

# **CRIMINAL PROCEDURE (AMENDMENT) (SCOTLAND) ACT 2004**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### ***Schedule - Further modifications of the 1995 Act.***

173. **Paragraph 2** is consequential on the changes introduced by the Act to the process of appointing trial diets in the High Court, whereby trial diets are appointed for a particular day rather than all cases being cited to the first day of the sitting. This paragraph makes amendments to section 2 of the 1995 Act, which deals with arrangements for trials including transferring cases from one place to another. References in section 2(3), (4) and (5) of the Act are amended by sub-paragraphs (a), (c) and (d) of paragraph 2 by deleting the references to sittings and replacing these references with trial diets. Where parties are all agreed that a trial diet should be rescheduled paragraph 2(b) amends section 2 so as to allow the court to consider a joint application without hearing parties.
174. **Paragraphs 3 and 12** are consequential on the changes introduced by section 4 of the Act. An accused charged with certain sexual offences is prohibited by section 288C of the 1995 Act from conducting his own defence at his trial. Section 4 extends that to prohibiting the accused from conducting his case in person at the preliminary hearing. Section 17A of the 1995 Act entitles the accused, on his arrest, to be told of the restrictions on the conduct of his defence and paragraph 3 extends that so he must also be told about the restrictions which apply to the preliminary hearing in the High Court by amending section 17A accordingly. Section 35(4A) of the Act requires the accused to be informed at his judicial examination of the prohibition on his conducting his defence in person. Paragraph 12 makes the necessary consequential amendment to include reference at the judicial examination to prohibition of an accused conducting his defence at the preliminary hearing also.
175. **Paragraph 4** amends section 23A of the 1995 Act in order to provide that that section also applies to persons admitted to bail under the new section 65(8C) as introduced by this Act.
176. **Paragraph 5** amends section 24 of the 1995 Act to provide that the standard conditions of bail include a condition that accused must appear at every diet at which he is required by this Act to appear and that section 24(6) which allows the court to impose a requirement that the accused deposit a sum of money in court does not apply where an accused is admitted to bail under section 65(8C) of the Act.
177. **Paragraph 6** amends section 25 of the 1995 Act by inserting a new subsection (4) to provide that where the court is referred to in that section (other than subsection 2A) it shall be read as the Lord Advocate in cases where the Lord Advocate has admitted the person to bail. Under section 24 of the 1995 Act both the court and the Lord Advocate may grant bail and impose bail conditions, but under section 25 at present power to set a domicile of citation is confined to the court. This amendment will allow the Lord Advocate, in issuing a bail order, to set a domicile of citation.

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178. [Paragraph 7](#) inserts a new section 25A into the 1995 Act to provide that where an accused person is entitled to be admitted to bail in cases where the custody time limits cannot be met and that person refuses to accept the conditions imposed then that person continues to be detained in custody under the warrant of committal for as long as he fails to accept those conditions.
179. [Paragraph 8](#) amends section 27 of the 1995 Act so to provide that an offence is committed where the accused on bail fails to appear at any diet at which he is required by the 1995 Act to appear.
180. [Paragraph 9](#) amends section 28 of the 1995 Act by introducing new subsections (4A) and (4B). Subsection (4A) ensures that the court to which an accused admitted to bail under section 65(8C) has to be brought if arrested for breach, or suspected breach, of bail is the court which admitted the accused to bail under that section. Subsection (4B) provides that if an accused person released on bail under section 65(8C) is brought before the court in respect of breach of bail conditions, the prosecutor will be given an opportunity to make an application for an extension of the custody time limits, and if such an application is not made, or is refused, gives power to the court to release the accused under the original order or vary the original order by imposing such conditions as the court considers appropriate.
181. [Paragraph 10](#) amends section 31 of the 1995 Act by inserting a new subsection (3A) which provides that the prosecutor may apply only for a review of the conditions imposed on bail when an accused is admitted to bail under section 65(8C) of the Act and that the power of the court to recall bail does not apply to bail under section 65(8C)
182. [Paragraph 11](#) amends section 32 of the 1995 Act by inserting new subsections (2A) and (7B). New subsection (2A) provides that any appeal by the prosecutor in relation to an accused admitted to bail under section 65(8C) is restricted to an appeal against the conditions imposed only. Subsection (7B) provides that in the event that the prosecutor makes such an appeal the accused may continue to be detained under the original warrant of committal for a period of 72 hours, or such longer period as the High Court may allow, after which he will be released on bail subject to the conditions imposed whether the appeal is disposed of or not.
183. [Paragraphs 13 and 14](#) provide that the first diet in the sheriff court and the preliminary hearing in the High Court may be discharged and an examination of the facts ordered where the court is satisfied that the accused is insane so that his trial cannot proceed and that the examination in fact may take immediately following the making of the order. Any citation of the accused to the trial diet or to the preliminary hearing is a valid citation to the examination of the facts.
184. [Paragraph 15\(a\)](#) amends section 66(4) of the 1995 Act to provide that the copy indictment served on the accused shall include a list of the productions to be put in evidence by the prosecution.
185. [Paragraph 15\(b\), \(c\) and \(d\)](#) picks up on a missed consequential in relation to the amendment to section 66 of the 1995 Act which was made by section 61 of the Criminal Justice (Scotland) Act 2003. Section 66 was amended by section 61 to allow for an accused to be cited by a notice affixed to his door advising him of the address at which he can collect the indictment. Along with the service copy indictment section 66(6A) provides that an accused charged with certain sexual offences is given notice that at his trial his defence may be conducted by a lawyer only. Section 66 is amended by paragraph 8(b), (c) and (d) to provide that in High Court cases the notice shall intimate to the accused that his case at the preliminary hearing may be conducted only by a lawyer and, where the accused is cited by way of a notice affixed on his door rather than service of the indictment, a notice in the same terms as the section 66(6A) notice will be given to him when he collects the indictment.
186. [Paragraph 15\(e\)](#) repeals an unnecessary provision in subsection (10) of section 66.

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187. **Paragraph 16** is consequential on section 1 of the Act. That section introduces preliminary hearings in all cases indicted into the High Court. Accused persons will be cited to this hearing rather than a trial diet. The preliminary hearing is the point to which all pre-trial notices and applications now relate. Section 67(3) allows certain objections in respect of witnesses to be made not less than 10 clear days before the trial diet. Subparagraph (a) amends this section to provide that in High Court cases that objection must be lodged no less than 7 clear days before the preliminary hearing. Sub-paragraph (b) provides that the prosecutor shall have a duty to cite witnesses in the list attached to the indictment only if it has been ascertained at the preliminary hearing or the first diet or in any application to dispense with the preliminary hearing under section 72B(1) that the prosecutor or the accused requires the witness to attend at the trial. Sub-paragraph (c) inserts subsection (5A) into section 67. That subsection allows the prosecutor to examine any witness or put in evidence any production not included in the list lodged by the prosecutor provided that written notice is given to the accused not less than 7 clear days before the preliminary hearing or such later time, before the jury is sworn, as the court may on cause shown allow.
188. **Paragraph 17** repeals section 67A of the 1995 Act in consequence of section 19 of the Act which re-enacts section 67A in an updated and extended form.
189. **Paragraph 18** is consequential on section 1 of the Act and makes amendments to the procedure to be followed in relation to productions. Sub-paragraph (a)(ii) and (iv) amends section 68(3) as it relates to proceedings in the High Court. They modify the time limits for lodging and challenging productions to relate to the preliminary hearing. Sub-paragraph (a)(i) and (iii) maintain the current time limits for the sheriff court.
190. **Paragraph 19** is consequential on section 1 of the Act. An accused person who wishes to object to a previous conviction contained in the notice served on him with the indictment has to do so in writing. In terms of section 69(3) as currently drafted that notice has to be given prior to the trial diet. This paragraph amends that section so that in a High Court case the accused requires to give notice no less than seven clear days before the preliminary hearing. The current time limits for sheriff court cases are preserved.
191. **Paragraph 20** is consequential on section 13 of the Act and refers to the sheriff court. First diets are held in sheriff and jury cases in terms of section 71 of the 1995 Act and subsection (2) of that section requires the court to consider certain matters. Section 13 of the Act substitutes a new section 79 in the 1995 Act and lists preliminary pleas and issues which if raised must be dealt with at the first diet. This paragraph inserts references to preliminary pleas and issues as defined in that new section 79 for the existing reference to matter in section 71(2) of the 1995 Act. Sub-paragraph (b) repeals unnecessary provisions in subsections (8) and (8A).
192. **Paragraph 21** repeals section 71A of the 1995 Act.
193. **Paragraph 22** is consequential on section 15 of the Act. Subsection (5) of that section allows applications to discharge diets and fix an earlier or later date. Section 74 deals with appeals against decisions at preliminary diets, but provides that an appeal may not be taken against various court decisions to set, adjourn or postpone diets. Paragraph 22 adds to the list of decisions which are not appealable the decision to accelerate the trial diet.
194. **Paragraph 23** repeals a reference to section 72 of the 1995 Act in section 75 of the 1995 Act. This is consequential upon section 1 which replaces section 72 of the 1995 Act.
195. **Paragraph 24** amends section 76 of the 1995 Act which sets out the procedure where an accused desires to plead guilty. The amendment provides that where an accused subsequently pleads not guilty at a diet convened in terms of section 76 the High Court may postpone the preliminary hearing and that the period of that postponement shall not count towards any time limit applying in the case.

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196. [Paragraph 25](#) is consequential upon section 1 of the Act. It amends section 78 of the 1995 Act which provides that where an accused intends to state a special defence or to lead evidence calculated to exculpate him by incriminating a co-accused he cannot do so unless he lodges notices in terms of that section. It goes on to provide that he cannot examine any witnesses or put in evidence any productions not included on the lists lodged by the prosecutor unless he has given notice of his intention to do so. Subparagraphs (a), (b) and (c) amend section 78(1), (3) and (4) by requiring these notices to be lodged in High Court cases not less than seven clear days before the preliminary hearing. The current time limits for the sheriff court are preserved. Subparagraph (d) provides that copies of the notice for the use of the court should be lodged with the appropriate sheriff clerk before the preliminary hearing in the High Court and (as at present) before the trial diet in the sheriff court.
197. [Paragraph 26](#) repeals section 80 of the 1995 Act in consequence of section 15 of the Act which re-enacts section 80 in an updated and extended form.
198. [Paragraph 27](#) is consequential on section 9 of the Act, which inserts a new section 81 into the 1995 Act setting out the procedure to be followed where the trial diet has not gone ahead. Where an accused is fully committed for trial and a diet has been fixed but has been deserted *pro loco et tempore*, postponed or adjourned (or a notice has been issued that the trial is to take place at another place) section 82 provides that the warrant of committal remains in force. Paragraph 27(a) amends section 82 to safeguard the warrant where diets have been continued or accelerated and paragraph 27(b) amends paragraph (c) of the section to reflect the fact that the court will in future appoint trial diets.
199. [Paragraph 28](#) makes amendments to the provisions in section 83 of the Act, which provides for the transfer of sheriff court solemn proceedings from one sitting to another sitting elsewhere in the sheriffdom. In particular, they provide that where parties jointly seek transfer of proceedings no hearing need be held and repeal section 83(3), which relate to a “warrant to cite” which will no longer be required under the provisions of the Act.
200. [Paragraphs 29](#) and [30](#) are consequential upon the amendments to section 66 of the 1995 Act by section 7 of this Act. Jurors are at present cited to attend at a sitting of the High Court. In future, however, trials in the High Court will not be assigned to sittings but will either have a fixed date for calling or have a date specified as the first day of a period (to be fixed by Act of Adjournal) in which the diet must call. The way in which jurors are cited requires to be amended to reflect this. Paragraph 29 amends section 84(8) of the 1995 Act to allow jurors to be cited to attend for trials in the High Court where the court is sitting. Section 84(9) is similarly amended to provide that the jurors on the list shall be the list of jurors for all trials to be held by the High Court sitting at that particular place. The requirement in subsections (8) and (9) that the lists be signed by a judge are also repealed.
201. [Paragraph 29\(c\)](#) repeals another reference to the “warrant of citation” which will, under the provisions of this Act, no longer be required.
202. [Paragraph 30](#) further amends the provision in relation to jurors. Paragraph 30(a) amends section 85(2) of the 1995 Act to provide that the list and number of jurors shall be prescribed by Act of Adjournal. Paragraph 30(b) and (c) amends subsections (4) and (5) of section 85 to reflect the fact that the sittings system in the High Court is replaced by fixed trials.
203. [Paragraph 31](#) amends section 87 of the 1995 Act to give the clerk of court power where the judge is unavailable due to death, illness or absence in cases where no evidence has been led to adjourn the diet in all the cases appointed for that day until later in the day or to a later date being no more than two months from that date and in cases where evidence has been led to adjourn that diet and all other cases appointed for that day until later in the day, or a date not more than seven days later; or with the consent of parties

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desert the diet *pro loco et tempore*. The amendments reflect that as a result of the Bill, the sittings system in the High Court is now replaced by fixed trial dates.

204. [Paragraph 32](#) restates the time limits contained in section 119 of the 1995 Act where a new prosecution is authorised following an appeal to take account of the amendments to section 66(1) of the 1995 Act.
205. [Paragraph 33](#) is consequential on section 22 of the Act. Section 22 of the Act introduces new procedures for the citing of witnesses for precognition. The provisions relate to all cases including summary cases making subsection (1)(a) of section 140 unnecessary. This paragraph therefore repeals section 140(1)(a).
206. [Paragraph 34](#) is consequential on section 11 of the Act. Section 156 of the 1995 Act applies to witnesses in both solemn and summary procedure. Section 11 of the Act introduces procedures for dealing with obstructive witness in proceedings on indictment. Subsections (1), (2) and (3) of section 156 are therefore amended to reflect the fact that they now refer to summary procedure only.
207. [Paragraphs 35 to 37](#) amend existing provisions in sections 245A to 245E of the 1995 Act to ensure consistency between those provisions in the 1995 Act that apply to restriction of liberty orders (RLOs) and the corresponding provisions introduced into the 1995 Act by section 17 that apply to movement restriction conditions.
208. [Paragraph 35](#) amends subsection (6) of section 245A (restriction of liberty orders) of the 1995 Act to require the local authority to provide a report on the place where an offender subject to an RLO will be required to remain and information on the attitude of those likely to be affected by the enforced presence of the offender.
209. [Paragraph 36](#) amends subsection (2) of section 245C (remote monitoring) of the 1995 Act to clarify that tampering with, or intentional damage to, the remote monitoring equipment constitutes a breach of the RLO.
210. [Paragraph 37](#) amends section 245E (variation of a restriction of liberty order) of the 1995 Act by inserting a new subsection (4A) requiring the court, when considering variation of a restriction of liberty order which will change the offender's place of restriction, to obtain a report on the place where the offender will be required to remain and information on the attitude of those to be affected by the enforced presence of the offender at the new address. Subsection (6)(a) of section 245E is amended to require only the local authority to provide such a report.
211. [Paragraphs 38 and 39](#) are consequential on section 1 of the Act. Where an accused is charged in a special capacity such as being the holder of a licence; or where the age of a person is specified these facts shall be held as admitted unless challenged. These paragraphs require the challenges to be raised as preliminary issues at the preliminary hearing in the High Court or the first diet in the Sheriff Court.
212. [Paragraph 40](#) is consequential on section 1 of the Act. Section 257 of the 1995 Act places on parties a duty to seek agreement of evidence. The duty applies from the service of the indictment until the jury is sworn. However as the High Court is introducing a preliminary hearing at which it is desired to dispose of all preliminary matters, including where possible the agreement of evidence, parties are encouraged to seek agreement prior to that hearing. This paragraph amends section 257 by inserting a subsection to that effect.
213. [Paragraph 41](#) is consequential on section 1 of the Act. Where a party considers that certain evidence is uncontroversial he serves a statement on the other party to that effect. The other party can challenge any fact specified or referred to in the statement. The procedure is set out in section 258 of the 1995 Act and the time limits in relation to service and challenge relate at present to the trial diet. Paragraph (a) amends subsection (2) and inserts a subsection (2A) so that the time limits in the High Court refer to the preliminary hearing.

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214. [Paragraph 42](#) is consequential on section 1. Section 259 of the 1995 Act allows in certain circumstances exceptions to the rule that hearsay evidence is inadmissible. Subsection (5) of that section requires the party who wishes to have evidence of a statement admitted to give notice of that fact. No time limit for giving the notice is stated, other than that it must be in advance of the trial. Subparagraph (a) of paragraph 42 now amends section 259 to require the notice in High Court cases to be given not less than seven days before the preliminary hearing or such later time as the judge may, on cause shown, allow. Subparagraph (b) retains the status quo in any other case.
215. [Paragraphs 43 and 44](#) amend sections 271A and 271C of the 1995 Act which were inserted by the Vulnerable Witnesses (Scotland) Act 2004. The amendments require applications and notices relating to the special measures for taking the evidence of child or vulnerable witnesses in High Court cases to be lodged no later than 14 days before the preliminary hearing in the High Court and no later than 7 days before the first diet in the sheriff court and appoints any disputed notices to be disposed of at that hearing or diet or at such other diet to be held before the trial diet.
216. [Paragraph 45](#) is consequential on section 1 of the Act. Section 274 of the 1995 Act prohibits evidence relating to the sexual conduct of the complainer in trials for certain serious sexual offences. Under Section 275(1), the accused may apply to have such evidence admitted in certain limited circumstances. In terms of section 275B, applications for the purpose of 275(1) currently require to be made within 14 clear days of the trial diet. Paragraph 45 amends that section to provide that the application to be made no less than seven days before the preliminary hearing in High Court cases.
217. [Paragraph 46](#) is consequential on the introduction of the preliminary hearing in the High Court. It amends section 277(2)(a) of the 1995 Act to provide that a transcript of an interview between a police officer or a person commissioned appointed or authorised under section 6(3) of the Customs and Excise Management Act 1979 and an accused person shall not be admissible in evidence unless a copy of it has been served on the accused not less than 14 days before the preliminary hearing. The existing time limit in relation to sheriff court cases is preserved. Paragraph 46 also amends section 277(2) (b) of the 1995 Act to provide that notice of a challenge to the making or accuracy of a transcript must be given by the accused not less than six days before the preliminary hearing in High Court cases and in any other case six days before the trial.
218. [Paragraph 47](#) is a consequential on the new section 79 introduced by section 13 of the Act. It substitutes a reference to section 79(1) for the existing reference to section 72(1) (b)(iv) as a new section 72 is substituted by section 1 of the Act. In consequence of this amendment, any application under section 278 of the 1995 Act to determine that the record of the judicial examination or any part of it should not be admitted as evidence should be raised as a preliminary issue at the preliminary hearing.
219. [Paragraph 48](#) amends section 280(6) of the 1995 Act (which refers to the procedure for notifying and challenging the certification of routine evidence) by requiring that in High Court cases the certificate referred to in that subsection must be served by the prosecutor on the accused not less than fourteen days before the preliminary hearing.
220. [Paragraph 49](#) amends section 281(1) of the 1995 Act to provide that any challenge to the identity of the deceased in an autopsy report must in a High Court case be lodged not less than 7 days before the preliminary hearing. It also amends section 281(2) to remove the need for the prosecutor to specify when he intimates an autopsy or forensic science report to the accused which of the pathologists or forensic scientists responsible for the report will be called to give evidence. That means that either of those scientists may give evidence at the trial.
221. It also provides that any notice from the accused requiring the attendance of the other scientist as well must be submitted seven days before the preliminary hearing in High Court cases.

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222. Paragraphs 50 to 54 are all consequential on the introduction of the mandatory preliminary hearing. All relate to the need for notices in relation to evidential issues to be served before the preliminary hearing, so that the court at the hearing can consider them if it considers that to be appropriate.
223. Paragraphs 55 and 56 amend sections 288C and 288D of the 1995 which relate to the prohibition on the accused conducting his own defence in certain cases and the appointment of the court of a solicitor to act on behalf of the accused in those circumstances. The amendment to section 288C ensures that any proof in relation to any supplementary statement in relation to a victim statement made by virtue of section 14(3) of the Criminal Justice (Scotland) Act 2003 is included among the diets at which the accused is prohibited from conducting his own defence in the circumstances outlined in section 288C. The amendment to section 288D ensures that the duty on the court to appoint a solicitor where it ascertains that the accused has not engaged a solicitor extends also to that situation.
224. Paragraph 57 inserts definitions of “preliminary hearing”, “preliminary issue” and “preliminary plea” in the interpretation section of the 1995 Act
225. Paragraph 58 amends Schedule 9 to the 1995 Act (certificates of proof of certain routine matters) to take account of changes in relation to bail provisions made in this Act, in particular the introduction of bail for reluctant witnesses.