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

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

EXPLANATORY NOTES

INTRODUCTION

Part 2 - Proceedings

Police functions

Section 7: Liberation on undertaking

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

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

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

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

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

58. Section 22(1G) of the 1995 Act sets out the lifespan of conditions attached to an undertaking. If not rescinded, they expire at the end of the day on which the accused's

case is due to call in court; alternatively, if a warrant is granted, they expire at the end of the day on which the accused appears in court in answer to the warrant. It follows that in every circumstance other than where a warrant is granted the conditions fall at the end of the day on which the undertaking is due to call. The court can, of course, consider anew the imposition of bail conditions if the accused appears in answer to an undertaking.

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

60. Section 7(3) makes a minor amendment to section 135 of the 1995 Act. This amendment makes it clear that the accused who is apprehended on a warrant, and released on undertaking, does not require to be brought before a court in the course of the first day after apprehension.

Summary procedure

Section 8: Manner of citation

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

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

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

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

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

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

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

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

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

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

Section 9: Procedure at first calling

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

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

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

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

Section 10: Intimation of diets etc.

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

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

Section 11: Pre-trial time limits

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

Section 12: Disclosure of convictions

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

New section 166A

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

New Section 166B

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

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

Section 13: Complaints triable together

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

Section 14: Proceedings in absence of accused

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

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

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

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

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

87. Subsections (1) to (3) of the new section 150A allow for a court to hear any diet, except a diet of first calling, in the absence of the accused. In most instances this will be on the motion of the prosecutor; however, where the accused is absent from a diet set for sentencing, for example, where the case has been adjourned for a social enquiry report following conviction of the accused, the court may proceed to pass sentence of its own accord. Two requirements are imposed by new section 150A. These are: firstly, the court must be satisfied that the accused was duly cited to the hearing or that s/he received intimation of the hearing; and, secondly, that it is in the interests of justice to proceed in the accused's absence. This includes leading evidence and returning a verdict.

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

Section 15: Failure of accused to appear

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

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

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

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

Section 16: Obstructive witnesses

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

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

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

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

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

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

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

New section 156A

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

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

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

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

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

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

106. Subsection (8) applies with modifications to section 25 (Bail conditions: supplementary) of the 1995 Act to orders made under section 156A(1)(b) (i.e. where the court releases an apprehended witness on bail). Section 25, amongst other things,

provides that the requirement of an accused to give details of his address at which s/he may be cited to attend court when liberated on bail. This requirement will apply to a witness liberated under these provisions.

New section 156B

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

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

109. Subsection (3) provides that, in proceedings for breach of bail, the fact that the witness was on bail, or was subject to a particular condition of bail, or that s/he failed to appear at a diet to which s/he had been cited, shall be held to be admitted unless challenged by a preliminary objection.

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

New section 156C

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

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

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

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

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

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

New section 156D

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

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

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

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

Section 17: Prosecution of companies etc.

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

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

123. The section further provides that if the body corporate fails to appear or be represented at a diet to which it has been cited or had due intimation of the court may proceed to hear and dispose of the case. In proceeding in the absence of a representative the court must satisfy itself that citation or intimation have been effected on the body corporate and that it would be in the interests of justice to proceed. The provisions relating to proceedings in the absence of a company representative are comparable to those made in section 150A of the 1995 Act (inserted by section 14 of this Act) which deals with proceedings in the absence of an individual accused.

Preparation for summary trial

Section 18: Intermediate diets

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

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

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

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

Section 19: Notice of defences

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

New Section 149B

129. Subsections (1) & (2) provide that where the accused intends to insist on a special defence, a defence which incriminates a co-accused, a defence of automatism or coercion or a defence of consent in certain sexual offences, the accused must intimate that intention to the prosecutor in advance. Failure to so intimate will make it incompetent to found on that defence in court unless the court, on cause shown, allows

the accused so to do. Currently, under the provisions of section 149, a defence of alibi may be founded upon at any time up until the first witness is sworn. A plea of consent in relation to certain sexual offences requires to be notified no less than 10 days prior to the trail diet.

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

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

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

133. Subsections (7) & (8) provide that where a notice of defence is intimated to the prosecutor, the prosecutor is entitled to an adjournment of the case whether or not the notice was given timeously and whether or not the adjournment could have been requested at an earlier diet.

Section 20: Proof of uncontroversial matters

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

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

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

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

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

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

Section 21: Service of documents through solicitor etc.

140. This section introduces a new requirement on solicitors engaged by an accused for the purposes of the accused's defence at trial to intimate that fact to the procurator fiscal and the court. The purpose of the requirement is to enable documents, other than

the complaint, to be served on an accused through that person's solicitor. A similar requirement already exists for solemn cases – see sections 72F and 72G of the 1995 Act.

New Section 148C

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

142. Subsection (2) provides that the solicitor is deemed to have complied with subsection (1) in circumstances where s/he has (1) appeared at the first calling of the case and tendered a plea on behalf of the accused or intimated in writing a plea on behalf of the accused and (2) at the same time has notified the court and the prosecutor that s/he is also engaged by the accused for the purposes of the accused's defence at trial. The notification under subsection (2) can be given orally or in writing, whereas notification under subsection (1) must be in writing.

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

New Section 148D

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

Transfer of summary cases

Section 22: Transfer of proceedings

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

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

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

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

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

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

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

New section 137C

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

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

New Section 137D

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

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

Section 23: Time bar for transferred and related cases

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

New Section 136A

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

Other provisions

Section 24: Reports about supervised persons

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

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

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

Section 25: Summary appeal time limit

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

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

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

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

Solemn cases

Section 26: Pre-trial time limits

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

Section 27: Obstructive witnesses

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

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

Section 28: Proceedings against bodies corporate

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

Section 29: Jury Citation

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

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

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

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

Section 30: Duty to seek agreement of evidence

173. This section amends subsection (4) of section 257 of the 1995 Act and provides that the duty provided under subsection (1) (to seek and secure agreement of evidence capable

of being agreed in advance of the trial) is extended to all proceedings on indictment. Currently that subsection relates only to proceedings in the High Court It also provides a deadline by which the duty is to be complied with (before the preliminary hearing in High Court cases and before the first diet in sheriff court cases).

Section 31: Petition proceedings outwith sheriffdom

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

Section 32: Failure of accused to appear.

New section 102A

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Miscellaneous

Section 33: Apprehension warrants

New section 297A

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

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

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

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

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

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

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

section 90A of the 1995 Act, and summary warrants granted under section 135 and 156 of the 1995 Act.

Section 34: Participation of accused in identification procedures

New section 267B

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

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

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

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

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

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

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

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

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

Section 35: Evidence on commission

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

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

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

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

211. Subsection (3)(c) adds further provision to section 271I, and applies sections 274, 275, 275B (except subsection (2)(b)), 275C, 288C, 288E and 288F of the 1995 Act. Sections 274 and 275 contain certain prohibitions on the leading of evidence, and on questioning, which relates to the sexual history of the complainer in cases of certain sexual offences. In addition, section 275B provides the timescales under which an application regarding leading evidence must be made. Section 275C relates to expert evidence as to subsequent behaviour of the complainer in certain cases. Section 288C, 288E and 288F prohibit the accused from conducting his or her own defence in certain cases. Subsection (3)(c) provides that the protections available to witnesses in court proceedings as set out in the named sections apply equally in commissioner proceedings when used as a special measure in respect of vulnerable witnesses. This subsection also provides that the commissioner shall be a judge or a sheriff. This is so that s/he has the power to rule on questions of admissibility of evidence and whether certain questions may be asked of the witness.

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

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

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

Section 36: Victim notification scheme

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

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

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

Section 37: Recovery of documents

New section 301A

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

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

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

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

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

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

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

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

New section 298A

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

Section 39 : Refixing diets

New sections 75B and 137ZA

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

Section 40: Power of court to excuse procedural irregularities

New section 300A

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

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

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

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

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

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

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

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

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

Section 41: Electronic proceedings

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

New section 303B – Electronic summary proceedings.

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

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

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

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

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

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

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

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

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

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

New section 308A – Expressions relating to electronic complaints

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

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

Section 42 – Further provision for summary cases.

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

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