Scottish Law Commission

promoting law reform

(DISCUSSION PAPER No 137)

Discussion Paper on Crown Appeals

discussion paper

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March 2008

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965[1] for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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Professor George L Gretton
Professor Gerard Maher, QC
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The Commission would be grateful if comments on this Discussion Paper were submitted by 13 May 2008.

Please ensure that, prior to submitting your comments, you read notes 1-3 on the facing page. Comments may be made on all or any of the matters raised in the paper. All non-electronic correspondence should be addressed to:

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[1] Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820).

Contents

Contents (cont'd)

Part 1 Introduction

Our remit

1.1 On 20 November 2007 we received the following reference from the Minister 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 discussion paper 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.

1.2 We have undertaken to work on this as a short-term priority project and to submit a report to the Scottish Government by the summer of 2008. For this reason the consultation period will be shortened to six weeks from the date of publication of this discussion paper.

1.3 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 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[1] 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,[2] 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.

1.4 In this discussion paper we invite comments on a number of issues that arise in connection with the reference. The most important of these 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. If such a right is granted, a number of practical issues arise.

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[1] Criminal Procedure (Scotland) Act 1995, s 106.

[2] 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 paras 3.16-3.17 below.

These include the test that should be applied to any Crown appeal, and the consequences of a successful appeal. Consideration is also given to the categories of ruling to which a right of appeal might apply, and as to whether a requirement of leave should be imposed. If an appeal is successful the question of authority to bring a new prosecution arises. We think that the question of fairness to the accused is important at this stage, and consideration is given to the circumstances when a new prosecution might be contrary to the interests of justice.

Reference group and preliminary consultation

1.5 In our initial consideration of this project we have had the benefit of discussions with a reference group consisting of members of the judiciary;[3] 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,[4] the Law Society of Scotland's Criminal Law Committee,[5] and the Crown Office.[6] We would like to express our gratitude to all of the individuals concerned for their assistance with this project.

Structure of the discussion paper

1.6 In Part 2 of the discussion paper we consider 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 provision, 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. We outline the history of this provision and the existing law governing such submissions. We ask whether the statutory procedure is satisfactory, and also whether the scope of a submission of no case to answer should be widened in certain respects. The second form of judicial ruling that we consider is based on a 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 outline the existing law and practice, and ask whether the procedure is satisfactory in its present common law form or whether it should be replaced by a statutory procedure. We ask whether, if a statutory procedure were introduced, the ruling should take the form of a direction to the jury to return a particular verdict or whether the verdict should be that of the judge, given that it results from his decision. We also consider whether, if a statutory procedure were enacted, it would be desirable to set out the basis on which such a ruling can be made. The third form of judicial ruling that is considered is a ruling on an objection to evidence made in the course of a trial; in some cases such rulings can in practice result in an acquittal because the evidence that is excluded is essential to the Crown case, or at least its exclusion seriously damages the Crown case. In each case we consider procedure at the trial.

1.7 In Part 3 of the discussion paper we consider the possibility of a Crown right of appeal against judicial rulings falling into the foregoing categories. The most important question, which is central to the discussion paper, is the general issue of whether the Crown

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[3] Lords Eassie and Bracadale and Sheriff Kenneth Maciver.
[4] Ian Duguid QC, Niall McCluskey and Andrew Brown.
[5] William McVicar, Gerry Sinclair and Alan McCreadie, Deputy Director of Law Reform at the Society.
[6] Nigel Orr, Head of the Appeals Unit.

should be given a right of appeal against judicial rulings which can bring a solemn case to an end without a verdict of a jury. This is discussed at paragraph 3.18 onwards. The arguments for and against such a right are set out at paragraphs 3.19-3.22, and we are anxious to obtain a reaction to those arguments. Obviously, if there are arguments that we have not stated, we would be interested to hear them.

1.8 We also consider the appropriate test for a Crown appeal. With defence appeals this is that a miscarriage of justice has occurred. With appeals of the kind under consideration, however, the issues are confined to questions of law. We ask whether the test for Crown appeals should be a twofold test: that there has been an error of law and that the ruling is likely to have a significant effect on the outcome of the case.

1.9 Thereafter, we consider the result of a successful Crown appeal. We express the view that the normal result would be a re-trial, the Crown being given authority to raise a new prosecution. In some cases, however, we think that it might be preferable to allow for an appeal in the course of a continuing trial, preserving the diet, and we discuss this possibility.

1.10 Thereafter, at paragraphs 3.33 onwards, we consider a range of issues that arise if a Crown right of appeal is granted. We ask first whether any such right should extend to all of the rulings discussed in Part 2 or should be restricted to certain categories. In this respect, four categories of ruling seem to be involved. The first consists of rulings on submissions of no case to answer under section 97 of the Criminal Procedure (Scotland) Act 1995; these result in the acquittal of the accused on one or more charges. The second category consists of rulings on a common law submission or statutory equivalent which result in the acquittal of the accused on one or more charges. It is thought that there are no particular problems in according the Crown a right of appeal against either of those categories. The third category consists of rulings on a common law submission or statutory equivalent which amend or reduce the charges faced by the accused but do not acquit him of those charges. In this case, we are of opinion that a right of appeal should be subject to a requirement of leave to appeal. This reflects the fact that such rulings vary greatly in their importance for the Crown case, and we think that it would be undesirable that there should be a right of appeal against a ruling that does not significantly weaken the Crown case, especially as an appeal is likely to involve the total or partial abandonment of the trial diet. The fourth category consists of rulings on evidence. In this case, we consider that if a right of appeal is to be granted, any appeal must be made before the conclusion of the Crown evidence, to preserve the principle that a jury verdict of acquittal cannot be challenged. We think that any such appeal should be subject to a requirement of leave; our reasons are essentially the same as those for the third category of ruling. Subject to that, we consider that a right of appeal is practicable as a matter of procedure in all four cases.

1.11 If a right of appeal is given to the Crown, the Appeal Court[7] should have power to grant authority to bring a new prosecution; that is the point of an appeal rather than a procedure such as the existing right of the Lord Advocate to seek a reference on a point of law.[8] In exceptional cases, it might be possible to allow for an appeal procedure in the course of a trial, in such a way that the trial diet is not discharged, but we think that in the majority of cases that will cause serious practical difficulties; consequently, in the majority of

[7] The High Court of Justiciary sitting as an appeal court in terms of s 103 of the Criminal Procedure (Scotland) Act 1995; for brevity, we refer simply to the Appeal Court throughout.
[8] Criminal Procedure (Scotland) Act 1995, s 123.

cases there is no alternative to a new prosecution if the Appeal Court consider that appropriate.[9] In Part 4 we consider the circumstances in which it would not be appropriate to permit a new prosecution to be brought. We suggest that the most appropriate criterion is that authority for a new prosecution should be refused if that is contrary to the interests of justice, and we discuss various circumstances in which that might be the case. Examples include delay, loss of evidence and practical problems that may arise from procedure at the original trial, for example the difficulties that might arise if the trial continued in respect of other charges or other accused. Finally, in the same part, we consider a number of incidental issues, including time limits and bail and custody.

1.12 A summary of the questions for consultees is found in Part 5.

1.13 In Part 1 of the Appendix 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.[10] 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 continental European countries, where rights of appeal by both prosecution and defence are widely recognised.[11]

1.14 In Part 2 of the Appendix we outline the law of a number of other jurisdictions on the matters considered in this discussion paper; 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. In New South Wales the law was altered by a statute of 2006.

1.15 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 discussion paper relate to Scottish criminal procedure, which has its own history and its own distinctive forms.

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[9] See paras 3.26 to 3.31 below.
[10] The United Kingdom has indicated an intention to ratify this Protocol but has not yet done so.
[11] See, generally, Mireille Delmas-Marty and J R Spencer (eds), *European Criminal Procedures* (2002).

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.[12] 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.

[12] 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.

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

2.1 In this part of the discussion paper we 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 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.[1] Statutory exceptions exist,[2] 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. 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. The position at common law was summarised by Lord Justice General Cooper in *Kent v HM Advocate,*[3] a case where

[1] Walker and Walker, *The Law of Evidence in Scotland* (2nd edn, 2000), Ch 5, especially paras 5.1.1-5.4.8.
[2] *Ibid*, para 5.5.1.
[3] 1950 JC 38.

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 sheriff-substitute refused to grant such a ruling on one charge, and the case was appealed. The Lord Justice General said:[4]

> "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 The accused was thus placed in a dilemma: whether to lead evidence or to make a submission. 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,[5] 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 appointed to examine criminal procedure during the mid-1970s. It is discussed in their Second Report.[6] The Thomson Committee pointed out[7] that a similar procedure to that proposed was in operation in England and in many other countries. They stated[8] that the witnesses who gave evidence on the question were approximately equally divided, with strong views expressed on either side. The arguments in favour of the proposal were summarised as follows:[9]

> "The arguments in favour are that if, at the close of the case for the Crown, there is no evidence on which a reasonable juror could bring in a verdict of guilty, under proper direction, then the Crown has failed to make out its case. It is maintained that at that stage the defence should be entitled to submit that there is no case to answer. The Crown, having led all the evidence it intends to put before the jury (or the judge in a summary case) should not rely on making up its failure by evidence which may or may not emerge by examination of witnesses led for the defence. It is also suggested that the present procedure places an unfair burden on the accused's adviser. If he is convinced at the end of the prosecution case that there is no case to answer he has to decide then whether or not to lead evidence. If he decides to lead evidence he takes the risk that a defence witness may supply some small piece of

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[4] 1950 JC 38 at 41.
[5] 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.
[6] Committee chaired by the Hon Lord Thomson, *Criminal Procedure in Scotland (Second Report)*, Cmnd 6218 (1975) Ch 48.
[7] *Ibid*, para 48.02.
[8] *Ibid*, para 48.03.
[9] *Ibid*, para 40.03.

evidence which may make the case strong enough to go to the jury when otherwise it would not. On the other hand, if he decides not to lead evidence and he is wrong in his assessment of the situation and the judge lets the case go to the jury, he has lost the opportunity of leading exculpatory evidence. It is alleged that this is a cruel dilemma and an invidious and unfair position in which to place the defence. It is also claimed in favour of the introduction of the proposed procedure that it would save a great deal of the court's time. At present, in some cases the defence leads evidence unnecessarily in cases where clearly the Crown has failed to prove its case or, more likely, where there is some doubt about the position, and the defence is not confident what view the judge will take."

The arguments against the proposal were summarised as follows:[10]

> "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."

2.5 The Thomson Committee's conclusions were expressed as follows:[11]

> "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 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. 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.*"

2.6 The original suggestion of a no case to answer submission appears to have been derived from the forms of criminal procedure in force in England and other countries where the legal system is based on English law. Nevertheless, there is no sign that the Thomson Committee had regard to the details of English practice, and indeed 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:[12]

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[10] *Ibid*, para 48.04.
[11] *Ibid*, para 40.05.
[12] No draft Bill was attached to their recommendations.

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 a reference to a reasonable juror might be seen as going to the quality or weight of the evidence rather than its legal sufficiency.[13]

2.7 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.
>
> (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.

2.8 The wording of section 97 makes it clear that a statutory submission of no case to answer is concerned with the technical sufficiency of the evidence rather than its quality; subsection (2) refers to the judge's being satisfied "that the evidence led by the prosecution is insufficient in law to justify the accused being convicted". Questions of the quality of weight of evidence, notably issues of credibility and reliability, are excluded from the procedure.[14] This interpretation is supported by the cases in the Appeal Court that deal with

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[13] See para 2.8 below.

[14] The difference between sufficiency and quality can 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.

no case to answer submissions.[15] In the first case in which the new provisions were considered, *Williamson v Wither*[16] the court stated:[17]

> "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.

2.9 Later cases in the Appeal Court have adopted the same approach. Where circumstantial evidence is relied on to provide corroboration, the proper approach is to consider whether the facts and circumstances that are relied on by the Crown are capable of supporting the Crown case. If they are, it is for the jury to decide whether they do in fact support the Crown case, and a submission of no case to answer would have to be repelled. This point is made in *Fox v HM Advocate*[18] in the opinion of Lord Justice General Rodger:[19]

> "… it is of the very nature of circumstantial evidence that it may be open to more than one interpretation and that it is precisely the role of the jury to decide which interpretation to adopt."

The same approach was taken in the case of *Murdo Smith v HM Advocate*,[20] where the question was whether there was sufficient circumstantial evidence to support an inference that the accused was concerned in the supplying of controlled drugs. The circumstantial evidence consisted of the recovery of a large quantity of banknotes from the accused's house where he lived alone. The money appeared to have been secreted with some care. Many of the banknotes were heavily contaminated with heroin, to a degree that was much greater than that typically found in currency circulating in the United Kingdom. The court held[21] that, if circumstantial evidence might give rise to a number of inferences but at least one inference was indicative of guilt of the crime charged, there is a case to answer which should go to the jury. On the facts of the case, the court held[22] that there was ample circumstantial evidence from which the jury would be entitled to infer that the money secreted had come from an illegitimate source, and that the appellant was aware of that fact. The court did not consider it legitimate to draw the inference, however, that the appellant knew that the banknotes were the product of, or used for the purposes of, supplying controlled drugs to others. This approach is based on the proposition that, in considering a submission of no case to answer, the judge should only have regard to questions of the technical sufficiency of evidence, and should not stray into questions of the quality or weight

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[15] 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.
[16] 1981 SCCR 214.
[17] *Ibid*, at 217.
[18] 1998 JC 94; 1998 SCCR 115.
[19] 1998 JC 94 at 101A; 1998 SCCR 115 at 126E.
[20] [2008] HCJAC 7, 7 February 2008, unreported.
[21] *Ibid*, para [16].
[22] *Ibid*, at para [21] onwards.

of evidence or its credibility or reliability or its overall significance for the case. Those questions are for the jury, and the jury's function must be respected.

2.10 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:*[23]

> "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,[24] 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".[25] The same rule applies if the accused wishes to make a submission that parts of the offence libelled should be deleted.[26]

2.11 If a submission of no case to answer is upheld, the result is an acquittal of the accused by the judge. This matter was considered by the Thomson Committee in their Second Report.[27] 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;[28] 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[29] 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. This recommendation was taken into account in section 97(2) of the Criminal Procedure (Scotland) Act 1995, where it is provided that the judge shall acquit the accused of the offence charged. We are of opinion that this approach is sound;

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[23] (6th edn, R 17: Aug 2003) para 18-75.
[24] For example, murder to culpable homicide, or rape to attempted rape, or theft to reset.
[25] Discussed below at paras 2.19-2.25.
[26] This is less common because, generally speaking, corroboration is not required in respect of every element an offence but only in respect of the commission of the offence taken as a whole. Similarly, aggravations do not require to be corroborated.
[27] *Criminal Procedure in Scotland (Second Report)*, Cmnd 6218 (1975) ch 49, "Formal Verdicts of the Jury".
[28] Usually following a submission at the conclusion of all evidence, in the form of a common law submission.
[29] *Criminal Procedure in Scotland (Second Report)*, Cmnd 6218 (1975) para 49.03.

the decision is that of the judge, and the judge should follow his decision through to acquittal. This point is of some relevance to the common law submission, and we will return to it when we discuss that procedure.[30]

2.12 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. In two newspaper articles in *The Scotsman*,[31] Lord McCluskey has argued that the procedure is inappropriate; any submission that the evidence against the accused is 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 this background, we think it appropriate to reconsider the provisions of section 97, with a view to discovering whether in practice it operates in a satisfactory fashion. We accordingly ask the following questions:

1. (a) 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?

(b) 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?

2.13 We have been asked to give general consideration to judicial rulings that can bring a solemn case to an end without a verdict of a jury. Consequently we think it appropriate to consider not only whether the scope of the section 97 procedure should be restricted but also whether it might be widened. The section is subject to two important limitations: first, the judge is not permitted to consider the quality of the evidence; secondly, the procedure may not be used in any case where the accused wishes to submit that parts of the offence libelled should be deleted or wishes to submit that an alternative should be substituted for the offence libelled. In the latter category of case the issue involves the legal sufficiency of evidence rather than the quality of the evidence. These two restrictions raise separate issues, and we consider them separately.

2.14 In relation to the first, the quality of the evidence, it is clear that any power of the judge to acquit the accused must respect two fundamental principles: first, the assessment of the quality of the evidence, including all questions of credibility and reliability and the proper inferences to be drawn from circumstantial evidence, is a matter for the jury alone; second, the functions of the judge in a solemn criminal trial are restricted, generally speaking, to questions of law. Consequently any power of the judge to sustain a submission of no case to answer must be based on a legal test. Against this background, it seems to us that the only test that could be applied is that, on the evidence led by the Crown, no reasonable jury, properly directed, could return a verdict of guilty.[32] If that test is used, the question is whether no reasonable jury *could* return a guilty verdict on the evidence before

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[30] At para 2.19 below.
[31] On 24 September and 3 December 2007
[32] This is essentially the test laid down in s 106(3)(b) of the Criminal Procedure (Scotland) Act 1995, as inserted by the Crime and Punishment (Scotland) Act 1997, s 17(1): see para 3.9 below. It is also the test that is used in one form of common law submission: see paras 2.20 and 2.23 below.

them.[33] That is a test that has proved difficult to satisfy in appellate proceedings.[34] It is, however, a test that raises a question of law.

2.15 The argument for extending the section 97 procedure in cases of this sort is that it would enable the judge the reject the Crown case, without requiring the accused to elect whether or not to give evidence, in cases where the prosecution evidence was essentially hopeless. Examples may help to illustrate this possibility. First, on a charge of assault in the street, all of the eye-witnesses were very drunk at the time and provided totally contradictory accounts of what happened. It was not clear who attacked whom and in what order. In those circumstances it might be thought that no reasonable jury could properly convict. Nevertheless, as matters stand, a submission to that effect could only be made at the close of the defence evidence, if any. Second,[35] in allegations of rape committed against two young children the evidence might disclose clear and important contradictions in the account given by one of the complainers. In such a case it will normally be essential to rely on the *Moorov* principle[36] for corroboration that the offences had occurred, and in that event it is essential that at least two complainers should be accepted as credible and reliable witnesses. If the contradictions in the account given by one of the complainers are serious, it might be possible to take the view that no reasonable jury could properly convict. At present, however, that argument could not be taken as a section 97 submission but only at the close of all evidence, including defence evidence. This example assumes that the contradictions are within the evidence of one complainer. If, on the other hand, the contradictions were between the evidence of the two complainers, a submission of no case to answer under section 97 could be made; in that event it could be said that the differences between the two accounts were such that they did not provide mutual corroboration for each other in accordance with the *Moorov* principle. This example suggests that the difference between a case where legal sufficiency is in issue and a case where only quality of evidence is in issue may in practice not be very great.[37] Nevertheless, there is a clear distinction in law: in one case the principles of corroboration are involved; in the other all that is involved is an assessment of the quality of the evidence.

2.16 The second restriction on the section 97 procedure relates to cases where the accused wishes to argue that in the light of the evidence a lesser charge should be substituted for that libelled[38] or that parts of the libel should be deleted.[39] The argument for extending the section 97 procedure in cases of this sort is essentially that the whole of the charges against the accused should be tested on the basis of the Crown evidence, and that the accused should not have to elect whether to give evidence before making such a challenge. Nevertheless, in this category of case there is sufficient evidence in law in relation to an offence of some sort, albeit an alternative or reduced offence. Consequently, if

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[33] *King v HM Advocate* 1999 JC 226; 1999 SCCR 330, discussed below at para 3.9.
[34] Where the issue has been raised under s 106(3)(b); see paras 3.9 and 3.10 below.
[35] Based on *E v HM Advocate* 2002 JC 215; 2002 SCCR 341.
[36] 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.
[37] In a sense it could be said that questions of quality of evidence inevitably lead on to the question of sufficiency, in that it must be determined which evidence is accepted before it can be decided whether that evidence is sufficient in law. Procedurally, however, it is necessary that the judge should rule on sufficiency before the jury are given directions. For this purpose, he is required to take account of any evidence that the jury *could* accept, which will normally relieve him of any consideration of the quality of that evidence.
[38] For example, culpable homicide for murder, or reset for theft.
[39] For example, in a charge of assault and robbery, deleting any reference to the use of a knife of other weapon.

the section 97 procedure were to be extended to cover such cases it would be necessary to extend the powers of the judge. At present all that he can do is to sustain the submission and acquit the accused[40] or repel the submission. If the issue is the restriction of a charge or the substitution of a lesser offence, it would be necessary to confer a power on the judge to amend the charges.

2.17 The arguments against extending the section 97 procedure seem to us to be the following. First, a question involving the quality of the evidence, as against its legal sufficiency, should be based on the totality of the evidence including such evidence as the accused chooses to lead. The decision on the quality of evidence is essentially a matter of impression, and that impression will develop as the case proceeds. The quality of evidence should only be decided on a final impression, reached at the conclusion of the whole of the evidence. Second, the quality of evidence is primarily a matter for the jury; the judge may only intervene if the high test, that no reasonable jury properly directed could convict, is satisfied. In order to apply that test the judge should consider the totality of the evidence. Third, in relation to cases where it is sought to reduce a charge or substitute a lesser charge, the accused concedes that the Crown has a sufficiency of evidence in relation to at least one charge. The Crown case must therefore go to the jury, and the accused will inevitably be forced to decide whether or not to give evidence.

2.18 In the light of the foregoing considerations, we ask the following question:

2. 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:

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

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

Common law submission

2.19 The so-called "common law submission" is regularly encountered in practice. Its basis in law 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.[41] 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,[42] 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.

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[40] Under s 97(2); see para 2.11 above.
[41] Renton and Brown, *Criminal Procedure* (6th edn, R 26: Aug 2006), para 18-76.
[42] *Kent v HM Advocate* 1950 JC 38; see para 2.3 above.

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*. In that event the judge listens to the defence submission, makes up his mind and directs the jury accordingly.

2.20 It is competent to use the foregoing procedure to raise questions of 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 raised. The disadvantage with this procedure by comparison with the statutory procedure under section 97 is that the motion can only be made after any defence evidence has been led; if a common law submission is made it is incompetent to lead evidence thereafter. 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[43] or by reducing the charge to lesser alternative.[44] As explained above,[45] it is not competent to raise either of these matters in a statutory submission of no case to answer.

Issues arising in connection with common law submission

(i) Timing: right of reply

2.21 It seems to us that several questions arise in relation to the common law submission. In the first place, 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. In some cases there may be a practical reason for not making the submission until that stage, because it is only after the prosecutor's speech that the accused knows with certainty precisely what the Crown seeks to make of the evidence. Nevertheless, we are of opinion that it is unsatisfactory that the prosecutor should have no right of reply. As a general rule, both sides should be heard on any disputed question, to enable their respective points of view to be put forward and, indeed, as an aid to the judge's decision. In addition, it may be desirable that the accused should be entitled as of right to make a submission at the close of the evidence, before the Crown speech. If these matters were to be addressed, legislation would be required.

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

2.22 In the second place, the common law submission is based on practice rather than any clearly defined rules of law. Apart from the issues discussed in the last paragraph, it may be desirable to provide for an equivalent form of submission in statute. That would

[43] For example, by deleting a reference to a weapon in a charge of assault.
[44] For example, reducing a charge or murder to culpable homicide because the *mens rea* that is necessary for murder has not been established by the Crown evidence: compare *Purcell v HM Advocate* 2008 SLT 44; or reducing a charge of rape to attempted rape because penetration has not been proved by corroborated evidence.
[45] At paras 2.8-2.10.

serve to make the procedure clearer, as well as dealing with the issues of timing and the prosecutor's right of reply. Moreover, a statutory statement of the procedure would provide an opportunity to state clearly the issues that may 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

2.23 If it is thought desirable to state the issues that may be raised in such a submission the next question is what those issues should be. This question is connected with the scope of the statutory submission of no case to answer made at the close of the Crown evidence, as discussed in paragraphs 2.13-2.18 above. We are of 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 means that they would correspond to the issues that may 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,[46] 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 would nevertheless welcome 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

2.24 If a right of appeal is to be granted,[47] the manner in which a successful common law submission is given effect causes a problem. 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 discussion paper that a verdict of acquittal given by a jury should be exempt from challenge by the Crown.[48] Nevertheless, it seems to us that the ruling following a common law submission or any statutory equivalent is in substance a ruling by the judge, and the fact that it is given effect through a verdict of the jury is merely a matter of form. Moreover, the Thomson Committee in their Second Report[49] concluded that directed verdicts were generally undesirable. That is the policy that has been followed in section 97 of the Criminal Procedure (Scotland) Act 1995.[50] We share the view of the Thomson Committee on this

[46] 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.
[47] Discussed below in Part 3.
[48] See para 1.3 above and para 3.1 below; the Thomson Committee referred to a "deeply entrenched principle" that a person acquitted by a jury should not be liable to retrial: *Criminal Appeals in Scotland (Third Report)*, Cmnd 7005 (1977), para 4.12.
[49] *Criminal Procedure in Scotland (Second Report)*, Cmnd 6218 (1975), ch 49, discussed at para 2.11 above.
[50] It has also been followed in section 95 to deal with cases where the prosecutor intimates that he does not intend to proceed or the accused tenders a plea of guilty in the course of the trial.

matter: 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, 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.[51] Consequently, a right of appeal would not infringe the underlying assumption that the verdict of a jury will remain exempt from challenge by the Crown.

2.25 Against the foregoing background, we invite comments on the following questions and proposals:

3. (a) At the close of the whole of the evidence, or at the close of the Crown speech to the jury, should it be possible to make a submission to deal with any one or more of the matters enumerated in paragraph 2.23?

(b) If so, should the procedure be left on its present common law basis? Alternatively, should the procedure be stated in statutory form?

(c) Should the accused be entitled to make such a submission without Crown consent at the close of the evidence, prior to the Crown speech?

(d) If it remains competent for the accused to make such a submission after the Crown speech, the Crown should be given a right of reply.

(e) Whether or not the procedure is given detailed statutory form, 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.

(f) If the procedure is to be stated in statutory form, are the grounds for such a submission adequately stated in paragraph 2.23? Should those grounds be set out in a statutory provision?

Evidential rulings

2.26 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.[52] In terms of section 79 of the Criminal Procedure (Scotland) Act 1995,[53] 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,[54] the judge is directed to dispose of any preliminary issues at the preliminary hearing.[55] 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,

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[51] It does not always do so, because the procedure can be used to amend or reduce a charge.
[52] *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.
[53] As substituted by s 13(1) of the Criminal Procedure (Amendment) (Scotland) Act 2004.
[54] As substituted by s 1(3) of the Criminal Procedure (Amendment) (Scotland) Act 2004.
[55] Comparable procedures exist in the sheriff court.

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, some will still arise in the course of the trial. Unexpected developments can 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, or that proper procedures were not followed in recovering or analysing productions. Developments of that nature cannot easily be foreseen, and consequently on occasion the judge will require to rule on the admissibility of evidence during the course of a trial.

2.27 In such cases the judge's ruling may have the practical effect of terminating the prosecution. For example, where in order to provide a sufficiency of evidence the Crown is dependent upon admissions made by the accused in a police interview, a ruling that the interview was unfairly conducted and hence inadmissible will inevitably be fatal to the prosecution. In such a case the Crown may immediately accept that the ruling is fatal and desert 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 the submission may or may not be successful. If it 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 should be noted that 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. If the jury decide to convict, there would be no question of a Crown appeal.[56] If the jury decide to acquit, the Crown might claim that the ruling on evidence was at least a material reason for the acquittal. In the event, however, there is a verdict of acquittal, and it is a fundamental presupposition of this discussion paper that a verdict of acquittal returned by a jury should be exempt from challenge.

2.28 Consequently, if there is to be an appeal against a ruling on evidence, it would require to be made before the jury are asked to return a verdict. Indeed, 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 a response to a Crown case that might later be held to be incomplete. The implications for this procedure on appeal are considered at paragraphs 3.44 onwards.

2.29 The need for rulings on evidence must clearly continue, and we have no questions to ask in relation to the way in which such rulings are made; the present procedures appear to work in a satisfactory manner. We consider the question of whether such rulings should be subject to a Crown right of appeal at paragraph 3.51 below.

[56] Although further complications might arise if that verdict were the subject of a successful defence appeal.

Part 3 Rights of appeal

Introduction

3.1 We are required by our reference to consider the law relating 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[1] 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 are those discussed in Part 2 of this discussion paper: a ruling under section 97 of the Criminal Procedure (Scotland) Act 1995 that there is no case to answer, a ruling following a common law submission that a charge should be amended or reduced or that the evidence is such that no reasonable jury properly directed could convict, and certain types of evidential ruling. Before considering possible rights of appeal against each of these types of ruling, we intend to say something about the history of rights of appeal in solemn criminal cases in Scotland.

Rights of appeal in solemn criminal cases

Common law

3.3 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.[2] 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.[3] Nevertheless, technical errors could be corrected, for example in fixing the details of a sentence.

3.4 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.[4] It is a remedy that is only open to the defence. The equivalent that is available to the prosecution is a bill of advocation.[5] 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

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[1] At para 1.3.
[2] Alison, *Criminal Law*, ii, 25.
[3] *Ibid*, at 660-661.
[4] Renton and Brown, *Criminal Procedure* (6th edn, R 28: Apr 2007), para 33-01.
[5] 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.

inferior judge or on account of partiality or incapacity on his part.[6] 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.[7] 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.[8] It is not a competent method of obtaining a review of the merits of a case.[9]

Appeals by accused following conviction

3.5 A right to appeal against conviction on indictment was introduced by the Criminal Appeal (Scotland) Act 1926.[10] 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.[11] 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.

3.6 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 –

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[6] Lord McCluskey and Paul McBride, *Criminal Appeals* (2nd edn, 2000), p 7, para 3.12.
[7] Renton and Brown, *Criminal Procedure* (6th edn, R 29: Aug 2007), para 33-19; recognised in s 74 of the Criminal Procedure (Scotland) Act 1995.
[8] *Ibid,* para 33-22.
[9] *MacLeod v Levitt* 1969 JC 16, per Lord Cameron at 19.
[10] 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.
[11] Renton and Brown, *op cit*, at para 29-03 onwards.

(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.

3.7 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*:[12]

> "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 discussion paper it is not necessary to consider in detail the grounds on which appeals have been allowed under section 106.[13] Three grounds are, however, relevant to the present question.

3.8 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.[14]

3.9 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".[15] 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.*[16] The appellant had been convicted of murder,

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[12] Lord McCluskey and Paul McBride, *Criminal Appeals* (2nd edn, 2000), p 225, para 7.11.

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

[14] *Gonshaw v Bamber* 2004 SLT 1270; the case involved summary proceedings, but the principle is clearly equally applicable to appeals from solemn proceedings.

[15] 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.

[16] 1999 JC 226; 1999 SCCR 330.

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 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:[17]

> "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.*[18] 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.

3.10 In one subsequent case, *E v HM Advocate,*[19] 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[20] 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:[21]

> "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.

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[17] 1999 JC 226 at 228H; 1999 SCCR 330 at 333E-F.
[18] 2000 SCCR 861.
[19] 2002 JC 215; 2002 SCCR 341.
[20] 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.
[21] 2002 JC 215; 2002 SCCR 341, at paras [30] and [31].

> 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.[22] 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 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.

3.11 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

3.12 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."

3.13 The significance of these procedures has been substantially increased by the reforms introduced by the Criminal Procedure (Amendment) (Scotland) Act 2004.[23] 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.*[24] The appeal must be taken not later than two days after the decision appealed against.[25] The

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[22] Renton and Brown, *Criminal Procedure* (6th edn, R 28: Apr 2007) para 29-20.3, fn 1.
[23] Following the Bonomy Report, referred to at para 2.26 above.
[24] Criminal Procedure (Scotland) Act 1995, s 74(1).
[25] *Ibid*, s 74(2).

High Court is given power to adjourn the hearing for such period as appears appropriate.[26] Any such appeal is without prejudice to an appeal under section 106 or section 108 of the 1995 Act.

Appeals against sentence

3.14 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 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.[27] 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.[28] 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

3.15 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 discussion paper. 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

3.16 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.[29] 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.[30] On this matter the

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[26] *Ibid*, s 74(3A).
[27] A similar procedure is applied to appeals against conviction under s 106; in this case reconsideration is by three judges.
[28] *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).
[29] *Criminal Appeals in Scotland (Third Report)*, Cmnd 7005 (1977), ch 4.
[30] *Ibid*, para 4.02.

Committee found that their witnesses were fairly evenly divided into two groups, holding opposing views.[31] 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 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*.
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> 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[32] 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.[33] The Committee observed:[34]

> "[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.

3.17 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

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[31] *Ibid*, paras 4.04-4.010.
[32] *Criminal Procedure in Scotland (Second Report)*, Cmnd 6218 (1975), ch 48.
[33] *Ibid*, para 48.05.
[34] *Ibid*.

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 common; only nine have been reported since 1980; but they do on occasion have important consequences.[35] The proposal that is under consideration in this discussion paper goes beyond the Lord Advocate's reference; it involves a full right of appeal with the possibility of a re-trial.

Arguments for and against Crown right of appeal

3.18 Against this background, we are required to consider whether Crown rights of appeal should be extended to judicial rulings in solemn procedure that can bring a case to an end without the verdict of a jury; this includes cases where the accused is acquitted through the ruling made by the judge.[36] As mentioned previously, three types of ruling are relevant: a decision under section 97 of the 1995 Act that there is no case to answer, a ruling following a common law submission, and certain types of evidential ruling. These give rise to different practical problems, which are discussed below.[37] Before these are considered, however, we propose to consider the general arguments in favour of and against a Crown right of appeal.

3.19 The principal arguments in favour of a Crown right of appeal against a judicial ruling appear to us to be as follows:

(i) An appeal involves reconsideration of the matter in dispute in such a way that the issues and arguments can usually be better focused 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 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.

(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

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[35] 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.

[36] The reference strictly speaking extends to defence rights of appeal as well as Crown rights, but for reasons stated below at para 3.61 we consider that the defence right of appeal under section 106 is adequate to protect the interests of the accused; we further conclude that that right should not be extended.

[37] At para 3.33 onwards.

criminal cases.[38] 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.[39]

(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 English Commission as "accuracy of outcome"[40]). 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.[41]

3.20 In addition to the above general arguments, a further point can perhaps be made in favour of the suggestion that the Crown should have a right of appeal against judicial rulings that can bring a solemn case to an end without the verdict of a jury. In our preliminary consultations the view has been expressed that in recent years one of the general underlying developments in criminal procedure has been a move towards equality between prosecution and defence. That principle has usually been invoked in favour of the rights of the accused, but it is of general application. The Crown prosecutes in the public interest, and in appropriate cases there is no reason that the principle of equality should not be used to give the Crown similar rights to the accused.[42] This tendency is illustrated by developments in other jurisdictions, where there has in recent years been a move towards granting the prosecution extended rights of appeal. In Part 2 of the Appendix we summarise the current position in England and Wales, Canada, certain Australian states, New Zealand and Ireland. These are all jurisdictions where serious criminal charges are dealt with by trial by jury, in a manner that is recognisably similar to the procedures used in Scotland.[43] In

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[38] 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 a Crown appeal. The Lord Advocate's reference procedure is also a recognition of the advantages of reconsideration by an appellate court.

[39] 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 and New South Wales a similar right of appeal is accorded to the prosecution.

[40] The Law Commission, *Double Jeopardy and Prosecution Appeals*, Law Com No 267 (2001), para 7.12.

[41] 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.

[42] We should state that there is no suggestion that any rights, of appeal or otherwise, should be taken away from the accused: see para 3.59 below.

[43] Although there are obvious differences, notably the requirement of corroboration in Scots law and the use of simple majority verdicts in Scotland.

England and Wales extended Crown rights of appeal were accorded by Part 9 of the Criminal Justice Act 2003; that statute permits appeals against judicial rulings that correspond, broadly speaking, to the categories of ruling considered in this discussion paper. In New Zealand, New South Wales, Tasmania and Western Australia a prosecution right of appeal exists against acquittals that have been directed by the trial judge. In Canada a Crown right of appeal on questions of law has existed since 1892. The prosecution are permitted to appeal on a "question of law alone". This expression has been construed in such a way that there would not be a right of appeal on the question of whether a reasonable jury could have convicted, but there would be a right of appeal on a decision that there was no evidence (the equivalent of insufficiency in Scots law) and a ruling on the admissibility of evidence. Further details of the approach taken by each of these systems of law can be found in the Appendix.

3.21 The principal arguments against a Crown right of appeal appear to us to be 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 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.[44]

3.22 In relation to the first of the arguments against a Crown right of appeal, two further points may be significant. 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.[45] On this approach, the rule against double jeopardy, in its

[44] The expenses of the defence will usually be met by the Scottish Legal Aid Board.
[45] See Part 1 of the Appendix which deals with the Convention.

broadest sense, does not come into operation until appeal procedures have been completed. Second, 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.[46] Decisions of a single judge, by contrast, are normally subject to appeal.[47] 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.

3.23 We emphasise once more that there is no proposal to permit the Crown to challenge the verdict of a jury. Moreover, any appeal against the decision of the trial judge to acquit the accused would lie only on questions of law. This is in accordance with the general structure of criminal appeals which, apart from sentence appeals and appeals based on new evidence, are normally confined to issues of law. For this purpose, of course, the question of whether a reasonable jury properly directed could have convicted is a question of law.[48]

Comments and questions

3.24 In the light of the foregoing arguments, we consider it appropriate to ask the following general question:

> **4. As a matter of general principle, should the Crown 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?**

At this stage we ask the question as a matter of principle. If the question is answered in the affirmative, it will be necessary to consider separately each of the categories of judicial ruling considered above, to determine whether the Crown should be given a right of appeal against each category and, if so, what conditions should be attached to a right of appeal. Before we deal with these issues, however, it is necessary to consider two other matters: the test that should be applied to any Crown appeal and the result of a successful Crown appeal.

Test for Crown appeal

3.25 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.[49] 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 expression "miscarriage of justice" has been held to confer a degree of discretion on the Appeal Court.[50] 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 discussion paper considers rights of appeal against judicial rulings that are capable of bringing a solemn case to an end without

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[46] Thomson Committee, *Criminal Appeals in Scotland (Third Report)*, para 4.12, quoted above at para 3.16.
[47] 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 3.16 above.
[48] See para 3.10 above.
[49] S 106(3).
[50] *McCuaig v HM Advocate*, 1982 JC 59; 1982 SCCR 125.

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. In these circumstances we consider that there is a question as to what the test should be. It seems to us that error of law must be an element in the test; that is the fundamental issue in any appeal against any of the judicial rulings considered in Part 2 of this discussion paper. In addition, however, we are of opinion that an appeal should only be allowed if the ruling is likely to have a significant effect on the outcome of the case. This condition might not be of great importance in cases where the prosecution is brought to an end on one or more charges, but it could be important if appeals are permitted against rulings that amend or reduce a charge and evidential rulings, where the significance of such a ruling can vary greatly.

Result of successful Crown appeal

3.26 The proposal that has been referred to us is a right of appeal in the proper sense; it would involve the quashing of the 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.[51] In the great majority of cases we are of opinion that the continuation of the existing trial will not be a realistic possibility because of the delay that will 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.[52] 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.[53]

3.27 Nevertheless, 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[54] 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 incline 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. Such legislation might require to deal with a number of

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[51] 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.

[52] It would frequently be possible to play the tape-recording of the proceedings at first instance.

[53] 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.

[54] Periods of 12 weeks and upwards are not unknown in cases involving fraud or embezzlement.

practical problems, including the provision of a report by the trial judge within a strict time limit, the extension if necessary of the notes of evidence and the custody of the process while the appeal proceeds.[55] It is not thought that any of these would present insuperable difficulties, although care must be taken to ensure that the provisions will work effectively in practice.

3.28 Such a procedure would bear some similarity to the existing power of a trial judge to bring in two other judges to decide any difficult or important issue of law. That power is used on occasion; an example is found in *HM Advocate v Purcell*.[56] In that case the accused had run down and killed a boy who was using a pedestrian crossing; at the time the accused was fleeing the police and was admittedly driving in a reckless and dangerous manner. He was charged with murder. At the end of the evidence for the Crown and defence, counsel for the accused intimated that he wished to make a submission that, on the facts alleged in the charge and the evidence given in support of it, it would not be open to the jury to return a verdict of guilty of murder, as opposed to culpable homicide or the statutory offence under section 1 of the Road Traffic Act 1988. The trial judge decided that the submissions and argument on the matter should be heard by a bench of three judges, including himself.[57] It was held that the circumstances libelled in the indictment did not satisfy the requirements of the crime of murder, since they did not libel any wilful act intended to cause physical injury. Consequently the accused's submission was upheld, and the case was continued on that basis. The accused was found guilty of culpable homicide. The court observed that the issue turned essentially on the terms of the indictment rather than the evidence, and should probably have been raised as a preliminary matter, before the beginning of the trial. We understand that the ability of the Keeper of the Rolls to find three judges for that court was somewhat fortuitous, and it cannot be assumed that such resources would always be available. The procedure used in cases such as *Purcell* does not of course involve an appeal; it is a decision of three judges at first instance, and the decision is given in the course of a continuing trial.

3.29 During our preliminary consultation it was suggested that it might be possible to develop the existing procedure for calling in additional judges to provide a form of appeal procedure. The advantage of such a procedure, it was suggested, would be that the appeal took place before the accused was acquitted; thus there would be no need to quash an acquittal. That would mean that the requirements of finality and certainty, which are especially important in relation to criminal charges, would be respected, and the third and fourth of the arguments against appeal that are set out at paragraph 3.21 above would not apply. It was further pointed out that Crown appeals against judicial acquittals are unlikely to be frequent; consequently the practical difficulties of convening a court at short notice would not arise very often. We can see some force in this argument, and we have accordingly included a question[58] as to whether any appeal procedure should in all cases involve a reference to the Appeal Court prior to acquittal. Nevertheless, the general view of those with whom we have consulted at a preliminary level was that the practical difficulties of convening

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[55] The process should remain with the trial court as long as the trial proceeds, but in the event of an appeal it is obviously required by the Appeal Court. Something must therefore be said about the transmission of the process and, if appropriate, its return.

[56] 2008 SLT 44. Authority for the procedure is found in s 1(5) of the Criminal Procedure (Scotland) Act 1995.

[57] Lord Eassie, a member of our reference group, presided over the court, and we are grateful to him for his comments on the case.

[58] Question 5(c), at para 3.32 below.

a court at short notice, with a report and in many cases the extended notes of evidence, will render such a procedure impossible except in a small minority of cases.

3.30 Consequently, in the following parts of the discussion paper we proceed on the assumption that the normal result of a successful appeal would be a re-trial rather than a continuation of the existing trial. In that event, the acquittal would be set aside and it would be necessary for the Crown to seek authority for a new prosecution. In relation to appeals by a convicted person, such a power is found in section 118(1)(c) of the Criminal Procedure (Scotland) Act 1995; that section provides that the High Court may dispose of an appeal against conviction by "setting aside the verdict of the trial court and quashing the conviction and granting authority to bring a new prosecution in accordance with section 119 of this Act". Section 119 sets out the procedure for re-trial following the quashing of a conviction; we discuss it further in Part 4 of this discussion paper.[59]

3.31 In some cases, however, a new prosecution might result in prejudice or unfairness to the accused.[60] For reasons that are developed in the next Part of this discussion paper, we are of opinion that the best means of dealing with such prejudice is to permit the Appeal Court to decide whether or not to authorise a new prosecution, and to provide that such authority should not be given if it is contrary to the interests of justice.

3.32 We accordingly put forward the following questions and proposals:

5. (a) If the Crown is given a right of appeal against judicial rulings of the sort under discussion,[61] what should the test be? Should it be a double test, that the judge's ruling was wrong in law and was likely to have a significant effect on the outcome of the case? Would another formulation be preferable?

(b) If such an appeal is successful, the normal result should be a re-trial rather than a continuation of the existing trial.

(c) Alternatively, would it 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?

(d) On the assumption that it would not be practicable in the normal case to have an appeal heard during the continuation of a trial, it would nevertheless be desirable to have such a procedure available for use in exceptional cases, such as trials that had continued for a long time, to avoid the waste of the trial diet.

Judicial rulings that can result in acquittal of accused

3.33 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.

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[59] At paras 4.8-4.10.
[60] Possible forms of prejudice are discussed at para 4.3 below.
[61] That is to say, rulings on a submission of a no case to answer under s 97 of the Criminal Procedure (Scotland) Act 1995, rulings following a common law submission and evidential rulings in the course of a trial.

Submission of no case to answer

3.34 In relation to a submission under section 97 of the Criminal Procedure (Scotland) Act 1995, we consider that the position is 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.[62] The sufficiency of evidence is a question of law; consequently any appeal would be on a question of law.

3.35 Nevertheless, 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.[63] 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

3.36 One further issue requires consideration: if it is decided that the Crown should have a right of appeal against rulings of no case to answer, should a requirement of leave be imposed? This matter is considered below, at paragraph 4.11.

Multiple charges and multiple accused

3.37 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. In that event we are of opinion that the trial should continue in respect of the remaining charges; that ensures that the trial diet and the evidence that has been led are not wasted. This should be subject to an exception if the remaining charges are relatively minor but in that event the Crown's existing power to desert proceedings *pro loco et tempore* should be sufficient to deal with the problem. If the trial continues a number of problems can arise in respect of the charge that has resulted in an acquittal, but it seems to us that these problems relate not to the appeal process itself but to the possibility of a re-trial. They are discussed below in Part 4.[64]

3.38 We accordingly ask the following question:

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

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[62] See para 2.8 and 2.9 above.
[63] 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.
[64] See para 4.3.

Common law submission or statutory equivalent

(i) The principle of an appeal and its scope

3.39 In relation to a common law submission or statutory equivalent the position is more complex. Nevertheless, if it is decided that the Crown should have a right of appeal against judicial rulings that can terminate a case without a verdict of the jury, we are of opinion that such an appeal should lie against a ruling following a common law submission or equivalent as well as a ruling following the statutory procedure under section 97. Although their scope is different, the two procedures serve broadly similar functions; and both involve judicial rulings that are capable of bringing the prosecution of a charge to an end without a jury verdict.[65] Moreover, if an appeal lay against a ruling under section 97 but not against a ruling following a common law submission, there could be an incentive for the accused to delay making any submission until all the evidence had been completed, or until the prosecutor had addressed the jury.[66] It seems wrong that the timing of a submission should have the result of defeating a right of appeal.

3.40 A further issue then arises. The judge's ruling following a successful common law submission will bring the prosecution to an end, in respect of one or more charges, only if the challenge is to the whole of a charge. Since the enactment of the no case to answer procedure now found in section 97 of the 1995 Act, that result will normally occur only where the contention for the defence is that no reasonable jury properly directed could convict of the charge in question. Perhaps the most frequent use of a common law submission, however, is in an attempt to have a charge reduced to a lesser alternative offence or to have part of a charge deleted. In such cases the prosecution is not terminated; the charge in its amended form goes to the jury and the jury return a verdict. 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.

3.41 If it is decided that judicial rulings should be subject to a Crown right of appeal, 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.

3.42 Against the extension of a Crown right of appeal to such rulings, it can be said 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

[65] Although the common law submission can be and often is used to reduce or modify a charge rather than to terminate its prosecution.
[66] This would prevent the leading of defence evidence, but in many cases no evidence is led for the defence.

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 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 a right of appeal against rulings of that nature.

3.43 We invite 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. The arguments seem to us to be set out in the two preceding paragraphs. We accept, however, that it is undesirable that relatively minor rulings should be the subject of appeal. That problem could, we think, be dealt with by imposing a leave requirement. It is true that the Crown rights of appeal that have been granted in the past are not subject to any such requirement; nor is there any such requirement for a Lord Advocate's reference. Nor do we have any reason to suppose that the Crown would appeal relatively insignificant rulings. Nevertheless, it seems to us that it is 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. Consequently we are of opinion that a requirement of leave should be imposed in this case, and also in respect of evidential rulings.[67] The question of leave is discussed below at paragraph 4.11.

3.44 A successful common law submission may only affect one charge out of two or more. In that case, if the Crown appeals against the judge's ruling, we can see no reason for the trial not to continue in respect of the remaining charges, unless they are relatively minor. If they are minor, 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 continue, we consider that that should not have any bearing on whether an appeal may be made, but it might have an impact on whether a re-trial is ordered. This matter is discussed below in Part 4 of this discussion paper.

3.45 Before we deal with the procedural issues that arise if a right of appeal is granted, we should mention rulings based on a submission that no reasonable jury properly directed could convict of one or more charges. A right of appeal against such a ruling does not seem to us to cause significant practical difficulties. In this case, the effect of the judge's ruling under present procedure is that the jury are directed to return a verdict of not guilty in respect of the whole of one or more charges. If the procedure is put into statutory form, that might be replaced by an acquittal by the judge, but once again the acquittal would relate to the whole of one or more charges. Consequently any appeal would be intimated following the judge's ruling. So far as the substance of any such appeal is concerned, the Appeal Court deals with appeals against conviction on a similar ground under section 106(3)(b) of the Criminal Procedure (Scotland) Act 1995, and it is not thought that a Crown appeal would give rise to fundamentally different problems.

[67] See paras 3.55 and 3.56 below.

(ii) Procedure in appeals against rulings following common law submission or statutory equivalent

3.46 If it is decided that a Crown right of appeal against judicial rulings should be extended to rulings following a common law submission or statutory equivalent that merely amend or reduce a charge without an acquittal, a question arises as to the timing of such an appeal. The result of the judge's ruling is not to 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 exist 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.

3.47 The first of these alternatives would work as follows. Following the judge's ruling, the jury would return a verdict. If that verdict is not guilty, it is clearly unlikely that a guilty verdict would have been returned on the original charge, which must obviously bear some relationship to the amended charge. In that event there should be no right of appeal; such a right would serve no useful purpose, and in any event it is assumed for present purposes that jury verdicts of acquittal must remain exempt from challenge by the Crown. If the jury returns a verdict of guilty, a Crown appeal can be permitted because there is no acquittal. Consequently, the Crown could decide whether or not to appeal after the conclusion of the case. This would obviously be subject to time limits and a leave requirement, but there would be no difficulty in providing for these. Any appeal would, of course, be against the judge's ruling rather than the jury's verdict. Nevertheless, if the appeal were successful the Appeal Court would require to set aside the jury's verdict and the conviction would require to be quashed;[68] thereupon re-trial would be ordered, if appropriate.

3.48 The second alternative would require the Crown to decide whether it wished to appeal against the judge's ruling before any further procedure took place, and in particular before the speeches and charge to the jury. That would obviously place a considerable onus on the Crown. Moreover, if this procedure were followed, the charge that was the subject of the appeal would not go to the jury. Consequently, even if the appeal were unsuccessful, the whole trial procedure that had taken place in respect of that charge would be wasted.[69]

3.49 Despite the difficulties discussed in the preceding paragraph, we favour the second alternative. The problem with the first, an appeal after the jury has returned a verdict, is that it involves the quashing of a jury verdict at the instance of the Crown. While the verdict that is quashed is of guilty, the purpose of overturning it is to enable the Crown to raise a new prosecution for a more serious charge than the charge of which the accused was convicted. The difficulty that this creates is perhaps perceptual rather than real, in that the ruling that is reversed is that of the judge, not the jury; nevertheless, it seems to us that such a procedure would involve an inroad into the 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

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[68] By means of a provision similar to s 118(1)(b) of the Criminal Procedure (Scotland) Act 1995.

[69] 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, this problem would not arise.

intimate an appeal immediately after the judge's ruling. As to the difficulties created by the latter procedure, we are of opinion that in practice they will not be of great significance. The trial procedure will be wasted even if a Crown appeal is unsuccessful,[70] but we would not expect appeals of this nature to be very common; consequently we are inclined to discount this drawback. As to the requirement that the Crown make an immediate decision on whether to appeal, we do not think that this is a serious problem. The prosecutor should be very familiar with the case, and should be able to make a rapid assessment of the judge's ruling. Obviously a short adjournment might be given to permit the Crown to consider its position; in cases of obvious difficulty we see no great problem in adjourning the case overnight for this purpose. Overall, we do not think that the disadvantages of an immediate appeal outweigh the undesirability of allowing the Crown to have a jury's verdict quashed by the Appeal Court.

3.50 We accordingly put forward the following questions:

7. (a) Should the Crown have a right of appeal against a ruling on a common law submission or statutory equivalent? In this connection, should a distinction be drawn between two categories of such rulings: those which result in an acquittal of one or more charges against the accused and those which merely amend or reduce a charge?

(b) We would welcome any comments on the procedural issues discussed at paragraphs 3.47-3.49.

Evidential rulings

3.51 As has already been mentioned,[71] the great majority of evidential questions will now be dealt with at a preliminary hearing or a preliminary diet, and in such cases both the Crown and the accused will have a right of appeal under section 74 of the Criminal Procedure (Scotland) Act 1995.[72] In some cases, however, evidential rulings will arise at trial, and the judge will be required to rule on the admissibility of the evidence in question. Such cases are likely to be limited in number; section 79A of the 1995 Act restricts objections to the admissibility of evidence that are raised after the first diet or preliminary hearing, and in cases where the objection is not raised until after the beginning of the trial it does so in a strict manner.[73] Subsection (4) of that section provides that, where a party seeks to raise an objection to the admissibility of any evidence after the commencement of the trial, 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". Nevertheless, although most evidential questions should be disposed of before the trial begins, some will still arise in the course of the trial.[74]

3.52 A number of practical problems arise in connection with appeals against evidential rulings.

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[70] If the Crown appeal is successful, the trial procedure will be wasted on either approach.
[71] At paras 2.26 and 3.13.
[72] Such rights of appeal are subject to the requirement that leave should be granted by the court of first instance: s 74(1). If leave is refused by the judge of first instance there is no recourse to the Appeal Court; nevertheless, we are not aware of any indication that the results of this procedure are unsatisfactory.
[73] See para 2.26 above.
[74] See para 2.27 above.

(i) Timing

3.53 The practical consequences of an evidential ruling during the trial are discussed at paragraphs 2.27 and 2.28 above. Essentially, the significance of any particular ruling may or may not be instantly obvious. Nevertheless, any appeal would have to made before the jury were invited to consider a verdict, and there are obvious practical advantages in insisting that any appeal should be made prior to the conclusion of the Crown evidence. That means that the prosecutor would require to make a rapid decision as to whether the Crown wished to appeal. We do not think that this should cause any insuperable difficulty. The prosecutor should be familiar with the evidence that is likely to be led and should be able to form a fairly definite view as to how important the excluded evidence is. Obviously, a short adjournment might be given to enable the Crown to consider its position, but we think that that is a matter of procedure that can be left to the trial judge. We are of opinion that the only mandatory requirement is that the appeal should be intimated prior to the close of the Crown evidence.

(ii) Leave to appeal

3.54 The question of whether leave to appeal against an evidential ruling should be required is discussed below, at paragraph 4.16; our provisional view is that leave should be required.

(iii) Consequences of decision to appeal

3.55 If the Crown decides to appeal, we are of opinion that, unless an Appeal Court can be convened at very short notice,[75] it will 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.[76] 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. In the normal course of events a motion to desert *pro loco et tempore* can be refused by the trial judge. This should not be a problem in the present category of case, however, at least if a leave requirement is imposed; if leave is granted the trial must be deserted unless an appeal court can be convened almost immediately. If not all charges are affected by the ruling, the trial can continue in respect of the remaining charges. To the extent that that causes any prejudice in future proceedings, we are of opinion that that is a matter that is relevant not to whether an appeal should be permitted but to whether a re-trial is in the interests of justice, and it should be considered in the context of a re-trial rather than an appeal.[77]

3.56 In the light of the foregoing considerations, we put forward the following question and proposal:

8. (a) Should the Crown have a right of appeal against evidential rulings made during a trial?

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[75] See paras 3.27-3.28 above.

[76] If an appeal does 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.

[77] See para 4.3 below.

(b) If the Crown have such a right, any appeal should be intimated before the conclusion of the prosecution evidence.

(c) We would welcome any comments on the procedural issues discussed at paragraph 3.55.

Number of appeals

3.57 We have been unable to obtain any reliable estimate of the number of Crown appeals that might be made against judicial rulings falling into the three categories that are under consideration. In general we do not consider the frequency with which any right of appeal might be used to be important. If a right of appeal were used frequently, that might place significant demands on the Appeal Court; nevertheless, provided that the appeals were made on a responsible basis, the frequency of the appeals would indicate that there is a serious defect in the present law. If a right of appeal were not used frequently, that would obviously lessen the demands on the Appeal Court, but it does not follow that a right of appeal is undesirable; the cases where it was exercised might be particularly important cases, or the points of law might be of particular importance. In this connection we note the views of the Thomson Committee:[78]

> "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 which the Crown considers has been wrongly decided in the trial court."

3.58 When the Law Commission for England and Wales considered the question of prosecution rights of appeal,[79] they considered the question of how much prosecution appeals would be used. Ultimately they accepted the views of the Crown Prosecution Service,[80] who stated:

> "Although the right would be rarely exercised, the occasions on which it would be used would be significant – affecting the conduct of important cases or the decision of important points of law. The very existence of the right will, we believe, improve the quality of judicial rulings at trials and thereby keep its use to a minimum."

We have no reason to believe that the position in Scotland would be any different. Moreover, we agree with the English Commission's view that the existence of a right of appeal might have an effect on the quality of judicial rulings, which would tend to restrict the need for any appeal.

Defence right of appeal

3.59 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 proposals to extend 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

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[78] *Criminal Appeals in Scotland (Third Report)*, Cmnd 7005 (1977), para 4.11.
[79] The Law Commission, *Double Jeopardy and Prosecution Appeals*, Law Com No 267 (2001), para 7.11.
[80] *Ibid*.

judge's ruling on any of the matters under consideration in this discussion paper. It is thought that that is sufficient to protect the rights of the accused. In this connection, it is important that the Appeal Court has decided that, in considering sufficiency of evidence for the purposes of a no case to answer argument, it is the state of evidence at the close of the Crown case that matters; any evidence subsequently given by any accused or by a defence witness does not fall to be taken into account.[81] 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 was 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 proposals to alter the rights of the accused, which we consider to be adequately protected.

[81] See para 3.8 above.

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,[1] if a Crown appeal were successful the normal result would be a re-trial. The 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.[2] In another case,[3] 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[4] or the time that has elapsed since the offence.[5]

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 Unfairness may result from a large range of matters. Examples include the following:

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

(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.

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[1] At paras 3.26-3.30 above.
[2] *Farooq v HM Advocate* 1993 SLT 1271.
[3] *Jones v HM Advocate* 1991 SCCR 290.
[4] *Cameron v HM Advocate* 1999 SCCR 11.
[5] *Glancy v HM Advocate* 2001 SCCR 385; the length of time spent by the accused in custody was also taken into account.

(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 may 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 Consequently, if an appeal is allowed and the judge's acquittal is quashed, we are of opinion that a re-trial should not be automatic. The Appeal Court should be given power to grant authority to bring a new prosecution,[6] 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 are of opinion that, because of the large range of circumstances that may be relevant to this issue, a general formulation should be used. We consider that the expression "contrary to the interests of justice" is the most appropriate general formulation. An alternative might be "unfair in all the circumstances of the case". Nevertheless, we are inclined to prefer the former expression, which is easily understood and somewhat wider in its import. In addition, the expression "contrary to the interests of justice" indicates that the court is to take an objective approach; in our preliminary consultation the view was expressed that this was desirable, and that the expression "contrary to the interests of justice" would be the better formulation. We are 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 are conscious that on occasion some of these factors may operate against each other; for example, fairness to the accused may run counter to the public interest in the due prosecution of crime, or the interests of the victim. Nevertheless, 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.

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[6] As is provided, in relation to an appeal against conviction, in s 118(1)(c) of the Criminal Procedure (Scotland) Act 1995.

4.5 A further question is 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 tend to favour the former approach; this follows the scheme of section 118 of the Criminal Procedure (Scotland) Act 1995, where no examples are given.

4.6 Finally, if authority to bring a new prosecution is refused by the Appeal Court, it seems to us that the trial judge's acquittal should stand. That is demanded by basic considerations of certainty and finality. In that event, therefore, the Appeal Court should not quash the acquittal.

4.7 In these circumstances we put forward the following proposals and questions:

9. (a) In the event of a successful Crown appeal, the Appeal Court should have power to grant authority to bring a new prosecution. 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.

(b) Is the formulation "contrary to the interests of justice" the appropriate test for this purpose?

(c) Should examples be given of the main cases where a new prosecution might be contrary to the interests of justice?

(d) If authority for a new prosecution is refused, the acquittal by the trial judge should remain in force.

Procedural issues: restrictions on further prosecution

4.8 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. It is thought that corresponding provisions would be appropriate if any Crown right of appeal is granted.

4.9 Provision is made in section 119(4) and (5) for 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[7] the order setting aside the verdict is to have the effect for all purposes as an acquittal.[8] Section 119(6) and (7) makes provision for evidence in proceedings in a new

[7] Subs (8) states when proceedings shall be deemed to be commenced.
[8] Subs (9).

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.[9] Once again, it is thought that comparable provisions to all of the foregoing would be appropriate in relation to any Crown right of appeal.

4.10 We accordingly ask the following question:

10. If a Crown right of appeal is granted, is it appropriate that in any new prosecution restrictions should be imposed similar to those found in section 119 of the Criminal Procedure (Scotland) Act 1995? Should these be modified in any way?

Procedural issues: leave to appeal

4.11 As we have already indicated,[10] one further issue must be considered: if the Crown is given a right of appeal against judicial rulings, should a requirement of leave be imposed? Appeals by the accused require leave;[11] appeals from preliminary hearings require leave of the judge of first instance whether they are by the Crown or the accused;[12] Crown appeals against sentence do not;[13] nor does a Lord Advocate's reference.[14] 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, for reasons discussed in the following paragraphs, we consider that a leave requirement should be introduced if appeals are permitted against certain categories of ruling following a common law submission[15] and evidential rulings. Our provisional view is that leave should not be required for appeals against rulings that result in an acquittal on one or more charges.

Submission of no case to answer

4.12 If a submission of no case to answer is successful, the result is that the accused is acquitted on one or more charges. Such a ruling is clearly significant for the outcome of the case, and if appeals against such rulings were considered in isolation we would not have seen a need for a requirement of leave to appeal. Nevertheless, if a leave requirement is introduced in respect of certain rulings following a common law submission and evidential rulings, it is arguable that the requirement should be imposed generally, in order to maintain consistency. We can see no practical difficulty in imposing a requirement of leave for an

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[9] 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 SCCR 411.
[10] Paras 3.36, 3.43 and 3.54 above.
[11] Criminal Procedure (Scotland) Act 1995, s 107; this is granted through the sifting procedure.
[12] *Ibid*, s 74(1).
[13] *Ibid*, s 108.
[14] *Ibid*, s 123.
[15] Those that do not result in an acquittal on a particular charge.

appeal against a ruling on a submission of no case to answer. In that event, we are of opinion that the criterion for leave should be arguability, the criterion used in section 107 of the Criminal Procedure (Scotland) Act 1995 for defence appeals.

Common law submission or statutory equivalent

4.13 A common law submission or statutory equivalent raises more complex issues. At paragraph 3.43 we pointed out that, in cases where the result of a successful submission is 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.[16] Nevertheless, we are of opinion that a leave requirement should be imposed in respect of rulings that do not result in such an acquittal.

4.14 Consequently, an issue arises 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 do not have the effect of acquittal on one or more charges. The advantage of the former course of action is that there is a uniformity of practice. (This would clearly be appropriate if it were decided that appeals against rulings on a no case to answer submission at the close of the Crown evidence should be subject to a leave requirement.) The advantage of restricting a leave requirement to submissions that do not have the effect of an acquittal would be that it was more precisely targeted at the relevant mischief; this is that rulings that do not result in an acquittal vary greatly in their significance. Acquittal on one or more charges, by contrast, is nearly always significant.[17] Our provisional conclusion is that there is no need for a leave requirement in respect of rulings that result in an acquittal or one or more charges. Nevertheless, we would welcome comments on the question of whether all rulings following a common law submission or statutory equivalent should be subject to a leave requirement, or only those that do not result in an acquittal on one or more charges.

4.15 The next issue is the criterion for leave to appeal. 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.[18] In the present context, however, the most important criterion is the impact that the ruling has on the Crown case. On that basis, we are of opinion that two criteria should be applied: (i) whether the ruling has a significant effect on one or more of the charges against the accused; and (ii) arguability. If the ruling results in an acquittal, it would be assumed that the first criterion was satisfied (on the assumption that such rulings are subject to a leave requirement).

Evidential rulings

4.16 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

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[16] 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.

[17] On occasion minor charges are inserted in an indictment for evidential purposes, to enable evidence to be led about the matters narrated in the charge; in such cases the Crown usually have no intention of moving for conviction on the particular charge. A judicial acquittal on such a charge would not be significant, but it is most unlikely that any such charge would ever go as far as submission; they are almost invariably deserted before that stage.

[18] Criminal Procedure (Scotland) Act 1995, s 107(1)(a).

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. Even if the Crown is given a right to appeal against evidential rulings, it seems inappropriate that the right of appeal should be available for any kind of ruling, especially as the consequence of an appeal is likely to be the desertion of the trial diet.[19] For this reason we are of opinion that there would be clear advantages in imposing a requirement that leave be obtained for an appeal, essentially for the reasons discussed at paragraph 3.43 above in relation to common law submissions. While we have 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 is important, there is a clear public interest in ensuring that a partly completed trial is not abandoned. That interest suggests that there should be no automatic right of appeal, and it can, we think, best be protected by imposing a leave requirement.

4.17 The next issue is the test that should be applied for leave to appeal. Clearly cases where the ruling is fatal to the Crown case are suitable for an appeal, but in other cases a ruling may result in a serious weakening of the Crown case, and we incline to the view that an appeal should be possible in such cases, on the assumption that the principle of a right of appeal is conceded. The principal reason for this is that it will frequently be impossible to be certain whether a ruling is actually fatal. We accordingly suggest that leave to appeal should be given only if the ruling (or a series of rulings taken together) significantly weakens the Crown case in relation to the offence or offences that are the subject of the appeal.[20] In addition, a general requirement of arguability should be imposed.[21] In applying these criteria, in particular that of significant weakening of the Crown case, the judge will frequently have to rely on the explanation given by the Crown to determine how far there is such a weakening. We do not think that this should be a problem, however; the court often has to rely on information provided by the Crown in deciding on procedural matters.

Granting of leave to appeal

4.18 We accordingly propose that a requirement of leave to appeal would be appropriate in two cases: appeals following a ruling on a common law submission that does not result in an acquittal and appeals following evidential rulings. Our provisional view is that there is no need for any general requirement of leave, but we invite comment on this issue. Whichever course is adopted, there remains the question of how leave should be granted. 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.[22] In appeals from 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

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[19] See para 3.55 above.

[20] 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.

[21] The criterion for defence appeals in s 107 of the Criminal Procedure (Scotland) Act 1995.

[22] 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 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.

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 are 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.

4.19 In relation to the judicial rulings that we are now considering, a system that permitted leave to be granted by the High Court rather than the trial judge would be possible in respect of rulings that acquit the accused on one or more charges. In those cases the trial is at an end, and there is sufficient time for a procedure similar to that found in section 107 of the Criminal Procedure (Scotland) Act 1995 for defence appeals. That would apply to rulings on a submission of no case to answer and some rulings following a common law submission or a statutory equivalent. With other rulings following a common law submission, however, at least if intimation of an appeal is required immediately following the judge's ruling, it would not be possible to make use of such a system. The same is true of evidential rulings. The problem here is that the Crown must decide rapidly whether or not to intimate an appeal; with rulings following a common law submission (where there is no acquittal on a charge) intimation must be immediate, and with evidential rulings an appeal must be intimated by the end of the Crown case. That would not permit leave to be granted by a sifting procedure; instead, leave would have to be granted by the trial judge, as with appeals against decisions at preliminary hearings. We do not think that that would cause any insuperable difficulty; we are not aware of any criticism of the decisions on leave to appeal taken by judges at preliminary hearings.

4.20 We accordingly put forward the following proposals and questions:

11. (a) If the Crown is granted a right of appeal against rulings under section 97 of the Criminal Procedure (Scotland) Act 1995 that there is no case to answer, leave to appeal should not be required.

(b) If the Crown is granted a right of appeal against a ruling on a common law submission or statutory equivalent, such appeals should be subject to a requirement of leave in any case where the ruling does not result in an acquittal on one or more charges but merely amends or reduces a charge. Leave should not be required where the ruling results in an acquittal on one or more charges.

(c) If the Crown is granted a right of appeal against evidential rulings made during a trial, any such appeal should be subject to a leave requirement.

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

(b) In respect of appeals against a ruling on a common law submission or statutory equivalent which does 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.

(c) In respect of an appeal against an evidential ruling, there should be an additional criterion that the result of the judge's ruling is a significant weakening of the Crown case.

13. (a) Which court should grant leave to appeal?

(b) In particular, in relation to rulings following a common law submission or statutory equivalent that do not result in an acquittal on one or more charges, and in respect of evidential rulings, is it appropriate that leave should be granted by the trial judge?

(c) In relation to other rulings, if a leave requirement is imposed, should leave be granted by the trial judge, or should it be granted by the High Court using a sifting procedure similar to that found in section 107 of the Criminal Procedure (Scotland) Act 1995?

Bail and custody

4.21 A bail order continues until the case is disposed of, unless it is formally recalled. The result of an acquittal is that any bail order is immediately discharged.[23] Therefore, if the trial judge acquits the accused of all charges against him, any bail order will cease to apply. If the accused is acquitted of some charges but convicted of others, the bail order will come to an end when sentence is passed; only the sentence will operate from that point onwards. If the accused is in custody at the time of his trial, an acquittal on all charges will obviously have the result that he is to be liberated (if not otherwise in custody). If an accused who is in custody is acquitted on some charges only, the judge must pronounce sentence on the other charges, which may or may not involve a continuation of custody. It follows that, if the Crown is permitted to appeal against an acquittal by the judge, provision must be made for bail and custody during the period when the appeal is pending and during any period thereafter when a re-trial is pending.

4.22 It seems to us 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;[24] he has been acquitted, albeit by the judge rather than the jury, and that must be respected. Nevertheless, there may be extreme cases where custody is desirable. It may also be desirable to continue or impose a bail order, especially if special conditions are required; for example, it might be desirable in some cases that the accused should be made to surrender his passport. We are accordingly of opinion that if Crown appeals against acquittal are permitted, provision should be made in legislation for the possibility, following the intimation of a Crown appeal, that the accused may be either remanded in custody or subjected to a bail order. We would regard a remand in custody as exceptional, but we think that the possibility should be catered for.

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[23] See generally Renton and Brown, *Criminal Procedure* (6th edn), ch 10.
[24] This assumes that he is not in custody on other charges.

4.23 If a Crown appeal is allowed, matters would be different in that the acquittal has been quashed. We think, however, 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. In this connection, section 119(10) of the Criminal (Procedure) (Scotland) Act 1995 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 think that a similar provision could be used in the event that the Crown is given a right of appeal against a judicial acquittal, with modifications to deal with the period prior to the hearing of the appeal.

14. We have no specific questions on the issues discussed in paragraphs 4.21 to 4.23 but we would welcome comments on the matter.

Restrictions on reporting of proceedings

4.24 One of the factors that might render a re-trial contrary to the interests of justice is the possibility that the publicity attendant on the original trial makes it impossible for the accused to have a fair hearing. 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. If the Crown were permitted to appeal against a judicial acquittal, this provision might be of importance. We do not, however, think that it is necessary to make any specific proposals in this regard; the existing legislation seems adequate.

Incidental procedure

4.25 If the Crown is given a right to appeal against judicial acquittals, incidental procedural matters would require to be dealt with in the legislation.[25] We note this point, but we do not think that it is necessary to consult on it.

[25] As in ss 119 and 120 of the Criminal Procedure (Scotland) Act 1995.

Part 5 List of questions

1. (a) 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?

   (b) 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?

   (Paragraph 2.12)

2. 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:

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

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

   (Paragraph 2.18)

3. (a) At the close of the whole of the evidence, or at the close of the Crown speech to the jury, should it be possible to make a submission to deal with any one or more of the matters enumerated in paragraph 2.23?

   (b) If so, should the procedure be left on its present common law basis? Alternatively, should the procedure be stated in statutory form?

   (c) Should the accused be entitled to make such a submission without Crown consent at the close of the evidence, prior to the Crown speech?

   (d) If it remains competent for the accused to make such a submission after the Crown speech, the Crown should be given a right of reply.

   (e) Whether or not the procedure is given detailed statutory form, 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.

   (f) If the procedure is to be stated in statutory form, are the grounds for such a submission adequately stated in paragraph 2.23? Should those grounds be set out in a statutory provision?

   (Paragraph 2.25)

4. As a matter of general principle, should the Crown 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?

(Paragraph 3.24)

5. (a) If the Crown is given a right of appeal against judicial rulings of the sort under discussion, what should the test be? Should it be a double test, that the judge's ruling was wrong in law and was likely to have a significant effect on the outcome of the case? Would another formulation be preferable?

(b) If such an appeal is successful, the normal result should be a re-trial rather than a continuation of the existing trial.

(c) Alternatively, would it 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?

(d) On the assumption that it would not be practicable in the normal case to have an appeal heard during the continuation of a trial, it would nevertheless be desirable to have such a procedure available for use in exceptional cases, such as trials that had continued for a long time, to avoid the waste of the trial diet.

(Paragraph 3.32)

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

(Paragraph 3.38)

7. (a) Should the Crown have a right of appeal against a ruling on a common law submission or statutory equivalent? In this connection, should a distinction be drawn between two categories of such rulings: those which result in an acquittal of one or more charges against the accused and those which merely amend or reduce a charge?

(b) We would welcome any comments on the procedural issues discussed at paragraphs 3.47-3.49.

(Paragraph 3.50)

8. (a) Should the Crown have a right of appeal against evidential rulings made during a trial?

(b) If the Crown have such a right, any appeal should be intimated before the conclusion of the prosecution evidence.

(c) We would welcome any comments on the procedural issues discussed at paragraph 3.55.

(Paragraph 3.56)

9. (a) In the event of a successful Crown appeal, the Appeal Court should have power to grant authority to bring a new prosecution. 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.

(b) Is the formulation "contrary to the interests of justice" the appropriate test for this purpose?

(c) Should examples be given of the main cases where a new prosecution might be contrary to the interests of justice?

(d) If authority for a new prosecution is refused, the acquittal by the trial judge should remain in force.

(Paragraph 4.7)

10. If a Crown right of appeal is granted, is it appropriate that in any new prosecution restrictions should be imposed similar to those found in section 119 of the Criminal Procedure (Scotland) Act 1995? Should these be modified in any way?

(Paragraph 4.10)

11. (a) If the Crown is granted a right of appeal against rulings under section 97 of the Criminal Procedure (Scotland) Act 1995 that there is no case to answer, leave to appeal should not be required.

(b) If the Crown is granted a right of appeal against a ruling on a common law submission or statutory equivalent, such appeals should be subject to a requirement of leave in any case where the ruling does not result in an acquittal on one or more charges but merely amends or reduces a charge. Leave should not be required where the ruling results in an acquittal on one or more charges.

(c) If the Crown is granted a right of appeal against evidential rulings made during a trial, any such appeal should be subject to a leave requirement.

(Paragraph 4.20)

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

(b) In respect of appeals against a ruling on a common law submission or statutory equivalent which does 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.

(c) In respect of an appeal against an evidential ruling, there should be an additional criterion that the result of the judge's ruling is a significant weakening of the Crown case.

(Paragraph 4.20)

13. (a) Which court should grant leave to appeal?

(b) In particular, in relation to rulings following a common law submission or statutory equivalent that do not result in an acquittal on one or more charges, and in respect of evidential rulings, is it appropriate that leave should be granted by the trial judge?

(c) In relation to other rulings, if a leave requirement is imposed, should leave be granted by the trial judge, or should it be granted by the High Court using a sifting procedure similar to that found in section 107 of the Criminal Procedure (Scotland) Act 1995?

(Paragraph 4.20)

14. We have no specific questions on the issues discussed in paragraphs 4.21 to 4.23, but we would welcome comments on the matter.

(Paragraph 4.23)

Appendix

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 as 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,[1] and the understanding that a verdict only becomes final when all rights of appeal have been exhausted.[2]

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.[3]

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

[2] 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.

[3] 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.[4]

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".[5] 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*,[6] 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..."[7]

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[4] 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.

[5] Police and Criminal Evidence Act 1984, s 78.

[6] [1981] 1 WLR 1039; [1981] 2 All ER 1060.

[7] *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.[8]

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.[9]

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*[10] 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.[11]

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.[12]

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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[8] See the Law Commission Consultation Paper *Prosecution Appeals Against Judges' Rulings,* CP 158 (2000), para 6.12.
[9] *Ibid*, para 6.13, citing *Turnbull* [1977] QB 224 and *Fergus* (1993) 98 Cr App R 313.
[10] Law Com No 276.
[11] The Law Commission, *Prosecution Appeals Against Judges' Rulings*, CP 158 (2000), para 4.3.
[12] *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.[13]

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".[14] 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.[15] 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".[16]

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*,[17] 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.[18] 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.[19] The effect of the ruling appealed against is suspended while the appeal is pursued.[20]

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 order an adjournment or discharge the jury.[21] On hearing the appeal, the Court of Appeal

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[13] The Law Commission, *Prosecution Appeals Against Judges' Rulings*, CP 158 (2000), paras 6.15-6.16.
[14] The Law Commission, *Double Jeopardy and Prosecution Appeals*, Law Com No 267 (2001), para 7.38.
[15] *Ibid*, para 7.74.
[16] *Ibid*, para 7.68.
[17] In the absence of anything in s 58 expressly limiting the appeal to a point of law alone.
[18] Criminal Justice Act 2003, s 58(7).
[19] *Ibid*, s 58(8), (9).
[20] *Ibid*, s 58(10), (11).
[21] *Ibid*, s 59.

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.[22]

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),[23] and only where the Court of Appeal is satisfied that the ruling or rulings appealed against significantly weaken the prosecution's case.[24] 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.[25] 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.[26] 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.[27]

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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[22] *Ibid*, s 61.
[23] *Ibid*, s 62(3), (9). The Secretary of State may amend the list of qualifying offences by order under s 62(10).
[24] *Ibid*, s 63.
[25] *Ibid*, s 64.
[26] *Ibid*, s 66.
[27] *Ibid*, s 67.

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

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.[30] 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.[31] 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.[32].

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.[33] It is now settled, following the decision of the Court of Appeal in *R v Flyger*[34] 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.*[35] 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.[36]

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.[37]

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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[28] Crimes Act 1961, s 347(1).
[29] *Ibid*, subs (4).
[30] See *R v Flyger* [2001] 2 NZLR 721 at 726, para [16].
[31] Crimes Act 1961, s 347(4).
[32] See, for instance, *R v Lachlan Elliot Downing* [1999] NZCA 275, 23 November 1999, unreported.
[33] See the authorities cited by the New Zealand Law Commission at paras 145-148 of their Report on *Criminal Prosecution*, R 66 (2000).
[34] [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.
[35] [1981] 2 All ER 1060; see *R v Flyger* [2001] 2 NZLR 721at 725, paras 13-17.
[36] *Parris v Attorney-General* [2004] 1 NZLR 519.
[37] 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.[38] 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.[39]

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.[40]

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.[41] 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.[42] Judicial review is not available where the decision is made by a High Court judge.[43]

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.[44] This has been suggested as the appropriate course by the Court of Appeal.[45] 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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[38] Crimes Act 1961, s 380(4).
[39] *Ibid*, ss 380(3), 381.
[40] *Ibid*, first proviso to s 382(2).
[41] *R v Grime* [1985] 2 NZLR 265, per Richardson J at 267, applying *R v Fogden* [1945] NZLR 380.
[42] *Auckland District Court v Attorney General* [1993] 2 NZLR 129 at 136.
[43] 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.
[44] For an example, see *The Queen v Rokas Karpavicius* [2001] 3 NZLR 41.
[45] *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.[46]

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.[47]

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.[48] 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,[49] and may also hear witnesses for the defence.[50] 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.[51]

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[52]). 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:[53]

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[46] New Zealand Law Commission, *Criminal Prosecution*, R 66 (2000), para 158.
[47] The Bill, which would also place restrictions upon the right to trial by jury in certain case and introduce exceptions to double jeopardy, appears not to have progressed since it was considered in committee on 23 March 2007, although it is still before the Parliament and features in the Government's programme (see the report of Prime Minister Helen Clark's opening address to the Parliament on 12 February 2008, available at http://tinyurl.com/2yv5xw). Links to the Bill and associated Parliamentary documents may be found at http://tinyurl.com/yvr4zm.
[48] Criminal Code of Canada, Part XVIII.
[49] *Ibid*, s 540(1)(a).
[50] *Ibid*, s 541.
[51] *Ibid*, s 548(1).
[52] See *Walker v The King* [1939] SCR 214.
[53] *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.

> "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 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."[54]

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.[55] 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.[56]

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.[57] 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.[58]

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,[59] or as to the interpretation of a legal standard[60] 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

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[54] *R v Monteleone* [1987] 2 SCR 154, per McIntyre J at para 8.
[55] *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.
[56] *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.
[57] Criminal Code of Canada, s 676.
[58] *Ibid*.
[59] *R v B(G)* [1990] 2 SCR 57.
[60] *R v Araujo* [2000] 2 SCR 992 per Lebel J at para 18.

whole of the evidence and to determine on that basis whether the guilt of the accused had been established beyond a reasonable doubt.[61] It has been held that the reasonableness of a verdict or the sufficiency of the evidence does not raise a question of law alone.[62]

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",[63] 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.[64] 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*:[65]

> "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*,[66] 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

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[61] *R v Morin* [1988] 2 SCR 345 per Sopinka J at 361.
[62] *R v B(G),* [1990] 2 SCR 57.
[63] 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.
[64] *R v MacKenzie* [1993] 1 SCR 212.
[65] *R v Morin* [1988] 2 SCR 345 per Sopinka J at 361.
[66] [1990] HCA 51; (1990) 171 CLR 207. The opinions of the High Court on the common law are binding across all states and territories.

there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty.

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."[67]

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.[68]

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.[69] 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.*[70] In 1987, the appeal provision was amended to remove the word "alone", apparently with the intention of restoring the wider interpretation.[71]

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,[72] but may, notwithstanding that it is of the opinion that the point raised by the appeal

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[67] *Ibid*, opinion of the court (Deane, Dawson, Toohey, Gaudron & McHugh LJJ) at paras 17-18.

[68] 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."

[69] Criminal Code Act 1924 (Tas), s 401(2)(b).

[70] 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*).

[71] 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.

[72] Criminal Code Act 1924 (Tas), s 402(1).

might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.[73] If the Court of Appeal allows an 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.[74]

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,[75] allows the prosecutor to appeal to the Court of Appeal against a decision ordering a permanent stay of proceedings on a charge[76] 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.[77] The right of appeal also extends to an acquittal entered in a trial by judge alone.[78] 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.[79]

2.46 The Criminal Law and Evidence Amendment Bill 2006, presently before the Western Australian parliament, would 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.[80]

2.48 In 2002 the High Court of Australia ruled in *R v Carroll*[81] 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.[82] The campaign coincided with a New South Wales State election. The day prior to the

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[73] Criminal Code Act 1924 (Tas), s 402(2).
[74] *Ibid*, subs (5).
[75] Which substantially re-enacts section 688(2) of the Criminal Code Act 1913.
[76] Criminal Appeal Act 2004 (WA), s 24(2)(c).
[77] *Ibid*, s 24(2)(e).
[78] *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).
[79] *Ibid*, s 33(2).
[80] 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.
[81] [2002] HCA 55.
[82] Charles Parkinson, "Double Jeopardy Reform: The New Evidence Exception for Acquittals," (2003) 26 University of New South Wales Law Journal 603 at 603-604.

election being called, Premier Carr announced that the rule against double jeopardy would be reformed in New South Wales to allow retrials based on fresh evidence,[83] 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).[84]

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.[85] 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.[86]

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.[87] 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.[88]

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 (see above, paragraph 2.46) 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.[89]

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.[90]

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[83] 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).
[84] Rowena Johns, *Double Jeopardy,* New South Wales Parliamentary Library Research Service, Briefing Paper No 16/03 at 9 (available at http://tinyurl.com/ywummc).
[85] 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.
[86] Model Criminal Code Officer's Committee, *Double Jeopardy,* (2004). Both this and the discussion paper are available at http://tinyurl.com/ynr8xs.
[87] Available at http://tinyurl.com/2ejddq.
[88] *Ibid*.
[89] *Ibid*.
[90] 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

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[91] and, if made within 28 days, does not require leave.[92] On hearing the appeal the Court of Criminal Appeal may affirm or quash the acquittal appealed against.[93] If the acquittal is quashed the Court of Criminal Appeal may order a new trial in any manner as it sees fit,[94] but cannot proceed to convict or sentence the accused for the offence charged nor direct the trial court hearing the retrial to do so.[95]

2.54 These provisions do not apply retrospectively to those acquitted prior to their enactment,[96] 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.[97]

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..."[98] 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.[99] 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)."[100]

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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.

[91] Crimes (Appeal and Review) Act 2001 (NSW), s 107(2).

[92] *Ibid*, subs (3).

[93] *Ibid*, subs (5).

[94] *Ibid*, subs (6).

[95] *Ibid*, subs (7).

[96] *Ibid*, subs (8).

[97] *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".

[98] Criminal Procedure Act 1967, s 34(1), prior to its substitution by s 21 of the Criminal Justice Act 2006.

[99] *The People (Attorney General) v Crinnion* [1976] IR 29, per Henchy J at 36 (*obiter*).

[100] 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,[101] but may allow an appeal against pre-trial rulings (which, under Irish procedure, are rare).[102]

2.58 Article 34 of the Irish Constitution creates a constitutional right of appeal from convictions in the Central Criminal Court.[103] In 1982, the majority of the Supreme Court in *The People (Director of Public Prosecutions) v O'Shea*,[104] 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.[105] 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.[106]

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*.[107] 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.[108]

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*.[109] The Law Reform Commission noted that it appeared that there was no constitutional prohibition on prosecution appeals from jury acquittals.[110] The Commission, however, declined to recommend the introduction of a prosecution appeal

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[101] 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.
[102] *Ibid*; The Law Reform Commission, *Consultation Paper on Prosecution Appeals in Cases Brought on Indictment*, LRC CP 19 (2002), paras 1.36-1.37.
[103] 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."
[104] [1982] IR 384.
[105] 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.
[106] *Ibid,* paras 1.38-1.45.
[107] LRC CP 19 (2002).
[108] *Ibid,* ch 5.
[109] LRC 81 (2006).
[110] *Ibid,* para 1.35.

which might overturn an acquittal,[111] 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.[112]

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."[113]

[111] The Law Reform Commission, *Prosecution Appeals and Pre-Trial Hearings*, LRC 81 (2006), para 1.36.
[112] *Ibid*, Introduction, para 7.
[113] Balance in the Criminal Law Review Group, *Final Report* (2007) at 197; available at http://tinyurl.com/24ltfg.

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