

CRIMINAL PROCEEDINGS ETC. (REFORM) (SCOTLAND) ACT 2007

EXPLANATORY NOTES

INTRODUCTION

Part 2 - Proceedings

Miscellaneous

Section 37: Recovery of documents

New section 301A

216. This section introduces power to the sheriff court to grant orders for commission and diligence for the recovery of documents or for the production of documents. New section 301A is inserted into the 1995 Act. Orders for commission and diligence are more regularly used in civil proceedings; however, they are not unknown in the criminal context. Commission and diligence is a means of recovering documents which are required in respect of a litigation and are held in the hands of third parties. Currently the power to grant commission and diligence for the recovery of documents in criminal cases is only enjoyed by the High Court of Justiciary (*H.M. Advocate v. Ashrif* 1988 S.L.T. 567 refers). As a result a separate application has to be made to the High Court of Justiciary if commission and diligence is required during the course of a case in the sheriff or district court.
217. Although in practice little distinction may be made between the two orders, an order for the production of documents appears to be the most appropriate remedy when documents are sought by the accused and they are in the hands of the Crown (*McLeod v. H.M. Advocate* (No. 2) 1998 S.L.T. 233; *Maan v. H.M. Advocate* 2001 S.L.T. 408). The position in relation to a sheriff's power to grant an order for the production of documents is less clear than for commission and diligence. The provisions of section 37 of the Act resolve any uncertainty in that regard.
218. Subsections (1), (2) and (3) confer a power on the sheriff court to grant orders for commission and diligence for the recovery of documents and orders for the production of documents. Sheriff courts are given this power in relation to: solemn proceedings in that sheriff court; and summary proceedings both in that court and in any JP court in that sheriff court's district.
219. Under subsection (4) applications for such orders cannot be made, in relation to solemn proceedings, until the indictment has been served on the accused, or s/he has been cited to answer an indictment; or in relation to summary proceedings until the accused has answered the complaint.
220. Subsection (5) provides that the grant or refusal to grant the application can be appealed to the High Court.

221. The available case law on the subject deals only with cases where the accused has sought to recover documents. There are other methods open to the prosecutor or police for the recovery of information during the investigation of alleged offences. To that end it is envisaged that it will invariably be the accused who applies to the court for these orders. Subsection (7) enables the prosecutor to be heard at any application for an order under subsection (1) or at an appeal under subsection (5) whether or not the prosecutor is a party to the application or appeal. Therefore, where the accused seeks documents from another individual or organisation the prosecutor will have a right to make representations in relation to whether or not that order should be granted. By virtue of the fact that a third-party holder (i.e. the holder of the documents which are sought) will be a party to the application it would be competent for that holder to raise any objection to the granting of the application.
222. Subsection (8) provides that the powers of the High Court to grant the orders mentioned in subsection (3) are restricted to orders in connection with proceedings in the High Court. This is analogous to the position in civil proceedings where sheriffs deal with applications for commission and diligence relating to cases which are before that court and Court of Session judges deal with applications for commission and diligence in cases before that court.