The Law Commission
Consultation Paper No 158

PROSECUTION APPEALS AGAINST JUDGES' RULINGS

A Consultation Paper

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are:

The Honourable Mr Justice Carnwath CVO, *Chairman*
Professor Hugh Beale
Miss Diana Faber
Mr Charles Harpum
Judge Alan Wilkie, QC

The Secretary of the Law Commission is Mr Michael Sayers and its offices are at Conquest House, 37-38 John Street, Theobalds Road, London WC1N 2BQ.

This consultation paper, completed on 26 June 2000, is circulated for comment and criticism only. It does not represent the final views of the Law Commission.

The Law Commission would be grateful for comments on this consultation paper before 31 October 2000. Comments may be sent either –

(a) by post to Mr R Percival
Law Commission
Conquest House
37-38 John Street
Theobalds Road
London WC1N 2BQ

Tel: 020-7453-1232
Fax: 020-7453-1297

or (b) by e-mail to criminal.lawcom@lcdhq.gsi.gov.uk

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THE LAW COMMISSION

PROSECUTION APPEALS AGAINST JUDGES' RULINGS

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PART I
INTRODUCTION

THE REFERENCE

1.1 On 24 May 2000, the Home Secretary formally asked this Commission to undertake a review of the law governing prosecution appeals against judge-directed acquittals in criminal proceedings and other adverse rulings by a judge which may lead to the premature ending of the trial. The terms of reference for this review are:

> To consider
>
> (1) whether any, and if so what, additional rights of appeal[1] or other remedies should be available to the prosecution from adverse rulings of a judge in a trial on indictment which the prosecution may wish to overturn and which may result or may have resulted, whether directly or indirectly, in premature termination of the trial;
>
> (2) to what, if any, procedural restrictions such appeals would be subject;
>
> and to make recommendations.

1.2 Our work on the subject considerably pre-dated this formal reference. In his Tom Sargant Memorial Lecture, given on 29 November 1999, the Attorney-General indicated that he, the Lord Chancellor and the Home Secretary would be asking us to do some work in this area. The Attorney-General said:

> My concern is simply this: that there is an imbalance in the system. If a judge decides to stay a prosecution on the ground of abuse of process, or to direct the jury to acquit a defendant, or to make a ruling concerning the admissibility of evidence which has the effect of depriving the prosecution of a crucial plank in its case – ought not the prosecution to be able to test that decision on appeal? If it cannot, are we not allowing in fact a system in which judges are unaccountable to the appeal courts as to a crucial aspect of their responsibilities, at the very time that we are providing them with greater powers through the implementation of the Human Rights Act?
>
> I recognise that there are a large number of issues involved in this suggestion. We must not over correct the imbalance, so that the defence are left at a disadvantage. We must not introduce unnecessary delay into the system. If new rights are given to the prosecution, we must take care to ensure that they are not greater than those available to the defence. There is a case for considering some filter in the system, for instance ensuring that no appeal is brought without the consent of the DPP or the Law Officers.

[1] In this paper, we follow the reference in using the conventional phrase "right of appeal" to include a right which is subject to a leave requirement.

> Practical and resource issues would need to be addressed. But I strongly suspect that the mere existence of a prosecution right of appeal, even if only sparingly used, could lead to a significant and beneficial change in the culture of practice in the criminal courts.[2]

In January 2000, we agreed to undertake the project.

1.3 On 8 June 2000, the report by His Honour Gerald Butler QC, a retired circuit judge, of his inquiry into the prosecution of the case of *Doran* was published.[3] Judge Butler had been asked to inquire into the prosecution after the trial judge, Mr Justice Turner, had stayed the proceedings as an abuse of the process of the court, and referred the case to the Attorney-General. The case was one of considerable importance. It involved the importation of 309 kilograms of cocaine, said to have a "street value" of about £34 million. One of Judge Butler's recommendations was that

> [c]onsideration should be given as to whether or not the prosecution should have a right of appeal where a prosecution is terminated consequent upon a finding that there has been an abuse of process.

1.4 The Government's response to this recommendation, published at the same time as the report, was to refer to our reference. The response continued:

> The Attorney-General will provide a copy of the Butler report to the Law Commission, drawing attention to [the recommendation], so that it can be taken into account by the Law Commission in formulating its proposals.[4]

1.5 The terms of the reference include judges' rulings on matters of law and discretion. We see no difficulty in concluding that the types of rulings which may presently form the subject matter of a defence appeal following a conviction should equally be considered as the subject matter of a possible prosecution appeal. The reference refers to rulings made "in a trial": we assume that this is apt to include rulings made before the formal commencement of the trial.

1.6 We consider that, in order to answer properly the questions posed by the reference, we must cast our net rather more widely than the express terms of the reference strictly require. In order to come to reasoned conclusions about the

[2] Tom Sargant Memorial Lecture, 29 November 1999. Similarly, the DPP, David Calvert-Smith QC, giving evidence to the Home Affairs Select Committee, said "I believe that the fact of the right to appeal would perhaps have a good effect on the decisions themselves, in that, if a judge knows that he can be appealed either way in due course, he, or she, is going to focus carefully on the decision": House of Commons Home Affairs Select Committee, The Double Jeopardy Rule (1999–2000) HC 190, Minutes of Evidence, p 11 (question 71).

[3] Written Answer, *Hansard* (HC) 8 June 2000, vol 351, col 330. Report of the Inquiry into the Prosecution of the case of Regina v Doran and Others (2000) by His Honour Gerald Butler QC (available from Customs and Excise).

[4] The Government's response is available on the Customs and Excise website (http://www.hmce.gov.uk).

desirability of prosecution appeals in relation to rulings which result in "premature termination" of a trial, we must also consider those rulings which do not. We also take the view that, in order to assist respondents in assessing our provisional proposals on the matters within the terms of the reference, it is appropriate for us to set out our provisional conclusions on such wider matters as the desirability of a general prosecution right of appeal against jury verdicts, and the continuation of the present prosecution opportunities to appeal.

RELATIONSHIP WITH DOUBLE JEOPARDY

1.7 Announcing the reference, the Home Secretary explained that he had previously asked this Commission to consider the law of double jeopardy. He emphasised that, in respect of this new reference, "the issue … is the question of a prosecution right of appeal against adverse rulings made by the judge, which leads to the ending of the trial before the jury has considered the evidence".[5]

1.8 The rules relating to double jeopardy[6] prevent a *final* acquittal or conviction from being re-opened. The provisional proposals in our consultation paper on double jeopardy were about re-formulating and extending the rules, and extending the permissible exceptions. An exception to the double jeopardy rule would come into play when, after a perfectly properly conducted trial, compelling new evidence became available (in the case of our proposed new evidence exception), or it was later discovered that the judge, a witness or a juror had been bribed or intimidated (in the case of the existing "tainted acquittals" exception, which we proposed extending).

1.9 This consultation paper deals with the distinct issue of whether the prosecution should be allowed to appeal against rulings made by judges. In contrast with our work on double jeopardy, we are here considering acquittals which are yet to become final, and an appeal involves no breach of the double jeopardy rules. A prosecution right of appeal would be exercised when the prosecution considered that the judge had made an error in a ruling in advance of or during the trial. In contrast to the double jeopardy exceptions, the prosecution would be asserting *at the time* that the course of the trial was flawed and should be corrected by the appellate court.

1.10 When we agreed to undertake this project, the consultation period on our consultation paper on double jeopardy had yet to expire. We had to decide how to dove-tail our work on that project with prosecution appeals. We decided that, although the two projects were dealing with distinct parts of the law, they were nevertheless related. They both concern the circumstances in which an acquittal

[5] Written Answer, *Hansard* (HC) 24 May 2000, vol 350, cols 493–494W.

[6] In English law, autrefois acquit and convict, and what in our double jeopardy consultation paper we termed the *Connelly* principle (see *Connelly v DPP* [1964] AC 1254). We also dealt with the supposed rule that evidence which would otherwise be admissible becomes inadmissible if it relates to alleged offences of which the defendant has previously been acquitted. The House of Lords has since held that there is no such rule: *Z*, *The Times* 23 June 2000. See Consultation Paper No 156 (1999) Parts II and VIII.

at a trial may be revisited at the instigation of the prosecution. Some of the arguments apply to both. Once we had agreed to undertake the current project, it seemed sensible to present our eventual conclusions on both projects together, as a package, rather than continue to treat them as completely separate law reform exercises. Our intention, therefore, is to consult on this paper, and then report on both double jeopardy and prosecution appeals together.

THE INTERNATIONAL PERSPECTIVE

1.11 Internationally, prosecution rights of appeal in relation to serious offences are much more widespread than the exceptions to the double jeopardy rule we discussed in our consultation paper. Of the countries we surveyed for that paper, only in Germany, Denmark and Finland did we find an exception to the double jeopardy rule open to the prosecution.[7] Prosecution appeals, however, are a general feature of continental European jurisdictions.

1.12 There are also precedents for prosecution appeals in common law countries. In particular, Canada has had a system of prosecution appeals since 1892.[8] Under the Canadian criminal code, the Attorney-General can appeal against an acquittal in proceedings on indictment "on any ground of appeal that involves a question of law".[9] There are also rights of appeal where a superior court of criminal jurisdiction either orders an indictment to be quashed, or otherwise "refuses or fails to exercise jurisdiction on an indictment", and in respect of "an order of a trial court that stays proceedings on an indictment or quashes an indictment".[10] In Australia, Tasmania's Attorney-General can appeal against an acquittal on a broad range of grounds,[11] and in Western Australia the prosecution can appeal against a directed acquittal or an acquittal by a judge sitting alone.[12] New Zealand allows appeals against various pre-trial orders and directions, and has a

[7] In an ECHR sense, our procedures for defence appeals out of time, and references to the Court of Appeal from the Criminal Cases Review Commission, would count as exceptions to the double jeopardy rule for the benefit of the defence, because they are both procedures allowing the re-opening of a "final" verdict. This type of exception for the benefit of the defence is more widespread than that for the benefit of the prosecution.

[8] The history of the Canadian system of prosecution appeals is set out in *Morgentaler, Smoling and Scott* (1985) 22 CCC (3d) 353, 401–403. The view of the Ontario Court of Appeal that the system of prosecution appeals did not violate ss 7, 11(d) and (h) of the Canadian Charter of Rights and Freedoms was upheld by the Supreme Court: (1988) 37 CCC (3d) 449.

[9] Canadian Criminal Code, s 676(1)(a).

[10] Canadian Criminal Code, s 676(1)(b) and (c).

[11] That the verdict was unreasonable, could not be supported "having regard to the evidence", there was a wrong decision on a question of law, "or that on any ground whatsoever there was a miscarriage of justice": Criminal Code Act 1924 (Tasmania) s 401(2)(b).

[12] Criminal Code Act 1913 (Western Australia) ss 688(2)(b) and 690(3).

procedure for the making of applications to the trial judge to reserve a question of law for the Court of Appeal during the course of the trial.[13]

1.13 There are no prosecution appeals against the verdict of a jury in Scotland. In relation to trial on indictment ("solemn procedure"), the prosecution have similar rights as in England and Wales to appeal against sentence and to refer a point of law following acquittal (in Scotland, to the High Court, which hears all criminal appeals).[14] The prosecution and the defence have equal rights to appeal against most decisions made during pre-trial hearings ("first" and "preliminary diets"). Such hearings are not limited to cases of a certain description, unlike the regimes for preparatory hearings in England and Wales, but they will not necessarily take place in all cases.[15] There is a further remedy available to the prosecution known as "advocation", a form of review of decisions by inferior courts (including the High Court sitting as a court of first instance). The prosecution can challenge by advocation various decisions of a court (but not a final acquittal) both before and during the trial. It is comparatively rarely used,[16] but in a recent long-running fraud case was used by the prosecution to overturn a Sheriff's decision to discharge the jury as a result of the ill-health of one of their number.[17] The position in Northern Ireland is very similar to that in England and Wales. The prosecution enjoy the same or closely similar rights in relation to references on a point of law, appeals against sentence, and appeals against rulings at preparatory hearings in serious fraud cases.[18] A brief description of the law of various foreign jurisdictions can be found in Appendix B to our consultation paper on double jeopardy.

OUR APPROACH

The structure of this paper and our conclusions

1.14 In Part II, we briefly review the extensive range of prosecution appeals in the current law. We turn in Part III to the principles affecting the availability of a prosecution appeal. We are concerned in this part to work out how we can assess whether or not a prosecution right of appeal would be *fair*. We do so by

[13] Crimes Act (New Zealand) 1961, ss 379A, 380 and 381.

[14] *Renton and Brown's Criminal Procedure* (6th ed 1996) paras 28–04 to 28–05.

[15] *Ibid*, ch 17. A first diet is automatically held in the Sheriff Court, but a preliminary diet in the High Court (ie sitting as a first instance criminal court) depends on the application of the parties. Certain matters must be dealt with at a first or preliminary diet, and there is a discretion in relation to other matters. Where the application for the diet only concerns discretionary matters, the judge may refuse to hold one (a decision which may not be appealed).

[16] A L Stewart, *The Scottish Criminal Courts in Action* (1990) p 236.

[17] *HM Advocate v Khan* 1997 SCCR 100. For advocation generally, see *Renton and Brown's Criminal Procedure* (6th ed 1996) paras 33–19 to 33–32.

[18] Criminal Appeal (Northern Ireland) Act 1980, s 15; Criminal Justice Act 1988, s 36; Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988 (SI 1988 No 1846). There is no equivalent to preparatory hearings under the Criminal Procedure and Investigations Act 1996, s 29 in Northern Ireland.

identifying two different ways in which it can be said that a particular procedure is fair. A procedure might be fair because it tends to result in an *accurate outcome* – it is fair that the innocent are acquitted and that the guilty are convicted. It is also possible to say that a procedure is fair because it accords with *process aims* – values about how the procedure works, irrespective of the outcome. For the most part, the elements of a fair procedure will both be conducive to accuracy of outcome *and* serve process aims. In the context of prosecution appeals, however, these objectives may conflict. Some forms of prosecution appeals may result in greater accuracy of outcome, but at the *expense* of process aims. We therefore set ourselves the task of using this distinction to determine which possible forms of prosecution appeals are fair, or capable of being fair, and which are not.

1.15 In Part IV, we use this approach to draw a distinction between the fairness of appeals against rulings made by a judge which *terminate* a trial (either because their direct legal effect is to bring proceedings to a halt, or because the result of the ruling is that the prosecution is forced to throw in its hand), and those which do not. We provisionally conclude that appeals against terminating rulings *may* be fair, but that those against non-terminating rulings during the course of a trial are (generally) not.

1.16 Having made this distinction, we turn to a list of rulings, starting at the pre-trial stage (in Part V) and going through the course of the trial to the final jury verdict (in Part VI).

1.17 We re-visit, in Part V, the distinction between terminating and non-terminating rulings in the context of the different forms that rulings in advance of a trial proper can take. Again balancing accuracy of outcome against process values, we provisionally conclude that the existing statutory right of the prosecution (and the defence) to appeal against a ruling (whether terminating or non-terminating) made at a formal preparatory hearing should be retained. As far as any other rulings made before the start of the trial proper are concerned, we provisionally propose that there should be prosecution rights of appeal only against terminating rulings.

1.18 Moving on to the trial proper in Part VI, we provisionally conclude that the prosecution should have the right to appeal against terminating rulings made up to the end of the prosecution case; but that thereafter there should be no such right of appeal. We provisionally conclude that there should not be a prosecution right of appeal against the upholding of a submission, at the conclusion of the prosecution case, that there is no case to answer. Further, we provisionally consider that there are particularly compelling reasons why a prosecution right of appeal against a verdict by the jury, whether following a misdirection by the judge or not, would not be fair.

1.19 Part VII deals with important ancillary and procedural matters, designed to further safeguard the fairness of our provisional proposals. They include a limit on the seriousness of the offences in respect of which an appeal should be possible; a leave requirement; and strict time limits for applications for leave, for

the hearing of appeals, and for subsequent retrials, where the appeal is successful. We also provisionally conclude that the Court of Appeal should apply a simple test couched in terms of the interests of justice in deciding whether to quash an acquittal and order a retrial. There are also proposals to allow the detention of a defendant pending appeal, and imposing reporting restrictions.

An illustration

1.20 The impact of our proposals can be illustrated by the case of *Doran*, the subject matter of Judge Butler's recent report. The prosecution case was that eight defendants had been involved in the importation of a massive quantity of cocaine from South America. The cocaine was seized from a small boat which was in the process of unloading it on the Sussex coast.[19] Three trials were started or contemplated. The first was aborted when the judge allowed a defence submission that the jury should be discharged, following the giving of an important piece of evidence by a customs officer that had not previously been disclosed, as it should have been. In the second trial, five defendants were convicted by the jury, two were acquitted by the jury, and one was acquitted on the direction of the judge following a successful submission of no case to answer. Those alleged to be the principal conspirators were sentenced to 25 years' imprisonment. The convictions, however, were overturned on appeal on the basis of inadequacies in the summing-up, and a retrial was ordered. Before the start of the retrial, the judge accepted a defence application that the indictment should be stayed as an abuse of process, and the remaining defendants were discharged.[20]

1.21 Had our provisional proposals been law, there would have been no possible prosecution appeal against the order discharging the jury, because it was not a terminating ruling.[21] Neither would there have been a right of appeal against the ruling allowing the submission of no case to answer in the second trial, because it took place after the end of the prosecution case. There would have been no appeal against the jury's acquittals at the end of the second trial. There would, however, have been a right to appeal, which in this case would probably have been exercised, against the abuse of process ruling, which finally terminated the proceedings.[22]

THE IMPORTANCE OF THE JURY

1.22 Our conclusion that a right of appeal against a jury acquittal would be unfair deserves to be underlined. The Royal Commission on Criminal Justice considered that "the jury system is widely and firmly believed to be one of the

[19] His Honour Gerald Butler QC, Report of the Inquiry into the Prosecution of the case of Regina v Doran and Others (2000) pp 3–6.

[20] *Ibid*, pp 5, 9–11.

[21] Such a ruling terminates the current trial, but does not completely terminate the proceedings, because there can be (and in this case, was) a retrial on the same indictment. See para 4.2 below.

[22] Butler Report, chs 8 and 9, particularly pp 138–139.

cornerstones of our system of justice."[23] Apart from the limited case of serious fraud trials,[24] we are not aware of any serious suggestion in recent times that this should cease to be so. It cannot be doubted that there is a deep attachment to trial by jury in criminal cases, among the population at large and within legal and academic opinion. We take the view that the jury is the centrally important feature of the system for trying serious crimes, and should remain so.[25]

1.23 This alone suggests that no proposal for a prosecution right of appeal should be adopted which detracts from the central importance of the jury. We take the view that it is appropriate to go further: a good test of a proposal for a prosecution right of appeal is whether it can fairly be said to *enhance* the role of the jury. Our provisional proposals for limited prosecution rights of appeal against rulings which would otherwise terminate proceedings do, we consider, pass this test. The point of these rights of appeal is to allow a jury to make the decision. A successful exercise of a prosecution right of appeal would stop a judge wrongly preventing a case from getting to a jury.

HOW MUCH WOULD PROSECUTION APPEALS BE USED?

1.24 The main subject matter of this paper is whether or not it would be *fair* to introduce a prosecution right of appeal. It is important, however, to bear in mind that, even if a particular reform might be fair in the abstract, it would only be desirable to introduce it if there is a real need to do so. In the current context, such a real need would be demonstrated by the frequency with which the prosecution would avail itself of a right of appeal.

1.25 It seems inherently plausible that there are a significant number of cases in which the judge makes an error of law which disadvantages the prosecution to the extent that there is an acquittal where there would otherwise have been a finding of guilt. In 1998, out of 10,761 convictions after pleas of not guilty[26] in the Crown Court,[27] there were 2,099 applications for leave to appeal against conviction, of which 714 were granted.[28] Of the 693 appeals heard in 1998, 290 were ultimately successful, in whole or part.[29] In most of these cases, although by no means all,[30] the Court of Appeal will have found that the trial judge made

[23] Report of the Royal Commission on Criminal Justice (1982) Cm 2263, p 2.

[24] Report of the Fraud Trials Committee (1986), chaired by Lord Roskill.

[25] Without, of course, seeking to offer a view on the special case of serious fraud trials.

[26] Generally, there is no real prospect of a successful appeal against conviction where the defendant has pleaded guilty, except where the judge has made a ruling the effect of which is to deprive the defendant of a defence in law: see *Chalkley* [1998] QB 848.

[27] Lord Chancellor's Department, Judicial Statistics: Annual Report (1998) Cm 4371, p 66, table 6.11.

[28] *Ibid*, p 12, table 1.7.

[29] *Ibid*, table 1.8.

[30] A comparatively small number of appeals are based on new evidence, or some irregularity not attributable to the judge, such as improper contact with the jury.

some error, and that that error was sufficiently serious to render the conviction unsafe. It would seem proper to assume that the number of occasions on which similar errors occur to the detriment of the prosecution is at least of a similar order of magnitude. No doubt there would not be a similar number of successful appeals – the incidence of the burden of proof, and the test to be applied by the Court of Appeal in appeals against conviction, are such that one would expect very many more appeals against conviction to be successful than appeals against acquittal. Nevertheless, in the light of these statistics it would be surprising if the number of acquittals that would fall to be quashed would be insignificant, were any such procedure available. It seems to us likely that significant use would be made of prosecution rights of appeal, and we proceed on that basis.

1.26 Moreover, if in our final report we were to recommend the new rights of appeal provisionally proposed in this paper, the Government would of course need to consider whether any additional resources would be necessary in order to implement any such recommendations without adversely affecting those available for the existing appeals system. It would be assisted in this assessment were respondents to indicate the extent to which our provisionally proposed new rights of appeal would be used. **We invite views on whether the prosecution rights of appeal discussed in this paper, if enacted, would be used to a significant extent.**

1.27 It might be argued that prosecution appeals are needed, not to satisfy the justice of the case, but to stop the law taking the wrong course. However, there is already a (rarely used) mechanism allowing the Attorney-General to refer a point of law to the Court of Appeal for its opinion, in a case in which the defendant was acquitted.[30] We invite any respondents who advance this additional reason for introducing prosecution appeals to indicate what are perceived to be the inadequacies of the Attorney-General's reference procedure.

[30] See paras 2.2 – 2.3 below.

PART II
PROSECUTION APPEALS AND RETRIALS IN THE CURRENT LAW

2.1 In this part, we set out briefly

(1) the main forms of prosecution appeal or review in the current law of England and Wales; and

(2) the various circumstances in which there may be a retrial.

As will be seen, there are already many circumstances in which the prosecution enjoys limited rights of appeal, and retrials are also a familiar feature of English criminal procedure.

PROSECUTION APPEALS

From the Crown Court

Attorney-General's references on a point of law

2.2 The Criminal Justice Act 1972, section 36, makes provision for the Attorney-General to refer a point of law, arising out of a trial on indictment which resulted in an acquittal, to the Court of Appeal. The Court of Appeal can refer the case to the House of Lords. Provision is made for the acquitted person to argue the point, either through an advocate or, with leave, in person. Where he or she declines to do so, the court may appoint an advocate as an amicus curiae. The Court of Appeal gives its opinion on the point of law. It does not affect the acquittal of the defendant in any way. The purpose of the provision is to allow the court to correct an error of law made by a first instance judge, and, by that means, clarify a difficult issue of law. It operates for the benefit of the development of the law to be applied in future cases, rather than to ensure that justice is done in the case giving rise to the reference.

2.3 The first reference was made in 1974, and in the 25 years since then, there have been reported a total of 41. In some years there are no reported references (for instance, 1993 and 1997). In 1995 there were two, in 1996 one, and in 1998 three.

Appeals against rulings at preparatory hearings

2.4 Under two separate statutory regimes, it is possible for a judge to hold a preparatory hearing. The earlier regime relates to serious fraud cases. The Criminal Justice Act 1987 established a new system for the prosecution and trial of serious fraud, largely based on the recommendations of the Roskill Committee.[1] In addition to preparatory hearings, the system included provision for transferring cases to the Crown Court, rather than requiring them to be

[1] Report of the Fraud Trials Committee (1986), chaired by Lord Roskill.

committed by the magistrates.[2] In 1996, the Criminal Procedure and Investigations Act provided a similar preparatory hearing procedure, designed for other types of long or complicated cases. The two systems have been brought generally into alignment with one another.[3]

2.5 The commencement of the preparatory hearing counts as the start of the trial (and so the defendant is arraigned at that time).[4] The purposes for which a hearing can be ordered are (a) identifying issues likely to be material to a jury, (b) assisting their understanding of such issues, (c) expediting proceedings before the jury, or (d) assisting trial management.[5] Under the system relating to serious fraud, it must appear to the judge that the evidence "reveals a case of fraud of such seriousness or complexity that substantial benefits are likely to accrue from a hearing before the jury is sworn" for these purposes.[6] The criterion under the 1996 Act is that the indictment must reveal "a case of such complexity, or a case whose trial is likely to be of such length, that substantial benefits are likely to accrue from a hearing before the jury is sworn", in terms of the same purposes.[7]

2.6 At a preparatory hearing, a judge may make a ruling on "any question as to the admissibility of evidence" and "any other question of law relating to the case".[8] Both parties have an interlocutory right of appeal against such a ruling to the Court of Appeal, subject to a requirement for leave. In cases on the serious fraud regime the Court of Appeal has determined that the power to make these rulings is governed by the purposes for which the hearing may be held. As Evans LJ stated in *Hedworth*:[9]

> two conditions must be satisfied before the Court of Appeal can have jurisdiction [to hear an appeal from a preparatory hearing]: first, there must be an issue of law, or evidence, within section 9(3); secondly, the order appealed from must have been made within the ambit of the preparatory hearing, that is to say within the scope of section 7(1).

[2] Criminal Justice Act 1987, ss 4–10. The power to hold a preparatory hearing is not confined to transferred cases.

[3] Criminal Procedure and Investigations Act 1996, Part III.

[4] Criminal Justice Act 1987, s 8; Criminal Procedure and Investigations Act 1996, s 30.

[5] Criminal Justice Act 1987, s 7(1); Criminal Procedure and Investigations Act 1996, s 29(2).

[6] Criminal Justice Act 1987, s 7(1).

[7] Criminal Procedure and Investigations Act 1996, s 29(1).

[8] Criminal Justice Act 1987, s 9(3)(b) and (c); Criminal Procedure and Investigations Act 1996, s 31(3)(a) and (b). In the 1987 Act there is also a specific power to consider a question arising under Criminal Justice Act 1993, which relates to the relevance of external law to certain charges of conspiracy, attempt and incitement: s 9(3)(aa).

[9] [1997] 1 Cr App R 421, 430. The defendant had sought to appeal against a refusal to quash an amended indictment made in the course of a preparatory hearing.

2.7 There are, therefore, two categories of ruling made at the same time or on the same occasion as a preparatory hearing, which are not subject to the right of appeal. First, a ruling may be made at a preparatory hearing, but not be a ruling on the law or the admissibility of evidence, and therefore not appealable. An example is an order directing the prosecution to supply a case statement under section 9(4) of the Act, which has been found to be a matter of pure case management.[10] Second, a ruling might be a ruling on law or admissibility, but not be for one of the purposes laid down for preparatory hearings. It is therefore not within the "ambit" of the preparatory hearing. Thus, for instance, an application to quash a count on the indictment might serve one of the purposes of the hearing – the expedition of proceedings – but it could not be made at the preparatory hearing because that was not the purpose of the motion to quash, that purpose being to prevent the defendant having to face that count.[11] The result is a list of applications which cannot be made at a preparatory hearing: a motion to quash an indictment, an application based on whether the prosecution had power to bring the prosecution, an application to stay the indictment as an abuse of process, an application to apply reporting restrictions, an application to discharge a witness summons, and an application to sever.[12]

Unduly lenient sentences

2.8 The Criminal Justice Act 1988, section 36, introduced a prosecution right of appeal against sentence in certain limited classes of case. Where he or she considers that a sentence passed in proceedings in a Crown Court is unduly lenient, the Attorney-General may refer the sentence to the Court of Appeal to "review" the sentence. Having reviewed the sentence, the Court of Appeal may quash the original sentence and substitute any alternative sentence it considers appropriate, provided that the Crown Court had the power to impose the alternative sentence. The provision applies to sentences passed for offences triable only on indictment, and such other offences or "descriptions" of case as may be specified by order.[13] This order-making power has been used to apply the provisions to indecent assault, making a threat to kill and cruelty to a child (and attempts to commit, or incitement of, these offences),[14] and to cases which have been transferred to the Crown Court under the serious fraud provisions.[15] Where a sentence has been reviewed under section 35, there is a power in the

[10] *Smithson* [1994] 1 WLR 1052.

[11] *Hedworth* [1997] 1 Cr App R 421. See also the discussion of *Moore* (unreported, 4 February 1991) in Alun Jones QC, "The Decline and Fall of the Preparatory Hearing" [1996] Crim LR 460, 463.

[12] See *Archbold 2000*, para 2–119, and cases cited therein.

[13] Criminal Justice Act 1988, s 35(3).

[14] Criminal Justice Act 1988 (Reviews of Sentencing) Order 1994 (SI 1994 No 119).

[15] Or where a charge has been transferred, then dismissed under Criminal Justice Act 1987, s 6(1), then further proceeded with on the basis of a voluntary bill of indictment: Criminal Justice Act 1988 (Reviews of Sentencing) Order 1995 (SI 1995 No 10).

Court of Appeal to certify a point of law for the consideration of the House of Lords.

2.9 This power is much more extensively used than the power to refer a point of law, and the number of references has generally increased year by year. From 1989 to 1998, the figures for each year have been 9, 25, 26, 37, 30, 50, 77, 68, 70 and 95. The percentages of references heard which resulted in increases in sentence, for the same years, were 85.7, 85, 78.3, 87.9, 85.7, 81.3, 93.2, 74.2, 68.1, and 83.9.[16]

Judicial review

2.10 The Divisional Court of the Queen's Bench Division of the High Court has a general jurisdiction in respect of decisions of the Crown Court "other than its jurisdiction in matters relating to trial on indictment", which are for the Court of Appeal.[17] Thus the main business of the Crown Court, trying cases on indictment, is subject to a defence right of appeal only, in accordance with the provisions of the Criminal Appeal Act 1968; but where a matter determined in the Crown Court is not a "matter relating to trial on indictment", the jurisdiction of the Divisional Court remains, and judicial review proceedings can be brought by the prosecution as well as the defence.

2.11 The expression "matters relating to trial on indictment" has been described as "extremely imprecise",[18] and interpreting it has not proved straightforward for the courts. Indeed for a short time it appeared that the judicial review procedure might be available to the prosecution to challenge a decision by a Crown Court judge to stay an indictment as an abuse of process. In *R v Central Criminal Court, ex p Randle*,[19] the Divisional Court concluded that a decision by a Crown Court judge that an indictment should be stayed as an abuse of process was *not* a matter relating to trial on indictment. There is at least one reported case, *R v Norwich Crown Court, ex p Belsham*,[20] in which, by way of a judicial review, the prosecution challenged a ruling that the indictment should be stayed as an abuse of process. However, in *R v Manchester Crown Court, ex p DPP*,[21] the House of Lords overruled *ex p Randle* and *ex p Belsham*.

2.12 There remains a list of matters which have been found not to relate to trial on indictment, and in respect of which the prosecution may apply for judicial review. Some, however, were decided in part on the basis of *ex p Randle* and *ex p*

[16] Figures provided by the Legal Secretariat to the Law Officers. The figures for references made are those for all cases referred, including those subsequently withdrawn and those in respect of which leave was not granted.

[17] Supreme Court Act 1981, ss 29(3), 15(1), and 53(2). Appeal to the Court of Appeal is generally available only to a defendant, and against a conviction or equivalent final verdict.

[18] *R v Manchester Crown Court, ex p DPP* [1993] 1 WLR 1524, 1528, *per* Lord Browne-Wilkinson.

[19] [1991] 1 WLR 1087.

[20] [1992] 1 WLR 54.

[21] [1994] 1 AC 9.

Belsham, so must be seen as open to some doubt. Those within the ambit of judicial review include decisions to extend or refuse to extend custody time limits,[22] a decision on an application under the Criminal Justice Act 1987 to dismiss transfer charges,[23] and a listing decision which could affect the validity of the trial.[24] In *R v Crown Court at Maidstone, ex p Harrow London Borough Council*,[25] an insane defendant was committed for trial at the Crown Court on an indictment, but then was made the subject of an order which the judge had no jurisdiction to make. The order was not appealable to the Court of Appeal. The Divisional Court found that, although the subject of the application for judicial review was something that would ordinarily be characterised as a "matter relating to trial on indictment", the court nevertheless had jurisdiction where the Crown Court had no jurisdiction at all to act as it did.

From magistrates' courts

Appeal to the Divisional Court

2.13 There are in general two routes to the Divisional Court from the magistrates: judicial review and an appeal by way of case stated. Most decisions of the magistrates may be the subject of a judicial review by the Crown, but there is an exception for an acquittal. Only where the "acquittal" was the result of a trial which was, in fact, a nullity, will judicial review be available to the Crown.[26] The appropriate form of appeal is generally the case stated procedure, particularly where the identification of the facts found by the magistrates is important.[27] Judicial review is available to the prosecution in respect of other decisions of the magistrates, such as whether or not to commit for trial or sentence, and decisions about mode of trial.[28]

2.14 Case stated may be used on the grounds that a verdict or sentence is either "wrong in law" or "in excess of jurisdiction".[29] A person aggrieved by the verdict, including the prosecutor, can apply to the magistrates to state a case. The

[22] See, eg, *R v Manchester Crown Court, ex p McDonald* [1999] 1 WLR 841.

[23] *R v Central Criminal Court, ex p Director of Serious Fraud Office* [1993] 1 WLR 949.

[24] *R v Southwark Crown Court, ex p Customs and Excise Commissioners* [1993] 1 WLR 764. For administrative reasons, the trial in a serious fraud case was listed before a judge who had not conducted the preparatory hearing. It was possible, the Divisional Court found, that such a decision could render the trial a nullity (as it would were the trial judge to change during the course of a normal trial on indictment).

[25] [2000] 2 WLR 237.

[26] *R v Dorking Justices, ex p Harrington* [1984] AC 743. In that case, the House of Lords held that the prosecution could succeed where the magistrates had dismissed the information without having heard any evidence, in breach of their statutory duty to determine the case after hearing evidence (Magistrates' Courts Act 1981, s 9(2)).

[27] *R v Morpeth Ward Justices, ex p Ward* (1992) 95 Cr App R 215.

[28] Appeals against a decision of the magistrates' court not to extend a custody time limit are to the Crown Court: Prosecution of Offences Act 1985, s 22(8).

[29] Magistrates' Courts Act 1980, s 111. It applies only to a final determination of the case: *Streames v Copping* [1985] QB 920, *Loade v DPP* [1990] 1 QB 1052.

case is a formal document adopted by the court, setting out the facts found and a question or questions for the Divisional Court. As well as pure points of law, the question may also ask whether, on the facts found, the magistrates came to the correct conclusion. Thus, although case stated does not provide an avenue to appeal against a finding of fact, the conclusions drawn from the facts can be challenged. The use of case stated to appeal against sentence is limited.[30] If it allows a prosecutor's appeal against an acquittal, the Divisional Court can either quash the acquittal and remit the case to the magistrates with a direction to convict and proceed to sentence, or convict and sentence the respondent itself. The court also has the power to order a rehearing before the same or a different bench.[31]

Appeal against a grant of bail

2.15 A new right of appeal for the prosecution against a grant of bail was introduced in the Bail (Amendment) Act 1993. Appeal is to the Crown Court. The right relates to offences punishable by five years' imprisonment or more (or either the simple or aggravated forms of taking a conveyance without consent) where the prosecution has made representations to the magistrates against the grant of bail, and it is available only to specified public prosecutors.[32] Before the right can be exercised, the prosecution must give notice orally at the bail hearing itself, before the defendant is released.[33] The notice must then be confirmed in writing and served on the defendant within two hours after the end of the hearing. The appeal must take place within 48 hours. Pending appeal, the defendant remains in custody.

Customs and Excise cases

2.16 The prosecution has a general right of appeal to the Crown Court against "any decision" of the magistrates in proceedings for an offence under the Customs and Excise Management Act 1979 and other customs and excise Acts. This right of appeal is not confined to points of law and is without prejudice to the prosecution's right to apply for a case to be stated. It applies to any decision of the

[30] A sentence may be appealed on the ground that it is wrong in law, but not that it is simply too severe (or too lenient), unless it is so far outside the normal discretionary limits for the offence that the Divisional Court can conclude that it could only have been arrived at as a result of some error of law. Appeals by way of case stated against sentence generally are rare, although there have been a substantial number of prosecution appeals against sentences in driving cases.

[31] *Griffiths v Jenkins* [1992] 2 AC 76.

[32] Bail (Amendment) Act 1993, s 1. The prosecutors are the Crown Prosecution Service (s 1(2)(a)), the Serious Fraud Office, the Department of Trade and Industry, Customs and Excise, the Department of Social Security, the Post Office and the Inland Revenue (s 1(2)(b) and Bail (Amendment) Act 1993 (Prescription of Prosecuting Authorities) Order 1994).

[33] A requirement satisfied when notice was given to the clerk five minutes after the bench rose, before the defendant had been released: *R v Isleworth Crown Court, ex p Clarke* [1998] 1 Cr App R 257.

court, including those relating to mode of trial and sentence, as well as acquittals.[34]

Appeals from appeals

2.17 In general, rights of further appeal are equally available to the prosecution as to the defence. This is so even where the original right of appeal is only available to the defendant. Only a defendant may appeal to the Crown Court against a conviction in the magistrates court. The appeal is by way of re-hearing.[35] The prosecution may nevertheless appeal by way of case stated against the Crown Court's decision if the defendant's appeal is successful.[36] Similarly, only a defendant can appeal against the verdict of a trial on indictment,[37] but where the Court of Appeal quashes the conviction, the Crown has the same rights as the defence to appeal to the House of Lords.[38] Both sides have the same rights to appeal from the Divisional Court to the House of Lords.[39]

RETRIALS

2.18 A retrial may take place in the following circumstances.

Discharge of the jury

2.19 The discharge of the jury brings the trial to a halt, but is not equivalent to a verdict of not guilty.[40] The defendant can be tried again, without the need for any further formalities. A jury may be discharged during the ordinary course of the trial, or as a result of a failure to agree (by the necessary majority) on a verdict.

Discharge during the course of the trial

2.20 A judge may discharge an individual juror, or the whole jury, before they have given a verdict, where it is necessary to do so.[41] Individual jurors may be discharged because of illness, other personal circumstances which make it impossible for them to continue,[42] misconduct or bias.[43] As long as nine jurors

[34] Customs and Excise Management Act 1979, ss 147(3) and 1(1); *R v Customs and Excise Commissioners, ex p Wagstaff* (1998) 162 JP 186; *R v Customs and Excise Commissioners, ex p Brunt* (1998) 163 JP 161.

[35] Magistrates' Courts Act 1980, s 108.

[36] Supreme Court Act 1981, s 28.

[37] Criminal Appeal Act 1968, s 2.

[38] That is, either party can apply to the Court of Appeal to certify a point of general public importance and to grant leave to appeal. If leave is refused (as it usually is), the party applies to the House of Lords for leave: Criminal Appeal Act 1968, s 33.

[39] Appeal is direct to the House of Lords, rather than to the Court of Appeal, "in a criminal cause or matter": Administration of Justice Act 1960, s 1(a).

[40] *Davison* (1860) 2 F & F 250, 175 ER 1046; *Randall* [1960] Crim LR 435.

[41] *Winsor* (1866) LR 1 QB 289, 390.

[42] For instance, in *Richardson* [1979] 1 WLR 1316, a juror was discharged when her husband had died the night before.

remain, the trial can continue.[44] If the number of jurors remaining falls below that number, they must be discharged and the trial brought to a halt. When an allegation of misconduct or bias comes to the attention of the trial judge, he or she must investigate the allegation, which will involve questioning the individual juror concerned, and sometimes the jury as a whole.[45] Where, for instance, it is alleged that improper approaches have been made to a juror (such as offers of bribes, or intimidation), the judge will have to consider whether the trial can safely be continued if the individual juror (or jurors) involved in the approach is discharged. If the approach had been communicated to other jurors, so that they too may be "contaminated", the judge may be driven to exercise his or her discretion to discharge the jury as a whole.[46]

2.21 Circumstances may also arise where the judge is asked to discharge the jury as a whole. This may happen when inadmissible and prejudicial evidence is accidentally elicited. It commonly occurs where the previous convictions of the defendant become known.[47] Other irregularities may relate to the retirement of the jury, such as where the jury bailiffs retired with them,[48] or where some jurors attempted to contact the deceased victim by use of a ouija board in their hotel.[49] If such a matter comes to the attention of the judge, he or she may discharge the jury as a whole. If it is not revealed until after the verdict, the Court of Appeal may quash the conviction.[50]

2.22 A jury may have to be discharged at any time between being sworn and delivering their verdict.[51] In principle, it is possible for a retrial to follow virtually

[43] The test to be applied by the tribunal (the judge or, on appeal, the Court of Appeal), having regard to the relevant circumstances, is whether there is a real danger of bias on the part of the juror concerned, in the sense that he or she might unfairly regard with favour or disfavour the defence or the prosecution: *Gough* [1993] AC 646.

[44] Juries Act 1974, s 16.

[45] *Blackwell* [1995] 2 Cr App R 625.

[46] See *Putnam* (1991) 93 Cr App R 281 for the way in which the judge should approach such a decision.

[47] For an example of a recent case, see *Barraclough* [2000] Crim LR 324.

[48] *McNeil, The Times* 24 June 1967.

[49] *Young* [1995] QB 324.

[50] The general rule is that the jury no longer functions after all its verdicts are given. There are some exceptions, for instance to correct technical errors in the giving of verdicts: *Maloney* [1996] 2 Cr App R 303.

[51] In *Quinn* [1996] Crim LR 516, for instance, a juror recognised an associate of the defendant within minutes of being sworn. The judge initially chose to discharge the jury as a whole so as to be able to use another available potential juror to make up a full jury of twelve rather than continue with eleven. The judge went back on the decision once it became clear that there were no "spare" jurors available. (The appeal was dismissed.)

immediately after the discharge of the jury, but in practice there may be listing constraints.[52]

Discharge as a result of a failure to agree

2.23 A jury is always told in the summing-up to come to a unanimous verdict.[53] If it has failed to do so within two hours and ten minutes, it can be told that it may now return a majority verdict.[54] It may also be given a direction explaining that there is a need for "discussion, argument and give and take" in the jury room.[55] If the jury still fails to return a verdict after such time that it appears that it may be unable do so, the judge should call the members of the jury back into court and ask them if there is any chance of reaching agreement. Depending on their answer, the judge may discharge them or give them more time. If they still fail to agree, they will be discharged.[56] The defendant may then be retried. It is usual for a defendant to be retried by a second jury where the first disagreed. The practice, however, is for the prosecution to offer no evidence if the second jury also fails to agree.[57]

Retrials ordered by the Court of Appeal, Criminal Division

2.24 Where the Court of Appeal quashes a conviction as unsafe, it has the power to order a retrial if the interests of justice so require.[58] The appellant can only be ordered to be retried for

(1) the offence in respect of which the Court has quashed his or her conviction;

(2) another offence of which he or she could have been convicted on an indictment for that offence; or

[52] The Court of Appeal has recently given guidance to Crown Courts on when it is necessary to adjourn a retrial for a brief period, rather than continue immediately, to avoid the danger of the discharged jurors meeting and "contaminating" the new jury in smaller court centres: *Barraclough* [2000] Crim LR 324.

[53] *Practice Direction (Crime: Majority Verdicts)* [1967] 1 WLR 1198. See also the Judicial Studies Board specimen direction, available on their website (http://jsboard.co.uk).

[54] Juries Act 1974, s 11. Ten jurors must agree where there are eleven or twelve jurors, nine where there are ten jurors. Two hours is the statutory limit: ten minutes was added by *Practice Direction (Majority Verdict)* [1970] 1 WLR 916 to ensure that a full two hours was spent actually deliberating in the retiring room. The terms of the direction allowing the jury to reach a majority verdict are set out in *Practice Direction (Crime: Majority Verdicts)* [1967] 1 WLR 1198.

[55] *Watson* [1988] QB 690. A *Watson* direction should not be combined with the majority direction: *Buono* (1992) 95 Cr App R 338.

[56] *Rose* [1982] AC 822.

[57] *Archbold 2000*, para 4–440.

[58] Criminal Appeal Act 1968, s 7(1). The power to order a retrial when quashing a conviction was first granted to the Court of Criminal Appeal in the Criminal Appeal Act 1964, s 1. It was, however, limited to cases in which the court quashed the conviction on the basis of new evidence. The power assumed its current, general form as a result of the Criminal Justice Act 1988, s 43.

(3) an offence which was put as an alternative to that for which he or she was convicted, and in respect of which the jury were discharged from entering a verdict because of the conviction.[59]

If the retrial results in a conviction, the defendant cannot be given a more severe sentence than in the first trial, and time spent in prison following the initial conviction counts against the second sentence, as does time spent remanded in custody awaiting the retrial.[60]

2.25 The procedure is for the Court of Appeal to order a new indictment to be preferred. The appellant cannot, however, be arraigned on the new indictment more than two months after the order for a retrial was made, without the leave of the Court of Appeal. Once the two months period has elapsed, the appellant can apply to the court for an order setting aside the order for a retrial, and directing the Crown Court to enter a verdict of not guilty. On such an application, the Court of Appeal can, alternatively, grant leave to arraign, but only if satisfied that the prosecution has acted with all due expedition, and there remains good and sufficient cause for a retrial despite the lapse of time. The same criteria apply to an application by the prosecution to arraign out of time.[61]

The tainted acquittals procedure

2.26 Where a person has been acquitted as a result of interference with or intimidation of a juror or a witness or potential witness, in certain circumstances the High Court can quash the acquittal. As a result, new proceedings can be taken against the acquitted person for the original offence.[62] The procedure has never been used.

2.27 The procedure only applies where the interference or intimidation resulted in the conviction of the person responsible for an offence relating to the administration of justice,[63] and the court before whom that person was convicted certifies that the interference or intimidation raised a "real possibility" that the acquitted person would not otherwise have been acquitted. An application is then made to the High Court, which must quash the acquittal if it considers it likely that, but for the interference or intimidation, the acquitted person would not have been acquitted (provided that the acquitted person has had an opportunity to make written representations, and the conviction is not likely to be successfully appealed). Both the Crown Court and the High Court can also take into account the lapse of time, or any other reason that would make it against the interests of justice to take further proceedings against the acquitted person.

[59] Criminal Appeal Act 1968, s 7(2).

[60] Criminal Appeal Act 1968, Sched 2, para 2.

[61] Criminal Appeal Act 1968, s 8.

[62] Criminal Procedure and Investigations Act 1996, ss 54–57.

[63] The offences are perverting the course of justice, the offence under the Criminal Justice and Public Order Act 1994, s 51(1), and aiding, abetting, counselling or procuring, suborning or inciting a person to commit an offence under the Perjury Act 1911, s 1.

PART III
THE PRINCIPLES AFFECTING THE AVAILABILITY OF A PROSECUTION APPEAL

3.1 The ideal, for a criminal justice system, is to achieve a proper balance between the contending interests of the participants – the defendant, the public (as represented by the prosecution), the witnesses and the alleged victim. If we were to seek to encapsulate that notion in a single word, that word would be "fairness"; and in general this is what we mean when in this paper we refer to the need for fairness. However, fairness of trial has come largely to be associated with fairness exclusively *to the defendant*, and it is in this sense that it is used in Article 6 of the ECHR. From time to time we will also refer to fairness in this sense, but, where we do so, we will make it clear.

3.2 In this part, we attempt to identify the major principles and aims which have a bearing on the fairness (in the wider sense) of criminal procedure, and in particular on allowing the prosecution a right of appeal.

TWO AIMS OF THE CRIMINAL JUSTICE SYSTEM

3.3 A principal aim of the criminal justice system is to ensure, as far as possible, that those who are guilty are convicted and that those who are not guilty are acquitted. It is to achieve *accuracy of outcome*, and that is how we refer to it in this paper.

3.4 This is not, however, the sole aim. Accuracy of outcome is not to be single-mindedly pursued whatever the means. The criminal justice system is, by its nature, coercive. Its processes intervene compulsorily in the lives of those who are subject to it. In a civilised, democratic society the arrangements and procedures for the investigation and prosecution of crime must reflect respect for, and uphold the fundamental rights and freedoms of, the individual. This constitutes an aim distinct from the instrumental aim of accuracy of outcome. It is a *process aim*, and we propose to adopt that nomenclature in this paper.

3.5 Accuracy of outcome can benefit either the prosecution or the defendant, depending on whether the defendant is guilty or innocent. By contrast, process aims by their nature work only in favour of the defendant. They arise out of the relationship between the citizen and the state, and regulate what the state can properly do to the citizen. They reflect society's valuation of the citizen's autonomy and entitlement to be treated with dignity and respect.[1]

[1] What we term accuracy of outcome and process aims appear elsewhere as *competing* justifications for procedural rights: see the discussion in P P Craig, *Administrative Law* (4th ed 1999) pp 402–403. Process values (or aims) were identified in R Summers, "Evaluating and Improving Legal Processes – a plea for 'process values'" (1974) 60

3.6 Some rules further both aims. A procedure which provides the defendant with the opportunity to be heard, equality of arms with the prosecution, an independent tribunal, advance notice of the prosecution case and so on is more likely to come to an accurate conclusion than one which does not. Sometimes, however, the two aims are in conflict. For example, the number of trials reaching accurate outcomes would presumably be increased if the required standard of proof were not so high; but the cost, in terms of fairness to innocent defendants, would be too great. Thus the process aim takes precedence over accuracy of outcome.

3.7 A more controversial example is the question whether improperly obtained evidence should be admissible. Sometimes there is no conflict. Torturing a confession out of a suspect is not only a morally wrong use of state power: it is also *ineffective*, in the sense that a procedure which relies on it is likely to result in inaccurate outcomes. On the other hand, evidence obtained from an unlawful search, or an illegal interception of communications, may be very likely to lead to a more accurate outcome. Should it therefore be admitted, or should it be inadmissible because it has been obtained in an unconscionable way? To determine what is *fair* in a particular case, the competing values must be weighed against each other.

3.8 In *Sang*[2] the House of Lords appeared unwilling to give any weight at all to process values in such a case. According to Lord Diplock:

> … the function of the judge at a criminal trial as respects the admission of evidence is to ensure that the accused has a fair trial according to law. It is no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them. If it was obtained illegally there will be a remedy in civil law; if it was obtained legally but in breach of the rules of conduct for the police this is a matter for the appropriate disciplinary authority to deal with. What the judge at the trial is concerned with is not how the evidence sought to be adduced by the prosecution has been obtained, but with how it is used by the prosecution at the trial. … However much the judge may dislike the way in which a particular piece of evidence was obtained before proceedings were commenced, if it is admissible

Cornell LR 1. Other important texts are J Mashaw, *Due Process in the Administrative State* (1985) and F Michaelman, "Formal and Associational Aims in Procedural Due Process" in Pennock and Chapman (eds) *Due Process* (1977) p 126. D J Galligan favours what we call accuracy of outcome, and in *Due Process and Fair Procedures* (1996) pp 75–82 attacks the coherence of what he describes as the "dignitarian" alternative. The argument is essentially about the theoretical priority of one or other of the two possible justifications. Our use of the distinction is theoretically simpler and does not require us to enter that debate. Terminology differs: Summers uses "good result efficacy" and "process values", Michaelman uses "formal" and "nonformal", Galligan uses "outcome related" and "non-outcome related", and Craig uses "instrumental" and "non-instrumental".

[2] [1980] AC 402.

> evidence probative of the accused's guilt it is no part of his judicial function to exclude it for this reason.[3]

Subsequently, however, a broad statutory discretion to exclude evidence which "would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it" was enacted in the Police and Criminal Evidence Act 1984, section 78. Although the focus of section 78 is the fairness of the *proceedings*, its terms also specifically enjoin the court to take into account "the circumstances in which the evidence was obtained". The section itself was born out of a compromise between competing conceptions of fairness in Parliament, during the progress of the Bill. It was introduced by the Government in response to strong support for an amendment proposed by Lord Scarman which would have introduced a rebuttable presumption that improperly obtained evidence should be excluded. Other amendments had been moved which would have introduced a rule of exclusion in such circumstances.[4]

3.9 Not surprisingly, steering a course between accuracy of outcome and process aims in this context has caused the courts some difficulties.[5] The courts have, on occasions, used section 78 to exclude evidence, particularly confessions, which, although probative of guilt, was unfairly or improperly obtained. One example of a developed line of case law is that relating to evidence obtained by the use of *agents provocateurs*, in which the court has laid down criteria for trial judges to determine whether the efficacy of such evidence outweighs the process aims involved.[6] In *Chalkley*, on the other hand, it was stated that "The exercise for the judge under section 78 is not the marking of his disapproval of the prosecution's breach, if any, of the law in the conduct of the investigation or the proceedings, by a discretionary decision to stay them".[7] A clue to how the Court of Appeal will

[3] [1980] AC 402, 436–437. Arguably, other speeches took a broader view: see, eg, Lord Salmon at 444–445, Lord Fraser of Tullybelton at 447, and Lord Scarman at 452.

[4] See the account of the legislative history in Katherine Grevling, "Fairness and the Exclusion of Evidence under Section 78(1) of the Police and Criminal Evidence Act" (1997) 113 LQR 667.

[5] The current edition of *Archbold* describes section 78 as "one of the most important provisions" in the Act, which "plays a fundamental role in the consideration of the admissibility of evidence". The passage continues: "Yet its precise scope remains uncertain": *Archbold 2000*, para 15–340.

[6] *Smurthwaite; Gill* [1994] 1 All ER 898.

[7] [1998] QB 848. It has been argued that the Court of Appeal, after initially giving considerable weight to what are in effect process values in the application of s 78, has more recently returned to an approach which emphasises accuracy of outcome: Choo and Nash, "What's the Matter with Section 78?" [1999] Crim LR 929. The argument for the second part of the thesis relies heavily on *Chalkley*. It is worth noting that the dicta on section 78 in that case are obiter, and could be considered contrary to *Smurthwaite; Gill* [1994] 1 All ER 898. *Chalkley* also took a strongly accuracy-oriented line on the test in the Court of Appeal for allowing an appeal under the Criminal Appeal Act 1968, s 2, as amended by the Criminal Appeal Act 1995, that a conviction is "unsafe". The court essentially concluded that where a defendant was in fact guilty, the conviction could not be unsafe. There is a close relationship between the approach to the "unsafe" test on the one hand, and section 78 and abuse of process on the other. If a conviction is safe if the defendant is, in fact, guilty, regardless of *how* he or she was convicted at first instance, it

apply section 78 after the full implementation of the Human Rights Act 1998 may be provided by the Privy Council case of *Mohammed v The State*. The case was an appeal from Trinidad and Tobago, where the right to consult a lawyer after arrest is enshrined in the constitution. The appellant had confessed without being informed of this right. The Privy Council held that the confession was not automatically to be excluded, but

> the fact that there has been a breach of a constitutional right is a cogent factor militating in favour of the exclusion of the confession. In this way the constitutional character of the infringed right is respected and accorded a high value. Nevertheless, the judge must perform a balancing exercise in the context of all the circumstances of the case. Except for one point their Lordships do not propose to speculate on the varying circumstances which may come before the courts. The qualification is that it would generally not be right to admit a confession where the police had deliberately frustrated a suspect's constitutional rights.[8]

3.10 In *Khan v UK*,[9] the European Court of Human Rights found that the central evidence in the case, a covertly obtained tape recording of conversations between the applicant and another, had been obtained in breach of Article 8 of the Convention, because it was not obtained "in accordance with the law", in the absence of proper statutory regulation of surveillance techniques. The fact of the breach of Article 8, however, did not render the admission of the evidence unfair such as to amount to a breach of Article 6. Article 6 did not lay down rules for the admission of evidence, and it was not part of the Court's function to correct mere errors of law or fact by national courts. The admission of evidence obtained in breach of the Convention did not *automatically* render the trial unfair, even where it was effectively the only evidence, and the applicant had had ample opportunity to contest both the authenticity of the tape recordings and the fairness of their admission.

3.11 The influence of both aims can be seen in certain decisions in the comparatively recently developed jurisdiction to stay an indictment as an abuse of process.

would be (almost) pointless to require at first instance the exclusion of reliable but improperly obtained evidence, or the trial of someone whose presence before the court is an affront to the integrity of the criminal justice system, because failure of a judge to exclude the evidence or stay the indictment would be incapable of correction on appeal. This implication in the context of *ex p Bennett*-type abuse of process was rejected in *Mullen* [1999] 3 WLR 777. The European Court of Human Rights has found that a finding that a conviction was not unsafe is not the same as finding that it was not unfair, and cannot be a substitute for it: *Condron v UK*, *The Times* 9 May 2000. The proper interpretation of the "unsafe" test will in all probability have to be revisited once the Human Rights Act 1998 comes fully into effect on 2 October 2000. It appears likely that the court will be required to adopt a more expansive interpretation than that advanced in *Chalkley* to give full effect to those Convention rights which express process values (and the court will be enabled so to do by means of the interpretational technique introduced by the Human Rights Act 1998, s 3).

[8] [1999] 2 AC 111, 124.

[9] *The Times* 23 May 2000.

Such a stay may be granted when it is impossible for the defendant to receive a fair trial, for instance where a delay in proceedings not attributable to the prosecution has resulted in the loss of potential defence evidence. This reflects the aim of avoiding an inaccurate outcome.[10] Alternatively, an indictment may be stayed where it offends the court's sense of propriety that the defendant should be put on trial at all, such as where his or her presence before the court is the result of unconscionable behaviour by the authorities, or where he or she has received an assurance that there will be no prosecution. This reflects a process value, that the court will not allow itself to be used in a way that is inimical to the values of the criminal justice system as a whole, even if that would ensure the conviction of a guilty person.

3.12 In this context, the increasing weight given to process aims is evident. It was established in *R v Horseferry Road Magistrates' Court, ex p Bennett*[11] that an indictment should be stayed as an abuse of process where the defendant's presence before the court was a result of a serious abuse of power by the state, even if the trial itself could be conducted fairly (that is, without compromising accuracy of outcome). In *Latif*,[12] another case in the House of Lords, Lord Steyn emphasised the balancing exercise:

> … the judge must weigh in the balance the public interest in ensuring that those who are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means.

In *Mullen*[13] the Court of Appeal applied this approach, balancing some factors, such as the degree of abuse by the public authorities involved and the need to discourage them from behaving in such a way, against others, including the seriousness of the crime.

3.13 Finally, and most relevantly in the present context, the conflict between accuracy and process aims may be seen in the debates on the introduction of a prosecution right of appeal against sentence in the Criminal Justice Act 1988, section 37. Those in favour of the change emphasised its importance in achieving accurate outcomes: "The whole purpose is to get the right sentence in the right way, in the right place, at the right time".[14] Those against relied on the unfairness of subjecting a defendant to the procedure:

[10] *A-G's Reference (No 1 of 1990)* (1992) 95 Cr App R 296. It may be that the approach of the court attaches less weight to accuracy of outcome where the delay is attributable to the prosecution. In practice, it appears that the courts have recourse to both accuracy and process values in their consideration of delay. For a particularly clear example of such a mixture, see *D* [2000] 1 *Archbold News* 1.

[11] [1994] 1 AC 42.

[12] [1996] 1 WLR 104.

[13] [1999] 3 WLR 777.

[14] Lord Roskill, *Hansard* (HL) 14 July 1987, vol 488, col 959.

> It would be very unfair to a defendant that after a substantial period of time, perhaps at liberty, he should be taken back into court and, because of a difference of opinion between three judges and one judge, he should find himself deprived of liberty.[15]

In its practice, the Court of Appeal has sought to accommodate the concern with process values, by reducing what would have been the proper sentence at first instance by a certain margin to reflect what is generally referred to as the "element of double jeopardy".

HUMAN RIGHTS ISSUES

3.14 Giving greater emphasis to process aims reflects a more human rights based approach. The content of human rights is determined in England and Wales by the contents of the ECHR (with due regard to the jurisprudence of the European Court of Human Rights), and their effect is governed by the terms of the Human Rights Act 1998. Of course, many of the rights in the ECHR can be justified in terms of accuracy as well as process aims. Others, however, reflect process aims, if necessary at the expense of accurate outcomes. Particularly important in the present context is the requirement of a fair trial in Article 6, which is concerned solely with fairness *to the defendant*.

3.15 The primary focus of the European Court of Human Rights is to decide whether an applicant's rights have or have not been violated in a particular case before it. In certain cases, however, a whole system or procedure can be found to be non-compliant. If the essential features of a procedure are such that unfairness is built into it, then it will always fail to produce a fair result. Recently, for example, the way in which British courts martial were convened was found to involve a violation of Article 6, and the system had to be reformed.[16] Prosecution rights of appeal do not fall into this category. There is no prohibition, either explicit or implied, of prosecution appeals in Article 6. It would be surprising if there were, as prosecution rights of appeal are generally a feature of the criminal justice systems of continental Europe.

3.16 There is, however, some danger in simply considering a particular procedure in isolation from the rest of the criminal justice system. Article 6 lays down, both explicitly and implicitly, certain specific requirements of fairness. For instance, Article 6(3)(c) makes explicit provision for a right to legal aid for representation by counsel where necessary. The Strasbourg Court has implied, from the terms of Article 6(1), a right to an oral hearing in person and to equality of arms.[17]

[15] Lord Wigoder, *Hansard* (HL) 14 July 1987, vol 488, col 959.

[16] See *Findlay v UK*, 1997–1/30 (1997), 24 EHRR 221, where the Court found that provisions of the Army Act 1955 breached the requirements of Article 6(1) guaranteeing the independence and impartiality of judicial officers in criminal proceedings. The relevant sections were amended by the Armed Forces Act 1996.

[17] See *Ekbatani v Sweden*, Series A vol 134 (1991), 13 EHRR 504; *Toth v Austria*, Series A vol 224 (1991), 14 EHRR 551; *Ruiz-Mateos v Spain*, Series A vol 262 (1993), 16 EHRR 505.

However, the general terms of the first sentence of Article 6(1) have also been held to create an open-ended, residual, guarantee of fairness. The specific rights spelt out are examples or manifestations of the general right to a fair hearing, but they do not necessarily exhaust it.[18] This general right to a fair hearing can be directly applied, even where it is not possible to point to a violation of one of the specific rights, whether explicit or implied. In such a case, the Strasbourg Court adopts what has been described as a "trial as a whole basis", making a general assessment of the fairness of the trial, taking all of the circumstances into account.[19]

3.17 In the light of the approach of the ECHR, we conclude that, in considering particular extensions to the prosecution's power to seek to appeal an adverse ruling, we should balance the enhancement of accuracy of outcome against the adverse impact on any relevant process aims, and consider whether the trial process *as a whole* would, as a result, be rendered unfair to the defendant. If we were to conclude that it would not render the trial process unfair, then we would expect any such extension of prosecution appeals to be compliant with the Convention.

3.18 It may be that, with full implementation of the Human Rights Act 1998, process aims will be given greater prominence in the courts' deliberations. An important development in this context is the observation by the European Court of Human Rights in *Condron v UK* that

> the question whether or not the rights of the defence guaranteed to an accused under Article 6 of the Convention were secured in any given case cannot be assimilated to a finding that his conviction was safe in the absence of any enquiry into the issue of fairness.[20]

DIFFERENT RIGHTS OF APPEAL

3.19 The argument in favour of prosecution appeals is that they are conducive to accuracy of outcome. A prosecution right of appeal is designed to remove an inaccuracy which benefits the defendant (for instance, a wrong ruling by a judge on the law).[21] By correcting the inaccuracy, a successful appeal makes it more likely that a guilty defendant will be convicted. Conversely, the outcome is no *less* likely to be accurate if an appeal is unsuccessful. At first sight, therefore, an

[18] The point is often made by the Court, particularly with reference to the paragraph (3) guarantees.

[19] See Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (2nd ed 1995) pp 202–203; van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd ed 1998) pp 428–430. For cases see, eg, *Barbera, Messegue and Jabardo v Spain* Series A vol 146 (1988), 11 EHRR 360, paras 68, 67; *Schenk v Switzerland* Series A vol 140 (1988), 13 EHRR 242, para 46.

[20] *The Times* 9 May 2000.

[21] Of course, appellate courts too can make mistakes. Nevertheless, for the purposes of this paper it seems reasonable to suppose that generally the appeals process works, in the sense of correcting errors at first instance and not overturning correct first instance decisions.

extension of the prosecution's rights of appeal would further the aim of accuracy of outcome.

3.20 However, there are a number of possible rights of appeal which could be granted to the prosecution. It may be that some of them would, by their very existence, distort the trial process in a way that could militate *against* accuracy of outcome. It is therefore not sufficient simply to assume that more rights of appeal would yield more accurate outcomes, and to ask whether that advantage is outweighed by any relevant process aims. Some rights of appeal may offer greater benefits than others, in terms of accuracy of outcome; and some may have greater drawbacks than others, in terms of process aims. It follows that there is unlikely to be a *single* answer to the question: is a prosecution right of appeal fair? All will turn on the answers to the further questions: appeals against which adverse decisions, at which stages of the trial, and subject to what procedural requirements? Whether a *particular* right of appeal is justifiable will depend on a judgment as to whether (and if so, to what extent) it would yield more accurate outcomes; how far, if at all, it would damage process aims; and where the balance of fairness lies.

CONCLUSIONS

3.21 **We provisionally conclude that the proper approach to the question whether to grant the prosecution a particular right of appeal is**

(1) to identify the extent (if any) to which that right of appeal would enhance or detract from the aim of ensuring accuracy of outcome;

(2) to identify the extent (if any) to which it would detract from process aims; and,

(3) by balancing these factors, to come to a conclusion whether the trial process would thus be rendered unfair.

PART IV
TERMINATING AND NON-TERMINATING RULINGS

4.1 In this part, we consider the distinction between rulings adverse to the prosecution which *terminate* the trial, and those which do not. We provisionally conclude that allowing a prosecution right of appeal against the latter would be unfair, but that a right of appeal against the former would not necessarily be unfair.

4.2 Our reference refers to rulings "which may have resulted, whether directly or indirectly, in premature termination of the trial". The distinction suggested by this phrase between rulings which result in termination of a trial and rulings which do not is, we consider, important. We understand it to mean not just rulings which abort a *particular* trial, with the result that there is a retrial (for instance, a ruling discharging the jury). Rather, we understand it to mean rulings which terminate the prosecution altogether, by resulting in a verdict of not guilty.

4.3 It is possible to distinguish between the following categories of rulings, where the judge rules against the prosecution:

(1) Rulings which necessarily terminate the trial by virtue of the nature of the ruling itself – rulings which, as a matter of law, have as the direct consequence that the trial is terminated. They include, for instance, rulings that the indictment be stayed as an abuse of process, or that there is no case to answer.

(2) Rulings which terminate the trial because, although the ruling does not necessarily terminate the trial as a matter of law, its effect is to persuade the prosecution to offer no or no further evidence, so that the judge orders or directs a verdict of not guilty.

(3) Rulings which do not terminate the trial, because the prosecution can continue, albeit with a weakened case.

The first two categories we refer to as "terminating rulings" and the third as "non-terminating rulings". Clearly, a ruling will generally only be "terminating" if the judge rules in a particular way. If the judge rules against the Crown on an application to stay proceedings as an abuse of process, or a submission of no case to answer, the trial terminates. If the judge rules against the *defendant* on such an application, he or she will (generally)[1] continue to contest the matter on the facts.

[1] A possible exception is where the abuse of process application is based on the contention that it is unfair to try the defendant at all (rather than that the defendant cannot receive a fair trial). The logic of *R v Horseferry Road Magistrates Court, ex p Bennett* [1994] 1 AC 42 and *Mullen* [1999] 3 WLR 777 is that such an application could succeed even where the defendant is in fact guilty (and will plead guilty if the abuse application fails).

PROSECUTION APPEALS AGAINST NON-TERMINATING RULINGS

4.4 We provisionally consider that to allow the prosecution a right of appeal against non-terminating rulings during the course of a trial would be both undesirable in principle and impossible in practice. It would be unfair, because it would result in significant delay for insufficiently good reason; no procedure which was both practicable and fair could be designed to allow such a right; and it would offend against the principle of equality of arms.

Delay

4.5 The avoidance of delay is a key process aim.[2] It is expressed by the requirement of Article 6 of the ECHR for a trial within a reasonable time. It is oppressive to the individual defendant if the trial process as a whole takes too long to reach its conclusion. The process of prosecution, of itself, places a considerable burden on the individual defendant. As we said in our consultation paper on double jeopardy, "It cannot be doubted that facing trial, at least for a serious offence, must be extremely distressing. This distress is not confined to the defendant. His or her family also suffers, as do witnesses on both sides, including the alleged victim."[3] In many cases, it involves the remand of the defendant in custody, often for many months. It amounts to the imposition by the state of a very significant burden on the citizen. The imposition of that burden must be justified; and part of that justification must be that it will not be imposed for any longer than is commensurate with fairness.

4.6 The English criminal justice system now places particular emphasis on the avoidance of delay.[4] This is important when considering prosecution appeals. Extending prosecution appeals will inevitably *add* to the existing delays in the system (other things being equal). It will do so directly because of the need to list and hear the appeal in the case in which the appeal is made, on top of the existing procedures. It will do so indirectly, because the hearing of appeals will inevitably use resources – in terms of both money and court time – which could otherwise be devoted to other cases, leading to delay in those other cases. Further, the cases which would be delayed as a result of the introduction of prosecution appeals co-opting court time in the Court of Appeal are defence appeals against conviction. Given that a large number of appeals against conviction are allowed each year

[2] The notion of "timeliness" features as one of a small number of process values identified at the beginning of a "catalogue" of such values in R Summers, "Evaluating and Improving Legal Processes – a plea for 'process values'" (1974) 60 Cornell LR 1, where the phrase itself was coined. It includes, as well as due expedition, the requirement that sufficient time be allowed before trial for the defence to be prepared (cf Article 6(3)(b) of the Convention). This aspect is not relevant to our current enquiry.

[3] Double Jeopardy, Consultation Paper No 156 (1999) para 4.7.

[4] See for instance the custody time limit regime, which has recently been further toughened by both the Government and the courts (Crime and Disorder Act 1998, s 43; *R v Manchester Crown Court, ex p McDonald* [1999] 1 WLR 841), and the Narey reforms (Martin Narey, Review of Delay in the Criminal Justice System: A Report (1997), available from the Home Office).

(290 in 1998),[5] delay in hearing those cases will be delay in releasing the not guilty. We conclude that the avoidance of delay is a process aim which might be adversely affected by a prosecution right of appeal.

4.7 We accept that expedition is a process value to which high value should be attached. If it is capable of being adversely affected by a prosecution right of appeal, it follows that, in order to be justifiable, a prosecution right of appeal must have a notably high value in enhancing accuracy of outcome.

4.8 A terminating ruling is of the highest significance, in that it brings the proceedings to an end. The value, in terms of accuracy of outcome, of correcting an erroneous terminating ruling is therefore very high. A non-terminating ruling, on the other hand, merely makes the task of the prosecution (unnecessarily) harder, rather than bringing it altogether to a stop. It remains possible that the jury will convict despite the wrong ruling.

4.9 It is a matter of judgment, but our provisional conclusion is that, undertaking the balancing exercise between the potential enhancement of accuracy of outcome and the potential conflict with the process aim of expedition, an appeal against a non-terminating ruling would be unfair.

Devising a procedure for appeals against non-terminating rulings

4.10 Delay during the course of a jury trial impacts directly on accuracy of outcome. An adjournment of more than a short period is likely to prejudice the effectiveness of the jury as a fact-finding body to such an extent that it would become unfair to proceed. How long that period might be will depend on a number of factors. For example, in a complicated fraud case, which continues for weeks or months, where much of the evidence may be documentary, adjournments of several days or even a week or two at a time may occur without any impropriety. In another type of trial, particularly one where the impact of oral evidence is likely to be crucially important, adjournments of even a few days are undesirable. In our view, the period necessary for the preparation and hearing of an appeal will almost inevitably be longer than the period during which a jury could reasonably stand adjourned, even in a long trial.[6] In our view any prosecution right of appeal which has to be encompassed *within the trial* is, in practice, virtually impossible to conceive.

[5] See para 1.25 above.

[6] At an early stage, it appears that appeals against rulings at preparatory hearings could be accommodated very quickly indeed in the Court of Appeal – Alun Jones QC in "The Decline and Fall of the Preparatory Hearing" [1996] Crim LR 460 refers to two early cases being heard within two days of the first instance hearing. More recent experience suggests that this is no longer the case: Simon Davis, "Interlocutory Appeals" [1998] 1 *Archbold News* 6.

4.11 The result is that any scheme incorporating a right to appeal against a non-terminating ruling would, in practice,[7] have to provide that the first trial be aborted and, *whatever the outcome of the appeal*, there would be a retrial. Conversely, an appeal against a *terminating* ruling made during a jury trial would also require a retrial, *but only if the appeal were allowed*. This would mean that where the ruling was of the highest significance – a terminating ruling – the defendant would be required to endure delay only where the ruling was wrong, and therefore the value of the appeal high in terms of accuracy of outcome; but where the significance was lower – a non-terminating ruling – the defendant would face delay whether the ruling was wrong or right. Even where it was wrong, there would be less justification for the delay, in terms of accuracy of outcome, than in the case of a terminating ruling; and if it were right, the delay would be imposed for no pay-off at all in increased accuracy. This, we provisionally conclude, is essentially unfair.

Equality of arms

4.12 We are not in this project directly concerned with defence rights of appeal. This is one context, however, in which the relationship between the rights of appeal available to the defence and those available to the prosecution is important.

4.13 A defendant has a right of appeal against a conviction. He or she has no free-standing right of appeal against a ruling in the course of the trial but before he or she has been convicted, as opposed to a general right of appeal against conviction (based on the ground that the ruling was wrong). If the judge makes a ruling such that the defendant has no defence on the facts he or she admits, then the proper course is for the defendant to change his or her plea to guilty and appeal. This happens when, for instance, the judge makes a ruling that the particular defence relied on by the defendant is not available on the undisputed facts. On the other hand, where the judge makes a ruling that merely has the effect of making the prosecution case stronger, the defendant will, in practice, be unable to appeal if he or she then changes his or her plea to guilty. This is true even if the ruling is such as to make the prosecution case overwhelmingly strong, removing all real hope of an acquittal by the jury. The defendant's only remedy is to continue to plead not guilty and appeal against the conviction after the jury finds him or her guilty. He or she cannot change his or her plea to guilty and immediately appeal.[8] In the terminology of this part, the defendant has a right of appeal against a terminating ruling, but not against a non-terminating ruling. If the prosecution were to be granted a right of appeal against non-terminating rulings, it would be given a right that the defence does not have.

[7] It would theoretically be possible to have a procedure in which the prosecution merely indicated that they intended to appeal against a non-terminating ruling during the course of the trial, but the trial continued, and the appeal would only have to be heard if the jury acquitted. Such a procedure would, however, be akin to a prosecution appeal against the final verdict of the jury, and is open to the same objections: see paras 6.21 – 6.26 below.

[8] This is the effect of *Chalkley* [1998] QB 848: in these circumstances, the change of plea is an admission of guilt on the facts, such that the conviction cannot be considered "unsafe".

4.14 Our provisional view is that it is in principle unfair for the prosecution to enjoy rights of appeal, where the defence does not have equivalent rights. Access to the same procedural rights – equality of arms between the defence and the prosecution – is an aspect of the right to a fair hearing. For the defendant to have lesser procedural rights than the prosecution offends against both accuracy of outcome and process values. It makes an accurate outcome less likely if the prosecution can contest rulings they dislike while the defence cannot, and it offends against our sense of procedural fair play.

4.15 The European Court of Human Rights has implied from the guarantee of a fair trial in Article 6 of the Convention just such a principle of equality of arms. Although the existing Strasbourg jurisprudence is not definitive, we would expect the Court to share our view that it would be unfair for the prosecution to have a right of appeal which was not available to the defence.[9]

4.16 Were it to be considered desirable to allow the prosecution a right of appeal against non-terminating rulings, one answer to the problem presented by the requirement for equality of arms would be to give *both* sides a right of appeal against a non-terminating ruling. We do not consider this to be a realistic option. In the first place, there is a tradition of judicial resistance to interlocutory appeals in criminal cases.[10] Secondly, in view of the practical considerations discussed earlier in this part, giving *both* sides such a right of appeal would involve massive disruption and delay to the system, at enormous cost. Finally, a defence right of appeal would be subject to the same insurmountable procedural problems as the equivalent possible prosecution right of appeal discussed in paragraphs 4.10 – 4.11 above.

4.17 Alternatively, it might be argued that the fact that a defendant has a *general* right of appeal against the verdict of the jury was sufficiently equivalent to a prosecution right of appeal against a *particular* non-terminating ruling. This argument might be persuasive if an appeal against conviction were always allowed where the Court of Appeal finds that a particular ruling against the defence was wrong. That is not, however, the case. The test on appeal is whether

[9] The principle of equality of arms is "an inherent element of a fair trial": *X v Germany* (1963) 6 YB 520, 574. It requires, in both criminal and non-criminal cases, that "everyone who is a party to such proceedings shall have a reasonable opportunity of presenting his case to the court under conditions which do not put him at a substantial disadvantage vis-à-vis his opponent": *Kaufman v Belgium* (1986) 50 DR 98, 155. Where a state chooses to make an appeals procedure available, it must satisfy the Article 6 guarantees, subject to suitable modifications: *Konig v Germany* Series A vol 27 (1978), 2 EHRR 170, para 98. There is no case on differing rights of appeal. In *Borgers v Belgium* Series A vol 214-B (1991), 15 EHRR 92, the applicant was entitled to view the Belgium Court of Cassation's procureur general, who acted as an advisor to the court, as an adversary where, in open court, he had called for the applicant's appeal to be dismissed. The fact that the procureur general retired with the judges when they considered their conclusion was therefore a breach of the principle of equality of arms.

[10] See, eg, *R v Wells Street Stipendiary Magistrate, ex p Seillon* [1978] 1 WLR 1002 and *R v Greater Manchester Justices, ex p Aldi GmbH and CoKG* (1995) 159 JP 717.

or not the conviction is "unsafe".[11] As currently interpreted, a conviction is only unsafe where "it appears that a person has been convicted of a crime which he may not have committed",[12] except where the judge should have stayed proceedings as an abuse of process, on the basis that it would be unfair to bring the defendant to trial.[13] If, therefore, the ruling was wrong, but nevertheless the Court of Appeal remains convinced, as a matter of fact, that the appellant is guilty, the conviction would not be quashed. It appears likely that this interpretation of the test for "unsafe" will now be subject to some review,[14] but it is highly unlikely that it would ever be the case that, if a ruling upon which a ground of appeal against conviction was based was found to be wrong, the appeal would *automatically* be successful.[15] By not having a right of appeal against a non-terminating ruling, the defendant is losing the possibility of correcting an error by the judge and then (as a result) being acquitted by the jury. It might be objected that, if there was a real chance of the jury acquitting, the Court of Appeal would not remain convinced of the appellant's guilt. That, however, ignores the vagaries of criminal litigation. We consider that, if a defence appeal against a non-terminating ruling were available, it is highly likely that defendants would avail themselves of it widely, as an alternative to awaiting conviction and appealing against the conviction.

CONCLUSIONS

4.18 **We provisionally conclude**

(1) that the prosecution should not be given a right to appeal against a non-terminating ruling made during the course of a trial; but

(2) that a prosecution right of appeal against a terminating ruling made during the course of a trial is capable of being fair.

4.19 We now look at the rulings against which it would be possible to introduce a prosecution right of appeal, and consider in each case whether it would be fair to do so. The options as they appear to us are set out below. The list broadly reflects the ordinary course of a trial on indictment:

(1) rulings at a preparatory hearing;

(2) rulings at a pre-trial hearing;

(3) terminating rulings:

  (a) made before the jury is sworn;

[11] Criminal Appeal Act 1968, s 2(1).

[12] *Callaghan* [1999] 5 *Archbold News* 2. See also *Chalkley* [1998] QB 848.

[13] *Mullen* [1999] 3 WLR 777.

[14] As a consequence of the judgment of the European Court of Human Rights in *Condron v UK*, *The Times* 9 May 2000: see n 7 to para 3.9 above.

[15] Certainly, such a result is not required by the Convention: *Schenk v Switzerland* Series A vol 140 (1988), 13 EHRR 242; *Khan v UK*, *The Times* 23 May 2000.

(b) made after the jury is sworn but before any evidence is heard;

(c) made during the course of the prosecution case;

(d) made after the conclusion of the prosecution case but before the defence opens its case, particularly

(i) rulings on submissions of no case to answer; but also

(ii) rulings on amending the indictment in the light of the prosecution case;

(e) made during the course of the defence case;

(f) made after the close of the defence case, including

(i) rulings at that stage on submissions of no case to answer;

(ii) rulings on the law relating to how the judge intends to sum up to the jury; and

(iii) rulings as to the contents of counsel's speeches;

(g) relating to answers to jury questions following retirement; and

(4) jury acquittals.

PART V
PROSECUTION APPEALS IN ADVANCE OF THE TRIAL

5.1 The law currently provides two types of regime by which rulings may be made in advance of the commencement of the trial proper. The first is by way of preparatory hearings. This is available only in two types of case, but, insofar as is relevant for our purposes, its provisions are virtually identical whichever type of case is involved.[1] Certain rulings made under this procedure are subject to appeal, with leave, by either prosecution or defence to the Court of Appeal.

5.2 The second regime, the pre-trial hearing, applies to any trial on indictment. It empowers a judge, in advance of the trial starting (that is, before the jury is sworn), on the application of any party, or of the judge's own motion, to make a ruling on the same matters as those to which the preparatory hearing regime applies. Such rulings are binding until the case is disposed of at first instance, though subject to the power of a judge to discharge or vary the ruling on the application of any party, or on the judge's own motion, if it appears to him or her to be in the interests of justice so to do. [2] Such a ruling is not, therefore, subject to any appeal until the conclusion of the trial. If there is a conviction then the ruling can form the basis of an appeal against conviction in the same way as any other ruling.

THE START OF THE TRIAL

5.3 In the absence of a statutory provision to the contrary, a trial starts when the jury is sworn.[3] There is such a statutory provision in relation to preparatory hearings: the trial starts with the hearing.[4] However, for our purposes, it makes more sense to deal with preparatory hearings and pre-trial hearings together as part of a before-trial phase. Where we refer to the start of "the trial proper", therefore, we mean the swearing of the jury, rather than what is technically the start of the trial at the beginning of a preparatory hearing.

[1] See paras 2.4 – 2.7 above.

[2] Criminal Procedure and Investigations Act 1996, ss 39 and 40.

[3] *Tonner* [1985] 1 WLR 344.

[4] Criminal Justice Act 1987, s 8(1); Criminal Procedure and Investigations Act 1996, s 30.

PREPARATORY HEARINGS

The scope of the jurisdiction

5.4 The terms of the two statutory regimes for preparatory hearings, and appeals from them, are now largely identical.[5] Despite this close similarity, however, there is an important difference in the context in which the two regimes operate.

5.5 The former is part of a regime for dealing with serious fraud cases. Such cases are also liable to be transferred direct to the Crown Court. The decision to transfer, which, in practice if not in law, is generally coextensive with the holding of a preparatory hearing, is made by one of a small number of designated prosecution authorities on the basis of their judgement that the case is of such seriousness or complexity that it is appropriate that the management of the case should, without delay, be taken over by the Crown Court. Thus the criterion guiding their decision is whether the management of the case as a whole is best placed forthwith in the Crown Court, not necessarily that a preparatory hearing would be advantageous. In practice we believe that the decision of a judge to hold a preparatory hearing under this rubric is likely to be coextensive with its characterisation as a serious fraud case for the purpose of transfer.[6] If we are in error in this assumption we would welcome correction from practitioners and judges who regularly deal with these cases.

5.6 By way of contrast there is no such practical limit on the use of preparatory hearings under the 1996 Act. This is in our view a matter of some significance, because it appears to us to be at least capable of very substantially increasing the number of cases in which preparatory hearings, and thus interlocutory appeals, may feature. The criterion for holding a hearing does not expressly require that the case be objectively long or complex, merely that it be long or complex *enough* for the judge to be of the opinion that there are substantial benefits in holding a preparatory hearing. If, for instance, a preparatory hearing would have a substantial benefit in making a relatively short case shorter still, it may arguably be justifiable to hold a preparatory hearing. Obviously, there must be some minimum length or level of complexity below which there could not possibly be any substantial benefit, for any of the specified purposes, in holding a preparatory hearing. There are, however, a large number of trials of some, but not great, length, and of some, but not daunting, complexity, which might well reasonably fall within this criterion.

5.7 There is a contrary view. The Act refers to "a case whose trial is likely to be of such length that substantial benefits are likely to accrue" from a preparatory

[5] Criminal Justice Act 1987, ss 7–10; Criminal Procedure and Investigations Act 1996, Part III.

[6] The transfer procedure will be abolished in respect of indictable-only offences as a result of the introduction of a new system of sending such cases directly to the Crown Court: Crime and Disorder Act 1998, s 51; Sched 8, para 65. These provisions have so far been brought into force in a number of pilot areas: Crime and Disorder Act 1998 (Commencement No 2 and Transitional Provisions) Order 1998 (SI 1998 No 2327).

hearing for the purpose of expediting the trial. Arguably, this cannot be read as including *any* case whose trial is likely to be expedited by a preparatory hearing, however short it would otherwise be. It implies that the trial must have the potential to be shortened *because it would otherwise be so long*. If this is the intention, the requirement is not satisfied merely because what would in any event be a short trial can be made shorter still.

5.8 However, there is some evidence against the correctness of this view in the small number of reported cases. The first case in which there was an appeal against a ruling at a preparatory hearing under the 1996 Act, *Aujla*,[7] was listed at first instance for a two week trial.[8] Although substantial, such a length of trial is hardly out of the ordinary fare of the Crown Court. Similarly, in *Z*[9] the Court of Appeal and House of Lords heard successive appeals against a ruling at a preparatory hearing in a rape case. It was more complicated than an average rape case, because it turned on the admissibility of evidence of other alleged rapes of which the defendant had been acquitted; but it was not a case that one would expect to take very long to try. In these appeals it was not argued that there had been no jurisdiction to hold the preparatory hearing because the case fell outside the statutory criteria, so they are not authority on the point. But they suggest that there may be cases in which it suits both sides that there should be a preparatory hearing, and neither side is therefore inclined to argue that there is no jurisdiction to hold one.

5.9 If that is right, the result would seem to be that it is possible that the 1996 Act regime will be used in a much greater number of cases than that for serious fraud cases. If that is so, then it is also possible that it will be used in a way which could be described as unpredictable or inconsistent. Reasonable judges could reasonably differ on whether they were empowered to hold a preparatory hearing and, if so, whether to do so in a particular case. It might, in some cases, develop as a matter of the personal trial management style of the individual judge. The provisions for preparatory hearing in such cases have not been in existence for very long (they were brought into force on 15 April 1997),[10] and it may well be that the full potential of the procedure has yet to be appreciated by counsel or judges.

5.10 The assumption which underpins the preparatory hearing regime is that the rulings made will normally be non-terminating, as they are made for the purposes of the better management of the trial. An application to stay the proceedings as an abuse of process, for example, falls outside the ambit of a

[7] [1998] 2 Cr App R 16.

[8] Simon Davis, "Interlocutory Appeals" [1998] 1 *Archbold News* 6.

[9] (2000) 164 JP 240; *The Times* 23 June 2000.

[10] Criminal Procedure and Investigations Act 1996 (Appointed Day No 4) Order 1997 (SI 1997 No 1019).

preparatory hearing;[11] so does an application to quash the indictment.[12] If such an application is successful, therefore, the prosecution has no right of appeal.

5.11 If, however, the ruling does fall within the statutory purposes of the preparatory hearing, it is subject to appeal, even if it is a terminating ruling. In *R*[13] the judge had rejected the defence's submissions that the proceedings should be stayed as an abuse of process *and/or* that crucial evidence should be excluded under section 78 of the Police and Criminal Evidence Act 1984. The defence was unable to appeal against the former ruling; but the latter was a ruling on a "question as to the admissibility of evidence", and was therefore open to appeal. It was immaterial that, had the ruling gone the other way, the prosecution would have been unable to proceed at all.

> The meaning of the statute cannot be affected by the consequences of the ruling. Some rulings on admissibility will have little or no effect on the conduct of the prosecution's case. Others, such as the ruling sought in this case, would or might have the effect that the prosecution cannot proceed, but such a consequence cannot alter the character of the ruling, namely that it was a ruling as to the admissibility of evidence. Such a ruling made in the course of a preparatory hearing can be the subject of an interlocutory appeal.[14]

It follows that, if the ruling *had* gone the other way (that is, had it been a terminating ruling), the *prosecution* would have been able to appeal against it.

The risk of delay

5.12 The availability of an appeal may have an adverse effect on the process aim of avoiding delay in the trial process. This is because it is important, if possible, to ensure that any preparatory hearing is held sufficiently far in advance of the (planned) start of the trial to accommodate any appeal against a ruling at the hearing. The rules require that an application to hold a preparatory hearing be made at an early stage: within 28 days of committal, transfer or the preferment of a voluntary bill of indictment (or 7 days after an application for dismissal is determined or withdrawn, in a transfer case).[15]

5.13 In practice, where a case is transferred under the serious fraud provisions, the application for a preparatory hearing is made by the prosecution as soon as the

[11] *Gunawardena* (1990) 91 Cr App R 55.

[12] *Hedworth* [1997] 1 Cr App R 421.

[13] *The Independent* 10 April 2000.

[14] Transcript No 200000375 S1 (22 February 2000) para 7, *per* Tuckey LJ.

[15] Criminal Justice Act 1987 (Preparatory Hearings) Rules 1997 (SI 1997 no 1051) r 4; Criminal Procedure and Investigations Act 1996 (Preparatory Hearings) Rules 1997 (SI 1997 No 1052) r 4. There is provision for extensions of the time limit on application by a party, either before or after the time limit expires. The rules are expected to be amended in due course to take account of the provision for sending indictable-only cases directly to the Crown Court in the Crime and Disorder Act 1998, s 51.

indictment is lodged. Such cases are given an early listing for mention in the Crown Court, at which the timetable for the case is considered, including the likely start date for the trial and the listing of any preparatory hearing.[16]

5.14 Current practice in relation to serious fraud preparatory hearings, therefore, aims to ensure that there will be sufficient time, between the start of the preparatory hearing and the fixed date for the commencement of the trial before the jury, for all necessary steps to be taken, including any interlocutory appeal against a ruling.

5.15 Whilst this is so for serious fraud cases, where the decision to transfer is closely linked with the decision to hold a preparatory hearing, it may not necessarily be the same for cases under the 1996 Act, where minds may not be focused on the need for, or desirability of, a preparatory hearing quite as early in the trial process. There may be a danger, as the breadth of the procedure in the 1996 Act becomes better known, that difficulties will emerge in ensuring that there is time to accommodate an appeal between the preparatory hearing and the initial listed date for the commencement of the trial before the jury. A judge can hold a preparatory hearing without an application by either side if he or she chooses. It is, therefore, possible that on the day appointed for the trial to start, a judge might choose to deal with an issue in the form of a preparatory hearing, rather than in the course of the trial or as a pre-trial issue. In our view this is unlikely to arise often. There now exist sufficient tools of case management, particularly at the plea and directions hearing, to enable a timeous decision to be taken on whether to hold a preparatory hearing, either on application or on the court's own motion, so as to minimise any delay in the trial process consequent upon any possible appeal.

5.16 **We provisionally conclude that the present preparatory hearing regimes, under which either side may appeal a ruling in advance of the start of the trial before the jury, constitute elements of a fair trial procedure.**

STATUTORY PRE-TRIAL HEARINGS

5.17 The 1996 Act also introduced a procedure for the making of binding rulings at pre-trial hearings. A judge may make such a ruling at any time after the case is committed, transferred or sent to the Crown Court and before the jury is sworn, on any question relating to the admissibility of evidence or any ("other") question of law relating to the case. There are no purposive requirements for the hearing such as there are in respect of preparatory hearings, and no rights of appeal.

5.18 All cases (except serious fraud cases) are automatically listed for a plea and directions hearing, in accordance with a practice direction issued in 1995.[17] Our understanding is that, thereafter, there may be further listings in advance of the

[16] *Arlidge and Parry on Fraud* (2nd ed 1996) paras 14-032 and 14-060.

[17] *Practice Direction (Crown Court: Plea and Directions Hearings)* [1995] 1 WLR 1318.

trial itself for further directions at which pre-trial rulings may be given. At any hearing before the trial starts, including the initial plea and directions hearing, a judge may make a binding ruling under the Criminal Procedure and Investigations Act 1996, section 40.[18]

5.19 At some Crown Court centres, it is the practice to fix the date for trial at the initial plea and directions hearing. At others, a date may not be fixed until some time later. The gap between the initial plea and directions hearing and the trial might be as short as two or three weeks in the case of a short, simple trial listed as a "warned list"[19] case. In other cases, it might be many months, and there might be a number of further listings for directions.

5.20 As with preparatory hearings, most rulings made under this rubric will not result in the termination of the proceedings. It is nonetheless possible that they might. For instance, a ruling on admissibility or some other question of law may result in the prosecutor deciding not to proceed with the case. Thus the rulings made may be either terminating or non-terminating.

5.21 At one time it was thought that, by virtue of the terms of section 2 of the Criminal Appeal Act 1968, no binding ruling should, in prudence, be made before a trial had started by a jury being sworn. This resulted in juries being sent away for days or weeks whilst legal argument and rulings were made. The basis for this practice was removed by the amendments made to the 1968 Act in the Criminal Appeal Act 1995.[20] In practice such rulings are now routinely made immediately before the jury is sworn, at a time when all the parties are ready for the trial to start once the rulings have been made. There is no requirement for a pre-trial ruling that any substantial benefit need accrue for the better management of the trial. Rather, the procedure is simply a part of the general armoury for conducting the business of the court conveniently and expeditiously.

5.22 Rulings made under this procedure are binding but subject to review by a judge at any time if the interests of justice so require. Thus, if a ruling is wrong for any reason, it may be corrected without interrupting the trial process. The only advantage of an appeal to the Court of Appeal from a non-terminating pre-trial ruling would be that a different and higher level court would look at the ruling. Thus a right of appeal might result in erroneous rulings being corrected on appeal which a Crown Court judge might not have corrected if invited to review the ruling in the course of the trial. This might particularly be so if he or she was the judge who had made the initial ruling. This would be some enhancement in the aim of accuracy of outcome, which should not be discounted.

[18] There should be no ruling on the law until a plea is taken: *Vickers* [1975] 1 WLR 811; *Marshall, Coombes and Eren* [1998] 2 Cr App R 282.

[19] That is, a case which should be heard at some time during a specified week, but without a particular day being allocated in advance. The parties will be informed the day before the case comes on.

[20] See the discussion in *Archbold 2000*, para 4–93.

5.23 Thus, where a ruling at a pre-trial hearing is non-terminating, there is some limited enhancement of the accuracy of outcome to be had from giving the prosecution a right of appeal to the Court of Appeal. In our view, however, that is far outweighed by the inevitable inconvenience and delay to the trial in the large number of cases in which such rulings are routinely and properly sought immediately before the jury is sworn. We think it obvious that when the parties have prepared themselves for trial, and have their witnesses available, it would be hugely damaging to the potential fairness of the trial process to have them sent away at that point for an indeterminate period whilst an appeal is pursued.

5.24 **We provisionally conclude that there is no sound basis for extending the rights of appeal under the preparatory hearing regimes to non-terminating rulings made under the pre-trial hearing regime.** Having balanced the factors, granting such a right would tend to make the trial process unfair.

TERMINATING RULINGS

5.25 As we have observed above, rulings in both preparatory hearings and pre-trial hearings will normally, but not always, be non-terminating rulings. The ruling may be terminating because the prosecution decides not to proceed. Applications may be made to quash the indictment or stay the proceedings at any stage of the proceedings, whether before or after the start of the trial. At present, the only case in which the prosecution can appeal against a terminating ruling made before the start of the trial proper is where the ruling is made in the course of a preparatory hearing *and* (unlike a decision to quash the indictment or stay the proceedings) is within the statutory purposes of such a hearing. In other words there is *no* right of appeal against a terminating ruling made in advance of the trial proper where (a) the ruling is made at a pre-trial hearing rather than a preparatory hearing, or (b) it is made at a preparatory hearing, but falls outside the statutory purposes of the hearing. Should there be a right of appeal in either or both of these cases?

5.26 We have provisionally concluded in Part IV above that an appeal against an incorrect terminating ruling prima facie has a high value in enhancing accuracy of outcome. In our view this is sufficient to raise a presumption in favour of granting the prosecution a right of appeal against such a ruling unless it is outweighed by the countervailing arguments that it would detract from the process aim of procedural fairness.

5.27 Whenever such a terminating ruling is made, a successful appeal will almost inevitably result in the proceedings going ahead with the trial commencing later than the original date. This will result in the trial process lengthening, and may pose a problem for the defence in terms of its witnesses' availability. In our view these considerations may be dealt with by requiring the prosecution to observe a strict and speedy timetable for commencing an appeal and, thereafter, bringing it

on for hearing.[21] Further, the success of the appeal may be made dependent on an overall requirement that a retrial be in the interests of justice.[22] Our conclusion is that, as a matter of principle, if such appropriate safeguards are put in place these process factors do not, on their own, outweigh the high value in terms of enhanced accuracy of outcome attached to a prosecution appeal against terminating rulings.

5.28 It would clearly be anomalous if there were a right of appeal against terminating rulings made at pre-trial hearings and not against those which are made at preparatory hearings but fall outside the statutory purposes, such as the quashing of the indictment or the stay of proceedings as an abuse of process. This would mean that only in a serious or complex case, deserving of a preparatory hearing, would such a ruling *not* be appealable. Such rulings cannot simply be treated as having been notionally made at a pre-trial hearing rather than the preparatory hearing, because the start of the preparatory hearing is deemed to be the start of the trial, and there is no further room for a pre-trial hearing. A right of appeal against terminating rulings made before the start of the trial proper would therefore have to extend to *any* such ruling, whatever the nature of the hearing at which it is made, and, where it is made at a preparatory hearing, whether or not it falls within the statutory purposes of the hearing.

5.29 **We provisionally propose that (subject to the safeguards referred to in Part VII below) there should be a prosecution right of appeal against a terminating ruling made before the start of the trial proper, but not covered by the existing right of appeal against a ruling at a preparatory hearing.** This would include:

(1) terminating rulings at preparatory hearings where there is now no right of appeal, because the ruling falls outside the statutory purposes of the preparatory hearing;

(2) terminating rulings at statutory pre-trial hearings; and

(3) terminating rulings at non-statutory hearings.

[21] See paras 7.14 – 7.16 and 7.20 – 7.25 below.

[22] See paras 7.27 – 7.29 below.

PART VI
PROSECUTION APPEALS AND THE TRIAL PROPER

6.1 In this part we consider what prosecution rights of appeal there should be against terminating rulings made after the start of the trial proper (that is, excluding preparatory hearings). We also include in this part our provisional views on, and proposals in relation to, appeals against acquittals by the jury.

IMPLICATIONS OF LIMITING APPEALS TO TERMINATING RULINGS

6.2 We provisionally concluded in Part IV that, as the exercise of a prosecution right of appeal against non-terminating rulings made during the trial would inevitably result in the first trial being aborted and a second trial taking place, it would be unfair to introduce one. We concluded in Part V that, where the effect of the ruling is to terminate the trial in the ways we described, then, prima facie, granting the prosecution a right of appeal would be fair, subject to certain safeguards. This was because we formed the view that any delay and difficulty to the defence with its witness availability for a trial on another date might be safeguarded by the imposition of strict and short time limits and a residual "interests of justice" requirement. We consider these issues in detail in Part VII below.

6.3 There is, however, a further issue where the ruling appealed against is made in the course of the trial. In practice, virtually all the terminating rulings which are going to be made during the trial will be made by the close of the prosecution case, and any submission at that stage that there is no case to answer.[1] A prosecution appeal against such rulings, if successful, will lead to a retrial. Depending on how far the case had progressed before the ruling was made, the prosecution may have called some or all of its evidence and the defence may have tested that in cross-examination. In so doing the defence may have revealed some or all of its strategy, although it will not have begun to present its case. It may also have provided the prosecution witnesses who have given evidence with a "dry run". Accordingly, in these ways the defence would be disadvantaged at a retrial

[1] The only kinds of terminating ruling that can occur at all after the close of the prosecution case are those that terminate the trial as a matter of law, because after that time the prosecution cannot *choose* not to continue. Up until the end of the prosecution case, it is a matter for Crown counsel to decide whether to offer no or no further evidence. This remains so, even if the judge is of the view that the evidence available does amount to a prima facie case against the defendant, and accordingly he or she would not allow a submission of no case to answer (unless counsel invites the judge to approve the intended course of action, in which case he or she must abide by the judge's decision). After the close of the prosecution case, however, the prosecution cannot discontinue the case without the consent of the judge. If prosecution counsel does not consider that the case should proceed, but the judge disagrees, prosecution counsel is not under a duty to cross-examine the defence witnesses or to address the jury: see the Farquharson Committee on the duties of prosecuting counsel (*Archbold 2000*, paras 4–95 and 4–96), confirmed by the Court of Appeal in *Grafton* [1993] QB 101.

by facing a prosecution potentially better prepared. Conversely, the defence will have available for cross-examination on the retrial an additional version of events from prosecution witnesses on the basis of which it may be able to mount a challenge to witnesses' reliability, based on inconsistencies in their various accounts.

6.4 Where the balance of advantage may lie in such circumstances will vary from case to case. We assume for the purpose of this paper that the balance will disadvantage the defence. Thus this is a factor to be added to the other matters previously discussed which militate against a prosecution right of appeal.

6.5 We cannot ignore the tactical elements in a trial. Were there to be a rule which only permitted an appeal by the prosecution against terminating rulings made before any evidence had been called, there would be every incentive for the defence to avoid making applications for such rulings until the evidence had begun, thereby avoiding the possibility of an appeal by the prosecution. This would place the onus on the prosecution to be pro-active in seeking rulings in advance of that stage. Out of an abundance of caution the prosecution might feel obliged to seek rulings on matters which might, in the light of the evidence, turn out not to have been required. This would be a waste of court time and a distortion of the trial process. It might be possible to require the defence, before the start of the trial, to identify all legal issues which might require a determination so as to enable the prosecution to determine which matters properly required a ruling. If the defence were conscientious, this too might lead to a superfluity of unnecessary rulings. In any event, what would be the sanction if the defence was less than conscientious? Were the defence to make an application during the evidence, not having flagged it up in advance, it would be hard to see how it would be consistent with a fair trial for the trial judge to refuse to entertain it because of a procedural failing. In any event, it would not be beyond the wit of the defence legal team in most cases to mount a plausible argument either that they did not have notice of the issue, or that it would have been premature to make an application until the evidence started to emerge in a particular way, or even that they had not noticed the point earlier and their client should not be penalised for their shortcomings.

6.6 Retrials are a routine feature of the trial process. In some cases it will be a full retrial in the sense that there will already have been a trial which has run its course. This is so where there has been a "hung" jury and where the Court of Appeal has ordered a retrial on a successful appeal against conviction. In other cases, it will only be a partial retrial, depending on how far the trial has progressed before the jury has been discharged for whatever reason. Thus such a retrial may or may not expose the defence to the hazard of presenting its case a second time. A retrial following a successful prosecution appeal against a terminating ruling made in advance of the conclusion of the prosecution case, by way of contrast, will never put the defence at such a risk. Even though it may be that, on balance, the prosecution is advantaged by a retrial, we can see no good reason for supposing that the availability of a retrial, on its own, would constitute an unfairness in the trial process. For that reason, and in order to avoid the

adverse effects on the trial process of tactical considerations such as we have described above, we are of the view that the considerable enhancement of accuracy of outcome to be gained from correcting an erroneous terminating ruling outweighs the process disadvantages to the defendant, including those attendant upon a retrial.

6.7 **We provisionally propose that (subject to the safeguards referred to in Part VII below) there should be a prosecution right of appeal against a terminating ruling made during the trial up to the conclusion of the prosecution evidence.**

6.8 A possible exception to our statement that virtually all terminating rulings will be made before the end of the prosecution case relates to rulings on disclosure of relevant material in the hands of the prosecution. The general rule is that such material should be disclosed to the defence, but the prosecution can apply to the judge (who will hear only the prosecution, in private) for a ruling that disclosure need not be made where it would not be in the public interest (such as where it would reveal the name of an informer).[2] Such rulings are generally made before the end of the prosecution case. However, the judge is under a duty to keep such rulings under continuous review,[3] and it is possible that the defence evidence might shed new light on the circumstances, such as to make the judge reconsider his or her ruling and order disclosure. If the prosecutor is not willing to make the disclosure, the prosecution will come to an end and the defendant be discharged. Our provisional view is that such late rulings are unlikely to be sufficiently common to justify a special rule to allow later appeals.

6.9 Nevertheless, **we invite views on whether there should be a special rule in relation to terminating rulings on disclosure, to allow prosecution appeals after the close of the prosecution case.** We would be grateful for information as to the frequency of such rulings.

SUBMISSIONS OF NO CASE TO ANSWER

6.10 In Part V and in the preceding section of this part, we have considered situations in which the aim of accuracy of outcome was unequivocally served by the prosecution having an appeal. We considered the extent to which some types of conflict with process aims might outweigh the enhancement of accuracy. In considering a prosecution right of appeal against a ruling of no case to answer, however, we have to consider whether allowing such an appeal may, in addition, detract from the aim of accuracy of outcome itself.

6.11 A distortion in the way in which the defence conducts the case is likely (other things being equal) to prejudice the accuracy of the outcome to the disadvantage

[2] Criminal Procedure and Investigations Act 1996, ss 3(6), 7(5), 8(5) and 9(8); Crown Court (Criminal Procedure and Investigations Act 1996) (Disclosure) Rules 1997 (SI 1997 No 698) rr 2–3.

[3] Criminal Procedure and Investigations Act 1996, s 15(3).

of the defendant. We now consider whether the mere *existence* of a prosecution right of appeal against a ruling of no case at the conclusion of the prosecution case, regardless of its exercise on a given occasion, could give rise to such distortion by inducing the defence to forbear from seeking such a ruling.

6.12 The defence may, at the close of the prosecution case, make an application to the judge that there is no case to answer. If the judge agrees, he or she will direct the jury to acquit the defendant. According to the leading case of *Galbraith*[4] a submission of no case should be allowed if either there is no evidence at all of at least one essential element of the case (the first limb); or if there is *some* evidence, but it is so tenuous that, taken at its highest, a jury could not properly convict on the basis of it (the second limb). Where the strength of the evidence depends on the view to be taken of a witness's credibility, or some other matter usually taken to be in the province of the jury, the judge should not substitute his or her own view. If on one *possible* view of the evidence there is a case to answer, the submission must be rejected. While the position is not altogether clear, it seems that the judge is not under a duty to withdraw the case from the jury if no submission is made by defence counsel.[5] An application can also be made, it would appear, at the close of all of the evidence.[6]

6.13 In identification cases, the rules relating to submissions of no case to answer are rather different. They constitute the key to the protection developed by the English courts against wrongful convictions on the basis of mistaken identity. As a result of celebrated miscarriages of justice in the early 1970s caused by mistaken identification evidence, the Court of Appeal laid down that, where the evidence of identification is poor, the judge should look for supporting evidence. If there is none, he or she should allow a submission of no case to answer. Criteria are given for determining whether the evidence is "poor". They depend on factors such as the length of the observation, the lighting conditions and so on. In identification cases, there is a duty on a judge, even in the absence of a defence submission, to act on his or her own initiative to withdraw a case from the jury if he or she forms the view that it is appropriate so to do. The judge must, in addition, satisfy himself or herself after the defence case that the quality of the identification evidence remains sufficient to go to the jury.[7]

6.14 The ability of a defendant to submit to the judge that there is no case is an important safeguard for the defendant. It protects him or her from a perverse verdict of guilty by the jury. This might be particularly important where the defendant belongs to a group which is unpopular or subject to discrimination, or where the nature of the defence is unsavoury. In identification cases, experience has shown that juries may easily be persuaded by honest but mistaken witnesses.

4 [1981] 1 WLR 1039.

5 *Juett* [1988] Crim LR 113. See also *Archbold 2000*, para 7–79.

6 *Anderson, The Independent (Case Summary)* 13 July 1998; *Ramsay* [2000] 6 *Archbold News* 3. For a contrary argument, see *Archbold 2000*, para 4–292.

7 *Turnbull* [1977] QB 224; *Fergus* (1993) 98 Cr App R 313.

This makes the protection for the defendant of the ability to make a submission of no case particularly important. At its core lies the burden of proof. It is for the prosecution to prove guilt, not for the defence to prove innocence. The case should not continue if there is no evidence, or not enough to demand a response. This fundamental principle also helps protect the defendant at earlier stages in the process. Prosecution decision-makers know from the outset that they must have sufficient evidence of each and every element of the offence, or the case will not get to the jury at all, however persuasive their evidence on another part of the case is. They cannot rely on the defendant proving the case for them.

6.15 Where it is reasonable for the defence to argue on a submission that a case falls within either limb of *Galbraith*, the existence of a prosecution right of appeal against a successful submission of no case would put the defence in an invidious position. The dilemma for the defence would be that if it makes a submission of no case, and is successful, there is a danger that the prosecution will appeal and there will be a retrial. In the interim, the prosecution case might improve. The prosecution might seek and obtain more evidence to shore up the weaknesses exposed first time round. The defence's case might deteriorate. Its witnesses might become unavailable. The prosecution evidence might have appeared tenuous at the initial trial because of a particularly effective cross-examination of one or more of the Crown's witnesses. There is no guarantee that this will be repeated at the retrial. The defence, in making the decision whether or not to make a submission, would bear in mind that the prosecution has a weak case, and, therefore, that there is a realistic prospect that the jury will acquit, particularly in the light of the way the trial has gone thus far.

6.16 Such a dilemma would result in a real risk that defendants might not make a submission of no case, when they should. They should not be put in that position. If the law relating to submissions of no case is right, it secures accuracy of outcome, in that the defendant who makes a successful submission of no case will be rightly acquitted, when there is a risk that, absent a submission of no case, he or she would be wrongly convicted by the jury.

6.17 Quite apart from the danger of wrongful conviction, a defendant who did not make a submission of no case out of fear of a prosecution appeal would be disadvantaged even if the jury acquitted. If a defendant is to be acquitted, it is procedurally fairer that he or she be acquitted earlier rather than later, as he or she is then bearing the burden of prosecution for a shorter period. Of secondary importance is the fact that it saves resources, both in terms of money and court time. The longer and more complicated the case, the greater the saving of public funds in not having issues go the distance which should have been excluded at an early stage.

6.18 Our view is that it is not feasible in this respect to draw a distinction between the first and second limb of *Galbraith*. First, the distinction between there being absolutely no evidence for an element of an offence, and there being some very tenuous evidence for it, is too slight to provide a basis for an important procedural distinction. Second, it might put the parties in an invidious or even ludicrous position. The defence might find itself having to argue that there was,

indeed, *some* evidence of every element, but that it was too tenuous to amount to a case to answer. On the other hand, the prosecution might find itself in a position in which it argued in the first instance that there was sufficient evidence to go to the jury but, in the alternative, if there was no case to go to the jury it was because there was no evidence at all (in relation to a particular element), rather than some tenuous evidence. Such arguments might also be ventilated on appeal on the question of the jurisdiction of the Court of Appeal.

6.19 Similar difficulties would arise if the judge were minded of his or her own motion to rule that there was no case to answer, as is his or her duty in an identification case.[8] It would be unfair to a defendant, who would rather take his or her chance with the jury, to make such a ruling appealable. On the other hand, if there were an exception to the right of appeal where such a ruling was by the judge of his or her own motion, it would inevitably result in the procedural absurdity of defence counsel inviting the judge to make a determination on his or her own motion whilst studiously avoiding actually making a submission. It would also be likely to lead to inconsistency, in that some judges would be more likely to take the initiative than others. In our view the consequences of such a distinction would be grotesque.

6.20 **We provisionally conclude that there should be no right of appeal by the prosecution against a ruling of no case to answer made at the conclusion of the prosecution case.**

JURY ACQUITTALS

6.21 We are not asked in our terms of reference to consider prosecution appeals from a jury's verdict of acquittal following its consideration of the evidence. Nevertheless, we consider that it would be helpful to deal with it here.[9]

6.22 We give our views on the central importance of the jury in Part I.[10] Any proposal to allow a general prosecution right of appeal, simply on the basis that the jury came to the wrong decision on the facts, would undermine the jury. The jury might become, in effect, no more than a screening mechanism for the final finders of fact, the Court of Appeal. The general attachment to the jury is based on the perception that it serves both accuracy of outcome and process values. Juries are seen as being more likely to produce an accurate result by virtue of their acquaintance with the normal life of the community, and as legitimising the criminal justice system by making the ultimate decision on guilt one for a randomly selected group of the defendant's peers. Any question of an appeal on the unconstrained basis that the jury got it wrong should be rejected out of hand, as profoundly damaging to both the accuracy and legitimacy of the system.

[8] *Turnbull* [1977] QB 224 at pp 228–230, *per* Lord Widgery CJ.

[9] See para 1.6 above.

[10] See paras 1.22 – 1.23 above.

6.23 It might be argued, however, that this prohibition should not apply to appeals against an acquittal where the *judge* has *misdirected* the jury. There may be an identifiable parallel with appeals against conviction. It is not perceived as undermining the jury to quash a *conviction* where the jury was misdirected. The judge has asked the jury to do the wrong thing. The implication is that if he or she had asked them to do the right thing, they would not have convicted. May this argument be used to sustain a prosecution right of appeal against an erroneous direction by the judge in favour of the defendant, where there has been an acquittal? We reject this suggestion. If there were a prosecution right of appeal against misdirections, in order to avoid every misdirection leading to a possible retrial, there would have to be a requirement that the misdirection should be *responsible* for the acquittal. This would require the Court of Appeal to make an assessment of the likely impact on the jury had the correct direction been given. This has frequently been required of the court when it considers appeals against conviction, in that once it has determined that a direction was unsatisfactory or wrong, it must nevertheless go on to decide whether the misdirection renders the conviction unsafe, so that it must be quashed. This approach has been thrown into doubt as a result of the decision of the Strasbourg Court in the case of *Condron v UK*.[11] On one view it is not permissible for the Court of Appeal to speculate at all on what may or may not have influenced the jury. For our purposes, however, we assume that the test for a successful appeal against conviction will continue to be whether or not the conviction is unsafe, in whatever form may be devised so to accommodate the concept of a fair trial.

6.24 In our view a similar exercise would not be acceptable in the case of a prosecution right of appeal. When considering an appeal against conviction, because of the standard of proof in criminal trials, the Court of Appeal only has to be satisfied that a correct direction would have raised a *doubt*. Establishing that a conviction is unsafe because a jury might have had a doubt about an element of the offence if they had been correctly directed is not comparable to concluding that, absent the misdirection, a jury would have been sure of guilt. *Finding* a possible doubt does not require the Court of Appeal to come to a firm conclusion about what the jury must have decided on each of the various issues in the trial, what evidence they accepted and what they rejected, and so on. To *remove* all reasonable doubt, the Court of Appeal would have to conclude that the jury must, in fact, have been sure that each of the other elements of the offence were established and that, but for the misdirection, it would have been sure of the sole remaining element. It is easy to see how a misdirection may muddy the pure waters of the jury's sureness of guilt so as to render a conviction unsafe. It is, in our view, not possible to see how the Court of Appeal could remove all the mud of doubt from an acquittal so as to be left with pure water. As Lord Keith recognised in *DPP v Stonehouse*,[12] a jury might acquit because the evidence gave rise to "nuances" which, although they might not be obvious to a lawyer, were "apparent to the collective mind of a lay jury".

[11] *The Times* 9 May 2000.

[12] [1978] AC 55, 94E.

6.25 The point, however, goes further. It is always the function of the jury and not the judge to find the facts and apply them to the law as stated by the judge.[13] The judge, and indeed the parties, may say what they consider the "real" questions in the case to be, but, absent a formal admission,[14] all facts remain in issue and the jury is *entitled* to find what it will on them. So a determination by the Court of Appeal, on a prosecution appeal against a misdirection by the judge in the summing-up, that the jury can *only* have had a doubt about the subject matter of the misdirection, and not about any other issue, would not only be difficult in practice, but objectionable in principle. It would require judges to do that which the law reserves to juries.

6.26 **We provisionally conclude that there should be no right of appeal by the prosecution against a jury's verdict of not guilty, even where there has been a misdirection by the trial judge which may have favoured the defence.**

[13] *DPP v Stonehouse* [1978] AC 55, 94D.

[14] An admission made under the Criminal Justice Act 1967, s 10 is "conclusive evidence" of the fact admitted for the purposes of the proceedings in which it is admitted.

PART VII
ANCILLARY AND PROCEDURAL MATTERS

7.1 In this part, we consider some ancillary and procedural issues thrown up by our provisional proposals.

7.2 First we discuss whether the new right of appeal should be available in respect of all offences, and if not, which. Our concern in the next five sections is to suggest ways in which new prosecution rights of appeal could be exercised with the minimum delay, and in accordance with the Human Rights Act 1998. The key ECHR provisions are Article 6 and, where the defendant is in custody, Article 5. We then address the question of the appropriate approach of the Court of Appeal to such an appeal, and finally the issue of reporting restrictions.

THE OFFENCES TO WHICH THE RIGHT OF APPEAL SHOULD APPLY

7.3 We have concluded that it would not be *unfair to defendants* to give the prosecution a right of appeal against terminating rulings made in the course of the trial. This conclusion applies irrespective of the nature of the offence charged. It does not follow, however, that the introduction of such a right of appeal would be equally *desirable* irrespective of the nature of the charge. Offences tried on indictment range from the very serious to the comparatively minor. In the latter kind of case, it is arguable that the costs and delays inherent in an appeal, even if not rendering the appeal unfair, would nevertheless be out of proportion to the public interest in securing a conviction.

7.4 On one view, this is a consideration which the prosecuting authority can be trusted to take into account in deciding whether to exercise any right of appeal. In some cases an appeal might be appropriate because the proceedings have an importance which transcends the seriousness of the offence charged – for example, where a police officer is charged with a minor assault. It is arguable that it should be possible to appeal against the premature termination of such a case, and that the availability of that option would not result in a spate of unmeritorious appeals in trivial cases. It is noteworthy that the Attorney-General's existing power to refer a point of law to the Court of Appeal after an acquittal extends to all offences tried on indictment.[1]

7.5 On the other hand, by contrast with that existing power, the introduction of a prosecution right of appeal would enable the prosecution to reopen the proceedings against the individual defendant concerned. It would constitute a significant erosion (albeit, in our view, a justifiable one) of the advantages currently enjoyed by the defence. We propose it because we think it is not only justifiable but also necessary. However, it is only in the more serious cases that the need for reform is pressing, because it is in those cases that the public interest

[1] Criminal Justice Act 1972, s 36: see para 2.2 above.

is most damaged by the erroneous termination of proceedings. We think it would be wrong to assume that, because a right of appeal is both justifiable and necessary in more serious cases, it should be created for all cases where it is justifiable – even if in some such cases it is unnecessary.

7.6 In our recent consultation paper on double jeopardy we provisionally proposed that the double jeopardy rule should be subject to a new exception where new and strong evidence of guilt emerges after an acquittal, but that this exception should apply only in comparatively serious cases. We considered the possibility of simply confining it to the most serious *offences*. We concluded, however, that this approach was insufficiently flexible, and instead proposed a criterion based on the sentence that, if proved, the offence alleged would be likely to attract.[2] This proposal was criticised by some respondents as being unduly complicated; and, while we have as yet formed no final views on any of the issues raised in the double jeopardy paper, we do not think such a criterion would be appropriate in the context of prosecution appeals. In our view the new right of appeal should be confined to prosecutions for those offences that are *legally categorised* as the most serious, irrespective of the facts of the individual case.

7.7 There are various ways in which the list of qualifying offences might be compiled. One would be to include only those offences that can only be tried on indictment; another, to include only those that carry a maximum sentence of some minimum severity (say, at least five or seven years' imprisonment). Our provisional preference, however, is to follow the precedent of the provisions in the Criminal Justice Act 1988 which enable the Attorney-General to refer a *sentence* to the Court of Appeal on the ground that it appears to be unduly lenient.[3] These provisions are more relevant in the present context than those enabling the Attorney-General to refer a point of law after an acquittal, because, like the right of appeal we propose, they have direct consequences for the individual defendant. It seems appropriate that the prosecution should have the right to appeal against a terminating ruling in those cases, and only those, where, had there been a conviction, there would have been power to refer the sentence.[4]

7.8 The power to refer an unduly lenient sentence now extends to

(1) offences triable only on indictment;[5]

(2) indecent assault, making a threat to kill, and cruelty to a child (and attempts to commit, or incitement of, these offences);[6] and

[2] Double Jeopardy (1999) Consultation Paper No 156, paras 5.18 – 5.29.

[3] Criminal Justice Act 1988, s 36: see para 2.8 above.

[4] In his evidence to the House of Commons Select Committee on Home Affairs enquiry into double jeopardy, the DPP, David Calvert-Smith QC, said that he was attracted to the use of this as the criterion of seriousness in relation to our proposal for a new evidence exception to the double jeopardy rule: Home Affairs Select Committee, The Double Jeopardy Rule (1999–2000) HC 190, Minutes of Evidence, p 3 (question 14).

[5] Criminal Justice Act 1988, s 35(3)(b)(i).

[6] Criminal Justice Act 1988 (Reviews of Sentencing) Order 1994 (SI 1994 No 119).

(3) cases transferred to the Crown Court under the serious fraud provisions.[7]

These categories can be extended by order.

7.9 **We provisionally propose that the new right of appeal should be available only where, had the defendant been convicted of the offence (or any of the offences) of which he or she is acquitted, the Attorney-General would have had power to refer the sentence to the Court of Appeal on the ground that it was unduly lenient.**

LEAVE AND CONSENT REQUIREMENTS

7.10 All forms of appeal on indictment (save a reference to the Court of Appeal from the Criminal Cases Review Commission) are subject to a leave requirement. Leave may be granted by the trial judge, or by the full Court of Appeal, but, in practice, leave is generally determined by a single judge of the Court of Appeal.[8] In our view, there is no reason why a prosecution appeal should be given a higher procedural status than a defence appeal, which is subject to the requirement for leave. It would be contrary to the spirit of the Article 6 principle of equality of arms to give the prosecution privileged access to the Court of Appeal. **We provisionally propose that there should be a leave requirement, in the same form as for existing rights of appeal to the Court of Appeal, in respect of prosecution appeals**.[9]

7.11 Should there be an additional hurdle for the prosecution to surmount before it could appeal, such as obtaining the consent of the Attorney-General or the Director of Public Prosecutions? We do not consider that any such requirement would be appropriate or desirable, save in those cases where the prosecution itself had to have the consent of one or other of these officers. It would inevitably lead to further delay. The vast majority of prosecutions are in the hands of the CPS. It would be reasonable to expect the CPS to provide the necessary internal checks on inappropriate or ill-considered appeals. If it did not, we would expect the Court of Appeal, in giving judgment on appeals falling within those descriptions, to make it clear that it was expected to do so in the future. It would be reasonable to suppose that comparatively few potential appeals would therefore be winnowed out by the further consent stage. If that were the case, then the additional delay occasioned by the consent requirement would not be justified.[10]

[7] Or where a charge has been transferred, then dismissed under the Criminal Justice Act 1987, s 6(1), then further proceeded with on the basis of a voluntary bill of indictment: Criminal Justice Act 1988 (Reviews of Sentencing) Order 1995 (SI 1995 No 10).

[8] Under Criminal Appeal Act 1968, s 31.

[9] It would therefore include provision for an unsuccessful application for leave to be renewed to the full Court of Appeal.

[10] In our report Consents to Prosecution (1998) Law Com No 255, at paras 6.37, 6.46, 6.52 – 6.54, we set out three categories of *offences* in respect of which we recommended that there be a consent provision. It cannot be argued that there is a parallel between any of those categories and the decision to seek leave to appeal against a terminating ruling.

7.12 Where, however, the consent of the Attorney-General or another officer was required for the initiation of the prosecution in the first place, different considerations might arise. It is arguable that, if a consent is necessary to initiate a prosecution, the same consent should be required before the Crown appeals against a ruling, the result of which, if the appeal is successful, would be a new trial.

7.13 **We provisionally consider that it would generally be neither necessary nor desirable to introduce a further check on the exercise by the prosecution of its rights of appeal, such as a requirement for the Attorney-General's consent or that of the Director of Public Prosecutions; but we invite views on whether, where the consent of any person was needed to initiate the prosecution, that person's consent should be required before the prosecution could appeal against a ruling.**

TIME LIMITS FOR APPLICATIONS FOR LEAVE

7.14 The present regime for a prosecution or defence appeal against a ruling at a preparatory hearing requires the party appealing to make an application to the trial judge for leave to appeal within two days of the ruling, or within seven days to the Court of Appeal.[11] Other, prosecution only, appeals require even stricter deadlines. If it wishes to appeal against a grant of bail, the Crown must so indicate orally at the hearing itself.[12]

7.15 We see no reason to disturb the present arrangement for the prosecution right of appeal in respect of preparatory hearings. The principal difference between this category and the others we provisionally propose is that the prosecution can appeal without the entire proceedings necessarily being terminated. Where the ruling is not made at a preparatory hearing, and is a terminating one, the closer analogue is with the appeal against bail, in that a decision as to what should happen to the defendant must be made immediately. We therefore consider that the prosecution should be required to indicate at the hearing, immediately after the ruling is given, that it is minded to appeal. Such an indication should be followed within a short time, say seven days, by a properly argued notice of appeal, or a clear indication that it is not intended to proceed with the appeal.

7.16 **We provisionally propose that**

(1) in respect of appeals arising from a preparatory hearing, the requirements for notice of an application for leave to appeal should be as they are in the current law; but

(2) in respect of other appeals against terminating rulings, the prosecution should be required

[11] Criminal Justice Act 1987 (Preparatory Hearings) (Interlocutory Appeals) Rules 1988 (SI 1988 No 1700) r 3; Criminal Procedure and Investigations Act 1996 (Preparatory Hearings) (Interlocutory Appeals) Rules 1997 (SI 1997 No 1053) r 3.

[12] Bail (Amendment) Act 1993, s 1(4).

(a) to indicate at the hearing itself that it is minded to appeal against the ruling; and

(b) within seven days of the ruling, to serve a full notice of application for leave to appeal on the trial judge and/or the Court of Appeal.

DETENTION OF DEFENDANTS PENDING APPEAL

7.17 In respect of the existing prosecution rights of appeal to the House of Lords from both the Divisional Court and the Court of Appeal, there is a power for the court appealed against to order the detention of the appellant pending appeal, and to release him or her from that detention on bail.[13] Our understanding is that the power to detain is comparatively rarely used.[14] These provisions, however, only apply where, but for the decision of the court appealed against, the defendant would be liable to be detained. The power to detain ceases at the expiration of the time for which he or she would have been liable to be detained in the absence of the finding in his or her favour on appeal. Because this situation only arises where the court appealed against is itself an appellate court, the phrase "liable to be detained" can only refer to a liability to be detained pursuant to the sentence of the first instance court, or a sentence passed by a court in respect of separate proceedings. The situation in respect of a prosecution right of appeal against a first instance decision is somewhat different. It is true that a defendant who had been remanded in custody before and during the trial would, in all likelihood, continue to be held on remand for the duration of the trial. That is not the same as being "liable" to be detained in pursuance of a proper sentence of the court, which is the situation covered by the existing provisions. A person who is not subject to a sentence may only be detained for a purpose which is sanctioned by some other provision. Further, regard must be had to Article 5 of the ECHR which, in virtually all instances, envisages detention, otherwise than pursuant to a sentence, in circumstances which are paralleled by the provisions of the Bail Act.[15]

7.18 In our view it would be unsatisfactory for a person, who was not admitted to bail in advance of the trial, automatically to have bail whilst a prosecution appeal is pending against his or her directed acquittal, provided that those reasons continue, or new ones arise which would have resulted in bail being refused prior to the first trial. This is the more so as we envisage that the outcome of any successful prosecution appeal would be a retrial. Were it otherwise, the procedure for prosecution appeals followed by a retrial could be readily thwarted by a defendant absconding or intimidating witnesses who may well be required to give evidence in any retrial, should the prosecution succeed. A defendant would only have been remanded in custody before the trial was terminated for a good reason, compliant with Article 5. Were that reason to persist after termination,

[13] Criminal Appeal Act 1968, s 37; Administration of Justice Act 1960, s 5(1).

[14] As, accordingly, is the power to release from that detention on bail.

[15] Subject to our final recommendations following our consultation on Bail and the Human Rights Act 1998 (1999) Consultation Paper No 157.

any detention would be within Article 5. **We provisionally propose that the court should have the power to detain the defendant pending the hearing of a prosecution appeal.**

7.19 A question which arises is whether such a power should be limited so that the grounds for detention, rather than release on bail (with or without conditions), included *only* the avoidance of the risk of absconding or intimidating witnesses, or whether the grounds for detention should replicate the grounds for refusing bail in advance of the first instance trial – for example, to prevent the defendant offending while on bail, or for his or her own protection.[16] If the latter option is adopted, it would merely involve extending the right to bail as it presently exists in the Bail Act 1976. The former would introduce a more extensive right to bail for a defendant pending appeal than that which applies to other (unconvicted) defendants. **We provisionally propose that, pending the hearing of a prosecution appeal, the defendant should have the right to bail on the same basis as other unconvicted defendants.**

TIME LIMITS ON THE HEARING OF APPEALS

7.20 As the circumstances in which we propose a right of appeal by the prosecution are limited to specific rulings which have already been the subject of detailed argument, there is less likely to be any good reason for delaying bringing the appeal on for hearing. This will be the more so if the defendant is in custody pending the outcome of the appeal, despite having been acquitted. The arguments on appeal will be the same as, or similar to, those before the judge, with the addition of arguments relating to matters such as the judge's scope for the exercise of discretion and the desirability of a retrial, and frequently, in more serious cases, will have been argued at the trial with the assistance of written skeleton arguments exchanged and submitted in advance. All that need be obtained specifically for the appeal hearing would be the transcript of the judge's ruling, which could ordinarily be ordered from the shorthand writers by the Crown Court as soon as the prosecution submitted an application for leave to appeal.

7.21 Where the defendant is in custody pending appeal, we can see no good reason why there should not be a custody time limits regime for the hearing of the appeal. The experience of the custody time limits regime has shown the value of strict timetables in encouraging due expedition. Further, it is an important element in demonstrating compliance with the provision in Article 5 requiring a person not to be held in detention for an excessive time. In our view, there should be a similar provision in respect of prosecution appeals.

7.22 **We provisionally propose that there should be a time limit in all cases where the defendant is remanded in custody, to run between the conclusion of the trial and the conclusion of the appellate process before the Court of Appeal. We invite views on what the time limit should be,**

[16] Bail Act 1976, s 4 and Sched 1.

but provisionally suggest something of the order of two months. Unless the Court of Appeal grants leave for further time, two months is the period currently allowed for a defendant to be arraigned on a new indictment when the Court of Appeal allows an appeal against conviction and orders a retrial.[17]

7.23 By "the conclusion of the appellate process", we mean the upholding or dismissal of the appeal, or the refusal of leave to appeal and the lapsing of the time limit for renewing the application to a full court. We do not think it would be desirable to introduce separate time limits for the determination of leave and the determination of any subsequent substantive appeal, because to do so would limit the freedom of the Registrar of Criminal Appeals to list leave applications and substantive hearings at the same time.[18]

7.24 The custody time limit regime provides for the possibility, in limited circumstances, of an extension to the time limit. Although we would expect its use to be very limited, there seems to us to be a good case for allowing a similar extension in respect of the prosecution right of appeal, to deal with a rare case in which an inflexible time limit might not be conducive to justice. It is important that, in exercising such a power, the Court of Appeal should have regard to the overall "reasonable time" requirement of Articles 5 and 6. We would particularly welcome views on what the criteria for such an extension should be. For the purposes of our provisional proposal, we echo those relating to custody time limits, but limit the "good and sufficient" limb in accordance with an interests of justice test. **We provisionally propose that the Court of Appeal should have power to extend the custody time limit for the hearing of the appeal if the prosecution had exercised due diligence in promoting the hearing of the appeal, *and* there was a good and sufficient reason to extend the limit in the interests of justice.**

7.25 Article 6 requires a criminal trial to take place within a reasonable time. There is an argument for an additional, albeit less strict, timetable applicable to all prosecution appeals, not just those in which the defendant is held in custody. **We invite views on whether, in addition to a custody time limit, there should be a time limit within which all prosecution appeals must be heard, whether or not the defendant is in custody.**

TIME LIMITS ON RETRIALS

7.26 **We provisionally propose that there should be a time limit of two months for the defendant to be arraigned on a new indictment, if the Court of Appeal orders a retrial.** This replicates the current position where the Court of Appeal orders a retrial after quashing a conviction.[19] It does not impose a

[17] Criminal Appeal Act 1968, s 8(1).

[18] As is common in appeals from preparatory hearings.

[19] Criminal Appeal Act 1968, s 8(1). If the two months expires then the person who was to be retried may not be arraigned on the relevant indictment unless the Court of Appeal grants leave. Such leave shall not be granted unless the Court of Appeal is satisfied both that the prosecution has acted with all due expedition and that there is good and sufficient cause

timetable on the opening of the new trial in the Crown Court itself, and so there is a theoretical possibility that there could be significant delay between arraignment and the start of the trial proper. However, we are not aware of any complaints that retrials following the quashing of a conviction are subject to such delays. Nevertheless, **we invite views on whether the parallel existing provisions relating to retrials following the quashing of convictions work well.**

THE CRITERIA TO BE APPLIED BY THE COURT OF APPEAL

The interests of justice

7.27 Even if the Court of Appeal concluded that the judge's ruling was wrong, that would not be sufficient in itself to determine the appeal. Just as the Code for Crown Prosecutors permits proceedings to be instituted only where there is a realistic prospect of conviction *and* the public interest requires a prosecution, so it would in our view be wrong for a prosecution appeal to result in a retrial without the court first considering whether, in all the circumstances of the case, this is in the interests of justice. Something may have happened between the time that the original trial was terminated and the appeal hearing that substantially undercuts the prosecution case, such that the Court of Appeal considers that there is now no prima facie case; or the health of the defendant might have deteriorated to such an extent that it was no longer in the interests of justice that he or she should be further prosecuted, after the delay necessitated by the appeal. Allowing the Court of Appeal to decline to order a retrial in such circumstances would provide the court with the means to do justice in unusual and unforeseeable cases.

7.28 Another kind of case in which the court might conclude that the interests of justice do not require a retrial is that in which the offence charged is comparatively minor. We proposed above that the right of appeal should be confined to certain more serious offences;[20] but not every example of conduct falling within one of these offences is necessarily of the gravest culpability. If, contrary to our proposal, the right of appeal were to extend to *any* offence tried on indictment, the seriousness of the offence would obviously carry more weight in determining where the interests of justice lie.

7.29 Yet another possible reason for refusing a retrial is that, although the ruling was wrong, the prosecution's decision to offer no or no further evidence in the light of that ruling was questionable. It is possible that a prosecutor may decide on that course of action not because the ruling makes the prosecution case unsustainable but because it offers an opportunity to terminate a trial which, for whatever

for a retrial in spite of the lapse of time since the order for a retrial was made: s 8(1B)(i) and (ii). Further, where a person has been ordered to be retried but may not be arraigned without leave, he or she may apply to the Court of Appeal to set aside the order for retrial and to direct the court of trial to enter a judgment and verdict of acquittal of the offence for which he or she was ordered to be retried: s 8(1A).

[20] Para 7.9.

reason, is perceived as going badly and is therefore likely to fail – thus preserving the chance of a retrial, after a successful appeal, before a different judge and jury, and where the mishaps of the first trial may be avoided. In other words, the decision may have been dictated by tactics in circumstances where, but for the right of appeal, the prosecution would not have been terminated. We doubt that this situation would often arise. Nevertheless, we think prosecutors should be discouraged from regarding an appeal as an easy option, offering the opportunity to treat an erroneous, damaging, but not fatal ruling as a pretext for aborting a trial which is going badly in the hope of securing a retrial. We believe that it would be desirable for the legislation to make express provision that, where the trial was terminated by the prosecution's decision to offer no or no further evidence in the light of the ruling, one of the factors to be considered by the Court of Appeal in determining whether the interests of justice require a retrial is whether a reasonable prosecutor, properly mindful of his or her duty, would have taken that decision irrespective of the existence of a right of appeal.

The correctness of the ruling

7.30 The central task of the court in determining the appeal, however, will normally be to decide whether or not the judge's decision was correct, either as a matter of strict law or as an exercise of his or her discretion. We envisage that the approach of the court would mirror the approach to such issues presently adopted on appeals against conviction. In that context, the single statutory test is whether or not the conviction is "unsafe"; but the court will usually approach that question by first asking whether the rulings and directions complained of were right or wrong. Similarly, we expect that in hearing a prosecution appeal, the court would first ask itself whether the ruling appealed against was right or wrong.

7.31 It does not follow that the court should be required to make a formal determination of that issue, as well as deciding whether (if the ruling was wrong) a retrial would be in the interests of justice. The existence of such a requirement would present difficulty where the court thought the ruling was wrong but a retrial would *not* be in the interests of justice. In such a case the court would presumably either formally overturn the ruling, but allow the verdict of acquittal to stand, or overturn the verdict but decline to order a retrial. In our view, either of these outcomes would be unjust. The effect of the court's order would in either case be to quash the ruling which had led directly to the defendant's acquittal, thus depriving that acquittal of any legal basis, without allowing the defendant's guilt or innocence to be established at a retrial. This would leave the defendant in an invidious position, akin in some respects to a verdict of "not proven" which has been scrupulously eschewed in the law of England and Wales.

7.32 In our view, therefore, the question whether the appeal should succeed should be determined by a single compendious test, namely whether it is in the interests of justice that the acquittal be overturned and a retrial ordered. One factor, and normally the most important, for the court to consider in determining that issue would be whether the ruling was right or wrong. But, in our view, the order of the court must be limited *either* to the appeal being dismissed and the acquittal

standing, *or* the appeal being allowed and a retrial ordered, in which the defendant would start with the advantage of the presumption of innocence.[21]

Provisional proposals

7.33 **We provisionally propose**

(1) that the sole criterion to be applied by the Court of Appeal in determining an appeal against a terminating ruling should be whether, in all the circumstances of the case, it is in the interests of justice that the acquittal should be quashed and a retrial ordered; but

(2) that, in determining whether that criterion is satisfied, the court should be required to consider, together with any other factors that it may consider to be relevant,

(a) whether the ruling appealed against was correct, and

(b) where the trial was terminated by a decision of the prosecution to offer no or no further evidence, whether that decision was one which was open to a competent and conscientious prosecutor.

REPORTING RESTRICTIONS

7.34 **We provisionally propose that there should be an automatic ban on the reporting of an appeal until either the appeal is dismissed, or, if it is allowed, the retrial has finished, but that the Court of Appeal should have power to vary the order.** If there were no such restrictions, there would be a substantial risk of a jury at a retrial being prejudiced by publicity given to the arguments used in, and the outcome of, the appeal. There would be no restriction on reporting the retrial in the normal way, to the extent that it could be done without mentioning the appeal. We do not believe that such restrictions would amount to a breach of Article 10, any more than do the present restrictions in respect of prosecution appeals from rulings at preparatory hearings, which this proposal closely follows.

[21] We do not consider that the use of such a test would detract from the value of the court's judgments as precedents. In respect of a conviction appeal, the court may currently find that the judge's ruling was wrong, but that the conviction was nevertheless safe. Such a finding does not undermine the value of the finding in relation to the ruling.

PART VIII
PROVISIONAL PROPOSALS AND CONSULTATION ISSUES

In this part we list our provisional proposals and conclusions, and other issues on which we seek respondents' views. More generally, **we invite comments on *any* of the matters contained in, or issues raised by, this paper, and any other suggestions that respondents may wish to put forward. For the purpose of analysing the responses it would be very helpful if, as far as possible, they could refer to the numbering of the paragraphs in this part.**

HOW MUCH WOULD PROSECUTION APPEALS BE USED?

1. We invite views on whether the prosecution rights of appeal discussed in this paper, if enacted, would be used to a significant extent.

(paragraph 1.26)

THE PRINCIPLES AFFECTING THE AVAILABILITY OF PROSECUTION APPEALS

2. We provisionally conclude that the proper approach to the question whether to grant the prosecution a particular right of appeal is

   (1) to identify the extent (if any) to which that right of appeal would enhance or detract from the aim of ensuring accuracy of outcome;

   (2) to identify the extent (if any) to which it would detract from process aims; and,

   (3) by balancing these factors, to come to a conclusion whether the trial process would thus be rendered unfair.

(paragraph 3.21)

TERMINATING AND NON-TERMINATING RULINGS

3. We provisionally conclude

   (1) that the prosecution should not be given a right to appeal against a non-terminating ruling made during the course of a trial; but

   (2) that a prosecution right of appeal against a terminating ruling made during the course of a trial is capable of being fair.

(paragraph 4.18)

PROSECUTION APPEALS IN ADVANCE OF THE TRIAL

Preparatory hearings

4. We provisionally conclude that the present preparatory hearing regimes, under which either side may appeal a ruling in advance of the start of the trial before the jury, constitute elements of a fair trial procedure.

(paragraph 5.16)

Statutory pre-trial hearings

5. We provisionally conclude that there is no sound basis for extending the rights of appeal under the preparatory hearing regimes to non-terminating rulings made under the pre-trial hearing regime.

(paragraph 5.24)

Terminating rulings

6. We provisionally propose that (subject to the safeguards referred to below) there should be a prosecution right of appeal against a terminating ruling made before the start of the trial proper, but not covered by the existing right of appeal against a ruling at a preparatory hearing.

(paragraph 5.29)

PROSECUTION APPEALS AND THE TRIAL PROPER

Terminating hearings during the prosecution case

7. We provisionally propose that (subject to the safeguards referred to below) there should be a prosecution right of appeal against a terminating ruling made during the trial up to the conclusion of the prosecution evidence.

(paragraph 6.7)

8. We invite views on whether there should be a special rule in relation to terminating rulings on disclosure, to allow prosecution appeals after the close of the prosecution case.

(paragraph 6.9)

Submissions of no case to answer

9. We provisionally conclude that there should be no right of appeal by the prosecution against a ruling of no case to answer made at the conclusion of the prosecution case.

(paragraph 6.20)

Jury acquittals

10. We provisionally conclude that there should be no right of appeal by the prosecution against a jury's verdict of not guilty, even where there has been a misdirection by the trial judge which may have favoured the defence.

(paragraph 6.26)

ANCILLARY AND PROCEDURAL MATTERS

The offences to which the right of appeal should apply

11. We provisionally propose that the new right of appeal should be available only where, had the defendant been convicted of the offence (or any of the offences) of which he or she is acquitted, the Attorney-General would have had power to refer the sentence to the Court of Appeal on the ground that it was unduly lenient.

(paragraph 7.9)

Leave and consent requirements

12. We provisionally propose that there should be a leave requirement, in the same form as for existing rights of appeal to the Court of Appeal, in respect of prosecution appeals.

(paragraph 7.10)

13. We provisionally consider that it would generally be neither necessary nor desirable to introduce a further check on the exercise by the prosecution of its rights of appeal, such as a requirement for the Attorney-General's consent or that of the Director of Public Prosecutions; but we invite views on whether, where the consent of any person was needed to initiate the prosecution, that person's consent should be required before the prosecution could appeal against a ruling.

(paragraph 7.13)

Time limits for applications for leave

14. We provisionally propose that

    (1) in respect of appeals arising from a preparatory hearing, the requirements for notice of an application for leave to appeal should be as they are in the current law; but

    (2) in respect of other appeals against terminating rulings, the prosecution should be required

        (a) to indicate at the hearing itself that it is minded to appeal against the ruling; and

        (b) within seven days of the ruling, to serve a full notice of application for leave to appeal on the trial judge and/or the Court of Appeal.

(paragraph 7.16)

Detention of defendants pending appeal

15. We provisionally propose that the court should have the power to detain the defendant pending the hearing of a prosecution appeal.

(paragraph 7.18)

16. We provisionally propose that, pending the hearing of a prosecution appeal, the defendant should have the right to bail on the same basis as other unconvicted defendants.

(paragraph 7.19)

Time limits on the hearing of appeals

17. We provisionally propose that there should be a time limit in all cases where the defendant is remanded in custody, to run between the conclusion of the trial and the conclusion of the appellate process before the Court of Appeal. We invite views on what the time limit should be, but provisionally suggest something of the order of two months.

(paragraph 7.22)

18. We provisionally propose that the Court of Appeal should have power to extend the custody time limit for the hearing of the appeal if the prosecution had exercised due diligence in promoting the hearing of the appeal, *and* there was a good and sufficient reason to extend the limit in the interests of justice.

(paragraph 7.24)

19. We invite views on whether, in addition to a custody time limit, there should be a time limit within which all prosecution appeals must be heard, whether or not the defendant is in custody.

(paragraph 7.25)

Time limits on retrials

20. We provisionally propose that there should be a time limit of two months for the defendant to be arraigned on a new indictment, if the Court of Appeal orders a retrial. We invite views on whether the parallel existing provisions relating to retrials following the quashing of convictions work well.

(paragraph 7.26)

The criteria to be applied by the Court of Appeal

21. We provisionally propose

    (1) that the sole criterion to be applied by the Court of Appeal in determining an appeal against a terminating ruling should be whether, in all the circumstances of the case, it is in the interests of justice that the acquittal should be quashed and a retrial ordered; but

(2) that, in determining whether that criterion is satisfied, the court should be required to consider, together with any other factors that it may consider to be relevant,

(a) whether the ruling appealed against was correct, and

(b) where the trial was terminated by a decision of the prosecution to offer no or no further evidence, whether that decision was one which was open to a competent and conscientious prosecutor.

(paragraph 7.33)

Reporting restrictions

22. We provisionally propose that there should be an automatic ban on the reporting of an appeal until either the appeal is dismissed, or, if it is allowed, the retrial has finished, but that the Court of Appeal should have power to vary the order.

(paragraph 7.34)