

CRIMINAL PROCEDURE (AMENDMENT) (SCOTLAND) ACT 2004

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

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- 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 a 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.

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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

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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.