

SEXUAL OFFENCES (PROCEDURE AND EVIDENCE) (SCOTLAND) ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Section 2: Appointment of solicitor by court in such cases and availability of legal aid

11. **Section 2(1)** inserts a new section 288D into the 1995 Act. This new section imposes on the court a duty to appoint a solicitor to the accused where the court is satisfied that he or she will not have legal representation for the trial. Subsection (2)(b) and (c) of the new section extend the duty to cover cases where the accused has dismissed his or her solicitor, or a solicitor has withdrawn from acting, and the court is satisfied that the accused does not intend to instruct another.
12. As the purpose of imposing the duty is to ensure that the accused is represented throughout the trial, subsection (3) of the new section provides that a court-appointed solicitor cannot be dismissed by the accused, nor can he or she be obliged by the accused to dismiss counsel. The latter safeguard prevents the accused from putting the solicitor in a position where counsel is removed without a suitable alternative being readily available. It remains open to the solicitor to agree to the dismissal of counsel.
13. Subsections (4) and (5) of the new section make provision for the role of a court-appointed solicitor. He or she is placed under an obligation to seek the instructions of the accused. If instructions are obtained which the solicitor is able to follow, adopting normal professional rules of conduct, then he or she should follow them. To the extent that such instructions cannot be obtained, the solicitor's duty is to act in the interests of the accused to the best of his or her ability on the basis of the material available. Otherwise, no difference is drawn between a court-appointed solicitor and any other solicitor acting for an accused in a sexual offence case purely by virtue of the fact of court appointment.
14. Subsection (6) of the new section allows the court to discharge a solicitor it has appointed to the accused, and select another, where satisfied that the original appointee cannot continue to act, whether on the instructions or in the interests of the accused. However, lack of co-operation on the part of the accused would not in itself mean that the solicitor was unable to continue to act in the accused's interests.
15. Section 2(2) of the Act amends section 22 of the Legal Aid (Scotland) Act 1986 so as to make legal aid available automatically and without means-testing where the court appoints a solicitor to act for the accused under section 288D. Section 2(3) amends section 31 of the 1986 Act to remove the accused's right to choose his or her solicitor once the court has reached the stage of appointing one for him or her under the Act.