



PROSECUTION APPEALS AGAINST JUDGES' RULINGS

A Consultation Paper

**CONSULTATION PAPER NO 158
(Summary)**

PROSECUTION APPEALS AGAINST JUDGES’ RULINGS

CONSULTATION PAPER No 158

A SUMMARY

| | <i>Page</i> |
|---|-------------|
| PART I: INTRODUCTION | 1 |
| PART II: PROSECUTION APPEALS AND RETRIALS IN THE CURRENT LAW | 2 |
| PART III: PRINCIPLES AFFECTING THE AVAILABILITY OF PROSECUTION APPEALS | 3 |
| PART IV: TERMINATING AND NON-TERMINATING RULINGS | 4 |
| PART V: PROSECUTION RIGHTS OF APPEAL IN ADVANCE OF THE TRIAL | 5 |
| PART VI: PROSECUTION APPEALS AND THE TRIAL PROPER | 6 |
| PART VII: ANCILLARY AND PROCEDURAL MATTERS | 8 |
| PART VIII: PROVISIONAL PROPOSALS AND CONSULTATION ISSUES | 11 |
| [THE FULL TEXT OF THIS PART IS REPRODUCED] | |

**PROSECUTION APPEALS AGAINST JUDGES' RULINGS
(CONSULTATION PAPER 158)**

A SUMMARY

1. This summary is intended to assist those wishing to contribute to the Law Commission's consultation process on this subject. The proposals in the consultation paper are provisional, and are offered to stimulate debate. They do not constitute the final view of the Law Commission. We welcome views on all of them, and on any other aspect of the subject matter of the paper. Generally, this summary deals with each part of the Consultation Paper in turn.¹ The last part, which lists the provisional proposals and consultation issues, is reproduced in full. It will assist our analysis of responses if respondents could, as far as possible, use the numbering of the paragraphs in that part.

PART I: INTRODUCTION

2. On 24 May 2000, the Home Secretary made a reference to the Commission in the following terms:²

To consider

- (1) whether any, and if so what, additional rights of appeal or other remedies should be available to the prosecution from adverse rulings of a judge in a trial on indictment which the prosecution may wish to overturn and which may result or may have resulted, whether directly or indirectly, in premature termination of the trial;
- (2) to what, if any, procedural restrictions such appeals would be subject;

and to make recommendations.

3. This project deals with prosecution appeals (where the prosecution seek to put right what they consider to be an error, within the context of the trial), and it is thus distinct from our earlier consultation paper on double jeopardy³ (which is concerned with new evidence or fundamental defects emerging after the conclusion of the trial). However, the two are related, and we intend therefore to

¹ Occasionally, some re-arrangement has been made. References to "para" without more are references to paragraph numbers in the consultation paper.

² Our work on the project pre-dated the reference, the Commission agreeing to undertake the project in January 2000. The project was also the Government's response to a recommendation that consideration be given to prosecution appeals against certain rulings in Report of the Inquiry into the Prosecution of the case of Regina v Doran and Others (2000) by His Honour Gerald Butler QC (available from Customs and Excise): see Written Answer, *Hansard* (HC) 8 June 2000, vol 351, col 330. Paras 1.1 – 1.6.

³ Double Jeopardy (1999) Consultation Paper No 156.

present our conclusions on both together, following the consultation period on this paper.⁴

4. We emphasise the importance of the jury, and suggest that a good test for a proposal for a prosecution right of appeal is whether it can fairly be said to *enhance* the role of the jury. We consider that our provisional proposals in this paper pass that test – their point is to prevent a judge from wrongly preventing a case from getting to a jury.⁵
5. Even if one or more of the possible prosecution rights of appeal would be *fair* (the question with which this paper is principally concerned), before it was introduced, there should be a demonstrated need for it. It seems to us plausible that, if introduced, prosecution appeals would be significantly used. We provide figures for appeals against conviction under the current system. We invite views on how much the proposed new rights of appeal would be used.⁶

PART II: PROSECUTION APPEALS AND RETRIALS IN THE CURRENT LAW

6. Both limited prosecution rights of appeal and retrials are familiar parts of the law of England and Wales.

Prosecution appeals

7. Where a person is acquitted, the Attorney-General can refer a point of law to the Court of Appeal, who give their opinion on the point. Although it does not affect the acquitted defendant, the procedure can clarify a point of law. It is rarely used (there have been forty one reported cases since 1974).⁷
8. Preparatory hearings can be held in serious fraud cases, or cases which are otherwise long or complex. Judges at such hearings can make rulings on points of law or the admission of evidence from which either side can appeal, provided that the ruling relates to the statutory functions of the hearing.⁸
9. The Attorney-General has a right of appeal against unduly lenient sentences. The right arises only in respect of the most serious offences (those which can only be tried on indictment) and such others as the Secretary of State adds by order. It is fairly extensively used (there were 95 in 1998).⁹
10. Although it is not possible to use the remedy of judicial review in a “matter relating to trial on indictment”, it can be used as an appeal in various ancillary matters, such as custody time limits. There was a period during which it was

⁴ Paras 1.7 – 1.10.

⁵ Paras 1.22 – 1.23.

⁶ Paras 1.24 – 1.27.

⁷ Paras 2.2 – 2.3.

⁸ Paras 2.4 – 2.7.

⁹ Paras 2.8 – 2.9.

thought to apply also to applications to stay an indictment as an abuse of process.¹⁰

11. The prosecution can appeal by way of case stated from the magistrates' court to the Divisional Court of the Queen's Bench Division of the High Court against various decisions, including an acquittal, on the basis that it is either "wrong in law" or "in excess of jurisdiction". There is also a specific right of appeal against the grant of bail by the magistrates. In addition, a special provision allows the Crown to appeal to the Crown Court against any decision of the magistrates in Customs and Excise cases.¹¹
12. Generally, rights of further appeal from an appellate decision are equally available to the prosecution or the defence, even where the original appeal was open only to the defence. Only defendants can appeal against a conviction at the magistrates to the Crown Court, but both sides can appeal from there to the Divisional Court; only a defendant can appeal against a jury's verdict, but both sides can appeal from the Court of Appeal to the House of Lords. Both can appeal from the Divisional Court to the House of Lords.¹²

Retrials

13. A retrial can take place in a number of circumstances. A jury may be discharged during the course of the trial for any number of reasons, for example because too many jurors have become unable to continue, or some misconduct or bias. This can happen at any time during the course of the trial. A jury can also be discharged if a sufficient number of them fail to agree on a verdict.¹³
14. A retrial can also be ordered by the Court of Appeal, where it quashes a conviction on appeal, and (although the power has yet to be used) by the High Court where an acquittal is quashed because it is "tainted" by interference with or intimidation of a juror or witness.¹⁴

PART III: PRINCIPLES AFFECTING THE AVAILABILITY OF PROSECUTION APPEALS

15. This part identifies two principal aims of the criminal justice system. One aim is to ensure the conviction of the guilty, and the acquittal of the innocent – *accuracy of outcome*. The other is to uphold fundamental rights and express community values in the way in which it works – a *process aim*. Accuracy of outcome can work in favour of either the defendant or the prosecution, whereas the process aim benefits only the defendant. These two aims can work in the same direction. A right to an adversarial hearing, with equality of arms between the prosecution

¹⁰ Paras 2.10 – 2.12.

¹¹ Paras 2.13 – 2.16.

¹² Para 2.17.

¹³ Paras 2.19 – 2.23.

¹⁴ Paras 2.24 – 2.27.

and defence respects the rights of the defendant *and* is more likely to result in the right outcome. It is, however, possible that the two can conflict. We discuss how potential conflicts have been worked out in the law of England and Wales in recent times, and the impact of a more rights-based approach consequent on the impact of the provisions of the European Convention on Human Rights as a result of the Human Rights Act 1998.¹⁵

16. The argument in favour of prosecution appeals is that they are conducive to accuracy of outcome. They are designed to remove inaccuracies which benefit the defendant. On the other hand, in certain circumstances, the mere existence of a prosecution right of appeal would distort the trial process in a way inimical to accuracy of outcome. Further, in general prosecution appeals detract from process aims. The desirability of introducing a particular prosecution right of appeal, therefore, will depend on: (i) determining whether it does, in fact, enhance accuracy of outcome; (ii) the extent to which it detracts from process values, and (iii) whether the trial process as a whole is fair when the two are balanced against each other.¹⁶

PART IV: TERMINATING AND NON-TERMINATING RULINGS

17. In this part, we consider the distinction, drawn in the terms of reference, between rulings adverse to the prosecution which terminate proceedings, and those which do not. A ruling may terminate a prosecution either because it does so as a matter of law (such as staying the indictment as an abuse of process or allowing a submission of no case to answer, which results in a directed acquittal), or because it persuades the prosecution to offer no further evidence. A non-terminating ruling simply makes the prosecution's task harder.¹⁷
18. We provisionally consider that allowing prosecution rights of appeal against non-terminating rulings during the course of the trial would be both undesirable in principle and impossible in practice.¹⁸
19. First, we suggest that the avoidance of delay is a particularly important process value. All prosecution appeals during the trial will result in delay. Terminating rulings are of the highest significance, because they bring proceedings to an end. The value of an appeal against an erroneous terminating ruling is therefore very high. It is significantly less so for a non-terminating ruling, because the trial continues and the jury might convict despite the erroneous ruling. It is a matter of judgment, but we consider (i) that the high value in terms of accuracy of outcome where the ruling is a terminating one outweighs the process value of

¹⁵ Paras 3.3 – 3.18.

¹⁶ Paras 3.19 – 3.21.

¹⁷ Paras 4.1 – 4.3.

¹⁸ Para 4.4.

avoiding delay, but (ii) the lesser enhancement of accuracy where the subject is a non-terminating ruling does not.¹⁹

20. Second, it is impossible to devise an acceptable practical procedure for appealing non-terminating rulings. A jury cannot stand by for the weeks it might take for an appeal to come on, so an appeal even against a non-terminating ruling must occasion the abandonment of the trial and the commencement of a new trial. That, however, would mean that where the less important non-terminating ruling was concerned, a retrial would be needed *whatever the outcome of the appeal*, whereas for a more important terminating ruling, there would only be that outcome where the ruling was found to be wrong. Thus the potential detriment to the process value of due expedition is much greater where the ruling is a non-terminating one.²⁰
21. Third, the defence only has a right of appeal against conviction. There is no free-standing right of appeal against rulings. This means, in effect, that the defence has a right of appeal against terminating rulings (ie rulings as a result of which he or she has in effect no option but to plead guilty and exercise the right to appeal), but not non-terminating rulings. It would be unfair in principle and contrary to the principle of equality of arms to give the prosecution a right that the defendant did not enjoy. Further it would not be practicable to give *both* sides the right to appeal against non-terminating rulings.²¹
22. We provisionally conclude that the prosecution should not have a right of appeal against non-terminating rulings, but that prosecution appeals against terminating rulings are capable of being fair.²²

PART V: PROSECUTION RIGHTS OF APPEAL IN ADVANCE OF THE TRIAL

23. In this part we revisit the distinction between terminating and non-terminating rulings in the context of rulings made in advance of the start of the trial proper.²³
24. In respect of the existing rights of appeal against rulings at preparatory hearings,²⁴ we conclude that delay is likely to be kept sufficiently in check for the present law, which allows either side to appeal against non-terminating as well as terminating rulings, to be acceptable. We express some concern that the newer

¹⁹ Para 4.5 – 4.9.

²⁰ Paras 4.10 – 4.11.

²¹ Paras 4.12 – 4.17.

²² Para 4.18.

²³ We use this expression to mean the swearing of the jury followed by the opening of the prosecution case, even where, as a matter of statute, the trial is deemed to start at some earlier stage.

²⁴ See para # above in this summary.

form of the procedure, that relating to long or complicated cases generally, might become more widely used and used closer to the start of the trial proper.²⁵

25. In addition, there is also now provision for judges to make binding rulings on the law at pre-trial hearings. Such hearings, however, may take place at any time up to immediately before the swearing of the jury. We provisionally conclude that there should be no appeal against non-terminating rulings at that stage.²⁶
26. Most rulings at preparatory or pre-trial hearings will not be terminating ones, but the possibility of terminating rulings cannot be excluded. We provisionally conclude that there should be a prosecution right of appeal against terminating rulings made in advance of the trial, where these are not already covered by the existing right of appeal. This would therefore cover rulings made at preparatory hearings, but not included in the existing right of appeal because of their subject matter, and terminating rulings made at pre-trial hearings.²⁷

PART VI: PROSECUTION APPEALS AND THE TRIAL PROPER

Implications of limiting appeals to terminating rulings

27. In practice, nearly all terminating rulings will take place either during the prosecution case, or immediately afterwards, when a submission of no case to answer is made. A successful prosecution appeal against such a ruling will result in a retrial. Depending on when the ruling was made, the prosecution will have adduced all or some of its evidence. This will give their witnesses a dry run for giving evidence in the retrial, and the defence may have revealed its strategy in cross examination. Although in other ways, a retrial might assist the defence, we assume that the defence are disadvantaged by a retrial. This is a factor to be weighed against extending prosecution appeals.²⁸
28. It is important to be aware of tactical considerations. If prosecution appeals were limited to issues raised before any evidence was called the defence would have an incentive to delay rulings, if at all possible, until after the start of the evidence. We do not believe that it is possible to get round this incentive by requiring the defence to raise issues early. If it was up to the prosecution to ensure that matters were raised at an early stage, they might raise unnecessary issues for decision out of an abundance of caution. This would be wasteful of resources and distort the trial process.²⁹
29. Retrials are a routine feature of the trial process.³⁰ Those ordered after an appeal against a ruling made during the prosecution case may or may not disadvantage

²⁵ Paras 5.4 – 5.16.

²⁶ Paras 5.17 – 5.24.

²⁷ Paras 5.25 – 5.29.

²⁸ Paras 6.3 – 6.4.

²⁹ Para 6.5.

³⁰ See paragraphs 13-14 above.

the defence. The availability of a retrial would not on its own constitute unfairness in the trial process. For this reason, and in order to avoid the tactical consequences referred to in paragraph 28 above, we consider that the considerable enhancement of accuracy of outcome to be gained by allowing a prosecution appeal will outweigh the process disadvantages to the defendant. We accordingly provisionally propose that there should be a right of prosecution appeal against terminating rulings up to the end of the prosecution case.³¹

30. A possible exceptional case is where a ruling requiring the prosecution to disclose previously undisclosed material is made after the end of the prosecution case. These are, we suggest, infrequent and probably do not justify an exception to the general rule, but we invite views.³²

Submissions of no case to answer

31. The ability of the defendant to submit that there is no case to answer is an important safeguard against wrongful conviction. The danger of allowing a prosecution appeal against a ruling that there is no case to answer is that it might persuade the defence not to make the submission in the first place. The defence might take the view that, where the prosecution case is not strong, they would do better to hope the jury acquits rather than risk obtaining a ruling of no case and losing a subsequent appeal. In these circumstances, allowing a prosecution right of appeal would distort the trial process, and in doing so would damage rather than serve accuracy of outcome. We accordingly provisionally propose that there should be no right of appeal against successful submissions of no case to answer.³³

Jury acquittals

32. Although our terms of reference do not require us to consider prosecution appeals from jury acquittals, we consider that it would assist respondents in assessing our other provisional proposals if we set out our conclusions on the subject. Our view is that the jury is the centrally important part of the system for trying serious crime, and that a general prosecution right of appeal on the facts would undermine the jury as an institution.³⁴
33. It might, however, be argued that there should be a prosecution right of appeal where the judge has misdirected the jury, just as a conviction appeal can be based on a misdirection. We reject the parallel. Before it could quash an acquittal on the basis of a misdirection, the Court of Appeal would have to be satisfied that the acquittal was the result of the misdirection. In defence appeals against conviction, it is not difficult to establish a causal link between the misdirection and the conviction, because the burden of proof only requires the Court of

³¹ Paras 6.6 – 6.7.

³² Paras 6.8 – 6.9.

³³ Paras 6.10 – 6.20.

³⁴ Paras 1.6, 6.21 – 6.22.

Appeal to be satisfied that without the misdirection, a doubt as to the guilt of the defendant might arise. Where the jury has acquitted, however, the Court of Appeal would have to be sure that all other possible doubts had been resolved by the jury in favour of the prosecution, and they only acquitted because of the misdirection. To ask the Court of Appeal to do so is both difficult in practice and objectionable in principle. In a criminal case, all unadmitted facts remain in issue, and the jury is entitled to find what it will on each one of them. For the Court of Appeal to determine that the jury can only have had a doubt about the subject matter of the misdirection removes that entitlement from the jury. We provisionally conclude that there should be no prosecution right of appeal from a jury's verdict.³⁵

PART VII: ANCILLARY AND PROCEDURAL MATTERS

The offences to which the right of appeal should apply

34. We consider that only more serious cases should be subject to a prosecution right of appeal. It is only in such cases that the need for reform is pressing, because it is in those cases that the public interest is most damaged by erroneous terminations of proceedings. We provisionally propose that the procedure should be limited to those offences in respect of which the Attorney-General has the existing power to refer sentence to the Court of Appeal. The offences to which that applies are offences triable only on indictment, indecent assault, making a threat to kill, cruelty to a child (and attempts to commit or incitement of those offences), and cases transferred to the Crown Court under the serious fraud provisions.³⁶

Leave and consent requirements

35. We provisionally propose that there should be a requirement for leave for an appeal to be obtained from the trial judge or the Court of Appeal, as for appeals against conviction.³⁷
36. We do not think it appropriate to introduce a general requirement for the consent of the Attorney-General or Director of Public Prosecutions. That would lead to delay without, in practice, having much effect on the number of cases coming forward. We ask for views on whether there should be such a requirement where a consent was necessary for the initiation of the prosecution in the first place.³⁸

Time limits for applications for leave

37. We see no reason to disturb the present arrangements in respect of appeals from preparatory hearings. In respect of our proposed extended rights of appeal, there should be strict requirements. The prosecution should indicate at the hearing

³⁵ Paras 6.23 – 6.26.

³⁶ Paras 7.3 – 7.9.

³⁷ Para 7.10.

³⁸ Paras 7.11 – 7.13.

itself that they are minded to appeal, and then serve a full notice of application for leave within seven days.³⁹

Detention of defendants pending appeal

38. It would be unsatisfactory if a defendant who, for good reason, had not had bail before the ruling against which the prosecution were appealing should automatically be released pending the appeal. There is a danger that he or she would abscond before a retrial, if the appeal was successful, or take action to undermine the prosecution evidence at the retrial. We therefore provisionally propose that there be a power to detain an acquitted person in such circumstances, with the same right to bail as exist before conviction.⁴⁰

Time limits on the hearing of appeals

39. Where the defendant is in custody pending an appeal, we provisionally propose that there should be a custody time limit, the limit to be of the order of two months, subject to extension on the same basis as other custody time limits. We also invite views on whether there should be a further time limit within which all appeals must be heard, regardless of whether or not the defendant is in custody.⁴¹

Time limits on retrials

40. We provisionally propose that there should be a two month time limit within which the defendant would have to be arraigned on a new indictment, if the Court of Appeal ordered a retrial. This mirrors the current requirement where the Court of Appeal quashes a conviction and orders a retrial. We ask for views on the provisions in respect of conviction work well.

The criteria to be applied by the Court of Appeal

41. In certain circumstances, even if the Court of Appeal were to conclude that the judge's ruling was wrong, it would not be in the interests of justice for the defendant to be retried. The prosecution case might have deteriorated, the health of the defendant might be such that it was no longer fair to prosecute him or her, or the offence might be, on the facts, comparatively minor. Another possible reason for rejecting a retrial would be where, although the ruling was wrong, the prosecution could have gone on with the case, but chose not to for essentially tactical reasons.⁴²
42. Generally, however, the central task of the Court of Appeal would be to determine the correctness of the ruling. The ultimate question for the Court of Appeal in an appeal against conviction is whether or not the conviction is "unsafe". The court approaches the question by determining whether the rulings

³⁹ Paras 7.14 – 7.16.

⁴⁰ Paras 7.17 – 7.19.

⁴¹ Paras 7.20 – 7.25.

⁴² Paras 7.27 – 7.29.

or directions complained of were right or wrong as part of considering whether the conviction is safe. The court on a prosecution appeal would ask itself whether the ruling was right or wrong as part of its consideration whether a retrial would be in the interests of justice. It does not follow, however, that the court should make a formal determination on the correctness of the ruling. It would leave a defendant in an invidious position if the Court were formally to order that the ruling was wrong, but that there would nonetheless be no retrial.⁴³

43. We provisionally propose that there should be a single criterion of whether it was in the interests of justice that the acquittal should be quashed and a retrial ordered. In determining that question, the court should be required to consider whether the ruling was correct, and, where the trial was terminating by a decision of the prosecution to offer no further evidence, whether that decision was one that was open to a reasonable and competent prosecutor.⁴⁴

Reporting restrictions

44. There should be an automatic ban on reporting of an appeal until it was dismissed, or until the resultant retrial was finished, subject to a power in the Court of Appeal to vary the restriction.⁴⁵

⁴³ Paras 7.30 – 7.32.

⁴⁴ Para 7.33.

⁴⁵ Para 7.34.

PART VIII

PROVISIONAL PROPOSALS AND CONSULTATION ISSUES

In this part we list our provisional proposals and conclusions, and other issues on which we seek respondents' views. More generally, **we invite comments on any of the matters contained in, or issues raised by, this paper, and any other suggestions that respondents may wish to put forward. For the purpose of analysing the responses it would be very helpful if, as far as possible, respondents could refer to the numbering of the paragraphs in this part.**

HOW MUCH WOULD PROSECUTION APPEALS BE USED?

1. We invite views on whether the prosecution rights of appeal discussed in this paper, if enacted, would be used to a significant extent.

(CP paragraph 1.26: see summary paragraph 5)

THE PRINCIPLES AFFECTING THE AVAILABILITY OF PROSECUTION APPEALS

2. We provisionally conclude that the proper approach to the question whether to grant the prosecution a particular right of appeal is
 - (1) to identify the extent (if any) to which that right of appeal would enhance or detract from the aim of ensuring accuracy of outcome;
 - (2) to identify the extent (if any) to which it would detract from process aims; and,
 - (3) by balancing these factors, to come to a conclusion whether the trial process would thus be rendered unfair.

(CP paragraph 3.21: see summary paragraph 16)

TERMINATING AND NON-TERMINATING RULINGS

3. We provisionally conclude
 - (1) that the prosecution should not be given a right to appeal against a non-terminating ruling made during the course of a trial; but
 - (2) that a prosecution right of appeal against a terminating ruling made during the course of a trial is capable of being fair.

(CP paragraph 4.18: see summary paragraph 22)

PROSECUTION APPEALS IN ADVANCE OF THE TRIAL

Preparatory hearings

4. We provisionally conclude that the present preparatory hearing regimes, under which either side may appeal a ruling in advance of the start of the trial before the jury, constitute elements of a fair trial procedure.

(CP paragraph 5.16: see summary paragraph 24)

Statutory pre-trial hearings

5. We provisionally conclude that there is no sound basis for extending the rights of appeal under the preparatory hearing regimes to non-terminating rulings made under the pre-trial hearing regime.

(CP paragraph 5.24: see summary paragraph 25)

Terminating rulings

6. We provisionally propose that (subject to the safeguards referred to below) there should be a prosecution right of appeal against a terminating ruling made before the start of the trial proper, but not covered by the existing right of appeal against a ruling at a preparatory hearing.

(CP paragraph 5.29: see summary paragraph 26)

PROSECUTION APPEALS AND THE TRIAL PROPER

Terminating hearings during the prosecution case

7. We provisionally propose that (subject to the safeguards referred to below) there should be a prosecution right of appeal against a terminating ruling made during the trial up to the conclusion of the prosecution evidence.

(CP paragraph 6.7: see summary paragraph 29)

8. We invite views on whether there should be a special rule in relation to terminating rulings on disclosure, to allow prosecution appeals after the close of the prosecution case.

(CP paragraph 6.9: see summary paragraph 30)

Submissions of no case to answer

9. We provisionally conclude that there should be no right of appeal by the prosecution against a ruling of no case to answer made at the conclusion of the prosecution case.

(CP paragraph 6.20: see summary paragraph 31)

Jury acquittals

10. We provisionally conclude that there should be no right of appeal by the prosecution against a jury's verdict of not guilty, even where there has been a misdirection by the trial judge which may have favoured the defence.

(CP paragraph 6.26: see summary paragraph 33)

ANCILLARY AND PROCEDURAL MATTERS

The offences to which the right of appeal should apply

11. We provisionally propose that the new right of appeal should be available only where, had the defendant been convicted of the offence (or any of the offences) of which he or she is acquitted, the Attorney-General would have had power to refer the sentence to the Court of Appeal on the ground that it was unduly lenient.

(CP paragraph 7.9: see summary paragraph 34)

Leave and consent requirements

12. We provisionally propose that there should be a leave requirement, in the same form as for existing rights of appeal to the Court of Appeal, in respect of prosecution appeals.

(CP paragraph 7.10: see summary paragraph 35)

13. We provisionally consider that it would generally be neither necessary nor desirable to introduce a further check on the exercise by the prosecution of its rights of appeal, such as a requirement for the Attorney-General's consent or that of the Director of Public Prosecutions; but we invite views on whether, where the consent of any person was needed to initiate the prosecution, that person's consent should be required before the prosecution could appeal against a ruling.

(CP paragraph 7.13: see summary paragraph 36)

Time limits for applications for leave

14. We provisionally propose that
 - (1) in respect of appeals arising from a preparatory hearing, the requirements for notice of an application for leave to appeal should be as they are in the current law; but
 - (2) in respect of other appeals against terminating rulings, the prosecution should be required
 - (a) to indicate at the hearing itself that it is minded to appeal against the ruling; and
 - (b) within seven days of the ruling, to serve a full notice of application for leave to appeal on the trial judge and/or the Court of Appeal.

(CP paragraph 7.16: see summary paragraph 37)

Detention of defendants pending appeal

15. We provisionally propose that the court should have the power to detain the defendant pending the hearing of a prosecution appeal.

(CP paragraph 7.18: see summary paragraph 38)

16. We provisionally propose that, pending the hearing of a prosecution appeal, the defendant should have the right to bail on the same basis as other unconvicted defendants.

(CP paragraph 7.19: see summary paragraph 38)

Time limits on the hearing of appeals

17. We provisionally propose that there should be a time limit in all cases where the defendant is remanded in custody, to run between the conclusion of the trial and the conclusion of the appellate process before the Court of Appeal. We invite views on what the time limit should be, but provisionally suggest something of the order of two months.

(CP paragraph 7.22: see summary paragraph 39)

18. We provisionally propose that the Court of Appeal should have power to extend the custody time limit for the hearing of the appeal if the prosecution had exercised due diligence in promoting the hearing of the appeal, *and* there was a good and sufficient reason to extend the limit in the interests of justice.

(CP paragraph 7.24: see summary paragraph 39)

19. We invite views on whether, in addition to a custody time limit, there should be a time limit within which all prosecution appeals must be heard, whether or not the defendant is in custody.

(CP paragraph 7.25: see summary paragraph 39)

Time limits on retrials

20. We provisionally propose that there should be a time limit of two months for the defendant to be arraigned on a new indictment, if the Court of Appeal orders a retrial. We invite views on whether the parallel existing provisions relating to retrials following the quashing of convictions work well.

(CP paragraph 7.26: see summary paragraph 40)

The criteria to be applied by the Court of Appeal

21. We provisionally propose
- (1) that the sole criterion to be applied by the Court of Appeal in determining an appeal against a terminating ruling should be whether, in all the circumstances of the case, it is in the interests of justice that the acquittal should be quashed and a retrial ordered; but

- (2) that, in determining whether that criterion is satisfied, the court should be required to consider, together with any other factors that it may consider to be relevant,
 - (a) whether the ruling appealed against was correct, and
 - (b) where the trial was terminated by a decision of the prosecution to offer no or no further evidence, whether that decision was one which was open to a competent and conscientious prosecutor.

(CP paragraph 7.33: see summary paragraph 43)

Reporting restrictions

- 22. We provisionally propose that there should be an automatic ban on the reporting of an appeal until either the appeal is dismissed, or, if it is allowed, the retrial has finished, but that the Court of Appeal should have power to vary the order.

(CP paragraph 7.34: see summary paragraph 44)