



# Criminal Procedure (Scotland) Act 1995

## 1995 CHAPTER 46

### PART XIII

#### MISCELLANEOUS

#### *[<sup>F1</sup>Trials for sexual offences*

#### Textual Amendments

- F1** S. 288C and cross-heading inserted (1.11.2002) by [Sexual Offences \(Procedure and Evidence\) \(Scotland\) Act 2002 \(asp 9\), s. 1](#); S.S.I. 2002/443, [art. 3](#) (with art. 4(1)(2))

#### **288C Prohibition of personal conduct of defence in cases of certain sexual offences**

[<sup>F2</sup>(1) An accused charged with a sexual offence to which this section applies is prohibited from conducting his case in person at, or for the purposes of, any relevant hearing in the course of proceedings (other than proceedings in a JP court) in respect of the offence.

(1A) In subsection (1), “relevant hearing” means a hearing at, or for the purposes of, which a witness is to give evidence.]

(2) This section applies to the following sexual offences—

- (a) rape [<sup>F3</sup>(whether at common law or under section 1(1) of the Sexual Offences (Scotland) Act 2009 (asp 9))];
- (b) sodomy;
- (c) clandestine injury to women;
- (d) abduction of a woman or girl with intent to rape;  
[ abduction with intent to commit the statutory offence of rape;]
- <sup>F4</sup>(da) (e) assault with intent to rape;  
[ assault with intent to commit the statutory offence of rape;]

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- <sup>F5</sup>(ea)
- (f) indecent assault;
  - (g) indecent behaviour (including any lewd, indecent or libidinous practice or behaviour);
  - (h) an offence under section [<sup>F6</sup>311 (non-consensual sexual acts) or 313 (persons providing care services: sexual offences) of the Mental Health (Care and Treatment)(Scotland) Act 2003];
  - (i) an offence under any of the following provisions of the Criminal Law (Consolidation)(Scotland) Act 1995 (c.39)—
    - (i) sections 1 to 3 (incest and related offences);
    - (ii) section 5 (unlawful sexual intercourse with girl under 13 or 16);
    - (iii) section 6 (indecent behaviour toward girl between 12 and 16);
    - (iv) section 7(2) and (3)(procuring by threats etc. );
    - (v) section 8 (abduction and unlawful detention);
    - (vi) section 10 (seduction, prostitution, etc. of girl under 16);
    - (vii) section 13(5)(b) or (c)(homosexual offences);
- [<sup>F7</sup>(j) an offence under any of the following provisions of the Sexual Offences (Scotland) Act 2009 (asp 9)—
- (i) section 2 (sexual assault by penetration),
  - (ii) section 3 (sexual assault),
  - (iii) section 4 (sexual coercion),
  - (iv) section 5 (coercing a person into being present during a sexual activity),
  - (v) section 6 (coercing a person into looking at a sexual image),
  - (vi) section 7(1) (communicating indecently),
  - (vii) section 7(2) (causing a person to see or hear an indecent communication),
  - (viii) section 8 (sexual exposure),
  - (ix) section 9 (voyeurism),
  - (x) section 18 (rape of a young child),
  - (xi) section 19 (sexual assault on a young child by penetration),
  - (xii) section 20 (sexual assault on a young child),
  - (xiii) section 21 (causing a young child to participate in a sexual activity),
  - (xiv) section 22 (causing a young child to be present during a sexual activity),
  - (xv) section 23 (causing a young child to look at a sexual image),
  - (xvi) section 24(1) (communicating indecently with a young child),
  - (xvii) section 24(2) (causing a young child to see or hear an indecent communication),
  - (xviii) section 25 (sexual exposure to a young child),
  - (xix) section 26 (voyeurism towards a young child),
  - (xx) section 28 (having intercourse with an older child),
  - (xxi) section 29 (engaging in penetrative sexual activity with or towards an older child),
  - (xxii) section 30 (engaging in sexual activity with or towards an older child),
  - (xxiii) section 31 (causing an older child to participate in a sexual activity),

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- (xxiv) section 32 (causing an older child to be present during a sexual activity),
  - (xxv) section 33 (causing an older child to look at a sexual image),
  - (xxvi) section 34(1) (communicating indecently with an older child),
  - (xxvii) section 34(2) (causing an older child to see or hear an indecent communication),
  - (xxviii) section 35 (sexual exposure to an older child),
  - (xxix) section 36 (voyeurism towards an older child),
  - (xxx) section 37(1) (engaging while an older child in sexual conduct with or towards another older child),
  - (xxx1) section 37(4) (engaging while an older child in consensual sexual conduct with another older child),
  - (xxxii) section 42 (sexual abuse of trust) but only if the condition set out in section 43(6) of that Act is fulfilled,
  - (xxxiii) section 46 (sexual abuse of trust of a mentally disordered person);]
- <sup>F8</sup>(k) [ attempting to commit any of the offences set out in paragraphs (a) to (j).]

- (3) This section applies also to an offence in respect of which a court having jurisdiction to try that offence has made an order under subsection (4) below.
- (4) Where, in the case of any offence, other than one set out in subsection (2) above, that court is satisfied that there appears to be such a substantial sexual element in the alleged commission of the offence that it ought to be treated, for the purposes of this section, in the same way as an offence set out in that subsection, the court shall, either on the application of the prosecutor or *ex proprio motu*, make an order under this subsection.
- (5) The making of such an order does not affect the validity of anything which—
  - (a) was done in relation to the alleged offence to which the order relates; and
  - (b) was done before the order was made.
- (6) The Scottish Ministers may by order made by statutory instrument vary the sexual offences to which this section applies by virtue of subsection (2) above by modifying that subsection.
- (7) No such statutory instrument shall be made, however, unless a draft of it has been laid before and approved by resolution of the Scottish Parliament.

<sup>F9</sup>(8) [ <sup>F10</sup> ..... ]

- [ In subsection (2)—
- <sup>F11</sup>(9) (a) the references to “rape” in paragraphs (d) and (e) are to the offence of rape at common law; and
  - (b) the references to “the statutory offence of rape” in paragraphs (da) and (ea) are (as the case may be) to?
    - (i) the offence of rape under section 1 of the Sexual Offences (Scotland) Act 2009, or
    - (ii) the offence of rape of a young child under section 18 of that Act.]]

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### Textual Amendments

- F2** S. 288C(1)(1A) substituted for s. 288C(1) (28.3.2011) by [Criminal Justice and Licensing \(Scotland\) Act 2010 \(asp 13\)](#), [ss. 69\(2\)\(a\)](#), 206(1); S.S.I. 2011/178, art. 2, sch.
- F3** Words in s. 288C(2)(a) inserted (1.12.2010) by [Sexual Offences \(Scotland\) Act 2009 \(asp 9\)](#), ss. 61, 62(2), [Sch. 5 para. 2\(7\)\(a\)](#); S.S.I. 2010/357, [art. 2\(a\)](#)
- F4** S. 288C(2)(da) inserted (1.12.2010) by [The Sexual Offences \(Scotland\) Act 2009 \(Supplemental and Consequential Provisions\) Order 2010 \(S.S.I. 2010/421\)](#), art. 2, [Sch. para. 1\(4\)\(a\)\(i\)](#)
- F5** S. 288C(2)(ea) inserted (1.12.2010) by [The Sexual Offences \(Scotland\) Act 2009 \(Supplemental and Consequential Provisions\) Order 2010 \(S.S.I. 2010/421\)](#), art. 2, [Sch. para. 1\(4\)\(a\)\(ii\)](#)
- F6** Words in s. 288C(2)(h) substituted (27.9.2005) by [The Mental Health \(Care and Treatment\) \(Scotland\) Act 2003 \(Modification of Enactments\) Order 2005 \(S.S.I. 2005/465\)](#), art. 2, [Sch. 1 para. 27\(5\)](#)
- F7** S. 288C(2)(j) substituted (1.12.2010) by [Sexual Offences \(Scotland\) Act 2009 \(asp 9\)](#), ss. 61, 62(2), [Sch. 5 para. 2\(7\)\(b\)](#); S.S.I. 2010/357, [art. 2\(a\)](#)
- F8** S. 288C(2)(k) inserted (1.12.2010) by [Sexual Offences \(Scotland\) Act 2009 \(asp 9\)](#), ss. 61, 62(2), [Sch. 5 para. 2\(7\)\(c\)](#); S.S.I. 2010/357, [art. 2\(a\)](#)
- F9** S. 288C(8) inserted (1.2.2005) by [Criminal Procedure \(Amendment\) \(Scotland\) Act 2004 \(asp 5\)](#), ss. 25, 27(1), [Sch. para. 55\(b\)](#); S.S.I. 2004/405, [art. 2\(1\)](#), Sch. 1 (with savings in arts. 3-5)
- F10** S. 288C(8) repealed (28.3.2011) by [Criminal Justice and Licensing \(Scotland\) Act 2010 \(asp 13\)](#), [ss. 69\(2\)\(b\)](#), 206(1); S.S.I. 2011/178, art. 2, sch.
- F11** S. 288C(9) inserted (1.12.2010) by [The Sexual Offences \(Scotland\) Act 2009 \(Supplemental and Consequential Provisions\) Order 2010 \(S.S.I. 2010/421\)](#), art. 2, [Sch. para. 1\(4\)\(b\)](#)

### [<sup>F12</sup>288D Appointment of solicitor by court in such cases

- (1) This section applies in the case of proceedings [<sup>F13</sup>(other than proceedings in a JP court)] in respect of a sexual offence to which section 288C above applies.
- (2) Where the court ascertains that—
- (a) the accused has not engaged a solicitor for the purposes of
    - [<sup>F14</sup>(i) the conduct of his case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A)) in the proceedings; or]
    - [<sup>F15</sup>(iii) the conduct of his case at any commissioner proceedings; or]
  - (b) having engaged a solicitor for those purposes, the accused has dismissed him; or
  - (c) the accused's solicitor has withdrawn,
- then, where the court is not satisfied that the accused intends to engage a solicitor or, as the case may be, another solicitor for those purposes, it shall, at its own hand, appoint a solicitor for those purposes.
- (3)
- A solicitor so appointed is not susceptible to dismissal by the accused or obliged to comply with any instruction by the accused to dismiss counsel.
- (4) Subject to subsection (3) above, it is the duty of a solicitor so appointed—
- (a) to ascertain and act upon the instructions of the accused; and
  - (b) where the accused gives no instructions or inadequate or perverse instructions, to act in the best interests of the accused.

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- (5) In all other respects, a solicitor so appointed has, and may be made subject to, the same obligations and has, and may be given, the same authority as if engaged by the accused; and any employment of and instructions given to counsel by the solicitor shall proceed and be treated accordingly.
- (6) Where the court is satisfied that a solicitor so appointed is no longer able to act upon the instructions, or in the best interests, of the accused, the court may relieve that solicitor of his appointment and appoint another solicitor for the purposes [F16 referred to in subsection (2)(a) above.]
- [ Where, in relation to commissioner proceedings, the commissioner is satisfied that F17(6A) a solicitor so appointed is no longer able to act upon the instructions, or in the best interests, of the accused, the commissioner is (for the purpose of the application of subsection (6) above) to refer the case to the court.]
- (7) The references in subsections (3) to ([F18(6A)]) above to “a solicitor so appointed” include references to a solicitor appointed under subsection (6) above.
- (8) In this section “counsel” includes a solicitor who has right of audience in the High Court of Justiciary under section 25A (rights of audience in various courts including the High Court of Justiciary) of the Solicitors (Scotland) Act 1980 (c.46).
- [ In this section, “commissioner proceedings” means proceedings before a F19(9) commissioner appointed under section 271I(1) or by virtue of section 272(1)(b) of this Act.]]

#### Textual Amendments

- F12** S. 288D inserted (S.) (1.11.2002) by [Sexual Offences \(Procedure and Evidence\) \(Scotland\) Act 2002](#) (asp 9), [s. 2\(1\)](#); S.S.I. 2002/443, [art. 3](#) (with art. 4(1)(2))
- F13** Words in s. 288D(1) inserted (28.3.2011) by [Criminal Justice and Licensing \(Scotland\) Act 2010](#) (asp 13), [ss. 69\(3\)\(a\)](#), 206(1); S.S.I. 2011/178, art. 2, sch.
- F14** S. 288D(2)(a)(i) substituted for s. 288D(2)(a)(i)(ii) (28.3.2011) by [Criminal Justice and Licensing \(Scotland\) Act 2010](#) (asp 13), [ss. 69\(3\)\(b\)](#), 206(1); S.S.I. 2011/178, art. 2, sch.
- F15** S. 288D(2)(a)(iii) inserted (23.4.2007) by [Criminal Proceedings etc. \(Reform\) \(Scotland\) Act 2007](#) (asp 6), [ss. 35\(6\)\(a\)](#), 84; S.S.I. 2007/250, [art. 3\(a\)](#)
- F16** Words in s. 288D(6) substituted (28.3.2011) by [Criminal Justice and Licensing \(Scotland\) Act 2010](#) (asp 13), [ss. 69\(3\)\(c\)](#), 206(1); S.S.I. 2011/178, art. 2, sch.
- F17** S. 288D(6A) inserted (23.4.2007) by [Criminal Proceedings etc. \(Reform\) \(Scotland\) Act 2007](#) (asp 6), [ss. 35\(6\)\(c\)](#), 84; S.S.I. 2007/250, [art. 3\(a\)](#)
- F18** Word in s. 288D(7) substituted (23.4.2007) by [Criminal Proceedings etc. \(Reform\) \(Scotland\) Act 2007](#) (asp 6), [ss. 35\(6\)\(d\)](#), 84; S.S.I. 2007/250, [art. 3\(a\)](#)
- F19** S. 288D(9) added (23.4.2007) by [Criminal Proceedings etc. \(Reform\) \(Scotland\) Act 2007](#) (asp 6), [ss. 35\(6\)\(e\)](#), 84; S.S.I. 2007/250, [art. 3\(a\)](#)

**Changes to legislation:**

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**Changes and effects yet to be applied to the whole Act associated Parts and Chapters:**

Whole provisions yet to be inserted into this Act (including any effects on those provisions):

- s. 5A inserted by 2010 asp 13 Sch. 7 para. 26
- s. 13(1B)(1C) inserted by 2006 asp 10 s. 82(2)
- s. 13(2)(aa) inserted by 2006 asp 10 s. 82(3)(b)
- s. 13(3A) inserted by 2006 asp 10 s. 82(4)
- s. 13(5)(ba) inserted by 2006 asp 10 s. 82(5)(a)
- s. 13(6)(a)(iii) and word inserted by 2006 asp 10 s. 82(6)(b)
- s. 13(8) inserted by 2006 asp 10 s. 82(7)
- s. 22(5A) inserted by 2007 asp 6 s. 7(2)(g)
- s. 22A(1A) inserted by 2023 asp 4 s. 1(2)
- s. 23B(1)(1A) substituted for s. 23B(1) by 2023 asp 4 s. 2(2)(a)
- s. 23B(6A) inserted by 2023 asp 4 s. 1(3)(c)
- s. 23B(8)-(10) inserted by 2023 asp 4 s. 2(2)(c)
- s. 23C(1A) inserted by 2023 asp 4 s. 2(3)(b)
- s. 23C(3) inserted by 2023 asp 4 s. 2(3)(c)
- s. 24(2C) inserted by 2023 asp 4 s. 4(4)
- s. 24(2AA) inserted by 2023 asp 4 s. 4(2)
- s. 73A inserted by 2004 asp 3 s. 2(3)
- s. 167(7D)(7E) inserted by 2007 asp 17 sch. 4 para. 1(3)
- s. 167(7D) words substituted by 2010 asp 13 Sch. 3 para. 16(2)
- s. 167(7E) words substituted by 2010 asp 13 Sch. 3 para. 16(3)
- s. 194ZA repealed by 2014 asp 18 sch. 3 para. 25
- s. 200A inserted by 2016 asp 1 s. 85
- s. 205A added by 1997 c. 48 s. 1(1) (This amendment not applied to legislation.gov.uk. 1997 c. 48, s. 1 repealed (27.6.2003) without ever being in force by 2003 asp 7, s. 19(3); S.S.I. 2003/288, art. 2, Sch.)
- s. 210ZA inserted by 2023 asp 4 s. 5
- s. 249(4A)-(4D) inserted by 2014 asp 1 s. 24
- s. 271D(4A) inserted by 2019 asp 8 s. 6(4)
- s. 271F(2)(aa) inserted by 2019 asp 8 s. 10(4)
- s. 271AA inserted by 2019 asp 8 s. 6(2)
- s. 271BZD inserted by 2019 asp 8 s. 3(2)
- s. 288AB288AC inserted by 2024 asp 1 s. 32(3)
- Sch. 5A added by 1997 c. 48 s. 1(2) (This amendment not applied to legislation.gov.uk. 1997 c. 48, s. 1 repealed (27.6.2003) without ever being in force by 2003 asp 7, s. 19(3); S.S.I. 2003/288, art. 2, Sch.)