CHAPTER 11 - APPEALS

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CHAPTER 11 - APPEALS

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11.0 INTRODUCTIONS AND DEFINITIONS

In this chapter, references to:

- sections of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"), unless otherwise indicated, and are shown as, for example "s175(4)";
- references to rules are those in the Act of Adjournal (Criminal Procedure Rules) 1996 (S.I. 1996 No. 513 (S.47)) unless otherwise indicated;
- forms are to those in the 1996 Act of Adjournal unless otherwise indicated; and
- forms for reporting to Crown Office are shown as, for example: Appeals form **app-pre**.

In the diagrams, any stages at which Procurators Fiscal **must** act are indicated in bold boxes. Stages at which they **should** act, if appropriate, are shown by bold boxes having a broken outline.

Instructions and guidance to Procurators Fiscal contained in the main text is indicated by the use of text in italics.

11.01 OFFICE POINT OF CONTACT

Procurators Fiscal should specify a point of contact in each office for appeals (for summary, Sheriff and Jury and High Court cases).

11.02 TIMEOUS OBJECTIONS

The attention of Procurators Fiscal is drawn to the provisions of s118(8) - solemn - and s192(3) - summary, which provide that:

"No conviction, sentence, judgement, order of court or other proceedings whatsoever in or for the purposes of summary proceedings under this Act -

(a) shall be quashed for want of form, or

(b) where the accused had legal assistance in his defence, shall be suspended or set aside in respect of any objections to -

(i) the relevancy of the complaint, or to the want of specification therein; or

(ii) the competency or admission or rejection of evidence at the trial in the inferior court,

unless such objections were timeously stated"

Failure to object at the time may be fatal to any subsequent appeal - see for example Jardine v Howdle 1997 SCCR 294.

Accordingly, Procurators Fiscal should bear this provision in mind when reporting and should indicate, where appropriate, whether objection was taken timeously and what arguments, if any, were advanced at first instance.

REPORTING BY PROCURATORS FISCAL: GENERAL CONSIDERATIONS

11.03 CORRESPONDENCE

1 To the Appeals Unit - Procurators Fiscal should use the appropriate appeals form. General correspondence to the Unit should be addressed to the unit for the attention of the member of staff dealing with the appeal or issue (if known).

2 To Defence Agents and other parties - Procurators Fiscal should consider if Crown Counsel's instructions may be required in respect of correspondence in connection with appeals. In particular, Procurators Fiscal should be aware of the possibility of simultaneous correspondence with a number of sources, for example, Crown Office with Edinburgh correspondents, the Law Officers with MPs or MSPs, and correspondence with Procurators Fiscal.

11.04 PREPARATION OF THE REPORT

The Procurator Fiscal's report should identify the relevant Procurator Fiscal Depute including any assisting depute or advocate. Court deputes should retain in

the case papers a detailed note of any salient points (including arguments and the court's determination) which may arise in appeal proceedings.

Reports should be prepared by the depute(s) who appeared in court. If, however, this is not possible, reports should not be delayed.

Where a report is prepared by someone other than the depute in court, the reporter should make this clear in the report and should attempt provide an accurate record of what took place in court, in so far as possible.

Crown Counsel will require to rely on this information in considering whether or not to appeal and also in presenting the appeal before the appeal court. The Court places great reliance on information provided by the Crown. For example, where Crown answers are lodged in common law appeals, in the event of a factual dispute, the Court will normally prefer the Crown version. The importance of providing accurate information cannot be stressed too highly if the confidence of the Court is to be maintained.

11.05 PROCEDURAL HISTORY

In every appeal, or potential appeal, reported, Procurators Fiscal should provide, for Crown Counsel's information, a copy of the Minutes of Procedure in the Court of first instance.

11.06 APPEALS FORM

When reporting Procurators Fiscal should provide a separate appeals form and report for each individual appellant and each separate appeal by that appellant.

11.07 NOTIFICATION OF PROGRESS OF APPEALS

Procurators Fiscal will be kept advised of the progress of any appeal, in so far as possible, and in all cases will be advised of the outcome of the appeal.

11.08 SIFT RESULTS

Procurators Fiscal will be notified of the sift result. On occasion, however, as a result of Justiciary Office seeking to meet performance targets, the first intimation that leave to appeal has been granted may be the appearance of the appeal on a Court Roll. In these circumstances, Procurators Fiscal will be advised by telephone and **must** report immediately.

11.09 VICTIMS

See Chapter 12, paragraph 21.

11.10 CROWN APPEALS

Factors which will be taken into account include:

- Public interest considerations;
- The significance of any decision in law made by the court and its consequences generally;
- Whether the issue has already been clarified in another case;
- Local difficulties;
- Other difficulties in the case which may serve to mask the issue which is sought to be addressed - e.g. an underlying problem involving relevancy of the charge or a procedural problem.

Other factors may be taken into account in relation to Crown appeals against sentence - see section 11.63.

Where a Procurator Fiscal considers that a Crown appeal may be merited, he may wish to discuss the matter with a member of the Appeals Unit legal staff before reporting. Depute Fiscals are encouraged in the first instance to discuss the matter with a senior colleague in their office for guidance.

11.11 TIME LIMITS APPLYING TO APPEALS

In solemn appeals, where the last day for lodging an Intimation of Intention to Appeal or a Note of Appeal falls on a day on which Justiciary Office is closed, the period is extended to the next day when the office is open: s111(1).

In summary appeals, where any period of time specified in Part X of the 1995 Act falls on a Saturday, Sunday or Court holiday for the relevant court, the period is

extended to the next day which is not a Saturday, Sunday or Court holiday: s194(1).

PART II - DEFENCE APPEALS AGAINST CONVICTION AND/ OR SENTENCE

11.12 INTRODUCTION

This Section outlines procedures in (statutory) defence appeals against conviction and/or sentence. There may exist other remedies - see Part V.

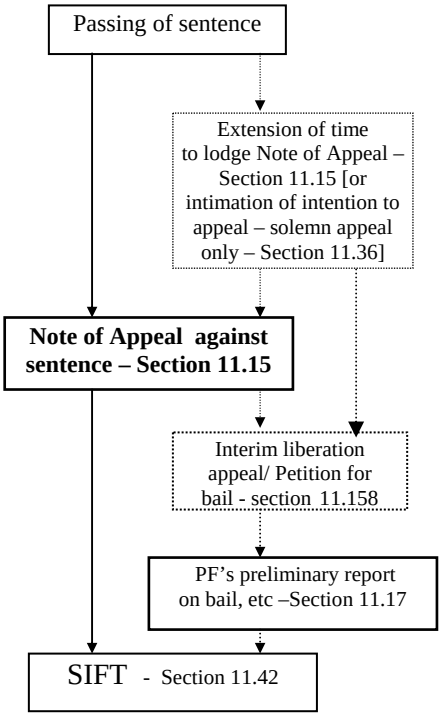
By the statutory appeals outlined below, the appellant may bring under review of the High Court any miscarriage of justice in the proceedings: summary - s175(5); solemn - s106(3).

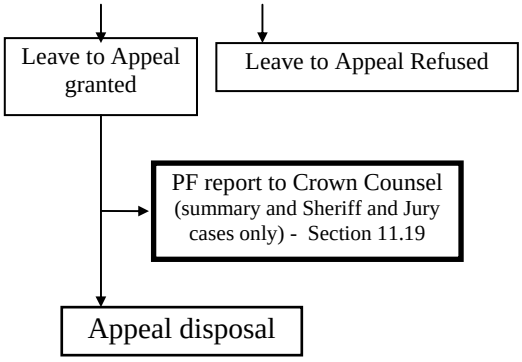
The ground(s) of appeal must contain adequate specification (High Court of Justiciary Practice Note, 29.3.85; Renton and Brown, Appendix E, CPL paragraph C1.02).

The appeals described in this Section are subject to sift procedures - see Section 11.42.

DEFENCE APPEALS AGAINST SENTENCE - SUMMARY AND SOLEMN

11.13 OUTLINE





11.14 INTRODUCTION AND SCOPE OF THE APPEAL

In general, the ground of appeal in a (defence) appeal against sentence will be that the sentence is excessive. The ground of appeal should specify why it is alleged that the sentence is excessive.

"Sentence" is defined in s307(1) of the 1995 Act.

The appeal may be one against: sentence; absolute discharge; admonition; probation; community service; or deferred sentence. The relevant statutory provisions are as under-noted:

Disposal	Summary	Solemn
Sentence	s175(2)(b)	s106(1)(b)
Absolute discharge, admonition	s175(2)(c)	s106(1)(c)
Probation, community service	s175(2)(c)	s106(1)(d)
Deferred sentence	s175(2)(c)	s106(1)(e)

Other matters in which the appeal procedure is provided by statute to be the same as that for an appeal against sentence are specified in section 11.22.

11.15 MARKING THE APPEAL

a. Summary appeal against sentence

The appeal is taken by Note of Appeal (Form 19.3-A) - s186(1) - lodged with the Clerk of the Court of first instance within **1 week** of the passing of the sentence or making of the order in open court - s186(2)(a). The time limit may be extended: by s186(5) or by s186(8) and s181(1) - rule 19.4. The Procurator Fiscal will be sent a copy of the Note of Appeal by the Clerk of Court - s186(3)(a).

b. Solemn appeal against sentence

The appeal is taken by Note of Appeal - Form 15.2B - lodged with the Clerk of Justiciary within **2 weeks** of the passing of the sentence or making of the order in open court - s110(1)(a). Where the appeal has commenced by intimation of intention to appeal against conviction and sentence (see paragraph 11.36), but continues against sentence only, the Note of Appeal must be lodged within 6 weeks of the lodging of intimation of intention to appeal - s110(1)(a).

A copy of the Note of Appeal is sent by the Clerk of Justiciary to the Crown Agent - s110(1)(a). The Procurator Fiscal will be notified by Crown Office of the lodging of the Note of Appeal. Alternatively, if the prospective appellant seeks or is granted an extension of time in which to lodge a note of appeal (form 15.2-C) - s111(2) - the Procurator Fiscal will be notified and will be advised of the lodging of any Note of Appeal in due course.

11.16 RETENTION OF PRODUCTIONS

See section 11.178.

11.17 PROCURATOR FISCAL'S PRELIMINARY REPORT TO CROWN OFFICE

a Summary appeals

Procurators Fiscal should arrange with clerks of court to receive prompt notification where an appeal against sentence marked in summary proceedings.

As soon as notification is received that an appeal has been marked, and in any event within 3 days, *the Procurator Fiscal should submit:*

*i. a completed form **app-sen** along with*
ii. a copy of the complaint and
iii. a copy Note of Appeal.

b. Solemn appeals

i. Sheriff Court appeals (except remits):

When the Procurator Fiscal receives a copy of the Note of Appeal, *he should forward to Crown Office within 3 days:*

- *appeals form **app-sen** and*
- *a copy indictment.*

ii. High Court appeals:

No report is required in relation to an appeal against a sentence imposed in the High Court (including one on remit) unless specifically requested by Appeals Unit staff.

c. Competency and setting aside of sentence (or conviction and sentence)

In general, no formal report is required at this preliminary stage

d. Interim liberation and suspension of disqualification

Where the Procurator Fiscal is notified that:

- in summary proceedings, an appeal against refusal of **interim liberation** has been marked, or
- in solemn proceedings (Sheriff Court only), an application has been made for interim liberation

he should submit a report immediately in accordance with section 11.159.

For further information on interim liberation and suspension of

disqualification, see sections 11.156-11.162 and 11.169-11.172 respectively.

11.18 SIFT PROCEDURES

See section 11.42. The Procurator Fiscal will be advised of the sift result.

11.19 PROCURATOR FISCAL'S REPORT TO CROWN COUNSEL – LEAVE TO APPEAL GRANTED

Where leave to appeal is granted in whole or in part in respect of an appeal against sentence arising out of summary proceedings or solemn proceedings in the Sheriff Court (except following a remit to the High Court), the Procurator Fiscal will provide a report for Crown Counsel's information. In a solemn (Sheriff Court) appeal, the Procurator Fiscal will be provided with a copy of the Sheriff's report.

The Justiciary Office aims to enrol appeals against sentence is within 14 days from the date of granting of leave to appeal. *Accordingly, in an appeal against sentence (only), where leave to appeal is granted, **Procurators Fiscal must report,** on an updated Appeals Form **app-sen**, **within 3 days of receiving***

The Crown's role in a defence appeal against sentence is merely to assist the court in matters of fact and law. ***In most cases, there will be no need for the Procurator Fiscal to provide a formal report.***

11.20 ADDITIONAL OR AMENDED GROUNDS OF APPEAL

In summary proceedings, additional grounds may be specified by the sift judge(s) - s187(7). There appears to be no statutory provision allowing additional grounds to be lodged otherwise.

In solemn proceedings, additional grounds of appeal may be lodged with leave of the court on cause shown - s110(4); or may be specified by the sift judge(s) - 107(8).

On occasion, the Appeal Court may allow the grounds to be amended after hearing submissions.

Where additional or amended grounds are lodged, these will, if necessary and time permitting, be intimated to the Procurator Fiscal for observations, if any.

11.21 ABANDONMENT OF APPEAL

See section 11.137.

11.22 OTHER MATTERS WHICH MAY BE APPEALED BY NOTE OF APPEAL AGAINST SENTENCE

a. Under the 1995 Act, *inter alia*, restriction of liberty order - s245A(7); hospital orders, etc. - s60.

b. Under the Proceeds of Crime (Scotland) Act 1995 (all references are to sections of that Act):

i. confiscation orders - s1(8); s10(a). See Donnelly v Her Majesty's Advocate 1999 SCCR 508; Adamson v Her Majesty's Advocate, 1999 SCCR 994. Special provisions apply where:
- a postponed confiscation order has been made - s10 (note the extended time limits);
- there has been an increase in benefit of realisable property - s11;
- realisable property is inadequate to meet payments under a confiscation order - s12.

ii. the granting or refusal of an application by the recipient of:
a gift - s5(3);or of
an implicative gift - s6(3);
see sections 5(5) and 6(5) of the Act.

iii. suspended forfeiture orders - s21(12).

iv. recall or variation of a suspended forfeiture order - s27(2).

v. forfeiture orders in the District Court - s22(7).

vi. return of, or compensation for, property wrongly forfeited - s27(2).

c. a non-harassment order (or variation or revocation of an order) - s234A(3).

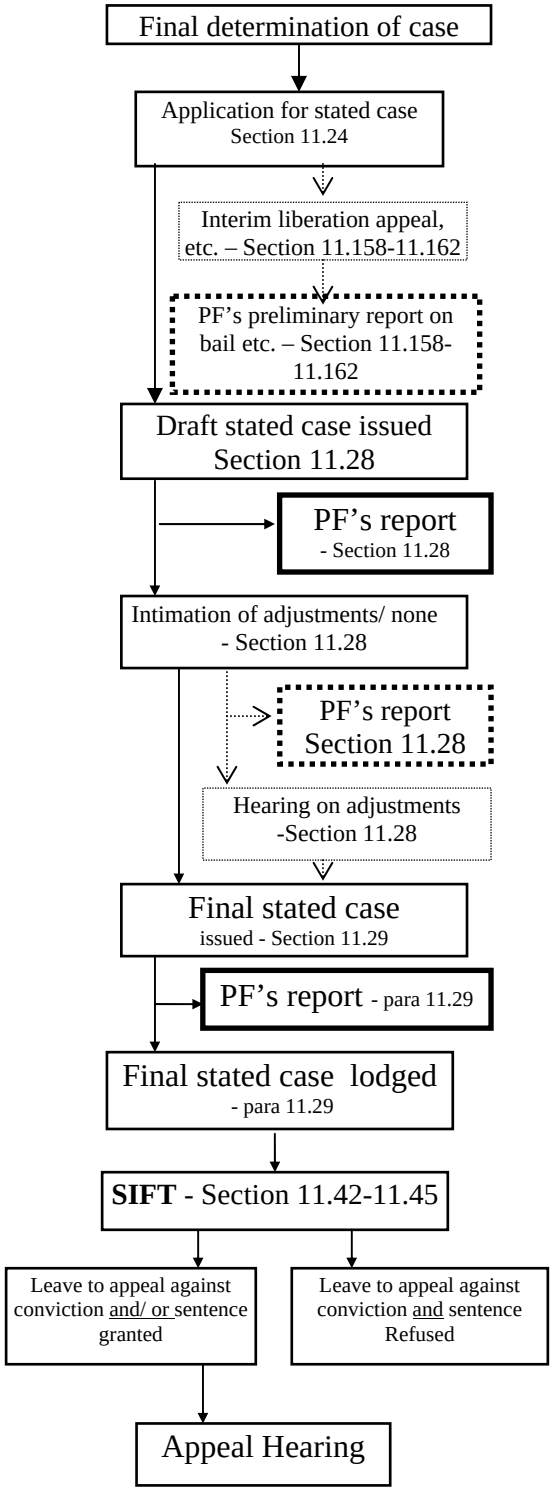
d. an order under **s16(2) or (4) of the Prisoners and Criminal Proceedings (Scotland) Act 1993** – section 16(5)(a). The Appeal Court may substitute a period not exceeding the period between the date on which the person

was released and the date on which he would (but for his release) have served his sentence in full.

DEFENCE APPEALS AGAINST CONVICTION OR CONVICTION AND SENTENCE

SUMMARY APPEALS - STATED CASE

11.23 OUTLINE



11.24 APPLICATION FOR STATED CASE

A person convicted, or found to have committed an offence, may appeal against conviction - s175(2)(a); or conviction and sentence - s175(2)(d).

The appeal is taken by way of an Application for Stated Case - form 19.2A - which should:

i. be made within one week of the final determination of the proceedings - s176(1)(a);
ii. contain a full statement of all matters which the appellant wishes to bring under review - s176(1)(b); and
iii. be sent to the Procurator Fiscal within the same period of time - s176(1).

The case is finally determined on the day on which sentence is passed in open court: - s194(3); and when particulars of the conviction and sentence are recorded - Tudhope v Colbert 1978 SLT (Notes) 57. If sentence is deferred in terms of s202, the case is finally determined on the date on which sentence is first deferred - s194(3).

The convicted person may appeal against a decision on competency and relevancy by, or as part of, a Stated Case: Harvey v Lockhart 1991 SCCR 83.

The grounds may be amended, or additional grounds added.

The time limit may be extended – see section 11.31.

11.25 SPECIFICATION OF GROUNDS AND REFUSAL TO ISSUE A DRAFT STATED CASE

If the application for Stated Case includes a ground which the inferior court is unable to take into account (e.g. fresh evidence; defective representation), the High Court may nonetheless have regard to it at the hearing - s182(2)

If the matters to be brought under review are not sufficiently specified, the trial judge may have difficulty in drafting an appropriate stated case and the Crown will be at a disadvantage at the adjustment stage. The High Court has held that, in certain circumstances, it is appropriate for a judge to refuse to state a case if the application does not fulfil the statutory requirements:

- where a ground of appeal stated merely "that the Sheriff erred in law" and the Sheriff stated a case, the Court observed that he was not obliged to do so because of the unspecific character of the application: Dickinson v Valentine 1988 SCCR 325.

- an application proceeding on the ground that there was "insufficient evidence for a conviction" is not in accordance with the statutory requirement: Galloway v Hillary 1983 SCCR 119.

Although in the circumstances outlined it may be appropriate for the judge to refuse to issue a stated case, the judge (or Clerk of Court) is not entitled to state that the grounds of appeal are irrelevant if they comply with the requirements of section 176(1)(b): McTaggart, Petitioner 1987 SCCR 638.

A case should be stated even if the application reveals a misunderstanding of the reasoning for the verdict: McDougall, Petitioner 1986 SCCR 128.

11.26 INTERIM LIBERATION, INTERIM SUSPENSION OF DISQUALIFICATION AND RETENTION OF PRODUCTIONS

a. Interim liberation - see section 11.158-11.162.
b. Interim suspension of disqualification - see section 11.169-11.172.
c. Retention of productions - see section 11.178.

11.27 DRAFT STATED CASE

Within three weeks of the final determination of the proceedings, a draft stated case shall be prepared and a copy sent to the appellant or his solicitor and to the Procurator Fiscal - s178(1).

a. Format of the stated case

Where the appeal proceeds on the basis that the judge **erred in repelling a submission of no case to answer** (under s160) guidance as to how the case should be stated is given in the case of Wingate v McGlennan 1991 SCCR 133. Two situations may arise in a defence appeal:

i. Where a submission of no case to answer has been **rejected and the accused chooses to lead no evidence and is convicted**:

- the stated case should contain findings in fact;
- it is not necessary for the judge to set out the evidence led by the prosecution and the inferences drawn therefrom because the findings in fact must necessarily be based solely on that evidence;
- in his note, the Sheriff should explain in brief the evidence on which his findings were based.

In exceptional cases questions may arise as to whether the evidence led justified inferences being drawn. In such cases, the judge may require to set out in detail the prosecution evidence.

ii. Where a submission of no case to answer has been **rejected and the accused has proceeded to lead evidence and has been convicted**, the stated case will require:

- to set out the evidence led by the prosecution and any inferences drawn therefrom; and

- to set out the findings in fact, which must be made on the whole evidence led before the Sheriff.

In addition:

- It must be made clear that the findings in fact are made on the **evidence as a whole**. If this is not done, the High Court will most probably give the benefit of the doubt to the appellant and allow the appeal: Jordan v Allan 1989 SCCR 202.

- Where relevant to the findings in fact, the judge should comment on the **credibility and reliability** of all witnesses (including the appellant). If no comment is made in relation to the evidence of the appellant and any defence witnesses, the court may hold that the findings in fact cannot be treated as findings made on the whole evidence and allow the appeal: Robertson v McGlennan 1994 SCCR 394.

- The judge must also have **stateable and defensible reasons for drawing an inference of guilt** and must articulate these in the case: Petrovitch v Jessop 1990 SCCR 1.

b. Lack of conjunction of testimony in the evidence given by Crown witnesses. The evidence must be set out in order to allow the court to ascertain whether there has been a "fundamental divergence" in the evidence of these witnesses: McDonald v Scott 1993 SCCR 78; Hutton v Heywood A1/94: Young v HMA 1997 SCCR 405.

c. Complex Stated Cases may result if the appeal is against not only the **merits** of the conviction (for example, relating to some aspect of the evidence led), but **also a point of competency or relevancy**, leave to appeal under s174 having been refused or not sought. This may result in cases being stated by two different Sheriffs, one Sheriff dealing with the plea to competency or relevancy and the other the trial. In such situations each Sheriff should make findings in fact in relation to the matter dealt with by him, provide a note dealing with his part in the proceedings and pose questions in law. In effect two Stated Cases are combined into one - see e.g. Beattie v Tudhope 1984 SCCR 198.

11.28 ADJUSTMENT OF THE CASE

Within **three weeks of the issue** of the draft stated case, each party should lodge adjustments to the draft case or intimation that there are none - s179(1). A copy should be sent to the other party (or his solicitors).

The time limits may be extended – see section 11.31.

If the **appellant** fails to lodge adjustments or to intimate that he has no adjustments, the appeal will be deemed to be abandoned - s179(3).

i. Procurator Fiscal's report to Crown Office

*On receipt of the draft stated case the Procurator Fiscal will submit a report on appeals form **app-cas** to Crown Counsel. **The report must be submitted no later than eleven days after the issue of the draft stated case***

The Procurator Fiscal should provide a separate report in respect of each appellant, regardless of the fact that they may have appeared as co-accused on a single complaint.

*The Appeals Form must confirm the current position in relation to the granting of **interim liberation** or suspension of **disqualification** ad interim.*

Crown Counsel's instructions will be communicated to the Procurator Fiscal.
Where adjustments are instructed, the Procurator Fiscal should lodge and intimate these accordingly. Where there are none, it is best practice, to intimate this.

ii. Hearing on Adjustments

Where adjustments are proposed, within one week of the expiry of the time for intimating adjustments, there shall be a hearing to consider the adjustments or alterations - s179(4).

Any proposed adjustments intimated by the appellant should be reported to Crown Counsel as soon as possible for their consideration and instructions.
***Two copies** of the proposed adjustments should be submitted.*

The hearing may proceed in the absence of a party - s179(5).

Where a proposed adjustment is rejected and not withdrawn, this requires to be minuted - s179(6) - and the Sheriff (or justice) must deal with the matter in a note appended to the final stated case - s179(7). The High Court may take account of information contained in the Sheriff's note.

11.29 FINAL STATED CASE

The trial judge must state and sign a final stated case (including where appropriate a note on adjustments rejected and of the evidence supporting any finding in fact challenged) within two weeks - by virtue of s179(7) :

- of any hearing on adjustments
- or where there was none, of the expiry of the 3-week period in s179(1).

As soon as it is signed, the appropriate clerk must send it to the appellant and a copy to the respondent - s179(8).

The appellant requires to lodge the principal copy of the final stated case with the Clerk of Justiciary within 1 week of receiving it - s179(9). Failure to do so will result in the appeal being deemed to be abandoned - s179(10).

*As soon as the Procurator Fiscal receives a copy of the final Stated Case, he should forward **two copies** for Crown Counsel's information, together with a brief report, on an updated appeals form **app-cas**, on the hearing on adjustments. The report should reassess whether Crown Counsel should continue to support the conviction.*

11.30 AMENDED AND ADDITIONAL GROUNDS OF APPEAL

i. The appellant may, at any time within 3 weeks of the final determination of the proceedings, or within any period extended under s181(1), amend any matter stated in his application or add a new matter; and he shall intimate any such amendment or addition to the respondent or his solicitor - s176(3).

ii. The appellant may not found on any ground not contained in his application

for stated case, or duly made amendments except with leave of the Court on cause shown - s182(3).

iii. The sift judge(s) may specify a ground not contained in the stated case - s180(7) - but generally the appellant may not found on any ground of appeal in respect of which leave to appeal has been refused without leave of the Court on cause shown - s180(8).

The court may remit the stated case to the inferior court for amendment and return - s182(6)

*Any amendment should be intimated to Crown Counsel on an updated appeals form appeals form **app-cas**.*

11.31 EXTENSION OF TIME LIMITS

i. The **Sheriff Principal** may extend the time limits for:
- preparing the draft stated case under s178(1)
- holding the hearing on adjustments under s179(4) and
- stating and signing the final stated case under s179(1)

where the inferior judge is temporarily absent from duty, or is a temporary sheriff or a Justice of the Peace: s194(2) and rule 19.4.

ii. The **High Court** may extend the time limits for:
- applying for the draft stated case under s176(1)
- lodging adjustments (or intimating that there are none) under s179(1) and
- lodging the final stated case under s179(9)

by virtue of s181.

An application for extension in terms of s181(1) requires to be made in writing to the Clerk of Justiciary, stating the ground for the application; notification should be given to the clerk of the court of first instance - s181(2). The application is heard by a single Judge in chambers, in the same way as an appeal against refusal of interim liberation in a summary appeal.

When the application is decided by the High Court, the Clerk of Justiciary will intimate the decision to the lower court - s181(3). In practice, the clerk of the lower court will send a copy of the application to the Procurator Fiscal with the copy draft stated case.

It has been held that there is no right of appeal against a refusal to grant an extension and that the *nobile officium* cannot be used to obtain an extension of the time limits: Berry, Petitioner 1985 SCCR 106.

*Where the Procurator Fiscal receives notification that the appellant has applied for or been granted an extension of time he should intimated this to Crown Counsel on an updated appeals form **app-cas**.*

11.32 ABANDONMENT AND DEEMED ABANDONMENT OF APPEAL

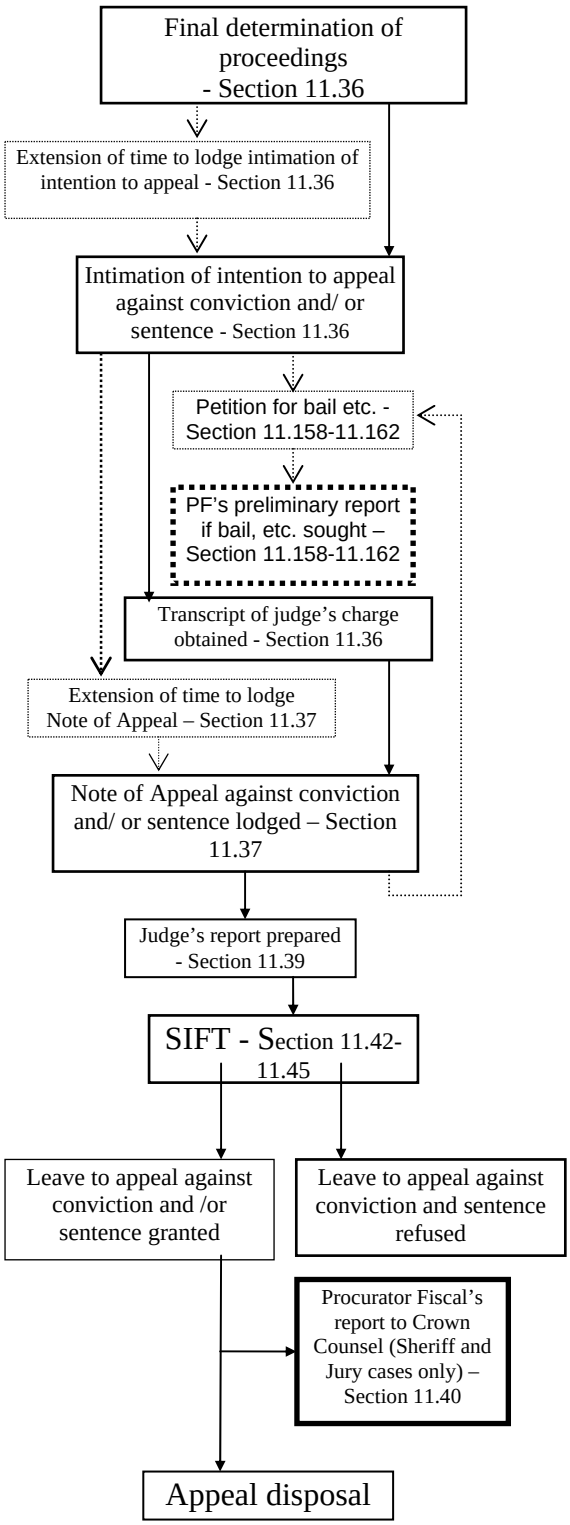
See sections 11.137 and 11.134.

11.33 SIFT PROCEDURES

See Section 11.42-11.45. The Procurator Fiscal will be notified of the sift result.

SOLEMN APPEALS

11.34 OUTLINE



11.35 INTRODUCTION

A person convicted on indictment may appeal against conviction - s106(1)(a); or conviction and sentence - s106(1)(f).

11.36 PRELIMINARY PROCEDURES

Within two weeks of the final determination of the proceedings the appellant must lodge written intimation of his intention to appeal against conviction or conviction and sentence with the Clerk of Justiciary - form 15.2A: s109(1) - and intimate it to the Crown Agent - s109(2). This period may be extended by the High Court - s111(2). No grounds of appeal are specified at this stage.

Crown Office will notify the Procurator Fiscal when an intimation of intention to appeal has been lodged. On occasions, where proceedings commence with an application for extension of time to lodge an intimation of intention to appeal, the Procurator Fiscal will be notified of the making of an application. In either case, no further notification may be given until the Note of Appeal is lodged, or the appeal is abandoned or deemed to be abandoned – see sections 11.138 and 11.136.

Once the notice of intention to appeal has been lodged, the Clerk of Justiciary will request a transcript of the judge's charge to the jury. His authority to request transcripts of proceedings is contained in s94(1). When it becomes available, a copy of the transcript is provided to the appellant and to Crown Office.

"Final determination" of a case is deemed to be the day on which sentence is passed in open court - s109(4). However, if the appeal is against conviction only, and sentence has been deferred in terms of section 202 of the 1995 Act (i.e. other than for inquiry or reports) the case will be regarded as "finally determined" for appeal purposes on the day on which sentence was first deferred. See too Tudhope v Colbert 1978 SLT (N) 57 and section 11.24.

Where there are several accused on one indictment, the trial of all of them must be brought to a finality before any one of them can exercise the right of appeal - Evans, Petitioner 1991 SCCR 160 @ 164C.

11.37 NOTE OF APPEAL

Within six weeks of lodging intimation of intention to appeal the appellant must lodge a written Note of Appeal (Form 15.2B) with the Clerk of Justiciary - s110(1)(a). This period may be extended by the High Court - s111(2). The Note of Appeal should contain a full statement of all grounds of appeal - s110(3)(b).

11.38 INTERIM LIBERATION AND SUSPENSION OF DISQUALIFICATION

a. Interim liberation - see Section 11.158-11.162;
b. Interim suspension of disqualification - see Section 11.169-11.172;
c Retention of productions – see Section 11.178.

11.39 JUDGE'S REPORT

The trial judge should, as soon as reasonably practicable after receiving the copy note of appeal, furnish the Clerk of Justiciary with a written report giving his opinion on the case generally and on the grounds contained in the Note of Appeal - s113. A copy of this report will be provided to the Appellant and to the Crown Agent - s113(2).

11.40 PROCURATOR FISCAL'S REPORT

a. High Court Convictions

A copy of the Note of Appeal will be provided for the Procurator Fiscal's information. A report will be obtained from the trial Advocate Depute.

Normally, the Procurator Fiscal will not require to provide a report, unless necessary in light of the grounds of appeal.

b. Sheriff and jury convictions

Where the appeal is against conviction or conviction and sentence in a Sheriff Court case, *the Procurator Fiscal will provide a report on Appeals form* ***app-sol*** *for Crown Counsel's information. A separate appeals form should be completed for each appellant.*

The Procurator Fiscal will be sent a copy of:

1.the Note of Appeal;
2.the judge's charge; and
3.the judge's report (if available).

The High Court has power to hear and determine the appeal without the judge's report having been provided: s113(3). ***Procurators Fiscal should ensure that their report is submitted within 5 days of receipt of the request.***

11.41 SIFT PROCEDURES

See Section 11.42-11.45. Procurators Fiscal will be notified of the sift result.

LEAVE TO APPEAL AGAINST CONVICTION AND/OR SENTENCE - "THE SIFT PROCEDURES"

11.43 INTRODUCTION

The procedures are explained in the High Court of Justiciary Practice Note No 1 of 1995 CPL paragraph C1.12.

Section 42 of the Criminal Justice (Scotland) Act 1995 amended the Criminal Procedure (Scotland) Act 1975, introducing the requirement that before any (defence) statutory appeal against conviction and/or sentence may be argued in the High Court of Justiciary, leave to appeal must first be obtained. The procedures, known collectively as the "sift procedure", came into force on 26 September 1995 - First Commencement Order [S.I. 1995 No 2295(C.45) (S171)].

The procedures have been consolidated into the Criminal Procedure (Scotland) Act 1995 in s107 (solemn appeals) and s180

(summary appeals). They apply to any appeal by a convicted person by Note of Appeal or by Stated Case against: conviction; a finding that the convicted person committed the offence; and/or sentence. They do not apply to any appeal by the Crown nor to defence appeals other than those under sections 106 or 175.

If the sift Judge(s) consider that the documents disclose **arguable grounds** of appeal, leave to appeal shall be granted. Leave may be granted even if the arguable ground(s) are identified by the sift Judge(s) and were not included in those lodged by the appellant.

In some cases, a further report may be required in light of any comments made or grounds of appeal identified by the sift judge(s). If so, the Procurator Fiscal will be advised and should provide a supplementary report as soon as possible thereafter.

If the Judge(s) considers that no arguable grounds of appeal are disclosed then leave to appeal shall be refused, with reasons given in writing. Intimation will be given to the appellant (or his solicitor) and to the Crown Agent (see the Practice Note).

11.44 THE PROCEDURES

a. The "first sift"

Once available, the relevant documents relating to the appeal are considered by a single Judge in Chambers. There is no appearance by either party.

The Judge may request a supplementary report from the trial Judge - rules 15.14 (solemn); 19.18 (summary).

If leave to appeal is refused in whole and the appellant has been released on interim liberation, the Judge shall grant a warrant for his apprehension. However, the operation of any warrant for apprehension and imprisonment granted after refusal at first sift is suspended for 14 days to allow for an appeal against such refusal to be lodged.

b. The "second sift"

Where leave to appeal has been refused, in whole or in part, the appellant may, within 14 days, appeal against the refusal in writing to the court. The application is made in a letter addressed to the Deputy Principal Clerk of Justiciary (see the Practice Note). In practice, the applicant may make further representations, expanding on the ground(s) and providing further relevant information.

The appeal against refusal of leave to appeal (the "second sift") is heard by two (or more) Judges of the High Court of Justiciary in Chambers. Neither party is represented.

Once again if leave to appeal is refused in whole, and the appellant has been released on interim liberation, the court may grant a warrant for his apprehension and imprisonment. In this case, the warrant has immediate effect.

c. Powers of the Court hearing any appeal.

Appeals to which the provisions relate may thereafter proceed only in respect of those grounds in respect of which leave to appeal has been granted. Application may, however, be made to the court to rely on any ground in respect of which leave to appeal has been refused.

The Court has power, too, to permit the lodging of <u>additional or amended</u> grounds of appeal when the case comes before a <u>quorum</u> of the court for a hearing.

11.45 RELEVANT STATUTORY PROVISIONS

	SOLEMN APPEAL – CONVICTION/	**SUMMARY APPEAL – STATED**	**SUMMARY APPEAL -**

	SENTENCE	CASE	SENTENCE
Procedure in chambers	s107(6)	s180(6)	s187(5)
1st sift procedure	s107(1)	s180(2)	s187(1)
Documents to be considered	s107(2)	s180(2)	s187(1)(a) and s186(4)
Refusal - warrant if on bail	s107(1)(b)(ii)	s180(1)(b)(ii)	s187(1)(b)(ii)
Warrant - suspended effect	s107(3)	s180(3)	s187(2)
Right of appeal against refusal of leave	s107(4)	s180(4)	s187(3)
2nd sift procedures	s107(5)	s180(5)	s187(4)
Further representations?	HCJ Practice Note 1/95, CPL paragraph C1.12	HCJ Practice Note 1/95	HCJ Practice Note 1/95
Grounds refused at sift cannot be relied on without leave of the court	s107(8)	s180(8)	s187(7)
Procedures for applying for such leave	s107(9)	s180(9)	s187(8)
Court may specify arguable ground (i.e. not contained in note etc.)	s107(7)	s180(7)	s187(6)
Not competent to found an appeal on any ground not in the note of appeal:-	s110(4)	s182(3)	s187(7)
Unless specified by sift Judge(s)	s110(5)	s182(4)	s187(7)
or leave granted by court on cause shown	s110(4)	s182(3)	

SOME PARTICULAR GROUNDS OF APPEAL

11.46 ADDITIONAL EVIDENCE

An appellant may bring under review of the High Court any alleged miscarriage of justice on the basis of the existence and significance of evidence which was not heard at the original proceedings: summary - s175(5); solemn - s106(3).

a. The existence of evidence:

1. Reasonable explanation

There must be a reasonable explanation as to why the evidence was not heard at the original proceedings: summary - s175(5A); solemn - s106(3A).

- The onus is on the appellant to provide a reasonable explanation for the failure to call the evidence at the trial. It will be sufficient for the appellant to persuade the Court that the explanation is genuine. It does not require to be shown by full legal proof that the explanation is true: Campbell (T) v HMA 1998 SCCR 214.

  If the explanation concerns what inquiries the solicitors acting at the time of the trial could reasonably have been expected to pursue, information which they could give as to what they did or did not know and any reason or reasons which they had for thinking that no further inquiries were called for may not be absolutely essential but is highly desirable: Barr v HMA 1999 SCCR 13

- In determining whether the explanation is deemed to be reasonable, the Court will have regard to the interests of justice according to the circumstances of the particular case: Campbell (T) v HMA 1998 SCCR 214.

- It would be difficult, if not impossible, for evidence to be admitted at the stage of an appeal if a tactical decision was taken not to adduce it at the trial: Campbell (T) v HMA 1998 SCCR 214.

2. Admissibility of evidence

The evidence must meet the current rules on admissibility, even if it was not admissible at the time of the original proceedings: summary - s175(5B); solemn - s106(3B).

3. Change of evidence

If the evidence is from a person who gave evidence at the original proceedings, there must also be a reasonable explanation as to why the new evidence was not given by that person at those proceedings; and that explanation must be supported by other evidence which:

- was not heard at the original proceedings,
- is from an independent source and
- is credible and reliable:

summary - s175(5C) and (5D); solemn - s106(3C) and (3D)).

The meaning of "reasonable explanation" is the same as in s175(5A) and s106(3A). The Court will initially, on the information provided, consider whether the evidence could support the explanation, and not whether it could support the content of the evidence and thereafter whether the independent evidence was capable of being regarded as credible and reliable: Campbell (T) v HMA 1988 SCCR 214.

If the evidence satisfies the criteria outlined above, an appeal is competent and the appellant must then establish that there has been a miscarriage of justice based not only on the existence of the new evidence but also on its significance.

b. The significance of evidence:

In considering significance, the Court will have regard to the quality of the evidence and will require to be persuaded that the witnesses who have given the additional evidence were credible and that the evidence given was

plainly reliable or was at least capable of being so regarded by a reasonable jury: Cameron v HMA 1987 SCCR 608 at 619.

If, the Court is satisfied that the additional evidence is at least capable of being described as important and reliable and which would have been bound, or at least likely to have had a material bearing upon, or a material part to play in, the jury's determination of a critical issue at the trial, it will be open to the Court to hold that a conviction returned in ignorance of that evidence represents a miscarriage of justice and to set aside the verdict and authorise a new prosecution: Cameron v HMA 1987 SCCR 608 at 619. See also Church v HMA 1999 SCCR 29, McLay v HMA 2000 SCCR 579 and Kidd v HMA Crown Office Circular A5/2000.

The Court may hear additional evidence relevant to any alleged miscarriage of justice or order such evidence to be heard by a Judge at the High Court or by such other persons at it may appoint for that purpose: summary - s182(5b); solemn - s104(b).

11.48 GROUNDS OF APPEAL RELATING TO THE JURY

In solemn appeals, the grounds of appeal may relate to a matter concerning the jury. This may require investigation.

Issues concerning jurors fall into a number of categories:

1. **Allegations of the existence of facts making it inappropriate for a juror to serve in a particular case**

   e.g.:
   - that a juror had some inappropriate personal knowledge about the facts of the trial;
   - that the juror knew personally or was related to an accused person or to a witness;
   - that an improper approach was made to a juror during the trial.

If information, bringing into question the appropriateness of a juror continuing to serve in a case, comes to the attention of the prosecutor during a trial, he should take steps to alert the presiding judge to the situation. The presiding judge may make inquiry into the facts and may allow the parties to address him on what further steps may be appropriate (egg whether the juror should be discharged): Stewart v HMA 1980 JC 103; McCadden v HMA 1985 SCCR 282; Pike v HMA 1987 SLT 488.

The presiding judge has discretion how to deal with the matter and may decide simply to give the jury a specific direction: Hamilton v HMA 1986 SCCR 226; Pike v HMA supra.

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Where the circumstances come to light only after the trial, in any appeal, the High Court will consider whether the facts disclosed amounted to a miscarriage of justice. It should be noted that:

i. even if a juror would have been excused had the facts been known to the trial judge at the time, it does not follow that the continued presence of the juror resulted in a miscarriage of justice: the principle that justice must be seen to be done does not extend to things which happen in the privacy of the jury room: Russell v HMA 1991 SCCR 790.

ii. there is a strong presumption that a jury can be entrusted with the responsibility of reaching a true verdict: Pullar v HMA 1993 SCCR 514; Pullar v UK 1996 SCCR 755. The former case contains important observations on:

   - the procedure to be followed and
   - the information which should be given to potential jurors and serving jurors before and during a trial

   to ensure in so far as possible that they disclose any potentially prejudicial contact with the case.

2. Allegations of improper approaches to the jury after they have retired to consider their verdict:

a. when a jury retire to consider their verdict they shall be enclosed - s99(1) - and no one shall thereafter be present with them except as provided for by the section.

b. the trial judge may give such directions as are appropriate in relation to the making of arrangements for overnight accommodation for the jury and for their continued seclusion - s99(4). Subject to the exception there, s99(2) provides that:

- no person shall visit the jury or communicate with them; and
- no juror shall leave the jury room (otherwise than as provided by the section).

c. If the prosecutor or any other persons contravenes the provisions of the section, the accused shall be acquitted: s99(5).

The subsection is not intended to apply to every communication with the jury but only to communications in cases where the law would presume some irregular and partial purpose - however the term "any other person" is wide enough to cover any person who wished to ensure that the accused was convicted and would apply to a judge who communicated with the jury in order to try to ensure that they convicted the accused: Thomson v HMA 1997 SCCR 121

3. Allegations that improper pressure was placed on the jury by the presiding judge to reach a verdict within a certain time.

The Appeal Court is concerned to know:

i. the precise wording used by the trial judge,
ii. the timing of the remarks, and
iii. the timing of any subsequent verdict reached.

Accordingly, *in so far as possible, Procurators Fiscal should make a note of any remarks made by the presiding judge and the relevant timings for future reference.*

For examples, see McKenzie and Thomson v HMA 1986 SCCR 94; Sinclair v HMA 1991 SCCR 520; Robertson v HMA 1996 SCCR 243.

11.49 PROCEDURES OPEN TO THE HIGH COURT

The Court of Appeal may examine the circumstances alleged to constitute the breach and may conduct enquiry, in public or in private as appropriate.

The Court may remit the case to any fit person to inquire and report in regard to any matter or circumstances affecting the appeal - s104(1)(d).

The court will not order such inquiry lightly. In cases of alleged prejudice, there must be substantial, convincing and trustworthy evidence to support the allegation: McCadden v HMA 1985 SCCR 282. This applies, even more strongly, where the court is being asked to order an investigation into the jury's deliberations, particularly where the information arises from a conversation which involves an apparent contravention of section 8(1) of the Contempt of Court Act 1981. The criteria that the evidence should be "*prima facie* sufficiently substantial, convincing and trustworthy to warrant an enquiry" mean that it is for the Appeal Court to make an assessment of not only the content and significance of that evidence but also its apparent quality: Swankie v HMA 1999 SCCR 1

PART III - CROWN APPEALS AGAINST ACQUITTAL AND SENTENCE AND LORD ADVOCATE'S REFERENCES

CROWN APPEALS FOLLOWING ACQUITTAL

SUMMARY APPEAL – STATED CASE

11.51 INTRODUCTION

The Procurator Fiscal may appeal to the High Court of Justiciary:

- on a point of law against acquittal: s175(3)(a), or
- against sentence passed on conviction on a point of law or as being unduly lenient or inappropriate: s175(3)(b) - see section 11.63-11.74.

An appeal against acquittal on a point of law is taken by way of an Application for Stated Case (on form 19.2A) which should:

i. be made within one week of the final determination of the proceedings - s176(1)(a) - see paragraph 11.24;
ii. contain a full statement of all matters which the appellant wishes to bring under review - s176(1)(b); and
iii. be sent to the accused within the same period of time - s176(1).

An appeal against sentence on a point of law may be taken by application for stated case, but may also be taken by Note of Appeal. See section 11.63-11.74.

Generally, an appeal will be taken only when a matter having significant practical or policy implications has arisen.

11.52 PROCURATOR FISCAL'S INITIAL REPORT

*If the Procurator Fiscal considers that an appeal by the Crown is appropriate, he should submit a written report on Appeals form **app-csc** immediately for Crown Counsel's instructions. In cases of urgency, however, or where guidance is sought, the matter may be discussed in outline with a member of the Appeals Unit staff.*

- Any application for stated case must be lodged with the clerk of court from which the appeal is taken **within one week of the final determination of the proceedings** - s176(1)(a). *Accordingly, any report should be submitted as soon as possible after the conclusion of the proceedings.*

The grounds of appeal may be amended within three weeks of the issue of the draft stated case and any such amendment shall be intimated to the respondent or their solicitor - s176(3). Otherwise, it is not possible to found on any matter not contained in the application except by leave of the High Court on cause shown - s182(3). Crown Counsel would not anticipate having to rely on the latter provision.

*Where Crown Counsel instruct that an application for a stated case should be lodged, **the Procurator Fiscal will be responsible for lodging the application with the clerk of court and sending a copy of it to the respondent** at his last known address or to the respondent's solicitor - s176(c).*

11.53 RETENTION OF PRODUCTIONS

See section 11.178.

11.54 DRAFT STATED CASE

Within three weeks of the final determination of the proceedings, a draft stated case will be sent to the Procurator Fiscal and a copy to the respondent or his solicitor: s178(b).

On receiving the draft stated case, the Procurator Fiscal must send the draft stated case as soon as possible to Crown Office along with a report as undernoted

11.55 ADJUSTMENTS OF THE DRAFT STATED CASE

Within three weeks of the receipt of the draft stated case, each party should lodge adjustments to the draft stated case or intimation that there are none - s179(1). A

copy should be sent to the accused (or his solicitors).

*Any adjustments proposed by the Crown must be intimated within **three weeks from the DATE OF ISSUE - NOT OF RECEIPT** - of the draft stated case: s179(1) . **If they are not, the appeal will be deemed abandoned: s179(3).***

The date of issue will be shown on minutes of procedure relating to the appeal.

a. Procurator Fiscal's report on adjustments

*As soon as the draft stated case is received by the Procurator Fiscal, and in any event within 11 days of the date of issue, he should forward it to Crown Counsel along with an updated report, on Appeals form **app-csc***Crown Counsel will instruct any adjustments which are to be intimated. *Where adjustments are instructed the **Procurator Fiscal must ensure that they are intimated to the Court and to the respondent or his solicitor timeously.***

Any adjustments proposed by the accused should be reported for Crown Counsel's consideration and instructions.

b. No case to answer

If the appeal proceeds on the basis that the judge erred in upholding a submission of no case to answer and acquitting the accused in terms of s160, the stated case should contain no findings in fact, but should simply set out the evidence adduced by the prosecution and any inferences drawn by the judge: Wingate v McGlennan 1991 SCCR 133.

c. Hearing on adjustments

Any hearing must be held within one week of the expiry of the three-week period (allowed for intimation of adjustments) - s179(4).

Crown Counsel will instruct the approach to be adopted at any hearing on adjustments

11.56 FINAL STATED CASE

The principal, signed stated case must be lodged in Justiciary Office WITHIN SEVEN DAYS OF ITS RECEIPT by the Procurator Fiscal. If it is not lodged timeously, the appeal will be deemed to have been abandoned.

The Procurator Fiscal must send to Crown Office the* PRINCIPAL, SIGNED STATED CASE *without delay.

*The principal signed stated case should be sent to Crown Office **immediately** along with an updated form **app-csc** (showing the date of receipt by the Procurator Fiscal of the signed stated case*

The signed stated case will be lodged with the Clerk of Justiciary by the Appeals Unit.

11.57 EXTENSION OF TIME LIMITS

The various time limits may be extended - see section 11.31. However, Crown Counsel will not normally consider authorising any application for an extension of the statutory time limits unless the failure to comply with them is due to circumstances outwith the control of the Crown e.g. illness of the trial depute.

11.58 ABANDONMENT OF THE APPEAL

If instructions are received from Crown Counsel to abandon the appeal, the Procurator Fiscal should lodge a minute of abandonment with the clerk of court and intimate the position to the respondent or the respondent's solicitor: s184(1). The minute of abandonment should be in the style set out in rule 19.5. A copy of the minute should be sent to Crown Office for Crown Counsel's information.

11.59 SIFT PROCEDURES

Sift procedures do not apply.

SOLEMN APPEALS

11.60 ERRORS OF LAW

There is no statutory procedure whereby an acquittal in solemn proceedings may be appealed. There is very limited scope for correcting some errors by Bill of Advocation – see section 11.98-11.104.

Any other error of law in a solemn trial is susceptible of review only by Lord Advocate's Reference.

LORD ADVOCATE'S REFERENCE

11.61 INTRODUCTION

In solemn proceedings, after conviction or acquittal, the Lord Advocate may refer a point of law to the High Court for their opinion - s123(1). The High Court's opinion on the point shall not affect the acquittal or conviction in the trial - s123(5). Accordingly, the procedure is of use only for the purpose of clarifying legal issues which have arisen in the course of a trial.

The following Lord Advocate's references have been taken:

- No 1 of 1983, 1984 SCCR 62 - admissibility of statements by a suspect in the course of a taped interview by police officers;
- No 1 of 1985, 1987 SLT 187 - questions of law relating to a charge of perjury ;
- No 1 of 1992, 1992 SLT 1010 - admissibility of hearsay evidence where the author of documents could not be identified (Note that this decision has been superseded by sch 8 to the 1995 Act, previously sch 3 to the 1993 Act);
- No 2 of 1992, 1992 SCCR 960 - joke as a motive for a crime;
- No 1 of 1994, 1995 SLT 248 - causation in a charge of culpable homicide arising from the supply and ingestion of a controlled drug;
- No 1 of 1996, 1996 SCCR 516 - method of proof of bank statements in criminal proceedings.

11.62 PROCURATOR FISCAL'S REPORT

Where consideration is being given to referring a point of law for consideration by Crown Counsel, Procurators Fiscal may, if desired, discuss the point in principle with the Head of the Crown Office Appeals Section or with the Deputy Crown Agent prior to the submission of a detailed written report.

There is no time limit for the taking of a Lord Advocate's Reference. However, any report for Crown Counsel's consideration should be submitted within 10 days of the decision complained of.

- *The Procurator Fiscal should report on appeals form **app-lar***

CROWN APPEALS AGAINST SENTENCE AND THE ROLE OF THE PROSECUTOR POST CONVICTION

CROWN APPEALS AGAINST SENTENCE

No appeal should be marked unless on Crown Counsel's instructions.

11.63 THE STATUTORY PROVISIONS

Note that sift procedures do not apply to Crown appeals.

a. Summary cases

The prosecutor in summary proceedings may appeal:

i. against sentence **on a point of law:**

- under s175(3)(b): e.g. appeals against a judge refraining from disqualifying from driving on the basis of exceptional hardship or a finding of special reasons.
  The appeal proceeds by application for stated case - s176(1) - and the **time limit** for marking the appeal is **7 days**.

- under s175(4A) in which case, the time limit for marking an appeal is 4 weeks: s186(2)(b). The range of sentences and other disposals, or failures to impose such disposals is wider than under s175(3)(b).

and

ii. against a disposal (including a sentence) - s175(4) - "where it appears to the Lord Advocate" that the disposal was **unduly lenient or inappropriate** - s175(4A): see section 11.71. The time limit for marking the appeal is **4 weeks**:

s186(2)(b). There is no provision for extension of this time-limit by the court.

The appeal proceeds by Note of Appeal against sentence (form 19.3-A): s186(2). See sections 11.64 et seq.

The Prosecutor's Right of Appeal in Summary Proceedings (Scotland) Order 1996 - made under s175(4) - came into force on 1 November 1996. By this order, the Secretary of State has specified:

"... any case in which, on or after 1st November 1996 -

i. sentence is passed, or
ii. a probation order, community service order or order deferring sentence is made, or
iii. the person is admonished or discharged absolutely"

as the class of case in which the prosecutor may appeal against the sentence passed in summary proceedings.

b. Solemn cases

The Lord Advocate may appeal

i. under s108, against sentence in solemn proceedings:

on a point of law: s108(b); or if it appears to him that the disposal is **unduly lenient or inappropriate:** s108(a) - see section 11.71; and

ii. under s60A against:

a. an order under s57(2)(a)-(d) or a decision to make no order – s57(2)(e); or
b. a hospital order, guardianship order, restriction order or hospital direction

on a point of law, or if it appears to him that the order, decision or direction was **inappropriate.**

iii. under s108A, against a decision NOT to impose the minimum sentence for a third conviction of certain drug trafficking offences - s205B(3).

The appeal proceeds by Note of Appeal in either case (form 15.2B): s110(1)(b).

11.64 UNDUE LENIENCY

The High Court of Justiciary has held that a sentence or other disposal may be regarded as being unduly lenient or inappropriate if it falls outside the range of sentences or other disposals which a judge at first instance, applying his mind to all the relevant factors, could reasonably have considered to be appropriate. An outline analysis of the Court's approach is given in section 11.72.

11.65 SENTENCING GUIDELINES

In HMA v Bell 1995 SCCR 245 @ 251A-B, the Lord Justice General (Hope), in delivering the opinion of the court stated that the court "…should and will … [impose] a more severe sentence [if it] is … required in order to provide guidance to sentencers generally."

S189(7) - summary - and s118(7) - solemn - permit the court, in disposing of an appeal against sentence to "pronounce an opinion on the sentence or other disposal or order which is appropriate in any similar case." Any court, when passing sentence, must have regard to any relevant opinion - s197
.
The power to issue sentencing guidelines under the statutory provision has not been used to date. The view may be taken that the corpus of reported decisions of the Appeal Court already provides guidance. See for example O'Neill v HMA 1999 SCCR 300 re discretionary life sentences.

11.66 REPRESENTATIONS FOR AND INQUIRIES ABOUT CROWN APPEALS AGAINST SENTENCE

a. Where representations or press inquiries are made **direct to Crown Office**, the Procurator Fiscal (and Advocate Depute where appropriate) will be asked for a report. Generally, the initial response given by Crown Office will be that Crown Counsel will give careful consideration to the question of marking an appeal.
*b. If, arising out of **High Court proceedings**, the Procurator Fiscal receives representations about the leniency of the sentence from the victim or any other interested party (including any press inquiry), he should report the*

matter immediately for Crown Counsel's consideration and on inquiry should state that he has done so.

c. *In **sheriff and jury or summary proceedings**, if the Procurator Fiscal receives such representations about the possibility of a Crown appeal against sentence, but considers that such an appeal would be inappropriate, he may indicate that he does not propose to report the matter to Crown Counsel. A senior member of staff should deal with such enquiries. If further inquiry is directed to Crown Office, a report will be requested from the Procurator Fiscal.*

d. *If staff of the Victim Information and Advice Service receive such representations, these should be passed to the Procurator Fiscal and not reported direct to Crown Office. The Procurator Fiscal will be responsible for handling these in accordance with paragraphs b or c above.*

e. *Any report must be signed (or approved and countersigned) by legal staff of Band F or above.*

11.67 PROCURATOR FISCAL'S REPORT TO CROWN OFFICE

Where the Procurator Fiscal (or Advocate Depute) *considers that the sentence satisfies the above test and a Crown appeal against sentence may be appropriate, or receives representations as outlined above. The Procurator Fiscal should submit a **report immediately** (and unless exceptional circumstances apply) **certainly no later than seven days** from the date when sentence was passed) for Crown Counsel's consideration. The report should be on appeals form **app-crs** and the following documents should be enclosed (copies where appropriate):*

i. complaint or indictment

ii. minutes of proceedings

iii. previous convictions (if any)

iv. precognition or police/agency report

v. any reports or other documents placed before the judge in connection with sentencing

vi. any other relevant documents.

A separate appeals form should be provided for each person against whom an appeal is to be considered.

In considering the question of an appeal, Crown Counsel will take into account, inter alia:

- The nature of the offence;
- The history of the offender;
- Any reasons given, views expressed or comments made by the sentencing judge;
- Any mitigating circumstances;
- Any reports or other documents placed before the court in connection with sentencing;
- The prosecutor's view; and
- Any representations received.

All relevant matters must be addressed in the report. It follows therefore, **that Procurators Fiscal (and Precognoscers where appropriate) must make a careful note of proceedings in court – and in particular, when reporting, must provide information about the Crown narrative, the plea in mitigation, the extent to which either was disputed and how any dispute was resolved** – see section 11.73.

The report should contain all the information required to enable accurate grounds of appeal to be prepared. Procurators Fiscal are reminded of criticisms which have been levelled at the Crown in respect of inaccurate grounds of appeal – see for example HMA v McKay 1996 SCCR 410.

Before being submitted, any report should first be considered by the Procurator Fiscal (or other senior member of staff) who should give his views on the merits of the appeal and countersign the report where appropriate.

*Where the sentence is one imposed in the **High Court** of Justiciary, the Advocate Depute will provide a report. The*

Procurator Fiscal, should nevertheless should submit a report as outlined above.

- *If the Procurator Fiscal intends to submit a report he should notify the Advocate Depute of his intention to do so.*
- *If the Advocate Depute indicates to the Procurator Fiscal his intention to report the matter to the Lord Advocate, the Procurator Fiscal should proceed to prepare a report.*

11.68 INTIMATION OF CROWN COUNSEL'S DECISION

Crown Counsel's decision will be intimated to the Procurator Fiscal and a copy of the Note of Appeal will be provided for information.
Where the Procurator Fiscal has received representations from interested parties, he should advise them of the decision taken. Where representations have been made directly to Crown Office, any reply will be sent from there and a copy of the reply provided to the Procurator Fiscal for his information. **The normal rules, that the Crown does not give reasons for a decision in any individual case, apply.**

11.69 LODGING THE NOTE OF APPEAL – UNDULY LENIENT OR INAPPROPRIATE DISPOSAL OR SENTENCE

The Note of Appeal must be lodged with the appropriate clerk of court **within four weeks** of the passing of the sentence.

a. Summary appeal

A draft Note of Appeal, approved by Crown Counsel will be provided to the Procurator Fiscal who must lodge it immediately with the clerk of the court of first instance.

Intimation should be made to the respondent or his solicitors (see below). A copy of the Note of Appeal lodged should be sent to Crown Counsel for their information.

b. Solemn appeal

The Note of Appeal will be lodged with the Clerk of Justiciary. Intimation will be given to the Procurator Fiscal and to the respondent or his solicitors by Crown Office.

Notification to the respondent and other interested parties

There is usually media interest in these appeals. Although the legislation provides that the appropriate clerk of court will intimate the appeal to the respondent - s186(3)(a) (summary); s110(1)(b) **(**solemn) - it is considered to be best practice for *intimation to given to the respondent (or his solicitors) by the prosecutor (Procurator Fiscal in summary appeals) as soon as the appeal is marked* in order to avoid the fact that an appeal was taken coming to his attention in a news report or broadcast.

The Procurator Fiscal should ensure that the victim, or interested relative of a deceased victim, is also given immediate notification

11.70 INTERIM LIBERATION AND SUSPENSION OF SENTENCE AND ABANDONMENT

Interim liberation and suspension of sentence
See PART VII.
Abandonment of appeal
Summary appeal – see section 11.137.
Solemn appeal - see section 11.138.

11.71 GROUNDS OF APPEAL

The prosecutor may appeal against the following disposals on the ground that:

		summary provisions	solemn provisions
a.	a sentence	s175(4)(a) and (4A)(b)(I)	s108(1)(a)and (2)(b)(i)
	an admonition	s175(4)(h) and (4A)(b)(I)	s108(1)(h)and (2)(b)(I)
	an absolute discharge	s175(4)(I) and (4A)(b)(I)	s108(1)(I) and (2)(b)(I)
	was **unduly lenient**		
b.	a decision not to make a supervised release order	s175(4)(b) and (4A)(b)(ii)	s108(1)(b)and (2)(b)(ii)
	a decision not to make a non harassment order	s175(4)(c) and (4A)(b)(ii)	s108(1)(c)and (2)(b)(ii)
	a decision to remit to the Principal Reporter	s175(4)(f) and (4A)(b)(iv)	s108(1)(f) and (2)(b)(iv)
	was **inappropriate**		
c.	the making of a probation order	s175(4)(d) and (4A)(b)(iii)	s108(1)(d)and (2)(b)(iii)
	a community service order	s175(4)(e) and (4A)(b)(iii)	s108(1)(e)and (2)(b)(iii)
	the deferment of sentence	s175(4)(g) and (4A)(b)(v)	s108(1)(g)and (2)(b)(v)
	was **inappropriate or on unduly lenient conditions**		

11.72 UNDUE LENIENCY – OUTLINE ANALYSIS AND LIST OF CASES HEARD

A. Cases Heard in the High Court of Justiciary as at 1 December 1999

1 Appeals against unduly lenient sentences:

i. Appeals allowed

HMA v McPhee 1994 SCCR 830
HMA v Friel and O'Donnell 1995 SCCR 745
HMA v McVey 1995 SCCR 706 (allowed in part)
HMA v McCluskie and McQueen 1997 SLT 356
HMA v McKinnon, unreported 27.9.96
HMA v Forrest, 14.1.98, 1998 SCCR 153
HMA v Alexander McKinlay, 1998 SCCR 201
HMA v Wallace 1999 SCCR 309
HMA v Craig Davidson, unreported, 7 July 1999
HMA v Carnall and others, unreported, 19 August 1999
HMA v Kevin Barry Higgins, unreported, 12 August 1999 (continued)

ii. Appeals refused

HMA v Bell 1995 SCCR 244
HMA v May 1995 SCCR 375
HMA v McAllister 1995 SCCR 545
HMA v Bennett aka Reekie 1996 SCCR 331
HMA v Ross 1996 SCCR 107
HMA v Gordon and Foy 1996 SCCR 274
HMA v Vincent Campbell, 1997 SLT 354
HMA v McPherson 1996 SCCR 802
HMA v Jamieson 1996 SCCR 836
HMA v Scottish Hydro Electric, unreported, 27.9.96
HMA v David Robertson and others, unreported,19.12.96
HMA v Donaldson 1997 SCCR 738
Donnelly v MacDougall, unreported, 1.5.97
HMA v Brand 1998 SCCR 71
HMA v Heron 1998 SCCR 449
HMA v Wheldon and others 1998 SCCR 710
HMA v Duff 1999 SCCR 193

b. Appeals against inappropriate deferment of sentence:

Appeals allowed

HMA v Lee 1996 SCCR 205
HMA v Fallan 1996 SCCR 80
HMA v Brough 1996 SCCR 377
HMA v McColl, 1996 SCCR 523
HMA v Callaghan, 1996 SCCR 709
HMA v Hodgson, 1997 SCCR 479
HMA v Spiers, unreported, 23.5.97

c. Appeals abandoned in court:
HMA v McKay, 1996 SCCR 410

B. Outline analysis

A sentence may not be appealed merely on the basis that it is lenient. It is recognised that sentence is essentially a matter for the discretion of the judge of first instance and the High Court of Justiciary has held that a sentence is unduly lenient only if it falls outside the range of sentences which a judge at first instance, applying his mind to all the relevant factors, could reasonably have considered to be appropriate: Bell @ 250C/D and Ross @ 112 D. The same approach applies where it is proposed that deferment of sentence is inappropriate: Lee. The deferment may be inappropriate where the sentencing judge fails to take account of relevant and material considerations: Hodgson.

The court has held that when a trial judge has heard evidence, he is in general in a better position than the Appeal Court to determine what sentence is appropriate: Bell per Lord Justice Clerk Ross.

In deciding whether a sentence may be said to be unduly lenient, the court will consider a number of factors such as:

- the circumstances of the offence and also those of the accused, including any change in his circumstances between commission of the offence and the date of sentence: McAllister and McKay - and mitigating circumstances generally: Fallan.

- the age of the offences: Ross and McKay - although this may be offset by any continuing effect of the offence on the victim: Brough.

- the fact that the accused pleaded guilty to or was found guilty of a less serious

charge than that originally libelled: Ross @ 112C; Brand.

- the Crown's acceptance of or acquiescence in a plea in mitigation: Bennett aka Reekie.

- the Crown's failure to draw a relevant factor fully to the attention of the sentencing judge: Donaldson.

- the forum in which the case was prosecuted: Robertson and others.

Even where the High Court considers that the sentence was unduly lenient, it will apply the approach outlined in Rennie v McNeill 1984 SCCR 11 and will not allow an appeal unless it considers that a higher sentence should be imposed at the time of hearing the appeal (under s118(4)(b) of the Criminal Procedure (Scotland) Act 1995), taking account of circumstances such as:

- the "element of hardship" inherent in a Crown Appeal, with the prospect that the sentence imposed by the trial judge may be increased by the Appeal Court: McKay.

- the fact that the sentence imposed may have been served: Bell and McVey @ 712 E/F - or that any monetary penalty or restitution imposed may have been paid: McAllister @ 549 D; Jamieson @ 840F (although any sentence substituted on the appeal being allowed may be modified to take account of this: McKinnon).

- the accused's personal circumstances at the time of hearing the appeal including any change in them since sentence was passed, for example, that he has not re-offended or that he has obtained employment since his release - Bell; that he has settled down and departed from his pattern of offending - McAllister; or that he has freed himself from drug addiction and been of benefit to the community - McKay.

The Appeal Court has however recognised that a sentence may require to be increased inter alia:

- for the protection of the public: Bell.
- if the offence is a very serious one and a more severe sentence is required to provide guidance to sentencers generally: Bell.
- where an exemplary sentence is called for, for the purpose of deterrence: Friel and O'Donnell.
- where there is an element of retribution and a more severe sentence is called for to express society's condemnation of a particular crime: Friel and O'Donnell; or
- where a more severe sentence is considered necessary simply to mark the gravity of a particular offence: Friel and O'Donnell - although the court must still be persuaded that sentence was of such a character that it could be described as unduly lenient: McPherson.

11.73 THE ROLE OF THE PROSECUTOR POST CONVICTION

The decision of the High Court of Justiciary in HMA v Bennett aka Reekie 1996 SCCR 331 has important implications for the Crown's involvement in criminal proceedings following conviction of the accused and in particular with reference to the plea in mitigation. Although the court's comments were made in the context of a Crown Appeal against Sentence, they are of general application.

11.74 BACKGROUND TO THE BENNETT CASE

The accused pled guilty in the High Court to charges of assault and was sentenced to probation and Community Service. The Crown appealed against the sentence as being unduly lenient. The appeal was refused.

In his plea in mitigation in the court of first instance, the Solicitor Advocate acting for the accused explained that it was intended to present a defence of automatism but that the key witness was not willing to give evidence. As he would be unable therefore to satisfy the test set out in Ross v HMA 1991 SCCR 823, he advised the accused to plead guilty and thereafter proceeded to put this material before the trial judge. The trial judge took this information into account as disclosed in his report to the Appeal Court. In light of this, the Crown

added an additional ground of appeal on the basis that the judge took account of material which he should not, namely the submission that the accused was suffering from non-insane automatism.

11.75 THE HIGH COURT'S DECISION

The High Court treated as significant the Crown's failure to challenge the material placed before the trial judge. In delivering the Opinion of the Court, the Lord Justice General said (at page 338D):

"... If the Lord Advocate wishes to challenge a sentence on the ground of undue leniency, he must ensure that the basis for that challenge is properly laid in the trial court.. If the argument is to depend on a submission that the trial judge took account of a point made in a plea in mitigation which he ought not to have taken into account because the facts or the law applicable to these facts is disputed, this is an argument, which, in fairness to the accused, ought to be drawn to the attention of the trial judge by the prosecutor before sentence is imposed."

The High Court has stated repeatedly that decisions in matters of sentencing are for the trial judge and not the responsibility of the prosecutor. In Bennett, the court re-affirmed the view that "... the Crown is the master of the instance at all times up until the moment when the prosecutor has moved the court to pronounce sentence. At that stage the matter moves entirely from the Crown to the Court, and it is desirable for good reasons of public policy that the Crown should not be involved in the process of sentencing in any way whatever. It is known to all who practice in the criminal system of this country that the Crown has absolutely no role or interest in this process." As was previously stated in HMA v McKenzie 1989 SCCR 587 @ page 594. However in Bennett, the Court went on to say that "The function of the prosecutor is not discharged when he has moved for sentence."

The Court's approach in Bennett was affirmed subsequently in the case of HMA v McKay, 1996 SCCR 410.

11.76 IMPLICATIONS OF THE DECISION IN BENNETT

b. Notwithstanding the foregoing, it may be that the Crown narrative of facts is disputed by the defence or that the plea in mitigation is inconsistent with the Crown narrative. Equally the plea in mitigation may be inconsistent with the plea of guilty tendered or alternatively aspects of the defence narrative may be disputed by the Crown:

- The general rule is that anything said by either party, if not disputed by the other, and anything said by the defence if not inconsistent with the plea of guilty tendered or manifestly false should be accepted by the Court : Galloway v Adair 1947 JC 7. However, if the Defence narrative is inconsistent with the plea of guilty the accused should be allowed to withdraw the plea: HMA v Johnston 1848 Ark 528.

- If the narrative presented by either party is inconsistent with that of the other or disputed by the other, the disputed material should be left out of consideration (Galloway v Adair) although it would be open to the court of first instance to call for evidence in support of the competing versions: Barn v Smith 1978 JC 17.

- The court is not entitled to prefer one version without hearing evidence and the appropriate procedure would be to allow evidence to be led in mitigation: Hughes v Donnelly 1994 SCCR 598.

The decision in Bennett places a duty on the Crown:

"The function of the prosecutor is not discharged when he has moved for sentence. It is his duty to ensure that information relevant to the matter of sentence is placed before the trial judge, and that the trial judge is alerted to the fact that information in a plea in mitigation is disputed or that it is or may be irrelevant."

c. Prosecutors should ensure that they have access to any reports or other documents to be placed before the judge in mitigation of sentence in order that consideration may be given to the question whether objection should be taken, or evidence led in rebuttal (see e.g. HMA v Nimmo and Forsyth 1839 Swin 338 - whether the author of a certificate of good character should be required by the Crown to give evidence).

Appropriate arrangements should be made with clerks of court to have copy reports provided before the relevant case(s) are called in court.

d. The prosecutor appearing at any diet following conviction MUST be aware of the facts of the case and the background in order to deal with any problems which may develop.

PART IV – PRELIMINARY APPEALS – SECTIONS 74 AND 174

11.77 SUMMARY APPEALS

Pleas to the competency and relevancy of a summary complaint or proceedings shall be stated at a first diet before a plea is tendered - s144(4). No such objection shall be permitted at a later stage in the proceedings except by leave of the Court on cause shown - s144(5).

An appeal against the decision of the Court which relates to such objection or denial as is mentioned in s144(4) is taken under s174 of the Act.

The right of appeal under s174(1) is "without prejudice to any right of appeal under section 175(1) to (6) or 191 of this Act" and there is scope, where appropriate and necessary, for appeal by stated case or by Bill of Advocation.

11.78 SOLEMN APPEALS

The matters specified in s72, including those relating to the competency or relevancy of the Indictment, shall be dealt with at a first diet (under s71) or at a preliminary diet (under s72) - s79. No objection to competency or relevancy of an Indictment shall be entertained where there has been a failure to give notice in terms of s71 or s72 except by leave of the Court on cause shown. This provision is designed to ensure that all preliminary matters are resolved before any case calls for trial. After the time for preliminary pleas to be stated has passed, the Court will only exceptionally permit such pleas to be stated: McAllister v HMA 1985 SCCR 36. It should be noted however that an objection that the proceedings are **fundamentally null** may be raised at any time: Sangster v HMA 1896 2 Adam 182. [See though Storie v Friel 1993 SCCR 955 which suggests that acquiescence may preclude an appeal succeeding on this ground]

The right of both parties to appeal to the High Court against a decision at a first or preliminary diet, including decisions relating to the competency and relevancy of an Indictment is contained in s74 of the Act. The right of appeal is without prejudice to:

- the right of appeal under s106 which gives a convicted person a right to appeal against conviction; and
- the right of appeal under s131 which preserves the prosecutor's right to bring a decision under review of the High Court by Bill of Advocation "in accordance with existing law and practice".

11.79 LEAVE TO APPEAL

Before a Note of Appeal under s74 or s174 may be lodged, leave to appeal must be obtained from the judge at first instance. The motion for leave to appeal should be made orally and be determined at the diet IMMEDIATELY following the pronouncement of the decision at that diet.

If leave to appeal is granted the Procurator Fiscal should notify the Appeals Unit legal staff of the position immediately (by telephone) and fax a report together with a copy of the complaint or indictment and any other significant documents for Crown Counsel's instructions.

11.80 REFUSAL OF LEAVE TO APPEAL

If the judge at first instance refuses leave to appeal, it is not possible to appeal against that refusal. This does not mean, however,

that the right to appeal the decision on competency and relevancy is lost.

As indicated above, there are other routes of appeal open to both parties:

a. Defence remedies:

i. Summary - **Stated case**: The convicted person may appeal against conviction - s175. The mode of such an appeal is by Stated Case - s176. Thus the accused, if leave to appeal has been refused, or if he has simply chosen not to use s174, may appeal the decision on competency and relevancy by or as part of a Stated Case - Harvey v Lockhart 1991 SCCR 83. Particular difficulties may arise if the issue involves evidence in a preliminary proof or the judge's decision to admit or reject evidence at such a proof.

Where in summary proceedings, an appeal by stated case "would be incompetent or would in the circumstances be inappropriate", a party may appeal "by **Bill of Suspension** against a conviction … on the ground of an alleged miscarriage of justice in the proceedings" : s191 - see for example Pettigrew v Ingram 1982 SLT 435.

ii. Solemn - the accused may also appeal decisions on the competency and relevancy by Note of Appeal under s106.

Bills of Suspension are not applicable to solemn procedure.

b. Crown remedy - Bill of Advocation:

i. Summary - where an appeal by stated case "would be incompetent or would in the circumstances be inappropriate" a party may appeal " … by Advocation against an acquittal on the ground of an alleged miscarriage of justice in the proceedings" : s191.

ii. Solemn - The prosecutor has a right of appeal under **s74 or by Bill of Advocation** in accordance with existing law and practice (i.e. according to common law) - s131. For examples see HMA v Lewis 1992 SCCR 223 and HMA v Sutherland 1992 SCCR 124. Even where the Prosecutor has obtained leave to appeal or has failed to exercise that right within the statutory time limit, an appeal by way of Bill of Advocation is not precluded - HMA v Shepherd 1997 SCCR 246.

11.81 TIME LIMITS FOR MARKING AN APPEAL

If leave to appeal is granted, the **Note of Appeal must be lodged within 2 DAYS** of the judge's decision being delivered in court. The period is extended by one day if the last day of the period falls on a Sunday - s194. However Procurators Fiscal will recognise that if the decision is given on a Friday, the Note of Appeal must be lodged on the following Monday and not the Tuesday.

11.82 APPEAL PROCEDURES

a. Defence appeal - plea(s) rejected

i. Summary

The appeal proceeds by Note of Appeal - Form 19.1A. The procedure is set out in rule 19.1.

Where the preliminary plea is repelled and the defence move and are granted leave to appeal the decision, a **plea of guilty or not guilty must be tendered and recorded** - rule 19.1: Lafferty v Jessop 1989 SLT 846; Jessop v First National Securities 1988 SCCR 1. A failure to state a plea need not necessarily render proceedings fundamentally null: Hogg v HMA 1998 SCCR 338, but the Court should be encouraged to ensure that a plea is recorded.

The clerk of the lower court will, in accordance with the requirements of rule 19.1:

- transmit the Note of Appeal, certified copies of the Complaint and Minutes of Proceedings and any other relevant documents to the Clerk of Justiciary,
- send a copy of the Note of Appeal to the Procurator Fiscal (but is not, it appears, required to send copies to the other parties - see next paragraph): and

- request a report from the presiding judge - see paragraph 11.85.

ii. Solemn

The appeal proceeds by Note of Appeal - Form 9.12. The procedure is set out in rule 9.11 et seq.

In an appeal from the Sheriff Court, the Sheriff Clerk will in accordance with rule 9.13:

- transmit a certified copy Indictment, Minute of Notice, Record of Proceedings, and any other relevant documents to the Clerk of Justiciary;
- send a copy of the Note of Appeal to the other parties or their solicitors; and
- request a report from the presiding judge - see paragraph 11.85.

*On receipt of the copy Note of Appeal, the Procurator Fiscal should send his report, on Appeals form **app-pre**, to Crown Office immediately. A separate appeals form should be provided for each appellant.*

b. Crown appeal - plea(s) upheld

*The report should be on Appeals form **app-pre** and be accompanied by a copy of the complaint or indictment. The report should set out clearly the nature of the plea(s), the submissions made, any authorities to which the court was referred and anything said by the court in upholding the plea(s).*

i. Summary appeal: Although rule 19.1 refers only to an appeal by the accused, the right of appeal extends to the Crown: Walkingshaw v Robison and Davidson Limited 1989 SCCR 359.

ii. Solemn appeal: Rule 9.11 *et seq* apply to both the accused and prosecutor.

*In either case, the Procurator Fiscal should lodge a Note of Appeal with the ground of appeal instructed by Crown Counsel within the time limit of **2 days**.*

A copy of the Note of Appeal lodged should be sent to Crown Office without delay.

11.83 PROCEDURE IN THE COURT OF FIRST INSTANCE PENDING DETERMINATION OF APPEAL

a. Plea upheld

If the case is brought to an end by the prosecutor and not by the court of first instance, any appeal is rendered incompetent.

b. Plea repelled

Where a **defence appeal** is taken it is **vital that the indictment or complaint is kept alive.** The instance will fall:

- where there is any failure to adjourn or postpone the proceedings, or
- if the proceedings in the lower court are adjourned sine die, rather than to a specified date: Lafferty v Jessop 1989 SLT 846, or
- if the adjournment is not minuted.

c. Plea upheld in part

Where the **plea to competency or relevancy is upheld in part only, or where it does not affect other charges on the indictment or complaint**, which as a result remains live, ***similar considerations should be born in mind****Thereafter the procedures under s74 or s174 may be followed.*

*Where proceedings remain live in the lower court, consideration must be given to any **time bar** difficulties and action which will require to be taken to resolve them.*

It must not be assumed that the trial will be postponed by the Court – see paragraph 11.86.

Procurators Fiscal should attempt to ensure that these requirements are complied with. In case of difficulty, the Appeals Unit legal staff should be consulted

11.84 PROCURATOR FISCAL'S REPORT TO CROWN COUNSEL

In any appeal in High Court proceedings, the matter will be dealt with by Crown Office. *However in solemn proceedings in the Sheriff Court and in summary proceedings, as soon as the Note of Appeal (Crown or defence) is available, the*

Procurator Fiscal should report to Crown Counsel, on appeals form ***app-pre***
Where the preliminary plea has not resulted in the dismissal of the indictment or complaint in its entirety, a trial diet will remain. In such a situation the report must outline the implications this will have for the time bar situation and include a recommendation as to whether the trial diet should be adjourned or postponed.

11.85 JUDGE'S REPORT

As soon as possible after receipt by him of the request for a report by the Clerk of the court of first instance, the presiding judge (or Sheriff etc.) will send a report on the proceedings at the diet to the Clerk of Justiciary: rule 9.14 - solemn; rule 19.1(7) - summary The Clerk of Justiciary will send a copy of the report to the parties or their solicitors - i.e. to Crown Office. The Procurator Fiscal may receive a copy from Crown Office or directly from the Clerk of the court of first instance.

11.86 POSTPONEMENT OF TRIAL

The High Court **may** postpone the trial to allow for an appeal under sections 74 and 174 and may direct that such period (or some part of it) shall not count towards any time limit applying in respect of the case: s74(3); s174(2).

If the High Court exercises these powers in an appeal under s74, or one under s174 from the Sheriff Court, the Clerk of Justiciary will send a copy of any order (and direction, where appropriate) to:

- the appropriate clerk of court,
- to all parties to the proceedings (Sheriff Court solemn) or
  to any co-accused not party to the appeal, or to their solicitors (summary proceedings)
- and to the Governor of any Institution in which any of the accused is detained:

see rules 9.15 and 19.1(9).

The Procurator Fiscal will be informed by the Appeals Unit of the terms of any such order.

In solemn proceedings, any Order for Postponement made by the High Court in terms of s74(3) has the same effect as a Warrant for Citation under s66 in respect of the date to which the trial diet has been postponed: rules 9.15(2), 9.6 and 9.7. Such a postponement however, (unlike one under s72(4), where the High Court orders a preliminary diet and postpones the trial diet) **may count towards any applicable time limit**.

11.87 ABANDONMENT OF APPEAL

The appellant may abandon his appeal at any time prior to the appeal being heard by the Appeal Court. Abandonment is effected be lodging a minute:

- in an appeal under s74, in terms of rule 9.17
- in an appeal under s174, in terms of rule 19.1(11)

with the Clerk of Justiciary.

Crown Office will notify the Procurator Fiscal of any such abandonment in a **defence appeal**.

Where a **Crown appeal** is to be abandoned, the Appeals Unit will deal with this and notify the Procurator Fiscal.

11.88 DISPOSAL OF THE APPEAL

a. Summary Appeal

In disposing of an appeal under s174 the High Court may, by s174(4):

a. affirm the decision of the court of first instance; or
b. remit the case to it with such direction in the matter as it thinks fit.

Where the court of first instance has dismissed the complaint or any part of it, the High Court may reverse that decision and direct that the court at first instance fix a trial diet.

b. Solemn Appeal

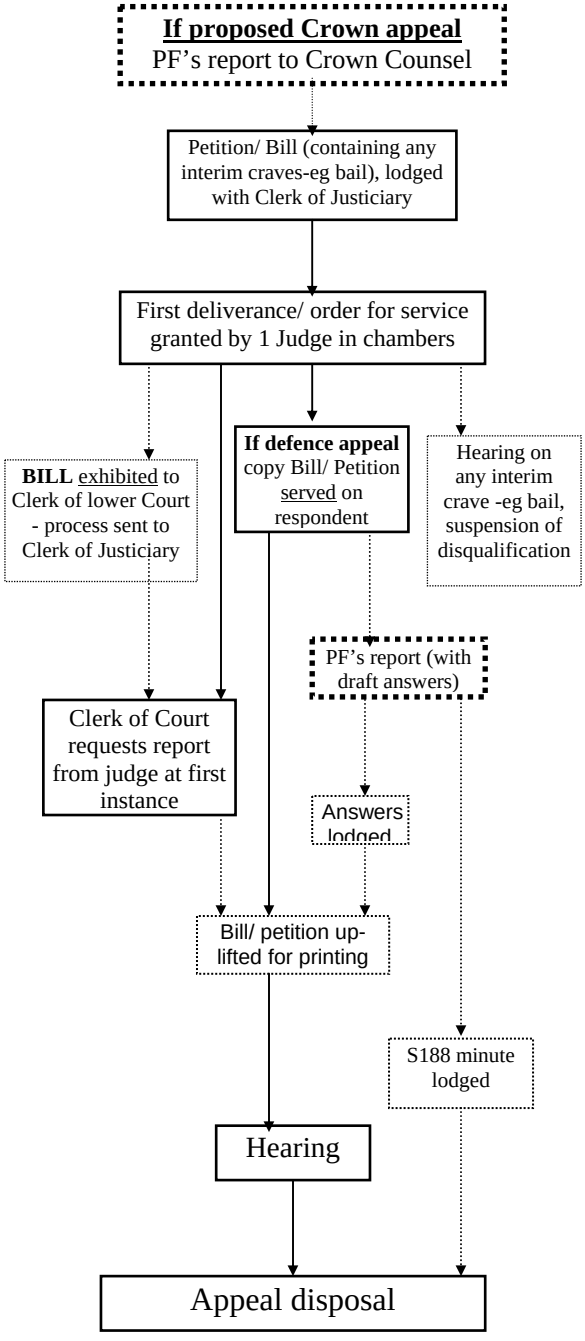
Where the Sheriff has dismissed an Indictment in whole and where the High Court on appeal under s74 has reversed that decision and made a direction that the court of first instance fix a trial diet, the direction will be authority to the Sheriff Clerk to issue

a fresh Warrant for Citation under the provisions of s66: rule 9.16(2).

Where the Appeal Court has reversed the decision of the court at first instance in respect of part of an Indictment, which that first Court rejected, the first Court having fixed a diet of trial in respect of the remainder of the Indictment, an accused will not be asked to plead to that part of the Indictment again until the trial diet is called.

PART V - COMMON LAW APPEALS: BILLS OF SUSPENSION, BILLS OF ADVOCATION AND PETITIONS TO THE *NOBILE OFFICIUM*

11.89 OUTLINE



BILLS OF SUSPENSION

11.90 FORMAT OF A BILL

The Bill is brought by the **complainer** (appellant) against the **respondent** (prosecutor) and commences with:

- a general **prayer**;
- followed by a complete **statement of facts/condescendences;** and, thereafter
- **pleas in law.**

11.91 SCOPE OF SUSPENSION

Suspension is a common law form of appeal open to the **defence only**. As with all common law appeal procedures, sift procedures do not apply.

Suspension is a procedure whereby warrants and decisions of lower courts may be suspended. It is available in both solemn and summary proceedings:

a. Solemn Proceedings

The procedure is frequently used in solemn proceedings to challenge various forms of warrants, including: warrants of committal; petition warrants and search warrants - **prior to trial**. See for example: HMA v Rae 1992 SCCR 1; Stuart v Crowe 1992 SCCR 181.

Suspension is **not competent** as a method of review of any conviction, sentence, judgement or order of a Sheriff Court in indictment proceedings before it: s130.

The High Court does not have power to review its own orders by suspension: Reilly v HMA 1995 SCCR 45 (an attempt to suspend the grant of a warrant to apprehend and commit to prison which had been granted in respect of failure to appear at a High Court diet).

However, the High Court can review its own orders by way of Petition to the n*obile officium* – see 11.105-11.111 and in Reilly the court treated the Bill as a Petition to the *Nobile officium*, illustrating the flexibility which the High Court will exercise, when necessary, in its appellate capacity.

b. Summary Proceedings

In summary cases, as well as providing a means of reviewing the grant of various forms of **warrant**, suspension is also routinely used:

- to appeal against **conviction** on the grounds of oppression due to the conduct of the presiding judge or prosecutor; and
- to review findings of **contempt of court**
- **fresh evidence** in a summary appeal.

Generally, a convicted person may appeal against conviction by way of Bill of Suspension where, for any reason, the statutory remedies provided by s175 would be incompetent or inappropriate: s191.

The right of appeal contained in s175 is without prejudice to any right of appeal under s191.

In exceptional cases in summary proceedings,, where an irregularity of a procedural nature is alleged at the trial diet, a **Bill of Advocation** may be competent whilst the trial is still in progress: HMA v Thomson 1994 SCCR 40, at 45C; Wilson v Caldwell 1989 SCCR 273 - see section 11.98-11.104

11.92 EXAMPLES OF ISSUES IN RESPECT OF WHICH SUSPENSION MAY BE USED

1. fundamental nullity.
2. oppression.
3. no jurisdiction.
4. no title to prosecute.
5. defective citation.
6. objection to competency of a complaint.
7. objection to relevancy of a complaint.
8. objection regarding the admission or rejection of evidence in respect of:
    a. the admission by the judge of incompetent evidence;
    b. the rejection of competent evidence; or
    c. any refusal by judge of competent questions.

9. to challenge an ex facie valid search warrant prior to the commencement of a trial.
10. to challenge a warrant of committal.

11.93 TIME LIMITS

No statutory time limit restricts appeal by Bill of Suspension. However, any **significant delay** on the part of the complainer in bringing the Bill may result in a plea of **acquiescence** (at common law) by the respondent being upheld - on the basis that the complainer has effectively accepted the decision complained of by failing to initiate his challenge with sufficient expedition. Where the plea of acquiescence is upheld, the court will not consider the merits of the Bill.

Delays of more than two years in bringing the appeals have been held to amount to acquiescence: Love v Wilson 1993 SCCR 325; Storie v Friel 1993 SCCR 955, (See too HMA v Sorrie 1996 SCCR 778 - Crown appeal by Bill of Advocation; see para 11.101.) A shorter period was hinted at in Shields v Donnelly 1999 SCCR 890.

11.94 THE FIRST ORDER (OR DELIVERANCE) AND INTERIM CRAVES – INCLUDING INTERIM LIBERATION

a. The First Order

The first order (or "first deliverance") granted by a single High Court judge:

- authorises service on the respondent(s);
- ordains the clerk of the lower court, on sight of the Bill and first order/deliverance
  i. to obtain (as soon as possible) a report from the presiding judge in the lower court, and then
  ii. to transmit that report along with the court minutes, indictment or complaint (which together make up "the proceedings"), to the Clerk of Justiciary; and
- authorises the hearing of the Bill (usually on an unspecified later date) and meantime fixing a date for any interim hearing (to be held before a single judge of the High Court).

Occasionally, where advance warning has been given that the Bill is to be lodged, e.g. in the course of a trial, Crown Counsel may be given an opportunity to argue the competency of the Bill before the single Judge in order to avoid disruption to the substantive proceedings.

b. Hearing on the Interim Crave

As there is no time limit for effecting service, the hearing on the interim crave often takes place before the prosecutor has received the service copy Bill.

Justiciary Office will however, notify Crown Office of the hearing. The High Court Unit trainee will arrange for intimation to be made to the Procurator Fiscal. Scant information may be available at this stage as Justiciary Office may not have retained a copy of the Bill.

c. Interim Liberation

Where interim suspension/liberation is sought, a preliminary report must be sent immediately for Crown Counsel's information. See section 11.162.

11.95 SERVICE ON THE PROSECUTOR

A copy of the Bill and first order will normally be served on the Procurator Fiscal by the solicitor for the complainer. Service of the Bill must be accepted.

Occasionally, service will be effected at Crown Office, in which case the Appeals Unit will give intimation as soon as possible to the Procurator Fiscal by telephone and/or fax.

The complainer's solicitors must return the docqueted Bill together with appropriate execution(s) to the Clerk of Justiciary in time for any hearing appointed.

11.96 PROCURATOR FISCAL'S REPORT TO CROWN OFFICE

There is no fixed period within which the Bill must be served. However, current Justiciary Office targets aim to have Bills heard within 28 days of the first order being granted. As a result of the Appeal Court

programme, Procurators Fiscal may often find that they are receiving first notification only very shortly before the hearing of the Bill.

Crown Counsel may consider it appropriate to lodge answers. Accordingly, *the Procurator Fiscal should submit his report on appeals form **app-com** for Crown Counsel's consideration as soon as possible, and in any event within ten days of receiving notice or intimation of the Bill.*

If answers to the Bill are to be lodged, the Appeals Unit will attend to the revision and lodging of these with the Clerk of Justiciary.

11.97 OUTCOME OF THE APPEAL

The court may grant the crave(s) of the Bill in whole or in part.

The Procurator Fiscal will be advised of the outcome of the Bill as soon as possible and in any event **within two working days.**

BILLS OF ADVOCATION

11.98 FORMAT OF THE BILL

A Bill of Advocation commences with

- a general **prayer**,
- and is then followed by a **statement of facts/condescendences**,
- with the **pleas in law** being at the end.

11.99 SCOPE OF ADVOCATION

This common law mode of appeal is generally considered to be the converse procedure to that afforded by Bill of Suspension, namely the **prosecutor**'s opportunity to appeal or to advocate (i.e. remove criminal proceedings from an inferior to a superior court) a judge's decision (or failure to make one), although it is also open to the defence (see, for example, Durant v Lockhart 1985 SCCR 72).

"The limited sphere of competence of ... advocation lies in the correction of irregularities in the preliminary stages of a case, though recourse to the process is incompetent until the cause is finally determined, unless in very special circumstances": MacLeod v Levitt 1969 JC 16 at page 19 per Lord Cameron.

Advocation is applicable in both solemn and summary proceedings. The procedures are almost identical to those for Bills of Suspension.

a. Solemn Proceedings

- Preliminary matters

  The Crown's right to appeal by Bill of Advocation "in accordance with existing law and practice" extends to the review of a decision of any solemn court and is without prejudice to the Crown's right of appeal under s74 in relation to at a first or preliminary diet - s131(1). This was explicitly recognised, for example, in HMA v Sorrie 1996 SCCR 778, in which the Crown was granted leave to appeal in terms of s74 but did not exercise that right of appeal and, instead, proceeded

by way of advocation. See too HMA v Shepherd 1997 SCCR 246.

- During the trial: The Crown
  - **cannot** advocate a decision on **admissibility** of evidence made **during a trial under solemn procedure**: HMA v Thomson 1994 SCCR 40.
  - may advocate a sheriff's decision to refuse to adjourn a diet **during** a sheriff and jury trial and, in exceptional cases, to obtain a remedy which would allow the trial to continue: HMA v Khan 1997 SCCR 100.

Where the appeal succeeds, the Crown may **reindict**: s131(2).

b. Summary Proceedings

The Crown may appeal against the acquittal of an accused person by Bill of Advocation where, for any reason, appeal under section 175 would be incompetent or inappropriate: s191(1).

11.100 EXAMPLES OF ISSUES WHICH MAY BE THE SUBJECT OF A BILL OF ADVOCATION

a. Incidental Procedures

- refusal of a sheriff to grant an order under section 7 of the Bankers' Books Evidence Act 1879 to inspect and copy entries in bankers' books.
- refusal of a sheriff to grant an incidental warrant to search premises.

b. Pre-trial/Trial Procedures

- failure of a sheriff to deal with case in accordance with the statutory duty - i.e. to allow a complaint to be called.
- Sheriff ordering a plea of guilty to be recorded though the prosecutor refused to accept the plea.
- refusal to continue a case, or to grant leave to desert pro loco et tempore.
- the conduct of a prosecutor at an intermediate diet.
- competency or merits of a decision on adjournment.
- finding of not guilty made by a sheriff before a trial had started.
- decision by a sheriff to desert the trial diet simpliciter.

11.101 TIME LIMITS

As with suspension, there are no fixed time limits. However, acquiescence may preclude an appeal - see paragraph 11.93 above. A delay of a little under three months by the Crown in bringing an appeal by the way of Bill of Advocation has been held by the High Court not to amount to acquiescence, but the Court stressed that the decision was reached having regard to what was described as "the very unusual circumstances of this case": HMA v Sorrie 1996 SCCR 778,

11.102 DEFENCE BILL OF ADVOCATION

a. The first order (or deliverance) in a defence bill

The procedure is the same as for a Bill of Suspension - see paragraph 11.94 above. Normally, however, there will be no interim crave.

b. Service on the prosecutor of a defence bill

The procedure is the same as for a Bill of Suspension - see paragraph 11.95 above.

c. Procurator Fiscal's report to Crown Office in connection with a defence bill

The procedure is the same as for a Bill of Suspension - see paragraph 11.96 above.
The Procurator Fiscal should provide a report to Crown Counsel within 10 days of receipt of the Bill. When reporting, the Procurator Fiscal should report on appeals form ***app-com***
3.

11.103 CROWN APPEAL BY BILL OF ADVOCATION

If the Procurator Fiscal considers that a Bill of Advocation should be taken by the Crown, he should submit a full report as soon as possible and no later than ten days after the decision complained of. When reporting, the Procurator Fiscal should report on appeals form ***app-com***

The report will be considered by Crown Counsel who will give the necessary instructions.

If a Bill of Advocation is to be taken, the final version of the Bill will be prepared in Crown Office and sent to the Clerk of Justiciary to obtain the first order for service.

When this is available, the Bill will be sent to the Procurator Fiscal who will be responsible for arranging, as soon as possible, exhibition to the Sheriff Clerk and service on the respondent.

The appeal cannot be heard until these procedures have taken place and the principal Bill, etc, has been returned to the Clerk of Justiciary. The date of the hearing may well be appointed before this however. Once service and exhibition have been effected, the principal Bill and executions must be returned to Crown Office immediately.

11.104 OUTCOME OF THE APPEAL

As with a Bill of Suspension, the court may grant the crave(s) of the Bill in whole or in part. The Procurator Fiscal will be advised of the outcome of the appeal as soon as possible.

PETITIONS TO THE NOBILE OFFICIUM

11.105 SCOPE OF PETITIONS TO THE NOBILE OFFICIUM

The *nobile officium* provides an extraordinary appeal procedure by which the High Court may prevent injustice or oppression, its scope being limited by the principle that this power will be exercised only where the circumstances involved are extraordinary or unforeseen and where no other remedy or procedure is provided by the law: Anderson v HMA 1974 SLT 239.

It is available to both Crown and defence, and in both summary and solemn proceedings.

The *nobile officium* cannot be used to override the express provisions of a statute or in a way which would conflict with statutory intention, express or clearly implied. It may be invoked by: the Crown; by an accused individual; by witnesses; by members of the legal profession involved in proceedings; and by other individuals not directly connected with the proceedings but who may have an interest in them, for example the owners of items forfeited by the court or journalists found in contempt of court in respect of publications.

The general scope for the competent application of Petitions to the *Nobile officium* is considered in Anderson v HMA 1974 SLT 239, MacPherson, Petitioners 1989 SCCR 518 and Express Newspapers plc, Petitioners 1999 SCCR 262.

11.106 FORMAT OF A PETITION TO THE NOBILE OFFICIUM

The petition commences with

- the **statements of fact**, which conclude with a statement that the petitioner has no other means of obtaining a remedy. These are followed by
- the **prayer of the petition** at the end.

11.107 EXAMPLES OF PETITIONS TO THE NOBILE OFFICIUM

a. Bail

- *Murder - Pre-conviction*: See Welsh, Petitioner 1990 SCCR 763, Schiavone, Petitioner 1992 SCCR 95 and Boyle, Petitioner 1993 SCCR 251;

- *Murder - Post-conviction*: See HMA v Ryan James Renicks 12 May 1998 (unreported);

- *Accused CFE'd on bail and subsequently fails to appear at a diet*: In Campbell, Petitioner 1989 SCCR 722; 1990 JC 128; 1990 SLT 875 the High Court held that a Petition to the *nobile officium* was the competent mode for applying for bail where an accused, released on bail at the stage of committal for further examination, subsequently fails to appear at a first/preliminary or trial diet and is subsequently arrested on a warrant for his arrest and detention until liberation in due course of law. Note however that in Love, Petitioner 1998 SCCR 161, the court held that the appropriate remedy is now an application for bail to the sheriff under s23(5) which, if refused, can then be brought before the High Court under s32(1). See 11.156.

b. Correction of record - conviction in false name: In Cox v Normand 1992 SCCR 431, the High Court recognised that the nobile officium could be used to correct details on a complaint and subsequent proceedings on it by inserting the correct name, address and date of birth of the accused and further by granting authority to correct the record of previous convictions of any innocent individual adversely affected. See section 11.182.

c. To review an action of the High Court which exceeds its powers. See Allan, Petitioner 1993 SCCR 686.

d. Where a statutory right has been lost through failure to observe time limits (at least where there has been no "mindless disregard of a statutory timetable") - see: HMA v Wood; HMA v Cowie 1990 SCCR 1951; Scott, Petitioner 1992 SCCR 102. (See too, though:
   - Fenton, Petitioner 1981 SCCR 288 - failure to timeously appeal against a refusal of bail pending appeal in which the High Court refused to grant the petition; and
   - Connolly, Petitioner 1997 SCCR 205 - failure to timeously lodge an application to three judges for leave to appeal under s107(4) after refusal of leave to appeal at first sift in which case the High Court dismissed the petition as incompetent.)

e. Appeal against sentence in respect of a supervised attendance order

f. Review of a finding of contempt of court or sentence following therefrom: Wyllie and another v HMA 1966 SLT 149.

11.108 TIME LIMITS

No statutory time limit restricts appeal by Petition to the *Nobile officium*. There appears to be no authority on the question of whether acquiescence may apply, but standing its application to both other forms of common law appeal, it is likely to do so. Accordingly, the caveats mentioned above in sections 11.93 and 11.101 apply equally to Petitions to the *Nobile Officium.*

11.109 DEFENCE PETITION TO THE NOBILE OFFICIUM

a. The first order/ deliverance in a defence petition

The procedure here is similar to that for Bills of Suspension and Advocation (see sections 11.94 and 11.102 supra).

b. Service on the prosecutor in a defence petition

Generally, a copy of the petition is served at Crown Office. In summary proceedings, it should also be served on the relevant Procurator Fiscal.

c. Procurator Fiscal's report to Crown Office in connection with a defence petition

The Procurator Fiscal should report on appeals form ***app-com.*** The enclosures which should

accompany the Procurator Fiscal's report will depend on the nature of the petition itself

11.110 OUTCOME OF APPEAL IN DEFENCE PETITION

As with Bills of Suspension and Advocation, the court may grant the prayer of the petition in whole or in part or may refuse it in its entirety.

The Procurator Fiscal will be advised of the outcome of the appeal as soon as possible and, in any event, within two working days.

11.111 CROWN APPEAL BY PETITION TO THE NOBILE OFFICIUM

If the Procurator Fiscal considers that an appeal should be taken by the Crown by way of Petition to the Nobile Officium, he should submit a full report as soon as possible and no longer than seven days after the decision complained of.

The Procurator Fiscal should report on appeals form ***app-com.*** The enclosures which should accompany the Procurator Fiscal's report will depend on the nature of the petition itself.

The report will be considered by Crown Counsel who will give the necessary instructions. If a Petition to the *Nobile Officium* is to be taken, the final version of the petition will be prepared in Crown Office and sent to the Clerk of Justiciary to obtain the first order for service.

When this is available, the petition will be sent to the Procurator Fiscal who should arrange for exhibition (as soon as possible) to the Clerk of the lower court and also for service on the respondent.

The appeal cannot be heard until these procedures have taken place and the principal petition, etc, has been returned to the Clerk of Justiciary, even though a date for the hearing may be fixed.

Accordingly, after service and exhibition, the principal petition and executions must be returned to Crown Office immediately.

PART VI - OTHER APPEALS

APPEALS IN CONNECTION WITH APPLICATIONS FOR EXTENSION OF TIME: s65 AND s147

SOLEMN PROCEEDINGS

11.112 POWER OF COURT TO GRANT EXTENSIONS

i. The 12-month time limit - s65(1) may be extended by the sheriff, or, where a High Court indictment served, by a single High Court judge - s65(3).

ii. The 80-day time limit - s65(4)(a) may be extended by a single judge of the High Court - s65(5).

iii. The110 day time limit - s65(4)(b) may be extended by a single judge of the High Court - s65(7).

11.113 PROCEDURE

The grant or refusal of an application to extend any of the periods specified above may be appealed by Note of Appeal: s65(8); rule 8.1 - forms 8.1A and 8.1B.

The forms require to be amended for a Crown appeal.

11.114 PROCURATOR FISCAL'S REPORT TO CROWN OFFICE

a. Where extension granted

Normally, no report is required in respect of appeals taken against the decision of a High Court judge to extend a statutory period, whether in relation to applications for extension of the 12-month period (High Court case) or of the 80 or 110-day periods (High Court or Sheriff Court case). Crown Office will deal with these on the basis of information already provided (Sheriff Court cases are available to the High Court Unit). *Where a report is required from the Procurator Fiscal in relation to a defence appeal against the granting of an extension by a High Court judge, a copy of the note of appeal will be provided by the Appeals Unit. In that situation, or where the grant of an extension to the 12 month period in a Sheriff Court case is the subject of an*

appeal, the Procurator Fiscal should immediately submit a full report on appeals form ***app-ext*** *for Crown Counsel's consideration*

Pressure of business on its own cannot constitute sufficient cause for extension of the 12 month period (see e.g. McGinty v HMA 1984 SCCR 176).

However, pressure of business may be a factor in an application for or grant of an extension (see e.g. Dobbie v HMA 1986 SCCR 72).

- ***In such cases, it is essential that all of the factors upon which the application is founded are narrated to the***

b. Where extension refused

Where a High Court judge refuses an extension and Crown appeal is taken, normally no report will be required from the Procurator Fiscal. Any such Crown appeal will be dealt with by Crown Office *Where a report is required from the Procurator Fiscal in relation to a refusal to extend by a High Court judge, a copy of the note of appeal will be sent to the Procurator Fiscal. In that situation, or where the Procurator Fiscal considers that a refusal of an extension by a sheriff should be the subject of an appeal, he should immediately submit a full report on appeals form* ***app-ext*** *for Crown Counsel's consideration*

11.115 OUTCOME

The High Court may affirm, reverse or amend the determination made: s65(8).

The Procurator Fiscal will be notified of the result as soon as possible and, in any event, within two working days.

SUMMARY PROCEEEDINGS

11.116 POWER OF COURT TO GRANT EXTENSIONS

The 40-day time limit [section 147(1)] may be extended by the sheriff: s147(2).

11.117 PROCEDURE

The grant or refusal of such an application may be appealed by Note of Appeal (on form 17.1) to the High Court: s147(3); rule 17.1.

The form requires to be amended for a Crown appeal.

Where the Procurator Fiscal considers that a refusal of an extension should be the subject of an appeal, or whether the sheriff grants the extension and his decision is appealed by the accused, the matter must be reported immediately to Crown Counsel for their consideration.

11.118 OUTCOME

The High Court may affirm, reverse or amend the determination made: s147(3). The Procurator Fiscal will be notified of the result as soon as possible and, in any event, within two working days.

INSANITY IN BAR OF TRIAL - APPEALS UNDER s62

11.119 SCOPE OF APPEAL PROCEDURES

s62 contains special appeal procedures which are open to an accused in both solemn and summary proceedings where:

- there has been a finding, or a refusal to find, that the accused is insane and unfit to plead, or
- there has been a finding or disposal following upon an examination of facts under s55, or
- there has been an order made under s57(2) – i.e. orders having the effect of hospital orders, etc.

11.120 RIGHTS OF APPEAL OF THE ACCUSED

Where an examination of facts has been held in proceedings on indictment, the right to appeal under s62 against a finding (or refusal to make a finding) of insanity in bar of trial (and the time limit of 7 days or marking such an appeal) are without prejudice to rights of appeal under s74(1).

11.121 TIME LIMITS FOR APPEAL

a. Where the appeal is:
- against a finding that the accused is insane so that his trial cannot proceed or continue; or
- against the refusal of the Court to make such a finding,

the appeal must be lodged not later than 7 days after that decision.

b. Where the appeal is:
- against a finding made under Section 55(2) following an examination of facts; or
- against such a finding and any disposal under s57(2) following an examination of facts,

the appeal must be lodged not later than 28 days after the conclusion of the examination.

c. Where appeal is against the disposal under s57(2) - only - made on acquittal or following a finding in an examination of facts (where the finding itself is not challenged), the appeal must be lodged not later than 14 days after the acquittal or the conclusion of the examination.

These time limits may be extended by the High Court on cause shown: s62(2).

11.122 EFFECT OF APPEAL ON TIME LIMITS APPLYING TO THE PROSECUTION

Where an appeal is taken under s62(1), the period from the date on which the appeal was lodged until it is withdrawn or disposed of shall not count towards any time limit applying in respect of the case: s62(4).

11.123 PROCEDURES

All appeals shall be in writing: s62(2). The Note of Appeal is lodged with the Clerk of Justiciary. Justiciary Office will intimate the appeal to Crown Office who will in turn notify the Procurator Fiscal. Justiciary Office will request a report from the presiding Judge or Sheriff.

11.124 PROCURATOR FISCAL'S REPORT

1. In **Sheriff Court** cases, on receiving intimation that an appeal has been lodged, *the Procurator Fiscal should report immediately on appeals form* ***app-ins*** *to Crown Counsel,;*

11.125 DISPOSAL OF APPEAL

In disposing of an appeal under s62 the High Court may:

- affirm the decision of the Court at First Instance;
- make any other finding or order which that Court could have made at the time; or
- remit the case to that Court with such directions as the High Court thinks fit.

Crown Office will intimate the disposal of such an appeal to the Procurator Fiscal.

11.126 CROWN APPEAL

See section 11.63-11.72, 11.73-11.76.

EUROPEAN COURT OF JUSTICE: ARTICLE 177 OF E.E.C TREATY

11.127 ISSUE RAISED AT FIRST INSTANCE

Where a question or issue under Article 177 of the E.E.C. Treaty, etc., is to be raised at first instance:

a in solemn proceedings

1 notice of intention to do so should be given to the court and other parties to the proceedings no later than 14 days after service of the indictment: rule 31.2(1);
2 consideration of the question should be reserved to the trial diet: rule 31.2(2);
3 after hearing the parties, the court may determine the question or may decide that a preliminary ruling should be sought: rule 31.2(4);
4 the procedural powers available to the court are specified in rules 31.2(3) and 31.2(5) - 31.2(7); and

b in summary proceedings

1 notice should be given before the accused is called on to plead: rule 31.3(1);

2 the accused is not then called on to plead unless the question is determined: rules 31.3(2) and (5);
3 after hearing the parties, the court may determine the question or may decide that a preliminary ruling should be sought: rule 31.3(4).

11.128 ISSUE RAISED IN APPEAL PROCEEDINGS

Where a question is raised in appeal proceedings, whether common law appeal or statutory, the Appeal Court "shall proceed to make a reference": rule 31.4.

11.129 PROCEDURE

The procedures for making a reference are contained in rule 31.5. The significant points are that the court may decide who will draft the reference and the manner in which this is to be done. The draft reference is adjusted. The manner of adjustment is decided by the court. Once adjusted, the court makes an order making the reference and the reference is transmitted by the clerk of court to the Registrar of the European Court. The reference is in terms of Form 31.5.

11.130 APPEAL AGAINST THE ORDER MAKING A REFERENCE

Any party to the proceedings who is aggrieved by an order (of a court of first instance) making a reference may appeal to the High Court in terms of rule 31.7 within 14 days of the making of the order.

The appeal is taken by lodging a Note of Appeal - Form 31.7 - with the clerk of the court making the order. A copy of the Note of Appeal must be served on every party to the proceedings. The powers of the Appeal Court in determining the appeal are specified in rule 31.7(5).

Note that in deciding that a preliminary ruling should be sought, the court is not making a reference. No appeal may be taken under the provision until the order making the reference has been made. It may be possible in some circumstances to advocate any interim order or procedure where this appears to be going off the rails.

11.131 GENERAL INSTRUCTIONS

Procurators Fiscal should contact the Appeals Unit as soon as notice of intention to raise a question is given by the accused, or where the Procurator Fiscal considers that the Crown should give such notice. Arrangements for reporting for Crown Counsel's instructions will be made at that time. Reports should be submitted on appeals form ***app-ecj.***

PART VII - DETERMINATION OF APPEALS AGAINST CONVICTION AND/OR SENTENCE

11.132 NOTIFICATION OF OUTCOME

Procurators Fiscal will be notified of the outcome of all appeals.

DISPOSAL OF APPEAL PRIOR TO ANY HEARING

11.133 REFUSAL OF LEAVE TO APPEAL

See section 11.42-11.45.

11.134 DEEMED ABANDONMENT

Where certain statutory time limits are not complied with, this has the effect of bringing an appeal to an end. In these circumstances though, there are provisions permitting extension of the relevant time limits by the relevant court.

11.135 STATED CASE

Where the appellant fails

- to lodge adjustments or intimate that there are none: s179(3), or
- to lodge the final stated case: s179(10)

the appeal will be deemed to be abandoned.

In practice, if adjustments are not intimated, the clerk of the lower court will notify the

Procurator Fiscal *who should notify Crown Office as soon as possible.*

Where the final stated case is not lodged, the Clerk of Justiciary will notify Crown Office who will in turn advise the Procurator Fiscal.

For the implications for Crown appeals, see paragraphs 11.55 and 11.56.

11.136 SOLEMN APPEAL AGAINST CONVICTION AND/OR SENTENCE

In relation to solemn appeals against conviction or conviction and sentence failure

- to lodge a Note of Appeal within 6 weeks of lodging the Intimation of Intention to Appeal or
- to lodge an Intimation of Intention to Appeal or Note of Appeal within any time limit extended by the Court

will result in the appeal being treated as having come to an end.

11.137 ABANDONMENT BY MINUTE OF ABANDONMENT: SUMMARY APPEALS

a. Crown or defence appeal against sentence

The appeal may be abandoned by lodging a Minute of Abandonment (on form 19.7: rule 19.7) with the appropriate clerk of court, who is, in terms of s186(9):

- if the Note of Appeal has not yet been transmitted to the Clerk of Justiciary in terms of s186(4), the Clerk of the sentencing court; otherwise
- the Clerk of Justiciary.

b. Stated case

If the stated case has not yet been lodged with the Clerk of Justiciary, the appeal may be abandoned by lodging a Minute of Abandonment (on form 19.5: rule 19.5) with the Clerk of the inferior court: s184. Such abandonment is without prejudice to any rights of appeal which an appellant may have in terms of s191 (suspension or advocation).

The appellant should intimate the abandonment to the Procurator Fiscal - s184(1). In addition, the Clerk of the inferior court will notify the Procurator Fiscal, or where the minute is lodged with the Clerk of Justiciary, he will notify the Clerk of the lower court and also the Crown Agent: rule 19.8.

On receiving intimation of abandonment of an appeal, the Procurator Fiscal should notify Crown Office as soon as possible, enclosing a copy of the minute.

Where the stated case is lodged with the Clerk of Justiciary, the appellant is deemed to have abandoned any other mode of appeal open to him.

The appeal may be abandoned in whole or in part. s175(8) permits the appellant to abandon the appeal against conviction and to proceed with an appeal against sentence only. The procedure is set out in rule 19.6.

11.138 SOLEMN APPEAL UNDER S106 – CROWN APPEALS AGAINST SENTENCE AND DEFENCE APPEALS AGAINST CONVICTION AND/OR SENTENCE

a. Notice of Abandonment

The appellant may abandon his appeal by lodging a notice of abandonment (on form 15.6: rule 15.6) with the Clerk of Justiciary: s116. The appeal is then deemed to have been dismissed by the court.

b. Partial Abandonment

Where an Intimation of Intention to Appeal against Conviction and Sentence has been lodged with the Clerk of Justiciary, but the appellant decides to proceed against conviction or sentence only, a Minute of Abandonment of the relevant aspect of the appeal is usually, but not always lodged with the Clerk of Justiciary along with the Note of Appeal. Where a Note of Appeal against both has been lodged, it is open to the appellant to abandon one or other aspect by Minute before Court.

Where the appeal is abandoned by Minute prior to the hearing, the Court has no discretion to require the appeal to proceed

as it does if the motion to abandon is made in Court.

11.139 COMMON LAW APPEALS

Common law appeals are usually abandoned by notice in writing to the Clerk of Court prior to the hearing.

DISPOSAL AT HEARING

11.140 THE DECISION OF THE COURT

Where the appeal proceeds to argument, the Court may deliver its decision immediately with reasons, may deliver its decision immediately with written reasons to follow in due course, or may make *avizandum.*

11.141 ABANDONMENT AT THE BAR

When the case calls in court, the appellant may intimate that he wishes to abandon the appeal. The court may decline the motion and insist that the appeal be argued.

11.142 DISMISSED FOR WANT OF INSISTENCE

a. Solemn appeal

Generally, if the appellant fails to appear for the appeal hearing, is not represented and no written argument has been submitted, the Court will treat the appeal as abandoned: s120(1). Nevertheless, if the Court proceeds to hear and determine the appeal, it may exercise its power to pass a sentence under part VIII of the 1995 Act (Appeals form solemn proceedings) even if the convicted person is absent: s120(2).

If the appellant is on **interim liberation** under s112(1) he must appear personally for the hearing(s) of the appeal - s112(3). If **he** fails to appear, the court may [in terms of s112(4)]:

- in a defence appeal - decline to consider the appeal, or dismiss it summarily, or
- in a Crown or defence appeal - consider and determine the appeal, or without prejudice to s27 (offences of breaching bail conditions) make such other order as it sees fit.

The same provisions apply where the appellant fails to appear if a **probation order, supervised attendance order, community service order, or restriction of liberty order** has been suspended in terms of s121A: s121A(3).

b. Summary appeal

An appellant granted bail shall appear personally in court for the hearing(s) of the appeal: s192(1). If **he** fails to appear, the court shall in terms of s192(2):

- dispose of the appeal as if it had been abandoned - s177(5) applies; or
- on cause shown, permit the appeal to be heard in his absence

If the appellant fails to appear where a **probation order, supervised attendance order, community service order, or restriction of liberty order** has been suspended in terms of s193A, the court may proceed in the same manner as under s121A(3): s193A(3). See **a.** above.

11.143 CONTINUED APPEALS

The Appeal Court may continue the appeal. This may occur where, for example, Counsel withdraws or is dismissed; the appellant seeks to lodge additional or amended grounds of appeal; notes of evidence are ordered to enable the appeal to be dealt with; the court directs evidence to be heard or enquiries to be conducted; or a supplementary report from the trial Judge is ordered.

Appeals are rarely continued to a specified date, but instead are continued to a date to be afterwards fixed.

The Appeals Unit will inform Procurators Fiscal of the reason for the continuation. The date of the hearing of any appeal is usually communicated to Crown Office only when the relevant Roll of Court is received - only two weeks or so before the hearing. Where appropriate, intimation of the date of the continued hearing will be given to the Procurator Fiscal as soon as possible, but normally can be given only at short notice.

11.144 APPEALS CONTINUED FOR GOOD BEHAVIOUR – GOOD BEHAVIOUR REPORTS

In both solemn and summary appeals against sentence (or where a conviction has been quashed in part and as a result, s118(3) - solemn - or s183(4) or s189(1) - summary - applies, the Appeal Court may continue the appeal for sentence and order the appellant to be of good behaviour. The Appeal Court will not normally specify a date for the continued hearing but will merely continue it for a specified period or to a date to be afterwards fixed. The Procurator Fiscal will be required to submit a report on the appellant's behaviour during the period to Crown Counsel. The Procurator Fiscal will be advised of the Court's interlocutor (formal or informal).

11.145 REFUSED

The appeal may be refused in whole or in part - e.g. as regards specific charges, in relation to conviction or to sentence or both.

11.146 ALLOWED

The appeal may be granted in whole or in part. The court may:

1 In an appeal against conviction:

a. set aside the verdict of the inferior Court and quash the conviction: solemn – s118(1)(b); stated case – s183(1)(c);

b. set aside the verdict of the inferior court and substitute an amended verdict of guilty: solemn – s118(1)(b); stated case – s183(1)(c). The amended verdict of guilty must be one which could have been returned on the indictment or complaint before the trial court – s118(2); s183(2): see Salmond v HMA 19991 SCCR 43; Rutherford v HMA 1997 SCCR 711. The court is empowered to pass another sentence or disposal or order (but not more severe than that quashed): solemn – s118(3); summary – s183(4). This power also extends to Bills of Advocation and suspension – s191(3); and

c. set side the verdict of the trial court, quash the conviction and grant authority to bring a new prosecution: solemn – s118(1)(c); stated case – s183(1)(d); Bill of advocation or suspension – s183(1)(d) and s191(3). See section 11.147

2 In a Crown or defence appeal against sentence:

quash the sentence and pass another sentence whether more or less severe: solemn - s118(4); summary – s189(1). In a summary appeal, the substituted sentence must be within the sentencing range of the inferior court – s189(2).

3 In a Crown appeal by stated case against acquittal [in terms of s183(6)]:

a. convict and sentence the respondent; or
b. remit the case to the inferior Court with instructions to convict and sentence the respondent; or
c. remit the case to the inferior Court with their opinion thereon. In these circumstances, the case is normally remitted to the inferior Court with instructions to proceed as accords. The Clerk of the inferior Court should thereafter re-enrol the case for the further proceedings.

The High Court's interlocutor should be sufficient to achieve this without the need for an incidental application from the prosecutor.

AUTHORITY TO BRING A NEW PROSECUTION

11.147 POWERS OF THE COURT

In disposing of an appeal against conviction the High Court may quash the conviction and grant the Crown authority to bring a new prosecution: s118(1)(c) - solemn; s183(1)(d) - summary [extended to advocation and suspension by s191(3)]. In deciding whether authority to bring a fresh prosecution should be granted, the Court will take account of factors such as:

- any significant fault on the part of the Crown: Mackenzie v HMA 1982 SCCR 499; Sinclair v HMA 1990 SCCR 412;
- the strength and nature of the evidence: Farooq v HMA 1993 SLT 1271;
- the age of the offence and effect of giving evidence on a witness: Kelly v Docherty 1991 SCCR 312 (child witness).

A new prosecution may be brought charging the accused with the same or any similar offence arising out of the same facts: s119(1) - solemn; s185(1) - summary. However, in a new prosecution:

- the accused cannot be charged with an offence more serious than that of which he was convicted in the earlier proceedings: s119(2) - solemn; s185(2) - summary. (These provisions supersede the decision in HMA v Boyle 1992 SCCR 939) and
- no sentence may be passed on conviction under the new prosecution which could not have been passed on conviction under the earlier proceedings: s119(3) - solemn; s185(3) - summary.

The High Court may also quash convictions on other charges in the indictment which were not the subject of appeal where:

- they are intimately connected with the charge in relation to which the appeal is taken and
- it is desirable that the jury at the retrial hear all material evidence: HMA v Boyle 1992 SCCR 939; Boyle, Petitioner 1992 SCCR 949.

Accordingly when reporting, Procurators Fiscal should include observations as to whether, in the event of a retrial being ordered, it may be desirable to re-indict on charges to which no appeal has been taken.

11.148 TIME LIMITS

Proceedings shall be **commenced within two months** of the date on which authority to bring the prosecution was granted: s119(5) - solemn; s185(5) - summary.

Proceedings are **deemed to be commenced**:

a in a case where a warrant to apprehend or to cite the accused is executed without unreasonable delay, on the date on which the warrant was granted; and
b in any other case, on the date on which the warrant is executed.

s119(8) - solemn; s185(8) - summary.

Provided that proceedings are commenced within the time limit, subsequent indictments may be deserted pro loco et tempore and the case re-indicted outwith the two month period: McPhelim v HMA 1997 SCCR 87. The **40 and 110 day rules apply** however - see paragraph 11.150.

Where no new prosecution is brought within 2 months, the order of the High Court setting aside the verdict shall have the effect of an acquittal: s119(9) - solemn; s185(9) - summary.

11.149 CROWN COUNSEL'S INSTRUCTIONS AND SERVICE OF COMPLAINT AND INDICTMENT

Procurators Fiscal will be advised of any decision of the High Court to grant leave to bring a fresh prosecution as soon as possible after leave is granted together with Crown Counsel's instructions as to any further proceedings.

Any warrant to apprehend granted for the new proceedings must be executed without due delay.

In sheriff court cases, Procurators Fiscal must ensure that the time limits set out in s119(5) and s185(5) are observed. In High Court cases the High Court Unit at Crown Office will prepare a fresh indictment service in the usual way.

If Crown Counsel instruct that no new prosecution is to be brought, the Procurator Fiscal must notify the accused, the Sheriff Clerk of the original court of trial, SCRO and any other party who ought to know of this decision. In particular, consideration should be given to notifying the victim of the crime of this decision. Crown Office will send notification to the Clerk of Justiciary.

11.150 CUSTODY OR BAIL

The accused may be remanded in custody or admitted to bail pending retrial - s119(10). Parties are given an opportunity to be heard on the question of bail.
Note however that:

- the 110 day rule applies to persons detained in custody pending retrial in solemn proceedings - s119(11); and
- the 40 day time limit applies to those accused remanded in custody pending retrial in summary proceedings - s185(10).

SETTING ASIDE CONVICTION OR SENTENCE IN SUMMARY PROCEEDINGS

11.151 PROSECUTOR'S CONSENT OR APPLICATION - S188

In summary proceedings, where the prosecutor is not prepared to maintain a conviction or sentence, he may lodge a minute with the clerk of the court of first instance consenting to the setting aside of the conviction or sentence: s188(1). A conviction and sentence may be set aside in whole or in part: s188(1)(a).

The procedure may be invoked whether or not an appeal has been marked.

If Crown Counsel consider that the conviction or sentence cannot be supported the Procurator Fiscal will be instructed to lodge a minute with the clerk of court. The instruction will specify the ground upon which the conviction is to be set aside.

On receipt of such an instruction, the Procurator Fiscal should without delay prepare and sign the minute and lodge it with the clerk of court. A copy should be sent to the convicted person or his solicitor: s188(2) and (3).

No s188 minute should be lodged unless on Crown Counsel's instructions.

On receipt of any minute, the clerk of court shall ascertain and note whether the convicted person or his solicitor desires to be heard by the High Court before the appeal, or application, is disposed of an thereafter transmit the complaint and proceedings to the Clerk of Justiciary: s188(3)(a) and (b).

Procurators Fiscal should ask the Clerk of Court to confirm that the proceedings have been transmitted to Justiciary Office. When confirmation is received, a copy of the minute should be sent the Appeals Unit for Crown Counsel's information with the Clerk of Court's confirmation..

The Clerk of Justiciary will present the minute or application before a Judge of the High Court (usually in chambers) and the Judge, after hearing the parties if they desire to be heard, may:

- **set aside the conviction** or the sentence, or both, either in whole or part - s188(4);
- award **expenses** to the convicted person both in the High Court and in the inferior court as the judge sees fit: s188(4)(a)(I); and
- where the conviction is set aside in part, pass another (but not more severe) **sentence** in substitution for the sentence originally imposed in respect of that conviction -s188(4)(a)(ii)

11.152 REMIT TO COURT

The Judge may, however, refuse to set aside the conviction or sentence and the proceedings will be returned to the clerk of the inferior court: s188(4)(b). In these circumstances any appeal will proceed in the normal manner , except that the date of the return of the proceedings to the inferior court will be treated as being the date of marking the appeal - s188(5).

11.153 EXPENSES

In setting aside the conviction, the court may award expenses in the High Court and in the inferior court.

11.154 OUTCOME

The Procurator Fiscal will be notified of the outcome.

PART VIII - SUSPENSION OF SENTENCES PENDING DETERMINATION OF AN APPEAL AND THEIR RE-IMPOSITION

11.155 SOLEMN PROCEEDINGS: S126

In solemn proceedings, no extract conviction (other than one for the detention of the convicted person) may be issued for 4 weeks after the date of conviction or until any appeal is determined: s126.

CUSTODIAL SENTENCES AND BAIL

11.156 PRE-CONVICTION

See Chapter 8

Application for bail following apprehension on a "Failure to appear" warrant in solemn proceedings

In Love, Petitioner 1998 SCCR 161, the petitioner was committed for further examination and granted bail. He failed to attend for trial in the High Court and a warrant for his arrest was granted (in the usual terms) “to officers of law to apprehend the .. accused and for his arrest and commitment to … Prison … therein to be detained until liberated in due course of law."

The warrant was executed and the petitioner arrested and detained. His petition for bail in the Sheriff Court was refused and he sought to appeal this refusal to the High Court under s32. The appeal was rejected as incompetent (by the Clerk of Justiciary) in light of the decision in Campbell, Petitioner 1989 SCCR 722.

Love petitioned the nobile officium on the basis that he had no other means of applying for bail. Although the prayer of the petition was granted on its merits, it was held to be incompetent, on the basis that the petitioner was a person who was committed until liberated in due course of law and so was entitled to apply for bail in terms of s23(5) to the Sheriff and, thereafter, on that application being refused, to appeal to the High Court under s32(1).

This decision therefore supersedes that in Campbell, Petitioner

11.157 FOLLOWING CONVICTION: AGAINST REMAND PENDING SENTENCE – S201

The Crown has no right of audience in relation to an application for bail under s201 or any subsequent appeal against refusal.

Procurators Fiscal need provide no report in relation to any appeal relating to the question of the granting of bail under s201.

11.158 FOLLOWING CONVICTION, FOR BAIL PENDING DETERMINATION OF APPEAL – INTERIM LIBERATION

Interim liberation pending determination of an appeal may be granted where it appears that there are *ex facie* grounds for the appeal succeeding. It is for the appellant to demonstrate why he should be granted bail. The mere granting of leave to appeal is not per se sufficient to show that bail should be granted: Ogilvie, Petitioner 1998 SCCR 187.

By custom, the Crown plays no active role at hearings on interim liberation etc. *However, when interim liberation is sought in the High Court, the Procurator Fiscal should draw to Crown Counsel's attention any matter which he considers relevant to:*

- *the granting or refusal of bail pending determination of the appeal;*
- *bail conditions which may be appropriate; and*
- *any concerns about a proposed or possible domicile of citation.*

Crown Office will communicate the result of any application in the High Court for, or appeal against the refusal of, bail to the Procurator Fiscal. Where interim liberation is granted, he will be advised as soon as possible.

The Procurator Fiscal must bear in mind any requirements of notification to victims or relatives.

11.159 INTERIM LIBERATION IN A SUMMARY APPEAL BY STATED CASE OR AGAINST SENTENCE

Where an appeal is taken by way of application for stated case, the appellant may apply for interim liberation and may appeal against a refusal or the conditions imposed: s177. The provisions are extended to apply to an appeal against sentence in summary proceedings: s186(10).

Procurators Fiscal should make arrangements with Clerks of Court to be given immediate notification of the result of any application for interim liberation.

a. Where interim liberation is granted at first instance *this information should be included in the relevant Appeals Form accompanying:*

- *in an appeal against sentence, the Procurator Fiscal's preliminary report - see paragraph 11.17; or*
- *in an appeal by stated case, the report on the draft stated case - see paragraph 11.28.*

A copy of the bail order should be enclosed.

b. Where interim liberation is refused at first instance and an appeal is taken against that refusal, *Procurators Fiscal should report to Crown Counsel immediately.*

Where Crown Office receives intimation of an interim liberation appeal from Justiciary Office, notification will be given to the Procurator Fiscal.

11.160 INTERIM LIBERATION IN SOLEMN APPEALS AGAINST CONVICTION AND/OR SENTENCE

The convicted person may apply for bail pending the determination of any appeal under s106:

- in a defence appeal against conviction and/ or sentence, etc (other than one against murder, etc.) under s112(1)(a); and
- in a Crown appeal against sentence under s112(1)(b).

See though paragraph 8.08. In respect of the excluded categories (murder , treason, etc) the application is by petition to the *nobile officium.*

a. The conditions to be satisfied

The High Court shall not grant interim liberation unless it considers that there are exceptional circumstances justifying the granting of it: s112(2). In Ogilvie, Petitioner 1998 SCCR 187, the Court made it clear that while there is a distinction between the approach to bail before trial and post - conviction, s112 does not require that an application for bail by an appellant who has lodged a Note of Appeal should be granted only if there are exceptional circumstances. The Lord Justice Clerk queried the inclusion of the test of "exceptional circumstances in the provision. One of the factors relevant to consideration of bail by the High Court are the apparent prospects of success of the appeal.

The appellant must:

- state reasons why interim liberation should be granted and also
- in a defence appeal, if the application precedes the lodging of the Note of Appeal, set out the proposed grounds of appeal - see the High Court of Justiciary Practice Note, 1994 SLT (News) 132.

See too Lord Wheatley's comments on interim liberation reported at 1984 SLT (News) 271.

b. Application for interim liberation at first instance

The procedures are as follows:
In an appeal against conviction for **murder** or treason the application for bail is by petition to the Nobile Officium [HMA v Renicks 1998 SCCR 417] to a quorum of the High Court - s24(2). **Otherwise** any application may be made to a single Judge - s103(5)(c) - in which case, the application is in terms of form 15-2D: rule 15.2(4).

The application is lodged with the Clerk of Justiciary who will notify Crown Office. If the Note of Appeal against conviction and/or sentence is available, a copy will be provided to the Procurator Fiscal for his information (and initial comments, if any).

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c. Appeal against refusal of interim liberation

If the application to a single judge is refused, the appellant may (within 5 days) appeal against that refusal to a quorum of the Court : s103(6); s105; rule 15.3. The application for the appeal is on form 15.3-B.

The Appeals Unit will deal with any appeal against the refusal of interim liberation in solemn proceedings.

11.161 REVIEW

Review of refusal: Where interim liberation has been refused, the appellant may apply for a review of that decision.

Review of conditions: Generally, the conditions can be reviewed: Gilchrist, Petitioner 1991 SCCR 699.

11.162 BILLS OF SUSPENSION AND LIBERATION

The First Order and interim craves - including interim liberation

The "First Order", granted by a single High Court Judge, authorises service on the respondent(s) and relevant Clerk of Court. The order will fix the date for any interim hearing (e.g. on interim liberation/ suspension of disqualification: rule 19.15), to be held before a single Judge - and may appoint a date for the appeal hearing itself.

The hearing on interim liberation is likely to be fixed at very short notice. As there is no time limit for effecting service, it often happens that the hearing on the interim crave takes place before the prosecutor has received the service copy Bill. Justiciary Office will notify Crown Office of the hearing.

Scant information may be available at this stage as Justiciary Office is unlikely to have retained a copy of the Bill.

Where interim liberation is sought, the Procurator Fiscal will be notified and *a preliminary report on appeals form **app-lib** must be sent immediately for Crown Counsel's information,*

The Procurator Fiscal's report on the substance of the Bill may be forwarded in due course - see section 11.96.

RETURN OF APPELLANT TO CUSTODY ON DETERMINATION OF THE APPEAL

11.163 GENERAL INSTRUCTIONS

If bail has been granted by the High Court, Procurators Fiscal should ensure that bail was accepted by the appellant and that he was released on bail.

11.164 APPEAL DISPOSED OF PRIOR TO HEARING

i. Leave to appeal refused at sift

A warrant will be granted by the judge or judges refusing leave to appeal. An extract warrant will accompany the intimation from Justiciary Office and will be forwarded to the Procurator Fiscal.

The following table outlines the statutory provisions:

	Solemn appeal	**Stated case**	**Summary appeal against sentence**
Refused at first sift The warrant is granted under:	s107(1)(b)(ii)	s180(1)(b)(ii)	s187(1)(b)(ii)
But does not take effect for 14 days to allow for any appeal against the refusal of leave to appeal:	s107(3)	s180(3)	s187(3)
Refused at second sift The warrant is granted under:	s107(5)(b)(ii)	s180(5)(b)(ii)	s187(5)(b)(ii)

ii. Appeal not proceeded with

a. Summary appeals

Where an appellant who has been released on interim liberation does **not proceed with his appeal by stated case or against sentence** by Note of Appeal, the inferior court may grant warrant to arrest and imprison him for the unexpired balance of his sentence. In terms of s177(5) – which applies to appeals by stated case - the period may run:

- from the date of his imprisonment under the warrant or
- on the application of the appellant, from such earlier date as the court thinks fit (but not later than the date of expiry of any term(s) imposed subsequently to the conviction appealed) (i.e. the period may be backdated).

[The application of s177(5) is extended to summary appeals against sentence by s186(10) and to the **failure of the appellant to appear** in an appeal from summary proceedings by s192(2)(a).]

Additionally, if the appeal was one by stated case:

- if at the time of abandonment the appellant is in custody or serving term(s) imposed subsequently to the conviction appealed, the period may run from such date as the court thinks fit (but not later than the expiry of any term(s) subsequently imposed): s177(6) (i.e. the period may be postdated). The appellant must be notified of the court's intention to exercise this power and has the right to be heard: s177(7).

Where the accused has been sent to prison on another matter subsequently and the provisions of s177(6) may apply, the crave in the warrant should seek a hearing to enable the accused to argue the matter and put forward any mitigation as to whether the sentence should be served concurrently: see Proudfoot v Wither 1990 SLT 742.

If an appeal at common law is abandoned before court, and interim liberation has been granted, no warrant will be issued by the High Court. *In these circumstances, the Procurator Fiscal should petition the court of first instance for a warrant for the appellant's apprehension in order that he may be returned to prison to serve the remainder of the sentence.*

b. Solemn appeals abandoned or deemed abandoned

In appeals from cases originally heard at the High Court of Justiciary an extract warrant for the apprehension of the appellant will be issued by the Clerk of Justiciary to the Appeals Unit and will be forwarded to the Procurator Fiscal.

Where the original trial was heard before a Sheriff and Jury, the Procurator Fiscal should petition the Sheriff for a warrant to ensure that the appellant serves the outstanding portion of his sentence. On receipt of the extract warrant the Procurator Fiscal should send it immediately to the police within an instruction to execute it as soon as possible.

11.165 APPEALS ABANDONED OR REFUSED AT COURT

Generally, if the appellant is on **interim liberation**, the Advocate Depute will move for a warrant to have the accused apprehended. The warrant will be granted immediately.

If the appellant is present in court, the warrant will be given to the prison officers in court who will take the appellant into custody straight from court.

If the appellant is not present, an extract warrant for the apprehension of the appellant will be issued by the Clerk of Justiciary to the Appeals Unit and will be forwarded to the Procurator Fiscal.

Summary appeal by stated case or against sentence

If following determination of an appeal by stated case or against sentence – Crown or defence - the appellant remains liable to imprisonment and:

a. **is on bail**, the court may grant warrant to apprehend and imprison him for the unexpired balance of the sentence, for a term to run from the date of apprehension: stated case - s183(10)(a); appeal against sentence – s189(4)(a); or.

b. **is serving a subsequent sentence** (ie not on remand), the court may grant warrant to arrest and imprison him from such date as the court thinks fit i.e. the sentence may be post-dated (but not later than the expiry of any term(s) subsequently imposed): stated case - s183(10)(b); appeal against sentence – s189(4)(b).

11.166 CALCULATION OF REMAINING SENTENCE IN SOLEMN APPEALS

The period between the admission of the convicted person to bail and the determination of the appeal is excluded in the calculation of the term of imprisonment [which includes detention in a young offenders institution, etc.: s125(4)]: s125(1). Any time which is spent in custody during that period (even if as a result of recall of bail) is included: s125(2).

Where the convicted person is in custody other than as a result of the

conviction giving rise to the appeal, the period of imprisonment relating to the appeal shall be deemed to run or be resumed on the date when the appeal is determined or abandoned: s125(3)(b) - subject to any direction of the High Court to the contrary.

Where the convicted person is not in custody, the period of imprisonment is deemed to run or be resumed on date of admission to custody: s125(3)(c) - subject to any direction of the High Court to the contrary.

FINES AND COMPENSATION ORDERS

11.167 ENFORCEABILITY PENDING APPEAL

Any fine or compensation order is not enforceable against the convicted person (and he is not required to make any payment in respect of it):

- **in solemn proceedings:** for 4 weeks form the date of the "verdict", or where an Intimation of Intention to Appeal against Conviction or Conviction and Sentence, or a Note of Appeal against Sentence (Crown or defence) has been lodged, until the appeal is determined: s121(4); and

- **in summary proceedings:** until any appeal against conviction or sentence (or disposal or order) is determined: s193(3).

Any payment made under a compensation order during such period shall be retained by the clerk of court- s250(4) - and not paid to the person in whose favour it was made: s121(4) - solemn: s193(3) - summary.

COMMUNITY SERVICE, PROBATION, SUPERVISED ATTENDANCE ORDERS AND RESTRICTION OF LIBERTY ORDERS

11.168 SUSPENSION PENDING APPEAL

Where:

- **in solemn proceedings**, an intimation of intention to appeal (or Note of Appeal under s106(b)(ii)(c) is lodged, or
- **in summary proceedings**, the convicted person or prosecutor appeals under s175

the Court may on application of the appellant direct that the whole or remaining part of a relevant sentence shall be suspended until the appeal is dealt with: s121A – solemn; s193A -

summary. The procedure is contained in rule 15.12A.

"Relevant sentence" is defined in s121(4) and s193(4) and means;

- a probation order
- a supervised attendance order
- a community service order
- a restriction of liberty order.

The section may assist in avoiding difficulties such as those which arose in HMA v Jamieson 1996 SCCR 836.

As there is no express provision dealing with the attachment of the order on conclusion of the appeal proceedings, it appears that as soon as the substantive appeal comes to an end, the order of disqualification, forfeiture, etc. takes effect immediately.

SUSPENSION OF DISQUALIFICATION, FORFEITURE, ORDERS FOR DESTRUCTION, ETC.

11.169 INTERIM SUSPENSION

Except where there is express statutory provision for suspension of disqualification, e.g. from driving (see s121(3) - solemn; s193(2) - summary), any disqualification, forfeiture or other disability ordered following conviction:

- in solemn proceedings, will not attach for 4 weeks or until the determination of any appeal by Note of Appeal (defence or Crown): s121(1); or

- in summary proceedings may be suspended by the trial court pending determination of the appeal (defence appeal against conviction and/ or sentence or Crown appeal against sentence): s193(1).

Where disqualification is suspended under this provision and leave to appeal is refused at sift under s107, s180 or s187, "determination" of the appeal is:

- 1st sift: **15** days
- 2nd sift: **7** days

after the date of intimation to the appellant or his solicitor of refusal of leave by the High Court: rule 15.13 - solemn; rule 19.17 - summary.

As there is no other express provision dealing with the attachment of the order on conclusion of the appeal proceedings, it appears that as soon as the substantive appeal comes to an end, the order of disqualification, forfeiture, etc. takes effect immediately.

11.170 INTERIM SUSPENSION OF DISQUALIFICATION FROM DRIVING

Where a person who is disqualified from driving appeals against his conviction or the sentence of disqualification he may apply to the sentencing court to suspend the disqualification "pending the appeal against the order" - s39(2) of the Road Traffic Offenders' Act 1988.

s41(2) of the Road Traffic Offenders' Act 1988 provides for disqualification to be suspended by the Appeal Court or a single Judge thereof on such terms as it or he shall think fit. An application for suspension under s41(2) cannot be made by a person disqualified in the Sheriff Court until after the disposal by that court of an application under s39(2) – rule 15.11(1)(b).

There is no provision for suspension of disqualification from driving in a Crown appeal.

In defence appeals:

i. in a solemn appeal (including the lodging of an Intimation of Intention to Appeal), "where a person who has been disqualified (from driving) … appeals against that disqualification" the application for interim suspension is made to the sentencing court - rule 15.11(1):

   - *Sheriff Court* - for the procedure see rule 15.11(2).

If the application is refused by the Sheriff, the appellant may petition the High Court - rules 15.11(1)(b) and 15.11(3).

- *High Court* (whether at first instance or on appeal from the Sheriff) the procedure is set out in rule 15.12. Intimation may be ordered and the application may be disposed of in open court or in chambers.

An order made by a single Judge is final - rule 15.12.

ii. in a summary appeal (other than by Bill of Suspension)

"where a person who has been disqualified (from driving) appeals against that disqualification … by stated case", the application for suspension of disqualification is made together with the application for the stated case - rule 19.9(1).

The application must be determined within 7 days – rule 19.9(2).Where it is refused, the appellant may appeal to (in practice, a single Judge of) the High Court. The procedures regulating lodging of the appeal application, intimation, etc are set out in rule 19.9(3)-(9).The decision of a single Judge is final - rule 19.9(10).

There is no rule dealing expressly with interim suspension of disqualification from driving in a summary appeal against sentence. The form of Note of Appeal (form 19.3-A) does however allow for the application and rule 19.16 deals with the procedures to be followed where such an appeal is refused. The power to suspend appears to derive solely from sections 39 and 41 the Road Traffic Offenders Act 1988.

iii. in an appeal by Bill of Suspension

The application to suspend disqualification is made by requesting interim suspension of the disqualification in the prayer of the Bill - rule 19.10(1). Where the Bill contains such a prayer, the Judge considering the first deliverance shall assign a diet for the parties to be heard on the crave of the interim order - rule 19.15.

Interim suspension does not have effect until:

- the Bill has been served on the respondent and
- the principal Bill and other necessary documents have been returned to the Clerk of Justiciary by the complainer or his solicitors – rule 19.10(2).

but the application must be decided within 7 days - rules 19.10(4) and 19.9(2).

11.171 RE-IMPOSITION OF DISQUALIFICATION FROM DRIVING

Where an appeal is determined in which disqualification from driving is suspended ad interim, the Procurator Fiscal need take no direct action to restore the disqualification.

11.172 APPEAL DETERMINED

Where an appeal is abandoned or refused in court, where appropriate, the Advocate Depute will move for disqualification to be re-imposed.

i. Solemn appeal

On determination of the appeal against a disqualification from driving, the Clerk of Justiciary shall, in terms of rule 15.12(6):

- for a Sheriff Court sentence - send the Clerk of that court a certified copy of the order determining the appeal. The Clerk of that Court shall, if appropriate, make the appropriate endorsement on the appellant's driving licence and intimate disqualification to the persons concerned.

The Procurator Fiscal should write to the Sheriff Clerk to ensure that the necessary steps are taken to re-impose the suspended order.

- for a High Court sentence - if the appeal against disqualification is refused in court, the Advocate Depute will move for disqualification to be re-imposed and this will be done by the Clerk of Court.

Where the appellant lodges a minute of abandonment with the Clerk of Justiciary in terms of rule 15.6, the appeal is deemed to have been dismissed: s106(1). Where the appellant lodges an Intimation of Intention to appeal but does not lodge a Note of Appeal, the appeal will, in due course, be deemed to be abandoned and notification will be given to Crown Office by the Clerk of Justiciary. The Procurator Fiscal will be advised where this occurs.

ii. Summary appeal including bills of suspension and advocation

Where an appeal is abandoned or refused in court, where appropriate, the Advocate Depute will move for disqualification to be re-imposed. On determination of an appeal [i.e. one by stated case, note of appeal or bill of suspension or advocation: rule 19.16(3)] where disqualification is to be re-imposed, this will be done by the Clerk of Justiciary, who shall send to the Clerk of the sentencing court a certified copy of the order made on the determination of the appeal - rule 19.16(1).

Where the appeal against a disqualification is refused or abandoned, the Clerk of the sentencing court shall make the appropriate endorsement on the driving licence and intimate the disqualification to the appropriate driving and police authorities -rule 19.16(2).

The prosecutor will be notified of the abandonment by the appropriate clerk of court - see rule 19.8.

PART IX - MISCELLANEOUS

THE PRISONERS AND CRIMINAL PROCEEDINGS (SCOTLAND) ACT 1993, SECTIONS 16 AND 17

11.173 INTRODUCTION

This section outlines the main provisions of the legislation. Other provisions deal with release on licence of a short-term prisoner – section 3 - and procedures for dealing with prisoners convicted in England or Wales or prisoners on licence from sentences imposed in Scotland - section 16.

A "long-term prisoner" means a person serving a sentence of imprisonment for a term of four years or more, while a "short-term prisoner" means a person serving a sentence of imprisonment for a term of less than four years – section 27.

When a short-term prisoner has served ½ of his sentence the Secretary of State must, release him unconditionally – section 1(1).

The Secretary of State must release on licence a long-term prisoner who has served 2/3 of his sentence – section (2) – but may do so, on the recommendation of the Parole Board, after the prisoner has served ½ of his sentence – section 1(3).

The licence (unless revoked) remains in force until the entire period specified in the original sentence (reckoned from the commencement of the sentence) has elapsed – section 11(1).

Where a prisoner who is released on licence re-offends while on licence, there are 2 possible consequences:

1 If he is a long-term prisoner, the [Secretary of State] may **revoke his licence** in terms of **section 17** and **recall him to prison**; **and**

2 Whether he is a long- or short-term prisoner, **following conviction**

for the new offence, the court dealing with the new offence may, by virtue of **section 16**, instead of or in addition to imposing a sentence for that offence:

i **return him to prison** – section 16(2), **or**

ii where the court which passed the original sentence is superior to that court, **refer the matter to the superior court** – section 16(4):

Where a released prisoner has committed a new offence and the court dealing with him is inferior to the court which imposed the earlier sentence, the proper course is for the inferior court to refer the case to the superior court before proceeding to impose sentence in respect of the new offence: HM Advocate v Donnachie 1994 SCCR 937; and

after hearing the parties on the matter: Her Majesty's Advocate v Foley, unreported, 22.4.99

Section 16 applies only where the accused has been released on licence, not where he is on home leave prior to release: Re McEleny 1997 SCCR 297

The fact that a person has been recalled to prison under section 17 does not preclude the making of an order under section 16.

An order under section 16(2) or (4) has the effect of revoking the licence.

When a sentence is imposed under section 16(2) or (4), if the aggregated sentence resulting from that order and any term of imprisonment to which he is sentenced for the new offence is six months or more but less than four years, as soon as he has served ½ of his sentence the Secretary of State shall release him on licence – i.e. as a short term prisoner – section 16(7) (substituted by the Criminal Justice (Scotland) Act 1995). This is qualified by section 11(3)(b). Where this provision applies, the licence remains in force (unless revoked):

- until the entire period specified in his [original] sentence has elapsed (reckoned from its commencement) or
- until the period for which he was ordered to be returned to prison under section 16(2)(a) has elapsed (if this will result in a later date).

11.174 THE DIFFERENCE IN APPLICATION BETWEEN SECTIONS 16 AND 17

An order recalling a prisoner under section 17 has the effect of returning him to prison from the date of recall to the date of expiry of the original sentence from which he had been released on licence.

An order under section 16 permits the court to return the prisoner to prison for up to a period equal to that between the date of commission of the new offence of which he is convicted and the date of expiry of the original sentence – section 16(2)(a)

11.175 CONCURRENT AND CONSECUTIVE SENTENCES

Where consecutive sentences are imposed, s27(5) of the 1995 Act requires these to be treated as a single term for the purposes of that part of the Act: McCall v Vannet 1997 SCCR 778. However:

i Section 17

Where an accused person is sentenced to imprisonment for a new offence, his licence already having been revoked under section 17 the new sentence may not be ordered to run consecutively to the original sentence of imprisonment – s204A 0f the 1995 Act: HM Advocate v Alexander King McGinn, 3 February 1999, unreported; Cowan v Her Majesty's Advocate, unreported, 1 April 1999; Her Majesty's Advocate v Graham, unreported, 16 June 1999.

ii Section 16

An order under section 16(2) can only take effect from the date on which the order is made: *McGinty v Normand*, High Court of Justiciary, 29 June 1995, unreported (referred to in McAvoy infra).

An order under section 16 must be made to be served concurrently with any current sentence - McAvoy v Friel 1998 SLT 480, but

The sentence of imprisonment for the new offence which gives rise to the order under section 16(2) can commence on the expiration of the period of imprisonment ordered under that section. The court minute should record that the period imposed under section 16(2) should be served before, and be followed by, any sentence of imprisonment imposed for the new offence – section 16(5)(b), although a defect in the order or minute may be immaterial where the same court sentences and imposes the section 16 order: Cowan v Her Majesty's Advocate, unreported, 1 April 1999. (By implication, this will not be so where the s16 order is imposed by a superior court and the new sentence by a lower court).

Section 204A of the 1995 Act applies only where the sentence is one from which the person has been released at any time. Section 16(5)(a) provides that the period for which a person is ordered under section 16(2) or (4) to be returned to prison shall be taken to be a sentence of imprisonment for the purposes of the 1993 Act (and of any appeal). A section 16(2) period is therefore not to be treated as part of the original sentence. The expiry date of a section 16(2) order has no necessary connection with the expiration of the original sentence from which the person was released. The period ordered under section 16(2) and any sentence imposed for the new offence will form a single term if they fulfil the conditions laid down in s27(5) of the 1995 Act. These distinctions have a bearing on the dates when the persons concerned will fall to be released in terms of sections 1 and 1A of the 1993 Act: Cowan v Her Majesty's Advocate, unreported, 1 April 1999.

11.176 FACTORS TO BE TAKEN INTO ACCOUNT IN DETERMINING LENGTH OF PERIOD OF RETURN TO PRISON UNDER SECTION 16

The court is entitled to have regard to:

1. the record of the convicted person taken as a whole - Lynch v Normand 1995 SCCR 404;
2. the time since his release on licence - Lynch v Normand;
3. the nature of the new offence (though the fact that the new offence was not analogous with the one in respect of which the convicted person was released on licence may be of no importance) - Lynch v Normand;
4. the gravity of the new offence: Smitheman v Lees 1998 SCCR 108;
5. the period of remand: English v McGlennan 1995 SCCR 767; see too Barr v Her Majesty's Advocate 1997 SLT 1004; 1997 SCCR 506 in which the Court disapproved the decision in Dailly v Her Majesty's Advocate 1996 SCCR 580);
6. any time spent in custody pending determination of a reference to the High Court: McEleny v Carnegie 1998 SCCR 15; and
7. any time spent in custody by virtue of an order recalling a person on licence under section 17, before the making of the order under section 16: HMA v Malcolm Christie North, High Court of Justiciary, Edinburgh on 12.2.99 (unreported), in which the Lord Justice Clerk (Cullen) made an order under s16 but in determining its duration,

took account of the time spent in custody by virtue of the s17 order.

11.177 DETERMINATION OF THE OVERALL TERM OF IMPRISONMENT

i Where the sentencing court may impose both the new sentence and also the order under section 16(2)

The court should determine the period for which the person is to be returned to prison and, at that stage, determine whether it is to be served before or concurrently with any sentence of imprisonment or detention imposed for the new offence. The court should then go on to consider whether to impose a sentence of imprisonment or detention for the new offence. If the court decides to do so, it should give effect to the previous decision by making that new sentence either follow, or run concurrently with, the period for which the person's return to prison is ordered under section 16(2).": Cowan v Her Majesty's Advocate, unreported, 1 April 1999

Where the section 16 order may be made by the sentencing court, in determining the total term of imprisonment which the sentencing court wishes the convicted person to serve, the court has a responsibility to consider whether to exercise its discretion to make an order under section 16 in conjunction with the imposition of the period of imprisonment for the new offence: HM Advocate v McGinn, unreported, 3 February 1999.

ii Where, before sentencing, the sentencing court may refer the case to a superior court for an order in terms of section 16(4)

The inferior judge has "a responsibility to consider … the discretion which he [has] to refer this case to the [superior] court so that it [can] decide whether a section 16 order should be made and if so, in respect of what period …
"… whether or not a case is to be referred to the sentencing court lies wholly within the discretion of the [inferior judge]...": Her Majesty's Advocate v Foley, unreported 22.4.99

RETENTION OF PRODUCTIONS

11.178 GENERAL INSTRUCTIONS

Against the possibility that an appeal may be lodged, the Procurator Fiscal must retain productions:

- **in solemn proceedings** for a period of four weeks after final determination. Where an appeal is taken under s106, the provisions of s106(5)-(9) apply. In particular, where productions are retained in pursuance of these provisions, they may not be released without the authority of the trial judge: s106(7).

- **In summary proceedings** for a period of 7 days after final determination, or where sentence is deferred under s202, after the date of such deferment. Where an appeal is marked, if necessary, Crown Counsel's instructions should be obtained regarding the release or retention of the productions.

In cases where an appeal against conviction is taken, Procurators Fiscal must retain the productions until the appeal is concluded.
If the Appeal Court authorises the bringing of a new prosecution, the productions must be retained for after the final determination of that new prosecution in accordance with the above periods, or until Crown Counsel instruct that there is to be no fresh prosecution.

If productions have returned to the police or reporting agency, steps should be taken to ensure their retention in accordance with the above instructions.

In case of difficulty, Procurators Fiscal should consult Appeals unit staff.

APPEALS IN CASES REPORTED BY THE HEALTH AND SAFETY EXECUTIVE

Procurators Fiscal are reminded of the arrangements which exist in relation to cases reported by the Inspectors of the Health and Safety Executive and which are (or may be the) the subject of appeal proceedings.

In order that there should be proper liaison regarding appeals arising out of prosecutions in such cases, the Lord Advocate has issued the following instructions:

11.179 PROSECUTION APPEALS GENERALLY

i When the relevant Inspector is of the view that an appeal should be considered, he should discuss the matter with the Procurator Fiscal on the day of the Court's decision or at the latest on the following day.

ii *If the Procurator Fiscal considers that an appeal should be taken, he should report the case for Crown Counsel's consideration immediately and should notify the Inspector.*

iii Within 48 hours of the discussion or notification, the Inspector will notify the Procurator Fiscal of his opinion, in writing. *In all cases, as soon as this report is received, the Procurator Fiscal will send it to Crown Counsel (together with his own report, if not already submitted).* This procedure will apply whether or not the Procurator Fiscal agrees with the views of the Inspector.

iv *When the Procurator Fiscal receives Crown Counsel's decision, he will communicate this to the Inspector.*

11.180 DEFENCE APPEALS GENERALLY

i When any appeal has been taken by the accused, *the Procurator Fiscal will send the Inspector a copy of the Judge's report or of the draft stated case.*

Within 3 days, the Inspector will send to the Procurator Fiscal a report containing his observations.

ii On receipt of the Inspector's report, the Procurator Fiscal will send it to Crown Office together with his own report on the case (if not already submitted) for Crown Counsel's instructions. Procurators Fiscal should however bear in mind targets for reporting to Crown Office and should ensure that any report which the Inspector proposes to submit is provided timeously.

If no report is received timeously, or if the Inspector has indicated that he has no observations to make, this matter should be made clear in the Procurator Fiscal's report to Crown Counsel.

11.181 STATED CASES

i Prosecution appeal

Where a prosecution appeal by stated case is taken, on receipt of the draft stated case, the Procurator Fiscal will send a copy to the Inspector. Within three days, the Inspector will advise the Procurator Fiscal in writing of his observations on the draft case.

The Procurator Fiscal will send these with the draft case and his own report to Crown Counsel for their instructions. Procurators Fiscal must, however, bear in mind targets for reporting to Crown Office and should ensure that any report which the Inspector proposes to submit is provided timeously.

If no report is received timeously, or if the Inspector has indicated that he has no observations to make, this matter

should be made clear in the Procurator Fiscal's report to Crown Counsel.

ii Attendance of Inspector at any hearing on adjustments

If the Inspector suggests in his report that he may have a contribution to make at any hearing on adjustments in an appeal by Stated Case, the Procurator Fiscal will give consideration to requesting the Sheriff to allow the Inspector to attend the hearing.

It is anticipated that the Inspector's role will be one of advising the Procurator Fiscal but it must be recognised that the Sheriff is unlikely to permit attendance by the Inspector if he has been a material witness in the trial.

iii Attendance of inspector at the hearing of the appeal

If the Inspector wishes to attend the hearing of the appeal, *the Procurator Fiscal should notify the Appeals Unit of the request.* Where this is done, the Appeals Unit will advise the Procurator Fiscal of any date fixed for the hearing of the appeal. *The Procurator Fiscal in turn should advise the Inspector*, but bearing in mind the possibility that the appeal may be withdrawn at short notice.

CORRECTION OF ENTRIES IN FALSE NAMES

11.182 THE NOBILE OFFICIUM AND SECTION 300

In Cox v Normand 1992 SCCR 431, the High Court held that the *nobile officium* had a role to play to correct details on a complaint (and subsequent proceedings on the complaint) by inserting the correct name, address and date of birth of the accused and by granting authority to correct the complainer's record of previous convictions where an individual had appeared, and, after giving a false name, had been convicted in that false name.

Since that decision was issued, s300 of the Criminal Procedure (Scotland) Act 1995 has been passed. It provides that where the High Court is satisfied that the record of conviction or sentence in summary proceedings inaccurately records the identity of any person, it may authorise the clerk of the court which convicted or sentenced the person to correct the record: s300(1). The application may be made by any party having an interest in the correction:s300(2). The Court may order intimation as it sees appropriate, but will not determining the matter without affording an opportunity to be heard to parties to the prosecution and any other person having an interest in the correction: s300(3).

The section, as can be seen, has limited application. It does not apply to solemn proceedings. It does not permit the court to quash a conviction in the name of an innocent 3rd party. The *nobile officium* therefore still has a place in the "correction" of false names. On occasions, where the true accused ahs not been identified or is untraced, the petition may require to seek dispensation with service.

In all cases of this kind, the particulars of the erroneously recorded conviction should be reported to the Appeals Unit in order that Crown Counsel's instructions may be obtained.

11.183 GENERAL SCOPE AND PROCEDURE

Section 303A of the 1995 Act entitles the executor of a convicted person who has died (or any other person appearing to the court to have a legitimate interest) to apply to the High Court for authority to institute any appeal which could have been instituted by the deceased or continue any which already has been instituted. This includes any appeal against conviction and/ or sentence, whether at common law or under statute.

Time limits apply. The application must be lodged within three months of the convicted person's death, although the court may allow later application on cause shown.

If the Scottish Criminal Cases Review Commission makes a reference to the High Court in respect of a person who is deceased, any application must be made within one month of the reference.

THE SCOTTISH CRIMINAL CASES REVIEW COMMISSION

11.184 ESTABLISHMENT

The Commission was set up in 1998 by virtue of Part XA of the 1995 Act as inserted by s25 of the Crime and Punishment (Scotland) Act 1997.

11.185 GENERAL POWERS OF COMMISSION

The Commission may refer any conviction or sentence (other than one of death), whether solemn or summary, to the Appeal Court, and regardless of whether an appeal has already been determined in the case. The ground for so doing is that the commission believe that a miscarriage of justice may have occurred, or that it is in the interests of justice to make the reference - s194C. This provision may be contrasted with the provision which it replaced, namely s295 which empowered the Secretary of State to refer a case to the court if he thought fit.
The Commission has investigative powers, including the power to apply to a Sheriff for a warrant to precognosce on oath and to apply to the High Court for warrant for production of documents: sections 194H and J.

There is no time limit restricting the age of convictions or sentences referred to the Court by the Commission.

EXPENSES IN APPEALS

11.186 AWARD OF EXPENSES

In disposing of an appeal arising out of summary proceedings, the Court may award expenses against the unsuccessful party. No expenses may be awarded under solemn procedure, except in bail appeals where a Crown appeal is refused, in which case, expenses may be awarded against the prosecutor - s32(6). [See too Renton and Brown, para 23-163.]

Expenses are awarded only on the application of the successful party.

Any motion for expenses may be opposed on its merits. Separately, modification may also be sought. The court may award expenses in full, as taxed by the Auditor of the Court of Session (or as negotiated between the parties) or as modified - either as a specified amount, which may be derived form of a scale of modified expenses produced by Justiciary Office, or as a proportion of taxed expenses - or may refuse expenses.

The statutory provisions relating to expenses in summary appeals are as follows:

1 Defence appeal against summary sentence:

The High Court shall have power in an appeal by note of appeal to award expenses both in the High Court and in the inferior court as it may think fit: s189(3).

2 Stated case and Crown appeal against summary sentence:
The High Court shall have power in an appeal under this Part of this Act to award such expenses both in the High Court and in the inferior court as it may think fit: s183(9).

3 Setting aside of conviction and or sentence in summary proceedings:

[The Judge may] award such expenses to the convicted person, both in the

High Court and in the inferior court, as the Judge may think fit: s188(4)(a)(i).

Expenses may also be awarded in respect of common law appeals.

Where the respondent decides not to oppose an appeal and has intimated this sufficiently well in advance so that as a result, Counsel for the appellant may restrict preparation for the appeal hearing [and in an appeal by stated case, or in a common law appeal the need for the appellant to print the process - and copy it for the court and respondents], expenses may be modified downwards.

Accordingly, where crown Counsel instruct that a defence appeal is not to be opposed or a Crown appeal insisted upon and that the appellant or respondent is to be notified, Procurators Fiscal should do so as quickly as possible and provide Crown Counsel with a copy of the letter(s) of notification in time for any appeal hearing.

7 **App-ins** Insanity in bar of trial - appeal under section 62

8 **App-lib** Interim liberation – application or appeal to the High Court

9 **App-pre** Preliminary appeal

10 **App-sen** Appeal against sentence

11 **App-seta** Setting aside conviction or sentence in summary proceedings - prosecutor's consent or application

12 **App-sol** Appeal against conviction or conviction and sentence (Solemn - Sheriff Court)

13 Petition for warrant to apprehend and return to prison following abandonment of appeal - see paragraph 11.164iia

14 Suggested style letter - see paragraph 11.164iia