

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

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### **Part 2 - Solemn Proceedings Generally**

##### ***Section 11 - Obstructive witnesses***

91. **Section 11** inserts into the 1995 Act new sections 90A to 90E setting out how the court may deal with obstructive witnesses. These provisions set out the law in relation to the issuing of warrants for the apprehension of witnesses in proceedings on indictment; provide that where a witness is brought to court the court may (*inter alia*) release the witness on bail; give parties the right to appeal against the terms of orders made in relation to obstructive witnesses (including bail orders); set out the sanctions where bail orders are breached; and provide for review of court orders made in relation to obstructive witnesses.

##### **New section 90A: apprehension of witnesses in proceedings on indictment**

92. Section 90A deals with the apprehension of witnesses in proceedings on indictment, and replaces existing law on the matter (subsection (8)). Subsections (2) and (3) set out the circumstances in which a warrant may be issued for the apprehension of a witness. These are:
- where the witness has been duly cited and has deliberately and obstructively failed to appear, and
  - where the court is satisfied by evidence on oath that the witness is being deliberately obstructive and is not likely to attend without compulsion.
93. Subsection (4) creates a presumption, in the absence of evidence to the contrary, that a witness who, having been duly cited, fails to appear has done so deliberately and obstructively.
94. Subsection (5) provides that an application for a warrant under subsection (1) may be made either orally or in writing and may be dealt with in chambers or in court with or without a hearing. Provision for the application to be made in writing means that it can be supported by a sworn affidavit by an officer of law attesting to the fact of citation without requiring that officer to attend the court. Under subsection (6) the warrant shall be as prescribed in an Act of Adjournal
95. Subsection (7) authorises officers of law in possession of the warrant to search for and apprehend the witness and take him to the appropriate court and grants authority to detain him meantime in a police cell or station or other convenient place. The warrant authorises the breaking open of shut and lockfast places for the purposes of executing the warrant.

96. Subsections (9) and (10) provide that a witness apprehended under a warrant should be brought before either a single judge of the High Court or the sheriff court no later than the first sitting day after he is apprehended.

**New section 90B – orders in respect of witnesses apprehended under section 90A**

97. Section 90B gives the court power to deal with witnesses apprehended under a warrant issued under the preceding section.
98. Subsection (1) states that where a witness has been apprehended and brought before the court parties and the witness will have an opportunity to address the court. The court may thereafter order the witness to be detained in custody until the conclusion of the diet at which he is due to give evidence; to be released on bail; or to be liberated. Under subsection (2) the court must be satisfied before ordering the witness to be detained in custody or released on bail that such an order is necessary and appropriate to secure attendance of the witness.
99. Subsection (3) retains the power of the court to make a finding of contempt of court in respect of any witness who fails to attend having been cited and to dispose of the case accordingly.
100. Subsection (4) provides that, where a witness has been ordered to be detained in custody until the conclusion of the diet in which he is to give evidence, the trial court may recall that order when excusing the witness even if the trial is not concluded. The trial court may therefore liberate the witness as soon as they take the view that the witness's presence is no longer required. For example, the court might decide to release the witness immediately after their evidence has been given but before the conclusion of the trial.
101. Subsections (5) and (6) authorise the court, when releasing a witness on bail, to impose such conditions as it considers necessary to secure the attendance of the witness at court other than a deposit of a sum of money in court.
102. Subsection (7) provides that where the court has ordered the witness to be detained in custody it may on the application of the witness recall that order and order that the witness be released on bail subject to a condition restricting his movements together with a requirement that his compliance with that condition be remotely monitored.
103. Subsections (8) to (10) provide for the application of certain provisions of sections 24A to 25 of the 1995 Act to cases where remote monitoring requirements have been imposed on a witness under subsection (7). The provisions applied make provision—
- requiring the parties to be given the right to be heard (section 24A(7))
  - requiring the effect of a remote monitoring requirement to be explained to the witness (section 24A(8) and (9))
  - as the matters to be considered and information to be obtained before the court imposes a remote monitoring requirement (section 24A(10) to (12))
  - as to monitoring in pursuance of remote monitoring requirements, including provision about devices to be worn for the purposes of such monitoring (section 24A(13) to (15) and section 24D)
  - enabling regulations to be made by the Scottish Ministers about the imposition of remote monitoring requirements (section 24B)
  - for the designation of persons who may monitor in pursuance of remote monitoring requirements (section 24C)
  - about specification of the conditions of bail and the witness's proper domicile of citation (section 25)

**New section 90C – breach of bail under section 90B(1)(b)**

104. Section 90C introduces sanctions for those witnesses who, having been granted bail, fail to comply with any of the conditions attached to the order granting bail.
105. Subsections (1) and (2) make provision analogous to that provided in section 27 of the 1995 Act in relation to accused in solemn cases who breach bail. Subsection (1) provides that any witness on bail who fails to appear at any diet to which he has been cited or who fails to comply with any condition imposed in the order shall be guilty of an offence and subsection (2) sets out the penalties which may be imposed in the event of a conviction under the preceding section. These penalties - a fine and imprisonment not exceeding two years - are the same as those which apply under section 27(7) of the 1995 Act where an accused in a solemn case fails to appear at a diet to which he has been cited.
106. Subsections (3) to (6) provide that evidence of an offence under subsection (1)(b) where the condition breached is a movement restriction condition or a requirement not to tamper with or intentionally damage the device may be given by production of documents automatically produced by a device specified in regulations made under section 24D(4) of the 1995 Act and a certificate signed by a person nominated by the Scottish Ministers that the statement relates to either the whereabouts of the witness or any tampering with or damage to the device. Subsection (7) provides for service of statement and certificate on the witness and subsection (8) allows the court to adjourn the trial if it considers that the witness has had insufficient notice of the statement or certificate.
107. Subsection (10) applies section 28 of the 1995 Act (which provides for the arrest and court appearance of an accused who has breached bail) to witnesses who have been granted bail. It allows a constable to arrest without warrant a witness who he has reasonable grounds for suspecting has broken or is likely to break the conditions imposed and to bring him to court. Once before the court, the court may recall or vary the bail order made or release the witness on the original order.

**New section 90D – review of orders under section 90B(1)(a) or (b)**

108. Section 90D gives the court power to review orders detaining the witness in custody or releasing him on bail.
109. Subsection (1) allows the court on the application of the witness to recall the order detaining the witness in custody and to make an order releasing him on bail or liberating him.
110. Subsection (2) authorises the court on the application of the witness to review the conditions imposed when granting bail; and make a new bail order with different conditions.
111. It also provides that, on the application of the person who applied for the warrant to apprehend the witness (that is, either the prosecutor or the accused) the court may recall the bail order or make a bail order with different conditions. Subsection (3) qualifies that right by providing that the court will only review a bail order in these circumstances where new material evidence is put before it. Under subsection (5) a court receiving such an application is required to intimate the application to the witness, fix a diet and, if it considers it necessary, grant a warrant to apprehend the witness.
112. Before making a new order the court must give the accused, the prosecutor and the witness the opportunity to be heard.
113. Subsection (4) sets the time limits for applications by a witness for a review of an order detaining him in custody or releasing him on bail, which are the same as those which apply in relation to a bail review sought by an accused or convicted person under section 30 of the 1995 Act. A first application may not be made earlier than the fifth day

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Act 2004 (asp 5) which received Royal Assent on 4th June 2004*

after the order was made and any further application no earlier than the fifteenth day after the order was made. These time limits do not apply to applications from parties citing the witness.

114. Subsection (6) retains the right of any party to appeal against the terms of any order made under Section 90B(1) for a witness to be remanded in custody, released on bail, or liberated.

**New section 90E – appeals in respect of orders under section 90B(1)**

115. Subsections (1) to (3) of section 90E give the witness, the prosecutor and the accused the right to appeal against the making any order under section 90B(1)(a), (b) or (c), including any condition imposed on bail under subsection (1)(b) of that section and provide that the party appealing shall intimate the appeal to the other parties.
116. Subsection (4) gives power to the High Court or to a judge of the High Court to deal with an appeal under this section. The High Court would deal with an appeal against the decision of a single judge of that court and a single judge would deal with an appeal from the sheriff court
117. Subsection (5) applies section 51 of the 1995 Act to witnesses under the age of 21. Section 51 provides that persons under the age of 16 are detained in secure accommodation or committed to the care of the local authority rather than detained in prison.