

LEGISLATIVE COUNCIL BRIEF

The Criminal Procedure Ordinance (Chapter 221)

CRIMINAL PROCEDURE (AMENDMENT) BILL 2023

INTRODUCTION

A At the meeting of the Executive Council on 23 May 2023, the Council ADVISED and the Chief Executive ORDERED that the Criminal Procedure (Amendment) Bill 2023 (“**Bill**”), at Annex A, should be introduced into the Legislative Council (“**LegCo**”).

JUSTIFICATIONS

2. Legislative amendments need to be introduced to the Criminal Procedure Ordinance (Cap. 221) (“**CPO**”) as soon as practicable to provide for statutory appeal procedures for the prosecution (a) to appeal against rulings of no case to answer (“**no-case rulings**”) made by the Court of First Instance (“**CFI**”) in criminal trials with a jury (“**No Case to Answer Appeal Proposal**”) and (b) to appeal by way of case stated against a verdict or order of acquittal given by the CFI constituted by a panel of three judges to try a case concerning offences endangering national security without a jury under Article 46 of the Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (“**HK National Security Law**”) (“**NSL 46 Appeal Proposal**”). The No Case to Answer Appeal Proposal and the NSL 46 Appeal Proposal are necessary, legitimate and timely responses to address lacunae in the criminal appeal system due to the prosecution’s inability to appeal against any no-case rulings and acquittals by professional judges of the CFI that are erroneous, so as to prevent possible miscarriage of justice.

No Case to Answer Appeal Proposal

3. In the judgment of *Re Secretary for Justice’s Reference Nos. 1-3 of 2021* [2022] 5 HKLRD 886 (“**Judgment**”) handed down on 28 October 2022, the Court of Appeal (“**CA**”) remarked that there is at present no statutory procedure for the prosecution to appeal against no-case rulings by judges of the CFI (“**Lacuna regarding no-case rulings**”) and that there is an urgent need for the statutory provisions to be reformed in this respect. The CA overturned the rulings of two

judges in the CFI and held that each of the cases under consideration had resulted in a serious miscarriage of justice in that the judges concerned impermissibly usurped the function of the juries and incorrectly withdrew the cases before their respective juries could consider them.

4. Under the current statutory regime, if a CFI judge makes an incorrect no-case ruling and directs the jury to acquit the defendant, the best that the prosecution can do is to refer the matter to the CA for clarification of the legal principles involved under section 81D of the CPO. The acquitted defendant cannot be retried, even if the judge had plainly erred. In the cases before the CA, the prosecution did invite the court to provide guidance on the viable way of preserving the status quo in similar future cases and one of the proposals under the existing statutory framework was for the trial judge to make a reservation of a question of law, namely whether there is a case to answer on the evidence adduced, for the consideration of the CA pursuant to section 81 of the CPO. It was nonetheless accepted that such a course was to be adopted sparingly and only in the most exceptional cases. This approach cannot specifically address the Lacuna regarding no-case rulings revealed by the Judgment.

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

6. In the United Kingdom, the Crown can appeal against a judge’s no-case ruling under Part 9 of the Criminal Justice Act 2003 (“**UK Act**”), specifically section 58.

7. Cases tried in the CFI all involve the most serious criminal offences. The Lacuna regarding no-case rulings could lead to irreversible consequences, in that the defendants acquitted based on no-case rulings of CFI’s judges could not be retried even if the judges had plainly erred. In the light of CA’s observation in the Judgment, there is a pressing need for the CPO to be amended as soon as practicable to put in place such a statutory appeal procedure to fill the Lacuna regarding no-case rulings and prevent further possible miscarriage of justice. To this end, the Government proposes to introduce legislative amendments to the CPO by making reference to Part 9 of the UK Act.

NSL 46 Appeal Proposal

8. A case concerning offences endangering national security may be tried in the CFI either before a judge and a jury, or before a three-judge panel without a jury if the Secretary for Justice (“**Secretary**”) has issued a certificate under Article 46 of the HK National Security Law¹.

¹ Article 46(1) of the HK National Security Law provides: “對高等法院原訟法庭進行的就危害國家安

9. As in criminal cases tried by professional judges such as judges of the District Court and magistrates, if a case is tried by a three-judge panel in the CFI without a jury, the panel will give reasons for its verdict. Under the existing CPO, whilst a defendant may appeal to the CA against his or her conviction or sentence by the CFI regardless of the mode of trial, the prosecution does not have a right to appeal to the CA if the defendant is acquitted by a three-judge panel even though its reasons for verdict may disclose an error of law. This is contrasted with an acquittal by a judge of the District Court or a magistrate which is subject to appeal by way of case stated under section 84 of the District Court Ordinance (Cap. 336) (“DCO”) or section 105 of the Magistrates Ordinance (Cap. 227) (“MO”) (as the case may be). The prosecution’s inability to appeal to the CA against an acquittal by a Panel in such circumstances gives rise to an anomaly.

10. A miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent. The miscarriage of justice arising from an erroneous acquittal would be gravest where the offence in question is one endangering national security. In order to serve the interests of justice and for the judicial authorities to properly discharge the duty under the HK National Security Law² to effectively prevent, suppress and impose punishment for acts and activities endangering national security, it is necessary that the prosecution be vested with the right to appeal, thereby giving the CA the opportunity to examine and, where justified, correct any error of law made by a three-judge panel of the CFI when trying cases concerning offences endangering national security without a jury.

11. As pointed out by a responsible official of the Legislative Affairs Commission of the Standing Committee of the National People’s Congress (“NPCSC”) on 30 December 2022 in response to questions by the media concerning the Interpretation by the NPCSC of Article 14 and Article 47 of the HK National Security Law, it is the imperative of Article 7³ of the HK National Security Law that the Hong Kong Special Administrative Region should amend and refine the relevant local legislation in a timely manner and resolve legal issues encountered in the implementation of the HK National Security Law through local legislation as far as practicable.

全犯罪案件提起的刑事檢控程序，律政司長可基於保護國家秘密、案件具有涉外因素或者保障陪審員及其家人的人身安全等理由，發出證書指示相關訴訟毋須在有陪審團的情況下進行審理。凡律政司長發出上述證書，高等法院原訟法庭應當在沒有陪審團的情況下進行審理，並由三名法官組成審判庭。” (Translation: In criminal proceedings in the Court of First Instance of the High Court concerning offences endangering national security, the Secretary for Justice may issue a certificate directing that the case shall be tried without a jury on the grounds of, among others, the protection of State secrets, involvement of foreign factors in the case, and the protection of personal safety of jurors and their family members. Where the Secretary for Justice has issued the certificate, the case shall be tried in the Court of First Instance without a jury by a panel of three judges).

² See in particular Articles 3, 8 and 42.

³ Article 7 of the HK National Security Law provides: “香港特別行政區應當儘早完成香港特別行政區基本法規定的維護國家安全立法，完善相關法律。” (Translation: The Hong Kong Special Administrative Region shall complete, as early as possible, legislation for safeguarding national security as stipulated in the Basic Law of the Hong Kong Special Administrative Region and shall refine relevant laws).

12. A timely legislative response to address the above anomaly and legal lacuna is therefore required. The Government proposes to amend the CPO to provide for a new statutory procedure for the prosecution to appeal against a verdict or order of acquittal given by the CFI constituted by a three-judge panel under Article 46 of the HK National Security Law. The proposed appeal mechanism will be appeal by way of case stated, which is modelled on the existing appeal by way of case stated procedures under section 84 of the DCO and section 105 of the MO. The proposed new provisions will be primarily modelled on section 84 of the DCO. The appeal will relate to matters of law only (which have been interpreted in case authorities to include a perverse conclusion or finding of fact that no reasonable judge, applying his or her mind to the proper considerations and giving himself or herself the proper directions, could have come to⁴).

13. The legislative amendments under the two proposals, being procedural in nature, will apply to rulings, verdicts or orders given after the legislative amendments come into operation. The two proposals have been considered by the Policy Committee.

OTHER OPTIONS

14. The legal lacunae can only be filled by creation of the proposed new statutory appeal mechanisms through legislative means. There are no other options.

THE BILL

15. The main provisions of the Bill are summarised below. The Bill contains 3 Parts and a Schedule.

Part 1 – Preliminary

16. Clause 1 sets out the short title and provides for commencement.

Part 2 – Amendments to the CPO

17. Clause 3 amends section 80 of the CPO to add the definition of HK National Security Law.

18. Clause 4 adds a new Division 3, containing ten sections (sections 81AA to 81AAJ), to Part IV of the CPO for the No Case to Answer Appeal Proposal –

⁴ E.g. *Li Man Wai v Secretary for Justice* (2003) 6 HKCFAR 466.

The new section 81AA

- (a) The new section 81AA contains the definitions for the interpretation of the new Division 3.

The new section 81AAB

- (b) The new section 81AAB provides that the new Division 3 does not apply in relation to a case concerning offences endangering national security tried in the CFI without a jury by a panel of three judges under Article 46 of the HK National Security Law. Our policy intent is that, because a no-case ruling by a three-judge panel of the CFI trying a case concerning offences endangering national security without a jury is a matter of law which results in an order of acquittal that can be appealed against by way of case stated under the NSL 46 Appeal Proposal, it is not necessary for the mechanism under the No Case to Answer Appeal Proposal to be applied to such situation.

The new section 81AAC

- (c) The new section 81AAC provides that the Secretary may, with the leave of the CFI or the CA, appeal to the CA against a no-case ruling. The Secretary may not make an appeal unless the Secretary -
 - (i) informs the CFI that the Secretary intends to appeal against the no-case ruling;
 - (ii) if the no-case ruling is made in relation to two or more offences, informs the CFI which one or more of the offences are to be the subject of the appeal (“**subject offence(s)**”); and
 - (iii) gives an acquittal guarantee in relation to the appeal,as soon as practicable (i) after the no-case ruling is made, or (ii) if the Secretary requests an adjournment to consider whether to appeal, after the expiration of the period of adjournment.
- (d) If as soon as practicable after a no-case ruling is made, the Secretary requests an adjournment to consider whether to appeal against the no-case ruling, the CFI must grant an adjournment until at least the next business day.
- (e) On informing the CFI of the intention to appeal, the Secretary may also include another ruling as the subject of the appeal, if that other ruling also relates to the subject offence(s).

The new section 81AAD

- (f) The new section 81AAD provides that, for the purposes of subparagraph (c)(iii) above, the Secretary gives an acquittal guarantee in relation to the appeal by informing the CFI that the Secretary agrees that the defendant charged with the subject offence(s) is to be acquitted of the offence(s) if –
 - (i) leave to appeal against the no-case ruling is not granted; or
 - (ii) whether or not leave to appeal against the no-case ruling is granted, the appeal is abandoned before it is determined by the CA.

The new section 81AAE

- (g) The new section 81AAE provides that if the Secretary requests an adjournment to consider whether to appeal against the no-case ruling, the no-case ruling is to have no effect until the expiry of the period of adjournment. If the Secretary informs the CFI of the intention to appeal, the no-case ruling is to have no effect in relation to the subject offence(s) until the appeal is determined by the CA or abandoned by the Secretary.

The new section 81AAF

- (h) The new section 81AAF provides that, if the Secretary informs the CFI of the intention to appeal against a no-case ruling, the CFI must decide whether or not the appeal is to be expedited.

The new section 81AAG

- (i) The new section 81AAG provides that if the trial is instituted for two or more offences, and one or more of the offences are not the subject offences, the trial or any proceedings relating to the trial may be continued in relation to those other offences.

The new section 81AAH

- (j) The new section 81AAH provides that the CA may confirm, reverse or vary the ruling that is the subject of the appeal. However, the CA may only reverse or vary a ruling if it is satisfied that the ruling involved an error of law or principle.
- (k) If the CA confirms a no-case ruling made in relation to an offence, it must order that the defendant be acquitted of that offence. If the CA reverses or varies a no-case ruling made in relation to an offence, it

must order that (i) the proceedings for that offence be resumed in the CFI, (ii) the defendant may be retried in the court for that offence, or (iii) the defendant be acquitted of that offence. But the CA may not make an order stated in (iii) unless it considers that the defendant could not receive a fair trial if an order in (i) or (ii) is made.

The new sections 81AAI and 81AAJ

- (l) The new section 81AAI imposes restrictions on the reporting of proceedings relating to appeals under the new Division, and any person in contravention will be guilty of an offence. The new section 81AAJ empowers the court to relax the restrictions on reporting in appropriate cases.

19. Clause 5 adds new Division 6, containing four sections, to Part IV of the CPO for the NSL 46 Appeal Proposal –

The new section 81DA

- (a) The new section 81DA –
 - (i) provides that if the CFI tries a case concerning offences endangering national security without a jury by a panel of three judges, and the CFI gives a verdict or order of acquittal in relation to a defendant in the case, the Secretary may appeal to the CA against the verdict or order, and that the appeal may only relate to matters of law; and
 - (ii) provides for the content of the case stated and the procedure for the appeal.

The new section 81DB

- (b) The new section 81DB provides that if, immediately after the CFI gives a verdict or order of acquittal, the Secretary informs the CFI that the Secretary intends to make the appeal, the CFI may order that the defendant be detained in custody or admit the defendant to bail (applying the requirements of Article 42 of the HK National Security Law⁵).

⁵ Article 42(2) of the HK National Security Law provides: “對犯罪嫌疑人、被告人，除非法官有充足理由相信其不會繼續實施危害國家安全行為的，不得准予保釋。” (Translation: No bail shall be granted to a criminal suspect or defendant unless the judge has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security).

The new section 81DC

- (c) The new section 81DC empowers the CA to issue a warrant directing that the respondent of the appeal be arrested and to order that the respondent be detained in custody or admit the respondent to bail (applying the requirements of Article 42 of the HK National Security Law).

The new section 81DD

- (d) The new section 81DD provides for the determinations that may be made by the CA for the appeal –
- (i) The CA has jurisdiction to entertain an appeal whether or not the respondent of the appeal appears (which is to be exercised subject to the usual requirements of procedural fairness);
 - (ii) If the CA is satisfied that there are sufficient grounds for interfering with the verdict or order, it must reverse the verdict or order, and direct resumption of the trial or a retrial; and
 - (iii) The CA may give all such necessary and consequential directions as it considers appropriate (which in practice may include, if circumstances so require, a direction to the CFI to find the respondent guilty and sentence the respondent accordingly⁶).

20. Clause 6 of the Bill consequentially amends section 83Y of the CPO so that the powers of the CA to extend the period for making the application to state a case, to issue a warrant of arrest, to order the detention of a defendant or respondent or to admit him or her to bail may be exercised by a single judge.

Part 3 – Related Amendments to Costs in Criminal Cases Ordinance (Cap. 492) (“CCCO”)

21. Clauses 7 and 9 add sections 9AA and 13AA respectively to the CCCO to empower the CA to order that costs of an appeal against no-case rulings under the new section 81AAC of CPO be awarded to the defendant or the Secretary (as the case requires).

22. Clauses 8 and 10 amend sections 9A and 13A of the CCCO respectively to provide for costs of an appeal by way of case stated under the new section 81DA of CPO.

The Schedule

23. The Schedule makes minor technical amendments to the CPO and its

⁶ By way of example, the CA made such direction in the case of *Secretary for Justice v Chan Chi Wan Stephen* [2016] 3 HKLRD 186.

subsidiary legislation.

B 24. The existing provisions being amended are at **Annex B**.

LEGISLATIVE TIMETABLE

25. The legislative timetable is as follows-

(a)	Publication in the Gazette	25 May 2023
(b)	First Reading and commencement of Second Reading debate	31 May 2023
(c)	Resumption of Second Reading debate, Committee stage and Third Reading	To be completed by 12 July 2023 (to be confirmed)

IMPLICATIONS OF THE PROPOSAL

26. The Bill contains safeguards which ensure that a defendant will enjoy the right to a fair trial (including the right to be tried without undue delay), and the Bill does not contravene the principle against double jeopardy⁷. The reporting restrictions in an appeal against no-case rulings seek to ensure a fair trial, and in any event the court may relax the reporting restrictions where it is appropriate in the circumstances of the case. The Bill is in conformity with the Basic Law, including provisions concerning human rights.

27. The Bill has no economic, civil service, productivity, environmental, sustainability, family, or gender implications. The Bill has financial implications as set out in **Annex C**.

28. The Bill will not affect the current binding effect of the CPO.

⁷ Article 11(6) of the Hong Kong Bill of Rights, which corresponds to Article 14(7) of the International Covenant on Civil and Political Rights, provides that “[n]o 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 Hong Kong”. Article 5 of the HK National Security Law also provides, amongst others: “任何人已經司法程序被最終確定有罪或者宣告無罪的，不得就同一行為再予審判或者懲罰。” (Translation: No one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in judicial proceedings). Where the law provides for a mechanism for the prosecuting authorities to appeal against an acquittal and the time for appeal has not expired, the acquitted person has not been “finally acquitted” in accordance with the law, and hence the aforesaid provisions are simply not engaged.

CONSULTATION

No Case to Answer Appeal Proposal

D 29. In January 2023, a consultation paper at **Annex D** was sent to various stakeholders for consultation on the No Case to Answer Appeal Proposal. The Government received submissions from respondents including those from the two legal professional bodies and two law schools which provided comments and suggestions referred to in paragraph 30 below, a number of Government Departments including those responsible for law enforcement, and one other organization. On the whole, most respondents supported the legislative proposal. They welcomed it as timely, reasonable and necessary.

30. In terms of implementation, The Law Society of Hong Kong and the University of Hong Kong commented that it is not appropriate to adopt the provisions of Part 9 of the UK Act entirely. Also, since the legislative proposal is confined to appeals against no-case rulings, a much simpler implementation than that of Part 9 of the UK Act may be warranted. The Hong Kong Bar Association, The Law Society of Hong Kong, the University of Hong Kong and the City University of Hong Kong have also provided some comments on the technical aspects regarding the implementation of the new appeal mechanism.

31. The LegCo's Panel on Administration of Justice and Legal Services ("AJLS Panel") was briefed on the consultation exercise and the key features of the legislative proposal at its meeting on 27 February 2023. Members of the Panel indicated support.

NSL 46 Appeal Proposal

E 32. In April 2023, a consultation paper at **Annex E** was sent to various stakeholders, including the two legal professional bodies and law schools, for consultation on the NSL 46 Appeal Proposal. For those respondents who provided a substantive reply, on the whole, they were supportive of the legislative proposal. In particular, the respondents generally agreed that there is an anomaly as described in paragraph 9 above following the creation of a new mode of trial for cases concerning offences endangering national security in the CFI, and that the interests of justice are served by providing the prosecution with an avenue of appeal to correct any erroneous acquittal given by a three-judge panel, similar to the position in respect of prosecution appeals against acquittals arising from District Court and Magistrates' Courts trials.

33. We briefed the AJLS Panel on the NSL 46 Appeal Proposal on 22 May 2023. Members of the Panel indicated support.

PUBLICITY

34. A press release will be issued on 23 May 2023. A spokesperson will be made available for answering media enquiries.

ENQUIRY

35. Any enquiry on this brief can be addressed to Ms Lorraine Chan, Senior Assistant Solicitor General (Policy Affairs) 2 at Tel. No. 3918 4108.

Department of Justice
May 2023

#583860v3

Criminal Procedure (Amendment) Bill 2023

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A BILL

To

Amend the Criminal Procedure Ordinance to introduce mechanisms, and provide for the procedures, for the Secretary for Justice to appeal against rulings that a defendant has no case to answer made by the Court of First Instance in criminal trials with a jury, and against verdicts or orders of acquittal given in cases concerning offences endangering national security tried in the Court of First Instance without a jury by a panel of 3 judges; to make minor technical amendments to the Ordinance and its subsidiary legislation; and to provide for related matters.

Enacted by the Legislative Council.

Part 1

Preliminary

1. Short title and commencement

- (1) This Ordinance may be cited as the Criminal Procedure (Amendment) Ordinance 2023.
- (2) Subject to subsection (3), this Ordinance comes into operation on the day on which it is published in the Gazette.
- (3) Sections 4, 7 and 9 and Part 2 of the Schedule come into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette.

2. Enactments amended

The enactments specified in Parts 2 and 3 and the Schedule are amended as set out in those Parts and that Schedule.

Part 2**Amendments to Criminal Procedure Ordinance (Cap. 221)****3. Section 80 amended (meaning of sentence)**

(1) Section 80, heading—

Repeal

“Meaning of sentence”

Substitute

“Interpretation of Part IV”.

(2) Section 80(1), Chinese text, definition of ~~刑罰~~—

Repeal

“內。”

Substitute

“內；”。

(3) Section 80(1)—

Add in alphabetical order

“*HK National Security Law* (《香港國安法》) means the Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (a translation of “《中華人民共和國香港特別行政區維護國家安全法》”), as applied in the Hong Kong Special Administrative Region under the Promulgation of National Law 2020 (L.N. 136 of 2020);”.

4. Part IV, Division 3 added

Part IV, after section 81—

Add**“Division 3—Appeal against Ruling of No Case to Answer****81AA. Interpretation of Division 3**

(1) In this Division—

acquittal guarantee (無罪保證)—see section 81AAD;*ruling* (判定) includes a decision, determination, direction, finding, notice, order, refusal, rejection or requirement;*Secretary* (司長) means the Secretary for Justice;*specified ruling* (指明判定)—see section 81AAC(1);*subject offence* (標的罪行)—see section 81AAC(2).

(2) If 2 or more defendants are charged jointly with the same offence, this Division applies as if the offence, so far as it relates to each of those defendants, were a separate offence for each defendant so that a reference in this Division to a ruling that relates to one or more offences includes a ruling that relates to one or more of those separate offences.

81AAB. Application of Division 3

This Division does not apply in relation to a case concerning offences endangering national security tried in the court without a jury by a panel of 3 judges under Article 46 of the HK National Security Law.

81AAC. Appeal against specified rulings

- (1) This section applies if the court makes a ruling during a trial that a defendant has no case to answer in relation to one or more offences (*specified ruling*).
- (2) The Secretary may, with the leave of the court or the Court of Appeal, appeal to the Court of Appeal against the specified ruling in relation to any of the offences (*subject offence*).
- (3) For the purpose of making an appeal under subsection (2), the Secretary must do all the acts specified in subsection (4) as soon as practicable after—
 - (a) the specified ruling is made; or
 - (b) if an adjournment is granted by the court under subsection (6)—the expiry of the period of adjournment.
- (4) The acts are—
 - (a) informing the court that the Secretary intends to appeal against the specified ruling;
 - (b) if the specified ruling is made in relation to 2 or more offences—informing the court which one or more of the offences are to be the subject offences; and
 - (c) giving an acquittal guarantee in relation to the appeal.
- (5) If the Secretary requires more time to consider whether to appeal against the specified ruling, the Secretary may, as soon as practicable after the specified ruling is made, request an adjournment to do so.
- (6) If a request is made by the Secretary under subsection (5), the court must grant an adjournment until at least the next business day.

(7) On informing the court of the intention to appeal under subsection (4)(a), the Secretary may also include another ruling made by the court as the subject of the appeal if that other ruling also relates to the subject offence.

(8) In subsection (6)—

business day (工作日) means a day other than a closure day as defined by section 71(2) of the Interpretation and General Clauses Ordinance (Cap. 1).

81AAD. Acquittal guarantee

- (1) For the purposes of section 81AAC(4)(c), an acquittal guarantee is given by the Secretary in relation to the appeal when the Secretary informs the court of the matter specified in subsection (2).
- (2) The matter is that the Secretary agrees that the defendant charged with the subject offence is to be acquitted of the offence if—
 - (a) leave to appeal against the specified ruling is not granted; or
 - (b) whether or not leave to appeal against the specified ruling is granted—the appeal is abandoned by the Secretary before it is determined by the Court of Appeal.
- (3) If either of the conditions of the acquittal guarantee mentioned in subsection (2)(a) and (b) is met, the court or the Court of Appeal (as the case requires) must order that the defendant be acquitted of the subject offence.

81AAE. Specified ruling to have no effect pending appeal

- (1) If the Secretary requests an adjournment under section 81AAC(5) to consider whether to appeal against a

specified ruling, the specified ruling is to have no effect until the expiry of the period of adjournment.

- (2) If the Secretary informs the court under section 81AAC(4)(a) that the Secretary intends to appeal against a specified ruling in relation to a subject offence, the specified ruling is to have no effect in relation to the subject offence until the appeal is determined by the Court of Appeal or abandoned by the Secretary in relation to that offence.
- (3) To avoid doubt, if a specified ruling has no effect under this section—
 - (a) any consequences of the ruling are also to have no effect;
 - (b) the court may not take any steps in consequence of the ruling; and
 - (c) even if the court has taken any steps, they are also to have no effect.

81AAF. Expedited and non-expedited appeals

- (1) If the Secretary informs the court under section 81AAC(4)(a) that the Secretary intends to appeal against a specified ruling, the court must decide whether or not the appeal is to be expedited.
- (2) If the court decides that the appeal is to be expedited, it may order an adjournment.
- (3) If the court decides that the appeal is not to be expedited, it may—
 - (a) order an adjournment; or
 - (b) discharge the jury of the trial concerned.
- (4) The decision of the court to expedite an appeal may be reversed by the court or the Court of Appeal and, if the

decision is reversed, the court may act as mentioned in subsection (3)(a) or (b).

81AAG. Continuation of proceedings for offences not affected by appeal

If—

- (a) a trial mentioned in section 81AAC(1) is instituted for 2 or more offences; and
- (b) one or more of the offences (*other offences*) are not the subject offences,

the trial or any proceedings relating to the trial may be continued in relation to those other offences.

81AAH. Determination of appeal by Court of Appeal

- (1) On an appeal under section 81AAC, the Court of Appeal may confirm, reverse or vary the ruling that is the subject of the appeal.
- (2) However, the Court of Appeal may only reverse or vary a ruling if it is satisfied that the ruling involved an error of law or principle.
- (3) If the Court of Appeal confirms a specified ruling made in relation to an offence, it must order that the defendant be acquitted of that offence.
- (4) If the Court of Appeal reverses or varies a specified ruling made in relation to an offence, it must order that—
 - (a) the proceedings for that offence be resumed in the court;
 - (b) the defendant may be retried in the court for that offence; or
 - (c) the defendant be acquitted of that offence.

- (5) However, the Court of Appeal may not make an order under subsection (4)(c) unless it considers that the defendant could not receive a fair trial if an order is made under subsection (4)(a) or (b).
- (6) The Court of Appeal may also give all such necessary and consequential directions as it considers appropriate.

81AAI. Restrictions on reports of proceedings relating to appeals under this Division

- (1) This section applies if the court makes a specified ruling in relation to a defendant during a trial.
- (2) Subject to subsections (3) and (4), a person must not publish in Hong Kong a written report, or broadcast in Hong Kong a report, of—
 - (a) any steps taken under section 81AAC, 81AAD, 81AAF or 81AAH for the purpose of an appeal under section 81AAC against the specified ruling;
 - (b) the application of section 81AAE in relation to the specified ruling;
 - (c) an appeal under section 81AAC against the specified ruling;
 - (d) an appeal under section 31 of the Hong Kong Court of Final Appeal Ordinance (Cap. 484) against an order made by the Court of Appeal under section 81AAH(3) or (4) in relation to the specified ruling;
 - (e) an application for leave to appeal for an appeal mentioned in paragraph (c) or (d); or
 - (f) any order or direction made by the court, the Court of Appeal or the Court of Final Appeal in relation to an appeal mentioned in paragraph (c) or (d) or an

- application for leave to appeal mentioned in paragraph (e).
- (3) Subsection (2) does not apply if the report is published or broadcast after the conclusion of the trial, or any retrial ordered under section 81AAH(4)(b), of the defendant or any other defendant in the trial (whichever is the latest).
- (4) Subsection (2) does not apply to a report that only contains one or more of the following matters—
- (a) the identity of the court and the name of the judge;
 - (b) the names of the defendant and witness;
 - (c) the offence with which the defendant is charged;
 - (d) the names of counsel and solicitor in the proceedings;
 - (e) if the proceedings are adjourned—the date and place to which they are adjourned;
 - (f) any arrangements as to bail;
 - (g) whether, for the purpose of the proceedings, representation was provided to the defendant or any of the defendants under the Legal Aid in Criminal Cases Rules (Cap. 221 sub. leg. D).
- (5) If a report is published or broadcast in contravention of subsection (2), each of the following persons commits an offence—
- (a) for a publication of a written report as part of a newspaper or periodical publication—the proprietor, editor, publisher or distributor of the newspaper or publication;
 - (b) for a publication of a written report otherwise than as part of a newspaper or periodical publication—the person who publishes or distributes it;

- (c) for a broadcast of a report in a programme—
 - (i) the person who transmits or provides the programme; or
 - (ii) the person who has functions in relation to the programme that correspond to those of the editor of a newspaper or periodical publication.
- (6) A person who commits an offence under subsection (5) is liable on conviction to a fine at level 5 and to imprisonment for 6 months.
- (7) Proceedings for an offence under this section must not be instituted without the consent of the Secretary.
- (8) In this section—

broadcast (廣播) means sounds or visual images broadcast by wireless telegraphy, or by means of a high frequency distribution system over wires, or other paths provided by a material substance and intended for general reception;

publish (發布), in relation to a report, means publish the report, either by itself or as part of a newspaper or periodical publication, for distribution to the public.

81AAJ. Court may relax restrictions on reports

- (1) The court, the Court of Appeal or the Court of Final Appeal may order that section 81AAI(2) is not to apply, or is not to apply to a specified extent, to a report of any proceedings before it.
- (2) If the court, the Court of Appeal or the Court of Final Appeal intends to make an order under subsection (1), the defendant in the proceedings concerned may make an objection against the making of the order.

- (3) If a defendant makes an objection under subsection (2), the court, the Court of Appeal or the Court of Final Appeal (as the case requires) may only make the order if it is satisfied, after considering the representations of the defendant, that it is in the interests of justice to do so.
- (4) If an order is made under subsection (3), the order is not to apply to the extent that a report deals with any of the objections or representations.”.

5. **Part IV, Division 6 added**

Part IV, after section 81D—

Add

“Division 6—Appeal by Way of Case Stated

81DA. Appeal by way of case stated against verdict of acquittal given by the court without jury

- (1) This section applies if—
 - (a) the court tries a case concerning offences endangering national security without a jury by a panel of 3 judges under Article 46 of the HK National Security Law; and
 - (b) the court gives a verdict or order of acquittal (including an order quashing or dismissing a charge for an alleged defect in the charge or for want of jurisdiction) in relation to a defendant in the case.
- (2) The Secretary for Justice (*Secretary*) may appeal to the Court of Appeal against the verdict or order.
- (3) The appeal may only relate to matters of law.
- (4) For the purpose of making an appeal under subsection (2), the Secretary must make an application in writing to the

- court requesting the court to state a case for the opinion of the Court of Appeal.
- (5) An application under subsection (4) may only be made before the expiry of the following period—
 - (a) within 14 clear days after the reasons for the verdict or order have been recorded; or
 - (b) if the Court of Appeal extends the period mentioned in paragraph (a) before or after the expiry of the period—within the extended period.
 - (6) If the Secretary makes an application under subsection (4) before the expiry of the period specified in subsection (5), the court must state the case.
 - (7) A case stated under subsection (6) must set out—
 - (a) the facts and the grounds on which the verdict or order was arrived at or given; and
 - (b) the grounds on which the verdict or order is questioned.
 - (8) Sections 106, 107, 108 and 109 of the Magistrates Ordinance (Cap. 227) (*applicable provisions*) apply, with necessary modifications, to the preparation and amendment of the case stated and the setting down of the appeal.
 - (9) Without limiting subsection (8), the applicable provisions apply with the following modifications—
 - (a) a reference to “magistrate” in the applicable provisions is a reference to the court; and
 - (b) a reference to “judge” in the applicable provisions is a reference to the Court of Appeal.

81DB. Defendant may be detained in custody or admitted to bail immediately after verdict of acquittal

- (1) If, immediately after the court gives a verdict or order mentioned in section 81DA(1)(b) in relation to a defendant, the Secretary for Justice informs the court that the Secretary intends to appeal against the verdict or order under section 81DA(2), the court may—
 - (a) on the application of the Secretary, order that the defendant be detained in custody pending the determination of the appeal by the Court of Appeal; or
 - (b) admit the defendant to bail.
- (2) To avoid doubt, subsection (1) is subject to Article 42 of the HK National Security Law.

81DC. Court of Appeal may issue warrant for arrest of respondent

- (1) If the Secretary for Justice makes an application under section 81DA(4) for the purpose of making an appeal under section 81DA(2), the Court of Appeal may, on application made by the Secretary in chambers, issue a warrant addressed to police officers directing that the respondent of the appeal be arrested and brought before the Court of Appeal.
- (2) If the respondent is arrested under subsection (1), the Court of Appeal may—
 - (a) order that the respondent be detained in custody pending the determination of the appeal by the Court of Appeal; or
 - (b) admit the respondent to bail.
- (3) To avoid doubt, subsection (2) is subject to Article 42 of the HK National Security Law.

81DD. Determination of appeal by Court of Appeal

- (1) On an appeal against a verdict or order under section 81DA, whether or not the respondent of the appeal appears at the hearing of the appeal, the Court of Appeal—
 - (a) if it is satisfied that there is no sufficient ground for interfering with the verdict or order—must dismiss the appeal; or
 - (b) if it is satisfied that there are sufficient grounds for interfering with the verdict or order—must reverse the verdict or order, and direct that—
 - (i) the trial in which the verdict or order is given in relation to the respondent be resumed in the court; or
 - (ii) the respondent be retried in the court.
- (2) The Court of Appeal may also give all such necessary and consequential directions as it considers appropriate.”

6. Section 83Y amended (powers of Court of Appeal under Part IV which are exercisable by single judge)

- (1) After section 83Y(2)(b)—

Add

“(ba) to extend the period within which an application may be made under section 81DA(4);”.
- (2) After section 83Y(2)(e)—

Add

“(ea) to issue a warrant under section 81DC(1);
(eb) to order that a respondent be detained in custody or admitted to bail under section 81DC(2);”.
- (3) Section 83Y(2)—

Repeal paragraph (i).

Part 3

Related Amendments to Costs in Criminal Cases Ordinance (Cap. 492)

7. **Section 9AA added**

After section 9—

Add

“9AA. Defence costs on unsuccessful appeal against ruling of no case to answer

If the Secretary for Justice informs the Court of First Instance under section 81AAC(4)(a) of the Criminal Procedure Ordinance (Cap. 221) that the Secretary intends to appeal against a specified ruling (as defined by section 81AAC(1) of that Ordinance), the Court of Appeal may order that costs be awarded to the defendant if—

- (a) leave to appeal under section 81AAC of that Ordinance against the specified ruling is not granted;
- (b) the appeal is abandoned by the Secretary before it is determined by the Court of Appeal; or
- (c) the Court of Appeal confirms the specified ruling.”.

8. **Section 9A amended (defence costs where Court of Appeal dismisses appeal by way of case stated)**

Section 9A, after “under”—

Add

“section 81DA of the Criminal Procedure Ordinance (Cap. 221) or”.

9. Section 13AA added

After section 13—

Add**“13AA. Prosecution costs on successful appeal against ruling of no case to answer**

If an appeal is made under section 81AAC of the Criminal Procedure Ordinance (Cap. 221) against a specified ruling (as defined by section 81AAC(1) of that Ordinance), the Court of Appeal may order that costs be awarded to the Secretary for Justice if the Court of Appeal reverses or varies the specified ruling.”.

10. Section 13A amended (prosecution costs where Court of Appeal allows appeal by way of case stated)

Section 13A, after “under”—

Add

“section 81DA of the Criminal Procedure Ordinance (Cap. 221) or”.

Schedule

[s. 2]

Minor Technical Amendments to Criminal Procedure Ordinance (Cap. 221) and its Subsidiary Legislation**Part 1****Repeal of Cross-headings in, and Addition of Division Headings to, Part IV of Criminal Procedure Ordinance (Cap. 221)****1. Cross-heading before section 80 repealed**

Cross-heading before section 80—

Repeal the cross-heading.**2. Part IV, Division 1 heading added**

Before section 80—

Add**“Division 1—Interpretation”.****3. Cross-heading before section 81 repealed**

Cross-heading before section 81—

Repeal the cross-heading.**4. Part IV, Division 2 heading added**

Before section 81—

Add

“Division 2—Reservation of Question of Law”.

5. **Cross-heading before section 81A repealed**

Cross-heading before section 81A—

Repeal the cross-heading.

6. **Part IV, Division 4 heading added**

Before section 81A—

Add

**“Division 4—Review of Sentence on the Application of
the Secretary for Justice”.**

7. **Cross-heading before section 81D repealed**

Cross-heading before section 81D—

Repeal the cross-heading.

8. **Part IV, Division 5 heading added**

Before section 81D—

Add

“Division 5—Reference of Question of Law”.

9. **Cross-heading before section 81E repealed**

Cross-heading before section 81E—

Repeal the cross-heading.

10. **Part IV, Division 7 heading added**

Before section 81E—

Add

“Division 7—Appeal against Discharge”.

11. **Cross-heading before section 82 repealed**

Cross-heading before section 82—

Repeal the cross-heading.

12. **Part IV, Division 8 heading added**

Before section 82—

Add

**“Division 8—Appeal against Conviction on
Indictment”.**

13. **Cross-heading before section 83E repealed**

Cross-heading before section 83E—

Repeal the cross-heading.

14. **Part IV, Division 9 heading added**

Before section 83E—

Add

“Division 9—Retrial”.

15. **Cross-heading before section 83G repealed**

Cross-heading before section 83G—

Repeal the cross-heading.

16. **Part IV, Division 10 heading added**

Before section 83G—

Add

“Division 10—Appeal against Sentence”.

- 17.
- Cross-heading before section 83J repealed**

Cross-heading before section 83J—

Repeal the cross-heading.

- 18.
- Part IV, Division 11 heading added**

Before section 83J—

Add

“Division 11—Appeal in Cases of Insanity”.

- 19.
- Cross-heading before section 83M repealed**

Cross-heading before section 83M—

Repeal the cross-heading.

- 20.
- Part IV, Division 12 heading added**

Before section 83M—

Add

“Division 12—Unfitness to Stand Trial”.

- 21.
- Cross-heading before section 83O repealed**

Cross-heading before section 83O—

Repeal the cross-heading.

- 22.
- Part IV, Division 13 heading added**

Before section 83O—

Add

“Division 13—Further Provisions Relating to Appeals and Questions of Law Reserved”.

- 23.
- Cross-heading before section 83P repealed**

Cross-heading before section 83P—

Repeal the cross-heading.

- 24.
- Part IV, Division 14 heading added**

Before section 83P—

Add

“Division 14—Review by Court of Appeal of Cases Tried on Indictment”.

- 25.
- Cross-heading before section 83Q repealed**

Cross-heading before section 83Q—

Repeal the cross-heading.

- 26.
- Part IV, Division 15 heading added**

Before section 83Q—

Add

“Division 15—Procedure from Notice of Appeal to Hearing”.

- 27.
- Cross-heading before section 83U repealed**

Cross-heading before section 83U—

Repeal the cross-heading.

28. Part IV, Division 16 heading added

Before section 83U—

Add

“Division 16—The Hearing”.**29. Cross-heading before section 83W repealed**

Cross-heading before section 83W—

Repeal the cross-heading.

30. Part IV, Division 17 heading added

Before section 83W—

Add

“Division 17—Other Matters Depending on Result of Appeal”.**31. Cross-heading before section 83Y repealed**

Cross-heading before section 83Y—

Repeal the cross-heading.

32. Part IV, Division 18 heading added

Before section 83Y—

Add

“Division 18—Supplementary”.**Part 2****“報道” Substituted for “報導”****Division 1—Amendments to Criminal Procedure Ordinance
(Cap. 221)****33. Section 9P amended (restriction on reports of bail proceedings)**

(1) Section 9P, Chinese text, heading—

Repeal

“報導”

Substitute

“報道”.

(2) Section 9P(1), (2) and (3), Chinese text—

Repeal

“報導” (wherever appearing)

Substitute

“報道”.

(3) Section 9P(5), Chinese text, definition of 發布—

Repeal

“報導” (wherever appearing)

Substitute

“報道”.

**34. Section 16 amended (discharge of accused after committal
without a hearing)**

Section 16(7) and (8), Chinese text—

Repeal

“報導”

Substitute

“報道”。

**Division 2—Amendments to Criminal Procedure (Appeal
against Discharge) Rules (Cap. 221 sub. leg. F)**

35. Rule 6 amended (restrictions on reports of appeals)

(1) Rule 6, Chinese text, heading—

Repeal

“報導”

Substitute

“報道”。

(2) Rule 6(1), (2) and (3), Chinese text—

Repeal

“報導”

Substitute

“報道”。

**Division 3—Amendments to Criminal Procedure
(Applications under Section 16) Rules (Cap. 221 sub. leg. G)**

36. Rule 16 amended (written and broadcast reports)

(1) Rule 16, Chinese text, heading—

Repeal

“報導”

Substitute

“報道”。

(2) Rule 16(1), (2) and (3), Chinese text—

Repeal

“報導”

Substitute

“報道”。

Explanatory Memorandum

The main object of this Bill is to amend the Criminal Procedure Ordinance (Cap. 221) (*Cap. 221*) to introduce mechanisms, and provide for the procedures, for the Secretary for Justice (*Secretary*) to appeal against—

- (a) rulings that a defendant has no case to answer made by the Court of First Instance (*CFI*) in criminal trials with a jury; and
- (b) verdicts or orders of acquittal given in cases concerning offences endangering national security tried in the CFI without a jury by a panel of 3 judges.

2. The Bill contains 3 Parts and a Schedule.

Part 1—Preliminary

3. Clause 1 sets out the short title and provides for commencement.

Part 2—Amendments to Cap. 221

4. Clause 3 amends section 80 of Cap. 221 to add the definition of *HK National Security Law*.

5. Clause 4 adds new Division 3 to Part IV of Cap. 221. In particular—

- (a) the new section 81AA contains the definitions for the interpretation of that new Division, and the new section 81AAB provides for the application of that new Division;
- (b) the new section 81AAC—
 - (i) provides that the Secretary may, with the leave of the CFI or the Court of Appeal (*CA*), appeal to the CA against a ruling of no case to answer made by the CFI during a trial; and

- (ii) provides for the steps to be taken by the Secretary for making the appeal;
 - (c) the new section 81AAD provides for the acquittal guarantee to be given by the Secretary in relation to the appeal;
 - (d) the new section 81AAE provides that a ruling of no case to answer is to have no effect pending the appeal;
 - (e) the new section 81AAF requires the CFI to decide whether the appeal is to be expedited;
 - (f) the new section 81AAG provides that the trial or any related proceedings may be continued in relation to any offence that is not the subject of the appeal;
 - (g) the new section 81AAH provides for the determinations that may be made by the CA in relation to the appeal and the grounds on which the determinations may be made;
 - (h) the new section 81AAI imposes restrictions on reporting of proceedings relating to the appeal; and
 - (i) the new section 81AAJ empowers a court to relax the restrictions on reporting in appropriate cases.
6. Clause 5 adds new Division 6 to Part IV of Cap. 221. In particular—
- (a) the new section 81DA—
 - (i) provides that if the CFI tries a case concerning offences endangering national security without a jury by a panel of 3 judges, and the CFI gives a verdict or order of acquittal in relation to a defendant in the case, the Secretary may appeal to the CA by way of case stated against the verdict or order, and that the appeal may only relate to matters of law; and
 - (ii) provides for the content of the case stated and the procedure for the appeal;

- (b) the new section 81DB provides that if, immediately after the CFI gives a verdict or order of acquittal, the Secretary informs the CFI that the Secretary intends to make the appeal, the CFI may order that the defendant be detained in custody or admit the defendant to bail;
 - (c) the new section 81DC empowers the CA to issue a warrant directing that the respondent of the appeal be arrested and to order that the respondent be detained in custody or admit the respondent to bail; and
 - (d) the new section 81DD provides for the determinations that may be made by the CA for the appeal.
7. Clause 6 consequentially amends section 83Y of Cap. 221 so that certain new powers of the CA under the new Division 6 of Part IV of Cap. 221 may be exercised by a single judge.

Part 3—Related Amendments to Costs in Criminal Cases Ordinance (Cap. 492) (Cap. 492)

8. Clauses 7 and 9 add new sections 9AA and 13AA respectively to Cap. 492 to empower the CA to order that costs of an appeal against a ruling of no case to answer under the new section 81AAC of Cap. 221 be awarded to the defendant or the Secretary (as the case requires).
9. Clauses 8 and 10 amend sections 9A and 13A of Cap. 492 respectively to provide for costs of an appeal by way of case stated under the new section 81DA of Cap. 221.

Schedule

10. The Schedule makes minor technical amendments to Cap. 221 and its subsidiary legislation.

Interpretation

80. Meaning of sentence

(1) In this Part—

sentence (刑罰), in relation to an offence, includes any order made by a court in dealing with an offender, including a hospital order. (*Amended 20 of 1979 s. 3*)

(2) Any power of the Court of Appeal to pass a sentence includes a power to make a recommendation for deportation under section 21 of the Immigration Ordinance (Cap. 115).

(*Replaced 34 of 1972 s. 15*)
[*cf. 1968 c. 19 s. 50 U.K.*]

Supplementary

83Y. Powers of Court of Appeal under Part IV which are exercisable by single judge

(1) The powers of the Court of Appeal under this Part which are specified in subsection (2) and the power to give directions under section 156(5) of the Crimes Ordinance (Cap. 200) may be exercised by a single judge in the same manner as they may be exercised by the Court of Appeal and subject to the same provisions. (*Amended 25 of 1978 s. 5*)

(2) The said powers are the following—

- (a) to give leave to appeal;
- (b) to extend the time within which notice of appeal or of application for leave to appeal may be given;
- (c) to allow an appellant to be present at any proceedings;
- (d) to order a witness to attend for examination;
- (e) to admit an appellant to bail;
- (f) to make orders under section 83F(2) and discharge or vary such orders;
- (g) to give directions under section 83W(1);
- (h) to give leave to apply for the review of a sentence under section 81A;
- (i) to make orders under section 83XX for the payment of costs; (*Added 2 of 1978 s. 4*)

- (j) to order a respondent to be detained in custody under section 81A(3). (*Added 20 of 1979 s. 8*)
- (3) If the single judge refuses an application on the part of an appellant or applicant to exercise in his favour any of the powers above specified, the appellant or applicant shall be entitled to have the application determined by the Court of Appeal.
- (4) The references in this section to a single judge are to a single judge of the Court of Appeal or of the Court of First Instance. (*Added 29 of 1978 s. 2. Amended 25 of 1998 s. 2*)
- (Added 34 of 1972 s. 18)*
[cf. 1968 c. 19 s. 31 U.K.]

9A. Defence costs where Court of Appeal dismisses appeal by way of case stated

If the Court of Appeal dismisses an appeal under section 84 of the District Court Ordinance (Cap. 336), the Court of Appeal may order that costs be awarded to the defendant.

(Added 23 of 2002 s. 9)

13A. Prosecution costs where Court of Appeal allows appeal by way of case stated

If on hearing an appeal under section 84 of the District Court Ordinance (Cap. 336), the Court of Appeal reverses the verdict or order of acquittal, the Court of Appeal may order that costs be awarded to the prosecutor.

(Added 23 of 2002 s. 10)

Interpretation

80. Meaning of sentence

(1) In this Part—

sentence (刑罰), in relation to an offence, includes any order made by a court in dealing with an offender, including a hospital order. (*Amended 20 of 1979 s. 3*)

(2) Any power of the Court of Appeal to pass a sentence includes a power to make a recommendation for deportation under section 21 of the Immigration Ordinance (Cap. 115).

(*Replaced 34 of 1972 s. 15*)
[*cf. 1968 c. 19 s. 50 U.K.*]

Reservation of question of law

81. Power to reserve question of law for consideration of Court of Appeal

(1) The judge of the court of trial may reserve for the consideration of the Court of Appeal any question of law which may arise on the trial of any indictment.

(2) In exercising his power under subsection (1), the judge may act either of his own motion or on the application of the Secretary for Justice or the defence. (*Amended L.N. 362 of 1997*)

(3) A judge may, if he reserves a question of law under subsection (1) and the accused person has been convicted—

(a) postpone judgment until the question has been considered and decided; and

(b) commit the person convicted to prison or admit him to bail, with or without one or more sufficient sureties, and in such sum as he may think fit, conditioned to appear at such time or times as the judge may direct and receive judgment.

(4) Upon consideration of a question reserved under subsection (1), the Court of Appeal may—

(a) affirm or quash the conviction or order a new trial; and

(b) make such other orders as may be necessary to give effect to its decision:

Provided that the Court of Appeal may, notwithstanding that it is of opinion that the question so reserved might be decided in favour of the convicted person, affirm the conviction if it considers that no miscarriage of justice has actually occurred.

(Replaced 34 of 1972 s. 15)

Review of sentence on the application of the Secretary for Justice

81A. Application by Secretary for Justice for review of sentence

- (1) The Secretary for Justice may, with the leave of the Court of Appeal, apply to the Court of Appeal for the review of any sentence (other than a sentence which is fixed by law) passed by any court, other than the Court of Appeal, on the grounds that the sentence is not authorized by law, is wrong in principle or is manifestly excessive or manifestly inadequate. *(Amended L.N. 362 of 1997)*
- (2) An application under subsection (1) shall—
 - (a) be in writing signed by the Secretary for Justice; *(Amended L.N. 362 of 1997)*
 - (b) be accompanied by the documents, or copies of the documents, specified in subsection (2A);
 - (c) be filed with the Registrar within 21 days, or within such further time as the Court of Appeal may allow, after the date on which the sentence was passed or any proceedings for the review, under section 104 of the Magistrates Ordinance (Cap. 227), of the sentence or of the conviction on which the sentence was passed, were withdrawn or disposed of. *(Amended 20 of 1979 s. 4)*
- (2A) The following documents are specified for the purpose of subsection (2)(b)—
 - (a) in the case of a sentence passed by a magistrate, a statement of the facts found by him or admitted before him and of the reasons for the sentence;
 - (b) in the case of a sentence passed by a District Judge, the statement of the reasons for the verdict placed on record in accordance with section 80 of the District Court Ordinance (Cap. 336) and a statement of the reasons for the sentence;
 - (c) in the case of a sentence passed by a judge of the High Court, the record of the whole of the proceedings before him other than the evidence given in any trial that took place in those proceedings; *(Amended 25 of 1998 s. 2)*

- (d) in any case, any report concerning the respondent which was before the court which passed the sentence. (*Added 20 of 1979 s. 4*)
- (2B) The documents, or copies of the documents, specified in subsection (2A) shall be delivered to the Secretary for Justice within 7 days of a request therefor being made in writing to the magistrate or District Judge who passed the sentence or, if the sentence was passed by a judge of the High Court, to the Registrar. (*Added 20 of 1979 s. 4. Amended L.N. 362 of 1997; 25 of 1998 s. 2*)
- (3) The Court of Appeal may order a respondent to be detained in custody until an order has been made under section 81B(1).
- (4) The Court of Appeal may, if it seems fit, on the application of a respondent, admit the respondent to bail pending the hearing of the application.
- (5) The Court of Appeal may, if it refuses an application, award against the Secretary for Justice such amount of costs as it may determine, save that the amount shall not, if the respondent is legally aided, exceed the total of the contributions which he is liable to make. (*Amended L.N. 362 of 1997*)
- (6) In this section and sections 81B and 81C—
- respondent** (答辯人) means a person on whom a sentence has been passed.

(Added 18 of 1972 s. 2. Amended 20 of 1979 s. 4)
[cf. N.Z. Crimes Act 1961 s. 383]

Reference of question of law

81D. Reference to Court of Appeal of question of law following acquittal

- (1) Where a person tried on indictment has been acquitted (whether in respect of the whole or part of the indictment) the Secretary for Justice may, if he desires the opinion of the Court of Appeal on a question of law which has arisen in the case, refer that question to the Court of Appeal which shall, in accordance with this section, consider the point and give its opinion on it. (*Amended L.N. 362 of 1997*)
- (2) For the purpose of its consideration of a question referred to them under this section the Court of Appeal shall hear argument—
- (a) by, or by counsel on behalf of, the Secretary for Justice; (*Amended L.N. 362 of 1997*)

- (b) if the acquitted person desires to present any argument, by counsel on his behalf or, with the leave of the Court of Appeal, by the acquitted person himself; and
 - (c) if the Court of Appeal so directs, by counsel appointed as amicus curiae by the Registrar.
- (3) Where, on a question being referred to the Court of Appeal under this section, the acquitted person appears by counsel for the purpose of presenting any argument to the Court of Appeal, he shall be entitled to his costs, that is to say to the payment out of the general revenue of such sums as are reasonably sufficient to compensate him for any expenses properly incurred by him for the purpose of being represented on the reference; and any amount recoverable under this subsection shall be ascertained as soon as practicable by the Registrar.
- (4) A reference under this section shall not affect the trial in relation to which the reference is made or any acquittal in that trial.

(Added 20 of 1979 s. 7)
[cf. 1972 c. 71 s. 36 U.K.]

Appeal against a discharge

(Amended 57 of 1988 s. 31)

81E. Appeal to Court of Appeal following discharge

- (1) Where any person has been discharged under section 16 or 79G or under section 22 of the Complex Commercial Crimes Ordinance (Cap. 394), the Secretary for Justice may appeal to the Court of Appeal against that person's discharge. *(Amended 57 of 1988 s. 32; 69 of 1995 s. 4; L.N. 362 of 1997)*
- (2) The appeal may be—
- (a) on any ground which involves a question of law;
 - (b) on the ground that the documents and evidence before the court were sufficient to establish a prima facie case against the accused for the offence set out in the charge or for any other offence for which he might be convicted upon that charge.
- (3) The Court of Appeal may, if it allows an appeal under this section, quash the acquittal of the accused and order him to be tried.
- (4) The Court of Appeal may, in ordering a trial, make such orders as appear to it to be necessary for the custody, or admission to bail, of the person ordered to be tried.

- (5) The provisions of section 81D(2) and (3) shall apply to an appeal under this section as they do to an appeal under section 81D(1).

(Added 48 of 1983 s. 4)

Appeal against conviction on indictment

82. Right of appeal

- (1) A person convicted of an offence on indictment may appeal to the Court of Appeal against his conviction.
- (2) The appeal may be—
- (a) on any ground which involves a question of law alone; and
 - (b) with the leave of the Court of Appeal, on any ground which involves a question of fact alone, or a question of mixed law and fact, or on any other ground which appears to the Court of Appeal to be a sufficient ground of appeal;

but if the judge of the court of trial grants a certificate that the case is fit for appeal on a ground which involves a question of fact, or a question of mixed law and fact, an appeal lies under this section without the leave of the Court of Appeal.

(Replaced 34 of 1972 s. 18)
[cf. 1968 c. 19 s. 1 U.K.]

Retrial

83E. Power to order retrial

- (1) Where the Court of Appeal allows an appeal against conviction and it appears to the Court of Appeal that the interests of justice so require, it may order the appellant to be retried.
- (2) A person shall not under this section be ordered to be retried for any offence other than—
- (a) the offence of which he was convicted at the original trial and in respect of which his appeal is allowed as mentioned in subsection (1);
 - (b) an offence of which he could have been convicted at the original trial on an indictment for the first-mentioned offence; or

- (c) an offence charged in an alternative count of the indictment in respect of which the jury were discharged from giving a verdict in consequence of convicting him of the first-mentioned offence.

(Added 34 of 1972 s. 18)
[cf. 1968 c. 19 s. 7 U.K.]

Appeal against sentence

83G. Appeal against sentence following conviction on indictment

A person who has been convicted of an offence on indictment may appeal to the Court of Appeal against any sentence (not being a sentence fixed by law) passed on him for the offence, whether passed on his conviction or in subsequent proceedings.

(Added 34 of 1972 s. 18)
[cf. 1968 c. 19 s. 9 U.K.]

Appeal in cases of insanity

83J. Appeal against verdict of not guilty by reason of insanity

A person in whose case there is returned a verdict of not guilty by reason of insanity may appeal to the Court of Appeal against the verdict—

- (a) on any ground of appeal which involves a question of law alone; and
- (b) with the leave of the Court of Appeal, on any ground which involves a question of fact alone, or question of mixed law and fact, or on any other ground which appears to the Court of Appeal to be a sufficient ground of appeal,

but if the judge of the court of trial grants a certificate that the case is fit for appeal on a ground which involves a question of fact, or a question of mixed law and fact, an appeal lies under this section without the leave of the Court of Appeal.

(Added 34 of 1972 s. 18)
[cf. 1968 c. 19 s. 12 U.K.]

Unfitness to stand trial

83M. Right of appeal against finding of disability

- (1) Where there has been a determination under section 75 of the question of a person's fitness to be tried, and the jury has returned a finding that he is under disability, the person may appeal to the Court of Appeal against the finding.
- (2) An appeal under this section may be—
 - (a) on any ground of appeal which involves a question of law alone; and
 - (b) with the leave of the Court of Appeal, on any ground which involves a question of fact alone, or a question of mixed law and fact, or on any other ground which appears to the Court of Appeal to be a sufficient ground of appeal,

but if the judge of the court of trial grants a certificate that the case is fit for appeal on a ground which involves a question of fact, or a question of mixed law and fact, an appeal lies under this section without the leave of the Court of Appeal.
- (3) Subject to subsection (4), section 75(6) and (7) shall apply to this section as it applies to section 75. *(Added 37 of 1996 s. 6)*
- (4) Without prejudice to the operation of sections 105 and 113 of the Magistrates Ordinance (Cap. 227), this section shall not apply to a determination under section 75 made by a magistrate. *(Added 37 of 1996 s. 6)*

(Added 34 of 1972 s. 18)
[cf. 1968 c. 19 s. 15 U.K.]

Further provisions relating to appeals and questions of law reserved

83O. Prohibition of staying or reversal of judgment or allowing appeal on specified grounds

Except where, in the opinion of the Court of Appeal, a miscarriage of justice has actually occurred, no judgment shall be stayed or reversed under section 81 and no appeal shall be allowed under section 83, 83K or 83N—

- (a) on the ground of any defect which, if pointed out before the jury were empanelled or during the progress of the trial, might have been amended by the court of trial; or
- (b) because of any error committed in summoning or swearing a juror; or
- (c) because of any objection which might have been stated as a ground of challenge of a juror; or
- (d) because of any informality in the swearing of a witness.

(Added 34 of 1972 s. 18)

Review by Court of Appeal of cases tried on indictment

83P. Reference by Chief Executive

- (1) Where a person has been convicted on indictment or been tried on indictment and found not guilty by reason of insanity, or been found by a jury to be under disability, the Chief Executive may, if he thinks fit, at any time either—
 - (a) refer the whole case to the Court of Appeal and the case shall then be treated for all purposes as an appeal to the Court of Appeal by that person; or
 - (b) if he desires the assistance of the Court of Appeal on any point arising in the case, refer that point to the Court of Appeal for its opinion thereon, and the Court of Appeal shall consider the point so referred and furnish the Chief Executive with its opinion thereon accordingly.
- (2) A reference by the Chief Executive under this section may be made by him either on an application by the person referred to in subsection (1), or without any such application.
- (3) For the avoidance of doubt, it is hereby declared that this section also applies in a case where an appeal has been heard and determined by the Court of Final Appeal. (*Added 79 of 1995 s. 50*)

(Added 34 of 1972 s. 18. Amended 39 of 1999 s. 3)
[cf. 1968 c. 19 s. 17 U.K.]

Procedure from notice of appeal to hearing

83Q. Initiating procedure

- (1) A person who wishes to appeal under this Part to the Court of Appeal, or to obtain the leave of that Court to appeal, shall give notice of appeal or, as the case may be, notice of application for leave to appeal, in such manner as may be provided by rules and orders made under section 9.

- (2) Notice of appeal, or of application for leave to appeal, shall be given within 28 days from the date of the conviction, verdict or finding appealed against, or, in the case of appeal against sentence, from the date on which sentence was passed, or, in the case of an order made or treated as made on conviction, from the date of the making of the order:
 Provided that, where sentence was passed more than 7 days after the date of conviction, verdict or finding, notice of appeal, or of application for leave to appeal, against the conviction, verdict or finding may be given within 28 days from the date on which sentence was passed.
- (3) The time for giving notice under this section may be extended, either before or after it expires, by the Court of Appeal.
- (4)-(5) *(Repealed 24 of 1993 s. 11)*
- (6) (a) Where a protected prisoner of war or protected internee has been sentenced to imprisonment for a term of 2 years or more, the time within which he must give notice of appeal or of an application for leave to appeal shall, notwithstanding the provisions of subsection (1), be the period from the date of his conviction or, in the case of an appeal against sentence, of his sentence to the expiration of 10 days after the date on which he received a notice given— *(Amended 24 of 1993 s. 11)*
- (i) in the case of a protected prisoner of war, by an officer of Her Majesty's forces;
- (ii) in the case of a protected internee, by or on behalf of the Commissioner of Correctional Services,
- that the protecting power has been notified of his conviction and sentence. *(Replaced L.N. 346 of 1982)*
- (b) For the purposes of this subsection, the expression ***protected prisoner of war*** (受保護的戰俘), ***protected internee*** (受保護的囚犯) and ***the protecting power*** (保護當局) have the meanings assigned to them by the Geneva Conventions Act, 1957, as applied to Hong Kong by the Geneva Conventions Act (Colonial Territories) Order in Council 1959. [*cf. 1968 c. 19 Sch. 5 Part I U.K.*]
- (Added 34 of 1972 s. 18)*
[cf. 1968 c. 19 s. 18 U.K.]

The hearing

83U. Right of appellant to be present

- (1) A defendant shall be entitled to be present at the hearing of an application for leave to appeal and an appeal unless the Court of Appeal, where it considers it necessary in the interests of justice or public order or security to do so, orders otherwise. *(Replaced 79 of 1995 s. 50)*
- (2) *(Repealed 79 of 1995 s. 50)*
- (3) The power of the Court of Appeal to pass sentence on a person may be exercised although he is for any reason not present.

(Added 34 of 1972 s. 18)
[cf. 1968 c. 19 s. 22 U.K.]

Other matters depending on result of appeal

83W. Effect of appeal on sentence

- (1) The time during which an appellant is in custody pending the determination of his appeal shall, subject to any direction which the Court of Appeal may give to the contrary, be reckoned as part of the term of any sentence to which he is for the time being subject.
- (2) Where the Court of Appeal gives a contrary direction under subsection (1), it shall state its reasons for doing so; and it shall not give any such direction where—
 - (a) leave to appeal has been granted; or
 - (b) a certificate has been given by the judge of the court of trial under section 82; or
 - (c) the case has been referred to it by the Chief Executive under section 83P. *(Amended 39 of 1999 s. 3)*
- (3) Where an appellant is admitted to bail under section 83R, the time during which he is at large after being so admitted shall be disregarded in computing the term of any sentence to which he is for the time being subject.
- (4) The term of any sentence passed by the Court of Appeal under section 83A, 83B, 83C, 83I or 83K(4) shall, unless the Court of Appeal otherwise directs, begin to run from the time when it would have begun to run if passed in the proceedings from which the appeal lies.

(Added 34 of 1972 s. 18)
[cf. 1968 c. 19 s. 29 U.K.]

Supplementary

83Y. Powers of Court of Appeal under Part IV which are exercisable by single judge

- (1) The powers of the Court of Appeal under this Part which are specified in subsection (2) and the power to give directions under section 156(5) of the Crimes Ordinance (Cap. 200) may be exercised by a single judge in the same manner as they may be exercised by the Court of Appeal and subject to the same provisions. (*Amended 25 of 1978 s. 5*)
- (2) The said powers are the following—
 - (a) to give leave to appeal;
 - (b) to extend the time within which notice of appeal or of application for leave to appeal may be given;
 - (c) to allow an appellant to be present at any proceedings;
 - (d) to order a witness to attend for examination;
 - (e) to admit an appellant to bail;
 - (f) to make orders under section 83F(2) and discharge or vary such orders;
 - (g) to give directions under section 83W(1);
 - (h) to give leave to apply for the review of a sentence under section 81A;
 - (i) to make orders under section 83XX for the payment of costs; (*Added 2 of 1978 s. 4*)
 - (j) to order a respondent to be detained in custody under section 81A(3). (*Added 20 of 1979 s. 8*)
- (3) If the single judge refuses an application on the part of an appellant or applicant to exercise in his favour any of the powers above specified, the appellant or applicant shall be entitled to have the application determined by the Court of Appeal.
- (4) The references in this section to a single judge are to a single judge of the Court of Appeal or of the Court of First Instance. (*Added 29 of 1978 s. 2. Amended 25 of 1998 s. 2*)

(Added 34 of 1972 s. 18)
[cf. 1968 c. 19 s. 31 U.K.]

9P. Restriction on reports of bail proceedings

- (1) Unless it appears to the court that the interests of public justice otherwise require, no person shall publish in Hong Kong a written report, or broadcast in Hong Kong a report, of any bail proceedings containing any matter other than that permitted under subsection (2).
- (2) A report of bail proceedings may contain—
 - (a) the name of the person being the subject of those proceedings;
 - (b) the offence with which the person being the subject of those proceedings is charged;
 - (c) the identity of the court and the name of the magistrate, District Judge or judge, as the case may be;
 - (d) the names of counsel and solicitors, if any, engaged in the bail proceedings;
 - (e) the result of the bail proceedings and where the person being the subject of those proceedings is admitted to bail subject to any condition under section 9D(2), the details of any such condition;
 - (f) where the bail proceedings are adjourned, the date and place to which they are adjourned.
- (3) If a report is published or broadcast in contravention of this section, the following persons—
 - (a) in the case of publication of a written report as part of a newspaper or periodical publication, any proprietor, editor, publisher or distributor thereof;
 - (b) in the case of a publication of a written report otherwise than as part of a newspaper or periodical publication, the person who publishes or distributes it;
 - (c) in the case of a broadcast of a report, any person who transmits or provides the programme in which the report is broadcast and any person having functions in relation to the programme corresponding to those of the editor of a newspaper or periodical publication,shall be guilty of an offence and shall be liable on conviction to a fine at level 5 and to imprisonment for 6 months.
(Amended E.R. 4 of 2021)

(4) Proceedings for an offence under this section shall not be instituted otherwise than by or with the consent of the Secretary for Justice. (*Amended L.N. 362 of 1997*)

(5) In this section—

broadcast (廣播) means sounds or visual images broadcast by wireless telegraphy or by means of a high frequency distribution system over wires, or other paths provided by a material substance and intended for general reception;

publish (發布), in relation to a report, means publish the report, either by itself or as part of a newspaper or periodical publication, for distribution to the public.

(*Added 56 of 1994 s. 2*)

Discharge of accused

16. Discharge of accused after committal without a hearing

(1) Where the accused was committed for trial under section 80C(4) of the Magistrates Ordinance (Cap. 227) or proceedings stand transferred to the court for trial under section 77A(6) of the District Court Ordinance (Cap. 336), the accused may at any time—

(a) if the Secretary for Justice does not institute proceedings within the period specified in section 14(1)(a) or (aa), as the case may be, after the expiration of that period; or

(b) after the filing of the indictment and prior to his arraignment thereon, (*Amended L.N. 395 of 1983*)

apply to a judge for his discharge on the grounds that the evidence disclosed in the documents handed to the court under section 80C(1) of the Magistrates Ordinance (Cap. 227) or, as the case may be, delivered to the Registrar under section 10A, as read with any further evidence the Secretary for Justice has notified the accused he will seek to have admitted at the trial, is insufficient to establish a prima facie case against him for the offence with which he is charged or for any other offence for which he might be convicted upon that charge. (*Amended 59 of 1992 s. 5; L.N. 362 of 1997*)

(2) If an application is made under subsection (1) in the circumstances specified in paragraph (a) thereof—

(a) the judge may, of his own motion or on the application of the accused, require the Secretary for Justice to file indictment within such time, and on such terms (if any) as to costs as may be specified in the order;

- (b) subject to any order under paragraph (a), the Secretary for Justice may at any time after an application is made under subsection (1), and before the final determination thereof, file an indictment, but the judge may award costs against him if the applicant has incurred any costs by reason of the late filing of the indictment. (*Amended L.N. 362 of 1997*)
- (3) The judge may after perusal of the documents and after hearing any representations which the accused and the Secretary for Justice may wish to make, direct that the accused shall not be arraigned on the charge, and direct that he be discharged. (*Amended L.N. 362 of 1997*)
- (4) Subject to section 81E(3), a discharge under this section shall be deemed to be an acquittal.
- (5) An accused who has made an application under subsection (1) and thereafter abandons or does not proceed with his application, may not make a further application or have the application previously made by him reinstated.
- (6) Where an indictment has been filed references in this section to the charge shall be construed as references to the charge as set out in the indictment.
- (7) Without derogation from the generality of its powers under section 9 the Rules Committee may make rules under that section for regulating and restricting written or broadcast reports of proceedings under this section or section 79G or 81E. (*Amended 13 of 1995 s. 26; 69 of 1995 s. 2*)
- (8) Section 87A(8) and (9) of the Magistrates Ordinance (Cap. 227) shall apply to a contravention of rules under section 9 as read with subsection (7) of this section as they do to a report published or broadcast in contravention of section 87A.

(*Added 48 of 1983 s. 4*)

6. Restrictions on reports of appeals

- (1) Unless the Court of Appeal, on the application of the respondent, otherwise directs, no person shall publish in Hong Kong a written report, or broadcast in Hong Kong a report, of any proceedings on an appeal containing any matter other than that permitted by paragraph (3).
- (2) Notwithstanding paragraph (1), a report of proceedings on an appeal containing matter other than that permitted by paragraph (3) may be published where the Court of Appeal either disallows the appeal or allows the appeal but does not quash the acquittal of the respondent and order him to be tried.
- (3) A report of proceedings on appeal may contain—
 - (a) the identity of the court and the names of the judges thereof;
 - (b) such details concerning the proceedings on the application under section 16 to which the appeal relates as may lawfully be published or broadcast in accordance with the Criminal Procedure (Applications under Section 16) Rules (Cap. 221 sub. leg. G); (*E.R. 6 of 2019*)
 - (c) the grounds of the appeal or a summary thereof;
 - (d) the names of counsel and solicitors engaged in the proceedings;
 - (e) any decision of the Court of Appeal on the disposal of the appeal and, in the event of the Court of Appeal determining that the respondent is to be tried, the charge upon which he is to be tried;
 - (f) where the proceedings on appeal are adjourned, the date to which they are adjourned;
 - (g) whether legal aid was granted to the respondent.

16. Written and broadcast reports

- (1) Unless a judge, on the application of the applicant, otherwise directs, no person shall publish in Hong Kong a written report, or broadcast in Hong Kong a report, of any proceedings on an application containing any matter other than that permitted by paragraph (3).
- (2) Notwithstanding paragraph (1), a report of proceedings on an application containing matter other than permitted by paragraph (3) may be published or broadcast where the judge directs that the accused shall not be arraigned on the charge and directs that he be discharged, and the period within which an appeal against such discharge may be made has expired and no appeal has been made or appeal has been made and it has been abandoned or dismissed.
- (3) A report of proceedings on application may contain—
 - (a) the name of the judge;
 - (b) the offence, or a summary thereof, on which the applicant was committed;
 - (c) the grounds of the application, or a summary thereof;
 - (d) the names of counsel and solicitors engaged in the proceedings;
 - (e) any determination of the judge upon the application;
 - (f) where the proceedings on the application are adjourned, the date and place to which they are adjourned;
 - (g) whether legal aid was granted to the applicant.

FINANCIAL IMPLICATIONS OF THE PROPOSAL

Financial Implications

The proposals stipulated in the Bill may have an impact on the workload of the Judiciary. However, an appeal will not be necessary unless the no-case ruling involves an error of law or principle, or the acquittal by the three-judge panel involved an error of law. Thus, the number of appeals under the new mechanisms is unlikely to be substantial and the workload generated may not be significant.

2. That said, in case the Judiciary cannot absorb the additional workload in the future, it will sort out the necessary financial and manpower resource requirements with the Government and seek resources in accordance with the established mechanism.

Consultation Paper on the Criminal Procedure (Amendment) Bill

INTRODUCTION

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

BACKGROUND

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

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

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

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

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

PURPOSE

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

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

OVERVIEW OF THE PROPOSED BILL

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

I. Scope

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

A. Right of appeal

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

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

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

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

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

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

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

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

B. Level of court and types of trials

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

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

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

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

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

C. Rulings to be heard together

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

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

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

II. Appeal mechanism

A. *Timing of application*

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

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

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

B. *Acquittal guarantee*

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

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

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

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

C. Suspension of effect of ruling

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

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

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

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

D. Expedited and non-expedited appeals

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

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

E. Determination of appeals

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

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

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

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

F. Reversal of rulings

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

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

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

G. Costs

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

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

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

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

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

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

H. Restrictions on reporting

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

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

III. Procedural rules

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

SUMMARY OF THE PROPOSED NEW PROVISIONS

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

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

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

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

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

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

CONSULTATION

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

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

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

Fax: 3918 4799

E-mail: cpo@doj.gov.hk

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

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

Constitutional and Policy Affairs Division
Department of Justice
January 2023

#575460v5A

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



Criminal Justice Act 2003

2003 CHAPTER 44

PART 9

PROSECUTION APPEALS

Introduction

57 Introduction

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

Commencement Information

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

General right of appeal in respect of rulings

58 General right of appeal in respect of rulings

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

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

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

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

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

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

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

Textual Amendments

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

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

Commencement Information

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

59 Expedited and non-expedited appeals

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

Commencement Information

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

60 Continuation of proceedings for offences not affected by ruling

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

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

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

Commencement Information

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

61 Determination of appeal by Court of Appeal

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

Textual Amendments

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

Commencement Information

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

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

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PROSPECTIVE

Right of appeal in respect of evidentiary rulings

62 Right of appeal in respect of evidentiary rulings

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

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

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

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

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

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

63 Condition that evidentiary ruling significantly weakens prosecution case

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

64 Expedited and non-expedited appeals

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

65 Continuation of proceedings for offences not affected by ruling

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

66 Determination of appeal by Court of Appeal

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

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

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

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

Miscellaneous and supplemental

67 Reversal of rulings

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

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

Commencement Information

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

68 Appeals to the House of Lords

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

Commencement Information

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

69 Costs

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

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

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

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

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

Commencement Information

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

70 Effect on time limits in relation to preliminary stages

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

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

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

Commencement Information

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

71 Restrictions on reporting

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

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

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

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

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

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

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

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

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

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

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

Textual Amendments

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

Commencement Information

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

72 Offences in connection with reporting

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

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

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

Commencement Information

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

73 Rules of court

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

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

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

74 Interpretation of Part 9

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

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

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Textual Amendments

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

Commencement Information

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

Status:

This version of this part contains provisions that are prospective.

Changes to legislation:

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

[View outstanding changes](#)

Changes and effects yet to be applied to :

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

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

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

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

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

**Consultation Paper on the
Legislative Proposal to Introduce a Mechanism for
Appeal against Acquittal by the Court of First Instance
Constituted by a Panel of Three Judges for
Cases Concerning Offences Endangering National Security**

INTRODUCTION

The Department of Justice (“**DoJ**”) would like to invite comments on the legislative proposal (“**Proposal**”) which seeks to amend the Criminal Procedure Ordinance (Cap. 221) (“**CPO**”) to introduce a statutory procedure for the prosecution to appeal by way of case stated against a verdict or order of acquittal by the Court of First Instance (“**CFI**”) constituted by a panel of three judges (“**Panel**”) to try a case concerning offences endangering national security without a jury under Article 46 of the Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (“**HK National Security Law**”).

BACKGROUND

Current law on appeal mechanisms for criminal trials generally

2. It is a rule of the common law that any right to appeal must be expressly conferred by legislation. Existing legislation provides for the right of defendants in criminal cases to appeal against conviction and/or sentence at all levels of trial courts, i.e. the magistrates’ courts¹, the District Court (“**DC**”) ² and the CFI³.

¹ Section 113 of the Magistrates Ordinance (Cap. 227) (“**MO**”).

² Sections 82 and section 83G of the CPO, read in conjunction with section 83 of the District Court Ordinance (Cap. 336) (“**DCO**”).

³ Sections 82 and section 83G of the CPO.

3. As regards the prosecution's right to appeal in criminal cases under existing legislation, the Secretary for Justice ("SJ") may appeal against the acquittal by a magistrate⁴ or by the DC⁵ by way of case stated to the CFI or to the Court of Appeal ("CA") respectively, and may apply to the CA for review of any sentence passed by a magistrate and the DC⁶.

4. In *Li Man Wai v Secretary for Justice*⁷, the Court of Final Appeal ("CFA") explained the nature of an appeal by way of case stated (in the context of section 105 of the MO but the principles therein are of general application). An appeal by way of case stated is not an appeal by way of rehearing but a review by the appellate court on the limited ground that there is an error of law or an excess of jurisdiction. Where a magistrate or a judge has come to a conclusion or finding of fact which no reasonable magistrate or judge, applying his/her mind to the proper considerations and giving himself/herself the proper directions, could have come to, this would be regarded as an error of law. Such a conclusion or finding is often described as "perverse". This is the case where the appellate court is satisfied that the magistrate or the judge, in reaching his/her conclusion or finding, has misdirected himself/herself on the facts or misunderstood them, or has taken into account irrelevant considerations or has overlooked relevant considerations. In such a case, the appellate court is entitled to intervene and the magistrate's or judge's conclusion or finding would not be allowed to stand.

5. On the other hand, the prosecution's right to appeal in respect of criminal trials in the CFI is more circumscribed. Currently, the SJ may only appeal against certain decisions of a Judge of the CFI that will effectively result in a defendant's acquittal without undergoing a full trial⁸, and may

⁴ Section 105 of the MO.

⁵ Section 84 of the DCO.

⁶ Section 81A of the CPO.

⁷ *Li Man Wai v Secretary for Justice* (2003) 6 HKCFAR 466.

⁸ Namely, appeal under section 81E of the CPO against a discharge under section 16 of the CPO, and appeal under section 81F of the CPO against an order quashing an indictment under section 53 of the CPO. It may also be noted that the DoJ recently proposed to amend the CPO to provide for a statutory appeal procedure for the prosecution to appeal against rulings of no case to answer by judges of the CFI in criminal trials (see paragraph 17 below).

apply for review of any sentenced passed by the CFI⁹. However, the CPO does not provide for any right of the prosecution to appeal against an acquittal of a defendant after a full trial in the CFI to the CA. The CPO provides for a procedure for the prosecution to refer questions of law arising from such trial to the CA for opinion¹⁰, but the acquittal will not be affected, and the acquitted defendant cannot be retried even if the CA finds any error of law that undermines the acquittal.

6. Defendants and the prosecution may appeal against any final decision of the CFI or CA (as the case may be) to the CFA with the leave of the CFA¹¹. However, “a verdict or finding of a jury” is explicitly carved out from the appealable final decision of the CFI, meaning that the prosecution cannot appeal against an acquittal by the jury in the CFI to the CFA.

Trial of cases concerning offences endangering national security in the CFI

7. The HK National Security Law came into effect on 30 June 2020. Article 41(1) provides that the HK National Security Law and the laws of the Hong Kong Special Administrative Region (“HKSAR”) shall apply to procedural matters, including those related to criminal investigation, prosecution, trial, and execution of penalty, in respect of cases concerning offences endangering national security over which the HKSAR exercises jurisdiction.

8. Article 46 of the HK National Security Law provides:

“對高等法院原訟法庭進行的就危害國家安全犯罪案件提起的刑事檢控程序，律政司長可基於保護國家秘密、案件具有涉外因素或者保障陪審員及其家人的人身安全等理由，發出證書指示相關訴訟毋須在有陪審團的情況下進行審理。凡律政司長發出上述證書，高等法院原訟法庭應當在沒有陪審團的情況下進行審理，並由三名法官組成審判庭。”

⁹ Section 81A of the CPO.

¹⁰ Section 81D of the CPO.

¹¹ Sections 31 and 32 of the Hong Kong Court of Final Appeal Ordinance (Cap. 484).

(English translation:

“In criminal proceedings in the Court of First Instance of the High Court concerning offences endangering national security, the Secretary for Justice may issue a certificate directing that the case shall be tried without a jury on the grounds of, among others, the protection of State secrets, involvement of foreign factors in the case, and the protection of personal safety of jurors and their family members. Where the Secretary for Justice has issued the certificate, the case shall be tried in the Court of First Instance without a jury by a panel of three judges.”)

9. After enactment of the HK National Security Law, there are two modes of trial for a case concerning offences endangering national security in the CFI, namely (i) the conventional mode of trial before a judge and a jury; and (ii) where the SJ issues a certificate under Article 46 of the HK National Security Law, trial before a three-judge Panel without a jury. As the CA pointed out in *Tong Ying Kit v Secretary for Justice*¹²,

“Granted jury trial is the conventional mode of trial in the Court of First Instance, it should not be assumed that it is the only means of achieving fairness in the criminal process. Neither [Article 87 of the Basic Law] nor [Article 10 of the Hong Kong Bill of Rights] specifies trial by jury as an indispensable element of a fair trial in the determination of a criminal charge. When there is a real risk that the goal of a fair trial by jury will be put in peril by reason of the circumstances mentioned in the third ground, the only assured means for achieving a fair trial is a non-jury trial, one conducted by a panel of three judges as mandated by [Article 46(1) of the HK National Security Law]. Such a mode of trial serves the prosecution’s legitimate interest in maintaining a fair trial and safeguards the accused’s constitutional right to a fair trial.”

¹² *Tong Ying Kit v Secretary for Justice* [2021] 3 HKLRD 350.

10. Whilst a jury is not required to give reasons for its verdict, where a case concerning offences endangering national security in the CFI is tried by a Panel without a jury, the Panel will give reasons for its verdict¹³. The defendant, the prosecution and members of the public would be able to understand the Panel's analysis of the evidence and the law, the findings of facts and findings of law it made in reaching its verdict.

11. As the HK National Security Law does not contain any provision concerning appeal, the appeal mechanisms in cases concerning offences endangering national security tried in the CFI continue to be governed by the local laws of the HKSAR, in particular the CPO, whether the case is tried by a judge and a jury or by a Panel without a jury. Thus, for cases concerning offences endangering national security tried in the CFI by a Panel, whereas a defendant has the right to appeal to the CA against any conviction by the Panel, the existing CPO does not allow the prosecution to appeal to the CA against an acquittal by a Panel.

JUSTIFICATIONS

12. The prosecution's inability to appeal against an acquittal by a Panel trying a case concerning offences endangering national security in the CFI to the CA gives rise to an anomaly. Like cases tried by a magistrate or the DC, the Panel will give reasons for its verdict. A reasoned verdict enables the prosecution to ascertain whether the court has committed any error of law, and if so, how such error has impacted on the ultimate verdict of acquittal. Just as there is a legitimate public interest in allowing the prosecution to appeal against an erroneous verdict of acquittal by a magistrate or the DC by way of cases stated, there is no reason why the prosecution should not in similar circumstances be allowed to appeal against an erroneous verdict of acquittal by a Panel.

¹³ Which is what the court did in *HKSAR v Tong Ying Kit* [2021] HKCFI 2200, the first case concerning offences endangering national security tried in the CFI by a Panel without a jury.

13. The public interest in detection of crime and bringing criminals to justice is well-recognised¹⁴. To enable the prosecution to bring an appeal so that the appellate court can scrutinise and correct any error of law committed by the trial court serves the interests of justice, and does not in any way undermine any constitutional right enjoyed by a defendant charged with a criminal offence, including the right to a fair trial¹⁵. This appeal mechanism is especially important in the context of handling cases concerning offences endangering national security. It is necessary in order to ensure proper discharge of the judicial authorities' duty under the HK National Security Law¹⁶ to effectively prevent, suppress and impose punishment for acts and activities endangering national security.

14. As pointed out by a responsible official of the Legislative Affairs Commission of the Standing Committee of the National People's Congress ("NPCSC") on 30 December 2022 in response to questions by the media concerning the Interpretation by the NPCSC of Article 14 and Article 47 of the HK National Security Law, it is the imperative of Article 7¹⁷ of the HK National Security Law that the HKSAR should amend and refine the relevant local legislation in a timely manner and resolve legal issues encountered in the implementation of the HK National Security Law through local legislation as far as practicable.

15. A statutory procedure for the prosecution to appeal against acquittal does not contravene the principle of finality or the principle against double jeopardy. Article 11(6) of the HKBOR, which corresponds to Article 14(7) of the International Covenant on Civil and Political Rights ("ICCPR"), provides that "[n]o 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 Hong Kong". Where the law provides for a mechanism for the prosecuting authorities to appeal against an

¹⁴ See e.g. *HKSAR v Lee Ming Tee & Securities and Future Commission (Intervener)* (2003) 6 HKCFAR 336, at 396A-C, para 187; *HKSAR v Chan Kau Tai* [2006] 1 HKLRD 400, at para 116(5).

¹⁵ Article 87 of the Basic Law and Articles 10 and 11 of the Hong Kong Bill of Rights ("HKBOR"). See also Article 4 and Article 5 of the HK National Security Law.

¹⁶ See in particular Articles 3, 8 and 42.

¹⁷ Article 7 of the HK National Security Law provides that the HKSAR shall complete, as early as possible, legislation for safeguarding national security as stipulated in the Basic Law and shall refine relevant laws.

acquittal and the time for appeal has not expired, the acquitted person has not been “finally acquitted” in accordance with the law, and hence Article 11(6) of the HKBOR or Article 14(7) of the ICCPR is simply not engaged¹⁸.

16. All in all, the DoJ considers that it is necessary and legitimate to amend the CPO to provide for a statutory procedure for the prosecution to appeal by way of case stated against a verdict or order of acquittal by a Panel constituted under Article 46 of the HK National Security Law to try a case concerning offences endangering national security in the CFI to the CA, and legislative amendment to implement the Proposal should be introduced as soon as practicable.

17. The DoJ recently proposed to amend the CPO to provide for a statutory appeal procedure for the prosecution to appeal against rulings of no case to answer by judges of the CFI in criminal trials (“**No Case to Answer Appeal Proposal**”)¹⁹. Similar to the No Case to Answer Appeal Proposal, the present proposal will address a lacuna in the criminal appeal system due to the prosecution’s inability to appeal against acquittals directed or given by professional judges of the CFI, so as to prevent possible miscarriage of justice. A timely response to such significant legal lacunae is necessary. The DoJ aims to introduce the two legislative proposals by an amendment bill as soon as practicable.

¹⁸ In *State of Trinidad and Tobago v Boyce* [2006] 2 AC 76, at para 15, the Judicial Committee of the Privy Council rejected the proposition that the old common law rule which prevented the prosecution from appealing against an acquittal formed a fundamental right or freedom. Their Lordships had this to say at paras 15-16:

“[15] ... they certainly do not think that [the principle against double jeopardy] is infringed by the prosecution having the right to appeal against an acquittal.

[16] ... There is nothing particularly unfair or unjust about a statutory rule which enables an appellate court to correct an error of law by which an accused person was wrongly discharged or acquitted and order that the question of his guilt or innocence be properly determined according to law. Such a rule exists in many countries. ...”

¹⁹ For details of the No Case to Answer Appeal Proposal, please refer to the discussion paper for the meeting of the Legislative Council Panel on the Administration of Justice and Legal Services on 27 February 2023 (ref: LC Paper No. CB(4)130/2023(01)), available at <https://www.legco.gov.hk/yr2023/english/panels/ajls/papers/ajls20230227cb4-130-1-e.pdf>.

KEY FEATURES OF THE PROPOSAL

18. The DoJ would like to seek the views of the Judiciary, legal profession and other relevant stakeholders on the Proposal comprising the following features.

Mode and scope of appeal

19. The Proposal will introduce new provisions under Part IV of the CPO to provide for a right of the SJ to appeal to the CA against a verdict or order of acquittal of a three-judge Panel constituted under Article 46 of the HK National Security Law to try a case concerning offences endangering national security in the CFI without a jury (including any order quashing or dismissing a charge for any alleged defect in the charge or want of jurisdiction). The Proposal will not affect cases tried in the CFI with a jury, whether they are cases concerning offences endangering national security or otherwise.

20. As mentioned above, the proposed appeal mechanism will be appeal by way of case stated, essentially modelled on the existing appeal by way of case stated procedure under section 84 of the DCO and section 105 of the MO which judges and practitioners are familiar with. The proposed new provisions will be primarily modelled on section 84 of the DCO. We believe this will facilitate the development of the procedures, practice and jurisprudence of the new mechanism of appeal against acquittal by the Panel, and achieve coherence amongst prosecution appeals against acquittals in different levels of courts.

21. The appeal will relate to “matters of law only”, in the sense explained in established case authorities (see paragraph 4 above).

Appeal mechanism

22. Under the Proposal, the appeal will be initiated by the SJ making an application in writing to the Panel to state a case. The application has to

be made within 14 clear days after the reasons for a verdict have been recorded or after the order of acquittal has been made (whichever is later), or within such further period as the CA may allow. The proposed appeal period is longer as compared with that for an appeal by way of case stated under section 84 of the DCO (7 days which may be extended by the court). Given the unique nature of cases concerning offences endangering national security which often involve relatively complex and novel points of laws, and complicated factual matrix, it is necessary to allow the prosecution more time to consider whether or not to lodge an appeal. By comparison, the proposed appeal period is shorter than the appeal periods applicable to other types of prosecution appeals under the CPO (e.g. 21 days for application for review of sentence²⁰ and for appeal against discharge²¹).

23. The case stated should set forth the facts, the grounds on which the verdict or order of acquittal was arrived at or made, and the grounds on which the acquittal is questioned for the opinion of the CA.

24. We are mindful of the fact that a Panel comprises three judges pursuant to Article 46 of the HK National Security Law, but do not think it necessarily follows that the CA determining an appeal against any decision of the Panel must be constituted by more than three Justices of Appeal. Existing section 34(2)(b) of the High Court Ordinance (Cap. 4) (“HCO”) provides that the CA shall be duly constituted for the purpose of determining any appeal under Part IV of the CPO if it consists of an uneven number of Justices of Appeal not less than 3. It would be for the CA to determine the number of Justices of Appeal²² determining a particular appeal as it sees fit.

25. It is necessary to preserve the status quo of a defendant/respondent pending determination of the prosecution’s appeal. With reference to section 35 of the Hong Kong Court of Final Appeal Ordinance (Cap. 484) and section 84(b) of the DCO, we propose to introduce the following provisions:

²⁰ Section 81A(2)(c) of the CPO.

²¹ Rule 3(2) of the Criminal Procedure (Appeal against Discharge) Rules (Cap. 221F).

²² By virtue of section 5(2) of the HCO, a judge of the CFI may, on the request of the Chief Justice, act as an additional judge of the CA.

- (a) Immediately after the Panel gives a verdict or order of acquittal, the prosecution may give notice of intention to appeal. If so, the Panel may either (i) on the prosecution's application, remand the defendant in custody pending determination of the appeal or (ii) admit the defendant to bail.
- (b) If an application to state a case has already been made, the prosecution may also apply to the CA for a warrant to arrest the respondent. Once the respondent is brought before the CA pursuant to such warrant, the CA may remand the respondent in custody or admit the respondent to bail.
- (c) To avoid doubt, Article 42 of the HK National Security Law applies to the consideration of remand and bail.²³

26. Currently, section 83Y of the CPO provides that certain powers of the CA under Part IV of the CPO may be exercised by a single judge, such as to extend the time within which notice of appeal may be given, to admit an appellant to bail or to order a respondent to be detained in custody. In line with the existing practice, we propose that the powers of the CA to extend the period for making the application to state a case, to issue a warrant of arrest, to detain or admit a respondent to bail may be exercised by a single judge.

27. With reference to section 84(c) of the DCO, we propose that the CA may do the following in determination of the appeal:

- (a) If the CA is satisfied that there is no sufficient ground for interfering with the verdict or order of acquittal, it must dismiss the appeal;
- (b) If the CA is satisfied that there is sufficient ground for interfering with the verdict or order of acquittal, it must reverse the verdict or order, and direct (i) that the trial be resumed or (ii) that the defendant be retried. Even if the CA finds the Panel has erred in

²³ Article 42(2) of the HK National Security Law provides that no bail shall be granted to a criminal suspect or defendant unless the judge has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security.

law, it does not mean that CA must interfere with the acquittal. There must be “sufficient ground for interfering”²⁴;

- (c) The CA may also give all such necessary and consequential directions as it thinks fit.

28. For an appeal by way of case stated against acquittal by the DC, section 84(c)(ii) of the DCO also empowers the CA to find the respondent guilty, record a conviction and pass such sentence on the respondent as might have been passed on him by a judge. This specific power will not be adopted under the Proposal as the CA in *Secretary for Justice v Wong Sau Fong*²⁵ took the view that such a power would be inconsistent with Article 11(4) of the HKBOR which guarantees a convicted person’s right of appeal against sentence.

29. Defence and prosecution costs in appeals by way of case stated under section 84 of the DCO are respectively provided in section 9A and section 13A of the Costs in Criminal Cases Ordinance (Cap. 492). We propose to amend the latter Ordinance to provide for defence and prosecution costs for the new appeal mechanism.

Procedural rules

30. With reference to section 84(a) of the DCO, we propose that the provisions of sections 106 to 109 of the MO will apply, *mutatis mutandis*, to the preparation, amendment and setting down of a case stated.

31. Currently, no rules of court have been prescribed for appeals by way of case stated under section 84 of the DCO and section 105 of the MO and the appeal mechanisms have so far operated without any significant difficulties. Therefore, we believe that it is not necessary to make any procedural rules by way of subsidiary legislation to facilitate the operation of the new appeal mechanism. Nonetheless, if, in the future, the Judiciary and legal practitioners consider it necessary to have procedural rules for the new appeal mechanism, the Criminal Procedure Rules Committee can make rules

²⁴ *Secretary for Justice v Fan Kin Chung* CACC 381/2022 (5 March 2003).

²⁵ *Secretary for Justice v Wong Sau Fong* [1998] 2 HKLRD 254.

and orders to regulate the practice and procedure by virtue of section 9 of the CPO.

CONSULTATION

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

33. Please address your views and comments to the following on or before 8 May 2023 –

Policy Affairs Unit 2
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5/F, East Wing, Justice Place
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which are directly related to the consultation.

Department of Justice
April 2023