistrates is set according to the conditions of service "applicable to service in local government." The provisions for the appointment terms of part-time stipendiary magistrates are similar to those for JPs at subsections 67(3) and (4) of this Act. Part-time stipendiary magistrates will be appointed for renewable terms of five years, subject to the entitlement to resign at any time and need to retire at 70.

409. Subsection (9) requires Scottish Ministers to comply with any order that they make as to procedure and consultation for appointing stipendiary magistrates. Subsection (10) illustrates what such an order may relate to. This allows Ministers to set out how stipendiary magistrates would be recruited. The order could, for example, set out any role that the Judicial Appointments Board for Scotland may assume in the recruitment process. These subsections replicate the provisions for JPs at section 67(5) and (6).

410. Subsection (12) concerns those currently holding the office of stipendiary magistrate. It replicates the provisions made for JPs at section 67(7). Subsection (12) makes provision for stipendiary magistrates' appointment to terminate on a date specified by order. It also states that they are to be appointed as a stipendiary magistrate under section 74 unless they decline their appointment. Their new appointments will start on the same the day that their old appointments cease.

Section 75: Stipendiary magistrates: further provision

411. This section makes provision for the payment, reappointment, removal and disqualification of stipendiary magistrates.

412. Subsection (1) gives Scottish Ministers the power to determine the remuneration, allowances and pension provision of stipendiary magistrates. The exact mechanism by which Ministers will determine this is still to be decided. One possibility is that the remuneration of stipendiary magistrates will be linked to another, independently determined, pay scale. Subsection (2) makes it clear that Scottish Ministers are to pay the expenditure arising from subsection (1).

413. Subsection (3) specifies those provisions in the Act relating to JPs which also apply to stipendiary magistrates. These provisions relate to terms of appointment, reappointment, removal and disqualification.

414. The provisions in section 70 of the Act will, in effect, only apply to part-time stipendiary magistrates, since they relate to reappointment at the end of a five year term of appointment. A part-time stipendiary magistrate is to be reappointed at the end of their five year term unless they decline their reappointment; they are aged 69 years or over; they are disqualified under the provisions of section 73 relating to sequestration and bankruptcy; or the sheriff principal makes a recommendation against reappointment. Sheriffs principal will be able to recommend against the reappointment of part-time stipendiary magistrates on the grounds that they have not complied with any terms of appointment relating to their availability to meet local business needs (this provision could be especially relevant for part-time stipendiary magistrates) and on such other grounds as the sheriff principal considers relevant. Since stipendiary magistrates will not be subject to training, appraisal or residential requirements, failure to comply with any of those is not specified as a possible ground for removal. Since stipendiary magistrates will not be subject to appraisal, “inadequate performance” does not constitute a specific ground for a recommendation against reappointment for part-time stipendiary magistrates.

415. Similarly, at subsection (3)(c) the “inadequate performance” provision set out at section 71(6)(b) of this Act as a possible ground for removing JPs does not apply to stipendiary magistrates.

416. Under subsection (3)(d), the provisions of sections 72 and 73 apply to stipendiary magistrates as well as to JPs. These sections relate to the disqualification of solicitors who are JPs, and disqualification in the case of sequestration and bankruptcy.

Section 76: Signing functions

417. This section sets out who, in future, will be able to carry out the signing functions which can currently be undertaken by people on the supplemental list under sections 15(8) and (9) of the 1975 Act.

418. Subsection (1) makes it clear that no person who is a member of a local authority, a member of the Scottish Parliament, a member of the House of Commons or a member of the House of Lords can sit on the bench as a JP. JPs who become members of these bodies can still, however, exercise the signing functions set out at subsection (6). In addition, any member of a local authority can exercise the signing functions set out at subsection (6), regardless of whether or not they are a JP.

419. Subsection (6) defines what is meant by "signing functions". The definition is the same as that currently used in section 15(9) of the 1975 Act, and limits the range of documents which can be signed. For example, local authority members will be able to countersign written declarations that somebody has lost their insurance policy, or that they wish to change their name. They are also able to confirm facts within their own knowledge – for example by signing passport applications and shotgun licensing applications for people whom they know. However unlike “full” justices of the peace under the 1975 Act, or

any justice of the peace under the current Act, people who can only undertake "signing functions" cannot sign affidavits (since these record oral statements) or warrants.

420. These sections are different in their effect from the provisions of the 1975 Act which related to signing functions. Under sections 15(8) and (9) of the 1975 Act, anybody placed on the supplemental list could undertake signing functions, but no other functions, by virtue of their office. Under section 15(1) of the 1975 Act, all JPs are currently placed on the supplemental list once they reach the age of 70. Under section 12 of the 1975 Act, as amended by the Bail, Judicial Appointments etc (Scotland) Act 2000, councillors are not able to hold office as full justices, but can be entered onto the supplemental list. Under section 11(1) of the 1975 Act, local authorities are currently allowed to nominate up to one quarter of their councillors to be entered onto the supplemental list.

421. Under the provisions of this Act, there will not be a supplemental list. JPs who have reached the age of 70 will not therefore have signing functions. Under subsections (2) and (3), all councillors will automatically have signing functions by virtue of their office, which will allow them to sign the range of documents set out in subsection (6). If a person were appointed as a JP after this section's provisions had come into force, therefore, and then became a councillor, they would remain as a JP at least until the end of their five year term of appointment, but would only be able to undertake signing functions. In addition, the bar on councillors sitting on the bench as justices will be extended to MPs, MSPs and members of the House of Lords.

422. The provisions at subsections (3) and (4) make it clear that forms (such as statutory declarations regarding lost insurance policies) which specify a "JP" as a possible signatory, can also be signed by a stipendiary magistrate or local authority member, if they are exercising signing functions.

423. Subsection (5) provides that JPs and councillors cannot charge a fee for exercising signing functions.

Section 77: Records and validity of appointment etc.

424. This section makes provision for the keeping of records of those holding office as JPs and stipendiary magistrates. It also provides for the appointments and acts of JPs and stipendiary magistrates to be valid, even if certain requirements set out in this Act have not been met.

425. Subsection (1) requires Scottish Ministers to keep a list of all people who hold office as a JP or stipendiary magistrate; a record of the instruments of appointment for all JPs and stipendiary magistrates; and a record of any order removing a JP or stipendiary magistrate from office. Subsections (2) and (3) require Scottish Ministers to send the list and record to the sheriff clerk of each sheriff court, and for arrangements to be made to ensure that the list is available for public inspection.

426. Subsections (4) and (5) make it clear that the appointments and acts of JPs and stipendiary magistrates are still valid, even if their appointment has not complied with the requirements for procedure and consultation set out in an order made under section 67(5) or section 74(9); the requirement that the JP ordinarily live in or within 15 miles of their constituency at the time of their first appointment has not been met; or if a JP has breached one of their terms of appointment as set out in section 68(2).

Part 5 – Inspection of the Crown Office and Procurator Fiscal Service

Section 78: Appointment of Inspector

427. This section provides for the appointment of Her Majesty's Inspector of Prosecution in Scotland by the Lord Advocate and makes provision for the length of appointment

and associated matters. Subsection (5) allows the Inspector to authorise any person to exercise any functions of the Inspector.

Section 79: The Inspector's functions

428. This section provides for the functions of the Inspector.

429. Subsection (1) provides that the task of the Inspector is to secure the inspection of the Crown Office and Procurator Fiscal Service (the "Service"). Subsection (2) makes provision for a report to be provided by the Inspector to the Lord Advocate on any particular matter referred to the Inspector by the Lord Advocate. These subsections place the current administrative arrangements under statutory authority. In practice the Inspector and his or her staff will be civil servants.

430. Subsections (3) and (4) provide authority for the Inspector to require information of any person directly involved in the operation of the Service of a general or specific character including in electronic or documentary form. Subsection (5) places a duty on the Inspector to provide the Scottish Ministers with details of any expenditure incurred in the exercise of the Inspector's functions.

431. Subsection (6) requires the Inspector to submit an annual report to the Lord Advocate. Subsection (7) allows the Lord Advocate to comment on the draft annual report before the annual report is submitted under subsection (6). Subsection (8) provides for the annual report to be laid before the Scottish Parliament.

432. Subsection (9) ensures the independence of the Inspector.

Part 6 – General

Section 80: Modification of enactments

433. This section introduces the schedule to the Act which makes amendments to certain enactments.

Section 81: Orders

434. This section regulates the order making powers that are to be found in the Act. All orders will be made by statutory instrument. Subordinate legislation powers which are inserted into the 1995 Act are regulated by that Act.

Section 82: Ancillary provision

435. This allows the Scottish Ministers to make ancillary provision in statutory instruments in consequence of the Act.

Section 83: Interpretation

436. This section provides definitions.

Section 84: Commencement and short title

437. This section provides for commencement of the Act to be made by order, except for sections 81 to 83 which come into force on Royal Assent.

Schedule

Modification of Enactments
Sheriff Courts and Legal Officers (Scotland) Act 1927

438. Paragraph 1 is consequential upon Scottish Ministers having the responsibility for the administration of JP courts. They will also have responsibility for JP court clerks.

Public Records (Scotland) Act 1937

439. Paragraph 2 provides for amendments to the 1937 Act that will make it clear that the sheriff principal will be responsible for the preservation of the records of the JP courts within his or her sheriffdom. New section 2A is added to the 1937 Act which makes provision for the storage of JP court records. These provisions are largely in line with the provisions in place for the storage of sheriff court records, with several exceptions. They provide that the Sheriff Principal may, on the application of the Keeper of the Records of Scotland ("the Keeper"), make an order directing that selected JP court records of that sheriffdom shall be transmitted to the Keeper. This is in contrast to sheriff court records where an order of the Lord President is required. Subsection (2) of new section 2A provides that such an order shall not apply to any record less than 10 years old unless the sheriff principal is satisfied that adequate provision cannot otherwise be made. This again is in contrast to the provision for sheriff court records where records must generally be at least 25 years old. JP court records are to be transmitted to the Keeper within six months of the date of the order whereas sheriff court records cannot be transmitted earlier than three months from the date of the order.

Social Work (Scotland) Act 1968

440. Paragraph 3 is consequential on the changes made by section 51 of the Act which introduces work orders. It provides that a person who accepts such an order is subject to the supervision of the Social Work department of the area where s/he is carrying out that work.

Education (Scotland) Act 1980

441. Paragraph 4 amends the Education (Scotland) Act to allow local authority prosecutions under that Act to be brought in the JP court.

Legal Aid (Scotland) Act 1986

442. Paragraph 5 is consequential on section 14 of the Act. It amends the Legal Aid (Scotland) Act 1986 and is intended to replicate, in summary proceedings, changes made to solemn proceedings by the Criminal Procedure (Amendment) (Scotland) Act 2004. The amendments extend the availability of automatic criminal legal aid in terms of subsection 22(1)(dd) of the 1986 Act to solicitors who have been appointed by the court to deal with a summary trial in the absence of the accused; and disapply the provisions of section 31(1) of the 1986 Act, which allows the legally aided accused to select his or her own solicitor in such a case. If the case is proceeding in the absence of the accused s/he will not be in a position to choose a solicitor.

Criminal Justice Act 1988

443. Paragraph 6 amends section 133(5)(b)(ii) of the Criminal Justice Act 1988. The amendment updates a reference to make clear that the Scottish Ministers can make payments of compensation for a miscarriage of justice where a conviction has been quashed on a reference from the Scottish Criminal Cases Review Commission to the High Court of Justiciary. This corrects a legislative oversight and has a retrospective effect.

Road Traffic Offenders Act 1988

444. Paragraph 7 is consequential upon the establishment of JP courts and inserts references to that court in place of the district court.

Environmental Protection Act 1990

445. Paragraph 8 provides that any income received from fixed penalty notices issued under the Act will accrue to the issuing authority. This is consequential on the disestablishment of the district court and the intended repeal of section 23(2) of the 1975 Act.

Criminal Procedure (Scotland) Act 1995

446. Paragraph 9 is consequential upon the creation of JP courts. Subparagraph 1 substitutes references to JP courts for district courts where they appear in section 6 of the Act.

The subparagraph further provides that prosecutions under the Education (Scotland) Act 1980 may be brought in the JP court by someone other than the procurator fiscal. This will allow local authority prosecutions to be brought in the JP court.

447. Subparagraph (2) repeals subsections (1) & (2) of section 7 of the 1995 Act and makes further consequential amendments to that section, clarifying the powers of the district court (and therefore the JP court, post-introduction).

448. Subparagraph (3) removes the requirement for the sheriff principal to consult the local authority before prescribing court holidays.

449. Subparagraphs (4) & (5) are consequential on the introduction of JP courts.

450. Subparagraph (6) amends section 9 of the 1995 Act and provides that where several offences have been committed in different sheriff court districts the accused may be tried on a complaint in any of the JP courts for any one of those districts.

451. Subparagraph (7) repeals section 9A of the 1995 Act. Equivalent provision to that contained in that section is made in section 62(5) of the Act.

452. Paragraph 10 amends section 10 of the 1995 Act and provides that crimes committed in different sheriff court districts may be prosecuted on complaint in any of the sheriff courts or JP courts in which the alleged offences took place. The present provisions may create a doubt as to whether the prosecution requires to be on indictment.

453. Paragraph 11 inserts a new section 10A into the 1995 Act and is consequential upon sections 22 and 31 of the Act. It confers jurisdiction upon the sheriff and the procurator fiscal of the relevant courts where proceedings have been initiated in or transferred to a court other than that where the offence took place. This is intended to avoid any doubt over jurisdiction as otherwise conferred by sections 4, 9 and 10 of the 1995 Act.

454. Paragraph 12 makes technical amendments which are consequential on provisions in relation to solemn warrants in sections 32 and 33 of the Act.

455. Paragraph 13 makes minor amendments to sections 72F and 72G of the 1995 Act. The relevant provisions of that Act presently relate to “proceedings on indictment”. The amendments clarify the scope of those provisions by making it clear that all solemn proceedings are covered, whether or not the stage of service of an indictment has been reached.

456. Paragraph 14 makes provision consequential upon sections 3 and 27 of the Act.

457. Paragraph 15 subparagraph (1) deletes certain words that are unnecessary.

458. Subparagraph (2) makes a number of minor amendments that tidy up existing provisions.

459. Subparagraph (3) provides for intimation to be made to the Crown Agent rather than the Lord Advocate in bail appeals made by witnesses.

460. Paragraph 16 makes various provisions in relation to appeals.

461. Subparagraph (1) makes changes to the appeal system in solemn cases. Section 107 of the 1995 Act is amended. The timescale for seeking leave of the High Court to rely on grounds of appeal which have been deemed to be unarguable at an earlier sift is amended. In consequence, the procedure for notification of the application to the Crown Agent is adjusted.

462. Subparagraphs (2), (3), (4), and (5) adjust existing provisions for the sake of accuracy in the 1995 Act.

463. Subparagraph (6) rectifies an omission in section 119(11) of the 1995 Act by substituting new cross references in that subsection to parts of section 65 of the Act

(relating to custody time limits in solemn proceedings). The effect is that where the High Court grants authority to bring a new prosecution under section 118(1)(c) of the 1995 Act in disposing of an appeal, and the accused is remanded in custody pending trial, s/he will have the protection of the custody time limits in section 65 in both Sheriff Court and High Court solemn proceedings.

464. Paragraph 17 makes minor adjustments to section 135 of the 1995 Act, and is consequential on the introduction of section 102A into that Act by section 32 of this Act.

465. Paragraph 18(1) is consequential on the introduction of section 32A into the 1995 Act by section 5 of this Act.

466. Paragraph 18(2) and (3) make changes to the appeal system in summary cases. Subparagraph (2) amends section 180 of the 1995 Act, which deals with appeals against conviction, and subparagraph (3) amends section 187, which deals with appeals against sentence. The effect of the amendments is identical. The timescale for seeking leave of the High Court to rely on grounds of appeal which have been deemed to be unarguable at an earlier sift is amended. In consequence, the procedure for notification of the application to the Crown Agent is adjusted.

467. Paragraph 18(4) is consequential on the introduction of section 32A into the 1995 Act by section 5 of this Act.

468. Paragraph 19 amends section 210A of the Criminal Procedure (Scotland) Act 1995 which makes provision about the imposition of extended sentences by adding to the list in that section the new offences created by the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005.

469. Paragraph 20 makes amendments to sections 211, 217, 222 and 223 of the 1995 Act. The amendments make further provision in relation to the collection and enforcement of fines.

470. Subparagraph (1) amends section 211(6) of the 1995 Act, which makes provision as to whom fines should be paid and accounted for. The word “summary” is deleted from subsection (6) in order to provide that all court imposed fines are to be subject to the provision in section 211(6). The words “clerk of court” are substituted with the words “clerk of any court, or to any other person (or class of person) authorised by the Scottish Ministers for the purpose”. This provides flexibility as to the individual or office holder who, in future, should be responsible for the collection of fines and will allow, for example, certain accounting functions to be carried out centrally, rather than by individual clerks of court. The words “by him” are also deleted from the subsection – they are no longer being necessary in view of the other changes being made. This subparagraph also repeals subsection (5) of section 211. Section 211(6) now makes provision in relation to the payment of all court imposed fines, so section 211(5) is deleted as unnecessary.

471. Subparagraph (2) is consequential on the introduction of Fines Enforcement Officers by this Act and provides that where an offender who has been fined and is under the supervision of an officer of the local authority fails to adhere to the payment arrangements for that fine the report that will be produced by the local authority officer should be submitted to the FEO where an enforcement order is in force in respect of the fine. Section 226G(4) (as inserted by section 55 of this Act) provides that the FEO must include a copy of that report with the report s/he is required to produce to the court when referring a case back to court.

472. Subparagraph (3) makes amendments to section 222 of the 1995 Act, which sets out the procedure for the transfer of fines, both within Scotland and between Scotland and the rest of the UK. It provides that a transfer of fines order may, in future, be made at the instance of the clerk of court rather than the court. It inserts a new subsection (1A) into section 222 which provides that the clerk of court in any court within a sheriffdom may transfer a fine to any other court within the same sheriffdom for the purpose of

enforcement. This provision will enable the clerk of court to transfer all outstanding fines against an offender within the sheriffdom to a single court, so that, where an offender needs to appear in court in respect of outstanding fines, all fines outstanding against that offender can be considered together at the one hearing. Taken together, these provisions will allow the clerk of court to transfer all fines (from both within and outwith the sheriffdom) to a single court in order that they may all be considered at one court hearing where it proves necessary to do so. Other consequential amendments are made.

473. Subparagraph (4) amends section 223 of the 1995 Act, which makes provision in relation to the procedure to be followed by clerks of court in relation to the transfer of fines. It is provided that where a transfer of fine order is made the clerk of the receiving court requires to remit or account for the fine to the court in which it was originally imposed if that court is outwith Scotland. Other consequential amendments are made.

474. Paragraph 21 is consequential upon section 5 of this Act, and removes the right of the prosecutor to be heard on bail post-conviction as provided for in section 245J(5) of the 1995 Act..

475. Paragraph 22 is consequential upon the change to the legal basis for the appointment of stipendiary magistrates.

476. Paragraph 23 amends section 283 of the 1995 Act. That section deals with certification of evidence obtained using video surveillance. The amendment expands the terminology used to include the recording of sounds as well as visual images, and to allow for recordings to be made on devices other than video tape.

477. Paragraph 24 is consequential upon the increase in sentencing power of the sheriff provided for in part 3 of this Act.

478. Paragraph 25 inserts definitions into the 1995 Act as a consequence of the establishment of JP courts.

479. Paragraph 26 makes further amendments to the 1995 Act as a consequence of the introduction of JP courts.

Bail, Judicial Appointments etc. (Scotland) Act 2000

480. Paragraph 27 repeals sections 8 to 11 of, and paragraphs 2 and 3(2) of the schedule to, the 2000 Act which make provision for the appointment and functions of JPs. Sections 67 to 77 of the Act make new provision for the appointment and functions of JPs. The repeal of section 11 and para 3(2) of the schedule to the 2000 Act is consequential on allowing education prosecutions to take place in JP courts.

Sexual Offences (Procedure and Evidence) (Scotland) Act 2002

481. Paragraph 28 makes provision consequential on section 19 of the Act.

Public Appointments and Public Bodies etc. (Scotland) Act 2003

482. Paragraph 29 makes a consequential amendment to the Public Appointments and Public Bodies etc. (Scotland) Act 2003 to remove Justice of the Peace Advisory Committees (JPACs) from the list of specified authorities which are subject to the Code of Practice for Ministerial Appointments to Public Bodies in Scotland. The amendment is a consequence of the change in the way in which JPAC members are appointed. At present, all appointments covered by schedule 2 to the Public Appointments and Public Bodies etc. (Scotland) Act 2003 are made by Ministers or on the recommendation of Ministers. In future, the Executive anticipates that JPAC members will be appointed by sheriffs principal, rather than by Ministers. Future inclusion of JPAC appointments in Schedule 2 to the 2003 Act would therefore be inappropriate.

Criminal Justice (Scotland) Act 2003

483. Paragraph 30 makes provision consequential on section 62(5) of the Act, and generally in connection with the establishment of JP courts.

Dog Fouling (Scotland) Act 2003

484. Paragraph 31 provides that any income received from fixed penalty notices issued under the 2003 Act will accrue to the issuing authority. This is consequential on the disestablishment of the district court and the intended repeal of section 23(2) of the 1975 Act.

Antisocial Behaviour etc. (Scotland) Act 2004

485. Paragraph 32(a) provides that any income received from fixed penalty notices issued under section 51 of the 2004 Act will accrue to the issuing authority. This is consequential on the disestablishment of the district court and the intended repeal of section 23(2) of the 1975 Act. Other amendments consequential on the establishment of the JP court are made.

Enactments generally: references to district courts and justices

486. Paragraph 33 makes changes to enactments as a consequence of the introduction of JP courts. It also makes provision for Scottish Ministers to make further consequential amendments in that regard if necessary.