



# Criminal Justice and Licensing (Scotland) Act 2010

2010 asp 13

## PART 3

### CRIMINAL PROCEDURE

#### *Children*

#### **52 Prosecution of children**

- (1) The 1995 Act is amended as follows.
- (2) After section 41 insert—

#### **“41A Prosecution of children under 12**

- (1) A child under the age of 12 years may not be prosecuted for an offence.
- (2) A person aged 12 years or more may not be prosecuted for an offence which was committed at a time when the person was under the age of 12 years.”.
- (3) In section 42 (prosecution of children), in subsection (1)—
  - (a) for “No child under the age of 16 years shall” substitute “A child aged 12 years or more but under 16 years may not”,
  - (b) for “his instance” substitute “the instance of the Lord Advocate”, and
  - (c) for “a child under the age of 16 years” substitute “such a child”.
- (4) In section 234AA (antisocial behaviour order), in subsection (2), paragraph (b) is repealed.

*Offences: liability of partners***53 Offences: liability of partners**

- (1) A partner of a partnership (other than a limited liability partnership) is guilty of a corporate offence where—
  - (a) the partnership is guilty of the corporate offence, and
  - (b) it is proved that the corporate offence committed by the partnership—
    - (i) was committed with the consent or connivance of the partner (whether alone or among others), or
    - (ii) was attributable to the neglect of the partner (whether alone or among others).
- (2) In subsection (1), a “corporate offence” is an offence in relation to which an enactment has the effect that where—
  - (a) a body corporate is guilty of the offence, and
  - (b) it is proved that the offence—
    - (i) was committed with the consent or connivance of a director (whether alone or among others), or
    - (ii) was attributable to the neglect of a director (whether alone or among others),the director (as well as the body corporate) is guilty of the offence.
- (3) In subsection (1), the references to a partner of a partnership include references to a person purporting to act as a partner of the partnership.
- (4) Subsection (1) does not apply in relation to a corporate offence if an enactment (other than subsection (1)) makes provision in relation to the offence having the same effect as that subsection.

*Witness statements***54 Witness statements**

- (1) This section applies where—
  - (a) in the course of a criminal investigation, a witness makes a statement in relation to the matter to which the investigation relates,
  - (b) the statement is contained in a document, and
  - (c) the witness is likely to be cited to give evidence in criminal proceedings arising from the matter.
- (2) Before the witness gives evidence in the criminal proceedings, the prosecutor may—
  - (a) give the witness a copy of the statement, or
  - (b) make the statement available for inspection by the witness at a reasonable time and in a reasonable place.
- (3) Section 262 of the 1995 Act (interpretation of certain expressions for purposes of sections 259 to 261A of that Act) applies for the purposes of this section as it applies for the purposes of section 261A of that Act except that for the purposes of this section “statement” does not include a victim statement.

*Police liberation***55 Breach of undertaking**

After section 22 of the 1995 Act insert—

**“22ZA Offences where undertaking breached**

- (1) A person who without reasonable excuse breaches an undertaking given by the person under section 22—
  - (a) by reason of failing to appear at court as required under subsection (1C) (a) of section 22, or
  - (b) by reason of failing to comply with a condition imposed under subsection (1D) of that section,is guilty of an offence.
- (2) A person who is guilty of an offence under subsection (1) is liable on summary conviction to—
  - (a) a fine not exceeding level 3 on the standard scale, and
  - (b) imprisonment for a period—
    - (i) where conviction is in the JP court, not exceeding 60 days,
    - (ii) where conviction is in the sheriff court, not exceeding 12 months.
- (3) Despite subsection (1)(b), where (and to the extent that) the person breaches the undertaking by reason of committing an offence while subject to the undertaking—
  - (a) the person is not guilty of an offence under that subsection, and
  - (b) subsection (4) applies instead.
- (4) The court, in determining the sentence for the subsequent offence, must have regard to—
  - (a) the fact that the subsequent offence was committed in breach of the undertaking,
  - (b) the number of undertakings to which the person was subject when that offence was committed,
  - (c) any previous conviction of the person of an offence under subsection (1)(b),
  - (d) the extent to which the sentence or disposal in respect of any previous conviction differed, by virtue of this subsection, from that which the court would have imposed but for this subsection.
- (5) The reference in subsection (4)(c) to any previous conviction of an offence under subsection (1)(b) includes any previous conviction by a court in England and Wales, Northern Ireland or a member State of the European Union other than the United Kingdom of an offence that is equivalent to an offence under subsection (1)(b).
- (6) The references in subsection (4)(d) to subsection (4) are to be read, in relation to a previous conviction by a court referred to in subsection (5), as references to any provision that is equivalent to subsection (4).

- (7) Any issue of equivalence arising in pursuance of subsection (5) or (6) is for the court to determine.
- (8) Subsections (3)(b) and (4) apply only if the fact that the subsequent offence was committed while the person was subject to an undertaking is specified in the complaint or indictment.
- (9) In this section and section 22ZB, “the subsequent offence” is the offence committed by a person while the person is subject to an undertaking.

### **22ZB Evidential and procedural provision**

- (1) In any proceedings in relation to an offence under section 22ZA(1), the fact that a person—
  - (a) breached an undertaking given by the person under section 22 by reason of failing to appear at court as required under subsection (1C) (a) of that section, or
  - (b) was subject to any particular condition imposed under subsection (1D) of that section,
 is, unless challenged by preliminary objection before the person’s plea is recorded, to be held as admitted.
- (2) In any proceedings in relation to an offence under section 22ZA(1) or (as the case may be) the subsequent offence—
  - (a) something in writing, purporting to be an undertaking given by a person under section 22 (and bearing to be signed and certified), is sufficient evidence of the terms of the undertaking so given,
  - (b) a document purporting to be a notice (or copy of a notice) effected under subsection (1F) of that section is sufficient evidence of the terms of the notice,
  - (c) an undertaking whose terms are modified under paragraph (b) of that subsection is to be regarded as if given in the terms as so modified.
- (3) The fact that the subsequent offence was committed while the person was subject to an undertaking is to be held as admitted, unless challenged—
  - (a) in summary proceedings, by preliminary objection before the person’s plea is recorded, or
  - (b) in the case of proceedings on indictment, by giving notice of a preliminary objection in accordance with section 71(2) or 72(6)(b)(i) of this Act.
- (4) Where the maximum penalty in respect of the subsequent offence is specified by (or by virtue of) any enactment, that maximum penalty is, for the purposes of the court’s determination of the appropriate sentence or disposal in respect of that offence, increased—
  - (a) where it is a fine, by the amount equivalent to level 3 on the standard scale, and
  - (b) where it is a period of imprisonment—
    - (i) as respects conviction in the JP court, by 60 days,
    - (ii) as respects conviction in the sheriff court or the High Court, by 6 months,

even if the maximum penalty as so increased exceeds the penalty which it would otherwise be competent for the court to impose.

- (5) A penalty under section 22ZA(2) may be imposed in addition to any other penalty which it is competent for the court to impose even if the total of penalties imposed may exceed the maximum penalty which it is competent to impose in respect of the original offence.
- (6) The reference in subsection (5) to a penalty being imposed in addition to another penalty means, in the case of sentences of imprisonment or detention—
  - (a) where the sentences are imposed at the same time (whether or not in relation to the same complaint), framing the sentences so that they have effect consecutively,
  - (b) where the sentences are imposed at different times, framing the sentence imposed later so that (if the earlier sentence has not been served) the later sentence has effect consecutive to the earlier sentence.
- (7) Subsection (6)(b) is subject to section 204A of this Act.
- (8) The court must state—
  - (a) where the sentence or disposal in respect of the subsequent offence is different from that which the court would have imposed but for section 22ZA(4), the extent of and the reasons for that difference, or
  - (b) otherwise, the reasons for there being no such difference.
- (9) A court which finds a person guilty of an offence under section 22ZA(1) may remit that person for sentence in respect of that offence to any court which is considering the original offence.
- (10) At any time before the trial of an accused in summary proceedings for the original offence, it is competent to amend the complaint to include an additional charge of an offence under section 22ZA(1).
- (11) In this section, “the original offence” is the offence in relation to which an undertaking is given.”.

### *Grant of warrants*

## **56 Grant of warrants for execution by constables and police members of SCDEA**

- (1) A sheriff or justice of the peace does not lack power or jurisdiction to grant a warrant for execution by a person mentioned in subsection (2) solely because the person is not a constable of a police force for a police area lying wholly or partly in the sheriff’s or justice’s sheriffdom.
- (2) The persons referred to in subsection (1) are—
  - (a) a constable,
  - (b) police member of the Scottish Crime and Drug Enforcement Agency.

*Bail***57 Bail review applications**

- (1) The 1995 Act is amended as follows.
- (2) In section 30 (bail review)—
  - (a) for subsection (2A) substitute—
 

“(2A) On receipt of an application under subsection (2), the court must—

    - (a) intimate the application to the prosecutor, and
    - (b) before determining the application, give the prosecutor an opportunity to be heard.

(2AA) Despite subsection (2A)(b), the court may grant the application without having heard the prosecutor if the prosecutor consents.”, and
  - (b) in subsection (2C), in paragraph (b), for “heard” substitute “determined”.
- (3) In section 31 (bail review on prosecutor’s application)—
  - (a) after subsection (2), insert—
 

“(2ZA) Despite subsection (2)(b), the court may grant the application without fixing a hearing if the person granted bail consents.”, and
  - (b) in subsection (3), the word “hearing” is repealed.

**58 Bail condition for identification procedures etc.**

- In section 24 of the 1995 Act (bail and bail conditions)—
- (a) in paragraph (b) of subsection (4), sub-paragraph (ii) and the word “and” immediately preceding it are repealed, and
  - (b) in subsection (5), after paragraph (ca) insert—
 

“(cb) whenever reasonably instructed by a constable to do so—

    - (i) participates in an identification parade or other identification procedure; and
    - (ii) allows any print, impression or sample to be taken from the accused;”.

**59 Bail conditions: remote monitoring requirements**

Sections 24A to 24E of the 1995 Act (bail conditions: remote monitoring) are repealed.

*Prosecution on indictment***60 Prosecution on indictment: Scottish Law Officers**

- (1) The 1995 Act is amended as follows.
- (2) In section 64 (prosecution on indictment), in subsection (1), for “in name” substitute “at the instance”.
- (3) The title of section 287 becomes “Demission from office of Lord Advocate and Solicitor General for Scotland”.

## (4) In that section—

- (a) in subsection (1)—
  - (i) for “by a Lord Advocate” substitute “at the instance of Her Majesty’s Advocate”,
  - (ii) for “his” where it first occurs substitute “the holder of the office of Lord Advocate”, and
  - (iii) after “successor” insert “or the Solicitor General”,
- (b) in subsection (2)—
  - (i) for “in name of” substitute “at the instance of Her Majesty’s Advocate or”, and
  - (ii) the words “then in office” are repealed,
- (c) after subsection (2), insert—
  - “(2A) Any such indictments in proceedings at the instance of the Solicitor General may be signed by the Solicitor General.
  - (2B) All indictments which have been raised at the instance of the Solicitor General shall remain effective notwithstanding the holder of the office of Solicitor General subsequently having died or demitted office and may be taken up and proceeded with by his successor or the Lord Advocate.
  - (2C) Subsection (2D) applies during any period when the offices of Lord Advocate and Solicitor General are both vacant.
  - (2D) It is lawful to indict accused persons at the instance of Her Majesty’s Advocate.”, and
- (d) in subsection (4)—
  - (i) after “Advocate” insert “or Solicitor General”,
  - (ii) in paragraph (a), after “subsection (1)” insert “or (2B)”,
  - (iii) in paragraph (b), for “in the name” substitute “raised at the instance”, and
  - (iv) after that paragraph, insert—
    - “(c) by virtue of subsection (2D) above, is raised at the instance of Her Majesty’s Advocate”.

(5) In Schedule 2, the words “A.F.R. (*name of Lord Advocate*),” are repealed.*Transfer of justice of the peace court cases***61 Transfer of justice of the peace court cases**

After section 137C of the 1995 Act insert—

**“137CA Transfer of JP court proceedings within sheriffdom**

- (1) Subsection (2) applies—
  - (a) where the accused person has been cited in summary proceedings to attend a diet of a JP court, or

- (b) if the accused person has not been cited to such a diet, where summary proceedings against the accused have been commenced in a JP court.
- (2) The prosecutor may apply to a justice for an order for the transfer of the proceedings to another JP court in the sheriffdom (and for adjournment to a diet of that court).
- (3) On an application under subsection (2), the justice may make the order sought.
- (4) In this section and sections 137CB and 137CC, “justice” does not include the sheriff.

### **137CB Transfer of JP court proceedings outwith sheriffdom**

- (1) Subsection (2) applies where the clerk of a JP court informs the prosecutor that, because of exceptional circumstances which could not reasonably have been foreseen, it is not practicable for the JP court or any other JP court in the sheriffdom to proceed with some or all of the summary cases due to call at a diet.
- (2) The prosecutor shall as soon as practicable apply to the sheriff principal for an order for the transfer of the proceedings to a JP court in another sheriffdom (and for adjournment to a diet of that court).
- (3) Subsection (4) applies where—
  - (a) either—
    - (i) the accused person has been cited in summary proceedings to attend a diet of a JP court, or
    - (ii) if the accused person has not been cited to such a diet, summary proceedings against the accused have been commenced in a JP court, and
  - (b) there are also summary proceedings against the accused person in a JP court in another sheriffdom.
- (4) The prosecutor may apply to a justice for an order for the transfer of the proceedings to a JP court in the other sheriffdom (and for adjournment to a diet of that court).
- (5) Subsection (6) applies where—
  - (a) the prosecutor intends to take summary proceedings against an accused person in a JP court, and
  - (b) there are also summary proceedings against the accused person in a JP court in another sheriffdom.
- (6) The prosecutor may apply to a justice for an order for authority for the proceedings to be taken at a JP court in the other sheriffdom.
- (7) On an application under subsection (2), the sheriff principal may make the order sought with the consent of the sheriff principal of the other sheriffdom.
- (8) On an application under subsection (4) or (6), the justice is to make the order sought if—
  - (a) the justice considers that it would be expedient for the different cases involved to be dealt with by the same court, and



- (b) a justice of the other sheriffdom consents.
- (9) On the application of the prosecutor, the sheriff principal who has made an order under subsection (7) may, with the consent of the sheriff principal of the other sheriffdom—
  - (a) revoke the order, or
  - (b) vary it so as to restrict its effect.
- (10) On the application of the prosecutor, the justice who has made an order under subsection (8) (or another justice of the same sheriffdom) may, with the consent of a justice of the other sheriffdom—
  - (a) revoke the order, or
  - (b) vary it so as to restrict its effect.

### **137CC Custody cases: initiating JP court proceedings outwith sheriffdom**

- (1) Subsection (2) applies where the prosecutor believes—
  - (a) that, because of exceptional circumstances (and without an order under subsection (3)), it is likely that there would be an unusually high number of accused persons appearing from custody for the first calling of cases in summary prosecutions in the JP courts in the sheriffdom, and
  - (b) that it would not be practicable for those courts to deal with all the cases involved.
- (2) The prosecutor may apply to the sheriff principal for an order authorising summary proceedings against some or all of the accused persons to be—
  - (a) taken at a JP court in another sheriffdom, and
  - (b) maintained—
    - (i) at that JP court, or
    - (ii) at any of the JP courts referred to in subsection (1) as may at the first calling of the case be appointed for further proceedings.
- (3) On an application under subsection (2), the sheriff principal may make the order sought with the consent of the sheriff principal of the other sheriffdom.
- (4) An order under subsection (3) may be made by reference to a particular period or particular circumstances.”.

### *Additions to complaint*

## **62 Additional charge where bail etc. breached**

- (1) In section 27 of the 1995 Act (breach of bail conditions: offences), after subsection (8) insert—
  - “(8A) At any time before the trial of an accused in summary proceedings for the original offence, it is competent to amend the complaint to include an additional charge of an offence under this section.”.

- (2) In section 150 of that Act (failure of accused to appear), for subsection (10) substitute—

“(10) At any time before the trial in the prosecution in which the failure to appear occurred, it is competent to amend the complaint to include an additional charge of an offence under subsection (8).”.

*Dockets and charges in sex cases*

**63 Dockets and charges in sex cases**

After section 288B of the 1995 Act insert—

*“Dockets and charges in sex cases*

**288BA Dockets for charges of sexual offences**

- (1) An indictment or a complaint may include a docket which specifies any act or omission that is connected with a sexual offence charged in the indictment or complaint.
- (2) Here, an act or omission is connected with such an offence charged if it—
  - (a) is specifiable by way of reference to a sexual offence, and
  - (b) relates to—
    - (i) the same event as the offence charged, or
    - (ii) a series of events of which that offence is also part.
- (3) The docket is to be in the form of a note apart from the offence charged.
- (4) It does not matter whether the act or omission, if it were instead charged as an offence, could not competently be dealt with by the court (including as particularly constituted) in which the indictment or complaint is proceeding.
- (5) Where under subsection (1) a docket is included in an indictment or a complaint, it is to be presumed that—
  - (a) the accused person has been given fair notice of the prosecutor’s intention to lead evidence of the act or omission specified in the docket, and
  - (b) evidence of the act or omission is admissible as relevant.
- (6) The references in this section to a sexual offence are to—
  - (a) an offence under the Sexual Offences (Scotland) Act 2009,
  - (b) any other offence involving a significant sexual element.

**288BB Mixed charges for sexual offences**

- (1) An indictment or a complaint may include a charge that is framed as mentioned in subsection (2) or (3) (or both).
- (2) That is, framed so as to comprise (in a combined form) the specification of more than one sexual offence.

- (3) That is, framed so as to—
  - (a) specify, in addition to a sexual offence, any other act or omission, and
  - (b) do so in any manner except by way of reference to a statutory offence.
- (4) Where a charge in an indictment or a complaint is framed as mentioned in subsection (2) or (3) (or both), the charge is to be regarded as being a single yet cumulative charge.
- (5) The references in this section to a sexual offence are to an offence under the Sexual Offences (Scotland) Act 2009.

### **288BC Aggravation by intent to rape**

- (1) Subsection (2) applies as respects a qualifying offence charged in an indictment or a complaint.
- (2) Any specification in the charge that the offence is with intent to rape (however construed) may be given by referring to the statutory offence of rape.
- (3) In this section—
  - (a) the reference to a qualifying offence is to an offence of assault or abduction (and includes attempt, conspiracy or incitement to commit such an offence),
  - (b) the reference to the statutory offence of rape is (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.”.

### *Remand and committal of children*

## **64 Remand and committal of children and young persons**

- (1) Section 51 of the 1995 Act (remand and committal of children and young persons) is amended in accordance with subsections (2) and (3).
- (2) The following provisions are repealed—
  - (a) in subsection (1)—
    - (i) in paragraph (a) the words from “but” to “applies”, and
    - (ii) paragraph (bb),
  - (b) in subsection (2A), the words “Subject to subsection (4) below”,
  - (c) subsections (3) and (4), and
  - (d) in subsection (4A), the words “or subsection (4) above”.
- (3) In subsection (5), for “(1)(aa), (b)(ii), (bb)(ii) or (3)(b)” substitute “(1)(aa) or (b)(ii)”.
- (4) In section 23 of the Criminal Justice (Scotland) Act 2003 ([asp 7](#)) (remand and committal of children and young persons), subsections (6) and (7) are repealed.

*Prosecution of organisations***65      Meaning of “organisation”**

In section 307(1) of the 1995 Act (interpretation), after the definition of “order for lifelong restriction”, insert—

““organisation” means—

- (a) a body corporate;
- (b) an unincorporated association;
- (c) a partnership;
- (d) a body of trustees;
- (e) a government department;
- (f) a part of the Scottish Administration;
- (g) any other entity which is not an individual;”.

**66      Proceedings on indictment against organisations**

(1) The title of section 70 of the 1995 Act (proceedings against bodies corporate) is amended by substituting “organisations” for “bodies corporate”.

(2) Section 70 of that Act is amended as follows.

(3) In subsection (1), for “a body corporate” substitute “an organisation”.

(4) For subsection (2) substitute—

“(2) The indictment may be served by delivery of a copy of the indictment together with notice to appear at—

- (a) in the case of a body of trustees—
  - (i) the dwelling-house or place of business of any of the trustees,  
or
  - (ii) if the solicitor of the body of trustees is known, the place of  
business of the solicitor,
- (b) in the case of any other organisation, the registered office or, if there is no registered office or the registered office is not in the United Kingdom, at the principal place of business in the United Kingdom of the organisation.”.

(5) In subsection (3)—

- (a) for “the registered office or principal place of business of the body corporate” substitute “any place”, and
- (b) for “the registered office or place of business” substitute “that place”.

(6) In subsection (4)—

- (a) for “A body corporate” substitute “An organisation”, and
- (b) the words “of the body corporate” are repealed.

(7) In subsection (5), for “body corporate” in both places that expression occurs substitute “organisation”.

(8) In subsection (5A)(a), for “body corporate” substitute “organisation”.

(9) In subsection (6)—

- (a) for “a body corporate” substitute “an organisation”, and
  - (b) for “the body corporate” substitute “the organisation”.
- (10) In subsection (7), for “a body corporate” substitute “an organisation”.
- (11) In subsection (8), for paragraph (c) substitute—
- “(ba) in the case of a partnership (other than a limited liability partnership), a partner or other person in charge, or locally in charge, of the partnership’s affairs;
  - (bb) in the case of an unincorporated association, the secretary or other person in charge, or locally in charge, of the association’s affairs;
  - (c) in the case of any other organisation, an employee, officer or official of the organisation duly appointed by it for the purposes of the proceedings.”.
- (12) In subsection (9), after paragraph (b) insert—
- “(c) in the case of a partnership (other than a limited liability partnership), purporting to be signed by a partner;
  - (d) in the case of an unincorporated association, purporting to be signed by an officer of the association;
  - (e) in the case of a government department or a part of the Scottish Administration, purporting to be signed by a senior officer in the department or part,”.

## **67 Prosecution of organisations by summary procedure**

- (1) Section 143 of 1995 Act (prosecution of companies etc.) is amended as follows.
- (2) In subsection (1), for “a partnership, association, body corporate or body of trustees” substitute “an organisation”.
- (3) In subsection (2), for “partnership, association, body corporate or body of trustees in their” substitute “organisation in its”.
- (4) In subsection (4), for “A partnership, association, body corporate or body of trustees” substitute “An organisation”.
- (5) In subsection (5)(b), for “of the partnership, association, body corporate or body of trustees” substitute “, officer or official of the organisation”.
- (6) In subsection (6), after paragraph (d) insert—
- “(e) in the case of a government department or part of the Scottish Administration, purporting to be signed by a senior officer in the department or part,”.
- (7) In subsection (7)—
- (a) for “a partnership, association, body corporate or body of trustees” substitute “an organisation”,
  - (b) for “partnership, association, body corporate or (as the case may be) body of trustees” substitute “organisation”.

**68 Manner of citation of organisations in summary proceedings**

In section 141 of the 1995 Act (manner of citation), in subsection (2)(b), for “a partnership, association or body corporate” substitute “an organisation other than a body of trustees”.

*Personal conduct of case by accused***69 Prohibition of personal conduct of case by accused in certain proceedings**

- (1) The 1995 Act is amended as follows.
- (2) In section 288C (prohibition of personal conduct of defence in cases of certain sexual offences)—
  - (a) for subsection (1) substitute—
 

“(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.”, and
  - (b) subsection (8) is repealed.
- (3) In section 288D (appointment of solicitor by court in cases to which section 288C applies)—
  - (a) in subsection (1), after “proceedings” insert “(other than proceedings in a JP court)”,
  - (b) in subsection (2)(a), for sub-paragraphs (i) and (ii) substitute—
 

“(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”, and
  - (c) in subsection (6), for the words from “of the accused’s defence” to the end substitute “referred to in subsection (2)(a) above.”.
- (4) In section 288E (prohibition of personal conduct of defence in certain cases involving child witness under the age of 12)—
  - (a) subsection (1) is repealed,
  - (b) in subsection (2)(b), for “the trial” substitute “any hearing in the course of the proceedings”,
  - (c) after subsection (2) insert—
 

“(2A) The accused is prohibited from conducting his case in person at, or for the purposes of, any hearing at, or for the purposes of, which the child witness is to give evidence.”,
  - (d) in subsection (4), at the end insert “and as if references to a relevant hearing were references to a hearing referred to in subsection (2A) above”,
  - (e) in subsection (6)—
    - (i) for paragraphs (za) and (a) substitute—
 

“(a) that his case at, or for the purposes of, any hearing in the course of the proceedings at, or for the purposes

*Status: This is the original version (as it was originally enacted).*

- of, which the child witness is to give evidence may be conducted only by a lawyer,” and
- (ii) in paragraph (c), for the words from “preliminary” to “trial” substitute “hearing”, and
- (f) subsection (8) is repealed.
- (5) In section 288F (power to prohibit personal conduct of defence in other cases involving vulnerable witnesses)—
- (a) in subsection (1), for “the trial” substitute “any hearing in the course of the proceedings”,
- (b) in subsection (2), for the words from “defence” to the end substitute “case in person at any hearing at, or for the purposes of, which the vulnerable witness is to give evidence.”,
- (c) in subsection (3)(a), for “trial” substitute “hearing”,
- (d) in subsection (4), for the words from “after” to the end substitute “in relation to a hearing after, as well as before, the hearing has commenced.”,
- (e) subsection (4A) is repealed,
- (f) in subsection (5), at the end insert “and as if references to a relevant hearing were references to any hearing in respect of which an order is made under this section”, and
- (g) subsection (6) is repealed.

*Disclosure of convictions etc.*

**70 Disclosure of convictions and non-court disposals**

- (1) After section 101 of the 1995 Act insert—

**“101A Post-offence convictions etc.**

- (1) This section applies where an accused person is convicted of an offence (“offence O”) on indictment.
- (2) The court may, in deciding on the disposal of the case, have regard to—
- (a) any conviction in respect of the accused which occurred on or after the date of offence O but before the date of conviction in respect of that offence,
- (b) any of the alternative disposals in respect of the accused that are mentioned in subsection (3).
- (3) Those alternative disposals are—
- (a) a—
- (i) fixed penalty under section 302(1) of this Act, or
- (ii) compensation offer under section 302A(1) of this Act, that has been accepted (or deemed to have been accepted) on or after the date of offence O but before the date of conviction in respect of that offence,
- (b) a work order under section 303ZA(6) of this Act that has been completed on or after the date of offence O but before the date of conviction in respect of that offence.

- (4) The court may have regard to any such conviction or alternative disposal only if it is—
- (a) specified in a notice laid before the court by the prosecutor, and
  - (b) admitted by the accused or proved by the prosecutor (on evidence adduced then or at another diet).
- (5) A reference in this section to a conviction which occurred on or after the date of offence O is a reference to such a conviction by a court in any part of the United Kingdom or in any other member State of the European Union.”.
- (2) For section 166A of that Act substitute—
- “166A Post-offence convictions etc.**
- (1) This section applies where an accused person is convicted of an offence (“offence O”) on summary complaint.
- (2) The court may, in deciding on the disposal of the case, have regard to—
- (a) any conviction in respect of the accused which occurred on or after the date of offence O but before the date of conviction in respect of that offence,
  - (b) any of the alternative disposals in respect of the accused that are mentioned in subsection (3).
- (3) Those alternative disposals are—
- (a) a—
    - (i) fixed penalty under section 302(1) of this Act, or
    - (ii) compensation offer under section 302A(1) of this Act, that has been accepted (or deemed to have been accepted) on or after the date of offence O but before the date of conviction in respect of that offence,
  - (b) a work order under section 303ZA(6) of this Act that has been completed on or after the date of offence O but before the date of conviction in respect of that offence.
- (4) The court may have regard to any such conviction or alternative disposal only if it is—
- (a) specified in a notice laid before the court by the prosecutor, and
  - (b) admitted by the accused or proved by the prosecutor (on evidence adduced then or at another diet).
- (5) A reference in this section to a conviction which occurred on or after the date of offence O is a reference to such a conviction by a court in any part of the United Kingdom or in any other member State of the European Union.”.
- (3) In section 302 of that Act (fixed penalty: conditional offer by procurator fiscal), in subsection (2), after sub-paragraph (ii) of paragraph (e) insert—
- “(ia) that that fact may be disclosed to the court also in any proceedings for an offence to which the alleged offender is, or is liable to become, subject at such time as the offer is accepted;”.



- (4) In section 302A of that Act (compensation offer by procurator fiscal), in subsection (2), after sub-paragraph (ii) of paragraph (f) insert—
- “(ia) that that fact may be disclosed to the court also in any proceedings for an offence to which the alleged offender is, or is liable to become, subject at such time as the offer is accepted;”.
- (5) In section 303ZA of that Act (work orders), in subsection (3)—
- (a) after sub-paragraph (i) of paragraph (e) insert—
- “(ia) that if a work offer is not accepted, that fact may be disclosed to the court in any proceedings for the offence to which the offer relates;”;
- (b) in sub-paragraph (ii) of that paragraph, for “the offer has been accepted” substitute “a resultant work order has been completed”;
- (c) after sub-paragraph (ii) of that paragraph insert—
- “(ia) that that fact may be disclosed to the court also in any proceedings for an offence to which the alleged offender is, or is liable to become, subject at such time as the offer is accepted;”, and
- (d) in sub-paragraph (iii) of that paragraph, for “work order under subsection (6) below” substitute “resultant work order”.

## **71 Convictions by courts in other EU member States**

- (1) Schedule 4 makes modifications of the 1995 Act and other enactments for the purposes of and in connection with implementing obligations of the United Kingdom created by or arising under the Framework Decision (so far as they have effect in or as regards Scotland).
- (2) The Scottish Ministers may by order make further provision for the purposes of and in connection with implementing those obligations.
- (3) The provision may, in particular, confer functions—
- (a) on the Scottish Ministers,
- (b) on other persons.
- (4) An order under subsection (2) may modify any enactment.
- (5) In this section, the “Framework Decision” means Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.

### *Appeals: time limits*

## **72 Time limits for lodging certain appeals**

- (1) The 1995 Act is amended as follows.
- (2) In section 74 (appeals in connection with preliminary diets), in subsection (2)(b), for “2” substitute “seven”.

- (3) In section 174 (appeals relating to preliminary pleas), in subsection (1), for “two” substitute “seven”.

### *Crown appeals*

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

After section 97 of the 1995 Act insert—

### **“97A Submissions as to sufficiency of evidence**

- (1) Immediately after one or other (but not both) of the appropriate events, the accused may make either or both of the submissions mentioned in subsection (2) in relation to an offence libelled in an indictment (the “indicted offence”).
- (2) The submissions are—
  - (a) that the evidence is insufficient in law to justify the accused’s being convicted of the indicted offence or any other offence of which the accused could be convicted under the indictment (a “related offence”),
  - (b) that there is no evidence to support some part of the circumstances set out in the indictment.
- (3) For the purposes of subsection (1), “the appropriate events” are—
  - (a) the close of the whole of the evidence,
  - (b) the conclusion of the prosecutor’s address to the jury on the evidence.
- (4) A submission made under this section must be heard by the judge in the absence of the jury.

### **97B Acquittals etc. on section 97A(2)(a) submissions**

- (1) This section applies where the accused makes a submission of the kind mentioned in section 97A(2)(a).
- (2) If the judge is satisfied that the evidence is insufficient in law to justify the accused’s being convicted of the indicted offence, then—
  - (a) where the judge is satisfied that the evidence is also insufficient in law to justify the accused’s being convicted of a related offence—
    - (i) the judge must acquit the accused of the indicted offence, and
    - (ii) the trial is to proceed only in respect of any other offence libelled in the indictment,
  - (b) where the judge is satisfied that the evidence is sufficient in law to justify the accused’s being convicted of a related offence, the judge must direct that the indictment be amended accordingly.
- (3) If the judge is not satisfied as is mentioned in subsection (2)—
  - (a) the judge must reject the submission, and
  - (b) the trial is to proceed as if the submission had not been made.

- (4) The judge may make a decision under this section only after hearing both (or all) parties.
- (5) An amendment made by virtue of this section must be sufficiently authenticated by the initials of the judge or the clerk of court.
- (6) In this section, “indicted offence” and “related offence” have the same meanings as in section 97A.

#### **97C Directions etc. on section 97A(2)(b) submissions**

- (1) This section applies where the accused makes a submission of the kind mentioned in section 97A(2)(b).
- (2) If the judge is satisfied that there is no evidence to support some part of the circumstances set out in the indictment, the judge must direct that the indictment be amended accordingly.
- (3) If the judge is not satisfied as is mentioned in subsection (2)—
  - (a) the judge must reject the submission, and
  - (b) the trial is to proceed as if the submission had not been made.
- (4) The judge may make a decision under this section only after hearing both (or all) parties.
- (5) An amendment made by virtue of this section must be sufficiently authenticated by the initials of the judge or the clerk of court.

#### **97D No acquittal on “no reasonable jury” grounds**

- (1) A judge has no power to direct the jury to return a not guilty verdict on any charge on the ground that no reasonable jury, properly directed on the evidence, could convict on the charge.
- (2) Accordingly, no submission based on that ground or any ground of like effect is to be allowed.”.

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

After section 107 of the 1995 Act insert—

#### **“107A Prosecutor’s right of appeal: decisions on section 97 and 97A submissions**

- (1) The prosecutor may appeal to the High Court against—
  - (a) an acquittal under section 97 or 97B(2)(a), or
  - (b) a direction under section 97B(2)(b) or 97C(2).
- (2) If, immediately after an acquittal under section 97 or 97B(2)(a), the prosecutor moves for the trial diet to be adjourned for no more than 2 days in order to consider whether to appeal against the acquittal under subsection (1), the court of first instance must grant the motion unless the court considers that there are no arguable grounds of appeal.

- (3) If, immediately after the giving of a direction under section 97B(2)(b) or 97C(2), the prosecutor moves for the trial diet to be adjourned for no more than 2 days in order to consider whether to appeal against the direction under subsection (1), the court of first instance must grant the motion unless the court considers that it would not be in the interests of justice to do so.
- (4) In considering whether it would be in the interests of justice to grant a motion for adjournment under subsection (3), the court must have regard, amongst other things, to—
  - (a) whether, if an appeal were to be made and to be successful, continuing with the diet would have any impact on any subsequent or continued prosecution,
  - (b) whether there are any arguable grounds of appeal.
- (5) An appeal may not be brought under subsection (1) unless the prosecutor intimates intention to appeal—
  - (a) immediately after the acquittal or, as the case may be, the giving of the direction,
  - (b) if a motion to adjourn the trial diet under subsection (2) or (3) is granted, immediately upon resumption of the diet, or
  - (c) if such a motion is refused, immediately after the refusal.
- (6) Subsection (7) applies if—
  - (a) the prosecutor intimates an intention to appeal under subsection (1)(a), or
  - (b) the trial diet is adjourned under subsection (2).
- (7) Where this subsection applies, the court of first instance must suspend the effect of the acquittal and may—
  - (a) make an order under section 4(2) of the Contempt of Court Act 1981 (c.49) (which gives a court power, in some circumstances, to order that publication of certain reports be postponed) as if proceedings for the offence of which the person was acquitted were pending or imminent,
  - (b) after giving the parties an opportunity of being heard, order the detention of the person in custody or admit him to bail.
- (8) The court may, under subsection (7)(b), order the detention of the person in custody only if the court considers that there are arguable grounds of appeal.

#### **107B Prosecutor's right of appeal: decisions on admissibility of evidence**

- (1) The prosecutor may appeal to the High Court against a finding, made after the jury is empanelled and before the close of the evidence for the prosecution, that evidence that the prosecution seeks to lead is inadmissible.
- (2) The appeal may be made only with the leave of the court of first instance, granted—
  - (a) on the motion of the prosecutor, or
  - (b) on that court's initiative.
- (3) Any motion for leave to appeal must be made before the close of the case for the prosecution.

- (4) In determining whether to grant leave to appeal the court must consider—
  - (a) whether there are arguable grounds of appeal, and
  - (b) what effect the finding has on the strength of the prosecutor’s case.

### **107C Appeals under section 107A and 107B: general provisions**

- (1) In an appeal brought under section 107A or 107B the High Court may review not only the acquittal, direction or finding appealed against but also any direction, finding, decision, determination or ruling in the proceedings at first instance if it has a bearing on the acquittal, direction or finding appealed against.
- (2) The test to be applied by the High Court in reviewing the acquittal, direction or finding appealed against is whether it was wrong in law.

### **107D Expedited appeals**

- (1) Subsection (2) applies where—
  - (a) the prosecutor intimates intention to appeal under section 107A or leave to appeal is granted by the court under section 107B, and
  - (b) the court is able to obtain confirmation from the Keeper of the Rolls that it would be practicable for the appeal to be heard and determined during an adjournment of the trial diet.
- (2) The court must inform both parties of that fact and, after hearing them, must decide whether or not the appeal is to be heard and determined during such an adjournment.
- (3) An appeal brought under section 107A or 107B which is heard and determined during such an adjournment is referred to in this Act as an “expedited appeal”.
- (4) If the court decides that the appeal is to be an expedited appeal the court must, pending the outcome of the appeal—
  - (a) adjourn the trial diet, and
  - (b) where the appeal is against an acquittal, suspend the effect of the acquittal.
- (5) Where the court cannot obtain from the Keeper of the Rolls confirmation of the kind mentioned in subsection (1)(b), the court must inform the parties of that fact.
- (6) Where the High Court in an expedited appeal determines that an acquittal of an offence libelled in the indictment was wrong in law it must quash the acquittal and direct that the trial is to proceed in respect of the offence.

### **107E Other appeals under section 107A: appeal against acquittal**

- (1) This section applies where—
  - (a) an appeal brought under section 107A is not an expedited appeal,
  - (b) the appeal is against an acquittal, and
  - (c) the High Court determines that the acquittal was wrong in law.
- (2) The court must quash the acquittal.

- (3) If the prosecutor seeks leave to bring a new prosecution charging the accused with the same offence as that libelled in the indictment, or a similar offence arising out of the same facts as the offence libelled in the indictment, the High Court must grant the prosecutor authority to do so in accordance with section 119, unless the court considers that it would be contrary to the interests of justice to do so.
- (4) If—
  - (a) no motion is made under subsection (3), or
  - (b) the High Court does not grant a motion made under that subsection,
 the High Court must in disposing of the appeal acquit the accused of the offence libelled in the indictment.

**107F Other appeals under section 107A or 107B: appeal against directions etc.**

- (1) This section applies where—
  - (a) an appeal brought under section 107A or 107B is not an expedited appeal, and
  - (b) the appeal is not against an acquittal.
- (2) The court of first instance must desert the diet *pro loco et tempore* in relation to any offence to which the appeal relates.
- (3) The trial is to proceed only if another offence of which the accused has not been acquitted and to which the appeal does not relate is libelled in the indictment.
- (4) However, if the prosecutor moves for the diet to be deserted *pro loco et tempore* in relation to such other offence, the court must grant the motion.
- (5) If the prosecutor seeks leave to bring a new prosecution charging the accused with the same offence as that libelled in the indictment, or a similar offence arising out of the same facts as the offence libelled in the indictment, the High Court must grant the prosecutor authority to do so in accordance with section 119, unless the court considers that it would be contrary to the interests of justice to do so.”.

**75 Power of High Court in appeal under section 107A of 1995 Act**

In section 104(1) of the 1995 Act (which makes provision as regards the power of the High Court in appeals under section 106(1) or 108 of that Act), after “106(1)” insert “, 107A, 107B”.

**76 Further amendment of 1995 Act**

- (1) In section 110(1) of the 1995 Act (note of appeal), after paragraph (b), add—
  - “(c) where the prosecutor intimates intention to appeal under section 107A(1), within 7 days after the acquittal or direction appealed against, the prosecutor may, except in the case of an expedited appeal, lodge such a note with the Clerk of Justiciary, who must send a copy to the judge and to the accused or to the accused’s solicitor,

- (d) within 7 days after leave to appeal under section 107B(1) is granted, the prosecutor may, except in the case of an expedited appeal, lodge such a note with the Clerk of Justiciary, who must send a copy to the judge and to the accused or to the accused's solicitor,
  - (e) in the case of an expedited appeal, as soon as practicable after the decision as to hearing and determining the case is made under section 107D(2), the prosecutor may—
    - (i) lodge such a note with the Clerk of Justiciary, and
    - (ii) provide a copy to the judge and to the accused or to the accused's solicitor.”.
- (2) In section 113(1) of that Act (judge's report), after “under” insert “any of paragraphs (a) to (d) of”.
- (3) After section 113 of that Act insert—

**“113A Judge's observations in expedited appeal**

- (1) On receiving a note of appeal given under section 110(1)(e), the judge who presided at the trial may give the Clerk of Justiciary any written observations that the judge thinks fit on—
    - (a) the case generally,
    - (b) the grounds contained in the note of appeal.
  - (2) The High Court may hear and determine the appeal without any such written observations.
  - (3) If written observations are given under subsection (1), the Clerk of Justiciary must give a copy of them to—
    - (a) the accused or the accused's solicitor, and
    - (b) the prosecutor.
  - (4) The written observations of the judge are available only to—
    - (a) the High Court,
    - (b) the parties, and
    - (c) any other person or classes of person prescribed by Act of Adjournal, in accordance with any conditions prescribed by Act of Adjournal.”.
- (4) In section 119 of that Act (provision where High Court authorises new prosecution)—
- (a) in each of subsections (1) and (10), after “118(1)(c)” insert “or 107E(3) or 107F(5)”,
  - (b) for subsection (2), substitute—
    - “(2) In a new prosecution under this section—
      - (a) where authority for the prosecution is granted under section 118(1)(c), the accused must not be charged with an offence more serious than that of which the accused was convicted in the earlier proceedings,
      - (b) where authority for the prosecution is granted under section 107E(3), the accused must not be charged with an offence more serious than that of which the accused was acquitted in the earlier proceedings,

- (c) where authority for the prosecution is granted under section 107F(5), the accused must not be charged with an offence more serious than that originally libelled in the indictment in the earlier proceedings.”,
- (c) after subsection (2) insert—
  - “(2A) In a new prosecution under this section brought by virtue of section 107F(5), the circumstances set out in the indictment are not to be inconsistent with any direction given under section 97B(2)(b) or 97C(2) in the proceedings which gave rise to the appeal in question unless the High Court, in disposing of that appeal, determined that the direction was wrong in law.”, and
- (d) in subsection (9), after “setting aside the verdict” insert “or under section 107E(3) or 107F(5) granting authority to bring a new prosecution”.

*Retention and use of samples etc.*

**77      Retention of samples etc.**

- (1) The 1995 Act is amended as follows.
- (2) In section 18 (prints, samples etc. in criminal investigations)—
  - (a) in subsection (3), for “section 18A” substitute “sections 18A to 18F”,
  - (b) in subsection (7A), for “sections 19 to 20” substitute “, subject to the modification in subsection (7AA), sections 18A to 19C”, and
  - (c) after subsection (7A) insert—
    - “(7AA) The modification is that for the purposes of section 19C as it applies in relation to relevant physical data taken from or provided by a person outwith Scotland, subsection (7A) is to be read as if in paragraph (d) the words from “created” to the end were omitted.”.
- (3) In section 18A (retention of samples)—
  - (a) for subsection (1) substitute—
    - “(1) This section applies to—
      - (a) relevant physical data taken or provided under section 18(2), and
      - (b) any sample, or any information derived from a sample, taken under section 18(6) or (6A),
 where the condition in subsection (2) is satisfied.”,
  - (b) in subsection (2), after “whom” insert “the relevant physical data was taken or by whom it was provided or, as the case may be, from whom”,
  - (c) in subsection (3), for “sample or information” substitute “relevant physical data, sample or information derived from a sample”,
  - (d) after subsection (8) insert—
    - “(8A) If the sheriff principal allows an appeal against the refusal of an application under subsection (5), the sheriff principal may make an order amending, or further amending, the destruction date.



- (8B) An order under subsection (8A) must not specify a destruction date more than 2 years later than the previous destruction date.”,
- (e) in subsection (10), for “sample or information” substitute “relevant physical data, sample or information derived from a sample”,
- (f) in subsection (11)—
- (i) in paragraph (a) of the definition of “the relevant chief constable”, after “who” insert “took the relevant physical data or to whom it was provided or who”, and
  - (ii) in the definition of “relevant sexual offence” and “relevant violent offence”, after “have” insert “, subject to the modification in subsection (12),”, and
- (g) after subsection (11) insert—
- “(12) The modification is that the definition of “relevant sexual offence” in section 19A(6) is to be read as if for paragraph (g) there were substituted—
- “(g) public indecency if it is apparent from the offence as charged in the indictment or complaint that there was a sexual aspect to the behaviour of the person charged;””

## **78 Retention of samples etc. where offer under sections 302 to 303ZA of 1995 Act accepted**

After section 18A of the 1995 Act insert—

### **“18B Retention of samples etc. where offer under sections 302 to 303ZA accepted**

- (1) This section applies to—
- (a) relevant physical data taken from or provided by a person under section 18(2), and
  - (b) any sample, or any information derived from a sample, taken from a person under section 18(6) or (6A),
- where the conditions in subsection (2) are satisfied.
- (2) The conditions are—
- (a) the relevant physical data or sample was taken from or provided by the person while the person was under arrest or being detained in connection with the offence or offences in relation to which a relevant offer is issued to the person, and
  - (b) the person—
    - (i) accepts a relevant offer, or
    - (ii) in the case of a relevant offer other than one of the type mentioned in paragraph (d) of subsection (3), is deemed to accept a relevant offer.
- (3) In this section “relevant offer” means—
- (a) a conditional offer under section 302,
  - (b) a compensation offer under section 302A,

- (c) a combined offer under section 302B, or
  - (d) a work offer under section 303ZA.
- (4) Subject to subsections (6) and (7) and section 18C(9) and (10), the relevant physical data, sample or information derived from a sample must be destroyed no later than the destruction date.
- (5) In subsection (4), “destruction date” means—
  - (a) in relation to a relevant offer that relates only to—
    - (i) a relevant sexual offence,
    - (ii) a relevant violent offence, or
    - (iii) both a relevant sexual offence and a relevant violent offence,
 

the date of expiry of the period of 3 years beginning with the date on which the relevant offer is issued or such later date as an order under section 18C(2) or (6) may specify,
  - (b) in relation to a relevant offer that relates to—
    - (i) an offence or offences falling within paragraph (a), and
    - (ii) any other offence,

the date of expiry of the period of 3 years beginning with the date on which the relevant offer is issued or such later date as an order under section 18C(2) or (6) may specify,
  - (c) in relation to a relevant offer that does not relate to an offence falling within paragraph (a), the date of expiry of the period of 2 years beginning with the date on which the relevant offer is issued.
- (6) If a relevant offer is recalled by virtue of section 302C(5) or a decision to uphold it is quashed under section 302C(7)(a), all record of the relevant physical data, sample and information derived from a sample must be destroyed as soon as possible after—
  - (a) the prosecutor decides not to issue a further relevant offer to the person,
  - (b) the prosecutor decides not to institute criminal proceedings against the person, or
  - (c) the prosecutor institutes criminal proceedings against the person and those proceedings conclude otherwise than with a conviction or an order under section 246(3).
- (7) If a relevant offer is set aside by virtue of section 303ZB, all record of the relevant physical data, sample and information derived from a sample must be destroyed as soon as possible after the setting aside.
- (8) In this section, “relevant sexual offence” and “relevant violent offence” have, subject to the modification in subsection (9), the same meanings as in section 19A(6) and include any attempt, conspiracy or incitement to commit such an offence.
- (9) The modification is that the definition of “relevant sexual offence” in section 19A(6) is to be read as if for paragraph (g) there were substituted—
  - “(g) public indecency if it is apparent from the relevant offer (as defined in section 18B(3)) relating to the offence that there was a sexual aspect to the behaviour of the person to whom the relevant offer is issued;”.

**18C Section 18B: extension of retention period where relevant offer relates to certain sexual or violent offences**

- (1) This section applies where the destruction date for relevant physical data, a sample or information derived from a sample falls within section 18B(5)(a) or (b).
- (2) On a summary application made by the relevant chief constable within the period of 3 months before the destruction date, the sheriff may, if satisfied that there are reasonable grounds for doing so, make an order amending, or further amending, the destruction date.
- (3) An application under subsection (2) may be made to any sheriff—
  - (a) in whose sheriffdom the appropriate person resides,
  - (b) in whose sheriffdom that person is believed by the applicant to be, or
  - (c) to whose sheriffdom the person is believed by the applicant to be intending to come.
- (4) An order under subsection (2) must not specify a destruction date more than 2 years later than the previous destruction date.
- (5) The decision of the sheriff on an application under subsection (2) may be appealed to the sheriff principal within 21 days of the decision.
- (6) If the sheriff principal allows an appeal against the refusal of an application under subsection (2), the sheriff principal may make an order amending, or further amending, the destruction date.
- (7) An order under subsection (6) must not specify a destruction date more than 2 years later than the previous destruction date.
- (8) The sheriff principal's decision on an appeal under subsection (5) is final.
- (9) Section 18B(4) does not apply where—
  - (a) an application under subsection (2) has been made but has not been determined,
  - (b) the period within which an appeal may be brought under subsection (5) against a decision to refuse an application has not elapsed, or
  - (c) such an appeal has been brought but has not been withdrawn or finally determined.
- (10) Where—
  - (a) the period within which an appeal referred to in subsection (9)(b) may be brought has elapsed without such an appeal being brought,
  - (b) such an appeal is brought and is withdrawn or finally determined against the appellant, or
  - (c) an appeal brought under subsection (5) against a decision to grant an application is determined in favour of the appellant,the relevant physical data, sample or information derived from a sample must be destroyed as soon as possible after the period has elapsed, or, as the case may be, the appeal is withdrawn or determined.
- (11) In this section—

“appropriate person” means the person from whom the relevant physical data was taken or by whom it was provided or from whom the sample was taken,

“destruction date” has the meaning given by section 18B(5),

“the relevant chief constable” has the same meaning as in subsection (11) of section 18A, with the modification that references to the person referred to in subsection (2) of that section are references to the appropriate person.”.

## 79      **Retention of samples etc. taken or provided in connection with certain fixed penalty offences**

After section 18C of the 1995 Act insert—

### **“18D Retention of samples etc. taken or provided in connection with certain fixed penalty offences**

(1) This section applies to—

- (a) relevant physical data taken from or provided by a person under section 18(2), and
- (b) any sample, or any information derived from a sample, taken from a person under section 18(6) or (6A),

where the conditions in subsection (2) are satisfied.

(2) The conditions are—

- (a) the person was arrested or detained in connection with a fixed penalty offence,
- (b) the relevant physical data or sample was taken from or provided by the person while the person was under arrest or being detained in connection with that offence,
- (c) after the relevant physical data or sample was taken from or provided by the person, a constable gave the person under section 129(1) of the 2004 Act—
  - (i) a fixed penalty notice in respect of that offence (the “main FPN”), or
  - (ii) the main FPN and one or more other fixed penalty notices in respect of fixed penalty offences arising out of the same circumstances as the offence to which the main FPN relates, and
- (d) the person, in relation to the main FPN and any other fixed penalty notice of the type mentioned in paragraph (c)(ii)—
  - (i) pays the fixed penalty, or
  - (ii) pays any sum that the person is liable to pay by virtue of section 131(5) of the 2004 Act.

(3) Subject to subsections (4) and (5), the relevant physical data, sample or information derived from a sample must be destroyed before the end of the period of 2 years beginning with—

- (a) where subsection (2)(c)(i) applies, the day on which the main FPN is given to the person,

- (b) where subsection (2)(c)(ii) applies and—
  - (i) the main FPN and any other fixed penalty notice are given to the person on the same day, that day,
  - (ii) the main FPN and any other fixed penalty notice are given to the person on different days, the later day.
- (4) Where—
  - (a) subsection (2)(c)(i) applies, and
  - (b) the main FPN is revoked under section 133(1) of the 2004 Act,
 the relevant physical data, sample or information derived from a sample must be destroyed as soon as possible after the revocation.
- (5) Where—
  - (a) subsection (2)(c)(ii) applies, and
  - (b) the main FPN and any other fixed penalty notices are revoked under section 133(1) of the 2004 Act,
 the relevant physical data, sample or information derived from a sample must be destroyed as soon as possible after the revocations.
- (6) In this section—
  - “the 2004 Act” means the Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8),
  - “fixed penalty notice” has the meaning given by section 129(2) of the 2004 Act,
  - “fixed penalty offence” has the meaning given by section 128(1) of the 2004 Act.”.

## 80 Retention of samples etc. from children referred to children’s hearings

After section 18D of the 1995 Act insert—

### “18E Retention of samples etc.: children referred to children’s hearings

- (1) This section applies to—
  - (a) relevant physical data taken from or provided by a child under section 18(2); and
  - (b) any sample, or any information derived from a sample, taken from a child under section 18(6) or (6A),
 where the first condition, and the second, third or fourth condition, are satisfied.
- (2) The first condition is that the child’s case has been referred to a children’s hearing under section 65(1) of the Children (Scotland) Act 1995 (c.36) (the “Children Act”).
- (3) The second condition is that—
  - (a) a ground of the referral is that the child has committed an offence mentioned in subsection (6) (a “relevant offence”);
  - (b) both the child and the relevant person in relation to the child accept, under section 65(5) or (6) of the Children Act, the ground of referral; and

- (c) no application to the sheriff under section 65(7) or (9) of that Act is made in relation to that ground.
- (4) The third condition is that—
  - (a) a ground of the referral is that the child has committed a relevant offence;
  - (b) the sheriff, on an application under section 65(7) or (9) of the Children Act—
    - (i) deems, under section 68(8) of the Children Act; or
    - (ii) finds, under section 68(10) of that Act,the ground of referral to be established; and
  - (c) no application to the sheriff under section 85(1) of that Act is made in relation to that ground.
- (5) The fourth condition is that the sheriff, on an application under section 85(1) of the Children Act—
  - (a) is satisfied, under section 85(6)(b) of that Act, that a ground of referral which constitutes a relevant offence is established; or
  - (b) finds, under section 85(7)(b) of that Act, that—
    - (i) a ground of referral, which was not stated in the original application under section 65(7) or (9) of that Act, is established; and
    - (ii) that ground constitutes a relevant offence.
- (6) A relevant offence is such relevant sexual offence or relevant violent offence as the Scottish Ministers may by order made by statutory instrument prescribe.
- (7) An order under subsection (6) may prescribe a relevant violent offence by reference to a particular degree of seriousness.
- (8) Subject to section 18F(8) and (9), the relevant physical data, sample or information derived from a sample must be destroyed no later than the destruction date.
- (9) The destruction date is—
  - (a) the date of expiry of the period of 3 years following—
    - (i) where the second condition is satisfied, the date on which the ground of referral was accepted as mentioned in that condition;
    - (ii) where the third condition is satisfied, the date on which the ground of referral was established as mentioned in that condition;
    - (iii) where the ground of referral is established as mentioned in paragraph (a) of the fourth condition, the date on which that ground was established under section 68(8) or, as the case may be, (10) of the Children Act; or
    - (iv) where the ground of referral is established as mentioned in paragraph (b) of the fourth condition, the date on which that ground was established as mentioned in that paragraph; or
  - (b) such later date as an order under section 18F(1) may specify.

- (10) No statutory instrument containing an order under subsection (6) may be made unless a draft of the instrument has been laid before, and approved by resolution of, the Scottish Parliament.
- (11) In this section—
  - “relevant person” has the same meaning as in section 93(2) of the Children Act;
  - “relevant sexual offence” and “relevant violent offence” have, subject to the modification in subsection (12), the same meanings as in section 19A(6) and include any attempt, conspiracy or incitement to commit such an offence.
- (12) The modification is that the definition of “relevant sexual offence” in section 19A(6) is to be read as if for paragraph (g) there were substituted—
  - “(g) public indecency if it is apparent from the ground of referral relating to the offence that there was a sexual aspect to the behaviour of the child;”.

#### **18F Retention of samples etc. relating to children: appeals**

- (1) On a summary application made by the relevant chief constable within the period of 3 months before the destruction date the sheriff may, if satisfied that there are reasonable grounds for doing so, make an order amending, or further amending, the destruction date.
- (2) An application under subsection (1) may be made to any sheriff—
  - (a) in whose sheriffdom the child mentioned in section 18E(1) resides;
  - (b) in whose sheriffdom that child is believed by the applicant to be; or
  - (c) to whose sheriffdom that child is believed by the applicant to be intending to come.
- (3) An order under subsection (1) must not specify a destruction date more than 2 years later than the previous destruction date.
- (4) The decision of the sheriff on an application under subsection (1) may be appealed to the sheriff principal within 21 days of the decision.
- (5) If the sheriff principal allows an appeal against the refusal of an application under subsection (1), the sheriff principal may make an order amending, or further amending, the destruction date.
- (6) An order under subsection (5) must not specify a destruction date more than 2 years later than the previous destruction date.
- (7) The sheriff principal’s decision on an appeal under subsection (4) is final.
- (8) Section 18E(8) does not apply where—
  - (a) an application under subsection (1) has been made but has not been determined;
  - (b) the period within which an appeal may be brought under subsection (4) against a decision to refuse an application has not elapsed; or
  - (c) such an appeal has been brought but has not been withdrawn or finally determined.

## (9) Where—

- (a) the period within which an appeal referred to in subsection (8)(b) may be brought has elapsed without such an appeal being brought;
- (b) such an appeal is brought and is withdrawn or finally determined against the appellant; or
- (c) an appeal brought under subsection (4) against a decision to grant an application is determined in favour of the appellant,

the relevant physical data, sample or information derived from a sample must be destroyed as soon as possible after the period has elapsed or, as the case may be, the appeal is withdrawn or determined.

## (10) In this section—

“destruction date” has the meaning given by section 18E(9); and  
 “relevant chief constable” has the same meaning as in subsection (11) of section 18A, with the modification that references to the person referred to in subsection (2) of that section are references to the child referred to in section 18E(1).”.

**81 Extension of section 19A of 1995 Act**

In section 19A(6) of the 1995 Act (definitions of certain expressions for purposes of section 19A)—

- (a) in the definition of “relevant sexual offence”, for paragraph (g) substitute—  
 “(g) public indecency if the court, in imposing sentence or otherwise disposing of the case, determined for the purposes of paragraph 60 of Schedule 3 to the Sexual Offences Act 2003 (c.42) that there was a significant sexual aspect to the offender’s behaviour in committing the offence;”, and
- (b) in paragraph (h) of the definition of “relevant violent offence”, after subparagraph (iv), insert—  
 “(v) section 47(1) (possession of offensive weapon in public place), 49(1) (possession of article with blade or point in public place), 49A(1) or (2) (possession of article with blade or point or offensive weapon on school premises) or 49C(1) (possession of offensive weapon or article with blade or point in prison) of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39);”.

**82 Use of samples etc.**

(1) After section 19B of the 1995 Act insert—

**“19C Sections 18 and 19 to 19AA: use of samples etc.**

(1) Subsection (2) applies to—

- (a) relevant physical data taken or provided under section 18(2), 19(2)(a), 19A(2)(a) or 19AA(3)(a),
- (b) a sample, or any information derived from a sample, taken under section 18(6) or (6A), 19(2)(b) or (c), 19A(2)(b) or (c) or 19AA(3)(b) or (c),
- (c) relevant physical data or a sample taken from a person—



- (i) by virtue of any power of search,
  - (ii) by virtue of any power to take possession of evidence where there is immediate danger of its being lost or destroyed, or
  - (iii) under the authority of a warrant,
- (d) information derived from a sample falling within paragraph (c), and
- (e) relevant physical data, a sample or information derived from a sample taken from, or provided by, a person outwith Scotland which is given by any person to—
  - (i) a police force,
  - (ii) the Scottish Police Services Authority, or
  - (iii) a person acting on behalf of a police force.
- (2) The relevant physical data, sample or information derived from a sample may be used—
  - (a) for the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution, or
  - (b) for the identification of a deceased person or a person from whom the relevant physical data or sample came.
- (3) Subsections (4) and (5) apply to relevant physical data, a sample or information derived from a sample falling within any of paragraphs (a) to (d) of subsection (1) (“relevant material”).
- (4) If the relevant material is held by a police force, the Scottish Police Services Authority or a person acting on behalf of a police force, the police force or, as the case may be, the Authority or person may give the relevant material to another person for use by that person in accordance with subsection (2).
- (5) A police force, the Scottish Police Services Authority or a person acting on behalf of a police force may, in using the relevant material in accordance with subsection (2), check it against other relevant physical data, samples and information derived from samples received from another person.
- (6) In subsection (2)—
  - (a) the reference to crime includes a reference to—
    - (i) conduct which constitutes a criminal offence or two or more criminal offences (whether under the law of a part of the United Kingdom or a country or territory outside the United Kingdom), or
    - (ii) conduct which is, or corresponds to, conduct which, if it all took place in any one part of the United Kingdom would constitute a criminal offence or two or more criminal offences,
  - (b) the reference to an investigation includes a reference to an investigation outside Scotland of a crime or suspected crime, and
  - (c) the reference to a prosecution includes a reference to a prosecution brought in respect of a crime in a country or territory outside Scotland.
- (7) This section is without prejudice to any other power relating to the use of relevant physical data, samples or information derived from a sample.”.
- (2) In section 56 of the Criminal Justice (Scotland) Act 2003 ([asp 7](#)) (use of samples etc. voluntarily given)—

- (a) in subsection (1), after “from,” insert “or provided by”,
- (b) in subsection (2), for the words from “may” where it first occurs to the end substitute “, or information derived from that sample may be held and used—
  - (a) for the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution, or
  - (b) for the identification of a deceased person or a person from whom the sample or relevant physical data came.”,
- (c) in subsection (3), after “information” insert “derived from a sample”,
- (d) in subsection (5)(b), the words “with all information derived from them” are repealed,
- (e) in subsection (6)(a), for “it or them” substitute “the sample”,
- (f) in subsection (7)(a), the words “or relevant physical data”, in the second place where they occur, are repealed, and
- (g) after subsection (7) insert—
 

“(7A) In subsection (2)—

  - (a) the reference to crime includes a reference to—
    - (i) conduct which constitutes a criminal offence or two or more criminal offences (whether under the law of a part of the United Kingdom or a country or territory outside the United Kingdom), or
    - (ii) conduct which is, or corresponds to, conduct which, if it all took place in any one part of the United Kingdom would constitute a criminal offence or two or more criminal offences,
  - (b) the reference to an investigation includes a reference to an investigation outside the United Kingdom of a crime or suspected crime, and
  - (c) the reference to a prosecution includes a reference to a prosecution brought in respect of a crime in a country or territory outside the United Kingdom.”.

*Referrals from the Scottish Criminal Cases Review Commission*

**83 Referrals from Scottish Criminal Cases Review Commission: grounds for appeal**

In section 194D of the 1995 Act (further provisions as to references to the High Court by the Scottish Criminal Cases Review Commission), after subsection (4) insert—

- “(4A) The grounds for an appeal arising from a reference to the High Court under section 194B of this Act must relate to one or more of the reasons for making the reference contained in the Commission’s statement of reasons.
- (4B) Despite subsection (4A), the High Court may, if it considers it is in the interests of justice to do so, grant leave for the appellant to found the appeal on additional grounds.
- (4C) An application by the appellant for leave under subsection (4B) must be made and intimated to the Crown Agent within 21 days after the date on which a copy of the Commission’s statement of reasons is sent under subsection (4)(b).

- (4D) The High Court may, on cause shown, extend the period of 21 days mentioned in subsection (4C).
- (4E) The Clerk of Justiciary must intimate to the persons mentioned in subsection (4F)—
  - (a) a decision under subsection (4B), and
  - (b) in the case of a refusal to grant leave for the appeal to be founded on additional grounds, the reasons for the decision.
- (4F) Those persons are—
  - (a) the appellant or the appellant’s solicitor, and
  - (b) the Crown Agent.”.