

# CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### Part 3 - Criminal Procedure

##### *Section 73 – Submissions as to sufficiency of evidence*

328. This section inserts sections 97A, 97B 97C and 97D into the Criminal Procedure (Scotland) Act 1995. New section 97A effectively creates a statutory replacement for what is termed a "common law submission". Under the common law a submission to the court may be made by the defence at the end of all evidence in a case. If successful, it typically results in a direction, in the course of the judge's charge to the jury, that the jury should not convict on a particular charge, or should consider only a reduced charge. This direction may be focused on the basis that the evidence in the case is insufficient in law to justify a conviction. It is made in the context of the judge's role in determining questions of law, which comes before the ultimate assessment of questions of fact by the jury.
329. At present, an accused may make a submission as of right only after the Crown speech to the jury, although the Crown commonly consents to a submission being made at the close of the evidence. Where a submission is made after the Crown speech, the Crown does not have a right of reply, on the basis that at that stage the prosecutor is *functus officio* (prevented from taking the matter further as a result of having fulfilled his or her official duties).
330. Subsection (1) of section 97A gives the accused the right to make certain submissions immediately after the close of the evidence or after the prosecutor has addressed the jury. Subsection (2)(a) permits such a submission to contend that the evidence is insufficient in law to justify the accused's being convicted of the offence (or of any other offence of which the accused could be convicted under the indictment). The meaning of "insufficient in law" is the same as in section 97 of the 1995 Act and is a test of technical sufficiency rather than a test as to the quality of the evidence (section 97 permits an accused to submit that there is "no case to answer" at the end of the prosecution evidence, whereas section 97A focused on the situation at the end of all evidence in the case, including that for the defence. Accordingly, a submission under subsection 2(a) will most commonly succeed where there is an absence of corroboration or in the rare circumstance (such as arose in *HMA v Purcell* 2008 SLT 44) where the indictment is irrelevant and the judge could not permit the jury to convict regardless of the evidence. Subsection (2)(b) permits a submission to be made that there is no evidence to support some part of the circumstances set forth in the indictment; for example, to support the allegation of the use of a weapon in a charge of assault.
331. Section 97B applies where the accused makes a submission under section 97A(2)(a) that the evidence is insufficient in law to justify the accused's being convicted of the

indicted offence or of any other offence of which the accused could be convicted under the indictment.

- 332. Subsection (2) makes provision for where the judge is satisfied that the evidence is insufficient in law to justify a conviction for the indicted offence. It ensures that the trial will proceed only where the judge is satisfied that the evidence is sufficient in law to justify the accused's being convicted of a related offence or where another offence is libelled in the indictment which has not itself been subject to a submission under section 97A(2). When the judge is satisfied that the accused may be convicted of a related offence, the judge must direct that the indictment be amended to reflect this.
- 333. Subsection (3) provides for the continuation of the trial where the judge rejects a submission under section 97A(2)(a).
- 334. Subsection (5) ensures that the judge or the clerk of court will check and confirm that an amendment to the indictment under subsection (2)(b) has been properly made.
- 335. Section 97C makes similar provision to 97B, but instead of dealing with an outright acquittal of an indicted offence due to lack of evidence it covers the situation where the indictment is to be amended to reflect a lack of evidence on part, but not all, of the charge.
- 336. Section 97D makes explicit provision to ensure that it will not be competent for the defence to make a common law submission to the effect that no reasonable jury, properly directed on the evidence led in the case, could convict on a particular charge.