

HIGH COURT OF JUSTICIARY PRACTICE NOTE

No. 1 of 2005

PRELIMINARY HEARINGS

Introduction

1. Certain amendments to the Criminal Procedure (Scotland) Act 1995(a) (“the 1995 Act”) were introduced by the Criminal Procedure (Amendment) (Scotland) Act 2004(b). As a result, the 1995 Act now provides for the holding, in almost all cases at first instance in the High Court of Justiciary, of a preliminary hearing(c). Appropriate amendments have also been made to the Act of Adjournal (Criminal Procedure Rules) 1996 (“CPR”)(d). These were introduced by the Act of Adjournal (Criminal Procedure Rules Amendment) (Criminal Procedure (Amendment) (Scotland) Act 2004) 2005(e).
2. These provisions introduce significant change to the way in which the business of the High Court is conducted.
3. In cases where the accused intends to plead guilty, but no intimation has been given under section 76 of the 1995 Act, the plea of guilty should be tendered at the preliminary hearing. In taking account, for the purposes of section 196 of the 1995 Act, of the stage in the proceedings at which the accused indicated his intention to plead guilty, the court will have regard to the fact that he did so at or before the preliminary hearing.
4. In cases where the accused pleads not guilty at the preliminary hearing, the court will ascertain the state of preparation of the parties, and determine whether a trial diet may be appointed. The court will not appoint a trial diet unless it is reasonably satisfied that the trial will proceed at that diet.
5. The purpose of this practice note is to give guidance as to—
 - (a) what practitioners must do in preparation for the preliminary hearing;
 - (b) how the preliminary hearing will be conducted; and
 - (c) the issues that the court will expect practitioners to be able to address at the preliminary hearing.
6. In order to meet the requirements of the relevant statutory provisions it will be necessary for practitioners to carry out detailed preparations before the preliminary hearing. If, without reasonable excuse, a practitioner fails—
 - (a) to be fully prepared for a preliminary hearing,
 - (b) to have full instructions for a preliminary hearing, or
 - (c) otherwise to be in a position to engage in discussion of the issues that may arise at the preliminary hearing,
that state of affairs will be regarded by the court as unacceptable. The court will investigate, and record the reasons for, any such failure.

Written record of state of preparation

7. Section 72E of the 1995 Act requires the prosecutor and the legal representative of the

(a) 1995 c.46.

(b) 2004 asp 5.

(c) 1995 Act, sections 72 to 72D. Preliminary hearings will take place from 1st April 2005, see S.S.I. 2004/405.

(d) S.I. 1996/513.

(e) S.S.I. 2005/44.

accused to prepare and lodge a written record of their state of preparation with regard to their cases. The written record must be a joint one, although it may contain separate statements of the prosecutor's and the accused's representative's state of preparation(a). The prosecutor and the accused's representative must communicate in sufficient time before the preliminary hearing with a view to preparing the joint written record. It is important that there be real and timeous communication(b). A form for the written record is prescribed(c). The form must be completed fully, unambiguously and in detail. It must be lodged with the Clerk of Justiciary by 2.00 p.m. not less than two days before the preliminary hearing(d). For preliminary hearings scheduled to take place in Glasgow, the form should be lodged with the Clerk of Justiciary in Glasgow. In all other cases, the form should be lodged with the Clerk of Justiciary in Edinburgh.

8. The court will expect that, in preparing for a preliminary hearing—
- (a) the prosecutor and the accused's representative will each inform the court fully, in the joint written record, about the state of preparation of their case;
 - (b) the prosecutor and the accused's representative will have timeously lodged before the date of the preliminary hearing, any statutory notices upon which they propose to rely(e);
 - (c) the accused's representative will, before communicating with the prosecutor for the purpose of preparing the joint written record, have obtained from the accused all necessary instructions;
 - (d) the prosecutor and the accused's representative will each have considered, in detail, the evidence which they may require to lead in the event of the case proceeding to trial;
 - (e) the prosecutor and the accused's representative will each have taken steps to ascertain whether any of the witnesses who he or she may require to lead in the event of a trial will require special measures by reason of their being a child or a vulnerable person, and will each have lodged all necessary notices and made all appropriate applications in that regard(f);
 - (f) consideration will have been given by the prosecutor and the accused's representative to whether any preliminary plea(g), or preliminary issue(h), or other matter that might with advantage be disposed of before the trial(i), should be raised; and that all appropriate notices in that regard will have been lodged timeously; and
 - (g) the prosecutor and the accused's representative will have sought to agree as much evidence as possible in accordance with their duties(j).
9. If any of the steps mentioned in paragraph 8 above, or any other preparatory step required in the circumstances of the particular case, has not been taken before the preliminary hearing, the court will expect to be fully informed of the reasons.
10. The court will expect the prosecutor and the accused's representative each to inform it, and each other, at the earliest opportunity of any difficulties encountered in preparation for the preliminary hearing which may compromise the effectiveness of that hearing.

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- (a) 1995 Act, section 72E(2)(a).
 - (b) To facilitate communication with the court and the prosecutor, the accused's solicitor will be expected to advise the court and the prosecutor of any changes to his or her contact details.
 - (c) CPR Form 9A.4.
 - (d) CPR 9A.4.
 - (e) For example, under: section 67(5) of the 1995 Act (witnesses); section 68(3) of the 1995 Act (productions); section 78(3) of the 1995 Act (special defences, incrimination and notice of witnesses etc.); section 72(3) of the 1995 Act (preliminary plea); section 72(6)(b)(i) of the 1995 Act (preliminary issue); section 258(2) of the 1995 Act (statement of uncontroversial evidence); section 259(5) of the 1995 Act (exceptions to hearsay rule) or any application under section 272 of the 1995 Act (evidence by letter of request or on commission); section 273 of the 1995 Act (television link evidence from abroad); section 275 of the 1995 Act (exceptions to restrictions under section 274); section 280 of the 1995 Act (certificate of or challenge to routine evidence).
 - (f) 1995 Act sections 271 to 271M. Until the provisions of the Vulnerable Witnesses (Scotland) Act 2004 are brought into force, the court will expect parties to have made any necessary application under section 271 of the 1995 Act.
 - (g) Under section 79(2)(a) of the 1995 Act.
 - (h) Under section 79(2)(b) of the 1995 Act.
 - (i) Such as is mentioned in section 72(6)(b)(iv) of the 1995 Act.
 - (j) Under section 257 of the 1995 Act.

Conduct of preliminary hearing

11. The Crown, in consultation with the court, will assign the date, time and place of preliminary hearings, and will cite the accused to attend. Diets will normally be assigned on the assumption that the preliminary hearing will last no longer than one hour. In cases where it is anticipated that the preliminary hearing will last longer, the procedure described in paragraph 30 below must be followed.
12. At most preliminary hearings the accused will require to be present. If for any reason the accused's representative is aware, before the date of the preliminary hearing, that the accused will be unable to attend or may fail to attend the preliminary hearing, the court must be advised accordingly.
13. The clerk of court will call the diet, make a tape recording of the proceedings, and (in consultation with the presiding judge) make a written record of the preliminary hearing^(a). That written record will be in the form of a detailed minute, a copy of which will be sent to the prosecutor and the accused's legal representative.
14. The court will call upon the accused to plead to the charges in the indictment^(b).
15. Before the accused is called upon to plead, the court will dispose of any preliminary pleas^(c) of which notice has been given^(d). The court will expect the prosecutor and the accused's representative to be prepared to make full submissions on any such plea. Lists of authorities will be required in accordance with paragraph 29 below.
16. The court will expect the prosecutor and the accused's representative to be in a position at the preliminary hearing to discuss all matters mentioned in the joint written record of the state of preparation, and to answer in detail any questions asked by the court relating to the contents of the joint written record.
17. If the accused pleads not guilty, and the state of preparation is such that the court is satisfied that the case is ready to go to trial, the court will appoint a diet for trial. If the case is not ready to go to trial, the court may appoint such further hearing as seems appropriate. The court may make such orders and give such directions as may be necessary for the purpose of managing the case effectively.

Where the accused pleads guilty

18. In taking account, for the purposes of section 196 of the 1995 Act, of the stage in proceedings at which the accused indicated his intention to plead guilty, the court will have regard to the fact that he did so at or before the preliminary hearing.
19. When a plea of guilty is to be tendered and accepted at the preliminary hearing in terms other than as libelled, the court will expect a written note of the terms of the plea to be provided to the clerk of court at least 15 minutes before the case is due to call.
20. When a plea of guilty is tendered, the court will expect the prosecutor and the accused's representative to draw to its attention any reason of which they may be aware for continuing the case before sentencing (for example, to allow the victim or relatives of the victim to attend, or to obtain reports).
21. The court will expect to be informed by the accused's representative of the date on which

^(a) 1995 Act, section 72D(6).

^(b) 1995 Act, section 72(4).

^(c) Within the meaning of section 79(2)(a) of the 1995 Act.

^(d) Under section 72(3) of the 1995 Act.

notice of the accused's intention to plead guilty was first indicated to the prosecutor, and to receive confirmation of that information from the prosecutor.

22. The court will ordinarily expect the prosecutor to be in a position at the preliminary hearing—
 - (a) to narrate the procedural history of the case,
 - (b) to give a narrative of the facts, and
 - (c) to give the court any other information relevant to sentencing (such as a victim statement).
23. If no continuation for the purpose of the preparation of reports is required, the court will also expect the accused's representative to be in a position to make a plea in mitigation at the preliminary hearing.
24. Where a continuation for the purpose of obtaining reports is required, the court will ordinarily—
 - (a) expect the accused's representative to be in a position to confirm at the preliminary hearing that the prosecutor's narrative of the facts is accepted, and to state any additional facts (relating to the charge or charges) on which the accused proposes to rely in mitigation, but
 - (b) allow the accused's representative to reserve the plea in mitigation until the continued diet at which the reports are available.

Where the accused pleads not guilty

25. Where the accused pleads not guilty, the court will ordinarily expect the prosecutor and the accused's representative to be prepared to make full submissions at the preliminary hearing in respect of each of the following matters—
 - (a) any preliminary issues(a)of which notice has been given(b);
 - (b) any child witness notice(c);
 - (c) any vulnerable witness application(d);
 - (d) any other matter, identified in the joint written record, which in the opinion of the court could be disposed of with advantage before the trial;
 - (e) any objection to the admissibility of evidence which has been identified in the joint written record;
 - (f) any application regarding restrictions on evidence relating to sexual offences(e);
 - (g) any application for an order prohibiting the accused from conducting his own defence(f).
26. The court will ascertain whether either the prosecutor or the accused's legal representative intends to raise any objection to the admissibility of evidence which has not been notified in accordance with the statutory requirements(g). If there are any such objections, the court will expect the person intending to raise the objection to be in a position to make full submissions on the question of whether leave should be granted to raise the objection and, if necessary, on the objection itself.
27. The court will expect the prosecutor and the accused's representative to draw to its attention

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- (a) Within the meaning of section 79(2)(b) of the 1995 Act.
 - (b) Under section 72(6)(b)(i) of the 1995 Act.
 - (c) Under section 271A(2) of the 1995 Act.
 - (d) Under section 271C(2) of the 1995 Act. Until the provisions of the Vulnerable Witnesses (Scotland) Act 2004 are brought into force, the court will expect parties to be in a position to make full submissions in relation to any application under section 271 of the 1995 Act.
 - (e) Under section 275 of the 1995 Act.
 - (f) Under section 288F of the 1995 Act.
 - (g) For requirements, see section 72(3) of the 1995 Act.

in the joint written record, and be in a position to discuss fully at the preliminary hearing, in addition to the matters mentioned in paragraphs 25 or 26 above, any other matters which, if not dealt with at the preliminary hearing, might result in waste of court time, inconvenience to witnesses or jurors, or delay in the progress of the case.

28. Where at the preliminary hearing it appears that any matter not identified in the joint written record is one which in the opinion of the court could be disposed of with advantage before the trial^(a), the court will consider whether it should be disposed of at the preliminary hearing or at a further diet^(b).
29. If any preliminary plea or any matter of the sort mentioned in paragraphs 25 to 28 above is to be the subject of submissions at the preliminary hearing (or at any subsequent hearing before the trial diet), the prosecutor and the accused's representative must, two days before the hearing in question, lodge with the clerk of court a list of any authorities on which they propose to rely in their submissions. The list of authorities should contain specific reference to the passages in the authorities on which reliance is to be placed. Copies should be provided for the use of the court of any authorities that may not be readily available to the court.
30. If, at any time before the preliminary hearing, the prosecutor or the accused's representative forms the opinion that the time allocated for the hearing in question (see paragraph 11 above) is insufficient to enable all of the matters which are to be discussed at the hearing to be dealt with, the Clerk of Justiciary should be so advised as soon as possible. If the Clerk of Justiciary agrees with that opinion, he will advise the prosecutor and the accused's representative and, if appropriate, the judge who is scheduled to conduct the preliminary hearing. In the event of the Clerk doing so, the court will expect the prosecutor and the accused's legal representative to give careful consideration as to whether an application should be made to alter the date of the hearing or whether the better course would be to allow the hearing to proceed on the allocated date.
31. If, at the preliminary hearing, the prosecutor or the accused's representative proposes that a further diet should take place before the trial diet is appointed, either for the purpose of dealing with extended submissions on any preliminary plea or on any of the matters mentioned in paragraph 25 above, or for any other reason, they should be in a position to inform the court of—
 - (a) the reasons for seeking such a diet;
 - (b) the form of diet that is sought; and
 - (c) the time which it is expected the further diet will require.
32. If, at the preliminary hearing, the prosecutor or the accused's representative submits that, for any reason other than the appointment of a further hearing in terms of paragraph 31 above, a trial diet should not be appointed, they should be in a position to explain and discuss—
 - (a) the reason or reasons for not appointing a trial diet;
 - (b) what steps have been taken or are to be taken to address any difficulty or difficulties standing in the way of appointing a trial diet;
 - (c) how much time it is anticipated will be necessary to resolve the difficulty or difficulties; and
 - (d) how they propose that the case should proceed.
33. Where the prosecutor or the accused's representative proposes to take objection to the admissibility of evidence on a ground in respect of which the court may require to hear

^(a) 1995 Act, section 72(6)(b)(iv).

^(b) Under section 72(9)(a) of the 1995 Act.

evidence, the court will ordinarily expect to be informed at the preliminary hearing of—

- (a) the nature and ground of the objection;
 - (b) the identities of the witness who would give evidence at a trial within a trial; and
 - (c) the time likely to be occupied by hearing such evidence and disposing of the objection, so that consideration may be given to the appointment of a hearing to dispose of the objection by the trial judge before the trial diet.
34. The court will expect the prosecutor and the accused’s representative to be in a position to answer in detail questions about whether—
- (a) a statement of uncontroversial evidence has been served**(a)**;
 - (b) a challenge to any such statement has been served**(b)**;
 - (c) any such challenge has been accepted;
 - (d) an application that such a challenge be disregarded has been or is to be made**(c)**;
 - (e) it is expected that any outstanding challenge will be resolved before trial;
 - (f) a joint minute of agreement has been entered into**(d)**;
 - (g) any further steps have been taken with a view to agreeing evidence**(e)**.
35. The court will expect the prosecutor and the accused’s representative to be in a position to state whether reliance may be placed on any such document as is mentioned in section 260(5) of the 1995 Act. Copies of any such document should be made available to the court and all other parties before the preliminary hearing, and in any event must be available during the trial.
36. The prosecutor and the accused’s representative must each be in a position to state at the preliminary hearing—
- (a) whether they have intimated a full list of the witnesses they intend to call to all other parties, and if not, why not, and when any further lists of witnesses will be intimated;
 - (b) which Crown and defence witnesses they require to be present at the trial diet; and
 - (c) whether there are any perceived difficulties regarding the attendance of witnesses, through other commitments or anticipated reluctance to attend or for any other reason.
37. In the event of difficulty being encountered, after the preliminary hearing, in citing, or otherwise securing the attendance of a Crown or defence witness, the fact that such difficulty has been encountered, and the nature of the difficulty, should be intimated as soon as practicable to the Clerk of Justiciary and the other party.
38. The prosecutor and the accused’s representative must each be in a position to state to the court whether, in respect of any witness whom they propose to have in attendance at the trial, there are any special requirements (such as a special form of oath, the need for an interpreter, or the need for facilities in respect of a disability).
39. Where any person required as a witness is unable, or likely to be unable, to attend a proposed trial diet because of illness or injury, the party wishing to have that person attend the trial as a witness shall produce at the preliminary hearing a medical certificate vouching the proposed witness’s inability to attend court to give evidence. Any such certificate—
- (a) shall be given on soul and conscience;
 - (b) shall, where necessary, explain what symptoms the witness suffers that prevent

(a) Under section 258(2) of the 1995 Act.
(b) Under section 258(3) of the 1995 Act.
(c) Under section 258(4A) of the 1995 Act.
(d) Under section 256(2) of the 1995 Act.
(e) See section 257 of the 1995 Act.

- attendance at court or the giving of evidence;
- (c) shall contain a prognosis estimating when the witness is likely to be fit to give evidence; and
 - (d) shall state whether the witness is fit to give evidence on commission and, if so, under what conditions.
40. In the event of it becoming apparent, after the preliminary hearing, that a proposed witness is likely to be unable to attend the trial diet because of illness or injury, a medical certificate vouching that fact shall be provided to the court as soon as practicable. Any such certificate shall comply with sub-paragraphs (a) to (d) of paragraph 39 above.
41. The prosecutor must be in a position to inform the court at the preliminary hearing of any applicable statutory time limit which affects the commencement of the trial, and the date on which such statutory time limit is due to expire. Where an application for extension of any statutory time limit is made at the preliminary hearing, the prosecutor and the accused's representative must each be in a position to provide the court with full information about the procedural history of the case, including that of any previous indictment against the accused which has been deserted.
42. The parties are responsible for ensuring that any arrangements necessary to enable evidence to be led are in place. In particular—
- (a) they must be in a position to inform the court at the preliminary hearing of any information technology which they propose to use to present evidence at the trial diet;
 - (b) they are responsible for checking with Justiciary Office before the date of the preliminary hearing that any equipment they propose to use at the trial is compatible with the courtroom facilities;
 - (c) they are responsible for ensuring that the necessary equipment is available in court at the trial diet; and
 - (d) they are responsible for ensuring that a competent operator will be in attendance at the trial diet.

Appointment of trial diet

43. At the preliminary hearing the court will not appoint a trial diet unless it is satisfied by the information made available to it at the preliminary hearing that the trial will be ready to proceed at that date.
44. Where the court is so satisfied, the trial diet will be appointed by the court in the course of the preliminary hearing.
45. The prosecutor and the accused's representative at the preliminary hearing should be in a position to advise the court at that hearing about the availability for any proposed trial diet of the persons who are to act as prosecutor and accused's representative at that diet.
46. The court will expect the prosecutor and the accused's representative to give at the preliminary hearing a considered estimate of how long the trial is likely to last. The estimate should be expressed as a number of days.
47. In order to be able to assist the court, at the preliminary hearing, in appointing a suitable trial diet of appropriate length, the prosecutor and the accused's representative should, before the preliminary hearing, discuss and attempt to agree an appropriate range of dates and venues for the trial diet. They should inform the clerk of court, before the preliminary hearing, of the outcome of these discussions.

48. The court will decide whether a fixed or floating trial diet should be allocated^(a).
49. The final decision as to the date and location of the trial diet will always remain the responsibility of the court.

Review of bail conditions

50. If the accused is on bail, the court has a duty^(b) to review the conditions of bail at the preliminary hearing. The accused's representative should be in a position to make submissions in support of any motion made in that connection, and to answer any questions asked by the court in that regard.

Review of Practice Note

51. This Practice Note will be kept under review, and its terms may be modified from time to time in the light of experience.

Cullen of Whitekirk

Lord Justice General
Edinburgh

28th January 2005

^(a) See sections 72A(1) and 83A of the 1995 Act.
^(b) Under section 72A(9) of the 1995 Act.