

CRIMINAL JUSTICE (SCOTLAND) ACT 2003

EXPLANATORY NOTES

THE ACT THE ACT IS IN 12 PARTS.

Part 12 – Miscellaneous and General

Miscellaneous

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.

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

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.