



**Scottish Law Commission**  
*promoting law reform*

## **Report on Crown Appeals**

Report on a reference under section 3(1)(e) of the Law Commissions Act 1965  
Laid before the Scottish Parliament by the Scottish Ministers

**July 2008**

SCOT LAW COM No 212  
SG/2008/126  
EDINBURGH: The Stationery Office

**£18.55**

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ISBN: 978-0-10-8882210

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<sup>1</sup> Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820).



# SCOTTISH LAW COMMISSION

*Report on a reference under section 3(1)(e) of the Law Commissions Act 1965*

## **Report on Crown Appeals**

To: Kenny MacAskill MSP, Cabinet Secretary for Justice

We have the honour to submit to the Scottish Ministers our Report on Crown Appeals.

(Signed)

JAMES DRUMMOND YOUNG, *Chairman*  
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Malcolm McMillan, *Chief Executive*  
30 June 2008



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# Part 1 Introduction

## Our remit

1.1 On 20 November 2007 we received the following reference from the Cabinet Secretary for Justice, Mr Kenny MacAskill MSP:

"To consider the law relating to:

- judicial rulings that can bring a solemn case to an end without the verdict of a jury, and rights of appeal against such;
- the principle of double jeopardy, and whether there should be exceptions to it;
- admissibility of evidence of bad character or of previous convictions, and of similar fact evidence; and
- the *Moorov* doctrine;

and to make any appropriate recommendations for reform."

The present report is concerned only with the first part of this reference; the other parts are being considered in separate projects and will form the subject of later discussion papers and reports.

1.2 We undertook to work on this as a short-term priority project and to submit a report to the Scottish Government by the summer of 2008. We published Discussion Paper No 137 on *Crown Appeals* in March 2008. Because of the time constraints in our reference the consultation period was shortened to six weeks from the date of publication of the Discussion Paper. We nevertheless received a substantial number of responses, and we are grateful to those who commented on the Discussion Paper.<sup>1</sup>

1.3 We have had the benefit of discussions with a reference group consisting of members of the judiciary;<sup>2</sup> we have found our discussions with them to be of great assistance. We have also held preliminary consultations with representatives of the Faculty of Advocates Criminal Bar Association,<sup>3</sup> the Law Society of Scotland's Criminal Law Committee,<sup>4</sup> and the Crown Office.<sup>5</sup> We would like to express our gratitude to all of the individuals concerned for their assistance with this project.

## Scope of the Report

1.4 At the outset we should make clear that the present project is concerned only with judicial rulings and rights of appeal against judicial rulings; it does not involve consideration

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<sup>1</sup> The consultees who submitted responses to the Discussion Paper are listed in Appendix B.

<sup>2</sup> Lords Eassie and Bracadale and Sheriff Kenneth Maciver.

<sup>3</sup> Ian Duguid QC, Niall McCluskey and Andrew Brown.

<sup>4</sup> William McVicar, Gerard Sinclair and Alan McCreadie, Deputy Director of Law Reform at the Society.

<sup>5</sup> Nigel Orr, Head of the Appeals Unit.

of rights of appeal following a jury verdict that acquits the accused. At present the accused has a right of appeal following a verdict of guilty<sup>6</sup> but the Crown has no such right in the event of a verdict of not guilty or not proven. We are not asked to consider any change in this position. The assumption is that a verdict of acquittal by a jury will be sacrosanct, exempt from challenge by the Crown,<sup>7</sup> and that when an accused is acquitted by a jury he should not be liable to re-trial. That general principle is being considered in the second part of our reference, which relates to the rule against double jeopardy and whether exceptions should be allowed to it; nevertheless, in this part of the reference the general principle is a fundamental assumption.

1.5 The most important issue considered in this Report is whether the Crown should have a right of appeal against the categories of judicial ruling that may bring a solemn case to an end without a jury verdict. We have concluded that such a right should be granted.<sup>8</sup> As a result a number of practical issues arise. These include the test that should be applied to any Crown appeal, the consequences of a successful appeal, and whether a requirement of leave should be imposed. We go on to consider<sup>9</sup> when a new prosecution should be possible. The question of fairness to the accused is particularly important at this stage, and we conclude that the authority of the Appeal Court should be required for a new prosecution; such authority should be refused when a new prosecution would be contrary to the interests of justice.

1.6 We further consider<sup>10</sup> the different forms of judicial ruling that can bring a prosecution on indictment to an end without the verdict of a jury. The first of these is the statutory procedure, now contained in section 97 of the Criminal Procedure (Scotland) Act 1995, that permits the accused to make a submission of no case to answer at the close of the Crown evidence. This procedure is concerned with the technical sufficiency of the Crown evidence rather than its quality; by "technical sufficiency" we mean the existence of corroborated evidence to establish (i) that a crime has been committed; and (ii) that the accused was the perpetrator. In addition, the statutory procedure is limited in that it can only apply to the totality of an offence charged in the indictment. The procedure cannot be used to reduce a charge to a lesser alternative, or to delete elements of the charge. We conclude that the section 97 procedure should be retained, and that it should be widened by permitting the judge to consider whether the Crown case is such that no reasonable jury properly directed could convict of the charge libelled.

1.7 The second form of judicial ruling that we consider is based on the trial judge's power to direct the jury to return a not guilty verdict on any charge, or to direct the jury that any guilty verdict can only be on an amended charge or a lesser charge; this involves consideration of the form of submission (the so-called "common law submission") that may lead to such a direction. We conclude that statutory provision should be made for that form of procedure, in such a way that it may be used as of right at the conclusion of the evidence; if the judge's ruling results in the acquittal of the accused on any charge, the judge should himself acquit the accused.

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<sup>6</sup> Criminal Procedure (Scotland) Act 1995, s 106.

<sup>7</sup> This is subject to the possibility of a Lord Advocate's reference, but that procedure has no effect on the jury's verdict of acquittal: see Appendix C, paras 14-15.

<sup>8</sup> See paras 3.1-3.11 below.

<sup>9</sup> In Pt 4.

<sup>10</sup> In Pt 2.

1.8 In addition to the foregoing forms of ruling, a ruling on the admissibility of evidence made in the course of a trial can in practice result in an acquittal; this can occur because the evidence that is excluded is essential to the Crown case, or because its exclusion seriously damages the Crown case. Most such rulings are now made at preliminary diets or preliminary hearings.<sup>11</sup> Nevertheless, some objections to evidence will still result in a ruling during a trial, where unexpected developments occur in the course of oral evidence. For example, a witness may give some indication in evidence that a police interview was not fairly conducted. In such a case the judge's ruling may have the practical effect of terminating the prosecution; in the last example that would occur if admissions made by the accused during the interview were essential to provide a sufficiency of evidence against the accused. In this Report it is not necessary to consider rulings of this nature as such. We do, however, consider whether they should be subject to Crown right of appeal.<sup>12</sup>

1.9 Our recommendations relating to the forms of judicial ruling that can bring a solemn case to an end without the verdict of a jury are contained in Part 2 of this Report. Our recommendations in relation to rights of appeal are contained in Part 3. In Part 4 we consider the circumstances in which it would not be appropriate to permit a new prosecution to be brought on the ground that that would be contrary to the interests of justice. We also consider a number of incidental issues.<sup>13</sup> Part 5 contains a summary of our recommendations.

1.10 A draft Bill which would give effect to our recommendations is contained in Appendix A. Appendix B lists those who submitted written comments on our Discussion Paper.

1.11 In Appendix C we summarise the existing rights of appeal that exist in solemn criminal cases. It is hoped that these may set our recommendations in context.

1.12 Finally, Appendix D sets out comparative materials in relation to Crown appeals. In Part 1 of Appendix D we outline the relevant provisions of two international conventions, the International Covenant on Civil and Political Rights and the European Convention on Human Rights. Article 14(7) of the former, which states the rule against double jeopardy, provides that no-one should be liable to be tried again for an offence "for which he has already been finally convicted or acquitted in accordance with the law". The reference to being "finally" convicted or acquitted clearly permits a system of appeals by both prosecution and defence. The European Convention on Human Rights itself does not make express provision for the rule against double jeopardy, but such provision is made in Article 4 of the Seventh Protocol.<sup>14</sup> Article 4.1 provides that no-one shall be liable to be tried or punished again in criminal proceedings "for an offence for which he has already been finally acquitted or convicted in accordance with the law". Once again, this wording clearly permits both prosecution and defence appeals. We understand that this reflects practice in many

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<sup>11</sup> In consequence of ss 72(6), 79 and 79A of the Criminal Procedure (Scotland) Act 1995; see Discussion Paper, para 2.26.

<sup>12</sup> At paras 3.43-3.52

<sup>13</sup> Our remit does not extend to summary cases, where a Crown right of appeal already exists, although it may be that any amendment to solemn procedure will also require a parallel amendment to summary procedure.

<sup>14</sup> The United Kingdom has indicated an intention to ratify this Protocol but has not yet done so.

continental European countries where rights of appeal by both prosecution and defence are widely recognised.<sup>15</sup>

1.13 In Part 2 of Appendix D we outline the law of a number of other jurisdictions on the matters considered in this Report; those jurisdictions are England and Wales, New Zealand, Canada, Australia and Ireland. All of those jurisdictions make use of trial by jury in a manner that is recognisably similar to Scots law. In England and Wales, the Criminal Justice Act 2003 confers a right on the prosecution to appeal against judicial rulings in trials on indictment, including judicial acquittals on the ground of no case to answer. In New Zealand the Crown has for a number of years been entitled to appeal against an acquittal that has been directed by the trial judge. In Canada there has been a general right of prosecution appeal on questions of law since 1892. In this case, however, the notion of a question of law is restrictively construed, and only certain directed acquittals would be covered by it. Nevertheless, Canada is of interest because a wide right of prosecution appeal has been recognised for many years. In Australia, three states, New South Wales, Tasmania and Western Australia, permit a prosecution appeal against a directed acquittal.

1.14 We have included references to these jurisdictions to provide comparative material and to set Scottish procedure in context rather than to provide detailed suggestions as to the procedures that Scots law could adopt. The questions considered in this Report relate to Scottish criminal procedure, which has its own history and its own distinctive forms. Scottish criminal procedure is also grounded to a substantial extent in the requirement that the commission of an offence and the identity of the perpetrator should be proved by corroborated evidence; this is a requirement which, so far as we can discover, is unique to Scotland among jurisdictions where serious criminal cases are decided by the verdict of a jury alone.<sup>16</sup> The requirement of corroboration is especially important in relation to judicial rulings that can end a trial without a jury verdict, notably the submission of no case to answer under section 97 of the Criminal Procedure (Scotland) Act 1995. Because of these distinctive features of Scots law we consider that the criminal procedure in other jurisdictions is of limited assistance with regard to the details of procedure. Nevertheless, we think that the comparative material is important at a general level in indicating the way in which comparable problems are being approached in other jurisdictions; it is also important in showing recent developments in the law in those countries. These include a movement towards appeals against judicial acquittals, notably in England and Wales and New South Wales.

### **Timescale for Report**

1.15 We have already referred<sup>17</sup> to the restricted timescale that has been available for the preparation of this Report. This has attracted comment in certain academic circles.<sup>18</sup> We would emphasise that this has been a narrowly focussed project, concerned with certain very specific issues of criminal procedure. We are satisfied that in the time available it has been possible to carry out all the research that is necessary; indeed, we do not think that any other research would be useful. In this connection, although we have made reference to

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<sup>15</sup> See, generally, Mireille Delmas-Marty and J R Spencer (eds), *European Criminal Procedures* (2002).

<sup>16</sup> Commonwealth jurisdictions and the United States; the Scottish procedure is quite distinct from that used in France and jurisdictions where the system is based on French law, where the judges retire with the jury.

<sup>17</sup> Para 1.2.

<sup>18</sup> Notably Scott Wortley, "Law Reform after World's End" (2008) 12 *Edinburgh Law Review* 293.

comparative material, we have not used this to suggest procedures that Scots law might adopt; it is rather designed to set Scottish procedure in context. As we point out above,<sup>19</sup> Scottish criminal procedure has its own history and its own distinctive forms. These are largely grounded on the requirement of corroboration, a requirement which is unique to Scotland in jurisdictions where criminal cases are decided by the verdict of a jury alone. In other jurisdictions it is quite possible that comparative material will be of much greater importance; this applies in particular to England and Wales and the various systems whose law is based on English law. For this reason we do not think that it is appropriate to draw comparisons with the timescale adopted by other law reform bodies in undertaking similar projects.<sup>20</sup> Likewise, it is not appropriate to make comparisons between this project and other projects that we have carried out; this project is unusual in its tightly focussed nature. Consequently the timescale that we have been able to meet in this project should not be regarded as a precedent for other projects.

### **Legislative competence**

1.16 The recommendations put forward in this Report lie within the legislative competence of the Scottish Parliament. Criminal procedure is not a matter reserved to the Westminster Parliament under Schedule 5 to the Scotland Act 1998. We accordingly take the view that it would be competent for our draft Bill to be implemented by the Scottish Parliament, and the Bill has been drafted on that basis.

1.17 We further take the view that none of the recommendations in this Report raises any question of incompatibility with the European Convention on Human Rights or with the law of the European Union. The relevant provisions of the International Covenant on Civil and Political Rights and European Convention on Human Rights are discussed in Part 1 of Appendix D.

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<sup>19</sup> Para 1.14.

<sup>20</sup> We should point out that reform in this area has not always followed detailed and dispassionate consideration of the legal issues: see the example of New South Wales mentioned at para 2.48 of Appendix D.

## Part 2            Judicial rulings that can end a criminal trial without the verdict of a jury

2.1     The first part of the present reference requires us to consider the various forms of judicial ruling that are capable of ending a criminal trial without the verdict of a jury. These are three in number: the statutory submission of no case to answer under section 97 of the Criminal Procedure (Scotland) Act 1995, a ruling following a so-called "common law submission", and some evidential rulings. Rulings falling into the second and third of these categories do not always have the effect of bringing the prosecution to an end on any particular charge. The ruling following a common law submission may amend the terms of a charge or may alter the offence in the charge to a permissible alternative; in these cases the amended or alternative charge goes to the jury. Likewise, an evidential ruling may or may not have the effect of bringing the prosecution to an end on any particular charge, depending on the significance of the ruling. Nevertheless, rulings of both of the latter categories are capable of bringing a prosecution to an end, and we accordingly consider that they fall within the terms of our reference.

### **Statutory submission of no case to answer**

2.2     As we pointed out in our Discussion Paper,<sup>1</sup> it is a fundamental principle of Scottish criminal law that a criminal charge can generally only be proved if the crucial facts of the charge are established by corroborated evidence.<sup>2</sup> Statutory exceptions exist,<sup>3</sup> but otherwise the general rule applies to all criminal charges. The requirement of corroboration means that the crucial facts of an offence must be established by evidence from two separate sources. Those sources may consist of the direct evidence of witnesses, or evidential facts spoken to by witnesses from which a crucial fact may be inferred (generally known as circumstantial evidence), or a combination of the two. The crucial facts are the commission of the crime and the identification of the accused; both of these must be established by corroborated evidence. If the crucial facts are not established by corroborated evidence, the Crown case is insufficient in law and the accused must be acquitted.

2.3     At common law the accused was not entitled to submit that the Crown case was insufficient in law until the conclusion of all of the evidence, on behalf of both the Crown and the defence. After making such a submission the accused was not entitled to lead any further evidence. The position at common law was summarised by Lord Justice General Cooper in *Kent v HM Advocate*,<sup>4</sup> a case where at the close of the Crown evidence the accused moved the sheriff-substitute to direct the jury to return a verdict of not guilty. The

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<sup>1</sup> Para 2.2.

<sup>2</sup> Walker and Walker, *The Law of Evidence in Scotland* (2<sup>nd</sup> edn, 2000), Ch 5, especially paras 5.1.1-5.4.8.

<sup>3</sup> *Ibid*, para 5.5.1.

<sup>4</sup> 1950 JC 38.

sheriff-substitute refused to grant such a ruling on one charge, and the case was appealed. The Lord Justice General said:<sup>5</sup>

"I know of no warrant in the law and practice of Scotland for the course which the sheriff-substitute was asked to take in this case in the face of opposition by the Crown. The Crown can always drop a charge, and it is of course right and proper in suitable circumstances that a sheriff or presiding judge, when charging a jury at the end of the day after the evidence is complete and the speeches for the Crown and for the defence have been concluded, should direct the jury that there is no evidence in law to support a charge (or one or more of several charges), and that it is their duty to return a verdict of not guilty accordingly. But it is only at this stage that such a duty falls on the judge or can competently be undertaken by him on his own responsibility, for according to our practice the Lord Advocate is master of the instance, and, without his consent or the consent of his representative who is prosecuting, it is, in my view, incompetent for the case to be withdrawn at any earlier stage from the knowledge of the assize. If therefore a practice of withdrawing criminal charges prematurely has arisen, derived from a supposed analogy with civil jury practice, or with the very different practice in criminal trials in England, I hope that it will now be discarded as wholly unwarranted in Scottish criminal administration."

2.4 This placed the accused in a dilemma: at the close of the Crown case he could submit that the evidence adduced was insufficient in law, but if that submission was rejected no further evidence could be led on his behalf; alternatively, the accused could lead evidence in his own defence, but that created the risk that the defence evidence would provide the corroboration that was lacking from the Crown case. Because of this dilemma proposals were made that a new procedure should be introduced to enable an accused person to submit that there was no case to answer at the end of the Crown evidence, and thereafter to lead evidence if the submission were not upheld. Such a proposal was considered by the Grant Committee,<sup>6</sup> but the Committee were divided on the matter and made no recommendation; the majority favoured the retention of the existing arrangements. The same proposal was made to the Thomson Committee, which was set up to examine criminal procedure during the mid-1970s. It is discussed in their Second Report.<sup>7</sup> The Thomson Committee pointed out<sup>8</sup> that a similar procedure to that proposed was in operation in England and in many other countries. They stated<sup>9</sup> that the witnesses who gave evidence on the question were approximately equally divided, with strong views expressed on either side. They summarised the arguments on either side,<sup>10</sup> and reached the following conclusion:<sup>11</sup>

"Our own view is that there is a strong case for the proposal on grounds that the present system is wrong in principle in allowing the prosecutor to rely in some instances on the defence supplying the necessary evidence to secure a conviction. We share the view of those of our witnesses who think that the procedure places an unfair burden on the defence in that the decision of whether to lead evidence might prejudice the accused's case. We also agree with the minority of the Grant Committee who think that it is wrong that an accused who wishes to make a

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<sup>5</sup> 1950 JC 38 at 41.

<sup>6</sup> Report of the Committee chaired by the Rt Hon Lord Grant, Lord Justice Clerk, on the Sheriff Court, Cmnd 3243, (1967), paras 695 and 699.

<sup>7</sup> Committee chaired by the Hon Lord Thomson, *Criminal Procedure in Scotland (Second Report)*, Cmnd 6218 (1975) Ch 48.

<sup>8</sup> *Ibid*, para 48.02.

<sup>9</sup> *Ibid*, para 48.03.

<sup>10</sup> The relevant passages are quoted at para 2.4 of our Discussion Paper.

<sup>11</sup> *Op cit*, para 48.05.

submission in law that the prosecution case has not been made out, should be required to peril his whole case on that submission, without the alternative, if it fails, of leading evidence on his own behalf. We consider unjustified the fears of some of our witnesses that the proposed procedure will result in delays arising from successful appeals by the prosecutor against decisions of no case to answer. Like the minority of the Grant Committee we take the view that this will occur only in a small number of cases and is unlikely to be a problem. We propose to consider the question of the prosecutor's right of appeal in these cases in the wider context of appeals generally with which we shall be dealing in our next Report.<sup>12</sup> In our opinion the balance of the argument is in favour of the introduction of a procedure in both solemn and summary cases giving the accused a right to submit that there is no case to answer at the end of the Crown evidence and if the submission is not upheld a right to lead evidence. We so *recommend*."

2.5 As we pointed out in our Discussion Paper,<sup>13</sup> the original notion of a no case to answer submission appears to have been derived from the procedure found in England and other countries where the legal system is based on English law. It does not appear, however, that the Thomson Committee had regard to the details of English practice, and their discussion of the issues appears to concentrate on the distinctively Scottish requirement of corroboration. There is perhaps some ambiguity in precisely what the Thomson Committee had in mind:<sup>14</sup> the discussion generally proceeds on the assumption that a submission of no case to answer will deal with the legal sufficiency of the evidence led on behalf of the Crown, but the statement of the arguments in favour refers to the position where "there is no evidence on which a reasonable juror could bring in a verdict of guilty under proper direction"; on one view the reference to a reasonable juror might be seen as going to the quality or weight of the evidence rather than its legal sufficiency.<sup>15</sup>

2.6 The recommendation of the Thomson Committee was given effect by section 19 of the Criminal Justice (Scotland) Act 1980. The terms of that section are now contained in section 97 of the Criminal Procedure (Scotland) Act 1995:

"97.—(1) Immediately after the close of the evidence for the prosecution, the accused may intimate to the court his desire to make a submission that he has no case to answer both —

- (a) on an offence charged in the indictment; and
- (b) on any other offence of which he could be convicted under the indictment.

(2) If, after hearing both parties, the judge is satisfied that the evidence led by the prosecution is insufficient in law to justify the accused being convicted of the offence charged in respect of which the submission has been made or of such other offence as is mentioned, in relation to that offence, in paragraph (b) of subsection (1) above, he shall acquit him of the offence charged in respect of which the submission has been made and the trial shall proceed only in respect of any other offence charged in the indictment.

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<sup>12</sup> The Thomson Committee stated that they intended to consider the question of a prosecutor's right of appeal in a subsequent report. In their Third Report, however, they did not consider the question of appeals against judicial rulings following no case to answer submissions: see Appendix C, para 14.

<sup>13</sup> Para 2.6.

<sup>14</sup> No draft Bill was attached to their recommendations.

<sup>15</sup> See para 2.7 below.

(3) If, after hearing both parties, the judge is not satisfied as is mentioned in subsection (2) above, he shall reject the submission and the trial shall proceed, with the accused entitled to give evidence and call witnesses, as if such submission had not been made.

(4) A submission under subsection (1) above shall be heard by the judge in the absence of the jury."

An almost identical provision dealing with summary proceedings is found in section 160 of the 1995 Act.

2.7 Section 97 refers to the judge's being satisfied that the prosecution evidence "is insufficient in law" to justify conviction of the offence charged; it is thus clear that it is concerned with the technical sufficiency of the evidence rather than its quality. Questions of the quality or weight of evidence, notably issues of credibility and reliability of witnesses, are excluded from the procedure.<sup>16</sup> This interpretation is supported by the cases in the Appeal Court that deal with no case to answer submissions.<sup>17</sup> Thus in *Williamson v Wither*,<sup>18</sup> the first case in which the new provisions were considered, the court stated:<sup>19</sup>

"It is important to see what the section says. It provides that the evidence led by the prosecution is insufficient in law to justify the accused being convicted. It is not whether or not the evidence presented is to be accepted and therefore the only question before the court at that stage is whether there is no evidence which if accepted will entitle the court to proceed to conviction."

That statement of the law emphasises that the only issue for the court is the legal sufficiency of the evidence to establish the essentials of the charge. It is assumed that the evidence that has been led will be accepted, and the only question is whether, in that situation, the evidence is sufficient for conviction.

2.8 Later cases in the Appeal Court have adopted the same approach. In cases involving circumstantial evidence<sup>20</sup> it has been emphasised that the proper approach is to consider whether the facts and circumstances relied on by the Crown are capable of supporting the Crown case; if they are, it is for the jury, not the judge, to decide whether they do in fact provide such support, and in that event a submission of no case to answer would have to be repelled. In *Fox v HM Advocate*,<sup>21</sup> Lord Justice General Rodger pointed out that it is of the nature of circumstantial evidence that it may be open to more than one

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<sup>16</sup> In our Discussion Paper, at para 2.8, we suggested that the difference between sufficiency and quality could be illustrated by the following example. An assault takes place in the street, and the accused runs away immediately afterwards. The complainer identifies the accused in a police identification parade and in court, but it is clear that at the time of the attack he was very drunk, and his recollection of other matters is revealed in cross-examination to be extremely poor. One other witness is able to identify the accused as the perpetrator, but he only obtained a fleeting glimpse, in poor lighting, as the accused fled. In such a case there is a technical sufficiency of evidence, in that two eyewitnesses state that they can identify the accused as the perpetrator. Nevertheless the quality of the evidence of each of the eyewitnesses is open to criticism, albeit for totally different reasons. The issue of legal sufficiency is one for the judge, but the assessment of the quality of the evidence is normally a matter for the jury.

<sup>17</sup> Many of these involve the provisions for summary procedure in section 160 and its predecessor; in these cases the Crown has a right of appeal by stated case. In solemn procedure the question of whether a no case to answer submission was wrongly rejected can arise in a defence appeal under section 106(3)(b) of the 1995 Act.

<sup>18</sup> 1981 SCCR 214.

<sup>19</sup> *Ibid*, at 217.

<sup>20</sup> Notably *Fox v HM Advocate* 1998 JC 94; 1998 SCCR 115, and *Smith v HM Advocate* 2008 SCCR 255; 2008 SCL 486.

<sup>21</sup> 1998 JC 94 at 101A; 1998 SCCR 115 at 126E.

interpretation, and he emphasised that it is precisely the role of the jury to decide which interpretation to adopt.

2.9 A further limitation on the scope of a submission of no case to answer is that it can only apply to the totality of an offence charged in the indictment. Consequently, if there is sufficient evidence in law to establish part of a charge or a competent alternative charge to that libelled, a submission of no case to answer cannot succeed. The law is thus stated in Renton and Brown's *Criminal Procedure*.<sup>22</sup>

"Where any charge is such that it would be competent on that charge for the jury to return a verdict of guilty of some other offence, a submission of no case to answer will not succeed unless there is insufficient evidence for conviction of any competent alternative charge as well as for conviction of the charge libelled. So, if the accused is charged with theft, and there is insufficient evidence for theft but sufficient for reset, the submission will fail and, unless the Crown drop the theft charge, the trial will proceed as a trial for theft. If, then, the defence lead evidence, it will be open to the Crown to try to obtain from the defence witnesses sufficient evidence to entitle them to seek a conviction for theft in the end of the day. Section 97 will not apply where there is sufficient evidence on any part of a charge (eg on some elements of a charge of assault or some articles in charge of theft) since that evidence would justify a conviction on the charge libelled which is deemed to include an allegation that the accused did all or part of the acts charged. What is to count as a separate charge depends on substance and not on form."

Consequently, when the accused wishes to submit that an offence charged should be reduced to a lesser alternative,<sup>23</sup> that cannot be done at the close of the Crown evidence but must await the conclusion of all evidence, for both Crown and defence; at that stage the submission is made in the form of a so-called "common law submission".<sup>24</sup> The same rule applies if the accused wishes to make a submission that parts of the offence libelled should be deleted.<sup>25</sup>

2.10 In our Discussion Paper<sup>26</sup> we pointed out that the proposals of the Thomson Committee on this issue were controversial when they were made; the Committee noted that the representations made to them were approximately equally divided, with strong views being expressed on both sides. The controversy has continued to some extent, and in newspaper articles in the Scotsman<sup>27</sup> Lord McCluskey argued that the procedure was inappropriate; any submission that the evidence against the accused was insufficient in law should be made at the conclusion of the whole of the evidence, and not at the close of the Crown evidence. Against that background, we thought it appropriate to reconsider the provisions of section 97, with a view to discovering whether it should be repealed or amended. To that end, we asked the following questions:<sup>28</sup>

Does the procedure in section 97 of the Criminal Procedure (Scotland) Act 1995 for making a no case to answer submission operate in a satisfactory fashion?

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<sup>22</sup> (6<sup>th</sup> edn, R 17: Aug 2003) para 18-75.

<sup>23</sup> For example, murder to culpable homicide, or rape to attempted rape.

<sup>24</sup> Discussed at paras 2.19-2.25 of the Discussion Paper.

<sup>25</sup> This is less common because, generally speaking, corroboration is not required in respect of every element of an offence but only in respect of the commission of the offence taken as a whole. Similarly, aggravations do not require to be corroborated.

<sup>26</sup> Para 2.12.

<sup>27</sup> On 24 September and 3 December 2007.

<sup>28</sup> Paras 2.12 and 2.18.

Should the procedure be retained in its present form? Would it be preferable to revert to the earlier procedure whereby any submission that the Crown evidence was insufficient in law could only be made at the conclusion of all the evidence, including any evidence for the defence?

Should the procedure in section 97 of the Criminal Procedure (Scotland) Act 1995 be extended to permit a submission to be made at the close of the Crown evidence that, on the evidence led by the Crown:

No reasonable jury properly directed could convict of the offence charged;

One or more of the charges labelled in the indictment should be amended by the substitution of an alternative charge or by the deletion of elements within the charge?

Thus, three possible proposals were put forward: the status quo; the repeal of section 97 and a reversion to the procedure that existed before 1980; and an extension of the section 97 procedure to permit additional matters to be raised.

2.11 The majority of consultees favoured an extension of the procedure, in whole or in part. These included the Law Society of Scotland. The Law Society recognised that there were difficulties when a judge determined questions of the quality of evidence, but they thought that it would be sensible to permit the judge, at the close of the Crown case, to rule that the case could not proceed further because no reasonable jury could convict; they thought that this would be used only in exceptional circumstances. The Law Society also suggested that it would be useful if the substitution of an alternative charge or the deletion of elements within the charge could be dealt with where possible at the close of the Crown case. Another consultee (Sir Gerald Gordon QC) stated that he understood that a submission that no reasonable jury could convict on the evidence had been made and sustained at the end of the Crown case in at least one criminal trial. In relation to amendment of a charge, he pointed out that it was quite common for the Crown to amend charges at the close of their case, and he could see no reason why the judge should not have the same power. Two consultees<sup>29</sup> thought that the judge should have power to amend or reduce the charges at the end of the Crown case but not to reject a charge on the basis that no reasonable jury could convict.

2.12 The status quo was favoured by the judges of the High Court. They indicated that the procedure provided in section 97 operated satisfactorily in practice. In relation to possible extension, they wrote:

"We do not favour an extension of the procedure provided by section 97 of the Criminal Procedure (Scotland) Act 1995 so as to permit a submission to be made at the close of the Crown case, either that no reasonable jury properly directed could convict of the offence charged, or that one or more of the charges labelled should be amended or deleted. We agree with the proposition that a question involving the quality of the evidence, as against its legal sufficiency, should be based on the totality of the evidence. Where it is accepted that the Crown has a sufficiency of evidence in relation to at least one charge or to part thereof, we agree that the accused must decide whether or not to give evidence."

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<sup>29</sup> Gerard Sinclair and the Sheriffs' Association.

2.13 The repeal of section 97 was supported by two consultees, Peter Ferguson QC and Crown Office. Crown Office indicated that the existing procedure did not operate in a satisfactory manner in practice and that it would be preferable to revert to the previous position.<sup>30</sup> Peter Ferguson QC, in a lengthy and cogently argued response, suggested that it would be preferable to revert to the old system of a common law submission, with the sufficiency of evidence being determined at the close of all the evidence. He stated:

"The only concern should be that the accused is not convicted on insufficient evidence. Postponing the no case submission to the conclusion of all the evidence does not affect the accused's rights in that regard. What it may do is require the accused to consider, with his lawyers, whether the Crown has enough evidence at the end of the Crown case; and, if it is thought that there is not, decide whether or not to lead evidence. That defence evidence may necessarily make good a deficiency in the prosecution case but it may not. In cross-examination the accused may, however, give evidence which has that effect. In that event, it is the accused's decision to give evidence, or to lead witnesses. He does not have to do so; he can do nothing and then move for an acquittal on the ground of insufficiency. If he does that and is wrong and there is a sufficient case, he has lost his right to give evidence but that is his deliberate, and tactical, decision."

Mr Ferguson went on to discuss the implications of the decision in *Gonshaw v Bamber*.<sup>31</sup> In that case, the sheriff rejected a submission of no case to answer. The accused was convicted. It was held by the Appeal Court the sheriff was wrong to reject the submission; at the close of the Crown case there was not a sufficiency of evidence on the charge libelled. The accused gave evidence, and that evidence made good the deficiency in the Crown case. The Appeal Court held that the accused's subsequent conviction was a miscarriage of justice; the submission of no case to answer should have been upheld, and in that event the accused would not have been required to give the evidence that provided the Crown with a sufficiency. Mr Ferguson suggested that this result must appear wrong to the average citizen.<sup>32</sup>

2.14 Collectively, we have not found the questions in this part of the reference to be easy. They can be said to raise fundamental issues as to the nature and purpose of a criminal trial. The reasons given by the Thomson Committee<sup>33</sup> seem to represent a pragmatic solution to a practical problem: the burden placed on the defence in deciding whether to lead evidence, which might prejudice the accused's case, and the corresponding inability to make a submission of no case to answer with the alternative, if it failed, of leading defence evidence. That pragmatic approach appears to us to explain why section 97 is limited to questions of sufficiency of evidence in relation to an entire charge; if any part of a charge is supported by sufficient evidence, the accused must decide whether or not to give evidence, regardless of the result of any submission at the close of the Crown case.

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<sup>30</sup> Unfortunately, no reasons were given for this view, although it was suggested that the Commission should consider comparable practice in England and other jurisdictions. We had in fact considered English practice, as our Discussion Paper made clear: Appendix, Pt 2, paras 2.2-2.5. In England the submissions that can be made at the end of the prosecution evidence are wider than those that can be made at present in Scotland. In relation to deletions or amendments to a charge, Crown Office suggested that practical difficulties would arise, because the evidence subsequently given by the accused could be designed to meet the amended charges. In addition, amendment would prevent the accused from being cross-examined on all of the charges in their original form.

<sup>31</sup> 2004 SLT 1270. We discuss that decision in detail below, at paras 2.26-2.31.

<sup>32</sup> Cf Peter Ferguson QC, "Prosecution Appeals" 2008 SLT (News) 91.

<sup>33</sup> See para 2.4 above.

2.15 Nevertheless, it may be that wider issues are involved. The nature and purpose of a criminal trial can be seen from two fundamentally different perspectives. On one hand, it may be regarded as an exercise designed to discover the truth of what happened: whether it has in fact been established beyond reasonable doubt and by corroborated evidence that the crime libelled was committed and that the accused committed it. On this approach, the function of corroboration is to confirm the truth of the accused's guilt, and the law's only concern, as Mr Ferguson points out, is that the accused should not be convicted on insufficient evidence; the source of that evidence does not matter. On the other hand, the nature and purpose of a criminal trial can be seen as providing certain formal procedures to determine whether the Crown has established its case. This perspective starts by recognising that a criminal prosecution is a serious matter, involving important inroads into the liberty of the citizen. Consequently, formal procedures must be designed to eliminate, so far as possible, the possibility that anyone will be wrongfully convicted. On this approach, the underlying truth is less important than adherence to those procedures, because of the overriding importance of the protections for individual liberty that those procedures are designed to achieve. Of course, the two approaches are not wholly incompatible with each other. On the first, "truth seeking" approach, rules governing such matters as the burden and standard of proof form an important protection for the accused, and the rules of corroboration exist to confirm the truth of the case against the accused.

2.16 If one adopts the "truth seeking" approach, what matters is that corroboration is provided; it is immaterial whether or not it has been provided in the course of the Crown evidence. If one adopts the "formal procedure" approach, by contrast, what matters is that the Crown should have satisfied all of the legal requirements that are necessary for a case to go to the jury by the time that it closes its case.

2.17 Against that background, the arguments in relation to the making of a submission at the close of the Crown evidence can be stated as follows.

*Arguments for repeal of section 97*

2.18 (i) The "truth-seeking" approach to a criminal trial supports repeal. What matters is that the accused should not be convicted on insufficient evidence; it is the requirement of corroboration that provides the fundamental protection for the accused by confirming the truth of the evidence against him. It is immaterial where that corroboration comes from as long as it provides confirmation of guilt. This form of protection for the accused is not affected by postponing a no case to answer submission to the close of all the evidence.

(ii) It is, moreover, for the accused and his advisers to decide whether evidence should be led for the defence. That is a tactical decision to be made by the accused and his legal advisers. If the defence evidence supplies a deficiency in the Crown case, that is the result of that tactical decision. That result is not unfair.

(iii) If section 97 were repealed, the problem raised by *Gonshaw v Bamber*<sup>34</sup> would no longer exist.

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<sup>34</sup> 2004 SLT 1270. See paras 2.26-2.31 below.

(iv) The section 97 procedure gives rise to a number of practical problems. These were summarised by the Thomson Committee as follows:

"The arguments against the proposal are that far from saving the court's time the procedure suggested would only serve to complicate matters, and in practice cause more delays in court. The delays would arise inevitably, because the prosecution, it is claimed, would require to have a right of appeal against dismissal of a case at this stage. It is also claimed that the procedure would lead to an increase of unfounded submissions of no case to answer, and consequent wasting of the time of the court. Others argue that the judge should not be required to issue a judgment on the merits twice in the same case as he would do in summary cases if the proposed procedure were introduced."<sup>35</sup>

#### *Arguments against repeal of section 97*

2.19 (i) Section 97 in its present form operates in a satisfactory fashion.<sup>36</sup>

(ii) The reasons stated by the Thomson Committee for the introduction of section 97<sup>37</sup> remain valid.

(iii) The responses to our Discussion Paper revealed little support for the repeal of section 97.<sup>38</sup>

#### *Conclusion on repeal of section 97*

2.20 We recognise that *Gonshaw v Bamber*<sup>39</sup> presents a problem; we discuss it below, and suggest how a solution might be found.<sup>40</sup> Nevertheless, it seems to us that the difficulty highlighted in that case is exceptional in nature, and the law cannot be expected to cater for every difficult case. In addition, we are impressed by two factors: section 97 appears to work well in practice; and there is no general opinion that it should be repealed. In these circumstances we have concluded that section 97 should not be repealed.

#### *Arguments for extension of section 97*

2.21 (i) The arguments for extending section 97 proceed on the view that particular importance should be accorded to the formal steps required in a trial. Consequently, at the close of the Crown case, it should be possible to say that the prosecution has done everything that is required as a matter of law to secure a conviction. Thus there must be a sufficiency of evidence, in that the essential facts of the Crown case are spoken to by corroborated evidence;<sup>41</sup> the evidence should be such that it might if accepted persuade a reasonable jury, properly directed, of the accused's guilt of the offences libelled; and every element in the charges in the indictment should be the

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<sup>35</sup> Thomson Committee, *Criminal Procedure in Scotland (Second Report)*, Cmnd 6218 (1975), para 48.04; Discussion Paper, para 2.4.

<sup>36</sup> This point was made by a majority of consultees, including the judges of the High Court; see para 2.12 above.

<sup>37</sup> See para 2.4 above.

<sup>38</sup> The only reasoned support for repeal came from Peter Ferguson QC. Lord McCluskey has also argued for repeal in articles in *The Scotsman*: see Discussion Paper, para 2.12. Crown Office supported repeal but provided no reasons.

<sup>39</sup> 2004 SLT 1270.

<sup>40</sup> Paras 2.26-2.31.

<sup>41</sup> Corroboration is necessary to establish two essential facts, that a crime has been committed and the identity of the perpetrator. Aggravations and procedural facts do not require to be corroborated.

subject of adequate evidence.<sup>42</sup> That would mean extending the existing procedure in section 97 to cover all of the matters that can at present only form the subject of a common law submission.

(ii) We noted at paragraph 2.14 of our Discussion Paper that the question of whether evidence is such as would entitle a reasonable jury properly directed to convict is a question of law. We also noted that this was a test that had proved difficult to satisfy in appellate proceedings; it would be even more difficult to satisfy at the close of the Crown case. Nevertheless, as we noted at paragraph 2.15 of our Discussion Paper, exceptional cases may arise in which the Crown evidence, though technically sufficient, is such that no reasonable jury, properly directed, could convict. That such cases will arise rarely does not mean that the trial judge need not have power to deal with them.

(iii) The fundamental issue underlying the submission of no case to answer goes beyond the acute dilemma identified by the Thomson Committee. Where the Crown evidence is sufficient to support a lesser charge, the accused still faces a dilemma in deciding whether, in leading defence evidence, to risk supplying evidence of the greater charge. The accused should only have to answer charges that have been adequately made out by the prosecution case and should never be faced with the decision to risk supplying a legal defect in that case from defence evidence. The Crown must make out the case against the accused in its entirety by the close of the prosecution case. Consequently, the law should permit that any significant challenge to a charge or any part of a charge may be made at the close of the Crown case.

(iv) Granting the Crown a right of appeal against certain judicial rulings<sup>43</sup> strengthens the position of the prosecution as against that of the accused. Accordingly it is appropriate to re-adjust the balance of rights of the Crown and the accused by expanding the grounds upon which a section 97 submission may be made. Furthermore, the possibility of a Crown appeal removes any potential concern over the possibility of prejudice to the administration of justice arising from erroneous rulings on an extended section 97.

(v) The reduction of charges under an extended section 97 submission might occasionally give rise to circumstances in which the evidence justified conviction of the offence originally charged, but the jury could only convict of the reduced charge. However, such cases may also arise under the present law where the Crown chooses to indict upon the lesser charge and the evidence against the accused proves stronger than anticipated. Courts have proven able under the present law to deal with any problems which may arise in this situation (for example in relation to the factors which a judge may take into account in sentencing).<sup>44</sup>

(vi) There is no reason to fear that the extension of section 97 would give rise to large numbers of ill-focussed submissions, or that agents and counsel will be tempted to advance ill-founded submissions purely to avoid later claims of defective

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<sup>42</sup> Sufficient evidence in relation to elements that must be established by corroborated evidence.

<sup>43</sup> Which we recommend below at para 3.11.

<sup>44</sup> Cf para 2.24(v).

representation and an *Anderson* appeal.<sup>45</sup> The courts are capable of weeding out any bad practice which may arise, and an argument based on fear of *Anderson* consequences could be levelled against the granting of any procedural right to the accused.

(vii) Widening the scope of section 97 might involve a greater risk of the occurrence of the situation in *Gonshaw v Bamber*. However, we later suggest ways in which the *Gonshaw* problem might be resolved.<sup>46</sup>

### *Arguments against extension of section 97*

2.22 Two possible extensions to the section 97 procedure have been canvassed:<sup>47</sup> (a) permitting a submission that, on the Crown evidence, no reasonable jury properly directed could convict; and (b) permitting a submission that, on the Crown evidence, one or more of the charges libelled in the indictment should be amended. The arguments against each possible extension differ from each other.

2.23 In relation to a submission that no reasonable jury could convict, the arguments are as follows:

(i) The existing procedure under section 97 has worked well in practice.<sup>48</sup> It can, moreover, be said to represent a fair balance between the interests of the accused and the interests of the Crown, which prosecutes in the public interest.

(ii) In Scottish criminal procedure, the assessment of the credibility and reliability of evidence is a matter for the jury, not the judge. Consequently, if section 97 were extended to permit such a submission, it would only be in exceptional cases that a judge could intervene at the close of the Crown evidence, before hearing any evidence for the accused.<sup>49</sup> It is not worth amending section 97 to cater for this rare occurrence, especially if section 97 is not extended in any other way.

(iii) In Scottish criminal procedure a fundamental distinction exists between the sufficiency of evidence on one hand and the quality or weight of evidence on the other hand.<sup>50</sup> The sufficiency of evidence is assessed, as a matter of law, on the assumption that the evidence led will be accepted by the jury.<sup>51</sup> The quality or weight of the evidence, by contrast, is almost invariably<sup>52</sup> a matter of fact. The assessment of the facts should be based on the totality of the evidence, including such evidence as the accused chooses to lead. Any decision on the quality of evidence is

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<sup>45</sup> Cf paras 2.23(vi) and 2.24(iii).

<sup>46</sup> Para 2.31.

<sup>47</sup> Discussion Paper, para 2.18.

<sup>48</sup> This was the view of the judges of the High Court: see para 2.12 above.

<sup>49</sup> This is borne out by the case law on section 106(3)(6) of the Criminal Procedure (Scotland) Act 1995, which permits an appeal by the accused on the basis that a jury returned a verdict that no reasonable jury properly directed could have returned: see Appendix C, paras 4 and 7-8. The Appeal Court has been reluctant to interfere with verdicts on this ground on the view that questions of credibility and reliability of evidence are matters for the jury.

<sup>50</sup> See para 2.7 above.

<sup>51</sup> See *Williamson v Wither*, 1981 SCCR 214, at 217; and *Fox v HM Advocate*, 1998 SC 94, at 101A; 1998 SCCR 115, at 126E.

<sup>52</sup> The only exception occurs in a case where no reasonable jury, properly directed, could convict. Even in such a case, however, although an issue of law is involved, it turns entirely on an assessment of the quality and weight of the evidence of fact.

essentially a matter of impression, and that impression will develop as the case proceeds. The quality of the evidence should only be decided on a final impression, reached at the conclusion of the whole of the evidence.<sup>53</sup>

(iv) The last point is particularly significant in cases involving multiple accused, where the evidence of co-accused may be important in forming a general picture of what happened. For example, in a case where the accused incriminate each other,<sup>54</sup> it is unrealistic to form any view the quality or weight of the evidence before hearing what the accused have to say.

(v) The widening of a no case to answer submission would only affect cases where *ex hypothesi* the Crown has led evidence that is sufficient in law to demonstrate that the accused is guilty of an offence, in the sense that there is corroboration of the essential elements of the offence. The requirement of corroboration is, together with the burden and standard of proof, the primary safeguard afforded by Scots law to prevent wrongful convictions. If that requirement is satisfied by the Crown evidence, there is nothing unfair in assessing the accused's guilt or innocence on the basis of the whole of the evidence, including any that he chooses to lead.

(vi) If the scope of a no case to answer submission were widened, it would lead to a significant increase in the number of such submissions. The defence would have nothing to lose in making such a submission, and counsel might well be concerned that the failure to make such a submission could lead to *Anderson* consequences.<sup>55</sup> There is a serious risk that the submissions made would in many cases be ill-focused; section 97 in its present form has the virtue of concentrating argument on whether there is a technical sufficiency of evidence in relation to the whole of one or more charges. This would lead to complication and delay in any criminal trials. It would also lead to an increase in the number of appeals.

(vii) Extension of section 97 would exacerbate the problem created by *Gonshaw v Bamber*.<sup>56</sup> If there were an increase in the number of submissions at the end of the Crown case, this could have significant effects.

2.24 In relation to a submission that, on the Crown evidence, one or more of the charges libelled in the indictment should be amended, the arguments against an extension are as follows:

(i) The existing procedure under section 97 works well in practice and can be said to represent a fair balance between prosecution and defence: see argument (i) in paragraph 2.23 above, which is equally applicable here.

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<sup>53</sup> This view was supported by the judges of the High Court: see para 2.12 above.

<sup>54</sup> By lodging a special defence of incrimination.

<sup>55</sup> That is, an appeal based on inadequate representation at the trial. See *Anderson v HM Advocate*, 1996 JC 29; 1996 SLT 155.

<sup>56</sup> 2004 SLT 1270. See paras 2.26-2.31 below.

(ii) In such cases, the Crown has *ex hypothesi* led evidence sufficient to demonstrate that the accused is guilty of an offence, albeit a lesser offence than that libelled. When the Crown has failed to lead sufficient evidence to demonstrate *any* criminal liability on a charge, the accused should not be compelled to elect whether to lead evidence;<sup>57</sup> but if the Crown does lead sufficient evidence to indicate criminal liability there is nothing unfair in the accused's being compelled to make that election. In such cases the dilemma that influenced the Thomson Committee does not apply.

(iii) Widening the scope of a no case to answer submission would lead to a significant increase in the number of such submissions and such submissions would tend to be ill-focused: see argument (vi) in paragraph 2.23 above, which is equally applicable here.

(iv) Extension of section 97 would exacerbate the *Gonshaw* problem: see argument (vii) in paragraph 2.23 above, which is equally applicable here.

(v) A problem similar to that in *Gonshaw* could also occur. Consider, for example, a case where a charge of rape is reduced to attempted rape at the close of the Crown case because of a lack of corroboration of penetration. The accused then gives evidence, during which he provides corroboration of penetration. He is duly convicted of attempted rape. On what basis does the judge sentence him? Logically, the fact of penetration should not be taken into account, because that element has been deleted from the charge. Nevertheless, in sentencing a judge can take account of a large number of factors, including previous convictions and psychiatric and social work reports. Why not the accused's own evidence? In such a case, as in *Gonshaw*, the problem is that the decision that the judge reached or ought to have reached at the close of the Crown case is shown by the defence evidence to be factually, if not legally, inaccurate.

## Conclusion

2.25 We have weighed up the foregoing arguments. Our conclusion, by a majority,<sup>58</sup> is that section 97 should be extended to permit a submission at the end of the Crown case that, on the evidence led, no reasonable jury, properly directed, could convict of the offence charged. On the other hand we reject, by a majority,<sup>59</sup> the suggestion that section 97 should be amended to permit the amendment of a charge at the end of the Crown case. We accordingly make the following recommendation:<sup>60</sup>

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<sup>57</sup> This is the reason underlying the Thomson Committee's recommendations: see para 2.4 above.

<sup>58</sup> Lord Drummond Young and Professor Grettton consider that, for the reasons stated at para 2.23 above, section 97 should not be extended. The suggested extension was opposed by the judges of the High Court, the Sheriffs' Association and Crown Office.

<sup>59</sup> For the reasons set out at para 2.21 above, Professor Maher and Professor Thomson consider that section 97 should be extended to include a submission that a charge in the indictment should be amended in the light of the evidence at the close of the Crown case. They also note that this position was adopted by the majority of consultees who responded on this point.

<sup>60</sup> Our remit does not extend to summary cases, but an analogous amendment could be made to section 160 of the Criminal Procedure (Scotland) Act 1995, the provision that corresponds to section 97 in summary cases.

1. **The procedure in section 97 of the Criminal Procedure (Scotland) Act 1995 should be extended to permit a submission to be made at the close of the Crown evidence that, on the evidence led by the Crown, no reasonable jury, properly directed, could convict of the offence charged.**

(Draft Bill, section 1)

### **The problem of *Gonshaw v Bamber***

2.26 We have already referred to the decision of the Appeal Court in *Gonshaw v Bamber*.<sup>61</sup> In that case, the accused was charged with intentionally disturbing a golden eagle while it was building a nest or was in, or near a nest containing eggs or young, contrary to section 1(5)(a) of the Wildlife and Countryside Act 1981. A submission of no case to answer was made at the close of the Crown case, and was rejected. One of the grounds on which the submission was made was that there was insufficient evidence to identify the accused. After the submission was rejected, the appellant gave evidence in his own defence. In his examination in chief he denied that he had attempted to get up to the nest, but he stated that he was the person to whom a crucial Crown witness had spoken. That was sufficient to provide corroboration of his identity. The appellant was convicted. The Appeal Court held that the sheriff was wrong to repel the submission of no case to answer in relation to the identification of the accused. The remaining question was whether, in those circumstances, the sheriff was entitled to convict the appellant of the charge. That depended on whether there was a miscarriage of justice for the purposes of section 175(5) of the Criminal Procedure (Scotland) Act 1995.<sup>62</sup>

2.27 The court referred<sup>63</sup> to the history of the no case to answer submission, and stated<sup>64</sup> that it was remarkable that the outstanding issue in the present appeal had not been the subject of any decision of the court, although it had been foreseen in *Little v HM Advocate*.<sup>65</sup> The court quoted the reasons for the Thomson Committee's recommendation.<sup>66</sup> It then continued:<sup>67</sup>

"The scope for a 'miscarriage of justice' in s 175 of the 1995 Act, or for that matter in s 106 which applies to indictment cases, has not been precisely defined. It may arise in a wide variety of circumstances, including an error of law on the part of the judge, an irregularity or impropriety in the trial procedure or some factor which has a bearing on the fairness of the trial. The question in every case is not whether the circumstances constitute in themselves a miscarriage of justice, but whether the conviction of the accused in those circumstances is a miscarriage of justice. Thus we agree with the submission of the advocate depute to this extent that, if there has been an erroneous ruling by the judge, it is only by looking at that ruling in the context of the whole trial that the court can determine whether or not a miscarriage of justice has occurred. If that is applied in the present case it is plain that the effect of the erroneous ruling of the sheriff was that it wrongly deprived the appellant of an acquittal on the charge, and instead put the appellant in the position that, in order to

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<sup>61</sup> 2004 SLT 1270; the case involved summary proceedings, but the principle is clearly equally applicable to appeals from solemn proceedings.

<sup>62</sup> The equivalent in summary proceedings of section 106 of the Act in solemn proceedings.

<sup>63</sup> Paras [8] and [9].

<sup>64</sup> Para [10].

<sup>65</sup> 1983 JC 16; 1983 SLT 489; 1983 SCCR 56.

<sup>66</sup> See para 2.4 above.

<sup>67</sup> 2004 SLT 1270, at paras [11] and [12].

give evidence in his own defence, he would have to supply the deficiency in the prosecution case. It was not suggested by the advocate depute that, by reason of his having elected to give evidence, the appellant lost his right to complain about the sheriff's failure to acquit him.

We disagree with the proposition advanced by the advocate depute, as if it was of universal application, that in determining whether or not there has been a miscarriage of justice, the court requires to look at the whole evidence. No doubt this is common, where, for example, the court is concerned with the effect of an erroneous admission of evidence or the misdirection of the jury (such as in *McIntosh v HM Advocate*). Where, on the other hand, a submission of no case to answer has been wrongly rejected, the court is dealing with the situation in which the accused should not have been required to consider giving, let alone to give, evidence in his own defence. We also disagree with the submission of the advocate depute that to look at the issue solely on the basis of the evidence at the close of the Crown case could result in a wrongful acquittal and result in a miscarriage of justice."

2.28 *Gonshaw v Bamber* involved a statutory offence of a relatively technical nature. The same principle could be applied, however, in a case of much greater gravity. For example, on a charge of murdering a child, a submission of no case to answer might be repelled; the accused might give evidence, and in his evidence he might reveal special knowledge that suggested that he had been the perpetrator of the crime. On appeal, it might be held that the judge had been wrong to reject the submission of no case to answer. Nevertheless, the disclosures made in the accused's own evidence would provide the necessary corroboration. On the authority of *Gonshaw* the court would be obliged to acquit the accused. It is not difficult to imagine that a public outcry might follow such a decision.

2.29 One way of dealing with the problem in *Gonshaw v Bamber* would be to repeal section 97 of the Criminal Procedure (Scotland) Act 1995, together with the corresponding summary provision.<sup>68</sup> For the reasons stated above, however, we are of opinion that section 97 serves a useful purpose, and should indeed be extended. It seems to us that the *Gonshaw* problem will be rare; it has only arisen once in the substantial period since the no case to answer provision was first enacted in 1980. We do not think that the advantages of the procedure in section 97 are outweighed by the possibility of the occasional hard case.

2.30 Nevertheless, it may be that a more targeted solution can be found to the *Gonshaw* problem. One possibility would have been for the Appeal Court to hold that, despite the wrongful rejection of the no case to answer submission, no miscarriage of justice had in fact occurred. The difficulty with this approach is that it appears to be ruled out by the reasoning of the court in *Gonshaw*.<sup>69</sup>

2.31 A further possibility is to deal with the *Gonshaw* problem by legislative action. We are of opinion that this possibility is beyond the scope of the present reference, and we have accordingly not considered it in detail. Nevertheless, a solution could be devised. It would be possible, for example, to provide that, if defence evidence is led, whether or not following a submission under section 97,<sup>70</sup> that evidence should be treated as evidence in the case for all purposes, including consideration of the sufficiency of the Crown case.<sup>71</sup>

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<sup>68</sup> S 160.

<sup>69</sup> See para 2.27 above.

<sup>70</sup> Or s 160.

<sup>71</sup> Cf the provision referred to by Peter Ferguson QC, "Prosecution Appeals" 2008 SLT (News) 91 at 94.

## Common law submission

2.32 In our Discussion Paper<sup>72</sup> we indicated the basis for the so-called "common law submission". This is the judge's power in charging the jury to direct them to return a not guilty verdict on any particular charge, or to direct them that any guilty verdict can only be on an amended or reduced charge.<sup>73</sup> Prior to delivering his charge to the jury the only power that the judge has to withdraw a charge from the jury without the consent of the Crown is that in section 97 of the Criminal Procedure (Scotland) Act 1995. When he delivers his charge to the jury, however, the judge may direct them to bring in a verdict of not guilty on any charge,<sup>74</sup> and in some circumstances he may be obliged to do so. Before such a power is exercised it is obviously desirable to have legal debate. The practice has therefore arisen that at the conclusion of all of the evidence, for both Crown and defence, the accused with Crown consent raises the issue of the proper form of charge that should go to the jury. Following a submission from defence counsel the Crown will reply, and the judge will issue his ruling. Thereafter the Crown will usually accept the ruling and withdraw or amend the charge. If the Crown does not do so, however, the judge will direct the jury in accordance with his ruling, either to return a verdict of not guilty on a particular charge or to modify or reduce the charge. The consent of the Crown is required for the foregoing procedure. If the Crown does not consent, the accused may make a similar submission after the prosecutor has addressed the jury. If the latter procedure is followed, the Crown does not have a right of reply, on the theory that at that stage the prosecutor is *functus officio*. In that event the judge listens to the defence submission, makes up his mind and directs the jury accordingly.

2.33 It is competent to use the foregoing procedure to challenge the legal sufficiency of the evidence, and indeed prior to the implementation of the Thomson Committee recommendations in 1980 this was the only way in which the sufficiency of the Crown case could be challenged. Since 1980, the common law submission has been used in two main categories of case. The first is to make a submission that no reasonable jury, properly directed on the law, could convict of a particular charge. The second is to submit that a charge should be modified, either by deleting part of it<sup>75</sup> or by reducing the charge to a lesser alternative.<sup>76</sup> As explained above,<sup>77</sup> it is not competent to raise either of these matters in a statutory submission of no case to answer.

2.34 In our Discussion Paper<sup>78</sup> we drew attention to a number of issues in connection with the common law submission. These were as follows:

(i) *Timing: right of reply*

2.35 The only time at which the accused can make such a submission as of right, without Crown consent, is after the prosecutor has addressed the jury. If that is done, the Crown has no right of reply. We expressed the opinion that it was unsatisfactory that the prosecutor should have no right of reply. In addition, we thought it desirable that the accused should be

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<sup>72</sup> Para 2.19.

<sup>73</sup> Renton and Brown, *Criminal Procedure* (6<sup>th</sup> edn, R 26: Aug 2006), para 18-76.

<sup>74</sup> *Kent v HM Advocate* 1950 JC 38; see para 2.3 above.

<sup>75</sup> For example, by deleting a reference to a weapon in a charge of assault.

<sup>76</sup> For example, reducing a charge of murder to culpable homicide because the *mens rea* that is necessary for murder has not been established by the Crown evidence, or reducing a charge of rape to attempted rape because penetration has not been proved by corroborated evidence.

<sup>77</sup> At paras 2.9-2.10.

<sup>78</sup> Paras 2.21-2.25.

entitled as of right to make a submission at the close of the evidence, before the Crown's speech. We pointed out that, if these matters were to be addressed, legislation would be required.

(ii) *Whether procedure should be left on common law basis*

2.36 The common law submission is based on practice rather than any clearly defined rules of law. We suggested that it might be desirable to provide for an equivalent form of submission in statute, to make the procedure clearer and to deal with the issues of timing and the prosecutor's right of reply. We further suggested that a statutory statement of the procedure would provide an opportunity to state clearly the issues that might be raised in such a submission. That would assist all of those involved in a trial to understand the function that the procedure is designed to serve.

(iii) *Issues that may be raised in common law submission or any statutory equivalent*

2.37 We further raised the question of what issues should be capable of being raised in a common law submission or any statutory equivalent. We expressed the opinion that issues raised in any statutory equivalent of a common law submission must be questions of law; otherwise they should be left to the jury. That meant that they would correspond to the issues that might be raised at present in a common law submission. These are:

- (i) an insufficiency of evidence to support a charge or part of a charge;
- (ii) an insufficiency of evidence to support the charge libelled, together with a contention that an alternative charge should be substituted;
- (iii) in matters where corroboration is not required,<sup>79</sup> a lack of evidence to support part of a charge;
- (iv) a contention that, on the evidence led, no reasonable jury properly directed could convict of the charge libelled.

We asked for comments as to whether any other matters would be appropriate for inclusion in any statutory replacement for a common law submission.

(iv) *Form of verdict*

2.38 Finally, we pointed out that the manner in which a successful common law submission is given effect would cause a problem if a right of appeal were granted.<sup>80</sup> At present a successful submission is given effect through the verdict of the jury, acting on a direction from the judge. It is an assumption of this Report that a verdict of acquittal given by a jury should be exempt from challenge by the Crown.<sup>81</sup> Nevertheless, it seemed to us that the ruling following a common law submission or any statutory equivalent is in substance a

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<sup>79</sup> This applies to aggravations and to matters that form part of the narrative of a charge, such as the use of a weapon in a charge of assault.

<sup>80</sup> Discussed below in Pt 3.

<sup>81</sup> See paras 1.4 and 3.1; the Thomson Committee referred to a "deeply entrenched principle" that a person acquitted by a jury should not be liable to re-trial: *Criminal Appeals in Scotland (Third Report)*, Cmnd 7005 (1977), para 4.12. In their response to our Discussion Paper, the Law Society of Scotland stated that it was an "important principle" that the jury's verdict is to remain sacrosanct.

ruling by the judge, and the fact that it is given effect through a verdict of the jury is a matter of form. The Thomson Committee in their Second Report<sup>82</sup> concluded that directed verdicts were generally undesirable. The Committee referred to the previous rule whereby, once a trial had begun, only the jury might return a verdict. Consequently, if the accused decided during the course of the trial to plead guilty and that was accepted by the prosecutor, the judge had to direct the jury to return a verdict of guilty. The same rule applied if the judge decided that the evidence was insufficient in law; the judge was required to direct the jury to acquit the accused. The Thomson Committee noted that cases had occurred where the jury looked unhappy at having to deliver such a verdict. They recommended<sup>83</sup> that juries should not be asked to return formal verdicts but that the judge should dispose of the case without calling upon the jury to return any verdict. That recommendation was taken into account in section 97(2) of the Criminal Procedure (Scotland) Act 1995, where it is provided that the judge should acquit the accused of the offence charged when a submission of no case to answer is sustained. In our Discussion Paper<sup>84</sup> we expressed the opinion that a similar procedure should apply to any ruling following the conclusion of the whole of the evidence. We thought that, if a ruling is in fact made by a judge, it should be treated for all legal purposes as the decision of the judge, and that should be followed through to the stage of acquittal; acquittal should accordingly be by the judge. If that is done, we pointed out that the ruling following a common law submission is a judicial ruling that can bring a solemn case to an end without the verdict of a jury. Consequently, a right of appeal would not infringe the underlying assumption that the verdict of a jury would remain exempt from challenge by the Crown.

### *Responses to Discussion Paper*

2.39 Consultees, with two exceptions,<sup>85</sup> supported the view that the procedure at present found in common law submission should be stated in statutory form, and that the accused should be entitled to make such a submission without Crown consent at the close of the evidence; that in any event the Crown should be given a right of reply; that any formal verdict that results from such a submission should be pronounced by the judge alone rather than by the jury acting on the judge's direction; and that the grounds for such a submission should be set out in statute.

2.40 In relation to those grounds, several consultees emphasised the advantage of the flexibility in the present procedures, and suggested that the Commission should not try to devise an exhaustive list of circumstances in which a submission could be made.<sup>86</sup> We accept that flexibility is important, and that any enumerated grounds should cover every matter that might reasonably be raised in the course of a trial at the close of the evidence. Nevertheless, it seems to us that the issues that we suggested<sup>87</sup> cover everything that might

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<sup>82</sup> *Criminal Procedure in Scotland (Second Report)*, Cmnd 6218 (1975), ch 49, discussed at para 2.4 above.

<sup>83</sup> *Ibid*, Cmnd 6218 (1975) para 49.03.

<sup>84</sup> Paras 2.11 and 2.24.

<sup>85</sup> One of these was Crown Office, which stated "We would welcome further discussion on whether such submissions should continue to be made at common law or should proceed on a statutory basis". We consider that the arguments are set out in sufficient detail in our Discussion Paper.

<sup>86</sup> This was the position of the Law Society of Scotland, who stated that, while the examples given in the Discussion Paper covered the vast majority of issues, matters could rise unexpectedly; the facts of *HMA v Purcell*, 2008 SLT 44, discussed at para 3.28 of our Discussion Paper, were cited as an example of the flexibility found in the existing procedure for a common law submission. In that case the court was concerned essentially with the relevancy of the terms of the indictment rather than the evidence, and observed that the argument should probably have been raised as a preliminary matter, before the beginning of the trial.

<sup>87</sup> Set out at para 2.37 above.

be raised. The fourth of these, that no reasonable jury properly directed could convict of the charge libelled on the basis of the evidence led, appears to us to be of wide application. That ground could apply clearly to cases where the evidence is so inadequate that a reasonable jury could not properly convict. Nevertheless, the reference to proper direction on the law is important; this indicates that any issue of law that requires to be dealt with in the judge's directions to the jury, or that might affect the terms of those directions, can be raised at this stage. Where, for example, it is contended that a charge is irrelevant,<sup>88</sup> that affects the form of direction that the judge could give the jury; he would be obliged to direct the jury that the charge as libelled was irrelevant and that they could not properly convict of that charge. For this reason we are of opinion that the grounds that we have set out are comprehensive, and that they should be stated in the legislation.

2.41 Finally, Peter Ferguson QC stated that in his opinion it would not be appropriate for the defence to be entitled to argue that, on the evidence led, no reasonable jury properly directed could convict of the charge libelled. He expressed the opinion that that was not, if properly viewed, a question of law. Consequently it should be left to the jury. The same argument was, he suggested, "just about acceptable" as a ground of appeal, but there the Appeal Court reviewed the evidence in the light of the jury's verdict. While we see some force in these contentions, we consider that the question of whether a reasonable jury properly directed could convict has traditionally been regarded as a question of law. That is the basis on which it is specified as a ground of appeal in section 106 of the Criminal Procedure (Scotland) Act 1995, and it seems to us that the same principle must apply to a defence submission during the trial, whether made at the close of the Crown case or at the close of all the evidence.

2.42 We accordingly make the following recommendation:

2. (a) **At the close of the whole evidence in the case it should be possible to make a submission to deal with any one or more of the following matters:**
  - (i) **an insufficiency of evidence to support a charge;**
  - (ii) **an insufficiency of evidence to support the charge libelled, together with a contention that an alternative charge should be substituted;**
  - (iii) **in matters where corroboration is not required,<sup>89</sup> a lack of evidence to support part of a charge;**
  - (iv) **a contention that, on the evidence led, no reasonable jury properly directed could convict of the charge libelled.**
- (b) **The procedure for such a submission should be stated in statutory form.**

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<sup>88</sup> As in *HMA V Purcell*, 2008 SLT 44.

<sup>89</sup> This applies to aggravations and to matters that form part of the narrative of a charge, such as the use of a weapon in a charge of assault.

**(c) Crown consent should not be required for the defence to make such a submission.**

**(d) If such a submission is made by the defence, the Crown should have a right of reply.**

**(e) Any formal verdict that results from such a submission should be pronounced by the judge alone rather than by the jury acting on the judge's direction.**

(Draft Bill, section 2 (inserted section 97A))

## Part 3 Rights of appeal

### Introduction

3.1 In this part of the Report consideration is given to rights of appeal against judicial rulings that can bring a solemn case to an end without the verdict of a jury. As indicated above<sup>1</sup> we are not considering rights of appeal following a verdict of acquittal by a jury. The convicted person has a right of appeal against a verdict of guilty; the Crown has no right of appeal against a jury verdict of acquittal, and it is not proposed to consider any change in this position.

3.2 The judicial rulings that are relevant for this purpose include those discussed in Part 2 of the Report: a ruling under section 97 of the Criminal Procedure (Scotland) Act 1995 that there is no case to answer, and a ruling following a common law submission, either that there is no case to answer or that a charge should be amended or reduced or that the evidence is such that no reasonable jury properly directed could convict. For the reasons discussed in Part 2 we are of opinion that the existing common law submission should be replaced by a statutory equivalent, and it is a right of appeal against that statutory submission that is considered in this part of the Report. In addition, we consider a right of appeal against certain categories of evidential ruling made in the course of a trial.

3.3 The existing rights of appeal in solemn criminal cases are summarised in Appendix C to this Report.

### Arguments for and against a Crown right of appeal

3.4 The fundamental issue raised in the present reference is whether a Crown right of appeal should be extended to the foregoing categories of ruling, and if so to which. The various categories of ruling give rise to different practical problems which are discussed below. First, however, we propose to consider the general issue of a Crown right of appeal.

3.5 In our Discussion Paper<sup>2</sup> we set out the principal arguments in favour of a Crown right of appeal against a judicial ruling in the following terms:

(i) An appeal involves reconsideration of the matter in dispute in such a way that the issues and arguments can usually be better focussed than is practicable at first instance. In particular, the fact that issues are raised for a second time affords all those concerned an opportunity for proper reflection about those issues, and often permits a level of detailed research that is simply not possible at first instance.

(ii) Appeals are heard by three or more judges sitting together; this enables the judges to discuss the issues among themselves, which is of assistance in reaching a decision. Issues can be seen more clearly; varying ideas about the case can be raised and debated among the judges, in a totally frank manner; the implications of

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<sup>1</sup> At para 1.3.

<sup>2</sup> Para 3.19.

any particular line of reasoning can be explored more effectively; and possible solutions can be seen more clearly.

(iii) Because a number of judges are involved, the Appeal Court will usually arrive at a degree of consensus. This has two advantages: extreme views are avoided, and the court will tend to build up a general consensus on the law more easily. Building up consensus is of importance in laying down and developing the law.<sup>3</sup>

(iv) Perhaps in reflection of the above advantages, decisions of a single judge are normally subject to a right of appeal. This applies generally, in both civil and criminal cases.<sup>4</sup> The right of appeal is of particular importance in relation to issues of law. The issue that we are considering is whether the Crown should have an appeal against rulings on the law.

(v) A judge is expected to give express reasons for his decisions. That makes it relatively easy for an Appeal Court to consider his reasoning and determine whether it is correct. That is in sharp contrast to the position of a jury, which does not provide any reasoning in support of its verdict. The lack of reasoning makes it much more difficult to challenge the jury's verdict; in particular, it makes it extremely difficult to know whether any particular element in the case was critical to the final decision.<sup>5</sup>

(vi) Rights of appeal tend to favour the accurate ascertainment of the law and its proper application to the facts of the individual case (matters referred to by the Law Commission for England and Wales as "accuracy of outcome"<sup>6</sup>). That in turn tends to favour the rule of law, in the sense of stating the law in ascertainable rules and applying those rules consistently.

(vii) The fact that rulings of individual judges are subject to review by a larger court may tend to build public confidence in the way that the legal system works.

(viii) The existence of a right of appeal can, in some cases, have a salutary effect on judicial practice at first instance.<sup>7</sup>

3.6 The principal arguments against a Crown right of appeal were stated by us as follows:

(i) It can be argued that, if an accused person has been acquitted, that should be final and certain. That principle is called into question by a Crown right of appeal against a judicial acquittal. Finality and certainty are of general importance in the law, but are especially important in criminal proceedings, in view of the very serious implications of a criminal prosecution for the rights of the citizen. A right of appeal

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<sup>3</sup> In Scots law and other systems in the English-speaking world, this is achieved through the system of precedent, which involves a formalised consensus that is binding on lower courts.

<sup>4</sup> In relation to criminal cases, decisions of the judge are subject generally to a defence appeal, and decisions at preliminary hearings and in relation to sentences are subject to appeal by either party. The Lord Advocate's reference procedure is also a recognition of the advantages of reconsideration by an appellate court.

<sup>5</sup> A defence appeal is available, of course, despite the difficulty of knowing whether, for example, a misdirection in law had an effect on the jury's verdict. In Canada a similar right of appeal is accorded to the prosecution.

<sup>6</sup> The Law Commission, *Double Jeopardy and Prosecution Appeals*, Law Com No 267 (2001), para 7.12.

<sup>7</sup> Under the present procedure, cases may exist where a judge is reluctant to sustain a submission of no case to answer because he knows that a decision to that effect is final, without the possibility of appeal.

against a judicial acquittal is different from the existing Crown rights of appeal, those applying to preliminary hearings and sentence appeals. A preliminary hearing occurs before the start of the trial, and does not result in any form of verdict. A sentence appeal can only take place following a verdict of guilty.

(ii) To the extent that a judicial ruling raises an important point of law, the procedure for a Lord Advocate's reference under section 123 of the Criminal Procedure (Scotland) Act 1995 is available. This enables important points of law to be raised by the Crown in order that they can be determined authoritatively.

(iii) An appeal will inevitably delay the final outcome of the case. This might of course be mitigated if a strict time limit were imposed on any Crown right of appeal. In addition, where delay causes actual prejudice to the accused, it should be possible to deal with that prejudice by using a power to refuse leave to bring a new prosecution; this is discussed in Part 4.

(iv) An appeal inevitably adds to the cost of cases, with additional expenses for both Crown and defence.<sup>8</sup>

3.7 In relation to the first of these arguments against Crown rights of appeal, which may be considered the most significant, we made two further points. First, appeal procedures can on one view be seen as part of a continuing judicial process, which is not complete until all rights of appeal have been exhausted. This is the approach taken by Article 4 of the Seventh Protocol to the European Convention on Human Rights.<sup>9</sup> On this approach, the rule against double jeopardy, in its broadest sense, does not come into operation until appeal procedures have been completed. Secondly, the decision of a judge is in a fundamentally different position from the verdict of a jury. A verdict of acquittal by a jury has traditionally been seen as sacrosanct in Scots law.<sup>10</sup> Decisions of a single judge, by contrast, are normally subject to appeal.<sup>11</sup> Moreover, challenging the decision of a judge is a relatively straightforward exercise because the judge is expected to give reasons for his decision. Challenging the verdict of a jury is much more difficult because no reasons are given; that makes it extremely difficult to determine whether, for example, an error of law by the judge in charging the jury has had a material effect on the jury's verdict.

3.8 In the light of the foregoing arguments, we asked in the Discussion Paper<sup>12</sup> the question whether, as a matter of general principle, the Crown should be given a right of appeal against at least some of the judicial rulings that can bring a solemn case to an end without the verdict of a jury.

3.9 With one exception, consultees were agreed that a right of appeal was desirable as a matter of principle.<sup>13</sup> The judges of the High Court of Justiciary stated:

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<sup>8</sup> The expenses of the defence will usually be met by the Scottish Legal Aid Board.

<sup>9</sup> See Pt 1 of Appendix D which deals with the Convention.

<sup>10</sup> Thomson Committee, *Criminal Appeals in Scotland (Third Report)*, para 4.12, quoted at para 14 of Appendix C.

<sup>11</sup> The Thomson Committee, in its *Second Report*, contemplated that rulings on a submission of no case to answer might be subject to an appeal: see para 14 of Appendix C.

<sup>12</sup> Para 3.24.

<sup>13</sup> The exception, the Sheriffs' Association, declined to express a view on the question, on the basis that it involved "a policy matter for the legislature".

"As the Discussion Paper points out, decisions of a single judge are normally subject to a right of appeal. The types of decision under discussion are capable of having a direct effect on the question of whether justice is achieved in an individual case. In our view the concept of a fair trial for the accused cannot be seen apart from the unfairness to a prosecutor, representing the public interest, of a well-founded prosecution being brought to a permanent conclusion by an incorrect ruling against which there is no appeal. In addition, the decisions under discussion are capable of affecting public confidence in the way in which the legal system operates."

We agree that rights of appeal are important in ensuring that the legal system operates fairly, essentially for the reasons set out in paragraph 3.5 above. We further agree that public confidence in the operation of the legal system is of great importance, and that such confidence is more likely to exist if the decisions of single judges are subject to review by an appellate court. Sound reasons exist for such a view, notably the fact that issues and arguments can usually be better focussed in an appeal court and the ability of the judges in an appeal court to consider a case at length and arrive at a consensus opinion. Overall, we consider the arguments in favour of a right of appeal to be strong.

3.10 In relation to the arguments against a right of appeal,<sup>14</sup> we consider that the principle of finality and certainty is outweighed by the advantages of an appeal procedure; finality and certainty only become important when the whole legal process against the accused, including any appeal, has been completed. As to the availability of the procedure for a Lord Advocate's reference, we consider that public confidence in the legal system is more likely to be maintained if an erroneous ruling at first instance can be reversed. Delay is inevitable if a right of appeal is permitted, but this can be mitigated by strict time limits and the ability of the Appeal Court to refuse a re-trial if delay has been excessive.<sup>15</sup> The additional expenses of an appeal will normally be met from public funds, and appear to us to be a price worth paying for the maintenance of public confidence in the system of criminal justice. We are of opinion that the disadvantages of a Crown right of appeal are substantially outweighed by its advantages.

3.11 We accordingly recommend:

3. **As a matter of general principle, the Crown should be given a right of appeal against at least some of the judicial rulings that can bring a solemn case to an end without the verdict of a jury.**

(Draft Bill, section 3 (inserted section 107A))

#### *Test for Crown appeal*

3.12 The next issue is the test that should be applied to any Crown appeal. In the Discussion Paper we pointed out that in appeals by a convicted person under section 106 of the Criminal Procedure (Scotland) Act 1995 the test that is applied is whether there has been a miscarriage of justice.<sup>16</sup> Defence appeals are, of course, considered after the jury have pronounced a verdict. At that stage the result of the case must be looked at in the light of a wide range of circumstances; that indicates that a fairly general test is desirable. The

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<sup>14</sup> Set out in para 3.6 above.

<sup>15</sup> See para 4.3 below.

<sup>16</sup> S 106(3).

expression "miscarriage of justice" has been held to confer a degree of discretion on the Appeal Court.<sup>17</sup> It enables the court to determine whether any particular error in the proceedings might have had an effect on the outcome of the case. The present Report considers rights of appeal against judicial rulings that are capable of bringing a solemn case to an end without the verdict of a jury. We consider that all such rulings involve questions of law; for this purpose, both sufficiency of evidence and the question of whether a reasonable jury properly directed could convict are questions of law, and are regularly dealt with as such by the Appeal Court.

3.13 In the Discussion Paper we expressed the view that error of law must be an element in the test; that was the fundamental issue in any appeal against any of the judicial rulings under consideration. In addition, we suggested that an appeal should only be allowed if the ruling was likely to have a significant effect on the outcome of the case. In general consultees agreed with the use of a two-stage test, although in one case it was suggested that the second limb of the test should be whether there was a miscarriage of justice, as in defence appeals. Certain consultees expressed the view that a right of appeal should only exist where the ruling resulted in the termination of proceedings, either in relation to a particular charge or in relation to the prosecution as a whole. For reasons discussed below,<sup>18</sup> we consider that the second of these limitations is not appropriate, and that appeals should be permitted against certain categories of ruling that do not bring proceedings to an end. We are of opinion that any reference to a miscarriage of justice is misconceived in a Crown appeal. The expression "miscarriage of justice" has been the subject of considerable case-law in relation to defence appeals, and it seems to us that it is a concept directed essentially towards a complaint by an accused person that he has been wrongly convicted. Crown appeals of the sort under consideration are based on error of law, and we do not think that reference to a miscarriage of justice assists in addressing the question of whether there has been such an error.

3.14 The judges of the High Court argued against a two-stage test.<sup>19</sup> They stated:

"In our view the test ought simply to be whether the judge's ruling was wrong in law. In considering appeals from rulings which have resulted in an acquittal this can be the only relevant test. A separate question as to whether the court ought to permit a re-trial might arise in relation to a successful appeal. We see no need for any different test in relation to appeals against other types of rulings. Depending on the circumstances of the appeal in question, we can well see that questions as to the effect of the ruling on the outcome of the case might arise. However, in our view these raise issues which are relevant to the question of whether authority to bring a new prosecution ought to be granted, rather than to whether the appeal ought to be granted."

We are persuaded by this reasoning. We think that, in relation to whether or not an appeal should be allowed, the only significant issue is whether or not the trial judge was correct in law. Any other questions are better addressed either at the stage of leave to appeal or at the stage where the court considers whether to authorise a new prosecution. If the ruling is unlikely to have a material effect on the outcome of the case, that is a factor that can be taken into account at that stage. Moreover, it seems to us that it is undesirable in principle

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<sup>17</sup> *McCuaig v HM Advocate*, 1982 JC 59; 1982 SCCR 125.

<sup>18</sup> Paras 3.30-3.38 and 3.46-3.52.

<sup>19</sup> A broadly similar view was expressed by Peter Ferguson QC.

that the test to be applied by the Appeal Court should be more complicated than is necessary. We accordingly recommend:

**4. The test for the Crown right of appeal should be a single test, that the judge's ruling was wrong in law.**

(Draft Bill, section 3 (inserted section 107B(2)))

*Result of successful Crown appeal*

3.15 As we pointed out in our Discussion Paper,<sup>20</sup> the proposal that has been referred to us is a right of appeal in the proper sense; it would involve the quashing of the judge's ruling and any consequential acquittal, with the possibility of further proceedings against the accused. It is accordingly essential to decide what form those further proceedings should take. Two possibilities exist: the continuation of the existing trial and a re-trial.<sup>21</sup> We expressed the view that in the great majority of cases the continuation of the existing trial would not be a realistic possibility because of the delay that would necessarily attend any appeal. Three main reasons exist for such delay. First, in any appeal a report from the trial judge will be necessary, which will inevitably take some time. Second, most such appeals are likely to raise the legal sufficiency of the Crown case or whether the Crown evidence supports a particular form of charge; some may raise the issue of whether a reasonable jury properly directed could convict. In cases falling into any of those categories it might be necessary to extend the notes of evidence.<sup>22</sup> That would also involve considerable delay. Third, it will in practice be extremely difficult to find three judges for an Appeal Court at very short notice, on account of the fact that the judges of the High Court are normally fully deployed; thus resources are simply not available for an additional Appeal Court. The delay that is likely to result from these three factors would make it difficult to hold the jury in readiness for the resumption of the trial, and in any event it would be difficult to resume the trial at a time when the evidence was still reasonably fresh in the minds of the jurors.<sup>23</sup>

3.16 Nevertheless, we considered that in some cases the rapid convening of an Appeal Court might be a preferable option despite the difficulty in obtaining resources. Where, for example, a trial had proceeded for a very long time,<sup>24</sup> the waste of the evidence that had been led might be a greater problem than the difficulties of finding three judges at short notice and obtaining a report from the trial judge within a short space of time. For this reason we inclined to the view that, if there is legislation to allow a Crown right of appeal, it should allow for the possibility of a continuation of the existing trial.

3.17 For the foregoing reasons, we proposed that, if a Crown appeal were successful, the normal result should be a re-trial rather than a continuation of the existing trial. We further

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<sup>20</sup> Para 3.26.

<sup>21</sup> If the trial judge had repelled a submission of no case to answer or other defence submission the result would be that the trial proceeded, ultimately to a verdict of the jury. This rules out a third theoretical possibility: that the appeal court substitute a verdict of guilty for the judge's acquittal of the accused. In any event, solemn criminal procedure is based on the fundamental proposition that in the absence of a plea any verdict of guilty must be that of the jury, which would of itself rule out the possibility of a directed verdict of guilty following a successful appeal.

<sup>22</sup> Nevertheless it might be possible to play the tape-recording of the proceedings at first instance.

<sup>23</sup> The English provisions found in Part 9 of the Criminal Justice Act 2003 assume that the trial will normally continue. That is, however, in the context of a different procedure with different forms of organisation, and we do not think that a similar procedure can be the norm in Scotland.

<sup>24</sup> Periods of 12 weeks and upwards are not unknown in cases involving fraud or embezzlement.

proposed that it would nevertheless be desirable to have a procedure available to permit an appeal to be heard during the continuation of a trial; such procedure would be used in exceptional cases, such as trials that had continued for a long time, to avoid the waste of the trial diet. As an alternative, we asked whether it would be practicable to make use of a procedure similar to that used at present where two judges are called in to decide a question of law, to enable appeals to be heard during the continuation of a trial.

3.18 The majority of consultees supported our basic proposal, although some preferred that the norm should be an appeal heard during the continuation of the trial.<sup>25</sup> Our reasons for proposing a re-trial as the norm were essentially practical: it would generally be impossible to prepare for an appeal in sufficient time to preserve the trial diet, and it was likely in practice to be difficult to find judges for an Appeal Court at short notice. In this connection, we attach particular importance to the reply received from the Lord Justice General. He stated:

"As noted in the Discussion Paper at paragraph 3.26, it would in most cases be impractical to continue the diet of trial pending the determination of the appeal. While in some circumstances a report from the trial judge might be produced quickly, in any case where it was necessary to extend any part of the evidence it would not be possible to hold the trial diet. There would also be practical difficulties in arranging an Appeal Court sitting at such short notice; this would not in all circumstances be impractical – an extra two judges are from time to time to sit with a trial judge when an issue of particular difficulty arises – but the convening of such an Appeal Court would require to be regarded as an exceptional measure rather than as routine. Such a course would almost inevitably disturb existing programmes – with the consequence that previously arranged business would require to be postponed, with consequential inconvenience and expense."

3.19 This reply supports our provisional view that a successful appeal should normally result in a re-trial; that would mean that the appeal could be heard at a time when sufficient judges were available. We think, however, that it would be possible in exceptional cases to have an appeal heard during the continuation of a trial, provided that sufficient judges are available; this might be appropriate when a trial had proceeded for several weeks, or even months. We emphasise, however, that such expedited appeals would not be the norm.<sup>26</sup>

3.20 We accordingly recommend:

5. **If a Crown appeal is successful, the normal result should be a re-trial rather than the continuation of the existing trial, on the assumption that leave is given to raise a fresh prosecution.**

(Draft Bill, section 3 (inserted section 107D))

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<sup>25</sup> In particular, Crown Office.

<sup>26</sup> Such a procedure would bear some similarity to the existing practice whereby two judges may be called in to decide a question of law along with the trial judge: see Discussion Paper, para 3.28. The existing procedure does not of course involve an appeal, and the trial judge sits as part of the courts. Our proposal involves a full appeal, to the Appeal Court, albeit on an expedited basis.

6. **Provision should nevertheless be made, for use in exceptional cases, to permit an appeal to be heard during the continuation of a trial (an "expedited appeal").**

(Draft Bill, section 3 (inserted section 107C))

### **Judicial rulings that can result in acquittal of accused**

3.21 We now consider the three types of judicial ruling that can bring a solemn criminal case to an end without the verdict of a jury.

#### **Submission of no case to answer**

3.22 In the Discussion Paper, we expressed the view<sup>27</sup> that in relation to a submission under section 97 of the Criminal Procedure (Scotland) Act 1995 the position was reasonably straightforward. If such a submission is successful, the result is the acquittal of the accused by the judge on the particular charge or charges to which the submission relates. That acquittal is based on an insufficiency of evidence, in the sense that there is no corroborated evidence of the commission of an offence or the identity of the perpetrator or circumstances from which the requisite state of mind of the perpetrator can be inferred.<sup>28</sup> The sufficiency of evidence is a question of law; consequently any appeal would be on a question of law.

3.23 Nevertheless, we pointed out that questions of law do not arise in the abstract; they inevitably relate to the facts of a particular case and the evidence led in that case. Consequently it would in all cases be necessary to have a report from the trial judge summarising the evidence and indicating the reasons for his decision to acquit the accused. In some cases it might also be necessary to have the notes of evidence extended to enable the Appeal Court to decide whether there was corroborated evidence of the essentials of the charge.<sup>29</sup> At least where the trial judge's summary of the evidence is not accepted as substantially correct by both the Crown and the accused, extending part of the notes of evidence would probably be essential.

#### *Leave to appeal*

3.24 The issue of leave to appeal is considered below at paragraph 4.13 onwards.

#### *Multiple charges and multiple accused*

3.25 As we indicated in our Discussion Paper,<sup>30</sup> a ruling on a submission of no case to answer may only affect one of a number of charges against the accused; moreover, charges against co-accused may still remain. We expressed the view that in that event the trial should continue in respect of the remaining charges; that would ensure that the trial diet and the evidence that had been led were not wasted. The same point would obviously apply if charges remained against a co-accused. We thought that there should be an exception if the remaining charges were relatively minor, but in that event we thought that the Crown's

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<sup>27</sup> Para 3.34.

<sup>28</sup> See para 2.7 and 2.8 above.

<sup>29</sup> Those essentials being that an offence has been committed, the identity of the perpetrator and the necessary state of mind on the part of the perpetrator.

<sup>30</sup> Para 3.37.

existing power to desert proceedings *pro loco et tempore* should be sufficient to deal with the problem. If the trial continued a number of problems might arise in respect of the charge that had resulted in an acquittal, but we thought that these problems related not to the appeal process itself but to the possibility of a re-trial.

3.26 In those circumstances, we asked whether the Crown should have a right of appeal against rulings under section 97 of the Criminal Procedure (Scotland) Act 1995 that there is no case to answer. The consultees who addressed this question were all in agreement that the Crown should have such a right.

3.27 In view of the response, we consider that our analysis in the Discussion Paper remains valid. We accordingly recommend:

7. **The Crown should have a right of appeal against rulings under section 97 of the Criminal Procedure (Scotland) Act 1995 that there is no case to answer.**

(Draft Bill, section 3 (inserted section 107A(1)(a)))

#### *Time limit for appeal*

3.28 A further issue is whether any time limit should be placed on the intimation of a Crown appeal. It seems to us that such a limit is necessary in the interests of certainty and finality of legal procedure. Moreover, because of the importance of an acquittal for the rights of the accused, it seems to us that a strict time limit is required. In appeals against decisions at preliminary hearings, this time limit is two days.<sup>31</sup> We think that a slightly longer period is justified in the present context, as consideration must be given to the evidence that has been led, and on occasion the prosecution may require an instruction from Crown Counsel. We consider that a period of seven days would represent an appropriate balance between the interest of the accused in certainty and finality and the need for the Crown to consider its position properly. If an appeal is to proceed as an expedited appeal,<sup>32</sup> however, it will in practice be essential for the Crown to intimate an appeal immediately after the judge's ruling. For these reasons we recommend:

8. **If the Crown is to appeal against an acquittal under section 97 of the Criminal Procedure (Scotland) Act 1995, a note of appeal must be lodged within seven days of the granting of leave to appeal. In an expedited appeal, a note of appeal should be lodged as soon as practicable after the decision that the appeal be expedited.**

(Draft Bill, section 5(1) (inserted section 110(1)(c) and (d)))

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<sup>31</sup> Under section 74(2) of the 1995 Act. See Appendix C, para 11.

<sup>32</sup> See para 3.19 and recommendation 6, above.

## Statutory equivalent of common law submission

### (i) *The principle of an appeal and its scope*

3.29 In relation to the statutory equivalent of a common law submission the position is more complex. Nevertheless, in the Discussion Paper<sup>33</sup> we expressed the view that, if the Crown were to have a right of appeal against judicial rulings that could terminate a case without a verdict of the jury, such appeal should lie against a ruling following an equivalent of the common law submission as well as a ruling following the statutory procedure under section 97. We stated that, although their scope was different, the two procedures served broadly similar functions; and both involved judicial rulings that were capable of bringing the prosecution of a charge to an end without a jury verdict.<sup>34</sup> We further pointed out that if an appeal lay against a ruling under section 97 but not against a ruling following the equivalent of a common law submission, there could be an incentive for the accused to delay making any submission until all the evidence had been completed. We thought it wrong that the timing of a submission should have the result of defeating a right of appeal.

3.30 We then raised the issue<sup>35</sup> of what should happen where the judge's ruling did not bring the prosecution to an end in respect of one or more charges but only reduced a charge to a lesser alternative offence or deleted part of a charge. In such cases, the prosecution is not terminated; the charge in its amended form goes to the jury and the jury return a verdict. We stated that, if that verdict is not guilty or not proven, any Crown appeal would be ruled out by the assumption that a jury's verdict of acquittal is to remain exempt from challenge by the Crown.

3.31 We then put forward arguments for and against extending a Crown right of appeal to rulings that do not result in an acquittal.<sup>36</sup> In support of extension, it can be argued that the right should extend not only to rulings that terminate the prosecution in respect of a particular charge but also to rulings that significantly reduce the scope or seriousness of the charge. By way of example, the reduction of a charge of rape to a contravention of section 5(3) of the Criminal Law (Consolidation) (Scotland) Act 1995, or the reduction of a charge of culpable homicide to one of careless driving under section 3 of the Road Traffic Act 1988, would each involve a major reduction in the importance of the charge. Likewise, in a charge of assault, deleting a reference to the use of a knife or firearm involves a significant reduction in the seriousness of the charge. On this argument, it is not obvious why a Crown appeal should not lie against rulings of that nature when it does lie against a ruling that the charge as a whole should be taken from the jury.

3.32 Against the extension of a Crown right of appeal to such rulings, we pointed out that in cases where part of a charge is deleted or a different charge is substituted there is still a prosecution which reaches the stage of a jury verdict. In many cases the amended or reduced charge that goes to the jury may be serious in nature; that occurs, for example, when a charge of murder is reduced to culpable homicide, or when a charge of rape is reduced to attempted rape. Moreover, in some cases the amendment may be trivial. That may happen when, for example, all that is deleted is a minor part of the narrative of the

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<sup>33</sup> Para 3.39.

<sup>34</sup> Although the common law submission can be and often is used to reduce or modify a charge rather than to terminate its prosecution.

<sup>35</sup> Para 3.40.

<sup>36</sup> Paras 3.41 and 3.42.

offence, or when an aggravation of permanent disfigurement is deleted leaving aggravations of permanent impairment and danger to life. It is surely undesirable that there should be appeals against rulings of that nature.

3.33 We invited comments on the question of whether a Crown right of appeal should extend to a ruling on a common law submission or statutory equivalent that does not have the effect of bringing the prosecution to an end in respect of one or more charges. We accepted that it was undesirable that relatively minor rulings should be the subject of appeal. We thought that that problem could be dealt with by imposing a leave requirement. We accepted that the Crown rights of appeal that had been granted in the past were not subject to any such requirement; nor was there any such requirement for a Lord Advocate's reference. Nor did we have any reason to suppose that the Crown would appeal relatively insignificant rulings. Nevertheless, it seemed to us that it was undesirable in principle that there should be an automatic right of appeal against such rulings; there is an important public interest in ensuring that a trial should be brought to a conclusion whenever possible, and it is wrong that a trial should be ended for insubstantial reasons. We accordingly expressed the opinion that a requirement of leave should be imposed in this case, and also in respect of evidential rulings.<sup>37</sup>

3.34 We further pointed out<sup>38</sup> that a successful common law submission may only affect one charge out of two or more. In that event, we thought that the trial should continue notwithstanding a Crown appeal against the judge's ruling. That would be subject to an exception if the other charges were relatively minor, but in that event we thought that the existing power of the Crown to move for desertion *pro loco et tempore* should be sufficient to deal with the situation. If the remaining charges continued to a verdict, we considered that that should not have a bearing on whether an appeal might be made, but that it might have an impact on whether a re-trial should be ordered.

3.35 In the Discussion Paper<sup>39</sup> we made reference to rulings based on a submission that no reasonable jury properly directed could convict on one or more charges. We expressed the view that a right of appeal against such a ruling should not cause significant practical difficulties. If, as we suggest, the procedure is put into statutory form, the judge will acquit the accused of the charge or charges in question. Consequently any appeal would be intimated following the judge's ruling. So far as the substance of any appeal is concerned, the Appeal Court deals with appeals against conviction on a similar ground under section 106(3)(b), and we did not think that a Crown appeal would give rise to fundamentally different problems.

3.36 Against the foregoing background, we asked<sup>40</sup> whether the Crown should have a right of appeal against a ruling on a common law submission or statutory equivalent. We further asked whether a distinction should be drawn between two categories of such rulings: those which result in an acquittal on one or more charges against the accused and those which merely amend or reduce a charge. Consultees unanimously agreed that the Crown should have a right of appeal against rulings that resulted in an acquittal on one or more charges. A

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<sup>37</sup> See Discussion Paper, paras 3.43, 3.55, 3.56 and 4.11.

<sup>38</sup> Para 3.44.

<sup>39</sup> Para 3.45.

<sup>40</sup> Para 3.50.

majority of consultees<sup>41</sup> agreed that a right of appeal should extend to all rulings following a submission at the close of the evidence. The judges of the High Court observed (in relation to rulings that do not result in an acquittal on one or more charges):

"However, once the principle of a right of appeal is conceded it is difficult to see why it should not be extended to such rulings. It is inconceivable that the Crown would wish to exercise such a right other than in the most important of circumstances. If such circumstances were thought to arise, it might be unfortunate if no right of appeal was available. A further safeguard of the need to obtain the leave of the trial judge would ensure that an appropriate right of appeal was available but that it was not exercised unnecessarily."

3.37 We find this reasoning persuasive. Reductions in a charge can be of great importance, as where a charge of culpable homicide is reduced to a contravention of section 3 of the Road Traffic Act 1988, or where the use of a firearm or knife is deleted from a charge of assault. It is plainly undesirable that minor deletions or amendments should be the subject of an appeal, but we are of opinion that it is most unlikely that the Crown would wish to appeal against such rulings. In any event, the imposition of a requirement of leave to appeal<sup>42</sup> should provide an additional level of protection in such cases.

3.38 We accordingly make the following recommendation:

9. **The Crown should have a right of appeal against a ruling on the statutory equivalent of a common law submission. Such a right should extend both to rulings which result in an acquittal on one or more charges and those which merely amend or reduce a charge.**

(Draft Bill, section 3 (inserted section 107A(1)(a) and (b)))

- (ii) *Procedure in appeals against rulings following statutory equivalent of common law submission*

3.39 In the Discussion Paper<sup>43</sup> we raised the question of the timing of any appeal against a ruling following a common law submission or statutory equivalent that merely amended or reduced a charge without an acquittal. In such a case the judge's ruling does not take the charge away from the jury; instead the jury are asked to return a verdict on the amended or reduced charge. Consequently two possibilities existed as to timing: the jury should return a verdict before the Crown is required to intimate whether it wishes to appeal; or alternatively the Crown should be required to intimate more or less immediately whether it wishes to appeal. We favoured the second alternative.<sup>44</sup> The problem with the first was that it involved an appeal after the jury had returned a verdict, and thus required the quashing of a jury verdict at the instance of the Crown. While the verdict that was quashed was of guilty, the purpose of overturning it was to enable the Crown to raise a new prosecution for a more serious charge than the charge of which the accused was convicted. We pointed out that the difficulty that this created was perhaps perceptual rather than real, in that the ruling that is reversed is that of the judge, reducing the charge, and not the decision of the jury. Nevertheless, it seemed to us that such a procedure would involve an inroad into the

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<sup>41</sup> Including the judges of the High Court of Justiciary, the Law Society of Scotland and Crown Office.

<sup>42</sup> See paras 4.15-4.17 below.

<sup>43</sup> Para 3.46.

<sup>44</sup> Para 3.49.

principle that the verdict of a jury should not be quashed at the instance of the prosecution. That principle would be maintained if the Crown required to intimate an appeal immediately after the judge's ruling.

3.40 We recognised that the foregoing procedure would cause difficulties in practice, in that the Crown would require to decide very rapidly whether it wished to appeal against the judge's ruling; a decision would be required before any further significant procedure took place, and before the speeches and charge to the jury. In addition, the charge that was the subject of the appeal would not go to the jury; thus the whole trial procedure that had taken place in respect of that charge would be wasted.<sup>45</sup> We were inclined to discount the problem that trial procedure would be wasted even if the Crown appeal were unsuccessful<sup>46</sup> because we did not expect appeals of this nature to be very common. In relation to the requirement that the Crown should make an immediate decision on whether to appeal, we did not think that the problem was serious. The prosecutor should be very familiar with the case, and should be able to make a rapid assessment of the judge's ruling. We thought that a short adjournment might normally be given to permit the Crown to consider its position; in cases of obvious difficulty this might extend to an adjournment overnight. Overall, we did not think that the disadvantages of an immediate appeal outweighed the undesirability of allowing the Crown to have a jury's verdict quashed by the Appeal Court.

3.41 We invited comments on this issue. Of the consultees who addressed this issue, a majority<sup>47</sup> agreed with our provisional view. We recognise that the problem of returning a verdict of guilty in an appeal by the Crown is one of perception rather than substance, but we remain of the view that it is undesirable to permit the Crown to challenge a jury's verdict, at least on the basis of our present terms of reference. For that reason we make the following recommendation:

- 10. If the Crown is to challenge a ruling following the statutory equivalent of a common law submission, leave to appeal should be sought forthwith, that is to say, either immediately the ruling is made or after a short adjournment to enable the Crown to consider its position.**

(Draft Bill, section 3 (inserted section 107A(2)(a)))

3.42 In cases where a ruling following the statutory equivalent of the common law submission results in an acquittal on one or more charges it seems to us that the discussion in paragraph 3.28 in respect of section 97 rulings is equally valid. We accordingly recommend:

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<sup>45</sup> For example, if the trial judge rules that a charge of murder should be reduced to culpable homicide and the Crown is permitted to appeal, the evidence that had been led in the case (which could be lengthy) would be wasted even if the Appeal Court ruled that the judge had been correct to reduce the charge. In that event a re-trial, if permitted, would be required on a charge of culpable homicide. If the Crown's appeal is successful, of course, the evidence is wasted, but that is the result of any successful appeal followed by a re-trial. If an appeal could be heard without deserting the trial diet, as discussed at paras 3.27-3.29 of the Discussion Paper, this problem would not arise.

<sup>46</sup> If the Crown appeal is successful, the trial procedure will be wasted on either approach.

<sup>47</sup> Including the judges of the High Court of Justiciary and the Law Society of Scotland.

11. **If the Crown is to appeal against a ruling on the statutory equivalent of a common law submission, a note of appeal must be lodged within seven days of the granting of leave to appeal. In an expedited appeal, a note of appeal must be lodged as soon as practicable after the decision that the appeal be expedited.**

(Draft Bill, section 5 (inserted section 110(1)(c) and (d)))

## **Evidential rulings**

3.43 Most rulings on the admissibility of evidence are now made at preliminary diets or preliminary hearings. This is the result of the reforms introduced by the Criminal Procedure (Amendment) (Scotland) Act 2004, which implemented the Bonomy Report.<sup>48</sup> In terms of section 79 of the Criminal Procedure (Scotland) Act 1995,<sup>49</sup> an objection by a party to admissibility of any evidence is now a preliminary issue. Under section 72(6)(b)(i) of the Criminal Procedure (Scotland) Act 1995,<sup>50</sup> the judge is directed to dispose of any preliminary issues at the preliminary hearing.<sup>51</sup> Preliminary issues may be raised at the trial with leave of the court, in terms of section 79 of the 1995 Act. Section 79A, however, provides that, where a party seeks to raise an objection to the admissibility of any evidence after the preliminary hearing in High Court proceedings or the first diet in proceedings on indictment in the sheriff court, the court shall not grant leave for the objection to be raised "unless it considers that it could not reasonably have been raised before that time". As a result of these provisions, most evidential questions should be disposed of before the trial begins. Nevertheless, as we indicated in the Discussion Paper,<sup>52</sup> some evidential questions will still arise during the course of the trial. This is most likely to occur where an unexpected development occurs in the course of oral evidence. In the Discussion Paper we gave the examples of a witness who gave some indication in evidence that a police interview was not fairly conducted, or that proper procedures were not followed in recovering or analysing productions. In a very helpful response to our Discussion Paper, Peter Ferguson QC pointed out an example of such an issue which arose in a case before the High Court sitting at Paisley.<sup>53</sup> In that case a forensic scientist conceded in cross-examination that she had not herself analysed the knot from which the accused's DNA profile was obtained. That work had been done by a technician. No hint of this was given in the forensic science report which had been specified in the list of productions annexed to the indictment. It was held by the trial judge that the scientist's evidence of the results of the analysis was hearsay and hence inadmissible. Developments of this nature cannot easily be foreseen, and accordingly the judge may on occasion have to rule on the admissibility of evidence during the course of a trial.

3.44 In such cases, as we point out in the Discussion Paper,<sup>54</sup> the judge's ruling may have the practical effect of terminating the prosecution. For example, if the Crown is dependent upon admissions made by the accused in a police interview to provide a sufficiency of

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<sup>48</sup> *Improving Practice: 2002 Review of the Practices and Procedure of the High Court of Justiciary* (2002). Available at [www.scotland.gov.uk/resource/doc/46932/0025198.pdf](http://www.scotland.gov.uk/resource/doc/46932/0025198.pdf).

<sup>49</sup> As substituted by s 13(1) of the Criminal Procedure (Amendment) (Scotland) Act 2004.

<sup>50</sup> As substituted by s 1(3) of the Criminal Procedure (Amendment) (Scotland) Act 2004.

<sup>51</sup> Comparable procedures exist in the sheriff court.

<sup>52</sup> Paras 2.26 and 2.27.

<sup>53</sup> *HM Advocate v McFarlane*, Paisley High Court, 26 July 2006, unreported.

<sup>54</sup> Para 2.27.

evidence, a ruling that the interview was unfairly conducted and hence inadmissible will inevitably be fatal to the prosecution. In other cases, however, matters may not be so clear-cut because other evidence that may provide corroboration is available, and the trial may proceed to a submission of no case to answer. At that point, if the submission is successful, the accused is acquitted, and the Crown might reasonably claim that the ruling on the admissibility of the interview had been fatal to the prosecution. In such a case, however, it is the ruling on the evidence that is the real subject of the Crown's complaint, not the ruling on the submission of no case to answer. In other cases the submission of no case to answer may be repelled, and the case may go to the jury. In that event, if the jury decide to convict, there would be no question of a Crown appeal.<sup>55</sup> If the jury acquit the accused, the Crown might claim that the ruling on evidence was at least a material reason for the acquittal. In that case, however, the jury has returned a verdict of acquittal, and it is a fundamental presupposition of this Report that a verdict of acquittal returned by a jury should be exempt from challenge.

3.45 We accordingly expressed the opinion<sup>56</sup> that, if there were to be an appeal against a ruling on evidence, it would require to be made before the jury were asked to return a verdict. We stated that there would be clear practical advantages if any appeal were made during or at the end of the Crown evidence; otherwise any defence evidence would be presented in response to a Crown case that might later be held to be incomplete.

3.46 Against the foregoing background, we asked in the Discussion Paper<sup>57</sup> whether the Crown should have a right of appeal against evidential rulings made during a trial. On this matter consultees were divided. The judges of the High Court were in favour of a right of appeal. In their response, they wrote:

"In accordance with our views on the general question of principle, our view is that such a right ought to be available to the Crown. We acknowledge again that such appeals will inevitably result in practical difficulties. However, we do not believe that these are such as to outweigh the arguments in favour of the availability of the right. Our view on this matter is strengthened by a recognition that few such rulings ought to be called for in light of current procedure. In High Court cases objections to the admissibility of evidence require to be intimated in writing not less than 7 clear days before the preliminary hearing. They are then adjudicated upon at that or a continued preliminary hearing. Section 79(1) of the Criminal Procedure (Scotland) Act 1995 permits the court, on cause shown, to allow the point to be raised outwith this period. However, section 79A(4) of the Act provides that where a party seeks to raise an objection after the commencement of the trial, the court shall not grant such leave unless it considers that the objection could not reasonably have been raised before that time. Either party is entitled, with the leave of the court of first instance, to appeal a ruling on a timeously stated objection dealt with at preliminary hearing. It might lead to unfortunate circumstances if such a right was not available to the Crown where the anticipated statutory procedure had not been followed and the objection was only taken at trial. Again we would expect that such a right of appeal would only very rarely be exercised and observe that a need to obtain leave ought to provide an adequate safeguard. It would in our view be appropriate to provide that such an application for leave to appeal would require to be intimated within 2 days of the decision. This would be the same timescale as provided by section 74(2)(b) of

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<sup>55</sup> Although further complications might arise if that verdict were the subject of a successful defence appeal.

<sup>56</sup> Para 2.28.

<sup>57</sup> Para 3.56.

the Criminal Procedure (Scotland) Act 1995 in relation to appeals from rulings on such matters given at preliminary hearings."

The Law Society of Scotland also favoured a right of appeal against evidential rulings, but only if the trial is deserted and there is no jury verdict.

3.47 Other consultees took the view that a right of appeal should be available but should be confined to decisions which were essential to the Crown case. This differs from our provisional conclusion<sup>58</sup> that a criterion for leave to appeal, in addition to arguability, should be that the judge's ruling results in a significant weakening of the Crown case. Peter Ferguson QC stated:

"I consider that only decisions taken to exclude evidence which is essential to making the Crown case against the accused sufficient should be liable to appeal by the Crown. The appeal should be after the trial judge has acquitted the accused in the relevant respect. So the appeal should follow the same course as an appeal against an acquittal referred to above. If on appeal it is apparent that the excluded evidence would still not have made the case against the accused sufficient, the appeal should be refused, even though the trial judge is held to have wrongly decided the objection. This approach will avoid the appeal court's having to assess whether the excluded evidence significantly weakened the case against the accused."

3.48 Mr Ferguson's view on this matter is to some extent tied to his view that the existing no case to answer procedure under section 97 of the Criminal Procedure (Scotland) Act 1995 should be abolished, and replaced by a submission at the close of the whole of the evidence; he points out that in that event defence evidence might make good an essential deficiency that existed through the wrongful exclusion of prosecution evidence.

3.49 Others opposed the extension of any right of appeal to evidential rulings. One consultee (Sir Gerald Gordon QC) stated that the current provisions for pre-trial hearings should be sufficient in most cases, and if the Crown have prepared their case properly there should not be any surprises. Another consultee (the Sheriffs' Association) opposed the extension of rights of appeal in such cases on the basis that they could see no justification for the Crown's having a greater right than the defence. Consequently, if the Crown were given a right of appeal, that right should be exercisable only after the conclusion of the trial. In relation to this response, we would point out that there is no intention to give the Crown greater rights than the defence. The positions of Crown and defence are not directly comparable, and in any event we proceed on the fundamental assumption that the Crown should not be entitled to challenge a jury verdict. That would of itself rule out any appeal following conclusion of the trial.

3.50 Two consultees (Margaret Scott QC and Christopher Shead, Advocate) opposed the extension of rights of appeal to evidential rulings on a number of bases. The first of these was that it would place the Crown in a privileged position by comparison with the defence, in that the Crown could appeal mid-trial. In addition, the Crown was not subject to the hurdle of demonstrating a miscarriage of justice, as the defence must. In relation to the first of these objections, an appeal mid-trial is an inevitable consequence of the assumption that the Crown should not be able to challenge a jury verdict. In relation to the second, we are of opinion that a requirement for leave to appeal that the judge's decision should have a

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<sup>58</sup> Explained at paras 4.16 and 4.17 of the Discussion Paper.

significant effect on the strength of the Crown case should have an effect comparable to the requirement of demonstrating a miscarriage of justice, but adapted in a manner that reflects the fact that the Crown appeal must take place mid-trial.

3.51 We accept that a right of appeal against evidential rulings during the trial is not likely to have an effect in more than a small minority of cases. We further accept that leave to appeal such rulings should only be granted in cases where the effect of the ruling is to produce a significant weakening of the Crown case. Nevertheless, we are persuaded by the reasoning of the judges of the High Court, in particular, that such a right should be granted. The Crown has a right of appeal in respect of evidential rulings made during pre-trial procedure, and consistency demands that the right should extend to all such rulings. We do not see any insuperable practical difficulties from such a right, provided that it is confined to cases where the ruling is important to the outcome of the trial. The requirement of leave to appeal should achieve that result. Moreover, the requirement that leave of the court should be required for a new prosecution<sup>60</sup> will permit the Appeal Court to bring a prosecution to an end in any case where they form the view that the right of appeal has been used improperly.

3.52 We accordingly make the following recommendation:

**12. The Crown should have a right of appeal against evidential rulings made during a trial.**

(Draft Bill, section 3 (inserted section 107A(1)(c)))

3.53 In our Discussion Paper<sup>61</sup> we raised a number of practical problems in connection with appeals against evidential rulings.

(i) *Timing*

3.54 In our Discussion Paper<sup>62</sup> we suggested that any appeal would have to be made before the jury were invited to consider a verdict, and that there were obvious practical advantages in insisting that any appeal should be made prior to the conclusion of the Crown evidence. That meant that the prosecutor would require to make a rapid decision as to whether the Crown wished to appeal. We did not, however, think that that should cause any insuperable difficulty. The prosecutor should be familiar with the evidence that was likely to be led and should be able to form a fairly definite view as to how important the excluded evidence was. A short adjournment might be desirable to enable the Crown to consider its position, but we thought that that was a matter of procedure that could be left to the trial judge. We accordingly proposed that any appeal should be intimated before the conclusion of the prosecution evidence.

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<sup>60</sup> Paras 4.1-4.9 below.

<sup>61</sup> Paras 3.52-3.55.

<sup>62</sup> Para 3.53.

3.55 The majority of consultees were of opinion that any appeal should be intimated either immediately or at latest by the conclusion of the Crown evidence. While it would obviously be desirable that any such appeal should be intimated as early as possible, to avoid the waste of court time, we are conscious that in some cases the Crown might wish to consider its position, and to that end it might be desirable to allow an appeal to be intimated at any point before the close of the Crown evidence. In addition, it appears to us that the significance of an evidential ruling might only become clear following a defence submission at the close of the Crown case. On that basis, we are of opinion that any appeal against an evidential ruling should be intimated before the defence case opens.

3.56 We accordingly recommend:

**13. Any appeal against an evidential ruling should be intimated before the opening of the defence case.**

(Draft Bill, section 3 (inserted section 107A(2)(b)))

(ii) *Leave to appeal*

3.57 The question of whether leave to appeal against an evidential ruling should be required is discussed subsequently, at paragraphs 4.18-4.20, our view is that leave should be required.

(iii) *Consequences of decision to appeal*

3.58 In our Discussion Paper<sup>63</sup> we expressed the opinion that, if the Crown decided to appeal, unless an Appeal Court can be convened at very short notice, it would be necessary for the Crown to desert the prosecution *pro loco et tempore*, either generally or in respect of the particular charge to which the ruling relates.<sup>64</sup> In cases where all charges were affected by the ruling, that would bring the trial to an end, and there would be no jury verdict. The appeal would then proceed as an appeal against a ruling by the trial judge. We pointed out that although a motion to desert *pro loco et tempore* can be refused by the trial judge that should not be a problem in the present category of case if a requirement of leave were imposed; if leave were granted the trial would have to be deserted unless an Appeal Court could be convened almost immediately. If not all charges were affected by the ruling, the trial could continue in respect of the remaining charges. To the extent that that might cause any prejudice in future proceedings, we expressed the opinion that that was a matter that was relevant not to whether an appeal should be permitted but to whether a re-trial was in the interests of justice, and should be considered in the context of a re-trial rather than an appeal.

3.59 Consultees who commented on these issues were in agreement with our analysis. We remain of the view expressed in paragraph 3.55 of our Discussion Paper, subject to one qualification. The appropriate procedure at trial, if there is an appeal and the trial diet must be deserted, is a decision by the court to desert *pro loco et tempore*. Normally that would give the Crown power to continue the prosecution of the accused without further reference to

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<sup>63</sup> At para 3.55.

<sup>64</sup> We indicated that, if an appeal did proceed during the trial without bringing the trial diet to an end, desertion *pro loco et tempore* would not be appropriate, and the Crown would simply move for leave to appeal, and if it were granted, move for an adjournment.

the court. For reasons discussed below,<sup>65</sup> we are of opinion that in any case where the Crown appeals against a ruling during a trial the authority of the Appeal Court should be required for any further prosecution. We see that as an essential safeguard for the rights of the accused.

3.60 We do not think that any formal proposal is required in respect of the foregoing matters other than the proposals,<sup>66</sup> in Part 4 of this Report, that the leave of the Appeal Court should be required for any new prosecution following a Crown appeal.

### **Defence right of appeal**

3.61 The convicted person has a right of appeal under section 106 of the Criminal Procedure (Scotland) Act 1995 if the jury convicts of any charge. We make no recommendation to alter this form of appeal. If the judge rejects a submission of no case to answer or a common law submission (or statutory equivalent) the result is that the case proceeds in the normal way, to a verdict of the jury; the case does not come to an immediate end. If that verdict goes against the accused, there is a broad right of appeal, which would cover the judge's ruling on any of the matters under consideration in this Report. It is thought that that is sufficient to protect the rights of the accused. A further practical matter is also relevant: if the accused were given an immediate right to appeal against a judge's ruling rejecting a no case to answer submission or common law submission, in many if not most cases there would be a strong incentive to exercise that right in the event that a submission failed. If leave to appeal were given, unless an Appeal Court could be found quickly, the trial would be at an end. The practical problems that that would cause can easily be imagined. It is true that a leave requirement would restrict the number of actual appeals, but the time taken up by unfounded submissions could still be considerable. For these reasons we make no recommendation to alter the rights of the accused, which we consider to be adequately protected.

3.62 As has been indicated above,<sup>67</sup> we do not accept the argument that the rights of appeal that we recommend will place the Crown in a better position than the defence. It is true that those rights involve an appeal during a trial, prior to any jury verdict, and that that is not a form of appeal that is available to the defence. Nevertheless, this feature is an inevitable consequence of the assumption that the Crown should not be entitled to challenge the verdict of a jury. We are of opinion that the right of the accused to challenge the jury's verdict under section 106 of the 1995 Act is quite sufficient to protect the accused against any erroneous ruling on law by the trial judge, whether in relation to a submission of no case to answer, a common law submission or any statutory equivalent, or any evidential ruling. In addition, we would emphasise the importance of the requirement, discussed in Part 4 of this Report, that the court should authorise any new prosecution of the accused following a successful Crown appeal. That power can be used to ensure that the Crown's right of appeal is not used in a manner that causes unfairness to the accused.

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<sup>65</sup> Paras 4.1-4.9.

<sup>66</sup> Paras 4.7 and 4.8 and proposals 14 and 15.

<sup>67</sup> Para 3.50.

## Part 4      Power to authorise new prosecution, fairness to accused and procedural and incidental issues

### Power to authorise new prosecution and fairness to accused

4.1 As we have already mentioned,<sup>1</sup> if a Crown appeal were successful the normal result would be a re-trial. The trial judges' ruling would be reversed, any consequent acquittal by the judge would be set aside, and the Crown would require to seek authority to bring a new prosecution. In relation to the corresponding provision for successful appeals against conviction, section 118(1)(c) of the Criminal Procedure (Scotland) Act 1995, the Appeal Court is given power to set aside the verdict of the trial court, to quash the conviction and to grant authority to bring a new prosecution in accordance with section 119 of that Act. Under these provisions a new prosecution is not automatic. Where, for example, it appeared that the Crown evidence was of a generally unsatisfactory nature authority to bring a new prosecution was refused.<sup>2</sup> In another case,<sup>3</sup> following their conviction the accused gave evidence for the Crown at the trial of another person on the same charge, having been called as *socii*. An appeal against conviction was successful and the verdicts against the accused were set aside. Authority to bring a fresh prosecution was refused; the setting aside of the conviction operated retroactively, with the result that the appellants were immune from prosecution because they had given evidence for the Crown. Yet other examples of reasons for refusing a re-trial are the existence of a long delay in proceedings<sup>4</sup> or the time that has elapsed since the offence.<sup>5</sup>

4.2 The foregoing cases indicate that, in deciding whether to authorise a re-trial, the Appeal Court will consider the question of fairness to the accused. In our opinion it is essential that a similar approach should be taken if any right of appeal is accorded to the Crown. Indeed, when an acquittal is overturned, the potential for unfairness is substantially greater than if a conviction is reversed.

4.3 In our Discussion Paper,<sup>6</sup> we suggested that unfairness might result from a large range of matters. Examples included the following:

- (i) Delay, whether since the trial or since the indictment was served, might be sufficient to render further proceedings unfair.

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<sup>1</sup> At paras 3.15-3.20 above.

<sup>2</sup> *Farooq v HM Advocate* 1993 SLT 1271.

<sup>3</sup> *Jones v HM Advocate* 1991 SCCR 290.

<sup>4</sup> *Cameron v HM Advocate* 1999 SCCR 11.

<sup>5</sup> *Glancy v HM Advocate* 2001 SCCR 385; the length of time spent by the accused in custody was also taken into account.

<sup>6</sup> Para 4.3.

(ii) Publicity attendant upon the original trial might be such that there was a significant risk that the fairness of a re-trial would be prejudiced.

(iii) Essential evidence might have been lost since the original trial. Especially if that is defence evidence, or evidence that tended to favour the accused, its loss might render a re-trial unfair.

(iv) Events at the original trial might render a re-trial unfair. An obvious example of this is where the judge's ruling has not stopped proceedings and the trial has continued in respect of other charges or against other accused. In either event the accused might have given evidence, either in his own defence or on behalf of the former co-accused. The leading of that evidence might render a re-trial unfair. This would not necessarily be so in every case; for example, evidence given on behalf of a co-accused might not be relevant to the charges against the accused, or might be of minimal relevance to such charges. In some cases, however, that evidence might be highly relevant to the charges against the accused, and in that event a re-trial might be unfair because the accused had shown his hand in advance. The particular circumstances of individual cases might obviously vary enormously.

(v) Disclosure of the defence case during the original trial might give the prosecution an advantage at a re-trial, and in some cases that could render further proceedings unfair. To some extent this is a generalisation from the last point. The circumstances of individual cases can clearly vary greatly, and the disclosure of evidence may or may not be sufficiently significant to bar a re-trial.

Other situations might exist where a re-trial would be unfair to the accused; this list is not intended to be comprehensive. Any such unfairness is potentially relevant to the question of whether a re-trial should be authorised.

4.4 We accordingly expressed the opinion in our Discussion Paper<sup>7</sup> that, if an appeal is allowed and the judge's acquittal is quashed, a re-trial should not be automatic. We suggested that the Appeal Court should be given power to grant authority to bring a new prosecution,<sup>8</sup> but it should be provided that the new prosecution will not be authorised in cases where that is contrary to the interests of justice. We were of opinion that, because of the large range of circumstances that might be relevant to this issue, a general formulation should be used. We considered that the expression "contrary to the interests of justice" is the most appropriate general formulation. As an alternative we suggested the formula "unfair in all the circumstances of the case", but we indicated that we preferred the former expression, which we thought was easily understood and somewhat wider in its import. In addition, we thought that the expression "contrary to the interests of justice" indicated that the court was to take an objective approach; in our preliminary consultation it had been stated that this was desirable and that the expression "contrary to the interests of justice" would be the better formulation. We were of opinion that a power of this nature would permit the Appeal Court to take account of any of the factors discussed in paragraph 4.3, so far as they are relevant to the particular case. We were conscious that on occasion some of these factors might operate against each other; for example, the interests of the accused might run

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<sup>7</sup> Para 4.4.

<sup>8</sup> As is provided, in relation to an appeal against conviction, in s 118(1)(c) of the Criminal Procedure (Scotland) Act 1995.

counter to the public interest in the due prosecution of crime or the interests of the victim. Nevertheless, we thought that the breadth of the power conferred on the Appeal Court under the proposed test would permit it to take account of such conflicting interests, balancing them as appropriate.

4.5 A further question raised in the Discussion Paper<sup>9</sup> was whether legislation should simply state the general rule that authority to bring a new prosecution should not be given where that is contrary to the interests of justice, or whether specific examples of cases where prosecution might be contrary to the interests of justice should be given. In general we tended to favour the former approach; this followed the scheme of section 118 of the Criminal Procedure (Scotland) Act 1995, where no examples are given.

4.6 Finally, we suggested<sup>10</sup> that, if authority to bring a new prosecution is refused by the Appeal Court, the trial judge's acquittal should stand. That appeared to us to be demanded by basic considerations of certainty and finality. In that event, therefore, we suggested that the Appeal Court should not quash the acquittal.

4.7 Against the foregoing background, we put forward<sup>11</sup> a number of proposals and questions dealing with these matters. Consultees agreed unanimously that, in the event of a successful Crown appeal, the Appeal Court should have power to grant authority to bring a new prosecution, and that that power should be subject to an exception where a new prosecution is considered by the Appeal Court to be contrary to the interests of justice. With one exception,<sup>12</sup> consultees favoured the formulation "contrary to the interests of justice". The majority of consultees were of opinion that examples should not be given of the main cases where a new prosecution might be contrary to the interests of justice. The judges of the High Court, in particular, were of this view. This confirms our provisional view that it is not necessary in this case to give specific examples of cases where prosecution might be against the interests of justice.

4.8 In relation to cases where authority to bring a new prosecution is refused by the Appeal Court, all consultees agreed that the accused must be acquitted. Two consultees<sup>13</sup> suggested that, if the appeal were allowed, it was essentially illogical to permit the trial judge's acquittal to stand. Instead, the result of a successful appeal should be the quashing of that acquittal, but if authority to bring a new prosecution is refused the Appeal Court should itself acquit the accused. We find this reasoning persuasive, and we will recommend accordingly.

4.9 We accordingly make the following recommendations:

- 14. In the event of a successful Crown appeal, the Appeal Court should have power to grant authority to bring a new prosecution, where that is not contrary to the interests of justice.**

(Draft Bill, sections 3 (inserted section 107D(1)(c), 2(a) and (3)) and 5(4)(a)))

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<sup>9</sup> Para 4.5.

<sup>10</sup> Para 4.6.

<sup>11</sup> Para 4.7.

<sup>12</sup> Sir Gerald Gordon QC, who preferred the formulation "unfair in all the circumstances".

<sup>13</sup> Professor Paul Roberts of Nottingham University and Gerard Sinclair of the Scottish Criminal Case Review Commission.

- 15. If authority for a new prosecution is refused, the acquittal by the trial judge should be quashed but the Appeal Court should itself acquit the accused.**

(Draft Bill, section 3 (inserted section 107D(2)))

### **Procedural issues: restrictions on further prosecution**

4.10 If authority is granted to bring a new prosecution, restrictions must clearly be placed on what is permissible. In relation to appeals against conviction, section 119(2) of the Criminal Procedure (Scotland) Act 1995 provides that in a new prosecution the accused shall not be charged with an offence more serious than that of which he was convicted in the earlier proceedings. Section 119(3) provides that no sentence may be passed on conviction under the new prosecution which could not have been passed on conviction under the earlier proceedings. In our Discussion Paper<sup>14</sup> we suggested that corresponding provisions would be appropriate if a Crown right of appeal were granted.

4.11 We further made reference to section 119(4) and (5), which set time limits in respect of a new prosecution. Subsection (4) provides that the new prosecution may be brought notwithstanding that any time limit for the commencement of proceedings other than that mentioned in subsection (5) has elapsed. Subsection (5) provides that proceedings in any new prosecution shall be commenced within two months of the date on which authority to bring the prosecution was granted. If proceedings are not commenced within the two-month time limit<sup>15</sup> the order setting aside the verdict is to have the effect for all purposes as an acquittal.<sup>16</sup> Section 119(6) and (7) make provision for evidence in proceedings in a new prosecution under the section. Subsection (6) provides that it shall, subject to subsection (7), be competent for either party to lead any evidence which it was competent for him to lead in the earlier proceedings. That includes evidence relating to any charge which was disposed of at the original trial, whether by conviction or acquittal; such evidence may obviously be relevant to the charge or charges in the re-trial. Subsection (7) is designed to deal with that situation. It provides that the indictment in a new prosecution under the section shall identify any matters as respects which the prosecutor intends to lead evidence by virtue of subsection (6) which would not have been competent but for that section. Consequently, where evidence is to be led of charges that were disposed at the original trial, the subject-matter of that evidence must be identified by the prosecutor.<sup>17</sup>

4.12 In our Discussion Paper<sup>18</sup> we asked whether it was appropriate that in any new prosecution restrictions should be imposed similar to those found in section 119 of the Criminal Procedure (Scotland) Act 1995. All but one of the consultees agreed that comparable restrictions would be required. We accordingly make the following recommendation:

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<sup>14</sup> Para 4.8.

<sup>15</sup> Subs (8) states when proceedings shall be deemed to be commenced.

<sup>16</sup> Subs (9).

<sup>17</sup> If the evidence would be admissible merely on the basis of the charges contained in the new indictment, subs (7) does not apply: *Diamond v HM Advocate* 1999 JC 244; 1999 SLT 1001; 1999 SCCR 411.

<sup>18</sup> Para 4.10.

**16. In any new prosecution restrictions should be imposed corresponding to those found in section 119 of the Criminal Procedure (Scotland) Act 1995.**

(Draft Bill, section 5(4))

**Procedural issues: leave to appeal**

4.13 As we have already indicated, one further issue requires consideration: whether a requirement of leave should be imposed. Appeals by the accused require leave;<sup>19</sup> appeals from preliminary hearings require leave of the judge of first instance whether they are by the Crown or the accused;<sup>20</sup> Crown appeals against sentence do not;<sup>21</sup> nor does a Lord Advocate's reference.<sup>22</sup> In the latter two cases the assumption is clearly that the Crown's right will be used responsibly, and we are not aware of any significant evidence that it is not. Nevertheless, in our Discussion Paper we suggested<sup>23</sup> that a leave requirement should be introduced if appeals were permitted against certain categories of ruling following a common law submission<sup>24</sup> and evidential rulings. In relation to appeals that resulted in an acquittal on one or more charges, by contrast, we were of opinion that leave should not be required.

*Submission of no case to answer*

4.14 The result of a successful submission of no case to answer is that the accused is acquitted on one or more charges. Such a ruling is clearly significant for the outcome of the case, and in our Discussion Paper we did not see any need for a requirement of leave to appeal. We nevertheless asked, in our Discussion Paper<sup>25</sup> whether a leave requirement should be imposed in order to maintain consistency with other categories of appeal. A majority of consultees agreed with our provisional view. The most substantial reason for the contrary view, that leave to appeal should be required in every case, was that this would preserve consistency.<sup>26</sup> Despite the majority support for our proposals, we now think that leave to appeal should be required in cases where the accused is acquitted of a charge.

*Statutory equivalent of common law submission*

4.15 We pointed out in our Discussion Paper<sup>27</sup> that a common law submission or statutory equivalent raised more complex issues. In cases where the result of successful submission was a relatively minor amendment or reduction of a charge, it is undesirable that an appeal should be permitted. That problem does not arise if the result of the submission is the acquittal of the accused on one or more charges.<sup>28</sup> We expressed the opinion, however, that a leave requirement should be imposed in respect of rulings that did not result in such an acquittal.

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<sup>19</sup> Criminal Procedure (Scotland) Act 1995, s 107; this is granted through the sifting procedure.

<sup>20</sup> *Ibid*, s 74(1).

<sup>21</sup> *Ibid*, s 108.

<sup>22</sup> *Ibid*, s 123.

<sup>23</sup> Paras 4.11-4.20.

<sup>24</sup> Those that do not result in an acquittal on a particular charge.

<sup>25</sup> Para 4.11; question 11(a).

<sup>26</sup> Response by the Law Society of Scotland.

<sup>27</sup> Para 4.13.

<sup>28</sup> This will normally occur in cases where the basis for the submission has been that no reasonable jury properly directed in the law could convict.

4.16 We accordingly raised the question as to whether a leave requirement should apply to all rulings made following a common law submission or statutory equivalent or merely to rulings that did not have the effect of acquittal on one or more charges. The opinion of consultees on this matter generally followed their views on submissions of no case to answer. Once again, a majority agreed that a distinction should be drawn. A minority favoured uniformity of practice; once again the substantial reason was that put forward by the Law Society, that of maintaining consistency in all cases.

4.17 As in the case of submissions of no case to answer, we now think that leave should be required in cases where the result of the judge's ruling is the acquittal of the accused on one or more charges, in addition to cases where the ruling merely amends or reduces a charge.

#### *Evidential rulings*

4.18 In the Discussion Paper<sup>29</sup> we indicated that evidential rulings vary greatly in their significance. Some have the effect of terminating prosecution, as where the judge excludes evidence of a police interview that provides essential corroboration of the Crown case. Others may have a relatively trivial effect. Many will fall into an intermediate category: they may or may not be fatal to the Crown case according to how the other evidence turns out, and possibly how it is interpreted for the purposes of a submission of no case to answer. In the Discussion Paper we expressed the view that it was inappropriate that a right of appeal should be available for any kind of ruling, especially as the consequence of an appeal was likely to be the desertion of the trial diet.<sup>30</sup> We accordingly expressed the opinion that there would be clear advantages in a requirement of leave to appeal, essentially for the reasons discussed above in relation to common law submissions. In particular, there is an important public interest in ensuring that a trial should be brought to a conclusion whenever possible, and it is wrong that a trial should be ended for insubstantial reasons. While we had no reason to suppose that the Crown would exercise a right of appeal on anything other than a reasonable basis, confining the right to cases where the ruling was significant, the public interest in ensuring that a partly completed trial is not abandoned seemed to us important. We accordingly concluded that there should be no automatic right of appeal, and we thought that that objective could best be promoted by a requirement of leave.

4.19 We accordingly asked<sup>31</sup> whether, if the Crown were granted a right of appeal against evidential rulings made during a trial, any such appeal should be subject to a leave requirement. All but two of the consultees agreed with our provisional conclusion that there should be a requirement of leave. The contrary view was that the Crown could be expected to exercise its right of appeal responsibly. In these circumstances we remain of the opinion that there should be a requirement of leave, for the reasons stated in the last paragraph.

4.20 We accordingly make the following recommendations:

- 17. (a) Leave to appeal should be required against rulings under section 97 of the Criminal Procedure (Scotland) Act 1995 that there is no case to answer.**

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<sup>29</sup> Para 4.16.

<sup>30</sup> *Ibid.*

<sup>31</sup> Para 4.20; question 11(c).

**(b) Leave to appeal should be required against all rulings following the statutory equivalent of a common law submission.**

**(c) Leave to appeal should be required in respect of evidential rulings made by the judge during a trial.**

(Draft Bill, section 3 (inserted section 107A(1)))

*Criteria for leave to appeal*

4.21 In our Discussion Paper<sup>32</sup> we raised the issue of the criteria that should apply to a requirement of leave to appeal. We pointed out that in section 107 of the Criminal Procedure (Scotland) Act 1995, dealing with appeals by a convicted person, the criterion for leave is the existence of arguable grounds of appeal.<sup>33</sup> We thought it clear that arguability should be one criterion that had to be satisfied by the Crown. In addition, however, we thought that an additional criterion should be imposed in respect of each of the two categories of ruling where leave to appeal was appropriate. In relation to appeals against rulings following the statutory equivalent of a common law submission where the accused was not acquitted of any charge, we thought that the additional criterion should be whether the ruling had a significant effect on one or more of the charges against the accused.

4.22 In relation to evidential rulings, we pointed out<sup>34</sup> that cases where the ruling was fatal to the Crown case were clearly suitable for appeal. In other cases we thought that a ruling might result in a serious weakening of the Crown case, and our provisional view was that an appeal should be possible in such cases. The principal reason for this conclusion was that it would frequently be impossible to be certain whether a ruling was actually fatal. We accordingly suggested that leave to appeal should be given only if the ruling in question (or a series of rulings taken together) significantly weakened the Crown case in relation to the offence or offences that were the subject of the appeal.<sup>35</sup> We pointed out that in applying that criterion the judge would frequently have to rely on the explanation given by the Crown to determine how far there was such a weakening. We did not think that that should be a problem; the court must often rely on information provided by the Crown in deciding on procedural matters.

4.23 Against the foregoing background, we proposed that in every case where leave to appeal was required arguability should be a criterion. In addition, we proposed that in respect of appeals against a ruling on a statutory equivalent of a common law submission which did not result in an acquittal, there should be an additional criterion that the ruling has a significant effect on one or more of the charges against the accused. In respect of an appeal against an evidential ruling, we proposed that there should be an additional criterion that the result of the judge's ruling is a significant weakening of the Crown case.

4.24 The reaction of consultees to these proposals varied. Several agreed with us. The judges of the High Court, however, thought that it was unnecessary to specify criteria. They stated:

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<sup>32</sup> Paras 4.15 and 4.17; question 12.

<sup>33</sup> Criminal Procedure (Scotland) Act 1995, s 107(1)(a).

<sup>34</sup> Para 4.17.

<sup>35</sup> This test is essentially the same as that used in England and Wales in s 63(2) of the Criminal Justice Act 2003 in relation to the evidentiary rulings. We think that that test is well suited to Scottish procedure.

"The concept of leave to appeal is a familiar one. It features in other aspects of criminal procedure. Generally speaking the criteria for granting leave are not defined or referred to in other circumstances and we see no need to do so in relation to the matters under discussion. In any event, the criteria suggested in the Discussion Paper of 'arguability' and 'significant effect' must be considerations to which judges already give weight in determining whether or not to grant leave".

Other consultees suggested that criteria should include whether the appeal was in the interests of justice. In relation to appeals against evidential rulings, Crown Office suggested that an appropriate formula might be that the judge's ruling had "a significant effect on the evidence to be admitted".

4.25 We remain of opinion that criteria for leave to appeal should be specified. We would see considerable force in the argument presented on behalf of the judges of the High Court if arguability were the only consideration for leave, on the basis that all judges and sheriffs will understand that that is the general test applicable to leave. In relation to rulings that do not result in an acquittal, however, there is an important public interest in ensuring that a trial should be brought to a conclusion whenever possible, and it is wrong that a trial should be ended for insubstantial reasons. For this reason, we are of opinion that specific leave criteria are required in such cases to ensure that the foregoing consideration is taken into account in every case. We remain of the view that the criteria proposed in our Discussion Paper<sup>36</sup> remain appropriate.

4.26 We accordingly recommend:

**18. (a) In every case where leave is required arguability should be a criterion.**

**(b) In respect of appeals against a ruling on a statutory submission which does not result in an acquittal, there should be an additional criterion that the ruling has a significant effect on one or more charges against the accused.**

**(c) In respect of an appeal against an evidential ruling (or series of such rulings), there should be an additional criterion that the result of the ruling (or series of rulings) is a significant weakening of the Crown case.**

(Draft Bill, section 3 (inserted section 107A(3)))

### *Granting of leave to appeal*

4.27 In our Discussion Paper, we pointed out<sup>37</sup> that in an appeal by a convicted person leave is granted through the sifting procedure under section 107 of the Criminal Procedure (Scotland) Act 1995; this operates as a form of preliminary appeal.<sup>38</sup> In appeals from

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<sup>36</sup> Paras 4.15, 4.17, 4.20.

<sup>37</sup> Para 4.18.

<sup>38</sup> A judge of the High Court considers the note of appeal, together with the report of the trial judge or sheriff and certain other documents, and determines whether these disclose arguable grounds of appeal. If he is of opinion that arguable grounds of appeal are disclosed, he grants leave to appeal; if not, he refuses leave and states his reasons in writing. If leave is refused, the appellant may apply to the High Court for leave. In that event, the papers, usually accompanied by a supplementary opinion from the appellant's counsel, are considered by either

decisions at preliminary hearings leave must be granted by the court of first instance, in accordance with section 74(1) of the 1995 Act; that section further provides that such leave may be granted either on the motion of the appellant or *ex proprio motu*. In civil cases, where leave is required for an appeal, the Rules of Court generally provide that leave may be given either by the Lord Ordinary or by the Inner House. We were of opinion that, where it is practicable, application should be made to an appellate court for leave to appeal; this avoids the danger that the judge of first instance makes a wrong decision and then compounds his error by refusing leave to appeal. Nevertheless, there are cases where such a course is not practicable, and the preliminary hearings system is clearly in that position; there would not be sufficient time to permit any other form of leave.

4.28 In relation to the judicial rulings that we are now considering, we pointed out<sup>39</sup> that if intimation of an appeal is required immediately following the judge's ruling, or at latest before the end of the Crown case, it would not be possible to make use of a system that permitted leave to be granted by the High Court rather than the trial judge. That would apply to rulings following the statutory equivalent of a common law submission where the ruling did not result in an acquittal, and also to evidential rulings. The problem in such cases was that the Crown must decide rapidly whether or not to intimate an appeal, and that would not permit leave to be granted by a sifting procedure. For that reason we concluded that leave would have to be granted by the trial judge, as with appeals against decisions at preliminary hearings. We did not think that that would cause any insuperable difficulty; we were not aware of any criticism of the decisions on leave to appeal taken by judges at preliminary hearings.

4.29 In view of the foregoing considerations, we asked<sup>40</sup> which court should grant leave to appeal, and in particular whether it was appropriate that leave should be granted by the trial judge or whether a sifting procedure might be used. The opinions of consultees varied. The judges of the High Court expressed the view that it would be appropriate for leave to be granted by the trial judge. They pointed out that this is the position with objections or other issues raised in advance of trial. The circumstances in which leave to appeal was required were so restricted that no need was seen for a sifting procedure. Other consultees thought that it should be possible for either the trial judge or the appeal court, or possibly a single judge of the High Court, to grant leave. Despite these representations, we remain of opinion that the practical difficulties of such a course are formidable. In this connection, we reiterate that there is a clear public interest in ensuring that a trial once started should be concluded wherever possible. Moreover, we are not aware of any serious criticism of the way in which the leave requirement in respect of pre-trial hearings has operated in practice. We accordingly recommend:

**19. In all cases where leave to appeal is required, it should be granted by the trial judge or sheriff.**

(Draft Bill, section 3 (inserted section 107A(1)))

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two (in sentence appeals) or three (in substantive appeals) judges of the High Court, who determine whether there are arguable grounds of appeal. Once again, if leave to appeal is refused, reasons must be given in writing.

<sup>39</sup> Para 4.19.

<sup>40</sup> Question 13.

## Bail and custody

4.30 In our Discussion Paper<sup>41</sup> we discussed the issue of bail and custody in relation to Crown appeals. We pointed out that, in the event of an acquittal on all charges, the accused would fall to be liberated (if not otherwise in custody), and any bail order would immediately be discharged. It accordingly appeared to us that, if the Crown were permitted to appeal against an acquittal by the judge, provision would be required for bail and custody during the period when the appeal is ending and during any period thereafter when a re-trial was ending.

4.31 We expressed the view that during the period between the acquittal and the hearing of the appeal, the strong presumption must be that the accused should not be remanded in custody;<sup>42</sup> the acquittal, albeit by the judge, must be respected. We thought, however, that there might be extreme cases where custody was desirable. It might also be appropriate to continue or impose a bail order, especially if special conditions are required; an example is in a case where it was desirable that the accused should surrender his passport. We accordingly expressed the opinion<sup>43</sup> that provision should be made in legislation for the possibility, following the intimation of a Crown appeal, that the accused might be either remanded in custody or subjected to a bail order. We added that we would regard a remand in custody as exceptional, but we thought that the possibility should be catered for.

4.32 We further indicated<sup>44</sup> that, if a Crown appeal were allowed, matters would be different in that the acquittal had been quashed. We expressed the opinion that a general provision permitting either a remand in custody or a bail order following an acquittal should be able to cater for both the period between the acquittal and the appeal and the period between the appeal and any re-trial. We referred to the analogous provision in section 119(10) of the Criminal Procedure (Scotland) Act 1995; this provides that, if authority is granted to bring a new prosecution following an appeal against conviction, the High Court shall, after giving the parties an opportunity of being heard, order the detention of the accused person in custody or admit him to bail. We thought that a similar provision could be used to deal with Crown appeals, with appropriate modifications to deal with the period prior to the hearing of the appeal.

4.33 In general our proposals met with the approval of consultees. One exception<sup>45</sup> expressed concern about the position between acquittal and the authorisation of a re-trial. He thought that bail should not be refused to someone who had been acquitted, perhaps subject to very exceptional circumstances. He further pointed out that bail or custody could only apply if the Crown intimated an appeal immediately, or obtained leave within, say, 24 hours. Crown Office referred to the need to take account of a gap between acquittal and the lodging of an appeal. We see considerable force in these points. Our intention was that, following an acquittal, the accused should be liberated except in the most extreme cases. A commoner occurrence would be the granting or continuation of bail on conditions, such as the surrender of a passport. Nevertheless, we remain of opinion that provision should be made for custody in order to deal with extreme cases. It is those extreme cases that are

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<sup>41</sup> Paras 4.21-4.23.

<sup>42</sup> This assumes that he is not in custody on other charges.

<sup>43</sup> Para 4.22.

<sup>44</sup> Para 4.23.

<sup>45</sup> Sir Gerald Gordon QC.

most likely to raise public concern, and we think that they should be catered for. Despite that, we remain of the view that the power to remand in custody pending an appeal should only be exercised in the most exceptional cases.

4.34 We accordingly make the following recommendation:

- 20. The court should have power, in exceptional circumstances, to remand the accused in custody pending the hearing of an appeal, or to admit him to bail during that period.**

(Draft Bill, section 3 (inserted section 107A(4)(b)))

- 21. The court should have power to remand the accused in custody or to admit him to bail during any period between the authorisation of a new prosecution and the resulting trial.**

(Draft Bill, section 5(4)(a) (amending section 119(10)))

### **Restrictions on the reporting of proceedings**

4.35 In our Discussion Paper, we referred<sup>46</sup> to the fact that one of the factors that might render a re-trial contrary to the interests of justice was the possibility that the publicity attendant on the original trial made it impossible for the accused to have a fair hearing. We pointed out that section 4(2) of the Contempt of Court Act 1981 gives the court power to order that the publication of any media report of any proceedings should be postponed for such period as the court thinks necessary for the purposes of avoiding a substantial risk of prejudice, either in those proceedings or in other proceedings which are pending or imminent. We thought, however, that the existing legislation might be adequate to deal with this possibility.

4.36 Two consultees dealt with this matter. One<sup>47</sup> thought that there should be no need for an order in these circumstances, except possibly in the case of appeals against evidential rulings. The other<sup>48</sup> thought that section 4(2) of the Contempt of Court Act 1981 would not be sufficient to deal with the situation following an acquittal until the stage when a re-trial was sought; until then, there was some doubt as to whether it could be said that proceedings were imminent or pending. The consultee accordingly suggested that there should be an express power in the trial judge to make an order under section 4(2) at the conclusion of the trial if the Crown stated that an appeal was to be considered. It would then be possible to make intimation to the media under the procedure sanctioned by the Appeal Court in *Galbraith v HM Advocate*;<sup>49</sup> this would allow the media to be represented at the hearing before the order became final, and at that stage there would be a right to challenge the order by petition.

4.37 We agree that in the majority of cases, probably the great majority, there will be no need to consider any order under section 4(2) of the Contempt of Court Act 1981. Nevertheless, it seems to us that provision should be made for such an order. The

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<sup>46</sup> Para 4.24.

<sup>47</sup> Sir Gerald Gordon QC.

<sup>48</sup> Peter Ferguson QC.

<sup>49</sup> 2000 SCCR 935.

procedures considered in this Report are most likely to be used in high profile cases which are, because of their very nature, likely to attract a great deal of public interest and media attention. In these circumstances it seems to us that it is desirable that section 4(2) should be capable of application.

4.38 We accordingly recommend:

- 22. Power should be conferred on a trial judge to make an order under section 4(2) of the Contempt of Court Act 1981 where the Crown has been granted leave to appeal and it appears to the court that, following the appeal, there is a possibility that proceedings might be brought against the accused for an offence of which he was acquitted.**

(Draft Bill, section 3 (inserted section 107A(4)(a)))

## Part 5            Summary of recommendations

1.     The procedure in section 97 of the Criminal Procedure (Scotland) Act 1995 should be extended to permit a submission to be made at the close of the Crown evidence that, on the evidence led by the Crown, no reasonable jury, properly directed, could convict of the offence charged.

(Para 2.25; Draft Bill s 1)

2.     (a)     At the close of the whole evidence in the case it should be possible to make a submission to deal with any one or more of the following matters:
  - (i)     an insufficiency of evidence to support a charge;
  - (ii)    an insufficiency of evidence to support the charge libelled, together with a contention that an alternative charge should be substituted;
  - (iii)   in matters where corroboration is not required, a lack of evidence to support part of a charge;
  - (iv)    a contention that, on the evidence led, no reasonable jury properly directed could convict of the charge libelled.
- (b)     The procedure for such a submission should be stated in statutory form.
- (c)     Crown consent should not be required for the defence to make such a submission.
- (d)     If such a submission is made by the defence, the Crown should have a right of reply.
- (e)     Any formal verdict that results from such a submission should be pronounced by the judge alone rather than by the jury acting on the judge's direction.

(Para 2.42; Draft Bill s 2 (inserted s 97A))

3.     As a matter of general principle, the Crown should be given a right of appeal against at least some of the judicial rulings that can bring a solemn case to an end without the verdict of a jury.

(Para 3.11; Draft Bill s 3 (inserted s 107A))

4.     The test for the Crown right of appeal should be a single test, that the judge's ruling was wrong in law.

(Para 3.14; Draft Bill s 3 (inserted s 107B(2)))

5. If a Crown appeal is successful, the normal result should be a re-trial rather than the continuation of the existing trial, on the assumption that leave is given to raise a fresh prosecution.

(Para 3.20; Draft Bill s 3 (inserted s 107D))

6. Provision should nevertheless be made, for use in exceptional cases, to permit an appeal to be heard during the continuation of a trial (an "expedited appeal").

(Para 3.20; Draft Bill s 3 (inserted s 107C))

7. The Crown should have a right of appeal against rulings under section 97 of the Criminal Procedure (Scotland) Act 1995 that there is no case to answer.

(Para 3.27; Draft Bill s 3 (inserted s 107A(1)(a)))

8. If the Crown is to appeal against an acquittal under section 97 of the Criminal Procedure (Scotland) Act 1995, a note of appeal must be lodged within seven days of the granting of leave to appeal. In an expedited appeal, a note of appeal should be lodged as soon as practicable after the decision that the appeal be expedited.

(Para 3.28; Draft Bill s 5(1) (inserted s 110(1)(c) and (d)))

9. The Crown should have a right of appeal against a ruling on the statutory equivalent of a common law submission. Such a right should extend both to rulings which result in an acquittal on one or more charges and those which merely amend or reduce a charge.

(Para 3.38; Draft Bill s 3 (inserted s 107A(1)(a) and (b)))

10. If the Crown is to challenge a ruling following the statutory equivalent of a common law submission, leave to appeal should be sought forthwith, that is to say, either immediately the ruling is made or after a short adjournment to enable the Crown to consider its position.

(Para 3.41; Draft Bill s 3 (inserted s 107A(2)(a)))

11. If the Crown is to appeal against a ruling on the statutory equivalent of a common law submission, a note of appeal must be lodged within seven days of the granting of leave to appeal. In an expedited appeal, a note of appeal must be lodged as soon as practicable after the decision that the appeal be expedited.

(Para 3.42; Draft Bill s 5(1) (inserted s 110 (1)(c) and (d)))

12. The Crown should have a right of appeal against evidential rulings made during a trial.

(Para 3.52; Draft Bill s 3 (inserted s 107A(1)(c)))

13. Any appeal against an evidential ruling should be intimated before the opening of the defence case.

(Para 3.56; Draft Bill s 3 (inserted s 107A(2)(b)))

14. In the event of a successful Crown appeal, the Appeal Court should have power to grant authority to bring a new prosecution, where that is not contrary to the interests of justice.

(Para 4.9; Draft Bill s 3 (inserted s 107D(1)(c), (2)(a) and (3)))

15. If authority for a new prosecution is refused, the acquittal by the trial judge should be quashed but the Appeal Court should itself acquit the accused.

(Para 4.9; Draft Bill s 3 (inserted s 107D(2)))

16. In any new prosecution restrictions should be imposed corresponding to those found in section 119 of the Criminal Procedure (Scotland) Act 1995.

(Para 4.12; Draft Bill s 5(4))

17. (a) Leave to appeal should be required against rulings under section 97 of the Criminal Procedure (Scotland) Act 1995 that there is no case to answer.

(b) Leave to appeal should be required against all rulings following the statutory equivalent of a common law submission.

(c) Leave to appeal should be required in respect of evidential rulings made by the judge during a trial.

(Para 4.20; Draft Bill s 3 (inserted s 107A(1)))

18. (a) In every case where leave is required arguability should be a criterion.

(b) In respect of appeals against a ruling on a statutory submission which does not result in an acquittal, there should be an additional criterion that the ruling has a significant effect on one or more charges against the accused.

(c) In respect of an appeal against an evidential ruling (or series of such rulings), there should be an additional criterion that the result of the ruling (or series of rulings) is a significant weakening of the Crown case.

(Para 4.26; Draft Bill s 3 (inserted s 107A(3)))

19. In all cases where leave to appeal is required, it should be granted by the trial judge or sheriff.

(Para 4.29; Draft Bill s 3 (inserted s 107A(1)))

20. The court should have power, in exceptional circumstances, to remand the accused in custody pending the hearing of an appeal, or to admit him to bail during that period.

(Para 4.34; Draft Bill s 3 (inserted s 107A(4)(b)))

21. The court should have power to remand the accused in custody or to admit him to bail during any period between the authorisation of a new prosecution and the resulting trial.

(Para 4.34; Draft Bill s 5(4)(a) (amending s 119(10)))

22. Power should be conferred on a trial judge to make an order under section 4(2) of the Contempt of Court Act 1981 where the Crown has been granted leave to appeal and it appears to the court that, following the appeal, there is a possibility that proceedings might be brought against the accused for an offence of which he was acquitted.

(Para 4.38; Draft Bill s 3 (inserted s 107A(4)(a)))

# Appendix A

## Criminal Appeals etc. (Scotland) Bill [DRAFT]

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# Criminal Appeals etc. (Scotland) Bill

## [DRAFT]

An Act of the Scottish Parliament to make provision in relation to criminal appeals and submissions in criminal trials; and for connected purposes.

### **1 Submission of no case to answer**

In section 97 of the 1995 Act (submission of no case to answer), after subsection (2) there is inserted the following subsection—

“(2A) For the purposes of this section, evidence is insufficient in law to justify conviction of an offence if on that evidence no reasonable jury, properly directed, would be entitled to convict the accused of the offence.”.

#### NOTE

Section 1 amends section 97 of the Criminal Procedure (Scotland) Act 1995 (submission of no case to answer), and implements recommendation 1 (paragraph 2.25). The existing section 97(2) applies a test of technical sufficiency; only where there is an absence of corroboration can a submission of no case to answer succeed (see paragraphs 2.7-2.8). Inserted subsection (2A) broadens the test to be applied under section 97 to one of whether, on the prosecution evidence, no reasonable jury, properly directed, could convict the accused of the offence.

As we note at paragraph 2.40, the reference to proper direction on the law is important: where there is an absence of the necessary corroboration, or where the change is irrelevant (cf *HMA v Purcell* 2008 SLT 44), the trial judge is bound to direct the jury that they may not convict. Thus the definition of "insufficient in law" supplied by inserted section 2A allows section 97 to address both the question of corroboration and the broader question of whether the quality of the prosecution evidence is such as to permit a reasonable jury, properly directed, to convict.

### **2 Submission as to insufficiency etc. of evidence**

After section 97 of the 1995 Act there is inserted the following section—

#### **“97A Submission as to insufficiency etc. at the close of the whole of the evidence**

- (1) Immediately after the close of the whole of the evidence, the accused may intimate to the court his desire to make a submission on an offence charged in the indictment (either or both)—
  - (a) that the evidence is insufficient in law to justify his being convicted of the offence or of any other offence of which he could be convicted under the indictment,
  - (b) that there is no evidence to support some part of the circumstances set forth in the indictment.

- (2) If after hearing both parties the judge is satisfied that the evidence is insufficient in law to justify the accused's being convicted of the offence charged in respect of which the submission has been made or of any other offence of which the accused could be convicted under the indictment, the judge shall acquit the accused of the offence charged in respect of which the submission has been made and the trial shall proceed only in respect of any other offence charged in the indictment.
- (3) If after hearing both parties the judge is satisfied that the evidence is insufficient in law to justify the accused's being convicted of the offence charged in respect of which the submission has been made but that it is sufficient in law to justify his being convicted of some other offence of which he could be convicted under the indictment, the judge shall direct the prosecutor to amend the indictment accordingly.
- (4) If after hearing both parties the judge is satisfied that there is no evidence to support some part of the circumstances set forth in the indictment, the judge shall direct the prosecutor to amend the indictment accordingly.
- (5) If, after hearing both parties, the judge is not satisfied as is mentioned in any of subsections (2) to (4) above he shall reject the submission and the trial shall proceed as if such submission had not been made.
- (6) For the purposes of this section, evidence is insufficient in law to justify conviction of an offence if on that evidence no reasonable jury, properly directed, would be entitled to convict the accused of the offence.
- (7) An amendment made by virtue of this section shall be sufficiently authenticated by the initials of the clerk of court.
- (8) A submission under subsection (1) above shall be heard by the judge in the absence of the jury."

#### NOTE

Section 2 creates a statutory replacement for the "common law submission", and implements recommendation 2 (paragraphs 2.32-2.42).

At present, the accused may make a submission as of right only after the Crown speech to the jury, although the Crown commonly consents to a submission's being made at the close of the evidence. Where a submission is made after the Crown speech, the Crown does not have a right of reply, on the theory that at that stage the prosecutor is *functus officio* (paragraph 2.32).

Section 97A(1) gives the accused the right to make a submission immediately after the close of the evidence. Subsection (1)(a) permits a submission to be made that the evidence is insufficient in law to justify the accused's being convicted of the offence or of any other offence of which he could be convicted under the indictment. The meaning of "insufficient in law" is the same as in section 97, as amended by section 1 of this Bill (see subsection (6)). Accordingly, a submission under subsection 1(a) will succeed in three circumstances: first, where there is an absence of corroboration; second, where the evidence is so weak that no reasonable jury, properly directed, could convict upon it; and third, in the rare circumstance (such as arose in *HMA v Purcell* 2008 SLT 44) where the indictment is irrelevant and the judge could not permit the jury to convict regardless of the evidence. Subsection (1)(b) permits a submission to be made that there is no evidence to support some part of the circumstances set forth in the indictment; for example, to support the allegation of the use of a weapon in a charge of assault. We consider that subsection (1) fully reproduces the grounds upon which a common law submission may presently be made (see paragraph 2.40).

Subsection (2) implements recommendation 2(a)(i) and (iv). Subsection (3) implements recommendation 2(a)(ii) and (iv). Subsection (4) implements recommendation 2(a)(iii).

### **3 Prosecutor's right of appeal**

After section 107 of the 1995 Act there are inserted the following sections—

#### **“107A Prosecutor's right of appeal**

- (1) The prosecutor may with the leave of the court of first instance (granted either on the motion of the prosecutor or *ex proprio motu*) appeal to the High Court against—
  - (a) an acquittal under section 97 or 97A of this Act,
  - (b) a direction under section 97A(3) or (4) of this Act, or
  - (c) a finding, made after the jury is empanelled and before the close of the evidence for the prosecution, that evidence which the prosecution seeks to lead is inadmissible.
- (2) Any motion under subsection (1) above for leave to appeal must be made—
  - (a) in relation to an acquittal or direction, immediately after the acquittal or direction, or
  - (b) in relation to a finding, before the defence begins to lead evidence.
- (3) In determining whether to grant leave to appeal under subsection (1) above the court shall—
  - (a) where the appeal is against an acquittal, consider whether there are arguable grounds of appeal,
  - (b) where the appeal is against a direction, consider whether there are arguable grounds of appeal and what effect the direction has in diminishing the seriousness of the allegations contained in the indictment, or
  - (c) where the appeal is against a finding, consider whether there are arguable grounds of appeal and what effect the finding has on the strength of the prosecutor's case.
- (4) If it appears to the court that by virtue of this section there is a possibility that proceedings may be brought against a person for an offence of which he has been acquitted, it may (either or both)—
  - (a) make an order under section 4(2) of the Contempt of Court Act 1981 (c.49) (which gives a court power, in some circumstances, to order that publication of certain reports be postponed) as if such proceedings were pending or imminent,
  - (b) exceptionally and after giving the parties an opportunity of being heard, order the detention of the person in custody or admit him to bail.”.

#### NOTE

Section 107A gives the prosecutor a right of appeal against rulings under sections 97 and 97A, and findings made during the course of the trial that evidence which the prosecution seeks to lead is inadmissible.

Subsection (1) creates the right of appeal and establishes the requirement for leave of the trial court in all cases. This implements recommendations 3, 7, 9, 12, 17 and 19 (see paragraphs 3.4-3.11, 3.22, 3.27, 3.29-3.38, 3.43-3.52, 4.13-4.20 and 4.27-4.29).

Subsection (2) requires any motion for leave to appeal to be made immediately after the acquittal or direction appealed against, or, in the case of a finding that evidence is inadmissible, before the defence begins to lead evidence. This implements recommendations 10 and 13 (see paragraphs 3.39-3.41 and 3.54-3.56).

Subsection (3) sets out the factors to be taken into account by the court in determining whether or not to grant leave to appeal and this implements recommendation 18 (see paragraphs 4.21-4.26).

Section 4(2) of the Contempt of Court Act 1981 allows a court, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in any proceedings which are pending or imminent, to order that the publication of any report of the proceedings be postponed for such period as the court thinks necessary. Subsection (4)(a) of section 107A allows the court, where it appears that the prosecution appeal may result in further proceedings against a person for an offence of which he has been acquitted, to make an order under section 4(2) of the Contempt of Court Act 1981 in order to avoid the risk of prejudice to those further proceeding. This implements recommendation 22 (see paragraphs 4.35-4.38).

Subsection (4)(b) permits the court, exceptionally and after hearing the parties, to order the detention of an acquitted person in custody or admit him to bail pending the hearing of the prosecution appeal. This implements recommendation 20 (see paragraphs 4.30-4.34).

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

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

#### **NOTE**

Section 107B(1) allows the High Court, in considering an appeal under section 107A, to review not only the decision appealed against by any earlier decisions which may have a bearing on the decision appealed against. So, for example, where an acquittal under section 97 is appealed, the High Court will be able to review not only the trial judge's decision that the evidence led by the prosecution was insufficient in law to justify the conviction of the accused, but also that judge's earlier finding that an element of prosecution evidence was inadmissible.

Subsection (2) provides that the test to be applied by the High Court in considering an appeal is whether the trial judge's decision was wrong in law. This implements recommendation 4 (see paragraphs 3.12-3.14).

### **107C Expedited appeals**

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

#### NOTE

Section 107C makes provision for expedited appeals to be heard and determined during an adjournment of the trial where the court has been able to confirm that it would be practicable to do so. This implements recommendation 6 (see paragraphs 3.15-3.20).

### **107D Other appeals under section 107A**

- (1) Where an appeal brought under section 107A of this Act is neither an appeal against an acquittal nor an appeal to be dealt with as an expedited appeal—
  - (a) the court of first instance shall desert the diet *pro loco et tempore* in relation to an offence charged in the indictment if it is an offence to which the direction or finding appealed against is relevant,
  - (b) the trial shall proceed only if another offence (of which the accused has not been acquitted) is charged in the indictment, and
  - (c) if a new prosecution is to be brought charging the accused with the same or any similar offence arising out of the same facts as the offence mentioned in paragraph (a) above, the prosecutor must move the High Court that it, in disposing of the appeal, grant authority to bring that new prosecution in accordance with section 119 of this Act.
- (2) Where the High Court, in an appeal other than an expedited appeal, determines that an acquittal of an offence charged in the indictment was wrong in law it shall quash the acquittal and—

- (a) if a new prosecution is to be brought charging the accused with the same or any similar offence arising out of the same facts as the offence mentioned in paragraph (a) above, the prosecutor must move the High Court that it, in disposing of the appeal, grant authority to bring that new prosecution in accordance with section 119 of this Act,
- (b) if either no motion is made under paragraph (a) above or the High Court does not grant a motion so made, it shall in disposing of the appeal acquit the accused of the offence charged in the indictment.
- (3) The High Court shall not grant a motion under paragraph (c) of subsection (1) above or under paragraph (a) of subsection (2) above if it considers that to bring a new prosecution would be contrary to the interests of justice.”.

NOTE

Section 107D makes provision for non-expedited appeals.

Subsection (1) applies in relation to appeals other than appeals against acquittal. Here, in the absence of an expedited appeal, the trial of any charge to which the decision relates cannot continue; paragraphs (a) and (b) together provide that the court shall desert the diet in relation to that charge (or those charges) *pro loco et tempore* and the trial shall proceed only in relation to any other charges remaining on the indictment. The ordinary consequence of desertion *pro loco et tempore* is that the Crown is free to bring a fresh indictment (see Renton & Brown, *Criminal Procedure* (6<sup>th</sup> edn, R 22: Apr 2005) paragraph 18-21). The effect of paragraph (c) is that the authority of the Appeal Court is required before any further proceedings may be taken in respect of the charge which is the subject of an appeal.

Subsection (2) applies in relation to a non-expedited appeal against acquittal under either section 97(2) or section 97A(2). It provides that where the Appeal Court determines that the acquittal was wrong in law, it shall quash the acquittal. Paragraph (a) provides that a new prosecution may only be brought for the same or any similar offence arising out of the same facts with the authority of the Appeal Court and in accordance with section 119. Paragraph (b) provides that if no motion is made for such authority, or if the Appeal Court refuses such a motion, the Appeal Court shall itself acquit the accused of the offence in question. This subsection implements recommendations 5 and 15 (see paragraphs 3.15-3.20 and 4.1-4.9).

Subsection (3) provides that the Appeal Court shall not grant authority to bring a new prosecution where the bringing of a new prosecution would be contrary to the interests of justice. This implements recommendation 14 (see paragraphs 4.1-4.9).

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

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

NOTE

Section 104 of the 1995 Act confers a number of powers upon the High Court when hearing appeals under section 106(1) or 108, including power to order the production of documents, to hear evidence etc. Section 4 of the Bill amends section 104 to make these powers available for use in connection with appeals under section 107A.

## 5 Further amendment of the 1995 Act

- (1) In section 110(1) of the 1995 Act (note of appeal), after paragraph (b) there are added the following paragraphs—
  - “(c) within 7 days after leave to appeal under section 107A(1) of this Act is granted, the prosecutor may, except in the case of an expedited appeal, lodge such a note with the Clerk of Justiciary, who shall send a copy to the said judge and to the accused or to the accused’s solicitor,
  - (d) in the case of an expedited appeal, as soon as practicable after the decision as to hearing and determining the case is made under section 107C(1) of this Act, the prosecutor may—
    - (i) lodge such a note with the Clerk of Justiciary, and
    - (ii) provide a copy to the said judge and to the accused or to the accused’s solicitor.”
- (2) In section 113(1) of that Act (judge’s report), after the word “under” there is inserted “any of paragraphs (a) to (c) of”.
- (3) After section 113 of that Act there is inserted—

### “113A Judge’s observations in expedited appeal

- (1) On receiving a note of appeal provided to him under section 110(1)(d) of this Act, the judge who presided at the trial may furnish the Clerk of Justiciary with such written observations as the judge thinks fit on (either or both)—
  - (a) the case generally,
  - (b) the grounds contained in the note of appeal;but the High Court may hear and determine the appeal without any such written observations.
- (2) If written observations are furnished under subsection (1) above, the Clerk of Justiciary shall provide a copy of them to—
  - (a) the accused or his solicitor, and
  - (b) the prosecutor.
- (3) The observations of the judge shall be available only to the High Court, the parties, and, on such conditions as may be prescribed by Act of Adjournal, such other persons or classes of person as may be so prescribed.”
- (4) In section 119 of that Act (provision where High Court authorises new prosecution)—
  - (a) in each of subsections (1) and (10), after the words “118(1)(c)” there is inserted “or 107D(1)(c) or (2)(a)”,
  - (b) after subsection (2) there is inserted—

“(2A) In a new prosecution under this section brought by virtue of section 107D(1)(c) or (2)(a), the circumstances set forth in the indictment are not to be inconsistent with any direction given under section 97A(3) or (4) of this Act in the proceedings which gave rise to the appeal in question unless the High Court, in disposing of that appeal, determined that the direction was wrong in law.”, and
  - (c) in subsection (9), after the words “setting aside the verdict” there is inserted “or under section 107D(1)(c) or (2)(a) granting authority to bring a new prosecution”.

## NOTE

Section 5 makes a number of amendments to the 1995 Act. The amendments made by subsections (1) to (3) relate to the lodging of notes of appeal and the provision of the trial judge's report. Subsection (4) makes amendments concerned with the procedure following the granting of the Appeal Court's authority to bring further proceedings following a successful Crown appeal.

Section 110 of the 1995 makes provision for notes of appeal. Subsection (1) contains time limits for lodging such notes and provides for the transmission of copies of such notes to the court and to the parties concerned in the appeal. Subsection (3) requires that a note of appeal identify the proceedings, contain a full statement of the ground of appeal, and be in as nearly as may be the form prescribed by Act of Adjournal. Subsection (4) provides that, except by leave of the High Court on cause shown, it shall not be competent for an appellant to found any aspect of his appeal on a ground not contained in the note of appeal.

Subsection (1) of section 5 inserts new sub-paragraphs (c) and (d) into section 110(1) of the 1995 Act, providing for the lodging of a note of appeal within seven days of the granting of leave for a non-expedited appeal under section 107A, and as soon as practicable after a decision under section 107C(1) that an appeal be expedited. An effect of this insertion is that subsections (3) and (4) apply to Crown appeals as they do to appeals by a convicted person under section 106 and by the Lord Advocate against disposal under section 108. (Note, however, that while the time limits for appeals by convicted persons may be extended under either section 110(2) or 111(2), the time limit imposed upon a Crown appeal by inserted paragraph (c) of section 110(1) cannot be extended). This implements recommendations 8 and 11 (see paragraphs 3.28 and 3.42).

Section 113 of the 1995 Act requires the trial judge, on receiving the copy note of appeal sent to him under section 110(1), to furnish the Clerk of Justiciary with a written report giving the judge's opinion on the case generally and on the grounds contained in the note of appeal. It is appropriate that such a note should be provided to assist the Appeal Court in considering a Crown appeal; but in an expedited appeal, where the appeal is to be heard during an adjournment of the trial, it will often be impractical to require a full report. Sections 5(2) and (3) of the Bill address these points. The effect of subsection (2), together with subsection (1), is to apply section 113 of the 1995 Act to non-expedited appeals; in any such appeal, the trial judge will be required to provide a full report. Subsection (3) inserts a new section 113A into the 1995 Act, permitting the trial judge in an expedited appeal to furnish the Clerk of Justiciary with such written observations as he thinks fit.

Subsection (4) makes amendments applying section 119 of the 1995 Act (provision where High Court authorises new prosecution) to Crown appeals. This implements recommendations 16 and 21 (see paragraphs 4.10-4.12 and 4.30-4.34). Paragraph (c) amends subsection (9) of section 119. The effect of this amendment is that where two months elapse following the date upon which the Appeal Court grants authority under section 107D(1)(c) or (2)(a) and no new prosecution has been brought, the order granting authority to bring a new prosecution shall have the effect, for all purposes, of an acquittal.

## **6 “The 1995 Act”**

In this Act, “the 1995 Act” means the Criminal Procedure (Scotland) Act 1995 (c.46).

## **7 Saving**

Nothing in this Act affects proceedings commenced before this Act comes into force.

## NOTE

Section 6 prevents the provisions of the Bill from applying to proceedings commenced before it comes into force. Solemn proceedings are taken to commence on the earliest of the date of the grant of a petition

warrant to arrest and commit the accused, the intimation of a petition, and the service of an indictment (see Renton & Brown, *Criminal Procedure* (6<sup>th</sup> edn, R 14: cf 2002) para 12-04).

**8 Short title and commencement**

- (1) This Act may be cited as the Criminal Appeals etc. (Scotland) Act 2008.
- (2) This Act comes into force on the day after the date of Royal Assent.

# Appendix B

## List of consultees who submitted written comments on Discussion Paper No 137

Sheriff Frank R Crowe  
The Crown Office and Procurator Fiscal Service ("Crown Office")  
Peter Ferguson QC  
Sir Gerald Gordon QC  
The Right Honourable Lord Hamilton (The Lord Justice General)  
The Judges of the High Court of Justiciary  
The Law Society of Scotland  
Professor Paul Roberts, University of Nottingham  
Margaret Scott QC  
Christopher Shead, Advocate  
Gerard Sinclair, Scottish Criminal Cases Review Commission  
The Sheriffs' Association  
Sheriff Thomas Welsh QC

# Appendix C

## Existing rights of appeal in solemn criminal cases

### *Common law*

1. At common law rights of appeal in solemn cases were very limited. Sentences pronounced in the sheriff court, whether in solemn or summary procedure, were open to review by the High Court of Justiciary; this arose from the status of the sheriff court as an inferior court.<sup>1</sup> This right of review did not, however, allow for any appeal against a verdict of a jury in the sheriff court. There was no right of appeal from the High Court; the rationale was that it was not competent for the court which pronounced a sentence to amend, alter or vary it, the court being *functus officio* once a sentence was pronounced.<sup>2</sup> Nevertheless, technical errors could be corrected, for example in fixing the details of a sentence.

2. In general, the law that now governs criminal appeals is the result of statutory provision. Nevertheless, two common law procedures remain important, namely bills of suspension and bills of advocation. Suspension is a process whereby an illegal or improper warrant, conviction or judgment issued by an inferior court may be reviewed and, if appropriate, set aside by the High Court.<sup>3</sup> It is a remedy that is only open to the defence. The equivalent that is available to the prosecution is a bill of advocation.<sup>4</sup> Originally advocation involved the removal of the cause, at its commencement or during its course, from an inferior judge to the High Court on account of an objection to the jurisdiction of the inferior judge or on account of partiality or incapacity on his part.<sup>5</sup> In time, however, advocation came to be used as a method of review, and ultimately as a method of review available in respect of any court of solemn jurisdiction, including the High Court.<sup>6</sup> As such it is a remedy for error committed in the course of and during the dependence of a trial or criminal process, before the final judgment or sentence. It is normally confined to procedural errors in the preliminary stages of a case, prior to final judgment.<sup>7</sup> It is not a competent method of obtaining a review of the merits of a case.<sup>8</sup>

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<sup>1</sup> Alison, *Criminal Law*, ii, 25.

<sup>2</sup> *Ibid*, at 660-661.

<sup>3</sup> Renton and Brown, *Criminal Procedure* (6<sup>th</sup> edn, R 28: Apr 2007), para 33-01.

<sup>4</sup> Advocation can also be used by the defence except when it lies from the High Court sitting as a court of first instance; nevertheless, its general importance is as a form of appeal by the prosecution.

<sup>5</sup> Lord McCluskey and Paul McBride, *Criminal Appeals* (2<sup>nd</sup> edn, 2000), p 7, para 3.12.

<sup>6</sup> Renton and Brown, *Criminal Procedure* (6<sup>th</sup> edn, R 29: Aug 2007), para 33-19; recognised in s 74 of the Criminal Procedure (Scotland) Act 1995.

<sup>7</sup> *Ibid*, para 33-22.

<sup>8</sup> *MacLeod v Levitt* 1969 JC 16, per Lord Cameron at 19.

### *Appeals by accused following conviction*

3. A right to appeal against conviction on indictment was introduced by the Criminal Appeal (Scotland) Act 1926.<sup>9</sup> The grounds on which the court might allow an appeal were set out in section 2 of the Act; these were:

- (a) that the verdict of a jury should be set aside on the ground that it was unreasonable and could not be supported having regard to the evidence;
- (b) that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law; or
- (c) that on any ground there was a miscarriage of justice.

Those grounds remained substantially the same until the Criminal Justice (Scotland) Act 1980 which replaced them with a single ground of appeal, that a miscarriage of justice had occurred. That test was continued into the original version of section 106 of the Criminal Procedure (Scotland) Act 1995. In 1994 the Government appointed a Committee under the chairmanship of Sir Stewart Sutherland to examine the criteria for consideration of appeals and possible changes to the statutory criteria. When the Committee reported in 1996 it concluded that a single ground of appeal should be retained and that that ground should continue to be miscarriage of justice.<sup>10</sup> The result of the Sutherland Committee's recommendations, however, was significant amendment to the appeal provisions contained in the 1995 Act; these amendments are found in the Crime and Punishment (Scotland) Act 1997.

4. Section 106(1) of the Criminal Procedure (Scotland) Act 1995 in its present form provides that any person convicted on indictment may, with leave granted in accordance with section 107, appeal to the High Court against conviction and against most forms of sentence. Section 106(3) states the ground of appeal:

"(3) By an appeal under subsection (1) above a person may bring under review of the High Court any alleged miscarriage of justice, which may include such a miscarriage based on –

- (a) subject to subsections (3A) to (3D) below, the existence and significance of evidence which was not heard at the original proceedings; and
- (b) the jury's having returned a verdict which no reasonable jury, properly directed, could have returned."

Thus the single ground remains a miscarriage of justice, but specific provision is made for new evidence and for an unreasonable jury verdict.

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<sup>9</sup> The background to the Act was the case of Oscar Slater, whose conviction in 1908 for murder was widely recognised as a miscarriage of justice.

<sup>10</sup> Renton and Brown, *op cit*, at para 29-03 onwards.

5. The general practice of the Appeal Court in considering appeals under section 106 of the Criminal Procedure (Scotland) Act 1995 is summed up in the following passage, taken from McCluskey and McBride on *Criminal Appeals*:<sup>11</sup>

"The High Court now tends to look rather at the seriousness, importance and materiality of the error that the appeal brings to light. Whatever the character of the error (misdirection, wrongful exclusion of evidence, misconduct by the prosecution, etc), the High Court, in the light of its judgment about the importance of that error in the context of the whole trial, goes on to make the further judgment as to whether or not what went wrong may have affected the understanding and the deliberations of the jury in such a way as to lead them to draw an important inference or inferences adverse to the appellant. If the judgment is that the error was likely to have influenced the jury to reach a material judgment adverse to the appellant it will hold that the ground of appeal has been made out, that the 'alleged' miscarriage of justice was a true miscarriage of justice, and, a miscarriage of justice having occurred, the conviction appealed against must be quashed."

For the purposes of this Appendix it is not necessary to consider in detail the grounds on which appeals have been allowed under section 106.<sup>12</sup> Three grounds are, however, relevant to the questions considered in the present Report.

6. In the first place, an appeal may be allowed on the ground that the evidence was insufficient in law for a conviction. In this connection, if a judge wrongly rejects a submission of no case to answer, and evidence is then led by any accused which makes good the deficiency in the Crown evidence, any conviction will be regarded as a miscarriage of justice.<sup>13</sup>

7. In the second place, an appeal may be allowed on the basis that the jury has returned a verdict "which no reasonable jury, properly directed, could have returned".<sup>14</sup> In general, however, the Appeal Court has been reluctant to interfere with verdicts on this ground, on the basis that questions of credibility and reliability of evidence are matters for the jury and the court should be slow to substitute its own views. An example of this approach is found in the first case where the Appeal Court considered the amended version of section 106(3)(b), *King v HM Advocate*.<sup>15</sup> The appellant had been convicted of murder, principally on the basis of evidence of admissions made by him that were consistent with his having attacked the deceased in his flat in the early hours of Saturday. Evidence had also been available from witnesses who stated that they had heard the sound of a quarrel coming from the deceased's flat at about that time. The medical evidence indicated that the accused could not have survived for more than a brief period after the attack. Evidence was also led, however, which contradicted this version of events; witnesses stated that they had seen the deceased outside his flat later on Saturday and on Sunday. The court held that on the evidence available the jury were entitled to conclude beyond reasonable doubt that the

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<sup>11</sup> Lord McCluskey and Paul McBride, *Criminal Appeals* (2<sup>nd</sup> edn, 2000), p 225, para 7.11.

<sup>12</sup> Renton and Brown, *Criminal Procedure* (6<sup>th</sup> edn, R 13: Apr 2002), paras 29-08 – 29-39.0.1, in relation to appeals against conviction.

<sup>13</sup> *Gonshaw v Bamber* 2004 SLT 1270; the case involved summary proceedings, but the principle is clearly equally applicable to appeals from solemn proceedings.

<sup>14</sup> S 106(3)(b) of the Criminal Procedure (Scotland) Act 1995, as substituted by the Crime and Punishment (Scotland) Act 1997, s 17(1). The power to set aside the verdict of a jury on the ground that it was unreasonable goes back to s 2 of the Criminal Appeal (Scotland) Act 1926, but the reference to this ground was deleted by the Criminal Justice (Scotland) Act 1980; nevertheless, the general reference to a "miscarriage of justice" almost certainly comprehended this ground.

<sup>15</sup> 1999 JC 226; 1999 SCCR 330.

appellant had murdered the deceased. The fact that some evidence contradicted such a conclusion did not mean that the verdict was unreasonable; moreover, the fact that the court might have had a reasonable doubt about such a verdict was not sufficient to establish that a miscarriage of justice had occurred. Lord Justice General Rodger stated the test under section 106(3)(b) of the Criminal Procedure (Scotland) Act 1995 as follows:<sup>16</sup>

"The test is objective: the court must be able to say that no reasonable jury *could* have returned a guilty verdict on the evidence before them. Since in any case where [section 106(3)(b)] is invoked the jury will *ex hypothesi* have returned a guilty verdict, their verdict will have implied they were satisfied beyond reasonable doubt that the appellant was guilty. What the appellant must establish therefore is that, on the evidence led at the trial, no reasonable jury could have been satisfied beyond reasonable doubt that the appellant was guilty."

A broadly similar approach was followed in *Donnelly v HM Advocate*.<sup>17</sup> The result of these cases is that, where there is an irreconcilable conflict between evidence indicating guilt and evidence indicating innocence, the jury is entitled to choose between the different accounts.

8. In one subsequent case, *E v HM Advocate*,<sup>18</sup> the court upheld an appeal on the ground stated in section 106(3)(b). The accused was convicted of two charges of rape committed against his children. The two complainers were both young, and the Crown relied upon the *Moorov* principle<sup>19</sup> for corroboration that the offences had occurred. It was accordingly essential that the jury should accept both complainers as credible and reliable. At least two members of the court formed the view that there were clear and important contradictions in the evidence of one of the complainers and significant flaws in the other parts of the evidence. Lord Justice Clerk Gill stated:<sup>20</sup>

"It is an oversimplification to say that in applying section 106(3)(b) the court is substituting its own view on the question of reasonable doubt for that of the jury. The court has to go further. It has to decide whether it can say that, on any view, a verdict of guilty beyond reasonable doubt was one that no jury could reasonably have returned. The court has to make a judgment on the evidence that the jury heard and assess the reasonableness of the verdict with the benefit of its collective knowledge and experience.

In making this assessment the court must certainly keep in mind that the jury heard and saw the witnesses, and that the meaning and significance of a witness's evidence may not always be fully conveyed on the printed page; but the court must also consider whether, on the facts of the case before it, it is at any serious disadvantage to the jury in these respects."

Appeals subsequent to *E* based on the unreasonableness of a jury's verdict have not generally succeeded.<sup>21</sup> Overall, the cases seem to establish that the test that must be satisfied for such an appeal to succeed is demanding. The justification for a strict test is the general rule that credibility and reliability are matters for the decision of the jury, and unless

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<sup>16</sup> 1999 JC 226 at 228H; 1999 SCCR 330 at 333E-F.

<sup>17</sup> 2000 SCCR 861.

<sup>18</sup> 2002 JC 215; 2002 SCCR 341.

<sup>19</sup> The principle - derived from the case of *Moorov v HMA* 1930 JC 68 - that evidence of the commission of a crime from a single witness can corroborate evidence of the commission of another crime from a single witness provided that the crimes are sufficiently connected in time, character and circumstances to suggest that they form part of a single course of criminal conduct.

<sup>20</sup> 2002 JC 215; 2002 SCCR 341, at paras [30] and [31].

<sup>21</sup> Renton and Brown, *Criminal Procedure* (6<sup>th</sup> edn, R 28: Apr 2007) para 29-20.3, fn 1.

the jury's verdict is shown to be unreasonable or perverse the court will not interfere with it. Finally, it should perhaps be emphasised that the question of whether a verdict is one that no reasonable jury properly directed in the law could have returned is itself a question of law; that is the theory that underlies section 106(3)(b), and provides the basis on which the Appeal Court can interfere with such verdicts.

9. In the third place, an appeal under section 106 may lie on the ground that the judge wrongly permitted evidence to be led (or wrongly refused to permit defence evidence), if the Appeal Court concludes that the decision to allow or reject the evidence resulted in a miscarriage of justice. Once again this is a straightforward matter of law. A range of other grounds exists for defence appeals; these include misdirections in the course of the judge's charge and significant procedural irregularities. None of those other grounds would be relevant to appeals from judicial decisions that can end a case without a jury verdict.

#### *Appeals from preliminary diets and preliminary hearings*

10. Section 74 of the Criminal Procedure (Scotland) Act 1995 permits appeals from most decisions made at preliminary diets or preliminary hearings. Such appeals are available to both the Crown and the accused. Subsection (1) is in the following terms:

"(1) Without prejudice to—

- (a) any right of appeal under section 106 or 108 of this Act; and
- (b) section 131 of this Act,

and subject to subsection (2) below, a party may with the leave of the court of first instance (granted either on the motion of the party or *ex proprio motu*) in accordance with such procedure as may be prescribed by Act of Adjournal, appeal to the High Court against a decision at a first diet or a preliminary hearing."

11. The significance of these procedures has been substantially increased by the reforms introduced by the Criminal Procedure (Amendment) (Scotland) Act 2004.<sup>22</sup> In the High Court the great majority of questions relating to the admissibility of evidence are now dealt with at preliminary hearings. Consequently most rulings on evidence will be open to appeal, at a stage before the beginning of the trial. Leave to appeal must be obtained from the court of first instance, granted on the motion of either party or *ex proprio motu*.<sup>23</sup> The appeal must be taken not later than two days after the decision appealed against.<sup>24</sup> The High Court is given power to adjourn the hearing for such period as appears appropriate.<sup>25</sup> Any such appeal is without prejudice to an appeal under section 106 or section 108 of the 1995 Act.

#### *Appeals against sentence*

12. The convicted person has a right of appeal against sentence under section 106 of the Criminal Procedure (Scotland) Act 1995. Such an appeal requires the leave of the High Court under section 107. The grounds of appeal are considered first by a judge of the High

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<sup>22</sup> Following the Bonomy Report, *Improving Practice: 2002 Review of the Practices and Procedure of the High Court of Justiciary* (2002).

<sup>23</sup> Criminal Procedure (Scotland) Act 1995, s 74(1).

<sup>24</sup> *Ibid*, s 74(2).

<sup>25</sup> *Ibid*, s 74(3A).

Court, who decides whether the papers produced disclose arguable grounds of appeal (a procedure generally known as the "first sift"). If leave to appeal is refused the convicted person may apply to the High Court for leave to appeal. This involves a reconsideration of the papers by, in sentence appeals, two judges, who must once again decide whether the papers disclose arguable grounds of appeal.<sup>26</sup> The Crown is given a right of appeal against sentence by section 108. Section 108(1) permits the Lord Advocate to appeal against most forms of disposal, including a sentence passed on conviction. Subsection (2) provides that an appeal under subsection (1) may be made on a number of grounds; these include any point of law arising in connection with the sentence, and that the disposal was unduly lenient. This right of appeal is not subject to any requirement of leave; the assumption is clearly that the Lord Advocate will exercise the right responsibly and will not appeal on unarguable grounds.<sup>27</sup> We were informed by the Crown Office that at present approximately 10 sentence appeals are lodged by the Crown each year. In one year 17 were lodged, but in general the number has not varied a great deal. In such cases, of course, the accused has been convicted of an offence.

### *Summary procedure*

13. In summary procedure all appeals against conviction and all appeals by a prosecutor must be pursued by stated case, in accordance with sections 176-179, 181-185, 188, 190 and 192 of the Criminal Procedure (Scotland) Act 1995. These procedures fall outside the scope of this Report. Nevertheless, it should be noted that under section 175(3) the prosecutor may appeal to the High Court on a point of law against an acquittal in summary proceedings or against a sentence passed on conviction in such proceedings. The prosecution thus has a general right of appeal on questions of law.

### *Lord Advocate's reference*

14. Finally, although the procedure is not technically an appeal, we should mention the right of the Lord Advocate to seek a reference under section 123 of the Criminal Procedure (Scotland) Act 1995. This was introduced as a result of the recommendations of the Thomson Committee.<sup>28</sup> The Thomson Committee considered a proposal that the Crown should have a right of appeal to the High Court on the judge's ruling on a point of law, in order that the court could consider the point of law and give its opinion.<sup>29</sup> On this matter the Committee found that their witnesses were fairly evenly divided into two groups, holding opposing views.<sup>30</sup> The Committee indicated that they had found the proposal difficult, but their conclusions were as follows:

"4.11 ...We are of the view that the certainty to be gained by having the opinion of the High Court on a difficult point of law is an important consideration. We do not consider that there is any great force in the argument that the right of appeal would seldom be exercised. That does not seem to us a sound reason for denying the Crown the right to obtain from the High Court a ruling on an important point of law

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<sup>26</sup> A similar procedure is applied to appeals against conviction under s 106; in this case reconsideration is by three judges.

<sup>27</sup> *HM Advocate v McKay* 1996 JC 110, where the court stated that, in view of the privilege of the Lord Advocate of appealing without leave, it was "entitled to demand from the Lord Advocate and his advisers a high standard of care and accuracy from the outset in the handling of these appeals" (per Lord Justice General Hope at 114F).

<sup>28</sup> *Criminal Appeals in Scotland (Third Report)*, Cmnd 7005 (1977), ch 4.

<sup>29</sup> *Ibid*, para 4.02.

<sup>30</sup> *Ibid*, paras 4.04-4.010.

which the Crown considers has been wrongly decided in the trial court. The Crown already has this right in summary procedure and a convicted person has this right in both solemn and summary procedure. We consider that the Crown should have a right of appeal on a point of law in solemn procedure and we so *recommend*.

4.12 We also considered the arguments for and against a re-trial of the acquitted person in the event of the Crown appeal being successful. We appreciate that if there is to be no re-trial the appeal can have no practical effect on the particular case. We can however find no justification for infringing the deeply entrenched principle whereby a person once acquitted by a jury should not be liable to re-trial. We consider that the value of the Crown's right of appeal lies rather in the opportunity it will provide for the development of the law than in any effect it might have on a particular case. We therefore *recommend* that the acquittal should be unaffected by the outcome of the appeal."

It should be noted that the Committee's reasoning in paragraph 4.12 of their Third Report relates to acquittals by the verdict of a jury; it does not relate to an acquittal by the judge. In the section of their Second Report dealing with the introduction of a no case to answer submission<sup>31</sup> the Committee referred to the fears of some witnesses that the proposed procedure would result in delays arising from successful appeals by the prosecutor against decisions of no case to answer.<sup>32</sup> The Committee observed:<sup>33</sup>

"[W]e take the view that this will occur only in a small number of cases and is unlikely to be a problem. We propose to consider the question of the prosecutor's right of appeal in these cases in the wider context of appeals generally with which we shall be dealing in our next Report."

In their Third Report, however, the Thomson Committee did not give consideration to the question of appeals against judicial rulings following no case to answer submissions. This may have been the result of an oversight.

15. The provisions governing a Lord Advocate's reference are found in section 123 of the Criminal Procedure (Scotland) Act 1995. Subsection (1) provides that, where a person tried on indictment is acquitted or convicted of the charge, the Lord Advocate may refer a point of law which has arisen in relation to that charge for the opinion of the High Court. The person acquitted and his solicitor are notified of the reference, and the person acquitted is entitled to appear or be represented at the hearing. If he does not elect to appear, the High Court is to appoint counsel to act at the hearing as *amicus curiae*. Subsection (5) provides that the opinion on the point referred under subsection (1) shall not affect the acquittal or, as the case may be, conviction in the trial. In accordance with the Thomson Committee's recommendations, there is no provision for a re-trial; the procedure is designed to enable the Crown to obtain an authoritative ruling on a point of law that has arisen in the course of a trial, but there is no practical effect on that trial. Lord Advocate's references are not

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<sup>31</sup> *Criminal Procedure in Scotland (Second Report)*, Cmnd 6218 (1975), ch 48.

<sup>32</sup> *Ibid*, para 48.05.

<sup>33</sup> *Ibid*.

common; only nine have been reported since 1980; but they do on occasion have important consequences.<sup>34</sup>

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<sup>34</sup> For example, *Lord Advocate's Reference (No 1 of 2001)*, 2002 SLT 466, in which the Appeal Court reviewed the definition of the crime of rape, holding that force was not required.

# Appendix D

## Crown appeals: Comparative materials

### Part 1

#### International Instruments

*The International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR)*

1.1 Article 14(7) of the ICCPR, to which the United Kingdom is a party, provides:

"No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

1.2 Article 4 of the Seventh Protocol to the ECHR provides:

"1 No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2 The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3 No derogation from this Article shall be made under Article 15 of the Convention."

1.3 Each Article prevents a person from being subjected to second trial for an offence for which he has already been *finally* acquitted or convicted in accordance with the law and penal procedure of the state. This reflects the general existence of rights of appeal by both prosecution and defence against the decisions of criminal trial courts in most European countries,<sup>1</sup> and the understanding that a verdict only becomes final when all rights of appeal have been exhausted.<sup>2</sup>

1.4 The United Kingdom has indicated its intention to sign and ratify the Seventh Protocol, though it has yet to do so, owing to the need to abolish or equalise three rules of English matrimonial property law before UK law could comply with the remaining provisions of the Protocol.<sup>3</sup>

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<sup>1</sup> For a general survey of criminal procedure in various European jurisdictions, see Mireille Delmas-Marty and JR Spencer (eds) *European Criminal Procedures* (2002).

<sup>2</sup> This is also the position under the Canadian Charter of Rights and Freedoms, s11(h): *R v Morgentaler* [1988] 1 SCR 30 at 155-156.

<sup>3</sup> See the statement of the Parliamentary Under-Secretary of State, Ministry of Justice (Baroness Ashton of Upholland), *Hansard*, HL, Vol 693, pt 108, col WA131 (26 June 2007).

## Part 2

### England and Wales

2.1 England and Wales has recently legislated, in the Criminal Justice Act 2003, to extend the rights of the prosecution to appeal against judicial rulings in trials on indictment. Prior to these amendments, it was not possible for the prosecution to appeal against any judicial stay of proceedings or acquittal in proceedings on indictment.<sup>4</sup>

#### *Rulings which can bring a trial on indictment to an end*

2.2 English law recognises an inherent power in a criminal court to stay proceedings as an abuse of process, and a trial judge has 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".<sup>5</sup> An adverse ruling on either of these issues may bring a prosecution to an end, either directly as a matter of law or, where evidence is excluded, by persuading the prosecution to offer no evidence, or no further evidence, so that the judge orders or directs a verdict of not guilty.

2.3 The defence is entitled, at the close of the prosecution case, to make an application to the judge that there is no case to answer. If this application is upheld, the judge will direct the jury to acquit the defendant. According to the leading case of *Galbraith*,<sup>6</sup> the submission should be upheld if either there is no evidence at all of one or more essential elements of the offence (the "first limb" of the *Galbraith* test) or where there is some evidence, but it is so tenuous that, taken at its highest, a jury could not properly convict upon it (the "second limb"):

"How then should the judge approach a submission of "no case"? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends upon the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury..."<sup>7</sup>

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<sup>4</sup> It was for some time thought possible to subject the decision of a Crown Court judge to stay an indictment as an abuse of process to judicial review - on the basis that the Divisional Court's jurisdiction was ousted only in relation to "matters relating to trial on indictment" and a stay was not such a matter - before this was ruled out by the decision of the House of Lords in *R v Manchester Crown Court, ex parte DPP* [1994] 1 AC 9.

<sup>5</sup> Police and Criminal Evidence Act 1984, s 78.

<sup>6</sup> [1981] 1 WLR 1039; [1981] 2 All ER 1060.

<sup>7</sup> *R v Galbraith* [1981] 1 WLR 1039, per Lord Lane CJ at 1042.

2.4 The Law Commission has noted that it appears possible also to make a submission in similar terms at the close of all of the evidence, although it seems that the competence of this course is open to question.<sup>8</sup>

2.5 The approach to a no case to answer submission is different where identification evidence is in issue. The Court of Appeal has held that where the evidence of identification is poor, the judge should look for supporting evidence and, if there is none, should allow a submission of no case to answer. Criteria are given for determining whether the evidence is "poor", including the length of the observation, the lighting conditions etc. In identification cases there is a duty on the judge to withdraw the case from the jury if he is satisfied that it is appropriate to do so, irrespective of whether there has been an application by the defence. In addition, the judge must be satisfied at the close of the defence case that the quality of the identification evidence remains sufficient to go to the jury.<sup>9</sup>

#### *The Law Commission's Consideration of Rights of Appeal*

2.6 On 24 May 2000, the Law Commission was formally requested to consider whether any, and if so what, additional rights of appeal 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.

2.7 The Law Commission published a Consultation Paper, *Prosecution Appeals Against Judges' Rulings*, later that year, and published their conclusions on the topic (together with those relating to a separate project on double jeopardy) in their Report on *Double Jeopardy and Prosecution Appeals*<sup>10</sup> in March of 2001.

2.8 In the Consultation Paper, the Law Commission distinguished between "terminating rulings", which either terminated the trial as a matter of law or had the effect of persuading the prosecution to offer no or no further evidence, so that the judge ordered or directed a verdict of not guilty, and "non-terminating rulings", which did not terminate the trial because the prosecution could continue, albeit with a weakened case.<sup>11</sup>

2.9 Their preliminary conclusion was that there should be a prosecution right of appeal against a terminating ruling made before the close of the prosecution case, but that no right of appeal should be given against non-terminating rulings or against rulings of no case to answer.<sup>12</sup>

2.10 The Law Commission's opposition to an appeal against rulings of no case to answer was based largely upon a concern that the existence of such an appeal, with the possible consequence of a new trial before a different jury, would place the defence in an invidious position. In the interval between the appeal and the new trial, the prosecution case might improve. The prosecution might seek and obtain more evidence to shore up the

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<sup>8</sup> See the Law Commission Consultation Paper *Prosecution Appeals Against Judges' Rulings*, CP 158 (2000), para 6.12.

<sup>9</sup> *Ibid*, para 6.13, citing *Turnbull* [1977] QB 224 and *Fergus* (1993) 98 Cr App R 313.

<sup>10</sup> Law Com No 276.

<sup>11</sup> The Law Commission, *Prosecution Appeals Against Judges' Rulings*, CP 158 (2000), para 4.3.

<sup>12</sup> *Ibid*, paras 6.7, 6.20.

weaknesses obtained the first time round. The defence's case might deteriorate, and the weakness which resulted in the original ruling might be due to successful cross-examination of one or more of the Crown's witnesses, which might not be repeated at the re-trial. In the Law Commission's view, such concerns would result in a real risk that defendants might not make a submission of no case, when they should.<sup>13</sup>

2.11 Consultees generally welcomed the Commission's initial proposals in relation to terminating rulings during the prosecution case, and shared its initial view that an appeal against non-terminating rulings "would be wholly impracticable, would throw the system into chaos and would be contrary to long established principle".<sup>14</sup> Around half of those who responded to the consultation were not persuaded by the Commission's arguments that there should be no right of appeal against a ruling of no case to answer, prompting the Commission to revise its recommendations. In its report on *Double Jeopardy and Prosecution Appeals*, the Law Commission recommended that a right of appeal should be introduced, but that it should be restricted to appeals against decisions taken under the first limb of *Galbraith*, that there was no evidence in relation to one or more essential elements of the charge.<sup>15</sup> In the Commission's view, there was a clear distinction between an appeal on a point of law under the first limb, and one under the second limb, which "does not involve a point of law at all".<sup>16</sup>

### *The Criminal Justice Act 2003*

2.12 Part 9 of the Criminal Justice Act 2003 introduces a complex scheme of prosecution appeal rights, going significantly beyond what was recommended by the Law Commission.

2.13 Section 58 gives the prosecution a general right of interlocutory appeal against judicial rulings made during a trial on indictment at any time before the start of the judge's summing up to the jury. This extends to rulings of no case to answer based upon either limb of *Galbraith*,<sup>17</sup> and where the appeal is against a ruling of no case to answer the prosecution may also appeal one or more other rulings which have been made by the judge in relation to the offence or offences which are the subject of appeal.<sup>18</sup> Section 58 applies only to terminating rulings, and before an appeal can be taken under that section the prosecution must inform the court that it agrees that the defendant should be acquitted if either leave to appeal to the Court of Appeal is not obtained or the appeal is abandoned before it is determined by the Court of Appeal.<sup>19</sup> The effect of the ruling appealed against is suspended while the appeal is pursued.<sup>20</sup>

2.14 Where the prosecution informs the court that it intends to appeal, the judge must decide whether the appeal should be expedited. If he decides that it should be, he may order an adjournment. If he decides that the appeal should not be expedited, he may either

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<sup>13</sup> The Law Commission, *Prosecution Appeals Against Judges' Rulings*, CP 158 (2000), paras 6.15-6.16.

<sup>14</sup> The Law Commission, *Double Jeopardy and Prosecution Appeals*, Law Com No 267 (2001), para 7.38.

<sup>15</sup> *Ibid*, para 7.74.

<sup>16</sup> *Ibid*, para 7.68.

<sup>17</sup> In the absence of anything in s 58 expressly limiting the appeal to a point of law alone.

<sup>18</sup> Criminal Justice Act 2003, s 58(7).

<sup>19</sup> *Ibid*, s 58(8), (9). Where the prosecution indicates its agreement in terms of s 58(8), it may appeal against a ruling which would not otherwise have terminated the case: *Prosecution Appeal (No 2 of 2008): R v Y* [2008] EWCA Crim 10, [2008] Crim LR 466.

<sup>20</sup> *Ibid*, s 58(10), (11).

order an adjournment or discharge the jury.<sup>21</sup> On hearing the appeal, the Court of Appeal may confirm, reverse or vary the ruling to which the appeal relates. Where the ruling is confirmed, the court must order that the defendant be acquitted; where it is varied or reversed, the court may either order that proceedings for the relevant offence may be resumed in the Crown Court, that a fresh trial take place in the Crown Court for that offence, or that the defendant be acquitted. The Court of Appeal may not make an order for the resumption of the trial or for a fresh trial unless it considers it necessary in the interests of justice to do so.<sup>22</sup>

2.15 In extending to both limbs of *Galbraith* and in permitting appeals against rulings at any stage of the trial before the judge's summing up, these provisions go somewhat beyond the Law Commission's recommendations.

2.16 A more dramatic departure from those recommendations is found in sections 62 to 67, which provide a right of appeal, with leave of the Court of Appeal, against non-terminating evidentiary rulings made at any time before the opening of the case for the defence. While the section 58 right of appeal is available in any trial on indictment, an appeal under section 62 is available only in a trial for a "qualifying offence" (of which 39, ranging from murder to robbery and hijacking, are listed in Part 1 of Schedule 4),<sup>23</sup> and only where the Court of Appeal is satisfied that the ruling or rulings appealed against significantly weaken the prosecution's case.<sup>24</sup> As with an appeal against a terminating ruling, the judge must decide whether or not the appeal should be expedited, and if he decides that it should not be, may discharge the jury.<sup>25</sup> On hearing the appeal, the Court of Appeal may confirm, reverse or vary any ruling to which the appeal relates, and must either order that proceedings be resumed in the Crown Court, that a fresh trial take place, or – where the prosecution has indicated that it does not intend to continue with the prosecution – order that the defendant be acquitted.<sup>26</sup> The Court of Appeal must not reverse a ruling unless it is satisfied that the ruling was wrong in law, involved an error of principle, or was not reasonable for the judge to have made.<sup>27</sup> At the time of writing, sections 62 to 67 have not been brought into force.

## **New Zealand**

2.17 New Zealand law permits the judge in a trial on indictment to make a number of orders which would bring the prosecution to an end, and allows the prosecution an appeal in a number of circumstances.

### *Rulings which can bring a trial on indictment to an end*

2.18 At the stage of committal for trial, the judge may, after perusing the depositions and considering such other evidence and other matters as are submitted for his consideration, direct that no indictment shall be filed, or, if it has been, that the accused shall not be

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<sup>21</sup> *Ibid*, s 59.

<sup>22</sup> *Ibid*, s 61.

<sup>23</sup> *Ibid*, s 62(3), (9). The Secretary of State may amend the list of qualifying offences by order under s 62(10).

<sup>24</sup> *Ibid*, s 63.

<sup>25</sup> *Ibid*, s 64.

<sup>26</sup> *Ibid*, s 66.

<sup>27</sup> *Ibid*, s 67.

arraigned on that indictment and, in either case, direct that the accused be discharged.<sup>28</sup> Such a discharge is deemed to be an acquittal.<sup>29</sup>

2.19 New Zealand law recognised the availability of a plea of no case to answer at common law, and this common law plea continues to be available in summary procedure. In proceedings on indictment, the common law submission of no case to answer is now subsumed within the general power of the trial judge, contained in section 347 of the Crimes Act 1961, to direct that the accused be discharged.<sup>30</sup> The relevant provision is section 347(3), which provides that the judge may, in his discretion, at any stage of any trial, whether before or after verdict, direct that the accused be discharged. Such a discharge is deemed to be an acquittal.<sup>31</sup> An application for discharge may be made at the close of the Crown case, at the close of the defence case, or even after the jury has returned a verdict.<sup>32</sup>

2.20 There was, until recently, conflicting authority as to the test to be applied in considering a section 347(3) discharge on the basis of insufficiency of evidence.<sup>33</sup> It is now settled, following the decision of the Court of Appeal in *R v Flyger*<sup>34</sup> that the test to be applied where the submission is made at the close of the Crown case is the same as in a common law submission of no case to answer, and reflects that set out in the English case of *R v Galbraith*.<sup>35</sup> The test is the same whether the discharge is sought in a trial before a judge and jury or a judge sitting alone, and is concerned solely with whether there is before the court evidence which, if accepted, would as a matter of law be sufficient to prove the case.

2.21 Where an application for a section 347(3) discharge is made after the close of the defence evidence, the test to be applied should reflect that which would apply on an appeal on evidentiary grounds, asking whether any properly directed jury could reasonably convict, or whether any such conviction would not be supported by the evidence.<sup>36</sup>

2.22 In addition to discharges based upon insufficiency of evidence, a judge may discharge the accused under section 347(3) where the continuation of the prosecution would be contrary to the public interest, as where there were factors such as unfair or unconscionable conduct by police or prosecution, undue delay, or other risk of unfairness.<sup>37</sup>

## Appeals

2.23 Section 379A of the Crimes Act 1961 enables either the prosecutor or the accused, at any time before the trial, to appeal to either the Court of Appeal or the Supreme Court against a number of specified pre-trial orders, including an order quashing or amending the

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<sup>28</sup> Crimes Act 1961, s 347(1).

<sup>29</sup> *Ibid*, subs (4).

<sup>30</sup> See *R v Flyger* [2001] 2 NZLR 721 at 726, para [16].

<sup>31</sup> Crimes Act 1961, s 347(4).

<sup>32</sup> See, for instance, *R v Lachlan Elliot Downing* [1999] NZCA 275, 23 November 1999, unreported.

<sup>33</sup> See the authorities cited by the New Zealand Law Commission at paras 145-148 of their Report on *Criminal Prosecution*, R 66 (2000).

<sup>34</sup> [2001] 2 NZLR 721, followed and explained in *Parris v Attorney-General* [2004] 1 NZLR 519; see too *The Attorney-General of NZ v The District Court at Auckland & Anor* HC AC CIV-2006-404-5460, Courtney and Lang JJ, High Court of New Zealand, 2 April 2007, unreported.

<sup>35</sup> [1981] 2 All ER 1060; see *R v Flyger* [2001] 2 NZLR 721 at 725, paras 13-17.

<sup>36</sup> *Parris v Attorney-General* [2004] 1 NZLR 519.

<sup>37</sup> New Zealand Law Commission, *op cit*, at paras 149-150, citing *R v E T E* (1990) 6 CRNZ 176 as an example of a discharge based on delay amounting to abuse of process.

indictment, orders in relation to disclosure of information and orders in relation to the anonymity of witnesses. On such an appeal, the appeal court may confirm or vary the original decision, or may set the decision aside and make such order as it thinks appropriate.

2.24 Section 380 of the Crimes Act 1961 provides that at any time either during or after a trial, the court before which an accused person is tried may reserve for the opinion of the Court of Appeal any question of law arising in connection with the case. A reference may be made following either conviction or acquittal. If the result of the trial is acquittal, the accused shall be discharged, subject to being again arrested if the Court of Appeal orders a new trial.<sup>38</sup> Either the prosecutor or the accused may apply to the court to reserve a question; if the court refuses to do so, the applicant may apply to the Court of Appeal.<sup>39</sup>

2.25 Section 380 is available for appeals against sentence (in which case the Court of Appeal may either pass such sentence as ought to have been passed or remit to the trial court with an appropriate direction), and also against conviction or acquittal. No conviction or acquittal shall be set aside, nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial, or some misdirection given, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage of justice was thereby occasioned on the trial.<sup>40</sup>

2.26 However, it has been held that a trial court may not state a case under section 380 where the accused has been discharged under section 347 since, although such a discharge is deemed to be an acquittal, it cuts the trial short so that it cannot be said that *the result of the trial* is acquittal.<sup>41</sup> Section 380 is the only means by which the Crown can contest an acquittal, so no appeal is open to the prosecution following a discharge under section 347.

2.27 The decision of a District Court judge to grant a discharge under section 347 is amenable to judicial review, although this will be appropriate only in rare cases where, by reason of the nature of the error of jurisdictional law in the District Court, the intervention of the High Court is imperative.<sup>42</sup> Judicial review is not available where the decision is made by a High Court judge.<sup>43</sup>

2.28 Although an appeal on a point of law under section 380 is not available where the judge discharges an accused, it is available where the prosecution moves the trial judge, instead of discharging the accused under section 347, to direct the jury to return an acquittal.<sup>44</sup> This has been suggested as the appropriate course by the Court of Appeal.<sup>45</sup> However, the New Zealand Law Commission regarded the practice of a directed verdict to be an unnecessary complication and recommended that the Crown should have recourse to a section 380 procedure where there had been a section 347 discharge on a point of law

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<sup>38</sup> Crimes Act 1961, s 380(4).

<sup>39</sup> *Ibid*, ss 380(3), 381.

<sup>40</sup> *Ibid*, first proviso to s 382(2).

<sup>41</sup> *R v Grime* [1985] 2 NZLR 265, per Richardson J at 267, applying *R v Fogden* [1945] NZLR 380.

<sup>42</sup> *Auckland District Court v Attorney General* [1993] 2 NZLR 129 at 136.

<sup>43</sup> On the basis that while the District Court is a court of limited jurisdiction, the High Court is not; see the New Zealand Law Commission, *op cit*, at 57, para 157.

<sup>44</sup> For an example, see *The Queen v Rokas Karpavicius* [2001] 3 NZLR 41.

<sup>45</sup> *R v Grime* [1985] 2 NZLR 265, per Richardson J, at 269.

only, so that the discharge was conditional upon the ultimate determination of the reserved point of law.<sup>46</sup>

2.29 The Criminal Procedure Bill 2004 contains, among other provisions, a new section 381A of the Crimes Act 1961 which would permit an appeal against a section 347 discharge on the basis suggested by the Commission.<sup>47</sup>

## Canada

2.30 Canada has among the most extensive rights of prosecution appeal of any common-law jurisdiction.

### *Rulings which can bring a trial on indictment to an end*

2.31 Canadian law has a system of preliminary inquiries in which a judge may determine, before committing an accused for trial on indictment, whether or not there is a sufficient prima facie case against the accused.<sup>48</sup> A preliminary inquiry may be held at the request of either prosecution or defence, and shall hear evidence from the prosecution witnesses, who may be cross-examined by the defence,<sup>49</sup> and may also hear witnesses for the defence.<sup>50</sup> When all the evidence has been taken by the justice before whom the preliminary inquiry is held, he shall, if in his opinion there is sufficient evidence to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction, order the accused to stand trial; or discharge the accused, if in his opinion on the whole of the evidence no sufficient case is made out.<sup>51</sup>

2.32 The Canadian analogue of the Scots submission of no case to answer is found in the common-law motion for a directed verdict of acquittal, made at the close of the prosecution evidence. The proper procedure is for the judge to direct the jury to return a verdict of acquittal rather than acquitting the accused himself (though such an acquittal would also be effective<sup>52</sup>). The test to be applied in deciding a motion for directed acquittal is the same as should be applied by the justice at a preliminary hearing - that is, whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty - and a charge should be allowed to go to the jury in any case where there is admissible evidence which could, if it were believed, result in a conviction. The test is the same whether the evidence is direct or circumstantial:<sup>53</sup>

"Where there is before the court any admissible evidence, whether direct or circumstantial, which, if believed by a properly charged jury acting reasonably, would justify a conviction, the trial judge is not justified in directing a verdict of acquittal. It is not the function of the trial judge to weigh the evidence, to test its quality or reliability

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<sup>46</sup> New Zealand Law Commission, *Criminal Prosecution*, R 66 (2000), para 158.

<sup>47</sup> The Bill, which would also place restrictions upon the right to trial by jury in certain cases and introduce exceptions to double jeopardy is still before the New Zealand Parliament at the time of writing. Links to the Bill and associated Parliamentary documents may be found at <http://tinyurl.com/yvr4zm>.

<sup>48</sup> Criminal Code of Canada, Part XVIII.

<sup>49</sup> *Ibid*, s 540(1)(a).

<sup>50</sup> *Ibid*, s 541.

<sup>51</sup> *Ibid*, s 548(1).

<sup>52</sup> See *Walker v The King* [1939] SCR 214.

<sup>53</sup> *United States of America v Shephard* [1977] 2 SCR 1067 at 1080; *R v Arcuri* [2001] 2 SCR 828 at para 21; *R v Monteleone* [1987] 2 SCR 154 at 160.

once a determination of its admissibility has been made. It is not for the trial judge to draw inferences of fact from the evidence before him. These functions are for the trier of fact, the jury."<sup>54</sup>

2.33 The Law Reform Commission of Canada twice recommended that rather than directing the jury to acquit where there was insufficient evidence at the close of the Crown case, the acquittal should be by ruling of the judge, and this suggestion found judicial support in the case of *R v Rowbotham*, in which a jury had shown reluctance to return a verdict of acquittal as directed by a judge.<sup>55</sup> Despite these recommendations, the directed verdict procedure appears to remain unamended.

### *Appeals*

2.34 There is no appeal available to either party against the ruling of a justice at a preliminary inquiry, though the justice's decision may be reviewed by *certiorari* on the ground of excess of jurisdiction, either where the accused has been committed for trial in the absence of any evidence in relation to an essential element of the offence or where the justice, in ruling to dismiss, failed to consider all of the evidence.<sup>56</sup>

2.35 Canada is unusual in giving the prosecution a general right of appeal against acquittals on a question of law. This right, which has been available since 1892, extends to all acquittals, including acquittals by a jury on the merits of the case. Section 676 of the Criminal Code gives the Attorney General the right to appeal to the Court of Appeal against a judgment or verdict of acquittal of a trial court in proceedings by indictment on any ground of appeal which involves a question of law alone.<sup>57</sup> The prosecution may also appeal against an order of a superior court of criminal jurisdiction that quashes an indictment or fails to exercise jurisdiction on an indictment, against an order of a trial court that stays proceedings on an indictment or quashes an indictment and, with leave of the Court of Appeal, against the sentence passed by a trial court in proceedings of indictment, unless that sentence is one fixed by law.<sup>58</sup>

2.36 A Crown appeal is permitted on a "question of law alone". A judge's error as to the elements of the offence which require to be proved,<sup>59</sup> or as to the interpretation of a legal standard<sup>60</sup> has been held to raise a question of law alone. A question of law will also arise where there is a misdirection as to the proper approach to be taken to the evidence, such as where jurors are instructed that they should examine individual pieces of evidence and subject them piecemeal to the criminal standard rather than instructing them to consider the whole of the evidence and to determine on that basis whether the guilt of the accused had

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<sup>54</sup> *R v Monteleone* [1987] 2 SCR 154, per McIntyre J at para 8.

<sup>55</sup> *R v Rowbotham*; *R v Roblin* [1994] 2 SCR 463; the Law Reform Commission first recommended change in their Working Paper on *The Jury in Criminal Trials*, WP 27 (1980) at p 145, and again in their Working Paper on *Double Jeopardy, Pleas and Verdicts*, WP 63 (1991) at p 94.

<sup>56</sup> *R v Deschamplain* [2004] 3 SCR 601; as the statute entitles the justice to dismiss if "on the whole of the evidence" the case is not made out, a failure to consider the whole of the evidence is a jurisdictional error.

<sup>57</sup> Criminal Code of Canada, s 676.

<sup>58</sup> *Ibid.*

<sup>59</sup> *R v B(G)* [1990] 2 SCR 57.

<sup>60</sup> *R v Araujo* [2000] 2 SCR 992 per Lebel J at para 18.

been established beyond a reasonable doubt.<sup>61</sup> It has been held that the reasonableness of a verdict or the sufficiency of the evidence does not raise a question of law alone.<sup>62</sup>

2.37 Accordingly, a directed acquittal on the basis of insufficiency of evidence will be appealable by the Crown only where the dismissal was on the basis that there was no evidence in relation to an offence or one or more of its essential elements, and not merely on the basis that the available evidence was tenuous.

2.38 In order to overturn a jury verdict of acquittal where the Crown has established an error of law at the trial, the onus is upon the Crown to satisfy the appeal court "that the verdict would not necessarily have been the same if the trial judge had properly directed the jury",<sup>63</sup> which has been held to be equivalent to showing that the jury's verdict "might have been different" had the error of law not occurred.<sup>64</sup> However, it appears that the test may not be as low as its language would at first suggest. As Sopinka J observed for a majority of the Supreme Court in *R v Morin*:<sup>65</sup>

"I am prepared to accept that the onus is a heavy one and that the Crown must satisfy the Court with a reasonable degree of certainty. An accused who has been acquitted once should not be sent back to be tried again unless it appears that the error at the first trial was such that there is a reasonable degree of certainty that the outcome may well have been affected by it. Any more stringent test would require an appellate court to predict with certainty what happened in the jury room. That it cannot do."

## Australia

2.39 The extent of prosecution rights of appeal in Australia varies from state to state and territory to territory. Two states, Tasmania and Western Australia, have long-standing prosecution rights of appeal; one, New South Wales, has recently introduced such a right; and a number of other states and territories are considering amending their law.

### *Rulings which can bring a trial on indictment to an end*

2.40 Each Australian state and territory permits the judge in a trial on indictment to bring the case to an end if the Crown evidence is insufficient to warrant a conviction. The opinion of the High Court of Australia in *Doney v R*,<sup>66</sup> sets out the test to be applied in considering such a direction under Australian law:

"... if there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision. Or, to put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty.

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<sup>61</sup> *R v Morin* [1988] 2 SCR 345 per Sopinka J at 361.

<sup>62</sup> *R v B(G)*, [1990] 2 SCR 57.

<sup>63</sup> The test first articulated by Kerwin J in *White v R* [1947] SCR 268 at 276 and approved by a majority of the Supreme Court in *Vézeau v The Queen* [1977] 2 SCR 277 at 292.

<sup>64</sup> *R v MacKenzie* [1993] 1 SCR 212.

<sup>65</sup> *R v Morin* [1988] 2 SCR 345 per Sopinka J at 361.

<sup>66</sup> [1990] HCA 51; (1990) 171 CLR 207. The opinions of the High Court on the common law are binding across all states and territories.

It is necessary only to observe that neither the power of a court of criminal appeal to set aside a verdict that is unsafe or unsatisfactory nor the inherent power of a court to prevent an abuse of process provides any basis for enlarging the powers of a trial judge at the expense of the traditional jury function. The power of a court of criminal appeal to set aside a verdict on the ground that it is unsafe or unsatisfactory, like other appellate powers, is supervisory in nature. Its application to the fact-finding function of a jury does not involve an interference with the traditional division of functions between judge and jury in a criminal trial. Nor does the existence in a trial judge or a court of powers to stay process or delay proceedings where the circumstances are such that the trial would be an abuse of process."<sup>67</sup>

2.41 *Doney* remains the law, though remarks made, *obiter*, in the High Court of Australia suggest that it might be appropriate to consider reversing *Doney* and allowing an acquittal to be directed where the judge is not of the opinion that there is a reasonable prospect that a reasonable jury, properly instructed, would convict the accused.<sup>68</sup>

### *Rights of Appeal*

2.42 Prior to 2006, only two Australian jurisdictions – Tasmania and Western Australia – allowed the prosecution to appeal against an acquittal in a jury trial.

2.43 In Tasmania, the Attorney General may appeal against an acquittal on a question of law, with leave of the trial judge or the Court of Appeal.<sup>69</sup> Until 1987, the right of appeal was on a “question of law *alone*”, and there was conflicting authority as to whether this included an appeal against a procedural decision or one which raised a question of mixed fact and law. This question was ultimately resolved, in favour of a narrow interpretation, by the judgment of the High Court of Australia in *Williams v The Queen*.<sup>70</sup> In 1987, the appeal provision was amended to remove the word “alone”, apparently with the intention of restoring the wider interpretation.<sup>71</sup>

2.44 The Court of Appeal shall allow an appeal if it is of opinion that the judgment or order of the court of trial should be set aside on the ground of the wrong decision on any question of law,<sup>72</sup> but may, notwithstanding that it is of the opinion that the point raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.<sup>73</sup> If the Court of Appeal allows an

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<sup>67</sup> *Ibid*, opinion of the court (Deane, Dawson, Toohey, Gaudron & McHugh LJJ) at paras 17-18.

<sup>68</sup> This is the statutory test which applies in committal proceedings in New South Wales. See *Antoun v R* [2006] HCA 2; (2006) 224 ALR 51; 80 AJLR 497 (8 February 2006), per Callinan J at fn 74, para [86]. Callinan J equated this broader test to the test “that has been adopted in the United Kingdom”, but does not cite authority for the UK’s [*sic*] adoption of the broader test. He went on to say: “It is seriously open to question, in my opinion, whether it is in the public interest, having regard to the expense of criminal proceedings and the jeopardy to an accused, of permitting a tenuous, inherently weak or vague case to go to a jury, and whether, in view of the grant to Magistrates [at the committal hearing], but not to judges, of a power to end a criminal case before the time when a jury is to decide it, the approach in the United Kingdom or some like approach ought not to be adopted in this country.”

<sup>69</sup> Criminal Code Act 1924 (Tas), s 401(2)(b).

<sup>70</sup> Cf *R v Jenkins* [1970] Tas SR 13 (no appeal against procedural decisions), *R v Jessop* [1970] Tas SR 64 (a conclusion of mixed fact and law may be challenged where it proceeds on a misdirection in law), and *Williams v The Queen* (1986) 161 CLR 278 (HCA) (favouring the approach in *Jenkins*).

<sup>71</sup> There is still some uncertainty as to whether the approach in *Jenkins* or *Jessop* is to be preferred as a reading of the amended provision - see, for example, *Director of Public Prosecutions v Lynch* [2006] TASSC 89 at para 44.

<sup>72</sup> Criminal Code Act 1924 (Tas), s 402(1).

<sup>73</sup> Criminal Code Act 1924 (Tas), s 402(2).

appeal against an order suspending judgment or an acquittal, it may order a retrial, order that judgment be pronounced on the offender, that a conviction be entered against the offender, or that the offender appear before any court at a specified time to receive judgment.<sup>74</sup>

2.45 Western Australia has a long-standing right of prosecution appeal from an acquittal at the direction of the trial judge. Section 24 of the Criminal Appeals Act 2004,<sup>75</sup> allows the prosecutor to appeal to the Court of Appeal against a decision ordering a permanent stay of proceedings on a charge<sup>76</sup> and against a judgment of acquittal, other than on account of unsoundness of mind, entered after a decision by the judge that the accused has no case to answer.<sup>77</sup> The right of appeal also extends to an acquittal entered in a trial by judge alone.<sup>78</sup> On hearing such an appeal, the Court of Appeal may affirm, vary or set aside the decision and any judgment entered or order made as a result of the decision; may enter any judgment, make any order or otherwise take any step which could have been taken by the court of first instance, and, if it sets aside a decision, may order a new trial.<sup>79</sup>

2.46 Section 32 of the Criminal Law and Evidence Act 2008 amends section 24 of the Criminal Appeals Act 2004 to allow the prosecution to appeal against an acquittal in a trial before a judge and jury for a serious offence (punishable by imprisonment for 14 years or more), on the ground that there was an error of fact or law made by the trial judge.

#### *Rights of Appeal – Recent Developments*

2.47 The New South Wales Law Reform Commission advised in 1996 that a right of appeal against a directed acquittal should not be introduced in New South Wales. The Commission considered that the paramount, and therefore overriding, consideration in considering the introduction of a right of appeal was the rule against double jeopardy, which, in this instance, should not be compromised.<sup>80</sup>

2.48 In 2002 the High Court of Australia ruled in *R v Carroll*<sup>81</sup> that it would be an abuse of process to try a man for perjury after he had successfully appealed against his original conviction for the rape and murder of a 17 month old baby, notwithstanding subsequent forensic evidence which suggested his guilt. Following the High Court's decision in *Carroll*, *The Australian* newspaper ran a campaign against the "unfairness" of the double jeopardy rule.<sup>82</sup> The campaign coincided with a New South Wales State election. The day prior to the election being called, Premier Carr announced that the rule against double jeopardy would

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<sup>74</sup> *Ibid*, subs (5).

<sup>75</sup> Which substantially re-enacts section 688(2) of the Criminal Code Act 1913.

<sup>76</sup> Criminal Appeal Act 2004 (WA), s 24(2)(c).

<sup>77</sup> *Ibid*, s 24(2)(e).

<sup>78</sup> *Ibid*; in certain circumstances, indictable offences may be tried by a judge alone in accordance with the Criminal Procedure Act 2004, Part 4, Division 7, and any finding of the judge has, for all purposes, the same effect as a finding or verdict of a jury (s 120(1)(b) of that Act).

<sup>79</sup> *Ibid*, s 33(2).

<sup>80</sup> See the New South Wales Law Reform Commission, *Directed Verdicts of Acquittal* (Report 77, 1996), paras 3.1-3.5. This is available online, together with the preceding Discussion Paper of the same title (DP 37, 1995), at [www.lawlink.nsw.gov.au/lrc](http://www.lawlink.nsw.gov.au/lrc).

<sup>81</sup> [2002] HCA 55.

<sup>82</sup> Charles Parkinson, "Double Jeopardy Reform: The New Evidence Exception for Acquittals," (2003) 26 University of New South Wales Law Journal 603 at 603-604.

be reformed in New South Wales to allow retrials based on fresh evidence,<sup>83</sup> modelled on the English Criminal Justice Bill 2002. In addition to creating exceptions to the rule against double jeopardy, the Act which finally resulted – the Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006 – also introduced a right of prosecution appeals against directed acquittals (discussed below).<sup>84</sup>

2.49 In Queensland, pressure for reform of the rule against double jeopardy prompted the Attorney-General of Queensland to request that the Standing Committee of Attorneys-General (SCAG) review the rule.<sup>85</sup> SCAG referred the matter to its Model Criminal Code Officers Committee (MCCOC), comprised of experts from each Australian jurisdiction. The MCCOC produced a discussion paper in 2003 on *Issue Estoppel, Double Jeopardy and Prosecution Appeals against Acquittals*, followed by a report on the subject in 2004.<sup>86</sup>

2.50 In July 2006, the Council of Australian Governments (COAG) agreed that reform of the rule against double jeopardy was deserving of nationally consistent treatment and set up a working group to progress reform in this area. In April 2007, the COAG Working Group produced a model for reform of the rule against double jeopardy, which was largely similar to the proposals put forward by the MCCOC.<sup>87</sup> COAG agreed that all jurisdictions in Australia would implement the recommendations, with the exception of Victoria and the Australian Capital Territory who reserved their positions in relation to the recommendations.<sup>88</sup>

2.51 As well as recommending the introduction of exceptions to the prohibition on double jeopardy, the COAG report recommended that legislation in all jurisdictions should allow the prosecution to appeal against an acquittal, at least on a question of law against an acquittal for an indictable offence, by a jury at the direction of a trial judge or by a judge alone. The report further recommended that jurisdictions might wish to consider implementing further modifications along the lines of the Western Australian Criminal Law and Evidence Amendment Bill 2006 (now the Criminal Law and Evidence Amendment Act 2008) or the Tasmanian Criminal Code, allowing an appeal against an acquittal, and that consideration should also be given to allowing the prosecution to appeal against interlocutory judgments or orders, including rulings on the admissibility of evidence where they eliminate or substantially weaken the prosecution case.<sup>89</sup>

2.52 To date, the only state or territory to have introduced a new right of appeal against a directed acquittal is New South Wales.<sup>90</sup>

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<sup>83</sup> Michelle Edgely, "Truth or Justice? Double Jeopardy Reform for Queensland: Rights in Jeopardy," (2007) 7(1) Queensland University of Technology Law and Justice Journal 108 (available at <http://tinyurl.com/yp2o3w>).

<sup>84</sup> Rowena Johns, *Double Jeopardy*, New South Wales Parliamentary Library Research Service, Briefing Paper No 16/03 at 9 (available at <http://tinyurl.com/ywummc>).

<sup>85</sup> Kelley Burton, "Reform of the Double Jeopardy Rule on the Basis of Fresh and Compelling DNA Evidence in New South Wales and Queensland," [2004] James Cook University Law Review 5 at 8; Rowena Johns, *op cit* at 21.

<sup>86</sup> Model Criminal Code Officer's Committee, *Double Jeopardy*, (2004). Both this and the discussion paper are available at <http://tinyurl.com/ynr8xs>.

<sup>87</sup> Available at <http://tinyurl.com/2ejddq>.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> The original Bill for what was to become the Criminal Code (Double Jeopardy) Amendment Act 2007 (Qld), introduced by a private member, was based upon the New South Wales reforms and contained a right of appeal against a directed acquittal. The final Bill, introduced with government support, omitted this provision, leaving Queensland with exceptions to double jeopardy but without prosecution appeals against directed acquittals.

2.53 Section 107 of the Crimes (Appeal and Review) Act 2001, as inserted by the Crimes (Appeal and Review) (Amendment) Double Jeopardy Act 2006, gives the prosecution in New South Wales the right to appeal an acquittal at the direction of the trial judge or an acquittal entered by a judge in criminal proceedings for an indictable offence heard before a judge sitting alone. The appeal must proceed on a ground that involves a question of law alone<sup>91</sup> and, if made within 28 days, does not require leave.<sup>92</sup> On hearing the appeal the Court of Criminal Appeal may affirm or quash the acquittal appealed against.<sup>93</sup> If the acquittal is quashed the Court of Criminal Appeal may order a new trial in any manner as it sees fit,<sup>94</sup> but cannot proceed to convict or sentence the accused for the offence charged nor direct the trial court hearing the retrial to do so.<sup>95</sup>

2.54 These provisions do not apply retrospectively to those acquitted prior to their enactment,<sup>96</sup> and it has been held by the New South Wales Court of Criminal Appeal that these provisions cannot apply to an individual where proceedings against him were started prior to commencement of section 107.<sup>97</sup>

## Ireland

2.55 Irish law does not allow the prosecution a right of appeal against acquittal, although it does make provision for a question of law to be referred for the opinion of the Supreme Court following acquittal. Prior to 2006, this right was restricted to cases in which the acquittal had been directed by the trial judge, but now extends to all acquittals. In March 2007, a review group appointed by the Ministry of Justice recommended the introduction of a prosecution appeal against an erroneous decision of the trial judge, including interlocutory and evidential rulings and directed acquittals.

2.56 Section 34 of Criminal Procedure Act 1967 enables the prosecution to appeal against certain rulings in a case that results in an acquittal, but the opinion of the Supreme Court is without prejudice to the acquittal. Prior to its amendment in 2006, section 34 permitted the reference of a question of law to the Supreme Court only "where, on a question of law, a verdict in favour or an accused person is found by direction of the trial judge..."<sup>98</sup> This seems to have been interpreted narrowly, as allowing a reference only upon a question of law on which the verdict was directed by the trial judge and not, for example, upon earlier evidential rulings which had the effect of undermining the prosecution case so as to lead to a later ruling of insufficiency of evidence.<sup>99</sup> The Criminal Justice Act 2006 amended the 1967 Act to allow a reference to be made "[w]here a person tried on indictment is acquitted (whether in respect of the whole or part of the indictment)."<sup>100</sup>

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<sup>91</sup> Crimes (Appeal and Review) Act 2001 (NSW), s 107(2).

<sup>92</sup> *Ibid*, subs (3).

<sup>93</sup> *Ibid*, subs (5).

<sup>94</sup> *Ibid*, subs (6).

<sup>95</sup> *Ibid*, subs (7).

<sup>96</sup> *Ibid*, subs (8).

<sup>97</sup> *Regina v JS* [2007] NSWCCA 272, which also contains authoritative consideration, by a bench of 5 judges, of the meaning of "a question of law alone".

<sup>98</sup> Criminal Procedure Act 1967, s 34(1), prior to its substitution by s 21 of the Criminal Justice Act 2006.

<sup>99</sup> *The People (Attorney General) v Crinnion* [1976] IR 29, per Henchy J at 36 (*obiter*).

<sup>100</sup> Criminal Procedure Act 1967, s 34(1), as substituted by s 21 of the Criminal Justice Act 2006.

2.57 Section 16 of the Courts of Justice Act 1947 permits a Circuit Judge, if an application is made by any party to any matter pending before him, to state a case for the determination of the Supreme Court. This has been held not to permit a case to be stated during a trial on indictment,<sup>101</sup> but may allow an appeal against pre-trial rulings (which, under Irish procedure, are rare).<sup>102</sup>

2.58 Article 34 of the Irish Constitution creates a constitutional right of appeal from convictions in the Central Criminal Court.<sup>103</sup> In 1982, the majority of the Supreme Court in *The People (Director of Public Prosecutions) v O'Shea*,<sup>104</sup> held that the general words of Article 34 should be read literally and, so read, conferred a right of appeal upon the prosecution as well as the accused.

2.59 A peculiar aspect of the appeal based upon Article 34 of the Constitution was that it permitted prosecution appeals from the Central Criminal Court, but not from the Circuit Court or the Special Criminal Court. In view of this anomaly, an official committee recommended in 1993 that the Article 34 prosecution appeal be abolished and replaced with a statutory right of prosecution appeal from directed acquittals in the Circuit Court, the Central Criminal Court and the Special Criminal Court.<sup>105</sup> However, the legislature chose not to follow the committee's recommendation in full, and the Criminal Procedure Act 1993, rather than instituting a new statutory prosecution right of appeal, simply abolished the existing route under Article 34 of the Constitution.<sup>106</sup>

2.60 The Irish Law Reform Commission considered the issue of prosecution appeals in its 2002 *Consultation Paper on Prosecution Appeals in Cases Brought on Indictment*.<sup>107</sup> The Commission set out five possible models for a prosecution appeal, ranging from a narrow "without prejudice" model (in which an advisory opinion might be sought on questions of law, but only where these arise on terminating rulings) to a comprehensive "with prejudice" right of appeal. The Consultation Paper set out detailed arguments regarding the merits of each of these options with a view to making recommendations in a later report, but did not itself contain recommendations.<sup>108</sup>

2.61 The Criminal Justice Act 2006 – which adopted the broad "without prejudice" model – preceded the publication of the Law Reform Commission's Report on *Prosecution Appeals and Pre-trial Hearings*.<sup>109</sup> The Law Reform Commission noted that it appeared that there was no constitutional prohibition on prosecution appeals from jury acquittals.<sup>110</sup> The Commission, however, declined to recommend the introduction of a prosecution appeal

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<sup>101</sup> On the view that such a case is not pending before the judge, but before the jury: *The People (Attorney General) v McGlynn* [1967] IR 232.

<sup>102</sup> *Ibid*; The Law Reform Commission, *Consultation Paper on Prosecution Appeals in Cases Brought on Indictment*, LRC CP 19 (2002), paras 1.36-1.37.

<sup>103</sup> Article 34.4.3 of the Constitution provides: "The Supreme Court shall, with such exceptions and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court, and shall also have appellate jurisdiction from such decisions of other courts as may be prescribed by law."

<sup>104</sup> [1982] IR 384.

<sup>105</sup> See the Law Reform Commission, *op cit*, para 1.43, fn 114. Only four prosecution appeals were ever brought: *ibid*, para 2.17, fn 249.

<sup>106</sup> *Ibid*, paras 1.38-1.45.

<sup>107</sup> LRC CP 19 (2002).

<sup>108</sup> *Ibid*, ch 5.

<sup>109</sup> LRC 81 (2006).

<sup>110</sup> *Ibid*, para 1.35.

which might overturn an acquittal,<sup>111</sup> on the ground that it was appropriate to allow the changes introduced by the 2006 Act to "without prejudice" appeals to take effect and to examine how these worked in practice, and also on the basis that the issue of broader prosecution rights of appeal was to be addressed by the *Balance in the Criminal Law Review Group* established by the Minister for Justice, Equality and Law Reform in October 2006.<sup>112</sup>

2.62 That group produced its final report in March of 2007, concluding:

"We ultimately have come to the conclusion that a trial that founders on an error of law made by a trial judge cannot reasonably be described as a trial in due course of law. There must, logically, therefore be a "with prejudice" right of redress against erroneous decisions by a trial judge, whether that is an interlocutory or evidential ruling (including a ruling which weakens the prosecution case, followed by a jury acquittal) or a directed acquittal... The fact that such a trial judge error might be followed by a jury acquittal does not in our view mean that the principle of jury trial is in any way compromised by allowing a with prejudice appeal. The jury decision on the merits following reception of all admissible evidence is totally impregnable under our proposal. Only where the jury is directed as to its verdict, or wrongly prevented from considering admissible evidence, could the jury verdict be impugned."<sup>113</sup>

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<sup>111</sup> The Law Reform Commission, *Prosecution Appeals and Pre-Trial Hearings*, LRC 81 (2006), para 1.36.

<sup>112</sup> *Ibid*, Introduction, para 7.

<sup>113</sup> Balance in the Criminal Law Review Group, *Final Report* (2007) at 197; available at <http://tinyurl.com/24lftfg>.

Printed in the UK for the Stationery Office on behalf of the Queen's Printer for Scotland  
C2 07/08

Cover printed on 75% recycled paper  
Text printed on 100% recycled paper