

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

EXPLANATORY NOTES

INTRODUCTION

Part 2 - Proceedings

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.

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

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.

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

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.