

**Legislative Council Panel on
Administration of Justice and Legal Services**

Proposal to Amend the Criminal Procedure Ordinance (Cap. 221)

I. PURPOSE

This paper briefs Members on Government's proposal to introduce legislative amendments to the Criminal Procedure Ordinance (Cap. 221) ("CPO") to provide for a statutory appeal procedure for the prosecution to appeal against rulings of no case to answer by judges of the Court of First Instance ("CFI") in criminal trials, the key features of the legislative proposal and the outcome of the consultation exercise conducted from 12 January to 2 February 2023 on the legislative proposal.

II. BACKGROUND

2. In the judgment of *Re Secretary for Justice's Reference Nos. 1-3 of 2021* [2022] 5 HKLRD 886 ("**the Judgment**") handed down on 28 October 2022, the Court of Appeal ("CA") overturned the rulings of two judges in the CFI and held that each of the cases under consideration had resulted in a serious miscarriage of justice in that the judges concerned impermissibly usurped the function of the juries and incorrectly withdrew the cases before their respective juries could consider them.

3. The CA made an observation that there is at present no statutory procedure for the prosecution to appeal against CFI's judges' rulings of no case to answer ("**the Lacuna**") and that there is an urgent need for the statutory provisions to be reformed in this respect.

4. Under the current statutory regime, if a CFI judge has made an incorrect ruling of no case to answer and acquitted the defendant, the best that the prosecution can do is to refer the matter to the CA for clarification of the legal principles involved under section 81D of the CPO. The acquitted accused cannot be retried, even if the judge had plainly erred. In the cases

before the CA, the prosecution did invite the court to provide guidance on the viable way of preserving the *status quo* in similar future cases and one of the proposals under the existing statutory framework was for the trial judge to make a reservation of a question of law, namely whether there is a case to answer on the evidence adduced, for the consideration of the CA pursuant to section 81 of the CPO. It was nonetheless accepted that such a course was to be adopted sparingly and only in the most exceptional cases. As this approach cannot specifically address the Lacuna revealed by the Judgment, the CPO has to be urgently amended to put in place such an appeal procedure.

5. The CA considered that there is “*obviously considerable merit, therefore, in Hong Kong adopting a similar measure to that which operates in the United Kingdom*” (§§145-148 of the Judgment).

6. In the United Kingdom (“UK”), the Crown can appeal against a judge’s ruling of no case to answer under Part 9 of the Criminal Justice Act 2003 (“UK Act”), specifically section 58. After careful consideration of the Judgment, the Government proposes to provide for a statutory appeal procedure, making reference to Part 9 of the UK Act, for the prosecution to appeal against rulings of no case to answer by judges of the CFI in criminal trials by way of the legislative proposal. This aims to provide an immediate solution to fill the Lacuna mentioned in the Judgment so as to prevent further possible miscarriage of justice.

—— 7. A consultation exercise (as set out in **Annex A**) was conducted from 12 January to 2 February 2023. The Government received 11 submissions from respondents including those from the 2 legal professional bodies, 2 law schools and a number of Government Departments including those responsible for law enforcement and one other organisation.

8. In Part III of this Paper, we set out the key features of the legislative proposal, which may be subject to revision after further consideration of the comments received. In Part IV, we give an overview of the outcome of the consultation exercise and the comments received.

III. KEY FEATURES OF THE LEGISLATIVE PROPOSAL

9. The legislative proposal seeks to add new provisions to the CPO, making reference to the provisions in Part 9 of the UK Act with necessary modifications. Currently, criminal appeals are provided under Part IV of the CPO.

A. Scope

Right of appeal, level of court and types of trial

10. The legislative proposal will provide the prosecution with a right to appeal against a ruling of no case to answer by CFI judges in criminal trials. The appeal should be subject to the leave of the trial judge or the CA. The new appeal regime should apply to criminal trials in the CFI with or without a jury.

11. At the moment, the prosecution can challenge a ruling of no case to answer at both the District Court and Magistrates' Court levels. The new appeal procedure under the legislative proposal would not apply to criminal trials in the District Court or the Magistrates' Courts.

Rulings to be heard together

12. The rulings preceding the final ruling of no case to answer may well have been the reason or foundation of the no case ruling. If the prosecution is precluded from challenging the underlying rulings, it may be severely handicapped in appealing the ruling of no case. The legislative proposal will therefore provide that, where the ruling to be appealed against is one of no case to answer, the prosecution may at the same time nominate one or more other rulings which have been made by a judge(s) in relation to the trial on indictment and which relate to the offence(s) which are the subject of the appeal, and the other rulings will also be treated as the subject of the appeal.

B. Appeal mechanism

Timing of application

13. The legislative proposal will provide that the prosecution may not appeal in respect of the ruling of no case to answer unless following the making of the ruling, it (i) informs the court that it intends to appeal, or (ii) requests an adjournment to consider whether to appeal, and if such an adjournment is granted, it informs the court following the adjournment that it intends to appeal.

Acquittal guarantee

14. The legislative proposal will provide that at or before the time the prosecution informs the Court of its intention to appeal against a ruling of no case to answer, the prosecution must give a guarantee of acquittal, such that in the event that the leave to appeal the CA is not obtained or the appeal is abandoned before determination by the CA, the defendant must be acquitted. If this step is not followed, there can be no appeal.

Suspension of effect of ruling

15. The suspension of the effect of the ruling of no case to answer is important as it maintains the *status quo* and prevents the judge(s) from pressing on and directing the jury to acquit. The legislative proposal will therefore provide that, where the prosecution informs the court of its intention to appeal, the ruling is to continue to have no effect in relation to the offence(s) which are the subject of the appeal whilst the appeal is pursued.

Expedited and non-expedited appeals

16. The legislative proposal will provide that, where the prosecution informs the court of its intention to appeal, the court must decide whether or not the appeal should be expedited, so that urgent cases can be heard swiftly and, if successful, the trials can continue without delay.

Determination of appeals

17. The legislative proposal will provide that the CA may confirm, reverse or vary any ruling to which the appeal relates. Where the CA confirms the ruling that there is no case to answer in relation to an offence, it must order that the defendant be acquitted of that offence.

18. Where the CA reverses or varies the ruling that there is no case to answer in relation to an offence, it must order that (i) proceedings for that offence may be resumed in the CFI, or (ii) a fresh trial may take place in the CFI for that offence, or (iii) the defendant be acquitted of that offence. But the CA may not make an order in (iii), unless it considers that the defendant could not receive a fair trial if an order in (i) or (ii) were made.

Reversal of rulings

19. The legislative proposal will provide that the CA may not reverse a ruling of no case to answer unless it is satisfied that the ruling was wrong in law, involved an error of law or principle, or was one that it was not reasonable for the judge(s) to have made.

Costs

20. The legislative proposal will provide that the CA may order that costs of the defendant be paid by the prosecution if leave to appeal is not obtained, the appeal is abandoned before it is determined by the CA, or the CA confirms the ruling on appeal. Where the CA reverses or varies the ruling on appeal, it may make such order as to costs to be paid by the defendant to such person as it considers just and reasonable.

Restrictions on reporting

21. Under the legislative proposal, restrictions will be imposed on the reporting of matters relating to the prosecution's appeal against a ruling of no case to answer and any person in contravention will be guilty of an

offence. This would prevent the jury from being influenced and the defendant from being prejudiced by adverse publicity.

C. Procedural rules

22. We also propose that, following the passing of the legislative proposal, procedural rules should be implemented by enacting new subsidiary legislation to facilitate smooth operation of the new appeal regime in practice.

IV. OUTCOME OF THE CONSULTATION EXERCISE

23. On the whole, most respondents support the legislative proposal to provide for a statutory appeal procedure for the prosecution to appeal against rulings of no case to answer by judges of the CFI in criminal trials. They welcome the proposal as timely, reasonable and necessary.

24. In terms of implementation, some respondents commented that it is not appropriate to adopt the UK provisions entirely. Also, since the legislative proposal is confined to appeals of rulings of no case to answer, a much simpler implementation than that of Part 9 of the UK Act may be warranted. There are also some comments on the technical aspects regarding the implementation of the new appeal mechanism.

25. A summary of the major comments received are set out at
Annex B.

V. WAY FORWARD

26. The Government will carefully review the respondents' comments to consider how to take forward the legislative proposal. Subject to further deliberations, the Government aims to introduce the bill containing the legislative proposal into the Legislative Council in the second quarter of 2023.

VI. ADVICE SOUGHT

27. Members are invited to note and comment on the legislative proposal.

Department of Justice
February 2023

Consultation Paper on the Criminal Procedure (Amendment) Bill

INTRODUCTION

The Department of Justice (“**DoJ**”) would like to invite comments on the proposed Criminal Procedure (Amendment) Bill (“**the proposed Bill**”) which seeks to provide for a statutory appeal procedure for the prosecution to appeal against rulings of no case to answer by judges of the Court of First Instance (“**CFI**”) in criminal trials.

BACKGROUND

2. In the judgment of *Re Secretary for Justice’s Reference Nos. 1-3 of 2021* [2022] HKCA 1635 (“**the Judgment**”) handed down on 28 October 2022, the Court of Appeal (“**CA**”) overturned the rulings of two judges in the CFI and held that each of the cases under consideration had resulted in a serious miscarriage of justice in the sense that the judges concerned impermissibly usurped the function of the juries and incorrectly withdrew the cases before their respective juries could consider them.

3. The CA made an observation that there is at present no statutory procedure for the prosecution to appeal against CFI’s judges’ rulings of no case to answer (“**the Lacuna**”) and that there is an urgent need for the statutory provisions to be reformed in this respect.

4. Under the current statutory regime, if a CFI judge has made an incorrect ruling of no case to answer and acquitted the defendant, the best that the prosecution can do is to refer the matter to the CA for clarification of the legal principles involved under section 81D of the Criminal Procedure Ordinance (“**CPO**”). The acquitted accused cannot be retried, even if the judge had plainly erred. In the cases before the CA, the prosecution did invite the court to provide guidance on the viable way of preserving the status quo in similar future cases and one of the proposals under the existing statutory

framework was for the trial judge to make a reservation of a question of law, namely whether there is a case to answer on the evidence adduced, for the consideration of the CA pursuant to section 81 of the CPO. The CA accepted that such a course was to be adopted “*sparingly*” and only in the “*most exceptional cases*”. The CPO has to be urgently amended to put in place such an appeal procedure in order to fill the Lacuna as exposed by the Judgment.

5. The CA considered that there is “*obviously considerable merit, therefore, in Hong Kong adopting a similar measure to that which operates in the United Kingdom*” (§§145-148 of the Judgment).

PURPOSE

6. In the United Kingdom (“UK”), the Crown can appeal against a judge’s ruling of no case to answer under Part 9 of the Criminal Justice Act 2003 (“UK Act”) (a copy of which is at **Annex**), specifically section 58. After careful consideration of the Judgment, the DoJ proposes to provide for a statutory appeal procedure similar to that under Part 9 of the UK Act for the prosecution to appeal against rulings of no case to answer by judges of the CFI in criminal trials by way of the proposed Bill. This aims to provide an immediate solution to fill the Lacuna mentioned in the Judgment so as to prevent further possible miscarriage of justice.

7. The DoJ would like to seek the views of the Judiciary, legal profession and other relevant stakeholders on the proposed Bill.

OVERVIEW OF THE PROPOSED BILL

8. The proposed Bill seeks to add new provisions to the CPO, which are modelled on the provisions in Part 9 of the UK Act with modifications. In this regard, we set out in the following paragraphs an overview of the proposed Bill and issues on which we would like to seek your views and comments.

I. Scope

9. Currently, criminal appeals are provided under Part IV of the CPO. Sections 81A-81F provide for various types of prosecution's appeal, and sections 82-83Z govern appeals by defendants. We therefore propose to add new provisions to Part IV of the CPO after section 81A-81F, but before sections 82-83Z.

A. Right of appeal

10. As mentioned in paragraph 3 above, there is currently no statutory procedure for the prosecution to appeal against a ruling of no case to answer by CFI judges.

11. The UK Act provides a general right of appeal against rulings in relations to trials on indictment. Section 58 of the UK Act allows the Crown to appeal a ruling by the judge that: -

- (a) relates to one or more offences included in the indictment (section 58(1));
- (b) was made at any time until the start of the judge's summing-up (section 58(1), (13)-(14)); and
- (c) has the effect of terminating the trial, as explained in *R v Thompson & another* [2007] 1 WLR 1123, *R v Clark* [2008] 1 Cr App R 33 and *CPS v C, M and H* [2009] EWCA Crim 2614.

There is, therefore, no right of appeal against a judge misdirecting a jury in his summing-up.

12. In order to provide an immediate solution to fill the Lacuna mentioned in the Judgment so as to prevent further possible miscarriage of justice, we propose to confine the scope of this amendment exercise to appeals against a ruling of no case to answer by CFI judges in criminal trials only, instead of covering "a ruling by the judge that has the effect of

terminating the trial” which appears to be unnecessarily too wide for the present purpose. We therefore propose that the new provisions will be expressly confined to the ruling of no case to answer and only preconditions (a) and (b) of paragraph 11 be adopted without adopting the precondition (c) of paragraph 11. In line with adopting the precondition (b), we propose that there should be no right of appeal against a judge’s misdirection in a summing-up.

13. By virtue of section 57 of the UK Act, the right of appeal in the UK does not extend to a ruling that a jury should be discharged, or to a ruling that can be appealed to the CA by virtue of any other enactment. We propose that this should be adopted.

14. **DoJ invites views and comments on the proposed scope of the right of appeal under the new appeal regime set out in paragraphs 12 and 13 above.**

B. Level of court and types of trials

15. Section 57 of the UK Act provides that in relation to a trial on indictment, the prosecution is to have the rights of appeal to the CA for which provision is made by Part 9 and such appeal may be brought only with the leave of the trial judge or the CA. We propose to adopt a similar approach in Hong Kong for an appeal against a ruling of no case to answer by CFI judges. The appeal should be subject to the leave of the trial judge or the CA. As in the UK regime and in line with other appeals where leave can be granted by the trial judge or the CA, where leave is refused by the trial judge, the applicant can make a renewed application to the CA.

16. Under sections 41-42 of the CPO, all criminal cases in the CFI are to be tried by a judge and a jury, unless the Secretary for Justice files a motion that the case shall be tried before two judges and a jury (i.e. trial at bar). Article 46 of the Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region provides that in criminal proceedings in the CFI concerning offences endangering national security, the Secretary for Justice may issue a certificate

directing that the case shall be tried without a jury; the case shall be tried in the CFI without a jury by a panel of three judges. We propose that the new appeal regime should provide for appeals against a ruling of no case to answer by CFI judges in criminal trials with or without a jury.

17. The prosecution can challenge a no case to answer ruling of a District Court judge by way of case stated under section 84 of the District Court Ordinance (Cap. 336). For cases in the Magistrates' Courts, the prosecution can challenge a magistrate's ruling of no case to answer either by way of a review under section 104 of the Magistrates Ordinance (Cap. 227), or an appeal by way of case stated under section 105 of that Ordinance. We consider that it is not necessary to apply the new appeal procedure to criminal trials in the District Court or the Magistrates' Courts.

18. **DoJ invites views and comments on the proposed level of court and types of trials the rulings of which are to be subject to the new appeal regime.**

C. Rulings to be heard together

19. The rulings preceding the final ruling of no case to answer may well have been the reason or foundation of the no case ruling. If the prosecution is precluded from challenging the underlying rulings, it may be severely handicapped in overturning the decision on no case. The Court of Final Appeal made a ruling along this line in the case of *HKSAR v Milne John* [2022] HKCFA 22 in the context of the prosecution's appeal against the trial judge's termination of trial by ordering a permanent stay of proceedings. See §§20-25 of the judgment.

20. In accordance with section 58(7) of the UK Act, where the ruling is one of no case to answer, the prosecution may nominate other rulings that relate to the offence for the CA to consider. The prosecution must do so at the same time as it informs the Court of its intention to appeal. The other nominated rulings will be regarded as subject to the appeal.

21. DoJ proposes that the prosecution may at the same time nominates one or more other rulings which have been made by a judge(s) in relation to the trial on indictment and which relate to the offence(s) which are the subject of the appeal and the other ruling(s) will also be treated as the subject of the appeal. **DoJ invites views and comments on this proposal.**

II. Appeal mechanism

A. *Timing of application*

22. Section 58(4) of the UK Act provides that the prosecution may not appeal in respect of the ruling unless –

- (a) following the making of the ruling, it –
 - (i) informs the court that it intends to appeal, or
 - (ii) requests an adjournment to consider whether to appeal, and
- (b) if such an adjournment is granted, it informs the court following the adjournment that it intends to appeal.

23. We propose to adopt the same restrictions on the timing of making an appeal under section 58(4) of the UK Act. **DoJ invites views and comments on this proposal.**

B. *Acquittal guarantee*

24. Under the UK regime, at or before the time the Crown informs the Court that it intends to appeal, the prosecutor must give the guarantee of acquittal required by section 58(8)-(9) of the UK Act. If this step is not followed there can be no appeal (*R v LSA* [2008] 1 WLR 2881, *C, M and H & R v NT* [2010] WLR 2655).

25. The prosecutor must give the “acquittal guarantee” at or before informing the trial Court that it intends to appeal. The acquittal guarantee will usually be given orally in Court when the parties are present. Under

section 58(12) of the UK Act, where the prosecution has given the “acquittal guarantee”, and either of the conditions mentioned in section 58(9) of the UK Act is fulfilled, the judge or the CA must order that the defendant in relation to the offence or each offence concerned be acquitted of that offence. The conditions mentioned in section 58(9) are that (a) leave to appeal to the CA is not obtained, and (b) the appeal is abandoned before it is determined by the CA.

26. We propose that the arrangements under section 58(8), (9) and (12) of the UK Act be adopted. **The DoJ invites views and comments on this proposal.**

C. Suspension of effect of ruling

27. Pursuant to section 58(3) and (10) of the UK Act, when the prosecution informs the judge of the intention to appeal, or requests an adjournment to consider an appeal, the judge’s ruling of no case to answer is to have no effect and continues to be so whilst the appeal is pursued. This means that the ruling and any not guilty verdict resulting from it is suspended pending the outcome of the appeal.

28. Further, under section 58(11) of the UK Act, during suspension of the ruling, any consequences of the ruling are also to have no effect, the judge may not take any steps in consequence of the ruling, and if he does so, any such steps are also to have no effect.

29. The suspension of the effect of the ruling of no case to answer is important as it maintains the *status quo* and prevents the judge(s) from pressing on and directing the jury to acquit. Since the judge(s) should not be allowed to proceed in any way, such consequences or steps taken in consequence of the ruling should remain to have no effect even when the appeal is unsuccessful or abandoned before determination. In the event the appeal is unsuccessful or abandoned before determination, the CA will deal with the matter and direct an acquittal as per section 58(12) of the UK Act.

30. We therefore propose that the arrangements under section 58(3), (10) and (11) of the UK Act be adopted. **The DoJ invites views and comments on this proposal.**

D. Expedited and non-expedited appeals

31. In accordance with section 59 of the UK Act, where the prosecution informs the court of its intention to appeal, the judge must decide whether or not the appeal should be expedited, so that in urgent cases the appeal can be heard swiftly and, if successful, the trial can continue without further delay.

32. It would be in the interest of justice that appeals of this nature be determined as soon as practicable. It avoids unnecessary discharge of the jury, especially where the trial is long and complex and involves a significant amount of public resources. We therefore propose that a provision similar to section 59 of the UK Act should be adopted. **The DoJ invites views and comments on this proposal.**

E. Determination of appeals

33. In accordance with section 61 of the UK Act, on appeal, the CA may confirm, reverse or vary any ruling to which the appeal relates. Where the CA confirms the ruling that there is no case to answer, it must, in respect of the offence or each offence which is the subject of the appeal, order that the defendant in relation to that offence be acquitted of that offence. Where the CA reverses or varies the ruling that there is no case to answer, it must in respect of the offence or each offence which is subject of the appeal, do any of the following –

- (a) order that proceedings for that offence may be resumed in the Crown Court,
- (b) order that a fresh trial may take place in the Crown Court for that offence,
- (c) order that the defendant in relation to that offence be acquitted of that offence.

34. But the CA may not make an order in (c) in respect of an offence unless it considers that the defendant could not receive a fair trial if an order in (a) or (b) were made.

35. We propose this arrangement under section 61 of the UK Act be adopted and the references to “Crown Court” should be replaced by the CFI. **The DoJ invites views and comments on this proposal.**

F. Reversal of rulings

36. Section 67 of the UK Act provides that the CA may not reverse a ruling unless it is satisfied that: -

- (a) the ruling was wrong in law;
- (b) the ruling involved an error of law or principle; or
- (c) the ruling was a ruling that it was not reasonable for the judge to have made.

37. We propose that the three criteria under section 67 of the UK Act for the reversal of a no case to answer ruling should be adopted. **The DoJ invites views and comments on this proposal.**

G. Costs

38. Costs provisions pertaining to specific types of prosecution’s appeal can be found in the CPO, for example, sections 81A(5), 81D(3) and 81F(6).

39. Pursuant to section 69(2) of the UK Act, the CA may make a costs order in favour of the defendant on appeal under Part 9 of the UK Act. Section 69(3) provides that where the CA reverses or varies a ruling on an appeal under Part 9 of the UK Act, it may make such order as to the costs to be paid by the defendant, to such person as may be named in the order, as it considers just and reasonable. Under section 69(4) of the UK Act, the costs

ordered to be paid by the defendant may include the reasonable cost of any transcript of a record of proceedings made in accordance with rules of court.

40. We consider it appropriate to make similar provision to provide that the CA may make such order as to costs to be paid by the defendant to such person as it considers just and reasonable when the CA reverses or varies the ruling on appeals.

41. As for the costs of transcripts, they would in any event be covered by the CA's costs order if they are properly obtained (i.e. just and reasonable). It is also noted that there is no similar stipulation for transcripts in other costs provisions under the CPO or the Costs in Criminal Cases Ordinance (Cap. 492). There does not appear to be any compelling reason to expressly include the costs of transcripts in the costs provisions specifically for this type of appeal.

42. **The DoJ invites views and comments on this proposal.**

H. Restrictions on reporting

43. Sections 71-72 of the UK Act provide for restrictions and offences on reporting of (a) anything done under the provisions governing general right of appeal in respect of rulings or expediting of appeals (section 71(1)(a)), or (b) an appeal to the CA under Part 9 or to the Supreme Court in relation to an appeal under Part 9 (including any application for leave to make such appeal) (section 71(1)(b)-(d)).

44. The reporting restrictions under sections 71-72 of the UK Act would prevent the jury from being influenced and the defendant from being prejudiced by adverse publicity. Similar provisions on reporting restriction in relation to bail proceedings can be found in section 9P of the CPO. We therefore propose that imposition of reporting restrictions similar to those under sections 71-72 of the UK Act should be adopted. **The DoJ invites views and comments on this proposal.**

III. Procedural rules

45. We also propose that, following the passing of the proposed Bill, procedural rules should be implemented by enacting new subsidiary legislation to facilitate smooth operation of the new appeal regime in practice. **The DoJ invites views and comments on this proposal.**

SUMMARY OF THE PROPOSED NEW PROVISIONS

46. In summary, the DoJ wishes to invite views and comments on the following new provisions which are modelled on Part 9 of the UK Act and to be added to the CPO:

- (a) The prosecution will have a right to appeal against a ruling of no case to answer by CFI judges in criminal trials with or without a jury, and such appeal may be brought only with the leave of the trial judge(s) or the CA (*cf. sections 57 and 58 of the UK Act*, see paragraphs 10 to 18 above);
- (b) The new appeal procedure does not apply to criminal trials in the District Court or the Magistrates' Courts (see paragraphs 17-18 above);
- (c) The prosecution may at the same time nominate one or more other rulings which have been made by a judge(s) in relation to the trial on indictment and which relate to the offence(s) which are the subject of the appeal and the other rulings will also be treated as the subject of the appeal (*cf. section 58(7) of the UK Act*, see paragraphs 19-21 above);
- (d) The prosecution may not appeal in respect of the ruling unless following the making of the ruling, it (i) informs the court that it intends to appeal, or (ii) requests an adjournment to consider whether to appeal, and if such an adjournment is granted, it informs the court following the adjournment that it intends to

appeal (*cf. section 58(4) of the UK Act*, see paragraphs 22-23 above);

- (e) At or before the time the prosecution informs the Court of its intention to appeal against a ruling of no case to answer, the prosecution must give a guarantee of acquittal, such that in the event that the leave to appeal the CA is not obtained or the appeal is abandoned before determination by the CA, the defendant must be acquitted. If this step is not followed, there can be no appeal (*cf. section 58(8)&(9) of the UK Act*, see paragraphs 24-26 above);
- (f) If the prosecution informs the court of its intention to appeal, the ruling is to continue to have no effect in relation to the offence(s) which are the subject of the appeal whilst the appeal is pursued (*cf. section 58(3)&(10) of the UK Act*, see paragraphs 27-30 above);
- (g) Where the prosecution informs the court of its intention to appeal, the court must decide whether or not the appeal should be expedited, so that urgent cases can be heard swiftly and, if successful, the trials can continue without delay (*cf. section 59 of the UK Act*, see paragraphs 31 to 32 above);
- (h) The CA may confirm, reverse or vary any ruling to which the appeal relates. Where CA confirms the ruling, it must order that the defendant be acquitted of the relevant offence. Where the CA reverses or varies the ruling, it must order that (i) proceedings for that offence may be resumed or (ii) a fresh trial may take place, or (iii) the defendant be acquitted if the CA considers that the defendant could not receive a fair trial if an order for (i) or (ii) were made (*cf. section 61 of the UK Act*, see paragraphs 33 to 35 above);
- (i) The CA may not reverse a ruling of no case to answer unless it is satisfied that the ruling was wrong in law, involved an error of

law or principle, or was one that it was not reasonable for the judge(s) to have made (*cf. section 67 of the UK Act*, see paragraphs 36 to 37 above);

- (j) Where the CA reverses or varies the ruling on appeal, it may make such order as to costs to be paid by the defendant to such person as it considers just and reasonable (*cf. section 69 of the UK Act*, see paragraphs 38-42 above);
- (k) Restrictions will be imposed on the reporting of matters relating to the prosecution's appeal against a ruling of no case to answer and any person in contravention will be guilty of an offence. (*cf. sections 71 and 72 of the UK Act*, see paragraphs 43 to 44 above);
- (l) Following the passing of the proposed Bill, procedural rules will be implemented by enacting new subsidiary legislation to facilitate smooth operation of the new appeal regime in practice (see paragraph 45 above).

CONSULTATION

47. Before taking the matter forward, DoJ would like to seek the views of the Judiciary, legal professional bodies and other relevant stakeholders on the proposed Bill outlined above.

48. Please address your views and comments to the following on or before 2 February 2023 –

Policy Affairs Unit 2
Constitutional and Policy Affairs Division
Department of Justice
5/F, East Wing, Justice Place
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(Subject: Criminal Procedure (Amendment) Bill Consultation)

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49. DoJ may, as appropriate, reproduce, quote, summarise or publish the written comments received, in whole or in part, in any form, without seeking permission of the contributing parties.

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Constitutional and Policy Affairs Division
Department of Justice
January 2023

Status: This version of this part contains provisions that are prospective.

Changes to legislation: Criminal Justice Act 2003, Part 9 is up to date with all changes known to be in force on or before 10 November 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes



Criminal Justice Act 2003

2003 CHAPTER 44

PART 9

PROSECUTION APPEALS

Introduction

57 Introduction

- (1) In relation to a trial on indictment, the prosecution is to have the rights of appeal for which provision is made by this Part.
- (2) But the prosecution is to have no right of appeal under this Part in respect of—
 - (a) a ruling that a jury be discharged, or
 - (b) a ruling from which an appeal lies to the Court of Appeal by virtue of any other enactment.
- (3) An appeal under this Part is to lie to the Court of Appeal.
- (4) Such an appeal may be brought only with the leave of the judge or the Court of Appeal.

Commencement Information

- II** S. 57 wholly in force at 4.4.2005, see s. 336(3) and [S.I. 2005/950, art. 2\(1\)](#), [Sch. 1 para. 4](#) (subject to [art. 2\(2\)](#), [Sch. 2](#))

General right of appeal in respect of rulings

58 General right of appeal in respect of rulings

- (1) This section applies where a judge makes a ruling in relation to a trial on indictment at an applicable time and the ruling relates to one or more offences included in the indictment.

Status: This version of this part contains provisions that are prospective.

Changes to legislation: *Criminal Justice Act 2003, Part 9 is up to date with all changes known to be in force on or before 10 November 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

- (2) The prosecution may appeal in respect of the ruling in accordance with this section.
- (3) The ruling is to have no effect whilst the prosecution is able to take any steps under subsection (4).
- (4) The prosecution may not appeal in respect of the ruling unless—
 - (a) following the making of the ruling, it—
 - (i) informs the court that it intends to appeal, or
 - (ii) requests an adjournment to consider whether to appeal, and
 - (b) if such an adjournment is granted, it informs the court following the adjournment that it intends to appeal.
- (5) If the prosecution requests an adjournment under subsection (4)(a)(ii), the judge may grant such an adjournment.
- (6) Where the ruling relates to two or more offences—
 - (a) any one or more of those offences may be the subject of the appeal, and
 - (b) if the prosecution informs the court in accordance with subsection (4) that it intends to appeal, it must at the same time inform the court of the offence or offences which are the subject of the appeal.
- (7) Where—
 - (a) the ruling is a ruling that there is no case to answer, and
 - (b) the prosecution, at the same time that it informs the court in accordance with subsection (4) that it intends to appeal, nominates one or more other rulings which have been made by a judge in relation to the trial on indictment at an applicable time and which relate to the offence or offences which are the subject of the appeal,that other ruling, or those other rulings, are also to be treated as the subject of the appeal.
- (8) The prosecution may not inform the court in accordance with subsection (4) that it intends to appeal, unless, at or before that time, it informs the court that it agrees that, in respect of the offence or each offence which is the subject of the appeal, the defendant in relation to that offence should be acquitted of that offence if either of the conditions mentioned in subsection (9) is fulfilled.
- (9) Those conditions are—
 - (a) that leave to appeal to the Court of Appeal is not obtained, and
 - (b) that the appeal is abandoned before it is determined by the Court of Appeal.
- (10) If the prosecution informs the court in accordance with subsection (4) that it intends to appeal, the ruling mentioned in subsection (1) is to continue to have no effect in relation to the offence or offences which are the subject of the appeal whilst the appeal is pursued.
- (11) If and to the extent that a ruling has no effect in accordance with this section—
 - (a) any consequences of the ruling are also to have no effect,
 - (b) the judge may not take any steps in consequence of the ruling, and
 - (c) if he does so, any such steps are also to have no effect.
- (12) Where the prosecution has informed the court of its agreement under subsection (8) and either of the conditions mentioned in subsection (9) is fulfilled, the judge or the

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Court of Appeal must order that the defendant in relation to the offence or each offence concerned be acquitted of that offence.

(13) In this section “applicable time”, in relation to a trial on indictment, means any time (whether before or after the commencement of the trial) before the [^{F1}time when the judge starts his] summing-up to the jury.

[^{F2}(14) The reference in subsection (13) to the time when the judge starts his summing-up to the jury includes the time when the judge would start his summing-up to the jury but for the making of an order under Part 7.]

Textual Amendments

F1 Words in s. 58(13) substituted (8.1.2007) by [Domestic Violence, Crime and Victims Act 2004 \(c. 28\)](#), [ss. 30\(1\)](#), 60; [S.I. 2006/3423](#), [art. 2](#) (subject to [art. 3](#))

F2 S. 58(14) inserted (8.1.2007) by [Domestic Violence, Crime and Victims Act 2004 \(c. 28\)](#), [ss. 30\(2\)](#), 60; [S.I. 2006/3423](#), [art. 2](#) (subject to [art. 3](#))

Commencement Information

I2 S. 58 wholly in force at 4.4.2005, see s. 336(3) and [S.I. 2005/950](#), [art. 2\(1\)](#), [Sch. 1 para. 4](#) (subject to [art. 2\(2\)](#), [Sch. 2](#))

59 Expedited and non-expedited appeals

- (1) Where the prosecution informs the court in accordance with section 58(4) that it intends to appeal, the judge must decide whether or not the appeal should be expedited.
- (2) If the judge decides that the appeal should be expedited, he may order an adjournment.
- (3) If the judge decides that the appeal should not be expedited, he may—
 - (a) order an adjournment, or
 - (b) discharge the jury (if one has been sworn).
- (4) If he decides that the appeal should be expedited, he or the Court of Appeal may subsequently reverse that decision and, if it is reversed, the judge may act as mentioned in subsection (3)(a) or (b).

Commencement Information

I3 S. 59 wholly in force at 4.4.2005, see s. 336(3) and [S.I. 2005/950](#), [art. 2\(1\)](#), [Sch. 1 para. 4](#) (subject to [art. 2\(2\)](#), [Sch. 2](#))

60 Continuation of proceedings for offences not affected by ruling

- (1) This section applies where the prosecution informs the court in accordance with section 58(4) that it intends to appeal.
- (2) Proceedings may be continued in respect of any offence which is not the subject of the appeal.

Status: This version of this part contains provisions that are prospective.

Changes to legislation: *Criminal Justice Act 2003, Part 9 is up to date with all changes known to be in force on or before 10 November 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

Commencement Information

- I4** S. 60 wholly in force at 4.4.2005, see s. 336(3) and [S.I. 2005/950, art. 2\(1\), Sch. 1 para. 4](#) (subject to [art. 2\(2\), Sch. 2](#))

61 Determination of appeal by Court of Appeal

- (1) On an appeal under section 58, the Court of Appeal may confirm, reverse or vary any ruling to which the appeal relates.
- (2) Subsections (3) to (5) apply where the appeal relates to a single ruling.
- (3) Where the Court of Appeal confirms the ruling, it must, in respect of the offence or each offence which is the subject of the appeal, order that the defendant in relation to that offence be acquitted of that offence.
- (4) Where the Court of Appeal reverses or varies the ruling, it must, in respect of the offence or each offence which is the subject of the appeal, do any of the following—
 - (a) order that proceedings for that offence may be resumed in the Crown Court,
 - (b) order that a fresh trial may take place in the Crown Court for that offence,
 - (c) order that the defendant in relation to that offence be acquitted of that offence.
- [^{F3}(5) But the Court of Appeal may not make an order under subsection (4)(c) in respect of an offence unless it considers that the defendant could not receive a fair trial if an order were made under subsection (4)(a) or (b).]
- (6) Subsections (7) and (8) apply where the appeal relates to a ruling that there is no case to answer and one or more other rulings.
- (7) Where the Court of Appeal confirms the ruling that there is no case to answer, it must, in respect of the offence or each offence which is the subject of the appeal, order that the defendant in relation to that offence be acquitted of that offence.
- (8) Where the Court of Appeal reverses or varies the ruling that there is no case to answer, it must in respect of the offence or each offence which is the subject of the appeal, make any of the orders mentioned in subsection (4)(a) to (c) (but subject to subsection (5)).

Textual Amendments

- F3** S. 61(5) substituted (14.7.2008) by [Criminal Justice and Immigration Act 2008 \(c. 4\), ss. 44, 153](#) (with [Sch. 27 para. 16](#)); [S.I. 2008/1586, art. 2\(1\), Sch. 1 para. 23](#)

Commencement Information

- I5** S. 61 wholly in force at 4.4.2005, see s. 336(3) and [S.I. 2005/950, art. 2\(1\), Sch. 1 para. 4](#) (subject to [art. 2\(2\), Sch. 2](#))

Status: This version of this part contains provisions that are prospective.

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PROSPECTIVE

Right of appeal in respect of evidentiary rulings

62 Right of appeal in respect of evidentiary rulings

- (1) The prosecution may, in accordance with this section and section 63, appeal in respect of—
 - (a) a single qualifying evidentiary ruling, or
 - (b) two or more qualifying evidentiary rulings.
- (2) A “qualifying evidentiary ruling” is an evidentiary ruling of a judge in relation to a trial on indictment which is made at any time (whether before or after the commencement of the trial) before the opening of the case for the defence.
- (3) The prosecution may not appeal in respect of a single qualifying evidentiary ruling unless the ruling relates to one or more qualifying offences (whether or not it relates to any other offence).
- (4) The prosecution may not appeal in respect of two or more qualifying evidentiary rulings unless each ruling relates to one or more qualifying offences (whether or not it relates to any other offence).
- (5) If the prosecution intends to appeal under this section, it must before the opening of the case for the defence inform the court—
 - (a) of its intention to do so, and
 - (b) of the ruling or rulings to which the appeal relates.
- (6) In respect of the ruling, or each ruling, to which the appeal relates—
 - (a) the qualifying offence, or at least one of the qualifying offences, to which the ruling relates must be the subject of the appeal, and
 - (b) any other offence to which the ruling relates may, but need not, be the subject of the appeal.
- (7) The prosecution must, at the same time that it informs the court in accordance with subsection (5), inform the court of the offence or offences which are the subject of the appeal.
- (8) For the purposes of this section, the case for the defence opens when, after the conclusion of the prosecution evidence, the earliest of the following events occurs—
 - (a) evidence begins to be adduced by or on behalf of a defendant,
 - (b) it is indicated to the court that no evidence will be adduced by or on behalf of a defendant,
 - (c) a defendant’s case is opened, as permitted by section 2 of the Criminal Procedure Act 1865 (c. 18).
- (9) In this section—

“evidentiary ruling” means a ruling which relates to the admissibility or exclusion of any prosecution evidence,

“qualifying offence” means an offence described in Part 1 of Schedule 4.

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- (10) The Secretary of State may by order amend that Part by doing any one or more of the following—
 - (a) adding a description of offence,
 - (b) removing a description of offence for the time being included,
 - (c) modifying a description of offence for the time being included.
- (11) Nothing in this section affects the right of the prosecution to appeal in respect of an evidentiary ruling under section 58.

63 Condition that evidentiary ruling significantly weakens prosecution case

- (1) Leave to appeal may not be given in relation to an appeal under section 62 unless the judge or, as the case may be, the Court of Appeal is satisfied that the relevant condition is fulfilled.
- (2) In relation to an appeal in respect of a single qualifying evidentiary ruling, the relevant condition is that the ruling significantly weakens the prosecution's case in relation to the offence or offences which are the subject of the appeal.
- (3) In relation to an appeal in respect of two or more qualifying evidentiary rulings, the relevant condition is that the rulings taken together significantly weaken the prosecution's case in relation to the offence or offences which are the subject of the appeal.

64 Expedited and non-expedited appeals

- (1) Where the prosecution informs the court in accordance with section 62(5), the judge must decide whether or not the appeal should be expedited.
- (2) If the judge decides that the appeal should be expedited, he may order an adjournment.
- (3) If the judge decides that the appeal should not be expedited, he may—
 - (a) order an adjournment, or
 - (b) discharge the jury (if one has been sworn).
- (4) If he decides that the appeal should be expedited, he or the Court of Appeal may subsequently reverse that decision and, if it is reversed, the judge may act as mentioned in subsection (3)(a) or (b).

65 Continuation of proceedings for offences not affected by ruling

- (1) This section applies where the prosecution informs the court in accordance with section 62(5).
- (2) Proceedings may be continued in respect of any offence which is not the subject of the appeal.

66 Determination of appeal by Court of Appeal

- (1) On an appeal under section 62, the Court of Appeal may confirm, reverse or vary any ruling to which the appeal relates.

Status: This version of this part contains provisions that are prospective.

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- (2) In addition, the Court of Appeal must, in respect of the offence or each offence which is the subject of the appeal, do any of the following—
- (a) order that proceedings for that offence be resumed in the Crown Court,
 - (b) order that a fresh trial may take place in the Crown Court for that offence,
 - (c) order that the defendant in relation to that offence be acquitted of that offence.
- (3) But no order may be made under subsection (2)(c) in respect of an offence unless the prosecution has indicated that it does not intend to continue with the prosecution of that offence.

Miscellaneous and supplemental

67 Reversal of rulings

The Court of Appeal may not reverse a ruling on an appeal under this Part unless it is satisfied—

- (a) that the ruling was wrong in law,
- (b) that the ruling involved an error of law or principle, or
- (c) that the ruling was a ruling that it was not reasonable for the judge to have made.

Commencement Information

- I6** S. 67 wholly in force at 4.4.2005, see s. 336(3) and [S.I. 2005/950, art. 2\(1\), Sch. 1 para. 4](#) (subject to [art. 2\(2\), Sch. 2](#))

68 Appeals to the House of Lords

- (1) In section 33(1) of the 1968 Act (right of appeal to House of Lords) after “this Act” there is inserted “ or Part 9 of the Criminal Justice Act 2003 ”.
- (2) In section 36 of the 1968 Act (bail on appeal by defendant) after “under” there is inserted “ Part 9 of the Criminal Justice Act 2003 or ”.
- (3) In this Part “the 1968 Act” means the Criminal Appeal Act 1968 (c. 19).

Commencement Information

- I7** S. 68 wholly in force at 4.4.2005, see s. 336(3) and [S.I. 2005/950, art. 2\(1\), Sch. 1 para. 4](#) (subject to [art. 2\(2\), Sch. 2](#))

69 Costs

- (1) The Prosecution of Offences Act 1985 (c. 23) is amended as follows.
- (2) In section 16(4A) (defence costs on an appeal under section 9(11) of Criminal Justice Act 1987 may be met out of central funds) after “hearings)” there is inserted “ or under Part 9 of the Criminal Justice Act 2003 ”.
- (3) In section 18 (award of costs against accused) after subsection (2) there is inserted—

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“(2A) Where the Court of Appeal reverses or varies a ruling on an appeal under Part 9 of the Criminal Justice Act 2003, it may make such order as to the costs to be paid by the accused, to such person as may be named in the order, as it considers just and reasonable.”

(4) In subsection (6) after “subsection (2)” there is inserted “ or (2A) ”.

Commencement Information

I8 S. 69 wholly in force at 4.4.2005, see s. 336(3) and [S.I. 2005/950, art. 2\(1\), Sch. 1 para. 4](#) (subject to [art. 2\(2\), Sch. 2](#))

70 Effect on time limits in relation to preliminary stages

(1) Section 22 of the Prosecution of Offences Act 1985 (c. 23) (power of Secretary of State to set time limits in relation to preliminary stages of criminal proceedings) is amended as follows.

(2) After subsection (6A) there is inserted—

“(6B) Any period during which proceedings for an offence are adjourned pending the determination of an appeal under Part 9 of the Criminal Justice Act 2003 shall be disregarded, so far as the offence is concerned, for the purposes of the overall time limit and the custody time limit which applies to the stage which the proceedings have reached when they are adjourned.”

Commencement Information

I9 S. 70 wholly in force at 4.4.2005, see s. 336(3) and [S.I. 2005/950, art. 2\(1\), Sch. 1 para. 4](#) (subject to [art. 2\(2\), Sch. 2](#))

71 Restrictions on reporting

(1) Except as provided by this section no publication shall include a report of—

- (a) anything done under section 58, 59, 62, 63 or 64,
- (b) an appeal under this Part,
- (c) an appeal under Part 2 of the 1968 Act in relation to an appeal under this Part, or
- (d) an application for leave to appeal in relation to an appeal mentioned in paragraph (b) or (c).

(2) The judge may order that subsection (1) is not to apply, or is not to apply to a specified extent, to a report of—

- (a) anything done under section 58, 59, 62, 63 or 64, or
- (b) an application to the judge for leave to appeal to the Court of Appeal under this Part.

(3) The Court of Appeal may order that subsection (1) is not to apply, or is not to apply to a specified extent, to a report of—

- (a) an appeal to the Court of Appeal under this Part,

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- (b) an application to that Court for leave to appeal to it under this Part, or
 - (c) an application to that Court for leave to appeal to the [^{F4}Supreme Court] under Part 2 of the 1968 Act.
- (4) The [^{F5}Supreme Court] may order that subsection (1) is not to apply, or is not to apply to a specified extent, to a report of—
 - (a) an appeal to [^{F6}the Supreme Court] under Part 2 of the 1968 Act, or
 - (b) an application to [^{F6}the Supreme Court] for leave to appeal to it under Part 2 of that Act.
- (5) Where there is only one defendant and he objects to the making of an order under subsection (2), (3) or (4)—
 - (a) the judge, the Court of Appeal or the [^{F7}Supreme Court is] to make the order if (and only if) satisfied, after [^{F8}considering] the representations of the defendant, that it is in the interests of justice to do so, and
 - (b) the order (if made) is not to apply to the extent that a report deals with any such objection or representations.
- (6) Where there are two or more defendants and one or more of them object to the making of an order under subsection (2), (3) or (4)—
 - (a) the judge, the Court of Appeal or the [^{F7}Supreme Court is] to make the order if (and only if) satisfied, after [^{F9}considering] the representations of each of the defendants, that it is in the interests of justice to do so, and
 - (b) the order (if made) is not to apply to the extent that a report deals with any such objection or representations.
- (7) Subsection (1) does not apply to the inclusion in a publication of a report of—
 - (a) anything done under section 58, 59, 62, 63 or 64,
 - (b) an appeal under this Part,
 - (c) an appeal under Part 2 of the 1968 Act in relation to an appeal under this Part, or
 - (d) an application for leave to appeal in relation to an appeal mentioned in paragraph (b) or (c),at the conclusion of the trial of the defendant or the last of the defendants to be tried.
- (8) Subsection (1) does not apply to a report which contains only one or more of the following matters—
 - (a) the identity of the court and the name of the judge,
 - (b) the names, ages, home addresses and occupations of the defendant or defendants and witnesses,
 - (c) the offence or offences, or a summary of them, with which the defendant or defendants are charged,
 - (d) the names of counsel and solicitors in the proceedings,
 - (e) where the proceedings are adjourned, the date and place to which they are adjourned,
 - (f) any arrangements as to bail,
 - [^{F10}(g) whether, for the purposes of the proceedings, representation was provided to the defendant or any of the defendants under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.]

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- (9) The addresses that may be included in a report by virtue of subsection (8) are addresses—
- (a) at any relevant time, and
 - (b) at the time of their inclusion in the publication.
- (10) Nothing in this section affects any prohibition or restriction by virtue of any other enactment on the inclusion of any matter in a publication.
- (11) In this section—
- “programme service” has the same meaning as in the Broadcasting Act 1990 (c. 42),
- “publication” includes any speech, writing, relevant programme or other communication in whatever form, which is addressed to the public at large or any section of the public (and for this purpose every relevant programme is to be taken to be so addressed), but does not include an indictment or other document prepared for use in particular legal proceedings,
- “relevant time” means a time when events giving rise to the charges to which the proceedings relate are alleged to have occurred,
- “relevant programme” means a programme included in a programme service.

Textual Amendments

- F4** Words in s. 71(3) substituted (1.10.2009) by [Constitutional Reform Act 2005 \(c. 4\)](#), ss. 40(4), 148, [Sch. 9 para. 82\(3\)\(a\)](#); S.I. 2009/1604, [art. 2\(d\)](#)
- F5** Words in s. 71(4) substituted (1.10.2009) by [Constitutional Reform Act 2005 \(c. 4\)](#), ss. 40(4), 148, [Sch. 9 para. 82\(3\)\(b\)](#); S.I. 2009/1604, [art. 2\(d\)](#)
- F6** Words in s. 71(4) substituted (1.10.2009) by [Constitutional Reform Act 2005 \(c. 4\)](#), ss. 40(4), 148, [Sch. 9 para. 82\(3\)\(b\)](#); S.I. 2009/1604, [art. 2\(d\)](#)
- F7** Words in s. 71(5)(6) substituted (1.10.2009) by [Constitutional Reform Act 2005 \(c. 4\)](#), ss. 40(4), 148, [Sch. 9 para. 82\(3\)\(c\)](#); S.I. 2009/1604, [art. 2\(d\)](#)
- F8** Word in s. 71(5)(a) substituted (28.6.2022) by [Judicial Review and Courts Act 2022 \(c. 35\)](#), [ss. 15\(7\)](#), 51(3)
- F9** Word in s. 71(6)(a) substituted (28.6.2022) by [Judicial Review and Courts Act 2022 \(c. 35\)](#), [ss. 15\(7\)](#), 51(3)
- F10** S. 71(8)(g) substituted (1.4.2013) by [Legal Aid, Sentencing and Punishment of Offenders Act 2012 \(c. 10\)](#), s. 151(1), [Sch. 5 para. 65](#); S.I. 2013/453, [art. 3\(h\)](#) (with savings and transitional provisions in S.I. 2013/534, [art. 6](#))

Commencement Information

- I10** S. 71 wholly in force at 4.4.2005, see s. 336(3) and [S.I. 2005/950](#), [art. 2\(1\)](#), [Sch. 1 para. 4](#) (subject to [art. 2\(2\)](#), [Sch. 2](#))

72 Offences in connection with reporting

- (1) This section applies if a publication includes a report in contravention of section 71.
- (2) Where the publication is a newspaper or periodical, any proprietor, editor or publisher of the newspaper or periodical is guilty of an offence.
- (3) Where the publication is a relevant programme—

Status: This version of this part contains provisions that are prospective.

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- (a) any body corporate or Scottish partnership engaged in providing the programme service in which the programme is included, and
 - (b) any person having functions in relation to the programme corresponding to those of an editor of a newspaper,is guilty of an offence.
- (4) In the case of any other publication, any person publishing it is guilty of an offence.
- (5) If an offence under this section committed by a body corporate is proved—
 - (a) to have been committed with the consent or connivance of, or
 - (b) to be attributable to any neglect on the part of,an officer, the officer as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.
- (6) In subsection (5), “officer” means a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity.
- (7) If the affairs of a body corporate are managed by its members, “director” in subsection (6) means a member of that body.
- (8) Where an offence under this section is committed by a Scottish partnership and is proved to have been committed with the consent or connivance of a partner, he as well as the partnership shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly.
- (9) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale.
- (10) Proceedings for an offence under this section may not be instituted—
 - (a) in England and Wales otherwise than by or with the consent of the Attorney General, or
 - (b) in Northern Ireland otherwise than by or with the consent of—
 - (i) before the relevant date, the Attorney General for Northern Ireland, or
 - (ii) on or after the relevant date, the Director of Public Prosecutions for Northern Ireland.
- (11) In subsection (10) “the relevant date” means the date on which section 22(1) of the Justice (Northern Ireland) Act 2002 (c. 26) comes into force.

Commencement Information

III S. 72 wholly in force at 4.4.2005, see s. 336(3) and [S.I. 2005/950](#), [art. 2\(1\)](#), [Sch. 1 para. 4](#) (subject to [art. 2\(2\)](#), [Sch. 2](#))

73 Rules of court

- (1) Rules of court may make such provision as appears to the authority making them to be necessary or expedient for the purposes of this Part.
- (2) Without limiting subsection (1), rules of court may in particular make provision—
 - (a) for time limits which are to apply in connection with any provisions of this Part,
 - (b) as to procedures to be applied in connection with this Part,

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- (c) enabling a single judge of the Court of Appeal to give leave to appeal under this Part or to exercise the power of the Court of Appeal under section 58(12).
- (3) Nothing in this section is to be taken as affecting the generality of any enactment conferring powers to make rules of court.

74 Interpretation of Part 9

- (1) In this Part—
 - “programme service” has the meaning given by section 71(11),
 - “publication” has the meaning given by section 71(11),
 - “qualifying evidentiary ruling” is to be construed in accordance with section 62(2),
 - “the relevant condition” is to be construed in accordance with section 63(2) and (3),
 - “relevant programme” has the meaning given by section 71(11),
 - “ruling” includes a decision, determination, direction, finding, notice, order, refusal, rejection or requirement,
 - “the 1968 Act” means the Criminal Appeal Act 1968 (c. 19).
- (2) Any reference in this Part (other than section 73(2)(c)) to a judge is a reference to a judge of the Crown Court.
- (3) There is to be no right of appeal under this Part in respect of a ruling in relation to which the prosecution has previously informed the court of its intention to appeal under either section 58(4) or 62(5).
- (4) Where a ruling relates to two or more offences but not all of those offences are the subject of an appeal under this Part, nothing in this Part is to be regarded as affecting the ruling so far as it relates to any offence which is not the subject of the appeal.
- (5) Where two or more defendants are charged jointly with the same offence, the provisions of this Part are to apply as if the offence, so far as relating to each defendant, were a separate offence (so that, for example, any reference in this Part to a ruling which relates to one or more offences includes a ruling which relates to one or more of those separate offences).
- (6) Subject to rules of court made under section 53(1) of the Supreme Court Act 1981 (c. 54) (power by rules to distribute business of Court of Appeal between its civil and criminal divisions)—
 - (a) the jurisdiction of the Court of Appeal under this Part is to be exercised by the criminal division of that court, and
 - (b) references in this Part to the Court of Appeal are to be construed as references to that division.
- [^{F11}(7) In its application to a trial on indictment in respect of which an order under section 17(2) of the Domestic Violence, Crime and Victims Act 2004 has been made, this Part is to have effect with such modifications as the Secretary of State may by order specify.]

Status: This version of this part contains provisions that are prospective.

Changes to legislation: Criminal Justice Act 2003, Part 9 is up to date with all changes known to be in force on or before 10 November 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) [View outstanding changes](#)

Textual Amendments

- F11** S. 74(7) inserted (8.1.2007) by [Domestic Violence, Crime and Victims Act 2004 \(c. 28\)](#), ss. 58(1), 60, [Sch. 10 para. 62](#); [S.I. 2006/3423](#), [art. 2](#) (subject to [art. 3](#))

Commencement Information

- I12** S. 74 wholly in force at 4.4.2005, see s. 336(3) and [S.I. 2005/950](#), [art. 2\(1\)](#), [Sch. 1 para. 4](#) (subject to [art. 2\(2\)](#), [Sch. 2](#))

Status:

This version of this part contains provisions that are prospective.

Changes to legislation:

Criminal Justice Act 2003, Part 9 is up to date with all changes known to be in force on or before 10 November 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations.

View outstanding changes

Changes and effects yet to be applied to :

- specified provision(s) amendment to earlier commencing SI 2012/2574, Sch. by [S.I. 2012/2761 art. 2](#)

Changes and effects yet to be applied to the whole Act associated Parts and Chapters:

Whole provisions yet to be inserted into this Act (including any effects on those provisions):

- s. 29(2C)-(2E) inserted by [2022 c. 35 Sch. 2 para. 4\(2\)\(c\)](#)
- s. 29(2AA) inserted by [2022 c. 35 Sch. 2 para. 4\(2\)\(b\)](#)
- s. 150(aa) inserted by [2012 c. 10 Sch. 26 para. 19\(2\)](#) (This amendment not applied to legislation.gov.uk. Sch. 26 para. 19 omitted (11.12.2013) by virtue of 2013 c. 22, Sch. 16 para. 23(2); S.I. 2013/2981, art. 2(d))
- s. 150(ba) inserted by [2012 c. 10 Sch. 26 para. 19\(3\)](#) (This amendment not applied to legislation.gov.uk. Sch. 26 para. 19 omitted (11.12.2013) by virtue of 2013 c. 22, Sch. 16 para. 23(2); S.I. 2013/2981, art. 2(d))
- s. 151(A1) inserted by [2008 c. 4 s. 11\(3\)](#)
- s. 151(1A) inserted by [2008 c. 4 s. 11\(5\)](#)
- s. 151(1A)(b) word substituted by [2008 c. 4 Sch. 4 para. 76\(3\)](#) (This amendment not applied to legislation.gov.uk. S. 151(1A) is still only prospectively inserted by 2008 c. 4, s. 11(5))
- s. 151(1A)(c) substituted by [2009 c. 25 Sch. 17 para. 8\(3\)](#) (This amendment not applied to legislation.gov.uk. S. 151(1A) is still only prospectively inserted by 2008 c. 4, s. 11(5))
- s. 151(4A) inserted by [2009 c. 25 Sch. 17 para. 8\(5\)](#)
- s. 151(8)(c)-(f) inserted by [2009 c. 25 Sch. 17 para. 8\(6\)\(c\)](#)
- s. 165(5) inserted by [2014 c. 12 s. 179\(3\)](#)
- s. 237(1A) inserted by [2006 c. 48 s. 34\(3\)](#)
- s. 237(1B)(f)(g) inserted by [2021 c. 11 Sch. 13 para. 40\(b\)](#)
- s. 239A inserted by [2015 c. 2 s. 8\(1\)](#)
- s. 239A cross-heading inserted by [2015 c. 2 Sch. 3 para. 5](#)
- s. 250(5C) inserted by [2015 c. 2 Sch. 3 para. 7\(4\)](#)
- s. 255A(4A) inserted by [2015 c. 2 s. 9\(2\)](#)
- s. 255B(3A) inserted by [2015 c. 2 s. 9\(3\)\(b\)](#)
- s. 255B(4A)-(4C) inserted by [2015 c. 2 s. 9\(3\)\(d\)](#)
- s. 255C(3A) inserted by [2015 c. 2 s. 9\(4\)\(b\)](#)
- s. 255C(4A)-(4C) inserted by [2015 c. 2 s. 9\(4\)\(d\)](#)
- s. 256A(1)-(1B) substituted for s. 256A(1) by [2015 c. 2 s. 9\(6\)\(a\)](#)
- s. 256A(4A)(4B) inserted by [2015 c. 2 s. 9\(6\)\(f\)](#)
- s. 256A(5)(6) substituted for s. 256A(5) by [2015 c. 2 s. 9\(6\)\(g\)](#)
- s. 256AZA inserted by [2015 c. 2 s. 10\(1\)](#)
- s. 257(3) inserted by [2006 c. 48 s. 34\(4\)](#)
- s. 258(1A) inserted by [2006 c. 48 s. 34\(5\)](#)
- s. 260(4)(aa) substituted for word by [2008 c. 4 s. 34\(7\)\(b\)](#) (This amendment not applied to legislation.gov.uk. S. 34(2)(4)(b)(7)(10) omitted (3.12.2012) by virtue of 2012 c. 10, s. 118(4)(b); S.I. 2012/2906, art. 2(d))

- Sch. 15B para. 49A omitted by [S.I. 2019/780 reg. 26\(4\)\(c\)](#) (This amendment not applied to legislation.gov.uk. Regs. 21, 25, 26, 27, 30 revoked (1.12.2020) by 2020 c. 17, Sch. 28; S.I. 2020/1236, reg. 2)
- Sch. 15B para. 49B omitted by [S.I. 2019/780 reg. 26\(4\)\(d\)](#) (This amendment not applied to legislation.gov.uk. Regs. 21, 25, 26, 27, 30 revoked (1.12.2020) by 2020 c. 17, Sch. 28; S.I. 2020/1236, reg. 2)
- Sch. 20B para. 34(6)(7) substituted for Sch. 20B para. 34(6) by [2015 c. 2 Sch. 3 para. 10](#)

**Summary of Major Comments Received from the Consultation Exercise
on the Proposal to Amend the Criminal Procedure Ordinance**

Issues	Respondents' Comments
A. <u>Presentation of the new provisions</u>	
1. Extent of adoption the UK provisions	• A respondent considered that the Government's proposed adaptations of provisions under the UK Act and modifications to be made are largely measured and reasonable. • In light of the aim of the reform to provide for appeals for rulings of no case to answer only, a respondent considered that a much simpler implementation than that of Part 9 of the UK Act is warranted. Provisions should be written specific to appeals of rulings of no case to answer by the prosecution. • A respondent observed that criminal litigation in the UK could be quite different from Hong Kong in various aspects, for example the criminal legal aid system, the size of the criminal bench, time for access to transcripts of hearings, size of pool for jury selection, etc. These differences are germane to the consideration of how the proposed amendments are to be drafted. On the other hand, existing similar provisions applicable to the District Court and the Magistrates' Court should provide useful references in the drawing up of the amendments.
B. <u>Scope</u>	
2. Right of appeal	• A respondent considered that the proposal to confine the scope for prosecutorial appeal to just fill the statutory lacuna and no more is a reasonable approach. On the other hand, another respondent queried whether the proposed new appeal mechanism should cover terminating rulings apart from rulings of no case to answer. • A respondent sought clarification as to whether the reform covers cases where the trial judge directs the jury to acquit based on an erroneous evaluation that there is insufficient evidence without making

Issues	Respondents' Comments
	a ruling of no case to answer. • A respondent considered that leave of either the trial judge or the CA to lodge an appeal under the new appeal mechanism is required. • A respondent is concerned as to how an appeal under the new appeal mechanism would impact on other offences in the same indictment. • A respondent is concerned that the process of seeking leave unavoidably lengthens the proceedings, which in turn lengthens the stay of the defendant in correctional facilities. The respondent is also concerned that the proposal is silent on the rights of the defendant to bail pending appeal.
3. Level of court and types of trials	• A respondent considered that the proposal about the level of court and types of trials subject to the new appeal mechanism is a reasonable one as it would effectively cover all criminal trials in the CFI. • A respondent agreed that it is not necessary to apply the new appeal procedure to criminal trials in the District Court or the Magistrates' Courts.
4. Rulings to be heard together	• A respondent opined that ruling(s) leading to the no case to answer decision should be treated together with the appeal against the no case to answer ruling. If those rulings are not dealt with together in the appeal, it may result in procedural or legal absurdities. The timing requirement for the prosecution to nominate which ruling(s) is to be dealt with together on appeal is reasonable. • A respondent expressed that it seems unnecessary to expressly provide for related rulings to be made the subject of the same appeal (with reference to section 58(7) of the UK Act) as it is basic and implicit in the idea of an appeal of a ruling.

Issues	Respondents' Comments
	A respondent had reservations about the proposed inclusion of other rulings as the subject of the appeal as it would allow the prosecution to revisit all the evidence and re-litigate all the rulings already made in favour of the defendant. The respondent queried if the jury who had heard the evidence and/or submission should be discharged if the prosecution succeeded in appealing against the no case to answer ruling. The proposal would make a jury trial difficult.
C. <u>Appeal mechanism</u>	
5. Timing of application	- A respondent suggested imposing a time limit within which an appeal may be made. - A respondent considered that there is no better alternative in design from the one proposed.
6. Acquittal guarantee	- A respondent took the view that it is not necessary for the prosecution to guarantee anything if there is no rule to suspend the ruling of no case to answer. It seems basic that the ruling of no case to answer should stand if leave is not obtained or the prosecution abandons the appeal. The respondent queried why the CA needs to order that the defendant be acquitted in these two situations. The respondent considered that a simple rule that says the ruling of no case to answer stands in these two situations should suffice. - A respondent considered the mechanism for acquittal guarantee reasonable and is a necessary part of the overall system design. It should go hand in hand with the suspension of effect of ruling mechanism. It provides certainty of outcome in the event that leave to appeal is not granted or the appeal is abandoned.
7. Suspension of effect of ruling	Considering this type of appeal has to be launched in the middle of an on-going trial, a respondent considered that it is natural that the trial would be suspended which is essential to preserve the trial's <i>status quo</i>.

Issues	Respondents' Comments
	• A respondent questioned whether the suspension is to address the concern about bail and detention pending appeal and if that is the case, we should have a provision to deal with the issue directly. • A respondent proposed adding a timetable on the prosecution's indication to appeal and the bail arrangements during appeal because upon suspension, the trial is not terminated and the jury has not been discharged. A long suspension would make resumption of the trial difficult for jury. Bail procedures similar to those at the District Court could be adopted and there should be a discussion on the standard for granting bail to the defendant.
8. Expedited and non-expedited appeals	• A respondent considered that the procedural options available under section 59 of the UK Act give the court very clear options and provide procedural clarity. • A respondent considered that all appeals against rulings of no case to answer must be expedited, as a matter of course and case management. • A respondent expressed that there needs to be enough flexibility to allow the court and the parties to determine the best course of action in the circumstances of the particular case in the interest of justice, and without incurring unfairness to the defendant.
9. Determination of appeals	• Two respondents considered that the proposals with reference to section 61 of the UK Act about determination of appeals and section 67 of the UK Act about grounds of reversal of rulings are reasonable. • A respondent opined that the notion of allowing an appeal if the ruling was "not reasonable for the judge to have made" under section 67(c) of the UK Act is ambiguous and should not be introduced. The other two grounds under section 67(a)-(b) of the UK Act are sufficient. • A respondent queried how one can ensure that the ground of "reasonableness" under section 67(c)

Issues	Respondents' Comments
	of the UK Act be applied consistently and becomes an objective legal standard.
10. Costs	• A respondent opined that necessary legislative amendments should be made so that the prosecution can be made liable to pay costs to the defence should their appeal be unsuccessful or abandoned, but not against the defendant if the appeal initiated against him/her by the prosecution is successful. • A respondent objected to the proposal that the defendant may be ordered to pay costs where the CA reverses or varies a ruling on an appeal, because it is unfair to the defendant and would deter the defendant from making a submission of no case. There is no justification why the defendant needs to bear the costs consequence for an error made by the judge in the defendant's favour. In addition, many criminal cases in the High Court are legally-aided. Apart from book entries, the prosecution may not recover anything. Thus, the proposal may not have the intended sanctioning effect. If there are provisions on costs for the prosecution, as a matter of fairness, there should also be specific provisions on costs for the defendant.
11. Restrictions on reporting	• Given the nature and timing of this type of appeal, a respondent considered that reporting restrictions are necessary to prevent juries from being influenced and the defendant from being prejudiced by adverse publicity. The proposal to adopt provision similar to the UK Act is reasonable. • On the other hand, a respondent did not consider any restrictions on reporting are necessary. All of the evidence relied upon by the prosecution would have been called in open court and referred to in earlier media reports. If it is referred to again in news report of an appeal proceeding, it is not too much different from reports of the evidence in an appeal against conviction.