

HIGH COURT JURISDICTION IN RELATION TO CRIMINAL PROCEEDINGS

ANALYSIS OF RESPONSES

INTRODUCTION

- 1 This document analyses responses to CP 184, The High Court's Jurisdiction in relation to Criminal Proceedings, which we published in October 2007. This analysis is published to accompany our report The High Court's Jurisdiction in relation to criminal proceedings LC 324.
- 2 The analysis covers written responses. We also held meetings with people interested in CP 184, as described in our report. Some comments made at meetings are referred to in this analysis, but all of them fed into the policy directly and are reflected in the report. Written comments from consultees also influenced the development of policy, as we describe in the report.
- 3 A list of respondents, and the abbreviations we use in referring to them, is included at Appendix A.
- 4 CP 184 put proposals and asked questions. Some respondents responded to the proposals and some to the questions. They are brought together in this analysis where they relate to the same issue. A table showing how the proposals and questions fit together is included at Appendix B. References to paragraph numbers in square brackets are to CP 184.

PROPOSAL 8.1 (Q 9.3 AND 9.4 RELATE)

A new framework

We provisionally propose that all appeals against convictions and/or sentences of the Crown Court (whether exercising its first instance jurisdiction, its appellate jurisdiction or its committal for sentence jurisdiction) should lie to the Court of Appeal. The Criminal Appeal Act 1968 should be extended to cover convictions and sentences of the Crown Court exercising its appellate jurisdiction.

[paragraph 4.20]

Q 9.3:

Do consultees agree that the Criminal Appeal Act 1968 should be amended so as to enable all appeals against convictions and/or sentences of the Crown Court (whether exercising its first instance jurisdiction, its appellate jurisdiction or its sentencing jurisdiction) to lie to the Court of Appeal?

Q 9.4:

Do consultees agree that extending the Criminal Appeal Act 1968 to enable defendants to challenge convictions and sentences of the Crown Court when exercising its appellate jurisdiction would be an adequate substitute for challenging such convictions and sentences by case stated and judicial review?

- 5 Two respondents (Tony Edwards and the CPS) simply agreed with the proposal at 8.1. Three respondents only agreed partially (OCJR, LRC of the Bar Council, and Master Venne, Registrar of Criminal Appeals and Master of the Crown Office).
- 6 The LRC of the Bar Council and OCJR answered 9.3 in the affirmative, but did not agree that extending the 1968 Act in the way proposed would be an adequate substitute for proceeding by judicial review or by case stated. The LRC of the Bar Council was content for the case stated procedure to be abolished, but believed that judicial review serves an important function. [see paragraphs 21 and 22 below] The OCJR had a different reason for disagreeing with 9.4: 9.4 mentioned only defendants' rights of appeal, and the OCJR was concerned that existing prosecution (and third party) rights of challenge would be lost.
- 7 Master Venne's objection was more fundamental. Although content to see defendants' appeals against conviction in the Crown Court acting in its appellate capacity be dealt with by the CACD, he did not think it was a good idea for appeals against sentence to go to the CACD (see paragraph 109 below).
- 8 With regard to question 9.4, Master Venne thought that whether the proposed route of appeal would be an adequate substitute for judicial review and case stated depended on the test and procedure put in place.

PROPOSAL 8.2 (Q 9.5)

We provisionally propose that all appeals against convictions and/or sentences of the Crown Court when exercising its appellate jurisdiction should require the leave of the Court of Appeal.

[paragraph 4.26]

- 9 Four consultees agreed with this proposal (the OCJR, the LRC of the Bar Council, Tony Edwards, and the CPS). Master Venne agreed in relation to appeals against conviction, but not in relation to appeals against sentence.

QUESTION 9.6

Do consultees believe that there should be a more stringent leave requirement than that currently contained in the Criminal Appeal Act 1968 in cases where a conviction results from or a sentence is imposed by the Crown Court exercising its appellate jurisdiction?

[paragraphs 4.24 to 4.27]

- 10 The CPS was alone in thinking that there should be a more stringent leave requirement for cases coming from the Crown Court's appellate jurisdiction. Four respondents did not accept this idea. Tony Edwards thought it would introduce an unnecessary complication. The OCJR wrote, "If the nature of the Court of Appeal's jurisdiction in these cases is set out clearly enough in legislation, there should be no need for a more stringent leave requirement." Master Venne thought it arguable that the test should be the same as in appeals from the Crown Court in its trial jurisdiction because appeals to the Crown Court from the magistrates' court proceed by way of rehearing (and the issues at the rehearing may not be the same as those at the original trial).

PROPOSAL 8.3 (Q 9.7)

We provisionally propose that section 58 of the Criminal Justice Act 2003 should be extended so as to apply to all 'terminating' rulings made by the Crown Court irrespective of whether the ruling was made in relation to an offence being tried on indictment.

[paragraph 4.31]

- 11 The combined effect of this proposal and proposal 8.4 and question 9.9 is that the prosecution should be able to challenge “terminating” rulings, however they arose, but not be able to quash acquittals at the Crown Court, however they arose.
- 12 Five respondents agreed with this proposal (HM Council of Circuit Judges, HHJ Peter Murphy, Tony Edwards, the CPS and the LRC of the Bar Council) and two disagreed (OCJR and Master Venne). The OCJR disagreed because it did not think that the right of appeal under section 58 was appropriate for rulings which are not interlocutory rulings. They suggested instead looking to amend section 10 of the 1968 Act.¹

PROPOSAL 8.4 (Q 9.8)

We provisionally propose that section 36 of the Criminal Justice Act 1972 should be extended so as to permit the Attorney-General, following an acquittal by the Crown Court when exercising its appellate jurisdiction, to refer to the Court of Appeal a point of law which has arisen in the case.

[paragraph 4.39]

- 13 This proposal envisaged the prosecution seeking an Attorney-General’s reference – a ruling on a point of law – but without any effect on the particular acquittal.
- 14 Two respondents (the LRC of the Bar Council and Tony Edwards) simply agreed with the proposal. Master Venne gave measured agreement (“This would arguably be a useful tool as it would provide a safety valve for the lack of precedent in Crown Court Appeals”). The CPS and the OCJR both disagreed.
- 15 The CPS acknowledged that there is currently a disparity between a defendant being acquitted following a trial on indictment, and a defendant being acquitted by the Crown Court exercising its appellate jurisdiction, but did not think it should “be resolved by removing from the prosecution its current ability to seek to overturn the acquittal in the latter”. An Attorney-General’s reference was not seen as adequate.
- 16 The OCJR thought that the Crown should have the right of appeal against final rulings of the Crown Court.

¹ Section 10 of the CAA 1968 provides for appeal against sentence where a defendant has been committed to the Crown Court for sentence.

QUESTION 9.9

Do consultees agree that if the prosecution is unable to overturn an acquittal of the Crown Court when exercising its first instance jurisdiction (other than one resulting from a 'terminating' ruling), it should also be unable to overturn an acquittal of the Crown Court when exercising its appellate jurisdiction?

[paragraphs 4.32 to 4.39]

- 17 Respondents to this question followed the same pattern as in the previous question: the CPS and the OCJR both disagreed while three other respondents (the LRC of the Bar Council, Master Venne and Tony Edwards) agreed.
- 18 The OCJR thought that the CP proposals distinguished between situations where the Crown Court's decision is a "terminating ruling" and those where it is an "acquittal" because it "reflects the distinction in trials on indictment between judges stopping the trial and juries acquitting the defendant at the end". The OCJR did not agree that this is where the real distinction lies. Rather, they argued that the real distinction is between judge's rulings which may be overturned and juries' decisions to acquit, which may not. The OCJR further argued that the distinction is not pertinent where the Crown Court is acting in its appellate jurisdiction. It is submitted that the distinction is in fact between decisions by the tribunal of law and decisions by the tribunal of fact. If the Crown Court in its appellate jurisdiction acquits a defendant it is acting as the tribunal of fact. If that is taken as the basis, then the question at 9.9 offers a consistent position.

QUESTION 9.10

Do consultees agree that section 36 of the Criminal Justice Act 1988 (Attorney-General's reference of an unduly lenient sentence following a trial on indictment) should not be extended to sentences imposed by the Crown Court when exercising its appellate jurisdiction?

[paragraphs 4.40 to 4.43]

- 19 Three respondents (the LRC of the Bar Council, the CPS and Tony Edwards) gave simple agreement, without more. The OCJR and Master Venne also agreed, and gave reasons. The OCJR's position was that the prosecution should have the right of appeal in all cases anyway. Master Venne thought the issue would very rarely arise – "If the CCT is exercising its appellate jurisdiction, it is limited to its Magistrates' Court powers" – and that this was reason not to extend the Attorney-General's powers.

PROPOSAL 8.5 (Q 9.1)

We provisionally propose that section 28(1) of the Supreme Court Act 1981 be amended so as to preclude all orders, judgments or other decisions of the Crown Court made in criminal proceedings being challenged by way of appeal by case stated to the High Court.

[paragraph 4.46]

- 20 Five respondents commented on this proposal, and all were content with it. The respondents were the LRC of the Bar Council, the CPS, Master Venne, OCJR and Tony Edwards. The LRC of the Bar Council's agreement was, however, contingent on judicial review being retained: "providing that a residual power of judicial review remains the proposal to abolish the procedure for stating a case from the Crown Court is sensible". They commented, "a small number of cases, particularly those referred at para. 4.6 of the consultation paper ... do not fit comfortably with the proposed Court of Appeal route. It is right that the High Court should have a supervisory jurisdiction over aspects of procedural fairness of the Crown Court's processes. This could however be properly dealt with in judicial review."

PROPOSAL 8.6 (Q 9.2)

We provisionally propose that section 29(3) of the Supreme Court Act 1981, by virtue of which certain determinations, orders, judgments or other decisions of the Crown Court may be challenged by way of application for judicial review to the High Court, should be repealed.

[paragraph 4.70]

- 21 The CPS, Master Venne, OCJR and Tony Edwards were all content with this proposal. The LRC of the Bar Council, however, was very concerned at the potential loss of judicial review. They wrote,

Judicial review has nevertheless proved to be a useful protection of the individual, in particular see the run of cases concerning custody time limits.² Although it is difficult to see why these arguments could not have been run in the Court of Appeal, and no great prejudice would result from the proposed changes which would in future require an appellant to go to the Court of Appeal rather than the High Court, we are firmly of the view that it would be wrong to abolish judicial review so far as it relates to the Crown Court. We have already seen the erosion of habeas corpus, to abolish judicial review as well would in our view be potentially dangerous.

22 They also wrote,

It is noted that the Law Commission recognises at para 4.47 that the position is far less straightforward in relation to the High Court's supervisory powers in judicial review than case stated. We share the Law Commission's caution but not its conclusion. Whilst it is recognised that the number of judicial reviews of decisions of the Crown Court are not large we are strongly opposed to any proposal to abolish this route. The supervisory role of the High Court as a protection of the individual's common law rights is a fundamental bulwark of our legal system. The current arrangements properly prevent the High Court from interfering with the trial process whilst at the same time allowing the High Court to prevent the Crown Court from exceeding its powers or acting procedurally improperly. We note that the Law Commission is not proposing to abolish these safeguards but to transfer them from the High Court to the Court of Appeal. This is unnecessary. The current arrangements whereby a two-member Divisional Court hears judicial reviews in criminal causes or matters works well and would not be improved by the proposed transfer. We therefore oppose the provisional proposal to abolish section 29(3) of the Supreme Court Act 1981.

² *R v Manchester Crown Court, ex parte McDonald* [1999] 1 Cr App R.409, DC ;
R v Sheffield Crown Court, ex parte Headley [2000] 2 Cr App R 1 DC.

THE NEW STATUTORY APPEAL: PROPOSAL 8.7 (Q 9.11)

We provisionally propose that there should be a new statutory appeal to the Court of Appeal to enable the Court of Appeal to entertain challenges to determinations, judgments, orders or rulings of the Crown Court on the grounds that the decision or ruling:

(1) is wrong in law;

(2) involves a serious procedural or other irregularity; or

(3) is one that no competent and reasonable tribunal could properly have made.

[paragraph 4.71]

- 23 The Bar Council LRC did not agree with this proposal. Master Venne simply wrote, "This provision would deal with peripheral decisions such as custody time limits, bail, witness orders and funding". The CPS approved it without further comment³ but other responses to this proposal were qualified agreement.
- 24 Tony Edwards agreed subject to extending the criteria "to the full *Wednesbury* test" by which he meant adding "or has considered an irrelevant matter or taken account of an irrelevant one".
- 25 The OCJR had doubts about the second limb. They thought the reference to serious irregularity opened the way to "a significant amount of nugatory litigation". They thought it "might be better to amend limb (1) to read "wrong in law or principle" and to omit limb (2)" but concluded that, "provided the new test is within the overall ambit of the case stated and judicial review tests, we have no strong views as to how it is framed".
- 26 Wood Green Crown Court judges queried "whether it was appropriate to ask a court to 'self-certify' in accordance with the third ground".

³ Although in discussion, the CPS said that the wording proposed was to be preferred to the wording in section 61 of the Criminal Justice Act 2003.

- 27 The position of the Criminal Sub-Committee of the Council of HM Circuit Judges was that, if case stated and judicial review are to be done away with, then a new procedure is “desirable” and the grounds identified are “appropriate”. The Committee thought the new procedure should “be principally directed toward appeals from the Crown Court exercising its appellate functions” and it should not “convey additional rights of appeal in other situations particularly in relation to the first instance jurisdiction of the Crown Court”.

PROPOSAL 8.8 (Q 9.12) (SEE ALSO Q 9.24 BELOW)

We provisionally propose that the new statutory appeal should be subject to leave being granted by the Crown Court.

[paragraph 4.72]

- 28 The CPS was content with the leave proposal; others were not. Tony Edwards objected strongly. The OCJR thought it “out of kilter with the criminal law”. They suggested that “[l]eave to apply under the new statutory appeal should be granted either by the Crown Court or on application to the Court of Appeal in the usual way.” They pointed out, “This has significant implications for costs.”
- 29 In discussion, at least two of the Old Bailey judges expressed concern that the CACD was not involved in the process of giving leave.
- 30 The Wood Green Crown Court judges felt that
- ...if a system were introduced, it should not be a closed system in which the Crown Court itself was the sole arbiter of leave to appeal. We feel it would be necessary for there to be an outlet to the single judge. This in turn would add to the delays in the system. These delays, cumulative and inevitable, are a very powerful reason not to pursue this scheme.
- 31 The Newspaper Society was concerned at any restriction on access to the courts:
- The media must have the immediate right to appeal at any and all stages of the proceedings or appeal proceedings, immediately a determination or order or other decision affecting open justice is made. The right to appeal should be unfettered by leave requirements.
- 32 Master Venne commented,

It is difficult to comprehend a CCT judge ruling that their decision is one that no competent and reasonable tribunal could properly have made. It would seem more satisfactory if the issue of leave was one which was determined by a CACD SJ. Consideration could however be given as to whether or not a CCT could grant leave akin to granting a trial judge's certificate. Whatever the decision, it would seem appropriate that there is always the opportunity for the matter to be dealt with by a SJ.

PROPOSAL 8.9 (Q 9.13 AND Q 9.14)

We provisionally propose that the new statutory appeal should not be capable of being invoked to challenge:

(1) a conviction, sentence or acquittal arising out of any proceedings in the Crown Court; and

(2) any other decision or ruling of the Crown Court against which an appeal lies to the Court of Appeal by virtue of any other enactment.

[paragraph 4.73]

- 33 There was broad agreement with this proposal.⁴ The LRC of the Bar Council's agreement has to be taken in the context of its disagreement with dispensing with Judicial review. The OCJR agreed with the proposal but thought it "beg[ged] the further question of whether a different appeal is required for dealing with Crown Court decisions where the court is acting in its appellate function, and another one for other kinds of Crown Court criminal decisions (not relating to trial on indictment)".
- 34 Again, the main concern of The Newspaper Society was access to the courts and "open justice". It referred to "the protracted litigation on open justice occasioned by section 29 SCA 1981 to determine its remit, even after implementation of s 159 CJA 1988" and thought that "It would be important to guard against similar problems in any implementation of recommendation 8.9, paragraph 4.37 and the other recommendations which exclude use of the proposed new appeal rights where there are other statutory rights of appeal".

⁴ Tony Edwards wrote, "Not where other remedies exist".

PROPOSAL 8.10 (Q 9.15)

We provisionally propose that the Court of Appeal, when determining a statutory appeal, should not have the power to make prerogative orders but instead should be able to confirm, reverse or vary a decision.

[paragraph 4.74]

- 35 Four respondents agreed with this proposal (Tony Edwards, the CPS, the OCJR and Master Venne); the LRC of the Bar Council did not.

PROPOSAL 8.11 (Q 9.16)

We provisionally propose that the Court of Appeal, when determining a statutory appeal, should have the power to reverse a decision and remit the case to the Crown Court with its opinion for a further decision to be made.

[paragraph 4.75]

- 36 This proposal is also about the powers which the Court of Appeal should have under the proposed new statutory appeal. All five respondents who commented on it agreed, though the LRC of the Bar Council reaffirmed that it objected to the loss of judicial review. Master Venne thought this could be particularly useful in cases with “complicated fact-finding issues”.

THE CIRCUMSTANCES IN WHICH RESORT TO THE NEW STATUTORY APPEAL SHOULD BE PERMITTED

- 37 The CP distinguished different grounds according to the stage in proceedings that had been reached. That approach in itself attracted some criticism. The Criminal Sub-Committee of HM Circuit Judges wrote,

Whilst we can understand the logic of identifying the appropriate avenues for appeal by reference to the stage the proceedings have reached we are far from satisfied that would address the concerns expressed above. Currently avenues for challenging rulings, with the exception of terminating rulings, are such that those challenges are, in practice, against rulings made before a jury is sworn, for example in the course of preparatory hearings. [fn omitted] There have been relatively few appeals against terminating rulings and we understand that there are strict protocols observed by the CPS in relation to challenges. Any proposal that results in additional means of challenge once a jury is sworn and a trial underway risk serious disruption to the proper and efficient progress of trials, problems and inconvenience for jurors and stress for victims and witnesses. It must never be forgotten that a general right of appeal can be exercised after conviction.

Crown Court exercising its first instance jurisdiction

- 38 The first proposal to be considered under this heading related to the time after the conclusion of the trial:

PROPOSAL 8.12 (Q 9.17)

Decisions and orders made after the jury has been discharged

We provisionally propose that, subject to obtaining leave from the Crown Court, any person directly affected by a determination or order made after the jury has been discharged in a trial on indictment (other than a determination or order which is a 'sentence' for the purposes of the Criminal Appeal Act 1968 or against which an appeal lies to the Court of Appeal by virtue of any other enactment) should be able to appeal to the Court of Appeal on the grounds that the determination or order:

(1) is wrong in law;

(2) involves a serious procedural or other irregularity; or

(3) is one that no competent and reasonable tribunal could properly have made.

[paragraph 5.40]

- 39 Four respondents (the CPS, the Criminal Sub-Committee of the Council of HM Circuit Judges, Wood Green Crown Court judges, HHJ Peter Murphy) were content with this proposal, and another three (the LRC of the Bar Council, Tony Edwards and The Newspaper Society) gave qualified agreement.⁵
- 40 In discussion, HHJ Peter Beaumont QC said that he was in favour of the proposals dealing with appeals against decisions/rulings made after the jury had reached its verdict.
- 41 Master Venne noted that the proposal would lead to an increase in the type of matters that can be appealed, and gave the example of a Recovery of Defence Costs Order.⁶
- 42 Not all respondents picked up on the point that this proposal would allow third parties to challenge a post-trial ruling. The Wood Green Crown Court judges thought it seemed “a small field of endeavour”. By contrast, the Rose Committee, in discussion, was very concerned about that possibility. Master Venne commented, “It is arguable that a clear definition of ‘a person directly affected’ is required as it potentially has a very wide application”.
- 43 The CPS queried,
- We would also welcome clarification on the term “third party”. The prosecution sometimes represents the interests of victims and witnesses in court. Does the term “third party” include victims and witnesses – as distinct from, for example, a publisher or a campaigning group?
- 44 The OCJR was concerned about the extension to third parties:

⁵ Tony Edwards wrote, “Not where other remedies exist”.

⁶ Where a defendant is publicly funded, regulations require the court (other than a magistrates’ court) to “make an order requiring him to pay some or all of the cost of any representation so funded for him” Criminal Defence Service (Recovery of Defence Costs Orders) Regulations 2001 (SI 2001/856) as amended by Criminal Defence Service (Recovery of Defence Costs Orders) (Amendment) Regulations 2004 (SI 2004/1195). There are some exceptions. However, by virtue of s 28(4) and s 29(6) of the Senior Courts Act 1981, such orders may be challenged in the High Court.

Although the parties to criminal proceedings are the prosecutor and defendant alone, third party appeal rights are acceptable within the parameters imposed by section 29(3) in its current form. General third party appeal rights against any Crown Court decision relating to trial on indictment, as proposed in the paper, are likely to give rise to delay and disruption to proceedings.

- 45 The OCJR also did not agree with the proposal because it saw it as creating new rights of appeal relating to trial on indictment, to which it was opposed.
- 46 The OCJR was also concerned about cost implications: “As also noted above, restricting the power to grant leave to the Crown Court is unacceptable. Allowing defendants to petition the Court of Appeal direct is likely to increase the number of appeals and would have cost implications.”
- 47 The OCJR described what it hoped to see:

The policy enshrined in section 29(3) is that no decision relating to trial on indictment should be appealable. Our preferred approach is to abolish the case stated and judicial review jurisdictions and replace them with a statutory right of appeal against such Crown Court decisions as the courts have decided are appealable despite the terms of section 29(3), and additionally any such specific kinds of decision as it is considered should be appealable on their particular merits.

PROPOSAL 8.13 (Q 9.18)

- 48 This next proposal related to rulings during the trial.

Decisions and rulings made after the jury has been sworn and before it has been discharged

We provisionally propose that:

- (1) a defendant or a directly affected third party,
- (2) subject to obtaining the leave of the Crown Court,
- (3) may appeal forthwith to the Court of Appeal against any determination, judgment, order or ruling made after the jury has been sworn and before it is discharged (other than one against which an appeal lies by virtue of any other enactment),

(4) on the grounds that the determination, judgment, order or ruling: (a) is wrong in law;

(b) involves a serious procedural or other irregularity; or

(c) is one that no competent and reasonable tribunal could properly have made,

(5) if:

(a) being unable to appeal forthwith, he or she would have no adequate remedy in respect of the determination, judgment, order or ruling; and

(b) the decision or ruling is one:

(i) which affects the liberty of the defendant or the third party;

or

(ii) which the defendant or third party seeks to challenge as being unlawful by virtue of section 6(1) of the Human Rights Act 1998.

[paragraph 5.63]

- 49 The CPS agreed with the proposal, without further comment. The LRC of the Bar Council also agreed, although again subject to their caveat that they objected to the basic scheme. There were weighty objections to the proposal from Wood Green Crown Court judges, from HHJ Peter Murphy, Master Venne, Ed Rees QC, the OCJR and the Criminal Sub-Committee of HM Circuit Judges. Master Venne wrote, "I have very great reservations about any proposal to confer what is in effect a new interlocutory right of appeal."
- 50 Those who disagreed with the proposal had reservations about the phrase "no adequate remedy". The Circuit Judges wrote, "We consider that the concept of 'no adequate remedy' is imprecise and could potentially give rise to problems. It is important to bear in mind that unintended consequences may flow from measures introduced with the best of intentions." The OCJR thought the concept "fraught with difficulty". Ed Rees QC thought it was not a practicable test.
- 51 A later proposal tried to narrow the concept of "adequate remedy" – see question 9.21 below.

- 52 The principal cause for concern was the potential breadth of issues which could be the source of challenges during trial, and the risk of increased satellite litigation. For example, HM Council of Circuit Judges commented, “Decisions concerning the identity of parties, publicity and the like are generally taken either before the trial begins or at the conclusion of proceedings. There is no necessity to introduce these proposals, risking the consequences of satellite litigation in general, to cater for the few cases where those decisions are made.” They also made the general comment: “We believe that the introduction of such a general and imprecise basis for challenge during trial is quite unnecessary and undesirable. The consequences are likely to result in disruption and uncertainty. It would open Pandora’s Box.”
- 53 In discussion, HHJ Peter Thornton QC referred to rulings made in response to applications for a witness to have the benefit of giving evidence behind screens. Such rulings were frequently sought. He envisaged that, if permitted to do so, defendants would wish to challenge rulings which permitted the use of screens. Likewise, in cases where the application was refused, the disappointed witness might wish to challenge the decision. One of his colleagues thought such applications were mostly granted anyway.
- 54 The OCJR had “particular concerns about limb (ii) because there is potentially no limit to the number of decisions it would render appealable”. Ed Rees QC wrote, “The proposal would appear to allow for the derailment of the trial at any stage.”
- 55 Wood Green Crown Court judges wrote, “the more we thought of the matter the more such phrases as “affects the liberty of the defendant” and the inclusion of rights of third parties gave us increasing concern. We all felt that such wording and the inclusion of HRA as a criterion would give the opportunity for a whole range of satellite arguments and delays.”
- 56 HHJ Peter Murphy saw the reference to HRA rights rather differently:

Appeals against rulings during trial are highly problematic. The proposed test refers to: rulings affecting the liberty of the defendant or a third party, or which are unlawful by virtue of article 6 of the ECHR, and are such that there would be no adequate remedy without an immediate appeal. The Commission believes that the number of rulings that satisfy these criteria would be very small. I disagree. Many rulings affect the right to a fair trial under article 6, and it is not hard to imagine cases in which a perfectly legitimate argument could be made. What about bail applications, PII applications, competence arguments, attempts to uphold legal privilege?

[He here makes a counter-suggestion, which is described at paragraph 63 below.]

I ...dissent respectfully from the view [in the response of his Wood Green colleagues] that HR provisions are a problem. We have a duty to safeguard the right of fairness, and while I think that English law generally does this well without reference to article 6, we should take the ECHR fully into account. In this instance, I don't think it requires us to reach a conclusion different from the one we would reach without it. But I think it is a mistake to include it in the grounds for an interim appeal against a ruling made during trial, as I have indicated above, because it makes the issue unnecessarily broad.

- 57 In discussion, HHJ Peter Thornton QC said that as an advocate he had been involved in a case where it was arguable that the judge at the conclusion of the prosecution case had made an irrational decision to remand in custody a defendant who previously had been on bail.
- 58 Satellite litigation would disrupt and delay the proceedings in question, and other cases too: "the jury will have to await the appeal being dealt with by CACD, the defendant may have to be accommodated for a longer period than if the trial proper were to continue, the application will have to be prepared by CACD lawyer/admin staff and then listed before the CACD, thus using Court and judiciary time". Such litigation may well turn out to be pointless, Master Venne thought: if there were grounds for appeal, they could be pursued in the usual way, and if the defendant was successful on an interlocutory appeal that may not be the end of the matter, there may still be a conviction and so ultimately the whole process would have been academic.

- 59 The proposal could open up rulings to challenge by people other than the parties – in an example given in discussion with the CPS, a complainant asks to be able to give evidence in a particular way, but the application is refused. The prosecutor decides not to challenge the decision, but the proposal would allow the *witness* to do so, which could lead to a large number of challenges.
- 60 The CPS also referred, in discussion, to rulings on evidence and disclosure being such regular features of a trial (as compared with, for example, rulings remanding witnesses in custody or refusing costs orders) that proposals which allow appeals against such rulings have the potential to interrupt a trial frequently, and repeatedly.
- 61 Mr Justice Pitchers, in discussion, referred to unsuccessful applications to break fixtures being challenged: it would be undesirable and regrettable if appeals were permitted against such rulings.
- 62 Respondents also pointed out the issue of what would happen to the jury who had been sworn: would they be discharged? Would the trial be adjourned?
- 63 HHJ Peter Murphy felt this proposal was “highly problematic”. “The Commission believes that the number of rulings that satisfy these criteria would be very small. I disagree. Many rulings affect the right to a fair trial under article 6, and it is not hard to imagine cases in which a perfectly legitimate argument could be made. What about bail applications, PII applications, competence arguments, attempts to uphold legal privilege? I suggest it would be better to enumerate a very few specific issues, which are viewed as so important that the trial should not be permitted to continue without a review of the ruling, in the public interest (which could include irreparable harm to the defendant’s position). I suggest as examples: points of law which call into question the legal validity or sufficiency of the indictment; and PII applications which, if denied, would compel the Prosecution to abandon the case.”
- 64 The OCJR thought the part of the proposal which would allow challenge where (b) the decision or ruling is one (i) which affects the liberty of the defendant or the third party; or (ii) which the defendant or third party seeks to challenge as being unlawful by virtue of section 6(1) of the Human Rights Act 1998 was “wrong in principle” and that it would “draw a large number of cases into the net, without compensating benefits”.
- 65 On a point of detail, Ed Rees QC queried the phrase, “affects the liberty of the defendant” in condition 2(a). He asked, “Is this to be taken literally as the deprivation of liberty in direct consequence of the decision. If so, might it not be better to list the forms of order. If not, what does it mean?”

- 66 On this point, the CPS in discussion suggested that a defendant who was in custody would be able to use this proposal to challenge, say, a ruling rejecting a submission of no case to answer, because the consequence of the decision is that the case continues, and a consequence of the case continuing is that the defendant is not at liberty.
- 67 In discussion the OCJR suggested that it might be possible to have a fixed list of those rulings affecting third parties which would be susceptible to appeal. This could be augmented by an order making power enabling the list to be added to if thought desirable. On the other hand, another consultee was not in favour of fixed lists: they do not cater for the unexpected, and if there is a catch-all which allows for the unexpected, then there seems to be no point in the fixed list.
- 68 Some respondents thought the proposal wrong in principle because the defendant already has a right of appeal post-conviction (HM Circuit Judges and Master Venne also referred to this right as significant).
- 69 The proposal was in part predicated on a belief that pre-trial issues are generally dealt with pre-trial. The criminal procedures have recently been revised to encourage such practice, and it is certainly the aim. Feedback from discussion with the CPS and Crown Court judges suggested it is not, however, the reality. Courts are unwilling to assign judges to particular cases; judges are unwilling to make rulings which bind their successors; counsel is unwilling to seek a ruling which will bind the advocate who is going to conduct the trial. So in practice, issues which should be addressed before the date a trial is listed, are not. Further, practice varies enormously around England and Wales.
- 70 In discussion, respondents also said that having different grounds/conditions for the new statutory appeal depending on whether the application is made before/after the jury is sworn (or the trial is listed) would lead to inconsistent decisions.
- 71 If the rules are tighter for appeals once the trial is underway, there could be an incentive, from the judge's point of view, to deal with a ruling on a matter which could result in an appeal after the jury has been sworn rather than pre-trial. Again, inconsistency could result, and also the incentive is counter to the general theoretical push for issues to be addressed pre-trial. On the other hand, the incentive for the representatives would be for the matter to be dealt with pre-trial.

72 A judge at Snaresbrook Crown Court made the valuable point that, if there is significance in a cut-off point, namely the likelihood of being able to obtain a review is greater on one side of the cut-off point than the other, that not only puts pressure on parties and the judge to have an issue discussed at a particular point in the process, but it also creates a *new cause of argument*. For example, a defendant might seek to argue that, by refusing to take a particular legal argument before the jury is sworn, the judge is depriving the defendant of a potential right to challenge the ruling reached.

73 With regard to the effect on witnesses if a trial is adjourned while a challenge to the judge's ruling is pursued, Mr Justice Pitchers made the point that this can have a particularly bad impact on vulnerable witnesses, who gear themselves up to give evidence on the day they expect, and can find it very hard if they are then not called.

PROPOSAL 8.14 (Q 9.19)

74 On the cut-off point, proposal 8.13 identified the point when the jury was sworn as the cut-off point. Proposal 8.14 offered the alternative cut-off point as the day on which the trial proper is listed to start. No consultees positively preferred the alternative. The Council of HM Circuit Judges wrote, "The subtle change in timing does not alter our views."

75 Tony Edwards thought the "critical issue is inconvenience to the jury", and therefore the swearing of the jury was an appropriate cut-off point.

76 The CPS preferred proposal 8.13 on this issue, "as this would avoid difficulties with warned list trial starting dates."

77 The OCJR also thought the swearing of the jury was to be preferred "because it is used in other contexts and so is clear."

78 Master Venne thought there might be slightly less disruption, but many of the practical actions necessary to bring a case to trial will already have been put into effect.

79 In various discussions it was clear that practice varies around the country as to when the jury is sworn: some courts will swear the jury and then hear legal argument whereas others will do the reverse.

QUESTION 9.20

Do consultees believe that a defendant or directly affected third party should also be able to appeal forthwith against a determination, judgment, order or ruling made after the jury has been sworn and before it is discharged if:

(1) the appeal would not 'significantly' interrupt the proceedings before the jury; and/or

(2) it would be in the 'interests of justice'?

[paragraphs 5.54 to 5.55]

- 80 There was some support for this proposal: from the CPS (preferring the "interests of justice" test), the LRC of the Bar Council (subject to their caveat) and Tony Edwards. Tony Edwards qualified his support by saying that it should read "and", not "and/or".
- 81 There was significant opposition to the proposal from Master Venne, the OCJR, and HM Council of Circuit Judges. Master Venne thought that what counted as a significant interruption would be "a subjective test to be applied by Crown Court judges which would inevitably result in inconsistent decisions".
- 82 The OCJR thought that a fundamental problem with this proposal was that, instead of reducing the potential for litigation, it increased it: "This proposal introduces two new concepts, 'significantly interrupting the proceedings' and 'in the interests of justice'. Clearly, such matters can only be determined on a case by case basis. The application of this test would generate further unnecessary litigation".
- 83 The Circuit Judges did not think the proposal a practical one in this form. Rather,

The only basis upon which we could see a purpose for such a provision would be to deal with those few cases such as *R (TB) v The Combined Court at Stafford* [2006] EWHC 1645 (Admin) where a third party might wish a determination. Thus we would be inclined to consider something along the lines set out above available to an affected third party where that third party seeks to invoke Articles 8 or 9 of the Human Rights Act 1998.

QUESTION 9.21

'Do consultees agree that a defendant or third party has an 'adequate' remedy in respect of a determination, judgment, order or ruling if:

(1) he or she can resort to a specific statutory appeal in respect of the determination, judgment, order or ruling; or

(2) no adverse effect:

(a) would materialise from the determination, judgment, order or ruling in the event of the defendant being acquitted; and

(b) no adverse effect, other than any sentence passed following conviction, would materialise from the determination, judgment, order or ruling if the appeal against conviction was successful?

[paragraphs 5.50 to 5.51]

84 Tony Edwards, the CPS, Master Venne and the LRC of the Bar Council all agreed with this question. The OCJR noted that it did not support a “no adequate remedy” limb, but “[t]hat aside, it would seem likely that in most cases limb (1) would not apply. It follows that the court would have to apply limb (2). This would engage it in a case by case decision about whether the particular circumstances were to be regarded as having an ‘adverse effect’. This would generate further unnecessary litigation.”

85 The Council of Circuit Judges, in their comments on proposal 8.15, said,

We believe that references to an “adequate remedy” are imprecise and would encourage satellite litigation and delay. This would have the effect of wearing down victims and witnesses as a tactic by the unscrupulous, of whom there are many in the criminal sphere.

86 Ed Rees QC, in his comments on other proposals, argued that if the intention behind the proposals is that challenges via the proposed new statutory appeal would be rare, because the post-conviction right of appeal is generally to be considered an “adequate remedy”, then this should be made explicit.

87 The message is consistent with comments on other proposals: if a test is set by reference to concepts, then the room for argument about what the concept means risks unnecessary litigation.

PROPOSAL 8.15 (Q 9.22)

Decisions and rulings made before the jury is sworn

We provisionally propose that:

(1) a defendant or a directly affected third party,

(2) subject to obtaining the leave of the Crown Court,

(3) may appeal forthwith to the Court of Appeal against any determination, judgment, order or ruling (other than one against which an appeal lies by virtue of any other enactment) made before the jury has been sworn,

(4) on the grounds that the determination, judgment, order or ruling:

(a) is wrong in law;

(b) involves a serious procedural or other irregularity; or

(c) is one that no competent and reasonable tribunal could properly have made,

(5) if:

(a) being unable to appeal forthwith, he or she would have no adequate remedy in respect of the determination, judgment, order or ruling; or

(b) he or she, even if unable to appeal forthwith, would have an adequate remedy in respect of the determination, judgment, order or ruling but the potential advantages of permitting an appeal forthwith are such as to make it the right course.

[paragraph 5.88]

- 88 The CPS was the only respondent to express written agreement with the proposal as it stood, and they did not give reasons. Tony Edwards was content so long as it included “the full *Wednesbury* test”. In discussion, the judges at Snaresbrook Crown Court thought that it can be useful to settle questions in advance of lengthy trials (as could have occurred in *Preddy*,⁷ or where a ruling would lead to a change of plea, or where there is no dispute on the facts).
- 89 HM Council of Circuit Judges, the OCJR, Master Venne and Wood Green Crown Court judges all opposed the proposal. Two other respondents (HHJ Peter Murphy and Ed Rees QC) could not agree with it but made suggestions as to how it could be improved.
- 90 The reasons for opposition were that the proposed right of appeal was unnecessary and impractical, and that the consequences would be unwelcome.

⁷ [1996] 3 WLR 255.

- 91 Ed Rees QC and the Circuit Judges both thought that, in cases serious enough to have a Preparatory Hearing, there is already a right of appeal and it did not seem necessary to have an additional right of immediate appeal.
- 92 The consequences of an additional interlocutory appeal were seen as being delay and a drain on resources by the OCJR, by Ed Rees QC, by the Wood Green Crown Court judges, and by the Circuit Judges. The consequences would not be proportionate.
- 93 Limb 5(b) came in for particular criticism from the OCJR: “The test envisaged in limb (5)(b) is of itself capable of generating significant new litigation. A test such as ‘the potential advantages of permitting an appeal forthwith are such as to make it the right course’ has no place in the scheme of criminal proceedings.”
- 94 The Wood Green Crown Court judges also thought the terms of the proposal were so unclear as to encourage litigation: “We believed that the scope would be much wider than was envisaged and the Bar would be duty bound to push at the boundaries of the “debaring clauses”. Their concern related in part to the phrase “no adequate remedy”: they suggested that if a judge were invited to dismiss a case and refused, then paragraph 5(b) would come into play and so an interlocutory right of appeal would arise in every case. They acknowledged that that was unlikely:

Of course that won't happen but the proposals put forward, in whatever form they finally take, will have major ramifications and we do not believe that these consequences are currently fully appreciated. We fear that this would make trial work very difficult and slow down the progress and that the wit and ingenuity of the Bar would cause a great deal of work and delay.

- 95 HHJ Peter Murphy had a slightly different perspective:

I don't agree with the approach of designing the new scheme with the goal of preventing the Bar from abusing it. We cannot blame the Bar for seeking to take advantage of whatever provisions are enacted. They have a duty of zealous advocacy for the defendant, and it is their job to make whatever legitimate arguments can be made, which involves pushing the envelope in some cases. Rather, the answer lies in refining the remedy in narrow and specific terms, so that it cannot be abused easily, but is available in proper cases.

- 96 HHJ Peter Murphy thought that if his counter-proposal were followed up (see above) that would cover pre-trial issues and those arising during trial.

PROPOSAL 8.16 (Q 9.23)

Alternative cut off point

- 97 Proposal as above in 8.15 but with a cut-off point of “made before the day on which the trial proper is listed to start.”
- 98 Those respondents who addressed this alternative proposal rejected it in favour of the cut-off point proposed in 8.15, i.e. the swearing of the jury. The CPS, the LRC of the Bar Council and the OCJR all expressed a preference for the swearing of the jury as the cut-off point rather than the day on which the trial proper is listed to start.

QUESTION 9.24

Renewal of application for leave

Do consultees agree that in all cases, if the Crown Court refuses an application for leave to appeal, a defendant or third party should not be able to renew the application to the Court of Appeal?

[paragraphs 5.52 to 5.53]

- 99 The CPS was alone in agreeing with this proposal. Tony Edwards “strongly” disagreed. Master Venne opposed it, and pointed out “In any event the decision could arguably be the subject of judicial review”. The LRC of the Bar Council opposed it. The OCJR also thought it was not an appropriate restriction: “The ability to petition the appellate court direct is an important element of criminal appeal procedure.”
- 100 The next question concerned the exclusion of the prosecution from the proposed new appeal procedure:

QUESTION 9.25

Prosecution appeals

9.25 Do consultees agree that, apart from decisions relating to custody time limits, the prosecution should not be able to invoke the new statutory procedure in order to challenge any determination, judgment, order or ruling made prior to the jury being discharged?

[paragraphs 5.42 and 5.70]

- 101 Master Venne wondered whether it was necessary, given that the prosecution have a right of interlocutory appeal under the CJA 2003.
- 102 The LRC of the Bar Council and the Circuit Judges were inclined to agree, though the Circuit Judges thought that the prosecution should be able to invoke the proposed new statutory appeal in relation to custody time limits.
- 103 Tony Edwards, the OCJR, and the CPS did not agree. The OCJR thought the proposed appeal right should be available to prosecuting authorities – but bearing in mind the opposition of the OCJR to new interlocutory appeal rights overall.

PROPOSAL 8.17 (Q 9.26)

Composition of juries

We provisionally propose that decisions and rulings made by the trial judge in relation to the composition of the jury should be treated as having been made after the jury has been sworn.

[paragraph 5.68]

- 104 The Circuit Judges, LRC of the Bar Council, the CPS and Tony Edwards all agreed with this proposal. Master Venne disagreed. The OCJR also disagreed: they were unclear about the basis for the proposal and thought that at the least, it was a complicating factor, and therefore unwelcome.

PROPOSAL 8.18 (Q 9.27)

Custody time limits

We provisionally propose that special provision should be made to enable the prosecution to invoke the new statutory appeal in order to challenge decisions relating to custody time limits.

[paragraph 5.107]

- 105 Master Venne disagreed with this proposal. All other consultees who commented on it agreed.

QUESTION 9. 28

Cases tried on indictment without a jury

Do consultees believe that special provision should be made for cases tried on indictment without a jury. If 'yes', what form should such provision take?

[paragraph 5.108]

- 106 The Circuit Judges did not think there needed to be special provision. Master Venne again questioned the need for special provision, given the right of interlocutory appeal under the CJA 2003. The OCJR could not see the need for special provision either, but because they could not see any significant difference between jury and non-jury trials in this respect. Tony Edwards, by contrast, thought that if the main reason for restricting challenges to court decisions was to avoid delay and inconvenience to juries, then the impetus for the restrictions did not exist if the trial did not involve a jury.
- 107 The CPS suggested the calling of evidence as the cut-off point if there were no jury to be sworn.

THE CROWN COURT'S APPELLATE JURISDICTION

- 108 In discussion, Lynne Knapman (Deputy Master) and Martyn Cowlin (Senior Legal Manager) at the Administrative Court Office thought that, if magistrates' decisions are to be unaffected while all Crown Court challenges have to go via the CA(CD), there might be an incentive for defendants to use case stated/judicial review as a means of challenge rather than to appeal to the Crown Court. So there could be an increase in the numbers of case stated/judicial review of magistrates' court decisions.
- 109 Master Venne wrote that sentence appeals from the Crown Court acting in its appellate capacity should not go to the CACD:

It seems to me that there is a real possibility that we would have a lot of sentence appeals from the Crown Court sitting in its appellate jurisdiction. My particular concerns are driving matters especially drink driving and 'totting' procedures. It is also right that the magistrates' courts deal with a very wide range of offences – tacographs, axle weights etc. It is not appropriate in my view that the CACD should be required to deal with the minutiae of these offences. Moreover the lawyers in the Criminal Appeal Office would need to have the kind of extensive knowledge that magistrates' court legal advisers have in relation to summary offences and their sentences. The right to an appeal against sentence to the CACD would amount to a third bite of the cherry.

PROPOSAL 8.19 (Q 9.29)

Decisions and orders made by the Crown Court after it has determined an appeal

We provisionally propose that, subject to obtaining leave from the Crown Court, any person directly affected by a determination or order made by the Crown Court after it has determined an appeal by way of rehearing (other than a determination or order which is a 'sentence' for the purposes of the Criminal Appeal Act 1968 or against which an appeal lies to the Court of Appeal by virtue of any other enactment) should be able to appeal to the Court of Appeal on the grounds that the determination or order:

- (1) is wrong in law;
- (2) involves a serious procedural or other irregularity; or
- (3) is one that no competent and reasonable tribunal could properly have made.

[paragraph 5.120]

- 110 Five respondents commented on this proposal, and they all agreed with it, subject to their general caveats (namely about who should give leave, and, in the case of the LRC of the Bar Council, about the loss of judicial review). The OCJR had two specific caveats. First, “we are unwilling to assume that the Criminal Appeal Act 1968 should be extended to cover convictions and sentences imposed in the Crown Court’s appellate capacity in exactly the same way as convictions and sentences in trials on indictment. A separate appeal may be required.” However, they had no difficulty with the appeal proposed so long as it went no further than would currently be permissible under case stated or judicial review.
- 111 Their second caveat related to the exact grounds of the appeal. As with proposal 8.7 above, they thought the reference to serious irregularity opened the way to “a significant amount of nugatory litigation”. They thought it “might be better to amend limb (1) to read “wrong in law or principle” and to omit limb (2)”.
- 112 In discussion, Mr Justice Pitchers questioned the wisdom of the proposals that allowed for an appeal against a sentence passed by the Crown Court when exercising its appellate jurisdiction. This would only serve to permit a convicted defendant to have a second go at securing a reduction in sentence.

PROPOSAL 8.20 (Q 9.30)

Decisions and rulings made by the Crown Court before it has determined an appeal

We provisionally propose that:

- (1) a defendant or a directly affected third party,
- (2) prior to the determination of an appeal by way of rehearing in the Crown Court,
- (3) subject to obtaining the leave of the Crown Court,
- (4) may appeal forthwith to the Court of Appeal against any determination, judgment, order or ruling made by the Crown Court prior to determining an appeal by way of rehearing,
- (5) on the grounds that the determination, judgment, order or ruling:
 - (a) is wrong in law;
 - (b) involves a serious procedural or other irregularity; or

(c) is one that no competent and reasonable tribunal could properly have made

(6) if:

(a) being unable to appeal forthwith, he or she would have no adequate remedy in respect of the determination, judgment, order or ruling; and

(b) the determination, judgment, order or ruling is one:

(i) which affects the liberty of the defendant or the third party;

or

(ii) which the defendant or third party seeks to challenge as being unlawful by virtue of section 6(1) of the Human Rights Act 1998.

[paragraph 5.122]

113 Tony Edwards agreed with this proposal. The CPS thought this should be opened up to the prosecution as well, as did the OCJR. The Circuit Judges and Master Venne queried the necessity and the proportionality of the proposal for appeals from summary trials.

114 The OCJR had doubts about the suitability of interlocutory appeals on rulings made in the course of rehearings on appeal from magistrates' court trials, ("There is a decided oddity about allowing an appeal against a court's decisions made while it is still determining, and has not finally determined, another appeal from another court") but said that on balance it was inclined to agree, because the Crown Court is not a court of precedent. "But for that, there would seem no reason at all to get the Court of Appeal involved while the Crown Court is hearing an appeal from the magistrates."

115 The OCJR also had comments to make on the directly affected third party:

There is an enduring principle that the parties to criminal trials are the prosecutor and the defendant alone. Against this background, one might argue that judicial review is essentially a civil procedure, that multi-party issues are a feature of the civil not the criminal law, and that the third party element of the judicial review jurisdiction should be abolished when the statutory appeal is created.

On the other hand, some people might think that this would be an excessively radical move and one going beyond the remit of the current exercise. Our preferred approach at the moment is to preserve without extending the judicial review test in the statutory appeal, namely that the applicant must have a sufficient interest in the matter. It appears that the terminology “a directly affected third party” (and “any person directly affected” in the question 9.29 appeal) is intended to re-work this definition. We have some doubts as to the desirability of attempting to rewrite the judicial review test for standing in the context of the present exercise. It raises issues all of its own and has wider implications.

PART 6: IMPLICATIONS FOR MAGISTRATES’ COURTS AND COURTS MARTIAL

116 The Justices’ Clerks’ Society limited their response to this Part, as did the Council of HM District Judges (Magistrates’ Courts) Legal Committee.

117 Master Venne had this to say about the implications for Courts-Martial:

The implications for CACD in respect of Courts-Martial appeals seems limited.

Appeals from District Court Martial/General Court Martial rest with Court Martials Appeal Court and thereafter in limited circumstances (point of law of general importance) to HL.

Appeals from summary dealing (by the Commanding Officer) are made to the Summary Appeal Court by way of re-hearing. Appeals following the determination of the SAC are byway of case stated or Judicial Review. (numbers unknown)

Appeals from Service Civilian Courts are dealt with by way of re-hearing by a Court-Martial, an appeal against any finding of the Court-Martial would be by way of Judicial Review (to date this provision has never been utilised).

118 The OCJR wrote,

Part 6 brings out well the implications for magistrates' courts. A point of interest here is that the Crown Court is not a court of precedent, no less presumably in its appellate jurisdiction than its first instance jurisdiction. If the High Court jurisdiction over the magistrates' court were abolished, one option might be to grant Crown Court rulings on appeal from the magistrates' court precedent status. But this would require further thought.

119 LRC of the Bar Council:

The Law Commission are not proposing to alter the current arrangements whereby there may be a case stated or judicial review of decisions of the magistrates' court and we support this view. Had this view not been adopted we would have had very grave concerns. The supervisory jurisdiction of the High Court over the magistrates' court is of course essential and we welcome the fact that it will be left as it is.... For the reasons set out in our introduction we favour the retention of judicial review in its current form and oppose the introduction of the new statutory scheme. However the implications referred to in paragraph 6.5 [that criminal proceedings in the magistrates' courts and the Courts-Martial would be the only criminal proceedings that would be subject to the supervisory jurisdiction of the High Court] must be correct and if the new statutory scheme were to be imposed we would maintain our support for the existing scheme.

120 In fact, it is not completely accurate to say, as we did at paragraph 6.5 of the CP, that, if our proposals in the CP were accepted, criminal proceedings in magistrates' courts and the Court Martial would be the only criminal proceedings that would remain subject to the supervisory jurisdiction of the High Court. The High Court has jurisdiction in the following types of proceeding: under the Prevention of Terrorism Act 2005 to review control orders; to make ancillary orders such as in relation to the Bankers' Books Evidence Act 1879; to make rulings in extradition cases; and to hear applications for judicial review in criminal cases where it is not the judge's decision which is being challenged but is the decision, for example, of the prosecuting authority. It also has jurisdiction in some matters which are "civil" proceedings, but which have at the least a clear connection with criminal proceedings, such as Serious Crime Prevention Orders under section 1 of the Serious Crime Act 2007. The High Court also has jurisdiction to hear a claim brought under the HRA 1998 in relation to judicial acts, which includes judicial decisions in criminal cases, but the proceedings in which the claim might be brought are themselves civil.

- 121 Professor J R Spencer said that challenges by way of appeal by case stated and applications for judicial review to the High Court against decisions of magistrates' courts should no longer be permitted. Rather, defendants should have to appeal to the Crown Court.
- 122 Tony Edwards was concerned that this idea would place a heavy burden on Crown Courts. The answer might be to require a certificate that the ruling or decision involved an issue of public importance.
- 123 With regard to the implications for magistrates' courts, Tony Edwards thought it

critical that there be a route of appeal direct to some part of the high court. Such decisions affect thousands of other cases and are binding in a way that crown court decisions could never be - see the recent decision on legal privilege (*R (Kelly) v Warley JJ*) which is of daily significance to the new cjss regime ["Criminal Justice, Simple, Speedy, Summary"]. I'd be happy to introduce a certification procedure that the issue is one of general public importance.

... A single appeal route from the magistrates' court to the crown court would weaken the present systems and be unhelpful. Binding judgements on matters of general public interest should be available by direct application to suitable members of the senior judiciary (whatever the court is called).

COSTS

- 124 This is the OCJR response on costs in full.

Costs are discussed at the end of Part 5 of the paper. These comments focus on the costs aspect of the proposed new statutory appeal from the Crown Court in its first instance capacity. They do not imply that transferring the Crown Court's appellate / second instance jurisdiction to the Court of Appeal is necessarily cost-neutral.

We agree that the costs impact of abolishing the case stated jurisdiction would not be great. The impact of abolishing the judicial review jurisdiction would be more significant. In terms of the report as a whole, these proposals should not be regarded as generating savings because an appeal from the Crown Court acting in its appellate jurisdiction (and indeed in any other aspect of its jurisdiction not relating to trial on indictment) is being retained. The question is, what would the costs generated by the new statutory appeal be, in addition to these current costs. On that subject, it is important to bear in mind the principle in the current difficult financial climate that any change in this area should not generate a net overall increase in costs.

The consultation paper proposes a new general right of appeal from the Crown Court in relation to any trial on indictment. Under the proposals in the paper, the test as to whether a decision of the court would be appealable is designed differently depending on whether the decision is made before, during or after the trial. The post-trial test is the loosest, followed by the pre-trial test, and finally the trial test.

As we have already stressed, under section 29(3), there is in principle no appeal from any decision relating to a trial on indictment. No matter how tightly it is constructed, any new general right of appeal will have cost implications. As noted above, restricting the power to grant leave to appeal cannot be restricted to the Crown Court. Therefore, it is necessary to take account not only of cases actually given leave to appeal, but of applications to the Court of Appeal for leave. Paragraph 5.125 of the paper gives some insight into the potentially large number of such applications. It indicates that of 91 applications to the High Court under existing procedures, only 37 were granted leave and only 18 were successful.

In reaching a view on costs, we need to calculate in particular:

1. How many appeals the proposals would generate;
2. What they would cost in court time; and
3. What they would cost in legal aid.

It will also be important to take prosecution costs into account.

It is possible to develop unit costs for court time and legal aid. The less certain element is the number of appeals. The present comments therefore focus on this aspect. In considering what model might best form a basis for calculating this number, we have considered the existing rights of “appeal” by case stated and judicial review from the magistrates’ court to the High Court, which bear some resemblance to what is proposed in that they are interlocutory, open to some third parties, and available before, during and after a trial in the magistrates’ court.

In 2005, 251 applications for leave to appeal to the High Court in criminal cases were received.⁸ Table D at the end of the consultation paper indicates that fewer than 100 were from the Crown Court. Assuming that the remainder were from the magistrates’ court in criminal matters, it follows that there is a pool of about 150 applications for leave to appeal a year from the magistrates’ court to the High Court.

It seems likely that most if not all of these applications involve contested cases. In 2006, there were 47,200 convictions after a trial in the magistrates’ court, out of a total of about 1.1 million cases. In the Crown Court, out of just over 75,000 cases, about a third were contested resulting in about 25,233 trials on indictment. See the Criminal Statistics England and Wales, tables 2.6 and 2.14.⁹ Thus there was about $47,200 \div 150 =$ approximately 1 application for leave to appeal per 314 cases in the magistrates’ court. Applying the calculation directly to the Crown Court, the number of additional applications / appeals would be approximately $25,233 \div 314 = 80$ a year.

⁸ See the 2005 Judicial Statics, page 31, at: <http://www.official-documents.gov.uk/document/cm69/6903/6903.pdf>

⁹ At <http://www.justice.gov.uk/docs/crim-stats-2006-tag.pdf>

However, only about 1 in 20 to 1 in 25 cases in the magistrates' court results in a trial and conviction, compared with about 1 in 3 contested cases in the Crown Court. As cases in the Crown Court are perhaps 8 times more likely to be contested than cases in the magistrates' court, it is likely that there would be many more attempts to appeal from trials on indictment and that the figure of 80 based on the number of appeals from the magistrates' court is an underestimate. We have seen figures suggesting that the annual numbers of hearings in the Crown Court include over 2,500 custody time limit applications, 1,200 Newton hearings, 800 abuse of process and 600 PII. These are very much the sort of hearings that are likely to generate appeals.

A more realistic figure for the additional number of appeals resulting from the statutory appeals in their proposed form would be, not 80 a year but 80×8 (the greater likelihood of a Crown Court case being contested) = 640 a year. Taking a as the unit cost of an appeal in court time and b as the unit cost in legal aid time, it may be calculated that the proposals would cost approximately $640 \times a + 640 \times b$ per annum to implement. HM Courts Service may be able to supply unit costs for a and b in Court of Appeal cases. It will also be necessary to factor in a greater number of appeals to the House of Lords, and prosecution costs.

As noted, these estimates relate only to contested cases. The proposed appeal rights extend beyond the trial itself, applying both after and, more importantly, before the trial, so all 75,000 Crown Court cases are potentially caught. It seems unlikely that there would be many appeals before the trial, but the possibility cannot be excluded. Furthermore, the availability of the potential for delay and disruption may encourage defendants who would otherwise plead guilty to contest cases.

- 125 Master Venne commented on resources within the CACD and across the criminal justice system generally:

Potential increase in work of Crown Court judge when exercising appellate jurisdiction with regards to a summing-up type exercise;

Matters currently dealt with by one judge in the Admin Court would arguably require at least two in the CACD.

126 The CPS referred to resource implications too:

However, we are concerned that extra interlocutory appeals will put new significant pressure on the Court of Appeal. Additional resources may be required to enable the Court of Appeal to deal expeditiously with these cases. Extra interlocutory appeals will also have an impact on the CPS' costs and resources, for example, the costs of representation on appeal, or additional witness expenses where witnesses are required to attend on more than one occasion and/or the proceedings are prolonged.

GENERAL POINTS

127 The Newspaper Society:

The Newspaper Society's prime concerns are that: the media has the right at any stage of legal proceedings to challenge formally, immediately and effectively any decision by a court to impose restrictions upon the media's access to court proceedings, or its reporting of court proceedings, or a court's refusal to lift such restrictions; that there should be immediate expedited hearings and decisions in respect of any such challenges; that successful challenges should result in the immediate lifting of any such restrictions; and that the legal appeal/review process should thereby ensure so far as possible continuous media/public access to proceedings and continuous, contemporaneous media reports of the proceedings, unaffected by the imposition of the original restriction.

Notwithstanding section 29(1) of the Supreme Court Act 1981 and appeal under section 159 Criminal Justice Act 1988, the media can currently invoke judicial review in respect of orders by Magistrates' Courts and Crown Courts when hearing an appeal, a committal for sentence or a civil matter. As the paper acknowledges, the Law Commission's reform proposals are therefore relevant to media litigation in pursuit of open justice.

128 Professor J R Spencer thought it would be better if challenges to Crown Court decisions could be heard at a location nearer to the relevant Crown Court – effectively meaning that the CA should go out on Circuit. Tony Edwards agreed. He thought that resident or other senior judges of the Crown Court could be nominated to hear such appeals. If an appeal raised an important point of law, it could be heard by a fully constituted Court of Appeal.

- 129 Tony Edwards would prefer a simpler scheme (less differentiation between different stages of proceedings).
- 130 Professor J R Spencer also said that there were statutory exceptions to the statement contained in paragraph 2.25 of the CP and that the present exercise was an opportunity to recommend their abolition.

APPENDIX A

CONSULTEES ON CP 184

We received written responses from

Tony Edwards

Ed Rees QC

Roger Elsey DJ (Magistrates)

Master Venne, Registrar of Criminal Appeals and Master of the Crown Office

Justices' Clerks Society

Criminal Sub-Committee, Council of HM Circuit Judges

Wood Green judges

HH Judge Murphy

Crown Prosecution Service (CPS)

Law Reform Committee of the Bar Council (LRC of the Bar Council)

Council of HM District Judges (Magistrates' Courts) Legal Committee

Better Trials Unit, Office of Criminal Justice Reform (OCJR)

The Newspaper Society

APPENDIX B

Connecting the provisional proposals (Part 8) with the questions for consultees (Part 9) and the relevant paragraphs in Consultation Paper 184

Proposal (Part 8)	Question (Part 9)	Paragraphs
1	9.3, 9.4	4.7-4.20
2	9.5	4.21-4.26
	9.6	4.24-4.27
3	9.7	4.28-4.31
4	9.8	4.32-4.39
	9.9	4.32-4.29
	9.10	4.40-4.43
5	9.1	4.3-4.36
6	9.2	4.47-4.70
7	9.11	4.55, 4.57-4.59
8	9.12	4.56
9	9.13	4.73
12	9.14	4.65
10	9.15	4.74
11	9.16	4.61-4.62, 4.75
12	9.17	5.38-5.40
13	9.18	5.43-5.63
14	9.19	5.90-5.100
	9.20	5.54-5.55
	9.21	5.50-5.51
15	9.22	5.69-5.88
16	9.23	5.90-5.101
	9.24	5.52-5.53
	9.25	5.42, 5.70
17	9.26	5.65-5.68
18	9.27	5.102-5.107
	9.28	5.108
19	9.29	5.113-5.120
20	9.30	5.113-118, 5.121-122
	9.31	