

CRIMINAL JUSTICE AND LICENSING (SCOTLAND) BILL

EXPLANATORY NOTES (AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament's Standing Orders, the following documents are published to accompany the Criminal Justice and Licensing (Scotland) Bill introduced in the Scottish Parliament on 5 March 2009:

- Explanatory Notes;
- a Financial Memorandum;
- an Executive Statement on legislative competence; and
- the Presiding Officer's Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 24–PM.

EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. 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.

COMMENTARY ON SECTIONS

PART 1 - SENTENCING

Section 1 - Purposes and principles of sentencing

4. Section 1(1) sets out the purposes of sentencing and 1(2) requires the courts to have regard to these when sentencing offenders. The duty applies regardless of whether the court is imposing a sentence, making an order or disposing of the case in any other way. This is not intended to prevent courts from considering other matters when sentencing offenders.

5. The weight to be given to each of the purposes of sentencing will vary depending on the facts and circumstances of the case and no inference should be drawn from the order in which they are listed.

6. Sections 1(3) and 1(4) set out other matters that the court must have regard to when sentencing offenders - the principles of sentencing. This does not prevent courts from considering other matters when sentencing offenders. These are not to be the only matters that the courts can consider and it is not intended to limit the matters that the court can take into account. No inference should be drawn from the order in which the principles are listed.

7. Section 1(5) sets out the circumstances in which it is not appropriate to require the courts to have regard to the purposes and principles of sentencing as detailed here. This includes occasions where courts are dealing with young offenders (i.e. those under 18 years of age), where a penalty is fixed by law and where courts are dealing with mental health disposals.

Section 2 – Relationship between section 1 and other law

8. Section 2 deals with the relationship between the requirement upon the courts to have regard to the purposes and principles of sentencing under section 1 and their other duties.

9. Section 2(1) provides that the court does not have to comply with the duty to have regard to the purposes and principles in a case where another provision of legislation contains requirements which are inconsistent with those purposes and principles.

10. If sentencing guidelines published by the Scottish Sentencing Council are inconsistent with the purposes and principles, section 2(2) provides that the court need not comply with the requirement to have regard to the purposes and principles in respect of those inconsistencies.

11. Section 2(3) provides that where the purposes and principles are inconsistent with those to which the court must have regard at common law, the court need not comply with the common law in respect of those inconsistencies.

12. Section 2(4) provides that apart from the circumstances dealt with in section 2(1) to (3) the purposes and principles to which the court must have regard under section 1 do not affect any other duty or power imposed or conferred on a court in respect of sentencing an offender.

Sections 3 - 13 - The Scottish Sentencing Council

13. Sections 3 – 13 and Schedule 1 set out the provisions for the establishment of a Scottish Sentencing Council (“the Council”), which will produce sentencing guidelines for Scotland.

14. Section 3 establishes the name of the Council and its status as a body corporate.

15. Section 4 sets out the objectives of the Council, which it must seek to achieve when carrying out its functions. These are to promote consistency in sentencing, assist the development of sentencing policy and support transparency in sentencing by promoting greater awareness and understanding of sentencing policy and practice.

16. Section 5 relates to the sentencing guidelines to be produced by the Council and what they may be about. Subsection (5) requires the Council to include an assessment in each guideline of the costs and benefits of the guideline and the projected impacts on the criminal justice system, in particular prisons and community justice services.

17. Section 6 sets out the consultation procedure for the Council, ahead of publishing any guidelines. The Council must publish a draft of the proposed guidelines for comment before publishing. There is a requirement to consult the Scottish Ministers and the Lord Advocate, as well as such other persons as the Council considers appropriate. Any draft must include the cost assessments and impact assessments required by section 5(5).

18. Section 7 details the effect of the guidelines on the courts. A court must have regard to any guidelines which are applicable in a case and must state its reasons if it chooses to depart from the guidelines. The guidelines that are applicable are those in force and applicable to the case at the time the court is sentencing the offender.

19. When the High Court is dealing with an appeal and is passing a different sentence under relevant provisions in the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”), then it must have regard to the guidelines that are applicable at the time that it is considering the appeal. The provisions in the 1995 Act are as follows:

- Section 118(3) relates to the power of the High Court to quash a sentence and pass another one of equal measure when dealing with an appeal against conviction;

- Section 118(4)(b) relates to the power of the High Court to pass a greater or lesser sentence when dealing with an appeal against conviction;
- Section 118(4A)(b) relates to cases where a court has imposed a sentence other than a mandatory sentence and the High Court opts to pass a different sentence, but one that is still not the mandatory sentence;
- Section 118(4A)(c)(ii) relates to the High Court's decision to set aside a decision and any sentence that departs from the mandatory sentence for drugs offences made under section 205B of the 1995 Act, and instead impose the mandatory minimum sentence or greater;
- Section 189(1)(b) relates to the power of the High Court, in an appeal against sentence in summary proceedings to quash the sentence and substitute another, whether more or less severe.

20. Section 7(6) is intended to prevent the revision of sentencing guidelines from becoming a ground for appeal referral by the Scottish Criminal Cases Review Commission. The Commission often deals with cases in which a significant period of time has lapsed between the original conviction and the appeal.

21. Section 7(7) requires the Lord Advocate to have regard to applicable sentencing guidelines when deciding whether to appeal a sentence.

22. Section 7(8) requires the prosecutor to have regard to applicable sentencing guidelines when deciding whether to appeal a sentence.

23. Section 8 gives the Scottish Ministers the power to request that the Council produces or reviews sentencing guidelines on any matter. While the Council must have regard to the request, it is not bound to comply with it. It must however, provide reasons for its decision not to comply.

24. Section 9 provides the High Court with the power to request that the Council reviews its guidelines on the occasions when it is sitting as an Appeal Court and has opted to pass another sentence under the provisions of the 1995 Act detailed in paragraph 8 above and has decided not to abide by the guidelines or has concluded that the guidelines do not deal adequately with an issue raised by the appeal.

25. The provisions require the High Court to state the reasons for its decision. The Council is required to review any guidelines referred to it under section 9(4).

26. Section 10 provides that the Scottish Court Service must provide the Council with information it may reasonably require in the form in which it requires.

27. Section 11 provides the Council with the power to publish and provide information and guidance on sentencing (in particular to the Scottish Ministers or members of the Scottish Parliament) and conduct research into sentencing. This section requires the Scottish Ministers to have regard to advice or proposals from the Council.

28. Section 12 relates to the business plan of the Council and sets out the requirements for the plan. It requires the Council to submit a 3 year plan to the Scottish Ministers describing how it plans to carry out its functions. Scottish Ministers must lay the plan before Parliament and the Council must publish it. It may also be revised at any time during its three years.

29. Section 13 relates to the annual report which the Council must submit to the Scottish Ministers and sets out the requirements for the content of the report. Each report must be laid before the Scottish Parliament by the Scottish Ministers and published thereafter by the Council.

Section 14 – Community payback orders

30. Section 14 inserts new sections 227A to 227ZK into the Criminal Procedure (Scotland) Act 1995 to establish community payback orders.

31. Section 227A makes provision for the court to impose a community payback order (CPO) on an offender, who has committed an offence, which would otherwise be punishable by imprisonment. Subsection (2) sets out the different requirements that can be included in a CPO. Subsection (3) requires the court to be satisfied that the seriousness of the offence(s) warrant imposition of a CPO. Subsection (4) provides two exceptions to the imposition of a CPO as an alternative to custody, specifically a level 1 unpaid work or other activity requirement, or a level 1 unpaid work or other activity requirement with a supervision requirement. Subsections (5) and (6) set out the restrictions on requirements a justice of the peace court may impose. Subsection (7) requires the court to ensure that the requirements, which form a CPO, are compatible. Subsections (8) and (9) provide powers for the Scottish Ministers to amend the requirements which may be imposed by the justice of the peace court by means of statutory instrument. Subsection (10) provides definitions of court, imprisonment and a level 1 unpaid work and other activity requirement.

32. Section 227B sets out the general procedures, which a court requires to apply, before imposing a CPO. Subsection (2) provides that before making a CPO, the court requires to obtain and take account of a report from a local authority officer. A CPO cannot be made unless such a report has been secured. Subsection (3) sets out who should receive a copy of the report. Subsection (4) provides that before making the order, the court must explain in open court, to the offender the purpose and effect of the CPO and the consequences for the offender should he/she fail to comply with its terms. Subsection (5) requires the offender to confirm that he/she understands and is willing to comply with all the requirements which form the CPO.

33. Section 227C sets out the generic requirements which need to feature in a CPO. These include the need to identify the area where the offender will reside and for the relevant local authority to nominate a responsible officer within 5 days of receiving a copy of the order. The order will indicate the need for the offender to comply with any instructions given by the responsible officer including change of address if the order does not impose a residence requirement. Subsections (3) and (4) set out the duties of the responsible officer including matters of compliance by the offender. Subsection (5) provides that in calculating the period of 5 days for the local authority to nominate a responsible officer, no account will be taken of Saturdays and Sundays.

34. Section 227D sets out the duties of the offender in relation to the CPO. Subsection (2) requires the offender to comply with the instructions of the responsible officer, including where an unpaid work or other activity requirement has been made to attend as instructed, and to notify changes of address and employment and educational circumstances. Subsection (3) provides for failure to comply with any of these duties will be treated as non-compliance with the order.

35. Section 227E makes further provision in relation to the CPO. Subsection (1) provides that a CPO is to be regarded as a sentence of the court. Subsection (2) provides that the court must give reasons for imposing the CPO in open court. Subsection (3) provides that the court in imposing a CPO is not prevented from taking other actions e.g. imposing a disqualification on the offender, making an order for forfeiture on the offence or ordering the offender to find caution for good behaviour. Subsections (4) and (5) indicate the arrangements to be followed by the clerk of the court with regard to those who should receive copies of the order and how they should be given. Subsection (6) provides for the form of the order to be set out in an Act of Adjournal.

36. Section 227F provides that the court in deciding on the requirements, which will form a CPO, should so far as possible avoid any conflict with the offender's religious beliefs, or interference with the offender's times of work or attendance at school or any other educational establishment.

37. Section 227G(1) sets out that as part of a supervision requirement and for the period specified the offender must attend as instructed for appointments with the responsible officer or his/her nominee. This indicates that the purpose of the requirement is to engage with the offender to support their rehabilitation. Subsection (2) concerns when a court must impose a supervision requirement. Subsection (2)(a) provides that a supervision requirement must be imposed on an offender under 18 years of age, subject to the court being satisfied that the local authority will be in a position to support and rehabilitate the offender. Subsection (2)(b) provides that a supervision requirement must be included in a CPO where certain other specified requirements are included or where the number of requirements amounts to two or more. A supervision requirement (subsections (3) and (4)) must be at least 6 months and not exceed 3 years.

38. Section 227H applies where a court makes a CPO and imposes a supervision requirement on the offender. Subsection (2) provides that, as part of the order, the court can also impose an obligation on the offender to pay compensation in relation to the offence(s) for which the CPO has been imposed. The compensation can be paid (subsection (3)) by a lump sum or in instalments as determined by the court. Subsection (4)(a) and (b) provide that where compensation is to be paid, it must be paid by the offender either within 18 months of the CPO being made or not later than 2 months before the end of the supervision period, whichever is earlier. The obligation to pay compensation and the time periods over which it is to be paid are to be treated as if they are part of the supervision requirement (subsection (5)).

39. Section 227I sets out the provisions the court must apply when imposing a CPO with an unpaid work or other activity requirement. Subsection (2) provides that the nature of the unpaid work or other activity requirement is not to feature as part of the order but rather to be determined by the responsible officer. Subsection (3) specifies the minimum and maximum

number of hours that constitute an unpaid work or other activity requirement. Subsections (4) and (5) provide for two levels of unpaid work and other activity to be known as level 1 and level 2 and defines the range of hours within these levels. Subsections (6) and (7) provide that the Scottish Ministers have the power to make an order varying the minimum and maximum hours of unpaid work or other activity that an offender can be required to perform. Subsection (8) defines 'specified' as relating to the unpaid work and activity requirement in the CPO.

40. Section 227J sets out further provisions in relation to an unpaid work and other activity requirement. Subsection (1) restricts the court to imposing this requirement only on an offender aged 16 years or over. Subsection (2) provides that this requirement can only be imposed by the court, where the court considers the offender to be suitable to perform the unpaid work or other activity requirement. Subsections (3) and (4) provide for the Scottish Ministers to make regulations to allow justice of the peace courts to impose a level 2 unpaid work and activity requirement.

41. Section 227K(1) provides for the split between unpaid work or other activity to be determined by the responsible officer subject to limits set out in subsection (2) on the maximum number of hours of other activity that can count towards the requirement. Subsection (3) and (4) provide the Scottish Ministers with powers to vary the limits specified in subsection (2).

42. Section 227L sets out the maximum time limit for completion of levels 1 and 2 unpaid work or other activity requirement.

43. Section 227M (1) and (2) provide that where the offender has defaulted on a fine not exceeding £500 and where the court in disposing of the matter would otherwise have imposed a custodial sentence, the court must impose a CPO with a level 1 unpaid work and other activity requirement. Subsection (3) limits the number of hours to 50 for the requirement where the fine that has been imposed does not exceed £200.

44. Subsection (4) provides that the fine or remaining instalment is discharged when the offender completes the hours of unpaid work and other activity requirement imposed by the court. Subsection (5) provides for discharge of the order where the offender after its imposition pays in full the amount of the fine outstanding. Subsection (6) sets out the arrangements which are to apply where the outstanding amount is paid in part. Subsection (7) provides that a level 1 unpaid work and other activity requirement can be imposed on an offender without his consent. Subsection (8) does not apply the wider consent provisions in relation to a CPO in dealing with a fine defaulter under the section 227M provisions. Subsection (9) provides that the court cannot impose a level 1 unpaid work and other activity requirement on an offender aged under 16 years, or where within the context of an overall maximum of 300 hours a further requirement would breach this limit. Subsection (9) does not apply this section to the High Court.

45. Section 227N(1) indicates that this section applies to situations where a court is considering imposing an unpaid work and other activity requirement on an offender already subject to an existing such requirement(s). Subsection (2) gives the court discretion to direct that the new requirement can be concurrent to any existing requirement(s). Where a concurrent requirement is made, subsection (3) sets out that the hours of unpaid work and other activity undertaken in respect of the new requirement also count towards any existing requirement(s).

46. Where a new unpaid work and other activity requirement is to be consecutive to an existing requirement, subsections (4) and (5) provide that the total number of hours to be undertaken must not exceed 300. Subsection (6) specifies that a court cannot impose a new unpaid work and activity requirement where it would result in the maximum 300 hours figure being exceeded.

47. Section 227O gives the Scottish Ministers the power to make rules for regulating performance of unpaid work and other activity requirements including in relation to a daily maximum number of hours, calculations of time undertaken, provision for travel expenses and record keeping.

48. Section 227P requires the offender to participate in a specified programme at the place specified and on the specified number of days. Subsection (2) provides a definition of “programme”. Subsection (3) prevents the court from making a programme requirement unless recommended by a local authority officer as being suitable for the offender to take part in. If the cooperation of someone other than the offender would be necessary to ensure the compliance of an offender with the proposed programme requirement, subsection (4) provides that the court can only impose the requirement if that other person consents. If the offender is subject to a programme requirement, Subsection (6) requires the offender to comply with any instructions given by the person in charge of the programme. Subsection (7) defines “specified” in relation to the programme requirement..

49. Section 227Q(1) requires the offender as part of a residence requirement to reside at a specified place for a specified period. If the specified place is to be a hostel or institution, subsection (2) restricts the court from imposing the requirement to only if it has been recommended by a local authority officer. Subsection (3) stipulates that the specified period must not be longer than the period specified in the supervision requirement. “Specified” means specified in the requirement (subsection (4)).

50. Section 227R(1) provides a definition including purpose of a mental health treatment requirement. Subsection (2) indicates that subject to certain specified types of treatment listed in subsection (3) the nature of the treatment is not to be specified. Before imposing a mental health requirement subsection (4) requires the court to be satisfied on the basis of evidence submitted by appropriately qualified individuals that three conditions (A – C) have been met. Subsection (5) sets out the considerations in relation to Condition A in that the offender must be suffering from a mental condition, which requires and may be susceptible to treatment and that other specified orders are not appropriate. Condition B is set out in subsection (6) and requires the proposed treatment to be appropriate for the offender. Subsection (7) requires that where the proposed treatment consists of a resident patient in a hospital arrangements exists for the offender’s reception (Condition C). Subsection (9) defines the specified treatment as the mental health treatment specified by the court in the requirement.

51. Section 227S(1) provides that proof of signature or qualifications on a report from an approved medical practitioner is not necessary when the report is submitted in evidence for imposition of a mental health treatment requirement. Subsections (2) and (3) state that the offender and his/her solicitor must receive a copy of the report of the medical evidence and the case may be adjourned to give the offender further time to consider the report.. Where the offender is being detained in hospital or remanded to custody, subsections (4) and (5) make

provision for an examination of the offender by an approved medical practitioner for the purposes of challenging the evidence to be presented in court. Subsection (6) provides for any such examination to be undertaken in private.

52. Section 227T(1) to (3) enable the practitioner under whose direction the treatment is being carried out to make arrangements where appropriate for the offender to receive a different kind of treatment or to receive it at a different place. Subsection (4) states the treatment to be provided requires to be of a kind which could have been specified in the requirement. Subsection (5) provides for the offender as a residential patient to receive treatment in a different institution or place not necessarily specified for that purpose as part of the requirement. Subsection (6) requires the agreement of the offender and the responsible officer to the proposed changes, for the agreement of an approved medical practitioner to accept the offender as a patient and where the offender is to be a resident patient for him/her to be received as such. Subsection (7) requires the court to be informed of changes under this section and for the planned treatment to be appropriate to the mental health treatment requirement.

53. Section 227U(1) specifies the purpose of a drug treatment requirement. Subsection (2) indicates that subject to certain specified types of treatment listed in subsection (3) the nature of the treatment is not to be specified. The person who treats or directs the treatment of the offender (subsection 4) must be appropriately qualified or experienced. Subsection (5) states that the specified period must not be longer than the period of the supervision requirement. Subsection (6) requires the court to satisfy itself before imposing a drug treatment requirement that a) the offender is dependent on drugs or misuses drugs, which are defined b) his/her condition may be treatable and c) arrangements exist for the offender's treatment. Subsection (7) defines "specified".

54. Section 227V(1) specifies the purpose of an alcohol treatment requirement. Subsection (2) indicates that subject to certain specified types of treatment listed in subsection (3) the nature of the treatment is not to be specified. The person who treats or directs the treatment of the offender (subsection 4) must be appropriately qualified or experienced. Subsection (5) states that the specified period must not be longer than the period of the supervision requirement. Subsection (6) requires the court to satisfy itself before imposing an alcohol treatment requirement that a) the offender is dependent on alcohol, b) his/her condition may be treatable and c) arrangements exist for the offender's treatment. Subsection (7) defines "specified".

55. Section 227W sets out the arrangements for periodic review of CPOs. When the court makes a CPO, subsection (1) provides for it to be reviewed at the time or times stated in the Order. Such reviews are to be referred to as "progress reviews"(subsection 2). Subsection (3) allows progress reviews to be carried out by the court which made the CPO or by the appropriate court and subsection (4) for the manner of the review to be determined by the court. Subsection (5) places a responsibility on the responsible officer to the court with a written report before a progress review takes place and subsection (6) a responsibility on the offender to attend each such review. Where he/she fails to attend the progress review, subsection (7) provides for the court to (a) issue a citation for the offender's attendance or (b) a warrant for his/her arrest. Subsection (8) defines the citation provisions. Subsection (9) provides for the court to vary, revoke or discharge the CPO on conclusion of a progress review.

56. Section 227X provides for application by the offender or the responsible officer to vary, revoke or discharge a CPO.

57. Section 227Y(1) applies where a court proposes to vary, revoke or discharge a CPO following a periodic review, application by offender or responsible officer. Subsection (2) provides that the court can only revoke, vary or discharge the order where it is in the interests of justice to do so, having regard to the circumstances following the start of the order. Subsection (3) and (4) set out the options available to the court in considering variation of the order. Subsection (5) provides that where the court proposes to extend the period or time limit specified in the requirement this cannot be longer than the overall maximum period or limit allowable for such a requirement. Subsection (6) applies the same principles set out in subsection (5) to an unpaid work and activity requirement.

58. Subsection (7) provides that where the court varies a restricted movement requirement, a copy of the variation order must be provided to the responsible officer. Subsection (8) allows the court when revoking an order to deal with the offender as it could if the order had not been made. Where the court proposes to vary, revoke or discharge the order, other than on the application of the offender, subsection (9) provides that it must issue a citation requiring the offender to appear before the court. Where the offender fails to appear as cited, subsection (10) allows a warrant for his/her arrest to be issued by the court. Subsection (11) defines the unified citation provisions.

59. Section 227Z(1) and (2) require the court when considering varying a CPO to first obtain a report from the responsible officer. Subsection (3) indicates who is to be provided with a copy of the report. Subsection (4) sets out that when varying the order the court must explain in ordinary language to the offender (a) the purpose and effect of each of the proposed varied requirements, (b) the consequences of non-compliance and (c) any variations to progress review arrangements. Subsection (5) requires confirmation from the offender that he/she understands the variations and is willing to comply with each of them.

60. Where the variation imposes a new requirement, subsection (6) sets out that (a) the court cannot a new requirement which was not available at the point of imposition of the order and (b) where a new requirement is permissible undertake the necessary steps which would have applied had it been imposed at the outset. Subsection (7) reinforces the need for the court to vary a requirement, which would not have been permissible at the point of imposition of the order.

61. Section 227ZA applies to situations where the offender (a) proposes to change, or has changed address within a different local authority to that specified in the order and (b) an application to vary the order to specify the new address has been made to the appropriate court. The court (subsection (2)) may only vary the order as proposed if arrangement exist in the new local authority area for the offender to comply with the order's requirements. Subsection (3) requires the new local authority to nominate one of its officer's to be the responsible officer for the order.

62. Section 227ZB details the procedures and powers of the court in dealing with cases where the offender has failed to comply with the terms and conditions of a CPO and is considered to be in breach of the order. Subsections (1) to (4) set out the procedures for bringing cases to court,

included issue of citations and warrants as required. Subsections (5) to (10) set out the options available to the court in dealing with cases where breach of an order has been admitted or proven. Subsection (6) indicates that where a court decides to vary the order to by imposing a new requirement this can include a restricted movement requirement.

63. Subsection (7) requires the court when imposing a restricted movement requirement to also make a supervision requirement if one is not already in place. Subsection (8) requires the restricted movement contractor to be provided with a copy of any such requirement. Subsection (9) restricts the maximum period of a restricted movement requirement to the remaining period of any existing supervision requirement or a maximum 12 months period, whichever is the lesser.

64. Subsection (10) requires the contractor supervising the restricted movement requirement to report any failure in compliance to the responsible officer. Subsection (11) requires the responsible to report incidents of failure of compliance to the court.

65. Section 227ZC details supplementary requirements in respect of evidence and penalties related to dealing with breaches of CPOs. Subsections (1) and (2) set out the custodial terms that different courts can impose for breach of a level 1 CPO. Subsection (3) provides for the evidence of one witness to be sufficient to evidence proof of breach of an order. Subsections (4) and (5) detail the evidence required to prove a breach of an order in respect of a requirement to pay compensation. Subsection (6) requires the court in dealing with cases of alleged breach to obtain a report from the responsible officer on the offender's compliance during the order.

66. Section 227ZD defines a restricted movement requirement (RMR) which can be imposed as a requirement of a community payback order for failure to comply with that order (see section 227ZB(5)(c) and (6)) and replicates some of the provisions of section 245A of the Criminal Procedure (Scotland) Act 1995 in respect of the requirements of the RMR.

67. Subsection (2) provides that the RMR may require an offender to remain at a specified address, and/or away from a specified address during certain specified periods. Subsection (3) restricts the requirement to remain at a certain address to 12 hours in any one day. Subsection (4) restricts the maximum duration of an RMR to 12 months. Subsection (6) empowers Scottish Ministers to amend by regulation the maximum periods specified in subsections (3) and (4)(b). The regulations would follow the affirmative procedure. Subsection (5) requires the court to specify the method of compliance and the person responsible for monitoring that compliance on the RMR. Subsections (6) and (7) provide for the Scottish Ministers to prescribe by regulation changes to the restrictions set out in subsections (3) and (4). Subsection (8) defines "specified" for the purposes of the section.

68. Section 227ZE further replicates some of the provisions of section 245A of the 1995 Act in respect of requirements placed on the court. Subsection (1) requires the court to be satisfied that compliance with the RMR can be monitored in the way specified in the order – which will be by way of remote (electronic) monitoring. Failure to be satisfied means that the RMR cannot be imposed. Subsections (2) and (3) require the court to obtain a report from the local authority, usually the social work service about the specified address and the views of the people staying at

that address who are likely to be affected by the enforced presence of the offender. The court may hear from the report writer if required before imposing the RMR

69. Section 227ZF provides for the court to consider an application from the offender to vary the terms of the RMR to change the specified address. Before agreeing to the variation the court must consider a report as detailed in section 227ZE above.

70. Section 227ZG applies section 245C of the 1995 Act (remote monitoring of compliance with restriction of liberty orders) to remote monitoring requirements. In particular this provides for the Scottish Ministers to make arrangements, including contractual arrangements, to remotely monitor compliance with RMRs and to specify by regulation the devices which may be used in remote monitoring. It also provides that an offender made subject to an RMR will be required to wear a device to enable such remote monitoring and should not tamper with or damage the devices used for remote monitoring.

71. Section 227ZH makes various provisions with respect to the functions of the Scottish Ministers, replicating some provisions from section 245A and 245B of the 1995 Act.

72. Subsections (1) to (3) provide for the Scottish Ministers to prescribe by regulation the court or classes of courts which may impose RMRs, the method of monitoring which may be used to monitor compliance with the RMR and the class of offender who may be made subject to an RMR. These regulations follow the negative resolution procedure.

73. Subsections (4) and (5) require the Scottish Ministers to determine the person or persons responsible for monitoring compliance with the RMR and provides for different persons to be determined for different methods of monitoring. In practice, this is likely to be the company contracted to provide the remote monitoring service as referred to in section 227ZG.

74. Subsections (6) to (8) require the Scottish Ministers to advise the court of who is responsible for monitoring compliance with the RMR, enabling the court to specify this on the order. These subsections also require Scottish Ministers to advise the courts if there is any change in the persons responsible for monitoring compliance, and for those courts to subsequently vary the RMR to specify the new responsible persons, to send a copy of the varied order to the new responsible person and to notify the offender of the variation.

75. Section 227ZI details the documentary evidence required in order to establish in any proceedings (most likely in breach proceedings) whether the offender has complied with the RMR. It provides that a document produced by the device specified in section 245C of the 1995 Act, as applied by section 227ZG (in practice the remote monitoring system), certificated by a person nominated by the Scottish Ministers that the statement provides information on the presence or otherwise of the offender at the specified address at the date and times shown on that document is sufficient evidence of the facts.

76. Section 227ZJ(1) requires local authorities to consult prescribed persons annually about the nature of the unpaid work and other activities to be undertaken as part of a CPO within their

areas. Subsection (2) defines “prescribed persons” as such persons or class or class of persons as prescribed by Scottish Ministers by regulations.

77. Section 227ZK provides definition of the term “the appropriate court” as used in relation to the provisions for the CPO.

Section 15 – Non-harassment orders

78. Section 234A of the Criminal Procedure (Scotland) Act 1995 (“the Act”), enables a prosecutor to apply for a non-harassment order against a person convicted of an offence involving harassment towards a victim. This section makes changes to the Act to make it less onerous for prosecutors to apply for an order.

79. Subsection (a) changes the test in section 234A(1) of the Act so that an order may be applied for where a person is convicted of an offence involving misconduct towards a victim. Misconduct is defined (as per the substituted definition at subsection (d)) as including “conduct that causes alarm or distress”. This is a lower threshold than the existing reference to ‘harassment’ of the victim and will remove the need for the accused to have been convicted of an offence which in itself involved conduct on more than one occasion. It will allow criminal non-harassment orders to be considered in a greater number of cases.

80. Subsection (b) makes an associated change so that an order can be made to prevent harassment rather than merely any ‘further harassment’ therefore giving the court powers to protect victims at an earlier stage.

81. Subsection (c) inserts new subsections (2A), (2B) and (2C) into section 234A. New subsection (2A)(a) allows the court to have regard to information on other offences which involved misconduct towards the victim which the offender has been convicted of or has accepted a fixed penalty or compensation offer or work order for under sections 302(1), 302A(1) and 303ZA(6) of the 1995 Act.

82. New subsection (2A)(b) sets out the way in which the information can be given to the court and will allow the court to see the relevant details of previous convictions (rather than simply a list of previous convictions as they currently do) when deliberating on an application for a non-harassment order. This is to enable a court to have fuller details of the past offending behaviour of a person.

83. New subsection (2B) limits the court’s right to have regard to this information in accordance with the existing rules on previous convictions, offers or orders set out in sections 101, 101A (solemn proceedings) and 166 and 166A (summary proceedings) of the 1995 Act. New subsection (2C) requires the court to give the offender the opportunity to respond to the application for a non-harassment order.

84. Subsection (d) substitutes a new subsection (7) relating to definitions.

Section 16 - Short periods of detention

85. Section 169 of the Criminal Procedure (Scotland) Act 1995 permits summary courts to detain offenders at court or a police station until 8pm in lieu of imprisonment, so long as the offender can get home that day. As this section is not used and has been redundant for some time, it is being repealed.

86. Section 206(1) of the Criminal Procedure (Scotland) Act 1995 provides that a summary court cannot impose imprisonment for a period of less than five days. The time period for imposing imprisonment is being extended from less than “five days” to less than “fifteen days”. Subsections (2) to (6) permit summary courts to sentence an offender to be detained in a certified police cell or similar place for up to four days. As there are no such certified police cells in Scotland, and have not been any for some time, subsections (2) to (6) are redundant and are therefore being repealed.

Section 17 - Presumption against short periods of imprisonment or detention

87. This section amends the Criminal Procedure (Scotland) Act 1995 so that a court should not sentence a person to a period of imprisonment not exceeding six months unless it considers that no other method of dealing with the person is appropriate. If the court is of the opinion that no other method of dealing with the offender is appropriate, other than imposing a sentence not exceeding six months, then the court must give its reasons for that opinion. The court must enter those reasons in the record of proceedings.

88. Subsection (3) deals with sentencing of children, and provides that where the court sentences a child to a period of detention of six months or less, then it must state its reasons for the opinion that no other method of dealing with the child is appropriate and enter those reasons in the record of proceedings.

Section 18 - Amendments of Custodial Sentences and Weapons (Scotland) Act 2007

89. Part 2 of the Custodial Sentences and Weapons (Scotland) Act 2007 (“2007 Act”) deals with the confinement and release of prisoners. These provisions of the 2007 Act have not yet been commenced. Section 18 makes amendments to a number of statutory provisions in the 2007 Act to change the framework relating to the release of prisoners from custody.

90. Subsections (2) and (3) repeal the provisions providing for custody-only sentences and prisoners in the 2007 Act and make provision for a new type of sentence called a short-term custody and community sentence. A short-term custody and community sentence is a sentence of imprisonment for less than the period prescribed in an order made by the Scottish Ministers. A custody and community sentence is a sentence of imprisonment for at the least the period prescribed by the Scottish Ministers in an order. For example a short-term custody and community sentence may be a sentence of imprisonment for less than one year and a custody and community sentence a sentence of imprisonment for a year or more. A prisoner serving a short-term custody and community sentence (a “short-term custody and community prisoner”) is released after he or she has served one-half of his or her sentence of imprisonment and is released on licence for the remainder of the sentence. Subsection (2) also makes provision for the order making power prescribing the period sentence of imprisonment that determines a short-

term custody and community sentence and a custody and community sentence is subject to the affirmative resolution procedure.

91. Subsection (4) makes a consequential amendment to the chapter title in Chapter 3 of Part 2 of the 2007 Act so that it refers to short-term custody and community prisoners.

92. Subsection (5) amends section 29 of the 2007 Act to require the Scottish Ministers to include supervision conditions in a prisoner's licence where the prisoner being released (other than one liable to removal from the United Kingdom) falls into the following categories: a life prisoner; a custody and community prisoner; a short-term custody and community prisoner released on compassionate grounds, a short-term custody and community prisoner subject to an extended sentence, a short-term custody and community prisoner who is a sex offender and is serving 6 months or more, or short-term custody and community prisoner who is a child.

93. Subsection (6) inserts a new provision relating to the licence conditions to which a short-term custody and community prisoner is to be subject to. The Scottish Ministers must include the standard conditions in the licence. The Scottish Ministers must also include the supervision conditions in the licence if the prisoner is a person to whom section 29(1) of the 2007 Act applies i.e. a prisoner released on compassionate grounds; a prisoner serving an extended sentence; a sex offender serving 6 months or more; or a child sentenced to detention. The Scottish Ministers may include other licence conditions if they consider this appropriate.

94. Subsection (7) inserts a new provision for the assessment of conditions for short-term community licences (the licence that a short-term custody and community prisoner is released on). The Scottish Ministers and local authorities are required to put in place joint working arrangements in relation the assessment and management of the risks posed by short-term custody and community prisoners. In deciding whether to include non-mandatory supervision conditions in a short-term community licence for a particular prisoner, the Scottish Ministers and the appropriate local authority must jointly assess whether any of such conditions are appropriate.

95. The appropriate local authority is defined as either the local authority in whose area the offender resided immediately prior to being sentenced or the local authority in whose area the offender intends to reside in upon his or her release on licence.

96. Subsection (8) amends section 47 of the 2007 Act to provide that Scottish Ministers may release, on a curfew licence, a short-term custody and community prisoner who is serving a sentence of 3 months or more and is of a description to be specified by the Ministers by order. Such an order is subject to the affirmative resolution procedure. Section 47(3) of the 2007 Act provides that the curfew licence must include a curfew condition, which is described in section 48 of the 2007 Act.

97. Subsection (8)(c) amends section 47 of the 2007 Act to specify the period during which a short-term custody and community prisoner may be released on a curfew licence. The Scottish Ministers may only release a short-term custody and community prisoner on curfew licence after the later of: the day on which the prisoner has served one-quarter or four weeks of the sentence (whichever is the greater), or the day falling 166 days before the expiry of one-half of the

sentence. In addition, release must be before the day falling 14 days before the expiry of one-half of the sentence. So the window for release on curfew licence is between 166 days and 14 days before the expiry of one-half of the sentence so long as the prisoner has served at least one-quarter (or 4 weeks if this is more than one quarter) of his or her sentence at the proposed time of release.

98. Subsection (8)(e) amends section 47(8) of the 2007 Act to provide that a curfew licence for a short-term custody and community prisoner remains in force until the expiry of the first half of that prisoner's sentence.

99. Paragraphs 2 to 5 of Schedule 1 make consequential amendments to sections 34, 35, 36, 37, 40 and 42 of the 2007 Act.

100. Paragraph 6 of Schedule 1 inserts a new section 42A into the 2007 Act. Section 42A applies where the Parole Board considers under section 42(3) of the 2007 Act that it is in the public interest that a recalled short-term custody and community prisoner be confined. The parole Board are required to provide the prisoner with the reasons for its determination in writing. If there is less than 4 months of the prisoner's sentence remaining, the prisoner must remain in custody for the remainder of the sentence. If there are between 4 months and 2 years of the prisoner's sentence remaining, the Board must fix a date when it will next review the prisoner's case within the period mentioned in section 42A(5). Section 42A(5) specifies that the period begins 4 months after the date of the determination and ends on the expiry of the prisoner's sentence. Subparagraph (6) provides that if no date is set under section 42A(4) the prisoner must remain in prison to the end of the sentence.

101. Section 42A(7) of the 2007 Act provides that if at least 2 years remain of the short-term custody and community prisoner's sentence then the Parole Board must, subject to section 26, fix a date for when it will next hear the prisoner's case within the period mentioned in section 42A(8). Section 42A(8) provides that the period begins 4 months after the date of the determination and ends immediately before the second anniversary of the determination. Section 42A(9) requires Scottish Ministers to refer the case to the Parole Board before any date set by the Parole Board under section 42A(4) or (7).

102. Paragraphs 7 to 14 of Schedule 1 make consequential amendments to sections 45, 46, 51, 55, 56 and Schedules 2 and 3 of the 2007 Act. Paragraphs 15 to 17 make minor consequential amendments to sections 167 and 210A of the Criminal Procedure (Scotland) Act 1995.

Section 19 – Early removal of certain short-term prisoners from the United Kingdom

103. This section substitutes a new version of Schedule 6 to the Custodial Sentences and Weapons (Scotland) Act 2007 ("2007 Act"). The Schedule contains transitory amendments to Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("1993 Act"), which will have effect until the 1993 Act is repealed by the 2007 Act. Paragraph 3(a) replicates the effect of the existing version of Schedule 6.

104. Paragraph 4 inserts three new sections, 9A to 9C, into the 1993 Act. Inserted section 9A provides for a definition of prisoners who are eligible for but not liable to removal from the UK.

In order to be eligible for removal, a prisoner must be able to satisfy the Scottish Ministers that he or she has the settled intention of residing permanently outside the UK if removed from prison. If satisfied, the Scottish Ministers may release the prisoner from prison using the power under inserted section 9B.

105. Inserted section 9B provides the Scottish Ministers with a discretionary power to release short-term prisoners who are liable to or eligible for removal from the UK. This power may be exercised at any time during the 180 day period before the prisoner will have served one-half of their sentence, provided that the prisoner has already served at least one-quarter of his or her sentence. This corresponds to the existing time limits for Home Detention Curfew in the 1993 Act (inserted by the Management of Offenders etc. (Scotland) Act 2005). The Scottish Ministers also have the power to amend the 180 day period, up or down, by means of an order subject to approval by the Scottish Parliament.

106. Inserted section 9B(3) sets out conditions that must be satisfied before a prisoner can be removed from prison under the powers conferred by this section. If a prisoner removed under this section remains in the UK but has not been returned to prison, subsection 9B(4) enables the Scottish Ministers to exercise their duties and powers under sections 1(1), 1AA or 3 of the 1993 Act in relation to the prisoner as if the prisoner were in prison (i.e. duty to release the prisoner after serving one half of the sentence, and the power to release on compassionate grounds).

107. Inserted section 9C provides for the detention and/or further removal of a person who re-enters the UK within a certain time after being released from prison under section 9B.

108. Paragraph 5 makes amendments to the International Criminal Court (Scotland) Act 2001. The amendments to section 24 of the 2001 Act prevent sections 9A, 9B and 9C of the 1993 Act from being applied to international criminal court prisoners.

Section 20 - Reports about supervised persons

109. This section amends section 203 of the 1995 Act (reports) to provide that where a local authority officer makes a report to the court to assist in deciding on the most appropriate sentence, a copy requires to be given to the offender, the offender's solicitor (if any) and the prosecutor.

Section 21 - Extended sentences for certain sexual offences

110. Under the provisions of section 86(1) of the Crime and Disorder Act 1998, which inserted section 210A into the Criminal Procedure (Scotland) Act 1995, the court is able to impose an "extended sentence" on an offender who is convicted of a relevant sexual or violent offence in circumstances where the offender would, but for the extended sentence, receive a determinate sentence of imprisonment of any length in respect of a sexual offence or a sentence of 4 years or more in respect of a violent offence.

111. Imposition of an extended sentence provides for an additional period of supervision on licence in the community over and above that which would normally have been the case. An extended sentence may only be passed in indictment cases and if the court is of the opinion that

the period of supervision on licence, which the offender would otherwise be subject to, would not be adequate for the protection of the public from serious harm from the offender.

112. An extended sentence is defined, by subsection (2) of section 210A, as being the aggregate of the term of imprisonment which the court would otherwise have passed (“the custodial term”) and a further period, known as the “extension period”, for which the offender is to be on licence (and which is in addition to any licence period attributable to the “custodial term”). The extension period shall not exceed 10 years (though subsection (5) provides that the total length of an extended sentence shall not exceed any statutory maximum for a particular offence).

113. The following example demonstrates how the extended sentence arrangements currently work in practice (i.e. from the implementation of section 15 of the Management of Offenders etc. (Scotland) Act 2005 in February 2006 which provided for sex offenders sentenced to more than 6 months in custody to be released on licence).

- Example - An offender sentenced to 3 years custodial term and 3 years extension period would be released after serving 18 months in prison but will be on licence for the balance of the custodial period ie. 18 months plus a further 3 years = 4 years and six months in total on licence.

114. Section 210A provides a definition of “sexual offence”, which takes the form of listed offences, either under statute or at common law. It also defines “violent offence”.

115. The new provision will allow courts in appropriate circumstances, to impose an extended sentence where a person is convicted of an offence which discloses, in the court’s opinion, a significant sexual aspect to the offender’s behaviour but which is not otherwise covered by the current definitions of “sexual offence” and “violent offence”.

116. Schedule 3 to the Sexual Offences Act 2003, lists at paragraphs 36-59 the sexual offences in Scotland in relation to which the notification requirements under that Act apply. Paragraph 60 includes “an offence in Scotland other than those mentioned in paragraphs 36 to 59 if the Court, in imposing sentence or otherwise disposing of the case, determines for the purposes of this paragraph that there was a significant sexual aspect to the offender’s behaviour in committing the offence”.

117. The new provision will remedy the current absence of a power for the courts to impose an extended sentence in such cases by adding a further “catch all” category to the list of offences, but this will be dependent on the offender being subject, by virtue of Schedule 3 to the Sexual Offences Act 2003, to the notification requirements of Part 2 of that Act.

Section 22 - Effect of probation and absolute discharge

118. This section makes amendments to a number of statutory provisions in order to remove unnecessary references to probation orders and to ensure that probation orders and orders for absolute discharge are treated appropriately in the Licensing (Scotland) Act 2005.

119. Subsection (1) amends section 1(4) of the Rehabilitation of Offenders Act 1974 to update references to statutory provisions which have now been consolidated twice. There is no change to the effect of the sections, and the amendment simply makes the section easier to read.

120. Subsections (2) and (3) remove redundant references to probation orders in sections 49(6) and 58(3) of the Civic Government (Scotland) Act 1982.

121. Subsection (4) inserts a new subsection (2A) into section 96 of the Licensing (Scotland) Act 2005. This will ensure that the court can make an exclusion order when dealing with a person who has been convicted of a violent offence and placed on probation. It displaces section 247(1), which would otherwise provide that the person would not be treated as having been convicted.

122. Subsection (5) inserts new subsections (5) and (6) into section 129 of the Licensing (Scotland) Act 2005 and specifies a number of provisions to which sections 247(1) and (2) of the Criminal Procedure (Scotland) Act 1995 do not apply. The purpose is to ensure that probation orders and orders for absolute discharge are treated as convictions for the purposes of these provisions of the Licensing (Scotland) Act 2005.

Section 23 - Offences aggravated by prejudice

123. Section 96 of the Crime and Disorder Act 1998 (“the 1998 Act”) created a statutory aggravation relating to race requiring that the court shall, on convicting a person of an offence, take the aggravation into account in determining the appropriate sentence.

124. In a similar vein, section 74 of the Criminal Justice (Scotland) Act 2003 (“the 2003 Act”) created a statutory aggravation relating to religion requiring that the court shall, on convicting a person of an offence, take the aggravation into account in determining the appropriate sentence.

125. This section amends both the 1998 Act and the 2003 Act to require that the courts record how an aggravation has affected a sentence (if at all) and to ensure consistency between the statutory provisions.

126. Subsection (1) substitutes subsection (5) of section 96 of the 1998 Act. This requires that, where an aggravation relating to prejudice is proved, the court must also explain how the aggravation has affected the sentence (if at all – and if not, then the reasons for this) and record the conviction in a manner which shows that the offence was aggravated by prejudice related to race.

127. Subsection (2)(a) inserts a new subsection (2A) into section 74 of the 2003 Act. This provides that the aggravation can apply even if prejudice relating to religion is not the sole motivation for the offence. This is already the case for racial aggravations and therefore ensures consistency between the two provisions.

128. Subsection (2)(b) replaces subsections (3) and (4) of section 74 of the 2003 Act with subsection (4A), which requires that, where an aggravation relating to prejudice is proved, the court must explain how the aggravation has affected the sentence (if at all – and if not, then the

reasons for this) and record the conviction in a manner which shows that the offence was aggravated by prejudice related to religion.

Section 24 - Voluntary intoxication by alcohol: effect in sentencing

129. This section provides that, at the point of sentence, the Court must not consider it a mitigating factor that the offender was voluntarily intoxicated at the time the offence was committed.

PART 2 - CRIMINAL LAW

Section 25 – Involvement in serious organised crime

130. Section 25(1) makes it an offence for a person to agree with at least one other person to become involved in the commission of serious organised crime. The effect is that those who conspire to commit serious organised crime, as defined, are guilty of an offence.

131. Section 25(2) defines serious organised crime for the purpose of this section and sections 26, 27 and 28 as crime involving two or more people acting together for the principal purpose of committing or conspiring to commit one or more serious offences.

132. A “serious offence” is also defined in subsection (2). It is an indictable offence that is committed with the intention of securing material benefit for any person or a serious act of violence committed for the purpose of securing such benefit at some time in the future.

133. Section 25(3) provides that this offence will attract a maximum penalty on indictment of 10 years imprisonment, an unlimited fine or both. In summary proceedings the available penalties are a maximum of 12 months imprisonment or a fine not exceeding the statutory maximum or both.

Section 26 – Offences aggravated by connection with serious organised crime

134. Section 26 makes provision about a statutory aggravation which applies in cases where an accused commits an offence connected with serious organised crime. Subsection (1) provides that section 26 applies where an indictment or complaint libels or specifies that an offence is aggravated by a connection with serious organised crime and it is subsequently proved that the offence is aggravated in that way.

135. Section 26(2) explains the circumstances in which an offence can be regarded to have been aggravated by a connection with serious organised crime. This relies on proof that the accused was motivated, in whole or in part, by the objective of committing or conspiring to commit serious organised crime. In terms of subsection (3), it is not material to the matter of establishing the accused’s motivation whether or not the accused actually enabled a person to commit serious organised crime (as defined in section 25(2)).

136. Section 26(4) specifies that the normal rules on corroboration in criminal proceedings do not apply to establishing the aggravation. Evidence from a single source is sufficient proof.

137. Section 26(5) sets out the steps the court must take when it is libelled in an indictment or specified in a complaint that an offence is aggravated by a connection with serious organised crime and proved that the offence is so aggravated. In addition to a number of formal matters, the court must take the aggravation into account in determining the appropriate sentence.

Section 27 – Directing serious organised crime

138. Section 27(1) makes it an offence to direct another person to commit a serious offence (as defined in section 25(2)) or an offence aggravated by a connection with serious organised crime under section 26.

139. Section 27(2) provides that a person also commits an offence where the direction he or she gives is to direct a further person to commit a serious offence or an offence aggravated by a connection with serious organised crime.

140. Section 27(3) and (7) set out what constitutes direction for the purposes of subsections (1) and (2). First, by virtue of section 27(3), the accused must have done something, or a series of things, to direct another person to commit an offence. Second, the accused must have intended that the thing or things done will persuade that person to commit an offence. And third, the accused must intend that the direction will result in a person committing or enable a person to commit serious organised crime. Section 27(7) provides that “directing” a person to commit an offence includes, but is not limited to, “inciting” a person to commit an offence.

141. Section 27(4) deals with the matter of proving the accused’s intention under section 27(3)(b) and (c). That intention may reasonably be inferred from the context in which the steps taken by the accused to direct another person to commit an offence were taken.

142. By virtue of section 27(5), any person directing a person to commit an offence mentioned in section 27(1) will be deemed to have done so regardless of whether that offence was in fact committed.

143. Section 27(6) makes provision about when a direction is to be treated as having been done in Scotland such that it comes within the jurisdiction of the Scottish courts. Where a message containing a direction is either sent or received in Scotland, the direction is to be treated as having been done in Scotland.

144. Section 27(8) deals with penalties. The penalty for the offences in subsections (1) and (2) when tried on indictment is a maximum of 14 years imprisonment, a fine or both. On summary conviction, the available penalties are a maximum of 12 months imprisonment, a fine not exceeding the statutory maximum or both.

Section 28 – Failure to report serious organised crime

145. Section 28 places certain classes of individual under a duty to report to the police any knowledge or suspicion of another person’s involvement in serious organised crime. It is an offence for an individual under such a duty to fail to disclose that knowledge or suspicion.

146. Subsections (1) and (2) describe the circumstances in which section 28 applies. Subsection (1) provides that this section applies where a person knows or suspects that another person has committed an offence under section 25 or 27 or an offence aggravated under section 26 in cases where that knowledge or suspicion arises from information obtained in one of two sets of circumstances, namely: (a) in the course of a person's trade, profession, business or employment or (b) as a result of a close personal relationship between the person holding the knowledge or suspicion and the person who has allegedly committed the offences. By virtue of subsection (2), section 28 only applies by virtue of a close personal relationship where the person holding the knowledge or suspicion has derived material benefit as a result of the commission of serious organised crime by the alleged offender.

147. Section 28(3) describes the offence. It provides that where this section applies it is an offence to fail to disclose to a constable any knowledge or suspicion described above and the information on which that is based.

148. Section 28(4) provides that it will be a defence to prove that the accused had a reasonable excuse for failing to disclose a knowledge or suspicion or the information on which it is based.

149. Subsections (5) and (6) provide that disclosure is not required by a professional legal adviser in relation to information they have received in privileged circumstances and set out what is meant by "privileged circumstances".

150. Section 28(7) makes it clear that the reference to a constable in subsection (3) includes a reference to a police member of the Scottish Crime and Drug Enforcement Agency.

151. The penalty for failing to report serious organised crime is stated in subsection (8) to be a maximum of five years imprisonment, a fine or both in proceedings tried on indictment or a maximum of 12 months imprisonment or a fine not exceeding the statutory maximum or both on summary conviction.

Section 29 – Articles banned in prison

152. This section amends section 41 of the Prisons (Scotland) Act 1989 ("the 1989 Act") to create additional specific offences in relation to the introduction, use and possession of a personal communication device (including a mobile telephone and any component part of a mobile telephone) in prisons. In addition, it provides a definition of "proscribed article" and "personal communication device", for the purpose of this section, and inserts further provisions which define the maximum penalty that can be imposed for the introduction, use or possession of personal communication device in a prison, and provide limited circumstances where it is not an offence to have a committed such an act .

153. Subsection (1)(a) substitutes section 41(1) of the 1989 Act, and provides that it is an offence for a person to introduce or attempt to introduce a "proscribed article" in a prison, without a reasonable excuse. It also provides that the maximum penalty that can be imposed for introducing or attempting to introduce a proscribed article (other than a personal communication device) into a prison is, on summary conviction, a period of imprisonment not exceeding 30 days, or a fine not exceeding level 3 on the standard scale (or both).

154. Subsections (1)(b)-(e) make minor consequential amendments to sections 41(2), 41(2A), 41(2B) and 41(3) of the 1989 Act.

155. Subsection (1)(f) inserts two new subsections after section 41(9). The new subsection (9A) provides a definition of “proscribed article” and the new subsection (9B) provides a definition of what a personal communication device includes.

156. Subsection (1)(g) updates the definition of “offensive weapon” in section 41(10) of the 1989 Act, by substituting the reference to the Prevention of Crime Act 1953 with a reference to the definition contained in section 47 of the Criminal Law (Consolidation)(Scotland) Act 1995.

157. Subsection (2) inserts two new sections after section 41 of the 1989 Act in relation to personal communication devices; sections 41ZA and 41ZB.

158. The new sections 41ZA(1)-(3) provides that it is an offence for a person to: Give a personal communication device to a prisoner while the prisoner is inside a prison; transmit or intentionally receive any communication by means of a personal communication device in a prison; or be in possession of a personal communication device while inside a prison.

159. Offences in section 41ZA(1)-(3) are, on indictment, a period of imprisonment not exceeding two years, or a fine, or both; or, in summary proceedings, a period of imprisonment not exceeding 12 months, or to a fine not exceeding the statutory maximum, or both.

160. The new section 41ZB provides a number of exceptions in relation to communication devices. In particular, subsections (1) and (2) of section 41AB provide that it will not be an offence to introduce, use or possess a personal communication device in a designated area of a prison, or where the person has received written authorisation from the governor, director of a prison, or the Scottish Ministers.

161. Subsections (3) and (4) of section 41ZB provide that it will not be an offence for a prison officer (or other prison official) to introduce, use or possess a personal communication device if the device is one supplied to the person specifically for use in the course of the person’s official duties at the prison, or the person is acting in accordance with those duties.

162. Subsection (5) of section 41ZB provides that no offence is committed by a person, other than a prisoner, where there is a reasonable excuse for the possession. A prisoner would not have a reasonable excuse, given that personal communication devices are not permitted in prisons and they are asked as part of the reception process whether or not they have any proscribed articles on their possession.

163. Subsections (6) and (7) of section 41ZB provide that it is a defence for a person accused of introducing, using or possessing a personal communication device in a prison to show that the person reasonably believed that the person was acting with authorisation or in circumstances where there was an overriding public interest which justified the person’s actions. For example, where an individual from the emergency service had to access the prison with a communication

device, in an emergency situation, and there was insufficient time for the individual to receive written authorisation.

164. Subsection (8) of section 41ZB provides the circumstances where written authorisation is given. In particular it provides that written authorisation should be provided in favour of a specified person (or person of a specified description), or for a specified purpose. Written authorisation is given either by the governor or director of the prison (in relation to activities at that prison), or the Scottish Ministers (in relation to activities at a prison specified in the authorisation).

165. Subsection (9) of section 41ZB provides the definition of a designated part of a prison, where it is not an offence to introduce, use or possess a personal communication device. This is necessary because it is not illegal to use or possess a personal communication device in the community. It is not the intention to penalise a person for entering an administrative area or other designated area of a prison with a personal communication device. It should only be an offence to introduce, use or possess a personal communication device beyond the designated part of a prison i.e. in the secure part of the establishment.

166. Subsection (10) of section 41ZB provides that prison officers or other prison officials who are crown servants or agents do not benefit from Crown immunity in relation to an offence of introducing, using or possessing a personal communication device in a prison. This is to ensure that the personal communication devices are only permitted in prisons in limited circumstances e.g. with authorisation.

Section 30 - Sale and hire of crossbows to persons under 18

167. The Crossbows Act 1987 controls the sale and hire of crossbows and this section introduces new provisions to that Act. Subsection (3) introduces a new section 1A to achieve consistency with the proof of age provisions of the Licensing (Scotland) Act 2005 by clarifying the defences a person charged with selling an article to someone underage can rely upon. Subsection (4) introduces a new section 3A which has the effect of legalising an attempt to purchase or hire a crossbow by a young person, where the young person is acting as part of an authorised test purchasing scheme. It also makes provision to ensure the safety of young people participating in such a scheme. These provisions bring the Act into line with the test purchasing provisions of the Licensing (Scotland) Act 2005.

Section 31 - Sale and hire of knives and certain other articles to persons under 18

168. Section 141A of the Criminal Justice Act 1988 controls the sale of knives and certain articles with a blade or point to under 18s. Subsections (2) and (3) amend the Act to close a gap in the law relating to the hiring of a knife or bladed article to an under 18. Subsection (4) amends the proof of age provisions of section 141A to ensure consistency with the Licensing (Scotland) Act 2005 by clarifying the defences a person charged with selling an article to someone underage can rely upon.

Section 32 - Certain sexual offences by non-natural persons

169. This section makes amendments to the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005. Subsection (2) broadens the range of penalties available for offences under sections 9(4)(b), 9(5)(b), 10(2)(b), 11(2)(b) and 12(2)(b) of the 2005 Act to include an unlimited fine. Consequently, a person found guilty of an offence on indictment under sections 9 to 12 of the 2005 Act, may be liable to an unlimited fine and/or imprisonment for up to 7 years in the case of offences to which section 9(4)(b) relate or, for the other relevant offences, for up to 14 years.

170. Subsection (3) inserts a new section 14A into the 2005 Act. Inserted section 14A provides that, where an offence under sections 10, 11 or 12 of the 2005 Act is committed by a body corporate (such as a company), a Scottish partnership, or an unincorporated association, certain officers of the body or other persons purporting to act in such a capacity may in certain circumstances be held to have committed the offence and will be liable to prosecution as well as the body.

Section 33 - Indecent images of children

171. This section extends the provisions of sections 52 and 52A of the Civic Government (Scotland) Act 1982 (“the 1982 Act”) to make it an offence to take, make, distribute, show, publish or possess etc. derivatives of indecent photographs or pseudo-photographs such as line traced and computer traced images. It also extends Schedule 1 to the Criminal Procedure (Scotland) Act 1995 (Offences Against Children Under the Age of 17 Years to which Special Provisions Apply) to include pseudo-photographs and amends Schedule 3 to the Sexual Offences Act 2003 (Sexual offences for the purposes of Part 2 of that Act) in relation to derivatives of indecent photographs or pseudo-photographs.

172. Subsection (1)(a)(i) amends section 52(2C)(b) of the 1982 Act to make clear that indecent pseudo-photographs include data capable of conversion into a pseudo-photograph only where that conversion would result in an indecent image.

173. Subsection (1)(a)(ii) amends section 52 of the 1982 Act by the insertion of new subsections (9) and (10). Section 52(9) extends the definition of “photograph” to cover derivatives of photographs or pseudo-photographs or combinations of these. For example, it includes a computer tracing which is neither a photograph nor a pseudo-photograph but is derived from one. Section 52(10) provides that subsection 52(2B) applies to such derivatives in the same way that it applies to pseudo-photographs.

174. Subsection (2) amends paragraph 2B of Schedule 1 to the Criminal Procedure (Scotland) Act 1995, which lists offences against children under the age of 17 to which special provisions apply. Paragraph 2B, which concerns offences under sections 52 and 52A of the Civic Government (Scotland) Act 1982, is amended to include offences involving indecent pseudo-photographs, as well as indecent photographs of a child under the age of 17 years.

175. Subsection (3) amends Schedule 3 to the Sexual Offences Act 2003, which lists sexual offences for the purposes of Part 2 of that Act. Part 2 of the 2003 Act makes provision for relevant offenders to be subject to the notification requirements set out in that Part of that Act

176. Subsection (3)(a) amends paragraph 44 of Schedule 3 to the Sexual Offences Act 2003 which relates to offences under section 170 of the Customs and Excise Management Act 1979 (concerning the penalty for the fraudulent evasion of duty etc.) in relation to goods which are prohibited from being imported where they included indecent photographs of children under 16. So as to provide consistency with the entries in the Schedule relating to offences in the Civic Government (Scotland) Act 1982 concerning the making, possessing &c of such indecent images, the entry is amended to provide that it applies only where the offender is 18 or over, or is or has been sentenced to at least 12 months imprisonment, or where the court considers it appropriate that the sex offender notification requirements should apply. While this will limit the automatic application of the notification requirements, the provisions outlined in the preceding paragraphs concerning SOPOs will mean that the restriction does not apply in relation to applications for SOPOs. Paragraph 44 of Schedule 3 to the Sexual Offences Act 2003 is also amended to include reference to pseudo-photographs of children under 16.

177. Subsection (3)(b) amends the interpretative provision in paragraph 97(b) of Schedule 3 to the 2003 Act to extend the meaning of indecent photographs and pseudo-photographs for that Act to include derivatives of such photographs and pseudo-photographs (by applying definitions in the 1982 Act which include the amendments made by subsection (1)(a)(ii), above).

Section 34 - Extreme pornography

178. This section creates a new offence of possession of extreme pornography and increases the maximum penalty for the sale etc. of obscene material of that nature. It inserts new sections 51A to 51C into the Civic Government (Scotland) Act 1982 and amends section 51 of that Act.

179. Subsection (1) amends section 51(3) of the 1982 Act to increase the maximum penalty, on conviction on indictment, from 3 to 5 years imprisonment for the offence of displaying, publishing, selling, distributing or possessing etc. with a view to selling or distributing obscene material, where that material contains an extreme pornographic image.

180. Subsection (2) inserts new sections 51A “Extreme pornography”, 51B “Exception to section 51A offence” and 51C “Defences to section 51A offence” into the 1982 Act.

181. Section 51A creates an offence of possession of an extreme pornographic image, defines such images and specifies the maximum penalty which may be imposed for the offence.

182. Subsection 51A(2) provides that an extreme pornographic image must be “obscene”, “pornographic” and “extreme”. The test of “obscene” means that the material must be of such a nature that it would fall within the category of the material whose sale etc. is already prohibited under section 51 of the 1982 Act.

183. Subsection 51A(3) defines a “pornographic” image as one which must reasonably be assumed to have been made solely or principally for the purpose of sexual arousal. Therefore, an image is not pornographic if it can reasonably be assumed that the image has been made principally for another purpose e.g. educational purposes.

184. Subsection 51A(4) provides that where an image forms part of a series of images which can provide a context, then that context, the image itself and any associated sounds must be taken into account when determining whether the image is pornographic.

185. Subsection 51A(5) sets out an example of how subsection 51A(4) can work. Where an image forms an integral part of a narrative (e.g. a story), the whole story will be considered for the purposes of determining whether the image in question is pornographic. This could lead to the conclusion that an image is not pornographic, notwithstanding that when considered on its own, the opposite conclusion would be reached. Subsection 51A(5) is only one example of how subsection 51A(4) may operate. The reference to “context” in subsection 51A(4) not only covers a narrative, it can also, for example, include a series of images which do not tell a story, but which have a recurring theme. In addition, subsection 51A(4) may operate so as to have the opposite effect to that described in subsection 51A(5)(b): examination of an image’s context could lead to the conclusion that an image *is* pornographic.

186. Subsection 51A(6) provides that an image is extreme if it depicts in an explicit and realistic way any of the acts set out in subsection 51A(6)(a) to (e). The terms “explicit” and “realistic” require that the act depicted in the image must be clearly seen, lifelike and convincing and appear to a reasonable person to be real. It is not required that the act itself is real.

187. Subsection 51A(7) provides that where an image is an integral part of a narrative, the context provided by that narrative may be taken into account in determining whether an image is extreme in terms of subsection 51A(6). In addition, any description or sound accompanying the image can similarly be taken into account.

188. Section 51B makes provision to exclude images in unaltered classified works and defines the circumstances in which such images are not excluded.

189. Subsections 51B(1) and (2) provide that possession of an excluded image is not an offence under section 51A and define an excluded image.

190. Subsection 51B(3) provides that an image extracted from a classified work for the purposes of sexual arousal is not an excluded image.

191. Subsection 51B(4) provides that in determining whether an image has been extracted for the purpose of sexual arousal, account may be taken of the storage, description, accompanying sound and context of the image.

192. Subsection 51B(5) defines terms used in this section including “classified work” and thereby “excluded image” in subsection 51B(2).

193. Section 51C makes provisions for defences to the offence of possession of extreme pornography. It replicates defences provided for possession of indecent images of children under section 52A of the 1982 Act and makes specific provision in relation to extreme images.

194. Subsection 51C(1) provides that the onus is on the accused to prove the matters specified in subsections 51C(2), (3) and (4) in order to use one or more of the defences. The Crown must prove the essential elements of the offence beyond reasonable doubt.

195. Subsection 51C(2) provides that it is a defence for a person to prove that: (a) he/she had a legitimate reason for possession of the image, (b) he/she had no knowledge of the image and no awareness as to the nature of the image or (c) the image was unsolicited and disposed of promptly.

196. Subsection 51C(3) provides a defence for those who directly participated in the act depicted in an extreme pornographic image and can prove the circumstances set out in subsection 51C(4). When read with subsections 51C(4) and (5) this subsection limits the defence to those who directly participate in simulated acts and retain the images for their own private use. The defence does not extend to a person who films or watches an act depicted in an image but who does not participate directly.

197. Subsection 51C(4) provides that a direct participant must be able to demonstrate that the act depicted in the image was simulated i.e. that it did not actually:

- take or threaten a person's life;
- result in nor was it likely to result in severe injury;
- involve non-consensual activity;
- feature a human corpse;
- feature an animal or carcass.

198. Subsection 51C(5) provides that the defence in subsection 51C(3) is not available if the image in question is shown, given or offered for sale to any person who was not a direct participant in the act depicted in the image.

Section 35 - People trafficking

199. Trafficking for the purposes of prostitution or for the making or production of obscene or indecent material is an offence under the provisions of section 22 of the Criminal Justice (Scotland) Act 2003, including where it is believed that another person is likely to exercise such control or to so involve the individual. Following changes made by the UK Borders Act 2007, the Bill will align the wording of the section 22 of the Criminal Justice (Scotland) Act 2003 with that now contained in the Sexual Offences Act 2003 by amending:

- section 22(1) (a) by extending its scope so that it refers to facilitating "entry into" the UK as well as the "arrival in" the UK
- section 22(4) by extending the extra-territorial effect so that it is not limited to British nationals and companies by providing that that the offence applies to

anything done whether inside or outside the UK by any person, no matter whether they are in any way connected to the United Kingdom. Section 22 (6) is also repealed. .

200. The section also makes clear that the sheriff court has jurisdiction to deal with those offences by amending section 22(5) to specify in the statute that the sheriff court should have jurisdiction to deal with those offences.

201. This is consistent with section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 which deals with extra-territorial sexual offences. Similar changes are made to the offences relating to trafficking for purposes other than sexual exploitation in sections 4 and 5 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 by amending:

- section 4(1) by extending its scope so that it refers to “entry into” the UK as well as the “arrival in” the UK;
- section 5 by repealing subsection (1) and (2) and adding a new provision to make clear that section 4(1) to (3) apply to anything done within or outwith the UK; and
- section 5 by adding a new provision to specify that in Scotland the sheriff court has jurisdiction to deal with those offences.

Section 36 - Alternative charges for fraud and embezzlement

202. Paragraph 8 of Schedule 3 to the Criminal Procedure (Scotland) Act 1995 can be applied in certain cases where the evidence led in court would not support a conviction on the basis of the offence as charged but would permit conviction of a different offence. It permits this application of an alternative charge in certain offences involving dishonest appropriation of property. For example, in terms of paragraph 8(2) of Schedule 3 an accused person charged with theft may instead be convicted of reset if the evidence led would not support conviction of theft but would support conviction of reset.

203. The amendments to Schedule 3 extend this principle to cover fraud and embezzlement. As a result of these changes, it will be possible for an accused charged with “breach of trust and embezzlement” to instead be convicted of “falsehood, fraud and wilful imposition”. Similarly, an accused charged with “falsehood, fraud and wilful imposition” may be convicted instead of “breach of trust and embezzlement”.

Section 37 - Conspiracy to commit offences outwith Scotland

204. Section 11A of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) provides that conspiracy in Scotland to commit an offence outwith the United Kingdom is in itself an offence, provided that the criminal purpose being conspired would constitute an offence in the place where it was intended to be carried out. However, section 11A of the 1995 Act does not cover conspiracies formed in Scotland to commit an offence in England, Wales and Northern Ireland. This section amends the scope of section 11A of the 1995 Act to cover conspiracy in Scotland to commit an offence in other parts of the United Kingdom.

PART 3 - CRIMINAL PROCEDURE

Section 38 – Prosecution of children

205. Section 38 implements in part the Scottish Law Commission’s Report on Age of Criminal Responsibility, published in 2002.

206. This section implements Recommendation 2 of the Scottish Law Commission’s Report by inserting a new section 41A into the Criminal Procedure (Scotland) Act 1995 prohibiting the prosecution of any child under the age of 12. The age limit applies at the commencement of the prosecution. In addition to the SLC’s recommendation, subsection (2) prevents persons over the age of 12 being prosecuted for an offence they committed under that age.

207. The prosecution of children between 12 and 16 would remain subject to the existing statutory provisions, requirements of the European Convention on Human Rights, and the current practices and directions of the Lord Advocate and the Crown Office. The main statutory provision limiting prosecution of children under 16 is section 42(1). This provides that no child under 16 is to be prosecuted except on the instructions of the Lord Advocate or at his instance and that any prosecution is to take place in the High Court or a sheriff court. Subsection (3) makes consequential amendments to section 42 so that it will apply to children aged between 12 and 16.

208. Subsection (4) makes a consequential amendment to section 234AA(2)(b), which provides that the criminal courts can make an antisocial behaviour order only where at the time when he committed the offence, the offender was at least 12 years of age. In light of the limit on prosecution established by section 41A, this provision is no longer necessary and is repealed.

209. The existing rule in section 41 that it shall be conclusively presumed that no child under the age of eight years can be guilty of any offence is retained.

Section 39 – Offences: liability of partners

210. Section 39 provides that where a partnership is guilty of a “corporate offence” that has been committed with the consent or connivance of a partner or attributable to the partner’s neglect that partner will also be guilty of the offence. “Corporate offences” are those where in similar circumstances statute provides for individual liability for directors of a body corporate.

211. The effect is to put partners of partnerships in the same position as directors of bodies corporate in relation to statutory criminal offences. Similar provision has already been made under the Limited Liability Partnerships (Scotland) Regulations 2001 in relation to partners of Limited Liability Partnerships, so these are excluded from the operation of section 39. As some statutes have already made provision for individual liability of partners, subsection (3) disapplies the new provisions where such provision has already been made.

Section 40 – Witness statements

212. Section 40 deals with covers witness statements and allows the Crown at any point, both before commencement and during the trial, to provide to any witness who is cited a copy of their statement or to give a witness access to it at a reasonable time and place. “Statement” is defined at (3) with reference to section 262 of the 1995 Act.

Section 41 - Breach of undertaking

213. Under section 22 (liberation on undertaking) of the 1995 Act an accused person can be released by the police on the undertaking that they will appear at court at a later date and that they will comply with certain conditions. The conditions which can be attached to a police undertaking are the same as those which can be applied to a bail order granted by a court and include, for example, a requirement not to commit further offences.

214. Section 41 adds new sections 22ZA and 22ZB to the 1995 Act. It makes provision in relation to offences committed while a person is subject to a police undertaking. These provisions are broadly similar to those that apply where an accused person commits an offence while liberated on bail.

215. Section 22ZA(1) provides that a person commits an offence where they fail to appear at court as required under an undertaking and also where they fail to comply with a condition attached to that undertaking. Subsection (2) provides for the applicable penalty levels for section 22ZA(1) offences. Subsections (3) (read with subsection (4)) provides that where a person subject to an undertaking commits a further offence, the fact that they have breached the undertaking is not to be treated as a separate offence, but is to be taken account of (along with the other listed factors in subsection (4)) by the court in determining the sentence for the further offence.

216. Section 22ZB makes provision for evidential and procedural matters in relation to offences committed or dealt with under section 22ZA.

Section 42 - Bail review applications

217. The prosecutor or the accused can apply for review of a decision to grant, or to refuse to grant, an application for bail or for review of the conditions attached to the grant of bail, e.g. for a change of address.

218. This section amends sections 30 and 31 of the 1995 Act to remove the requirement to hold a hearing in circumstances where an application for review is made but only when the other party consents to, and the court considers it appropriate to grant, the application. Section 30 is also amended to make it clear that an application for review by the accused must be intimated to the prosecutor.

Section 43 - Bail condition for identification procedures etc.

219. Section 43 introduces a new standard bail condition. This new condition provides, that whenever reasonably instructed by a constable to do so, a person released on bail should participate in an identification parade or other identification procedure, and allow any print, impression or sample to be taken from him or her. Although such a condition is not currently a standard condition, under section 24(4)(b) of the 1995 Act, the court may currently impose a further condition to this effect.

Section 44 - Prosecution on indictment: Scottish Law Officers

220. This section amends the procedures contained in the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) for the raising of indictments in name of the Lord Advocate.

221. Section 64 of the 1995 Act currently provides that all prosecutions before the High Court of Justiciary or before the Sheriff sitting with a jury shall proceed in name of Her Majesty’s Advocate.

222. Subsection (2) amends section 64 of the 1995 Act (and subsection (4) amends Schedule 2 to the 1995 Act) to provide that indictments are to be libelled at the instance of “Her Majesty’s Advocate”, removing any requirement for the individual Lord Advocate to be named, personally.

223. Subsection (3)(b)(i) makes a similar amendment to subsection 287(2) of the 1995 Act with regard to the Solicitor General where there is no Lord Advocate in office.

224. Section 287 of the 1995 Act sets out arrangements for the situation where a Lord Advocate resigns or dies and where there is a gap in time before a new Lord Advocate is appointed. In this case indictments are raised at the instance of the Solicitor General. Section 287 makes provision for circumstances where both offices of the Lord Advocate and Solicitor General are vacant, to include where both Law Officers demit office on the same day.

225. Subsection (3)(c) provides that indictments raised by the Solicitor General may be signed by that Law Officer. It also provides that during any period where both offices of the Scottish Law Officers are vacant as a result of the deaths of the Scottish Law Officers that it shall be lawful for indictments to be raised at the instance of the Lord Advocate. Subsection 3(d) includes provision that, where an indictment is raised at the instance of the Solicitor General, that indictment continues to be valid notwithstanding that he or she has since died or otherwise left office.

Section 45 - Transfer of justice of the peace court cases

226. This section introduces new provisions into the 1995 Act relating to the jurisdiction of the JP court in relation to the commencement and transfer of proceedings. Three new sections, 137CA, 137CB and 137CC, are inserted. The purpose is to make provision for JP courts similar to that which exists for the transfer of sheriff court cases under section 137A to 137C of the 1995 Act. It should be noted that consequential amendment to section 10A of the 1995 Act is made in Schedule 5 to this Bill.

227. Section 137CA provides that where an accused person has been cited to a diet, or where citation has not taken place but proceedings have been commenced against an accused in a JP court, the prosecutor may apply to a justice to transfer the proceedings to another JP court in the same sheriffdom.

228. Subsections (1) and (2) of section 137CB provide that where the clerk of a JP court informs the prosecutor that due to unforeseen circumstances it is not practicable for that JP court or any other JP court in the sheriffdom to proceed with some or all of the cases due to call at a diet, the prosecutor may apply to the sheriff principal to transfer the proceedings to a JP court in another sheriffdom.

229. Subsections (3) and (4) provide that where an accused person has been cited to a diet, or where proceedings have been commenced against an accused person in a JP court, the prosecutor can apply to a justice to transfer the proceedings to a JP court in another sheriffdom, if there are proceedings against the accused in a JP court in that sheriffdom.

230. Subsections (5) and (6) provide that where it is intended to take proceedings against an accused person in a JP court, and there are proceedings against the accused in a JP court in another sheriffdom, the prosecutor may apply to a justice for authority to take proceedings against the accused in a JP court in the other sheriffdom.

231. Subsection (7) provides that where an application is made under subsection (2), a sheriff principal may only make the order with the consent of the sheriff principal of the other sheriffdom. Subsection (9) permits the sheriff principal who has made an order under subsection (7) to revoke or vary it, with the consent of the sheriff principal of the receiving sheriffdom.

232. Subsection (8) provides that where an application is made under subsection (4) or (6), the justice is to make the order sought if s/he considers it expedient and if a justice of the other sheriffdom consents. Subsection (10) provides that a justice who has made an order under subsection (8) (or any justice of the same sheriffdom) may revoke or vary that order, if a justice of the receiving sheriffdom consents.

233. Subsections (1) & (2) provide that where there are exceptional circumstances leading to an unusually high number of accused persons appearing from custody for a first calling in JP courts, and it is unlikely that those courts would be able to deal with all these cases, the prosecutor may apply to the sheriff principal for authority to take proceedings against some or all of the accused in a JP court in another sheriffdom. The sheriff principal may order that the proceedings are to be maintained at the receiving JP court, or at the original court. Under subsection (4), the order may be made in relation to a particular period of time, or particular circumstances.

Section 46 – Additional charge where bail etc. breached

234. This section amends sections 27 (breach of bail conditions: offences) and 150 (failure of accused to appear) of the 1995 Act.

235. The effect of these amendments is to allow a complaint to be amended to include an additional charge covering an offence committed as a result of breaching bail conditions or an offence committed in respect of a failure to appear at a diet. A similar provision to allow amendment of a complaint to include a charge of breaching an undertaking is to be found in section 22ZB(10).

Section 47 - Remand and committal of children and young persons

236. This section repeals the provisions contained in section 51 of the 1995 Act, which allow for the remand of children aged 14 and 15 years to prison.

237. Where a child under the age of 16 years is not released on bail or ordained to appear he shall instead be remanded to the local authority to be detained either in secure accommodation or a suitable place of safety.

Sections 48 to 51 - Prosecution of organisations

238. Sections 48 to 51 deal with procedural matters in relation to the prosecution of organisations.

239. Section 70 of the 1995 Act deals with proceedings on indictment against bodies corporate. It provides for how the indictment is served, appearance by a representative for certain purposes, and the recovery of fines. It does not make provision about partnerships or other unincorporated associations. In contrast, section 143 of the same Act, which deals with summary procedure, specifically provides for how proceedings may be brought against partnerships, associations, and bodies of trustees as well as bodies corporate.

240. Sections 48 to 51 clarify and extend these procedural provisions by extending them to apply to “organisations”, as defined in the new definition inserted in the 1995 Act by section 48.

241. Section 49 amends section 70 of the 1995 Act to provide for:

- how indictments may be served on different sorts of organisation;
- how organisations may appear by a representative (defined in section 70(8) and (9)) for the purpose of stating objections to the competency or relevancy of the indictment or proceedings, tendering a plea of guilty or not guilty, making a statement in mitigation of sentence;
- the trial to proceed and the case be disposed of where an organisation does not appear either by a representative or by counsel or solicitor; and
- the recovery of fines

242. Section 50 similarly amends section 143 of the 1995 Act to provide for:

- summary proceedings to be taken against an organisation in its corporate capacity for against an individual representative of the organisation;

- how organisations may appear by a representative for the purpose of stating objections to the competency or relevancy of the complaint or proceedings, tendering a plea of guilty or not guilty, making a statement in mitigation of sentence;
- the case to proceed and the case be disposed of where an organisation does not appear either by a representative or by counsel or solicitor; and
- recovery of fines

243. Section 51 amends section 141(2)(b) of the 1995 Act to provide that an organisation (other than a body of trustees) may be cited in summary proceedings if the citation is left at its ordinary place of business with a partner, director, secretary or other official or if it is cited in the same manner as if the proceedings were in a civil court. Section 141(2)(c) already deals with citation of bodies of trustees.

Section 52 - Disclosure of convictions and non-court disposals

244. This section makes provision relating to the circumstances in which convictions and non-court disposals may be disclosed to the court in summary and solemn proceedings. Two new sections, 101A and 166A, are introduced to the 1995 Act and amendment is made to the existing provisions of the 1995 Act in relation to the disclosure of non-court disposals.

245. Subsections (1) and (2) of section 101A provide that when considering sentence in solemn proceedings the court may have regard to convictions, or non-court disposals, acquired after the date of the offence with which the accused is charged but before the date of conviction.

246. Subsection (3) specifies the non-court disposals which are referred to in subsection (2). These are:

- fixed penalties under section 302(1);
- compensation offers under section 302A(1); and
- work orders under section 303ZA(6) of the 1995 Act

247. A fixed penalty or compensation offer may be disclosed only if it has been accepted (or deemed to have been accepted) before the date of conviction. Only a work order that has been completed before the date of conviction may be disclosed to the court.

248. Subsection (4) of section 101A requires the prosecutor to provide the court with a notice of the conviction or non-court disposal.

249. Section 52(2) substitutes a new section 166A into the 1995 Act. The previous version of section 166A, inserted by section 12 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007, allowed the court in deciding on the disposal of a case in summary proceedings to have regard to any convictions acquired between the date of the offence and the date of conviction. The effect of new section 166A is to expand that provision to include non-court disposals. This is in the same manner as the provision for solemn proceedings under new section 101A discussed above.

250. Subsections (3) and (4) make amendments to section 302 and section 302A of the 1995 Act. Those sections provide for the offer of a procurator fiscal fixed penalty or compensation offer respectively. The amendments extend the provisions relating to the information to be provided to an alleged offender when an offer of these disposals is made. Subsections (3) & (4) provide that an offer of a fixed penalty or compensation offer must state that if it is accepted, or deemed to have been accepted, that fact may be disclosed to a court in any proceedings to which the alleged offender is (or is liable to become) subject at that time.

251. Amendments to section 303ZA of the 1995 Act under subsection (5) make provision relating to the information that must be included in an offer of a work order.

252. In addition to the information listed in section 303ZA the offer must also state that:

- if it is refused, or not completed, that fact may be disclosed in any proceedings for the offence in question;
- if it is completed, that fact may be disclosed in any proceedings for an offence committed within two years of the date of completion;
- if it is completed, that fact may be disclosed in any proceedings to which the alleged offender is (or is liable to become) subject at that time.

Section 53 – Time limits for lodging certain appeals

253. Section 74 of the 1995 Act makes provision in solemn criminal cases to allow for appeals to be taken in respect of certain decisions made by a court at either a first diet or a preliminary hearing. Section 174 of the 1995 Act makes provision for the procedure to be followed at the “first diet” of a summary criminal case. Both sections provide for appeals to be made against certain decisions of the court and stipulate that any appeal must be lodged no later than two days after the decision. Subsections (2) and (3) of section 53 amend sections 74 and 174 of the 1995 Act, by extending the time limit for lodging these appeals from 2 days to 7 days.

Section 54 – Submissions as to sufficiency of evidence

254. This section inserts sections 97A, 97B and 97C into the Criminal Procedure (Scotland) Act 1995. New section 97A effectively creates a statutory replacement for what is termed a “common law submission”. Under the common law a submission to the court may be made by the defence at the end of all evidence in a case. If successful, it typically results in a direction, in the course of the judge’s charge to the jury, that the jury should not convict on a particular charge, or should consider only a reduced charge. This direction may be focused on the basis that the evidence in the case is insufficient in law to justify a conviction. It is in the context of the judge’s role in determining questions of law, which comes before the ultimate assessment of questions of fact by the jury.

255. At present, an accused may make a submission as of right only after the Crown speech to the jury, although the Crown commonly consents to a submission being made at the close of the evidence. Where a submission is made after the Crown speech, the Crown does not have a right of reply, on the basis that at that stage the prosecutor is *functus officio* (prevented from taking the matter further as a result of having fulfilled his or her official duties).

256. Subsection (1) of section 97A gives the accused the right to make certain submissions immediately after the close of the evidence. Subsection (2)(a) permits such a submission to contend that the evidence is insufficient in law to justify the accused's being convicted of the offence (or of any other offence of which he could be convicted under the indictment). The meaning of "insufficient in law" is the same as in section 97 of the 1995 Act and is a test of technical sufficiency rather than a test as to the quality of the evidence. This permits an accused to submit that there is no case to answer. Accordingly, a submission under subsection 2(a) will succeed in two circumstances: either where there is an absence of corroboration or in the rare circumstance (such as arose in *HMA v Purcell* 2008 SLT 44) where the indictment is irrelevant and the judge could not permit the jury to convict regardless of the evidence. Subsection (2)(b) permits a submission to be made that there is no evidence to support some part of the circumstances set forth in the indictment; for example, to support the allegation of the use of a weapon in a charge of assault.

257. Subsection (3) provides that a submission of the kind referred to in subsection (2) may only be made under section 97A (and at the close of evidence). The effect of this provision is to bypass the use of the common law submission as it applies to the matters described in subsection (2).

258. Section 97B applies where the accused makes a submission under section 97A(2)(a) that the evidence is insufficient in law to justify the accused's being convicted of the indicted offence or of any other offence of which the accused could be convicted under the indictment.

259. Subsection (2) makes provision for where the judge is satisfied that the evidence is insufficient in law to justify a conviction for the indicted offence. It ensures that the trial will proceed only where the judge is satisfied that the evidence is sufficient in law to justify the accused's being convicted of a related offence or where another offence is libelled in the indictment which has not itself been subject to a submission under section 97A(2).

260. Subsection (3) provides for the continuation of the trial where the judge rejects a submission under section 97A(2)(a).

261. Subsection (5) ensures that the clerk of court will check and confirm that the amendment has been properly made.

262. Section 97C applies where the accused makes a submission under section 97A(2)(b) that there is no evidence to support some part of the circumstances set out in the indictment.

263. Subsection (2) provides that the prosecutor will be directed to amend the indictment where the judge is satisfied that there is no evidence to support some part of the circumstances set out in the indictment.

264. Subsection (3) provides for the continuation of the trial where the judge rejects a submission under section 97A(2)(b).

265. Subsection (5) ensures that the clerk of court will check and confirm that the amendment has been properly made.

Section 55 – Prosecutor’s right of appeal

266. The Crown is not able under the existing law to challenge a decision by a judge that brings a criminal case to an end. The existing rights of appeal available to the Crown are highly restricted. The prosecution may be able to use a bill of advocacy in relation to some aspects of the trial process, although this is normally confined to procedural errors in the preliminary stages of a case. The Crown may also appeal against sentence under section 108 of the Criminal Procedure (Scotland) Act 1995. This can be on a number of grounds, including that the disposal of the case was unduly lenient. The other option available to the Crown is not technically an appeal, but a reference made by the Lord Advocate under section 123 of the 1995 Act where the Crown wish the High Court to consider a particular point of law that arose in a criminal case. This has no effect on the disposal of the case that lead to the reference.

267. Section 107A gives the Crown a right of appeal against certain decisions by a judge that bring a criminal case to an end without a decision by a jury. These are rulings of no case to answer under section 97 and decisions under section 97A (the statutory replacement for a common law submission). Section 107B provides the Crown with a right of appeal against certain findings relating to the admissibility of prosecution evidence. These changes do not create any rights of appeal in relation to a decision by a jury.

268. Section 107A(1)(a) creates a right of appeal in relation to a decision by a judge under section 97 that, at the close of the evidence for the prosecution, the evidence led is insufficient in law to justify the accused being convicted of the offence charged. Paragraph (a) of subsection (1) also provides a right of appeal in relation to a decision taken under section 97B(2)(a), at the close of the entire evidence in the case, to acquit the accused of the indicted offence on the grounds that the evidence is insufficient in law to justify the conviction of the accused for that offence.

269. Paragraph (a) of subsection (1) creates a right of appeal in relation to a decision by a judge under section 97 that, at the close of the evidence for the prosecution, the evidence led is insufficient in law to justify the accused being convicted of the offence charged. Paragraph (a) also provides a right of appeal in relation to a decision taken under section 97B(2)(a), at the close of the entire evidence in the case, to acquit the accused of the indicted offence on the grounds that the evidence is insufficient in law to justify the conviction of the accused for that offence

270. Paragraph (b) of subsection (1) creates a right of appeal in relation to a direction made under section 97B(2)(b). This is a direction to the prosecutor to amend an indictment and is given where the judge is satisfied that the evidence is sufficient in law to justify the accused being convicted of a related offence. Paragraph (b) also provides a right of appeal against a decision under section 97C(2) directing the prosecutor to amend the indictment to reflect a decision that there is no evidence to support some part of the circumstances set out in the indictment.

271. Section 4(2) of the Contempt of Court Act 1981 allows a court, where it appears to be necessary in order to avoid a substantial risk of prejudice to the administration of justice in any proceedings which are pending or imminent, to order that the publication of any report of the proceedings be postponed for such period as the court thinks necessary. Subsection (2)(a) of section 107A allows the court, where it appears that the prosecution appeal may result in further proceedings against a person for an offence of which he has been acquitted, to make an order under section 4(2) of the Contempt of Court Act 1981. This will avoid the risk of prejudice to those further proceedings.

272. Subsection (2)(b) permits the court, in exceptional circumstances and after hearing the parties, to order the detention of an acquitted person in custody or admit him to bail pending the hearing of the prosecution appeal.

273. Most rulings on the admissibility of evidence are made at preliminary diets or preliminary hearings. However, some evidential questions may still arise during the course of a trial, for example where an unexpected development occurs in the course of oral evidence. If a challenge to admissibility of evidence is successful and the accused is acquitted, it could be maintained that a ruling on admissibility had been fatal to the entire prosecution.

274. Section 107B gives the prosecutor a right of appeal against findings made during the course of the trial that evidence which the prosecution seeks to lead is inadmissible. Subsection (2) establishes that the leave of the trial court is required in all appeal cases involving a finding that evidence is inadmissible. Subsection (3) requires any motion for leave to appeal to be made before the close of the Crown case. Subsection (4) sets out the factors to be taken into account by the court in determining whether or not to grant leave to appeal.

275. Section 4(2) of the Contempt of Court Act 1981 allows a court, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in any proceedings which are pending or imminent, to order that the publication of any report of the proceedings be postponed for such period as the court thinks necessary.

276. Subsection (5)(a) of section 107B allows the court, where it appears that the prosecution appeal may result in further proceedings against a person for an offence of which he has been acquitted, to make an order under section 4(2) of the Contempt of Court Act 1981 to avoid the risk of prejudice to those further proceedings. Subsection (5)(b) permits the court, in exceptional circumstances and after hearing the parties, to order the detention of an acquitted person in custody or admit him to bail pending the hearing of the prosecution appeal.

277. Subsection (1) of section 107C allows the High Court, in considering an appeal under section 107A or 107B, to review not only the decision appealed against but any earlier decisions which may have a bearing on the decision appealed against. So, for example, where an acquittal under section 97 is appealed, the High Court will be able to review not only the trial judge's decision that the evidence led by the prosecution was insufficient in law to justify the conviction of the accused, but also an earlier finding by that judge that an element of prosecution evidence was inadmissible. Subsection (2) provides that the test to be applied by the High Court in considering an appeal under section 107A or 107B is whether the trial judge's decision was wrong in law.

278. If a Crown appeal (under either section 107A or 107B) is successful, then the Crown may seek to continue the prosecution. It is likely that in the majority of cases the continuation of the existing trial would not be a realistic possibility because of the delay that would necessarily be incurred during the appeal process. Proceeding with the case in those circumstances would therefore require the Crown to raise a fresh prosecution. However, in some instances it may be considered practicable for the appeal to be heard and determined during an adjournment of the trial, allowing the trial to continue if the appeal is upheld. Such an appeal is defined as an “expedited appeal” in subsection (2).

279. Section 107D makes provision for expedited appeals to be heard and determined during an adjournment of the trial. Subsection (1) and (2) provide for the court to take steps to determine whether it would be practicable to continue the existing trial following the appeal. After hearing the views of both the Crown and the accused, the Court will decide whether the appeal should be heard during an adjournment of the trial.

280. Subsection (6) means that where an appeal against an acquittal under section 97 or 97B(2)(a) is successful; the High Court will quash the acquittal and direct that the trial is to continue in respect of the offence.

281. Section 107E makes provision for appeals against an acquittal that are not subject to the expedited appeal procedure provided for by section 107D. It applies to acquittals arising under section 97 or section 97B(2)(a) or as a consequence of a ruling that evidence that the prosecution sought to lead was inadmissible under section 107B(1). This section will apply where it would not be practicable to continue the existing trial whilst the appeal against conviction is being considered. Subsection (1) limits section 107E to appeals against an acquittal. Non expedited appeals that are *not* against an acquittal are dealt with under section 107F.

282. The effect of subsections (1)(c) and (2) are that where the High Court (sitting as a court of appeal) determines that the acquittal was wrong in law, it shall quash the acquittal. Subsection (3) provides for the High Court to grant authority for a new prosecution in accordance with section 119 of the Criminal Procedure (Scotland) Act 1995 for the same or any similar offence arising from the same facts. The High Court will not grant authority to bring a new prosecution where it considers that doing so would be contrary to the interests of justice.

283. Subsection (4) provides that if no motion is made for authority to bring a new prosecution, or if the High Court refuses such a motion, the High Court shall itself acquit the accused of the offence in question.

284. Section 107F makes provision for appeals made under section 107A or 107B that are not appeals against an acquittal and that are not subject to the expedited appeal procedure provided for by section 107D. This section will apply where it would not be practicable to continue the existing trial whilst the appeal against conviction was being considered. The practical effect of subsection (1) is to limit section 107F to non-expedited appeals against:

- a direction to amend the indictment to cover a related offence (where the judge is satisfied that the evidence is insufficient in law to justify the accused’s being convicted of the indicted offence) (section 97B(2)(b));

- a direction to amend the indictment (where the judge has ruled that there is no evidence to support some part of the circumstances set out in the indictment) (section 97C(2);
- a finding that prosecution evidence is inadmissible.

285. Non expedited appeals against an acquittal are dealt with under section 107E.

286. Because the appeal in question is not being expedited, the trial is unable to continue in relation to any offence to which the appeal relates. Subsection (2) therefore provides for the court to desert the diet in relation to that charge (or those charges) *pro loco et tempore* and, under subsection (3), the trial shall proceed only in relation to any other charges remaining on the indictment. The ordinary consequence of desertion *pro loco et tempore* is that the Crown is free to bring a fresh indictment (see Renton & Brown, *Criminal Procedure* (6th edn, R 22: Apr 2005) paragraph 18-21).

287. Subsection (4) provides for the High Court to grant authority for a new prosecution in accordance with section 119 of the Criminal Procedure (Scotland) Act 1995 for the same or any similar offence arising from the same facts. The High Court (sitting as a court of appeal) will not grant authority to bring a new prosecution where it considers that doing so would be contrary to the interests of justice.

Section 56 – Power of High Court in appeal under section 107A of 1995 Act

288. This section amends section 104 of the 1995 Act to make a number of powers available to the High Court for use in connection with appeals under sections 107A and 107B. Section 104 already confers powers upon the High Court when hearing appeals under section 106(1) or 108 of that Act, including power to order the production of documents, to hear evidence etc.

Section 57 – Further amendment of the 1995 Act

289. This section makes a number of amendments to the Criminal Procedure (Scotland) Act 1995. The amendments made by subsections (1) to (3) relate to the lodging of notes of appeal and the provision of the trial judge's report. Subsection (4) makes amendments concerned with the procedure following the granting of the High Court's authority to bring further proceedings following a successful Crown appeal.

290. Section 110 of the 1995 Act makes provision for notes of appeal. Subsection (1) of that section contains time limits for lodging such notes and provides for the transmission of copies of notes to the court and to the parties concerned in the appeal. Subsection (3) of that section requires that a note of appeal identify the proceedings, contain a full statement of the ground of appeal, and be in as nearly as may be the form prescribed by Act of Adjournal. Subsection (4) of that section provides that, except by leave of the High Court on cause shown, it shall not be competent for an appellant to found any aspect of his appeal on a ground not contained in the note of appeal.

291. Subsection (1) of section 57 inserts new sub-paragraphs (c), (d) and (e) into section 110(1) of the 1995 Act, providing for the lodging of a note of appeal within seven days of a non-expedited appeal being brought under section 107A; within seven days of the granting of leave for a non-expedited appeal under section 107B; and as soon as practicable after a decision under section 107D(2) that an appeal be expedited. An effect of this insertion is that subsections (3) and (4) (of section 110 of the 1995 Act) apply to Crown appeals as they do to appeals by a convicted person under section 106 and by the Lord Advocate against disposal under section 108. (Note, however, that while the time limits for appeals by convicted persons may be extended under either section 110(2) or 111(2), the time limit imposed upon a Crown appeal by inserted paragraphs (c) and (d) of section 110(1) cannot be extended).

292. Section 113 of the 1995 Act requires the trial judge, on receiving the copy note of appeal sent to him under section 110(1), to furnish the Clerk of Justiciary with a written report giving the judge's opinion on the case generally and on the grounds contained in the note of appeal. It is appropriate that such a note should be provided to assist the High Court in considering a Crown appeal; but in an expedited appeal, where the appeal is to be heard during an adjournment of the trial, it will often be impractical to require a full report.

293. Subsections (2) and (3) of this section address these points. The effect of subsection (2), together with subsection (1), is to apply section 113 of the 1995 Act to non-expedited appeals: in any such appeal, the trial judge will be required to provide a full report. Subsection (3) inserts a new section 113A into the 1995 Act, permitting the trial judge in an expedited appeal to furnish the Clerk of Justiciary with such written observations as he or she thinks fit.

294. Subsection (4) of section 57 makes amendments applying section 119 of the 1995 Act (provision where High Court authorises new prosecution) to Crown appeals. Paragraph (a) inserts reference to new prosecutions authorised under section 107E(3) and section 107F(4) in relation to non expedited appeals arising under section 107A or 107B.

295. Paragraph (b) creates a replacement for subsection (2) of section 119. New subsection (2)(a) reproduces the existing law which states that a new prosecution granted where a conviction is quashed under section 118 of the 1995 Act (following a successful appeal by the defence) may not proceed upon the basis of a more serious charge than that on which the accused was convicted in the earlier proceedings.

296. New subsection (2)(b) provides, where a new prosecution is granted after a successful appeal against an acquittal under section 107A or 107B, that a new prosecution may not proceed upon the basis of a more serious charge than that on which the accused was acquitted in the earlier proceedings.

297. New subsection (2)(c) places a similar restriction in relation to a new prosecution authorised under section 107F(4) resulting from an appeal against a direction as to sufficiency, admissibility or lack of evidence. By virtue of this subsection a new indictment may not contain a more serious charge than that libelled in the original proceedings.

298. Where a successful appeal under section 107A has resulted in a new prosecution, new subsection 2A of section 119 (inserted by paragraph (c)) ensures that the circumstances set out in

the new indictment are not to be inconsistent with any direction made by a trial judge to amend the old indictment under section 97B(2)(b) or 97C(2). A direction under those provisions would have been to either include a related offence within the indictment (the judge having ruled that the evidence was insufficient in law to justify a conviction under the indicted offence) or to reflect a ruling that there was no evidence to support some part of the circumstances set out in the indictment. However, this requirement does not apply if the High Court determines that the direction under section 97B(2)(b) or 97C(2) was wrong in law.

299. Paragraph (d) amends subsection (9) of section 119. The effect of this amendment is that where two months elapse following the date upon which the High Court grants authority under section 107E(3) and section 107F(4) and no new prosecution has been brought, the order granting authority to bring a new prosecution shall have the effect, for all purposes, of an acquittal.

Sections 58 – 60 - Retention and use of samples etc.

300. Sections 58 to 60 contain provisions on the retention and use of samples.

301. The law on police powers to take, retain and use DNA, fingerprints and other forensic data (such as palm prints) is predominantly set out in sections 18-20 of the 1995 Act. In general, samples and records of forensic data must be destroyed once the decision is taken not to prosecute an individual for the offence the samples and records were collected in connection with, or, if the individual is prosecuted, when the proceedings end without a conviction. If the individual is found guilty of the offence, the samples and records of their forensic data can be retained indefinitely

302. Section 18A of the 1995 Act allows an exception to this general rule where criminal proceedings have been initiated against an individual for an offence, but end without a conviction. This only applies to criminal proceedings for a list of serious sexual or violent offences set out in section 19A(6) of the 1995 Act. In these circumstances, DNA samples and records can be retained by the police for at least three years. At the end of that time, the Chief Constable can apply to a sheriff for these samples and records to be kept for up to a further two years and this process can be repeated at the end of each extended period.

303. Section 58 amends sections 18 and 18A of the 1995 Act, extending this exception to cover the retention of “relevant physical data” (which is defined in section 18(7A) of the 1995 Act as fingerprints, palm prints, prints or impressions of another external part of the body, and records of skin on an external part of the body) as well as DNA records.

304. Section 59 inserts new sections 18B and 18C to the 1995 Act. These introduce a similar exception to the normal rules governing retention of DNA, fingerprint and other physical data to that described above in relation to section 58, covering certain cases dealt with by the Children’s Hearings System. This applies where a child is referred to a Children’s Hearing on the grounds that they have committed one of a list of specified serious violent or sexual offences and has had DNA, fingerprint or other physical data taken from them under section 18 of the 1995 (upon his/her arrest or detention). The list of relevant offences will be drawn from the lists of sexual or

violent offences in section 19A(6) of the 1995 Act, and set out in secondary legislation, which will need to be approved by the Scottish Parliament.

305. If the child and relevant person (a parent or person with control over the child) accepts that he or she has committed one of the relevant offences, or a sheriff establishes that they have done so, DNA, fingerprint or other physical data can be kept for at least three years.

306. As with section 58, the Chief Constable will be able to apply to a sheriff for an extension of up to two years at the end of this time, and this process can be repeated at the end of each extended period.

307. If a child is referred to a Children's Hearing on the grounds of having committed a relevant offence and refuses to accept that such an offence was committed, any DNA, fingerprints and other physical data which has been taken from that child under section 18 of the 1995 Act must be destroyed. This also applies where the commission of a relevant offence by the child is not established by a sheriff, to whom a children's hearing refers the case to establish the facts or who reviews the case under section 85 of the Children (Scotland) Act 1995.

308. Section 60 inserts a new section 19C into the 1995 Act, setting out the general purposes for which DNA and fingerprint information can be used. This makes it clear that the police can use the DNA and fingerprint information as a tool to help prevent, detect, and investigate crime, and prosecute crime in court. It also allows the information to be used to establish the identity of a deceased person and also a person from whom DNA samples, relevant physical data and information from samples comes from, as there may be a need to identify a person from whom a body or body part where no criminal activity is suspected: for example, following a natural disaster. These purposes apply whether the crime or incident occurs or is being investigated in Scotland, elsewhere in the UK or abroad, enabling the police to assist with investigations and prosecutions wherever they take place.

309. At present, police use common law powers for the use of fingerprints and DNA in criminal investigations and prosecutions. The powers in new section 19C aim to provide clarity on the purpose for which samples and records of forensic data can be used. They are without prejudice to existing powers at common law.

Section 61 - Referrals from Scottish Criminal Cases Review Commission: grounds for appeal

310. The Scottish Criminal Cases Review Commission was established by section 194A of the 1995 Act, inserted by the Crime and Punishment (Scotland) Act 1997.

311. Section 194B(1) of the 1995 Act sets out the Commission's power to refer a person's conviction or sentence to the High Court. Where the Commission makes a reference to the High Court, the Commission is required to give the Court a statement of their reasons for making the reference, in accordance with section 194D(4).

312. The High Court is then required to consider the matter referred as if it were an appeal under Part 8 (appeals from solemn proceedings) or Part 10 (appeals from summary proceedings) of the 1995 Act.

313. Section 194C of the 1995 Act sets out the grounds on which the Commission can make a reference to the High Court. These are that the Commission believe that a miscarriage of justice may have occurred, and that it is in the interests of justice that a reference should be made.

314. The effect of a reference by the Commission is that there is no need for the applicant to seek leave to appeal under section 107 of the 1995 Act (for solemn appeals) and section 180 (for summary appeals). Where the Commission has made a reference to the High Court there is nothing to limit the appellant from raising grounds of appeal that are not related to the reasons that the Commission made the reference. Section 194D is being amended so that where the Commission make a reference, an appeal arising from this reference can only be based on grounds relating to one or more of the reasons given by the Commission in its statement of reasons.

315. If the appellant seeks to make a case based on grounds of appeal that are not related to the reasons contained for the Commission's reference, then this will only be possible if leave is given by the High Court in the interests of justice.

PART 4 - EVIDENCE

Section 62 – Witness statements: use during trial

316. Section 62 creates a power for the court to allow a witness to refer to his statement during the giving of evidence subject to the witness statement having been made available to the Crown and to the defence in advance of the trial. Subsection (3) extends the applicability of section 262 (construction of sections on hearsay) of the 1995 Act to witness statements. Within that, subsection (3)(c) disapplies the meanings of “criminal proceedings” and “made” to witness statements.

Section 63 - Spouse or civil partner of accused a compellable witness

317. This section makes provision for the spouse or civil partner of an accused to be a competent and compellable witness. This section amends section 264 of the 1995 Act and repeals section 130 of the Civil Partnership Act 2004. The common law provisions regarding the spouse as a witness will also be overturned.

318. This section provides that the spouse or civil partner of an accused is a competent and compellable witness for the prosecution, accused or co-accused in the proceedings against the accused. Currently the law provides that a spouse is a competent witness in all circumstances. However, s/he is a compellable witness for the prosecution or a co-accused only where s/he is compellable at common law. In respect of the common law, a spouse is only compellable where the accused is charged with an offence against him or her. The operation of the common law rule is not restricted to offences of personal injury, but extends to false accusation and to

offences against property, including theft and even the forgery of the spouse's signature on a cheque.

319. It does not extend to damage to property of which the spouse is only a tenant, unless perhaps if s/he is liable to pay for the repair of the damage. If a spouse of an accused is the victim of the crime with which the accused is charged then their marital status is of no consequence. A spouse and an unmarried partner would be a compellable witness for the prosecution in such a case.

320. It is only where the spouse is not the victim that s/he can decline to give evidence for the prosecution. If the spouse of an accused is called as a Crown witness, in circumstances in which s/he is not compellable against her husband or wife, s/he has the option of declining to give evidence. But if s/he elects to give evidence against the accused, s/he cannot decline to answer questions which incriminate the spouse. An unmarried partner cannot decline to give evidence in any circumstances.

321. By the 2004 Act, a civil partner is not a compellable witnesses for the prosecutor or a co-accused. Persons in a registered civil partnership are, accordingly, never compellable against each other.

322. This provision of the Bill will provide that the spouse and civil partner of an accused will be competent and compellable witnesses for the prosecution, accused or co-accused in any proceedings against the accused. In effect they will be treated no differently to any other witness. It will also take away the common law right of an accused's spouse to refuse to give evidence of matrimonial communications.

Section 64 – Special measures for child witnesses and other vulnerable witnesses

323. This section amends sections 271-271M of the 1995 Act to allow the special measures (listed at section 271H) that are available for vulnerable witness to be used in "any relevant criminal proceedings in the High Court or the sheriff court", as defined in subsection 2(b)(ii).

324. Subsections (3)-(9) replace all references to "trial" in sections 271-271M with references to the relevant criminal proceedings. This allows the special measures to be used in proceedings other than trials.

325. Subsection (10) makes consequential amendment to section 288E (5) of the 1995 Act.

Section 65 – Amendment of Criminal Justice (Scotland) Act 2003

326. Section 65 repeals section 15A of the Criminal Justice (Scotland) Act 2003. This section allowed the special measures to be used in relation to proofs in relation to victim statements. This section is no longer necessary now that the special measures may be used in any hearing in relevant criminal proceedings.

Section 66 - Witness anonymity orders

327. Subsection (1) inserts new sections 271N to 271Y into the 1995 Act and provides courts with an order-making power to secure anonymity for witnesses when giving evidence in court.

328. The new section 271N(1) sets out what a witness anonymity order is and defines the order in such a way as to grant the court a wide discretion as to how the court protects the anonymity of a witness in any particular case.

329. The new section 271N(2) refers to procedures detailed at sections 271P, 271Q and 271R which deal with how applications should be made and what conditions the court needs to consider when considering whether to make an order.

330. The new section 271N(3) and (4) lists the kinds of measures the court may use to secure the witness's anonymity. The list is only illustrative; the court may employ other measures if it thinks fit. Technological developments and the practical arrangements in the court may affect such decisions.

331. The new section 271N(5) provides that the court may not make a witness anonymity order which prevents the judge, jury or interpreter either from seeing the witness or from hearing the witness's natural voice. The judge, jury and interpreter must always be able to see and hear the witness.

332. The new section 271P(1) provides that applications for a witness anonymity order may be made by the accused as well as prosecutors. This reflects the position in the case of *Davis*, where the Court of Appeal allowed a defence witness as well as prosecution witnesses to give evidence anonymously. It is expected that defence applications are most likely to be made in multiple accused cases where one accused does not wish a witness's identity to be known by the other accused. But this subsection does not exclude the possibility of a defence application in a single accused case.

333. The new section 271P(2) provides that, where an application for an witness anonymity order is made by the prosecutor, the identity of witnesses may be withheld from the accused before and during the making of the application. This ensures that the operation of the legislation is not impeded by procedural challenges to the power of the prosecution to withhold this information pending the court's determination of the application for the witness anonymity order.

334. The new section 271P(2) therefore provides that prosecutors are under no obligation to disclose the witness's identity to the accused at the application stage but must inform the court of the identity of the witness. Similar provision is made for the accused in the new section 271P(3), except that the accused must always disclose the identity of the witness to the prosecutor and the court but do not have to disclose it to any other defendant.

335. The new section 271P(4) provides that where the prosecutor or the accused proposes to make an application for a witness anonymity order, information that might identify the witness

can be taken out of any relevant material which is disclosed before the application has been determined. This does not, however, override the obligation to disclose the identity of the witness to the court (in the case of a prosecutor's application) or to the court and prosecutor (in the case of an accused's application).

336. The new section 271P(2) also enables the court to direct that it should not be informed of the identity of the witness. This provides for the possibility that, whilst in the vast majority of cases the court will require to be informed of the witness's identity, there may be rare cases (particularly national security related cases) where even the court will neither need nor wish to know it.

337. The new section 271P(6) and (7) set out two basic principles. Subsection (6) states that on an application for a witness anonymity order every party to the proceedings must be given the opportunity to be heard. However, it may be necessary in the course of making the application to reveal some or all of the very information to which the application relates: for example, the name and address of the witness who is fearful of being identified. So subsection (7) provides that the court has the power to hear any party without an accused or the accused's legal representative being present. This reflects the existing practice, by which prosecution applications were expected to be made in the absence of any other parties in the case, with the accused able to make representations later at a hearing with the prosecution (and possibly other accused) present. It is expected that defence applications will be permitted without other accused being present but will always be made in the presence of the prosecution.

338. The new section 271Q(1) and (2) requires four conditions to be met before a court can make a witness anonymity order. They are described as conditions A, B, C and D.

339. The new section 271Q(3) sets out condition A, which is that the measures to be specified in the order are necessary for one of two reasons. The first is to protect the safety of the witness or another person or to prevent serious damage to property. There is no requirement for any actual threat to the witness or any other person. The second is to prevent real harm to the public interest. This will include, but will not be restricted to, the public interest in police or security service undercover officers being able to carry out future operations, whether or not they are fearful in any particular case.

340. The new section 271Q(4) sets out condition B, which is that the effect of the order would be consistent with the accused receiving a fair trial. Thus the grant of the order must be compliant with Article 6 of the ECHR.

341. The new section 271Q(5) sets out condition C, which is that the witness's testimony is such that in the interests of justice the witness ought to testify and new section 271Q(6) provides that either the witness would not testify if the order was not made or there would be real harm to the public interest if the witness were to testify without an order being made (such harm might, for example, arise as a result of the identity of a member of the security services being made public).

342. The new section 271Q(7) specifies that in determining for the purposes of condition A whether the order is necessary to protect the safety of the witness, another person or prevent damage to property, the court must have regard to the witness's reasonable fear of death or injury

either to himself or herself or to another person (for example family members or friends) or reasonable fear that there would be serious damage to property (for example fire bombing the witness's home).

343. The new section 271R(1) requires the court to have regard to the considerations set out in the new section 271R(2) when deciding whether to make an order. The court must also have regard to any other factors it considers relevant.

344. The considerations in new section 271R(2) are the accused's general right to know the identity of a witness, the extent to which credibility of the witness is relevant in assessing the weight of the evidence he or she gives, whether the witness's evidence might be the sole or decisive evidence in implicating the accused, whether the witness's evidence can be properly tested without knowing the witness's identity, whether the witness has a tendency or any motive to be dishonest and whether alternative means could be used to protect the witness's identity.

345. New section 271S requires the judge to warn the jury in a trial on indictment in such way as the judge considers appropriate, so as to ensure that the fact that the order was made does not prejudice the accused.

346. New section 271T(1), (2) and (3) provide for the court that has made an order to discharge or vary it in those proceedings, either on an application by a party to the proceedings or on its own initiative. This power may be used where, for example, a witness who previously gave evidence anonymously is content for the anonymity to be lifted.

347. New section 271T(4) the court must give every party to the proceedings an opportunity to be heard before determining an application for variation or discharge of an order or before varying or discharging an order on its own initiative.

348. New subsection 271U(1) sets out the various grounds for making an appeal to the High Court in relation to witness anonymity orders. An appeal can be made by the prosecutor or the accused. New section 271U(2) states that an appeal to the High Court can be allowed by the court hearing the trial in which the witness who is subject to an application for an anonymity order is to give evidence. As well as allowing for the prosecution and the accused to seek leave to make an appeal, this section also provides that the court itself may grant leave to appeal to the High Court on its own initiative.

349. New section 271U(4) allows the High Court hearing the appeal to postpone the relevant trial for as long as it thinks appropriate and instruct that any postponement should not affect any time limit associated with the case being tried.

350. New section 271V provides that the High Court, having considered an appeal, must overturn the granting of a witness anonymity order by the court hearing the relevant trial if it decides that the decision to grant the order was wrong in law. Once this decision has been taken the trial can continue but without the witness who was the subject of the order giving their evidence anonymously.

351. New section 271W enables the High Court, having considered an appeal, to reverse the decision of a court which has refused an application for a witness anonymity order, if it concludes that the decision of the judge in that court was wrong in law. The High Court must then order that appropriate measures should be taken to preserve the anonymity of the relevant witness when he or she is giving their evidence.

352. New subsections 271X(1) and (2) enable the High Court, having considered an appeal, to reverse the decision of a court that has varied the way in which the witness anonymity order has been applied if it concludes that the decision of the judge in that court was wrong according to the law. New subsection 271X(3) provides that the High Court can decide that other variations to the order are justified under the relevant terms of the law as set out at 271Q and 271R.

353. New subsection 271Y(1) enables the High Court, having considered an appeal, to reverse the decision of a court that has refused an application made by either the prosecutor or the accused to vary or disallow a witness anonymity order if it concludes that the decision of the judge in that court was wrong according to the law. Thereafter new subsections 271Y(2) and (3) provide for the High Court to disallow an order or vary it depending on the case, and allows it make an additional variation to the order as it deems appropriate and under the relevant terms of the law as set out at 271Q and 271R.

354. Subsection (2) provides for the coming into effect of provisions for witness anonymity orders.

355. Subsection (3) provides that witness anonymity orders made under an existing rule of law in a trial or a hearing that starts before the day the new provisions come into effect are not affected by the coming into force of these provisions.

Section 67 - Television link evidence

356. This section provides that section 273 of the Criminal Procedure (Scotland) Act 1995 will be amended to allow witnesses to give evidence from abroad via live television link in all criminal proceedings in the High Court or sheriff court.

357. A new section 273A is inserted that allows witnesses to give evidence via live television link from outwith Scotland, but within the United Kingdom, from an acceptable location within the United Kingdom, thereby relieving them of the requirement to travel to Scotland and give their evidence in the Scottish court.

PART 5 - CRIMINAL JUSTICE

Section 68 - Upper age limit for jurors

358. This section provides that the upper age limit for jurors serving on criminal juries in Scotland will be extended from the current limit of 65 to 70 years of age.

359. This involves amendment to section 1 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980. This amendment will allow individuals between 65 and 70 years of age to

be cited for jury service on criminal trials Scotland. Extending the upper age limit will also require amendment of sections 2 and 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 which relate to fines for non-attendance and offences relating to jury service in that these will apply to persons between 65 and 70 years of age. The upper age limit for jurors serving on civil trials remains unchanged at 65 years of age.

Section 69 - Persons excusable from jury service

360. This section replaces paragraph (a) of Schedule 1, Part 3, Group F of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 concerning the period of entitlement to excusal from criminal jury service in Scotland. This section makes provision to reduce the exemption period from 5 to 2 years for individuals who attend court but who are not subsequently balloted to sit on a jury. Currently the system makes no distinction between those who attend at court as required but do not then get picked from the ballot to serve, and those who attend and are selected by ballot to form part of a jury in a case.

361. It is not the intention that this should be a retrospective change; rather it will apply from the commencement date of this section of the legislation. This subsection has no impact on the power that a judge has, for example following particularly long or difficult trials, to direct that jurors be excused from service for any period up to and including excusal for life.

Section 70 - Data matching for detection of fraud etc.

362. Section 73 of, and Schedule 7 to, the Serious Crime Act 2007 provided the national audit agencies in England, Wales and Northern Ireland with the power to match data, and provides statutory provision for an existing data-matching scheme known as the National Fraud Initiative. The National Fraud Initiative is a UK-wide data matching scheme conducted for the purpose of assisting in the prevention and detection of fraud.

363. Section 70 of this Bill amends the Public Finance and Accountability (Scotland) Act 2000 to provide equivalent provisions enabling the National Fraud Initiative to be carried out in Scotland on a statutory basis. The main amendment consists of the insertion of a new Part 2A (Data Matching) of the 2000 Act consisting of sections 26A to 26G.

364. Section 26A(1) provides for Audit Scotland to carry out data matching exercises or to arrange for another organisation to do this on its behalf. Subsection (2) defines what a data matching exercise is. It involves the comparison of sets of data, for example, the taking of two local authority payroll databases and matching them. Matching exercises may identify fraudulent activity as having taken place. Subsection (3) defines the purposes for which a data matching exercise can be exercised. These purposes are assisting in the prevention and detection of fraud, assisting in the prevention and detection of crime other than fraud, and assisting in the apprehension and prosecution of offenders. Subsection (4) provides that data matching may not be used to identify patterns and trends in an individual's characteristics or behaviour which suggest nothing more than his potential to commit fraud in future. This is designed to prevent the Audit Scotland from creating individual "profiles" of future fraudsters.

365. Section 26B(1) provides that a person may disclose data to Audit Scotland for the purposes of a data matching exercise. This could include private sector bodies such as mortgage providers who wish to be part of the exercise. There is no compulsion on any of these bodies to take part in a data matching exercise. Subsection (2) provides that the disclosure of information does not breach (a) any duty of confidentiality owed by a person making the disclosure or (b) any other restriction on the disclosure of information, however imposed. Subsection (3) provides that nothing relating to voluntary provision of data authorises any disclosure which (a) contravenes the Data Protection Act 1998, or (b) is prohibited by Part 1 of the Regulation of Investigatory Powers Act 2000, or (c) allows the disclosure of data comprising or including patient data. Subsection (4) defines patient data as meaning data relating to an individual which is held for medical purposes and from which the individual can be identified. Subsection (5) defines medical purposes. Subsection (6) provides that this section does not limit the circumstances in which data may be disclosed apart from this section. Subsection (7) provides that data matching exercises may include data disclosed by a person outside Scotland.

366. Section 26C(1) enables Audit Scotland to require the disclosure of information to conduct a data matching exercise. Subsection (2) sets out which persons may be required to disclose data under subsection (1). They are those bodies whose accounts are subject to audit by the Auditor General, or are sent to him for auditing, local authorities, Licensing Boards and their officers, office-holders or members. Subsection (5) creates an offence and accompanying penalty for non-compliance with this requirement.

367. Section 26D sets out the circumstances in which information relating to a data matching exercise, including the results of such an exercise, may be disclosed by or on behalf of Audit Scotland, and the persons and bodies to whom the data may be disclosed. Subsection (6) imposes special restrictions on the disclosure of information if it includes patient data (as defined in subsection (7)). Subsection (8) places restrictions on the further disclosure of information disclosed under subsection (2) and allows the further disclosure in certain specified circumstances. Subsection (9) creates an offence of disclosing information where the disclosure is made other than as authorised by subsections (2) and (8), and sets out the penalty.

368. Section 26E(1) makes clear that Audit Scotland will be able to publish a report on its data matching exercises notwithstanding the limitation on disclosure as is provided under section 26D. Subsection (2) provides that a report that is published under section 26E may not include information relating to a particular person if (a) the person is the subject of any data included in the data matching exercise; and (b) the person can be identified from the information; and (c) the data is not otherwise in the public domain. Subsection (3) provides that Audit Scotland may publish a report in such a manner as it considers appropriate for bringing it to the attention of those members of the public who may be interested. Subsection (5) preserves the existing powers of an auditor to publish information under Part 2 of the 2000 Act or Part 7 of the Local Government (Scotland) Act 1973.

369. Section 26F(1) provides that Audit Scotland must prepare and keep under review a code of data matching practice. Subsection (2) sets out that all those involved in this process must have regard to the code of data matching practice. Subsection (3) requires Audit Scotland to consult all those bodies or office holders who must provide data, the Information Commissioner, and such other bodies as Audit Scotland thinks appropriate before preparing or altering the code of

data matching. Subsection (4) places a duty on Audit Scotland to publish the code from time to time.

370. Section 26G(1) provides for the Scottish Ministers to add public bodies to those listed in new section 26C(2) by order. The Scottish Ministers may also, by that subsection, modify the application of Part 2A to any body so added, and may remove bodies from section 26C(2). Subsection (2) provides that any order made under section 26G can include any incidental, consequential, supplemental or transitional provision the Scottish Ministers think fit. Subsection (3) defines the meaning of public body. Subsection (4) provides that a public body, whose functions are both public and private in nature, is a public body only to the extent of its functions which are public in nature.

371. Section 70(2) amends section 11 of the 2000 Act to allow Audit Scotland to impose reasonable charges in respect of the exercise of its functions in connection with a data matching exercise (such fees would currently be charged as part of any audit fee), and for these charges to be imposed on those who supply data for a data matching exercise and/or those who receive the results of such an exercise.

Section 71 - Sharing information with anti-fraud organisations

372. The Serious Crime Act 2007 (“the 2007 Act”) allows public authorities (within the meaning of section 6 of the Human Rights Act 1998) in England, Wales and Northern Ireland to disclose information as a member of a specified anti-fraud organisation for the purposes of preventing fraud or a particular kind of fraud.

373. Sections 68 to 72 of the 2007 Act provide the framework for the scheme. The information may be information of any kind, including personal and documentary information. Sections 68(5) and (6), 69(3) and 71(4) of the 2007 Act provide that the information sharing scheme, by which certain information may be shared for the purposes of preventing fraud, shall extend to reserved but not devolved information held by Scottish public authorities. By repealing these sections of the 2007 Act, this section will allow Scottish public authorities to disclose devolved information, for the purposes of the prevention of fraud or a particular kind of fraud, to a specified anti-fraud organisation.

374. Section 68(5) and (6) of the 2007 Act, excludes Scottish public authorities from the information sharing scheme in respect of devolved information. This section repeals 68(5) and (6) and as a result will allow Scottish public authorities to disclose and share such devolved information with anti-fraud organisations in the same way as public authorities in England, Wales and Northern Ireland.

375. Section 69(1) makes it an offence for a person to further disclose protected information which had been disclosed by a public authority member of an anti-fraud organisation or otherwise in accordance with any arrangements made by such an organisation. “Protected information” is any revenue and customs information disclosed by HM Revenue and Customs which reveals the identity of the persons to whom the information relates, and specified information disclosed by other public authorities. Section 69(3) provides that this offence does not apply where the original disclosure was by a relevant public authority (ie an authority not

covered by the new power in section 68) and related to devolved matters. As the power in section 68 is being extended to cover devolved information of Scottish public authorities, this exclusion can be removed and the offence in section 69(1) will apply to any protected information.

376. Section 71 of the 2007 Act provides that the Secretary of State must prepare and keep under review a code of practice with respect of the disclosure, for the purposes of preventing fraud or a particular type of fraud, of information by public authorities. This section of the Bill repeals section 71(4) of the 2007 Act so that the code of practice will apply for disclosures of devolved information made for the purposes of the prevention of fraud by Scottish public authorities. Section 71(4) of the 2007 Act provides that this does not apply in relation to disclosures, relating to devolved information, by Scottish public authorities. This section of the Bill also repeals in part section 71(6) of the 2007 Act to remove the now redundant definition of “relevant public authority”.

Section 72 - Closure of premises associated with human exploitation etc.

377. This section makes amendments to the Antisocial Behaviour etc. (Scotland) Act 2004 and provides for the closure of premises associated with the commission of “exploitation offences” such as human trafficking and child sexual abuse. Subsection (1) inserts new subsections (3A) and (3B) into section 26 of the 2004 Act. The inserted subsections (3A) and (3B) set out the grounds on which a senior police officer may authorise the service of a closure notice in cases involving an exploitation offence.

378. Subsection (2) amends the provisions in section 27 of the 2004 Act to take account of the form and service of a closure notice in cases involving an exploitation offence.

379. Subsection (3) makes amendments to section 30 of the 2004 Act and inserts new subsections (2A) and (3A). The inserted subsection (2A) sets out the conditions that must be met before the sheriff can make a closure order in respect of premises associated with the commission of an exploitation offence. The inserted subsection (3A) provides that, in determining whether or not to make a closure order, a sheriff shall have regard to any vulnerability of a victim of an exploitation offence.

380. Subsection (4) inserts new subsections (1A) and (3A) into section 32 of the 2004 Act. The inserted subsection (1A) enables a sheriff to extend the duration of a closure order for a period not exceeding the maximum period where it is necessary to prevent the commission of an exploitation offence. The inserted subsection (3A) sets out the conditions which must be satisfied before a senior police officer can make an application to extend the period for which a closure order has effect in cases involving an exploitation offence.

381. Subsection (5) amends section 33 of the 2004 Act in order to provide for the revocation of a closure order, following an application, in cases involving an exploitation offence.

382. Subsection (6) amends section 36 of the 2004 Act in order to provide for the making of appeals in respect of closure orders which have been given an extension in cases involving an exploitation offence.

383. Subsection (7) inserts a new section 40A into the 2004 Act and sets out the offences which may be considered as exploitation offences for the closure of premises under the 2004 Act.

Section 73 - Sexual offences prevention orders

384. Section 73 makes a number of amendments to the provisions of the Sexual Offences Act 2003 which relate to sexual offences prevention orders (SOPOs).

385. Subsections (1) and (2)(a) make provision concerning the criteria which currently exist in some cases before a person may become subject to the notification requirements under the 2003 Act, and before a SOPO can be made. Courts in Scotland can make a SOPO when dealing with an offender for an offence listed in Schedule 3 to the 2003 Act. For some offences listed in Schedule 3 there are conditions, which are based on the sentence or age of the persons involved in the offence, in place which currently limit the application of the scheme which provides for the making of a SOPO. Section 141 of the Criminal Justice and Immigration Act 2008 amended the 2003 Act for England and Wales and Northern Ireland to provide that these conditions do not restrict the making of a SOPO in cases where the conditions are not met. Section 73(1) and (2)(a) extends the application of the amendment made by section 141 of the 2008 Act so that it applies in Scotland.

386. Subsection (2)(b) corrects a minor error in section 109 of the Sexual Offences Act 2003. It ensures that section 107(2) will apply in applications for interim SOPOs. That section provides that prohibitions (which will, in due course, be extended by the Bill to include requirements) may be included in an order are those necessary for the purpose of protecting the public or any particular members of the public from serious sexual harm from the defendant, applies to interim SOPOs as well as full SOPOs.

387. Subsection (2)(c) inserts new section 111A into the Sexual Offences Act 2003. New subsections 111A(2)-(3) have effect of extending the permitted content of a SOPO, and an interim SOPO, so that the court can impose requirements as well as such other terms in the order, whether prohibitions, restrictions, or other terms, as it considers appropriate so as to protect the public by preventing, restricting or disrupting the involvement of the subject of the order in sexual crime.

388. Subsection (2)(d) amends section 112 of the Sexual Offences Act 2003 to provide that a SOPO may be made at the instance of the court or on the motion of the prosecutor.

Section 74 - Foreign travel orders

389. This section amends the provisions on foreign travel orders (“FTO”) in Part 2 of the Sexual Offences Act 2003 (“the 2003 Act”).

390. Subsections (2) and (3) amend sections 115 and 116 of the 2003 Act by increasing the age of a child from under 16 to under 18. The effect of subsection (2) is that a court can impose a foreign travel order on a qualifying offender if that offender is considered to pose a risk to a child who is outside the United Kingdom who is aged under 18.

391. The effect of subsection (3) is that it alters the criteria determining which sex offenders are to be regarded as “qualifying offenders”. A qualifying offender is a sex offender against whom a court may impose a FTO, provided all the other criteria set out in sections 114 to 116 of the 2003 Act are met. The amendment means that those who have committed certain sexual offences against children under 18, rather than offences against children under 16 will be regarded as “qualifying offenders”.

392. Subsection (4) amends section 117 of the 2003 Act to increase the maximum duration of any foreign travel order specified in s117(2), from six months to five years. Therefore, a court has the discretion to impose a FTO on a qualifying offender for any period of time up to a maximum of 5 years.

393. Subsection (5) inserts a new section 117B into the 2003 Act to require offenders who are subject to a FTO imposed under section 117(2)(c), that prohibits them from travelling anywhere in the world, to surrender their passports at a police station specified in the order. Such offenders must also surrender any new passports which they acquire throughout the duration of a FTO.

394. This new section also requires the police to return any passport as soon as reasonably practicable after the relevant FTO has ceased, unless that passport is a foreign passport or a passport issued by an international organisation and it has been returned by the police to the authorities outside the United Kingdom which issued the passport.

395. Subsection (6) amends section 122 of the 2003 Act to create a new offence of failing to comply with a requirement to surrender a passport.

Section 75 - Risk of sexual harm orders

396. Section 75 amends provisions of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 which concern risk of sexual harm orders.. The amendments are similar to those provided by section 73 for sexual offences prevention orders and have the effect of extending the permitted content of a risk of sexual harm order so that the court can impose requirements on persons who are made subject to such orders. Currently, like SOPOs, risk of sexual harm orders can only impose prohibitions on such persons.

Section 76 – Obtaining information from outwith United Kingdom

397. The Scottish Criminal Cases Review Commission (SCCRC) cannot currently issue, or apply for, a letter to request assistance from outwith the United Kingdom because its investigations are not within the scope of the Crime (International Co-operation) Act 2003 (“the 2003 Act”).

398. This section creates a bespoke power for the SCCRC to apply to a judge of the High Court to request assistance in obtaining information from outwith the United Kingdom for the purposes of carrying out its functions.

399. Section 7 of the 2003 Act sets out the authorities which may make requests for assistance, and in which circumstances and form requests may be made. Section 8 of the 2003 Act deals

with requests for assistance from the United Kingdom and sets out to which authorities requests may be sent. Section 9 of the 2003 Act sets out what may be done with the evidence obtained in relation to a request for assistance from abroad under section 7 of this Act.

400. Subsection (4) applies section 8 of the 2003 Act to requests for assistance from abroad by the SCCRC in the same way as it applies to section 7 of the 2003 Act, so that, requests for assistance are sent to a foreign court or authority designated by government of that country, or Interpol or EuroJust in cases of urgency.

401. Subsection (5) applies provisions of section 9 of the 2003 Act to requests for assistance from abroad by the SCCRC in the same way as they apply to section 7 of the 2003 Act. The effect is that information may not without the consent of the appropriate overseas authority be used for any purpose other than that specified in the request and when information is no longer required for that purpose (or any other purpose for which consent has been obtained) it must be returned to the appropriate overseas authority, unless that authority indicates that it need not be returned.

Section 77 – Grant of authorisations for directed and intrusive surveillance

402. This section amends the Regulation of Investigatory Powers (Scotland) Act 2000 (“the 2000 Act”) in relation to joint surveillance operations.

403. Subsection (2) inserts a new section 9A into the 2000 Act which makes provision about who may grant authorisations for the use of directed surveillance in a joint surveillance operation. Subsection (6) inserts a definition of “joint surveillance operation” into section 31 of the 2000 Act; such an operation is one involving at least two police forces in Scotland working together, or at least one police force in Scotland and the Scottish Crime and Drug Enforcement Agency (“the SCDEA”) working together.

404. Section 9A(2) provides that the persons who are designated for the purpose of granting an authorisation for directed surveillance in a joint surveillance operation are the same people who are designated for the purposes of section 6 of the 2000 Act in terms of an order made by the Scottish Ministers under section 8(1)¹ of that Act to grant authorisations for directed surveillance where the operation is not a joint surveillance operation: in relation to the SCDEA, that person is an officer of the rank of at least Superintendent or Grade PO7 Authorising Officer (Inspector in an urgent case); in relation to a police force that person is an officer of the rank of at least Superintendent (Inspector in an urgent case).

405. Subsection (3) amends section 10 (authorisations for intrusive surveillance) of the 2000 Act in two ways. Currently, the persons who may grant authorisations for the carrying out of intrusive surveillance are the chief constable of a police force and the Director General of the SCDEA. Section 10 is amended so as to include the Deputy Director General of the SCDEA as a person who may grant an authorisation for intrusive surveillance. Secondly, section 10 is

¹ That Order is currently the Regulation of Investigatory Powers (Prescription of Offices, Ranks and Positions)(Scotland) Order 2000 (SSI 2000/343) “as amended by the Regulation of Investigatory Powers (Prescription of Offices, Ranks and Positions) (Scotland) Amendment Order 2006 (SSI 466/2006)

further amended so as to provide that those same persons (namely, a chief constable of a police force, the Director General and the Deputy Director General) are permitted to grant authorisations for the carrying out of an intrusive surveillance operation where it is a joint surveillance operation.

406. Subsections (4) and (5) make consequential amendments as a result of the addition of the Deputy Director General of the SCDEA as a person who may grant authorisations for the carrying out of intrusive surveillance (including a joint surveillance operation). Subsection (4) amends section 11(3) of the 2000 Act so as to make it clear that the Deputy Director General of the SCDEA can only grant an authorisation for the carrying out of intrusive surveillance where the application is made by a police member of that Agency. Subsection (5) amends section 12A(1) of the 2000 Act so as to include the Deputy Director General of the SCDEA within the ambit of that section which deals with the grant of authorisations for intrusive surveillance in cases of urgency.

407. Subsection (6) amends section 31 of the 2000 Act so as to include a definition of joint surveillance operation.

Section 78 – Authorisations to interfere with property etc.

408. This section amends section 93 of the Police Act 1997 (“the 1997 Act”) so as to make equivalent amendments in relation to authorisations for interference with property as those which have been made by virtue of section 76 in relation to authorisations for directed and intrusive surveillance.

409. Subsection (2)(a) inserts subsections (3A) to (3D) into section 93 of the 1997 Act. Subsections (3A) to (3C) make provision about authorisations to interfere with property where there is a joint operation. Subsection (3D) defines a “joint operation” in the same way as it is defined for the purposes of the 2000 Act.

410. These provisions when read together ensure that in the case of a joint operation, the chief constable of a Scottish police force involved in the operation may authorise the persons mentioned in subsection (3C) to take action under section 93(1) of the 1997 Act. The persons mentioned in subsection (3C) are constables of any of the police forces involved in the joint operation (including action which might be outwith the area of operation of the constable’s own force) and if the SCDEA are involved in the operation, a police member of that Agency.

411. Similarly, where the SCDEA is involved in the joint operation, the Director General or the Deputy Director General of the SCDEA may authorise the persons mentioned in subsection (3C) to take action under section 93(1) to interfere with property.

412. As the 1997 Act extends to England and Wales also, subsection (3B)(a)(i) is designed to ensure that the amendments will only catch Scottish police forces.

413. Subsection (2)(b) amends subsection (5)(j) of section 93 of the 1997 Act so as to include the Deputy Director General of the SCDEA alongside the Director General as an “authorising officer” who may authorise interference with property.

414. Subsection (3)(c) inserts subsections (6) and (7) into section 94 (authorisation given in the absence of authorising officer) of the 1997 Act. These two new provisions read together make it clear that where the SCDEA are the lead Agency in a joint operation and the Director General or the Deputy Director General are not available then an application for an authorisation to interfere with property may be made to the chief constable of one of the forces involved in the joint operation.

415. Subsection (3)(a) and (b) make amendments consequential upon the insertion of new subsections (6) and (7) into section 94 of the 1997 Act.

Section 79 - Amendments of Part 5 of Police Act 1997

416. This section amends Part 5 of the Police Act 1997 (“the 1997 Act”). The 1997 Act is the legislation under which criminal record certificates (basic, standard and enhanced disclosures) are issued for employment and other purposes. The day to day functions of the Scottish Ministers under Part 5 of the 1997 Act are carried out by Disclosure Scotland.

417. Section 79 makes 2 amendments to the 1997 Act: the first provides an order making power to amend 5 definitions used in Part 5 of the 1997 Act; and the second clarifies the power to charge fees in connection with registration in the register of registered persons kept under section 120 of the 1997 Act.

418. Subsection (2) inserts a new section 113BA into Part 5 of the 1997 Act that will enable Scottish Ministers, by order, to amend the definitions of the expressions: “criminal conviction certificate” (basic disclosure) in section 112(2); “central records” in sections 112(3) and 113A(6); “criminal record certificate” (standard disclosure) in section 113A(3); “relevant matter” in section 113A(6); and “enhanced criminal record certificate” (enhanced disclosure) in section 113B(3).

419. Section 113BA(2) restricts the use of the order making power. An order can only be made to enable certificates to include information held outside the United Kingdom. Section 113BA(3) provides that any order will be a class 1 instrument, i.e. it cannot be made unless it has been laid in draft and approved by resolution of the Scottish Parliament.

420. It is intended that the order making power will be used to enable disclosure certificates to include relevant information from outside the United Kingdom (e.g. information relating to convictions for offences outside the United Kingdom) where that information has been provided to the Scottish Ministers on the basis that it may be used for employment purposes.

421. The second amendment to the 1997 Act is at section 79(3) and the effect is to insert 2 new subsections into section 120ZB.

422. An application for either a standard or an enhanced disclosure certificate must be countersigned by a person whose name is listed in the register kept by Scottish Ministers under section 120 of the 1997 Act. Section 120ZB, which was inserted into the 1997 Act by section 81 of the Protection of Vulnerable Groups (Scotland) Act 2007 (not yet in force), allows regulations to be made about this registration.

423. Section 120ZB(2A) clarifies the fee charging power in section 120ZB(2)(a). It provides that, in particular Ministers may charge fees in respect of applications to be listed in the register, this will allow fees for registration itself and for the nomination of counter-signatories. Different fees may be charged in different circumstances, annual or recurring fees may be charged and fees may be charged in advance or arrears.

424. It is intended that the power will be used to provide different fees for different situations. For example, a different charge is likely to be made for inclusion in the register for the first time as compared with an application from someone already listed to have another signatory added to act on behalf of their registration entry.

425. Lastly, section 120ZB(2B) will enable Ministers to disregard an application for inclusion in the register if the fee for that application is not paid.

Section 80 - Assistance for victim support

426. This section allows the Scottish Ministers to make grants for the purposes of the provision of assistance to victims, witnesses or other persons affected by a criminal offence. This extends the power to make grants under section 10 of the Social Work (Scotland) Act 1968, which permits grants to be made to national organisations or innovative projects, but excludes grants to local authorities.

Section 81 - Public defence solicitors

427. This section amends section 28A of the Legal Aid (Scotland) Act 1986 ("the 1986 Act") to place the Public Defence Solicitors Office ("the PDSO") on a permanent footing. The PDSO was established in 1998 to provide criminal defence services from solicitors employed by the Scottish Legal Aid Board ('the Board') on a trial basis.

428. Section 28A of the 1986 Act currently provides for regulations to be made for the purpose of carrying out a feasibility study. It also provides for the laying of a report before Parliament by 31 December 2008. The report was laid on 23 December 2008 [SG/2008/259]. This section removes these provisions as the PDSO is to be permanent.

429. Regulations have been made under section 28A of the 1986 Act². These regulations make provision for the employment of solicitors by the Board to provide criminal legal assistance.

² The Scottish Legal Aid Board (Employment of Solicitors to Provide Criminal Legal Assistance) Regulations 1998 (SI 1998/1938) as amended by the Scottish Legal Aid Board (Employment of Solicitors to Provide Criminal Legal Assistance) Amendment Regulations 2008 (SSI 2003/511)

Section 82 - Compensation for miscarriages of justice

430. The Scottish Government operates two schemes for the payment of compensation as a result of a miscarriage of justice. The statutory scheme under section 133 of the Criminal Justice Act 1988 (“the 1988 Act”) provides for compensation to be paid in certain circumstances. The decision as to whether compensation is payable is for Scottish Ministers but the amount of the award is quantified solely by an independent assessor. An ex gratia scheme covering other types of cases has also operated for a number of years with successful cases treated in the same way as statutory ones by the assessor.

431. Subsection (1)(a) provides an Order-making power for Scottish Ministers to specify further sets of circumstances in which compensation may be payable. This power will be used to replace the existing ex gratia scheme by placing it on a statutory footing with the existing statutory scheme. It is intended to correspond to the existing ex gratia criteria. The seriousness of the offence for which the individual was charged or detained, but not convicted, will be taken account of when assessing compensation (subsection (1)(c)). This is consistent with the way the assessor takes into account the seriousness of the offence when assessing compensation under the statutory scheme where the individual had been convicted.

432. Subsection (1)(b) inserts a new section into the 1988 Act to impose a time limit of 3 years for applications to be made for compensation. It also allows a discretionary power for the Scottish Ministers to waive that time limit where it is in the interests of justice to do so, or where there are exceptional circumstances. The 3 year time limit is consistent with civil limitation periods for personal injury claims.

433. Subsection (1)(d) makes the Independent Assessors have particular regard to any guidance issued by the Scottish Ministers. It is necessary to have a statutory basis for this guidance as the assessor is discharging a quasi-judicial role. It is not intended for the guidance to impinge on the independence of the assessor when making a decision on the quantum of a claim but is designed to promote consistency in decision making.

434. Section 133(5) of the 1988 Act states that a conviction being “reversed” (one of the criteria for eligibility for compensation) shall be taken to mean as referring to a conviction being quashed in certain circumstances. Section 188 of the Criminal Procedure (Scotland) Act 1995 allows for a conviction and sentence or both to be set aside by way of a minute from the prosecutor to the court without an appeal being heard but in such circumstances this would not entitle a successful appellant to seek compensation for a miscarriage of justice. Subsection (1)(e) makes appropriate changes to the 1988 Act to allow someone who has had their conviction set aside by way of section 188(1)(b) of the 1995 Act to be considered for compensation.

435. Subsection (1)(f) makes an amendment to the 1988 Act so that those persons who are subject to a probation order or discharged absolutely are eligible to seek compensation in accordance with the Act. The order-making power in this section is exercisable by statutory instrument subject to annulment in pursuance of a resolution of the Scottish Parliament.

436. Subsection (2) removes a redundant reference to the Criminal Injuries Compensation Board in Schedule 12 to the 1988 Act.

Section 83 - Financial reporting orders

437. The Serious Organised Crime and Police Act 2005 (“the 2005 Act”) introduced the use of Financial Reporting Orders (FRO). Those persons subject to an FRO are required to report their financial dealings over a specified period of time as directed by the court. In Scotland they can only be applied when someone is convicted of the common law offence of fraud or an offence specified in Schedule 4 to the Proceeds of Crime Act 2002.

438. Section 83 amends section 77 of the 2005 Act by inserting a new subsection (4A). The inserted subsection (4A) sets out the two ways in which an FRO can be made. It makes it clear that either a prosecutor may apply to the court to make an FRO or the court may make such an order at its own instance.

Section 84 - Compensation orders

439. Under section 249 of the 1995 Act, where a person is convicted of an offence, the court may make an order requiring him to pay compensation for any personal injury, loss or damage caused directly or indirectly, or alarm or distress caused directly, to the victim.

440. A court cannot make a compensation order in respect of loss suffered in consequence of the death of any person; or injury loss or damage due to an accident involving a motor vehicle on the road, except where the damage is treated as having arisen out of the theft of the car by the convicted person.

441. The maximum amount which may be awarded under a compensation order by a sheriff or stipendiary magistrate in summary proceedings is £10,000 (“the prescribed sum”). The maximum amount which can be awarded by a Justice of the Peace is an amount not exceeding level 4 on the standard scale (£2,500). In solemn proceedings there is no limit on the amount which may be awarded.

442. Subsection (1)(a)(i) amends section 249(1) of the 1995 Act. This allows courts to make compensation orders in relation to deaths or road accidents, subject to the following amendments.

443. Subsection (1)(a)(ii) amends section 249(1) to clarify that a compensation order must be paid in favour of the victim.

444. Subsection (1)(b) inserts a new subsection (1B) into section 249, which provides that compensation may be paid to a victim or a person who is liable for funeral expenses. A new subsection (1C) is also inserted, which defines a victim as either the person who has suffered injury, loss or damage, or a relative who has suffered a bereavement caused by an offence being committed.

445. Subsection (1)(c) inserts new subsections (3A), (3B) and (3C) into section 249. Subsection (3A) allows a compensation order to be made in cases where a road accident has been caused by an uninsured driver, provided no other type of compensation is payable. Subsection (3B) provides that where a compensation order is made following damage to a stolen vehicle or an

accident with an uninsured driver, then that compensation may include some or all of the cost of the loss of preferential insurance rates. Subsection (3C) provides that a compensation order may be made in respect of loss suffered as a result of bereavement and funeral expenses in connection with a person's death, except where the death was as a result of a road accident.

446. Subsection (1)(d) amends subsection (4) of section 249. This provides that unless subsections (3) – (3C) allow a compensation order to be made, then compensation orders shall not be made in respect of loss relating to a death or, injury, loss or damage relating to a road accident.

447. In some exceptional cases, statute provides that summary courts may impose a maximum fine, the amount of which exceeds “the prescribed sum” (i.e. the statutory maximum) of £10,000 set out by section 225(8) of the 1995 Act. Subsection (1)(f) inserts a new subsection (8A) into section 249 of the 1995 Act. Section (8A) allows the sheriff, in cases where an exceptionally high fine may be imposed, to make an compensation order up to the same amount.

448. Subsection (2) amends section 251 of the 1995 Act. It repeals paragraph (a) of subsection (1) of section 251 and removes the power of the court to reduce or discharge the compensation order when the injury, loss or damage has been held in civil proceedings to be less than it was taken to be for the purposes of the compensation order. This removes any explicit link with civil proceedings.

449. Subsection (2)(b) inserts a new subsection (1A) into section 251 of the 1995 Act. Subsection (1A) allows the court to review the compensation order at any time before it has been fully complied with and gives the court the power to increase the order if materially new information about the means of the offender has become available or the offender's financial circumstances have improved.

PART 6 - DISCLOSURE

450. This part of the Bill makes provision concerning the disclosure of evidence in criminal proceedings. It is a long established rule in the Scottish legal system that the Crown has an obligation to give the accused notice of the case against him, i.e. to tell him what charges he faces and what evidence the Crown intends to bring to prove the charges. Any *exculpatory* material should be identified and given/disclosed to the accused/defence. Disclosure is presently carried out on a common law basis but it is clear that there are shortcomings in the current regime. A series of high profile decisions of the Judicial Committee of the Privy Council including the cases of *Holland and Sinclair*, have refined that duty but have also given rise to some uncertainty about the exact requirements of the duty of disclosure.

451. Following these decisions Lord Coulsfield was invited to carry out a review on the law and practice of disclosure of evidence in the Scottish criminal justice system, which was published in August 2007. He recommended that disclosure would benefit from having a statutory framework. The provisions in the Bill seek to give effect to that recommendation and build on other recommendations made to clarify the law and practice in disclosure in criminal proceedings.

Section 85 - Meaning of “information”

452. This section defines what the term “information” covers where it is used in the provisions. It covers material of any kind (other than precognition statements and victim statements) which is given to or obtained by the prosecutor in connection with the case against the accused. It makes clear that material previous convictions and outstanding charges of those witnesses that the prosecutor intends to lead in evidence are disclosed. In solemn cases, any statements of witnesses whom the prosecutor intends to call against the accused are covered. In summary cases the statement itself need not be disclosed although any information contained in it that has not otherwise been disclosed to the accused should be disclosed. It is also designed to make clear that, although a precognition or victim statement does not require to be disclosed, where there is information contained in a precognition or victim statement which does require to be disclosed, that information should be disclosed.

Section 86 – Provision of information to prosecutor

453. This section creates a duty on an investigating officer, whether a police officer or officer of an investigating agency (as defined in subsection (9)), to create and submit schedules listing information gathered during the course of an investigation which may be relevant to cases which are brought by solemn proceedings only. As soon as practicable after the accused has appeared for the first time in the proceedings, the prosecutor will give notice of that appearance to the investigating agency to which the appearance relates. On receiving that notice, the investigating agency must prepare and give the schedule/s to the prosecutor. The information ingathered which may be relevant to the case for or against the accused will appear in one of three schedules (sensitive, highly sensitive or non-sensitive) dependant upon the nature of the information. On each schedule there will be an entry in respect of each piece of information held, together with a brief description of the information.

454. Subsection (7) provides that, where the investigating agency has previously included a reference to a piece of information on a schedule, whether that be because the same matter has been the subject of earlier proceedings or otherwise, it need not repeat that information in any subsequent schedule.

455. Subsection (8) defines “sensitive” in relation to an item of information.

Section 87 – Continuing duty to provide schedules of information

456. This section provides for a continuing duty on the investigating agency to submit further schedules to the prosecutor where additional, further information that may be relevant to the case for or against the accused is obtained during the course of the investigation. This duty continues until proceedings against the accused are concluded. Subsection (4) sets out circumstances in which the proceedings are deemed to have concluded.

Section 88 – Review and adjustment of schedules of information

457. This section provides for a duty on the prosecutor to review schedules of information, on their receipt from the investigating agency, and, in so doing, consider whether they agree with

the category of sensitivity specified for each piece of information as shown on the schedule/s by the investigating body i.e. sensitive, non-sensitive or highly sensitive.

458. Subsection (3) provides that when the prosecutor disagrees with the category of sensitivity given to the information by the investigating agency, as shown in the schedule/s, the prosecutor will return the schedule/s to the investigating agency and instruct that it be amended and resubmitted to the prosecutor. Subsection (4) provides that the investigating agency must, as soon as practicable after receiving the schedule/s, then adjust the schedule/s in the way required by the prosecutor and submit a revised schedule.

Section 89 – Prosecutor’s duty to disclose information

459. This section sets out the test by which information has to be disclosed to the accused under the statutory scheme. It provides that, where the accused appears for the first time in solemn proceedings, or where a plea of not guilty is recorded against the accused charged on summary complaint that the prosecutor has a duty to consider whether all information which may be relevant to the case for or against the accused meets the test. The prosecutor must review all such information of which he is aware (i.e. all information submitted to the prosecutor by the investigating agency) and determine whether subsection (3) applies to any of the information.

460. Subsection (3) sets out the rules which determine whether the information must be disclosed by the prosecutor. If subsection (3) applies to any of that information then the prosecutor must disclose all such information to the accused. Subsection (4) gives specific, non-exhaustive examples of types of information that the prosecutor must disclose. If subsection (3) does not apply to any of that information, then the prosecutor need not disclose that information to the accused.

461. Subsection (6) ensures that where, in any case, there is no such information that the prosecutor requires to disclose to the accused the prosecutor must notify the accused that, at that point in time, there is nothing that requires to be disclosed in respect of that case.

462. Subsection (7) provides that the prosecutor need not disclose anything that he has already disclosed in respect of the same matter (whether because it has been the subject matter of earlier proceedings or otherwise).

Section 90 – Continuing duty of prosecutor

463. This section confirms that in cases where the disclosure statutory scheme is to apply that the prosecutor has a duty to proactively review information that may be relevant to the case for or against the accused of which the prosecutor is aware for the purposes of complying with the disclosure scheme, until such time as the case concluded. Subsection (5) defines when a case is considered concluded.

Section 91 – Exemptions from disclosure

464. This section sets out the information which is exempt from the statutory scheme for disclosure. Information, the disclosure of which is prohibited by section 17 of the Regulation of Investigatory Powers Act 2000, must not be disclosed.

Section 92 – Redaction of non-disclosable information by prosecutor

465. This section applies where the Crown has a document or other piece of information in its possession that satisfies the disclosure test and which contains information which it not under a duty to disclose. This provision enables the Crown to be able to redact, edit or obscure the non-disclosable information from the document.

Section 93 – Solemn cases: additional disclosure requirement

466. This section provides that in solemn cases the prosecutor must disclose to the accused a schedule of any information which relates to the proceedings against the accused and which falls into the category of non-sensitive. The disclosure of this schedule, in solemn cases, is in addition to the basic requirement of disclosure of information, which meets the disclosure test.

Section 94 – Defence statements: solemn proceedings

467. This section provides that defence statements shall be mandatory in all solemn cases and provides the timings for lodging of such statements. Subsection (1) sets out the effect of a defence statement; that is, as soon as practicable after the accused lodges a defence statement or a pre-trial statement, the prosecutor must review all of the information which may be relevant to the case for or against the accused of which he is aware for the purposes of complying with the disclosure scheme.

468. Subsection 2 amends the Criminal Procedure (Scotland) Act 1995 by inserting a new section 70A. That section provides that the accused must lodge a defence statement at least 14 days before the first diet, in sheriff and jury proceedings, and the preliminary hearing, in High Court proceedings. The information that the defence statement must contain is specified in subsection (6) of new section 70A of the Criminal Procedure (Scotland) Act 1995.

469. New section 70A also provides that, at least 7 days before the trial diet, the accused must lodge a pre-trial statement. This statement must set out whether there has been a material change in circumstances since the defence statement was lodged and, if so, it must set out the details of that change and what the new position is. Subsection (5) enables the accused to lodge a defence statement at any other time before the trial diet.

Section 95 – Defence statements: summary proceedings

470. This section enables the accused to make a defence statement to the prosecutor in those summary proceedings where a plea of not guilty is recorded against the accused. The accused may do so in such cases at any time following the plea of not guilty until the conclusion of the proceedings. Subsection (5) defines when proceedings are to be taken to be concluded.

471. Subsection (2) sets out what a defence statement shall contain.

472. By subsection (3) the prosecutor must, as soon as practicable after receiving the defence statement, review all the information that relates to the proceedings of which the prosecutor is aware for the purposes of determining whether the disclosure test is satisfied. By subsection (3) the prosecutor must then either disclose any information that he is required to disclose that has, thus far, not been disclosed on account of it so far not meeting the disclosure test or inform the accused that the information has been reviewed but that no further information requires to be disclosed.

Section 96 – Effect of guilty plea

473. This section provides that where the prosecutor is required to disclose information to an accused, but before doing so a plea of guilty is recorded against the accused, that the prosecutor need not comply with the requirement in so far as it relates to the disclosure of information which is likely to form part of the prosecution case. If the accused withdraws the plea of guilty then this provision ceases to apply.

Section 97 – Means of disclosure

474. This section provides that the prosecutor may disclose information by any means including allowing the information to be viewed by the accused at a reasonable time and place. The provision is designed to make clear that the means of disclosure is entirely a matter for the prosecutor's discretion, and will ensure that it is open to the Crown to fulfil its disclosure obligations through provision of a narrative detailing the information.

Section 98 – Confidentiality of disclosed information

475. This section covers disclosed information and restricts how the accused and others may use information that has been disclosed to him. The restrictions are set out in subsections (2) and (4). These prevent the accused and all other persons to whom the information has been disclosed, whether by the prosecutor or any other person, from using or sharing disclosed information with anyone else in any way except where subsection (3) applies.

476. Subsections (3) and (5) make provision to ensure that, notwithstanding the overall restriction, the accused may use the information disclosed to him for certain specified purposes connected with the preparation and presentation of his case or appeal and with a view to taking an appeal, including references to the SCCRC.

477. Subsection (6) ensures that other legislation is given effect to, for example Data Protection Act 1998 and any other statutory scheme which creates prohibitions or obligations of confidentiality

Section 99 – Contravention of section 98

478. This section provides that any person who misuses information or otherwise breaches the confidentiality of the information, in terms of section 98, which has been disclosed to them will

commit an offence. The section provides that the maximum sentence on conviction in summary proceedings is 12 months imprisonment or a fine not exceeding the statutory maximum or both and, on conviction on indictment, 2 years imprisonment or a fine or both.

Section 100 – Order enabling disclosure to third party

479. This section enables the accused to apply to the court for an order allowing him to disclose information to a third party. The accused need not make an application if the use or disclosure is for any of the purposes set out in section 98(3).

480. Before making the order the court must allow the prosecutor and anyone else with an interest in the information the opportunity to make representations.

Section 101 – Contravention of order under section 100

481. This section provides that a person who knowingly uses or discloses information in contravention of an order enabling disclosure to a third party commits an offence and the maximum sentence for that offence, on conviction, in summary proceedings, 12 months imprisonment or a fine not exceeding the statutory maximum or both and, on conviction on indictment, 2 years imprisonment or to a fine or both.

482. Sections 102 through to 113 establish a procedure whereby the prosecution can seek authority of the Court not to disclose otherwise disclosable information on the grounds that disclosure would compromise a compelling public interest

Section 102 – Application for non-disclosure order

483. Section 102 provides for an application to be made to the Court by the prosecutor for an order prohibiting disclosure of information which he would otherwise require to disclose where such disclosure would create a risk of substantial prejudice to an important public interest. Subsection (2) sets out what that public interest means i.e. would likely cause serious injury, or death to any person, or would likely obstruct or prevent the prevention, detection, investigation or prosecution of crime or would be likely to cause serious prejudice to the public interest.

484. Subsection (3) provides that the prosecutor must make an application for a non-disclosure order in those circumstances.

485. Subsection (4) explains the effect of a non-disclosure order i.e. if the order is granted by the court, the prosecutor may withhold from the accused an item or items of information specified in the order which would otherwise require to be disclosed.

Section 103 – Application for non-notification order or exclusion order

486. Lord Coulsfield envisaged there being three types of procedure, broadly described as type 1, type 2 and type 3:

- Non-Disclosure application only - Crown and defence (and special counsel if appointed by the court) represented at hearing and have opportunity to make representations
- Exclusion with non disclosure applications - Crown represented at hearing and special counsel if appointed by Court. Defence may be represented only to allow them to be heard on the procedure, thereafter they are to be excluded from the hearing to decide whether the non-disclosure order is to be made
- Non-notification with exclusion and non disclosure applications - Crown represented at hearing and special counsel if appointed by Court. Accused and his/her legal representative are not present and are not notified of any of the hearings.

The provisions are designed to give effect to this.

487. Section 103 sets out the procedure where a prosecutor has applied for a non-notification order or an exclusion order. Subsection (2) provides that the prosecutor may apply for a non-notification order and/or an exclusion order in relation to solemn proceedings only.

488. Subsection (3) provides that the prosecutor can apply for an exclusion order in summary proceedings i.e. a non-notification order cannot be sought in summary proceedings.

489. Subsection (4) explains the effect of a non-notification order i.e. that it is an order prohibiting notice being given to the accused of the making of the applications for non-notification, exclusion and non-disclosure orders and also the decisions of the court in relation to any of those applications.

490. Subsection (5) explains the effect of an exclusion order i.e. that it is an order prohibiting the accused from attending or making representations in proceedings relating to the application for a non-disclosure order.

491. Subsections (6) and (7) set out the order in which the court must consider each application. Before making a decision on whether a non-disclosure should be granted the court must first make a decision in relation to any applications for non-notification and/or exclusion. This has the effect of ensuring that the court first considers whether any application for non-notification (if applied for) should be granted, then considers whether any application for exclusion should be granted (if applied for) and only then can consider whether the application for non-disclosure should be made.

Section 104 – Application for non-notification order and exclusion order

492. This section applies where the prosecutor has made an application for both a non-notification order and an exclusion order.

493. Subsection (2) requires the court, first, to fix a hearing to determine whether a non-notification order should be made.

494. Subsections (3) and (4) establish that, where an application is made for non notification the accused will not be notified of either the making of such applications or of the hearing. The accused will not be represented or appear at the hearing, also. (Although his interests may be represented by Special Counsel if one is appointed by the court).

495. Subsection (5) provides that the court must make a non-notification order if the conditions set out in subsection (6) are met. The tests in subsection (6) require the court to look at the information, and to consider what the effect will be of revealing it to the accused even where an application has been made; whilst at the same time in considering disclosure versus non disclosure, balancing the competing interests of the injury to the public interest imperative on the one side, with the private individuals interests and right to a fair trial on the other.

496. Subsection (7) provides that if the court makes a non-notification order, the court must grant the application for an exclusion order, also.

497. Subsection (8) provides that, if the court refuses to make a non-notification order, the court will then appoint a hearing to determine the application for an exclusion order and the accused will then be notified that an application for an exclusion order has been made and invited to attend at the hearing that has been appointed. At that hearing the prosecutor and accused will both be entitled to make representations, after which, the court may make an exclusion order if it is satisfied that the conditions in section 105(4) are met (see below).

Section 105 – Application for exclusion order

498. This section allows the prosecutor to apply for an exclusion order to exclude the accused from a hearing. This would result in an accused being excluded from attending and making representations at a hearing of the non-disclosure order.

499. Subsection (2) provides that on receiving an application for an exclusion order the court must appoint a hearing.

500. Subsections (3) and (4) provide for the Court to make an exclusion order providing certain conditions are met after it has given both the prosecutor and the accused the opportunity to be heard. The tests in subsection (4) require the court to look at the information, and to consider what the effect will be of revealing the nature of the information to the accused; whilst at the same time in considering disclosure versus non disclosure, balancing the competing interests of the injury to the public interest imperative on the one side, with the private individuals interests and right to a fair trial on the other.

Section 106 – Application for non-disclosure order: determination

501. This section allows the prosecutor to apply for a non disclosure order which would result in the information in question not being disclosed to the accused.

502. Subsections (2) and (3) provide for the court to make a non-disclosure order where certain conditions are met. The court must consider the information that the application relates to and give the prosecutor and, if the accused has not been excluded, the accused the opportunity to

make representation to the court. The court must also consider whether the prosecutor is required to disclose the information in question and whether, if it were to be disclosed, it would be likely to cause serious injury, or death, to any person, or it would be likely to obstruct or prevent the prevention, detection, investigation or prosecution of crime or it would be likely to cause serious prejudice to the public interest. The court is required to balance the public interest against the private individual's right to a fair trial. A further test is at subsection (3)(d) - that the public interest would be protected only by non-disclosure.

503. Subsection (4) provides that the court must consider whether the information could be disclosed or partly disclosed in such a way as to provide the accused with something rather than nothing and still achieve the correct balance between public and private interests.

504. Subsections (5) and (6) provide for ways in which the court might decide that information could be disclosed e.g. by provision of redacted or edited information or summaries of the information or any other way specified in the order.

Section 107 – Special counsel

505. This section gives a power to the court in considering an application for a non-notification order, an exclusion order or a non-disclosure order, to appoint special counsel to represent the interests of the accused in respect of the applications at a hearing on any or all of the applications. The test for such appointment is in subsection (3).

Section 108 – Appeal by prosecutor against refusal of application for order

506. This section provides for a prosecutor to be able to appeal against a court decision to refuse an application for a non-notification order and an exclusion order, or an application for an exclusion order or a non-disclosure order.

Section 109 - Appeal by accused against making of exclusion order or non-disclosure order

507. This section provides for an accused to be able to appeal against a court decision to make an exclusion order or a non-disclosure order.

Section 110 - Appeal by special counsel

508. This section provides for any special counsel appointed to be able to appeal against a court decision to make a non-notification order and an exclusion order, an exclusion order or a non-disclosure order.

Section 111 – Review of grant of non-disclosure order

509. This section entitles the prosecutor or the accused to apply to the court to seek review of a non-disclosure order. This would be on the basis that they have become aware of material information which was not available at the time the order was made.

510. Subsections (1) and (2) provides that such an application for review can be made only where the court has made a non-disclosure order, where the prosecutor or accused becomes aware of information that was unavailable to the court at the time of making that order and that the prosecutor or accused considers that the information is material information that the prosecutor ought to disclose.

511. Subsection (3) provides who can attend at a review hearing: the same parties as were heard in relation to the non-disclosure order will have the opportunity to make representations i.e. where there is a non-notification order and/or exclusion order in place, only the prosecutor and any special counsel appointed may be heard; where there are no such orders, the prosecutor, accused and any special counsel may all be heard.

512. In terms of subsection (4), where there was a non-notification order in place and the court is satisfied that the grounds for non-notification remain, the court may make an order prohibiting the accused being notified of the application, having the same effect as a non-notification order.

513. Similarly, in terms of subsection (5), where there was an exclusion order in place and the court is satisfied that the grounds for exclusion remain, the court may make an order excluding the accused from the review.

514. Subsection (6) provides that if the court is satisfied that the grounds for non-disclosure no longer remain, the court may recall the non-disclosure order, or make an order for partial disclosure.

515. Subsections (8) and (9) have the effect of allowing applications for review at any time following the making of the non-disclosure order until the conclusion of the proceedings, as defined in subsection (9).

Section 112 – Review by court of non-disclosure order

516. Section 112 provides that the court is to be under a duty to keep under review the appropriateness of a non- disclosure order made until the conclusion of the proceedings.

517. Subsection (2) provides that, where the court considers that the non-disclosure order might not be appropriate, the court must appoint a hearing to reconsider the order.

Section 113 – Applications and reviews: general provisions

518. This section sets out the procedure for dealing with applications, appeals and reviews of non-disclosure, exclusion and non-notification orders. The accused is not entitled to see or be made aware of the contents of the application for such orders or the application for the review of such orders or the information itself that the applications are designed to protect.

Section 114 – Code of practice

519. This section provides for a code of practice to accompany the legislation. It is intended that the legislation will provide the statutory framework for the disclosure scheme and the code will provide the detail on how it will operate in practice.

520. Subsections (1) and (4) provides for the Lord Advocate to prepare the code and lay it and any revisions to the code before Parliament. The intended effect of the provisions is that the code will regulate its own procedures and the date on which it, and any revised code, comes into effect.

521. Subsections (2) and (3) specify those persons who must have regard to the code namely police, prosecutors and any other investigating agency whom the Scottish Ministers prescribe, who carry out functions in relation to the investigation of crime and sudden deaths.

Section 115 – Acts of Adjournal

522. This section provides for the High Court to make such rules as it considers necessary to give full effect to these provisions.

Section 116 – Interpretation of Part 6

523. Subsection (1) clarifies the meaning of “prosecutor” and “procurator fiscal” where they appear in these provisions.

524. Subsection (2) clarifies that where there are references to the accused having information disclosed to him, or imposes any obligation on him in relation to disclosure; those references should be read as including reference to a solicitor or advocate acting on behalf of the accused.

PART 7 - MENTAL DISORDER AND UNFITNESS FOR TRIAL

Section 117 - Criminal responsibility of persons with mental disorder

525. Sections 117 to 120 and associated minor amendments in Schedule 5 implement the Scottish Law Commission’s Report on Insanity and Diminished Responsibility, published in 2004. The provisions directly reflect the draft Bill contained in the Commission’s Report, with changes only to reflect the incorporation of the provisions within the larger Criminal Justice and Licensing (Scotland) Bill, to deal with changes to the law since the Commission’s Report, and to correct some minor errors and omissions.

526. Section 117 introduces a new statutory defence to replace the common law defence of insanity. It does so by inserting a new section 51A into the 1995 Act. It provides for a special defence in respect of persons who lack criminal responsibility by reason of their mental disorder at the time of the offence with which they are charged.

527. Subsection (1) sets out the test for the new statutory defence. It provides that there are two elements to the test. The first is the presence of a mental disorder suffered by the accused at the

time of the conduct constituting the offence. Secondly, the mental disorder must have a specific effect on the accused for the defence to be available. This effect is the inability of the accused to appreciate either the nature or wrongfulness of the conduct constituting the offence. 'Nature' and 'wrongfulness' are alternative concepts and the defence may be established by proving lack of appreciation in respect of only one of them. The concept of appreciation is wider than that of mere knowledge. Failure to appreciate the nature of conduct would not therefore be precluded by knowledge of the physical attributes of the conduct. Similarly the defence may be available to an accused who knew that his conduct was in breach of legal or moral norms but who had reasons for believing that he was nonetheless right to do what he did.

528. Subsection (2) provides that the special defence does not apply to a person who at the time of the conduct constituting the offence had a mental disorder which consisted of a psychopathic personality disorder alone. The exclusion in this subsection applies only to psychopathic personality disorder. Other forms of personality disorder may give rise to the defence provided that the effect on the accused satisfies the test in subsection (1) above. The defence would also be available where psychopathic personality disorder co-existed with another mental disorder (including other personality disorders) provided that the effect of the other mental disorder falls within the test in subsection (1).

529. Under the common law insanity is classified as a special defence. Subsection (3) provides for a similar rule in relation to the new statutory defence based on mental disorder. The main effect of the characterisation of a defence as a special defence is in relation to various procedural requirements under the 1995 Act (e.g. section 78(1) (giving of notice), section 89 (reading of the defence to the jury)).

530. Subsection (4) deals with who can raise the defence and with the relevant standard of proof. It provides that the special defence can be raised only by the person charged with the offence. It cannot be raised by the Crown or by the court of its own accord. This provision is in contrast to the common law defence, which can be raised by the Crown. The subsection also provides that the standard of proof on an accused person who states the defence is the balance of probabilities. This rule corresponds with that for the common law defence of insanity (*HM Advocate v Mitchell* 1951 JC 53).

531. Section 117 introduces a statutory version of the plea of diminished responsibility in place of the common law plea. It does so by inserting a new section 51B into the 1995 Act. The test for the statutory plea is modelled on the common law as set out in *Galbraith v HM Advocate* 2002 JC 1, subject to some variations noted below.

532. Subsection (1) provides that a plea of diminished responsibility is applicable in cases of murder but not in respect of any other crime or offence. The effect of the plea, if proved, is that a person who would otherwise be convicted of murder is to be convicted instead of culpable homicide. The main difference between the two outcomes is that the court has a discretion in sentencing a person convicted of culpable homicide which it lacks in a murder case (a person convicted of murder must be given a sentence of life imprisonment: 1995 Act, section 205(1)). The test for the plea is based on that laid down in *Galbraith v HM Advocate*, namely at the time of the killing the accused must have been suffering from an abnormality of mind which substantially impaired his ability to determine or control his conduct. Comments by the Court in

the *Galbraith* case on this part of the common law test will be of use in interpreting the statutory test.

533. Subsection (2) makes two significant changes to the law on the plea of diminished responsibility. At common law the plea is not available where the relevant abnormality of mind falls within the scope of the insanity defence. The position is different under the Bill where the accused's condition at the time of an unlawful killing falls within the definitions of the both the defence based on mental disorder and diminished responsibility. In this situation, the accused has the option of advancing either the defence or the plea. Secondly the subsection allows for diminished responsibility to be based on the condition of psychopathic personality disorder. At common law this condition cannot be used as a basis for the plea (*Carraher v HM Advocate* 1946 JC 108). The subsection makes clear that this exclusion does not apply to the statutory test for diminished responsibility.

534. Subsection (3) clarifies the effect which a state of intoxication has on the availability of diminished responsibility. In the first place, the provision re-states the rule laid down in *Brennan v HM Advocate* 1977 JC 38 that a person who kills whilst in state of intoxication cannot found a plea of diminished responsibility on that condition. Secondly, it states that the presence of intoxication does not preclude diminished responsibility provided that there is a basis for the plea independently of the intoxication.

535. Subsection (4) deals with the burden and standard of proof in relation to a plea of diminished responsibility. The subsection follows the same approach as that for the defence based on mental disorder. Only the accused can raise the plea, and if raised the accused has to prove diminished responsibility on the balance of probabilities. The rule is in substance the same as the common law rule (*HM Advocate v Braithwaite* 1945 JC 55).

Section 118 - Acquittal involving mental disorder: procedure

536. Section 118 inserts a new section 53E into the 1995 Act. The new section deals with the procedure where an accused is acquitted by reason of mental disorder.

537. Subsection (1) of the new section 53E replaces the existing statutory procedure under section 54(6) of the 1995 Act for acquittal involving mental disorder. Under section 54(6) of the 1995 Act (before its repeal by this Bill), where the defence of insanity is raised in a solemn case, there must be a verdict returned by the jury. A consequence of section 54(6) is that a jury requires to be empanelled and directed to return a verdict even where the Crown accepts a plea of insanity. This subsection provides for a different procedure for the statutory defence based on mental disorder. Where the Crown accepts a plea by the accused based on the defence, the court is to declare that the accused has been acquitted by reason of the special defence. This provision assimilates the procedure for solemn and summary cases. A declaration setting out the special nature of the acquittal is necessary in order to trigger the provisions in Part VI of the 1995 Act which deal with disposals.

538. Subsections (2) and (3) of the new section 53E provide for the situation where the Crown has not accepted a plea by the accused of the defence based on mental disorder. The defence does not become an issue for the court or jury to consider unless there has been evidence to

support it. If the defence falls to be considered, in solemn cases the court must direct the jury to make a finding whether or not they accept that the defence has been established. Where the jury find that the defence has been established they must also declare whether their verdict of acquittal is based on the defence. A similar procedure applies in summary cases, where the court must state whether it finds that the defence has been established. If it has, the court must also declare whether the accused has been acquitted on that ground. The purpose of the declaration, in both solemn and summary cases, is to deal with the possibility that a jury might acquit the accused on some other ground. In this situation, even if the defence has been proved, the acquittal is not a special one triggering the disposal provisions of Part VI of the 1995 Act.

Section 119 - Unfitness for trial

539. Subsection (1) inserts a new section 53F into the 1995 Act. The new section replaces the existing common law rule on insanity as a plea in bar of trial, with a new statutory plea of unfitness based on the mental or physical condition of the accused.

540. Subsection (1) of the new section 53F sets out a general test for the new statutory plea of unfitness for trial. The effect of the provision is that a person is unfit for trial if he cannot effectively participate in the proceedings because of his mental or physical condition.

541. The Bill does not change the common law rule that the issue of an accused's fitness for trial may be raised by the accused, the Crown, or by the court. However, this subsection makes clear that the appropriate standard of proof for a finding of unfitness for trial is on the balance of probabilities.

542. Subsection (2) of the new section 53F lists various inabilities which if proved in respect of the accused indicate his unfitness for trial. The list in paragraph (a) is illustrative, and not exhaustive, of the types of inabilities which constitute lack of ability to participate effectively in proceedings. Paragraph (b) provides that other factors may be relevant to making a determination.

543. Subsection (3) of the new section 53F applies to the statutory plea a common rule laid down in *Russell v HM Advocate* 1946 JC 37. It makes clear that a person is not unfit for trial simply because he cannot remember what happened at the time of the offence with which he is charged. However the rule does not apply where the accused is suffering from problems affecting memory of events at the time of the trial itself.

544. Subsection (4) of the new section 53F explains the meaning of "the court" when used in the new section 53F.

545. Subsection (2) of section 119 amends the title of section 54 of the 1995 Act and introduces some amendments to that section.

546. Subsection (2)(a)(i) repeals part of section 54(1) of the 1995 Act. Section 54(1) of the 1995 Act contained a requirement that various court orders must be based on the evidence of two medical practitioners, one of whom must have been approved as having special expertise in

mental health. The effect of subsection 2(a)(i) is that this requirement does not apply to a finding by a court that a person is unfit for trial.

547. Subsections (2)(b) and (c) amend section 54 to reflect the names for the new defence and plea in bar of trial. References to insanity as a plea in bar are changed to refer to unfitness for trial.

548. Subsection (3) of section 119 repeals subsection (6) of section 54 of the 1995 Act. That provision dealt with procedure on insanity as a defence. The repeal follows on from the introduction by section 118 of the Bill of the new statutory defence based on the accused's mental disorder. By placing the defence in provisions separate from section 54, the definition of "court" in section 54(8) no longer applies to the procedure relating to the defence. The effect is to make clear that the provisions for recording an acquittal based on the defence apply to proceedings in the district/justice of the peace courts.

549. Subsection (3) of section 119 also repeals subsection (7) of section 54 of the 1995 Act. The effect is that the procedure in summary cases for the giving of notice of a plea of unfitness for trial is governed by the general rules for intimation of pleas in bar (see 1995 Act, section 144).

Section 120 - Abolition of common law rules

550. The effect of section 120 is to abolish any existing common law rules regarding the special defence of insanity, the plea of diminished responsibility and the plea of insanity in bar of trial.

PART 8 - LICENSING UNDER CIVIC GOVERNMENT (SCOTLAND) ACT 1982

551. Part 8 of the Bill makes various changes to the general licensing provisions of the Civic Government (Scotland) Act 1982 Act and to its specific provisions on metal dealers, market operators, public entertainment, late hours catering, and taxis and private hire cars.

Section 121 - Conditions to which licences under 1982 Act are to be subject

552. This section provides for mandatory and standard conditions to be attached to licences issued under the 1982 Act and makes consequential amendments.

553. Mandatory conditions are determined by the Scottish Ministers, or by the 1982 Act itself or other powers under other legislation to prescribe conditions. Under new section 3A(3), the order-making power for the Scottish Ministers to set mandatory conditions will be subject to the negative resolution procedure.

554. Standard conditions are determined by the licensing authorities under the 1982 Act - they must not be inconsistent with any mandatory conditions and must be reasonable. Licensing authorities have a duty (new section 3B(4)) to publish standard conditions determined by them and these can be applied to deemed grants or renewals (i.e. grant or renewal of licences where the authority has failed to reach a decision on an application within the statutory period allowed). Subsection (6) enables licensing authorities to impose further conditions, as well as omit or vary any of the standard conditions applicable to licences.

555. For both mandatory and standard conditions, different sets of conditions can be set for different types of licence (e.g. boat-hire licences or street traders' licences under sections 38 and 39 of the 1982 Act respectively).

Section 122 - Licensing: powers of entry and inspection for civilian employees

556. Section 5 of the 1982 Act empowers a constable or 'authorised officer' to enter and inspect premises to ensure compliance with licence conditions. This section extends the powers of 'authorised officers' to include civilian staff employed by the police (under the provisions of section 9 of the Police (Scotland) Act 1967) and makes consequential amendments to other parts of the 1982 Act.

Section 123 - Licensing of metal dealers

557. Under section 9 of the 1982 Act, the provisions dealing with the regulation and licensing of metal dealers and itinerant metal dealers are mandatory for licensing authorities to operate. Subsection (2) replaces the mandatory licensing scheme with an optional scheme, i.e. it will be open to local licensing authorities to determine whether or not a licence is required in their areas.

558. Subsection (3) repeals the exemption from the metal dealers' licensing scheme provisions (section 29 of the 1982 Act), thus bringing all metal dealers within the scope of the scheme, and makes consequential amendments. Licensing authorities are, however, empowered by this subsection to determine whether any exemptions should apply and, if so, at what level of annual turnover. Where licensing authorities opt to provide for exemptions, they are under a duty to publish details of them.

Section 124 – Licensing of taxis and private hire cars

559. Subsection (2) amends section 13(3) of the Civic Government (Scotland) Act 1982 to provide that an applicant for a taxi or private hire car driver's licence must have held throughout the period of 12 months immediately prior to the date of the application a licence authorising the person to drive a motor car issued under Part III of the Road Traffic Act 1988 or a licence which would at the time of the application entitle the person to such a licence without taking a test, not being a provisional licence.

560. Subsection (3) inserts new sections 17(2) – (4) which provide that a licensing authority must fix scales for the fares and other charges referred to in subsection (1) within 18 months beginning with the date on which the scales came into effect. Subsection (3) provides that in fixing the scales under subsection (2) a licensing authority may alter the fares or other charges or fix fares or other charges at the same rates. Subsection (4) provides that the licensing authority review the scales in accordance with subsection (4A) before fixing scales under subsection (2). Subsection (4A)(a) provides that a licensing authority, in carrying out a review, consult with persons or organisations appearing to be representative of taxi operators in the area. Subsections (4A)(b) and (c) set out procedures for consultation and notification of the licensing authority's proposals and subsection (d) provides that they consider any representations received thereon. Subsection 4B provides that a review must be completed before the end of the 18 month period beginning with the fixing of scales under subsection (2). Subsection (4D) sets out the duty to give notice as to the effect of the fare scales fixed and subsection (4E) contains the

notification requirements. Subsection (4F) provides that after fixing scales they must notify all operators of taxis within their area and the persons and organisations consulted under subsection (4A)(a). Section 17(5)(a) is amended to extend the period provided for notification of a licensing authority's decision from 5 days to 7 days.

561. Subsection (4) amends section 18(1) and introduces a new section 18(1A) to extend the right of appeal against the decision by a licensing authority in regard to the fixing of taxi fare scales or review to persons or bodies representative of taxi operators in the licensing area.

562. Subsection (5) inserts a new section 18A(1) which provides that following the fixing of scales or the carrying out of a review the licensing authority must determine the date upon which the scales are to come into effect and publish them in accordance with the terms of section 18A(3) to (5). Section 18A(2) provides that the revised scales may not come into effect earlier than 7 days after the date on which they were published. Sections 18A(3) to (5) set out the notification procedures and the timescale to be followed. Section 18(9) is repealed in consequence.

Section 125 - Licensing of market operators

563. Subsection (2) removes the exemption from the market operators' licensing provisions for non-commercial organisations at section 40(2) of the 1982 Act. While this will bring charitable organisations etc within the scope of the licensing provisions, licensing authorities have discretion as to whether to charge reduced or no fees to such organisations.

564. Subsection (3) repeals the words "by retail" from section 40(4) of the 1982 Act. Some licensing authorities have been reluctant to use their powers to license car boot sales because of the authorities' interpretation of those words. Removal of "by retail" should remove any restrictive interpretation and allow licensing authorities to regulate car boot sales along with other types of market operators.

Section 126 – Licensing of public entertainment

565. Subsection (2) repeals the words "on payment of money or money's worth" from section 41(2) of the 1982 Act. This allows licensing authorities to control large-scale public entertainments that are free to enter but authorities have discretion whether to license events such as gala days or school fetes.

566. Subsection (2) also updates some references to gambling legislation for premises that are exempt from the public entertainment licensing provisions (sections 41(2)(d) and (e) of the 1982 Act refer) and empowers the Scottish Ministers to add other premises to the list of exemptions. Under subsection (3), the order-making power for the Scottish Ministers to exempt other premises will be subject to the negative resolution procedure.

Section 127 -Licensing of late night catering

567. Under section 42 of the 1982 Act, premises providing meals and refreshments between 11pm and 5am require to be licensed where licensing authorities have opted to use this

provision. This section replaces the references to “meals or refreshments” with “food”, thus bringing late-night grocers and 24-hour stores within the scope of the provisions. It will continue to be for licensing authorities to determine which classes of premises actually require to be licensed.

Section 128 - Applications for licences

568. This section requires people applying for licences under the 1982 Act to provide details of their date and place of birth on the application forms. Where the applicant is not responsible for the day-to-day management of the activity being licensed, an employee or agent with such responsibility must provide such details. Similar provision is made in respect of applications on behalf of companies.

569. Subsections (2)(c), (d), (e), (f) and (g), and subsections (3)(d), (f), (g) and (h) amend various time limits of the application process to: make representations; provide reasons for decisions; give notice of hearings; and for licensing authorities to consider licence renewal applications received after the expiry date as renewals, rather than new applications.

570. Subsection (3)(e) updates paragraph 9(3) of Schedule 2 to the 1982 Act to reflect the position of the United Kingdom as a member state of the European Union and its obligations under EC law.

PART 9 - ALCOHOL LICENSING

Section 129 - Sale of alcohol to persons under 21 etc.

571. Each Licensing Board is required by section 6 of the Licensing (Scotland) Act 2005 (‘the 2005 Act’) to publish a licensing policy statement which is a statement of the policy on how it will carry out its functions. Such a statement must be prepared every three years. A Board may choose to publish a supplementary licensing policy statement during the three year period that the licensing policy statement applies. In preparing a licensing policy statement or a supplementary licensing policy statement a Board must consult with various people and ensure that the policy statement promotes the licensing objectives found in section 4 of the 2005 Act.

572. Subsection (3) inserts a new section 7A into the 2005 Act requiring Licensing Boards to include within the licensing policy statement a statement regarding the effect of off sales on those under 21 and whether this is having a detrimental effect on one or more of the licensing objectives in the whole or part of the Licensing Board’s area. For example a Board may decide that there was only a detrimental impact in certain communities.

573. The detrimental impact statement will form part of the three yearly licensing policy statement. It can also be published as a supplementary licensing policy statement in between the three year period. Subsection (6) of this new section enables the Police or the Local Licensing Forum set up by section 10 of the 2005 Act to require the Licensing Board to consider the detrimental impact assessment with a view to changing it in whole or in part. Following such consideration the Licensing Board may choose to publish a supplementary licensing policy statement.

574. In exercising its functions under the 2005 Act a Licensing Board is required to have regard to its licensing policy statement and any supplementary licensing policy statement it may have published (section 6(4) of the 2005 Act). The addition of the detrimental impact statement on off-sales to those under 21 would therefore enable a Licensing Board to have a policy of applying a condition to licensed premises which banned the sale of alcohol to those under 21 depending on the policy statement this could entail a restriction on off-sales to those under 21 in terms of geographical area, type of premises or time.

575. A Licensing Board can only impose conditions on a premises licence when it grants the licence under section 27(6) of the 2005 Act or if it reviews a premises licence under section 36 to 40 of the 2005 Act in those circumstances it may only do so on a case by case basis. Subsection (4) will enable Licensing Boards to vary all the premises in its area, or vary a category, or group of premises and apply the same conditions to all the premises in its area or the category or group of licences. A Board is only able to impose a bloc condition if the Board considers it necessary or expedient for the purposes of any of the licensing objectives (section 4 of the 2005 Act). Licensing Boards will also be restricted to imposing bloc conditions to areas set out by the Scottish Ministers in affirmative regulations under section 146 of the 2005 Act.

Section 130 - Premises licence applications: notification requirements

576. This section amends the list of those to whom the Licensing Board must send a copy of an application when undertaking its obligations under section 21(1) of the Licensing (Scotland) Act 2005. Previously a copy of the application was required to accompany each notice issued under section 21(1) of the 2005 Act. The section also removes the chief constable's obligation to provide the Board with antisocial behaviour reports. A Licensing Board's ability to request such reports is now provided for under section 24A of the Licensing (Scotland) Act 2005, inserted by section 132 of the Bill.

Section 131 - Premises licence applications: modification of layout plans

577. This section amends section 23(7) of the Licensing (Scotland) Act 2005 concerning the determination of an application for a premises licence. Section 23(7) provided that a Licensing Board could propose a modification to the operating plan in circumstances where the Licensing Board would otherwise refuse the application. The Licensing Board would grant the license if the applicant agreed to the proposed modification.

578. This section extends section 23(7) so that a Licensing Board can also propose a modification to the layout plan, which is required to accompany the application under section 20(2)(b) of the Licensing (Scotland) Act 2005. The Licensing Board may propose a modification to the layout plan in circumstances where the Licensing Board would otherwise refuse the application. The Licensing Board grants the license if the applicant agrees to the proposed modification. The amendment allows the Licensing Board to propose modifications to either the operating plan or the layout plan, or both if necessary.

Section 132 - Premises licence applications: antisocial behaviour reports

579. This section amends the Licensing (Scotland) Act 2005 requirements concerning a Chief Constable's obligation to provide the Licensing Board with an antisocial behaviour report. It

would be no longer necessary for the chief constable to provide a report in respect of every application. Instead, a report will only be required if the Licensing Board requests one, or if the chief constable wishes to forward a report for the Board's consideration.

Section 133 – Sale of alcohol to trade

580. This section adjusts an offence in the Licensing (Scotland) Act 2005 to enable the trade as defined by section 147(2) of the 2005 Act to purchase alcohol from a premises which holds a premises licence or occasional licence granted for the sale of alcohol under section 17 and 56 of the 2005 Act respectively. Previously the trade would only have been able to purchase from premises which supplied trade only. This section would now allow, for example, a restaurant owner to purchase alcohol from a supermarket for the restaurant without committing an offence.

Section 134 - Occasional licences

581. This section reduces the length of time a Licensing Board is required to wait for comments from the Chief Constable and the Licensing Standards Officer in respect of an application for an occasional licence by the Chief Constable and the Licensing Standards Officer from 21 days to a period of not less than 24 hours where the Licensing Board is satisfied that the application requires to be dealt with quickly. This section however restricts the ability to delegate approval of occasional licences which are "fast tracked" in this way to any member of the Board, any committee established by the Board and the clerk of the Board.

Section 135 - Extended hours application: variation of conditions

582. This section will enable Licensing Boards to amend for the first time the conditions of operation for a licensed premises for the duration of the extended period and the period that the extension applies to. For example if a premises was ordinarily open on a Saturday from 11am until 11pm and applied to extend its licence to 2am on that day, a Licensing Board would be able to vary conditions, for example, requiring door supervisors or use of plastic drinking vessels for the whole period, 11am on Saturday until 2am on Sunday, or any part of that period, not just for the extended period after 11pm.

Section 136 - Personal licences

583. Under section 76(3) of the Licensing (Scotland) Act 2005 a personal licence is not valid if at the time it is issued the individual to whom it is issued already holds a personal licence. The 2005 Act does not prevent an applicant making a second application, it is not a criminal offence and a Licensing Board must grant the application as the 2005 Act does not enable a Board to refuse an application on the grounds that an applicant already holds one.

584. This section amends the 2005 Act by enabling the Licensing Board to enact other options than granting, these being to refuse the application or hold a hearing to decide whether or not to grant the application if the applicant already holds a personal licence or if a previous personal licence held by the applicant had been surrendered or expired in the previous three years before a new application was made.

585. This provision is to close a possible loophole where a licence holder who had an endorsement under section 85(1) of the 2005 Act could avoid the suspension or revocation provisions of section 86 of the 2005 Act by voluntarily surrendering their personal licence before the Licensing Board had had an opportunity to consider what action it might take under section 86 of the 2005 Act, and then apply for another personal licence which would be “clean”. The section also makes it a criminal offence not to surrender a void personal licence or attempt to use a void licence as a valid licence. A level 3 fine under section 225 of the Criminal Procedure (Scotland) Act 1995 presently stands at £1000.

Section 137 - Emergency closure orders

586. This section changes the rank of the constable who may request or order a closure order for licensed premises and its subsequent extension or termination under section 97 to 99 of the Licensing (Scotland) Act 2005. The change is from a constable of or above the rank of superintendent as defined by section 147(1) of the Licensing (Scotland) Act 2005 to a constable of or above the rank of inspector.

Section 138 – False statements in applications: offence

587. An offence is committed by any person who makes a false statement on an application. This section could be used in respect of those who apply for a second personal licence, which a personal licence holder may wish to have as a backup as their original licence being suspended or revoked for improper conduct. The personal licence form specifically asks if the applicant already hold a licence. A level 3 fine under section 225 of the 1995 Act presently stands at £1000.

Section 139 – Further modifications of 2005 Act

588. Police powers to object to the granting of licenses for the sale of alcohol under the Licensing (Scotland) Act 2005 are extended.

589. Section 22 of the 2005 Act allows any person to object to an application for a premises licence, but subsection (2) limits the chief constable so that he can only object on the ground that he has reason to believe that the applicant is involved in serious organised crime and that refusal of the application is necessary for the purpose of the crime prevention objective (section 4(2)). Under section 21(5) the chief constable may recommend that an application be refused if necessary for the purpose of the crime prevention objective, but only where he is giving notice of any relevant or foreign offence. For occasional licences, section 57(2) allows the chief constable to recommend the refusal of an application only on the grounds of the crime prevention objective. Under section 73 of the 2005 Act, the chief constable may not object but may recommend that an application for a personal licence be refused if necessary for the purposes of the crime prevention objective, but only where he is giving notice of any relevant or foreign offence.

590. The amendments in Schedule 4 widen the grounds a licensing board may consider in refusing an application for a premises licence on receiving a notice from the chief constable, from the crime prevention objective to any of the licensing objectives listed in section 4 of the 2005 Act. This effectively widens the grounds on which a chief constable may object from

purely crime prevention to securing public safety, preventing public nuisance and protecting children from harm. Paragraph 5 sees this widening in relation to an application for a premises licence and this process is repeated in paragraph 6 where an applicant or connected person is convicted during the determination of a premises licence; in paragraph 7 it concerns the transfer of a premises licence on application of the licence holder; paragraph 12 & 13 are in respect of an application for a personal licence; paragraph 14 where an applicant is convicted during the determination of a personal licence and paragraph 15 where a personal licence holder is convicted.

591. Paragraph 16 ensures that the chief constable may report a personal licence holder to the licensing board for actions which are inconsistent with the licensing objectives and that a licensing board must then hold a hearing to consider what action if any should be taken against the personal licence holder as allowed by section 84(7) of the 2005 Act.

PART 10 - MISCELLANEOUS

Section 140 - Licensed premises: social responsibility levy

592. This section gives the Scottish Ministers a power through affirmative regulations to impose a charge on certain holders of licences under the Licensing (Scotland) Act 2005 and the Civic Government (Scotland) Act 1982. Money raised by the charge will be for local authorities to use in contributing towards the costs of dealing with the adverse effects of the operations of these businesses, for example extra policing or street cleaning or in furthering the licensing objectives listed in section 4 of the 2005 Act.

Section 141 - Annual report on Criminal Justice (Terrorism and Conspiracy) Act 1998

593. The Criminal Justice (Terrorism and Conspiracy) Act 1998 (“the 1998 Act”) was passed following emergency parliamentary procedure in the wake of the Omagh bombing in August 1998.

594. There were 2 main parts in the 1998 Act. Sections 1 to 4 made provision about procedure and forfeiture in relation to offences concerning proscribed organisations. Sections 5 to 7 concern conspiracy to commit offences outside the United Kingdom.

595. Section 8 requires that a statutory report on the working of the Act be laid before both Houses of Parliament on an annual basis. Although the section is drafted in such a way so as it applies generally to the working of the Act as a whole, it is understood that the requirement was directed principally at the terrorism provisions in sections 1 to 4, which have now been repealed.

596. Section 8 is now considered redundant. It has been repealed for England, Wales and Northern Ireland by the Criminal Justice and Immigration Act 2008. This section repeals section 8 of the 1998 Act as it applies to Scotland. The effect is that the section will be repealed UK wide.

Section 142 – Corruption in public bodies

597. Section 1 of the Public Bodies Corrupt Practices Act 1889 provides that a person in public office who is involved in any form of corrupt practice in connection with their work is guilty of a crime. Offences under the Act can be triable by solemn or summary procedure. Section 8 makes provision as to the application of the Act to Scotland. It provides that the sheriff principal and sheriff shall have jurisdiction to try any offence under the Act. The effect is that section 8 excludes the district court or the justice of the peace court from being able to try an offence under the 1889 Act. Section 8 is being amended to remove the exclusion of the jurisdiction of district courts or justice of the peace courts to try offences under the 1889 Act, so that lower level offences can be dealt with in those courts.

598. The Prevention of Corruption Act 1906 makes similar provision to the 1889 Act. It provides that any employee who carries out any activity in a corrupt manner is guilty of an offence. Section 3 of the 1906 Act makes provision as to its application to Scotland, and provides that all offences which are punishable under the Act on summary conviction shall be prosecuted before the sheriff. In line with the amendment being made to the 1889 Act, section 3(2) of the 1906 Act is being repealed to allow offences under the 1906 Act to be triable not only in the sheriff court but in the district court and justice of the peace court too.

PART 11 - GENERAL

Section 143 - Orders and regulations

599. This section regulates the powers of the Scottish Ministers contained in the Act to make regulations and orders. It provides for these powers to be exercisable by statutory instrument, and provides standard powers for instruments to include ancillary provisions and to make different provisions for different purposes. It also provides for the level of Parliamentary procedure to which any instrument is to be subject.

Section 144 – Interpretation

600. This section provides short references for three enactments referred to frequently throughout the Bill.

Section 145 - Modification of enactments

601. This section introduces Schedule 5 which makes modifications to certain enactments.

Section 146 – Ancillary provision

602. This section allows the Scottish Ministers by order to make supplementary, incidental or consequential provisions in connection with any provision of the Bill.

Section 147 -Transitional provision etc.

603. This section allows the Scottish Ministers by order to make transitory, transitional or savings provisions in connection with the coming into force of any provision of the Bill.

Section 148 – Short title and commencement

604. This section provides for commencement of the majority of the Bill to be made by order. Sections 143 to 148 will commence upon Royal Assent.

Schedule 1 – The Scottish Sentencing Council

605. Schedule 1 provides for the membership of the Council. It sets out the procedures for the appointment of members and membership of the Council.

606. It also contains detailed provisions on the procedure of the Council, ancillary process and powers to delegated functions.

607. Paragraph 13 places the Council on the list of authorities subject to investigation by the Scottish Public Services Ombudsman. Paragraph 14 places the Council under the requirements of the Freedom of Information (Scotland) Act 2002.

Schedule 2 – Short-term custody and community sentences: consequential amendments

608. See section 18 above.

Schedule 3 – Witness anonymity orders

609. This Schedule deals with appeals on the granting of witness anonymity orders made under common law powers prior to the provisions under 271N to 271T coming into effect. The High Court can only treat a conviction as unsafe if, as a result of an order made under common law, the accused did not receive a fair trial. It cannot rule a conviction as unsafe simply on the basis that the trial court had no power to make a witness anonymity order under common law.

Schedule 4 – Further modifications of 2005 Act

610. See section 139 above.

Schedule 5 – Modification of enactments

Paragraph 1 – The False Oaths (Scotland) Act 1933

611. Sections 44 to 46 of the Criminal Law (Consolidation) (Scotland) Act 1995 (“the 1995 Act”) re-enact most of the False Oaths (Scotland) Act 1933 (“the 1933 Act”). Schedule 5 to the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 which lists the repeals undertaken in the consolidation exercise does not include a reference to the 1933 Act. This is an error and should have been included at the time of the consolidation exercise was carried out. This section repeals the 1933 Act in full. Consequential amendments are required where reference is made to the 1933 Act, or a provision of that Act, in other pieces of legislation, substituting a reference to the new provisions in the 1995 Act. Paragraphs 4, 45 and 51 make the necessary consequential amendments.

Paragraph 2 – The Public Records (Scotland) Act 1937

612. Paragraph 2 amends section 14 of the Public Records (Scotland) Act 1937. Paragraph 1(a) puts beyond any doubt that references to “court records” in that Act include the Scottish Land Court as well as all the ordinary courts. Paragraph (2) provides that any question as to whether or not a document is part of the records of a particular court is to be determined by either the Lord President or the Lord Justice General.

Paragraph 3 – The Rehabilitation of Offenders Act 1974

613. Paragraph 3 amends section 1 (4)(b) of the Rehabilitation of Offenders Act 1974 (c.53) to change the reference of “insanity” in that Act to refer to the new defence created by the new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 117 of this Bill.

Paragraph 4 – The Evidence (Proceedings in Other Jurisdictions) Act 1975

614. This amendment is consequential on the repeal of the False Oaths (Scotland) Act 1933 by paragraph 1.

Paragraphs 5 –7 - The 1982 Act

615. Section 52(7) of the Civic Government (Scotland) Act 1982 provided that offences of taking, permitting to be taken, or making of any indecent photograph or pseudo-photograph (section 52(1)(a) of the 1982 Act) were to be included in the list of offences contained in Schedule 1 to the Criminal Procedure (Scotland) Act 1975. Schedule 1 to the 1975 Act listed offences against children under the age of 17 years, to which special provisions applied. Section 52(7) of the 1982 Act also provided that section 52(1)(a) offences were included in Schedule 1 to the 1975 Act for the purposes of Part III of the Social Work (Scotland) Act 1968, which has since been repealed.

616. Schedule 1 to the 1975 Act has since become Schedule 1 to the Criminal Procedure (Scotland) Act 1995, and was later amended by the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 to insert the offences under sections 52 and 52A of the 1982 Act in relation to an indecent photograph of a child under the age of 17 years. As section 52(7) has been overtaken by subsequent legislation, this subsection is repealed.

617. Paragraph 6 repeals a minor amendment made to section 52(7) of the Civic Government (Scotland) Act 1982 by the Criminal Justice Act 1988, consequential on the repeal of section 52 (7) by paragraph 6 of this schedule.

618. Paragraph 7 simply corrects a minor error in section 64 of the 1982 Act, which provides for appeals against orders in relation to public processions.

Paragraph 8 – The Legal Aid (Scotland) Act 1986

619. Paragraph 8 amends section 22 of the Legal Aid (Scotland) Act 1986 (c.47) which deals with the availability of criminal legal aid so as to substitute reference to the new defence and plea of unfitness for trial in place of the references to cases involving “insanity”.

Paragraph 9 – The Criminal Justice (Scotland) Act 1987

620. Sections 27 to 30 of the Criminal Law (Consolidation)(Scotland) Act 1995 provide for special investigating powers to be exercised by a nominee of the Lord Advocate in the event of a direction being given when a suspected offence may involve serious or complex fraud. They re-enact sections 51 to 54 of the Criminal Justice (Scotland) Act 1987.

Paragraph 11 – The Criminal Justice and Public Order Act 1994

621. Schedule 5 to the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 lists the provisions which were repealed as part of the consolidation exercise. However, the schedule does not include sections 51 to 54 of the 1987 Act. This is an error and should have been included at the time of the consolidation exercise. This paragraph repeals sections 51 to 54 of the 1987 Act, and paragraphs 8 and 9 repeal amendments made to those sections by the Criminal Justice Act 1988 and the Criminal Justice and Public Order Act 1994. .

Paragraphs 12, 13 and 14 – The Criminal Law (Consolidation) (Scotland) Act 1995

622. Section 16 of the Criminal Law (Consolidation) (Scotland) Act 1995 allows any parent, relative, guardian or person acting in the best interests of a woman or girl to ask for a warrant to be issued. This warrant will authorise a named constable to enter a specified place and search for that woman or girl where they believe she is unlawfully being held for immoral purposes. If the woman or girl is found she will be delivered to her parents or guardians.

623. There is also a right afforded to the person requesting the warrant to accompany the constable when the warrant is executed. This is an outmoded provision and in practical terms the police already have the common law power to request warrants for circumstances such as this. This section repeals section 16. The power has not been used for many years, and is repealed as it is considered to be redundant.

624. Part II of the Criminal Law (Consolidation) (Scotland) Act 1995 makes provision for sporting events and specifically makes provision regarding the control of alcohol, fireworks and flares at sporting grounds and sporting events. Paragraph 14 substitutes “it” for “in” section 23 (interpretation of part 2) to correct a typographical error. The relevant provision was originally section 77 of the Criminal Justice (Scotland) Act 1980 where the text was correct. Although we are not aware of any problems arising from the error in the definition we have taken the opportunity offered by this Bill to correct this mistake.

Paragraphs 15-43 – The 1995 Act

625. Paragraph 16 inserts new section 5A into the 1995 Act providing that it is competent for a sheriff to sign certain documents at any place in Scotland. As this is currently provided for under section 9A of the 1995 Act, this amendment has no effect on existing practice. However, new section 5A will become necessary upon the full repeal of section 9A (by paragraph 9(7) of the Schedule to the Criminal Proceedings etc. (Reform) (Scotland) Act 2007). Separate provision as to the signing of documents by justices of the peace and stipendiary magistrates is made in section 62 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007.

626. Paragraph 17 amends section 10A of the 1995 Act and is consequential upon section 46 of the Bill. It confers jurisdiction upon both the JP court and the procurator fiscal of the relevant court where proceedings have been initiated in or transferred to another JP court.

627. Paragraphs 18, 20, 21, 22, 23, 25, 26, 30 and 33-34 all concern the change in references to “insanity” and “insanity as a plea in bar” in the 1995 Act. References in the 1995 Act to “insanity” as a defence are changed to refer to the defence created by the new section 51A of the 1995 Act, as inserted by section 117 of this Bill. References to “insanity as a plea in bar” are changed to refer to unfitness for trial.

628. Paragraph 19 repeals parts of section 22 of the 1995 Act, in consequence of the amendments made by section 41.

629. Paragraph 24 amends section 61 of the 1995 Act. Section 61 of the 1995 Act contains a requirement that various court orders must be based on the evidence of two medical practitioners, one of whom must have been approved as having special expertise in mental health. The effect of these amendments is that this requirement does not apply to a finding by a court that a person is unfit for trial.

630. Paragraph 27 amends section 78(2) of the 1995 Act so as to provide that diminished responsibility is treated as if it were a special defence for the purpose of giving advance notice (see 1995 Act, section 78(1)). The plea is not treated as if it were a special defence for any other purpose (eg disclosure to the jury under section 89(1)).

631. Paragraph 28 removes a superfluous word from section 90D of the 1995 Act.

632. Paragraph 29 substitutes a new subsection (4) into section 102A of the 1995 Act. The effect of this is to remove from that subsection a reference to section 27(1)(a) of the 1995 Act which has no application in the context of the section 102A provision.

633. Paragraph 31 is consequential upon section 45 of the Bill. The effect is to ensure time limits for transferred and related cases apply also to relevant cases in JP courts.

634. Paragraph 32 makes an amendment to section 137B of the 1995 Act. Where a sheriff has made an order allowing the transfer of, or initiation of proceedings in, another sheriff court paragraph 28 provides that any other sheriff of the same sheriffdom may revoke or vary that order.

635. Paragraphs 35 to 37, 39 and 40 are consequential on the creation of community payback orders by section 14 of the Bill. These paragraphs repeal the provisions of the 1995 Act dealing with probation orders, community service orders, supervised attendance orders and community reparation orders, and remove references to probation orders from section 247 (effect of probation and absolute discharge).

636. Paragraph 38 amends section 245D which deals with the combination of restriction of liberty orders with other orders. It substitutes references to probation order with community

payback order. The effect of this section will be to enable a restriction of liberty order to be imposed concurrently with a community payback order (as is currently possible with restriction of liberty orders and probation orders). The amendments also remove the current option to impose a drug treatment and testing order, a restriction of liberty order and a probation order concurrently, meaning that the court will only be able to impose a restriction of liberty order concurrently with a community payback order or a drug treatment and testing order but not both.

637. Paragraph 41 amends section 254 to make clear that the term “article” includes animal. A consequential rearrangement of section 254 is made.

638. Paragraph 42 inserts new subsection (4AA) into section 258.. This clarifies that where an objection to a notice of uncontroversial evidence has been lodged in summary proceedings, this may be challenged at any time prior to an intermediate diet.

639. Paragraph 43 amends section 307 of the 1995 Act (which defines certain terms for the purposes of the 1995 Act) so as to provide that the meaning of "unfit for trial" is given in the new section 53F.

Paragraph 44 – The Crime and Punishment (Scotland) Act 1997

640. Paragraph 44 amends section 9 the Crime and Punishment (Scotland) Act 1997. Section 9 of the 1997 Act refers to "section 57(2)(a) of the 1995 Act (disposal where accused insane)." The effect is to substitute references to the new statutory defence and plea in bar of trial, in place of the reference to "insane".

Paragraph 45 – The Terrorism Act 2000

641. This amendment is consequential on the repeal of the False Oaths (Scotland) Act 1933 by paragraph 1.

Paragraph 46 – The Protection of Children (Scotland) Act 2003

642. Paragraph 46 amends section 10 of the Protection of Children (Scotland) Act 2003 so as to substitute reference to the special defence created by the new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 117 of this Bill, in place of the reference to acquittal on the ground of “insanity”.

Paragraph 47 – The Criminal Justice (Scotland) Act 2003

643. Paragraph 47 amends the Criminal Justice (Scotland) Act 2003 to adjust a reference in section 3 of that Act to section 57 of the 1995 Act to take account of the change of the title of section 57 by paragraph 21 of this Schedule.

Paragraph 48 – The Sexual Offences Act 2003

644. Paragraph 48 amends section 135 of the Sexual Offences Act 2003 so that references in Part 2 of that Act (notification and orders) to a person being found not guilty of an offence by reason of insanity include reference to a person acquitted by reason of the defence created by the

new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 117 of this Bill.

Paragraph 49 – The Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005

645. Paragraph 49 amends section 8 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005, which deals with persons who breach Risk of Sexual Harm Orders. It adds reference to a person acquitted of an offence of breaching an risk of sexual harm order by reason of the defence created by the new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 117 of this Bill alongside references to a person being found not guilty of such an offence by reason of insanity.

Paragraph 50 – The Management of Offenders etc. (Scotland) Act 2005

646. Paragraph 50 amends section 10 of the Management of Offenders etc. (Scotland) Act 2005 so that references to persons acquitted on the ground of insanity and persons found to be insane in bar of trial are updated to reflect the new equivalents established by this Bill.

Paragraph 51 – Serious Organised Crime and Police Act 2005

647. This amendment is consequential on the repeal of the False Oaths (Scotland) Act 1933 by Paragraph 1.

Paragraphs 52 – 54 - The Criminal Proceedings etc. (Reform) (Scotland) Act 2007

648. Paragraphs 53 and 54 remove unnecessary references from section 7 of, and the Schedule to, the 2007 Act, in consequence of the amendments made by section 41 of this Bill.

Paragraph 55 – The Protection of Vulnerable Groups (Scotland) Act 2007

649. Paragraph 55 amends section 32 of the Protection of Vulnerable Groups (Scotland) Act 2007 so as to substitute reference to the special defence created by the new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 119 of this Bill, in place of the reference to acquittal on the ground of “insanity”.

Paragraph 56 – The Counter-Terrorism Act 2008

650. Paragraph 56 amends section 45 of the Counter-Terrorism Act 2008 so as to substitute reference to the special defence created by the new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 117 of this Bill, in place of the reference to acquittal on the ground of “insanity” and to update a reference to section 55 of the Criminal Procedure (Scotland) Act 1995.

Paragraph 57 – The Coroners and Justice Act 2009

651. Paragraph 57 amends section 134 of the Coroners and Justice Bill so as to substitute references to the special defence created by the new section 51A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 117 of this Bill, in place of the references to acquittal on the ground of “insanity”.

FINANCIAL MEMORANDUM

INTRODUCTION

652. This document relates to the Criminal Justice and Licensing (Scotland) Bill introduced in the Scottish Parliament on 5 March 2009. It has been prepared by the Scottish Government to satisfy Rule 9.3.2 of the Parliament's Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament.

653. The Criminal Justice and Licensing (Scotland) Bill contains provisions on a range of topics to improve the justice system through changes to sentencing, criminal law, criminal procedure, evidence, criminal justice, licensing under the Civic Government (Scotland) Act 1982 and alcohol licensing. The Bill also contains a number of other miscellaneous justice topics.

Methodology

654. For all the topics contained within the Bill, consideration has been given as to whether a Regulatory Impact Assessment (RIA) was required. We will publish separately a summary of the regulatory impact of the Bill as a whole along with individual RIAs.

655. There are 5 topics within the Bill that carry a *significant* financial impact. For the purposes of this financial memorandum, a *significant* financial impact is defined as a topic having a financial impact of over £0.4m per annum once implemented. These 5 topics are as follows:

- The Scottish Sentencing Council (sections 3-13 of the Bill);
- Community payback orders/presumption against short periods of imprisonment or detention/reports about supervised persons (sections 14, 17 and 20 of the Bill);
- Serious organised crime (sections 25-28 of the Bill);
- Disclosure (sections 85-116 of the Bill); and
- Sale of alcohol to persons under the age of 21 (section 129 of the Bill).

656. Chapter 1 of this Financial Memorandum draws out from the Bill and details the financial impact of the 5 topics with a *significant* financial impact (as listed above).

657. The other chapters of this financial memorandum presents the financial impact of the remaining provisions of the Bill (ie. those that do not have a *significant* financial impact). The memorandum follows the order of the Bill being splits into chapters covering the following parts of the Bill:

- Chapter 2 of the Financial Memorandum covers Part 1 of the Bill – Sentencing;
- Chapter 3 of the Financial Memorandum covers Part 2 of the Bill - Criminal law;
- Chapter 4 of the Financial Memorandum covers Part 3 of the Bill - Criminal procedure;

These documents relate to the Criminal Justice and Licensing (Scotland) Bill (SP Bill 24) as introduced in the Scottish Parliament on 5 March 2009

- Chapter 5 of the Financial Memorandum covers Part 4 of the Bill – Evidence;
- Chapter 6 of the Financial Memorandum covers Part 5 of the Bill - Criminal justice;
- Chapter 7 of the Financial Memorandum covers Part 7 of the Bill – Mental disorder and unfitness for trial (note that Part 6 of the Bill – Disclosure is covered in chapter 1 of this Financial Memorandum);
- Chapter 8 of the Financial Memorandum covers Part 8 of the Bill - Licensing under the Civic Government (Scotland) Act 1982;
- Chapter 9 of the Financial Memorandum covers Part 9 of the Bill - Alcohol licensing; and
- Chapter 10 of the Financial Memorandum covers Part 10 of the Bill - Miscellaneous.

658. For the purposes of this financial memorandum, all figures given assume a commencement of provisions in April 2010. It should be noted this is unlikely to be the case for all provisions within the Bill with decisions as to when to commence provisions made in the future.

659. A number of topics within the Bill carry either no financial impact or a minimal financial impact. Where a section of the Bill is not mentioned within this financial memorandum, the provisions do not have any financial impact as they are merely technical changes to the law eg. a repeal of redundant provisions. There are however some sections (not technical changes to the law) that are mentioned that do not have a financial impact. These sections are included to provide an explanation as to why it is considered the particular section does not have a financial impact.

660. There are some topics which are described as having “minimal” costs/savings attached to them without specific figures being given. It is estimated that the financial impact of any of these topics is less than £3,000 per topic. An explanation is also given as to why we have been unable to provide a specific estimate of the financial impact for such topics.

661. A table providing an overall summary of the financial impact of the Bill is included at paragraph 991 of this financial memorandum.

CHAPTER 1:

PROVISIONS WITH SIGNIFICANT FINANCIAL IMPACT

SECTIONS 3-13 - THE SCOTTISH SENTENCING COUNCIL

662. The Scottish Sentencing Council (SSC) will be made up of 12 members drawn from both judicial and non judicial backgrounds. In order to carry out its functions effectively, the Council will need a dedicated team of professional support staff including lawyers, researchers, analysts and administrators. Our consultation paper on the proposed creation of a Sentencing Council

suggested its administrative support might be provided by the Scottish Court Service (SCS), which could be well placed to provide the body with necessary back office functions such as IT and human resources services. The following estimates are provided on that basis.

663. Based on the running costs incurred by bodies of a likely similar size, and the assumption that administrative functions would be provided by the Scottish Court Service, we anticipate that an annual budget of approximately £1-£1.1m will be required. This would be funded by the Scottish Government as an element of our funding of the Scottish Court Service and there will be no negative impact on the SCS as a result of its new responsibilities.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

664. We would provide funding to the Scottish Court Service in recognition of the support function which would be provided by the SCS to the Sentencing Council. These estimated costs are drawn from those incurred by the Sentencing Guidelines Council and Sentencing Advisory Panel for England and Wales and their shared secretariat and those incurred by the Scottish Criminal Cases Review Commission – similar organisations in terms of size to the Scottish Sentencing Council.

Members' fees and expenses

665. Those members of the Council who are not employed on a full time basis in the criminal justice system will be entitled to claim fees for meetings of the Council. All members will be entitled to claim reimbursement of travel and subsistence expenses actually and necessarily incurred in the course of business. The daily rate of fees payable will be around £230, based on the current rate set by the Sentencing Guidelines Council for England and Wales. On the assumption that the entire SSC would meet for a day once a month, this would amount to £33,120 annually. However, it should be noted the decision on how to manage its business and how often it needs to meet will ultimately sit with the SSC itself.

Cover for Judicial Absence

666. When members of the Judiciary are not available for bench work, because of other commitments, SCS requires to backfill for them. This costs SCS £575 per day plus travel and writing time for a part-time sheriff and £774 per day and writing time for a temporary judge. Again, with the assumption that the SSC will meet once a month, this amounts to an annual cost of £32,376.

Staff salaries

667. The support office to the Sentencing Council will be headed up by a Chief Executive who it is anticipated will be supported by a secretary to the Council, four members of staff dedicated to research, analysis and statistics, two members of staff with legal expertise and an administrative support team of four. Details of costs are as follows:

- Chief Executive (Deputy Director level) – £97,055
- Secretary to the Sentencing Council – (grade B1) £28,474

These documents relate to the Criminal Justice and Licensing (Scotland) Bill (SP Bill 24) as introduced in the Scottish Parliament on 5 March 2009

- Researchers x 4 (2 x grade C1 and 2 x grade B2) - £190,462
- Legal Officers x 2 (2 x C1) - £120,652
- Admin staff x 4 – (1 x grade A4, 3 x grade A3) £82,208
- Estimated annual staff salary expenditure – £518,851

Office expenditure, training and meetings

668. The estimated annual costs are £81,000 based on those incurred by the Sentencing Guidelines Council. We estimate that an initial set up cost of £450,000 will be needed to cover the provision of office furniture, equipment and computers and library shelving.

Accommodation

669. SCS has advised that its current estate has extensive demands on it. Accommodation for the SSC in the centre of Edinburgh for 12 people, a library and boardroom would cost in the region of £165,000 annually.

Research, publications and website

670. The estimated costs for this are £270,000, based on those incurred by the Sentencing Guidelines Council.

Members' fees and expenses	£33,120
Staff salaries	£518,851
Office expenditure, training and meetings	£81,000 (initial £450,000)
Accommodation	£165,000
Research, publications and website	£270,000
Judicial cover for absence	£32,376
Total	£1,100,347

COSTS ON LOCAL AUTHORITIES

671. None.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

672. None

Summary

Sections 3-13 - The Scottish Sentencing Council (all figures in £m)						
2010/11		2011/12		Eventual recurring costs	Total Non-recurring costs	Annual savings
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs			
1.100	0.450	1.100	0.000	1.100	0.450	0.000

SECTION 14 - COMMUNITY PAYBACK ORDERS

SECTION 17 - PRESUMPTION AGAINST SHORT PERIODS OF IMPRISONMENT OR DETENTION

SECTION 20 – REPORTS ABOUT SUPERVISED PERSONS

673. There are currently a number of community sentences that a court can impose. The policy intention is to replace the existing probation orders, community service orders, supervised attendance orders and community reparation orders with the new style Community Payback Order. The new Order will provide courts with a range of requirements from which those most appropriate to the individual offender will be selected.

674. Section 17 of the Bill provides for a presumption against custodial sentences of 6 months or less unless the particular circumstances of the case lead the court to believe that no other option would be appropriate. These provisions will not necessarily lead to the imposition of Community Payback Order. Courts in disposing of a case will continue to have access to certain other community penalties including Drug Treatment and Testing Orders and Restriction of Liberty Orders in addition to fines, etc.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

675. The majority of the additional costs, which will be incurred as a result of these provisions, will fall to be dealt with under the existing funding arrangements for section 27A of the Social Work (Scotland) Act 1968, which provides funding to the local authorities for delivery of criminal justice social work services. This ringfenced funding is routed in the first instance through the eight Community Justice Authorities, which have responsibility for distributing available funds to the constituent local authorities within their areas. Expenditure in relation to delivery of electronic monitoring requirements is the subject of a commercial contract between the Scottish Government and its electronic monitoring contractor.

Methodology

Financial Allocations

676. In the 2007-08 financial year, funding was allocated to the Community Justice Authorities for the following purposes as part of the overall grant made available:

- Community Service Orders £13,543,144
- Probation Orders £10,754,169
- Supervised Attendance Orders £3,374,589

677. The figure for probation orders is based on the cost of delivering a standard probation order. It equates in broad terms to a Community Payback Order with merely a supervision requirement.

678. Community Reparation Orders were the subject of a restricted 2 year pilot exercise. A sum of £354,772 was allocated for part year of 2007-08 for the pilot.

Number of Orders

679. In 2007-08, courts imposed the following number of orders:

- Community Service Orders 6,202
- Probation Orders 8,751
- Supervised Attendance Orders 4,438

680. The number of Community Reparation Orders during the part year operation of the pilots was minimal.

681. In broad terms this suggests that the unit costs for the individual sentences which will be replaced by the new Community Payback Order amount to:

- Community Service Orders £2,184
- Probation Orders £1,229
- Supervised Attendance Orders £760

682. The unit cost figure for Community Service Orders does not take account of those instances of where unpaid work is undertaken as a condition of a probation order. 3,053 such requirements were imposed in 2007-08. If account is taken of the latter the unit cost of delivering community service/unpaid work decreases to £1,463. It is not possible to produce a meaningful unit cost figure for Community Reparation Orders.

Requirements

683. The new Community Payback Orders will provide courts with a menu of seven requirements. In broad terms these equate to the additional conditions that are currently available to courts when imposing a probation order. 5,692 such additional conditions were made by courts in 2007-08, funding for which is provided through the ringfenced funding arrangements for criminal justice social work. In broad terms funding provided in 2007-08 for this purpose, which includes the cost of supported accommodation for offenders, amounted to £13.7m, although services/projects covered by this funding are not restricted to those on community sentences i.e. they are also used by ex-prisoners following release from custody, this figure should be taken as indicative only.

Electronic Monitoring

684. Courts can currently add an electronic monitoring condition to a probation order. In 2007-08, 113 such conditions were made. Courts will be unable to impose a condition of electronic monitoring when a person is first sentenced to a Community Payback Order, but this will be an option available to the court should the individual subsequently breach the order. The average unit costs for a 6 months period for electronic monitoring amount to approximately £3,500.

Review Hearings

685. The new Community Payback Order contains provisions for courts to periodically review the progress of an offender during the course of the order. Existing legislation in relation to

probation orders allow for review hearings to be undertaken as part of that order. No data is available on the number of such review hearings carried out each year but the estimated unit cost of a hearing covering judicial salaries and Scottish Court Service running costs amounts to £23.

Additional Costs associated with introduction of Community Payback Order

686. Responsibility for sentencing decisions in individual cases rests with courts. It is difficult to predict what impact the introduction of the Community Payback Order will have on current sentencing patterns. However, there are two key aspects, which require to be addressed. First, assuming no overall increase by courts in use of Community Payback Orders compared with the existing sentences, the extent to which additional costs will be incurred as a result of the introduction of the new Order. Second, the extent to which the new order will be viewed by courts as a more attractive sentencing option leading to increased numbers of orders and associated increased costs.

Review Hearings

687. On the basis of one review hearing per order it is estimated that the Community Payback Order might generate an additional 9,000 review hearings per year. Each review hearing will require the local authority supervising officer to submit a report to assist the court in carrying out the review. On the basis of a unit cost of £100 per report, an additional £900,000 will be needed for this purpose.

688. In addition, additional annual revenue funding of £162,000 will be needed for judicial salaries and £45,000 for Scottish Court Service running costs. One-off set up costs estimated at £50,000 for IT development will also be required.

Requirements

689. There are similarities between the Community Payback Order and the single Community Order, introduced in England and Wales following commencement of the Criminal Justice Act 2003. Experience since introduction of the Community Order, which offers a menu of 12 requirements (compared with the seven with the Community Payback Order) suggests that there has been little change in the number and types of requirements being imposed. The average number of requirements per order has remained broadly constant at 1.7 per order. In Scotland, historically the average number of additional conditions per probation order is estimated at 1.2 per order. In anticipation that there will be no significant increase by courts in the use of the available requirements we are proposing no increase in the £13,700,000 currently being provided for this purpose.

690. The one area, where we have identified a need for additional funding in respect of the menu of options is in respect of the provision whereby a supervision requirement will be mandatory when a Community Payback Order is imposed on a 16-17 year old offender. In 2007-08, 387 Community Service Orders, which are restricted to the carrying out of unpaid work, were imposed on offenders of this age group. On the basis of a unit cost of £1,229 per supervision requirement an additional £475,623 will be needed for this purpose.

Electronic Monitoring for breach

691. In dealing with breach of a Community Payback Order courts will have the option of imposing an electronic monitoring requirement. This will result in additional costs beyond those currently being incurred.

692. The average length of an electronic monitoring condition when applied to a probation order amounts to 5.3 months. Approximately 13% of community penalties, where a breach application is made, are dealt with by revocation of the order and imposition of a custodial sentence. This equates to 870 offenders per year. The intention is for an electronic monitoring requirement to be added to an order in appropriate cases, where a custodial term might otherwise have been imposed, although there is a possibility of electronic monitoring also being applied in other cases. There is no available data on the extent to which courts might use the electronic monitoring option in dealing with breach and we are therefore providing figures based on assumptions of a 25% or 50% usage (as compared with custody) plus a 10% displacement in respect of other cases. This would result in additional costs for the electronic monitoring contract of £728,488 and £1,725,633 respectively. For local authorities there would be additional costs in preparing reports of £21,800 and £43,500 and because a supervision requirement is mandatory where an electronic monitoring condition has been applied further costs of £41,610 and £82,650 respectively. For the Scottish Court Service we estimate additional costs of £80,510 and £116,532 for additional diets to consider electronic monitoring reports.

693. The additional costs which will be incurred in delivering Community Payback Orders assuming no volume increases is summarised below:

Cost of introduction of Community Payback Orders assuming no change in use (all figures in £m)		
	Recurring costs	Non-recurring costs
Review hearing reports	0.900	0.000
16-17 year olds	0.476	0.000
Other costs	0.095	0.000
Criminal Justice Social Work Costs	1.471	0.000
Judicial salaries	0.162	0.000
SCS running costs	0.045	0.000

Additional diets	0.098	0.000
IT development	0.000	0.050
Scottish Court Services Costs	0.305	0.050
Electronic Monitoring Costs	1.227	0.000
Total Costs	3.430	0.050

Volume Increases

694. It is difficult to forecast the extent to which courts might make increased use of the new order compared with existing sentences and against the backdrop of the presumption against the use of short term custodial sentences of six months or less. Over the past 5 years the annual rate of increase of numbers of probation orders, for example, has been 2.6%. We are adopting assumptions of a 10% and 20% increase in overall volumes.

10% assumption

695. Before a Community Payback Order can be imposed a court requires to have access to a report on the offender prepared by the local authority. The unit cost of these reports, known as Social Enquiry Reports, is estimated at £250. A 10% increase in orders would therefore require an additional 1,939 reports to be prepared at a cost of £484,750.

696. We estimate the additional costs, including those of the additional Social Enquiry Reports, which will be incurred by local authorities if a 10% increase were to occur, at £4,778,000. This sum reflects the impact of a 10% increase on current expenditure on the existing community penalties and requirements, which will be replaced by the new order. For the electronic monitoring contractor there would be additional costs of £122,761 and Scottish Courts Service £30,552. In all instances these would be additional to the additional costs identified in the table at paragraph 694.

20% assumption

697. A 20% increase would lead to increased costs for local authorities of £9,538,000, £245,522 for the electronic monitoring contractor and £55,000 for the Scottish Courts Service. These would be further to the additional costs set out in paragraph 693.

COSTS ON LOCAL AUTHORITIES

698. The additional costs, which will be incurred by local authorities, will be reimbursed by the Scottish Administration through the ringfenced funding arrangements for criminal justice social work.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

699. The costs of delivering the electronic monitoring requirements will be covered by a revised commercial contract between the Scottish Government and the electronic monitoring contractor.

Summary

Sections 14, 17 and 20 - Community sentence orders/Presumption against short periods of imprisonment or detention/Reports about supervised persons (all figures in £m)						
	2010/11 - Recurring costs assuming 10% workload increase	2010/11 - Recurring costs assuming 20% workload increase	2010/11 - Non- recurring costs	2011/12 - Recurring costs assuming 10% workload increase	2011/12 - Recurring costs assuming 20% workload increase	2011/12 - Non- recurring costs
Additional orders	2.767	5.534	0.000	2.767	5.534	0.000
Social enquiry reports	0.485	0.970	0.000	0.485	0.970	0.000
Review hearing reports	0.990	1.080	0.000	0.990	1.080	0.000
Requirements	1.380	2.740	0.000	1.380	2.740	0.000
16-17 year olds	0.523	0.571	0.000	0.523	0.571	0.000
Other costs	0.104	0.114	0.000	0.104	0.114	0.000
Criminal Justice Social Work costs	6.249	11.009	0.000	6.249	11.009	0.000
Judicial salaries	0.180	0.190	0.000	0.180	0.190	0.000
SCS running costs	0.050	0.050	0.000	0.050	0.050	0.000
Additional diets	0.110	0.120	0.000	0.110	0.120	0.000
IT development	0.000	0.000	0.050	0.000	0.000	0.000
Reasons to be recorded where custodial sentence of 6 months or less	0.298	0.264	0.000	0.298	0.264	0.000
Scottish Court Service costs	0.638	0.624	0.050	0.638	0.624	0.000

Electronic Monitoring costs	1.350	1.470	0.000	1.350	1.470	0.000
Total costs	8.237	13.103	0.050	8.237	13.103	0.000

SECTIONS 25-28 – SERIOUS ORGANISED CRIME

SECTION 25 – INVOLVEMENT IN SERIOUS ORGANISED CRIME

700. This should not involve many cases which would not currently be prosecuted under an existing offence. We anticipate around 2 new cases per year. Our figures are based on 2 cases per year in High Court proceedings, prosecution and prison costs. The average High Court costs are around £6,000 and the prosecution costs are £19,000. The average cost of imprisonment for one offender is £25,000 per year.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

701. The anticipated additional costs for the Scottish Court Service is £12,000 and for the Crown Office is £38,000 which is based on 2 cases at the High Court per year. The anticipated additional cost for the Scottish Prison Service is £80,000 in a year which is based on 2 persons imprisoned for an average of 4 years (where the individual is released at the half way point of sentence).

COSTS ON LOCAL AUTHORITIES

702. We do not anticipate any additional costs on local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

703. We do not anticipate any additional costs on other bodies, individuals or businesses.

Summary

Section 25 - Involvement in serious organised crime (all figures in £m)						
2010/11		2011/12		Eventual recurring costs	Total Non-recurring costs	Annual savings
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs			
0.130	0.000	0.210	0.000	0.210	0.000	0.000

SECTION 26 - OFFENCES AGGRAVATED BY CONNECTION WITH SERIOUS ORGANISED CRIME

704. Schedule 4 to the Proceeds of Crime Act 2002 sets out the range of offences that are likely to attract the statutory aggravation. The bulk of convictions (around 800 a year) are under sections 4(3)(b) and 5(3) of the Misuse of Drugs Act 1971 and we expect these would be the offences the aggravation would be linked to. This will not involve any cases which would not

currently be prosecuted under an existing offence. There will, therefore, be no extra court or prosecution costs.

705. In 2006-2007 there were 663 people convicted under section 4(3)(b) of the Misuse of Drugs Act 1971 (to be concerned in the supply of a controlled drug) who received an average sentence of 704 days. If 50% of this number receive an additional 20% added to their sentence for aggravation 330 individuals would receive an average sentence of 844 days with an additional 140 days, of which 70 will be served in custody. The average daily cost of imprisonment is £109 which gives a total of £2.5m.

706. In 2006-2007 144 people were convicted under section 5(3) of the Misuse of Drugs Act 1971 (an offence for a person to have a controlled drug in his possession with intent to supply) who received an average sentence of 292 days. If 50% of this number receive an additional 20% added to their sentence for aggravation. 72 individuals would receive an average sentence of 350 days with an additional 58 days, of which 29 are served in custody. The average daily cost of imprisonment is £109 which gives a total of £227,000.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

707. The estimated additional costs for the Scottish Prison Service is around £2.7m per year which is based on 330 individuals receiving an additional 70 days imprisonment for offences under section 4(3)(b) and 72 individuals receiving an additional 29 days in custody for section 5(3). There will be non-recurring costs of £5,000 in amending Scottish Court Service (SCS) IT systems to record the new aggravation. There will also be running costs of £18,000 in recording the aggravations.

COSTS ON LOCAL AUTHORITIES

708. We do not anticipate any additional costs on local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

709. We do not anticipate any additional costs on other bodies, individuals or businesses.

Summary

Section 26 – Offences aggravated by connection with serious organised crime (all figures in £m)						
2010/11		2011/12		Eventual recurring costs	Total Non-recurring costs	Annual savings
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs			
2.748	0.005	2.748	0.000	2.748	0.000	0.000

SECTION 27 - DIRECTING SERIOUS ORGANISED CRIME

710. The number of cases expected is low and we anticipate an average of 2 cases per year. These cases are likely to be at High Court level and the average cost of the court procedure is £25,000 per case: the average court costs being £6,000 and the average prosecution costs being £19,000.

711. The average cost of imprisonment is £40,000 per year. This figure is used for illustrative purposes only as it is not the marginal cost of imprisoning an offender for one year (which is substantially lower).

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

712. On the basis of 2 cases in the High Court each year the anticipated additional costs for the Scottish Court Service is £12,000 and the Crown Office is £38,000. The anticipated additional cost for the Scottish Prison Service is around £80,000 in a year, rising to £440,000 in year 5 (assuming individuals are sentenced to 7 years and are released at the 2/3 point of their sentence).

COSTS ON LOCAL AUTHORITIES

713. We do not anticipate any additional costs on local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

714. We do not anticipate any additional costs on other bodies, individuals or businesses.

Summary

Section 27 – Directing serious organised crime (all figures in £m)						
2010/11		2011/12		Eventual recurring costs	Total Non-recurring costs	Annual savings
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs			
0.130	0.000	0.210	0.000	0.566	0.000	0.000

SECTION 28 - FAILURE TO REPORT SERIOUS ORGANISED CRIME

715. The number of cases expected is low and we anticipate an average of 2 cases per year. These cases are likely to be at High Court level and the average cost of the court procedure is £25,000 per case: the average court costs being £6,000 and the average prosecution costs being £19,000. The average cost of imprisonment is £40,000 per year.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

716. The anticipated additional costs for the Scottish Court Service is £12,000 and for the Crown Office is £38,000 which is based on 2 cases at the High Court per year. The anticipated additional cost for the Scottish Prison Service is £80,000 which is based on 2 persons imprisoned for an average of 2 years (and where the individuals are released at the half way point of sentence).

COSTS ON LOCAL AUTHORITIES

717. We do not anticipate any additional costs on local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

718. We do not anticipate any additional costs on other bodies, individuals or businesses.

Summary

Section 28 - Failure to report serious organised crime (all figures in £m)						
2010/11		2011/12		Eventual recurring costs	Total Non-recurring costs	Annual savings
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs			
0.130	0.000	0.130	0.000	0.130	0.000	0.000

Overall summary (Serious organised crime)

Sections 25 to 28 – serious organised crime offences (all figures in £m)							
	2010/11	2010/11	2011/12	2011/12	Eventual recurring costs	Total Non-recurring costs	Annual savings
	Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs			
Section 25	0.130	0.000	0.210	0.000	0.210	0.000	0.000
Section 26	2.748	0.005	2.748	0.000	2.748	0.005	0.000
Section 27	0.130	0.000	0.210	0.000	0.566	0.000	0.000
Section 28	0.130	0.000	0.130	0.000	0.130	0.000	0.000
Total costs	3.138	0.005	3.298	0.000	3.654	0.005	0.000

SECTIONS 85-116 - DISCLOSURE

COSTS ON THE SCOTTISH ADMINISTRATION - OVERVIEW

Police Service

719. As a result of Lord Coulsfield's review, his recommendations, and in anticipation of the legislation, ACPOS established a steering group, implementation team and a number of working groups who examined practices and procedures within all the affected policing business areas; Criminal Justice, Crime Investigation, Sensitive and Intelligence material, Professional Standards, Forensics, Records Management, and Training. Additional costs to take this forward have already been spent and it is anticipated, will continue to accrue until at least the legislation comes into force.

720. In addition, to ensure that the Scottish Police Service is in a position to be compliant with their revelation and disclosure obligations prior to and after legislation is introduced a training strategy is being developed (Lord Coulsfield recommendation) to train staff on the principles and changes to practices and procedures that will require to be adopted as a result of the forthcoming legislation. It is estimated that approx 21,000 police officers and staff will require differing levels of training, dependant on their role (with additional costs for training materials).

721. In order to estimate the future expenditure likely to be incurred by the Scottish Police Service after the implementation of legislation covering Criminal Disclosure the following methodology was used.

Operational Policing after Legislation Implementation

722. When investigating a crime or offence and to subsequently report the circumstances to COPFS, police officers will as a result of new practices and procedures to be adopted spend additional time recording, reviewing, assessing and revealing all relevant material to COPFS to comply with their legislative requirements.

723. Dependant on the complexity, length of time, volume of material generated during an investigation, each enquiry and subsequent case reported to COPFS will determine the varying degrees of additional time spent recording, reviewing, assessing and revealing relevant material. Another contributing factor is whether the prosecution is dealt with in the summary or solemn courts, as the proposed procedures to be adopted for solemn cases are far more time consuming. It was therefore felt necessary to look at, and differentiate between investigations and prosecutions in both these areas.

724. In addition, it was felt necessary to break down the length of additional time spent conducting these processes within the solemn arena. This has been split into 2 distinct areas; Investigations which are conducted using HOLMES2/MIRSAP (manual incident rooms), usually only used in only the most serious of investigations such as murders or organised crime, and non HOLMES2/MIRSAP investigations.

725. These issues, whilst extremely difficult to quantify, have been explored using statistical information from the Scottish Government and COPFS along with operational policing data on

the deployment of HOLMES 2 incident rooms across the 8 Scottish Police forces. Research was also undertaken in England on the deployment of Disclosure officers and time spent by officers on disclosure duties.

726. Excluded in the considerations are investigations where a report has been submitted to COPFS and which has resulted in either COPFS applying a direct measure or taking no proceedings. The police will have still undertaken their responsibilities in these instances. Similarly, in major crime investigations or large scale intelligence led operations, which do not come to a successful conclusion, a considerable amount of resource and time may have been spent on recording, reviewing and assessment of material for revelation purposes. Also, for HOLMES 2 major crime investigations it is relatively common (identified through research in England and Wales) for multiple officers and intelligence officers to be deployed in the disclosure process.

Crown Office and Procurator Fiscal Service

727. Since the Privy Council decisions in *Holland* and *Sinclair* in 2005 the COPFS has had to develop much more detailed procedures in relation to disclosure, all of which has placed a substantial additional financial burden on the Crown Office and Procurator Fiscal Service (COPFS).

728. These detailed procedures have required staff to carry out a great deal of additional work that it did previously require to do, e.g. reconciliation in all High Court cases (checking that the Crown has received all statements submitted by the police and then ensuring that they have all been disclosed); sending out statements for all witnesses in all cases placed on petition or where the accused has pled not guilty (staffing costs to process and postage costs of sending these out); obtaining criminal history records for all witnesses (something that pre- *Holland* the COPFS did not obtain); considering statements and other materials to ensure that no sensitive irrelevant material about witnesses was disclosed in contravention of articles 2 & 8 of the ECHR; providing all of this new information to the defence; providing summaries of evidence in all summary prosecutions.

729. Many of the provisions to be contained in the Bill and in the associated Statutory Code of Practice, while not necessarily imposing additional work on COPFS, give these new procedures that were developed by the Crown a statutory basis.

730. In order to assess the additional costs over and above the substantial additional financial burden imposed by *Holland* and *Sinclair*, it is necessary to first consider where additional costs to COPFS might arise. In order to do this, the following questions were addressed:

- What, if any, IT changes are required as a result of the new provisions;
- What training requirements are necessary for staff that would be additional to current training provided?
- What will the Bill introduce which is new to the COPFS?

IT changes

731. On considering the proposed statutory disclosure regime, the principle IT changes will be required in relation to the transmission and completion of disclosure schedules in solemn cases.

Training

732. As a result of the changes to the disclosure regime the following one-off training will require to be given to staff:

- All staff (legal, administrative and precognition) will require to receive training on the basis changes to the system brought about by the legislation;
- All staff involved in solemn work (legal and precognition) will need to attend training on how to use and complete schedules.

733. As a result of the legislation, existing mandatory rolling-training courses will need to be updated. As such courses are always under review, it is anticipated that the additional costs of updating the mandatory courses will be negligible.

What's new in the legislation that might incur additional costs?

734. COPFS has estimated that the principal additional costs will be in using a system of schedules in all solemn cases.

735. It is anticipated that the creation of a new offence of misuse of disclosure material would not incur any additional costs as the number of such offences is likely to be minimal and would be offset against the savings made to the COPFS by no longer requiring to prepare protective orders prior to disclosure of certain evidence to the unrepresented accused (it should also be noted that such orders have been rare to date).

736. It is anticipated that the creation of the PII system will have minimal additional costs for the COPFS. This is based on the fact that, although there is currently no statutory scheme of public interest immunity, the Crown does still, at present, have to consider public interest immunity issues of which there have been few to date.

737. Although it is possible that the system of schedules will result in an increased number of defence applications to the court for additional disclosure, it is not possible at this stage to estimate the number of these. Accordingly, it is not possible to estimate the additional costs to the COPFS of this part of the new regime.

Scottish Court Service

738. It will only be with the detail of both primary and secondary legislation of court hearings and proceedings that an exact estimation of costs for the Disclosure provisions can be made. There is no indication of the numbers of cases likely to occur at each stage of the proceedings so only a general estimation of costs per hearing can be made.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION – DETAILS

Scottish Police Service - Operational Policing

739. The period of comparison for this estimate is the fiscal year 2007/08 and is subdivided into **Summary** and **Solemn** procedure via the reporting of cases to COPFS. The Scottish Police service recorded 385,509 Crimes and 571,881 Offences during the fiscal year 2007/08 with a total of 306,770 crimes being reported to COPFS.

Fiscal Year 2007/08	
District Court	39,733
Sheriff Court	80,283
Total Court Disposals	120,016

740. Behind every Standard Prosecution Report (SPR) submitted to COPFS, during the investigation and case preparation phase an officer will be required to spend additional time on recording, reviewing and assessing all material that has been obtained or generated by the investigation to ensure that all relevant material is identified and revealed to COPFS.

741. There is a potential that through the summary justice reform program that there will be a reduction in the number of cases submitted to COPFS and that more fixed penalties will be issued. This may reduce some of the additional time spent on revelation and disclosure however as there is currently no data available it is not viable to estimate any savings at this time.

742. In Solemn cases the level of recording, reviewing, assessing and revelation will significantly increase as a result of new practices and procedures to be adopted also the volume of material generated is significantly greater than in summary cases. Dedicated officer/s will be deployed in major crime investigation to deal solely with the new legal responsibilities and during an average year approximately 400 investigations are conducted throughout Scotland using HOLMES 2 and MIRSAP administration systems.

Fiscal Year 2007/08	
Sheriff & Jury	4,700
High Court	764
Total Court Disposals	5,464

HOLMES 2 and MIRSAP Investigations

743. Police forces anticipate having to dedicate a total of 50 officers to disclosure duties. Chief Constables will wish to maintain capacity to investigate Serious and Organised Crime and will need to consider how this could best be achieved. This could be through recruitment of suitable police support staff to act as Disclosure Reviewing Officers which would reduce the additional costs involved:

50 officers @ £44,000 per annum = £2,200,000

Non Holmes2/MISRAP Investigations

744. Detective officers will routinely be required to dedicate significant time to meeting disclosure requirements for serious crimes and offences.

Training

745. At the present time all Scottish forces are undertaking an increased period of recruitment and therefore the initial training courses delivered at the Scottish Police College, Junior Division have been amended to provide an awareness of Criminal Disclosure prior to the implementation of the full Criminal disclosure process. All training packages delivered within the Junior Division have been reviewed and “disclosure proofed” as part of the normal ongoing review processes employed by the Scottish Police College. Any future training packages, although likely to incur initial development costs will ultimately form part of the normal training curriculum with the cost implications being absorbed.

746. The police figures total £5.3m for set up and training. However the majority of costs (£4m for training of police officers) will be incurred in 2009-2010 in preparation for the implementation of disclosure, so only £1.3m has been included as a non-recurring cost for training, with the possibility of a small element of recurring cost.

Disclosure - Police (all figures in £m)	
Police officer time on disclosure duties	2.2
Training	1.3
Total costs	3.5

Scottish Police Services Authority

Forensic Services

747. SPSA Forensic Services estimate that all staff will require some form of training to ensure disclosure protocols are properly understood and adhered to.

Disclosure – SPSA training costs (all figures in £m)	
Training Staff Costs	Estimated cost
Total frontline staff affected = 427. This excludes managers and admin staff. Estimated no of days training required = 2 Total Cost (based on average rates)	0.110

Training Non Staff Costs	
Assumption is people would be trained on site or at the Scottish Police College to minimise non staff costs. As a contingency though it would be prudent to assume some sessions will need to be arranged off-site and some level of cost associated with travel and overnight stays. This is assumed to be 10% of staff costs.	0.011
Training Development Costs	
Development of training package and materials over a period of 6 weeks for 1 trainer	0.005
Production of training materials (printing etc.)	0.005
Delivery of training by 1 trainer, estimated to take 3 months full time	0.010
Non Staff – travel & subsistence for trainer	0.002
Total costs	0.143

Administration

748. There will be an impact on admin and potentially scientific resources at each of the SPSA service centres. The SPSA estimate is that this will amount to around 1 person at each centre and a central co-ordinator.

749. This would cost in the region of £150,000 assuming 4 Assistant Scientist posts, 1 based in each laboratory (£110,000), and the co-ordinator post pitched around scientist grade, who would be used to ensure compliance with disclosure protocols and to manage cases across service areas as a single point of contact for Police and COPFS (£40,000).

Defence Access

750. Where this occurs SPSA would look to minimise the cost impact but would have to accept that, where access is necessary there will need to be some level of cost incurred, for example it would be necessary for those seeking access to be accompanied throughout the period of their visits. This is an unknown and would vary according to the cases being reviewed. Current experience suggests we would require an additional two people to supplement the main disclosure posts and provide resilience in periods of absence or during major inquiries. This would cost around £55,000 for two assistant posts. Some of the cost of this could be recovered by charging defence teams for access at an hourly rate if this was seen as acceptable. This would need to be explored further though.

751. All SPSA estimates are based on rates of pay this year (2008-09) and will likely increase marginally over time.

Summary

Disclosure - SPSA costs (all figures in £m)	
Training	0.143
Administration	0.150
Access	0.055
Total costs	0.398

Scottish Crime Drug Enforcement Agency (SCDEA)

752. In relation to costs for training, this is incorporated in the police costings. The SCDEA is charged with progressing the investigation of serious and organised crime on behalf of the communities of Scotland and the Scottish Police service and as such all enquiries are deemed to have the potential to be prosecuted in either the High Court or Sheriff and Jury. As such it has been estimated that with the advent of disclosure there will be an impact on already stretched resources which it is assessed will equate to 10 persons being actively engaged with the management of Criminal Disclosure throughout the Agency. This will cover all areas of areas of Agency activity including Operations, Intelligence, eCrime, Scottish Money Laundering Unit and the Technical Support Unit and others at the 4 sites.

753. A decision as to whether the role of Criminal Disclosure Officer is performed by a Police Officer or a member of Police Staff has yet to be clarified and as such at this time associated staffing costs have yet to be determined.

Summary

Disclosure - SCDEA costs (all figures in £m)	
Police Officers undertake role of Criminal Disclosure Officer	$0.065 \times 10 = 0.650$
Field Support Officer undertake role of Criminal Disclosure Officer	$0.034 \times 10 = 0.340$
Expected total costs (average of two possible figures)	0.495

Crown Office and Procurator Fiscal Service

IT Costs

754. Although discussions are still at a very preliminary stage on how and the format in which schedules will be transmitted between the police and COPFS, it is estimated that the development costs for making the necessary IT changes could be £200,000.

Training

755. All staff (legal, administrative and precognition) will require to receive training on the basis changes to the system brought about by the legislation. It is anticipated that this could be done through a basic training session delivered by District Fiscals which is a relatively straightforward process. It may, however, be necessary to also conduct a ½ day training event for all legal staff at the Scottish Prosecution College to ensure that the implications of the Act for COPFS are fully understood particularly in relation to public interest immunity, misuse of disclosure material, access to witness statements etc. If so, it is anticipated that the cost to COPFS for such a course could be £15-20,000 taking into account Prosecution College costs, travel and subsistence and any essential backfill.

756. All staff involved in solemn work (legal and precognition) will need to attend training on how to use and complete schedules. Based on the training required on this in England and Wales, it is likely that a one day course at the Scottish Prosecution College for all legal and precognition staff will be required and the cost to COPFS for such a course could be about £50-£60,000 taking into account Prosecution College costs, travel and subsistence and any essential backfill.

757. Accordingly, the costs for training are estimated as follows:

Disclosure – COPFS training costs (all figures in £m)	
½ day training session for all legal members of staff (average expected costs)	0.018
Full day training session of all legal and precognition staff (average expected costs)	0.055
Total costs (average expected costs)	0.073

Completion of schedules in solemn cases

758. The following assumptions are being made:

- At present the average time spent on reconciliation per High Court case is 3 hours;
- The time required to consider and complete a schedule will be approx double the length of time required to complete the current reconciliation process adopted in High Court cases (based on the fact that the schedules will list all relevant information not just statements and productions and the process will include

considering material that has not actually been submitted). Accordingly it is assumed that 6 hours will be spent on the scheduling process per case;

- There will be an estimated 4700 Sheriff and Jury cases and 764 High Court cases per year based on 2007/2008 statistics;
- In High Court cases, therefore, 4,584 hours per year will be spent on the scheduling process. However, 2,292 hours of that would have been spent on the old reconciliation process which will be replaced by schedules. Accordingly, for High Court cases, the additional time spent on schedules will be 2,292 hours;
- For Sheriff and Jury cases the average time spent on scheduling will be 28,200 hours;
- Accordingly, it is assumed that completion of schedules will take an average of 30,492 additional hours work for COPFS staff;
- Consideration of schedules will be undertaken by the precognoscer;
- In the majority of cases, the precognoscer will be a Band D member of staff;
- The average hourly rate for a Band D member of staff is £11.70.

Disclosure - COPFS costs for completing the schedule (all figures in £m)	
For sheriff and jury cases	0.0000117 x 28200 hours = 0.330
For High Court cases	0.0000117 x 2292 hours = 0.027
Total costs	0.357

Review of Disclosure on receipt of mandatory Defence Statements in Solemn Proceedings

759. The following assumptions are being made:

- It is anticipated that the average time taken to review disclosure in High Court cases following receipt of defence statements will be 6 hours.
- The anticipated time taken to review disclosure in Sheriff and Jury cases following receipt of defence statements will be 2 hours.
- There will be an estimated 4700 Sheriff and Jury cases and 764 High Court cases per year based on 2007/2008 statistics.
- In High Court cases, therefore, 4584 hours per year will be spent reviewing disclosure following receipt of defence statements.
- For Sheriff and Jury cases, 9400 hours will be spent on the same reviewing process.
- Accordingly, it is assumed that reviewing disclosure following receipt of mandatory defence statements in solemn proceedings will take an average of 13,984 additional hours work for COPFS staff.

These documents relate to the Criminal Justice and Licensing (Scotland) Bill (SP Bill 24) as introduced in the Scottish Parliament on 5 March 2009

- The reviewing process will be undertaken by the precognoser.
- In the majority of cases, the precognoser will be a Band D member of staff.
- The average hourly rate for a Band D member of staff is £11.70.

Disclosure - mandatory Defence Statements in Solemn proceedings (all figures in £m)	
For sheriff and jury cases	£11.70 x 9400 = 0.110
For High Court cases	£11.70 x 4584 = 0.054
Total costs	0.164

760. Total Crown Office costs amount to:

Disclosure – total COPFS costs (all figures in £m)	
Training	0.073
Completing the schedule	0.357
Mandatory Defence Statements	0.164
Total costs	0.594

Scottish Court Service

761. There are a number of areas in the provisions which are likely to create additional court hearings which are estimated as follows:-

Disclosure – total Scottish Court Service (all figures in £m)			
	Estimates of numbers	Per 100 cases	Total
General			
Mandatory Defence Statements	Estimate 4200 cases at preliminary hearing/first diet @£20 per case	0.002	0.084

These documents relate to the Criminal Justice and Licensing (Scotland) Bill (SP Bill 24) as introduced in the Scottish Parliament on 5 March 2009

Adjournment to allow further time to the Crown where a Defence statement is only lodged shortly prior to trial	Hearing on motion for further time possible in High court or sheriff court. Estimate of 10 cases per annum.	0.006	0.001
Application for disclosure of item of material in schedule (Solemn only)	Hearing on application for disclosure per application possible in High court or sheriff court. Estimate of 50 cases per annum.	0.006	0.003
Application to court to pass on disclosed material which would otherwise be an offence – likely to be very rare			
Application to court by Defence for additional disclosure following lodging of defence statement			
Appeals against any decision made in any application as detailed above	Appeals will be very rare (less than 1 a year expected)	0.207	0.001
New offence of misuse of disclosed material (Solemn and summary)	SCS estimate limited number of cases – 10 for purposes of this financial memorandum with 2 in High Court (HC), 4 in Sheriff and Jury (S&J) courts and 4 cases in Justice of Peace (JP) courts.	HC – 0.600 S&J – 0.147 JP – 0.026	HC - 0.001 S&J - 0.006 JP – 0.000
Public Immunity Interest Hearings			
Crown application to court for hearing. Separate application for each item of information. Hearing necessary with a Special Counsel being appointed in some cases.	Hearing on application for non disclosure for PII reasons per application – estimated 10 cases with 5 cases in High Court and 5 cases in Sheriff and Jury Court		
	(High Court)	0.068 (per 50 cases)	0.007
	(Sheriff and Jury Court)	0.052 (per 50 cases)	0.005
Appointment of Special Counsel		(Cost of special counsel <u>not</u> budgeted for by SCS at this stage.)	N/A

These documents relate to the Criminal Justice and Licensing (Scotland) Bill (SP Bill 24) as introduced in the Scottish Parliament on 5 March 2009

Point of review of decision to prohibit disclosure at some stage in proceedings. (May also be set up as special court hearing) Accused/ special counsel may apply for review at any stage prior to conviction/ acquittal or following conviction for the purposes of considering appeal / review by SCCRC or during appeal proceedings. Considered by trial judge at hearing	Hearing on review of non disclosure for PII reasons within existing court proceedings – estimate of 20 cases. (High Court)	0.014	0.003
Appeal against any PII decision (Solemn and summary)	Based on 3 bench appeal hearings with estimated 20 cases.	0.207	0.041
Additional provisions in Rules for court to ensure safe and secure confidential storage of minutes of proceedings etc. and restricted access	‘Developed vetting’ per member of staff. Fitting of combination lock to provide ‘secure storage’ per court plus Securicor costs (11 courts in total)		Estimates based on application of Terrorism Act with 15 people vetted. 0.005 0.003
Requirement for Code of Practice : Following from Crown Disclosure manual			
Additional appeals to High Court against refusal of ‘protective order’ by Crown Bill of Advocation	Estimate of 2 cases.	0.207	0.004
Total costs			0.164

762. There may be an additional one-off cost required for IT upgrades to deal with additional hearings and applications, both within and outwith normal criminal case progression. This has an estimated cost of £100,000.

Scottish Legal Aid Board

763. The introduction of Mandatory Defence Statements will impact on the Scottish Legal Aid Board as per the table below.

Scottish Legal Aid Board – Estimated cost of introduction of Mandatory Defence Statements			
Court	No. of Cases	Costs	Total (all figures in £m)
High Court	1,005*	This equates to a fee of £125 plus VAT (£143.75) being payable to counsel for the drafting and lodging of the mandatory defence statement. We would seek to ensure that the fee allowable will also encompass any pre-trial statement which may require to be submitted. The “drafting” fee is similar to sums prescribed within the legal aid tables for written work required as part of the proper conduct of the case. <i>It is assumed that in the High Court counsel will be expected to complete this form.</i>	0.145
Sheriff Court	6,530*	This equates to a fee on average of circa £50 plus VAT (£57.50) payable to the solicitor. This is arrived at using the increased legal aid rates which are to be introduced shortly. The fee is arrived at by assuming the average time required of a solicitor to complete the form will be circa 30 minutes plus lodging and intimation dues.	0.375
The number of solemn accused in year to March 2008 was 8,158. The difference between no. of cases and accused is $8,158 - 7,535 = 623$ We assume a fee of £57.50 per accused.			0.036
TOTAL			0.556

* Based on number of cases in year to March 2008 where indictments have been served in solemn cases. Some cases will have multiple accused.

764. The following assumptions have been made:

- The solemn figures above represent the number of cases in year to March 2008 where indictments have been served. The number of accused in these cases totalled 8,158.
- Where counsel completes the mandatory defence statement SLAB are of the view that there will be no additional costs payable to the solicitor on the basis that the statutory test of taxation is that you do not make payment for the same work twice. SLAB believe that there is likely to be additional work on the solicitors’ part quite separate from the framing of the statement. However, they are of the view these costs will be subsumed within the normal communications which take place between defence agent and counsel.
- Although sanction may be granted for counsel in the sheriff court we are of the view that given the stage at which the mandatory statement must be completed, the defence statement will be the responsibility of the nominated solicitor to complete.

- This costing is based on the 2007-08 current fee structures and general profile of criminal cases. The introduction of the mandatory defence statement assumes that there will be no material changes in solicitors' behaviour in the conduct of cases.

COSTS ON LOCAL AUTHORITIES

765. We do not anticipate any additional costs on local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

766. We do not anticipate any additional costs on other bodies, individuals and businesses.

Summary

Sections 85-116 - Disclosure (all figures in £m)							
	2010/11		2011/12				
	Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs	Eventual recurring costs	Total Non-recurring costs	Annual savings
Police	2.200	1.300 (training)	2.200	0.000	2.200	1.300	0.000
SPSA	0.205	0.143 (training)	0.205	0.000	0.205	0.143	0.000
SCDEA	0.495	0.000	0.495	0.000	0.495	0.000	0.000
SCS	0.164	0.100	0.164	0.000	0.164	0.100	0.000
COPFS	0.485	0.073 (training) 0.200 (IT costs)	0.485	0.000	0.485	0.273	0.000
SLAB	0.556	0.000	0.556	0.000	0.556	0.000	0.000
Total costs	4.105	1.816	4.105	0.000	4.105	1.816	0.000

SECTION 129 - SALE OF ALCOHOL TO PERSONS UNDER THE AGE OF 21 ETC.

767. The impact of the provisions on businesses has been assessed by drawing on alcohol sales data, survey data and population figures in order to estimate the effect of raising the minimum age of off-sales alcohol purchases from 18 to 21. It should be noted that the provisions do not require Licensing Boards to raise the age. Rather the provisions place a duty on them to consider the detrimental impact of off-sales to those under 21 years of age, with a view to considering whether a condition should be applied to some or all licences in their Board area requiring those purchasing off-sales alcohol to be 21 or over. The actual impact on business will depend on the extent to which Boards choose to establish such conditions and the extent to which purchasers switch to on-sales.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

768. We do not anticipate any additional costs on the Scottish Administration.

COSTS ON LOCAL AUTHORITIES

769. There is likely to be a marginal additional cost on Licensing Boards in considering the detrimental impact of under 21 off-sales as part of their policy statement. However, this is considered to be a small addition to the overall work of the Board and is unlikely to have any significant resource impact. Licensing Standards Officers (LSOs) would have a role in ensuring compliance with any conditions laid down by Boards in relation to raising the age of off-sales purchases to 21, however, such costs are again likely to be marginal as the condition would be one of many on licensed premises. The cost of running the licensing system, including the costs of LSOs, are generally recovered by Licensing Boards from fee income.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

770. The additional costs on individuals will be limited to those aged 18-20 who may be restricted as to whether, or where they may be able to purchase off-sales alcohol. The cost of a unit of alcohol in on-sales is approximately three times that of off-sales (£1.28 compared with 40p)³, so it reasonable to assume that those affected may reduce their total intake, or alternatively spend more on alcohol.

771. In terms of the impact on business of raising the age of off-sales purchases to 21, it is difficult to quantify the income that the industry derives from any particular age group. However, using data from the General Register Office for Scotland (GRO)⁴, Scottish Health Survey (SHeS)⁵ and the Nielsen Company⁶, it is possible to generate an estimate. The latest population data from GRO shows that in Scotland, 18–20 year olds make up approximately 5% of those currently legally allowed to buy alcohol. Table 1, from SHeS⁷, illustrates the percentage of this age group drinking and the mean number of units of alcohol reported consumed per week.

Table 1: adults (16+) drinking prevalence (per wk)

	Age													
	16-24		25-34		35-44		45-54		55-64		65-74		75+	
Gender	M	F	M	F	M	F	M	F	M	F	M	F	M	F
% drinking any alcohol	90	91	93	92	93	92	95	93	93	85	90	79	80	69
Mean no of units /wk	19.6	12.2	20	11.9	23	10.3	23.1	11.2	21.1	7.9	15.7	5.2	12.5	2.7

³ Data supplied to the Scottish Government by The Nielsen Company: <http://www.scotland.gov.uk/Topics/Health/health/Alcohol/resources/nielson-data>. 40p is the mean price per alcohol unit across all alcoholic drinks in the off trade (2007) quoted in Nielson data: by category of drink mean price per unit varied from 23p to 87p.

⁴ GRO: Estimated population by age and sex, Scotland: 30 June 2007, available at: <http://www.gro-scotland.gov.uk/statistics/publications-and-data/population-estimates/mid-2007-population-estimates-scotland/index.html>

⁵ Revised Alcohol Consumption Estimates from the 2003 Scottish Health Survey, Scottish Government, May 2008, available at: <http://www.scotland.gov.uk/Resource/Doc/229667/0062208.pdf>

⁶ Op cit, The Nielsen Company.

⁷ Op cit, SHeS

772. Analysis of the Nielson Company data suggests that, on average, 63% of alcohol (expressed as units of pure alcohol,) is consumed in the form of off sales purchases. Applying that to the available SHeS data results in a market share of approximately 3% of the off trade for 18–20 year olds. In terms of value, this equates to approximately £38m per annum using 40p/unit as the average cost of a unit of alcohol from off sales⁸.

773. Subject to paragraph 775, a ban on off sales would represent around £15m in lost sales revenue to businesses. The UK Government would also lose around £23m in lost VAT and alcohol duty.

774. If 18–20 yr olds were to be banned from purchasing alcohol from off sales, then it is reasonable to assume that there would be an increase in purchases as on sales trade. The average cost of a unit of alcohol in licensed premises is quoted as £1.28 in the Nielsen data set (2007). It is very difficult to estimate how many 18-20 year olds who previously purchased alcohol from off sales will, in future, purchase alcohol from on sales, but businesses and the UK Government are likely to recover a proportion of lost revenue in this way. If 18-20 year olds were to spend some of this £15m on other items subject to VAT, then the UK Government would, in part, still receive the VAT currently paid on off sales.

775. The figures provided represent the maximum estimated effect of the provisions. They assume that every Licensing Board introduces a ban on the off sale of alcohol to 18-20 year olds across their entire Board area. The loss of revenue to the off sales trade is equivalent to the estimate of the value of total purchases currently made by 18-20 yr olds.

Summary

Section 129 - Sale of alcohol to persons under the age of 21 etc. (all figures in £m)						
2010/11		2011/12		Eventual recurring costs	Total Non-recurring costs	Annual savings
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs			
38.000	0.000	38.000	0.000	38.000	0.000	0.000

CHAPTER 2:

PART 1 OF THE BILL - SENTENCING

SECTION 15 – NON-HARASSMENT ORDERS

776. Figures provided by the Scottish Court Service suggest that there is a relatively low number of non-harassment orders granted each year.

⁸ Op cit, The Nielsen Company.

777. Figures for the Sheriff Courts are

- 2006 = 24 case disposals
- 2007 = 23 case disposals
- 2008 = 29 case disposals

778. This data excludes High Court and District/Justice of the Peace courts and the figures may be an undercount due to some court disposals being recorded as “text disposals” for which the SCS cannot identify what the exact disposal was.

779. The Crown Office and Procurator Fiscal Service has indicated that it should not entail more hours of work for COPFS if the decision is made to apply for an NHO.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

780. Given the lack of concrete data on the “cost “ of a non-harassment order, it is difficult to provide figures for the impact of the changes in the Bill. As a relatively low number of NHOs are currently granted each year, it is estimated that an increase of even 100% in the number of applications would have a minimal cost impact on the police, COPFS and Scottish Court Service.

SECTION 16 - SHORT PERIODS OF DETENTION

781. The provisions increase the minimum custodial sentence that can be imposed by a court from 5 days to 15 days. In practice, courts very rarely impose such short sentences and therefore there will be no financial impact of these provisions.

SECTION 18 – AMENDMENTS OF CUSTODIAL AND SENTENCES AND WEAPONS ACT (SCOTLAND) 2007

782. The modifications to the Custodial Sentences and Weapons (Scotland) Act 2007 will put in place a more proportionate and effective system for the end to end management of offenders sentenced to imprisonment. These amendments will form part of the plan for delivering a comprehensive offender management structure as set out in the Scottish Government’s plan – “*Protecting Scotland’s Communities: Fair, Fast and Flexible Justice*”⁹ published on 17 December 2008.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

783. There are no direct cost implications of the amendments proposed to the Custodial Sentences and Weapons (Scotland) Act 2007. However the costs involved in implementing the Custodial Sentences and Weapons (Scotland) Act 2007 (as amended by the measures proposed in the Bill) and compared with the consequential costs of implementing the 2007 Act as enacted

⁹ <http://www.scotland.gov.uk/Publications/2008/12/16132605/0>

are given below. These are based on current assumptions and prisoner projections and show the (indicative) impact on applying the modified measures in measureable packages.

COSTS ON LOCAL AUTHORITIES

784. No additional costs will have to be met by local authorities. While Criminal Justice Social Work is delivered by local authorities, they would not require to incur additional costs from within their overall budgets since the Scottish Government will fully reimburse the Community Justice Authorities the cost of the community component of the new arrangements. There are no costs on other bodies, individuals or businesses.

Summary

785. The figures are based on estimated prison population projections for 2015/16, this is indicative at this stage of the full implementation of the Custodial Sentences and Weapons (Scotland) Act 2007 as amended by the Criminal Justice and Licensing (Scotland) Bill provisions. The Scottish Government has made it clear in Protecting Scotland's Communities Fair, Fast and Flexible Justice that subject to certain modifications, the Custodial Sentences and Weapons (Scotland) Act could provide the structure upon which to build a modern offender management regime for offenders who are sentenced to a period of imprisonment. For the purposes of the overall summary table of the financial impact of the Bill at paragraph 991, these indicative costs are excluded.

Implementation of Custodial And Sentences And Weapons Act 2007 as amended by section 18 of the Bill (all figures in £m)			
	Estimates for (Year 5 implementation)* Based on 9,600 prisoners		
	Full implementation	Combined sentence applied at 1 year	Combined sentence applied at 2 years
Scottish Prison Service			
Continued detention	16.000	16.000	13.000
Recall to custody	17.800	14.000	8.600
Risk Assessment	4.600	4.100	2.900
Escorting	3.800	3.400	2.400
Overall Scottish Prison Service costs	42.200	37.500	26.900
Criminal Justice Social Work (funded by Scottish Government)	6.100	5.400	3.900
Scottish Court Service			
Appeals	0.030	0.030	0.020
Reports - Judicial Salaries	1.100	1.000	0.700
Reports - running costs	0.100	0.100	0.100
Overall SCS costs	1.230	1.130	0.820

These documents relate to the Criminal Justice and Licensing (Scotland) Bill (SP Bill 24) as introduced in the Scottish Parliament on 5 March 2009

COPFS	0.000	0.000	0.000
Police	0.020	0.020	0.010
Parole Board			
Detaining in custody	0.400	0.400	0.300
Recalls	0.100	0.100	0.000
Overall Parole Board costs	0.500	0.500	0.300
Scottish Legal Aid Board	0.500	0.400	0.300
Electronic Monitoring	0.900	0.800	0.500
Total costs	51.450	45.750	32.730

SECTION 19 - EARLY REMOVAL OF CERTAIN SHORT-TERM PRISONERS FROM THE UNITED KINGDOM

786. The provisions will provide a discretionary power to Scottish Ministers to authorise the early removal of short term foreign national prisoners held in Scottish prisons, subject to certain conditions (including that the released prisoner leaves the UK).

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

787. There will no additional costs associated with the provisions. There may be some limited savings to the Scottish Prison Service as a result of the early removal of foreign prisoners from the UK before the end of their sentence. These savings will be ad hoc and depend on the number of suitable prisoners who fit the criteria for early removal. It is expected there will be only a very small number of cases each year that will fit the criteria. For the purposes of this financial memorandum, it is estimated that this will be 6 prisoners each year that will be removed from the country an average of 60 days before the end of their prison sentence.

788. This averages out in saving 360 days each year where a prison place will not be used (6 prisoners x 60 days). The average cost of keeping a person in prison is £40,000 per year and this will be the estimated saving to SPS each year.

COSTS ON LOCAL AUTHORITIES

789. None.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

790. None.

Section 19 - Early removal of certain short-term prisoners from the United Kingdom (all figures in £m)						
2010/11		2011/12				
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs	Eventual recurring costs	Total Non-recurring costs	Annual savings
0.000	0.000	0.000	0.000	0.000	0.000	0.040

SECTION 21 - EXTENDED SENTENCES FOR CERTAIN SEXUAL OFFENCES

791. Extended sentences are imposed by the courts on sex and violent offenders where they consider that additional supervision is necessary to protect the public from serious harm from the offender following release. During 2007/08 there were 73 offenders being supervised in the community on extended sentences.

792. It is difficult to estimate how many more offenders would receive an extended sentence because of the new provision which would allow an extended sentence to be imposed in cases such as a breach of the peace where the offence has a significant sexual element. As the 73 offenders on extended sentences will cover both sex and violent offences we would estimate no more than 5 additional extended sentences being imposed per annum as a result of the new provision in relation to offences with a significant sexual aspect.

793. Current figures suggest that the annual unit cost of delivering statutory supervision is approximately £3,200. The additional cost of supervising 5 extra offenders on extended sentences is therefore estimated at $£3,200 \times 5 = £16,000$.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

794. The additional costs would fall to the Scottish Government who provide direct funding (through section 27A of the Social Work (Scotland) Act 1968) to local authorities for delivery of community-based supervision of offenders by criminal justice social work services. From April 2007, funding has been directed to the Community Justice Authorities (CJAs) which have responsibility for distributing funds to constituent local authorities according to the area partnership plan.

COSTS ON LOCAL AUTHORITIES

795. Local authorities will be funded under the arrangements described in the previous paragraph.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

796. No other bodies will incur costs.

Summary

Section 21 - Extended sentences for certain sexual offences (all figures in £m)						
2010/11		2011/12		Eventual recurring costs	Total Non-recurring costs	Annual savings
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs			
0.016	0.000	0.016	0.000	0.016	0.000	0.000

SECTION 23 - OFFENCES AGGRAVATED BY RACIAL OR RELIGIOUS PREJUDICE

797. Statutory aggravations for offences motivated by prejudice relating to race and religion are already in place. Section 96 of the Crime and Disorder Act 1998 provides that the court shall, when it is libelled in an indictment or specified in a complaint, and, in either case, proved that an offence has been racially aggravated, take the aggravation into account in determining the appropriate sentence. Section 74 of the Criminal Justice (Scotland) Act 2003 provides that when it has been libelled in an indictment or specified in a complaint, and, in either case, proved that an offence has been aggravated by religious prejudice; the court must take the aggravation into account in determining the appropriate sentence.

798. In 2006-07, 1081 persons were proceeded against for offences with a religious and/or racial aggravation. Of those, 870 had a charge proved. However, the information on whether a religious or racial aggravation was included in the final conviction and what if any impact it had on the sentence is less robust and it is sometimes that case that the information as to whether the aggravation has been taken into account in the determination of the sentence is not recorded. The provisions in the Bill require that the court must state on conviction that the offence was racially or religiously aggravated, record the conviction in a way that shows that the offence was so aggravated, take the aggravation into account in determining the appropriate sentence, and state where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or otherwise, the reasons for there being no such difference.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

Police

799. There will be no new costs to the police. The provisions in the Bill do not create any new offences. Aggravations relating to race have been in place since 1998 and aggravations relating to religion have been in place since 2003. The police are already required to record these aggravations as part of a charge when a report is put forward to the Procurator Fiscal.

Crown Office and Procurator Fiscal Service

800. The Crown Office already produces racially or religiously aggravated charges on complaints or indictments so the provisions in the Bill will not place any new burden.

Scottish Court Service

801. The provisions in the Bill will have some cost implications for the Scottish Court Service, with the added administrative arrangements involved in taking account of the recording (and other) requirements. SCS estimates a one-off cost of £5,000 for IT development and modifications. Based on the most up-to-date figures (2006-2007) for the number of individuals in Scotland proceeded against in which a racial or religious aggravation was applied, it is estimated that ongoing annual administrative costs for the SCS will be in the region of £23,800.

Scottish Prison Service

802. The provisions in the Bill will not impact on the number of offenders convicted of an aggravated offence. As a result, there will be no new costs for the Scottish Prison Service.

COSTS ON LOCAL AUTHORITIES

803. No additional costs to local authorities are anticipated.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

804. There are no costs for other bodies or businesses.

Section 23 - Offences aggravated by racial or religious prejudice (all figures in £m)						
2010/11		2011/12		Eventual recurring costs	Total Non-recurring costs	Annual savings
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs			
0.024	0.005	0.024	0.000	0.024	0.005	0.000

SECTION 24 - VOLUNTARY INTOXICATION BY ALCOHOL: EFFECT IN SENTENCING

805. The provisions set out in statute that voluntary intoxication through alcohol is not a mitigating factor in the commission of an offence. This measure codifies in statute an approach that is already generally used. The implications could include some minor savings in court time as the provision will prevent defence agents even considering pleading mitigation of a sentence due to intoxication. Any savings would however be minimal, but are very difficult to estimate.

CHAPTER 3:

PART 2 OF THE BILL - CRIMINAL LAW

SECTION 29 – ARTICLES BANNED IN PRISON

806. Offenders convicted of an offence relating to mobile phones as a prohibited article under the provisions of the Bill could potentially spend longer in custody than they otherwise would, if

they are found guilty of the offence. It is difficult to estimate how many convictions may be imposed for the introduction or use of a personal communication device in prisons. The creation of a specific offence in relation to this matter progressed together with the introduction of signal blocking devices (mobile phone blockers) in prison grounds is intended to provide an effective deterrent to the introduction and use of mobile phones in prisons. We anticipate that only those individuals who are suspected of introducing, or attempting to introduce, a personal communication device and those who are suspected of having used a personal communication device for the purposes of running their criminal activities within the prison or intimidating witnesses or members of the public will be reported to the police for possible prosecution. Prisoners found in possession of a mobile phone would likely be dealt with through the internal disciplinary procedures that apply to prisoners under the Prison Rules, as possession of a prohibited article is a disciplinary offence.

807. There were approximately 800 mobile phones, or component parts of mobile phones, found in SPS prisons over the last 12 months. This figure includes all incidents involving all mobile phones, i.e. those thrown over the perimeter wall, those found in communal areas of the prison, those found in prisoners' property and those found on individual prisoners. Of the 800 mobile phone finds, 68 were found in the possession of a prisoner. Therefore, a total of 68 individuals could have been reported to the Police and considered for possible criminal prosecution had legislation been in place. Given that the Scottish Prison Service envisages most such instances being dealt with by way of a fine or internally under the Prison Rules, and drawing on experience from HM Prison Service for England and Wales, which has had similar legislative provisions in force 1 March 2008, it is estimated that there may be around 10 prosecutions leading to convictions each year for the new offence.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

Scottish Court Service/Crown Office and Procurator Fiscal Service

808. Given that it is expected that the majority of prisoners will continue to be dealt with by internal prison discipline and considering the very low levels of prosecutions in England and Wales, there are likely to be minimal cost implications the Crown. With around 10 prosecutions likely to be taken forward in the sheriff and jury courts, additional costs of £14,800 are likely to fall on the Scottish Court Service.

Scottish Prison Service

809. In relation to possible additional costs falling on the Scottish Prison Service, a successful conviction and custodial sentence could theoretically result in some upward pressure on the prison population. However, the low number of prosecutions anticipated makes estimating additional costs difficult. SPS estimates that the recurring annual cost per prisoner place, if additional capacity were required is £40,000. It is estimated that the average daily prison population may increase by 5 as a result of the provisions. This is calculated from 10 convictions each year, where the average sentence handed down is 1 year with time served in jail being 6 months. The theoretical cost (if additional prison capacity were needed) is £200,000.

COSTS ON LOCAL AUTHORITIES

810. We do not anticipate any additional costs on local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

811. We do not anticipate any additional costs on other bodies, individuals or businesses.

Section 29 – Articles banned in prison (all figures in £m)						
2010/11		2011/12		Eventual recurring costs	Total Non-recurring costs	Annual savings
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs			
0.215	0.000	0.215	0.000	0.215	0.000	0.000

SECTIONS 30 - SALE AND HIRE OF CROSSBOWS TO PERSONS UNDER 18

SECTION 31 - SALE AND HIRE OF KNIVES AND CERTAIN OTHER ARTICLES TO PERSONS UNDER 18

812. The costs of these proposals for police forces are likely to be minimal and will depend on the number of test purchases carried out and whether they are incorporated into any wider scheme of test purchasing for offensive weapons. It should be noted that it is unlikely that a test purchasing scheme would be carried out for crossbows alone. It is not possible to provide an estimate of the costs incurred by Scottish Police Forces for mounting test purchasing programmes, because these are absorbed within operational police budgets and any test purchasing would likely form part of a wider test purchasing scheme. There are no other costs.

SECTION 32 - CERTAIN SEXUAL OFFENCES BY NON-NATURAL PERSONS

813. The provisions will broaden the range of available disposals for a solemn court where an offence has been committed under sections 9-12 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (the “2005 Act”). The court will now be able to impose a financial penalty as well as, or instead of, a custodial penalty. In 2007/08, there was one offence recorded under sections 9-12 of the 2005 Act. For the purposes of this financial memorandum, a very minimal financial impact is estimated.

SECTION 33 - INDECENT IMAGES OF CHILDREN

814. These provisions clarify offences relating to possession of indecent photographs of children to include pseudo-photographs i.e. images which are derived from actual photographs but which do not appear to be photographs themselves. It is not known how widespread possession of pseudo-photographs is among individuals in Scotland; however as this material is likely to come to light as a result of investigations into child pornography already instigated no or very minimal additional costs are expected to be incurred.

SECTION 34 - EXTREME PORNOGRAPHY

815. These provisions create a new offence of possession of extreme forms of pornographic material and increase penalties for existing offences of publicly displaying, publishing, selling, distributing and possessing for gain obscene material which is or includes an extreme pornographic image. It is not known how widespread possession of this material is among individuals in Scotland. On the one hand, it has been an offence to publish or distribute in Scotland obscene material of this nature for a number of years. However, given the developments in technology, including the emergence of the internet, which have made the production and distribution of such material faster, more convenient and anonymous, there may be a significant base of consumers. The key factor governing cost implications will be the number of investigations and prosecutions. It is impossible to quantify this but it is not expected that there will be a large number as many cases liable to be prosecuted are likely to be those that come to light as a result of investigations in other areas, including investigations into indecent images of children. In 2006-07, 71 persons were proceeded against on charges relating to possession of indecent images of children. We would not expect as many persons to be proceeded against in relation to possession of extreme pornographic material as those offences relating to indecent images of children will continue to have a higher priority for the police. For the purposes of this financial memorandum we therefore estimate that an average of 5 persons will be proceeded against for this offence in each year. It is assumed that these cases will be tried in the sheriff court under summary procedure.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

816. In 2007 the Scottish Crime and Drug Enforcement Agency's National High Tech Crime Unit estimated that the police investigation costs relating to possession of indecent images of children were around £1,000 per case. We have assumed that the investigation costs will be similar for extreme pornography which gives an overall estimated cost of £5,000 for 5 cases. Crown Office's prosecution costs range from £199, where a section 76 plea is made, to £676 if the case goes to trial (based on Crown Office's average case costs for 2006-07). On the assumption that the cases are tried under summary procedure in the sheriff court the weighted average case cost would be £320 which gives an overall total of £1,600.

817. From the Scottish Legal Aid Board's 2006-2007 annual report the average criminal case cost for a sheriff court case is £825 which gives an overall total of £4,125.

818. Costs to the Scottish Court Service range from £93 where there is a plea at first diet to £1,360 if the case goes to trial based on Scottish Court Service average criminal case costs for 2006-2007. On the assumption that the cases are tried under summary procedure in the sheriff court the weighted average case cost would be £244 which gives an overall total of £1,220.

819. It is not known in what proportion of cases the court will opt to impose a prison sentence on conviction. The Scottish Prison Service calculates that the cost of 6 months in prison is approximately £20,000. On the assumption that one offender per year receives a prison sentence of 6 months, the total additional cost to the Scottish Prison Service would be £20,000 per year.

COSTS ON LOCAL AUTHORITIES

820. We do not anticipate any additional costs on local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

821. We do not anticipate any additional costs on other bodies, individuals or businesses.

Summary

Section 34 - Extreme pornography (all figures in £m)						
2010/11		2011/12		Eventual recurring costs	Total Non-recurring costs	Annual savings
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs			
0.027	0.000	0.027	0.000	0.027	0.000	0.000

SECTION 35 - PEOPLE TRAFFICKING

822. The extension to the territorial extent of human trafficking offences will have a minimal financial impact as it will affect extremely few cases each year (if any at all). Extending the jurisdiction of the sheriff court to deal with human trafficking offences will also have a minimal financial impact, with some limited savings possible through cases being heard at a lower level than otherwise would have been the case. For the purposes of this financial memorandum, a nil financial impact has been assumed given the likely extremely few cases these provisions will affect.

CHAPTER 4:

PART 3 OF THE BILL - CRIMINAL PROCEDURE

SECTION 38 – PROSECUTION OF CHILDREN

823. In the last 5 years, there has only been 1 prosecution of a child under the age of 12. The provisions will therefore have no material financial impact.

SECTION 40 - WITNESS STATEMENTS

SECTION 62 – WITNESS STATEMENTS: USE DURING TRIAL

COSTS ON THE SCOTTISH ADMINISTRATION

Crown Office and Procurator Fiscal Service

Sending Copies of statements to witnesses

824. The following assumptions are being made:

- Copies of statements will be provided by post;
- Only witnesses categorised as civilian witnesses will require copies of their statement;
- It is estimated that 162,490 civilian witnesses will be cited to give evidence per year, based on 2007/2008 statistics;
- Statements will be posted out first class, at a cost of £0.36 per letter;
- In each summary case, it will take a Band B member of staff an average of .5 hours to process the case and send out the statements;
- The average hourly rate for a Band B member of staff is £7.24;
- There will be an estimated 44,005 pleas of not guilty at pleading diet at Sheriff Summary level and at estimated 7119 pleas of not guilty at pleading diet at District/JP level, based on 2007/2008 statistics, giving an estimated 51,124 cases in which statements will be obtained;
- Of the estimated 51,124 trials per year, it is anticipated that 25% of these will involve police witnesses only, leaving at estimated 38,343 cases in which civilian statements will require to be processed;
- Thus it is anticipated that there will be 19,171.5 hours work per year processing these for summary cases;
- There will be an estimated 5,464 solemn cases per year in which witness statements will be provided to witnesses, again requiring 0.5 hours work per case;
- Thus it is anticipated that there will be 2,732 hours work per year processing these for solemn cases.

Postage:		£0.36 x 162,490	=	£58,496.40
Staffing costs:	Summary	£7.24 x 19,171.5	=	£138,801.66
	Solemn	£7.24 x 2,732	=	£18,779.68
		Total cost per year	=	£216,077.74

Note: It is stressed that the costs detailed above are the upper limit of what is anticipated as COPFS will continue to consider methods of carrying out the work that will reduce the financial burden, e.g. through making effective use of IT systems

Scottish Court Service

825. The general assumption is that copies of statements will be provided by post, however there may be the odd occasion where a court may adjourn to allow witnesses to read statement – this would be an exception as it is not recommended to have witnesses given statements on day of trial. If court adjourned to allow witnesses to read statements, the result would be a delay to proceedings in High Court or Sheriff Court. Estimated costs of such delays per 20 cases is £2,000.

COSTS ON LOCAL AUTHORITIES

826. We do not anticipate any additional costs on local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

827. We do not anticipate any additional costs on other bodies, individuals and businesses.

Section 40 - Witness statements							
Section 62 – Witness statements: use during trial (all figures in £m)							
	2010/11		2011/12				
	Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs	Eventual recurring costs	Total Non-recurring costs	Annual savings
Section 40 – COPFS	0.216	0.000	0.216	0.000	0.216	0.000	0.000
Section 62 - SCS	0.002	0.000	0.002	0.000	0.002	0.000	0.000
Total costs	0.218	0.000	0.218	0.00	0.218	0.000	0.000

SECTION 41 - BREACH OF UNDERTAKING

828. This is a procedural change whereby in future, rather than libelling a separate charge, the accused will instead face the original charge with an “aggravation” added. There will be no financial impact of this change.

SECTION 42 - BAIL REVIEW APPLICATIONS

829. This provision will deliver a saving through the use of less court time. In 2007/08 there were 1900 applications for bail review, of which 400 were refused. It is already the case that uncontested applications relating to a change of address do not require a hearing (and so will not be covered by this change) and 90% of bail review applications relate to a change of address. This leaves around 150 applications for bail review which do not relate to a change of address and which are granted (those that are not granted are obviously contested). The majority of these cases will be contested as they relate to the bail conditions originally deemed acceptable by the prosecutors.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

830. For the purposes of this financial memorandum, if we estimate that around 50 cases will not be contested, then the saving in court time represented by not having to consider uncontested cases will be 10 minutes (max) @ £750 per hour x 50, or £6,250.

COSTS ON LOCAL AUTHORITIES

831. There will be no additional costs for local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

832. There will be no additional costs for other bodies, individuals or businesses.

Section 42 - Bail review applications (all figures in £m)						
2010/11		2011/12		Eventual recurring costs	Total Non-recurring costs	Annual savings
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs			
0.000	0.000	0.000	0.000	0.000	0.000	0.006

SECTION 43 - BAIL CONDITION FOR IDENTIFICATION PROCEDURES ETC.

833. The provisions introduce a new standard condition of bail to require that accused persons make themselves available: (i) to attend at an identification parade or other identification procedure; and (ii) to enable the taking of any print, impression or sample from them.

834. This new standard condition will save some court time as it will no longer be necessary for a prosecutor to have to ask the court to impose a requirement to participate in an ID procedure. At present it is relatively common (though no specific figures exist) for the prosecutor to seek such a requirement, and it is understood that the imposition of this condition is rarely, if ever, contested by the defence. The change made by the provisions therefore has the potential to achieve only a very small time saving in any individual case, but will potentially affect a substantial number of trials.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

835. No additional costs falling on the police or the Scottish Prison Service.

836. No additional costs falling on the Crown Office and Procurator Fiscal Service. There will be a minimal cost to the Scottish Court Service in updating their IT systems with details of this new standard condition. However, this is likely to be offset by a small cumulative saving of court (and prosecution time), as it will no longer be necessary for the prosecutor to have to ask the court to impose a requirement to participate in an ID procedure. It is not possible to estimate with any degree of certainty the amount of time that will be saved, but it is likely to be minimal.

COSTS ON LOCAL AUTHORITIES

837. We do not anticipate any additional costs on local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

838. We do not anticipate any additional costs on other bodies, individuals or businesses.

SECTION 44 - PROSECUTION ON INDICTMENT: SCOTTISH LAW OFFICERS

839. This provision is intended simplify the change over between Lord Advocates i.e. when can indictments be issued in the new name. There will be no costs associated with this provision. There may be some minimal savings as and when the provisions are used on occasions when the holder of the post of Lord Advocate changes, but given this provision will only be used as and when the holder of the post of Lord Advocate changes, it is not possible to estimate what savings are likely with any degree of certainty.

SECTION 46 - ADDITIONAL CHARGE WHERE BAIL ETC. BREACHED

840. The provisions will allow a complaint in summary proceedings to be amended, prior to trial, to include a charge of failing to appear. This will remove the need for the prosecutor to prepare a separate complaint containing the charge of failing to appear. This change should lead minimal savings in court, COPFS and legal aid costs. It will cut down on the need for a new complaint (with associated requirements as to service), and minimal additional legal aid costs currently incurred in representing an accused in what amounts to a separate matter will also likely be reduced. It is not possible to estimate these minimal savings with any degree of certainty as it is not clear how often the provisions will be used.

SECTION 47 - REMAND AND COMMITTAL OF CHILDREN AND YOUNG PERSONS

841. Over the last three years (up to and including the year 2007/08), an average of 27 young people were remanded on judicial unruly certificates and spent an average of 17 days in prison custody (average total of 459 days). With the abolition of judicial unruly certificates it is anticipated that these young people will, instead, be remanded to secure accommodation and associated costs will move from the Scottish Prison Service to the Local Authorities.

842. 2007/08 saw a significant fall in the number of young people remanded on judicial unruly certificates, and the time spent in prison custody, compared with previous years. This was due, in part, to the availability and uptake of alternative options. As a result it is anticipated that, if the legislation was not abolished, the numbers being remanded would continue to fall. Assuming implementation of the provisions in April 2010, costs have been calculated to reflect this projected fall at 25% per annum (both number of young people and number of days) for each of the two years (2008/09 and 2009/10) until 2010/11 implementation.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

843. No additional cost falling directly on the police.

844. No additional costs falling on the Crown Office and Procurator Fiscal Service. Minor savings may be achieved based on the fact that young people are generally remanded in prison for the shortest period of time before being transferred to a suitable secure unit. For this to be achieved, the case has to be called before a sheriff to vary the remand conditions.

845. No additional costs falling on the Scottish Court Service but some minor savings may be achieved as set out above.

846. No additional costs will fall on the Scottish Prison Service but again minor savings will be achieved. The average cost of a prison place is £40,000 per annum (approx £109 per day). Therefore average total savings to the prison service can be calculated at approximately £50,500 if the provisions had been implemented in 2007/08. As per above, this saving is anticipated to reduce by 25% per annum from April 2008 and the estimated recurring saving by the year 2012/13 is £11,983.

COSTS ON LOCAL AUTHORITIES

847. The burden will fall on local authorities to provide alternative remand accommodation, most likely in the form of secure accommodation. On average the cost per day of secure accommodation is calculated at £700 therefore the additional cost is calculated at approximately £321,500 for the year 2007/08. Additional costs will also fall on the local authority to transport young people from court to secure establishments and this has been estimated at £5,000. Total estimated cost to local authorities is approximately £326,500 for the year 2007/08. Assuming implementation in April 2010 of the provisions and the estimated 25% reduction in demand for places each year, this equates to a cost in 2010/11 of £137,742. It is projected that this cost will fall, due to the availability of alternative options to prison remand and secure accommodation, by 25% per annum, so that the recurring cost by 2012/13 is £77,480.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

848. We do not anticipate any additional costs on other bodies, individuals or businesses.

Summary

Section 47 – Remand and committal of children and young persons (all figures in £m)					
	2010/11		2011/12		Recurring costs by 2012/13
	Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs	
Local authorities	0.138	0.000	0.103	0.000	0.077
SPS	-0.021	0.000	-0.016	0.000	-0.012
Total costs	0.117	0.000	0.087	0.000	0.065

SECTION 52 - DISCLOSURE OF CONVICTIONS AND NON-COURT DISPOSALS

Convictions in solemn proceedings

849. The provisions will allow courts making sentencing decisions in solemn proceedings to take account of any conviction(s) acquired by an accused between the date of the offence which led to the current conviction and the actual date of that conviction. This change potentially allows a judge in determining sentence to consider additional convictions that might warrant a stricter sentence. This might in some cases result in an increased prison term. The extent of any increase as a result of this provision is extremely difficult to assess. It is not expected that the disclosure of post-offence convictions would be likely to have a significant impact on sentences, although there might be some slight increase in the level of sentences imposed. Ascertaining how much weight a judge is likely to give a direct measure in determining sentence is however very difficult to assess with such an appraisal (and impact of eventual sentence) likely to vary depending upon the facts of each case.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

850. Some minimal additional costs will fall on the Crown Office and Procurator Fiscal Service. The Procurator Fiscal will have to check the position as regards convictions/alternative disposals between the offence date and date of conviction. This is not work that is currently done. It may then be necessary to create and serve an amended schedule of previous convictions upon the accused and court. It is anticipated these costs will be minimal.

851. In relation to possible additional costs falling on the Scottish Prison Service, any impact on the prison population would depend on the extent of any increase in sentence length. It is impossible to quantify this but the effect is expected to be minimal.

COSTS ON LOCAL AUTHORITIES

852. We do not anticipate any additional costs on local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

853. We do not anticipate any additional costs on other bodies, individuals or businesses.

Fiscal fines, compensation offers and work orders in proceedings

854. The provisions will allow courts in making sentencing decisions in both solemn and summary proceedings to take account of offers of fiscal fines, compensation offers and work orders that have arisen following the date of the offence. This change potentially allows a judge in determining sentence to consider additional factors that might warrant a stricter sentence. This might result in a limited number of cases in an increased level of fine or prison term.

855. The extent of any increase as a result of this provision is extremely difficult to assess. It is not expected that the proposed change would be likely to have a significant impact on sentences, although there may be some slight increase. Ascertaining how much weight a judge is likely to

give a direct measure in determining sentence is however very difficult to assess with such an appraisal (and impact of eventual sentence) likely to vary depending upon the facts of each case.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

856. No additional costs falling on the police or Scottish Court Service.

857. Some minimal additional costs falling on the Crown Office and Procurator Fiscal Service. The Procurator Fiscal will have to check the position as regards convictions/alternative disposals between the offence date and date of conviction. This is not work that is currently done. It may then be necessary to create and serve an amended schedule of previous convictions upon the accused and court. It is anticipated these costs will be minimal.

858. In relation to possible additional costs falling on the Scottish Prison Service, any impact on the prison population would depend on the extent of any increase in sentence length. It is impossible to quantify this with any degree of certainty but the effect is expected to be minimal.

COSTS ON LOCAL AUTHORITIES

859. We do not anticipate any additional costs on local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

860. We do not anticipate any additional costs on other bodies, individuals or businesses.

SECTIONS 54-57 - CROWN APPEALS

861. The provisions will allow the Crown a right of appeal against two types of judicial ruling that can bring a solemn criminal case to an end without the verdict of a jury. These are rulings of no case to answer or on the basis of a statutory replacement of a common law submission. The Crown will also gain a right of appeal against certain judicial findings relating to the admissibility of prosecution evidence.

862. It is difficult to estimate how many appeals may be taken by the Crown under the provisions in the Bill. However, the Crown Office and Procurator Fiscal Service envisage that these rights of appeal will be used sparingly and only in cases which have been assessed by Crown Counsel as being appropriate to invoke the appeal procedure.

863. In relation to existing rights, the Crown exercises its right of appeal against an unduly lenient sentence approximately 10 times a year. The Lord Advocate's Reference procedure, which can be used where the Crown wish the Appeal Court to consider a particular point of law that arose in a criminal case, has been used 3 times since 1998 (but none since 2002).

864. The Crown estimates that the rights of appeal provided under this Bill are unlikely to be utilised more than 3-4 times a year. Such appeals would involve consideration by the Appeal Court, and if successful might result in a retrial of the accused although that is not guaranteed. In some exceptional circumstances it might be possible for an appeal to be considered

sufficiently swiftly to allow a continuation of the original trial. This would be substantially less expensive than a retrial.

865. Although it is difficult to estimate the likely duration of a Crown appeal with any accuracy, it is assessed for the purposes of this memorandum that a Crown appeal would take approximately 4 days court time per appeal given the likely profile and size of such cases.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

866. No additional costs falling on the police.

867. The average cost to the Scottish Court Service in salary terms per day for a solemn conviction appeal would be approximately £4,500. The cost to the Scottish Court Service of 4 appeal cases per annum, each lasting an average of 4 days is estimated to be approximately £72,000.

868. The Crown Office and Procurator Fiscal Service estimate that these appeals would be expected to involve around 40 days preparation and court time for an Advocate Depute. In addition, legal staff would have to consider a range of cases, many of which would not ultimately be subject to an appeal. This time cost is estimated at 0.25 of a full time legal post, together with 0.25 of a legal trainee. The estimate for average staffing costs for Crown Counsel and legal staff in a Crown appeal is £51,200.

869. The average prosecution costs of a High Court trial in 2005/06 was £19,300¹⁰ (adjusted for inflation £21,000). Assuming that there would be a retrial in each case and that the case would be in the High Court (neither of those assumptions are certain), the total annual expenditure to the Crown Office and Procurator Fiscal Service for 4 retrials per annum would be £84,000. In relation to court costs for retrials, it is estimated that the average court cost for 4 High Court retrials per annum would be £78,000, with non-recurring set-up costs of £5,000.

870. This gives a total annual court and prosecution cost figure of £285,200.

871. The average cost to the legal aid budget of a Criminal appeal case in 2007-08 was £1,615. The cost to the Scottish Legal Aid Board of 4 appeal cases of unusual complexity per annum is estimated to be approximately £40,000. The average cost to the legal aid budget of a non appeal High Court case in 2007-08 was £12,900. If there were to be a retrial in each Crown Appeal case (which is thought to be unlikely), the total annual expenditure for retrials is estimated at £51,600. Together, this gives a figure for the Scottish Legal Aid Board of £91,600.

872. In relation to possible additional costs falling on the Scottish Prison Service, a successful appeal followed by a retrial ending in a conviction and custodial sentence could theoretically result in some upward pressure on the prison population. However, the low number of appeals anticipated makes estimating additional costs very difficult. The process will not necessarily

¹⁰ Costs and Equalities and the Scottish Criminal Justice System, <http://www.scotland.gov.uk/Resource/Doc/237550/0065253.pdf>

result in a conviction and to have any effect on prison population, any custodial sentence would either have to result in a new term of imprisonment or extend an existing period of imprisonment. A nil financial impact has been assumed.

COSTS ON LOCAL AUTHORITIES

873. We do not anticipate any additional costs on local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

874. We do not anticipate any additional costs on other bodies, individuals or businesses.

Sections 54-57 - Crown appeals (all figures in £m)							
	2010/11		2011/12				
	Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs	Eventual recurring costs	Total Non-recurring costs	Annual savings
COPFS & SCS	0.285	0.000	0.285	0.000	0.285	0.000	0.000
Scottish Legal Aid Board	0.092	0.000	0.092	0.000	0.092	0.000	0.000
Total	0.377	0.000	0.377	0.000	0.377	0.000	0.000

SECTIONS 58-60 – RETENTION AND USE OF SAMPLES ETC.

875. The Scottish Police Services Agency (SPSA) indicate that, in 2007-08, 807 DNA records were retained in respect of individuals who were been proceeded against but not convicted of a relevant sexual or violent offence. For the purposes of this financial memorandum, we have assumed that the extending these retention arrangements to fingerprints will result in a similar number of fingerprint records being retained annually.

876. In response to Professor Fraser's review, the Scottish Children's Reporter Administration (SCRA) indicated that 883 children were referred to the Reporter on the ground that they had committed serious sexual or violent offences in 2006-07. We understand from SCRA that, in 2007-08, 12.2% of children referred to the children's hearings system on offence grounds either accepted those grounds or had them established. On this basis, for the purposes of this memorandum we have estimated that there would be around 100 cases per year where DNA and fingerprint data taken from children subsequently referred to the children's hearings system for serious violent or sexual offences could be retained for a limited period.

877. SPSA indicate that it costs approximately £25 to process a DNA sample (i.e. to turn into a DNA profile and place it on the system). However, currently most samples taken are routinely processed prior to a decision on the disposal of a case, so we anticipate little additional

processing cost in light of the new provisions. It costs £0.75 per annum to store DNA samples and approximately £9 per annum to maintain each fingerprint record.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

878. We estimate that an additional 807 fingerprint records would be retained in respect of individuals who were proceeded against but not convicted of a relevant sexual or violent offence. Approximately 100 fingerprint and DNA records taken from children subsequently referred to the children's hearings system would also be retained. The cost to SPSA of storing these additional records would be approximately £8,000 per annum. This cost will accumulate each year as another year's worth of samples is added to those already stored. However, this would reach a 'critical mass' at the end of the third year once records begin to be destroyed. Once destruction of records after three years' retention begins, approximately three years' worth of additional data will be retained at any one time.

879. There would be one-off system change costs to SPSA of around £25,000.

880. There may be minimal additional costs to the Crown Office and Procurator Fiscal Service associated with amendments to IT systems.

881. We do not anticipate additional costs to police forces. The provisions in the Bill provide powers to retain forensic data that has already been taken by police. Therefore, there should be no increase in the number of samples taken by the police.

882. No additional costs to the Scottish Court Service.

883. No additional costs to the Scottish Prison Service.

COSTS ON LOCAL AUTHORITIES

884. No additional costs to local authorities

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

885. No additional costs to other bodies, individuals and businesses.

Summary

Sections 58-60 – Retention and use of samples etc. (all figures are £m)							
	2010/11		2011/12		Eventual recurring costs	Total Non-recurring costs	Annual savings
	Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs			
Retention of fingerprint and other forensics data for 3 years – sexual and violent offences	0.007	0.025	0.014	0.000	0.021	0.025	0.000

These documents relate to the Criminal Justice and Licensing (Scotland) Bill (SP Bill 24) as introduced in the Scottish Parliament on 5 March 2009

Expressly stating what use can be made of DNA and other forensics data	0.000	0.000	0.000	0.000	0.000	0.000	0.000
Retention of DNA/forensics in Children's Hearing system	0.001	Costs included within "Retention of fingerprint and other forensics data for 3 years..." entry above	0.002	0.000	0.004	0.000	0.000
Total costs	0.008	0.025	0.016	0.000	0.025	0.025	0.000

SECTION 61 - REFERRALS FROM SCOTTISH CRIMINAL CASES REVIEW COMMISSION: GROUNDS FOR APPEAL

886. The impact of the provisions concerning miscarriage of justice appeals procedures will be to reduce the scope of appeals that can follow a SCCRC referral. In general, the appellant will in future only be able to raise appeal proceedings of the basis of the SCCRC statement of reasons (subject to a court permitting an appeal on other grounds).

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

887. There may be limited costs to the SCCRC as the grounds for appeal within their reports will assume greater importance. There may be a small increase in the number of judicial reviews sought by appellants who seek to challenge the grounds laid out in SCCRC statement of reasons. It is considered this may amount to 1 additional judicial review a year at the cost of £30,000. There may be some limited savings to the Scottish Court Service and COPFS as a result of the grounds for hearing of appeals being limited. It is not possible to quantify with any degree of certainty how much these savings would be.

COSTS ON LOCAL AUTHORITIES

888. There are no costs falling to local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

889. There are no costs falling on other bodies, individuals or businesses.

Section 61 - Referrals from Scottish Criminal Cases Review Commission: grounds for appeal (all figures in £m)						
2010/11		2011/12				
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs	Eventual recurring costs	Total Non-recurring costs	Annual savings
0.030	0.000	0.030	0.000	0.030	0.000	0.000

CHAPTER 5:

PART 4 OF THE BILL - EVIDENCE

SECTION 67 - TELEVISION LINK EVIDENCE

890. It is very difficult to estimate with any degree of certainty the number of cases where this provision will be used, but for the purposes of this financial memorandum an estimate of 100 cases each year is used.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

891. The cost to Scottish Court Service based on 100 cases per annum is estimated at –

High Court

- Judicial salaries £8,000
- Running costs £1,500

Sheriff Court

- Judicial salaries £6,000
- Running costs £1,500
- Court Service salaries in respect of additional court time - £30,000

One-off costs to equip 1 additional court per sheriffdom with tv links - £132,000

COSTS ON LOCAL AUTHORITIES

892. There are no costs falling on local authorities

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

893. There are no costs falling on other bodies, individuals and businesses.

Section 67 - Television link evidence (all figures in £m)						
2010/11		2011/12		Eventual recurring costs	Total Non-recurring costs	Annual savings
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs			
0.047	0.132	0.047	0.000	0.047	0.132	0.000

CHAPTER 6:

PART 5 OF THE BILL - CRIMINAL JUSTICE

SECTION 68 – UPPER AGE LIMIT FOR JURORS

SECTION 69 – PERSONS EXCUSABLE FROM JURY SERVICE

894. The provisions will raise the upper age limit of jurors from 65 to 70. This would increase the juror pool in Scotland by some 200,000 individuals per annum (based on General Register of Scotland figures - June 2006).

895. The provisions do not entail any new spending. It would save in the region of £250,000 to £300,000 per year since jurors drawing pensions would claim less than most jurors claiming allowances to replace lost earnings. We have assumed that 10% of all jurors will fall into the upper age band, and that a minority of these will be drawing a salary or a wage. That minority will grow over time as increasing numbers of people over 60 continue in employment of some kind and defer their pensions. For that reason the estimated savings have been pitched cautiously at rather less than the 10% of the £3m currently allocated to allowances. Any savings will be used to implement improvements to the system of reimbursement of jurors as set out in our consultation paper *“The Modern Jury in Scottish Criminal Trials¹¹”*.

896. The provisions will also change the rules on exemptions in respect of those who attend for jury duty, but do not sit on a jury. There is no financial impact of these provisions.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

897. No additional costs falling on the Scottish Court Service. Some savings likely to result for lower loss of earnings likely to be paid to those retired from work estimated at £250,000.

COSTS ON LOCAL AUTHORITIES

898. We do not anticipate any additional costs on local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

899. We do not anticipate any additional costs on other bodies, individuals or businesses.

¹¹ <http://www.scotland.gov.uk/Publications/2008/09/17121921/0>

Sections 68 – Upper age limit for jurors Section 69 – Persons excusable from jury service (all figures in £m)						
2010/11		2011/12		Eventual recurring costs	Total Non-recurring costs	Annual savings
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs			
0.000	0.000	0.000	0.000	0.000	0.000	0.250

SECTION 70 - DATA MATCHING FOR DETECTION OF FRAUD ETC.

900. The National Fraud Initiative is designed to allow Audit Scotland to compare information about individuals held by different public bodies, and on different financial systems, to identify circumstances that might suggest the existence of fraud or error. The provisions will put on a statutory basis the work of Audit Scotland in relation to the National Fraud Initiative.

901. In 2006/07 (the last full year for which figures are available), the work of Audit Scotland in relation to the National Fraud Initiative identified fraud amounting to nearly £10m. The provisions will help safeguard the work of Audit Scotland in this area.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

902. As the provisions will place on a statutory footing the work of Audit Scotland in relation to the National Fraud Initiative, there will be no additional costs incurred by the Scottish Administration.

903. Audit Scotland will have a power to charge fees on the costs incurred in obtaining data. This power already exists through currently used audit powers however and no changes to practice are envisaged that should alter the level of costs. The provisions should not therefore have a financial impact.

COSTS ON LOCAL AUTHORITIES

904. Audit Scotland will have a power to charge fees on the costs incurred in obtaining data. This power already exists through currently used audit powers however and no changes to practice are envisaged that should alter the level of costs. The provisions should not therefore have a financial impact.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

905. None.

SECTION 71 - SHARING INFORMATION WITH ANTI-FRAUD ORGANISATIONS

906. The provisions will enable public authorities to share information with each other and anti-fraud organisations to help prevent and detect fraud.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

907. It is likely that some public bodies will use the powers to prevent and detect fraud. It is a flexible power and will be up to public bodies to decide themselves how they use this new power. It is therefore difficult to provide an estimate of what additional costs will fall on these public bodies, but it is likely that any costs incurred will be offset by the benefits of preventing cases of fraud and the resultant savings that will accrue.

COSTS ON LOCAL AUTHORITIES

908. As above, it is likely that local authorities will use the powers to prevent and detect fraud. It is a flexible power and will be up to local authorities to decide themselves how they use this new power. It is therefore difficult to provide an estimate of what additional costs will fall on local authorities, but it is likely that any costs incurred will be offset by the benefits of preventing and detecting fraud and the resultant savings that will accrue.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

909. There will be no costs falling on other bodies, individuals and businesses.

SECTION 72 - CLOSURE OF PREMISES ASSOCIATED WITH HUMAN EXPLOITATION ETC.

910. The provisions amend the Antisocial Behaviour etc. (Scotland) Act 2004 by making explicit provision to provide for the closure of premises associated with the commission of offences in relation to trafficking of human beings and child exploitation.

911. There is likely to be a minimal financial impact as a result of the provisions. Senior police officers can already apply for similar closure powers under the 2004 Act, which provides for the service of closure notice, and making of closure orders of premises associated with antisocial behaviour. The new provisions will assist the police by widening closure powers to help the police deal with premises associated with human trafficking and child sexual exploitation. It is not expected there will be more than a 1 or 2 closure orders sought each year using this new power.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

912. This will be a discretionary power for the police and it is difficult to estimate precisely how often the power will be used. However, it is not thought that any more than 1 or 2 closure orders a year will take place across Scotland with a minimal financial impact.

COSTS ON LOCAL AUTHORITIES

913. There are no costs falling to local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

914. No costs will be placed on other bodies, individuals and businesses.

SECTION 73 - SEXUAL OFFENCES PREVENTION ORDERS

SECTION 75 - RISK OF SEXUAL HARM ORDERS

Extending range of cases where a sexual offences prevention order can be imposed

915. The provisions will extend the range of relevant cases where the court can impose a Sexual Offences Prevention Order (SOPO). On average, it is considered no more than 1 or 2 additional cases a year will emerge where a SOPO is imposed by the courts.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

916. It is likely there will be some additional costs for Scottish Court Service as hearings in relevant cases will be extended slightly to consider whether it is appropriate to impose a SOPO. However, these costs will be minimal as it is only a very low volume of relevant cases where such consideration will be appropriate.

COSTS ON LOCAL AUTHORITIES

917. None.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

918. None.

Explicit power for a prosecutor to ask the court for a SOPO/expanding content of a SOPO and Risk of Sexual Harm Order

919. The provisions will provide an explicit power for a prosecutor to apply to the court for a SOPO to be imposed at the point where the court moves for sentence. It is considered this may lead to a slight increase in the number of cases a year where a SOPO is imposed by the courts. This additional number of cases is likely to be no more than 3 cases a year.

920. The provisions will also expand the content of SOPOs/Risk of Sexual Harm Orders to allow the court to impose restrictions and obligations/requirements on an offender. This would be in addition to the court's current power to impose conditions that the offender requires to comply with.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

921. It is likely there will be some limited additional costs for Scottish Court Service as hearings in relevant cases will be extended slightly to consider the prosecutor's request that a SOPO should be imposed. However, these costs will be offset as it is likely that the cases where the prosecutor applies for a SOPO will often be cases where the police themselves would have sought the imposition of a SOPO at a later date. There will be some limited savings for the police therefore in no longer having to apply to the court for a SOPO in these cases. Scottish Court Service should also benefit from a reduction in the number of police applied for SOPOs.

922. In terms of the cost of monitoring the expanded SOPO/Risk of Sexual Harm Orders, it should be noted that these Orders are essentially an extension of the wider often multi-agency management of sex offenders in the community. While a variety of monitoring techniques are used, the intensity and nature of that monitoring will be dependent on the type and degree of risk-management required in each case, the operational decisions taken in each force on how to manage the Orders, and the capacity of each force to implement the Orders. With this in mind, it is difficult to provide an estimate for any costs associated with these provisions, though it is likely to be minimal in the wider context of work to monitor sex offenders in the community.

COSTS ON LOCAL AUTHORITIES

923. None.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

924. None.

SECTION 74 - FOREIGN TRAVEL ORDERS

925. The provisions, which mirror separate provisions in England, Wales, and Northern Ireland, will help protect vulnerable individuals by strengthening and widening the circumstances in which Foreign Travel Orders (FTOs) can be applied. In particular offenders subject to FTOs (i.e. those offenders most likely to want to travel to abuse children abroad) will have to surrender their passports. This will be of significant assistance to the police in enforcing FTOs. Increasing the maximum duration of a FTO from 6 months to 5 years will also attempt to increase the use of FTOs to prevent sex offenders travelling abroad. Between 2004/05–2006/07, only 5 FTOs were issued across the UK. No police force in Scotland has ever applied for/been granted an FTO. It is considered that these measures will lead to a slight increase in the number of cases a year where a FTO is imposed by the courts. This additional number of cases is likely to be no more than 1 or 2 cases a year.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

926. It is likely that there will be some minimal additional costs for the Scottish Court Service in processing FTOs. However these costs will be offset since there is a further provision allowing the police to obtain an FTO for a longer period without having to obtain a renewal.

COSTS ON LOCAL AUTHORITIES

927. None.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

928. None.

SECTION 76 – OBTAINING INFORMATION FROM OUTWITH UNITED KINGDOM

929. The provisions will provide legal authority for the Scottish Criminal Cases Review Commission (SCCRC) to request co-operation from other jurisdictions as they carry out investigations in alleged miscarriages of justice.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

930. There will be no additional costs arising from these provisions. There may be some minimal savings as the process by which the SCCRC can seek information from other jurisdictions will be simplified. It is not possible with any degree of certainty to estimate these savings.

COSTS ON LOCAL AUTHORITIES

931. None.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

932. None.

SECTION 77 – GRANT OF AUTHORISATIONS FOR DIRECTED AND INTRUSIVE SURVEILLANCE

933. Authorisation for police and SCDEA surveillance is undertaken by a number of relevant officers within these bodies under the terms of the Regulation of Investigatory Powers (Scotland) Act 2000. The provisions will allow one force to take the lead in authorising surveillance in joint operations (which could consist of two or more police forces, or the SCDEA and at least one police force). This is designed to reduce bureaucracy. The provision will not result in either more or less operations occurring; it will simply streamline the process for putting authorisations in place for joint operations.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

934. No additional costs falling on the police. Minimal savings may accrue to the police from the reduced bureaucracy, but these will be ad hoc and depend on the number of joint operations.

COSTS ON LOCAL AUTHORITIES

935. No additional costs falling on local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

936. No additional costs on other bodies, individuals or businesses.

SECTION 78 – AUTHORISATIONS TO INTERFERE WITH PROPERTY ETC.

937. In order to improve the effectiveness of the operation of the Scottish Crime and Drug Enforcement Agency (SCDEA), the Regulation of Investigatory Powers (Scotland) Act 2000 and the Police Act 1997 are being amended to allow the Deputy Director General of the SCDEA to authorise intrusive surveillance and property interference.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

938. No additional costs falling on the SCDEA. There will some efficiency savings as a result of freeing up some of the Director General's time to deal with other SCDEA matters.

COSTS ON LOCAL AUTHORITIES

939. No additional costs falling on local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

940. No additional costs on other bodies, individuals or businesses.

SECTION 79 - AMENDMENTS OF PART 5 OF POLICE ACT 1997

Requests to overseas jurisdictions

941. In 2007, Disclosure Scotland dealt with over 20,000 enhanced disclosure applications where the applicant gave a place of birth or previous address outwith the UK. This proposal gives Disclosure Scotland the power to gather information from any jurisdiction that is willing to share information for employment checking purposes. Three EU Member States have indicated a willingness to share information with the UK as has 1 other non-EU country. In 2007, Disclosure Scotland handled 7,100 applications from these countries.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

942. It is not possible to say what charge, if any, would be levied by an overseas jurisdiction. It is also hard to predict if the number of people coming to work in Scotland from these countries will rise or fall. But assuming static application figures, and a lower charge of £5 and a higher charge of £25 per application then the annual cost to the Scottish Government would range from £35,500 to £177,500. The alternative to the Scottish Government bearing this cost would be for the additional cost of gathering information from overseas to be passed onto applicants. The issue of translating overseas information is another factor that needs to be considered.

943. The language groups involved currently have a fee of £57 and £74 per 1,000 words for translation into English (from Interdepartmental Committee on Linguistic Services Government Guideline Rates (2007-8)). If the trend for UK information is repeated in overseas information, then 90% of applications to foreign jurisdictions would result in no information being returned. So 10% (710 on 2007 figures) would require some action. Of the applications in 2007, a total of 57% (405) might require translation. There is some flexibility around how this charge is calculated. We expect that between 100 and 150 words would require translation in each case.

With aggregation, the cost to Disclosure Scotland could be between £4,000 and £6,000 annually. If the translations have to be carried out on a case-by-case basis, the annual costs could be higher at around £23,000. If Scottish Ministers are to carry out effectively their functions under the Protection of Vulnerable Groups (Scotland) Act 2007 then translation will be necessary.

944. There will be development costs falling to Disclosure Scotland to create links and these could vary depending on the solution that is devised to gather the information. These are charged on a case-by-case basis as the need arises. Because of that it is not possible to give precise figure at this time.

945. There could be some costs to the Scottish Police Service if they wish to make use of any of the information that Disclosure Scotland gather and that requires to be translated separately by the Service.

946. No additional costs falling on the Crown Office and Procurator Fiscal Service.

947. No additional costs falling on the Scottish Court Service.

COSTS ON LOCAL AUTHORITIES

948. There could be a cost to local authorities if there is a need for language translation.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

949. There could be a cost if there is a need for language translation.

Section 79 - Amendments of Part 5 of Police Act 1997* (all figures in £m)						
2010/11		2011/12		Eventual recurring costs	Total Non-recurring costs	Annual savings
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs			
0.041-0.200	0.050-0.100	0.041-0.200	0.050-0.100	0.041-0.200	0.100-0.200	0.000

*Both the recurring and non-recurring costs are difficult to estimate accurately at this time due to a number of unknown factors. As regard recurring costs: first, the number of people from outwith the UK coming to live in Scotland; second, the number of people from that group who then go into paid or unpaid work where it is possible for their employer to have a criminal record check carried out; third, the number of people whose home country is willing to provide information to Scottish Ministers for Disclosure Scotland's purposes; and fourth the number of people in that group whose home country provide information that has to be translated into English. As regards non-recurring costs, these will cover such aspects as IT and supporting changes that are needed for the exchange of information to happen. The timing of this expenditure will happen as and when countries sign agreements to share information. At present it is not possible to say with confidence when this is likely to happen. The table estimates 2 countries signing agreements each year and at a cost to Scottish Ministers of £50,000 per time.

But even this is speculative as getting such agreements is a prolonged process. Also, more countries particularly from within the EU could become willing to provide information in the coming years and that too would affect these costs.

Fee charging regime

950. At January 2009, Disclosure Scotland had 3,036 registered persons / bodies and 9,187 nominees included in the register held under section 120 of the Police Act 1997. A one-off charge has been paid (£150 for registered persons / bodies and £10 for each nominee). The provisions will replace this one-off charge with an annual subscription.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

951. There will be development costs for Disclosure Scotland but as these will be an integral part of the solution to deliver the Protection of Vulnerable Groups (Scotland) Act 2007, it is not possible to separate out the costs of one small part of a much wider IT project.

952. No additional costs falling on the Scottish Police Service.

953. No additional costs falling on the Crown Office and Procurator Fiscal Service.

954. No additional costs falling on the Scottish Court Service.

COSTS ON LOCAL AUTHORITIES

955. There will be a charge to each Council for the annual subscription and also for nominees. It is not possible to say what these fees will be. Councils might also incur costs internally in relation to managing their registration. The policy intent will be that the total income received by Disclosure Scotland does not grow as a result of this, so income gained in subscription charges will be offset against disclosure fees.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

956. There will be a charge to each organisation for the annual subscription and also for each nominee. It is not possible to say what these fees will be. Organisations might also incur costs internally in relation to managing their registration.

957. It is not possible to provide non-recurring costs for this proposal as these costs will be part of the wider IT solution to deliver the Protection of Vulnerable Group (Scotland) Act 2007. It is also not possible to provide the future recurring costs. The determining factor, the fee to be charged for the annual subscription will be set in regulations under the Police Act 1997 to be made in the Scottish Parliament at a future date. Because of that, it is also not possible to say if any savings will arise for the bodies on which these costs will fall as comparison with the existing registration fee charging regime cannot be made now.

SECTION 80 - ASSISTANCE FOR VICTIM SUPPORT

958. The provisions introduce an enhanced power for Scottish Ministers to pay grant to victims' organisations. This power will be discretionary and therefore there is no direct financial impact of the provisions. It is intended to use the provision to allow a wider distribution of existing funding to victims' organisations.

SECTION 81 - PUBLIC DEFENCE SOLICITORS

959. The provisions will have the effect of confirming in statute the status of the Public Defence Solicitors' Office (PDSO). As the provisions will not change how the PDSO currently operates on a day to day basis, there is no financial impact of the change.

SECTION 82 - COMPENSATION FOR MISCARRIAGES OF JUSTICE

Ex gratia scheme

960. The provisions will place on a statutory footing the existing *ex gratia* scheme for payment of compensation as a result of a miscarriage of justice, combining it with the statutory scheme under the Criminal Justice Act 1988. The *ex gratia* scheme has been in operation since 1986 and no changes are planned to the coverage of the scheme as a result of putting it on a statutory footing.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

961. No additional costs will fall on the Scottish Administration. There may be some minimal administrative savings through combining the *ex gratia* and statutory schemes as a result of simplified processes, though it is not possible to provide a specific estimate of these savings.

COSTS ON LOCAL AUTHORITIES

962. None.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

963. None.

Convictions which the Crown have set aside

964. The provisions will permit the possibility of compensation being paid under the statutory miscarriage of justice scheme where it is the Crown who seek to have a conviction set aside. These cases are extremely rare, but can occur when, for example, it is found that an offence contained in a statutory instrument is found to be *ultra vires*.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

965. The purpose of the provisions is to ensure miscarriage of justice statute is fully comprehensive to cover all potential situations where compensation may become payable. It is

not expected that these provisions will be used very often, if at all. It is very difficult to estimate if any extra cases will occur where compensation is deemed payable, but it is likely to be very low (perhaps 1 or 2 a decade at most). For the purposes of this financial memorandum, no additional costs have been assumed.

COSTS ON LOCAL AUTHORITIES

966. None.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

967. None.

SECTION 83 - FINANCIAL REPORTING ORDERS

968. As a result of the provisions, we anticipate an increase in the number of Financial Reporting Orders (FROs) being imposed each year. Currently only one FRO has been imposed. Following the change, we estimate 12 cases per year will have a FRO imposed by the courts.

969. Using cost information provided by the Serious Organised Crime Agency (who administer FROs in England and Wales), we anticipate that an average of 10 working days would be required to facilitate the extra FROs each year. However, it has to be acknowledged that every case will be different in length and the amount of work involved cannot be estimated exactly. There has only been one case to date in Scotland and it is too early to work out the costs per order, therefore it is difficult to judge the average costs involved and the extent that the courts will impose these orders. However, any costs are estimated to be minimal.

SECTION 84 - COMPENSATION ORDERS

970. In 2006/07, 1,382 Compensation Orders were imposed as a main penalty. 4,870 were imposed as a secondary penalty in addition to another penalty, generally a fine. Compensation was ordered in 5 per cent of convictions in 2006/07, most frequently in convictions for vandalism (46 per cent of such convictions). The average value of compensation order awarded was £343 in 2006/07.

971. It is possible that by making Compensation Orders easier to impose, courts will move away from imposing fines as a main penalty in certain cases. In 06/07, 6,252 Compensation Orders at an average of £343 were imposed, totalling £2,144,436. Should there be an increase of, for example, 5% in the number of Compensation Orders imposed, this could represent a loss of fine revenue of £107,222 (using the average compensation award of £343).

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

972. Under the Scotland Act 1998 (Designation of Receipts) Order 2004, fine income is surrendered to the UK Consolidated Fund, so any reduction in fine income would not affect the Scottish Administration.

COSTS ON LOCAL AUTHORITIES

973. None.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

974. As noted above, fine income is surrendered to the UK Consolidated Fund so the UK Government may suffer a reduction in the amount of fine income received from Scottish courts. This is estimated to be £107,222 (as per above assumptions). As this represents a net transfer rather than a new cost, a summary table is not provided.

CHAPTER 7:

PART 7 OF THE BILL – MENTAL DISORDER AND UNFITNESS FOR TRIAL

SECTIONS 117-120 – MENTAL DISORDER AND UNFITNESS FOR TRIAL

975. The provisions will modernise the law without changing the current common law position. As such, the provisions will have no financial impact.

CHAPTER 8:

PART 8 OF THE BILL - LICENSING UNDER CIVIC GOVERNMENT (SCOTLAND) ACT 1982

SECTIONS 121-123 AND 125-128 – GENERAL CIVIC GOVERNMENT (SCOTLAND) ACT 1982

976. Most of the amendments to the Civic Government (Scotland) Act 1982 are of a technical nature (such as altering time periods for making representations on licence applications) and will not result in extra costs. A few of the amendments could potentially lead to minimal extra costs – they enable local authorities to license any premises selling food or drink at late hours, and remove the current exemptions from the public entertainment licensing provisions for free events and from the market operators' licensing provisions for non-commercial organisations. These are referred to below but for the reasons explained, no meaningful cost estimates can be supplied.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

977. None.

COSTS ON LOCAL AUTHORITIES

978. Where local authorities opt to introduce licensing schemes to cover any premises selling food or drink at late hours, or in respect of large-scale public entertainments (which are free to enter and were previously exempt), or non-commercial market operators (which were previously exempt), the authorities will incur some costs. However, these costs can be met from the fees the authorities will be able to charge. Paragraph 15 of Schedule 1 to the Civic Government (Scotland) Act 1982 empowers local authorities to charge reasonable fees - they must seek to

ensure that the fees are sufficient to meet their expenses in carrying out their functions under the 1982 Act. The overall impact of local authorities therefore should be neutral.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

979. As a corollary of the above, some late-night catering establishments, or previously exempt organisers of large-scale public entertainments and non-commercial market operators, will be required to pay fees to those local authorities who choose to introduce licensing schemes. But the 32 local authorities will have discretion in both determining whether to license such activities and what level of fee to charge. Consequently, no meaningful estimate of possible costs can be supplied.

SECTION 124 – LICENSING OF TAXIS AND PRIVATE HIRE CARS

980. The estimated maximum cost to Scottish licensing authorities relates to the additional cost of notifying all taxi operators when fixing any taxi scales or undertaking a review under section 17 of the Civic Government (Scotland) Act 1982. The estimated annual costs assume that the licensee of all taxis (10,441 licensed vehicles) in Scotland will receive notification (by First Class recorded delivery @ £1.08 per letter) in terms of section 17 based on 2 notifications per 3 year period.

COSTS FALLING ON THE SCOTTISH GOVERNMENT

981. There are no cost implications for the Scottish Government arising from the proposed legislative changes.

COSTS ON LOCAL AUTHORITIES

982. The costs to local authorities are those relating to the notification of additional parties (all taxi operators) under section 17. It is anticipated that licensing authorities will choose to notify parties by means of recorded delivery as opposed to personal service and our estimate of costs are based on that assumption. Current legislation requires that licensing authorities conduct fare scale reviews at least every 18 months. For the sake of calculating the cost to local authorities we have assumed that authorities will conduct notification procedure twice during a three year period.

983. Using the methodology above we calculate that the total annual cost to licensing authorities is unlikely to exceed £7,500 per annum.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

984. The above costs will be added in to the overall expenses incurred by licensing authorities in carrying out their licensing functions in relation to such licences and will be reflected in the licence fees applied by individual authorities in terms of section 12 of the 1982 Act. We calculate using the above methodology that the cost to individual taxi operators would amount to less than £1.00 per annum.

Section 124 – Licensing of taxis and private hire cars (all figures in £m)						
2010/11		2011/12		Eventual recurring costs	Total Non-recurring costs	Annual savings
Recurring costs	Non-recurring costs	Recurring costs	Non-recurring costs			
0.008	0.000	0.008	0.000	0.008	0.000	0.000

CHAPTER 9:

PART 9 OF THE BILL - ALCOHOL LICENSING

SECTION 130 - PREMISE LICENCE APPLICATIONS: NOTIFICATION REQUIREMENTS

985. These proposals will allow police forces to make savings by reducing notification and reporting requirements. While the amount of time spent on producing anti-social behaviour reports varies from force to force depending on IT systems we estimate that a report costs a minimum of £50 to produce and savings can be made by reducing the requirement to report to only where the Licensing Board requests it or where the police deem it necessary. Any savings therefore will be minimal.

SECTION 135 - EXTENDED HOURS APPLICATIONS: VARIATION OF CONDITIONS

986. The provisions will permit the application of extra conditions on a licensee when granted an extended hours licence. The provisions may create greater expense for any business on who they are imposed. However without the ability to impose such conditions there is the possibility that Licensing Boards would refuse to grant these additional hours licences and businesses would lose the additional revenue that they would expect to gain during the additional trading period. It is very difficult to provide an estimate for the cost on business as this will be dependent on the number of businesses who seek an extended hours licence, the type of additional conditions a Licensing Board wishes to impose and the number of occasions on which such conditions will apply.

PART 10 OF THE BILL - MISCELLANEOUS

SECTION 140 - LICENSED PREMISES: SOCIAL RESPONSIBILITY LEVY

987. The provisions have no direct financial implications as they enable the Scottish Ministers to establish arrangements for a Social Responsibility Levy by way of regulations. The application of a levy to licensed premises will shift some of the burden of dealing with the consequences of alcohol misuse from the public bodies which currently meet the cost – notably the police, the health service and the ambulance service – to those who profit from the sale of alcohol. We are of course sensitive to the impact of introducing a levy during an economic downturn when many businesses are facing increased costs and reducing income. A decision to introduce regulations

will not be take before autumn 2010 and consideration will be given to the prevailing economic climate at that time.

988. During the passage of the Bill through Parliament, we intend to work with stakeholders to develop the detail of the Social Responsibility Levy, including the parameters of the arrangements. Subject to the satisfactory completion of its work, a full regulatory impact assessment will be prepared and presented to Parliament with the appropriate regulations which would be subject to affirmative resolution procedure. The level or levels at which the levy may be set, and whether such levels should be set nationally or locally, will be considered on completion of the engagement process with stakeholders. Where the levy is applied some business may pass the cost onto customers.

SECTION 142 - CORRUPTION IN PUBLIC BODIES

989. The provisions will extend the jurisdiction of district/Justice of the Peace courts so they can deal with cases involving offences under the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1906. It is unlikely that any more than a 1/2 cases (at most) each year will be dealt with in the district/JP court following this change.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

990. It should be noted that the number of cases prosecuted under the two Acts is very low. There may be some extremely minimal savings for Scottish Court Service as some cases are tried in a lower court than they would have been previously.

991. The following table summarises the overall financial impact of the Bill:

SUMMARY OF ADDITIONAL COSTS ARISING FROM THE CRIMINAL JUSTICE AND LICENSING (SCOTLAND) BILL (all figures in £m)				
Section(s) of Bill	Details given at paragraph numbers within this financial memorandum	Eventual recurrent costs (a minus figure indicates a cost saving)	Eventual non-recurrent costs	Additional comment
Sections 3-13 – Scottish Sentencing Council	662-672	1.100	0.450	

These documents relate to the Criminal Justice and Licensing (Scotland) Bill (SP Bill 24) as introduced in the Scottish Parliament on 5 March 2009

Sections 14, 17 and 20 - Community Payback Order/Presumption against short periods of imprisonment or detention/Reports about supervised persons	673-699	10.670	0.050	Figure given here is mid point of range of two figures assuming 10% and 20% increase in use of community penalties following implementation of provisions (see table after para 700)
Section 19 – Early removal of certain short-term prisoners from the United Kingdom	786-790	-0.040	0.000	
Section 21 - Extended sentences for certain sexual offences	791-796	0.016	0.000	
Section 23 - Offences aggravated by racial and religious prejudice	797-804	0.024	0.005	
Sections 25-28 - Serious organised crime	700-718	3.654	0.005	
Section 29 – Articles banned in prison	806-811	0.215	0.000	
Section 34 - Extreme pornography	815-821	0.027	0.000	
Section 40 and 62 – Witness statements	824-827	0.218	0.000	
Section 42 - Bail review applications	829-832	-0.006	0.000	

These documents relate to the Criminal Justice and Licensing (Scotland) Bill (SP Bill 24) as introduced in the Scottish Parliament on 5 March 2009

Section 47 - Remand and committal of children and young persons	841-848	0.065	0.000	
Sections 54-57 – Crown appeals	861-874	0.377	0.000	
Sections 58-60 – Retention and use of samples etc.	875-885	0.025	0.025	
Section 61 – Referrals from Scottish Criminal Cases Review Commission: grounds for appeal	886-889	0.030	0.000	
Section 67 - Television link evidence	890-893	0.047	0.132	
Sections 68 and 69 - Jury service	894-899	-0.250	0.000	
Section 79 – Amendments to Part 5 of Police Act 1997	941-957	0.120	0.150	Figures shown are mid point of range of figures shown in table after para 950
Sections 85-116 – Disclosure	719-766	4.105	1.816	
Section 124 – Licensing of taxi and private hire cars	980-984	0.008	0.000	
Section 129 – Sale of alcohol to persons under the age of 21 etc.	767-775	38.000	0.000	As per para 776, this figure represents the <u>maximum</u> potential lost revenue to businesses and the UK Government.
TOTAL COSTS		58.405	2.633	

These documents relate to the Criminal Justice and Licensing (Scotland) Bill (SP Bill 24) as introduced in the Scottish Parliament on 5 March 2009

992. This table above does not include the financial impact of section 18 (Amendments of Custodial Sentences and Weapons (Scotland) Act 2007) of the Bill. Paragraph 785 explains the rationale for excluding this section's financial impact from the overall summary table.

EXECUTIVE STATEMENT ON LEGISLATIVE COMPETENCE

993. On 5 March 2009, the Cabinet Secretary for Justice (Kenny MacAskill MSP) made the following statement:

“In my view, the provisions of the Criminal Justice and Licensing (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

**PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE
COMPETENCE**

994. On 4 March 2009, the Presiding Officer (Alex Fergusson MSP) made the following statement:

“In my view, the provisions of the Criminal Justice and Licensing (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

These documents relate to the Criminal Justice and Licensing (Scotland) Bill (SP Bill 24) as introduced in the Scottish Parliament on 5 March 2009

CRIMINAL JUSTICE AND LICENSING (SCOTLAND) BILL

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