

2023年2月27日
討論文件

立法會司法及法律事務委員會
修訂《刑事訴訟程序條例》(第221章)的建議

I. 目的

政府建議就《刑事訴訟程序條例》(第221章)(“條例”)提出立法修訂，以訂定法定上訴程序供控方就原訟法庭法官在刑事審訊中作出的無須答辯的裁定提出上訴。本文件旨在向委員簡介該項政府建議、立法建議的要點，以及在2023年1月12日至2月2日期間就立法建議進行諮詢的結果。

II. 背景

2. 上訴法庭於2022年10月28日就由律政司司長轉交的法律問題2021年第1至3號案(*Re Secretary for Justice's Reference Nos. 1-3 of 2021* [2022] 5 HKLRD 886)頒下判決(“判決”)，推翻兩名原訟法庭法官的裁定，並裁定相關案件中的法官不當地取代了陪審團的職能，在相關陪審團考慮案情之前錯誤地撤回了案件，在相關的案件造成了嚴重的司法不公。

3. 上訴法庭觀察到現時並無法定程序可讓控方就原訟法庭法官作出的無須答辯的裁定提出上訴(“法律空隙”)，因此有迫切需要改革這方面的法例條文。

4. 在現行法律制度下，倘若因為原訟法庭法官作出錯誤的無須答辯裁定而讓被告人無罪釋放，控方充其量只能根據條例第81D條將事情轉交上訴法庭，以釐清當中涉及的法

律原則。即使法官明顯有錯，被宣告無罪的被告人亦不能再次受審。在上述由上訴法庭審理的案件中，控方曾請求法庭作出指引，說明在日後的類似案件中維持現狀的可行方法。其中一項建議是在現有法律條文的框架下讓主審法官根據條例第 81 條保留法律問題(即在所舉證據下是否有案須予答辯)，待上訴法庭考慮。然而，這種做法須謹慎地並且僅在最特殊的情況下採用。由於這種做法未能針對性解決判決所揭露的法律空隙，因此必須緊急修改條例以建立上訴程序。

5. 上訴法庭在判詞中表示，“香港採取與英國類似的措施顯然有相當大的好處”(判決第 145 至 148 段)。

6. 在英國，控方可以根據《2003 年刑事司法法令》(Criminal Justice Act 2003)(“英國法令”)第 9 部(特別是第 58 條)就法官作出的無須答辯的裁定提出上訴。政府在審慎考慮判決後，建議參考英國法令第 9 部，藉所提出的立法建議訂定法定上訴程序，供控方就原訟法庭法官在刑事審訊中所作出的無須答辯的裁定提出上訴。建議旨在填補判決所述的法律空隙提供即時解決方案，避免日後可能再次出現司法不公。

—— 7. 諮詢工作(詳情載於附件 A)在 2023 年 1 月 12 日至 2 月 2 日期間進行。政府收到 11 份回應，回應者包括兩個法律專業團體、兩間法律學院、多個政府部門(包括執法部門)及另一機構。

8. 本文件第 III 部分載列立法建議的要點，這些要點或會在我們進一步考慮意見後予以修訂。本文件第 IV 部分概述諮詢工作的結果及收到的意見。

III. 立法建議的要點

9. 立法建議旨在為條例加入新條文。這些新條文參考英國法令第 9 部的條文，再加以必須的改進。目前，條例第 IV 部訂明刑事上訴的相關規定。

A. 涵蓋範圍

上訴權利、法院級別及審訊類別

10. 立法建議將賦權控方就原訟法庭法官在刑事審訊中作出的無須答辯的裁定提出上訴，惟在上訴前控方必須得到主審法官或上訴法庭的上訴許可。新上訴制度應適用於原訟法庭的刑事審訊，不論有關審訊是否設有陪審團。

11. 現時，控方可就區域法院及裁判法院級別的法院對無須答辯的裁定提出挑戰。立法建議新訂的上訴程序將不適用於區域法院或裁判法院的刑事審訊。

合併審理的裁定

12. 法官所作出無須答辯的最終裁定，很可能以同一審訊中較早前的裁定為理由或根據。控方若無法對該等基本裁定提出質疑，或會嚴重窒礙其就無須答辯的裁定作出上訴。因此，立法建議將訂明，凡針對無須答辯的裁定而提出上訴，控方可同時指定已由法官在公訴程序審訊中作出並與上訴所牽涉的罪行有關的一項或多項其他裁定，而這些其他裁定亦會被視為上訴的一部份。

B. 上訴機制

提出上訴的時間

13. 立法建議將訂明，除非控方在無須答辯的裁定作出後隨即：(i)告知法院其有意上訴；或(ii)請求延期以考慮是否上訴，如延期請求獲批，在延期後告知法院其有意上訴，否則不得就裁定提出上訴。

無罪保證

14. 立法建議將訂明，控方在通知法院其有意就某項無須答辯的裁定提出上訴之時或之前，必須作出無罪保證，即控方如未能取得上訴許可或在上訴法庭作出裁決前放棄上訴，被告人必須獲判無罪。如不遵循這個步驟，便不能上訴。

暫停裁定效力

15. 暫停無須答辯裁定的效力非常重要，因為這樣可把案件維持現狀，防止法官根據該裁定指示陪審團宣告被告人無罪。因此，立法建議將會規定，如控方通知法院其有意上訴，在上訴期間，有關裁定對上訴所針對的罪行而言將持續無效。

加快和非加快上訴

16. 立法建議將訂明，在控方通知法院其有意上訴後，法院必須決定應否加快處理上訴，使緊急案件可以迅速審理；如上訴成功，審訊可繼續進行，沒有延誤。

對上訴作出裁決

17. 立法建議將訂明，上訴法庭可以維持、推翻或更改與上訴相關的任何裁定。如上訴法庭維持被告人無須就某項被控罪行答辯的裁定，必須作出命令，裁定被告人就該項控罪罪名不成立。

18. 如上訴法庭推翻或更改被告人無須就某項罪行答辯的裁定，便須下令(i)該項罪行的法律程序可在原訟法庭恢復進行；或(ii)該項罪行可在原訟法庭重審；或(iii)裁定被告人就該項罪行罪名不成立。然而，除非上訴法庭認為作出第(i)或第(ii)項命令會令被告人得不到公平審訊，否則不可作出第(iii)項命令。

推翻裁定

19. 立法建議將訂明，除非上訴法庭信納無須答辯的裁定在法律上有錯、涉及法律或原則錯誤，或法官作出該項裁定並不合理，否則不可推翻該項裁定。

訟費

20. 立法建議將訂明，如控方未能取得上訴許可或在上訴法庭作出裁決前放棄上訴，或上訴法庭在審理上訴時決定維持有關裁定，上訴法庭可下令控方支持被告人的訟費。如上訴法庭在審理上訴時推翻或更改有關裁定，則可作出其認為公正而合理的命令，下令被告人向有關人士支付訟費。

限制報導

21. 立法建議將對報導控方就無須答辯的裁定提出上訴一事施加限制，任何人如有違反即屬犯罪。這樣可防止陪審團受到影響，並避免被告人因負面報導而蒙受不利。

C. 程序規則

22. 我們亦建議，在立法建議獲通過後以制定新附屬法例的方式推行情序規則，以便新上訴制度在實際推行時運作暢順。

IV. 諮詢工作結果

23. 整體來說，大多數回應者支持這項立法建議，即訂立法定上訴程序供控方就原訟法庭法官在刑事審訊中作出無須答辯的裁定提出上訴。他們歡迎有關建議，認為建議屬及時、合理和必要的。

24. 在推行方面，有回應者認為不適宜全盤採用英國法令的條文。此外，鑑於有關立法建議僅限於就無須答辯的裁定而提出的上訴，所需的實施方法可能比英國法令第 9 部所訂的簡單得多。部分回應者亦就實施新上訴制度的技術方面提出意見。

—— 25. 收到的主要意見摘要載於**附件 B**。

V. 未來路向

26. 政府會審慎檢視回應者的意見，考慮如何推行立法建議。視乎進一步審議的結果，政府的目標是在 2023 年第二季向立法會提交立法建議的條例草案。

VI. 徵詢意見

27. 請委員備悉有關立法建議並提出意見。

律政司

2023 年 2 月

Consultation Paper on the Criminal Procedure (Amendment) Bill

INTRODUCTION

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

BACKGROUND

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

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

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

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

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

PURPOSE

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

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

OVERVIEW OF THE PROPOSED BILL

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

I. Scope

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

A. Right of appeal

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

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

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

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

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

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

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

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

B. Level of court and types of trials

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

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

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

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

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

C. Rulings to be heard together

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

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

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

II. Appeal mechanism

A. *Timing of application*

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

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

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

B. *Acquittal guarantee*

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

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

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

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

C. Suspension of effect of ruling

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

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

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

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

D. Expedited and non-expedited appeals

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

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

E. Determination of appeals

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

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

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

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

F. Reversal of rulings

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

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

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

G. Costs

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

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

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

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

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

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

H. Restrictions on reporting

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

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

III. Procedural rules

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

SUMMARY OF THE PROPOSED NEW PROVISIONS

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

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

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

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

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

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

CONSULTATION

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

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

Policy Affairs Unit 2
Constitutional and Policy Affairs Division
Department of Justice
5/F, East Wing, Justice Place
18 Lower Albert Road
Central, Hong Kong SAR
(Subject: Criminal Procedure (Amendment) Bill Consultation)

Fax: 3918 4799

E-mail: cpo@doj.gov.hk

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

50. Names of the contributing parties and their affiliations may be referred to in other documents that DoJ may publish and disseminate by different means after the consultation. If any contributing parties do not wish their names and/or affiliations to be disclosed, please expressly state so when making your written submission. Any personal data provided will only be used by DoJ and/or other government departments/agencies for purposes which are directly related to the consultation.

Constitutional and Policy Affairs Division
Department of Justice
January 2023

#575460v5A

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



Criminal Justice Act 2003

2003 CHAPTER 44

PART 9

PROSECUTION APPEALS

Introduction

57 Introduction

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

Commencement Information

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

General right of appeal in respect of rulings

58 General right of appeal in respect of rulings

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

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

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

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

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

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

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

Textual Amendments

- F1** Words in s. 58(13) substituted (8.1.2007) by [Domestic Violence, Crime and Victims Act 2004 \(c. 28\)](#), [ss. 30\(1\)](#), 60; [S.I. 2006/3423](#), [art. 2](#) (subject to [art. 3](#))
- F2** S. 58(14) inserted (8.1.2007) by [Domestic Violence, Crime and Victims Act 2004 \(c. 28\)](#), [ss. 30\(2\)](#), 60; [S.I. 2006/3423](#), [art. 2](#) (subject to [art. 3](#))

Commencement Information

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

59 Expedited and non-expedited appeals

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

Commencement Information

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

60 Continuation of proceedings for offences not affected by ruling

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

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

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

Commencement Information

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

61 Determination of appeal by Court of Appeal

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

Textual Amendments

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

Commencement Information

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

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

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PROSPECTIVE

Right of appeal in respect of evidentiary rulings

62 Right of appeal in respect of evidentiary rulings

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

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

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

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

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

63 Condition that evidentiary ruling significantly weakens prosecution case

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

64 Expedited and non-expedited appeals

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

65 Continuation of proceedings for offences not affected by ruling

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

66 Determination of appeal by Court of Appeal

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

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

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

Miscellaneous and supplemental

67 Reversal of rulings

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

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

Commencement Information

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

68 Appeals to the House of Lords

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

Commencement Information

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

69 Costs

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

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

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

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

Commencement Information

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

70 Effect on time limits in relation to preliminary stages

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

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

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

Commencement Information

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

71 Restrictions on reporting

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

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

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

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

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

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

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

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

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

Textual Amendments

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

Commencement Information

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

72 Offences in connection with reporting

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

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

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

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

Commencement Information

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

73 Rules of court

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

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

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

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

74 Interpretation of Part 9

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

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

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

Textual Amendments

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

Commencement Information

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

Status:

This version of this part contains provisions that are prospective.

Changes to legislation:

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

[View outstanding changes](#)

Changes and effects yet to be applied to :

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

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

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

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

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

就修訂《刑事訴訟程序條例》的建議進行諮詢期間收到的主要意見摘要

事項	回應者的意見
A. <u>新條文的表述方式</u>	
1. 採納英國條文的程度	<ul style="list-style-type: none">• 一名回應者認為政府採用英國法令的條文並加以變通的建議大致審慎和合理。• 鑑於是次改革的目的只是就無須答辯的裁定提供上訴程序，一名回應者認為實施方法應比英國法令第 9 部所訂的簡單得多。草擬法例條文時應針對控方就無須答辯的裁定而提出的上訴。• 一名回應者留意到，英國與香港的刑事訴訟在多方面，例如刑事法律援助制度、刑事法庭法官席的數目、取得審訊謄本所需時間、陪審團人選的多少等大相逕庭，當中的差異跟考量如何起草擬議修訂密切相關。另一方面，現行適用於區域法院及裁判法院的類似法例條文應可為制訂修訂提供有用參考。

事項	回應者的意見
B. 涵蓋範圍	
2. 上訴權利	<ul style="list-style-type: none"> • 一名回應者認為，把控方提出上訴的涵蓋範圍僅限於填補法律空隙，屬合理做法。另一方面，另一回應者詢問建議的新上訴機制是否應涵蓋除無須答辯裁定以外的其他具有終止審判效力的裁定。 • 一名回應者要求澄清是次改革是否涵蓋主審法官在沒有作出無須答辯的裁定下，根據證據不足的錯誤評估而指示陪審團裁定被告人無罪的案件。 • 一名回應者認為，循新上訴機制提出上訴必須先取得主審法官或上訴法庭的許可。 • 一名回應者關注循新的上訴機制提出的上訴將如何影響同一公訴書中的其他罪行。 • 一名回應者關注申請上訴許可的過程無可避免會延長有關法律程序，因而延長被告人在懲教設施所羈押的時間，但這項建議並無提及被告人在等候

事項	回應者的意見
	<p>上訴期間保釋的權利。</p>
<p>3. 法院級別及審訊類別</p>	<ul style="list-style-type: none"> • 一名回應者認為有關受新上訴機制規管的法院級別及審訊類別的建議合理，原因是有關建議將有效涵蓋原訟法庭的所有刑事審訊。 • 一名回應者同意無須把新上訴程序制度應用於區域法院或裁判法院的刑事審訊。
<p>4. 合併審理的裁定</p>	<ul style="list-style-type: none"> • 一名回應者認為，導致作出無須答辯裁定的各項裁定應與針對該無須答辯裁定所提出的上訴一併處理。若該等裁定不在上訴中一併處理，就可能產生程序或法律上的荒謬。要求控方指定擬在上訴中一併處理的其他裁定的時間規定，實屬合理。 • 一名回應者認為似乎沒有必要明文規定將相關裁定納入為同一上訴的一部份（參考英國法令第 58(7)條），原因是這種處理在上訴而言屬基本概念，不言而喻。

事項	回應者的意見
	<ul style="list-style-type: none"> 一名回應者對於把其他裁定納入為上訴一部份的建議有所保留，原因是這樣會讓控方可藉此重新審視所有證據，並就所有已作出並有利於被告人的裁定重新提出訴訟。該名回應者問到當控方就無須答辯的裁定上訴成功，應否解散曾經聽取有關證據及／或陳詞的陪審團。有關建議會使設有陪審團的審訊難以進行。
C. <u>涵蓋範圍</u>	
5. 提出上訴的時間	<ul style="list-style-type: none"> 一名回應者提議施加時限，任何上訴須於該時限內提出。 一名回應者認為沒有比按建議的設計更佳的做法。
6. 無罪保證	<ul style="list-style-type: none"> 一名回應者認為，如沒有暫停無須答辯的裁定的效力的規則，控方便無須作出任何保證。該名回應者認為，如控方未能取得上訴許可或放棄上訴，則無須答辯的裁定仍然有效是基本不過的。該名回應者詢問為何在這兩種情況下上訴法庭須下令判被告人無罪。該名回應者認為只須簡單訂明在這兩種情況下無須答辯的裁定仍然有效，便已足夠。

事項	回應者的意見
	<ul style="list-style-type: none"> • 一名回應者認為裁定無罪保證的機制合理，該機制是整個系統設計必需的一環，並應與暫停裁定效力的機制互相呼應。該機制為未能取得上訴許可或放棄上訴這兩種情況提供確切結果。
7. 暫停裁定效力	<ul style="list-style-type: none"> • 考慮到這類上訴須在正在進行的審訊中提出，一名回應者認為暫停審訊是很自然的，這對於維持審判現狀至關重要。 • 一名回應者質疑，暫停裁定效力是否為了解決在上訴待決期間的保釋和羈留問題。如是，我們應訂定直接處理該問題的條文。 • 一名回應者建議加入控方表示提出上訴的時間表及上訴期間的保釋安排，因為在暫停期間，審訊並未終止，而陪審團並未解散。長時間暫停將使陪審團難以恢復審訊。可採用類似區域法院的保釋程序，而批准被告人保釋的標準亦應予討論。
8. 加快和非加快	<ul style="list-style-type: none"> • 一名回應者認為，英國法令第 59 條下可選用的程序為法院提供非常清晰

事項	回應者的意見
上訴	<p>的選擇及程序的明確性。</p> <ul style="list-style-type: none"> • 一名回應者認為是理所當然，並從案件管理的角度而言，所有針對無須答辯的裁定提出的上訴都必須加快處理。 • 一名回應者表示，應有足夠彈性，讓法院及訴訟各方按特定案件的情況決定秉行公義，而不會對被告人構成不公的最佳做法。
9. 對上訴作出裁決	<ul style="list-style-type: none"> • 兩名回應者認為參考英國法令第 61 條有關對上訴作出裁決和英國法令第 67 條有關推翻裁定的理由的建議，均屬合理。 • 一名回應者認為，根據英國法令第 67(c)條“法官作出該項裁定並不合理”為理由判決上訴得直這個概念含糊不清，不應引用。英國法令第 67(a)至(b)條所載的另外兩項理由已經足夠。 • 一名回應者詢問如何可確保英國法令第 67(c)條的“合理性”理由貫徹一致地適用，並成為客觀的法律標準。

事項	回應者的意見
10. 訟費	<ul style="list-style-type: none">• 一名回應者認為應作出必需的立法修訂，訂明如控方上訴失敗或放棄上訴，控方須向辯方支付訟費；但即使控方上訴得直，有關被告人亦無須支付訟費。• 一名回應者反對有關上訴法庭在推翻或更改上訴針對的裁定時可下令被告人支付訟費的建議，認為這樣對被告人不公平，並會阻嚇被告人提出無須答辯的陳詞。被告人須為法官作出對其有利的錯誤而承擔訟費後果，並不合理。此外，不少高等法院的刑事案件被告人均獲法律援助。除帳面記錄外，控方未必可追回任何訟費。有關建議未必可達到預期的制裁效果。如對須向控方繳付訟費有所規定，為公平起見，亦應對須向被告人繳付訟費訂定具體條文。
11. 限制報導	<ul style="list-style-type: none">• 考慮到這類上訴的性質及時間，一名回應者認為有必要限制報導以防止陪審團受到影響，並避免被告人因負面報導而蒙受不利，又認為採用類似英國法令的條文的建議合理。

事項	回應者的意見
	<ul style="list-style-type: none">• 另一方面，一名回應者不認為有必要對報導施加任何限制。控方援引的所有證據均已在公開聆訊中呈堂，並在較早前的傳媒報導有所提述，如在有關上訴法律程序的新聞報導中再度提述，與報導在針對定罪的上訴中提述證據無甚分別。

律政司

2023 年 2 月