

# **CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### **Part 3 - Criminal Procedure**

##### ***Section 74 – Prosecutor’s right of appeal***

337. The Crown is not able under the existing law to challenge a decision by a judge that brings a solemn criminal case to an end. The existing rights of appeal available to the Crown are highly restricted. The prosecution may be able to use a bill of advocation in relation to some aspects of the trial process, although this is normally confined to procedural errors in the preliminary stages of a case. The Crown may also appeal against sentence under section 108 of the Criminal Procedure (Scotland) Act 1995. This can be on a number of grounds, including that the disposal of the case was unduly lenient. The other option available to the Crown is not technically an appeal, but a reference made by the Lord Advocate under section 123 of the 1995 Act where the Crown wish the High Court to consider a particular point of law that arose in a criminal case. This has no effect on the disposal of the case that led to the reference.
338. Section 107A gives the Crown a right of appeal against certain decisions by a judge that bring a criminal case to an end without a decision by a jury. These are rulings of no case to answer under section 97 and decisions under section 97B(2)(a) (a decision that the evidence is insufficient in law to convict the accused - the statutory replacement for a common law submission). The section also creates a right of appeal in relation to certain directions for the indictment to be amended. Section 107B provides the Crown with a right of appeal against certain findings relating to the admissibility of prosecution evidence. None of these changes create rights of appeal in relation to a decision by a jury.
339. Section 107A(1)(a) creates a right of appeal in relation to a decision by a judge under section 97 that, at the close of the evidence for the prosecution, the evidence led is insufficient in law to justify the accused being convicted of the offence charged and any other offence that the accused could have been convicted of under the indictment. Paragraph (a) of subsection (1) also provides a right of appeal in relation to a decision taken under section 97B(2)(a), to acquit the accused of the indicted offence on the grounds that the evidence is insufficient in law to justify the conviction of the accused for that offence.
340. Paragraph (b) of subsection (1) creates a right of appeal in relation to a direction made under section 97B(2)(b). This is a direction for the indictment to be amended and is given where the judge is satisfied that the evidence is sufficient in law to justify the accused being convicted of a related offence. Paragraph (b) also provides a right of appeal against a decision under section 97C(2) directing an amendment to the indictment to reflect a decision that there is no evidence to support some part of the circumstances set out in the indictment.

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341. Subsections (2) to (6) make provision for time limits where a prosecutor wishes to exercise the Crown right of appeal set out in subsection (1).
342. Subsections (2) and (3) cover the position where a judge has made an acquittal or direction of a type specified in subsection (1). The subsections permit the prosecutor to respond to the acquittal or direction by seeking an adjournment of up to two days in order to consider whether to bring an appeal. Where the adjournment is sought in respect of an acquittal, this must be granted unless the court considers that there are no arguable grounds of appeal. Where the adjournment is sought in respect of a direction, this must be granted unless the court considers that it would not be in the interests of justice to do so.
343. Subsection (5) sets out the timing for a prosecutor to bring an appeal under section 107A. It requires the prosecutor to take immediate action if it is wished to appeal an acquittal or direction of a kind listed in subsection (1). The prosecutor will have to either immediately intimate an intention to appeal or seek an adjournment under subsection (1A) or (1B). Where an adjournment is sought, any subsequent intimation of appeal would have to be made immediately after the period of adjournment or immediately after the refusal of the request for an adjournment.
344. The intimation under subsection (5) is only of an intention to appeal. Section 76(1) of this Act amends section 110(1) of the 1995 Act to provide that there is usually an overall deadline of 7 days from the making of the decision being appealed for the lodging of the note of appeal.
345. Subsection (7) of section 107A requires the court, where the prosecution has intimated an intention to appeal (or where there is an adjournment under subsection (2) for the prosecution to consider making an appeal) to suspend the effect of the acquittal. This will allow the court to grant bail without there appearing to be two contradictory orders in operation.
346. Section 4(2) of the Contempt of Court Act 1981 allows a court, where it appears to be necessary in order to avoid a substantial risk of prejudice to the administration of justice in the proceedings or in any other proceedings which are pending or imminent, to order that the publication of any report of the proceedings be postponed for such period as the court thinks necessary. Subsection (7)(a) of section 107A allows the court, where the prosecution has intimated an intention to appeal (or where there is an adjournment under subsection (2) for the prosecution to consider making an appeal) to make an order under section 4(2) of the Contempt of Court Act 1981. This will avoid the risk of prejudice to any further proceedings.
347. Subsection (7)(b) permits the court to order the detention of an acquitted person in custody or admit him to bail pending the hearing of the prosecution appeal. Subsection (8) ensures that detention can only occur where there are arguable grounds of appeal.
348. Most rulings on the admissibility of evidence are made at preliminary diets or preliminary hearings. However, some evidential questions may still arise during the course of a trial, for example where an unexpected development occurs in the course of oral evidence. If a challenge to admissibility of evidence is successful and the accused is acquitted, it could be maintained that a ruling on admissibility had been fatal to the entire prosecution.
349. Section 107B gives the prosecutor a right of appeal against findings made during the course of the trial that evidence which the prosecution seeks to lead is inadmissible. Subsection (2) establishes that the leave of the trial court is required in all appeal cases involving a finding that evidence is inadmissible. Subsection (3) requires any motion for leave to appeal to be made before the close of the Crown case. Subsection (4) sets out the factors to be taken into account by the court in determining whether or not to grant leave to appeal.

350. Subsection (1) of section 107C allows the High Court, in considering an appeal under section 107A or 107B, to review not only the decision appealed against but any earlier decisions which may have a bearing on the decision appealed against. So, for example, where an acquittal under section 97 is appealed, the High Court will be able to review not only the trial judge's decision that the evidence led by the prosecution was insufficient in law to justify the conviction of the accused, but also an earlier finding by that judge that an element of prosecution evidence was inadmissible. Subsection (2) provides that the test to be applied by the High Court in considering an appeal under section 107A or 107B is whether the trial judge's decision was wrong in law.
351. If a Crown appeal (under either section 107A or 107B) is successful, then the Crown may seek to continue the prosecution. It is likely that in the majority of cases the continuation of the existing trial would not be a realistic possibility because of the delay that would necessarily be incurred during the appeal process. Proceeding with the case in those circumstances would therefore require the Crown to raise a fresh prosecution. However, in some instances it may be considered practicable for the appeal to be heard and determined during an adjournment of the trial, allowing the trial to continue if the appeal is upheld. Such an appeal is defined as an "expedited appeal" in subsection (3) of section 107D.
352. Section 107D makes provision for expedited appeals to be heard and determined during an adjournment of the trial. Subsection (1) and (2) provide for the court to take steps to determine whether it would be practicable to continue the existing trial following the appeal. After hearing the views of both the Crown and the accused, the Court will decide whether the appeal should be heard during an adjournment of the trial.
353. Subsection (6) means that where an appeal against an acquittal under section 97 or 97B(2)(a) is successful; the High Court will quash the acquittal and direct that the trial is to continue in respect of the offence.
354. Section 107E makes provision for appeals against an acquittal that are not subject to the expedited appeal procedure provided for by section 107D. It applies to acquittals arising under section 97 or section 97B(2)(a) or as a consequence of a ruling that evidence that the prosecution sought to lead was inadmissible under section 107B(1). This section will apply where it would not be practicable to continue the existing trial whilst the appeal against conviction is being considered. Subsection (1) limits section 107E to appeals against an acquittal. Non expedited appeals that are *not* against an acquittal are dealt with under section 107F.
355. The effect of subsections (1)(c) and (2) are that where the High Court (sitting as a court of appeal) determines that the acquittal was wrong in law, it shall quash the acquittal. Subsection (3) provides for the High Court to grant authority for a new prosecution in accordance with section 119 of the Criminal Procedure (Scotland) Act 1995 for the same or any similar offence arising from the same facts. The High Court will not grant authority to bring a new prosecution where it considers that doing so would be contrary to the interests of justice.
356. Subsection (4) provides that if no motion is made for authority to bring a new prosecution, or if the High Court refuses such a motion, the High Court shall itself acquit the accused of the offence in question.
357. Section 107F makes provision for appeals made under section 107A or 107B that are not appeals against an acquittal and that are not subject to the expedited appeal procedure provided for by section 107D. This section will apply where it would not be practicable to continue the existing trial whilst the appeal against conviction was being considered. As non expedited appeals against an acquittal are dealt with under section 107E, the practical effect of subsection (1) is to limit section 107F to non-expedited appeals against:

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- a direction to amend the indictment to cover a related offence (where the judge is satisfied that the evidence is insufficient in law to justify the accused's being convicted of the indicted offence) (section 97B(2)(b));
- a direction to amend the indictment (where the judge has ruled that there is no evidence to support some part of the circumstances set out in the indictment) (section 97C(2));
- a finding that prosecution evidence is inadmissible.

358. Because the appeal in question is not being expedited, the trial is unable to continue in relation to any offence to which the appeal relates. Subsection (2) of section 107F therefore provides for the court to desert the diet in relation to that charge (or those charges) *pro loco et tempore* and, under subsection (3), the trial shall proceed only in relation to any other charges remaining on the indictment. The ordinary consequence of desertion *pro loco et tempore* is that the Crown is free to bring a fresh indictment (see Renton & Brown, *Criminal Procedure* (6<sup>th</sup> edn, R 22: Apr 2005) paragraph 18-21). Subsection (4) ensures that a trial will not continue in circumstances where a Crown appeal has been brought in relation to one aspect of the case and it is thought that no purpose would be served in continuing with the rest of the case. This might arise where an appeal is made in relation to a judicial decision affecting some but not all of the charges on the indictment.

359. Subsection (5) provides for the High Court to grant authority for a new prosecution in accordance with section 119 of the Criminal Procedure (Scotland) Act 1995 for the same or any similar offence arising from the same facts. The High Court (sitting as a court of appeal) will not grant authority to bring a new prosecution where it considers that doing so would be contrary to the interests of justice.