

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

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## **EXPLANATORY NOTES**

### **COMMENTARY ON THE SCHEDULE**

#### ***Paragraph 2***

41. Section 17 of the 1995 Act imposes a duty on the police to inform a suspect who is arrested of his or her right to have a solicitor informed of his or her whereabouts. Paragraph 2 follows this provision with a new section 17A, requiring an oral warning to be given on arrest in a sexual offence case that legal representation will be necessary at trial, that it is in the accused's interests to seek the assistance of a solicitor and that, if this is not done, the court will appoint one to him or her.

#### ***Paragraph 3***

42. Judicial examination is a preliminary hearing before a sheriff in a case which is to be tried before a jury. It is dealt with in section 35 of the 1995 Act.
43. Paragraph 3 inserts a new section 35(4A). This provides for an oral warning about legal representation at trial to be given to the accused by the sheriff at judicial examination. The warning will be in similar terms to that given by the police on arrest.

#### ***Paragraph 4***

44. Section 66 of the 1995 Act contains provision for a notice to be served on the accused along with the indictment in a jury case, calling on him or her to appear to answer the indictment at a specified trial date. Paragraph 4 inserts a new subsection (6A) requiring the notice to contain a written warning to the accused about the necessity of obtaining legal representation for the trial. This is to be in similar terms to the oral warnings given on arrest and at judicial examination. Where the trial is to be held in the High Court, the notice must also call on the accused to appear at the new pre-trial diet to be set under paragraph 7 of the schedule (new section 72A). This means that a specified date, time and venue for the pre-trial diet will require to be included in the notice.

#### ***Paragraph 5***

45. A first diet is a preliminary hearing in the sheriff court in a case which is to go to jury trial in that court. These diets are already compulsory in all cases. They are dealt with in section 71 of the 1995 Act.
46. Paragraph 5 amends section 71 to provide for the first diet to be used to establish whether the accused has legal representation for the trial. It inserts a new section 71(5A), which provides that a first diet may not take place in the absence of the accused in a sexual offence case. It also inserts a new section 71(8A), which restricts the court's power to adjourn a first diet to 48 hours where the adjournment is granted purely to give the accused a final chance to appoint his or her own solicitor.

### **Paragraph 6**

47. Paragraph 6 inserts a new section 71A into the 1995 Act. This provides for a further pre-trial diet to follow a first diet where it is established at the first diet that the accused is legally represented, but his or her solicitor is subsequently dismissed or withdraws. Such a solicitor will be under a duty to notify the court of what has happened. The court will then fix a further pre-trial diet which the accused will be required to attend.
48. Where it does not appear that the accused has legal representation for the trial, the court has a discretion (dependent on the circumstances of the case) to adjourn the diet for up to 48 hours to enable him or her to appoint a solicitor. Where the accused still makes no appointment, the court will proceed to appoint itself under section 2 of the Act (new section 288D).
49. A further pre-trial diet may be dispensed with by the court, but only where the accused has a solicitor who confirms his or her appointment to defend the accused in writing and requests that the diet be dispensed with. Such a solicitor will require to notify the court if he or she is dismissed or withdraws after the diet is dispensed with, or after an application to dispense with it has been made. Equally, where a further pre-trial diet takes place and a solicitor acting for the accused at that time is later dismissed or withdraws, there will be a duty on the solicitor to inform the court. These notification obligations will allow another pre-trial diet to be fixed (section 71A(2)), or an application to dispense with a forthcoming diet to be refused.
50. Section 71A(5) provides that any pre-trial diet occurring after a first diet must take place no less than 10 clear days before commencement of the trial. This may necessitate an application for postponement of the trial in some cases.

### **Paragraph 7**

51. Paragraph 7 inserts a new section 72A into the 1995 Act. This will make the holding of a pre-trial diet mandatory in all sexual offence cases to be tried in the High Court, unless dispensed with by the court when the accused has a solicitor who applies to do so. The accused must attend. The diet is to be used to establish whether the accused has legal representation for the trial. Subsection (3) of the new section confers on the court a discretion (dependent on the circumstances of the case) to grant the accused an adjournment for a maximum of 48 hours to enable him or her to appoint a solicitor. Where the accused still makes no appointment, the court will proceed to appoint itself under section 2 of the Act (new section 288D).
52. Subsection (4) contains the timescale within which the new pre-trial diet must be held. This corresponds to that applicable to the first diet in sheriff court jury cases.
53. Subsection (5) provides that a pre-trial diet may take place at the same time as any other preliminary hearing (known as a preliminary diet) which may have been fixed by the court in the same case, subject to the applicable timescale.
54. Subsection (7) requires a solicitor who is dismissed or withdraws from acting after applying for the pre-trial diet to be dispensed with, but before it has taken place or been dispensed with, to notify the court.
55. Subsection (8) requires a solicitor who is dismissed or withdraws from acting after the pre-trial diet takes place, or after it has been dispensed with, to notify the court. Subsections (7) and (8) will enable the court to deal with the situation by refusing any outstanding application to dispense with the diet, or by fixing a new pre-trial diet to consider the accused's legal representation afresh (section 72A(9)).

### **Paragraph 8**

56. In a non-jury case, section 140 of the 1995 Act provides for the service on the accused of a citation requiring him or her to appear in court to answer the charges in the

complaint. Paragraph 8 inserts a new subsection (2A) requiring the citation to include, or be accompanied by a notice containing, a written warning to the accused about legal representation. This will be in the same terms as the warning to be contained in the notice accompanying the indictment in a jury case.

### **Paragraph 9**

57. Section 144 of the 1995 Act sets down procedure at the first calling of a non-jury case in court. The accused will not necessarily be present at first calling. He or she may instead plead not guilty (or guilty) by letter, or may have a solicitor present. However, where the accused is present, the new section 144(3A) inserted by paragraph 9 will require the court to give the accused an oral warning about the need for legal representation. This will be in similar terms to the warning to be given by the sheriff at judicial examination in a jury case.

### **Paragraph 10**

58. Section 146(3) of the 1995 Act provides that, where a non-jury case is adjourned for trial, the prosecutor shall furnish the accused with a copy of the complaint, if he or she does not already have one. Paragraph 10 inserts a new subsection (3A), whereby the complaint requires to be accompanied by a notice containing a written warning in similar terms to that included in, or contained in the notice accompanying, any citation.
59. Paragraphs 2,3,4,8,9 and 10 of the schedule contain provision whereby failure to give any of the oral or written warnings specified in those paragraphs to the accused about the need for legal representation does not invalidate the proceedings against him or her. These warnings are to be supplied in the interests of the accused. However, given the number of them required to be communicated at different stages of the process and the advice about the need for representation which would be given to the accused by any competent solicitor, an entire prosecution is not to fail simply because a warning has not been provided.

### **Paragraph 11**

60. Paragraph 11 inserts a new section 148A into the 1995 Act. This provides for an interim diet in all non-jury sexual offence cases to be held unless dispensed with by the court where the accused has a solicitor who applies to do so. The accused is required to attend. The diet is to be used to establish whether the accused has legal representation for the trial. Subsection (3) of the new section confers on the court the same power to adjourn the diet for a maximum of 48 hours as is provided for the High Court. Where the accused still makes no appointment, the court will proceed to appoint a solicitor under section 288D. Subsection (4) allows the interim diet to take place at the same time as any other preliminary hearing (known as an intermediate diet) fixed for the same case. Since intermediate diets are compulsory in most sheriff and district courts, it is expected that in practice the interim and intermediate diets can be held at the same time.
61. Subsections (7) and (8) of the new section impose a duty on a solicitor who withdraws from acting or is dismissed after the interim diet has taken place, or after it has been dispensed with, or an application to dispense with it has been made, to notify the court. This will enable the court to refuse an application to dispense with the interim diet, or to fix a fresh interim diet to deal with the issue of legal representation (section 148A(9)).