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 1 (Protection of the public at large) deals with the assessment, treatment and sentencing of serious violent and sexual offenders. The Criminal Procedure (Scotland) Act 1995 will be amended to introduce a new life sentence of an order for lifelong restriction (OLR), to prescribe the procedure for assessing whether an offender meets the criteria for the new disposal and to make the interim hospital order available as a disposal in cases of insanity. This Part also provides for the establishment of a new public body to be known as the Risk Management Authority (RMA) and sets out the functions of the RMA as respects risk assessment and the minimisation of risk. The Risk Management Authority will have specific functions in relation to offenders for whom risk management plans are to be prepared.

Part 2 (Victims' rights) implements aspects of the Scottish Strategy for Victims, which was published by the Scottish Executive in January 2001. It establishes the following rights for victims of certain crimes:

- the right to make and submit a written 'victim statement' to the Court;
- the right to receive information about the release or escape of an offender, and to receive information from and make representations to the Parole Board for Scotland.

Part 2 also contains provisions empowering the police to pass on information about victims of crime to prescribed bodies who can provide counselling and support.

Part 3 (Sexual offences etc.) amends the law in relation to serious and sexual offences by:

- increasing the terms of imprisonment for possession and distribution of indecent photographs of children;
- bringing certain sexual offence provisions into line with the requirements of the European Convention on Human Rights;
- enabling certain sexual offences committed abroad to be tried in sheriff courts rather than only in the High Court;
- repealing a provision in the Crime and Punishment (Scotland) Act 1997 which is no longer required;
- widening the scope of the extended sentence available presently for sexual and violent offenders to offenders convicted of abduction;
- introducing new offences for those trafficking in human beings for the purposes of prostitution.

In addition, Part 3 implements certain of the recommendations of the Expert Panel on Sex Offending relating to reports for the courts. The panel was established in 1998 to advise the Scottish Ministers on relevant issues related to sex offenders and reported

in 2001 in "Reducing the Risk: Improving the response to sex offending" (http://www.scotland.gov.uk/library5/justice/aecr-00.asp).

Part 4 (Prisoners etc.) deals with the custody and detention of prisoners, their release and monitoring of their movements while on release. It makes changes to the law in the areas dealing with remanding certain young people in custody and with taking prisoners from prison to another place (such as a police station) at the police's request; and will enable a prisoner arrested in Scotland who is unlawfully at large from another UK jurisdiction to be detained temporarily in a Scottish prison or young offenders institution pending their transfer back to the relevant jurisdiction.

In relation to the law covering the release of prisoners, this Part makes changes to the Prisoners and Criminal Proceedings (Scotland) Act 1993 to:

- extend the Parole Board's existing power to require the Scottish Ministers to release on licence certain classes of prisoner to all classes of prisoners; and
- provide that a determinate sentence may be served consecutively to the punishment part of a life sentence and vice versa.

This Part will also enable the Scottish Ministers to set a condition on an offender's licence for the electronic monitoring of that offender when released from custody.

Part 5 (Drugs courts) empowers drug courts to impose interim sanctions such as short periods of custody or short periods of community service for non-compliance with a probation order or drug treatment and testing order whilst allowing the original order to continue.

Part 6 (Non-custodial punishments) makes changes to the law in relation to:

- restriction of liberty orders – by amending the Criminal Procedure (Scotland) Act 1995 to enable the transfer of these orders between courts and to make them a direct alternative to custody;
- anti-social behaviour orders – by amending the Crime and Disorder Act 1998 to provide for interim anti social behaviour orders and extending the power to apply for ASBOs to registered social landlords;
- drug treatment and testing orders and probation orders – by amending the Criminal Procedure (Scotland) Act 1995 to enable the courts to impose a condition of remote monitoring;
- non-harassment orders – by amending the Criminal Procedure (Scotland) Act 1995 to provide for a specific power of arrest for the breach of a non-harassment order;
- supervised attendance orders – by amending the Criminal Procedure (Scotland) Act 1995 to make changes to the penalties for breaching a supervised attendance order and to give the courts the power to impose a supervised attendance order as a first instance disposal for adult offenders;
- clarifying the law in relation to remand and bail for breach of non-custodial disposals.

Part 7 (Children) clarifies the law in relation to the physical punishment of children under 16. Punishment involving a blow to the head or shaking or the use of an implement are prohibited. This Part also prohibits the publication of material intended or likely to identify children in any way concerned in children's hearings and connected proceedings. Further, it enables the Scottish Ministers to inform victims (and parents and relevant persons where victims are children) about key stages of the children's hearings process where offence cases affect them. The Scottish Ministers will be enabled to identify by order certain other persons to whom information may be given, for example third parties concerned in processing compensation claims or providing information, advice and counselling services to victims.

Part 8 (Evidential, jurisdictional and procedural matters) amends the Criminal Procedure (Scotland) Act 1995 to:

- allow challenges to certain evidence relating to fingerprints and similar data where this is contained in certificate form;
- allow DNA samples to be taken by swabbing by a constable without authorisation from a senior officer;
- allow the police to retain DNA and fingerprints given voluntarily and with the consent of the person giving the sample ;
- permit the transfer of court cases across a sheriffdom boundary;
- empower a sheriff, magistrate or justice to sign, outwith the jurisdiction in which they operate, a warrant or other legal document relating to procedure within that jurisdiction;
- allow sheriff clerks to sign and issue citations for ancillary hearings associated with breach and review hearings for community disposals, restriction of liberty orders and drug treatment and testing orders;
- allow notice of a citation to be left at the home of the accused informing him or her where the indictment (or complaint) can be collected;
- ensure that it is competent for a court to continue a case to a future diet in circumstances where there is no evidence that service of the complaint on the accused has been effected;
- ensure that a review of a drug treatment and testing order can take place without the attendance of the Procurator Fiscal;
- enable previous convictions form other member States of the European Union to be recognised by the Scottish courts;
- give the prosecutor a right to be heard when a convicted person in solemn proceedings seeks bail and a right to appeal against the grant of bail to a convicted person in such proceedings;
- changes the maximum period for which a court can adjourn a case following conviction pending sentence to 4 weeks or on cause shown 8 weeks in all cases.

Part 9 (Bribery and corruption) changes the law on corruption as it relates to the international aspects of corruption. This is to ensure that the law complies with international obligations entered into by the UK Government.

Part 10 (Criminal records) extends the provisions of Part V of the Police Act 1997 to give the Scottish Ministers powers to:

- check that persons applying to become registered persons and those already registered to countersign applications for criminal record and enhanced criminal record certificates are suitable persons to receive criminal record information;
- refuse to register or to cancel the registration of an unsuitable person;
- notify registered persons where a new conviction against an individual is recorded subsequent to the issue of a criminal record or an enhanced criminal record certificate.

It also—

- adds to the range of persons qualifying for the enhanced criminal record certificate;
- extends the scope of the code of practice with which registered persons must comply;
- makes failure to comply with the code of practice a ground for de-registration;
- extends the scope of the regulations dealing with the maintenance of the list of registered persons.

Part 11 (Local authority functions) extends the funding powers for criminal justice social work to include arrest referral schemes and deferred sentences, and allows funding to be paid to groupings of local authorities.

Part 12 (Miscellaneous and general) deals with:

- the introduction of police custody and security officers;
- the increase of penalties for wildlife crime, and related changes to Part I of the Wildlife and Countryside Act 1981 which enhance police powers for certain wildlife crimes;
- the disqualification from jury service of offenders who are serving community penalties;
- the removal of the mandatory requirement that juries must be secluded for a continuous period whilst they are considering their verdict;
- the introduction of live TV links between courts and prisons or other places of detention;
- offences aggravated by religious prejudice;
- allowing search warrants issued in Northern Ireland in relation to premises in Scotland to be enforced on endorsement by a sheriff or JP in the jurisdiction in which the premises can be found;
- enabling electronic communication and storage for search warrants;
- local strategies to deal with anti-social behaviour.

This Part also deals with general matters relating to the Act such as transitional provisions, minor and consequential amendments, repeals, interpretation, order making powers, title and commencement.

Part 1 – Protection of the Public at Large

Risk assessment and order for lifelong restriction; Disposal in case of insanity

Sections 1 and 2 and schedule 1 – Risk assessment and order for lifelong restriction; Disposal of case where accused found to be insane

1. Sections 1 and 2 amend Parts XI and VI respectively of the Criminal Procedure (Scotland) Act 1995 to:
    - provide a new sentence to be called the order for lifelong restriction (OLR);
    - define the offences which may attract the new disposal;
    - provide the process for assessing the risk the offender's being at liberty presents to the public at large and consequent eligibility for the new disposal;
    - provide for arrangements for dealing with an offender who may have a mental disorder;
    - make an interim hospital order available to the court as an interim disposal in cases of insanity; and
    - remove the mandatory restriction requirement for persons dealt with on the grounds of insanity where the charge is murder.
2. Schedule 1 provides for consequential amendments to the Prisoners and Criminal Proceedings (Scotland) Act 1993 concerning the release on licence of offenders sentenced to an OLR and to the Criminal Procedure (Scotland) Act 1995 in relation to the notification of previous conviction information, the accused's right of appeal against sentence and the power of the sheriff to remit cases to the High Court for sentencing.

3. Section 1 amends the 1995 Act by inserting new sections 210B to 210H. It introduces a new sentence for the lifetime control of serious violent and sexual offenders who present a continuing risk to the public (the order for lifelong restriction (OLR)) and sets out the process by which such a sentence may be imposed.

4. Section 210B defines the offences for which the OLR may be imposed and prescribes that the disposal is available to the High Court only, although offenders can be remitted for sentence from the sheriff court where the offence falls within the relevant definition and it appears to the sheriff that the offender may meet the statutory criteria in the new section 210E. The relevant offences, excluding murder, are:

- a sexual offence (as defined by section 210A of the 1995 Act);
- a violent offence (as defined by section 210A of the 1995 Act);
- an offence which endangers life; or
- an offence which by its nature or circumstance indicates in the opinion of the Court a propensity to commit any of the preceding offences.

5. "Sexual offence" is defined in section 210A of the 1995 Act as:

(i) rape;

(ii) clandestine injury to women;

(iii) abduction of a woman or girl with intent to rape or ravish;

(iv) assault with intent to rape or ravish;

(v) indecent assault;

(vi) lewd, indecent or libidinous behaviour or practices;

(vii) shameless indecency;

(viii) sodomy;

(ix) an offence under section 170 of the Customs and Excise Management Act 1979 in relation to goods prohibited to be imported under section 42 of the Customs Consolidation Act 1876, but only where the prohibited goods include indecent photographs of persons;

(x) an offence under section 52 of the Civic Government (Scotland) Act 1982 (taking and distribution of indecent images of children);

(xi) an offence under section 52A of that Act (possession of indecent images of children);

(xii) an offence under section 1 of the Criminal Law (Consolidation) (Scotland) Act 1995 (incest);

(xiii) an offence under section 2 of that Act (intercourse with a stepchild);

(xiv) an offence under section 3 of that Act (intercourse with child under 16 by person in position of trust);

(xv) an offence under section 5 of that Act (unlawful intercourse with girl under 16);

(xvi) an offence under section 6 of that Act (indecent behaviour towards girl between 12 and 16);

(xvii) an offence under section 8 of that Act (abduction of girl under 18 for purposes of unlawful intercourse);

(xviii) an offence under section 10 of that Act (person having parental responsibilities causing or encouraging sexual activity in relation to a girl under 16);

(xix) an offence under subsection (5) of section 13 of that Act (homosexual offences); and

(xx) an offence under section 3 of the Sexual Offences (Amendment) Act 2000 (abuse of position of trust).

6. "Violent offence" is defined in section 210A of the 1995 Act as "any offence (other than an offence which is a sexual offence within the meaning of this section) inferring personal violence".

7. Section 210B also deals with the circumstances in which the court may make a new order called a risk assessment order (RAO). This in an order to be made by the court, either following a motion by the prosecutor or at its own instance.

8. Section 210B(2) provides that where an offender is convicted of an offence defined at 210B(1) and where it appears that the risk criteria set out in the new section 210E may be met, and provided that the prosecution has given prior notice to the accused of the intention to make a motion to the court, the prosecutor will ask the court to make a RAO. Alternatively, the court may make a RAO of its own accord where it is satisfied that the same statutory tests may be met. The court cannot make a RAO if the offender is already subject to an OLR or if it is satisfied that it is appropriate to make an interim hospital order under 210D(1).

9. The risk assessment order has the effect of adjourning the case for the purpose of an assessment to be carried out under section 210B(3) as to what risk is posed to the public by the offender being at liberty and for a report (a risk assessment report or "RAR") of that assessment to be prepared and submitted to the court. The RAR is to be prepared by a person accredited for that purpose by the Risk Management Authority and in a manner which will also be accredited by the RMA. The accreditation procedures are set out in section 11.

10. Section 210B(3) further provides that the RAO is authority for the offender to be taken to a place specified in that order and remanded in custody there pending the preparation of the RAR and a date being fixed for the sentencing hearing.

11. Section 210B(4) provides that when the risk assessment order is made, the case will be adjourned for no more than 90 days for the assessment to be carried out and the risk assessment report prepared. Under section 210B(5) if cause is shown, the court may extend the adjournment for a further period not exceeding 90 days. Where, because of circumstances outwith the control of the risk assessor, the assessor has been unable to complete the report within the period allowed by the extension the court may exceptionally grant a further extension for such period as appears to it to be appropriate. There is no right of appeal against the granting or refusal to grant a risk assessment order.

12. Section 210C deals with the risk assessment report (RAR). It provides that in preparing the RAR the assessor may take into account any allegation that the offender has engaged in criminal behaviour whether or not it resulted in prosecution and acquittal. Where the assessor takes such allegations into account in preparing the RAR each allegation must be listed in the report along with details of any additional evidence supporting the allegation. The assessor must also include in the risk assessment report an opinion as to whether the risk mentioned at 210B(3)(a) is high, medium or low and explain the extent to which any allegation and evidence has influenced that opinion. In reaching that assessment, the assessor must have regard to any relevant guidelines or standards issued by the Risk Management Authority.

13. Section 210C sets out the process for submitting the RAR and any accompanying documents to the court and to the other parties including the offender. On receipt of the RAR, the court must set a date for the sentencing hearing.

14. Section 210C also gives the offender a right to instruct a risk assessment report to be prepared at the same time as the RAR is being prepared by the court appointed risk assessor. The report instituted by the offender will be subject to the same conditions for completion and extension as provided at 210B(5) in respect of the RAR being prepared by virtue of the RAO. Provision is made for this report to be submitted to the court and other parties in the same fashion as the RAR.

15. Section 210C provides for the offender to object to the content or findings of the risk assessment report. The form of the objection will be prescribed by Act of Adjournal (a statutory instrument made by the High Court). In pursuance of such an objection, the prosecutor and offender will be able to produce witnesses and examine them about the content or findings of the RAR or alternative report prepared at the instruction of the offender.

16. Section 210D deals with offenders who may meet the risk criteria and may be suffering from a mental disorder. The provisions will enable the court to get information on the nature of the offender's mental disorder and how that relates to the risk the offender's being at liberty presents to the safety of the public at large . To achieve this the court must, instead of making a RAO, make an interim hospital order (IHO), where it appears to the court that the offender may meet the risk criteria and also the criteria for an interim hospital order as set out in section 53(1) of the 1995 Act unless the offender is already subject to an order for lifelong restriction previously imposed.

17. Section 210D also provides that where an IHO is made, a report assessing the risk the individual presents to the public at large shall also be prepared by a person accredited for that purpose by the RMA and in a manner that will also be subject to RMA accreditation. The assessment of risk is in addition to any psychiatric or medical report that is required to be submitted to the court under the IHO provisions. The process for submitting a RAR and the information it may contain as set out in section 210C(1) to (3) and the procedure for objecting to its content or findings as set out in section 210C(6)(a) and (b)(i) apply equally to the assessment of risk under section 210D(2).

18. Section 210E sets out the risk criteria to be considered at the stage when the court is considering whether to make a RAO (whether following a motion by the prosecutor or of its own accord) or an interim hospital order and at the stage when imposing or considering a motion to impose an OLR. The criteria will be applied in these circumstances to cases tried before the High Court and to those remitted from the sheriff court for sentence.

19. Section 210F deals with the new sentence – the order for lifelong restriction (OLR). The section provides that the OLR is a sentence of imprisonment or detention for an indeterminate period.

20. The section sets out the circumstances where a court must impose an OLR. Where however the offender has a mental disorder and satisfies the requirements of section 58 of the 1995 Act and the court considers it appropriate to make a hospital order with restriction, section 58(8) will apply and the court will not have power to impose an OLR even if the offender is also high risk.

21. The prosecutor has the right of appeal against a refusal by the court to make an OLR on the grounds that, on the balance of probabilities, the risk criteria are met.

22. Section 210G clarifies the court's powers where following upon conviction for a serious violent or sexual offence falling within section 210B:

- the court does not make a Risk Assessment Order (RAO) under new section 210B(2) or Interim Hospital Order (IHO) and assessment of risk under new section 210D(1) because it does not consider that the risk criteria may be met; or
- the court considers that the risk criteria are met but a RAO or an IHO is not made because the person has an Order for Lifelong Restriction (OLR) already.

23. In these circumstances the court may deal with the case in any way that it considers appropriate.

24. Section 210G also provides that where following upon a RAO an offender is not given an OLR under section 210F because the court is not satisfied that the risk criteria are met, it may impose any competent disposal except a life sentence or detention without limit of time.

25. Section 210H requires a judge (including a sheriff where the case has been prosecuted on indictment in the sheriff court), following conviction for an offence of the type listed in section 210B(1) (except murder), to prepare a report of the circumstances of the case including all information which the judge considers appropriate. This report will be done in writing as soon as practicable after the case is dealt with, unless a report has been called for under the provisions of section 21(4) of the Act (which deals with sexual offences and offences with a significant sexual element). The form of the report will be prescribed by Act of Adjournal. It is intended that such a report may be provided to and used by the assessor in preparing the RAR.

Section 2 – Disposal of case where accused found to be insane

26. Section 2 amends section 57 of the 1995 Act which provides the disposals for cases where the accused is found insane. This is where the accused is acquitted on grounds of insanity at the time of the act (or omission) constituting the offence (section 54(6)), the accused is acquitted following an examination of the facts (section 55(3)) or, following an examination of the facts, the court concludes that there are no grounds for acquitting the accused (section 55(2)). In these circumstances, the court can at present dispose of the case in the following ways:

"(a) make an order (which shall have the same effect as a hospital order) that the person be detained in such hospital as the court may specify;

(b) in addition to making an order under paragraph (a) above make an order (which shall have the same effect as a restriction order) that the person shall, without limit of time be subject to the special restrictions set out in section 62(1) of the 1984 Act;

(c) make an order (which shall have the same effect as a guardianship order) placing the person under the guardianship of a local authority or of a person approved by a local authority;

(d) make a supervision and treatment order (within the meaning of paragraph 1(1) of Schedule 4 to [the 1995] Act, or

(e) make no order

27. Section 2 amends these provisions to add to the list of disposals a power for the court to make an interim hospital order (IHO) under section 53 of the 1995 Act. An IHO may be imposed by the court after it is satisfied, on the evidence of two medical practitioners, that the offender is suffering from a mental disorder that requires the offender to be remanded to the State Hospital or other appropriate hospital. Section 53 also sets in place the procedure to be followed for the imposition, renewal and cessation of an IHO.

28. Section 2 replaces section 57(3) of the 1995 Act to provide that where an assessment following an IHO finds that an offender poses a high risk to the public and meets the criteria for compulsory detention, the court must impose a hospital order with restrictions.

29. The replacement removes the existing provisions which had the effect of requiring the court to make a hospital order and a restriction order where section 57(1) applied and the charge was murder even although the offender might not have a mental disorder. The effect of removing this provision is that where the charge is murder the court will have all the disposals under 57(2) available to it.

The Risk Management Authority

Sections 3 to 13 and schedule 2 – The Risk Management Authority

30. Sections 3 to 13 and schedule 2 provide for the establishment of a new authority to be known as the Risk Management Authority (RMA) and for this authority to be a public body. These sections also confer upon the RMA certain specific statutory functions in relation to the assessment and minimisation of risk posed to the public by offenders and certain accused persons.

31. Sections 3, 12 and 13 provide for the establishment of the RMA as a public body, and for the powers the RMA requires to operate as a public body and to discharge its functions in relation to the assessment and minimisation of risk. The sections also prescribe the RMA's duties in relation to account keeping and the production of annual reports. Schedule 2 makes provision concerning the constitution etc of the RMA.

32. Sections 4 to 11 set out the RMA's functions in relation to its broad remit of co-ordinating research and promulgating best practice in the field of risk assessment and the minimisation of risk and in playing a direct part in the management of high risk offenders for whom a risk management plan (RMP) is to be prepared. These functions are :

- to develop policy and carry out research in the field of assessment and management of risk posed by offenders;
- to monitor research into and promote effective practice in the assessment and minimisation of risk by issuing guidelines and standards and to commission research and pilot schemes in this area;
- to administer a scheme of accreditation and provide or secure education and training in relation to those professionals involved in the assessment and minimisation of risk;
- to monitor risk management plans for certain classes of offender.

Section 3 – The Risk Management Authority

33. This section establishes the Risk Management Authority and provides that it will exercise the functions given to it by the Act and any other legislation to ensure effective risk assessment and the minimisation of risk. The section also defines risk as the risk the person being at liberty presents to the safety of the public at large, and covers a person convicted of an offence or a person disposed of by the court on the grounds of insanity.

34. Section 3 also introduces schedule 2, which deals with a number of matters concerning the structure and procedures of the RMA (as a public body). Schedule 2 provides for:

- the status of the new body;
- the procedures for membership of the new body, including appointment, resignation and removal from office;
- the procedure of the authority;
- the arrangements for remuneration, allowances and pension for members of the authority;

- the arrangements for the employment of staff and for their pensions, allowances and gratuities.

Section 4 – Policy and research

35. This section describes the various functions the RMA will be required to undertake in relation to its policy and research role. In relation to research, the RMA will be able to compile and keep under review research and developments in the field of risk assessment and risk minimisation, including information about how relevant services are provided in Scotland. The section also empowers the RMA to carry out its own research or commission or co-ordinate research and to publish the findings. The RMA will be able to carry out pilot schemes for the purposes of developing and improving risk assessment and minimisation methods and use the results of the research and pilots to promote effective practice throughout Scotland. This will be done through issuing standards and guidelines which are dealt with in section 5. As part of this function the RMA will also be able to give appropriate advice and make appropriate recommendations to the Scottish Ministers.

Section 5 – Guidelines and standards

36. This section enables the RMA (in pursuance of its policy and research function, prescribed by section 4) to produce, by means of guidelines, a common framework including standards within which those involved in the assessment and management of risk are to operate. The standards will be defined, approved and published by the RMA. The section also provides that those involved in the assessment and minimisation of risk must have regard to the RMA's guidelines and standards when exercising their relevant risk management functions. Practitioners involved in the field of risk assessment and the minimisation of risk may also be accredited for those purposes. This matter is dealt with in section 11.

Sections 6 to 9 – Risk management plans: preparation, further provision, implementation and review

37. As explained above, the RMA has a specific function in relation to offenders for whom a risk management plan (RMP) is to be prepared. Initially this will be for those offenders who are sentenced to an order for lifelong restriction (OLR). However, the Act makes provision for the Scottish Ministers to make an order prescribing other categories of offenders for whom a RMP would have to be prepared. There is a statutory requirement for the authorities who have responsibilities in connection with the relevant offenders when in prison or released into the community on licence to prepare a RMP. The RMP will detail the role of those authorities involved with the offender in minimising the risk the offender's being at liberty presents to the safety of the public at large. The RMA has a specific function to approve and monitor the implementation of the RMP. The provisions dealing with the preparation of the RMP, its implementation and review and the RMA's function in relation to these matters are set out in sections 6 to 9.

38. Section 6 requires that a RMP must be prepared for an offender who is sentenced to an OLR, and any other category of offender which the Scottish Ministers may, by order, prescribe. The types of offences and the process by which an offender will be assessed for an OLR, including the criteria against which his or her level of risk will be measured, are dealt with in section 1.

39. Before making an order prescribing any new category of offender for whom a RMP will be required, the Scottish Ministers must consult the RMA and any other person as considered appropriate.

40. This section also prescribes that the RMP must contain an assessment of risk, the measures to be taken to minimise this risk and how these will be co-ordinated. The form of the RMP is to be specified and published by the RMA, which may also

provide guidance as appropriate on how the form should be prepared, implemented and reviewed. The authority preparing the RMP must use the published form.

41. The purpose of a RMP is to ensure that the risk the offender's being at liberty presents to the safety of the public at large (offender's risk) is properly managed on a multi-disciplinary basis and will detail the role of those authorities or bodies involved in managing the offender's risk. The RMP may place responsibility for implementing the RMP on any person who could reasonably be expected to assist with the minimisation of the offender's risk.

42. Section 7 prescribes that "the body" who will be responsible for preparing the RMP will be known as the "lead authority".

43. The identity of the lead authority following conviction will depend on the age of the offender and where the offender is liable to be detained or imprisoned.

44. There is no age limit on who may be sentenced to an OLR. If the offender is serving a sentence in prison or is being detained in a young offenders institution or is a child and is detained in some other establishment under section 208 of the Criminal Procedure (Scotland) Act 1995, the lead authority will be the Scottish Ministers. If the offender has a mental disorder and is detained in hospital under any of the provisions described in subsection (2) of section 7, the lead authority will be the State hospital or appropriate NHS authority.

45. This section also provides for a local authority to be the lead authority where the lead authority is not the Scottish Ministers or a hospital. In practice, the local authority will become the lead authority when the offender has been released from detention or imprisonment. Arrangements for transferring the lead from one authority to another, for example when an offender is released from detention or imprisonment are dealt with in section 9.

46. Section 8 sets out the preparation process for the RMP. The initial RMP is to be prepared within 9 months of the offender being sentenced or detained in hospital, although the RMA can grant a reasonable extension where an appeal under subsection (7) is pending. The lead authority is to consult any person or authority upon which it is considering conferring functions in relation to the implementation of the RMP and any other appropriate person. Those consulted are under a duty to comply with reasonable requests.

47. This section also requires the lead authority to submit the RMP to the RMA for approval. The RMA may either approve the plan or reject it if it does not comply with the minimum standards set out in section 6(3) or any other guidelines and standards which the RMA have prepared. If, in rejecting the RMP, the RMA considers that the lead authority has disregarded minimum standards or any relevant guideline, standard or requirement produced by the RMA in relation to the preparation of RMPs, the RMA can give reasonable directions to the lead authority or any person named in the plan concerning the preparation of a revised plan. Those receiving such a direction are obliged to comply with any reasonable direction. Those receiving such a direction may appeal to the sheriff against such a direction on the grounds that it is unreasonable.

48. Section 9 provides for the procedures for the implementation and review of RMPs. The lead authority and any other person having functions under the risk management plan are required to implement their respective responsibilities. If the RMA considers that the lead authority or other persons with duties under the plan are failing, without reasonable excuse, to implement the plan in accordance with those functions, the Authority may give directions to the lead authority or person concerned as to the implementation of the plan. The lead authority or relevant person is under a duty to comply with such a direction. Those receiving such a direction may appeal to the sheriff against such a direction on the grounds that it is unreasonable. The lead authority must report to the RMA annually on the implementation.

49. The section also provides a review process to be activated where there is likely to be a significant change in the offender's circumstances, for example, where the offender may be considered by the Parole Board for release on licence. Where a change is considered, the lead authority must review the RMP. If after review the lead authority considers that the current RMP is no longer suitable or is likely to become unsuitable then that authority must prepare a revised RMP and submit it to the RMA for approval within a period which the RMA may reasonably require. Where, following a review, the lead authority considers that it is no longer appropriate for it to continue as "lead" (for example where an offender is being released on licence), the responsibility will pass to a different lead authority as prescribed under section 7 and the new lead authority must prepare a revised RMP and have it approved by the RMA. The RMA's power to reject a RMP on the grounds that it does not meet agreed standards and issue directions apply equally to revised RMPs.

Section 10 – Grants to local authorities in connection with risk management plans

50. Section 10 enables the Scottish Ministers to make specific grants to local authorities subject to such conditions as they consider appropriate to assist with the preparation and implementation of the RMP. Before making such a grant the Scottish Ministers are to consult local authorities and other persons as appropriate.

51. It is expected that local authorities will bear the cost of preparing and implementing RMPs from within existing budgets on the basis that they already have a statutory duty to provide appropriate services for these offenders. However the RMA will be able to make recommendations to the Scottish Ministers concerning the granting of specific funding where it appears to the Authority that this is required to ensure that a RMP can be prepared or implemented.

Section 11 - Accreditation, education and training

52. This section gives the RMA two roles. It enables the RMA to:

- administer any scheme set up by the Scottish Ministers for the purpose of accrediting the processes of assessing and monitoring risk and practitioners who work in the area of risk assessment and minimisation. The RMA's function in this respect extends to awarding, suspending or withdrawing accreditation;
- carry out or commission relevant educational and training activities.

53. The section also empowers the Scottish Ministers to make regulations to establish appropriate accreditation schemes for the RMA to administer. The accreditation may cover any RMA-sponsored education or training and may also recognise other relevant experience or qualifications held. For example, the accreditation may recognise relevant qualification previously obtained, or obtained from a source other than the RMA. As respects the processes of assessing and minimising risk, the accreditation will provide recognition of the effectiveness of any method and practices which may be employed in that regard.

Section 12 – Functions: supplementary

54. This section makes the standard provisions required to enable the RMA to operate as a public body. In particular the RMA is empowered to acquire and dispose of land, enter into contracts, charge for goods and services and, with the consent of the Scottish Ministers, invest and borrow money. In addition it provides a power for the Scottish Ministers to direct the RMA in relation to the discharge of its functions.

Section 13 – Accounts and annual reports

55. This section provides for the standard account keeping and reporting procedures for a public body including the preparation and submission to the Scottish Ministers of

annual accounts and annual reports. The Scottish Ministers must publish the RMA's annual reports and lay a copy before the Scottish Parliament.

Part 2 – Victims' Rights

Section 14 – Victim statements

56. Section 14 confers upon victims of certain crimes the right to make a statement about the effect of the crime upon them, which will be normally be submitted to the court after a conviction and prior to sentencing.

57. Subsection (1) provides that the Scottish Ministers are to prescribe by affirmative order those courts or class of court in which the victim is to have the right to make a statement to the court. In addition this section includes a power for Scottish Ministers to prescribe by negative order the offences in respect of which the victim is to have the right to make a statement.

58. Subsection (2) provides that a person who has been (or is alleged to have been) the victim of a prescribed offence, has the right to make a statement (a "victim statement"). The right to make a victim statement arises either after a decision has been made by the procurator fiscal to bring proceedings in respect of the offence or before such a decision has been made if the procurator fiscal so decides. The victim statement should deal with the way and degree to which the offence (or apparent offence) has affected, and may be continuing to affect, that person. Subsection (2) is subject to subsection (6), which makes provision for the procedure to be followed where the victim is under 14, has died or is mentally or physically incapable of making such a statement.

59. Subsection (3) provides that where a person has made a victim statement and the sentence has not yet been passed, that person has the right to make a statement which is supplementary to or amplifies the victim statement. This will permit the victim to provide the court with the most up-to-date information concerning the effect of the offence on them.

60. Subsection (4) provides for the accused to receive a copy of the victim statement or statements from the prosecutor only after a plea of guilt or finding of guilt. If there is a dispute between the Crown and the defence about information contained in the victim statement, the Court may call a proof and hear evidence.

61. Subsection (5) provides that once the offender pleads or is found guilty the prosecutor must place the victim statement and any supplementary victim statement before the court and thereafter the court must have regard to information contained in the victim statement or statements, which is relevant to the offence(s) of which the accused has been convicted in determining sentence on the offender. Where an offender has been found not guilty in relation to some of the charges brought, the Court must disregard information in the victim statement that relates only to the unproven charges. In practice, the court must read the whole victim statement, disregard any information that it considers is not relevant and have regard only to relevant information in determining the sentence to be given to the offender.

62. Subsection (6) makes provision for the circumstances where the victim is either unable to make a statement because the victim has died, is incapable of exercising the right to make a statement because of mental or physical incapacity or is under the age of 14.

63. Where the victim has died, the victim's right to make a statement transfers to that victim's 4 qualifying nearest relatives taken from the list in subsection (10). Where the victim died whilst under 16, in addition to the 4 qualifying nearest relatives the child's carer (this being defined in accordance with the definition of "person who cares for the child" in section 2(28) of the Regulation of Care (Scotland) Act 2001) has the right to make a statement.

64. Where the victim is incapable of giving a statement due to mental or physical incapacity, the right to make a statement transfers to that victim's qualifying nearest relative according to the list in subsection (10). Subsection (7) provides that an inability to communicate which can be addressed by human or mechanical aid can be disregarded.

65. If the victim is a child under 14 years old, the right to make a statement may be exercised by the child's carer as defined in the Regulation of Care (Scotland) Act 2001. The Scottish Ministers have the power under subsection (13) to amend by affirmative order the age at which the victim is to have the right to make a statement.

66. Subsection (8) defines "qualifying person" for the purpose of subsection (6) by reference to subsections (9) and (10) but excluding persons who cannot make a victim statement because they are incapable or a child under the age of 14. Subsection (10) lists certain persons with a family relationship to the victim. This includes those who are not the mother, father or child of the victim, but who enjoyed a parent-child relationship with the victim, as defined under the provisions of the Children (Scotland) Act 1995. Subsection (10) also provides for cohabitees (defined in subsection (11)). The Scottish Ministers have the power under subsection (12) to amend by affirmative order the list of qualifying persons contained in subsection (10). Subsection (9) excludes a person who is on that list from being a "qualifying person" if they are accused or suspected of being the perpetrator of or having been implicated in the offence (or apparent offence) in question.

Section 15: Prohibition of personal conduct of defence in proofs ordered in relation to victim statements in cases of certain sexual offences

67. Subsection (2) amends the Criminal Procedure (Scotland) Act 1995 to prohibit the accused in certain sexual offence cases from personally questioning a victim on the content of their victim statement in any proof on the victim statement called after the accused is found or pleads guilty. The provisions that are being amended were inserted into the 1995 Act by the Sexual Offences (Procedures and Evidence) Act 2002, which made provision to prevent the accused questioning the victim in relation to these offences during the trial.

68. Section 15 also amends the 1995 Act to give the court power to appoint a solicitor for the purposes of his/her defence at any such proof on the victim statement if he/she does not have a solicitor for the reasons specified in section 288D(2)(a) of the 1995 Act.

Section 16: Victim's right to receive information concerning release etc. of offender

69. Section 16 confers rights on victims of certain crimes to receive from the Scottish Ministers certain information regarding their assailant's release into the community, where their assailant has been sentenced to prison for a period of 4 years or more, life imprisonment or detention for life. This includes children under the age of 18 who have been sentenced to be detained without limit of time for murder or on conviction by indictment. Specifically subsection (3) provides that victims should be informed:

- of the date of the offender's release (unless on temporary release);
- of the date of death if the offender dies before release;
- if the offender has been transferred outwith Scotland;
- if the offender has become eligible for temporary release ;
- if the offender has escaped or absconded from custody; and
- if the offender is unlawfully at large.

70. Subsection (1) provides for the circumstances under which information is to be provided to victims of such offences as are prescribed by the Scottish Ministers. The victim must indicate that they wish to receive the information. Where a victim qualifies they have

the right to receive information unless the Scottish Ministers decide that exceptional circumstances make disclosure inappropriate.

71. Subsections (5) and (6) replicate for the purposes of section 16, the arrangements included in section 14 to transfer the right of the victim under section 16 to an eligible relative or carer where the victim is dead, under 14 or incapable of exercising the right.

Section 17: Release on licence: right of victim to receive information and make representations

72. Section 17 confers on victims who are eligible to receive information under section 16 the right to receive certain information relevant to the release of the offender.

73. Subsection (1) gives the victim the right to make written representations to the Scottish Ministers concerning release of their assailant. The rights set out in subsection (1) arise where the victim has indicated to the Scottish Ministers a wish under subsection (2) to make such representations. The right does not exist unless the offender has reached the age of 16 by the date on which the case is referred to the Parole Board by the Scottish Ministers (subsection (3)). Subsection (4) provides that the Scottish Ministers will issue guidance on the form of such representations.

74. Subsection (5) provides that when the Scottish Ministers refer a case to the Parole Board for a decision on release they must fix a time within which written representations must be made to the Board for consideration and advise the victim accordingly. The Scottish Ministers will pass on the victim's representations to the Parole Board.

75. Subsection (6) lists certain information that the Board must inform the victim, even if representations have not been made, of their decision provided the victim has under subsection (11) intimated that they wish to receive it. The information listed is whether the Board has recommended or directed release. If the Board has recommended release it must inform the victim whether licence conditions have been set and, if any of them relate to contact with the victim or the victim's family, what those conditions are, together with any additional information which the Board feels it is appropriate to provide.

76. Subsections (7) and (8) deal with the situation where the offender's release on licence is automatic and the Parole Board's role is to make recommendations to the Scottish Ministers on licence conditions. Subsection (7) requires the Scottish Ministers to fix a time within which written representations must be made to the Board for consideration and to advise the victim accordingly.

77. Subsection (8) provides that in a case to which subsection (7) applies, even if representations have not been made, the Board is obliged to inform the victim (provided the victim has indicated under subsection (11) that they wish to receive the information) if it has recommended licence conditions and, if any of them relate to contact with the victim or the victim's family, what those conditions are.

78. Subsections (9) and (10) deal with the circumstances where the offender's case is not considered by the Parole Board and decisions upon licence conditions are taken by the Scottish Ministers. Subsection (9) provides that the Scottish Ministers are required to fix a time within which written representations must be made to them for consideration and to advise the victim accordingly.

79. Subsection (10) provides that, in a case to which subsection (9) applies, whether or not representations have been made (and the victim has indicated under subsection (11) that they wish to receive the information), the Scottish Ministers must inform the victim whether licence conditions have been set and, if any of them relate to contact with the victim or the victim's family, what those conditions are.

80. Subsection (12) specifies that section 17 does not apply:

- if the offender is released on compassionate grounds under the Prisoners and Criminal Proceedings (Scotland) Act 1993; or
- retrospectively, if the Scottish Ministers use the power contained in section 16(4)(a) to change the length of time for which offenders must be sentenced in order for their victims to become eligible to receive information.

Section 18: Disclosure of certain information relating to victims of crime

81. Section 18 enables the police to pass information regarding a victim, with the victim's consent to certain bodies for the purposes of providing the victim with counselling and support. The Scottish Ministers will require to prescribe by statutory instrument the bodies to whom the police may pass information.

82. Subsection (1) provides that a constable may pass certain information to the body or bodies prescribed by the Scottish Ministers. This information may include the person's name, address, telephone number, e-mail address and age, plus any other information which the constable deems appropriate as long as it does not include similar information (such as name and address) relating to the alleged perpetrator. The information provided may indicate that the case is one likely to be disposed of by a children's hearing.

83. Subsection (2)(a) provides that, where the victim of the crime has died, information on any one or more of the qualifying nearest persons as defined in section 14(8) who the constable considers would derive benefit from the counselling or support may be provided to the prescribed bodies again only with the consent of the person concerned.

84. Subsection (2)(b) provides that, where the victim of crime died as a child, information on a person who cared for that victim may be provided, for the purposes of counselling or support, to such bodies prescribed by the Scottish Ministers, again with that person's consent. A "person who cares for" another person is defined in section 2(28) of the Regulation of Care (Scotland) Act 2001 as "someone who, being an individual, provides on a regular basis a substantial amount of care for that person, not having contracted to do so and not doing so for payment or in the course of providing a care service".

Part 3 – Sexual Offences Etc.

Section 19 – Amendments in relation to certain serious and sexual offences

85. Section 19 amends the Civic Government (Scotland) Act 1982, the Criminal Law (Consolidation) (Scotland) Act 1995 and the Crime and Punishment (Scotland) Act 1997.

86. Section 19(1)(a) and (b) respectively amend sections 52 (the taking, showing or distribution of indecent photographs of a children) and 52A (the possession of indecent photographs of children) of the Civic Government (Scotland) Act 1982. The amendment to section 52 will increase the period of imprisonment for conviction on indictment from three years to ten years. The amendment to section 52A will allow the prosecution of these offences on indictment, with penalties of imprisonment for up to a period of five years or a fine or both.

87. Section 19(2)(a) repeals sections 8(1) and (2) of the Criminal Law (Consolidation) (Scotland) Act 1995. Section 8(1) of that Act creates an offence of removing an unmarred girl from and against the will of her parents with the intent that she has unlawful sexual intercourse. Section 8(2) provides a defence that the accused had reasonable cause to believe the girl was 18 years of age or over. Repealing this provision will not affect the law on abduction or the prohibitions on intercourse with a girl under 13.

88. Section 19(2)(b) repeals section 15 of the Criminal Law (Consolidation) (Scotland) Act 1995 which provides a legal defence to a charge of indecent assault against a girl under 16 on the grounds that her assailant had reasonable cause to believe that the girl was his wife.

89. Section 19(2)(c) amends section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995. The amendment will enable sex offences defined in that section and committed abroad by a British citizen or resident of the United Kingdom (and recognised by the relevant country as offences) to be tried in the sheriff court district in which the accused is apprehended or in custody or in such sheriff court district as the Lord Advocate may determine. Currently such offences may only be tried in the High Court.

90. Section 19(3) repeals section 1 of the Crime and Punishment (Scotland) Act 1997, which added a new section (section 205A) to the Criminal Procedure (Scotland) Act 1995. Section 205A makes provision for an automatic life sentence in circumstances where a person is convicted of two or more specified serious offences, but has never been brought into force.

Section 20 – Extended sentences

91. Section 20 inserts a new section 210AA into the Criminal Procedure (Scotland) Act 1995. The effect is that, where an accused is convicted on indictment of abduction, other than abduction of a woman or girl with intent to rape or ravish, that conviction is to be treated in the same fashion as a conviction for a violent offence as defined in section 210A of the 1995 Act. As a result, an extended sentence may be passed on an accused convicted on indictment of such an offence of abduction.

92. "Extended sentence" is defined in section 210A of the 1995 Act as a sentence of imprisonment which combines the term of imprisonment ("the custodial term") which the court imposes on the offender and a further period ("the extension period") for which the offender is to be subject to a licence.

93. A court may impose an extended sentence on a person convicted on indictment of a sexual or violent offence if it considers that the period (if any) which the offender would have otherwise been subject to a licence would not be adequate for the purpose of protecting the public from serious harm from the offender. Extended sentences are available to the court for a sexual offence (as defined in section 210A(10)) for which a determinate sentence of imprisonment has been imposed or for a violent offence (as defined in section 210A(10)) for which a sentence of at least 4 years' imprisonment has been imposed. The duration of an extended sentence is determined by the court's opinion of the need to protect the public from serious harm from the offender, and can be up to 5 years for a violent offence and up to 10 years for a sexual offence.

Section 21 – Sexual and certain other offences: reports

94. Section 21 makes various changes to court procedures in relation to sexual offences (as defined in section 210A(10) of the Criminal Procedure (Scotland) Act 1995) and to offences which, in the opinion of the court, disclose a significant sexual aspect to the accused's behaviour. These are based on recommendations from the Expert Panel on Sex Offending chaired by Lady Cosgrove, which produced the report *Reducing the Risk: Improving the response to sex offending* in June 2001. Section 21(1)(a) makes provision for section 21 to apply to cases where an accused is convicted of a sexual offence, as defined in section 210A(10) of the 1995 Act (full definition provided at paragraph 7 of these notes).

95. Section 21(1)(b) applies the provisions of section 21 to a case where a person is convicted of an offence the nature and circumstances of which disclose, in the opinion of the court, that there was a significant sexual aspect to the person's behaviour in committing it.

96. Section 21(2) makes provision that in a case, which falls within section 21(1) the court must before passing sentence obtain a report from the local authority on the offender's circumstances and character, and also any information concerning the offender's physical and mental condition before passing sentence. Additionally, section 21(2)(b) provides that where the qualifying case concerns a conviction on indictment, the court must obtain an assessment by a suitably qualified psychologist on the offender. Section 21(3) makes provision that, where a case proceeds to trial the trial judge, in a qualifying case under section 21(1), must prepare a report in writing as to the facts established by the evidence heard at the trial. The report must be prepared as soon as is reasonably practicable and the form of such a report will be prescribed by Act of Adjournal.

97. Section 21(5) provides that where a plea or partial plea of guilty is tendered and accepted by the prosecutor in a qualifying case under section 21(1), the narration of the facts given to the court by the prosecutor and anything said by or on behalf of the offender, when the plea of guilty is tendered, is to be recorded by shorthand notes or mechanical device.

98. Section 21(-87) provides that any report under section 21(2) or any record under section 21(5) is to be sent to a local authority officer and psychologist from whom a report is requested under sections 21(2)(a) and (b) respectively.

99. Section 21(6) provides that records under section 21(5) are to be treated in a similar fashion to a record of proceedings in solemn matters under section 93(1) of the 1995 Act and that the provisions of section 93(2) to (4) of the 1995 Act will apply to such records. Section 93(1) of the 1995 Act specifies that solemn proceedings shall be recorded by shorthand notes or mechanical means. Section 93(2) provides that a shorthand writer shall retain and sign his or her notes and certify the notes complete and correct. Section 93(3) provides that a person using mechanical means to record proceedings shall certify that the record is true and complete, identify the proceedings and retain the record. Section 93(4) provides for the payment by the Scottish Parliament of making such a record.

100. Section 21(7) provides that the Scottish Ministers may by subordinate legislation amend sections 21(5) and (6) to provide for a record to be made by such other means as they think fit. This would allow for recording in the future by means of new technology.

101. Section 21(9) amends the provisions of section 201(3) of the 1995 Act. Section 201 provides that a court may adjourn a case prior to imposing a sentence for the purpose of enabling enquiries or determining the most suitable method of dealing with a case. The period that the court may adjourn for this purpose is limited by section 201(3) to three weeks where the accused is in custody and four weeks where the accused is at liberty, and eight weeks on cause shown. The amendment made by section 20(9) of the Act extends the first two of these periods from three and four weeks to six weeks in each case. This is to allow reporters more time to prepare the reports that are required under this section.

Section 22 – Traffic in prostitution

102. Section 22 creates new offences of trafficking for the purposes of sexual exploitation. Scots law already contains a range of provisions – in statute and common law – to protect women and men from exploitation and abuse. The new offences have been created to implement the terms of the European Council Framework Decision (FD) on Trafficking in Human Beings which *inter alia* requires the harmonisation of Member States' criminal law and penalties on trafficking.

103. The provisions outlaw the practice of trafficking people for use in the sex industry. It will be an offence to engage in trafficking for the purpose of sexual exploitation (control over an individual for prostitution or involvement in the making or production of obscene or indecent material). The offences apply both cross border (in to and out of the UK) and within the UK. The offences do not have to involve arrival into or

departure from the UK (see subsection (4)). The offences will also cover behaviour outwith the UK by British citizens (and others specified in subsection (6)). In that event, proceedings may be brought anywhere in Scotland.

104. The maximum sentence where the case is prosecuted on indictment is 14 years and on summary conviction, imprisonment not exceeding 6 months, a fine or both (subsection (3)).

105. The new offence does not require the Crown to demonstrate that the person who arranged or facilitated the trafficking of an individual for the purpose of involving that individual in prostitution did so for gain because the new offence is directed at trafficking per se. Any consideration of gain will be taken into account in sentencing.

106. Subsection (7) defines material with reference to section 51 of the Civic Government (Scotland) Act 1982. This means that material includes any book, magazine, bill, paper, print, film, tape, disc or other kind of recording (whether of sound or visual images or both), photograph, drawing, painting, representation, model or figure and a photograph includes the negative as well as the positive version. Subsection (7) also defines material as including a pseudo-photograph with reference to section 52 of the 1982 Act and any data capable of conversion into a photograph or pseudo-photograph. This catches a copy of an indecent pseudo-photograph and data stored on a computer disc or by other electronic means which is capable of conversion into a pseudo-photograph.

Part 4 – Prisoners

Custody and temporary detention

Section 23 – Remand and committal of children and young persons

107. Section 23 amends the Prisons (Scotland) Act 1989 ("the 1989 Act") and the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") to enable young persons to be remanded in young offenders institutions in certain circumstances. In this context, "young persons" means persons aged 14 or over but under 21 years of age.

108. A young offenders institution is defined in section 19(1)(b) of the 1989 Act as a place in which offenders sentenced to detention in a young offenders institution may be kept. Subsection (1) amends this definition to allow young offenders institutions also to hold persons not less than 14 but under 21 years of age who are remanded or committed for trial or sentence.

109. Subsection (2) amends section 40 of the 1989 Act so that persons committed to a young offenders institution are included in the provisions about persons who are unlawfully at large.

110. Section 51 of the 1995 Act deals with the remanding and committal of young persons. There are various provisions which set out how a court may deal with persons in different age groups and in different circumstances. Subsection (3) amends the section with the effect that:

- persons aged 14 and 15 (unless they are certified as unruly or depraved) shall be committed to the local authority, which shall then place the young persons in secure accommodation or a suitable place of safety;
- persons aged 16 and over who are subject to a supervision requirement may be committed to prison, to a local authority or to a young offenders institution; and
- persons aged 16 and over who are not subject to a supervision requirement, and persons aged 14 and 15 who have been certified by the court as unruly or depraved, shall be committed to a remand centre, if the court has been notified that one is available, or to a young offenders institution or to a prison, if the court has not been so notified.

111. Subsection (4) removes the references to remand centres in section 51(2) of the 1995 Act. The effect of this is that, while the local authority to which a person is committed must be specified in a warrant, there is no similar requirement to specify a particular remand centre.

112. Subsection (5) inserts a new subsection (2A) into section 51 of the 1995 Act to provide that, subject to section 51(4), a person committed to a remand centre under any provision of the 1995 Act shall continue to be held in a remand centre for the period of committal or until liberated in due course of law.

113. Subsection (6) amends section 51(3)(b) of the 1995 Act so that, where a committal to a local authority of a person aged 14 or 15 is revoked by a court on the basis that the person is unruly or depraved, the court may commit the person to either a young offenders institution or a prison.

114. Subsection (7) amends section 51(4) of the 1995 Act. That section currently gives sheriffs the power to revoke an order committing a person aged 14 or 15 to a remand centre or a prison if they no longer consider that the order is necessary. Instead, the young person can be committed to an appropriate local authority which may then place the person in secure accommodation or a suitable place of safety. The section is amended to give sheriffs the power also to revoke orders committing young persons aged 14 or 15 to a young offenders institution.

115. Subsection (8) adds a new subsection (5) to section 51 of the 1995 Act. The effect of the new subsection is that, where a court commits a person to prison or to a young offenders institution under section 51, the warrant issued by the court allows the Scottish Ministers to detain the person in either a prison or a young offenders institution, without the need for any further court order.

Section 24 - Legal custody

116. Section 24 amends the Prisons (Scotland) Act 1989 ("the 1989 Act") to remove the need for prison officers to remain with a prisoner at all times when he or she is in the custody of the police or of a police custody and security officer, and clarifies the relationship between section 13 of the 1989 Act and section 295 of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act").

117. Section 24(1) amends section 13 of the 1989 Act, which defines "legal custody" for the purposes of that Act, to provide that:

- the definition relates to prisoners and is without prejudice to section 295 of the 1995 Act; and
- in addition to the existing circumstances in which a prisoner is in legal custody, a prisoner will also be in legal custody in terms of the 1989 Act if under the control of a constable or a police custody and security officer while outside a prison;
- "constable" includes a constable under any part of the law of the United Kingdom and Channel Islands.

118. Section 24(2) amends section 295 of the 1995 Act to provide that it is without prejudice to section 13 of the 1989 Act.

Section 25 – Temporary detention of person being returned to prison in England and Wales etc.

119. Section 25 inserts a new section 40B into the Prisons (Scotland) Act 1989 ("the 1989 Act") to provide that a person who is unlawfully at large from another jurisdiction in the UK or the Channel Islands can be detained in a Scottish prison or young offenders institution until arrangements can be made for his/her return to the jurisdiction from which he/she is unlawfully at large.

120. Section 40(1) of the 1989 Act provides that any person in Scotland who is unlawfully at large from a Scottish prison or young offenders institution may be arrested by a constable or prison officer without a warrant and taken to the place in which he or she is required in accordance with the law to be detained.

121. By virtue of paragraph 17 of Schedule 1 to the Crime (Sentences) Act 1997, the provisions of section 40(1) of the 1989 Act and the corresponding provisions for England, Wales and Northern Ireland extend throughout the UK and Channel Islands. However, under section 40(1), the power of a constable or prison officer in Scotland in relation to a person liable to be detained in another part of the UK or in the Channel Islands extends only to taking the person to the place in which he or she is required to be detained and not to detaining that person in a place in Scotland pending their being transported to the other jurisdiction. This has caused practical difficulties for the Scottish Prison Service, which section 25 will remove.

Consecutive sentences

Section 26 – Consecutive sentences: life prisoners etc.

122. Section 26 amends the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") to provide a new power for a court, when sentencing a person for an offence committed after the section comes into force and where that person is already serving a sentence of imprisonment, to order that:

- a life sentence may commence, in the case of an existing life prisoner, on the expiry of the punishment part of the existing life sentence or, if the prisoner is already serving a determinate sentence, at the point at which the Scottish Ministers would otherwise be required to release the prisoner; and
- a determinate sentence may commence, in the case of an existing life prisoner, on the expiry of the punishment part of the existing life sentence.

123. At present, a life sentence may not be ordered to commence at a date after the date of sentence, nor may a determinate sentence be ordered to run consecutively to it. The new power will be in addition to the sentencing powers which courts already have.

124. Section 26(1) inserts a new section 204B into the 1995 Act to provide courts with this new power. Where the second bullet point above applies, the new section will only apply to solemn proceedings, since summary proceedings are covered elsewhere in the 1995 Act, as explained below.

125. Section 26(2) amends section 167 in Part IX (Summary Proceedings) of the 1995 Act to provide that, in summary proceedings, where a sentence is imposed in the circumstances described in the second bullet point (paragraph 124) above, the court may order the later sentence to start on the expiry of the punishment part of the life sentence .

Release of prisoners

Section 27 – Release on licence etc. under 1989 Act

126. Section 27 amends sections 22 and 23 of the Prisons (Scotland) Act 1989 ("the 1989 Act") which govern the early release on licence of certain prisoners sentenced to determinate terms of imprisonment prior to 1 October 1993. Although these provisions were repealed by the Prisoners and Criminal Proceedings (Scotland) Act 1993, their application to those prisoners was preserved by that Act.

127. By virtue of the amendments contained in this section the Scottish Ministers become obliged to release on licence those serving a sentence of imprisonment of 10 years or more which was imposed before 1 October 1993, if the Parole Board so recommends. Given that the Parole Board has the power to direct the release of those sentenced before 1 October 1993 to less than 10 years and that the release of all life prisoners is now

at the direction of the Parole Board, these amendments will remove from the Scottish Ministers any discretion over the release of any prisoner sentenced before 1 October 1993 whose release on licence is recommended by the Parole Board.

128. In addition, section 22(7) of the 1989 Act, which governs the inclusion on release, and subsequent insertion, variation or cancellation of licence conditions, is modified so that the Scottish Ministers may only include licence conditions on release, or subsequently insert, vary or cancel such conditions in accordance with the recommendations of the Board.

Section 28 – Release on licence etc. under 1993 Act

129. Section 28 amends sections 1(3) and 12 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("the 1993 Act") which apply to the early release of long-term prisoners (i.e. those sentenced to a term of 4 years or more) who were sentenced on or after 1 October 1993. It also repeals section 20(3) of that Act.

130. Section 1(3) of the 1993 Act, read with section 53 of the Scotland Act 1998, provides that after a long-term prisoner has served half of his or her sentence the Scottish Ministers may, if recommended to do so by the Parole Board, release him or her on licence. This was modified on 1 April 1995 with the effect that the Scottish Ministers are statutorily obliged to release such a prisoner who is sentenced to a term of less than 10 years, if that sentence was imposed on or after 1 October 1993 and provided that the person is not liable to deportation from the UK. In other cases, where the Board recommends early release on licence, the Scottish Ministers exercise discretion over whether or not to accept the recommendation. The amendment proposed to section 1(3) will remove the Scottish Ministers' discretion and require them to release such a prisoner on licence if recommended to do so by the Parole Board.

131. Section 9(1) of the 1993 Act modifies the terms of section 1(3) of that Act in relation to persons liable to removal from the UK, for example those subject to an order for deportation. The modification is to the effect that the Scottish Ministers exercise discretion over whether or not to grant early release on licence in respect of such prisoners. The Board is not involved in such a decision. The Act does not affect the operation of these provisions.

132. Section 12 of the 1993 Act provides that in the case of a life prisoner or a long-term prisoner, sentenced on or after 1 October 1993 to a term of less than 10 years, no licence condition may be included on release or subsequently inserted, varied or cancelled except in accordance with the recommendation of the Parole Board. The amendment to section 12 will bring the arrangements governing the inclusion, insertion, variation or cancellation of licence conditions for all other long-term prisoners into line with those applicable to the classes of case referred to above. It will also provide, by way of exception to this, that the Scottish Ministers may include conditions in a licence on the release of a person on compassionate grounds (under section 3 of the 1993 Act), where the Parole Board was not consulted prior to release.

133. Section 20(3) of the 1993 Act – repealed by subsection (3) – provides that sections 1(3), 12(3)(a) and 17(1)(a) of that Act may be modified by order. The provision is redundant by virtue of the amendments being made by this section and section 36 of the Act.

Section 29 – Release on licence: life prisoners

134. Section 29 amends section 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("the 1993 Act") to provide that in certain circumstances where a life prisoner who has served the punishment part of a life sentence receives a further sentence (either for life or for a term) that prisoner will not have the right to require that his or her case should be reviewed by the Parole Board at a maximum interval of 2 years, as is presently the case. It also makes a minor consequential amendment to section 5 of the 1993 Act.

135. Section 29(2) inserts new subsections (5AB) to (5AD) into section 2 of the 1993 Act. Subsection (5AB), read with subsection (5AD), provides that where a life prisoner, who has served the punishment part, is given one or more other sentences (whether determinate or indeterminate) at a time between his or her case being referred to the Parole Board and a date being fixed for its determination, the Board may, in fixing a date under section 2(5A)(b) of the 1993 Act for the next review of the case, set a date which is, if the Board considers it appropriate, more than 2 years ahead.

136. New subsection (5AC), read with subsection (5AD), provides that where a life prisoner receives any other sentence after his or her case has been referred to the Parole Board and a date has been fixed by the Board for considering the prisoner's case, or where the Board has fixed a date for a subsequent consideration for parole, then in such circumstances the Parole Board shall fix a different date for considering the case and that the date shall be that on which the prisoner would be eligible to be released, or to be considered for release from all such other sentences, or a date that is as soon as practicable after that date.

137. Section 29(2) additionally amends section 2(7) of the 1993 Act to provide that until the "appropriate part" of any further determinate term of imprisonment has been served, the life prisoner may not require the Scottish Ministers to refer his or her case to the Parole Board. Subsection (7A), which is inserted into section 2 of the 1993 Act, defines the "appropriate part of the term".

138. Finally, section 29(2) amends section 2(9) of the 1993 Act so that those with more than one life sentence need to serve the punishment part of any such sentence before being eligible for parole.

Section 30 - Release on licence: certain consecutive sentences

139. Section 30 amends section 1A of the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("the 1993 Act") by adding a new subsection (2) which provides that where a prisoner who is serving a determinate sentence receives a sentence of imprisonment or detention for life or without limit of time which is to take effect on the day after he would, but for the indeterminate sentence, be entitled to be released from the determinate term, the Scottish Ministers shall not be required to release the prisoner until they are required to release him or her from the indeterminate term. Neither are the Scottish Ministers nor the Parole Board under any obligation to consider the prisoner for release from the determinate term until they are required to consider his or her release from the indeterminate sentence.

Section 31 - Release: Prisoners serving extended sentences

140. Section 31 amends section 3A of the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("the 1993 Act") so that where a prisoner subject to an extended sentence is recalled to custody and receives a life sentence before the Parole Board considers whether or not to direct immediate re-release, the prisoner will not be eligible for release until after having served the punishment part of the life sentence. (In such a case, the effect of the amendments in section 31 is that release will be in terms of section 2 of the 1993 Act.) It further provides that if in the interval between recall to custody and consideration of immediate re-release, the prisoner receives another determinate sentence, the Parole Board shall not be empowered to consider the case until the prisoner is eligible for release from the new sentence.

Section 32 – Release etc. under 1993 Act of prisoner serving consecutive or concurrent offence and non-offence terms

141. Section 32 amends the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("the 1993 Act").

142. Section 32(2) adds a new subsection (4A) to section 27 of the 1993 Act to define the meaning of the terms "wholly concurrent" and "partly concurrent". It provides that terms of imprisonment will be wholly concurrent if they are imposed on, and expire on, the same date. Terms will be partly concurrent if they are imposed on the same date but expire on different dates, or if they overlap but are imposed on different dates.

143. Section 32(3) amends Schedule 1 to the 1993 Act in relation to offence and non-offence terms which are consecutive or wholly or partly concurrent. Schedule 1 defines an "offence term" as a term of imprisonment on conviction of an offence and a "non-offence term" as a term of imprisonment or detention mentioned in section 5(1)(a) or (b) of the 1993 Act, namely a term imposed for non-payment of a fine or contempt of court.

144. Section 32(3)(a) replaces paragraph 2 of Schedule 1 (consecutive terms) with a new paragraph 2 to provide that where an offence term and a non-offence term are consecutive, the second term will be taken as beginning on the date following the person's release from the first term. Where an offence term and a non-offence term are consecutive but have been imposed on the same date, the non-offence term will follow the offence term.

145. Section 32(3)(a) also adds a new paragraph 2A to Schedule 1 to the 1993 Act. It provides that where offence and non-offence terms are wholly or partly concurrent, the early release provisions contained in sections 1(1) to (3) and 5(2) of the 1993 Act shall apply separately to each term.

146. Section 32(3)(b) repeals paragraph 3 and 4 of Schedule 1 to the 1993 Act , which set out how the early release provisions contained in section 1 of the 1993 Act applied to offence and non-offence terms that were wholly or partly concurrent. Those paragraphs have been superseded by the new provisions in paragraph 2A, described above.

Section 33 – Prisoners repatriated to Scotland

147. Section 33 amends the Repatriation of Prisoners Act 1984 ("the 1984 Act") to ensure that, for the purposes of early release, the sentence of a prisoner who is repatriated to Scotland is deemed to begin when the repatriation takes place. This means that all prisoners who are repatriated to Scotland will require to serve some period in custody prior to release.

148. As the Schedule to the 1984 Act stands, all long-term prisoners (i.e. those serving a sentence of imprisonment for 4 years or more, as defined in section 27(5) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("the 1993 Act")) require to serve two thirds of the balance of their sentence that is outstanding, following their transfer to Scotland, before they will automatically be released on licence. Their earlier release will only be possible if recommended by the Parole Board. However, the existing Schedule to the 1984 Act does not apply to short-term prisoners (defined in section 27(5) of the 1993 Act as those serving a sentence of imprisonment for less than 4 years). As a result, short-term prisoners who have served more than half of their sentence prior to their repatriation require to be released as soon as they arrive in Scotland. This has the potential to hinder the repatriation of short-term prisoners.

149. Section 33(1) therefore contains a new version of paragraph 2 of the Schedule to the 1984 Act . This new version will ensure that, for the purposes of early release, the sentences of all repatriated prisoners will be deemed to begin on the date of their transfer to Scotland. Account will still be taken of the time that the prisoner has served in the foreign jurisdiction. However, a short-term prisoner will require to serve one half of the outstanding balance of a sentence following his or her repatriation to Scotland. The amended Schedule does not change the existing law regarding the release of repatriated long-term prisoners.

150. Section 33(1) also amends section 3(9) of the 1984 Act and repeals paragraph 3 of the Schedule, removing provisions which are out of date in view of changes to the regime

for repatriated life prisoners brought about by the Convention Rights (Compliance) (Scotland) Act 2001.

151. Section 33(2) provides that the new version of paragraph 2 of the Schedule applies only to those who received at least one of their sentences on or after 1 October 1993 (the date when the relevant provisions in the 1993 Act came into force). The early release of repatriated prisoners sentenced before that date does not present difficulties and therefore the original Schedule to the 1984 Act, as amended by paragraph 5 of Schedule 2 to the Crime (Sentences) Act 1997 ("the 1997 Act"), shall continue to apply to such prisoners.

152. Section 33(4) amends paragraph 7 of Schedule 2 to the 1997 Act to make it clear that the Schedule to the 1984 Act, as amended by this paragraph, will apply to prisoners sentenced on or after 1 October 1993 but repatriated before the commencement of the new section. The new version of paragraph 2 of the Schedule to the 1984 Act, contained in section 33, will therefore apply only to prisoners who received at least one of their sentences on or after 1 October 1993 and who were repatriated after the commencement of section 33.

Section 34 – Suspension of conditions and revocation of licences under 1989 Act

153. Section 34 amends section 22 of the Prisons (Scotland) Act 1989 ("the 1989 Act") and inserts a new section 22A so as to suspend certain conditions in a prisoner's licence when the prisoner is being lawfully detained before the expiry of the licence. It also amends section 28 of that Act, to provide that the Scottish Ministers must revoke a person's licence and recall him or her to prison if the Parole Board so recommends.

154. Section 34(2) provides that section 22(6) of the 1989 Act, which obliges a licence holder to comply with the conditions in the licence, is to be subject to section 22A.

155. Section 34(3) inserts a new section 22A into the 1989 Act.

156. Subsection (1) of the new section 22A provides that where a prisoner is detained in custody, having been previously released on licence and while the licence is still in force, the effect of certain conditions of the licence is to be suspended. This is because, in such a case, some of the licence conditions will either be impossible to fulfil or will no longer be appropriate, because of the prisoner's detention in prison.

157. Subsection (2) of the new section provides that the suspension of the conditions will take effect when the prisoner is detained and will continue throughout the period for which he or she is liable to be detained or remanded. Immediately upon release, all the conditions will come back into force, provided that the licence has not already expired.

158. Subsection (3) of the new section specifies the conditions which will not be suspended and which will still remain in force while the prisoner is detained. These are, that the offender shall be of good behaviour and keep the peace, and – if such a condition has been imposed – shall not have contact with any named person or class of person from whom he or she is prohibited from having contact by virtue of his or her licence.

159. Subsection (4) of the new section provides that the Scottish Ministers may by order add to the conditions referred to in subsection (3) as they consider appropriate or remove or vary them.

160. Section 34(4) amends section 28 of the 1989 Act (revocation of licences) so that the Scottish Ministers are obliged to accept a recommendation from the Parole Board to recall a person to custody. As a consequence, section 28(1A) of the 1989 Act is rendered redundant, and is repealed.

Section 35 – Suspension of licence conditions under 1993 Act

161. Section 35 amends section 12 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("the 1993 Act") and adds a new section 12A to the Act, to suspend certain conditions in a prisoner's licence when, notwithstanding the issuing of a licence, he or she is then lawfully detained in custody. This may be because the prisoner:

- continues to be detained because he or she is serving a non-offence term of imprisonment or detention (for non-payment of a fine or for contempt of court) which is consecutive or partly concurrent with the sentence from which he or she has been released on licence; or
- is detained after release on licence while the licence remains in force, for example, because of a remand warrant or a subsequent sentence.

162. In such circumstances, some of the licence conditions will either be impossible to fulfil or will no longer be appropriate, because of the prisoner's detention in prison.

163. It also inserts a new section 12B. Its effect is that where a person is released on licence from a sentence under either the Prisons (Scotland) Act 1989 or under the 1993 Act and is then given a further sentence while the licence is still in force, the subsequent release will be on a single licence. This is to prevent the possibility that the person is released from the subsequent sentence on licence and that the licence in respect of the original sentence is also still in force.

164. Section 35(2) provides that section 12 of the 1993 Act, which obliges a licence holder to comply with the conditions in the licence, is to be subject to section 12A.

165. Section 35(3) inserts new sections 12A and 12B into the 1993 Act.

166. Subsection (1) of the new section provides that where a person is detained in custody, having been previously released on licence the licence is still in force, the effect of certain conditions of the licence is to be suspended.

167. Subsection (2) of the new section provides that the suspension of the conditions will take effect when the prisoner is detained and will continue throughout the period for which he or she is liable to be detained or remanded. Immediately upon release, all of the conditions will come back into force, provided that the licence has not already expired.

168. Subsection (3) of the new section specifies the conditions which will not be suspended and which will still remain in force while the prisoner is detained. These are, that the offender shall be of good behaviour and keep the peace, and – if such a condition has been imposed – shall not have contact with any named person or class of person from whom he or she is prohibited from having contact by virtue of the licence.

169. Subsection (4) of the new section provides that the Scottish Ministers may by order add to the conditions referred to in subsection (3) as they consider appropriate or remove or vary them.

170. Section 35(3) also inserts a new section 12B into the 1993 Act.

171. Subsection (1) of new section 12B provides that subsection (2) applies where a person has been released on licence and, while the licence is still in force, receives another sentence of imprisonment.

172. Subsection (2) provides that, in such a situation, the prisoner is to be released from the subsequent sentence on a single licence under Part 1 of the 1993 Act. This licence will be in respect of both the original and the subsequent sentences.

173. Subsection (3) provides that the single licence will take the place of the original licence and any licence which would otherwise have been granted in respect of the subsequent sentence, and that its conditions shall be those contained in the original

licence immediately prior to the single licence taking effect. In addition, the single licence shall remain in force until both the original licence and a licence in respect of the subsequent sentence would have expired.

Section 36 – Revocation of licences under 1993 Act

174. Section 36 amends sections 16 and 17 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("the 1993 Act") to provide that:

- the making of an order under section 16(2) or (4) of the that Act will no longer have the effect of revoking a person's licence; and
- the Scottish Ministers will be required to revoke a person's licence and recall him or her to prison where the Parole Board has so recommended (under section 17 of the 1993 Act).

175. Subsection (3) repeals section 16(7)(a) of the 1993 Act. This section provides that where a court makes an order under section 16(2) or (4) of that Act in respect of a person released on licence, the making of the order has the effect of revoking the licence. Thus an order under section 16(2) or (4) will no longer automatically have the effect of revoking a licence.

176. Subsection (4) amends section 17 of the 1993 Act to substitute new subsections (1), (1A), (1B), (2) and (3) for the existing subsections (1) to (3). The main effect of the new provisions is that the Scottish Ministers will be obliged to recall a person to prison if recommended to do so by the Parole Board. At present they have a discretion as regards those prisoners sentenced to a term of 10 years or more on or after 1 October 1993. Another effect is that Ministers will only be obliged to revoke a person's licence but not to recall them to custody where the person is at the time of revocation being detained. Otherwise, the effect of the substituted provisions is substantially preserved in the new provisions.

Section 37 – Extended sentences: recall to prison and revocation of licences

177. Section 37 amends section 26A of the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("the 1993 Act") to clarify when an extended sentence prisoner who is recalled to custody has an unconditional right of re-release. The effect is that, following the recall to custody of any prisoner serving an extended sentence, an automatic right to re-release will arise once the prisoner reaches the expiry date of his or her extension period.

178. Extended sentences are explained in paragraphs 91 and 92 above. They consist of a term of imprisonment ("the custodial term") and a further period ("the extension period") for which the offender is to be subject to a licence.

179. For as long as any prisoner is on licence he or she remains liable to have his or her licence revoked and to be recalled to custody in terms of section 17 of 1993 Act. However, following a prisoner's return to prison, the Parole Board must consider whether he or she should be immediately re-released. If the Parole Board decides that the prisoner should not be re-released at that stage, further consideration of his or her suitability for release will take place at regular intervals. However, it is not clear whether, as the law stands, the prisoner has an unconditional right to re-release at the end of the extension period, or whether he or she requires to be detained until the end of the extended sentence, in the event that these dates are different.

180. The dates will be different, by virtue of section 26A(5)(b) of the 1993 Act, if the custodial term that the prisoner receives is for less than 4 years. In this case, in accordance with section 26A(4) of the 1993 Act, the prisoner will be released on licence after serving half of the custodial term and will remain on licence for the duration of the extension period, which will begin on the date of the release on licence. (For those serving a term of 4 years or more the extension period begins at the expiry of the "custodial term" and not on the date on which they are released on licence.) However,

at the expiry of the extension period, the prisoner's extended sentence (consisting of the aggregate of the custodial term and the extension period) will not have expired.

181. The current interpretation of section 26A(9) of the 1993 Act is that it requires a prisoner who has been recalled to custody to be detained until the expiry of the entire extended sentence, unless the Parole Board directs the prisoner's earlier release, even though this date may be considerably later than the expiry of the extension period.

182. Subsection (2) clarifies the law by providing that the reference in section 17(5) of the 1993 Act to a prisoner who is recalled to custody being liable to be detained in "pursuance of his sentence" should be construed as a liability to be detained until the expiry of the extension period.

Section 38 – Special provision in relation to children

183. Section 38 amends section 7 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("the 1993 Act"). Section 7 provides for the early release of children who are sentenced under section 208 of the Criminal Procedure (Scotland) Act 1995 (detention of children convicted on indictment) to determinate periods of detention. Such children are treated in a comparable manner to adults except that there is no minimum period to be served before they can be considered for discretionary release, on the recommendation of the Parole Board; and that they are all issued with a licence on release, even if serving less than 4 years, so that social work supervision is available to assist their resettlement in the community.

184. The definition of a child is the same as that in the 1995 Act, namely a person:

(i) who has not attained the age of 16 years;

(ii) over the age of 16 years who has not attained the age of 18 years and in respect of whom a supervision order is in force; or

(iii) whose case has been referred to a children's hearing by virtue of section 33 of the Children (Scotland) Act 1995.

185. The amendments made by this section of the Act to the statutory regime governing the early release of children on licence are in line with to the changes proposed for adult prisoners by sections 28, 35 and 36 of the Act. In particular, it will be a matter for the Parole Board to decide whether a child sentenced under section 208 of the 1995 Act to a determinate term of detention should be released early on licence, and it will also be for the Board to decide whether the licence under which such a person has been released should be revoked (though in exceptional cases this decision may be taken by the Scottish Ministers without a recommendation of the Board). Certain licence conditions may also be suspended if, during the currency of the licence, the child is lawfully detained without the licence being revoked. In addition, if a child is ordered to be returned to detention for committing an offence following release but in the period during which, but for his or her early release, the child would still be serving a sentence, such an order is no longer to have the effect of revoking the licence (if it is still current).

Section 39 - Convention rights of certain life prisoners

186. Section 39 amends certain provisions of the schedule to the Convention Rights (Compliance) (Scotland) Act 2001 ("the 2001 Act"). The schedule contains transitional provisions in respect of prisoners serving a life sentence in Scotland on 8 October 2001, the date on which the provisions of the 2001 Act relating to life sentence prisoners came into force. Those provisions made changes to the early release provisions in the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("the 1993 Act").

187. Paragraph (a) inserts a new paragraph 7A into Part 1 of the schedule to the 2001 Act. This makes it clear that, where a person has waived the right to a punishment part hearing under paragraph 6 of the schedule, the early release provisions in Part 1 of the

1993 Act shall apply as if the person had had a punishment part specified. The length of the part would be the same as the period specified in their certificate.

188. Paragraph (b) makes certain changes to Part 4 of the schedule. This Part applies to life prisoners who had been transferred to Scotland before 8 October 2001 and who were still serving their sentences on that date. A new paragraph 49A is added to the schedule to make clear that Part 4 also applies to two further categories of prisoner in addition to those specified in paragraph 49. These categories are: certain of those who were transferred to Scotland between 1 October 1993 (when section 10 of the 1993 Act came into force) and 8 October 2001, and those who were transferred before 1 October 1993 and who were still in prison as at 8 October 2001.

189. Paragraph (b) also amends paragraph 53 of the schedule so as to extend the classes of prisoner whose cases will not, by virtue of that paragraph, be referred to the High Court for a punishment part hearing. These classes of prisoner are some of those covered by the new paragraph 49A.

190. Additionally, paragraph (b) replaces paragraph 67 of the schedule. The effect is that those prisoners whose cases are not, by virtue of paragraph 53, referred for a punishment part hearing are made subject to the early release provisions in Part 1 of the 1993 Act. They are deemed to have had a punishment part specified, and this is of the same length as the period specified in their certificate.

Monitoring on release

Section 40 – Remote monitoring of released prisoners

191. Section 40 makes provision for the remote monitoring of prisoners released on licence. It provides that the Scottish Ministers may include in a licence a condition that the prisoner comply with such conditions as appropriate to enable the remote monitoring of the prisoner's compliance with any other conditions of the licence or for the purpose of monitoring his or her whereabouts. An example of a licence condition that may be remotely monitored would be a condition requiring the prisoner to remain in or away from a particular place.

192. Section 40 applies, by virtue of subsection (1), to persons released on licence under section 22 of the Prisons (Scotland) Act 1989 (where the person has been sentenced prior to 1 October 1993) or under Part I of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (in respect of persons sentenced on or after that date), except those individuals under 16 at the time of their release under section 7(5) of the 1993 Act.

193. Subsection (3) provides that where a remote monitoring condition is specified in a licence, the Scottish Ministers must designate a person responsible for monitoring the prisoner and send to that person as soon as is practicable a copy of the licence condition together with any information required to fulfil the monitoring responsibility. Subsection (4) provides that the designated person will be responsible for monitoring the prisoner according to the licence conditions from the point at which they receive the copy of the licence condition and remain responsible until the licence condition has been suspended, cancelled, revoked or is otherwise no longer in force.

194. Subsection (5) provides the Scottish Ministers with the power to replace the designated person and amend the licence to reflect this. If this occurs this replacement person will become subject to subsections (3) and (4).

195. Subsection (7) applies section 245C of the Criminal Procedure (Scotland) Act 1995 to the remote monitoring of prisoners released on licence. Section 245C makes provision for the Scottish Ministers to make such arrangements as they see fit for the remote monitoring of compliance of offenders in respect of whom the court makes a restriction of liberty order.

196. Section 40(8) has the effect that the Scottish Ministers have the power to designate and amend the designation of the person responsible for monitoring the prisoner without having to consult or receive a recommendation from the Parole Board.

Parole Board to have regard to risk management plans

Section 41 – Parole Board to have regard to risk management plans

197. Section 41 inserts a new section 26B into the Prisons and Criminal Proceedings (Scotland) Act 1993 to provide that the Parole Board, when considering the case of an offender who is the subject of a risk management plan, must have regard to that plan on each and every occasion that it considers the offender's case.

Part 5 – Drugs Courts

Section 42 – Drugs courts

198. Section 42 provides for a court to be designated a drugs court and confers certain powers upon a judge when sitting as a drugs court.

199. Subsection (1) gives the Scottish Ministers the power to prescribe courts as "drugs courts". Given the provisions of section 88 of the Act this power is exercised by subordinate legislation subject to negative procedure. Drugs courts are defined as those especially appropriate to deal with cases involving persons dependent on, or with a propensity to misuse, drugs.

200. Subsection (2) allows Ministers to prescribe that there is to be a drugs court within a sheriffdom or sheriff court district or a commission area in which there is a district court constituted by a stipendiary magistrate. Where a sheriffdom or sheriff court district is prescribed, it is for the sheriff principal to nominate the particular sheriff court within that sheriffdom or sheriff court district that may sit as a drugs court. Similarly, where a commission area is prescribed, it is for the clerk of the relevant district court to nominate the particular district court, constituted by a stipendiary magistrate, that may sit as a drugs court.

201. Subsection (3) provides that a court is to have the powers specified in subsection (4) when sitting as a drug court. These powers are in addition to existing powers of the court.

202. Subsection (4) sets out the additional powers that are available to the drug court and provides that it has extended powers to deal with a breach by an offender of a drug treatment and testing order and a probation order. A drug treatment and testing order (DTTO) is an order made under section 234B of the Criminal Procedure (Scotland) Act 1995 (as inserted by section 89 of the Crime and Disorder Act 1998). It is a disposal targeted on serious offenders with a dependency on drugs who consent to the imposition of the order. The offender is placed on specialist treatment programmes and is subject to regular review by the court. A probation order is an order made under section 228 of the Criminal Procedure (Scotland) Act 1995, which requires an offender to be under supervision in the community for a specified period. The principal focus of the order, which requires the offender's consent, is to challenge the offender's criminality and behaviour. It is likely that the majority of probation orders imposed by a drugs court will have additional conditions of drug treatment and regular review by the court.

203. Where the drugs court is satisfied that a failure to comply with a condition of a DTTO or a probation order has occurred, it may impose one of two sanctions:

- a sentence of imprisonment of up to 28 days (including a period of custody of less than five days – currently the minimum period that may be imposed is 5 days under section 206 of the 1995 Act); or

- a community service order of up to 40 hours (including a period of community service of less than 80 hours - currently the minimum hours of CSO that may be imposed is 80 hours under section 238 of the 1995 Act).

204. The drugs court is given the power to impose these sanctions and to permit the DTTO or probation order to continue. There is no necessity for the drugs court to revoke the DTTO or probation order when it imposes one of the sanctions under subsection (4).

205. The effect of subsection (4) is to permit the drugs court to deal with repeated failures of the offender to comply with conditions of a DTTO or probation order by imposing short periods of detention or community service without revoking the DTTO or probation order. The drugs court may therefore impose periods of imprisonment until the cumulative limit of 28 days of imprisonment is reached and periods of community service until the cumulative limit of 40 hours is reached. Subsection (5) permits the Scottish Ministers to amend by subordinate legislation the period of imprisonment or community service that may be imposed by the drugs court under subsection (4).

206. Subsection (6) makes provision for the procedure to be followed where there is an allegation that the offender has failed to comply with his or her DTTO or probation order. This procedure is in addition to the existing procedure for such allegations, namely 234G of the 1995 Act in respect of DTTOs, and sections 232 and 233 of the 1995 Act in respect of probation orders. Subsection (7) provides that the offender may be provided with details of the alleged breach when that person attends a review hearing of a DTTO or a diet of review fixed as a condition of a probation order. This provision will enable the drugs court to deal more speedily with allegations of failure to comply.

207. Subsections (8) and (9) make provision that any court, when revoking a DTTO or probation order and imposing a sentence on the offender, must take into account any sentence of imprisonment or community service order imposed by the drugs court under subsection (4)(a) and (b).

Part 6 – Non-Custodial Punishments

Section 43 – Restriction of liberty orders

208. Section 43 makes provision in connection with the powers of the court:

- when making a restriction of liberty order in circumstances where an offender resides or is to reside in another court district; and
- when considering an application to vary such an order in circumstances where an offender already subject to a restriction of liberty order wishes to reside in another court district; and
- when considering a breach of a restriction of liberty order.

209. Restriction of liberty orders (RLOs) were introduced in Scotland by section 5 of the Crime and Punishment (Scotland) Act 1997. RLOs require an offender to be restricted as regards his/her being in a specified place for up to 12 hours per day or not being in a specified place for up to 24 hours per day, or both, for a maximum period of 12 months. Compliance with an RLO is monitored by remote monitoring equipment.

210. This section deals with the situation where an offender who has been given an RLO intends to move outwith the jurisdiction of the court which made the order. It provides that the court is to have the power to vary the terms of the order, including the arrangements for monitoring. The court in the area in which the offender is to reside will be given the power to deal with any breach, application for review or variation of the RLO as if it has made the original order.

211. The court is also to have the power to impose an RLO on an offender who resides, or is to reside, outwith the jurisdiction of the court. The court with jurisdiction for the area

in which the offender resides or is to reside has the power to vary, review and deal with a breach of the order.

212. Subsection (2) amends section 245A(5)(a) of the Criminal Procedure (Scotland) Act 1995 (the 1995 Act) to provide that, in cases where the offender resides (or is to reside) in a place outwith the jurisdiction of the court, the clerk of the court will send a copy of the RLO both to the person responsible for monitoring the offender's compliance with the order and to the clerk of a court which has jurisdiction over that place where the offender resides (or is to reside).

213. Subsection (3) amends subsection (1) of, and inserts new subsections (5) to (8) into, section 245E of 1995 Act. The amendment to section 245E(1) has the effect that where an offender with an RLO is residing outwith the jurisdiction of the court which made the order and the order has been transferred, under either sections 245A(5)(a)(ii) or 245E(7)(a) of the 1995 Act (as amended by the Act), to a court which has jurisdiction over the offender's place of residence, any application to review the order should be made to that court to which the order has been transferred.

214. The effect of the new section 245E(5) is to provide that when an RLO is in force in respect of an offender and the offender proposes to change his or her place of residence to one outwith the district of the court which made the order, the offender may make application to the court which made the order to vary it. If the court is satisfied that arrangements can be made to monitor the offender's compliance with the order, by the means of monitoring specified in the order, in the district to which the offender proposes to take up residence, the court will have the power to vary the terms of the order to allow these arrangements to be made. In addition, if the offender's change in residence requires a change in the person responsible for monitoring compliance with the order, the court will have the power to vary the order accordingly.

215. The new section 245E(6) provides that, in cases where the RLO requires the offender to remain in a specified place or places, the court may not vary the order in response to an application by the offender to relocate to a place outwith the jurisdiction of that court without first obtaining and considering information about the place or places, including information about the attitude of any persons likely to be affected by the enforced presence there of the offender.

216. If the court is not satisfied that suitable monitoring arrangements can be put in place in the district in which the offender is to reside, the new section 245E(8) provides that the court may refuse the application or revoke the order.

217. New section 245E(7) provides for notification in cases where the order is varied to allow the offender to relocate to an area outwith the jurisdiction of the court.

218. Section 43(4) of the Act amends the procedures set out in section 245F of the Criminal Procedure (Scotland) Act 1995 for dealing with breach of an RLO to make provision for cases in which the offender resides outwith the jurisdiction of the court which made the order and the order has been transferred, under either section 245A(5)(a)(ii) or 245E(7)(a) of the 1995 Act (as amended by the Act), to a court which has jurisdiction over the offender's place of residence. The effect is to permit the court in which the offender is now resident, which has received a copy of the original order or a copy of the varied order, to issue a citation or warrant for the offender to appear before it for a failure to comply with the order and, at the resulting hearing, to dispose of the case if a failure to comply has been established to the court's satisfaction.

Section 44 – Interim anti-social behaviour orders

219. Section 44 amends the Crime and Disorder Act 1998 (the 1998 Act) to empower a sheriff to make an interim anti-social behaviour order in an application for an anti-social behaviour order under section 19 of the 1998 Act.

220. Section 19 of the 1998 Act provides that a local authority may apply to the sheriff for an anti-social behaviour order (ASBO) on the grounds that:

- a person has acted in an anti-social manner (i.e. in a manner that caused or was likely to cause alarm or distress); or
- a person has pursued a course of anti-social conduct that caused or was likely to cause alarm or distress to one or more persons not of the same household as him or herself and that an order is necessary to protect persons in the authority's area from further anti-social acts or conduct by the person concerned.

221. If satisfied that these conditions are fulfilled the sheriff may make an anti-social behaviour order which will prohibit the person named in the order from doing anything described in the order.

222. There is no provision for interim anti-social behaviours in the 1998 Act. Section 44 amends sections 19, 21 and 22 of the 1998 Act, which makes provision for anti-social behaviour orders.

223. Section 44 inserts new subsection (2A) into section 19 of the 1998 Act which enables interim anti-social behaviour orders ("an interim ASBO") to be made. Subsection (2A) provides that when an anti-social behaviour order is applied for a sheriff may grant an interim order pending the final decision, if satisfied that:

- if the actions complained of were established the criteria for an ASBO would be satisfied; and
- an interim order is necessary to protect persons in the local authority area from further anti-social acts or conduct by the person against whom the order is sought.

224. The person in respect of whom the application is made must have received intimation of the application for an interim ASBO and it will be open to the court in its discretion to take account of any representations made following intimation.

225. Subsection (2) amends section 21 of the 1998 Act, which regulates the procedural provisions with respect to ASBOs, to make provision for an appeal against the granting of an interim ASBO and provides that the interim ASBO may continue in force whilst subject to an appeal. Subsection (3) makes provision for an amendment to section 22 of the 1998 Act in order that a breach of an interim ASBO may be treated as a criminal offence.

Section 45 - Application by registered social landlord for anti-social behaviour order

226. Section 45 amends the 1998 Act to extend the power to apply for anti-social behaviour orders (ASBOs) and interim ASBOs to registered social landlords ("RSLs") (as defined by section 57 of the Housing (Scotland) Act 2001). This will allow RSLs to obtain ASBOs against persons behaving anti-socially on or in the vicinity of properties provided or managed by RSLs. At present only local authorities, in consultation with the police, can apply for ASBOs in Scotland.

227. Extending the power to RSLs will be without prejudice to the power of the local authority to seek an ASBO in respect of RSL premises.

228. Section 45 also has the effect of amending section 21 of the 1998 act to make clear that RSLs must consult the police and notify the local authority before applying for an ASBO or interim ASBO.

Sections 46 and 47 – Requirement for remote monitoring in probation order and requirement for remote monitoring in drug treatment and testing order

229. Sections 46 and 47 amend the Criminal Procedure (Scotland) Act 1995 to allow the court, when it makes a probation order or a drug treatment and testing order (DTTO), to include as a condition of that order that the offender comply with certain restrictions on his or her movements and any requirement to enable remote monitoring of his or her compliance with those restrictions.

230. A probation order is an order made under section 228 of the Criminal Procedure Scotland Act 1995, which requires an offender to be under supervision in the community for a specified period. The principal focus of the order, which requires the offender's consent, is to challenge the offender's criminality and behaviour.

231. A drug treatment and testing order is an order made under section 234B of the Criminal Procedure Scotland Act 1995 (as inserted by section 89 of the Crime and Disorder Act 1998). A DTTO is a disposal targeted on serious offenders with a dependency on drugs who consent to the imposition of the order. The offender is placed on specialist treatment programmes and subject to regular review by the court.

232. Section 245A of the Criminal Procedure (Scotland) Act 1995 contains provisions concerning a Restriction of Liberty Order (RLO). RLOs were introduced in Scotland by section 5 of the Crime and Punishment (Scotland) Act 1997. They require an offender to be restricted to a specified place for up to 12 hours per day or from a specified place for up to 24 hours per day, or both, for a maximum period of 12 months. Compliance with an RLO is monitored by remote monitoring equipment.

233. Subject to the provisions in section 245A of the Criminal Procedure (Scotland) Act 1995, section 47 inserts a new section 234CA into the 1995 Act which provides that a DTTO may include a requirement that an offender comply with restrictions on movement for a specified period of up to 12 months. Section 46 inserts a new section 230A which provides that a probation order may also include a requirement that an offender comply with restrictions on his or her movement for a specified period of up to 12 months. Restrictions may be applied to both provisions as set out in section 245A(2) of the 1995 Act (periods and places).

234. Section 47(2) amends the 1995 Act by inserting a new section 234CA. Subsection (2) of this new section provides that where such a requirement is made as part of a DTTO a copy of the order shall be sent from the clerk of the court to the person who is responsible for monitoring the offender's compliance with the requirement. Similarly the new section 230A(2) (inserted by section 46(2) of the Act) provides for such a procedure where such a requirement is made as a condition of a probation order.

235. New section 234CA(3) provides that if the person responsible for monitoring the offender's compliance with the remote monitoring conditions of the DTTO finds that they have failed to comply with any of the requirements they should inform the supervising officer, who will inform the court. The supervising officer is the person appointed or assigned by the local authority under section 234C of the 1995 Act.

236. Section 46(2) amends the 1995 Act by inserting a new section 230A. Subsection (3) of new section 230A provides that if the person responsible for monitoring the offender's compliance with the remote monitoring conditions of the probation order finds that they have failed to comply with any of the requirements they should inform the supervising officer, who will inform the court. The supervising officer is the person appointed or assigned by the local authority under section 228(3) of the 1995 Act.

237. New section 234CA(4) provides that where the supervising officer reports an alleged breach of the remote monitoring condition in relation to a DTTO, the court may exercise the existing powers in section 234G of the 1995 Act. The new section 230A(4) inserted by section 46(2) provides that where such a breach is reported in relation to a probation order the court may exercise the existing powers in section 232 of the 1995 Act. The

documentary evidence required in proceedings concerning an alleged breach of the remote monitoring condition is to be that prescribed for RLOs in section 245H. Where the court is satisfied that the offender has failed without reasonable excuse to comply with any of the requirements of the remote monitoring condition, the court is to have the powers in section 234G(2) to impose a fine, vary or revoke the order. The DTTO may continue in force notwithstanding that a remote monitoring condition is removed.

238. New sections 234CA(5) and 230A(5) each apply sections 245A(6), (8) to (11), 245B and 245C of the 1995 Act, in relation to the imposition of, or compliance with the requirements of, an RLO, to the arrangements for remote monitoring set out in sections 234CA(1) and 245A(1) respectively.

239. New section 234CA(6) modifies section 234E of the 1995 Act in relation to a drug treatment and testing order with remote monitoring requirements. Section 234E of the 1995 Act sets out the procedures for the variation of the remote monitoring conditions in a drug treatment and testing order.

240. Section 234E(1) provides that where a DTTO is in force either the offender or the supervising officer may apply to the appropriate court for variation or revocation of the order. However, new section 234CA(6) provides that where a remote monitoring condition has been included in a DTTO the monitoring officer is only able to apply for a variation or revocation in relation to the remote monitoring requirement.

241. Section 234E(3) provides that where an application for variation or revocation of a DTTO is made, the offender and the supervising officer should be heard. New section 234CA(6) provides that the responsible person should also be heard if a remote monitoring condition forms part of the DTTO.

242. Section 234E(3)(a) provides that the court may vary the order. New section 234CA(6)(d) provides that this can include increasing or decreasing the period of monitoring as set out in the order.

243. New section 230A(6) provides that where a probation order has such a requirement, a request to amend the order may come from the person responsible for monitoring the requirement, but only in respect of that part of the order. New section 230A(7) provides that where such an application is made by the probationer or the supervising officer a copy shall be sent to the person responsible for monitoring compliance with the order. It also provides that where the responsible person applies for an amendment to the order they should copy the application to the probationer and supervising officer.

244. New section 234CA(7) provides that where such a requirement is varied in relation to a DTTO, the clerk of the court shall send a copy of the amended order to the person responsible for monitoring the offenders compliance with the order. New section 230A(7) provides that where such a requirement is varied in relation to a probation order, the clerk of the court shall send a copy of the amended order to the person responsible for monitoring the offenders compliance with the order.

245. Section 46(3) amends section 232 of the Criminal Procedure (Scotland) Act 1995 to provide that the maximum period for an extension to a requirement of a probation order is twelve months as set out in new section 230A(1).

Section 48 – Breach of certain orders: adjourning hearing and remanding in custody etc

246. Section 48 amends the Criminal Procedure (Scotland) Act 1995 by insertion of a new section 245J to provide clarification of the powers of courts to remand to custody (or release on bail) offenders, who are appearing before the court in relation to an apparent breach of a community disposal.

247. New subsection 245J(1) provides for the court in dealing with an offender, who is alleged to be in breach of a community disposal previously imposed by the court, to

adjourn the hearing to allow further enquiries to be made. It sets out the community disposals to be dealt with under this sub-section i.e. probation orders, drug treatment and testing orders, supervised attendance orders, community service orders or restriction of liberty orders.

248. An offender who is remanded to custody under this section has the right of appeal within 24 hours under new subsection 245J(4) to contest the refusal of bail or against the conditions of the bail order. Subsection 245J(5) requires a note of appeal to be presented to the High Court, who can consider the case either in court or in chambers. In reaching its decision after hearing the prosecutor and the appellant the High Court can confirm the order or grant bail on such conditions as it sees fit or alternatively ordain the appellant to appear at the adjourned hearing.

Section 49 – Power of arrest where breach of non-harassment order

249. Section 49 amends the Criminal Procedure (Scotland) Act 1995 and the Protection from Harassment Act 1997 to provide for a statutory power of arrest, by the police, for breach of a non-harassment order.

250. The police already have powers at common law to arrest without warrant if necessary in the interests of justice, and the new statutory power of arrest given by section 34 is to be exercised without prejudice to other common law and statutory powers of arrest. Section 49 makes provision for a constable to arrest without warrant a person reasonably suspected of breaching a non-harassment order. The power may be exercised where the non-harassment order is imposed in criminal proceedings following conviction for an offence involving harassment or where it has been granted in civil proceedings following an application to the court.

251. Section 8 of the Protection from Harassment Act 1997 defines a non-harassment order (NHO) as an order which the court may grant in an action for harassment to protect a person from further harassment. The NHO prohibits the defender from specified conduct in relation to the pursuer for a specified period of time. It is for the court to determine any specified conduct or time period to be included in the order. The court may also make a NHO following conviction for an offence involving harassment. Section 9 of the 1997 Act makes provision for the penalties to be imposed following a breach of the order, and designates a breach of an order as a criminal offence.

252. Section 234A of the Criminal Procedure (Scotland) Act 1995 makes provision that where a person has been convicted of a criminal offence, the prosecutor may apply to the court for a non-harassment order requiring the offender to refrain from such conduct, in relation to the victim, as may be specified by the court in the order. It permits the court to impose a non-harassment order, the procedure to be followed before such an order may be imposed and the penalties that may be imposed for a breach of such an order.

253. Section 49(1) amends section 234A of the 1995 Act by inserting two new subsections. The new subsection (4A) makes provision for a police constable to arrest without warrant a person the constable reasonably believes is breaching a non-harassment order. The new subsection (4B) specifies that the new power of arrest created by subsection (4A) is without prejudice to any other power of arrest.

254. Section 49(2) amends section 9 of the 1997 Act by inserting two new subsections. New subsection (3) makes provision for a police constable to arrest without warrant a person the constable reasonably believes is breaching a non-harassment order. New subsection (4) specifies that the new power of arrest created by subsection (3) is without prejudice to any other power of arrest.

Section 50 – Amendments in relation to certain non-custodial sentences

255. Section 50 amends the Criminal Procedure (Scotland) Act 1995 in relation to the arrangements for supervised attendance orders (SAOs) and restriction of liberty orders (RLOs).

256. A SAO is an order available to criminal courts in Scotland, which requires an offender who has failed to pay a fine to undertake a programme of designated activities for a specified number of hours.

257. Section 235 of the 1995 Act makes provision that where an offender who is 18 years or over, fails to pay a fine and is liable for imprisonment for that failure, and the court believes that it is appropriate to do so, it may impose a SAO. Section 235 permits the court to impose a SAO of not less than 10 hours and up to a maximum of 50 hours (for a fine not exceeding level 1 on the standard scale) and up to 100 hours in any other case. Section 236 of the 1995 Act permits the court to impose a SAO on an offender aged 16 or 17 years where the offender is convicted of a summary offence and the court believes that a fine is the appropriate disposal. The court is required to consider whether the offender is likely to pay the fine within 28 days. If the offender is likely to pay within 28 days the court may impose the fine with the alternative of a fixed period of a SAO in default in payment. If the offender is unlikely to pay within 28 days the court may impose a SAO.

258. Subsection (1) amends section 235 in order that a court may exercise its powers of imposing a SAO for offenders aged 16 years and over who have defaulted in the payment of their fine. That is, it lowers the age limit to 16 years. Subsection (2) amends section 236 in order that the court may exercise its powers under section 236 for offenders aged 16 years and over, to consider whether the offender is likely to pay within 28 days and if so impose a fine with an alternative of a SAO or if the offender is unlikely to pay within 28 days, impose a SAO. That is, it extends section 236 to offenders aged 16 and over.

259. Paragraphs 4 and 5 of Schedule 7 to the 1995 Act provide that the court may impose a sentence of three months in the sheriff court and 60 days in the district court in respect of a revocation or failure to comply with a SAO. Subsection (4) amends the maximum periods of imprisonment for revocation of or failure to comply with a SAO to 30 days in the sheriff court and 20 days in the district court.

260. Restriction of liberty orders (RLOs) were introduced in Scotland by section 5 of the Crime and Punishment (Scotland) Act 1997, which resulted in the insertion of sections 245A to 245I in the 1995 Act. RLOs require an offender to be restricted to a specified place for up to 12 hours per day or from a specified place for up to 24 hours per day, or both, for a maximum period of 12 months. Compliance with an RLO is monitored by remote monitoring equipment.

261. The amendments to section 245A of the Criminal Procedure (Scotland) Act 1995 (the 1995 Act) allow a court to impose a RLO made under that section as an alternative to imprisonment or any other form of detention.

262. Subsection (3) amends section 245A of the 1995 Act to make a RLO available to courts for offences (other than an offence for which the sentence is fixed by law) instead of imposing a sentence which includes a custodial element.

Part 7 – Children

Section 51 – Physical punishment of children

263. Section 51 clarifies the law as it applies to the exercise of physical punishment of children by their parents, guardians and other persons with charge or control of them.

264. At common law parents, guardians and other persons with charge or control of children are entitled to use force for the purpose of disciplining children if these actions are considered by the court to be justified as "reasonable chastisement". Such punishment must be moderate and not inspired by vindictiveness. To secure a conviction for assault the prosecution has to demonstrate *mens rea* or "criminal intent" on the part of the accused, and this prevents trivial contacts or harmless warning taps being treated as an assault.

265. In addition to the common law of assault, section 12 of the Children and Young Persons (Scotland) Act 1937 contains provisions dealing with the treatment of children and young people by persons of 16 years or over who have parental responsibilities in relation to them or who have charge or care of them. That section makes it an offence for such persons to treat that child with cruelty (described as wilful assault, ill-treatment, neglect, abandoning, exposing, or causing or procuring such treatment in a way which is likely to cause unnecessary suffering or injury to health).

266. Section 12 of the 1937 Act also provides that the rights of any parent, teacher, or other person having the lawful control or charge of a child or young person to administer physical punishment to the child are not affected by the offence provision. However, a teacher's right to administer physical punishment has effectively been removed subsequently by section 48A of the Education (Scotland) Act 1980 and section 16 of the Standards in Scotland's Schools etc Act 2000. Other provisions exist to prohibit physical punishment in other public care settings.

267. Section 51 clarifies the circumstances in which physical punishment of a child will never be reasonable, and provides a non-exhaustive list of the factors which are to be taken into account when considering whether such punishment in other circumstances is reasonable.

268. At common law, only certain categories of people can physically punish a child. These are people with parental responsibilities and rights in relation to the child, and anyone to whom they delegate their right to do so. In addition, a person with a close connection with the child, and who has care and control of the child, will also be entitled to physically punish a child. This covers, for example, the position of a child's unmarried father or step-parent who does not have formal parental responsibilities and rights.

269. The provisions of section 51 apply to cases where the defence to a charge of assault is based on the claim that the assault was reasonable chastisement. If the court is satisfied that the accused person is within the category of people entitled at common law to physically punish the child in question, the prosecutor will have to prove that the punishment went beyond what was reasonable chastisement. Where the accused did not have such a right, the prosecutor need only prove that the assault, or punishment, occurred.

270. Subsection (1) sets out the factors which must be considered by the court in deciding whether or not something which is claimed to have been done to a child by way of physical punishment was justifiable. The factors are derived from judgements by the European Court of Human Rights, relating to Article 3 of the European Convention on Human Rights, which states that "No one shall be subjected to torture or to inhuman or degrading treatment".

271. The factors set out in subsection (1)(a) are the nature of what was done to the child, the reason for it and the circumstances in which it took place. It is envisaged that these should prompt the court to consider the whole circumstances of the case, including the severity of the punishment, whether it was proportionate to the child's behaviour and whether it was given in appropriate circumstances.

272. Subsection (1)(b) directs the court to consider the duration and frequency of the punishment.

273. Subsection (1)(c) directs the court to consider any effect (whether physical or mental) which the punishment has been shown to have had on the child. It does not oblige the court to obtain medical or psychiatric evidence in every case, but to consider such evidence as is produced.

274. Subsection 1(d) directs the court to consider the child's age.

275. Subsection (1)(e) directs the court to consider the child's personal characteristics, including sex, and state of health at the time of the punishment. An example of how a court might take sex into account would be where it considers treatment which may be additionally humiliating, for example because a child's bare bottom is beaten in front of strangers of the opposite sex.

276. Subsection (2) provides that the court may also take into account any other factors which it considers appropriate in relation to the case.

277. Subsection (3) prohibits three specified types of punishment given to a child of any age: blows to the head; shaking; and the use of an implement, such as a belt, slipper or cane. Where these are used, then the punishment cannot be found to be justifiable assault. This list does not affect the power of the court to determine on other grounds that what was done was not justifiable. As in all cases, the prosecution will have to demonstrate an intention by the accused to punish the child. If it can be shown that the accused struck a child of any age by one of the means specified in subsection (3)(b) then that would be sufficient to secure a conviction. It will not be necessary also to demonstrate "criminal intent" or an intention to inflict severe pain or punishment that is excessive or unreasonable in all the circumstances.

278. Subsection (4) makes clear that this section applies only in respect of children who were under 16 at the time of the supposed punishment. There is no entitlement to use physical punishment above that age. Any supposed "punishment" of a person aged 16 or over would constitute assault.

279. Subsection (5) repeals references to "assault" in the Children and Young Persons (Scotland) Act 1937 which the Act renders unnecessary. Physical punishment of a child will be covered by the common law and by this section, while the 1937 Act will apply to cruelty, neglect and ill-treatment, which cannot be justifiable as reasonable punishment.

280. The section does not introduce new penalties, and sentences for assault will continue to be limited only by the sentencing powers of the court involved. At present, most such cases result in non-custodial sentences, and this is not expected to change as a result of the Act.

Section 52 – Prohibition of publication of proceedings at children's hearings etc.

281. Section 52 (a) extends section 44 of the Children (Scotland) Act 1995 ("the 1995 Act") to cover cases from the time that they are referred to the Principal Reporter. Previously, the protection only applied to a case when a children's hearing had actually been convened.

282. The prohibition on publication applies to all children who are connected with the hearing and not just the child referred to the hearing, including, for example, child witnesses and child victims. Such protection is offered in criminal justice proceedings, but has not been offered in cases referred to the Principal Reporter under existing legislative provisions.

283. The changes introduced by section 52 to the interpretation provisions in section 93 of the Children (Scotland) Act 1995 mean that the prohibitions extend to children and young people up to the age of eighteen years.

Section 53 – Provision by Principal Reporter of information to victims

284. Section 53 is a new provision enabling the Principal Reporter to share certain information with victims and certain other categories of approved person about offence cases referred to the Reporter.

285. Subsection (1)(a) provides that the information has to be requested by the approved person.

286. Subsection (1)(b) provides that the Principal Reporter needs to be satisfied that the provision of the information would not be detrimental to the best interests of the child concerned in the case or any other child in any way connected with it and that it is otherwise appropriate to provide the information.

287. Subsection (2) provides that the information that can be conveyed is restricted to the action taken by the Principal Reporter and any disposal of the case, but only insofar as that information relates to the offence rather than to any wider issues in the child's life

288. Subsection (3) details those classes of person with whom the Principal Reporter may share the information. The victim of the offence is the primary intended recipient of the information. Where the victim is a child under the age of eighteen, then the information can be shared with someone who is a "relevant person" in relation to that child. In addition, it is recognised that other third parties may have a genuine requirement to receive such information directly from the Principal Reporter. Scottish Ministers may therefore designate other persons or groups of persons as being approved persons for the purposes of this section. For example, it is intended that those persons making a determination as to whether to pay compensation to the victim in respect of any loss injury or damage suffered as a result of the offence and agencies providing counselling and advice services to victims will be among the third parties approved by Scottish Ministers for this purpose. When specifying approved parties, Ministers may impose conditions on the authorisation to receive information. For example, detailed conditions relating to the confidential handling of the information could be laid down in the order.

289. The definition of child for the purposes of these provisions is a person who has not attained the age of eighteen years.

Part 8 – Evidential, Jurisdictional and Procedural Matters

Section 54 – Certificates relating to physical data: sufficiency of evidence

290. Section 54 amends section 284 of the Criminal Procedure (Scotland) Act 1995 to provide an express right of challenge against the certificate provided for in the latter section.

291. Section 284(1) of the 1995 Act, as amended by section 47 of the Crime and Punishment Act 1997, allows a certificate to be served on an accused signed by an authorised person, stating that fingerprints or other physical data were taken from a named individual at a specified time, date and place. The certificate is then deemed to be sufficient evidence of the facts contained in it. Section 284(2) gives the accused no right to challenge the certificate.

292. Section 54 amends section 284(2) to provide a right of challenge where the defence give notice to the prosecution within seven days of service of the certificate that they do not accept the evidence contained in it.

Section 55 – Taking samples by swabbing

293. Section 55 amends the Criminal Procedure (Scotland) Act 1995 to remove the requirement to obtain authorisation from an inspector before a police constable can exercise compulsory powers to take a DNA sample by mouth swab, without force.

294. This is achieved by amending sections 18, 19, 19A and 19B of the 1995 Act which contain the statutory powers to obtain samples for DNA purposes. Section 18 applies where a person has been arrested and is in custody, or has been detained under section 14 of the 1995 Act. Sections 19 and 19A apply where a person has been convicted of an offence, although 19A covers only those offenders convicted of a sexual or violent offence as defined in subsection (6). Section 19B details circumstances where a constable may use reasonable force when obtaining samples.

295. Subsection (2) amends section 18 of the 1995 Act to:

- repeal subsection (6)(d) which includes mouth swabs among the methods of taking DNA samples that require the authorisation of an officer of at least the rank of inspector; and
- insert a subsection (6A) which provides a new power for a constable or police custody and security officer (at a constable's direction) to take a DNA sample by mouth swab, without the need for authorisation by a more senior officer.

296. Subsection (3) amends sections 19 and 19A of the 1995 Act to:

- remove mouth swabs from the methods of taking DNA samples that require the authorisation of at least an inspector; and
- insert in both sections a new subsection allowing a constable, or police custody and security officer (at a constable's direction) to take DNA samples by way of mouth swab when these sections apply, without the need for authorisation by a more senior officer.

297. Subsection (4) amends section 19B of the 1995 Act to insert a new subsection (2) which provides that the authority of an officer of at least the rank of inspector is required before a constable may use force to take a DNA sample by mouth swab under sections 18, 19 or 19A of that Act.

Section 56 – Retaining samples or relevant physical data where given voluntarily

298. Section 56 provides a statutory basis for the police to take, retain and use fingerprints, other prints and impressions and samples, with the written consent of an individual, either for the investigation of a particular offence or for any offence, depending on the consent given. It also makes provision for the withdrawal of such written consent.

299. Subsection (1) provides that these arrangements only apply when samples or prints cannot be taken under any other power, such as section 18 of the Criminal Procedure (Scotland) Act 1995, or a court warrant or other statutory power. This is designed to ensure that the arrangements will only be used when the police have no other power to take samples or prints and the consent of the individual is required.

300. Subsection (2) allows the police to use such samples and prints, taken with consent, in the investigation of an offence or offences. This puts on a statutory footing the current practice where the police take samples or prints with consent and check them against evidence from a scene of crime, for example mass DNA screenings in a geographical area. It also provides the police with authority, in certain circumstances, to retain the samples and prints for use in subsequent investigations whereas presently they would be destroyed at the conclusion of the investigation in connection with which they were obtained.

301. Subsection (3) provides that the police can only use samples and prints taken with consent in the investigation of offences when the person giving the consent has agreed in writing to their use, and that this consent can be limited to the investigation of the actual offence for which the sample or print was taken. A written consent limited in this way would be analogous to the current situation where the police will use samples or prints taken with consent to investigate a particular offence and then destroy them. The wider

consent will allow the police to avoid taking samples or prints repeatedly from certain people by retaining them for future investigations with the consent of the individual concerned.

302. Subsection (4) lays out how a person may withdraw consent to the sample or print being used to investigate offences. It provides that consent may be withdrawn by:

- giving notice in writing to the chief constable of the police force on whose behalf the print or sample was taken; or
- visiting any police station in that area and giving notice, either orally or in writing, to a constable or another authorised person.

303. It also provides that the person who receives the notice of withdrawal of consent must provide the person who gave the prints or sample with a written acknowledgement of receipt of the notice of withdrawal. This is intended to provide proof of the fact of withdrawal and its time and date if this becomes significant.

304. Subsection (5) provides that the withdrawal takes effect from the point when notice under subsection (4) is received. Subject to subsection (6) the sample or print, and information derived from it, is to be destroyed as soon as possible after notice of withdrawal is given.

305. Subsection (6) provides that subsections (4) and (5) do not affect the use of such samples or prints in evidence if checks made against any other sample or print were undertaken before consent was withdrawn, whether in the prosecution of the offence for which they were taken or for any other offence, depending on the consent the person has given under subsection (3). Subsection (6) makes clear that withdrawal of consent does not affect the admissibility of any evidence the police have uncovered during the course of their investigations prior to withdrawal taking effect, or the admissibility of evidence in respect of the taking of the sample and the giving and withdrawal of consent.

306. Subsection (7) defines when a check will fall within subsection (6).

307. Subsection (8) makes clear the meanings of "sample" and "relevant physical data" in the section, which are the same as the existing meanings in the 1995 Act.

Section 57 - Convictions in other Member States of the European Union

308. Section 57 enables previous convictions in European Union Member States to be libelled and taken into account in criminal proceedings in Scotland in a similar way as previous domestic convictions. Under the existing provisions in the Criminal Procedure (Scotland) Act 1995 (the 1995 Act), previous foreign convictions cannot be taken into account by the courts because section 307 of the 1995 Act provides that previous convictions or sentences are to be construed as those laid down by courts in the United Kingdom only.

309. The provisions implement the European Union Framework Decision (FD) 2001/888 JHA adopted on 6 December 2002, which amended FD 2000/383/JHA of 29 May 2000, on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the Euro. The FD requires every Member State to recognise the principle of the recognition of previous convictions in relation to offences involving counterfeiting the Euro under the conditions prevailing under its domestic law, and, under those same conditions to recognise for the purposes of establishing habitual criminality final sentence sentences handed down in other Member States. The provisions in section 57 go further than the FD because they allow any previous conviction to be taken into account, not just those that relate to counterfeiting the Euro.

310. Subsections (1) to (4) make provision for the situation where it is necessary to prove a previous foreign conviction.

311. Subsection (4) inserts section 286A into the 1995 Act. It provides that a certificate with the official seal of a Minister of the Member State in question containing particulars relating to a conviction extracted from the criminal records of that State, including copies of fingerprints that are certified as appearing from those records to have been taken from the person convicted on the occasion of the conviction, or the occasion of his last conviction, and which would be admissible in evidence in criminal proceedings in the State in question as a record of the skin of that person's fingers, will be sufficient evidence of the conviction and all preceding convictions. Such information as is provided can then be received in evidence in a similar way to that provided for by section 285 of the 1995 Act for UK previous convictions. Subsection 4(4) applies section 285(9) to this new section. Section 285(9) provides that the methods of proving a previous conviction authorised by the section are to be in addition to any other method of proof.

312. Subsection (5) amends the definition of previous conviction in section 307 (1) and (5) of the 1995 Act to enable previous foreign convictions to be taken into account. It also provides that, with regard to section 69(2) and section 166 of the 1995 Act, which deal with the situation where it is intended to draw to the court's attention a previous conviction in solemn and summary cases respectively, that references to previous convictions include those handed down by courts in EU Member States.

Section 58 – Transfer of sheriff court proceedings

313. Section 58 amends sections 83 and 137 of the Criminal Procedure (Scotland) Act 1995 to allow cases to be transferred from one sheriffdom to another as well as within a sheriffdom. Transfer between sheriffdoms will only be with the consent of the sheriff principals of both sheriffdoms.

314. Section 83 of the 1995 Act currently allows the transfer of cases from one sheriff to another within a sheriffdom, in relation to trials in solemn proceedings.

315. Section 58(1) amends subsection (1), inserts new subsections (1A), (2A) and (2B) and amends subsection (3) of section 83 of the 1995 Act to provide that:

- the sheriff may transfer a solemn case within the sheriffdom at any stage in the proceedings to a sitting of a sheriff court in any other district in that sheriffdom. The prosecutor may apply to the sheriff for an order to transfer it to a sitting of another sheriff court which shall be taken to be appointed under Section 66(1) of the 1995 Act;
- under subsection (1A) of section 83 the sheriff principal may transfer a solemn case outwith the sheriffdom at any stage in the proceedings where, due to exceptional circumstances it is not practicable for a case to be held in the respective sheriff court or any other in the sheriffdom. The prosecutor may apply to the sheriff principal for an order to transfer it to a sitting of a sheriff court, which shall be taken to be appointed under Section 66(1) of the 1995 Act, in another sheriffdom, providing the sheriff principal of the other sheriffdom consents;
- where an application is made under subsection (1A) in relation to a solemn trial, the sheriff principal may make such an order on joint motion or after giving the accused or the accused's counsel an opportunity to be heard by the sheriff, provided the sheriff hearing parties and the sheriff principal of the other sheriffdom consent; and
- the provisions in subsection (3) shall apply to subsection (2A).

316. Section 58(2) inserts new sections 137A and 137B into the 1995 Act. New section 137A provides that in summary proceedings, the prosecutor may, at any stage in a criminal case, apply to the sheriff to transfer it to a sitting of a sheriff court in any other district in that sheriffdom.

317. New section 137B provides that where, due to exceptional circumstances it is not practicable for a case to be held in the respective sheriff court or any other in the sheriffdom, the prosecutor may at any stage in the case apply to the sheriff principal for an order to transfer it to a sitting of a sheriff court in another sheriffdom provided the sheriff principal of the other sheriffdom agrees.

Section 59 – Competence of the justice's acting outwith jurisdiction

318. Section 59 inserts a new section 9A into the Criminal Procedure (Scotland) Act 1995 to provide that a justice may sign a warrant, judgement, interlocutor or other document relating to proceedings within that jurisdiction, while they are outwith their jurisdiction, as long as they are within Scotland. A "justice" in this context will include any sheriff. This power will extend to processing of electronic warrants as provided for by section 64A of this Act.

Section 60 – Unified citation provisions

319. Section 60 amends the Criminal Procedure (Scotland) Act 1995 and the Prisoners and Criminal Proceedings (Scotland) Act 1993 to apply the citation procedure set out in sections 216(3) and (5) of the 1995 Act to breach and ancillary proceedings in relation to community based disposals, restriction of liberty orders and drug treatment and testing orders.

320. Section 216 of the 1995 Act enables the clerk of the court to sign and issue a citation to attend court to the offender *in lieu* of the procurator fiscal.

321. This section amends the Criminal Procedure (Scotland) Act 1995 and the Prisoners and Criminal Proceedings (Scotland) Act 1993 to create a unified citation procedure in relation to breach and ancillary proceedings in those disposals already specified above. This will be achieved by inserting into section 307 of the 1995 Act a definition of a unified citation procedure which is as set out in section 216 of the Act and applying it to the following sections of the Act:

- section 232 – probation orders: failure to comply with requirement;
- section 233 – probation orders: commission of further offence;
- section 234E – amendment of drug treatment and testing order;
- section 234G – breach of drug treatment and testing order;
- section 239 – community service orders: requirements;
- section 240 – community service orders: amendment and revocation etc;
- section 245E – variation of restriction of liberty order;
- section 245F – breach of restriction of liberty order;
- Schedule 6 – discharge of and amendment to probation orders; and
- Schedule 7 – supervised attendance orders: further provisions.

322. The definition in section 307 of the 1995 Act is similarly applied to sections 15 and 18 of the 1993 Act which deal with the variation and breach of a supervised release order.

Section 61 – Citation other than by service of indictment or complaint

323. Section 61 amends the Criminal Procedure (Scotland) Act 1995 to introduce more flexibility in the arrangements for serving an indictment or complaint by making provision for an alternative method of citation.

324. This is achieved by amending sections 66, 140 and 141 of the Criminal Procedure (Scotland) Act 1995 to provide that in addition to the existing methods of service of an indictment or complaint, police may affix a notice on the door of an accused's home or place of business that states the date upon which the notice was left, that a complaint or indictment can be collected from a specified police station and calling upon the accused to appear and answer the indictment or complaint. The effect of such a notice is that the accused has been lawfully and properly cited to appear at court.

325. Section 66 of the 1995 Act makes provision concerning service of an indictment upon the accused in solemn proceedings. Section 66(4) provides that the accused shall be served with a copy of the indictment and of the list of the names and addresses of the witnesses to be cited by the prosecution. Section 61(1) amends section 66(4) of the 1995 Act by re-enacting the previous provisions for service but with new provision to permit service to be effected by the police leaving a notice attached to the door of the accused's dwelling-house or place of business. The notice must specify the date on which it was left, inform the accused that a copy of his or her indictment and list of witnesses may be uplifted from a specified police station and call on the accused to attend at the diet at which his or her case shall be called. It also provides that the form of such notice shall be specified by Act of Adjournal.

326. Under new subsection (4A), the date upon which the notice is left on the accused's door is deemed to be the date on which service was effected. Under new subsection (4B), the date upon which service is effected using the new procedure of citation must be in accordance with the rules in section 66(6) of the 1995 Act. That is, the notice attached to the door must call on the accused to attend at a case to be tried in the sheriff court at a first diet not less than 15 days after service or at a trial diet in the High Court not less than 29 days after service.

327. Thereafter section 61(1) amends subsections (7), (8), (11), (13) and (14) of section 66 of the 1995 Act to make reference to the new form of citation. The amendment to subsection (7) permits service of the new form of citation by any officer of law. The amendment to subsection (8) provides that no objection to the new form of citation can be upheld on the basis that the officer was not in possession of the warrant of citation and that it is not necessary to produce the execution of citation of the indictment. The amendment to subsection (11) provides that there may be no objection to the evidence of the officer who served the new form of citation on the grounds that the officer's name is not on the list of witnesses. The amendment to subsection (13) permits any deletion or correction to the new form of citation to be authenticated or signed by the procurator fiscal or the person serving the notice on the accused. The amendments to subsection (14) permits the deletion or correction of the new form of citation to be authenticated by the initials of the person serving the notice.

328. Section 61(2) of the Act amends section 140(2) of the 1995 Act by inserting a reference to the new section 141(2A) inserted by section 61(3) of the Act. Section 140 makes provision for the form and *induciae* (the period of notice of the hearing date that the accused is entitled to receive) of citation of accused persons and witnesses in summary proceedings. Section 141 makes provision for the procedure of citation in summary proceedings. The effect of the amendment to section 140(2) is to permit the new form of citation to operate alongside the provisions for citation set out in sections 140 and 141.

329. Section 61(3) inserts new subsections (2A) and (2B) into section 141 of the 1995 Act. New subsection (2A) sets out the mechanism of the new form of citation in summary proceedings by permitting a citation to be attached to the accused's dwelling-house door or to the door of his or her place of business, in the form to be specified by Act of Adjournal. The notice must specify the date on which it was attached, informing the accused from which specified police station the complaint may be uplifted and requiring him or her to appear and answer the complaint at a specified diet. New subsection (2B) makes provision that the date of the notice is to be deemed to be the date on which service is effected and the date from which the *induciae* is to run.

330. Section 61(3) also amends subsections (3), (5) and (7) of section 141 of the 1995 Act. The effect of the amendment to subsection (3) is to insert a reference to the new form of citation as being an effective form of citation. Subsection (5) is amended to permit a reference to the new form of citation so that the production of any letter or communication in writing, purporting to be from or on behalf of the accused cited in the new way, infers that the accused received the citation and that such evidence may be relied upon where the accused fails to attend the relevant court diet, as specified in section 144(4). Subsection (7) is amended to permit an execution of the new form of citation to be used in evidence, to prove to the court that service has been effected.

Section 62 - Leave to appeal: extension of time limit for application under section 107(4) of 1995 Act

331. Section 62 amends section 107 of the 1995 Act to give the High Court of Justiciary the power to extend the time limit in which a convicted person may apply to the High Court for leave to appeal against conviction or sentence or both following the decision by a single judge of the High Court to refuse leave to appeal.

332. At present a convicted person who is refused leave to appeal against conviction or sentence or both by a single High Court judge must apply to the High Court within 14 days of receiving notification of the refusal of leave to appeal. That time limit is not capable of extension. The new provision gives the High Court the discretion to extend the 14-day time limit notwithstanding that the application for leave to appeal is presented outwith the 14 day period and whether or not the 14 day period for lodging an application expired prior to the commencement of the new provision. This enables a convicted person who has not applied within the 14-day period for leave to appeal to rely upon the new provision as well as those cases where the 14 day period expired after the commencement of the new provision.

Section 63 – Adjournment at first diet in summary proceedings

333. Section 63 amends sections 144 and 145 of the Criminal Procedure (Scotland) Act 1995 and introduces a new section 145A into that Act. Section 144 makes provision for the procedure to be followed at the first diet, or calling, of a case in summary proceedings. This section of the Act amends section 144(9) to permit a reference to section 145A and designates a diet adjourned under section 145A as a first calling of a case and hence, subject to the provisions of section 144.

334. Section 145 of the 1995 Act makes provision for the court to adjourn a case, where the accused in not present at the first or pleading diet, to allow the accused to appear in person to answer the complaint; to allow for time for enquiry into the case or for any other cause that the court thinks reasonable subject to the limits in subsections (2) and (3). Section 145(2) restricts the total period that an accused may be held in custody under this section to 21 days, with each particular adjournment being restricted to no more than seven days except on cause shown. Section 145(3) restricts the period to which a case may be adjourned in any one period to twenty-eight days, where the accused is released on bail or ordained to appear.

335. The new section 145A permits the court to adjourn the case at the first calling, where the accused is not present and irrespective of whether the procurator fiscal is able to provide evidence that the accused has been cited to attend court, subject to the restrictions provided in subsections (2) and (3). Subsection (2) specifies that the court may permit the adjournment where the purpose is to allow the accused the opportunity of answering the complaint or for further time for enquiry into the case or for any other reasonable cause. Subsection (3) restricts any one adjournment granted under this subsection to a period of 28 days, irrespective of whether the accused is in custody or at liberty.

336. The effect of the introduction of section 145A is to permit the court to continue the case in the absence of the accused or where the prosecutor is unable to provide evidence to the court that the accused has been cited to appear at the diet. In addition, section 145A

permits adjournments of up to 28 days in order to allow the accused to answer the complaint, for further time for enquiry or for any other reasonable cause. The new provision does not detract from the sheriff's power to grant a warrant for the arrest of the accused where the accused has been lawfully cited and has failed to appear or where it is expedient to do so under section 139(1)(b) of the 1995 Act.

Section 64 – Review hearing of drug treatment and testing order

337. Section 64 amends section 234F of the Criminal Procedure (Scotland) Act 1995 to provide that a review hearing of a drug treatment and testing order can take place in the absence of the procurator fiscal.

338. A drug treatment and testing order is an order made under section 234B of the Criminal Procedure Scotland Act 1995 (as inserted by section 89 of the Crime and Disorder Act 1998). Section 234F of Criminal Procedure (Scotland) Act 1995 provides for the periodic review of this order.

339. Though section 234F does not specify that the procurator fiscal is required to be present at the review hearing of a drug treatment and testing order, in practice the courts have shown a reluctance to deal with the review in the absence of the procurator fiscal. However, in order to clarify the law section 53 provides that a review hearing can be held whether or not the procurator fiscal is present.

Section 65 - Transcript of record

340. Section 65 amends section 94 of the 1995 Act to give the High Court of Justiciary the power to regulate the transcription of the record of a trial under solemn procedure where the transcription is required for the purposes of an appeal. Section 65 amends subsection (2) and inserts subsections(2A) to (2F) into section 94 of the 1995 Act. The new provision in subsection (2) requires both the Crown and the defence to seek the approval of the High Court to the production of a transcript of a trial under solemn procedure for the purposes of an appeal and to show cause to the court why such an application should be granted.

341. New subsection (2A) provides that if a judge of the High Court so orders, the Clerk of Justiciary shall direct that a transcript of a record of the trial be made and sent to the appellant. The appellant must apply in writing, have been granted leave to appeal, and must show cause for requiring the transcript to comply with the provisions of section 94(2A) of the 1995 Act. Subsection (2C) requires the appellant to apply in writing to the High Court for a transcript of evidence within 14 days of being granted leave to appeal. The High Court has discretion to extend that period on cause shown. The applicant must also inform the prosecutor of the application. Subsection (2D) gives the prosecutor the right to make written representations about the application to the High Court within 7 days of receiving notification of the application.

342. New subsection (2B) provides that where the Crown Agent has received notification of the grant of leave to appeal to a person and wishes a transcript of evidence of that person's trial, the prosecutor will not be entitled to request a transcript under section 94(2)(a) of the 1995 Act. However, if the prosecutor applies in writing and shows cause, a High Court judge may order that the Clerk of Justiciary direct that a transcript be made and sent to the prosecutor. Where the prosecutor wishes a transcript to be made under section 94 (2B), subsection(2E) requires the prosecutor to apply in writing within 14 days of receiving notification of the grant of leave to appeal. The High Court has discretion to extend that period on cause shown. The prosecutor must also inform the person granted leave to appeal of his/her application. Subsection (2F) gives the person granted leave to appeal the right to make written representations about the application to the High Court within 7 days of receiving notification of the application.

Section 66 - Bail and Related matters

343. Section 66 makes a number of amendments to sections 103, 105 and 112 of the Criminal Procedure (Scotland) Act 1995 and inserts a new section 105A into the 1995 Act. These amendments give the prosecutor a right to be heard in bail applications by convicted persons in solemn proceedings and a right to appeal against the grant of appeal.

344. Section 103 of the Criminal Procedure (Scotland) Act 1995 covers appeals from solemn proceedings. Full appeals may be heard only by the full court (a three judge bench) but certain procedures - including admitting an appellant to bail - may be carried out by a single judge under Section 103(5)(c). In practice bail courts before a single judge usually consider a mix of pre and post conviction bail applications. Section 103(6) gives the convicted person a right to appeal to the full court where his or her application for bail is refused.

345. Section 66(2) inserts a new subsection (6A) in Section 103 which ensures that where a judge has granted bail, the prosecutor also has a right of appeal to the full court (technically expressed as a right 'to have the application determined by the High Court'). The detail of how this will work is spelled out in new Section 105A (below). It also ensures that Section 103(7) (which allows preliminary proceedings and incidental proceedings for a full appeal to be dealt with by a single judge) applies to an appeal (or 'application for determination') by a prosecutor under the new section 103(6A) as it applies to an appeal by a convicted person under section 103(6).

346. Section 105 of the 1995 Act covers the procedure to be followed once a single judge has dealt with applications in relation to pending appeals, including applications for bail.

347. Section 66(3) inserts a new subsection 4(A)in that section. This ensures that any application by a convicted person for his bail request to be determined by the full court is notified immediately to the Crown Agent, to allow the Crown to prepare for the hearing before the full court.

348. Section 66(4) inserts a new Section 105A in the 1995 Act. This sets out in some detail the procedure to be followed where the prosecutor seeks to appeal against the grant of bail by a single judge.

349. It provides that the prosecutor shall appeal against the grant of bail (technically, apply to the judge for a determination by the full Court) immediately after the judge has granted bail under section 103(5)(c). The Crown therefore has to be ready to appeal immediately after the bail decision but before the hearing concludes.

350. Once the prosecutor has lodged such an appeal, new section 105A provides that bail is suspended pending the full High Court hearing, but that hearing must take place within 7 days. This is to ensure that a convicted person who has in principle been granted bail does not have long to wait for a final determination of his or her bail application.

351. Under the new section 105A the convicted person's right to attend the full determination of his or her case by the High Court will be the same when the prosecutor appeals as it is when the convicted person him or herself does so.

- Where they are not legally represented, the convicted person may appear;
- Where they **are** legally represented, their lawyer will be present, and they must seek the further leave of the court to be personally present as well. This is done by filling in and returning the form issued by the Clerk of Justiciary. When the form is returned, the application is considered by the court and the Clerk then informs the applicant and other interested parties of the outcome.

352. Finally, new section 105A simply replicates in relation to an application (appeal) by the prosecutor the existing provisions of section 105(6) in relation to an appeal by a convicted person, confirming that a judge who has taken the decision which is being

appealed by the prosecutor may sit as a member of the bench which considers the prosecutor's application.

353. Section 112 of the 1995 Act sets out the procedure to be followed when a person seeks bail pending appeal. Section 112(1) - (5) covers applications for bail following solemn conviction. Section 112(6) - (8) set out the procedure to be followed when in solemn **or summary** proceedings a devolution appeal is lodged under paragraph 13 (a) of Schedule 6 to the Scotland Act 1998. (section 177(8) of the 1995 Act, which covers post conviction summary appeals in general, specifies that the provisions of section 112 on post conviction devolution appeals apply to summary appeals as they do to solemn ones).

354. Section 66(5) makes the changes necessary to section 112 to provide for a right for the prosecutor to be heard when the court is considering an application for bail by a convicted person pending appeal.

355. Sub-paragraph (b) (new subsections (2) and (2A) of section 112) ensures that reasons for granting bail are stated in all applications for bail, whether or not the note of appeal has been lodged. At present, reasons are required only where the convicted person is the appellant and he or she has lodged a note of appeal or where the Lord Advocate is the appellant The issues covered in the note of appeal can be quite different to those which might justify bail It also provides that the prosecutor has the right to be heard before the judge decides whether bail should be granted

356. In new subsection (2A), the amendment simply ensures that the 'exceptional circumstances' test (bail not to be granted unless there are exceptional circumstances) continues to apply as it does at present - to cases where no note of appeal has been lodged and to cases where the Lord Advocate is appealing a sentence he or she considers too lenient.

357. Sub-paragraphs (c) and (d) make the provision necessary to ensure that the prosecutor's new right to be heard is carried over to applications for bail pending devolution appeals -, where the appeal relates to a conviction on indictment. Such applications must continue to state the reasons for granting bail and the 'exceptional circumstances' test will also continue to apply in all such cases

358. Sub-paragraph (e) ensures that where a person convicted on indictment makes an application for bail pending an appeal (whether that is an appeal against conviction and/or sentence under section 112(1) or a devolution appeal under Section 112(6)) that application must be notified immediately and in writing to the Crown Agent. The hearing must take place not less than 7 days later, to give the Crown time to prepare.

Section 67 – Adjournment of case before sentence

359. Section 67 amends section 201 of the Criminal Procedure (Scotland) Act which deals with the power of the court to adjourn following conviction pending sentence. Usually this is to obtain further reports which will help the judge to determine what the sentence should be.

360. Section 67 provides that when a court adjourns a case, the maximum period for which an adjournment can last before a further court hearing should be 'four weeks, or on cause shown, eight weeks' in **all** cases, whether the convicted person is remanded in custody or given bail.

361. Previously a shorter period of three weeks was prescribed for those in custody. If reports or information were not available by the end of that period, the convicted person had to be brought back to court for a further three-week adjournment.

Part 9 – Bribery and Corruption

Sections 68 and 69 – Bribery and corruption: foreign officers etc.; Bribery and corruption committed outwith the UK

362. Sections 68 and 69 amend the law on corruption. These provide that it is an offence for UK nationals, Scottish partnerships or bodies incorporated in any part of the UK:

- to bribe or corrupt a foreign officer or a foreign public body; and
- where conduct of a UK national, Scottish partnership or body incorporated in any part of the UK takes place outwith the UK and would, if done in Scotland, constitute an offence of corruption and bribery.

363. Section 1 of the Public Bodies Corrupt Practices Act 1889 states:

"(1) Every person who shall by himself or by or in conjunction with any other person, corruptly solicit or receive, or agree to receive, for himself, or for any other person, any gift, loan, fee, reward, or advantage whatsoever as an inducement to, or reward for, or otherwise on account of any member, officer, or servant of a public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body as aforesaid is concerned, shall be guilty of a misdemeanour.

(2) Every person who shall by himself or by or in conjunction with any other person corruptly give, promise, or offer any gift, loan, fee, reward, or advantage whatsoever to any person, whether for the benefit of that person or of another person, as an inducement to or reward for or otherwise on account of any person or of another person, as an inducement to or reward for or otherwise on account of any member, officer, or servant of any public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body as aforesaid is concerned, shall be guilty of a misdemeanour.

364. The 1889 Act provides definitions for a number of key terms used in the Act including:

> ""public body" means any council of a county or of a city or town, a council of a municipal borough, also any board, commissioners, select vestry, or other body which has power to act under and for the purposes of any Act relating to local government, or the public health, or to poor law or otherwise to administer money raised by rates in pursuance of any public general Act but does not include any public body as above defined existing elsewhere than in the United Kingdom";
>
> "public office" means any office or employment of a person as a member, officer, or servant of such public body";
>
> "person" includes a body of persons, corporate or unincorporated;
>
> "advantage" includes any office or dignity, and any forbearance to demand any money or money's worth or valuable thing, and includes any aid, vote, consent, or influence, or pretended aid, vote, consent, or influence, and also includes any promise or procurement of or any gift, loan, fee, reward, or advantage, as before defined".

365. The Prevention of Corruption Act 1906 extended the law of corruption into the private sector. Section 1 of the 1906 Act creates an offence of corrupt transactions with agents. It states:

"(1) If any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business,

or for showing to forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or

If any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or

If any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt, account, or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal;

he shall be guilty of a misdemeanour, and shall be liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum, or to both; and

(b) on conviction on indictment, to imprisonment for a term not exceeding 7 years or to a fine, or to both.

366. Sections 1(2) and (3) define "consideration" as including "valuable consideration of any kind"; "agent" as including "any person employed by or acting for another person" and as a "person serving under the Crown or under any corporation or any municipal, borough, county, or district council, or any board of guardians"; and "principal" as including "an employer". The other sections deal with the level of prosecution of the offences.

367. Section 2 of the Prevention of Corruption Act 1916 concerns the presumption of corruption in certain cases. It states:

> "Where in any proceedings against a person for an offence under the Prevention of Corruption Act, 1906, or the Public Bodies Corrupt Practices Act, 1889, it is proved that any money, gift, or other consideration has been paid or given to or received by a person in the employment of His Majesty or any Government Department or a public body by or from a person, or agent of a person, holding or seeking to obtain a contract from His Majesty or any Government Department or public body, the money, gift, or consideration shall be deemed to have been paid or given and received corruptly as such inducement or reward as is mentioned in such Act unless the contrary is proved.

368. Section 4(2) and (3) defines "public body" as it was designated in the 1889 Act and includes "local and public authorities of all descriptions"; the expressions "agent" and "consideration" are defines by reference to the definition for those terms in the 1906 Act.

369. Section 68(1) ensures that both the common law offence of bribery, and existing corruption legislation, extend to persons holding public office outside the UK, that is, foreign officers or a foreign public body. Section 68(2) provides that amendments made by section 108(2) to (4) of the Anti-terrorism, Crime and Security Act 2001 to the Prevention of Corruption Act 1906, the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1916 are to have effect in Scotland.

370. Section 108(2) of the 2001 Act extends section 1 of the 1906 Act (corrupt transactions with agents) to include transactions in which the principal's affairs and business, and the agent's functions have no connection with the UK and are carried on outside the UK. Section 1 of the 1906 states that an "agent" includes any person employed by or acting for another, and that "principal" includes an employer.

371. Section 108(3) of the 2001 Act amends section 7 of the 1889 Act (interpretation relating to corruption in office) by extending the definition of "public body" to include any body which exists outside the UK.

372. Section 108(4) of the 2001 Act amends section 4(2) of the 1916 Act (which defines public bodies to include local and public bodies of all descriptions) by extending it to cover authorities that exist outside the UK.

373. Section 69 of the Act gives Scottish courts the extra-territorial jurisdiction over bribery and corruption offences committed abroad by UK nationals , Scottish partnerships and bodies incorporated under UK law. It enables common law offences and those offences specified in subsection (3), when committed by UK nationals, Scottish partnerships and bodies incorporated under UK law, to be prosecuted in Scotland, wherever those offences take place.

374. Subsection (2)(b) makes express provision that Scottish partnerships may be prosecuted in the Scottish Courts in respect of bribery and corruption offences committed outwith the United Kingdom. In particular the subsection makes provision that where it can be proved that the act occurred with the consent or connivance of, or can be attributed to, a partner or partners, that partner or partners as well as the partnership may be prosecuted.

375. Subsection (2) applies section 11(3) of the 1995 Act to cases to which section 55 of the Act applies. Section 11(3) of the 1995 Act makes provision for certain offences committed outside Scotland to be tried in any sheriff court district in Scotland in which the person is apprehended or in custody or in such sheriff court district as the Lord Advocate may determine.

376. Subsection (3) details the statutory offences to which this section applies (i.e. section 1 of the Public Bodies Corrupt Practices Act 1889 and the first two offences under section 1 of the Prevention of Corruption Act 1906).

377. Subsection (4) provides a definition of a "national of the United Kingdom" for the purposes of subsection (1) and refers to the British Nationality Act 1981 for a number of definitions. The 1981 Act defines a British Citizen as someone born or adopted, descended from or registered or naturalised in the UK; a British dependent Territories citizen as someone born, adopted, descended from or registered or naturalised in a dependent territory of the UK; a British National (Overseas) or a British Overseas citizen as a person who was a citizen of the UK or Colonies before the 1981 Act and does not become a British citizen or a British Dependent Territories citizen on the commencement of the 1981 Act; a British subject as a person who was a citizen of the UK and Colonies under the British Nationality Act 1948, other any other enactment and certain other categories; a British protected person as one of a class of persons defined by Order connected with a territory that is a protectorate or protected state or trust territory under the 1948 Act, and who is not a citizen of a commonwealth country which includes that territory.

Part 10 – Criminal Records

Section 70 – Registration for criminal record purposes

378. Section 70 amends Part V of the Police Act 1997 ("the 1997 Act").

379. Part V of the 1997 Act (sections 112 to 127) provides for the issue by the Secretary of State (now the Scottish Ministers) of certificates showing criminal conviction and criminal record information.

380. There are three types of certificates:

- a criminal conviction certificate (section 112);
- a criminal record certificate (sections 113 and 114); and
- an enhanced criminal record certificate (sections 115 and 116).

381. The criminal conviction certificate shows unspent convictions (in terms of the Rehabilitation of Offenders Act 1974) or states that there are no such convictions. Both

criminal record certificates and enhanced criminal record certificates show any unspent and spent convictions (in terms of the Rehabilitation of Offenders Act 1974) and any cautions. Enhanced criminal record certificates show in addition any information which a chief constable considers relevant to the position for which the individual is being considered and which can be included in the certificate without harming the interests of the prevention or detection of crime. The conviction information disclosed in the certificates relates to information contained in records held in the Scottish Criminal Record Office (SCRO) and in records obtained by SCRO from the Police National Computer.

382. Applications for criminal record certificates under section 113 of the Act and enhanced criminal record certificates under section 115 must be countersigned by a person listed in the register maintained under section 120 of the Act ("a registered person").

383. Subsection (2) inserts a new section 120A into the 1997 Act. The new section gives the Scottish Ministers power to refuse to include a person in the register maintained under section 120 of the Act, if they consider that the registration of that person is likely to make it possible for an unsuitable person to have access to criminal record information. The Scottish Ministers are also given power to remove a person from the register if they believe that the registration of that person has resulted in such information becoming known to an unsuitable person (subsection (2) of the new section).

384. Subsection (3) of the new section sets out the factors which the Scottish Ministers should have regard to when considering whether a person is suitable to have access to the information. These are:

- information relating to that person which concerns a conviction within the meaning of the Rehabilitation of Offenders Act 1974, including a spent conviction or a caution;
- whether that person is included in any list kept under section 81 of the Care Standards Act 2000 - that is, any list held by the Secretary of State for Health of individuals who are considered unsuitable to work with vulnerable adults;
- any information provided by the chief constable of a police force in Scotland in response to a requirement by the Scottish Ministers to provide information for the purposes of the new discretion;
- any information provided by the chief constable of a police force in England, Wales or Northern Ireland in response to a request by the Scottish Ministers to provide information for the purposes of the new discretion;
- any decision of the Scottish Ministers to refuse or withdraw registration or to refuse (because a breach of the Code of Practice on the use of information provided to registered persons) to issue a certificate; and
- any decision to refuse or withdraw registration under the provisions of Part V as it applies in another part of the UK.

385. Subsection (4) of the new section requires a chief constable of a police force in Scotland to comply with requests for information in relation to the new section. Subsection (5) of the new section provides for fees to be prescribed for the supply of information by chief constables

386. Section 70(3) amends section 115 of the 1997 Act by inserting into section 115(5) of that Act a provision which will add to the range of purposes in relation to which an enhanced criminal record certificate may be obtained. The addition is a purpose relating to an assessment, investigation or review by an adoption agency or local authority as to the suitability of a person, whether or not the person in respect of whom the certificate is sought, to adopt a child.

387. Section 70(3) further amends section 115 of the 1997 Act by inserting 5 new subsections which will add to the range individuals in respect of whom an enhanced criminal record certificate may be obtained. The range of such persons is extended to include: -

- individuals included or seeking inclusion in certain lists prepared for the purposes of Part I and Part II of the National Health Service (Scotland) Act 1978;
- Her Majesty's Inspectors and other persons appointed or seeking appointment for purposes of carrying out inspections of educational provision;
- individuals appointed or seeking appointment under section 39(2) of the Children (Scotland) Act 1995 as a member of a children's panel or a Children's Panel Advisory committee, or joint advisory committee, or sub-committees thereof;
- the Principal Reporter and officers to assist the Principal Reporter;
- prosecutors and officers to assist a prosecutor or to assist in the work of the Crown Office;
- persons (curators ad litem, reporting officers and "safeguarders") included or seeking to be included in a panel established by virtue of section 101(1) of the Children (Scotland) Act 1995.

388. Section 70(4) amends section 119(1) of the 1997 Act so as to extend the duty to supply information to cover the supply of information for purposes of considering a person's suitability to be registered or to continue to be registered under section 120 of the 1997 Act.

389. Section 70(5) inserts a new section 119A into the 1997 Act. This requires any person who holds in Scotland records of criminal convictions to make the records available to the Scottish Ministers in relation to their powers to cancel the inclusion of any person on the register. Ministers may also request information from the list of persons considered unsuitable to work with vulnerable adults. "Person" for this purpose does not include a public body or holder of public office, unless the person is a Scottish public authority.

390. Section 70(6) amends section 120 of the Police Act 1997 to provide that the duty to register is qualified by the new provisions conferring on the Scottish Ministers the discretion to refuse to include a person on the register. The section also provides that the Scottish Ministers may make regulations about the maintenance of the register in relation to the nomination of a person to countersign applications, a refusal or cancellation of a nomination, and the period after which a person refused registration or removed from the register may reapply.

391. Section 70(7) amends section 122 of the Police Act 1997. Section 122 makes provision for the Scottish Ministers to publish a code of practice, in connection with the use of information by registered persons under the 1997 Act. Section 70(7)(a) amends section 122 to permit the code of practice to be extended to cover, not only the use of information provided to registered persons, but also the discharge of any function of a registered person under the 1997 Act. Subsection (7)(b) amends section 122 of the 1997 Act to permit the Scottish Ministers to remove a registered person from the register, as a result of his or her failure to comply with the code of practice or for countersigning an application at the request of a body that has failed to comply with the code.

392. Section 70(8) inserts a new section 124A into the Police Act 1997 to provide that, where the Scottish Ministers have refused a person registration or where the person has been removed from the register because he or she has not complied with the code of practice, the person should be notified in writing of the action and the reason for it. A copy of the notice should also be sent to the Secretary of State. (that is, the Home Secretary).

393. The new section provides the person with a right to request in writing a review of the decision and to be notified of the results of the review. A copy is also to be sent to

the Secretary of State. Regulations may be made by negative procedure to deal with procedural matters related to the notification process

394. Section 70(8) also inserts a new section 124B, which provides for the Scottish Ministers to maintain a list of all persons in respect of whom a criminal record certificate or an enhanced criminal record certificate has been issued under sections 113 to 116 of the Act. The Scottish Ministers are given power to make regulations about the maintenance of this list. The section also empowers Ministers to notify the person who countersigned the application for the certificate or certain other persons of new convictions or relevant matters of which Ministers become aware after issuing a certificate. It also requires the Scottish Ministers in making regulations under section 124A to allow the listed person an opportunity to make representations regarding notification under subsection (3), and the Scottish Ministers should have regard to any such representations before making notification. The regulations may also require the person who would receive the notification (except a Minister of the Crown) to provide such information as they have which may be relevant to the exercise of the discretion to notify.

Part 11 – Local Authority Functions

Section 71 and 72 – Advice, guidance and assistance to persons arrested or on whom sentence deferred; Grants to local authorities discharging certain functions jointly

395. Sections 71 and 72 amend the Social Work (Scotland) Act 1968.

396. Section 71 (2) inserts new paragraph (ac) into section 27 (1) of the 1968 Act which requires local authorities to provide advice, guidance and assistance to prisoners during their period of imprisonment who will be subject to supervision following release. Responsibility for the provision of this service will fall on the local authority that the offender resided in prior to imprisonment or the local authority that the offender will reside in following release.

397. Section 71 (3) inserts new subsection (1A) and (1B) into section 27 of the 1968 Act. New subsection (1A) enables local authorities to provide advice, guidance and assistance to prisoners during their period of imprisonment who would not be subject to supervision on release and who request such services. Responsibility for the provision of this service will fall to the local authority area that the offender resided in prior to imprisonment or the local authority area that the offender will reside in following release.

398. New subsection (1B) makes clear that where more than one local authority is required by virtue of section 27(1)(ac) of the 1968 Act to provide such services the local authorities may agree amongst themselves that only one shall provide the services.

399. Section 71(4) inserts a new section 27ZA into the Social Work (Scotland) Act 1968. Section 27ZA(1) provides that it shall be a local authority function, if so directed by the Scottish Ministers, to provide services to persons who have been arrested and detained in police custody or those on whom sentence has been deferred, under section 202(1) of the 1995 Act (during the period of deferment) and whilst those persons are in that local authority's area. The Scottish Ministers may direct the extent to which such services are to be provided. In providing services to individuals under this section local authorities are required to have particular regard to those suffering from problems relating to dependency on drugs, alcohol or some other substance.

400. Subsection (2) of new section 27ZA provides for the local authority to be able to continue to provide a service to those released from police custody within their area for a period of up to 12 months from the date of release.

401. Section 71(5) amends section 27A of the Social Work (Scotland) Act 1968 to allow the Scottish Ministers to make grants to local authorities in respect of the functions exercised by the authority under new section 27ZA.

402. Section 72 inserts a new subsection (1A) into section 27A of the Social Work (Scotland) Act 1968 to provide that where local authorities have formed themselves into a grouping and are discharging functions mentioned in section 27(1) or new 27(ZA), the Scottish Ministers may make grants to a nominated local authority from this grouping.

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.