

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

**Criminal Procedure Ordinance (Cap. 221)
Proposed Draft Criminal Procedure
(Appeal against Ruling of No Case to Answer) Rules**

I. PURPOSE

This paper briefs Members on the Government’s proposal to introduce a set of Criminal Procedure (Appeal against Ruling of No Case to Answer) Rules (“**Proposed Draft Rules**”) to be made by the Criminal Procedure Rules Committee (“**Rules Committee**”) under section 9 of the Criminal Procedure Ordinance (Cap. 221) (“**CPO**”). The Proposed Draft Rules seek to implement the new “no case to answer” appeal mechanism under the Criminal Procedure (Amendment) Ordinance 2023 (“**Amendment Ordinance**”).

II. BACKGROUND

2. Following the passage of the Criminal Procedure (Amendment) Bill 2023 by the Legislative Council on 12 July 2023, the Amendment Ordinance was gazetted on 14 July 2023. Sections 4, 7 and 9 of, and Part 2 of the Schedule to the Amendment Ordinance (“**Relevant Provisions**”) provide for a “no case to answer” appeal mechanism, which allows the prosecution to appeal against rulings of no case to answer made by the Court of First Instance in criminal trials with a jury. The “no case to answer” appeal mechanism addresses the lacuna in the criminal appeal system due to the prosecution’s inability to appeal against erroneous rulings of no case to answer made by judges of the Court of First Instance in jury trials.

3. To facilitate the smooth operation of the “no case to answer” appeal mechanism in practice, it is necessary to establish a new set of rules setting out the relevant procedural matters for appeals under the appeal mechanism before the Relevant Provisions come into effect.

4. Pursuant to section 9 of the CPO, rules and orders regulating the practice and procedure under the CPO shall be made by the Rules Committee, and shall not have effect until approved by the Legislative Council and published in the Gazette.

5. Section 1(3) of the Amendment Ordinance provides that the Relevant Provisions come into operation on a day to be appointed by the Secretary for Justice (the “**Secretary**”) by notice published in the Gazette.

III. PROPOSAL

6. In formulating the “no case to answer” appeal mechanism under the Amendment Ordinance, reference was drawn to other procedural rules made under section 9 of the CPO, such as the Criminal Procedure (Reference of Questions of Law) Rules (Cap. 221E)¹ and the Criminal Procedure (Appeal against Discharge) Rules (Cap. 221F)², as well as the law and practice in United Kingdom, such as Part 9 of the Criminal Justice Act 2003, Criminal Procedure Rules 2020 and Criminal Practice Directions 2023.

7. We propose to model the Proposed Draft Rules on the existing provisions under Cap. 221E and Cap. 221F. The legislative proposal for the Proposed Draft Rules provide for:-

- (a) the definitions of appeal and respondent, and the words and expressions used in the Proposed Draft Rules and defined in Division 3 of Part IV of the CPO have the same meaning as in that Division;

¹ Under section 81D of the CPO, where a person tried on indictment has been acquitted (whether in respect of the whole or part of the indictment), the Secretary may, if he desires the opinion of the Court of Appeal on a question of law which has arisen in the case, refer that question to the Court of Appeal which shall consider the point and give its opinion on it. Cap. 221E, made by the Rules Committee under section 9 of the CPO, provide for the procedural matters including the use of language in, and the making, hearing, withdrawal and amendment of a reference under section 81D of the CPO.

² Under section 81E of the CPO, the Secretary may appeal to the Court of Appeal against any person’s discharge under section 16 or 79G or under section 22 of the Complex Commercial Crimes Ordinance (Cap. 394). The use of language in and the procedures for the making, hearing, withdrawal, amendment of an appeal under section 81E of the CPO, and other related matters are stipulated in Cap. 221F made by the Rules Committee under section 9 of the CPO.

- (b) the use of language in an appeal under the “no case to answer” appeal mechanism;
- (c) the Secretary to serve a notice to appeal in the specified form to the respondent of the appeal and the Registrar of the High Court (“**Registrar**”) and provides for the content of the notice;
- (d) the requirements that:-
 - i. a notice of appeal must invite the respondent to inform the Registrar, within the period specified in the notice, whether the respondent intends to present any argument to the Court of Appeal; and
 - ii. the Court of Appeal must not hear any argument by or on behalf of the Secretary before the specified period expires unless the respondent agrees or has indicated that the respondent intends not to present any argument to the Court;
- (e) the procedure for the withdrawal or amendment of the notice of appeal; and
- (f) the methods to serve a document on the respondent.

8. The proposed provisions of the Proposed Draft Rules for the items mentioned in paragraph 7 above are at the **Annex** for reference.

IV. CONSULTATION

9. The Government has consulted the relevant stakeholders including The Law Society of Hong Kong, the Hong Kong Bar Association and the Legal Aid Department. They generally welcomed the implementation of the Proposed Draft Rules and their comments have suitably been incorporated. The Government will submit the bilingual Proposed Draft Rules to the Rules Committee for approval.

V. WAY FORWARD

10. Members are invited to note the proposal in this paper. Comments or requests for information may be directed at Ms Kristal Chan, Senior Government Counsel (Ag) (tel: 3893 3415), email: cpo@doj.gov.hk).

Subject to Rules Committee's approval of the bilingual Proposed Draft Rules, it is our plan to introduce the Proposed Draft Rules to the Legislative Council for approval within this year and to have both the Relevant Provisions and the Proposed Draft Rules come into operation on the same day as soon as practicable.

Department of Justice
July 2024

**Criminal Procedure (Appeal against
Ruling of No Case to Answer) Rules**

Proposed Draft

Proposed Draft Criminal Procedure (Appeal against Ruling of No Case to Answer) Rules

1. [Omitted]

2. Interpretation

(1) In these Rules—

appeal (上訴) means an appeal made by the Secretary under section 81AAC of the Ordinance;

respondent (答辯人), in relation to an appeal against a specified ruling in relation to a subject offence, means the defendant charged with the subject offence.

(2) The words and expressions used in these Rules and defined in Division 3 of Part IV of the Ordinance have the same meaning as in that Division.

(3) Without limiting subrule (2), section 81AA(2) of the Ordinance applies in these Rules for the purposes of the definition of *respondent* in subrule (1).

3. Use of language in appeal

(1) The Court of Appeal may use either or both of the official languages in an appeal or a part of an appeal before it as it considers appropriate for the just and expeditious disposal of the appeal.

(2) The decision of the Court of Appeal under subrule (1) is final.

(3) A party to or a witness in an appeal or a part of an appeal before the Court of Appeal —

(a) may use either or both of the official languages; and

(b) may address the Court of Appeal or testify in any language.

(4) A legal representative in an appeal or a part of an appeal before the Court of Appeal may use either or both of the official languages.

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- (5) Documents filed in an appeal or served on a party to an appeal may be in either official language.
- (6) If a party (other than the Secretary) is served with a document relating to an appeal in an official language with which the party is not familiar, the party may, within 3 days of being served, request in writing the Secretary to provide a translation of the document into the other official language.
- (7) If a request is made under subrule (6)—
 - (a) the Secretary must provide the translation as soon as practicable; and
 - (b) the time for compliance with any rule or order requiring the taking of the next step in an appeal within a particular period starts to run only after—
 - (i) the time of receipt of the translation; or
 - (ii) another time as specified by the Court of Appeal.
- (8) The official record of an appeal must be kept in either or both of the official languages as the Court of Appeal directs.
- (9) The transcript of proceedings for appeal purposes must be prepared in the official language that the Court of Appeal directs.

4. Notice of appeal

- (1) For the purpose of making an appeal against a specified ruling, the Secretary must, within 21 days of the making of the specified ruling, serve a notice of appeal on—
 - (a) the respondent of the appeal; and
 - (b) the Registrar.
- (2) The requirement under subrule (1)(a) is taken to be complied with if—
 - (a) the respondent—

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- (i) cannot be found; or
 - (ii) is outside Hong Kong; and
 - (b) the Secretary has taken all reasonable steps to serve the notice of appeal on the respondent.
- (3) The notice of appeal must state—
 - (a) the specified ruling and any other ruling against which the Secretary intends to appeal;
 - (b) whether leave to appeal has been granted by the court;
 - (c) the ground of the appeal;
 - (d) the error of law or principle allegedly made by the court;
 - (e) the facts of the case as are necessary for the consideration of the ground and the error;
 - (f) the summary of arguments intended to be put to the Court of Appeal;
 - (g) the authorities intended to be cited;
 - (h) that an acquittal guarantee has been given by the Secretary under section 81AAC(4)(c) of the Ordinance; and
 - (i) whether the court decides to expedite the appeal and whether any action is taken by the court under section 81AAF(2) or (3) of the Ordinance.
- (4) The notice of appeal must be in the form specified under section 9(4) of the Ordinance.
- (5) If leave to appeal against the specified ruling has not been granted by the court, the notice of appeal also serves as an application to the Court of Appeal for leave to appeal.

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5. Respondent to be given opportunity to appear

- (1) Unless rule 4(2) applies, a notice of appeal must invite the respondent to inform the Registrar within the period specified in the notice (*specified period*)—
 - (a) whether the respondent intends to present any argument to the Court of Appeal; and
 - (b) if the respondent so intends, whether the respondent also intends to—
 - (i) present the argument by counsel on the respondent's behalf; or
 - (ii) appear in person.
- (2) The specified period must not be less than 28 days from the date of service of the notice.
- (3) The Court of Appeal must not hear any argument by or on behalf of the Secretary before the specified period expires unless the respondent agrees or has indicated that the respondent does not intend to present any argument to the Court of Appeal.

6. Withdrawal or amendment of notice of appeal

- (1) The Secretary may withdraw or amend a notice of appeal—
 - (a) at any time before the Court of Appeal begins the hearing of the appeal; or
 - (b) with the leave of the Court of Appeal, at any time after the Court of Appeal begins the hearing of the appeal and before the Court of Appeal makes a determination on the appeal.
- (2) A notice to withdraw or amend the notice of appeal must, if the Court of Appeal or Registrar so directs, be served on—
 - (a) the respondent; and

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- (b) an amicus curiae appointed by the Court of Appeal (if any).
- (3) To avoid doubt, if the Secretary withdraws a notice of appeal, the Secretary is taken as abandoning the appeal to which the notice relates for the purposes of sections 81AAD(2)(b) and 81AAE(2) of the Ordinance.

7. Methods of service

For the purposes of rules 4(1) and 6(2), service of a document on a respondent may be effected—

- (a) if the respondent is a body corporate, by—
 - (i) delivering the document to the secretary of the respondent at the respondent's registered or principal office;
 - (ii) sending the document by registered post addressed to the secretary of the respondent at that office; or
 - (iii) delivering the document to the solicitor of the respondent; or
- (b) otherwise, by—
 - (i) delivering the document to the respondent;
 - (ii) leaving the document for the respondent with a person at the respondent's last known or usual place of residence or business;
 - (iii) sending the document by registered post addressed to the respondent at the respondent's last known or usual place of residence or business; or
 - (iv) delivering the document to the solicitor of the respondent.