



# Criminal Procedure (Scotland) Act 1995

## 1995 CHAPTER 46

### PART VII

#### SOLEMN PROCEEDINGS

##### *Notice by accused*

#### **78 Special defences, incrimination and notice of witnesses, etc.**

- (1) It shall not be competent for an accused to state a special defence or to lead evidence calculated to exculpate the accused by incriminating a co-accused unless—
- a plea of special defence or, as the case may be, notice of intention to lead such evidence has been lodged and intimated in writing in accordance with subsection (3) below<sup>F1</sup> . . .
  - the court, on cause shown, otherwise directs.
- [<sup>F2</sup>(1A) Subsection (1) does not apply where—
- the accused lodges a defence statement under section 70A, and
  - the accused's defence consists of or includes a special defence.]

(2) Subsection (1) above shall apply [<sup>F3</sup>to a plea of diminished responsibility or] to a defence of automatism [<sup>F4</sup>, coercion or, in a prosecution for an offence to which section 288C of this Act applies, consent] as if it were a special defence.

[<sup>F5</sup>(2A) In subsection (2) above, the reference to a defence of consent is a reference to the defence which is stated by reference to the complainer's consent to the act which is the subject matter of the charge or the accused's belief as to that consent.

(2B) In subsection (2A) above, "complainer" has the same meaning as in section 274 of this Act.]

(3) A plea or notice is lodged and intimated in accordance with this subsection—

    - where [<sup>F6</sup>the case is to be tried in the High Court] , by lodging the plea or notice with the Clerk of Justiciary and by intimating the plea or notice to the

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*Changes to legislation: Criminal Procedure (Scotland) Act 1995, Section 78 is up to date with all changes known to be in force on or before 13 September 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details)*

- Crown Agent and to any co-accused not less than [<sup>F7</sup>seven clear days before the preliminary hearing] ;
- (b) where the [<sup>F8</sup>case is to be tried in the sheriff court] , by lodging the plea or notice with the sheriff clerk and by intimating it to the procurator fiscal and to any co-accused at or before the first diet.
- (4) It shall not be competent for the accused to examine any witnesses or to put in evidence any productions not included in the lists lodged by the prosecutor unless—
- (a) written notice of the names and addresses of such witnesses and of such productions has been given—
- (i) where the case is to be tried in the sheriff court, to the procurator fiscal of the district of the trial diet at or before the first diet; and
- (ii) where the case is to be tried in the High Court, to the Crown Agent at least [<sup>F9</sup>seven clear days before the preliminary hearing]
- (b) the court, on cause shown, otherwise directs.
- (5) A copy of every written notice required by subsection (4) above shall be lodged by the accused with the sheriff clerk of the district in which the trial diet is to be held, or in any case the trial diet of which is to be held in the High Court in Edinburgh with the Clerk of Justiciary, at or before
- [<sup>F10</sup>(a) where the case is to be tried in the High Court, the preliminary hearing;
- (b) where the case is to be tried in the sheriff court, the trial diet, for the use of the court.] .

#### Textual Amendments

- F1** Words in s. 78(1)(a) repealed (1.2.2005) by Criminal Procedure (Amendment) (Scotland) Act 2004 (asp 5), ss. 25, 27(1), **Sch. para. 25(a)**; S.S.I. 2004/405, **art. 2**, Sch. 1 (subject to arts. 3-5)
- F2** S. 78(1A) inserted (6.6.2011) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), **ss. 124(4)**, 206(1) (with s. 124(1)); S.S.I. 2011/178, **art. 2**, sch.
- F3** Words in s. 78(2) inserted (with application in accordance with art. 3 of the commencing S.S.I.) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), s. 206(1), **sch. 7 para. 46**; S.S.I. 2012/160, **art. 3**, sch.
- F4** Words in s. 78(2) substituted (1.11.2002) by Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 (asp 9), **s. 6(1)(a)**; S.S.I. 2002/443, **art. 3** (with art. 4(4))
- F5** S. 78(2A)(2B) inserted (1.11.2002) by Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 (asp 9), **s. 6(1)(b)**; S.S.I. 2002/443, **art. 3** (with art. 4(4))
- F6** Words in s. 78(3)(a) substituted (1.2.2005) by Criminal Procedure (Amendment) (Scotland) Act 2004 (asp 5), ss. 25, 27(1), **Sch. para. 25(b)(i)(A)**; S.S.I. 2004/405, **art. 2**, Sch. 1 (subject to arts. 3-5)
- F7** Words in s. 78(3)(a) substituted (1.2.2005) by Criminal Procedure (Amendment) (Scotland) Act 2004 (asp 5), ss. 25, 27(1), **Sch. para. 25(b)(i)(B)**; S.S.I. 2004/405, **art. 2**, Sch. 1 (subject to arts. 3-5)
- F8** Words in s. 78(3)(b) substituted (1.2.2005) by Criminal Procedure (Amendment) (Scotland) Act 2004 (asp 5), ss. 25, 27(1), **Sch. para. 25(b)(ii)**; S.S.I. 2004/405, **art. 2**, Sch. 1 (subject to arts. 3-5)
- F9** Words in s. 78(4)(a)(ii) substituted (1.2.2005) by Criminal Procedure (Amendment) (Scotland) Act 2004 (asp 5), ss. 25, 27(1), **Sch. para. 25(c)**; S.S.I. 2004/405, **art. 2**, Sch. 1 (subject to arts. 3-5)
- F10** Words in s. 78(5) substituted (1.2.2005) by Criminal Procedure (Amendment) (Scotland) Act 2004 (asp 5), ss. 25, 27(1), **Sch. para. 25(d)**; S.S.I. 2004/405, **art. 2**, Sch. 1 (subject to arts. 3-5)

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