

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

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

#### **Part 2 - Proceedings**

##### **Miscellaneous**

##### ***Section 33: Apprehension warrants***

##### **New section 297A**

191. This section inserts a new section 297A into the 1995 Act which sets out the procedure for the operation of apprehension warrants in all criminal proceedings. Subsection (1) provides that the section applies where a person has been apprehended under a warrant granted under the 1995 Act.
192. Subsection (2) allows for a person to be re-apprehended under a warrant where the person has been apprehended under the warrant but absconds from police custody.
193. Subsection (3) provides that where it is not practicable to bring a person apprehended on a warrant before a court as soon as is required by a provision in the 1995 Act, that person should be brought before a court as soon as practicable after the reason making it impracticable for the person to appear before the court no longer prevails.
194. Subsection (4) provides that where a warrant is granted in solemn proceedings and the impracticability referred to in subsection (3) arises because the person needs medical treatment or care, that person may be released under the warrant. Subsection (5) provides that a person released under subsection (4) may be re-apprehended under the original warrant.
195. Subsection (6) provides that subsection (3) does not affect the operation of section 22(1B) of the 1995 Act, which relates to warrants granted in summary proceedings.
196. Subsection (7) clarifies that nothing in this section prevents a court from granting a fresh warrant for the apprehension of the person.
197. Subsection (8) clarifies that section 297A applies to petition warrants granted under section 34 of the 1995 Act, solemn warrants granted under the new section 102A and section 90A of the 1995 Act, and summary warrants granted under section 135 and 156 of the 1995 Act.

### ***Section 34: Participation of accused in identification procedures***

#### **New section 267B**

198. **Section 34** inserts a new section 267B into the 1995 Act which provides that the court may make an order, on the application of the prosecutor, requiring the accused to attend at an identification parade or other identification procedure.
199. Subsections (1) and (2) provide that a court may, at any stage after the commencement of proceedings, on the application of the prosecutor, make an order requiring the accused person to participate in an identification parade or other procedure.
200. Subsection (3) provides that the court must allow the accused, where the accused is present, to make representations in respect of the application. It also gives the court a discretion (where it considers that it is appropriate to do so) to fix a hearing to allow the accused to make such representations if the accused is not present.
201. Subsection (4) provides that where the accused is not present, the clerk of court will notify the accused of any order made under subsection (1) . Subsection (5) outlines the manner in which that notice may be given.
202. Subsection (6) provides that a written execution signed by the clerk of court which is produced in court will be sufficient evidence of the fact that the clerk effected notice of the order on the accused.
203. Subsection (7) provides that where notice under subsection (4) is effected by registered post or recorded delivery the relevant post office receipt requires to be produced along with the execution of service.
204. Subsection (8) makes it an offence for a person, without reasonable excuse, to fail to comply with an order made under subsection (1). The offence is triable summarily only, regardless of whether the order which has allegedly been breached was imposed in respect of a summary or solemn case. A person will be liable on conviction to a fine not exceeding level 3 on the standard scale or to imprisonment for a period not exceeding 12 months, or to both.
205. Subsection (9) provides for references to section 141 of the 1995 act, in section 267B, to be read with such modifications as are necessary for its application in relation to that section.
206. Subsection (10) defines references to “the court” for the purposes of section 267B.

### ***Section 35: Evidence on commission***

207. **Section 35** seeks to clarify the role of commissioner and that of the presiding judge when evidence is being taken on commission, whether this be by way of special measures for vulnerable witnesses or otherwise.
208. Subsections (1) and (2) amend sections 66 and 140 of the 1995 Act which relate respectively to the service of the indictment (in solemn proceedings) and citation of the accused (in summary proceedings). These amendments provide, in each case, that where an accused is charged with committing a sexual offence, the accused must be given notice that s/he must be represented by a lawyer not only at any trial but also in any proceedings where evidence is taken on commission. They further provide that where an accused does not appoint a solicitor the court will appoint one.
209. Subsection (3) amends section 271I of the 1995 Act, which provides for the special measure for vulnerable witnesses of taking evidence by a commissioner.
210. The new section 271I(1A) as inserted provides that commissioner proceedings may take place by live television link. Section 271I(3)(a) of the 1995 Act is also amended

by subsection (3) and makes consequential provision about restrictions on where the accused may be during such proceedings.

211. Subsection (3)(c) adds further provision to section 271I, and applies sections 274, 275, 275B (except subsection (2)(b)), 275C, 288C, 288E and 288F of the 1995 Act. Sections 274 and 275 contain certain prohibitions on the leading of evidence, and on questioning, which relates to the sexual history of the complainer in cases of certain sexual offences. In addition, section 275B provides the timescales under which an application regarding leading evidence must be made. Section 275C relates to expert evidence as to subsequent behaviour of the complainer in certain cases. Section 288C, 288E and 288F prohibit the accused from conducting his or her own defence in certain cases. Subsection (3)(c) provides that the protections available to witnesses in court proceedings as set out in the named sections apply equally in commissioner proceedings when used as a special measure in respect of vulnerable witnesses. This subsection also provides that the commissioner shall be a judge or a sheriff. This is so that s/he has the power to rule on questions of admissibility of evidence and whether certain questions may be asked of the witness.
212. Subsection (4) amends section 272 of the 1995 Act in relation to the taking of evidence on commission generally. It provides that the protections set out in sections 274, 275, 275B (except subsection (2)(b)), 275C, and 288C of the 1995 Act apply to commissioner proceedings as they do to trial proceedings. As above, it also provides that the commissioner shall be a judge or a sheriff.
213. Section 275A(1) of the 1995 Act places a duty on the prosecutor to disclose any relevant previous convictions of the accused to the presiding judge where the court allows questioning or evidence which would normally be prohibited in terms of section 274 of the Act. Subsection (5) amends section 275A(1) of the 1995 Act and provides that where a commissioner has allowed evidence or questioning normally prohibited in terms of section 274 the prosecutor is still under a duty to lay any relevant previous convictions before the presiding judge during the course of the actual trial.
214. Subsection (6) amends section 288D of the 1995 Act and provides that the power of the court to appoint a solicitor where an accused is prohibited from conducting his own defence and has failed to appoint a solicitor is extended to ensure that the power to appoint a solicitor to act at proceedings before a commissioner remains with the court.

### ***Section 36: Victim notification scheme***

215. **Section 36** amends section 16 of the Criminal Justice (Scotland) Act 2003 to confer upon the current carers of children under the age of 14 in cases where the victim of a crime has died, the right, on the child's behalf to;
  - receive from Scottish Ministers certain information regarding the victim's assailant's release into the community
  - receive certain information regarding Parole Board review hearings and licence conditions from the Parole Board.
  - make representations to the Parole Board prior to a decision being taken on the release (and the licence conditions) of the offender and, in certain circumstances where decisions upon licence conditions are taken by the Scottish Ministers to make representations to the Scottish Ministers prior to a decision being taken by them on licence conditions and to receive certain information concerning licence conditions from the Scottish Ministers

These rights remain with the current carers until the child attains the age of 14 years when the rights transfer to the child in his or her own right.

### **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 haver (i.e. the holder of the documents which are sought) will be a party to the application it would be competent for that haver 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.

### ***Section 38: Intimation to respondent of certain applications to the High Court***

#### **New section 298A**

223. **Section 38** inserts a new section 298A into the 1995 Act and provides that bills of suspension and advocation (forms of criminal appeal) and petitions to the nobile officium (a form of appeal to the High Court where no other remedy is available to the appellant) may be intimated by serving a copy of it by a variety of means rather than having to serve personally the original document on the other party. Service may be made in the same manner as citation under section 141 of the 1995 Act (which sets out the ways in which the accused and witnesses may be cited to appear in court in summary proceedings). Currently service of bills and petitions is largely regulated by common law.

### ***Section 39 : Refixing diets***

#### **New sections 75B and 137ZA**

224. **Section 39** inserts a new section 75B into the 1995 Act (in relation to solemn proceedings) and a new section 137ZA (in relation to summary proceedings). These sections provide that the court may independently refix any diet which has been fixed for a non-sitting day without the need to hear from the prosecutor or the accused on the matter. Where the diet relates to a trial diet either party to the case is entitled to an adjournment of the new diet fixed if they can satisfy the court that it is not practicable for that party to proceed with the case on the new date.

### ***Section 40: Power of court to excuse procedural irregularities***

#### **New section 300A**

225. This section inserts section 300A into the 1995 Act and creates a new power for the court to relieve any party to a criminal case from failure to comply with certain procedural requirements. This power applies to summary and solemn cases. The power can be exercised whether the requirements are set out in statute (such as the 1995 Act) or whether they form part of the common law. An example of where this provision may be used would be where an accused appears on a number of complaints at different times and, in order that the complaints may be dealt with at the same time, the complaints are continued to the same date. On that date the complaints are dealt with, with the exception of one which was inadvertently missed from the court list. This was not discovered until the next day. As the complaint did not call on the date it was continued, the proceedings were deemed to have fallen at midnight on the date of the continuation. This provision would allow the prosecutor to apply to the court to seek an excusal of that irregularity and have the case called.
226. Subsection (1) sets out the circumstances in which the court can excuse a procedural irregularity. The irregularity must fall within the kinds described in subsection (5), and must also relate to the current criminal proceedings before the court. The court can exercise its power only where the conditions set out in subsection (4) apply.
227. Subsection (2) provides that the High Court, in appeal proceedings, can also excuse a procedural irregularity which occurred in the original proceedings which are the subject of the appeal. Subsection (3) provides that the application may be at the instance of the prosecutor or the accused and that the other party is to be given the opportunity to be heard.
228. Subsection (4) lists certain conditions of which the court must be satisfied before excusing a procedural irregularity under subsection (1). A procedural irregularity must have arisen from a mistake or an oversight, or another excusable reason, and the court must be satisfied in the circumstances of the case that its excusal would be in the interests of justice.

229. Subsection (5) describes the procedural failures that are covered by the court's power to excuse. Paragraphs (a) to (d) of subsection (5) list specific types of irregularity. The list is not intended to be exhaustive – paragraph (e) states that any other procedural requirement not complied with by the court, the prosecutor or the accused may be excused by the court, subject to the exclusions set out in subsections (6) and (7).
230. Subsection (6) expressly excludes irregularities arising from a period of detention of an accused person in custody which exceeds the relevant time limits contained in the 1995 Act. Therefore, for example, a failure on the part of the Crown to commence proceedings within the 40 day time limit in section 147 where the accused is being held in custody could not be excused under new section 300A. However, the general power in section 300A is without prejudice to any statutory provision that allows the court to extend a time limit (subsection (11)). Accordingly, in the above example, section 147(2) would continue to apply and an application could therefore be made under that provision for an extension of the time limit.
231. Subsection (7) expressly excludes irregularities relating to the admissibility or sufficiency of evidence, or any other evidential factor. For example the fact that evidence had been ruled as inadmissible because it was irrelevant could not be excused. Nor could a lack of corroboration (in terms of sufficiency of evidence) be excused.
232. Subsection (8) sets out the powers available to the court where it decides to excuse a procedural irregularity under subsection (1). Following an excusal, the court can make an order, as is necessary or expedient, for the purpose of restoring or facilitating the continuation of the proceedings as if the irregularity had never occurred, or protecting the rights of the parties to the case.
233. Subsections (11) & (12) make it clear that section 300A is to operate without prejudice to other parts of the 1995 Act which empower the court to cure defects in proceedings by, for example, allowing the court to alter a diet, extend a particular time period or limit, or any rule of law which allows departure from directory requirements to be excused.

#### ***Section 41: Electronic proceedings***

234. This section makes provision to allow for procedures such as initiation of proceedings and signing requirements in the summary courts to be carried out electronically. New sections 303B and 308A are inserted into the 1995 Act.

#### **New section 303B – Electronic summary proceedings.**

235. Section 138 of the 1995 Act provides that all summary proceedings must be instituted by a complaint which is signed by the procurator fiscal. The form and content of such a complaint is detailed in schedules 3 and 5 to the 1995 Act and rule 16.1 of the Act of Adjournal (Criminal Procedure Rules) 1996. Subsection (1) of new section 303B provides that proceedings may be initiated by electronic complaint and where this is the case the requirement for a signature by the procurator fiscal is satisfied by an electronic signature. Subsection (1)(c) specifies that an electronic signature will also be valid on other complaints as well as electronic complaints. So, for instance, a printed copy of a complaint which has been signed electronically can be regarded as having been validly signed. Electronic signature attracts the definition which is given to it in section 7(2) of the [Electronic Communications Act 2000 \(c.7\)](#).
236. Subsection (2) of the new section provides that any reference in the Act to a complaint includes a reference to an electronic complaint unless otherwise required.
237. Subsection (3) of the new section provides that where proceedings were initiated by electronic complaint that complaint shall be held to be the principal version of the complaint in the event of any conflict between that complaint and any other document.

*These notes relate to the Criminal Proceedings etc. (Reform) (Scotland)  
Act 2007 (asp 6) which received Royal Assent on 22 February 2007*

238. Subsection (4) of new section 303B provides that a juror's citation may be satisfied by an electronic signature of or on behalf of the sheriff clerk as required by section 85(4) of the 1995 Act.
239. Subsection (5) of the new section provides that a certificate produced by the prosecutor stating the period of time to be disregarded in calculating the date of commencement of proceedings (for the purposes of calculating time-bar in a case) where an offer from the prosecutor of a fixed penalty, compensation offer or work order has not been accepted or is recalled may be authenticated by an electronic signature. This relates to the provision in section 136B of the 1995 Act, which is introduced by section 54 of this Act – the certificate is referred to in the new section 136B(2).
240. Subsection (6) of the new section provides that the signing of postal citations of accused persons may be satisfied by electronic signature. Currently under section 141(3)(a) of the 1995 act these citations must be physically signed by the prosecutor.
241. Subsection (7) of the new section provides that where amendments are made to an electronic complaint authentication by the clerk of court by means of an electronic signature shall be sufficient.
242. Subsection (8) of the new section refers to section 172(2) of the 1995 Act which relates to the signing of warrants (other than warrants of apprehension or search), orders of court and sentences. New subsection (8) provides that the requirement to sign such items may be satisfied by means of an electronic signature of the clerk of court.
243. Subsection (9) of the new section provides that an electronic signature shall be sufficient authentication on a statement of uncontroversial evidence.
244. Subsection (10) of the new section provides that an electronic signature will be sufficient authentication where corrections of errors have been made in summary proceedings.

**New section 308A – Expressions relating to electronic complaints**

245. Section 41(2) of the Act inserts a new section 308A into the 1995 Act. This section provides definitions of the terms used in relation to electronic proceedings.
246. Subsections (1) & (2) give definitions of electronic complaint, electronic communication and electronic signature. Subsections (3) & (4) provide that Scottish ministers may by order modify the meaning of electronic signature.

***Section 42 – Further provision for summary cases.***

247. Subsections (1) (2) and (3) of section 42 provide that the Scottish Ministers may, by order, make provision for the purpose of or in connection with using electronic complaints, keeping the record of proceedings in electronic form, allowing validity and formality requirements to be satisfied by electronic means and using electronic communication. Such an order may relate to the availability and authentication of documents and records to specified persons or classes of persons, the authentication of documents and records and the use of electronic signatures in documents and records.
248. Subsection (4) provides that the terms 'electronic complaint' and 'electronic communication' are to be given the definition contained in new section 308A of the 1995 Act (inserted by section 41(2) of the Act).