



# Criminal Procedure (Scotland) Act 1995

## 1995 CHAPTER 46

### PART VII

#### SOLEMN PROCEEDINGS

##### *Notice by accused*

#### **78 Special defences, incrimination and notice of witnesses, etc.**

- (1) It shall not be competent for an accused to state a special defence or to lead evidence calculated to exculpate the accused by incriminating a co-accused unless—
- (a) a plea of special defence or, as the case may be, notice of intention to lead such evidence has been lodged and intimated in writing in accordance with subsection (3) below<sup>F1</sup> . . .
  - (b) the court, on cause shown, otherwise directs.
- [<sup>F2</sup>(1A) Subsection (1) does not apply where—
- (a) the accused lodges a defence statement under section 70A, and
  - (b) the accused's defence consists of or includes a special defence.]

(2) Subsection (1) above shall apply [<sup>F3</sup>to a plea of diminished responsibility or] to a defence of automatism [<sup>F4</sup>, coercion or, in a prosecution for an offence to which section 288C of this Act applies, consent] as if it were a special defence.

[<sup>F5</sup>(2A) In subsection (2) above, the reference to a defence of consent is a reference to the defence which is stated by reference to the complainer's consent to the act which is the subject matter of the charge or the accused's belief as to that consent.

(2B) In subsection (2A) above, "complainer" has the same meaning as in section 274 of this Act.]

(3) A plea or notice is lodged and intimated in accordance with this subsection—

    - (a) where [<sup>F6</sup>the case is to be tried in the High Court] , by lodging the plea or notice with the Clerk of Justiciary and by intimating the plea or notice to the

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- Crown Agent and to any co-accused not less than [<sup>F7</sup>seven clear days before the preliminary hearing] ;
- (b) where the [<sup>F8</sup>case is to be tried in the sheriff court] , by lodging the plea or notice with the sheriff clerk and by intimating it to the procurator fiscal and to any co-accused at or before the first diet.
- (4) It shall not be competent for the accused to examine any witnesses or to put in evidence any productions not included in the lists lodged by the prosecutor unless—
- (a) written notice of the names and addresses of such witnesses and of such productions has been given—
- (i) where the case is to be tried in the sheriff court, to the procurator fiscal of the district of the trial diet at or before the first diet; and
- (ii) where the case is to be tried in the High Court, to the Crown Agent at least [<sup>F9</sup>seven clear days before the preliminary hearing]
- (b) the court, on cause shown, otherwise directs.
- (5) A copy of every written notice required by subsection (4) above shall be lodged by the accused with the sheriff clerk of the district in which the trial diet is to be held, or in any case the trial diet of which is to be held in the High Court in Edinburgh with the Clerk of Justiciary, at or before
- [<sup>F10</sup>(a) where the case is to be tried in the High Court, the preliminary hearing;
- (b) where the case is to be tried in the sheriff court, the trial diet, for the use of the court.] .

#### Textual Amendments

- F1** Words in s. 78(1)(a) repealed (1.2.2005) by Criminal Procedure (Amendment) (Scotland) Act 2004 (asp 5), ss. 25, 27(1), **Sch. para. 25(a)**; S.S.I. 2004/405, **art. 2**, Sch. 1 (subject to arts. 3-5)
- F2** S. 78(1A) inserted (6.6.2011) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), **ss. 124(4)**, 206(1) (with s. 124(1)); S.S.I. 2011/178, **art. 2**, sch.
- F3** Words in s. 78(2) inserted (with application in accordance with art. 3 of the commencing S.S.I.) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), s. 206(1), **sch. 7 para. 46**; S.S.I. 2012/160, **art. 3**, sch.
- F4** Words in s. 78(2) substituted (1.11.2002) by Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 (asp 9), **s. 6(1)(a)**; S.S.I. 2002/443, **art. 3** (with art. 4(4))
- F5** S. 78(2A)(2B) inserted (1.11.2002) by Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 (asp 9), **s. 6(1)(b)**; S.S.I. 2002/443, **art. 3** (with art. 4(4))
- F6** Words in s. 78(3)(a) substituted (1.2.2005) by Criminal Procedure (Amendment) (Scotland) Act 2004 (asp 5), ss. 25, 27(1), **Sch. para. 25(b)(i)(A)**; S.S.I. 2004/405, **art. 2**, Sch. 1 (subject to arts. 3-5)
- F7** Words in s. 78(3)(a) substituted (1.2.2005) by Criminal Procedure (Amendment) (Scotland) Act 2004 (asp 5), ss. 25, 27(1), **Sch. para. 25(b)(i)(B)**; S.S.I. 2004/405, **art. 2**, Sch. 1 (subject to arts. 3-5)
- F8** Words in s. 78(3)(b) substituted (1.2.2005) by Criminal Procedure (Amendment) (Scotland) Act 2004 (asp 5), ss. 25, 27(1), **Sch. para. 25(b)(ii)**; S.S.I. 2004/405, **art. 2**, Sch. 1 (subject to arts. 3-5)
- F9** Words in s. 78(4)(a)(ii) substituted (1.2.2005) by Criminal Procedure (Amendment) (Scotland) Act 2004 (asp 5), ss. 25, 27(1), **Sch. para. 25(c)**; S.S.I. 2004/405, **art. 2**, Sch. 1 (subject to arts. 3-5)
- F10** Words in s. 78(5) substituted (1.2.2005) by Criminal Procedure (Amendment) (Scotland) Act 2004 (asp 5), ss. 25, 27(1), **Sch. para. 25(d)**; S.S.I. 2004/405, **art. 2**, Sch. 1 (subject to arts. 3-5)

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## [<sup>F11</sup>79 Preliminary pleas and preliminary issues.

- (1) Except by leave of the court on cause shown, no preliminary plea or preliminary issue shall be made, raised or submitted in any proceedings on indictment by any party unless his intention to do so has been stated in a notice under section 71(2) or, as the case may be, 72(3) or (6)(b)(i) of this Act.

[<sup>F12</sup>(1A) Subsection (1) is subject to section 271Q(8).]

- (2) For the purposes of this section and those sections—
- (a) the following are preliminary pleas, namely—
- (i) a matter relating to the competency or relevancy of the indictment;
  - (ii) an objection to the validity of the citation against a party, on the ground of any discrepancy between the record copy of the indictment and the copy served on him, or on account of any error or deficiency in such service copy or in the notice of citation; and
  - (iii) a plea in bar of trial; and
- (b) the following are preliminary issues, namely—
- (i) an application for separation or conjunction of charges or trials;
  - (ii) a preliminary objection under section [<sup>F13</sup>22ZB(3)(b),] 27(4A)(a) [<sup>F14</sup>or (4B), 90C(2A)] , 255 or 255A of this Act [<sup>F15</sup>section 9(6) of the Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8) or that section of that Act as applied by section 234AA(11) of this Act] ;
  - [<sup>F16</sup>(ia) an application for a witness anonymity order under section 271P of this Act;]
  - (iii) an application under section 278(2) of this Act;
  - (iv) an objection by a party to the admissibility of any evidence;
  - (v) an assertion by a party that there are documents the truth of the contents of which ought to be admitted, or that there is any other matter which in his view ought to be agreed; and
  - (vi) any other point raised by a party, as regards any matter not mentioned in sub-paragraphs (i) to (v) above, which could in his opinion be resolved with advantage before the trial.
- (3) No discrepancy, error or deficiency such as is mentioned in subsection (2)(a)(ii) above shall entitle an accused to object to plead to the indictment unless the court is satisfied that the discrepancy, error or deficiency tended substantially to mislead and prejudice the accused.
- (4) Where the court, under subsection (1) above, grants leave for a party to make, raise or submit a preliminary plea or preliminary issue (other than an objection to the admissibility of any evidence) without his intention to do so having been stated in a notice as required by that subsection, the court may—
- (a) if it considers it appropriate to do so, appoint a diet to be held before the trial diet for the purpose of disposing of the plea or issue; or
  - (b) appoint the plea or issue to be disposed of at the trial diet.]

### Textual Amendments

- F11** S. 79 substituted (1.2.2005) by [Criminal Procedure \(Amendment\) \(Scotland\) Act 2004 \(asp 5\)](#), ss. **13(1)**, 27(1); S.S.I. 2004/405, **art. 2**, Sch. 1 (subject to arts. 3-5)

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- F12** S. 79(1A) inserted (28.3.2011) by [Criminal Justice and Licensing \(Scotland\) Act 2010 \(asp 13\)](#), **ss. 90(2)(a)(i)**, 206(1); S.S.I. 2011/178, art. 2, sch.
- F13** Word in s. 79(2)(b)(ii) inserted (28.3.2011) by [Criminal Justice and Licensing \(Scotland\) Act 2010 \(asp 13\)](#), s. 206(1), **sch. 7 para. 47**; S.S.I. 2011/178, art. 2, sch.
- F14** Words in s. 79(2)(b)(ii) inserted (10.12.2007) by [Criminal Proceedings etc. \(Reform\) \(Scotland\) Act 2007 \(asp 6\)](#), ss. 80, 84, **Sch. para. 14**; S.S.I. 2007/479, **art. 3(1)**, Sch. (as amended by S.S.I. 2007/527)
- F15** Words in s. 79(2)(b)(ii) inserted (28.11.2004) by [Antisocial Behaviour etc. \(Scotland\) Act 2004 \(asp 8\)](#), ss. 144(1), 145(2), **Sch. 4 para. 5(2)**, S.S.I. 2004/420, **art. 3**, Sch. 1
- F16** S. 79(2)(b)(iia) inserted (28.3.2011) by [Criminal Justice and Licensing \(Scotland\) Act 2010 \(asp 13\)](#), **ss. 90(2)(a)(ii)**, 206(1); S.S.I. 2011/178, art. 2, sch.

### [<sup>F17</sup>79A **Objections to admissibility of evidence raised after first diet or preliminary hearing**

- (1) This section applies where a party seeks to raise an objection to the admissibility of any evidence after—
  - (a) in proceedings in the High Court, the preliminary hearing; or
  - (b) in proceedings on indictment in the sheriff court, the first diet.
- (2) The court shall not, under section 79(1) of this Act, grant leave for the objection to be raised if the party seeking to raise it has not given written notice of his intention to do so to the other parties.
- (3) However, the court may, where the party seeks to raise the objection after the commencement of the trial, dispense with the requirement under subsection (2) above for written notice to be given.
- (4) Where the party seeks to raise the objection after the commencement of the trial, the court shall not, under section 79(1) of this Act, grant leave for the objection to be raised unless it considers that it could not reasonably have been raised before that time.
- (5) Where the party seeks to raise the objection before the commencement of the trial and the court, under section 79(1), grants leave for it to be raised, the court shall—
  - (a) if it considers it appropriate to do so, appoint a diet to be held before the commencement of the trial for the purpose of disposing of the objection; or
  - (b) dispose of the objection at the trial diet.
- (6) In appointing a diet under subsection (5)(a) above, the court may postpone the trial diet for such period as appears to it to be appropriate and may, if it thinks fit, direct that such period (or some part of it) shall not count towards any time limit applying in respect of the case.
- (7) The accused shall appear at any diet appointed under subsection (5)(a) above.
- (8) For the purposes of this section, the trial shall be taken to commence when the jury is sworn.]

#### **Textual Amendments**

- F17** S. 79A inserted (1.2.2005) by [Criminal Procedure \(Amendment\) \(Scotland\) Act 2004 \(asp 5\)](#), **ss. 14(2)**, 27(1); S.S.I. 2004/405, **art. 2**, Sch. 1

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