



# Criminal Procedure (Amendment) (Scotland) Act 2004

2004 asp 5

## PART 1

### PROCEEDINGS IN THE HIGH COURT

#### *Preliminary hearings*

#### **1 Preliminary hearings**

- (1) In subsection (6) of section 66 (service and lodging of indictment etc.) of the Criminal Procedure (Scotland) Act 1995 (c. 46) (referred to in this Act as “the 1995 Act”)—
- (a) in paragraph (a)—
- (i) after “court” insert—
- “(i) ”,
- (ii) at the end insert “; and
- (ii) at a trial diet not less than 29 clear days after service of the indictment,”; and
- (b) for paragraph (b) substitute—
- “(b) where the indictment is in respect of the High Court, at a diet not less than 29 clear days after the service of the indictment (such a diet being referred to in this Act as a “preliminary hearing”).”.
- (2) In subsection (6A) of that section, paragraph (b) and the word “and” immediately preceding it are repealed.
- (3) For sections 72 to 73A of the 1995 Act substitute—

#### **“72 Preliminary hearing: procedure up to appointment of trial diet**

- (1) A preliminary hearing shall be conducted in accordance with this section and section 72A.

*Status: Point in time view as at 01/02/2005.*

*Changes to legislation: There are currently no known outstanding effects for the Criminal Procedure (Amendment) (Scotland) Act 2004, Cross Heading: Preliminary hearings. (See end of Document for details)*

- (2) The court shall—
- (a) where the accused is charged with an offence to which section 288C of this Act applies; or
  - (b) in any case—
    - (i) in respect of which section 288E of this Act applies; or
    - (ii) in which an order has been made under section 288F(2) of this Act,
 before taking any further step under this section, ascertain whether the accused has engaged a solicitor for the purposes of the conduct of his case at or for the purposes of the preliminary hearing.
- (3) After complying with subsection (2) above, the court shall dispose of any preliminary pleas (within the meaning of section 79(2)(a) of this Act) of which a party has given notice not less than 7 clear days before the preliminary hearing to the court and to the other parties.
- (4) After disposing of any preliminary pleas under subsection (3) above, the court shall require the accused to state how he pleads to the indictment.
- (5) If the accused tenders a plea of guilty, section 77 of this Act shall apply.
- (6) After the accused has stated how he pleads to the indictment, the court shall, unless a plea of guilty is tendered and accepted—
- (a) in any case—
    - (i) where the accused is charged with an offence to which section 288C of this Act applies;
    - (ii) in respect of which section 288E of this Act applies; or
    - (iii) in which an order has been made under section 288F(2) of this Act,
 ascertain whether the accused has engaged a solicitor for the purposes of his defence at the trial;
  - (b) unless it considers it inappropriate to do so at the preliminary hearing, dispose of—
    - (i) any preliminary issues (within the meaning of section 79(2)(b) of this Act) of which a party has given notice not less than 7 clear days before the preliminary hearing to the court and to the other parties;
    - (ii) any child witness notice under section 271A(2) or vulnerable witness application under section 271C(2) appointed to be disposed of at the preliminary hearing;
    - (iii) subject to subsection (8) below, any application under section 275(1) or 288F(2) of this Act made before the preliminary hearing; and
    - (iv) any other matter which, in the opinion of the court, could be disposed of with advantage before the trial;
  - (c) ascertain whether there is any objection to the admissibility of any evidence which any party wishes to raise despite not having given the notice referred to in paragraph (b)(i) above, and—
    - (i) if so, decide whether to grant leave under section 79(1) of this Act for the objection to be raised; and

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- (ii) if leave is granted, dispose of the objection unless it considers it inappropriate to do so at the preliminary hearing;
  - (d) ascertain which of the witnesses included in the list of witnesses are required by the prosecutor or the accused to attend the trial;
  - (e) ascertain whether subsection (7) below applies to any person who is to give evidence at or for the purposes of the trial or to the accused and, if so, consider whether it should make an order under section 271A(7) or 271D(2) of this Act in relation to the person or, as the case may be, the accused; and
  - (f) ascertain, so far as is reasonably practicable—
    - (i) the state of preparation of the prosecutor and the accused with respect to their cases; and
    - (ii) the extent to which the prosecutor and the accused have complied with the duty under section 257(1) of this Act.
- (7) This subsection applies—
- (a) to a person who is to give evidence at or for the purposes of the trial if that person is, or is likely to be, a vulnerable witness;
  - (b) to the accused if, were he to give evidence at or for the purposes of the trial, he would be, or would be likely to be, a vulnerable witness.
- (8) Where any application or notice such as is mentioned in subsection (6)(b)(iii) above is required by the provision under which it is made or lodged, or by any other provision of this Act, to be made or lodged by a certain time, the court—
- (a) shall not be required under that subsection to dispose of it unless it has been made or lodged by that time; but
  - (b) shall have power to dispose of it to the extent that the provision under which it was made, or any other provision of this Act, allows it to be disposed of notwithstanding that it was not made or lodged in time.
- (9) Where the court decides not to dispose of any preliminary issue, application, notice, objection or other matter referred to in subsection (6)(b) or (c) above at the preliminary hearing, it may—
- (a) appoint a further diet, to be held before the trial diet appointed under section 72A of this Act, for the purpose of disposing of the issue, application, notice, objection or matter; or
  - (b) appoint the issue, application, notice, objection or other matter to be disposed of at the trial diet.

### **72A Preliminary hearing: appointment of trial diet**

- (1) In any case in which subsection (6) of section 72 of this Act applies, the court shall, at the preliminary hearing—
- (a) after complying with that subsection;
  - (b) having regard to earlier proceedings at the preliminary hearing; and
  - (c) subject to subsections (3) to (7) below,
- appoint a trial diet.
- (2) In appointing a trial diet under subsection (1) above, the court may, if satisfied that it is appropriate to do so, indicate that the diet is to be a floating diet for the purposes of section 83A of this Act.

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- (3) In any case in which the 12 month period applies (whether or not the 140 day period also applies in the case)—
- (a) if the court considers that the case would be likely to be ready to proceed to trial within that period, it shall, subject to subsections (5) to (7) below, appoint a trial diet for a date within that period; or
  - (b) if the court considers that the case would not be likely to be so ready, it shall give the prosecutor an opportunity to make an application to the court under section 65(3) of this Act for an extension of the 12 month period.
- (4) Where paragraph (b) of subsection (3) above applies—
- (a) if such an application as is mentioned in that paragraph is made and granted, the court shall, subject to subsections (5) to (7) below, appoint a trial diet for a date within the 12 month period as extended; or
  - (b) if no such application is made or if one is made but is refused by the court—
    - (i) the court may desert the preliminary hearing *simpliciter* or *pro loco et tempore*; and
    - (ii) where the accused is committed until liberated in due course of law, he shall be liberated forthwith.
- (5) Subsection (6) below applies in any case in which—
- (a) the 140 day period as well as the 12 month period applies; and
  - (b) the court is required, by virtue of subsection (3)(a) or (4)(a) above, to appoint a trial diet within the 12 month period.
- (6) In such a case—
- (a) if the court considers that the case would be likely to be ready to proceed to trial within the 140 day period, it shall appoint a trial diet for a date within that period as well as within the 12 month period; or
  - (b) if the court considers that the case would not be likely to be so ready, it shall give the prosecutor an opportunity to make an application under section 65(5) of this Act for an extension of the 140 day period.
- (7) Where paragraph (b) of subsection (6) above applies—
- (a) if such an application as is mentioned in that paragraph is made and granted, the court shall appoint a trial diet for a date within the 140 day period as extended as well as within the 12 month period;
  - (b) if no such application is made or if one is made but is refused by the court—
    - (i) the court shall proceed under subsection (3)(a) or, as the case may be, (4)(a) above to appoint a trial diet for a date within the 12 month period; and
    - (ii) the accused shall then be entitled to be admitted to bail.
- (8) Where an accused is, by virtue of subsection (7)(b)(ii) above, entitled to be admitted to bail, the court shall, before admitting him to bail, give the prosecutor an opportunity to be heard.

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- (9) On appointing a trial diet under this section in a case where the accused has been admitted to bail (otherwise than by virtue of subsection (7)(b)(ii) above), the court, after giving the parties an opportunity to be heard—
- (a) shall review the conditions imposed on his bail; and
  - (b) having done so, may, if it considers it appropriate to do so, fix bail on different conditions.
- (10) In this section—
- “the 12 month period” means the period specified in subsection (1)(b) of section 65 of this Act and, in any case in which that period has been extended under subsection (3) of that section, includes that period as so extended; and
- “the 140 day period” means the period specified in subsection (4)(aa)(ii) of that section and, in any case in which that period has been extended under subsection (5) of that section, includes that period as so extended.

### **72B Power to dispense with preliminary hearing**

- (1) The court may, on an application made to it jointly by the parties, dispense with a preliminary hearing and appoint a trial diet if the court is satisfied on the basis of the application that—
- (a) the state of preparation of the prosecutor and the accused with respect to their cases is such that the case is likely to be ready to proceed to trial on the date to be appointed for the trial diet;
  - (b) there are no preliminary pleas, preliminary issues or other matters which require to be, or could with advantage be, disposed of before the trial; and
  - (c) there are no persons to whom section 72(7) of this Act applies.
- (2) An application under subsection (1) above shall identify which (if any) of the witnesses included in the list of witnesses are required by the prosecutor or the accused to attend the trial.
- (3) Where a trial diet is to be appointed under subsection (1) above, it shall be appointed in accordance with such procedure as may be prescribed by Act of Adjournal.
- (4) Where a trial diet is appointed under subsection (1) above, the accused shall appear at the diet and answer the indictment.
- (5) The fact that a preliminary hearing in any case has been dispensed with under subsection (1) above shall not affect the calculation in that case of any time limit for the giving of any notice or the doing of any other thing under this Act, being a time limit fixed by reference to the preliminary hearing.
- (6) Accordingly, any such time limit shall have effect in any such case 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.

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### **72C Procedure where preliminary hearing does not proceed**

- (1) The prosecutor shall not raise a fresh libel in any case in which the court has deserted a preliminary hearing *simpliciter* unless the court's decision has been reversed on appeal.
- (2) Where a preliminary hearing is deserted *pro loco et tempore*, the court may appoint a further preliminary hearing for a later date and the accused shall appear and answer the indictment at that hearing.
- (3) Subsection (4) below applies where, at a preliminary hearing—
  - (a) the hearing has been deserted *pro loco et tempore* for any reason and no further preliminary hearing has been appointed under subsection (2) above; or
  - (b) the indictment is for any reason not proceeded with and the hearing has not been adjourned or postponed.
- (4) Where this subsection applies, the prosecutor may, at any time within the period of two months after the relevant date, give notice to the accused on another copy of the indictment to appear and answer the indictment—
  - (a) at a further preliminary hearing in the High Court not less than seven clear days after the date of service of the notice; or
  - (b) at—
    - (i) a first diet not less than 15 clear days after the service of the notice and not less than 10 clear days before the trial diet; and
    - (ii) a trial diet not less than 29 clear days after the service of the notice,
 in the sheriff court where the charge is one that can lawfully be tried in that court.
- (5) Where notice is given to the accused under subsection (4)(b) above, then for the purposes of section 65(4) of this Act—
  - (a) the giving of the notice shall be taken to be service of an indictment in respect of the sheriff court; and
  - (b) the previous service of the indictment in respect of the High Court shall be disregarded.
- (6) In subsection (4) above, “the relevant date” means—
  - (a) where paragraph (a) of subsection (3) above applies, the date on which the diet was deserted as mentioned in that paragraph; or
  - (b) where paragraph (b) of that subsection applies, the date of the preliminary hearing referred to in that paragraph.
- (7) A notice referred to in subsection (4) above shall be in such form as may be prescribed by Act of Adjournal, or as nearly as may be in such form.

### **72D Preliminary hearing: further provision**

- (1) The court may, on cause shown, allow a preliminary hearing to proceed notwithstanding the absence of the accused.
- (2) Where—

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- (a) the accused is a body corporate;
  - (b) it fails to appear at a preliminary hearing;
  - (c) the court allows the hearing to proceed in its absence under subsection (1) above; and
  - (d) no plea is entered on its behalf at the hearing,
- it shall be treated for the purposes of proceedings at the preliminary hearing as having pled not guilty.
- (3) Where, at a preliminary hearing, a trial diet is appointed, the accused shall appear at the trial diet and answer the indictment.
  - (4) At a preliminary hearing, the court—
    - (a) shall take into account any written record lodged under section 72E of this Act; and
    - (b) may ask the prosecutor and the accused any question in connection with any matter which it is required to dispose of or ascertain under section 72 of this Act.
  - (5) The proceedings at a preliminary hearing shall be recorded by means of shorthand notes or by mechanical means.
  - (6) Subsections (2) to (4) of section 93 of this Act shall apply for the purposes of the recording of proceedings at a preliminary hearing in accordance with subsection (5) above as they apply for the purposes of the recording of proceedings at the trial in accordance with subsection (1) of that section.
  - (7) The Clerk of Justiciary shall prepare, in such form and manner as may be prescribed by Act of Adjournal, a minute of proceedings at a preliminary hearing, which shall record, in particular, whether any preliminary pleas or issues were disposed of and, if so, how they were disposed of.
  - (8) In this section, references to a preliminary hearing include an adjourned preliminary hearing.
  - (9) In this section and sections 72 to 72C, “the court” means the High Court.”.

#### **Commencement Information**

- I1** S. 1(1)(2) in force at 1.2.2005 by S.S.I. 2004/405, art. 2(1), sch. 1 (with arts. 3-5)
- I2** S. 1(3) in force at 1.2.2005 for specified purposes by S.S.I. 2004/405, art. 2(1), sch. 1 (with arts. 3-5)

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

After section 72D of the 1995 Act (as inserted by section 1(3) of this Act) insert—

### **“72E Written record of state of preparation in certain cases**

- (1) This section applies where, in any proceedings in the High Court, a solicitor has notified the Court under section 72F(1) of this Act that he has been engaged by the accused for the purposes of the conduct of his case at the preliminary hearing.

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- (2) The prosecutor and the accused’s legal representative shall, not less than two days before the preliminary hearing—
  - (a) communicate with each other with a view to jointly preparing a written record of their state of preparation with respect to their cases (referred to in this section as “the written record”); and
  - (b) lodge the written record with the Clerk of Justiciary.
- (3) The High Court may, on cause shown, allow the written record to be lodged after the time referred to in subsection (2) above.
- (4) The written record shall—
  - (a) be in such form, or as nearly as may be in such form;
  - (b) contain such information; and
  - (c) be lodged in such manner,
 as may be prescribed by Act of Adjournal.
- (5) The written record may contain, in addition to the information required by virtue of subsection (4)(b) above, such other information as the prosecutor and the accused’s legal representative consider appropriate.
- (6) In this section—
 

“the accused’s legal representative” means—

  - (a) the solicitor referred to in subsection (1) above; or
  - (b) where the solicitor has instructed counsel for the purposes of the conduct of the accused’s case at the preliminary hearing, either the solicitor or that counsel, or both of them; and

“counsel” includes a solicitor who has a right of audience in the High Court of Justiciary under section 25A (rights of audience in various courts including the High Court of Justiciary) of the Solicitors (Scotland) Act 1980 (c. 46).”

#### **Commencement Information**

**I3** S. 2 in force at 1.2.2005 by [S.S.I. 2004/405](#), [art. 2\(1\)](#), [sch. 1](#) (with [arts. 3-5](#))

### **3 Appeals**

- (1) Section 74 (appeals in connection with preliminary diets) of the 1995 Act is amended in accordance with this section.
- (2) In subsection (1), for the word “diet” where it secondly occurs, substitute “ hearing ”.
- (3) In subsection (2)—
  - (a) in paragraph (a)—
    - (i) after the word “first” insert “ diet ”,
    - (ii) for the word “diet” where it first occurs, substitute “ hearing ”,
  - (b) in paragraph (aa), in sub-paragraph (ii), for the words “diet, section 73(3A)” substitute “ hearing, section 72(6)(e) ”,
  - (c) after paragraph (aa) insert—



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“(ab) may not be taken against a decision at a preliminary hearing, in appointing a trial diet, to appoint or not to appoint it as a floating diet for the purposes of section 83A(2) of this Act;”.

(4) In subsection (3), for the words “the trial diet” substitute “ any trial diet that has been appointed ”.

(5) After that subsection insert—

“(3A) Where an appeal is taken under subsection (1) above 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 respect of the case.”.

(6) In subsection (4)(b), after “fix” insert—

“(i) where the indictment is in respect of the High Court, a further preliminary hearing; or

(ii) where the indictment is in respect of the sheriff court.”.

#### **Commencement Information**

**I4** S. 3 in force at 1.2.2005 by [S.S.I. 2004/405](#), art. 2(1), [sch. 1](#) (with arts. 3-5)

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

(1) In section 288C(1) of the 1995 Act (prohibition of personal conduct of defence in cases of certain sexual offences), after “conducting” insert—

“(a) his case in person at or for the purposes of a preliminary hearing; and  
(b) ”.

(2) In section 288D(2)(a) of that Act (appointment by the court of a solicitor in such cases), after “of” insert—

“(i) the conduct of his case at or for the purposes of a preliminary hearing; or  
(ii) ”.

(3) In section 288E of that Act (prohibition of personal conduct of defence in certain cases involving child witnesses under the age of 12)—

(a) in subsection (1), after “conducting” insert—

“(a) his case in person at or for the purposes of a preliminary hearing; and  
(b) ”,

(b) in subsection (6)—

(i) before paragraph (a) insert—

“(za) where he is indicted to the High Court in respect of the offence, that his case at or for the purposes of the preliminary hearing may be conducted only by a lawyer,”,

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- (ii) in paragraph (c), after the word “of” insert “ the conduct of his case at or for the purposes of the preliminary hearing (if he is indicted to the High Court in respect of the offence) or ”.
- (4) In section 288F of that Act (power to prohibit personal conduct of defence in cases involving vulnerable witnesses), after subsection (4) insert—
- “(4A) Where, in any proceedings in the High Court, an order is made under subsection (2) above before or at the preliminary hearing, the accused is also prohibited from conducting or, as the case may be, continuing to conduct, his case in person at or for the purposes of the preliminary hearing.”.

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**Commencement Information**

**I5** S. 4(1)(2) in force at 1.2.2005 by [S.S.I. 2004/405](#), art. 2(1), [sch. 1](#) (with arts. 3-5)

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