These notes relate to the Criminal Justice (Scotland) Act 2003 (asp 7) which received Royal Assent on 26 March 2003

CRIMINAL JUSTICE (SCOTLAND) ACT 2003

EXPLANATORY NOTES

THE ACT THE ACT IS IN 12 PARTS.

Part 12 – Miscellaneous and General

Miscellaneous

Section 73 – Public defence

403. Section 73 amends the Legal Aid (Scotland) Act 1986 to allow a feasibility study into solicitors employed by the Scottish Legal Aid Board providing representation in criminal cases to continue after 1 October 2003.

404. Section 28A of the Legal Aid (Scotland) Act 1986 was inserted by the section 50 of the Crime and Punishment Act 1997 and amended by section 9(7) of the Convention Rights (Compliance) (Scotland) Act 2001. It provides for the Scottish Legal Aid Board directly to employ solicitors to provide representation in criminal cases.

405. Section 28A(2) provides for a maximum of 6 solicitors (full time or equivalent) to be employed by the Scottish Legal Aid Board at any time. This is repealed to allow the Board to employ additional solicitors in any new pilot location. Section 28A also provides that any solicitor employed by the Board on a casual or temporary basis shall require to be a solicitor registered on the Criminal Legal Assistance Register. This is also being repealed as section 25A(3) requires any solicitor providing criminal legal assistance to be so registered.

406. Section 28A(3) authorises the Board to make such preparations for the feasibility study detailed in subsection (1) as will enable it to begin the study as soon as regulations made under subsection (1) come into force. As the study began in 1999, this provision is now unnecessary.

407. Section 28A(10) requires the Scottish Ministers to lay before the Scottish Parliament within 3 years of the date in which regulations were made under subsection (1) a report on the results of the feasibility study. Such a report was laid in September 2001, so this provision is now spent. Section 73(b) of the Act inserts a new subsection (9A) to provide that a further report on the continuing progress of the study shall be laid before the Scottish Parliament by the end of 2008.

408. Section 28A(11) provides that section 28A and the provisions of the Act referred to in subsection (12) shall cease to have effect 5 years after the date on which regulations made under section 28A(1) first came into force (i.e. 1 October 2003). This subsection, along with subsections (12), (13) and (14), which make provisions consequential to subsection (11), are repealed by this section.

409. Section 28A(15) has the effect of ensuring that nothing in section 28A shall prevent the commencement of sections 26 to 28 of the Legal Aid (Scotland) Act 1986. These sections have now been commenced, so this subsection is also repealed.

Section 74 – Offences aggravated by religious prejudice

410. Section 74 makes provision to deal with offences that are aggravated by religious prejudice. At present, at common law the courts can take account of aggravations when sentencing. This provision requires them to do so and sets out the procedure that is to be followed by the Crown. For the provisions in the Bill to apply, the aggravation will require to be libelled in the indictment or specified in a complaint by the Crown and proved. "Religious prejudice" includes sectarian prejudice.

411. An offence is aggravated by religious prejudice not just on the basis of actual religious belief but on the accused's perception of the religious, social, or cultural affiliation of the individual or group targeted by the offender. The section requires a court to consider whether any element of religious prejudice is involved in an offence and if it finds that the offence has been aggravated by religious prejudice to take that factor into account when sentencing. The court is also required to state the extent of and reasons for any difference in the sentence from that which would have been given had the offence not been aggravated by religious prejudice. In line with the position in relation to common law aggravations, evidence from a single source is sufficient to prove the aggravation, i.e. corroboration is not required.

Section 75 – Reintroduction of ranks of deputy chief constable and chief superintendent

412. Section 75 amends the Police (Scotland) Act 1967 ("the 1967 Act") to provide for the reintroduction of the ranks of deputy chief constable and chief superintendent.

413. Subsection (2) inserts a revised section 5 and a new section 5A into the 1967 Act. The revised section 5 provides that:

- each police force is to have a deputy chief constable;
- the ranks which may be held in a police force should include that of assistant chief constable, as formerly; but there will no longer be a requirement for every force to have at least one assistant chief constable;
- the appointments and promotion procedures set out in section 26 of the 1967 Act are to be followed for deputy as for assistant chief constables;

414. The revised section 5A provides that:

- the deputy chief constable may exercise or perform all of the powers and duties of the chief constable of that force where the chief constable is absent, incapacitated or suspended, there is a vacancy in that post, or at any other time with the consent of the chief constable;
- a person holding the rank of assistant chief constable may be designated by the police authority to exercise or perform all of the powers and duties of the chief constable of that force where both the chief constable and the deputy chief constable are absent, incapacitated or suspended, or there is a vacancy in both of those posts;
- only one person may be designated by the police authority to act as described above at any one time;
- the exercise of the powers set out in subsections (1)(a) or (b) or (2) of section 5A for a continuous period of more than three months will require the consent of the Scottish Ministers;
- the above is without prejudice to any other enactments which provide for the exercise by any other person of any powers of a chief constable.

415. All of these provisions formerly applied to the assistant chief constable designated as deputy to the chief constable. They will now apply to the deputy chief constable.

416. Subsection (3) amends section 7 of the 1967 Act to add deputy chief constable and chief superintendent to the list of ranks which may be held in a police force.

417. Subsection (4) amends section 26(2A)(b) of the 1967 Act so that the section applies to officers above the rank of chief superintendent (i.e. the same ranks as were formerly described as "above superintendent").

Section 76 – Police custody and security officers

418. Section 76 amends the Police (Scotland) Act 1967 ("the 1967 Act") to give statutory powers to certain civilian support staff who are to be employed by police authorities. The section also provides for police authorities to contract out the employment of such staff.

419. Subsection (2)(a) amends section 9(1) of the 1967 Act to provide that as well as employing civilian staff directly a police authority may appoint civilian staff on a contracted out basis.

420. Subsection (2)(b) inserts a new subsection (1A) in section 9 of the 1967 Act to provide that such staff as are employed or appointed and who hold a certificate that they are authorised to perform certain functions are to be known as "police custody and security officers". It also inserts a new subsection (1B) which provides that the powers of the police custody and security officers are to be as set out in section 9(1C) and their duties as are mentioned in section 9(1E). Subsection (1B) excludes police custody and security officers provided under a contract by virtue of subsection (1)(b) of section 9 of the 1967 Act from exercising the powers and duties in the premises of any court or in land connected with such premises. This means that only non-court elements of PCSO functions can be contracted out. PCSO functions in and around court premises are to be carried out by employees of the police authority.

421. Subsection (3) inserts a new section 9A into the 1967 Act to provide for the certification of police custody and security officers. It gives chief constables power to issue a certificate as detailed in section 9(1A) (inserted by subsection (2)(b)). Such a certificate can only be given if the chief constable is satisfied that the person is a suitable person for the job and has received sufficient training to enable them to perform their functions. The chief constable can revoke the certificate if these conditions are not satisfied, and suspend the certificate pending consideration of whether it should be revoked.

422. Subsection (3) also inserts a new section 9B into the 1967 Act to make it an offence for a person to make a statement which they know to be false, or to recklessly make a statement that is false, for the purpose of obtaining a certificate.

423. Subsection (4) amends section 39 of the 1967 Act to provide that police custody and security officers are treated in the same way as constables in relation to wrongful acts or omissions carried out by them as set out in this section, although this is subject to any agreement made as part of the contract for that persons services where the employment of that person has been contracted out by the police authority.

424. Subsections (5) to (8) make amendments to sections 41, 43, 44 and 45 of the 1967 Act respectively to ensure that police custody and security officers are dealt with in the same way as constables in relation to various matters arising from or connected with their employment. These are:

- assaults on constables etc.;
- impersonation etc.;
- offences by constables;
- warrant to search for police accoutrements and clothing.

425. Subsection (10) amends section 102(5) of the Criminal Justice and Public Order Act 1994 to provide for police custody and security officers carrying out functions in compliance with warrants and orders, in place of persons on whom the obligation to perform the function was originally placed by the warrant or order.

426. Subsection (11) amends section 307(1) of the 1995 Act to amend the definition of an "officer of the law" to include police custody and security officers.

Section 77, schedule 3 and that part of schedule 5 relating to the Wildlife and Countryside Act 1981: Wildlife Offences

427. Section 77 introduces schedule 3. Schedule 3 makes changes to the existing provisions of the Wildlife and Countryside Act 1981 ("the 1981 Act"). These changes provide for the upgrading of the penalties for wildlife offences under Part I of that Act; for the introduction of a general power of arrest in the case of such wildlife offences; for a standardisation of the period within which such offences may be prosecuted; and for related changes to the 1981 Act. Schedule 5 provides for the repeal of elements within the 1981 Act in the light of the substantive changes effected by schedule 3.

428. *Schedule 3* Paragraph 2 substitutes text in sections 6(8) and 7(3) of the 1981 Act. This substitution has the effect of standardising, at five years, the length of the prohibition which applies to certain activities (dealing in dead birds and keeping or possessing certain species of bird) following conviction for a range of relevant offences. These include offences (under any enactment) which involve the ill-treatment of birds or other animals, as well as specified offences under the 1981 Act.

429. Paragraph 3 amends section 7(4) of the 1981 Act to reflect the fact that the prohibition provided for in section 7(3) has been standardised at five years.

430. Paragraph 4 provides, in sub-paragraph (a), for a general power of arrest in relation to offences under Part I of the 1981 Act, by repealing part of the existing text of section 19(1)(c) of that Act. In sub-paragraph (b), the current provisions of Section 19(3) of the 1981 Act, relating to search warrants, are extended to enable search warrants to be issued for any offence under Part I of that Act.

431. Paragraph 5 extends the provisions of the 1981 Act regulating the prosecution of wildlife offences. As a result of the changes made in this paragraph, proceedings may be brought, in relation to all offences under Part I of the 1981 Act, within six months of sufficient evidence coming to the knowledge of the prosecutor.

432. Paragraph 6 provides for increased penalties in wildlife crime cases. It also regularises the tariff of maximum penalties for the majority of wildlife offences. These changes are achieved, via sub-paragraphs (a) and (b), by replacing the existing subsections (1), (2) and (3) in section 21 of the 1981 Act with a single, new subsection. The changes apply to all Part I offences, with the exception of those under section 14 of the 1981 Act, which are tackled separately in sub-paragraph (c). The change in sub-paragraph (d) follows from sub-paragraph (b) and removes a redundant reference to the repealed subsections (2) and (3).

433. The change effected by sub-paragraph (a) allows for custodial sentences of up to 6 months to be imposed following summary conviction for the listed Part I offences. The maximum fine is also standardised at Level 5 on the standard scale. As a consequence, all offences tried summarily will in future be subject to the same maxima and there will no longer be provision for special penalties in connection with bird-related offences.

434. Sub-paragraph (c) deals separately with the particular case of offences under section 14 of the 1981 Act. Section 14 prohibits the release of non-native species and a number of particularly damaging plants and animals which are listed in schedule 9 to the 1981 Act. Where a section 14 offence is tried summarily, the maximum penalty will be the same as for other Part I offences - a 6 month custodial sentence, a fine up to the statutory maximum, or both. In more serious cases, where a section 14 offence is tried

on indictment, the courts currently have the option to impose an unlimited fine. That option is retained but the option of a custodial sentence of up to 2 years is also provided.

Schedule 5

435. Schedule 5 repeals all references in the 1981 Act to the imposition of a special penalty in connection with bird-related offences. The concept of a special penalty for certain offences is redundant, as a consequence of the standardisation of maximum penalties effected by paragraph 6 of schedule 3.

Section 78 – Disqualification from jury service

436. Section 78 amends Schedule 1 to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 to disqualify for a specified period offenders subject to certain community disposals from serving on juries. These disposals are probation orders, drug treatment and testing orders (DTTOs), community service orders (CSOs) and restriction of liberty orders (RLOs).

437. Both probation orders and DTTOs may be imposed by the court where it is of the opinion it is expedient to do so. Both CSOs and RLOs are imposed by the court as a direct alternative to a custodial sentence.

438. The section also provides for disqualification from jury service in Scotland of those persons who receive equivalent English and Northern Irish community orders and DTTOs. Persons who are convicted and receive a community disposal in England and Wales or in Northern Ireland are disqualified from jury service in these jurisdictions. If these persons move to Scotland, this section provides that they will also be disqualified from jury service in Scotland.

439. Section 1(1)(d) of, and Part II of Schedule 1 to the 1980 Act list individuals who are disqualified from jury service.

440. Subsection (1) inserts a new paragraph into Schedule 1 to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 to add to the list of those disqualified from jury service. It provides that persons who have been convicted of an offence and as a result were given one or more specified community disposals will be disqualified from serving on a jury. So that a disqualification in respect of probation orders would be effective, it also disapplies section 247 of the 1995 in relation to such orders.

441. Subsection (1) applies except where the persons who have received a relevant order are rehabilitated persons for the purposes of the Rehabilitation of Offenders Act 1974. The 1974 Act provides for a rehabilitative period after which the conviction imposed is treated as spent. Section 5 of the 1974 Act specifies the rehabilitation periods in respect of specific disposals.

442. Subsection (2) provides, that subject to subsection (3), the provisions in subsection (1) will apply even if the community disposal was made before that subsection is brought into force. Consequently any person who is subject to a relevant order (and is not yet rehabilitated in accordance with the 1975 Act) will be disqualified from serving on a jury from the date on which the provision is brought into force. Subsection (3) provides that a person who has been cited for jury service or was serving on a jury and who would otherwise be disqualified from jury service on the coming into force of that subsection would not be excused or disqualified from jury service. The effect of the two subsections is that subsection (2) retrospectively disqualifies individuals who are subject to the provisions in subsection (1) from serving on a jury, unless (under subsection (3)) the individual has already been cited to appear as a juror.

Section 79 – Separation of jury after retiral

443. Section 79 amends section 99 of the Criminal Procedure (Scotland) Act 1995 to provide judges with the power to allow jurors to go home overnight even after they have retired to consider their verdict.

444. Section 99(4) of the 1995 Act provides that the judge may give appropriate instructions as regards the making of arrangements for overnight accommodation for the jury and for their continued seclusion if such accommodation is provided. This section is traditionally read as making the seclusion of the jury mandatory.

445. Section 79 inserts a new subsection (7) to provide the court with the power to allow the jury to separate after it has retired to consider its verdict, if this is considered appropriate.

Section 80 – Television link from court to prison or other place of detention

446. Section 80 provides for certain court proceedings, not including a hearing at which evidence is to be heard on the charge, to take place by live television link between a prison and the High Court and Sheriff Court.

447. The accused will use this link to watch the proceedings and communicate with the court and with those representing him or her as if present in court in person.

448. The court retains discretion to halt this arrangement before or during the diet and to postpone or adjourn the proceedings to the next court day, not being a Saturday, Sunday or court holiday in order that the accused be brought physically before the court. Where a postponement or adjournment occurs, any delay will not count towards any time limit in respect of the case.

Section 81 – Warrants issued in Northern Ireland for search of premises in Scotland

449. Section 81(1) provides that a search warrant granted by a magistrate or county court judge in Northern Ireland to search premises in Scotland may be endorsed by a sheriff or justice of the peace in Scotland within whose jurisdiction the premises may be found, and such endorsement authorises the search of the premises in Scotland as if the Scottish judge had originally granted the search warrant.

450. Subsection (2) prescribes the manner of endorsement as that specified by section 4(1) of the Summary Jurisdiction (Process) Act 1881. Under section 4, a process may be issued and endorsed by a court of summary jurisdiction by proof of the handwriting of the officer making the endorsement, such proof being by oath or declaration before a sheriff or justice of the peace. A form of endorsement is set out in the Schedule to that Act.

Section 82 - Use of electronic communication or electronic storage in connection with warrants to search

451. Section 82 enables the Scottish Ministers to make a statutory instrument to authorise the use of electronic communications or electronic storage in connection with certain search warrants.

452. Subsection (1) specifies that the warrants referred to are those granted under section 134(1) of the Criminal Procedure (Scotland) Act 1995. These common law warrants are most often used when the prosecutor, in carrying out his or her investigative role, seeks a search warrant before a person has been charged with an offence. However, such warrants can also be applied for after summary proceedings have begun. The subsection is without prejudice to section 8 of the Electronic Communications Act 2000 (the 2000 Act). Section 8 of the 2000 Act (power to modify legislation) is designed to remove restrictions arising from other legislation which prevent the use

of electronic communications or storage in place of paper, and to enable the use of electronic communications or storage of electronic data to be regulated where it is already allowed. However, section 8 is restricted to the modification of statutory provisions and cannot be used to modify common law rules.

453. Subsection (2) makes provision so that the Scottish Ministers may, by order, in relation to these search warrants, modify any rule of law or practice and procedure in relation to criminal proceedings (i.e. common law) so as to facilitate the use of electronic communication or electronic storage, instead of other forms of communication or storage.

454. Subsection (3) details the purposes for which the Scottish Ministers may make provision under subsection 2. These are the same as the purposes mentioned in relation to the provisions which may be modified under section 8(1) of the 2000 Act and in any of the paragraphs (a) to (f) of section 8(2). Section 8(2) of the 2000 Act describes the purposes for which modification by order may be made. An example of such a purpose, contained in section 8(2)(a) of the 2000 Act, is "the doing of anything which under such provisions is required to be or may be done or evidenced in writing or otherwise using a document".

455. Subsection (4) places a limitation on Ministers' power to make an order. The order is subject to negative procedure. Before making an order they must consider that authorising the option of electronic communication or storage will not result in arrangements for record keeping that are less satisfactory than those in existence.

456. Subsection (5) applies section 8(4) to (6) and (8) and section 9(5) and (6) of the 2000 Act to orders made under subsection (2). Section 8(4) and (5) of the 2000 Act specify the types of provision about electronic communications or the use of electronic storage that may be made. These relate to certain practical matters e.g. "provision as to the electronic form to be taken" and "provision requiring persons to prepare and keep records in connection with any use of electronic communications or electronic storage". Section 8(5) of the 2000 Act relates to section 8(4)(g) and concerns the practicalities that may need to be proved in legal proceedings, such as the time and date on which things were done. Section 8(6) of the 2000 Act provides that an order cannot require the use of electronic communications or storage. However, when someone has previously chosen the electronic option, the variation or withdrawal of such a choice may be subject to a period of notice specified in the order. Section 8(8) of the 2000 Act applies the provisions of section 8 to subordinate legislation as appropriate. Sections 9(5) and (6) of the 2000 Act make provisions in relation to any conditions and requirements imposed by an order and that different arrangements can be made for different cases.

457. Finally, by virtue of section 59 of the Bill, sheriffs, justices and stipendiary magistrates will be able to sign warrants outside their own jurisdiction provided they are in Scotland. These provisions will apply equally to electronic warrants if provision is made under the order making power in this section. The electronic signature will therefore be able to be applied by the sheriff anywhere in Scotland.

Section 83 – Anti-Social Behaviour Strategies

458. Section 83 inserts a new section 22A into the Crime and Disorder Act 1998, which imposes a statutory duty on local authorities and Chief Constables to prepare, review and publish a strategy for dealing with anti-social behaviour within the authority's area.

459. Section 22A(1) requires each local authority to prepare jointly with the relevant Chief Constable a strategy for dealing with anti-social behaviour within its area and to publish that strategy. Section 22A(2) sets out that the strategy should include specific provision for how the two parties will co-ordinate their functions and the arrangements for exchange of information in relation to anti-social behaviour.

460. Section 22A(3) requires both parties to keep the strategy under review, to revise it as necessary and to publish any revised strategy. Section 22A(4) defines the terms used in this section.