CRIMINAL PROCEDURE (AMENDMENT) (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament's Standing Orders, the following documents are published to accompany the Criminal Procedure (Amendment) (Scotland) Bill introduced in the Scottish Parliament on 7 October 2003:

- Explanatory Notes;
- a Financial Memorandum;
- an Executive Statement on legislative competence; and
- the Presiding Officer's Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 10–PM.

EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL

4. The Bill is in four parts.

5. Part 1 (proceedings in the High Court) deals with court procedures as they relate to the High Court of Justiciary. The Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") will be amended to accommodate these changes. The Bill provides for a mandatory preliminary hearing in High Court cases and the procedure for these hearings. It introduces a new procedure whereby the court will appoint an appropriate trial date at the preliminary hearing after having dealt with preliminary matters and having regard to the state of preparation of the case.

6. Part 2 (solemn proceedings generally) relates to trials under solemn procedure in the High Court and the sheriff court and amends the time limits and citation provisions which are common to both courts. In particular, it amends the present 110 day custody time limit for High Court cases to provide that a preliminary hearing must be held within that time. In such cases, it also provides that the trial must commence within a new custody time limit of 140 days. It extends the provisions of the 1995 Act allowing trials in absence and makes new provision in relation to reluctant witnesses. Under those new provisions the court may place a reluctant witness on bail including bail subject to a remote monitoring requirement. Part 2 also makes provision as to the matters to be dealt with at the new preliminary hearing in the High Court and at the mandatory first diet in sheriff court.

7. Part 3 (bail) amends the provisions of the 1995 Act in relation to bail. It provides power to require the remote monitoring of a condition of bail restricting a person's movements. It provides a right for the prosecutor to be heard in applications for bail review by an accused and also in applications for review by a convicted person released on bail pending an appeal.

8. Part 4 (miscellaneous and general) includes provision that at the first diet in the sheriff court the court shall ascertain which witnesses are required and review bail conditions. This brings procedure in the sheriff court on these points in line with that introduced by the Bill for the High Court. It amends the provision of the 1995 Act relating to sentencing following a guilty pleas so as to impose a requirement on the court to take into account the stage at which an accused intimates his intention to plead guilty, and imposes an obligation on the court, having done so, to state whether or not a different sentence has been imposed. It increases the power of

the sheriff to impose extended sentences in certain cases from 3 to 5 years, in line with the proposed introduction of section 13(1) of the Crime and Punishment Act 1997, which will have the effect of increasing the sentencing power of the sheriff and jury court to five years. The Bill makes new provision for the citation of witnesses for precognition. Minor and consequential amendments are contained in the schedule to the Bill.

COMMENTARY ON SECTIONS

PART 1 – PROCEEDINGS IN THE HIGH COURT

Section 1 – Preliminary hearings

9. Section 1 makes provision for the new mandatory preliminary hearings in High Court cases. It substitutes new provision 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 is adjourned, its date is altered, it 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

10. 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.

11. 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.

12. 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

13. 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) Act 2002 (asp 9); and
- cases involving vulnerable witnesses where the court has made an order under section 288E(2) of the 1995 Act, as proposed to be inserted by the Vulnerable Witnesses (Scotland) Bill.

14. Sections 288C and 288E prevent the accused in such cases from conducting his defence in person at the trial. Section 4 of the Bill (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.

15. 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 Bill.

16. 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.

17. 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. It is provided that the court may dispose of any preliminary issues of which notice has been given; dispose of any application in relation to special measures for vulnerable witnesses or evidence of previous sexual conduct; and ascertain which witnesses on the Crown's list are required by the accused. The court will also ascertain whether a vulnerable accused or witness requires any special measures to give their evidence. It 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.

18. 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 to do so.

New section 72A

19. New section 72A(1) applies in cases where the accused has not pled guilty. It provides that after complying with the procedures in section 72(6) the court is to proceed to appoint a trial diet having regard to earlier proceedings at the preliminary hearing. This is subject to the provisions of subsections (2) to (6) 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 9 of the Bill. 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 (7) 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 (8) 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

23. New section 72B empowers the court to adjourn, alter the date of, and, on application, dispense with the preliminary hearing.

24. No time limit is set for adjournments except where subsection (2) applies and it appears to the court that the accused has not engaged a solicitor for the purposes of the conducting of his case and he is prohibited from defending himself. In such a case the diet will be adjourned for a maximum of 48 hours to allow the accused to engage a solicitor, which failing the court will (under the separate provisions in the 1995 Act governing such cases) appoint one on his behalf.

25. Subsections (4) to (6) provide that the court may, on the application of any of the parties, before the hearing, discharge the hearing and fix a new hearing either earlier or later than the original date. Parties are to be given an opportunity to be heard but a hearing of the application may be dispensed with where all the parties join in the application.

26. Subsection (7) requires the accused to attend the hearing of the application unless the judge permits the hearing to proceed in his absence.

27. Subsections (8) to (10) 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 order the Clerk of Justiciary to appoint a trial date. The procedure to be followed by the Clerk of Justiciary will be regulated by Act of Adjournal.

28. The accused is required by subsection (11) to attend any trial date appointed by the Clerk of Justiciary after the court has dispensed with the preliminary hearing.

New section 72C

29. New section 72C makes provision where the preliminary hearing does not proceed. Subsection (1) provides that where the 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.

30. Subsections (2) to (5) 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 (4) makes provision for the calculation of the two month period.

New section 72D

31. 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.

32. Subsection (2) states that when a trial diet is appointed the accused is required to attend that diet.

33. Subsection (3)(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 (3)(b) ask parties any question in connection with any matter which it is required to dispose of, or ascertain, under section 72.

34. Subsections (4) to (6) ensure that the proceedings at a preliminary hearing are duly recorded (by mechanical or shorthand means); and that a transcript may be made and sent to an individual who requests it 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

35. 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.

36. Subsection (2) provides that the prosecutor and the accused's legal representative shall, not less than 2 days before the preliminary hearing, lodge a written record of their state of preparation with respect to their cases. The court has discretion under subsection (3) to allow a written record to be lodged late. Under subsection (4), the form of the record and the information to be covered 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.

37. Subsection (6) defines the legal representative for the accused as his solicitor or counsel (including a solicitor advocate) or both the solicitor and counsel.

Section 3 – Appeals

38. 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.

39. At present section 74 deals with appeals from the discretionary preliminary diets provided for in the current version of section 72 of the 1995 Act. Subsections (2) and (3) substitute references to the new mandatory preliminary hearing for references to the current preliminary diets under section 72. Subsection (3)(b) 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, a day appointed under section 83A(3) as the day on which the trial diet must commence. Section 83A(3) is inserted by section 8 of this Bill, and provides for the court to appoint a day on which the trial diet must commence, failing which the indictment will fall.

40. 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.

41. 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

42. 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.

43. Subsection (1) amends section 288C 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.

44. 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.

45. Subsection (3) amends section 288E of the 1995 Act (as proposed to be inserted by section 6 of the Vulnerable Witnesses (Scotland) Bill) so as to provide in that section that, where an order is made in a case involving a vulnerable witness prohibiting the accused from conducting his or her defence in person at the trial, the accused is also prohibited from conducting his or her case at or for the purposes of a preliminary hearing.

Section 5 – Engagement, dismissal and withdrawal of solicitor representing the accused

46. Section 5 inserts new section 72F in the 1995 Act. Subsections (1) and (2) of new section 72F require any solicitor engaged by the accused to notify the court and the prosecutor accordingly in writing of that fact in all High Court cases. If after notification that solicitor is dismissed or withdraws, he or she must also give immediate notification of that fact to the court.

47. Subsection (3) read with subsections (4) and (5) requires the court to fix a further pre-trial diet when a trial date has been fixed where:

- intimation is received after the preliminary hearing (or after the hearing has been dispensed with) that a solicitor then acting for the accused is no longer so acting; and
- the case is one in which the accused is prohibited from conducting his own defence.

48. Subsections (6) and (7) require the court, at the pre-trial diet, to ascertain from the accused whether he has appointed another solicitor to act on his behalf and, where it appears that the accused has not, to continue the diet for a period of not more than 48 hours. Where after 48 hours the accused has not appointed a solicitor, the court will do so under the separate provisions in the 1995 Act governing those cases where the accused is precluded from defending himself at the trial. Under subsection (8) a further diet under this section must be not less than 10 clear days before the trial diet.

49. Subsection (9) gives the court the power to postpone the trial diet for such period as appears appropriate and if it thinks fit direct that such period, or some part of it, shall not count towards any time limit applying in the case.

50. Subsection (10) gives the court power to dispense with a diet fixed under this section, but only if a solicitor engaged by the accused intimates that he has been engaged for the trial, and so requests.

Section 6 – Alteration of trial diet

51. Section 6 introduces a new section 79A into the 1995 Act which provides for adjournment, acceleration or postponement of trials diets in the High Court. Adjournment of a trial diet is provided for by subsection (1) of the new section and subsection (2) provides the Court may adjourn to a diet at another place where the court is sitting.

52. Subsections (3) to (5) as read with subsection (8) provide that any party may apply to the court at any time before the jury is sworn at the trial to accelerate or postpone the trial diet. The application will be determined after hearing parties but where parties apply jointly the court may proceed to fix a new date without a hearing.

53. Subsection (6) requires the accused to attend the hearing unless the judge permits the hearing to proceed in his absence

54. Subsection (7) makes clear that, in setting the new trial date, the judge must have regard to the state of preparation of the parties. It also gives the judge considering an application to accelerate or postpone a trial diet power to appoint an additional pre-trial diet as well as a trial diet where he considers that this would be useful, having regard to the need to dispose, or desirability of disposing, before the trial, of preliminary pleas, preliminary issues or other matters.

Section 7 – Procedure where trial diet does not proceed

55. Section 7 introduces a new section 81A into the 1995 Act which provides procedures where trial diets in the High Court do not proceed.

56. Subsection (1) provides that where the court has deserted the diet *pro loco et tempore* (temporarily) the Court may appoint a further trial diet for a later date and the accused is required to attend that further diet.

57. Subsection (2) requires the court to have regard to the state of preparedness of parties with their case and in particular the likelihood of the case being ready to proceed to trial on the date to be appointed for the trial. If there are any preliminary pleas, issues or other matters which require to be, or could be with advantage be, disposed of before the trial the judge may appoint a diet to be held before the trial diet for the purpose of disposing of them.

58. Subsection (3) provides that where a trial diet has been deserted *pro loco et tempore* and no further trial diet has been fixed under subsection (1), or where the indictment has not been brought to trial and has not been continued, adjourned or postponed, a notice and copy indictment may be served on the accused within two months after the diet to appear at a further preliminary hearing not less than seven clear days after service of the notice. Subsection (5) provides that the notice is to be in a form prescribed by Act of Adjournal. Subsection (4) makes provision as regards the start of the 2 month period.

Section 8 – Continuation of trial diet

59. Section 8 introduces a new section 83A into the 1995 Act which makes provision for two different approaches for the court in relation to appointing and continuing the trial diet.

60. Under subsection (3), the court may fix a particular day as being the one on which the trial diet shall commence. In such cases the diet cannot be continued without formally calling in court. If it is not called on that day, the indictment will fall. That means that the Crown cannot take further proceedings on that indictment. Subject to any overriding time limit constraints, however, the Crown may re-indict the case.

61. The other approach is that set out in subsections (1) and (2). In such cases the court will appoint a trial diet for a given day, but it will be possible to continue such a 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.

62. 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 (1) 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 (1) will be permissible.

PART 2 – SOLEMN PROCEEDINGS GENERALLY

Section 9 – Time limits

63. Section 9 amends section 65 of the 1995 Act, which contains the time limits for proceedings on indictment in the High Court and the sheriff court.

64. Subsection (1) of section 65 currently provides that where any trial on indictment is not commenced within 12 months of the first appearance of the accused on petition the current indictment is discharged and no further indictment on those charges can be issued. Subsection (2) of section 9 amends section 65(1) so as to require that, in High Court cases, a preliminary hearing must commence within 11 months of the first appearance of the accused on petition. The same consequences apply if the new 11 month time limit is not met i.e. the accused cannot be tried again on these charges.

65. Section 65(2) currently provides that the 12 month period does not operate so as to prevent trial in the case of an accused for whom a warrant has been issued for failure to appear at a diet in the case. Subsection (3) amends section 65(2) so as to provide that in this circumstance the 11 month time limit for the preliminary hearing also does not operate to prevent trial of the accused.

66. Subsection (4) amends section 65(3) so as to provide that a single judge of the High Court may on cause shown extend the periods of 11 and 12 months in High Court cases and that

the sheriff on cause shown may extend the 12 month period in any other case (i.e. cases indicted in the sheriff court and those cases where an indictment has not been served).

67. Subsection (5) amends section 65(4) ("custody time limits") so as to:

- provide that an accused may not be detained by virtue of the warrant committing him or her for trial for a period of more than 80 days without an indictment having been served and that where it is not served he or she shall be entitled to be admitted to bail. At present if the indictment is not served within that period the accused is simply liberated;
- provide that an accused indicted to the High Court may not be detained by virtue of the warrant committing him or her for trial for a period of more than 110 days without a preliminary hearing having commenced and that his or her trial must commence within a period of 140 days. The present time limit is that a trial must commence within the 110 day period. In addition, the subsection amends the present provision by giving the accused an entitlement to bail if these time limits are not complied with. At present if the 110 day period is not met the accused is liberated forthwith and is free from any further prosecution on the charges on the indictment; and
- retain the 110 day period for cases in the sheriff court but provide that where that time limit cannot be met the accused shall be entitled to bail rather than (as at present) being liberated forthwith and free from any further prosecution on the charges on the indictment.

68. Subsection (6) inserts new provision that where a preliminary hearing is dispensed with under the provisions of section 72B(8) the requirements to commence the hearing within the 11 month period (provided by the amendments made to section 65(1) by subsection (2)) and the 110 day period (provided by the amendment made to section 65(4) by subsection (5)(b)) do not apply.

69. Subsection (7) substitutes for the present subsection (5) of section 65 new subsections (5) to (5B) modifying the powers of the courts to grant extensions to the custody time limits. At present all applications for extension of the custody time limits are heard by a judge of the High Court. Where a time limit is not met the accused is liberated. Under the revised provisions applications for extensions will be dealt with by the court to which the cases has been indicted, although applications for extension of the 80 day time limit (when the indictment has not yet been served) will still be heard by the High Court. Parties have a right to be heard, although it will be possible for the judge to determine the application without a hearing where defence and prosecution make a joint application for an extension. The present provision excluding an extension of the 80 day period where but for some fault on the part of the prosecutor the indictment could have been served is repealed. So also are the specific grounds applicable to the present 110 day period namely, illness of the accused, absence or illness of any necessary witness or any other sufficient cause not attributable to fault on the part of the prosecutor. The sole ground for extension of the custody time limits is cause shown.

70. New subsection (5) provides that in any case where an indictment has not been served, a judge of the High Court may extend the time limit. In any other case the time limit may be

extended by a judge of the High Court, where the case is to be heard in the High Court, or the sheriff, where the case is to be heard in the sheriff court. The basis upon which an extension may be granted is, in every case, cause shown.

71. New subsection (5A) provides that before determining an application for extension wherever sought parties have to be given an opportunity to be heard. New subsection (5B) provides that where the application is a joint application the judge or sheriff may determine the application without hearing parties.

72. Subsection (8) repeals section 65(6) and (7) which contain provision as to the grounds on which applications for extensions may be granted. Subsection (9) introduces three new subsections into section 65.

73. Subsection (8A) provides that where an accused is entitled to be admitted to bail as a result of the custody time limits not being complied with he shall, where the indictment has not been served, be brought forthwith before a judge of the High Court or, where the indictment has been served, a judge of the court to which the case has been indicted.

74. Subsection (8B) provides that where an accused has been brought before a judge under subsection (8A) the prosecutor shall be given an opportunity to make an application for extension of the time limit.

75. Subsection (8C) provides that if no application is made by the prosecutor or if the application is refused the court, before admitting the accused to bail, shall give the prosecutor an opportunity to be heard. In effect, the prosecutor will have the opportunity to comment on bail conditions before they are set.

76. Subsection (10) provides that where an accused is cited by the affixing of a notice in the prescribed form to the door of the accused's dwelling-house or place of business the indictment shall be deemed to be have been served on the accused. This takes account of the change to available methods of citation which was made by section 61 of the Criminal Justice (Scotland) Act 2003, which amended section 66 of the 1995 Act.

Section 10 – Warrant for citation

77. Section 10 of the Bill amends section 66 of the 1995 Act which makes provision in relation to service and lodging of the indictment etc.

78. Subsection (1) of section 66 at present provides for the issue by the Clerk of Justiciary or, for solemn proceedings in the sheriff court, the sheriff clerk of a warrant to cite the accused, witnesses and jurors when sittings of the relevant court have been appointed to be held for the purposes of trial of persons accused on indictment.

79. Under the provisions of the Bill when a case is indicted in the High Court no trial diet will have been set. The accused will be cited to a preliminary hearing at which the trial diet may be appointed by the court if appropriate. That diet will be appointed not to a sitting but to a

specified date (which may under new section 83A inserted in the 1995 Act by section 8 of the Bill be a date fixed as a date on which the diet must call).

80. Subsection (2) substitutes in relation to High Court and sheriff court solemn proceedings a new subsection (1) in section 66 which provides that the Act shall be sufficient authority for the citation of accused, witness and jurors. This removes the need for a warrant to be issued by the Clerk of Justiciary or sheriff clerk. Subsection (3) provides for the consequential repeal of subsection (8) which relates to that warrant.

Section 11 – Trial in absence of accused

81. Section 11 of the Bill amends section 92 of the 1995 Act to give the court power to proceed with a solemn trial in the absence of the accused. At present, section 92 provides that a trial cannot take place in the absence of the accused. This is subject to the exception in section 54 of the 1995 Act that applies where the accused is insane and there is an examination of facts or the exception in section 92(2) where the accused requires to be removed from court because of disruptive behaviour.

82. Subsection (1) amends section 92(1) to make it clear that the requirement for the trial to take place in the presence of the accused is subject to the further exception provided for in new subsection (2A) of section 92 inserted by section 11(3).

83. Subsection (2) amends the existing provision in section 92(2) which allows the court to proceed with a trial in absence because of disruptive behaviour by the accused and appoint a counsel or a solicitor to represent his interests. The amendment removes the reference to the court appointing counsel. This is to ensure consistency with the amendments that are being made in the remainder of section 11 in relation to legal representation of the accused where there is a trial in absence under the further exception that is provided for in new section 92(2A) (see below).

84. Subsection (3) creates a further exception to the requirement that the trial take place in the presence of the accused by inserting new subsections (2A) to (2F) into section 92. New subsection (2A) gives the court discretion to proceed with a trial in the absence of the accused provided there has been a motion to this effect by the prosecutor and the court is satisfied that the accused has been cited under section 66 and it would be in the interests of justice to do so. Citation under section 66 means in the case of a sheriff court solemn case, citation to the trial diet and the case of a High Court solemn case citation to the preliminary hearing.

85. Subsections (2B) to (2E) make provision for the court to consider allowing the accused's solicitor to continue to act where that solicitor has authority, or to appoint a solicitor. New subsections (2C), (2D) and (2E) which concern the duties of the solicitor appointed by the court, the engagement of counsel by that solicitor and further appointments by the court are also applied to the existing legal representation power in section 92(2) where the court holds a trial in absence where the accused has been removed for disruptive behaviour.

86. Subsection (2F) provides that the provisions in relation to legal representation for the accused when there is a trial in absence do not apply if the trial relates to a sexual offence or an

offence in respect of which the court has made an order that there are vulnerable witnesses. This is because section 288D of the 1995 Act makes separate provision for the appointment of legal representation in those cases.

87. Subsection (5) amends section 66 of the 1995 Act to make provision to ensure that the accused is advised about the consequences of non-appearance when he is cited. The amendments provide that in a High Court case the notice that the accused receives under section 66 must advise him that if he does not appear at the preliminary hearing it may proceed in his absence, a trial diet may be appointed and if he does not appear at the trial diet the trial may proceed in his absence. In a sheriff court case it provides that the notice must advise him that if he does not appear at the trial diet it may proceed in his absence.

Section 12 – Reluctant witnesses

88. Section 12 inserts into the 1995 Act new sections 90A to 90E setting out how the court may deal with reluctant witnesses. These provisions set out the law in relation to the apprehension of witnesses in proceedings on indictment; provide that where a witness is brought to court the court may (*inter alia)* release the witness on bail; give parties the right to appeal against the terms of orders made in relation to reluctant witnesses (including bail orders); set out the sanctions where bail orders are breached; and provide for review of court orders made in relation to reluctant witnesses.

New section 90A

89. Section 90A deals with the apprehension of witnesses in proceedings on indictment, and replaces existing law on the matter (subsection (7)). Subsections (2) and (3) set out the circumstances in which a warrant may be issued for the apprehension of a witness. These are:

- where the witness has been duly cited and has failed to appear, without any just excuse for that failure being made by the witness or on the witness's behalf; and
- where the court is satisfied by evidence on oath that the witness is not likely to attend without compulsion.

90. Subsection (4) provides that application for a warrant under subsection (1) may be made either orally or in writing and may be dealt with in chambers or in court with or without a hearing. Provision for the application to be made in writing means that it can be supported by a sworn affidavit by an officer of law attesting to the fact of citation without requiring that officer to attend the court. Under subsection (5) the warrant shall be as prescribed in an Act of Adjournal.

91. Subsection (6) authorises officers of law in possession of the warrant to search for and apprehend the witness and take him to the appropriate court and grants authority to detain him meantime in a police cell or station or other convenient place. The warrant authorises the breaking open of shut and lockfast places for the purposes of executing the warrant.

92. Subsections (8) and (9) provide that a witness apprehended under a warrant should be brought before either a single judge of the High Court or the sheriff court no later than the first sitting day after he is apprehended.

New section 90B

93. Section 90B gives the court power to deal with witnesses apprehended under a warrant issued under the preceding section.

94. Subsection (1) states that, where a witness has been apprehended and brought before the court, the parties and the witness will have an opportunity to address the court. The court may thereafter order the accused to be detained in custody until the conclusion of the diet at which he is due to give evidence; to be released on bail; or to be liberated. Under subsection (2) it must be satisfied before ordering the witness to be detained in custody or released on bail that one or other of these orders are necessary and appropriate to secure attendance of the witness.

95. Subsection (3) retains the power of the court to make a finding of contempt of court in respect of any witness who fails to attend having been cited and to dispose of the case accordingly.

96. Subsection (4) provides that where a witness has been ordered to be detained in custody until the conclusion of the diet in which he is to give evidence the trial court may recall that order when excusing the witness even if the trial is not concluded. The trial court may therefore liberate the witness as soon as they take the view that the witness's presence is no longer required. For example, the court might decide to release the witness immediately after their evidence had been given but before the conclusion of the trial.

97. Subsections (5) and (6) authorise the court, when releasing a witness on bail, to impose such conditions as it considers necessary to secure the attendance of the witness at court other than a deposit of a sum of money in court.

98. Subsection (7) provides that where the court has ordered the witness to be detained in custody it may on the application of the witness recall that order and order that the witness be released on bail subject to a condition restricting his movements together with a requirement that his compliance with that condition be remotely monitored. Subsections (8) and (9) provide that the orders admitting the witness on bail shall apply as if the witness was an accused released on bail under sections 24A and 25 respectively of the 1995 Act.

New section 90C

99. Section 90C introduces sanctions for those witnesses who, having been granted bail, fail to comply with any of the conditions attached to the order granting bail.

100. Subsections (1) and (2) make provision analogous to that provided in section 27 of the 1995 Act in relation to accused in solemn cases who breach bail. Subsection (1) provides that any witness on bail who fails to appear at any diet to which he has been cited or who fails to comply with any condition imposed in the order shall be guilty of an offence and subsection (2) sets out the penalties which may be imposed in the event of a conviction under the preceding section. These penalties - a fine and imprisonment not exceeding two years - are the same as those which apply under section 27(7) of the 1995 Act where an accused in a solemn case fails to appear at a diet to which he has been cited.

101. Subsection (3) applies section 28 of the 1995 Act (which provides for the arrest and court appearance of an accused who has breached bail) to witnesses who have been granted bail. It allows a constable to arrest without warrant a witness who he has reasonable grounds for suspecting has broken or is likely to break the conditions imposed and to bring him to court. Once before the court, the court may recall or vary the bail order made or release the witness on the original order.

New section 90D

102. Section 90D gives the court power to review orders detaining the witness in custody or releasing him on bail.

103. Subsection (1) allows the court on the application of the witness to recall the order detaining the witness in custody and to make an order releasing him on bail or liberating him.

104. Subsection (2) authorises the court on the application of the witness to review the conditions imposed when granting bail; and make a new bail order with different conditions.

105. It also provides that, on the application of the person who applied for the warrant to apprehend the witness (that is, either the prosecutor or the accused) the court may recall the bail order or make a bail order with different conditions. Subsection (3) qualifies that right by providing that the court will only review a bail order in these circumstances where new material evidence is put before it. Under subsection (5) a court receiving such an application is required to intimate the application to the witness; fix a diet; and if it considers it necessary grant a warrant to apprehend the witness.

106. Before making a new order the court must give the accused, the prosecutor and the witness the opportunity to be heard.

107. Subsection (4) sets the time limits for applications by a witness for a review of an order detaining him in custody or releasing him on bail, which are the same as those which apply in relation to a bail review sought by an accused or convicted person under section 30 of the 1995 Act. A first application may not be made earlier than the fifth day after the order was made and any further application no earlier than the fifteenth day after the order was made. These time limits do not apply to applications from parties citing the witness.

108. Subsection (6) retains the right of any party to appeal against the terms of any order made under section 90B(1) for a witness to be remanded in custody, released on bail, or liberated.

New section 90E

109. Subsections (1) to (3) of section 90E give the witness, the prosecutor and the accused the right to appeal against the making of any order under section 90B(1)(a),(b) or (c), including any condition imposed on bail under subsection (1)(b) of that section and provide that the party appealing shall intimate the appeal to the other parties.

110. Subsection (4) gives power to the High Court or to a judge of the High Court to deal with an appeal under this section. The High Court would deal with an appeal against the decision of a single judge of that court and a single judge would deal with an appeal from the sheriff court.

111. Subsection (5) applies section 51 of the 1995 Act to witnesses under the age of 21. Section 51 provides that persons under the age of 16 are detained in secure accommodation or committed to the care of the local authority rather than detained in prison.

Section 13 – Preliminary pleas and preliminary issues

112. Section 13 substitutes a new section 79 in the 1995 Act. Most of this section replicates material already in the existing provisions in sections 72 and 79 of the 1995 Act including provision previously in section 72 for notice to be given to the court in relation to matters which can be dealt with before the trial. The new elements are that:

- it makes a clear division between preliminary pleas (which if conceded are likely to cause the case to fall) and preliminary issues. In new section 72 it is prescribed that at the preliminary hearing the former shall be taken before the accused is asked to plead, the latter after a plea has been taken and it is clear that the case is going to trial; and
- it adds express reference to objections to the admissibility of evidence to the list of preliminary issues, although this is qualified by the rider that the objection is one of which the party could reasonably be expected to give notice at this stage.

113. Subsection (1) provides that, except by leave of the court on cause shown, no preliminary plea or issue shall be raised or submitted in any proceedings on indictment unless the party has given notice of his intention to do so as prescribed in the sections governing the procedure at preliminary hearings in the High Court and at first diets in the sheriff court on the timescale.

114. Subsection (2) defines preliminary pleas and preliminary issues.

115. Subsection (3) provides that no accused shall be entitled to object to plead to an indictment due to a discrepancy, error or deficiency such as is mentioned in new section 79(2)(a)(ii) above unless the court is satisfied that these tended to mislead and prejudice the accused.

116. Subsection (4) provides that where the court allows a party to make, raise or submit a preliminary plea or issue without notice the court may, if it considers it appropriate to do so, appoint a diet to be held before the trial diet to consider it further. This provides another opportunity for such matters to be resolved before the trial diet, in addition to the preliminary hearing.

PART 3 – BAIL

Section 14 – Bail conditions: remote monitoring of restrictions on movements

117. This section inserts into the 1995 Act new section 24A. New section 24A provides that where a person has been refused bail the court on that person's application shall consider whether the imposition of an order restricting his movements which would be remotely monitored would enable the court to release that person on bail. This provision therefore only comes into play when a court has considered and rejected the option of bail on other conditions and concluded that the person should be remanded in custody.

118. Subsection (2) of the new section gives the applicant and the prosecutor an opportunity to be heard before the court decides whether to make the order.

119. Subsections (3) and (4) require the court before making such an order to explain to the person the effect of the order including the requirement to be monitored and the consequences which may follow any failure to comply with the condition and be satisfied that the applicant understands how the order will work.

120. Subsections (5) and (6) provide that before making an order which will restrict the applicant's movements requiring the applicant to remain in a specified place or places the court must obtain and consider information about these places including information as to the attitude of persons likely to be affected by the presence there of the applicant. This provision ensures, in particular, that all others living at the same address are consulted about the impact of the order restricting the applicant's movements to a particular place. The court may adjourn the proceedings for this purpose.

121. Subsection (7) requires the clerk of court to send a copy of any order under the new section to the person (referred to as "the monitor") who will be responsible for the remote monitoring of the person's movements. The clerk must also notify the monitor of any changes to the order.

122. Subsections (8) and (9) provide that where the monitor becomes aware that the person has breached the condition restricting his movements he shall immediately inform a constable. The constable will then seek to exercise his existing powers under section 28 of the 1995 Act (which provides for the arrest of an accused who has breached bail) to arrest the person. Where a constable has arrested such a person on the grounds that he suspects that the person has breached the condition he shall immediately inform the monitor.

123. Subsections (10), (11) and (12) apply with modifications the provisions relating to restriction of liberty orders under section 245A of the 1995 to orders made under new section 24A. The provisions applied provide for:

- the making of regulations by the Scottish Ministers in relation to the courts which may make orders for remote monitoring, the methods of monitoring and the persons in respect of whom they may be made;

- the Scottish Ministers to notify courts of the persons who may be appointed as monitors;
- the Scottish Ministers to make arrangements, including contractual arrangements, in respect of remote monitoring;
- the court, in making an order, to require the person in respect of whom it is made to wear a tagging device and to enable regulations to be made in respect of the tagging devices to be used in connection with remote monitoring; and
- statements and certificates produced from monitoring equipment to be sufficient evidence as to the whereabouts of the person whose movements are being monitored.

124. Subsection (13) provides that any requirement under this section shall be treated as a condition of bail, so attracting the general provisions of the 1995 Act in relation to bail conditions.

Section 15 – Bail review: rights of prosecutor to be heard etc.

125. Section 15 widens the right of the prosecutor to be heard in certain situations where the court is considering bail issues.

126. Subsection (2) amends section 25 of the 1995 Act so as to require an accused to intimate any application to alter his bail address in writing to the Crown Agent and requires the court to give the prosecutor an opportunity to be heard before determining the application. At present, although the prosecutor will normally be present in the bail court, the court does not have to hear the Crown's views.

127. Subsection (3) amends section 30 of the 1995 Act so as to require an appellant convicted on indictment who makes an application for a review of either the refusal of bail or of the conditions imposed to intimate the application to the Crown Agent. It also provides that the application must be heard not less than seven days after the date of intimation and that the prosecutor must have the opportunity of being heard.

128. Subsection (4) amends section 31 of the 1995 Act so as to provide that where the prosecutor has applied for a bail review the hearing on the application shall be not less than seven days after the day on which the application is made. This time limit is consistent with that in new section 105A (as inserted by section 66 of the Criminal Justice (Scotland) Act 2003) which provides for the appeal by a prosecutor against the grant of bail pending appeal to a convicted person to be heard within 7 days. It is designed to ensure that the period of uncertainty for the convicted person is kept as short as is practicable.

PART 4 – MISCELLANEOUS AND GENERAL

Section 16 – First diet in sheriff court solemn proceedings: witnesses and bail

129. Section 16 amends section 71 of the 1995 Act by inserting a new subsection (1C) which requires the sheriff court at a first diet to ascertain which of the witnesses on the list of Crown witnesses are required by the accused to attend the trial. Where the accused is on bail the court

is required to review the conditions of bail and after hearing parties may, if it considers it appropriate, fix bail on different conditions.

130. The section also makes consequential amendments to subsections (2) and (3) of section 71 to incorporate reference to the new subsection (1C). It replicates for the sheriff court first diet provisions made for preliminary hearings in the High Court in new sections 72 and 72A of the 1995 Act as inserted by section 1 of this Bill.

Section 17 – Sentence following guilty plea

131. Section 17 amends section 196 of the 1995 Act, which applies across solemn and summary procedure.

132. Subsection (2) of section 17 amends subsection (1) of section 196 so as to require the sentencing judge to take into account the stage at which the accused pleads guilty. At present the judge has discretion to consider the issue when determining sentence, but is not required to do so.

133. Subsection (3) introduces a new subsection which requires the judge to state when passing sentence whether his consideration of the stage and circumstances in which a guilty plea was tendered has led him to impose a sentence different from that which the convicted person would otherwise have received. In effect, he is required to state whether a sentence discount has been given. Where the sentence has not been altered by that consideration, the judge is required to make that fact clear and give reasons for the decision not to discount.

Section 18 – Increase in extended sentence which may be passed by sheriff court in certain cases

134. Section 18 of the Act amends section 210A(6) of the 1995 Act to increase the maximum extended sentence a sheriff may impose on certain sexual and violent offenders from three years to five years.

135. This relates to the proposal to bring into force section 13(1) of the Crime and Punishment Act 1997, which has the effect of increasing the custodial sentencing power of a sheriff sitting with a jury from 3 years to 5 years. At present section 210A(6) provides that a sheriff may not pass an extended sentence which exceeds the aggregate of the maximum custodial term he may set and an extension period not exceeding 3 years. This amendment simply brings the extended term which may be set in line with the 5 year sentencing powers which the Executive proposes separately to implement by commencement order.

Section 19 – Citation of witnesses for precognition

136. Section 19 inserts a new section 267A into the 1995 Act which re-enacts in an updated form section 67A of the 1995 Act. In particular, section 267A provides that the 1995 Act is sufficient warrant to cite for precognition and that citation shall be in the form prescribed by Act of Adjournal or as nearly as possible in such form.

Section 20 – Minor and consequential amendments

137. This section introduces the schedule to the Bill which makes minor and consequential amendments to the 1995 Act.

Section 21 – Ancillary provision

138. This allows Scottish Ministers to make ancillary provision in statutory instruments in consequence of the Bill.

Section 22 – Commencement and short title

139. This provides for commencement by order.

Schedule – Minor and consequential modifications of the 1995 Act

140. Paragraph 2 is consequential on the changes introduced by the Bill to the process of appointing trial diets, whereby trial diets are appointed for a particular day rather than all cases being cited to the first day of the sitting. This paragraph makes amendments to section 2 of the 1995 Act, which deals with arrangements for trials including transferring cases from one place to another. References in section 2(3), (4) and (5) of the Act are amended by sub-paragraphs (a), (c) and (d) of paragraph 2 by deleting the references to sittings and replacing these references with trial diets. Where parties are all agreed that a trial diet should be rescheduled, paragraph 2(b) amends section 2 so as to allow the court to consider a joint application without hearing parties.

141. Paragraphs 3 and 7 are consequential on the changes introduced by section 4 of the Bill. An accused charged with certain sexual offences is prohibited by section 288C of the 1995 Act from conducting his own defence at his trial. Section 4 extends that to prohibiting the accused from conducting his case in person at the preliminary hearing. Section 17A of the 1995 Act entitles the accused, on his arrest, to be told of the restrictions on the conduct of his defence and paragraph 3 extends that so he must also be told about the restrictions which apply to the preliminary hearing in the High Court by amending section 17A accordingly. Section 35(4A) of the 1995 Act requires the accused to be informed at his judicial examination of the prohibition on his conducting his defence in person. Paragraph 7 makes the necessary consequential amendment to include reference at the judicial examination to prohibition of an accused conducting his defence at the preliminary hearing also.

142. Paragraph 4 amends section 24 of the 1995 Act to provide that the accused must appear at every diet at which he is required by this Act to appear.

143. Paragraph 5 amends section 25 of the 1995 Act by providing that where the court is referred to in that section (other than subsection (2A)) it shall include the Lord Advocate. Under section 24 of the 1995 Act both the court and the Lord Advocate may grant bail and impose bail conditions, but under section 25 at present power to set a domicile of citation is confined to the court. This amendment will allow the Lord Advocate, in issuing a bail order, to set a domicile of citation.

144. Paragraph 6 amends section 27 of the 1995 Act so to provide that an offence is committed where the accused on bail fails to appear at any diet at which he is required by the 1995 Act to appear.

145. Paragraph 8(a) amends section 66(4) of the 1995 Act to provide that the copy indictment served on the accused shall include a list of the productions to be put in evidence by the prosecution.

146. Paragraph 8(b), (c) and (d) pick up on a missed consequential in relation to the amendment to section 66 of the 1995 Act which was made by section 61 of the Criminal Justice (Scotland) Act 2003. Section 66 was amended by section 61 to allow for an accused to be cited by a notice affixed to his door advising him of the address at which he can collect the indictment. Along with the service copy indictment section 66(6A) provides that an accused charged with certain sexual offences is given notice that at his trial his defence may be conducted by a lawyer only. Section 66 is amended by paragraphs 8(b), (c) and (d) to provide that where the accused is cited by way of a notice affixed on his door rather than service of the indictment a notice in the same terms as the section 66(6A) notice will be given to him when he collects the indictment.

147. Paragraph 8(e) repeals an unnecessary provision in subsection (10) of section 66.

148. Paragraph 9 is consequential on section 1 of the Bill. This section introduces preliminary hearings in all cases indicted into the High Court. Accused persons will be cited to this hearing rather than a trial diet. The preliminary hearing is the point to which all pre-trial notices and applications now relate. Section 67(3) allows certain objections in respect of witnesses to be made not less than 10 clear days before the trial diet. Sub-paragraph (a) amends this section to provide that in High Court cases that objection must be lodged no less than 7 clear days before the preliminary hearing. Sub-paragraph (b) inserts subsection (5A) into section 67. This allows the prosecutor to lodge lists of witnesses until no less than 7 clear days before the preliminary hearing or such later time as the court may in special circumstances allow.

149. Paragraph 10 repeals section 67A of the 1995 Act in consequence of section 19 of the Bill which re-enacts section 67A in an updated and extended form.

150. Paragraph 11 is consequential on section 1 of the Bill and makes amendments to the procedure to be followed in relation to productions. Sub-paragraphs (b) and (d) amend section 68(3) as it relates to proceedings in the High Court. They modify the time limits for lodging and challenging productions to relate to the preliminary hearing. Sub-paragraphs (a) and (c) maintain the current time limits for the sheriff court.

151. Paragraph 12 is consequential on section 1 of the Bill. An accused person who wishes to object to a previous conviction contained in the notice served on him with the indictment has to do so in writing. In terms of section 69(3) as currently drafted that notice has to be given prior to the trial diet. This paragraph amends that section so that in a High Court case the accused requires to give notice no less than seven clear days before the preliminary hearing. The current time limits for sheriff court cases are preserved.

152. Paragraph 13 is consequential on section 13 of the Bill and refers to the sheriff court. First diets are held in sheriff and jury cases in terms of section 71 of the 1995 Act and subsection (2) of that section requires the court to consider certain matters. Section 13 of the Bill substitutes a new section 79 in the 1995 Act and lists preliminary pleas and issues which if raised must be dealt with at the first diet. This paragraph inserts references to preliminary pleas and issues as defined in that new section 79 for the existing reference to matters in section 71(2) of the 1995 Act.

153. Paragraph 14 is consequential on section 6 of the Bill. Subsection (4) of that section allows applications to accelerate the trial diet and fix an earlier date. Section 74 deals with appeals against decisions at preliminary diets, but provides that an appeal may not be taken against various court decisions to set, adjourn or postpone diets. Paragraph 14 adds to the list of decisions which are not appealable the decision to accelerate the trial diet.

154. Paragraph 15 repeals a reference to section 72 of the 1995 Act in section 75 of the 1995 Act. This is consequential upon section 1 which replaces section 72 of the 1995 Act.

155. Paragraph 16 is consequential upon section 1 of the Bill. Where an accused intends to state a special defence or to lead evidence calculated to exculpate him by incriminating a co-accused he cannot do so unless he lodges notices in terms of section 78 of the Act and he cannot examine any witnesses or put in evidence any productions unless he has given notice of his intention to do so. Sub-paragraphs (a), (b) and (c) amend section 78(1), (3) and (4) by requiring these notices to be lodged in High Court cases not less than seven clear days before the preliminary hearing. Sub-paragraph (d) provides that copies for the use of the court should be lodged with the appropriate sheriff clerk before the preliminary hearing in the High Court and (as at present) before the trial diet in the sheriff court.

156. Paragraph 17 is consequential on section 6 of the Bill. Section 80 of the 1995 Act provides for alteration and postponement of trial diets in both the High Court and the sheriff court. Section 6 of the Bill introduces new procedures for the High Court and sub-paragraphs (a), (b), (c) and (d) of paragraph 17 amend section 80 so that it relates to the sheriff court only.

157. Paragraph 18 is consequential on section 7 of the Bill. Section 81 of the 1995 Act refers to cases in the High Court and sheriff court where the trial does not take place. Section 7 of the Bill introduces into the High Court new provisions for this. Sub-paragraphs (a) and (b) amend subsections (1) and (2) of section 81 so that it now refers to sheriff court cases only. Sub-paragraph (c) repeals section 81(7) of section 81, which refers to a method of citation now overtaken by provisions for citation introduced by section 10 of this Bill.

158. Paragraph 19 is consequential on section 7 of the Bill, which inserts a new section 81A into the 1995 Act setting out the procedure to be followed where the trial diet in the High Court has not gone ahead. Where an accused is fully committed for trial and a diet has been fixed but has been deserted *pro loco et tempore*, postponed or adjourned (or a notice has been issued that the trial is to take place at another place) section 82 provides that the warrant of committal remains in force. Paragraph 19(a) amends section 82 to safeguard the warrant where diets have been continued or accelerated and paragraph 19(b) amends subsection (c) of the section to reflect the fact that the court will in future appoint trial diets.

159. Paragraph 20 makes amendments to the provisions in section 83 of the Act, which provides for the transfer of sheriff court solemn proceedings from one sitting to another sitting elsewhere in the sheriffdom. In particular, they provide that where parties jointly seek transfer of proceedings no hearing need be held and repeal section 81(3), which relate to a warrant to cite which will under the Bill's provisions no longer be required.

160. Paragraphs 21 and 22 are consequential upon the amendments to section 66 of the 1995 Act by section 10 of the Bill. Jurors are at present listed to attend at a sitting of the High Court. In future, however, trials in the High Court will not be assigned to sittings but will be a mixture of dates fixed for calling of the diet or as the first day of a period (to be fixed by Act of Adjournal) in which the diet must call. The way in which jurors are cited requires to be amended to reflect this. Paragraph 21 amends section 84(8) of the 1995 Act to allow jurors to be cited to attend for trials in the High Court where the court is sitting. Section 84(9) is similarly amended to provide that the jurors on the list shall be the list of jurors for all trials to be held by the High Court sitting at that particular place. The requirement in subsections (8) and (9) that the lists be signed by a judge are also repealed.

161. Paragraph 21(c) repeals another reference to the warrant of citation which will, under the provisions of the Bill, no longer be required.

162. Paragraph 22 further amends the provision in relation to jurors. Paragraph 22(a) amends section 85(2) of the 1995 Act to provide that the list and number of jurors shall be prescribed by Act of Adjournal. Paragraph 22(b) and (c) amend subsections (4) and (5) of section 85 to reflect the fact that the sittings system in the High Court is replaced by fixed trials.

163. Paragraph 23 amends section 87 of the 1995 Act to give the clerk of court power where the judge is unavailable due to death, illness or absence in cases where no evidence has been led to adjourn the diet in all the cases appointed for that day until later in the day or to a later date being no more than two months from that date.

164. Paragraph 24 is consequential on section 11 of the Bill. That section introduces trials in absence in certain limited circumstances. Section 88 of the 1995 Act regulates the procedure for balloting a jury following upon a plea of not guilty. However as the accused will not be present when a trial in absence is ordered no plea can be tendered. This paragraph amends section 88 of the 1995 Act by providing that where the court is to proceed with a trial in absence the accused will be treated for that purpose as having pled not guilty.

165. Paragraph 25 restates the time limits contained in section 119 of the 1995 Act where a new prosecution is authorised following an appeal to take account of the amendments to section 66(1) of the 1995 Act.

166. Paragraph 26 is consequential on section 19 of the Bill. Section 19 of the Bill introduces new procedures for the citing of witnesses for precognition. The provisions relate to all cases including summary cases making subsection (1)(a) of section 140 unnecessary. This paragraph therefore repeals section 140(1)(a).

167. Paragraph 27 is consequential on section 12 of the Bill. Section 156 of the 1995 Act applies to witnesses in both solemn and summary procedure. Section 12 of the Bill introduces procedures for dealing with reluctant witness in proceedings on indictment. Subsections (1), (2) and (3) of section 156 are therefore amended to reflect the fact that they now refer to summary procedure only.

168. Paragraphs 28 and 29 are consequential on section 1 of the Bill. Where an accused is charged in a special capacity such as being the holder of a licence or where the age of a person is specified these facts shall be held as admitted unless challenged. These paragraphs require the challenges to be raised as preliminary issues at the preliminary hearing in the High Court or the first diet in the sheriff court.

169. Paragraph 30 is consequential on section 1 of the Bill. Section 257 of the 1995 Act places on parties a duty to seek agreement of evidence. The duty applies from the service of the indictment until the jury is sworn. However as the High Court is introducing a preliminary hearing at which it is desired to dispose of all preliminary matters, including where possible the agreement of evidence, parties are encouraged to seek agreement prior to that hearing. This paragraph amends section 257 by inserting a subsection to that effect.

170. Paragraph 31 is consequential on section 1 of the Bill. Where a party considers that certain evidence is uncontroversial he serves a statement on the other party to that effect. The other party can challenge any fact specified or referred to in the statement. The procedure is set out in section 258 of the 1995 Act and the time limits in relation to service and challenge relate at present to the trial diet. Paragraph (a) amends subsection (2) and inserts a subsection (2A) so that the time limits in the High Court refer to the preliminary diet.

171. Paragraph 32 is consequential on section 1. Section 259 of the 1995 Act allows in certain circumstance exceptions to the rule that hearsay evidence is inadmissible. Subsection (5) of that section requires the party who wishes to have evidence of a statement admitted to give notice of that fact. No time limit for giving the notice is stated, other than that it must be in advance of the trial. Sub-paragraph (a) of paragraph 30 now requires the notice in High Court cases to be given not less than seven days before the preliminary hearing or such later time as the judge may, on cause shown, allow. Sub-paragraph (b) retains the status quo in any other case.

172. Paragraphs 33 and 34 amend provisions proposed to be inserted into the 1995 Act by the Vulnerable Witnesses (Scotland) Bill. The amendments require applications and notices relating to the special measures for taking the evidence of vulnerable witnesses in High Court cases to be lodged 14 days before the preliminary hearing.

173. Paragraph 35 is consequential on section 1 of the Bill. Section 274 of the 1995 Act prohibits evidence relating to the sexual conduct of the complainer in trials for certain serious sexual offences. Under section 275(1), the accused may apply to have such evidence admitted in certain limited circumstances. Applications for the purpose of 275(1) require to be made within 14 clear days of the trial diet. This amendment requires the application to be made no less than seven days before the preliminary hearing in High Court cases.

174. Paragraph 36 is consequential on the introduction of the preliminary hearing in the High Court and provides that a transcript of an interview between a police officer or a person commissioned, appointed or authorised under section 6(3) of the Customs and Excise Management Act 1979 and an accused person shall be received in evidence and be sufficient evidence of the making of the transcript and its accuracy unless not less than seven days before the preliminary hearing the accused serves notice of a challenge to the making or accuracy of the transcript.

175. Paragraph 37 is a consequential on the new section 79 introduced by section 13 of the Bill. It substitutes a reference to section 79(2)(b)(iii) for the existing reference to section 72(1)(b)(iv), a new section 72 having been substituted by section 1 of the Bill. In consequence any application under section 278 of the 1995 Act to determine that the record of the judicial examination or any part of it should not be admitted as evidence should be raised as a preliminary issue at the preliminary hearing.

176. Paragraph 38 amends section 280(6) of the 1995 Act (which refers to the procedure for notifying and challenging the certification of routine evidence) by requiring that in High Court cases the certificate referred to in that subsection must be served by the prosecutor on the accused not less than fourteen days before the preliminary hearing.

177. Paragraph 39 amends section 281(1) of the 1995 Act to provide that any challenge to the identity of the deceased in an autopsy report must in a High Court case be lodged not less than 7 days before the preliminary hearing. It also amends section 281(2) to remove the need for the prosecutor to specify when he intimates an autopsy or forensic science report to the accused which of the pathologists or forensic scientists responsible for the report will be called to give evidence. That means that either of those scientists may give evidence at the trial.

178. It also provides that any notice from the accused requiring the attendance of the other scientist as well must be submitted seven days before the preliminary hearing in High Court cases.

179. Paragraphs 40 to 44 are all consequential on the introduction of the mandatory preliminary hearing. All relate to the need for notices in relation to evidential issues to be served before the preliminary hearing, so that the court at the hearing can consider them if it considers that to be appropriate.

180. Paragraph 45 inserts definitions of “preliminary hearing”, “preliminary issue” and “preliminary plea” into the interpretation section of the 1995 Act.

181. Paragraph 46 amends Schedule 9 to the 1995 Act (certificates of proof of certain routine matters) to take account of changes in relation to bail provisions made in this bill, in particular the introduction of bail for reluctant witnesses.

FINANCIAL MEMORANDUM

INTRODUCTION

182. The Criminal Procedure (Amendment) (Scotland) Bill forms a key part of the overall package of reform to High Court procedures set out in the White Paper *Modernising Justice in Scotland: the Reform of the High Court of Justiciary*.

183. The legislative changes proposed seek to ensure that cases come to trial only where this is necessary and when the case is ready to proceed. Much of the Bill deals with the introduction of mandatory preliminary hearings in the High Court. Together with the formal exchanges between prosecution and defence which precede them and with other new procedures designed to increase flexibility, these clearly have cost implications for the Scottish Court Service, the Crown Office and Procurator Fiscal Service and the legal aid fund. There will also be additional expenditure on judicial salaries. These costs are itemised below.

184. After an initial period while the reforms bed in, however, the Executive expect compensating savings in unproductive trial hearings. More proactive management by judges will reduce the number of adjourned trials. Greater incentives for those who intend to plead guilty to do so earlier in the process should reduce the number of trial hearings arranged and then aborted because the accused pleads guilty before the jury are sworn. These efficiency gains will help to free up judicial, court and legal aid resources, offsetting the additional input needed for mandatory preliminary hearings. Investment in productive work early in the lifespan of each case is, therefore, expected to result in savings in unproductive trial hearings later on.

185. After an initial 2 year bedding in period, therefore, most of the costs identified below are expected to be offset by compensating savings resulting from increased efficiency. Their effect is therefore non-recurrent, associated with the transition to new procedures and a new court culture. Once the system has bedded in, the more efficient High Court which will result will also be better placed to handle any further increase in the most serious cases (for example, additional prosecutions likely to arise from other Executive initiatives to tackle drug crime, such as any increase in cases as a result of the ongoing planned expansion of the Scottish Drug Enforcement Agency, and any changes in statutory sentences or prosecution policy which result in more cases being sent to the High Court).

186. After the initial 2 years it is expected that the changes will be cost neutral in terms of cost per case in relation to the legal aid fund, judicial salaries and the Scottish Courts Service's revenue budget. The Crown Office and Procurator Fiscal Service, however, will incur some recurrent costs as well as some non-recurrent costs in relation to implementing the proposals in the bill. Details are set out below.

187. There are also some cost implications in relation to the Bill provisions for remote monitoring of bail conditions restricting the movements of an accused. These are also set out below.

THE BASIS FOR COSTING CHANGES: NUMBER OF CASES TO BE HEARD IN THE HIGH COURT

188. The new procedures introduced by the Bill will apply in relation to all High Court cases. The Bill does allow for the court to rule that it is unnecessary to hold a preliminary hearing where both prosecution and defence can demonstrate they are ready to go immediately to trial, but the planning assumption is that a preliminary hearing will be held in every case.

189. The number of new indictments registered in the High Court of Justiciary has risen steadily over the last decade or so. Figures for the last 6 financial years are shown below.

Indictments registered in the High Court of Justiciary[1]

Financial Year	Indictments registered in the High Court
1997-98	1214
1998-99	1154
1999-2000	1362
2000-01	1343
2001-02	1489
2002-03	1513[2]

Since 1997-98, therefore, the number of indictments registered in the High Court has risen by around one quarter.

190. The projected implementation date is April 2005. The planning assumption is that of a continued increase of around 5% a year in the types of case which would currently be dealt with in the High Court.

191. In terms of cases which will actually be dealt with by the High Court, however, it is important to factor in the impact of the proposed implementation in spring 2004 of section 13(1) of the Crime and Punishment (Scotland) Act 1997. This will increase the sentencing power of a sheriff sitting with a jury to 5 years and on a historic analysis would enable around 20% of cases currently dealt with in the High Court to be dealt with in the sheriff court. This has been used as the planning assumption.

192. It is, however, recognised on the basis of the same historic analysis that the types of cases to be transferred to the sheriff court will be not only less serious, but also less complex and of the type more likely to result in a guilty plea. The most serious and complex cases will continue to be dealt with in the High Court. The impact of the change will therefore fall short of a 20% reduction in workload.

[1] Scottish Courts Service data.

[2] These figures are slightly different from those found in Lord Bonomy's Report because they relate to financial, not calendar years.

COSTS ON THE SCOTTISH EXECUTIVE

Introduction of preliminary hearings etc.: non-recurrent costs

193. The costs below are estimated to form a net addition to expenditure in 2005-06 and 2006-07. Thereafter the Executive's assessment is that they will be offset by compensating savings.

Legal aid fund

194. Our assessment suggests additional legal aid costs of around £1m per year, mainly in fees for counsel and solicitors for the new procedural steps. The compensating savings expected to arise will result from a reduction in the number of adjournments, more cases settled before trial and shorter trials.

195. These costings are based on detailed work undertaken by the Scottish Legal Aid Board.

Judicial salaries/judicial support costs and IT costs

196. Until judge time is freed up by a reduction in the number of unnecessary trial hearings, there will be a need to assign additional judge time to the new preliminary hearings. Judicial management of cases is a key element of the proposed reforms. This is expected to cost an additional £500,000 in each of the first 2 years of the scheme. This will be paid from the Justice Department budget. In addition, the Scottish Court Service will require an additional £150,000 in each of the first 2 years for judicial support costs and IT costs associated with the new preliminary hearing.

Introduction of preliminary hearings etc.: non-recurrent and recurrent costs

Crown Office and Procurator Fiscal Service (COPFS)

197. COPFS estimate that they will require an additional £508,000 per year from year one of the new system to support additional Advocates Depute (High Court prosecutors) and supporting Fiscals to ensure that the new procedures work as intended and that the Crown is fully prepared for the cases which do proceed to trial.

198. COPFS further estimates that after the initial 2 year period £250,000 of this cost will be offset by compensating reductions in prosecutor time through the reduction in unnecessary and adjourned trial hearings. The savings will not, however, completely offset the additional costs, and £258,000 per year will represent recurrent additional costs from 2005-06 onwards. This is because the Crown will have to do more preparation work in every case for the preliminary hearing; the benefits expected from a reduction in trial court time will compensate for the extra court time required for preliminary hearings, but will not offset in full the extra preparation time. This results in a small net increase in staff time costs for the Crown.

199. The Crown Office will also incur capital expenditure of £830k on additional software development to support more efficient and extensive disclosure of evidence and to improve handling of solemn business.

Bail conditions: remote monitoring of movements

200. It is anticipated that introducing provisions to remotely monitor compliance where a court, in granting bail, imposes a condition restricting an individual's movements will result in increased costs to the Scottish Executive for the services of the electronic monitoring provider. These provisions are targeted at those who would otherwise have been remanded in custody, so their implementation should result in a reduction in the average daily remand population. The intention is to pilot the new provisions. Costs will be met from the Justice Department general offender services budget for this period. There may also be a small increase in 100% funding for assessment purposes which will be met from within existing budgets.

Other cost implications

201. The proposed modernisation of the 110 day rule is likely to have a small impact on the number of remand places required by the Scottish Prison Service. There are considerable uncertainties about the impact of the changes, but the worst case assumption would be the occupation of a further 20 remand places. Any costs will be partially offset by reductions in the sentenced population (because sentences are usually backdated to the date when the convicted person was admitted to custody.) The cost consequences of this change will be covered by the existing operational budget of the Scottish Prison Service.

COSTS ON LOCAL AUTHORITIES

202. There may be small additional costs to local authorities for undertaking assessments, for the purposes of movement restrictions to be imposed in bail orders, of the place where the applicant is to remain and of the attitude of persons likely to be affected by the movement restrictions. This will be met by the Scottish Executive through the 100% funding arrangement, as above.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

203. There will be no cost implications for other bodies, individuals or businesses.

MARGINS OF UNCERTAINTY IN ESTIMATES

204. The planning assumptions used are set out above. The Executive have assumed that a preliminary hearing will be held in every case (although there will in practice be a few cases where they are not required) and hence that the Bill's provisions will apply equally to all High Court cases.

OVERLAP WITH OTHER DEVELOPMENTS

205. The costs for preliminary hearings may subsume some of the overall costs identified earlier for hearings under the Vulnerable Witnesses (Scotland) Bill in some cases. For the Crown in particular, however, the time taken to prepare an application for special measures and the time taken to argue in court will be unchanged, and will be additional to the work required in preparation for and attendance at the mandatory preliminary hearing introduced under this Bill. Any savings are expected to be very small.

TIMESCALES OVER WHICH COSTS ARE EXPECTED TO ARISE

206. Assuming that the Bill receives Royal Assent during the first year of the current Parliamentary session, it is anticipated that implementation will start from April 2005, taking account of the time needed to make necessary procedural changes by way of regulations/Act of Adjournal, to amend the legal aid regulations and to plan for a radical change in court programming. Also on the assumption that the Parliament passes the Vulnerable Witnesses (Scotland) Bill and that it receives Royal Assent on the same timescale, implementation of the two will be integrated so far as is practicable.

207. It is not proposed to phase implementation. The High Court of Justiciary is managed and run as a single court, albeit one which operates at different locations across Scotland. Court programming, for example, is done on an annual basis and covers all the High Court locations in a single exercise. Cases may be transferred from one court to another, and procedures therefore need to be consistent across the country. It is therefore proposed to bring in the full set of changes set out in the Bill across the country as a whole from a single date.

208. There will, of course, require to be transitional provisions under the order making power in the Bill to ensure clarity about which cases are to be handled under the new procedures and which cases underway before 2005 should be handled under the procedures in force before that date.

209. The Executive considers that existing resources are sufficient for it to meet such costs of the Bill as arise up to April 2006.

210. Costs arising from April 2006 will be taken account of in budget allocations following the next spending review.

ADDITIONAL COSTS DIRECTLY ATTRIBUTABLE TO THE PROVISIONS OF THE CRIMINAL PROCEDURE (AMENDMENT) (SCOTLAND) BILL

Nature of expenditure	**Amount**	**What will the money be spent on?**	**Which budget will fund?**
Expenditure whose impact will be non - recurrent[3]	£1m p.a.	Mainly fees for solicitors and counsel for new preliminary hearings	Legal aid fund
	£0.5m p.a.	Judicial salaries (extra judge time required for new preliminary hearings).	Justice Department budget
	£0.15m p.a.	Judicial support and IT costs associated with new preliminary hearing	Scottish Court Service
	£0.25m p.a.	Additional Crown preparation time involved in new procedures	Crown Office and Procurator Fiscal Service
Recurrent expenditure	£0.258m p.a.	Additional Crown preparation time not offset by savings[4]	Crown Office and Procurator Fiscal Service
Capital expenditure	£0.83m	Software development to support the new system	Crown Office and Procurator Fiscal Service

EXECUTIVE STATEMENT ON LEGISLATIVE COMPETENCE

211. On 7 October 2003, the Minister for Justice (Cathy Jamieson) made the following statement:

> "In my view, the provisions of the Criminal Procedure (Amendment) (Scotland) Bill would be within the legislative competence of the Scottish Parliament."

[3] After an initial 2 year transitional period the Executive estimate that savings resulting from additional efficiency will offset these additional costs. After that period, therefore, the impact of the changes should be cost neutral in terms of cost per case.

[4] See paragraph 198 above.

PRESIDING OFFICER'S STATEMENT ON LEGISLATIVE COMPETENCE

212. On 6 October 2003, the Presiding Officer (George Reid) made the following statement:

"In my view, the provisions of the Criminal Procedure (Amendment) (Scotland) Bill would be within the legislative competence of the Scottish Parliament."

These documents relate to the Criminal Procedure (Amendment) (Scotland)Bill (SP Bill 10) as introduced in the Scottish Parliament on 7 October 2003

CRIMINAL PROCEDURE (AMENDMENT) (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

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