*These notes relate to the Criminal Procedure (Amendment) (Scotland) Act 2004 (asp 5) which received Royal Assent on 4th June 2004*

# CRIMINAL PROCEDURE (AMENDMENT) (SCOTLAND) ACT 2004

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

### Part 1 - Proceedings in the High Court

#### *Section 1 - Preliminary hearings*

8. Section 1 makes provision for the new mandatory preliminary hearings in High Court cases. It substitutes new provisions into the 1995 Act setting out the procedure to be followed at such hearings, the process of setting a trial date, and the approach to be followed when the hearing does not proceed or the court concludes that it can be dispensed with. It also provides for the court at a preliminary hearing to take account of the written record of the state of preparation of the case prepared and lodged by parties in relation to the case.

#### Amendment of section 66

9. Subsection (1) amends section 66(6) of the 1995 Act which deals with citation of parties to court diets. At present the notice accompanying the indictment cites the accused to appear at the trial diet. Subsection (1)(b) provides that in the High Court the accused will now be cited to appear at a preliminary hearing. Subsection (1)(a) ensures the existing time limits continue to apply in sheriff court cases.

10. Subsection (2) repeals the provision that requires, in High Court cases, an accused charged with committing a sexual offence to be called upon to attend at a pre-trial diet in the High Court for the purpose of ascertaining whether he has legal representation. This is because there is no longer any need for a separate pre-trial diet solely to deal with that matter. It will now be dealt with at the mandatory preliminary hearing for all cases.

11. Subsection (3) introduces new sections dealing with preliminary hearings. New sections 72 to 72D are in substitution for the present sections 72 to 73A of the 1995 Act. These sections set out the purpose of the hearings and the procedure to be followed.

#### New section 72 – preliminary hearing: procedure up to appointment of trial diet

12. Subsection (2) of the new section 72 applies in cases where the accused is prevented from conducting his defence in person. These are—

- cases involving certain sexual offences as specified in section 288C of the 1995 Act, as inserted by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 (asp 9);
- cases involving child witnesses under the age of 12 in respect of certain offences specified in section 288E of the 1995 Act as inserted by the Vulnerable Witnesses (Scotland) Act 2004 (asp 3); and

- cases involving vulnerable witnesses where the court has made an order under 288F(2) of the 1995 Act, as inserted by the Vulnerable Witnesses (Scotland) Act 2004.

13. Sections 288C, 288E and 288F prevent the accused from conducting his defence in person at the trial. Section 4 of the Act (on which, see below) extends the prohibition so that it also applies in the preliminary hearing. Subsection (2) of this section requires the High Court, as a first step in the preliminary hearing in such cases, to ascertain whether or not the accused has engaged a solicitor for the purposes of the preliminary hearing. If not, the Court will be able to appoint a solicitor under section 288D of the 1995 Act.

14. Subsection (3) provides that all preliminary pleas of which 7 days notice has been given shall be disposed of at this stage. Preliminary pleas are set out in section 79(2)(a) of the 1995 Act as substituted by section 13 of the Act.

15. Subsections (4) and (5) provide that after disposing of the preliminary pleas the accused shall be asked to plead to the indictment, and make clear that the existing procedure following a guilty plea set out in section 77 of the 1995 Act will continue to apply.

16. Subsections (6) and (7) set out the procedure to be followed once it is clear that the accused is pleading not guilty and the case will be going to trial. They provide for the court, in any case in which the accused is prohibited from conducting his defence in person (see above) to ascertain whether the accused has engaged a solicitor for his trial. They go on to provide that the court may dispose of any preliminary issues of which notice has been given, any child witness notice or vulnerable witness application appointed to be disposed of at the preliminary hearing, any application in relation to evidence of previous sexual conduct or the prohibition of the accused conducting his own defence in cases involving a vulnerable witness and any other matter which the court considers could be disposed of with advantage before the trial. The court must also ascertain whether there is any objection to the admissibility of any evidence which any party wishes to raise despite not having given due notice. If there is such an objection, the court must decide whether to grant leave for the objection to be raised and if leave is granted dispose of the objection unless it considers it inappropriate to do so at the hearing. It is also provided that the court must ascertain which witnesses on the Crown's list are required by the parties and whether a vulnerable accused or witness requires any special measures to give their evidence. Finally, the court will enquire as to the state of preparedness of the parties and the extent to which they have sought to agree evidence as required by section 257 of the 1995 Act.

17. Subsection (8) makes further provision for dealing with matters which require an application or notice to the court, whether in relation to vulnerable witnesses or to a range of other evidential issues. It provides that the court is not required by the provisions of the new section to dispose of applications or notices unless they are made or lodged timeously according to the provisions relating to lodging and making of the application or notice. However, the court has the power to dispose of the application or notice out of time to the extent that those provisions allow for such disposal. Subsection (9) provides that where the court decides not to dispose of any preliminary matter at the preliminary hearing it may appoint a further hearing before the trial diet to do so; or it may appoint the matter to be disposed of at the trial diet.

## New section 72A – preliminary hearing: appointment of trial diet

18. New section 72A(1) provides that after complying with the procedures in section 72 the court is to proceed to appoint a trial diet having regard to earlier proceedings at the preliminary hearing Subsection (2) provides that, if satisfied that it is appropriate to do so, the court may in appointing the trial diet, indicate that it is to be floating diet for the purposes of section 83A of the 1995 Act (see comments on section 5 below). In contrast to a fixed diet, the indictment does not fall if a floating diet is not commenced on the day appointed but may be continued from sitting day to sitting day.

19. The appointment of the trial diet is subject to the provisions of subsections (3) to (7) which require that the trial diet is appointed so as to take place within any time limits for commencement of the trial applicable to the case. If the court considers that a trial date cannot be fixed within these time limits the court will give the prosecution an opportunity to apply to extend the relevant time limit. If the application to extend the time limit is granted the court shall then appoint a trial date within the time limit as extended.

20. The relevant time limits for these purposes are the 12 month period specified in section 65(1) of the 1995 Act and the new 140 day period specified in section 65(4) of that Act as amended by section 6 of the Act. They require that the trial be commenced within 12 months of first appearance on petition and, where the accused has been held in custody, after not more than 140 days detention by virtue of the warrant committing him to prison to await trial. Where the accused is in custody and the trial date cannot be appointed within the 140 days of the new time limit but can be appointed within the 12 month time limit, and no application is made to extend the custody time limit or an application is made and refused, the trial may be appointed within the 12 month time limit and the accused is entitled to be admitted to bail.

21. Where the court considers it unlikely that a trial can be fixed within the 12 month time limit and no application is made to extend that period (or an application is refused) the court may desert the case *simpliciter* (for ever) or *pro loco et tempore* (temporarily). In the first case the Crown cannot re-indict the case, but in the second re-indictment is possible. If the accused is in custody he will be liberated forthwith.

22. Subsection (8) requires that the prosecutor is given an opportunity to be heard before the accused is admitted to bail where the 140 day period cannot be met. Subsection (9) provides that where the accused is on bail the court shall review the bail conditions and if necessary fix bail on different conditions.

## New section 72B – power to dispense with preliminary hearing

23. New section 72B empowers the court, on joint application, to dispense with the preliminary hearing.

24. Subsections (1) to (3) provide for the court to dispense with a preliminary hearing where it is content that one is unnecessary, but only where the parties jointly apply for such dispensation and the court is satisfied that parties are prepared for trial, and that there are no outstanding preliminary issues or other matters that require consideration. The court will then appoint a trial date. The procedure to be followed will be regulated by Act of Adjournal.

25. The accused is required by subsection (4) to attend any trial diet appointed by the court after the court has dispensed with the preliminary hearing.

26. Subsections (5) and (6) provide that, where a preliminary hearing has been dispensed with, this does not affect the calculation of any time limit fixed by reference to the preliminary hearing and that such time limit shall have effect as if it were fixed by reference to the date on which the preliminary hearing would have been held if it had not been dispensed with.

## New section 72C – procedure where preliminary hearing does not proceed

27. New section 72C makes provision in relation to the procedure where the preliminary hearing does not proceed. Subsection (1) provides that where the hearing has been deserted *simpliciter* (permanently) the prosecutor cannot raise a new indictment unless that decision has been reversed on appeal. Subsection (2) provides that where a hearing has been deserted on a temporary basis the court may appoint a further hearing and the accused is required to appear and answer the indictment at that hearing.

28. Subsections (3) and (4) provide for the situations where the diet has been deserted temporarily and no further diet has been appointed or the indictment is not proceeded with and the hearing has not been adjourned or postponed. In these situations the Crown has two months within which to give the accused notice to appear and answer the indictment at a further preliminary hearing in the High Court. There is scope for the Crown to reconsider the court to which the case has been indicted. It may within the same period serve notice instead to appear and answer the indictment in the sheriff court rather than the High Court where the charge is one which the sheriff court may lawfully try. Subsection (5) provides that, in that situation, the giving of notice is to be taken as service of an indictment in the sheriff court and the previous service of the indictment into the High Court is to be disregarded. Subsection (6) makes provision for the calculation of the two month period.

### New section 72D – preliminary hearing: further provision

29. Subsection (1) allows a preliminary hearing to proceed in the absence of the accused. This enables the court to take decisions in relation to a case, including the decision to set a trial diet, even if the accused has not attended. Subsection (2) provides that if an accused body corporate fails to appear and enter a plea and the court allows the hearing to proceed in its absence, it shall be deemed to have pled not guilty

30. Subsection (3) states that when a trial diet is appointed the accused is required to attend that diet.

31. Subsection (4)(a) provides that the court shall at a preliminary hearing take into account any written record lodged under section 72E of the Act. New section 72E provides for lodging by prosecution and defence of a joint record of the state of preparedness of the case (see the notes in relation to section 2 below). The court may under subsection (4)(b) ask parties any question in connection with any matter which it is required to dispose of, or ascertain, under section 72.

32. Subsections (5) to (7) ensure that the proceedings at a preliminary hearing are duly recorded (by mechanical or shorthand means) in line with the provisions of section 93(2) to (4) of the 1995 Act. They also ensure that a full minute of the proceedings shall be prepared by the clerk, which includes in particular whether any preliminary pleas or issues were raised and how they were disposed of.

### *Section 2 - Written record of state of preparation in certain cases*

33. Section 2 inserts a new section 72E into the 1995 Act which makes provision for the joint preparation by prosecution and defence of a written record of the state of preparation of their cases. Subsection (1) applies the requirement to lodge the written record only to proceedings in the High Court where the solicitor for the accused has notified the prosecutor that he is acting for the accused at the preliminary hearing. No written record can be prepared unless the accused has a legal representative who can discuss the case with the prosecutor before the preliminary hearing.

34. Subsection (2) provides that the prosecutor and the accused's legal representative shall communicate with each other with a view to preparing and lodging jointly not less than 2 days before the preliminary hearing a written record of their state of preparation with respect to their cases and then lodge such written record. The court has discretion under subsection (3) to allow a written record to be lodged late. Under subsection (4), the form of the record, the information to be covered and the manner of lodging is to be prescribed by Act of Adjournal; and subsection (5) makes clear that the parties can also add any further information they consider to be appropriate.

35. Subsection (6) defines legal representative for the accused as his solicitor or counsel (including a solicitor advocate) or both the solicitor and counsel.

### *Section 3 - Appeals*

36. Section 3 amends the appeal provisions contained in section 74 of the 1995 Act to make decisions at preliminary hearings appealable to the High Court.

37. Subsections (2) and (3)(a) amend section 74(1) and (2) so as to substitute for references to the existing optional preliminary diet in section 72 of the 1995 Act references to the new mandatory preliminary hearing. Subsection (3)(c) amends a reference in section 74(2) to preclude appeals against a decision at a preliminary hearing when appointing a trial diet to fix, or not to fix, the diet as a floating diet for the purposes of section 83A(2). Section 83A(1) is inserted by section 8 of the Act, and provides for the court to appoint a day on which the trial diet must commence, failing which the indictment will fall. However, where the court has indicated that the diet is to be a floating diet, section 83A(2) provides that, without the diet having been commenced, it may be continued from sitting day to sitting day.

38. Subsection (5) inserts a new subsection (3A) in section 74 providing that where an appeal is taken against a decision at a preliminary hearing the High Court may adjourn, or further adjourn, the preliminary hearing 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 the case. Equivalent provision is set out in section 74(3) in relation to trial diets.

39. Subsection (6) amends section 74(4) so that where an indictment or any part of it was dismissed at the preliminary hearing and on appeal that decision is reversed the court may direct that a further preliminary hearing be held.

### *Section 4 - Prohibition on accused conducting case in person in certain cases*

40. Section 4 amends the existing provisions in the 1995 Act which prohibit an accused from conducting his or her own defence at the trial in certain cases so as also to preclude such an accused representing himself or herself at the preliminary hearing.

41. Subsection (1) amends section 288C(1) of the 1995 Act so as to provide in that section that an accused person in cases of certain sexual offences is prohibited from conducting his or her case at or for the purposes of a preliminary hearing.

42. Subsection (2) amends section 288D(2) so as to provide in that section that where the court ascertains that the accused has not engaged a solicitor for the purpose of the preliminary hearing or his or her solicitor has withdrawn or been dismissed the court shall appoint a solicitor for this purpose.

43. Subsection (3) amends section 288E of the 1995 Act as inserted by section 6 of the Vulnerable Witnesses (Scotland) Act 2004 so as to provide that an accused in cases involving a child witness under the age of 12 years is also prohibited from conducting his or her case at or for the purposes of a preliminary hearing.

44. Similarly, subsection (4) amends section 288F of the 1995 Act as inserted by section 6 of the Vulnerable Witnesses (Scotland) Act 2004 so that if the court in cases involving vulnerable witnesses has, before the preliminary hearing, made an order prohibiting the accused from conducting his defence in person at the trial, the accused will also be prohibited from conducting his case at the preliminary hearing.

### *Section 5 - Continuation of trial diet*

45. Section 5 introduces a new section 83A into the 1995 Act which makes provision in relation to the continuation of the trial diet in High Court cases.

46. Subsection (1) makes the general provision that where the trial diet does not commence on the day appointed for the holding of the diet the indictment shall fall. That means that

the Crown cannot take further proceedings on that indictment. Subject to any overriding time limit constraints, however, the Crown may re-indict the case.

47. Subsection (2) sets out a further approach that that where the court, in appointing the date for the trial diet, has indicated that it is to be a floating diet, it will be possible to continue such a diet, including any adjourned diet, from day to day without formally commencing it by calling it. Continuation will be by a minute signed by the Clerk of Justiciary, the form of which will be set out in Act of Adjournal. The Act of Adjournal will also set out the maximum number of sitting days for which the case can be so continued without being called. Thereafter it must be commenced by being called. Otherwise, the indictment falls.

48. Subsection (4) makes it clear that for the purposes of this section a trial diet will be taken to commence when it is called, and subsection (5) as read with subsection (2) provides that only regular sitting days will count towards the total number of days set out in the Act of Adjournal for which continuation by minute under subsection (2) will be permissible.

## Part 2 - Solemn Proceedings Generally

### *Section 6 - Time limits*

49. Section 6 amends section 65 of the 1995 Act, which contains the time limits for proceedings on indictment in the High Court and the sheriff court.

50. Subsection (1) of section 65 currently provides that where any trial on indictment is not commenced within 12 months of the first appearance of the accused on petition the current proceedings fall and no further indictment on those charges can be issued. Subsection (2) of section 6 amends section 65(1) so as to require that, in High Court cases, a preliminary hearing must commence within 11 months of the first appearance of the accused on petition. The same consequences apply if the new 11 month time limit is not met i.e. the accused cannot be tried again on these charges.

51. Section 65(2) currently provides that the 12 month period does not operate so as to prevent trial in the case of an accused for whom a warrant has issued for failure to appear at a diet in the case. Subsection (3) amends section 65(2) so as to provide that in those circumstances the 11 month time limit for the preliminary hearing also does not operate to prevent trial of the accused.

52. Subsection (4) amends section 65(3) so as to provide that a single judge of the High Court may on cause shown extend the periods of 11 and 12 months in High Court cases and that the sheriff on cause shown may extend 12 month period in any other case (ie cases indicted in the sheriff court and those cases where an indictment has not been served).

53. Subsection (5) amends section 65(4) (“custody time limits”) so as to-

- provide that an accused may not be detained by virtue of the warrant committing him or her for trial for a period of more than 80 days without an indictment having been served and that where it is not served he or she shall be entitled to be admitted to bail. At present if the indictment is not served within that period the accused is simply liberated; and

- provide that an accused indicted to the High Court may not be detained by virtue of the warrant committing him or her for trial for a period of more than 110 days without a preliminary hearing having commenced and that his or her trial must commence within a period of 140 days. The present time limit is that a trial must commence within the 110 day period. In addition, the subsection amends the present provision by giving the accused an entitlement to bail if these time limits are not complied with. At present if the 110 day period is not met the accused is liberated

forthwith and is free from any further prosecution on the charges on the indictment; and

- retain the 110 day period for cases in the sheriff court but provide that where that time limit cannot be met the accused shall be entitled to bail rather than (as at present) being liberated forthwith and free from any further prosecution on the charges on the indictment.

54. Subsection (6) inserts new provision that where a preliminary hearing is dispensed with under the provisions of new section 72B(8) the requirements to commence the hearing within the 11 month period (provided by the amendments made to section 65(1) by subsection (2)) and the 110 day period (provided by the amendment made to section 65(4) by subsection (5)(b)) do not apply.

55. Subsection (7) substitutes for the present subsection (5) of section 65 new subsections (5) to (5B) modifying the powers of the courts to grant extensions to the custody time limits. At present all applications for extension of the custody time limits are heard by a judge of the High Court. Where a time limit is not met the accused is liberated. Under the revised provisions applications for extensions will be dealt with by the court to which the case has been indicted, although applications for extension of the 80 day time limit (when the indictment has not yet been served) will still be heard by a judge of the High Court. Parties have a right to be heard, although it will be possible for the judge to determine the application without a hearing where defence and prosecution make a joint application for an extension. The present provision excluding an extension of the 80 day period where but for some fault on the part of the prosecutor the indictment could have been served is repealed. So also are the specific grounds applicable to the present 110 day period namely, illness of the accused, absence or illness of any necessary witness or any other sufficient cause not attributable to fault on the part of the prosecutor. The sole ground for extension of the custody time limits is cause shown.

56. Subsection (8) repeals section 65(6) and (7) which contain provision as to the grounds on which applications for extensions may be granted.

57. Subsection (9) introduces new subsections (8A) to (8D) into section 65. Subsection (8A) provides that where an accused is entitled to be admitted to bail as a result of the custody time limits not being complied with he shall, where the indictment has not been served, be brought forthwith before a judge of the High Court or, where the indictment has been served, a judge of the court to which the case has been indicted.

58. Subsection (8B) provides that where an accused has been brought before a judge under subsection (8A) the prosecutor shall be given an opportunity to make an application for extension of the time limit.

59. Subsection (8C) provides that if no application is made by the prosecutor or if the application is refused the court, before admitting the accused to bail, shall give the prosecutor an opportunity to be heard. In effect, the prosecutor will have the opportunity to comment on bail conditions before they are set.

60. Subsection (8D) provides that where an application to extend the time limit is refused and the prosecutor appeals against that refusal the accused may continue to be detained for a period of up to 72 hours from the granting of the bail, or for such longer period as the High Court may allow; and at the end of that period the accused must be released on bail whether the appeal has been disposed of or not.

61. Subsection (10) provides that where an accused is cited by the affixing of a notice in the prescribed form to the door of the accused's dwelling-house or place of business the indictment shall be deemed to be have been served on the accused. This takes account of the change to available methods of citation which was made by section 61 of the Criminal Justice (Scotland) Act 2003, which amended section 66 of the 1995 Act.

### *Section 7* - *Citation*

62. Section 7 of the Act amends section 66 of the 1995 Act which makes provision in relation to service and lodging of the indictment etc.

63. Subsection (1) of section 66 at present provides for the issue by the Clerk of Justiciary or, for solemn proceedings in the sheriff court, the sheriff clerk of a warrant to cite the accused witnesses and jurors when sittings of the relevant court have been appointed to be held for the purposes of trial of persons accused on indictment.

64. In terms of the Act, when a case is indicted in the High Court no trial diet will have been set. The accused will be cited to a preliminary hearing at which the trial diet shall be appointed by the court if appropriate. That diet will be appointed not to a sitting but to a specified date (which may under new section 83A inserted in the 1995 Act by section 5 of the Act be a date fixed as a date on which the diet must call).

65. Subsection (2) substitutes in relation to High Court and sheriff court solemn proceedings a new subsection (1) in section 66 which provides that the Act shall be sufficient authority for the citation of accused, witness and jurors. This removes the need for a warrant to be issued by the Clerk of Justiciary or sheriff clerk.

66. Subsections (3) and (4) amend the provisions relating to service where the accused is not in custody and provide that the accused may be cited by a constable affixing the notice referred to in subsection (4)(b) of section 66 at the accused's proper domicile of citation or in any other case at any premises which a constable reasonably believes to be the accused's dwelling house or place of business.

67. Subsection (5) inserts new subsections (6C) to (6E) into section 66. Subsections (6C) and (6D) provide that an accused will be taken as having been served with the indictment and notice of compearance referred to in section 66(6) if they are served on a solicitor who has intimated to the procurator fiscal that he is acting for the accused and has not informed that procurator fiscal that he has been dismissed or is no longer acting for the accused. Subsection (6E) imposes a duty on a solicitor who has, prior to service of the indictment, informed the prosecutor that he is engaged by the accused, to inform the procurator fiscal if he is dismissed by, or withdraws from acting for, the accused.

68. Subsection (6) provides for the consequential repeal of subsection (8) which relates to the warrant issued under the present subsection (1).

### *Section 8* - *Engagement, dismissal and withdrawal of solicitor representing the accused*

69. Section 8 inserts new section 72F in the 1995 Act. Subsection (1) of new section 72F requires any solicitor engaged by the accused in all proceedings on indictment to notify the court and the prosecutor accordingly in writing of that fact. Subsection (2) provides that if the solicitor has informed the procurator fiscal in writing prior to service of the indictment that he is acting and has not notified the procurator fiscal that he has been dismissed or has withdrawn from acting that is sufficient. Subsection (3) requires the solicitor if he or she is dismissed or withdraws to give immediate notification of that fact to the court and the prosecutor.

70. Subsection (4) provides that notification for the purposes of subsections (1) and (3) can be given to the prosecutor by being given, in the High Court cases, to the Crown Agent or, in sheriff court cases, to the procurator fiscal for the district where the trial is to be held.

71. Subsection (5) read with subsections (6) and (7) requires the court to fix a further pre-trial diet when a trial date has been fixed where:

- intimation is received after the preliminary hearing (or after the hearing has been dispensed with), or in sheriff court cases after the first diet, that a solicitor then acting for the accused is no longer so acting; and
- the case is one in which the accused is prohibited from conducting his own defence.

72. Subsection (8) requires the court, at the pre-trial diet, to ascertain from the accused whether he has appointed another solicitor to act on his behalf. Under subsection (9) a further diet under this section must be not less than 10 clear days before the trial diet.

73. Subsection (10) gives the court the power to postpone the trial diet for such period as appears appropriate and if it thinks fit direct that such period, or some part of it, shall not count towards any time limit applying in the case.

74. Subsection (11) gives the court power to dispense with a diet fixed under this section, but only if a solicitor engaged by the accused intimates that he has been engaged for the trial, and so requests.

### *Section 9 - Procedure where trial diet does not proceed*

75. Section 9 substitutes a new section 81 into the 1995 Act which provides for the procedure where the trial diet does not proceed.

76. Subsection (1) provides that where the court has deserted the trial *simpliciter* the prosecutor can not raise another indictment in respect of these charges unless that decision is reversed on appeal.

77. Subsection (2) provides that where the court has deserted the diet *pro loco et tempore* (temporarily) the Court may appoint a further trial diet for a later date and the accused is required to attend that further diet.

78. Subsection (3) requires the court to have regard to the state of preparation of parties with respect to their cases and in particular the likelihood of the case being ready to proceed to trial on the date to be appointed for the trial. If there are any preliminary pleas, issues or other matters which require to be, or could be with advantage be, disposed of before the trial the judge may appoint a diet to be held before the trial diet for the purpose of disposing of them.

79. Subsections (4) and (5) provide that where a trial diet has been deserted *pro loco et tempore* and no further trial diet has been fixed under subsection (2), or where the indictment falls or has not been brought to trial and has not been continued, adjourned or postponed, the prosecutor may give notice, if the trial diet was in the High Court, to the accused within two months after the diet on another copy of the indictment to appear at a further preliminary hearing not less than seven clear days after service of the notice. Alternatively, if the charge is one that can be lawfully tried in the sheriff court, notice may be given to the accused to appear at a first diet in the sheriff court not less than 15 clear days after service and a trial diet not less than 29 clear days after service of the notice. If the trial diet was in the sheriff court, the notice may be given to appear and answer the indictment at a further trial diet in the sheriff court not less than seven clear days after service of the notice or to a preliminary hearing in the High Court not less than 21 days after service of the notice.

80. Subsection (6) provides that where notice is given to the accused to appear and answer the indictment in the sheriff court in a case where the trial diet referred to in subsection (4) was in the High Court, or to appear and answer the indictment at a preliminary hearing in the High Court in a case where that trial diet was in the sheriff court the giving of notice shall be taken, for the purposes of section 65(4), to be service of an indictment in, respectively, the sheriff court or the High Court and the previous service of the indictment is to be disregarded.

81. Subsection (7) provides that the notice is to be in a form prescribed by Act of Adjournal.

82. Subsection (8) makes provision as regards the start of the 2 month period.

### *Section 10 - Trial in absence of accused*

83. Section 10 of the Act amends section 92 of the 1995 Act to give the court power to proceed with a solemn trial in the absence of the accused in certain cases. At present, section 92 provides that a trial cannot take place in the absence of the accused. This is subject to the exception in section 54 of the 1995 Act that applies where the accused is insane and there is an examination of facts or the exception in section 92(2) where the accused requires to be removed from court because of disruptive behaviour.

84. Subsection (1) amends section 92(1) to make it clear that the requirement for the trial to take place in the presence of the accused is subject to the further exception provided for in new subsection (2A) of section 92 inserted by section 10(3).

85. Subsection (2) amends the existing provision in section 92(2) which allows the court to proceed with a trial in absence because of disruptive behaviour by the accused and appoint a counsel or a solicitor to represent his interests. The amendment removes the reference to the court appointing counsel. This is to ensure consistency with the amendments that are being made in the remainder of section 11 in relation to legal representation of the accused where there is a trial in absence under the further exception that is provided for in new section 92(2A) (see below).

86. Subsection (3) creates a further exception to the requirement that the trial take place in the presence of the accused by inserting new subsections (2A) to (2F) into section 92. New subsection (2A) gives the court discretion to proceed with a trial in the absence of the accused on the motion of the prosecutor once evidence has been led, provided that evidence substantially implicates the accused and, taking into account the point in the proceedings where the failure to appear occurred, the court is satisfied that it is in the interests of justice to do so. Subsection (2B) makes provision for the court, where the prosecutor makes a motion under subsection (2A), if satisfied that there is a solicitor with authority to act for the purposes of representing the accused's interests at the hearing of the motion and for the purposes of the accused's defence at the trial, to allow that solicitor to act or if there is no such solicitor to appoint a solicitor to act for those purposes.

87. New subsections (2C) and (2D) relate to the duties of the solicitor appointed by the court and the engagement of Counsel. Subsection (2E) provides for the appointment of further solicitors by the court where the court is satisfied that a solicitor allowed to act under subsection (2B) no longer has authority to act or a solicitor appointed by the court under that subsection is no longer able to act in the best interests of the accused.

88. Subsection (2F) provides that the provisions in relation to legal representation for the accused when there is a trial in absence do not apply if the trial relates to a sexual offence or an offence in respect of which the court has made an order that there are vulnerable witnesses. This is because section 288D of the 1995 Act makes separate provision for the appointment of legal representation in those cases.

89. Subsection (5) amends section 66 of the 1995 Act to make provision to ensure that the accused if it is a body corporate is advised about the consequences of non-appearance when it is cited. The amendments provide that in a High Court case the notice must advise the body corporate that if it fails to appear as mentioned in section 70(4) of the 1995 at the preliminary hearing the hearing may proceed and a trial may be appointed in its absence and, in the case of the High Court or the sheriff court, if the body corporate fails to appear at the trial diet, that the trial may proceed in its absence. Subsection (6) amends section 70 of the 1995 Act by providing that the court requires to be satisfied that the body corporate was cited in accordance with section 66 of the Act and that it is in the interests of justice to do so before proceeding with the trial in the absence of the accused.

90. Subsections (7) and (8) amend the Legal Aid (Scotland) Act 1986 (c.47) to provide that accused persons are automatically entitled to legal aid for trials in absence and that the exception to the provision that an accused is entitled to choose a solicitor extends to these cases.

### *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 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.

### *Section 12 - Service etc. on accused through solicitor*

118. Section 12 introduces a new section 72G into the 1995 Act in relation to service on the accused through his solicitor.

119. Subsection (1) provides that anything which requires to be served on, given, notified or otherwise intimated to an accused shall be taken to be served, given, notified or intimated if served on, given, notified or intimated to the solicitor acting for the accused at the solicitor's place of business, The relevant solicitor is, in terms of subsection (2) the solicitor who has intimated to the prosecutor under section 72F(1) that he is engaged by the accused for the purpose of his defence and has not informed the prosecutor that he has been dismissed or has withdrawn or alternatively a solicitor who has been appointed by the court under section 92 or 288D of the 1995 Act. The form and manner of service intimation etc. will be as prescribed by Act of Adjournal.

### *Section 13 - Preliminary pleas and preliminary issues*

120. Section 13(1) substitutes a new section 79 into the 1995 Act. Most of this section replicates material already in the existing provisions in sections 72 and 79 of the 1995 Act including provision previously in section 72 for notice to be given to the court in relation to matters which can be dealt with before the trial. The new elements are that:

- it makes a clear division between preliminary pleas (which if conceded are likely to cause the case to fall) and preliminary issues. In new section 72 it is prescribed that at the preliminary hearing the former shall be taken before the accused is asked to plead, the latter after a plea has been taken and it is clear that the case is going to trial; and
- it adds express reference to objections to the admissibility of evidence to the list of preliminary issues.

121. Subsection (1) provides that, except by leave of the court, no preliminary plea or issue shall be raised or submitted in any proceedings on indictment unless the party has given notice of his intention to do so as prescribed in the sections governing the procedure at preliminary hearings in the High Court and at first diets in the sheriff court on the timescale.

122. Subsection (2) defines preliminary pleas and preliminary issues

123. Subsection (3) provides that no accused shall be entitled to object to plead to an indictment due to a discrepancy, error or deficiency such as is mentioned in new section 79(2)(a)(ii) unless the court is satisfied that these tended to mislead and prejudice the accused.

124. Subsection (4) provides that where the court allows a party to make, raise or submit a preliminary plea or issue ( other than an objection to the admissibility of any evidence) without notice the court may, if it considers it appropriate to do so, appoint a diet to be held before the trial diet to consider it further. This provides another opportunity for

such matters to be resolved before the trial diet, in addition to the preliminary hearing. Alternatively, the court may appoint the plea or issue to be disposed of at the trial diet.

125. Section 13(2) introduces a new Section 87A into the 1995 Act.

126. That section provides that where any preliminary plea or issue, or in a case to be tried in the High Court, any application notice or other matter referred to in section 72(6)(b)(iii) or (iv) is to be disposed of at the trial diet it shall be disposed of before the jury is sworn, unless where it is an objection to the admissibility of any evidence the court at the trial diet considers it is not capable of being disposed of before then.

### *Section 14 - Objections to admissibility of evidence raised without due notice*

127. Subsection (1) amends section 71 of the 1995 Act in relation to proceedings at the first diet in the sheriff court. It provides that the court shall ascertain if there is any objection to the admissibility of any evidence which any party wishes to raise despite not having given due notice. If this is so then the court shall decide whether to grant leave to allow the objection to be raised and if leave is granted dispose of the objection unless it considers it inappropriate to do so at that diet. Where the court decides not to dispose of the objection at the first diet, it may appoint a further diet to be held before the trial diet for the purpose of disposing of the objection or appoint the objection to be disposed of at the trial diet.

128. Subsection (2) introduces a new section 79A into the 1995 Act which concerns objections to the admissibility of evidence raised after the first diet, or the preliminary hearing.

129. New section 79A(2) provides that the court shall not, under section 79(1), grant leave for an objection to be raised unless the party seeking to raise it has given notice in writing to the other parties.

130. Subsection (3) provides that the court may dispense with the requirement for written notice to be given where the party seeks to raise the objection after the commencement of the trial However, subsection (4) goes on to provide that the court shall not grant leave for the objection to be raised after the commencement of the trial unless it considers it could not reasonably have been raised before that time.

131. Subsection (5) provides that where a party wishes to raise an objection before the commencement of the trial and the court under section 79(1) grants leave for it to be raised the court may if it considers it appropriate to do so appoint a diet before the trial diet for the purpose of disposing of the objection or dispose of the objection at the trial diet. Subsection (7) directs that the accused shall appear at any diet appointed under this subsection.

132. Subsection (6) provides that the court may postpone the trial diet for such period as appears 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 the case.

133. Subsection (8) provides that for the purpose of this section the trial shall commence when the jury is sworn.

### *Section 15 - Alteration of diets*

134. Section 15 of the Act introduces a new section 75A into the 1995 Act which provides for adjournment and alteration of diets.

135. Subsection (2) provides that any diet may be adjourned. Subsection (3) provides that in the case of a trial diet the diet may be adjourned only if the indictment is not brought to trial at the diet. It goes on to provide that if any diet is adjourned where, following enquiries as to whether the accused has engaged a solicitor for the purposes of the

conduct of his defence at the preliminary hearing or at the trial, it appears to the court that he has not done so, the adjournment shall be for a period of not more than 48 hours.

136. Subsection (4) provides that a trial diet in the High Court may be adjourned to a diet to be held at a sitting of the court in another place.

137. Subsections (5) to (7) provide that any party may apply to the court at any time before commencement of a diet to accelerate or postpone the diet. The application will be determined after hearing parties but where parties apply jointly the court may proceed to fix a new date without a hearing.

138. Subsection (8) requires the accused to attend any hearing in relation to the acceleration or postponement of the diet unless the judge permits the hearing to proceed in his absence.

139. Subsection (9) makes clear that, in setting a new trial diet, the judge must have regard to the state of preparation of the parties. It also gives the court power to appoint an additional pre-trial diet where it considers that there are any preliminary pleas, preliminary issues or other matters that could with advantage be disposed of, before the trial.

140. Subsection (10) provides that any diet fixed under subsection (5)(b) may be fixed notwithstanding that the holding of the diet on that date would result in any minimum or maximum period within which the diet is to be held or to commence not being complied with.

### *Section 16 - Uncontroversial evidence*

141. Section 16 of the Act introduces three new subsections (4A) to (4C) into section 258 of the 1995 Act. Subsections (4A) and (4B) provide that where a notice challenging a notice of uncontroversial evidence has been served the court may on the application of any party made not less than 48 hours before the preliminary hearing in the High Court or the first diet in the sheriff court direct that the challenge be disregarded for the purpose of section 258(4) of the 1995 Act if the court considers that the challenge is unjustified. Subsection (4C) provides that in proceedings in the High Court, the court may on cause shown allow an application under subsection (4B) to be made after the time limit specified therein.

## Part 3 - Bail

### *Section 17 - Bail conditions: remote monitoring of restriction on movements*

142. Section 17 inserts into the 1995 Act new sections 24A to 24E.

#### New section 24A – bail conditions: remote monitoring of restrictions on movements

143. New section 24A(1) provides that where a person has been refused bail the court, on that person's application, shall consider whether the imposition of a movement restriction condition with a remote monitoring requirement would enable the court to release that person on bail. This provision therefore only comes into play when a court has considered and rejected the option of bail on other conditions and concluded that the person should be remanded in custody.

144. Subsections (2) to (6) provide an additional power to enable the sheriff court or the High Court to impose a remote monitoring requirement as an additional a condition of bail at its own discretion in a case where the person appears on indictment or petition charged with, or convicted (pre-appeal) of, murder or rape and the court is granting bail subject to a movement restriction condition. In post-conviction cases of murder and rape, the court will have to justify its non use where bail is granted subject to a movement restriction condition. In cases where the charge is reduced the accused

has the right to have the remote monitoring requirement revoked unless there are exceptional circumstances which justify its retention. The prosecutor has the right to be heard before the requirement is removed allowing the court to take into consideration any other information.

145. Subsection (7) gives the accused and the prosecutor an opportunity to be heard before the court decides whether to impose a remote monitoring requirement.

146. Subsections (8) and (9) require the court before imposing a remote monitoring requirement to explain to the accused the effect of the requirement and the consequences which may follow any failure to comply. The accused has to confirm that he or she understands how the order will work.

147. Subsections (10) and (11) provide that the court, before imposing or varying the remote monitoring requirement, should also obtain and consider information, from the local authority, about places where an applicant may be required to remain, or avoid, under the movement restriction condition and the attitudes of persons affected by the enforced presence of the accused, for example, the family, landlord or householder. That information will only be supplied by the local authority to ensure as far as possible that any information provided is impartial. Subsection (12) provides that the court may adjourn the proceedings for this purpose.

148. Subsection (13) requires the clerk of court to send a copy of any remote monitoring requirement order under section 24A(1) or 24A(2) to the person (referred to as "the monitor") who will be responsible for the remote monitoring of the person's movements. The clerk must also notify the monitor of any variation or revocation of a remote monitoring requirement.

149. Subsections (14) and (15) provide that where the monitor becomes aware that the person has breached a condition imposed on bail restricting his movements he shall immediately inform a constable. Breach of the movement restriction monitoring condition is a breach of a condition of bail. The constable will then seek to exercise his existing powers under section 28 of the 1995 Act (which provides for the arrest of an accused who has breached bail) to arrest the person. Where a constable has arrested such a person on the grounds that he suspects that the person has breached the condition he shall immediately inform the monitor.

150. Subsection (16) provides that the right to apply for bail subject to a remote monitoring requirement does not affect the accused person's existing right to appeal against a refusal to grant bail. Subsection (17) also provides that when a person is refused bail under section 23 and then under section 24A(1) (bail with a remote monitoring requirement) any appeal against the decision to refuse bail under section 24A(1) will be combined with any appeal against refusal of bail under section 23. This is to avoid the possibility of two appeals running separately on the grounds that there are in fact two decisions.

151. Subsection (18) defines the terms "a movement restriction condition", "a remote monitoring requirement" and the "accused" used in sections 24A and 24B to 24E. Subsection (19) defines the term "monitor".

## New sections 24B to 24E

152. These replicate, for remote monitoring requirements imposed under new section 24A(1) or (2), the provisions relating to restriction of liberty orders under section 245A of the 1995 Act..

153. The provisions cover:

- the power to impose remote monitoring requirements (s.24B)
- monitoring of compliance (s.24C)

- remote monitoring arrangements (s.24D)
- documentary evidence in proceedings for breach of bail conditions that are subject to remote monitoring (s.24E).

154. Additionally section 24D(3)(b) provides that the person subject to the remote monitoring requirement shall not tamper with the monitoring equipment or knowingly allow it to be tampered with or intentionally damaged.

### *Section 18 - Bail review: rights of prosecutor to be heard*

155. Section 18 widens the right of the prosecutor to be heard in certain situations where the court is considering bail issues.

156. Subsection (2) amends section 25 of the 1995 Act so as to require an accused to intimate any application to alter his bail address in writing to the Crown Agent and requires the court to give the prosecutor an opportunity to be heard before determining the application. At present, although the prosecutor will normally be present in the bail court, the court does not have to hear the Crown's views.

157. Subsection (3) amends section 30 of the 1995 Act so as to require an accused or an appellant convicted on indictment who makes an application for a review of either the refusal of bail or of the conditions imposed to intimate the application to the Crown Agent. It also provides that the prosecutor must have the opportunity of being heard and that in the case of an application by an appellant the application must be heard not less than seven days after the date of intimation.

158. Subsection (4) amends section 31 of the 1995 Act so as to provide that where the prosecutor has applied for a bail review the hearing on the application shall be not more than seven days after the day on which the application is made. This time limit is consistent with that in new section 105A (as inserted by section 66 of the Criminal Justice (Scotland) Act 2003) which provides for the appeal by a prosecutor against the grant of bail pending appeal to a convicted person to be heard within 7 days. It is designed to ensure that the period of uncertainty for the convicted person is kept as short as is practicable.

## Part 4 - Miscellaneous and General

### *Section 19 - First diet in sheriff court solemn proceedings: witnesses and bail*

159. Section 19 amends section 71 of the 1995 Act by inserting a new subsection (1C) which requires the sheriff court at a first diet to ascertain which of the witnesses on the list of Crown witnesses are required by the prosecutor and the accused to attend the trial. Where the accused is on bail the court is required to review the conditions of bail and after hearing parties may, if it considers it appropriate, fix bail on different conditions.

160. The section also makes consequential amendments to subsections (2) and (3) of section 71 to incorporate reference to the new subsection (1C). It replicates for the sheriff court first diet provisions made for preliminary hearings in the High Court in new sections 72 and 72A of the 1995 Act as inserted by section 1 of this Act.

### *Section 20 - Sentence following guilty plea*

161. Section 20 amends section 196 of the 1995 Act, which applies across solemn and summary procedure.

162. Subsection (2) amends subsection (1) of section 196 so as to require the sentencing judge to take into account the stage at which the accused indicates his intention to plead guilty. At present the judge has a discretion to consider the issue when determining sentence, but is not required to do so.

163. Subsection (3) introduces a new subsection (1A) which requires the judge to state when passing sentence whether his consideration of the stage and circumstances in which a guilty plea was tendered has led him to impose a sentence different from that which the convicted person would otherwise have received. In effect, he is required to state whether a sentence discount has been given. Where the sentence has not been altered by that consideration, the judge is required to make that fact clear and give reasons for the decision not to discount.

### *Section 21 - Increase in extended sentence which may be passed by sheriff court in certain cases*

164. Section 21 of the Act amends section 210A(6) of the 1995 Act to increase the maximum extended sentence a sheriff may pass on certain sexual and violent offenders from three years to five years.

165. This relates to the to the bringing into force of section 13(1) of the Crime and Punishment (Scotland) Act 1997, on 1 May 2004 which had the effect of increasing the custodial sentencing power of a sheriff sitting with a jury from three years to five years. At present section 210A(6) provides that a sheriff may not pass an extended sentence which exceeds the aggregate of the maximum custodial term he may set and an extension period not exceeding 3 years. This amendment simply brings the extended term which may be set in line with the increase in the maximum custodial term which may be imposed by the sheriffs.

### *Section 22 - Citation of witnesses for precognition*

166. Section 22 inserts a new section 267A into the 1995 Act which re-enacts in an up-dated form section 67A of the 1995 Act. In particular, section 267A provides that the 1995 Act is sufficient warrant to cite for precognition and that citation shall be in the form prescribed by Act of Adjournal or as nearly as possible in such form.

### *Section 23 - Admissibility of prior statements of witnesses*

167. This section introduces a new subsection (5) into section 260 of the 1995 Act. Section 260 provides that in certain circumstances a prior statement by a witness may be admissible as any evidence of any matter stated in it of which oral direct evidence by a witness would be admissible if given in the course of criminal proceedings. There was some doubt as to whether the statement required to be included in the list of productions attached to the indictment. This new subsection is designed to remove that doubt and provides that the prior statement shall not be inadmissible only for the reason that it is not included in any list of productions.

### *Section 24 - Protection of Children (Scotland) Act 2003: references following conviction*

168. This section amends section 10 of the Protection of Children (Scotland) Act 2003 which sets out the arrangements for referral of individuals convicted of an offence against a child for inclusion in the list of persons considered unsuitable to work with children. Section 10 of the 2003 Act specifies the circumstances in which a court shall propose to make a referral and those where there is a discretion allowing them to propose a reference. At the time of the conviction the court is to propose the referral but the actual referral is not made until the period for lodging an appeal against that proposed reference is exhausted. Section 19B amends section 10 of the 2003 Act to provide that the actual reference is to be made either when the period for bringing an appeal has expired without an appeal having been brought, or where an appeal has been brought timeously and has been dismissed or abandoned.

169. The Criminal Procedure (Scotland) Act 1995 allows for the time limits for bringing appeals to be extended. Section 19B makes relevant changes to sections 110 and 111 in relation to appeals from solemn proceedings, to section 181 in relation to appeals

from summary proceedings and to section 186 in relation to appeals against sentence to make it clear that there can be no extension of the period in which an appeal can be made against a proposed reference. This does not affect the Court's power to extend periods during which appeals can be made against convictions, sentences or disposals.

### *Section 25 - Further modifications of the 1995 Act*

170. This section introduces the schedule to the Act which makes modifications of a minor and consequential nature to the 1995 Act.

### *Section 26 - Ancillary provision*

171. This allows Scottish Ministers to make ancillary provision in statutory instruments in consequence of the Act.

### *Section 27 - Commencement and short title*

172. This provides for commencement by order.

### *Schedule - Further modifications of the 1995 Act.*

173. Paragraph 2 is consequential on the changes introduced by the Act to the process of appointing trial diets in the High Court, whereby trial diets are appointed for a particular day rather than all cases being cited to the first day of the sitting. This paragraph makes amendments to section 2 of the 1995 Act, which deals with arrangements for trials including transferring cases from one place to another. References in section 2(3), (4) and (5) of the Act are amended by sub-paragraphs (a), (c) and (d) of paragraph 2 by deleting the references to sittings and replacing these references with trial diets. Where parties are all agreed that a trial diet should be rescheduled paragraph 2(b) amends section 2 so as to allow the court to consider a joint application without hearing parties.

174. Paragraphs 3 and 12 are consequential on the changes introduced by section 4 of the Act. An accused charged with certain sexual offences is prohibited by section 288C of the 1995 Act from conducting his own defence at his trial. Section 4 extends that to prohibiting the accused from conducting his case in person at the preliminary hearing. Section 17A of the 1995 Act entitles the accused, on his arrest, to be told of the restrictions on the conduct of his defence and paragraph 3 extends that so he must also be told about the restrictions which apply to the preliminary hearing in the High Court by amending section 17A accordingly. Section 35(4A) of the Act requires the accused to be informed at his judicial examination of the prohibition on his conducting his defence in person. Paragraph 12 makes the necessary consequential amendment to include reference at the judicial examination to prohibition of an accused conducting his defence at the preliminary hearing also.

175. Paragraph 4 amends section 23A of the 1995 Act in order to provide that that section also applies to persons admitted to bail under the new section 65(8C) as introduced by this Act.

176. Paragraph 5 amends section 24 of the 1995 Act to provide that the standard conditions of bail include a condition that accused must appear at every diet at which he is required by this Act to appear and that section 24(6) which allows the court to impose a requirement that the accused deposit a sum of money in court does not apply where an accused is admitted to bail under section 65(8C) of the Act.

177. Paragraph 6 amends section 25 of the 1995 Act by inserting a new subsection (4) to provide that where the court is referred to in that section (other than subsection 2A) it shall be read as the Lord Advocate in cases where the Lord Advocate has admitted the person to bail. Under section 24 of the 1995 Act both the court and the Lord Advocate may grant bail and impose bail conditions, but under section 25 at present power to

set a domicile of citation is confined to the court. This amendment will allow the Lord Advocate, in issuing a bail order, to set a domicile of citation.

178. Paragraph 7 inserts a new section 25A into the 1995 Act to provide that where an accused person is entitled to be admitted to bail in cases where the custody time limits cannot be met and that person refuses to accept the conditions imposed then that person continues to be detained in custody under the warrant of committal for as long as he fails to accept those conditions.

179. Paragraph 8 amends section 27 of the 1995 Act so to provide that an offence is committed where the accused on bail fails to appear at any diet at which he is required by the 1995 Act to appear.

180. Paragraph 9 amends section 28 of the 1995 Act by introducing new subsections (4A) and (4B). Subsection (4A) ensures that the court to which an accused admitted to bail under section 65(8C) has to be brought if arrested for breach, or suspected breach, of bail is the court which admitted the accused to bail under that section. Subsection (4B) provides that if an accused person released on bail under section 65(8C) is brought before the court in respect of breach of bail conditions, the prosecutor will be given an opportunity to make an application for an extension of the custody time limits, and if such an application is not made, or is refused, gives power to the court to release the accused under the original order or vary the original order by imposing such conditions as the court considers appropriate.

181. Paragraph 10 amends section 31 of the 1995 Act by inserting a new subsection (3A) which provides that the prosecutor may apply only for a review of the conditions imposed on bail when an accused is admitted to bail under section 65(8C) of the Act and that the power of the court to recall bail does not apply to bail under section 65(8C)

182. Paragraph 11 amends section 32 of the 1995 Act by inserting new subsections (2A) and (7B). New subsection (2A) provides that any appeal by the prosecutor in relation to an accused admitted to bail under section 65(8C) is restricted to an appeal against the conditions imposed only. Subsection (7B) provides that in the event that the prosecutor makes such an appeal the accused may continue to be detained under the original warrant of committal for a period of 72 hours, or such longer period as the High Court may allow, after which he will be released on bail subject to the conditions imposed whether the appeal is disposed of or not.

183. Paragraphs 13 and 14 provide that the first diet in the sheriff court and the preliminary hearing in the High Court may be discharged and an examination of the facts ordered where the court is satisfied that the accused is insane so that his trial cannot proceed and that the examination in fact may take immediately following the making of the order. Any citation of the accused to the trial diet or to the preliminary hearing is a valid citation to the examination of the facts.

184. Paragraph 15(a) amends section 66(4) of the 1995 Act to provide that the copy indictment served on the accused shall include a list of the productions to be put in evidence by the prosecution.

185. Paragraph 15(b), (c) and (d) picks up on a missed consequential in relation to the amendment to section 66 of the 1995 Act which was made by section 61 of the Criminal Justice (Scotland) Act 2003. Section 66 was amended by section 61 to allow for an accused to be cited by a notice affixed to his door advising him of the address at which he can collect the indictment. Along with the service copy indictment section 66(6A) provides that an accused charged with certain sexual offences is given notice that at his trial his defence may be conducted by a lawyer only. Section 66 is amended by paragraph 8(b), (c) and (d) to provide that in High Court cases the notice shall intimate to the accused that his case at the preliminary hearing may be conducted only by a lawyer and, where the accused is cited by way of a notice affixed on his door rather

than service of the indictment, a notice in the same terms as the section 66(6A) notice will be given to him when he collects the indictment.

186. Paragraph 15(e) repeals an unnecessary provision in subsection (10) of section 66.

187. Paragraph 16 is consequential on section 1 of the Act. That section introduces preliminary hearings in all cases indicted into the High Court. Accused persons will be cited to this hearing rather than a trial diet. The preliminary hearing is the point to which all pre-trial notices and applications now relate. Section 67(3) allows certain objections in respect of witnesses to be made not less than 10 clear days before the trial diet. Subparagraph (a) amends this section to provide that in High Court cases that objection must be lodged no less than 7 clear days before the preliminary hearing. Sub-paragraph (b) provides that the prosecutor shall have a duty to cite witnesses in the list attached to the indictment only if it has been ascertained at the preliminary hearing or the first diet or in any application to dispense with the preliminary hearing under section 72B(1) that the prosecutor or the accused requires the witness to attend at the trial Sub-paragraph (c) inserts subsection (5A) into section 67. That subsection allows the prosecutor to examine any witness or put in evidence any production not included in the list lodged by the prosecutor provided that written notice is given to the accused not less than 7 clear days before the preliminary hearing or such later time, before the jury is sworn, as the court may on cause shown allow.

188. Paragraph 17 repeals section 67A of the 1995 Act in consequence of section 19 of the Act which re-enacts section 67A in an updated and extended form.

189. Paragraph 18 is consequential on section 1 of the Act and makes amendments to the procedure to be followed in relation to productions. Sub-paragraph (a)(ii) and (iv) amends section 68(3) as it relates to proceedings in the High Court. They modify the time limits for lodging and challenging productions to relate to the preliminary hearing. Sub–paragraph (a)(i) and (iii) maintain the current time limits for the sheriff court

190. Paragraph 19 is consequential on section 1 of the Act. An accused person who wishes to object to a previous conviction contained in the notice served on him with the indictment has to do so in writing. In terms of section 69(3) as currently drafted that notice has to be given prior to the trial diet. This paragraph amends that section so that in a High Court case the accused requires to give notice no less than seven clear days before the preliminary hearing. The current time limits for sheriff court cases are preserved.

191. Paragraph 20 is consequential on section 13 of the Act and refers to the sheriff court. First diets are held in sheriff and jury cases in terms of section 71 of the 1995 Act and subsection (2) of that section requires the court to consider certain matters. Section 13 of the Act substitutes a new section 79 in the 1995 Act and lists preliminary pleas and issues which if raised must be dealt with at the first diet. This paragraph inserts references to preliminary pleas and issues as defined in that new section 79 for the existing reference to matter in section 71(2) of the 1995 Act. Sub-paragraph (b) repeals unnecessary provisions in subsections (8) and (8A)

192. Paragraph 21 repeals section 71A of the 1995 Act.

193. Paragraph 22 is consequential on section 15 of the Act. Subsection (5) of that section allows applications to discharge diets and fix an earlier or later date. Section 74 deals with appeals against decisions at preliminary diets, but provides that an appeal may not be taken against various court decisions to set, adjourn or postpone diets. Paragraph 22 adds to the list of decisions which are not appealable the decision to accelerate the trial diet.

194. Paragraph 23 repeals a reference to section 72 of the 1995 Act in section 75 of the 1995 Act. This is consequential upon section 1 which replaces section 72 of the 1995 Act.

195. Paragraph 24 amends section 76 of the 1995 Act which sets out the procedure where an accused desires to plead guilty. The amendment provides that where an accused

subsequently pleads not guilty at a diet convened in terms of section 76 the High Court may postpone the preliminary hearing and that the period of that postponement shall not count towards any time limit applying in the case.

196. Paragraph 25 is consequential upon section 1 of the Act. It amends section 78 of the 1995 Act which provides that where an accused intends to state a special defence or to lead evidence calculated to exculpate him by incriminating a co-accused he cannot do so unless he lodges notices in terms of that section. It goes on to provide that he cannot examine any witnesses or put in evidence any productions not included on the lists lodged by the prosecutor unless he has given notice of his intention to do so. Subparagraphs (a), (b) and (c) amend section 78(1), (3) and (4) by requiring these notices to be lodged in High Court cases not less than seven clear days before the preliminary hearing. The current time limits for the sheriff court are preserved. Subparagraph (d) provides that copies of the notice for the use of the court should be lodged with the appropriate sheriff clerk before the preliminary hearing in the High Court and (as at present) before the trial diet in the sheriff court.

197. Paragraph 26 repeals section 80 of the 1995 Act in consequence of section 15 of the Act which re-enacts section 80 in an updated and extended form.

198. Paragraph 27 is consequential on section 9 of the Act, which inserts a new section 81 into the 1995 Act setting out the procedure to be followed where the trial diet has not gone ahead. Where an accused is fully committed for trial and a diet has been fixed but has been deserted *pro loco et tempore*, postponed or adjourned (or a notice has been issued that the trial is to take place at another place) section 82 provides that the warrant of committal remains in force. Paragraph 27(a) amends section 82 to safeguard the warrant where diets have been continued or accelerated and paragraph 27(b) amends paragraph (c) of the section to reflect the fact that the court will in future appoint trial diets.

199. Paragraph 28 makes amendments to the provisions in section 83 of the Act, which provides for the transfer of sheriff court solemn proceedings from one sitting to another sitting elsewhere in the sheriffdom. In particular, they provide that where parties jointly seek transfer of proceedings no hearing need be held and repeal section 83(3), which relate to a "warrant to cite" which will no longer be required under the provisions of the Act.

200. Paragraphs 29 and 30 are consequential upon the amendments to section 66 of the 1995 Act by section 7 of this Act. Jurors are at present cited to attend at a sitting of the High Court. In future, however, trials in the High Court will not be assigned to sittings but will either have a fixed date for calling or have a date specified as the first day of a period (to be fixed by Act of Adjournal) in which the diet must call. The way in which jurors are cited requires to be amended to reflect this. Paragraph 29 amends section 84(8) of the 1995 Act to allow jurors to be cited to attend for trials in the High Court where the court is sitting. Section 84(9) is similarly amended to provide that the jurors on the list shall be the list of jurors for all trials to be held by the High Court sitting at that particular place. The requirement in subsections (8) and (9) that the lists be signed by a judge are also repealed.

201. Paragraph 29(c) repeals another reference to the "warrant of citation" which will, under the provisions of this Act, no longer be required.

202. Paragraph 30 further amends the provision in relation to jurors. Paragraph 30(a) amends section 85(2) of the 1995 Act to provide that the list and number of jurors shall be prescribed by Act of Adjournal. Paragraph 30(b) and (c) amends subsections (4) and (5) of section 85 to reflect the fact that the sittings system in the High Court is replaced by fixed trials.

203. Paragraph 31 amends section 87 of the 1995 Act to give the clerk of court power where the judge is unavailable due to death, illness or absence in cases where no evidence has

been led to adjourn the diet in all the cases appointed for that day until later in the day or to a later date being no more than two months from that date and in cases where evidence has been led to adjourn that diet and all other cases appointed for that day until later in the day, or a date not more than seven days later; or with the consent of parties desert the diet *pro loco et tempore*. The amendments reflect that as a result of the Bill, the sittings system in the High Court is now replaced by fixed trial dates.

204. Paragraph 32 restates the time limits contained in section 119 of the 1995 Act where a new prosecution is authorised following an appeal to take account of the amendments to section 66(1) of the 1995 Act.

205. Paragraph 33 is consequential on section 22 of the Act. Section 22 of the Act introduces new procedures for the citing of witnesses for precognition. The provisions relate to all cases including summary cases making subsection (1)(a) of section 140 unnecessary. This paragraph therefore repeals section 140(1)(a).

206. Paragraph 34 is consequential on section 11 of the Act. Section 156 of the 1995 Act applies to witnesses in both solemn and summary procedure. Section 11 of the Act introduces procedures for dealing with obstructive witness in proceedings on indictment. Subsections (1), (2) and (3) of section 156 are therefore amended to reflect the fact that they now refer to summary procedure only.

207. Paragraphs 35 to 37 amend existing provisions in sections 245A to 245E of the 1995 Act to ensure consistency between those provisions in the 1995 Act that apply to restriction of liberty orders (RLOs) and the corresponding provisions introduced into the 1995 Act by section 17 that apply to movement restriction conditions.

208. Paragraph 35 amends subsection (6) of section 245A (restriction of liberty orders) of the 1995 Act to require the local authority to provide a report on the place where an offender subject to an RLO will be required to remain and information on the attitude of those likely to be affected by the enforced presence of the offender.

209. Paragraph 36 amends subsection (2) of section 245C (remote monitoring) of the 1995 Act to clarify that tampering with, or intentional damage to, the remote monitoring equipment constitutes a breach of the RLO.

210. Paragraph 37 amends section 245E (variation of a restriction of liberty order) of the 1995 Act by inserting a new subsection (4A) requiring the court, when considering variation of a restriction of liberty order which will change the offender's place of restriction, to obtain a report on the place where the offender will be required to remain and information on the attitude of those to be affected by the enforced presence of the offender at the new address. Subsection (6)(a) of section 245E is amended to require only the local authority to provide such a report.

211. Paragraphs 38 and 39 are consequential on section 1 of the Act. Where an accused is charged in a special capacity such as being the holder of a licence; or where the age of a person is specified these facts shall be held as admitted unless challenged. These paragraphs require the challenges to be raised as preliminary issues at the preliminary hearing in the High Court or the first diet in the Sheriff Court.

212. Paragraph 40 is consequential on section 1 of the Act. Section 257 of the 1995 Act places on parties a duty to seek agreement of evidence. The duty applies from the service of the indictment until the jury is sworn. However as the High Court is introducing a preliminary hearing at which it is desired to dispose of all preliminary matters, including where possible the agreement of evidence, parties are encouraged to seek agreement prior to that hearing. This paragraph amends section 257 by inserting a subsection to that effect.

213. Paragraph 41 is consequential on section 1 of the Act. Where a party considers that certain evidence is uncontroversial he serves a statement on the other party to that effect. The other party can challenge any fact specified or referred to in the statement.

The procedure is set out in section 258 of the 1995 Act and the time limits in relation to service and challenge relate at present to the trial diet. Paragraph (a) amends subsection (2) and inserts a subsection (2A) so that the time limits in the High Court refer to the preliminary hearing.

214. Paragraph 42 is consequential on section 1. Section 259 of the 1995 Act allows in certain circumstances exceptions to the rule that hearsay evidence is inadmissible. Subsection (5) of that section requires the party who wishes to have evidence of a statement admitted to give notice of that fact. No time limit for giving the notice is stated, other than that it must be in advance of the trial. Subparagraph (a) of paragraph 42 now amends section 259 to require the notice in High Court cases to be given not less than seven days before the preliminary hearing or such later time as the judge may, on cause shown, allow. Subparagraph (b) retains the status quo in any other case.

215. Paragraphs 43 and 44 amend sections 271A and 271C of the 1995 Act which were inserted by the Vulnerable Witnesses (Scotland) Act 2004. The amendments require applications and notices relating to the special measures for taking the evidence of child or vulnerable witnesses in High Court cases to be lodged no later than 14 days before the preliminary hearing in the High Court and no later than 7 days before the first diet in the sheriff court and appoints any disputed notices to be disposed of at that hearing or diet or at such other diet to be held before the trial diet.

216. Paragraph 45 is consequential on section 1 of the Act. Section 274 of the 1995 Act prohibits evidence relating to the sexual conduct of the complainer in trials for certain serious sexual offences. Under Section 275(1), the accused may apply to have such evidence admitted in certain limited circumstances. In terms of section 275B, applications for the purpose of 275(1) currently require to be made within 14 clear days of the trial diet. Paragraph 45 amends that section to provide that the application to be made no less than seven days before the preliminary hearing in High Court cases.

217. Paragraph 46 is consequential on the introduction of the preliminary hearing in the High Court. It amends section 277(2)(a) of the 1995 Act to provide that a transcript of an interview between a police officer or a person commissioned appointed or authorised under section 6(3) of the Customs and Excise Management Act 1979 and an accused person shall not be admissible in evidence unless a copy of it has been served on the accused not less than 14 days before the preliminary hearing. The existing time limit in relation to sheriff court cases is preserved. Paragraph 46 also amends section 277(2)(b) of the 1995 Act to provide that notice of a challenge to the making or accuracy of a transcript must be given by the accused not less than six days before the preliminary hearing in High Court cases and in any other case six days before the trial.

218. Paragraph 47 is a consequential on the new section 79 introduced by section 13 of the Act. It substitutes a reference to section 79(1) for the existing reference to section 72(1)(b)(iv) as a new section 72 is substituted by section 1 of the Act. In consequence of this amendment, any application under section 278 of the 1995 Act to determine that the record of the judicial examination or any part of it should not be admitted as evidence should be raised as a preliminary issue at the preliminary hearing.

219. Paragraph 48 amends section 280(6) of the 1995 Act (which refers to the procedure for notifying and challenging the certification of routine evidence) by requiring that in High Court cases the certificate referred to in that subsection must be served by the prosecutor on the accused not less than fourteen days before the preliminary hearing.

220. Paragraph 49 amends section 281(1) of the 1995 Act to provide that any challenge to the identity of the deceased in an autopsy report must in a High Court case be lodged not less than 7 days before the preliminary hearing. It also amends section 281(2) to remove the need for the prosecutor to specify when he intimates an autopsy or forensic science report to the accused which of the pathologists or forensic scientists responsible for the report will be called to give evidence That means that either of those scientists may give evidence at the trial.

221. It also provides that any notice from the accused requiring the attendance of the other scientist as well must be submitted seven days before the preliminary hearing in High Court cases.

222. Paragraphs 50 to 54 are all consequential on the introduction of the mandatory preliminary hearing. All relate to the need for notices in relation to evidential issues to be served before the preliminary hearing, so that the court at the hearing can consider them if it considers that to be appropriate.

223. Paragraphs 55 and 56 amend sections 288C and 288D of the 1995 which relate to the prohibition on the accused conducting his own defence in certain cases and the appointment of the court of a solicitor to act on behalf of the accused in those circumstances. The amendment to section 288C ensures that any proof in relation to any supplementary statement in relation to a victim statement made by virtue of section 14(3) of the Criminal Justice (Scotland) Act 2003 is included among the diets at which the accused is prohibited from conducting his own defence in the circumstances outlined in section 288C. The amendment to section 288D ensures that the duty on the court to appoint a solicitor where it ascertains that the accused has not engaged a solicitor extends also to that situation.

224. Paragraph 57 inserts definitions of "preliminary hearing", "preliminary issue" and "preliminary plea" in the interpretation section of the 1995 Act

225. Paragraph 58 amends Schedule 9 to the 1995 Act (certificates of proof of certain routine matters) to take account of changes in relation to bail provisions made in this Act, in particular the introduction of bail for reluctant witnesses.