



The Law Reform Commission
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

REPORT

PROSECUTION APPEALS AND PRE-TRIAL HEARINGS

(LRC 81-2006)

IRELAND

**Law Reform Commission
35-39 Shelbourne Road, Ballsbridge, Dublin 4**

© Copyright

Law Reform Commission 2006
First Published November 2006

ISSN 1393-3132

THE LAW REFORM COMMISSION

Background

The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20 October 1975, pursuant to section 3 of the *Law Reform Commission Act 1975*.

The Commission's Second Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas in December 2000. The Commission also works on matters which are referred to it on occasion by the Attorney General under the terms of the Act.

To date the Commission has published 79 Reports containing proposals for reform of the law; 11 Working Papers; 41 Consultation Papers; a number of specialised Papers for limited circulation; An Examination of the Law of Bail; and 26 Annual Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained on the Commission's website at www.lawreform.ie

Membership

The Law Reform Commission consists of a President, one full-time Commissioner and three part-time Commissioners.

The Commissioners at present are:

<i>President:</i>	The Hon Mrs Catherine McGuinness, former Judge of the Supreme Court
<i>Full-time Commissioner:</i>	Patricia T. Rickard-Clarke, Solicitor
<i>Part-time Commissioner:</i>	Professor Finbarr McAuley
<i>Part-time Commissioner:</i>	Marian Shanley, Solicitor
<i>Part-time Commissioner:</i>	Donal O'Donnell, Senior Counsel
<i>Secretary/Head of Administration:</i>	John Quirke

Research Staff

<i>Director of Research:</i>	Raymond Byrne BCL, LLM, Barrister-at-Law
<i>Legal Researchers:</i>	John P. Byrne BCL, LLM (NUI), Barrister-at-Law Áine Clancy BCL Philip Flaherty BCL Caren Geoghegan BCL, LLM (Cantab), Barrister-at-Law Cliona Kelly BCL Joanne Lynch BCL, LLM (NUI) Margaret Maguire LLB Jane Mulcahy BCL, LLM (NUI) Tara Murphy BCL, LLM (Essex) Richard McNamara BCL, LLM (NUI) Catherine Ellen O’Keeffe LLB, LLM (NUI) Charles O’Mahony BA, LLB, LLM (Lond) David Prendergast LLB, Barrister-at-Law Sinéad Ring BCL, LLM (NUI) Keith Spencer BCL, LLM (Dub), BCL (Oxon), Barrister-at-Law Nicola White LLB, Attorney-at-Law (NY)

Administration Staff

<i>Project Manager:</i>	Pearse Rayel
<i>Executive Officer:</i>	Denis McKenna
<i>Legal Information Manager:</i>	Conor Kennedy BA, H Dip LIS
<i>Cataloguer:</i>	Eithne Boland BA (Hons), HDip Ed, HDip LIS
<i>Information Technology Officer:</i>	Liam Dargan
<i>Private Secretary to the President:</i>	Debbie Murray
<i>Clerical Officer:</i>	Ann Browne

Principal Legal Researcher on this Publication

Sinéad Ring, BCL (Law and German), LLM (NUI)

Contact Details

Further information can be obtained from:

Secretary/Head of Administration

Law Reform Commission
35-39 Shelbourne Road Ballsbridge Dublin 4

T: +353 1 637 7600

F: +353 1 637 7601

E: info@lawreform.ie

W: www.lawreform.ie

ACKNOWLEDGEMENTS/THE PROJECT

The Commission is grateful for the assistance it received from the following people in the preparation of this Report.

Ian Clark, Scottish Court Service
Mark Curley, Irish Prisons Service
Joe Costelloe, TD
Claire O'Regan, Solicitor
Dianne Drysdale, Scottish Executive, Justice Department
James Hamilton, Director of Public Prosecutions
Gordon Hook, Ministry of Justice, New Zealand
Howard C Hooper, Scottish Executive, Justice Department
Professor Dermot Walsh, University of Limerick
Nigel Gibbs, Crown Prosecution Service Policy Directorate
James MacGuill, Solicitor
Dr Paul A. McDermott, Barrister-at-Law
Claire Loftus, Chief Prosecution Solicitor
Steve Mihorean, Department of Justice, Canada
Professor Ian O'Donnell, Institute of Criminology, UCD
Professor David Ormerod, University of Leeds
Sara Parsons, National Crime Council
John Perrott, Department for Constitutional Affairs, UK
David Perry, Queen's Counsel
Mary-Ellen Ring, Senior Counsel
Noel Rubotham, Director of Reform and Development, Courts Service
Helen Williams, Department for Constitutional Affairs, UK

Full responsibility for the contents of this Report, however, rests with the Commission.

TABLE OF CONTENTS

Table of Legislation	xi
Table of Cases	xiii
INTRODUCTION	1
CHAPTER 1 UNDERLYING PRINCIPLES	5
A Introduction	5
B Prosecution Appeals in Cases brought on Indictment	5
(1) The Double Jeopardy Rule	6
(2) The Double Jeopardy Principle and Appeals by Defendants	7
(3) Would the Introduction of a ‘With Prejudice’ Right of Prosecution Appeal be Unconstitutional?	11
(4) When is an Accused Person in Jeopardy in the Irish Criminal Justice System?	13
(5) Further Considerations	14
C Prosecution Appeals in Summary Cases	15
D Pre-trial Hearings in Cases brought on Indictment	16
E Conclusions	17
(1) Report Recommendation	17
CHAPTER 2 PROSECUTION APPEALS IN INDICTABLE CASES	19
A Introduction	19
B The Existing Powers of Appeal	19
(1) Without Prejudice Appeals under Section 34 of the Criminal Procedure Act 1967	19
(2) Case Stated under Section 16 of the Courts of Justice Act 1947	20
C Consultation Paper Proposals	21
(1) Narrow ‘Without Prejudice’ Model	21
(2) Broad ‘Without Prejudice’ Model	21
(3) Narrow ‘With Prejudice’ Model	21
(4) Broad ‘With Prejudice’ Model	21
(5) Comprehensive ‘With Prejudice’ Model	21
D Developments since the Consultation Paper	22
(1) The Report of the Working Group on the Jurisdiction of the Courts: The Criminal Jurisdiction of the Courts	22
(2) Oireachtas Committee Report on a Review of the Criminal Justice System	22
(3) The Criminal Justice Act 2006	23
E Discussion	25
(1) Report Recommendation	25
(2) Report Recommendations	27
F Case Stated Appeals	28

CHAPTER 3	PROSECUTION APPEALS FROM SENTENCES IMPOSED IN THE DISTRICT COURT	29
A	Introduction	29
B	Existing Law on Prosecution Appeals	29
	(1) Appeals de novo	30
	(2) Case Stated	30
	(3) Judicial Review	32
	(4) Comparative Review	32
C	Consultation Paper Recommendation	33
D	Discussion	34
	(1) Proportionality and the Information Deficit	35
	(2) Lapsed Appeals	36
	(3) Report Recommendation	36
E	Further Reform	37
	(1) The Role of Prosecuting Counsel	38
	(2) The Information Deficit in Sentencing	39
	(3) Provision of Reasons by the Sentencing Judge	41
	(4) Report Recommendations	43
F	The Use of Prison and Alternatives to Imprisonment	43
	(1) Enforcement of Fines Bill	45
	(2) Criminal Justice Act 2006	45
	(3) Discussion	46
	(4) Report Recommendations	47
G	Prosecution Appeals against Sentences on Indictment	47
	(1) Appellate Rights of the Convicted Person following a Review on the Grounds of Undue Leniency	48
	(2) Report Recommendation	49
CHAPTER 4	PRE- TRIAL HEARINGS IN INDICTABLE CASES	51
A	Introduction	51
B	Current Pre-trial Procedure: Case Management	52
	(1) Case Management Today	54
C	Proposals for Reform of Pre-Trial Processes and Comparative Developments	56
	(1) The Report of the Working Group on the Jurisdiction of the Courts: The Criminal Jurisdiction of the Courts	56
	(2) Oireachtas Committee Report	57
	(3) Report on Videoconferencing	57
	(4) Report of the National Crime Council	58
	(5) Pre-trial Procedures in Other Jurisdictions	60
D	Discussion	75
	(1) Judicial Case Management – Reallocating Responsibilities	76
	(2) Report Recommendation	79
E	Pre-trial Hearings	80
	(1) Issues Relating to Pre-trial Hearings	81
	(2) Conclusion	86
	(3) Report Recommendation	88

TABLE OF LEGISLATION

Courts (Supplemental Provisions) Act 1961	1961, No. 39	Irl
Courts and Court Officers Act 1995	1995, No.. 31	Irl
Courts of Justice Act 1924	1924, No. 10	Irl
Courts of Justice Act 1928	1928, No. 15	Irl
Courts of Justice Act 1947	1947, No. 20	Irl
Crimes (Criminal Trials) Act 1999	1999, No. 35	Vic
Crimes (Local Courts and Appeal) Act 2001	2001, No. 120	NSW
Criminal Appeal Act 1907	1907, c. 23	Eng
Criminal Appeal Act 1968	1968, c. 19	Eng
Criminal Justice (Administration) Act 1924	1924, No.. 44	Eng
Criminal Justice Act 1972	1972, c. 71	Eng
Criminal Justice Act 1984	1984, No.. 22	Irl
Criminal Justice Act 1987	1987, c. 38	Eng
Criminal Justice Act 1988	1988, c. 33	Eng
Criminal Justice Act 1993	1993, No.. 6	Irl
Criminal Justice Act 1999	1999, No.. 10	Irl
Criminal Justice Act 2003	2003, c. 44	Eng
Criminal Justice Act 2006	2006, No. 26	Irl
Criminal Law (Rape) Act 1981	1984, No.. 10	Irl
Criminal Procedure (Scotland) Act 1995	1995, c. 46	Scot
Criminal Procedure Act 1967	1967, No.. 12	Irl
Criminal Procedure Act 1993	1993, No.. 40	Irl
Criminal Procedure and Investigations Act 1996	1996, c.25	Eng
European Arrest Warrant Act 2003	2003, No. 45	Irl
European Convention on Human Rights Act 2003	2003, No.. 20	Irl
Fisheries (Consolidation) Act 1959	1959, No. 14	Irl
Misuse of Drugs Act 1977	1977, No. 12	Irl
Police and Criminal Evidence Act 1984	1984, c. 60	Eng
Probation of Offenders Act 1907	7 Edw. 7. CH. 17	Eng
Safety, Health and Welfare at Work Act 2005	2005, No. 10	Irl
Safety, Health and Welfare at Work Act 2005	2005, No. 10	Irl
Summary Jurisdiction Act 1857	20 and 21 Vic c.43	Eng
Summary Proceedings Act 1957	1957, No.. 87	NZ

TABLE OF CASES

Attorney General's Reference (No 1 of 2004)	[2004] EWCA Crim 1025	Eng
Attorney General's Reference (No. 1 of 1975)	[1975] QB 773	773
Attorney General's Reference (No. 3 of 1999)	[2001] 2 AC 91	Eng
Attorney General's Reference (No.1 of 1975)	[1975] QB 773	Eng
CC v Ireland	[2005] IESC 48	Irl
Considine v Shannon Regional Fisheries Board	[1997] 2 IR 404	Irl
Corigliano v Italy	(1983) 5 EHRR 334	ECtHR
Director of Public Prosecutions v Nangle	[1984] ILRM 171	Irl
Director of Public Prosecutions v Smith	[2006] 2 Cr. App. R. 1	Eng
Doran v Ireland	(2006) 42 EHRR 13	ECtHR
Fitzgerald v Director of Public Prosecutions	[2003] 2 ILRM 537	Irl
Gilroy v Brennan	[1926] IR 482	Irl
H v Director of Public Prosecutions	[2006] IESC 55	Irl
Her Majesty's Advocate v Kirk	[2003] ScotHC 62	Scot
McFarlane v Director of Public Prosecutions	[2006] IESC 11	Irl
Northern Bank Finance Limited v Charlton	[1979] IR 149	Irl
O'Connor v Bus Átha Cliath	[2003] IESC 66	Irl
People (AG) v Burns	[2004] IESC 99	Irl
People (AG) v Conmey	[1975] IR 341	Irl
People (AG) v Crinnion	[1976] IR 29	Irl
People (AG) v Griffin	[1974] IR 416	Irl
People (AG) v Kennedy	[1946] IR 517	Irl
People (AG) v McGlynn	[1967] IR 232	Irl
People (AG) v O'Brien	[1963] IR 92	Irl
People (DPP) v Aherne	[2004] IECCA 13	Irl
People (DPP) v B.F.	[2001] 1 IR 656	Irl
People (DPP) v BF	[2001] 1 IR 656	Irl

People (DPP) v Botha	[2004] IECCA 1; [2004] 2 IR 375	Irl
People (DPP) v Cooney	[2004] IECCA 19	Irl
People (DPP) v Edgeworth	[2001] 2 IR 131	Irl
People (DPP) v Gilligan	[2005] IESC 78	Irl
People (DPP) v Isenborger	Court of Criminal Appeal 25 January 1999	Irl
People (DPP) v J.O'C.	[2000] 3 IR 478	Irl
People (DPP) v Kelly	[2004] IECCA 14; [2005] 2 IR 321	Irl
People (DPP) v Kenny	[2004] IECCA 2	Irl
People (DPP) v Murphy	[2005] IECCA 1	Irl
People (DPP) v O'C	[2006] IESC 54	Irl
People (DPP) v O'C (P)	[2003] IECCA 27 January	Irl
People (DPP) v O'Shea	[1982] IR 384	Irl
People (DPP) v Owens	[1999] 2 IR 16	Irl
People (DPP) v Quilligan (No. 1)	[1986] IR 495	Irl
People (DPP) v Quilligan (No.2)	[1989] IR 46	Irl
People (DPP) v Quilligan and O'Reilly (No. 3)	[1993] 2 IR 46	Irl
People (DPP) v Scully	[2005] 1 IR 242	Irl
People (DPP) v T.H.	[2006] IESC 48	Irl
People (DPP) v Z	Court of Criminal Appeal 14 March 1995	Irl
Phibbs v Hogan	High Court 27 May 2004	Irl
R (Hastings) v Justices of Galway	[1906] 2 IR 499	Irl
R v A	[2005] EWCA Crim 3533; [2006] 1 Cr App R 433	Eng
R v Ashton	[2006] EWHC Crim 794	Eng
R v Clarke and McDaid	[2006] EWCA Crim 1196	Eng
R v Connelly	[1964] AC 1254	Eng
R v Gleeson	[2003] EWCA Crim 3357	Eng
R v Hedworth	[1997] 1 Cr App R 421	Eng
R v Hunt	[1994] Crim LR	Eng
R v Jisl; R v Tekin	[2004] EWCA Crim 696	Eng
R v Kuimba	[2005] EWCA Crim 955	Eng
R v Pennine Acute Hospitals NHS Trust	[2004] 1 All ER 1324	Eng
R v Ponting	[1985] Crim LR 318	Eng

R v Shayler	[2002] UKHL 11; [2002] 2 All ER 477	Eng
R v Smith	[2006] 2 Cr. App.R.1	Eng
R v van Hoogstraten	[2004] Crim LR 498	Eng
R v Z	[2000] 2 AC 483	Eng
Salesi v Italy	(1998) 26 EHRR 187	ECtHR
St Albans Crown Court, ex parte Cinnamond	[1980] 2 Cr. App. R 235	Irl
State (Healy) v Donoghue	[1976] IR 325	Irl
State (Hunt) v Donovan	[1975] IR 39	Irl
State (O'Connell) v Fawsitt	[1986] ILRM 639	Irl
The King (McGrath) v Justices of Clare	[1905] IR 395	Irl
The Queen v Justices of Antrim	[1895] 2 IR 603	Irl
Todd v Murphy	[1999] 2 IR 1	Irl
Zimmerman and Steiner v Switzerland	(1984) 6 EHRR 17	ECtHR

INTRODUCTION

1. This Report follows on from two Consultation Papers. The first, the *Consultation Paper on Prosecution Appeals in Cases brought on Indictment*,¹ was prepared under the Commission's Second Programme for Law Reform.² The second, the *Consultation Paper on Prosecution Appeals from Unduly Lenient Sentences in the District Court*,³ was prepared as a result of a request from the Attorney General.⁴

2. This Report examines two types of prosecution appeal: prosecution appeals in cases brought on indictment and prosecution appeals against unduly lenient sentences in the District Court. In the current system, in a case brought on indictment, the convicted person is the only party allowed to appeal the verdict with a view to having it overturned. Since the passing of the *Criminal Procedure Act 1967*, the prosecution may appeal against certain rulings made in a case that results in an acquittal, but this appeal is 'without prejudice' to the acquittal - even if the appellate court rules that the trial court erred in law, the acquittal still stands. In the case of prosecutions in the District Court, the same general rule applies, subject to certain exceptions such as in fisheries cases. There is also a more general right of appeal on points of law up to the High Court using a procedure called case stated.

3. Chapter 1 of this Report, therefore, involves an examination of the underlying purpose of appeals in criminal cases. In essence, appeals are one mechanism for enhancing the reliability (including procedural fairness) of the entire trial process, in terms of the specific case appealed and the prevention of further errors. It is notable that appeals - whether against convictions or acquittals - were not an initial feature of trials on indictment.

¹ LRC CP 19-2002. In this Report it is referred to as 'the 2002 Consultation Paper.'

² *Second Programme for Examination of Certain Branches of the Law with a View to their Reform 2000-2007* (PN 9459) (December 2000). Available at www.lawreform.ie

³ LRC CP 33-2004. In this Report it is referred to as 'the 2004 Consultation Paper.'

⁴ On 5 February 2003 the Attorney General, exercising his power under section 4 of the *Law Reform Commission Act 1975*, requested the Commission to consider: "the conferring of a power, on the Director of Public Prosecutions, to appeal lenient sentences from the District Court."

The first statutory rights of appeal were limited to appeals by convicted persons.⁵ This reflected the importance of ensuring that an innocent person is not convicted and was consistent with the general principles of criminal law. It can, of course, equally be argued that a prosecution appeal could be described as attempting to prevent a miscarriage of justice - that a guilty person should not be acquitted. The Commission acknowledges that, in recent years, there has been a greater emphasis on the public interest in the outcome of criminal proceedings. This does not necessarily involve a crude change from “protecting the innocent” to “convicting the guilty”. More correctly, this modern approach involves examining the interests of the accused, the prosecution and the wider public interest. This influenced, for example, the introduction in 1993 of the prosecution power to appeal unduly lenient sentences in cases brought on indictment⁶ and the right of an accused to appeal based on newly-discovered evidence that indicates a miscarriage of justice.⁷ These legislative changes indicated that the interest in ensuring correct outcomes is not the exclusive preserve of the accused or the prosecution: the community has a shared interest in ensuring fair outcomes from the criminal process, whether in terms of the verdict or the sentence imposed. Therefore, it is crucial to recognise that the public interest also lies in the safeguarding of accused’s rights and the right to a fair trial.⁸ The accused person’s right to a fair trial is not in conflict with the community’s interest in having criminal matters prosecuted; the community has no constitutional interest in a prosecution and trial that is not fair or is otherwise in breach of the Constitution. However, as the law currently stands, the prosecution rights of appeal are clearly more limited than those of the convicted person.⁹

4. When the Commission published its Consultation Paper in 2002 its primary focus was the extension of the very limited form of ‘without prejudice’ appeal which was then available under the 1967 Act. In preparing this Report, the Commission has reiterated this as its key point of reference. As Chapter 2 of the Report notes, the *Criminal Justice Act 2006* has now extended the range of ‘without prejudice’ appeals along the lines contemplated in the 2002 Consultation Paper. In this Report, the Commission welcomes the enactment of these changes, which it considers

⁵ Sections 31 and 63 of the *Courts of Justice Act 1924*.

⁶ Section 2 of the *Criminal Justice Act 1993*.

⁷ Section 2 of the *Criminal Procedure Act 1993*. This also includes a review of the sentence.

⁸ “The applicant’s right to due process is a right inherent in the concept of justice, which is at the core of the Constitution.”: *People (DPP) v Gilligan* [2005] IESC 78 per Denham J.

⁹ See the 2002 Consultation Paper at Chapter 1.

will assist in achieving the aim of preventing future errors in trial rulings and consequently enhance the reliability of verdicts.

5. In light of the enactment of the *Criminal Justice Act 2006*, the Commission notes that the question of ‘without prejudice’ appeals has largely been dealt with,¹⁰ so that the only remaining question is whether ‘with prejudice’ appeals should be introduced. A ‘with prejudice’ appeal would allow the prosecution to question an acquittal, and, potentially, result in a retrial of the accused. A ‘with prejudice’ appeal could follow immediately after an acquittal or may involve the re-opening of an acquittal after many years on the basis of newly-discovered evidence. These appeals are commonly known as ‘fresh evidence’ appeals.

6. The introduction of ‘with prejudice’ appeals would involve a change to long-established criminal procedure. Furthermore, the Commission notes that serious questions arise as to whether a retrial after an acquittal by a jury that considered the case in full and on its merits would be consistent with the right to a fair trial in Article 38 of the Constitution, though as the Report makes clear this point remains unresolved.

7. In Chapter 1 the Commission examines the principles underpinning its consideration of prosecution appeals. The Commission makes it clear that it is not recommending the introduction of ‘with prejudice’ appeals whether they are immediate or whether they take the form of ‘fresh evidence’ prosecution appeals. The Commission considers that it is appropriate to allow the changes introduced by the *Criminal Justice Act 2006* to ‘without prejudice’ appeals by the prosecution to take effect and to examine how these work in practice. Indeed, the Commission is aware that this complex policy matter will be addressed by the *Balance in the Criminal Law Review Group* established by the Minister for Justice, Equality and Law Reform in October 2006.¹¹ In its consideration of prosecution appeals, the Commission was conscious that such appeals are concerned with the reliability of court verdicts. By way of example, an appellate court may find that a trial court ruling on a point of law was in error. Given that the jury’s role in a criminal trial is to decide the facts having been directed on the law by the trial judge, an incorrect direction on the law, or a ruling that incorrectly excludes evidence, may affect the reliability of the jury verdict. Of course, an alternative to correcting such a trial court ruling on appeal would be to consider the introduction of other measures which might minimise erroneous rulings in the first place. This led the Commission to examine proposals for pre-trial procedures which might enhance the ability

¹⁰ However, see the recommendations regarding anonymity of the acquitted person and legal aid at paragraphs 2.22-2.23, below.

¹¹ The expert review group is chaired by Dr Gerard Hogan. See www.justice.ie.

of the trial process to achieve reliable verdicts without the necessity to introduce any further form of prosecution appeal mechanism. The Commission considers that any future debate on the desirability of ‘with prejudice’ prosecution appeals should take account of the operation of the extended avenues of ‘without prejudice’ prosecution appeals under the 2006 Act and the Commission’s recommendations regarding a pre-trial questionnaire,¹² in conjunction with any deliberations of the *Balance in the Criminal Law Review Group*.

8. In the context of summary prosecutions in the District Court, which are dealt with in Chapter 3, the Commission has, in general, taken a similar approach. The Commission acknowledges, of course, that the issue of prosecution appeals in summary matters must be examined against a somewhat different constitutional and statutory background. Thus it has been definitively decided that prosecution appeals on points of law against summary acquittal are *not* unconstitutional.¹³ The Commission agrees that, in principle, serious errors in sentence at District Court level should be subject to review, but has concluded that, given the absence of an evidence-based problem and the lack of information on sentencing, it is not appropriate at present to confer a power on the prosecution to appeal District Court sentences. Nevertheless, the Commission considers that it is appropriate to consider the question of prosecution appeals in the wider context of possible procedural reforms, including for example, the role of prosecuting counsel in assisting the trial court and the development of a sentencing information system.

9. As already mentioned, in Chapter 4, the Commission examines the current pre-trial procedures in cases brought on indictment. These include co-operative case management arrangements, which have led to improved focus on central issues and the avoidance of unnecessary delays. Nonetheless, the Commission is conscious that there have been many recommendations to introduce mandatory pre-trial hearings which might prevent lengthy ‘trials-within-a-trial’ in which the admissibility of evidence is resolved after a jury has been empanelled to conduct a trial. The Commission examines these proposals and developments in other jurisdictions where mandatory pre-trial hearings have been introduced. The Commission recommends that consideration be given to further case management reforms, including a pre-trial questionnaire.

¹² See Chapter 4, below.

¹³ *Fitzgerald v Director of Public Prosecutions* [2003] 2 ILRM 537.

CHAPTER 1 UNDERLYING PRINCIPLES

A Introduction

1.01 This Chapter examines the principles that underpin the Commission's analysis of prosecution appeals. Section B discusses the operation of the double jeopardy rule and the constitutional issues surrounding prosecution appeals. Section C discusses prosecution appeals brought in summary cases and Section D examines pre-trial hearings. Section E sets out the Commission's conclusions and its recommendations as to the desirability of 'with prejudice' prosecution appeals.

B Prosecution Appeals in Cases brought on Indictment

1.02 Under the current law, the general rule is that there is no right on the part of the prosecution in a trial on indictment to appeal an acquittal on the merits and seek to have it overturned and a retrial ordered. Since 1967 the prosecution has had a limited right to appeal certain points of law but without prejudice to the acquittal - in other words, even if the prosecution shows there was an error of law, the acquittal stands.¹ In 2006 this 'without prejudice' right of appeal was expanded to include all rulings made in a trial on indictment. This is in contrast to the rights of appeal granted to a convicted person.²

1.03 In any criminal trial there are three sets of interests at play, a triangulation of interests. These are: those of the accused, those of the victim and those of the public.³ Despite the inherent tensions between these interests, the underlying goal is the same - that the guilty are convicted and the innocent acquitted. It might be argued that a system of prosecution

¹ Section 34 of the *Criminal Procedure Act 1967*.

² See the 2002 Consultation Paper at Chapter 1.

³ See Lord Steyn's remarks in *Attorney-General's Reference (No. 3 of 1999)* [2001] 2 AC 91, 118: "The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public."

appeals against unjust acquittals is potentially a useful tool in securing justice by correcting erroneous decisions made by the trial judge or jury.⁴ There is also an argument that, since there is a limited right of appeal from summary acquittals⁵ there also should be one from indictable cases, especially given the more serious nature of the offence involved.

(1) The Double Jeopardy Rule

1.04 The double jeopardy rule states that, where a trial process has concluded, a person should not be put in risk of being punished again for the same offence.⁶ Double jeopardy has its origins in the concept of *res judicata*, which means, in effect, the case has already been decided. In civil law, concepts such as issue estoppel and abuse of process give effect to this principle. In criminal law, issue estoppel, abuse of process, and the pleas of *autrefois acquit* and *autrefois convict* are used.

1.05 The rationale for the rule lies in the public interest in finality in the criminal justice process to protect individuals from the trauma of repeated prosecutions and to encourage confidence in the criminal justice system.⁷ Before the double jeopardy rule applies, it must be established that the accused was actually put in peril of being convicted and punished for the same or similar offence arising out of the same facts.⁸ If, for example, a jury fails to reach a verdict, the rule does not operate and the person can be tried again. If the offence charged is identical on the law and facts to the previous offence the double jeopardy rule will apply. However, the rule will not automatically operate where the prosecution brings a second indictment charging a different offence, but relying on exactly the same evidence and

⁴ Nevertheless, it is important to note the limited significance of any prosecution appeal; 95% of prosecutions brought to completion in 2004 resulted in convictions: Office of the Director of Public Prosecutions, *Annual Report 2004* (2005).

⁵ Under section 2 of the *Summary Jurisdiction Act 1857*: See Chapter 4, below.

⁶ The principle “has been acted upon as far back as our records extend”: *R (Hastings) v Justices of Galway* [1906] 2 IR 499, 505, per Palles CB. For a detailed examination of the area, see McDermott *Res Judicata and Double Jeopardy* (Butterworths 1999).

⁷ See further Choo *Abuse of Process and Judicial Stays of Criminal Proceedings* (Clarendon Press 1993); Dingwall “Prosecutorial Policy, Double Jeopardy and the Public Interest” (2000) 63 MLR 268. “Preventing harassment and inconsistent results the rule assists in ensuring that criminal proceedings command the respect and confidence of the public.”: *Connelly v Director of Public Prosecutions* [1964] AC 1254, 1353, per Lord Devlin.

⁸ The accused can plea *autrefois acquit* (he or she has already been tried and acquitted of the offence) or *autrefois convict* (he or she has already been tried and convicted of the offence). In addition, the courts may consider it an abuse of process for additional charges to be brought, following an acquittal or conviction, for different offences which arose from the same behaviour or facts. See further Walsh *Criminal Procedure* (Thomson Round Hall 2002).

witnesses as had been used in an earlier prosecution that resulted in an acquittal.⁹

(2) *The Double Jeopardy Principle and Appeals by Defendants*

1.06 Section 4 of the *Criminal Procedure Act 1993* empowers the Court of Criminal Appeal, on appeal by a defendant, to overturn a conviction and to order a retrial for the same offence.¹⁰ On one view, section 4 of the 1993 Act appears to be an exception to the double jeopardy rule in that the defendant faces a second trial. But in reality it is not an exception- this is because the trial verdict has not become final because the defendant has chosen to question it on appeal. The trial verdict therefore remains conditional, not final. It is only final once it is affirmed, either on appeal or at the conclusion of the retrial.

1.07 The grounds upon which a court may quash a conviction are that the conviction is unsafe or unsatisfactory. In practice the most likely grounds will concern an error of law or procedure at the trial, for example a misdirection or inadmissible evidence that was admitted at the trial.¹¹ However, even in the absence of an error of law or procedure, a conviction may still be quashed on the basis that the conviction is unreasonable or cannot be supported by the evidence. An important limiting factor is that the appeal court does not rehear the witnesses and will defer to the jury's decision on the basis that it had the opportunity to observe witnesses first hand and assess their credibility. Furthermore, in cases where the trial court makes findings of fact prior to the verdict, such as in confession cases, the Court of Criminal Appeal will generally adopt the findings of the trial court. The Court will only disturb them if they are "so clearly against the weight of testimony as to amount to a defeat of justice."¹² The Court will also quash a conviction if fresh evidence throws the certainty of the conviction into doubt.¹³

1.08 The decision to order a retrial following a successful appeal by a defendant depends on the facts of the case and the grounds of the successful appeal. If the defect that resulted in the quashed conviction can be corrected

⁹ See *People (DPP) v Quilligan and O'Reilly (No 3)* [1993] 2 IR 46 and *R v Connelly* [1964] AC 1254.

¹⁰ Section 4 of the 1993 Act repeals, in effect, the provisions of section 5(2) of the *Courts of Justice Act 1928*.

¹¹ See further Walsh *Criminal Procedure* (Thomson Round Hall 2002) at Chapter 22.

¹² *People (DPP) v Madden* [1977] IR 336, 339.

¹³ Section 2 of the *Criminal Procedure Act 1993*. Section 2 makes provision for the Court of Criminal Appeal to review alleged miscarriages of justice in cases where the court has previously rejected an appeal or an application for leave to appeal in the case

in a new trial, without unfairness to the accused, (for example, a misdirection) it is quite likely that the court would order a retrial. However, where a conviction is quashed due to the inadequacy of the prosecution case, the court will decline to exercise its jurisdiction to order a retrial.¹⁴

1.09 In other words, the definition of a concluded trial is contingent on all appellate processes having been exhausted. While most civil law systems allow both the convicted person to appeal convictions and the prosecution to appeal acquittals,¹⁵ in the common law systems, finality is traditionally reached where there is a jury acquittal. In civil law countries, appeals against convictions or acquittals are regarded as a continuation of the trial process, whereas in common law systems only appeals against convictions are so regarded. Accordingly, in civil legal systems, the principle of double jeopardy applies after the exhaustion of the appellate process by either the prosecution or the defence.

1.10 The European Convention on Human Rights (“ECHR”) is clearly influenced by the civil law tradition. Thus Article 4.1 of Protocol No. 7 to the Convention sets out the double jeopardy rule by stating that a person shall not “be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been *finally acquitted or convicted* in accordance with the law and penal procedure of the State”.¹⁶ Furthermore Article 4.2 of Protocol No.7 explicitly authorises fresh evidence prosecution appeals in the following terms:¹⁷

The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

¹⁴ *People (AG) v Griffin* [1974] IR 416.

¹⁵ On European criminal procedure, see further Delmas-Marty and Spencer (eds) *European Criminal Procedure* (Cambridge University Press 2002).

¹⁶ Emphasis added.

¹⁷ For example, see the rules of revision to the disadvantage of the accused (“Wiederaufnahme zuungunsten des Angeklagten”) contained in the German Criminal Procedure Code (Strafprozeßordnung) which allow the case to be reopened where the defendant’s case was helped by a false document or false evidence; where a judge or Schöffe committed a punishable offence; and where the acquitted person makes a credible confession.

1.11 Protocol No.7 has been included in the Schedule to the *European Convention on Human Rights Act 2003* as a Convention provision to which the courts in Ireland shall have regard.¹⁸

(a) *Fresh Evidence Appeals in Common Law Jurisdictions*

1.12 Article 4 of Protocol No. 7 of the ECHR envisages that the double jeopardy principle does not prevent reopening a case where there is a new or newly-discovered fact or a defect in the previous proceedings which could have affected the outcome of the case. As noted above, in Ireland the *Criminal Procedure Act 1993*¹⁹ provided for such reopening of a case *by a convicted person* alleging a miscarriage of justice. However, it would be a fundamental change for common law states to introduce a similar process to be utilised by the prosecution after an acquittal. Nonetheless, the Commission is conscious that this type of procedure has begun to be introduced in certain other jurisdictions.

1.13 In England and Wales and Northern Ireland, Part 10 of the *Criminal Justice Act 2003* empowers the English Court of Appeal to quash acquittals and order retrials where new and compelling evidence is discovered and it is in the interest of justice for the court to order a retrial.²⁰ The provisions apply to serious offences only.²¹ They arise from the

¹⁸ Article 50 of the Charter of Fundamental Rights of the European Union embodies the double jeopardy principle. The guarantee applies within the jurisdiction of each EU Member State. It also applies between jurisdictions of the Member States either within the framework of their traditional co-operation or as a matter of EU treaties and legislation. For example, Articles 3 and 4 of the 2002 Framework Decision on the European Arrest Warrant sets out the application of the double jeopardy principle. See the *European Arrest Warrant Act 2003*.

¹⁹ Section 2.

²⁰ Sections 54-56 of the *Criminal Procedure and Investigations Act 1996* provides for retrials in the case of acquittals tainted by intimidation of jurors or witnesses, but to date no retrials have been conducted under these provisions. In New Zealand, the *Criminal Procedure Bill* provides for 2 exceptions to the rule against double jeopardy - where the accused has committed an administration of justice offence resulting in a 'tainted acquittal' and where there is 'new and compelling evidence' not available at the first trial that indicates with a high degree of probability that the accused was guilty of the offence acquitted. This is despite the Attorneys General's view that the new and compelling evidence exception was not justified under the *New Zealand Bill of Rights Act 1990*. In contrast to English legislation, which contains a list of scheduled offences, the New Zealand *Criminal Procedure Bill* captures all offences that are punishable by a maximum term of imprisonment of 14 years or more. The Law Commission's Report, *Acquittal Following Perversion of the Course of Justice*, Wellington, 2001 stated that no case had been established for a 'new evidence' exception to the rule. The New Zealand Bill is, at the time of writing, awaiting the Committee of the Whole Stage, which is the process just prior to the third reading.

²¹ The provisions apply in Northern Ireland and in Wales. Part 10 does not apply to Scotland as criminal justice is a matter for the Scottish Parliament.

development of identification technology and cold-case review techniques, which enable more sophisticated forensic evaluation of bodily sample evidence than might have been available at the time it was gathered.²² The Act is retrospective in that it applies to acquittals before and after the commencement of the Act.²³ It is clear that the provisions in the 2003 Act appear to be modelled on Article 4.2 of Protocol No. 7.²⁴

1.14 In New South Wales the *Crimes (Appeal and Review) Amendment Double Jeopardy Bill 2006* is similar to the fresh evidence and tainted acquittal appeals introduced in England under the *Criminal Justice Act 2003*.²⁵ The Bill amends the *Crimes (Local Courts and Appeal) Act 2001* to enable the Court of Criminal Appeal, on application by the Director of Public Prosecutions, to apply for a retrial if there is fresh and compelling evidence and if there it is in the interests of justice to do so. It applies to all life sentence cases. In the case of offences punishable by 15 years or more, the Director of Public Prosecutions may apply for a retrial if there is a tainted acquittal.²⁶ New South Wales is the first Australian jurisdiction to change the law on double jeopardy.

1.15 The English 2003 Act and the New South Wales Bill involve forms of prosecution appeals that are novel in common law jurisdictions. The question as to whether such appeals should be introduced in Ireland has been the discussed in the Oireachtas.²⁷ While this involves a form of ‘with

²² The first use of Part 10 of the 2003 Act appears to have occurred on 11 September 2006, when William Dunlop pleaded guilty in his retrial for murder following his acquittal in 1991. The fresh evidence concerned was Dunlop’s subsequent confession to the murder: see *The Times*, 12 September 2006. Mr Dunlop was sentenced to life imprisonment with a minimum tariff of 17 years: *The Times*, 7 October, 2006. See also *In Re D* [2006] EWCA 733; [2006] 2 Cr.App.R. 286 where the Court of Appeal held that applications for reporting restrictions would be examined and the court should only make the order if satisfied that it was necessary, in the interest of justice, to require the imposition of restrictions. It was doubtful whether in future any form of press release by the Director of Public Prosecutions would be appropriate.

²³ Section 75(6).

²⁴ However, it should be noted that unlike Ireland, the United Kingdom has not ratified Protocol No 7 to the ECHR.

²⁵ The Bill passed Parliament on 17 October 2006 and is awaiting assent. The *Crimes (Appeal and Review) Amendment (DNA Review) Bill 2006* is cognate with this bill and was also passed by Parliament on the same date.

²⁶ An acquittal is ‘tainted’ if there has been an administration of justice offence committed in connection with the acquittal, and it is more likely than not that the person would not have been acquitted but for the commission of that offence. See the Bill at section 103.

²⁷ During the debate on the *Criminal Justice Bill 2004* (now the *Criminal Justice Act 2006*) in the Dáil Select Committee on Justice, Equality and Women’s Rights on 14 June 2006, Deputy Brendan Howlin sought to introduce an amendment to the Bill to

prejudice' appeal the Commission has concluded that for the purposes of this Report it should consider the issue of 'with prejudice' or 'without prejudice' appeals in a general context rather than in the context of specific instances. In addition, the Commission notes that its general point of reference for the discussion of prosecution appeals was primarily concerned with the extension of the forms of appeal beyond those extremely narrow 'without prejudice' appeals which had been in place at the time of the publication of the Consultation Paper in 2002. The Commission also notes that the wider policy context within which the type of appeal in the 2003 Act might be introduced in Ireland involves an extensive review beyond the scope of the Consultation Paper and this Report.²⁸

(3) *Would the Introduction of a 'With Prejudice' Right of Prosecution Appeal be Unconstitutional?*

1.16 The Commission now turns to examine the question of whether the introduction of a 'with prejudice' right of prosecution appeal would be unconstitutional. At this stage, it is crucial to note a number of points. First, at common law, there is no right of appeal. Therefore, one must look to the Constitution or statute to determine the extent to which the defence or the prosecution can appeal decisions of courts exercising criminal jurisdiction. The Constitution does not address the subject directly. Apart from providing a right of appeal to the Supreme Court from all decisions of the High Court, it has nothing specific to say about appeals in a criminal matter. Any other right of appeal must be conferred by statute.²⁹

1.17 Article 34.4.3° of the Constitution sets out the appellate jurisdiction of the Supreme Court. Article 34.4.3° states:

The Supreme Court shall, with such exceptions and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court, and shall also have appellate jurisdiction from such decisions of other courts as may be prescribed by law.

allow the prosecution to appeal an acquittal to the Court of Criminal Appeal and to apply to the Court to direct a retrial. The amendment was withdrawn.

²⁸ The Commission is conscious that this is precisely the review which is at the time of writing, to be undertaken by the *Balance in the Criminal Law Review Group* that has been established by the Tánaiste and Minister for Justice, Equality and Law Reform. The expert group is to examine certain areas of criminal procedure, including the possibility of 'fresh evidence' prosecution appeals and retrials following evidence of jury or witness tampering. See www.justice.ie.

²⁹ *State (Hunt) v Donovan* [1975] IR 39; *Todd v Murphy* [1999] 2 IR 1.

1.18 In *People (DPP) v O'Shea*³⁰ the Supreme Court used the words of Article 34.4.3^o to establish the right of direct prosecution appeal against an acquittal directed by the trial judge in the High Court.³¹ The key issue for the Court was whether Article 34.4.3^o should be given its literal meaning. O'Higgins CJ, with whom Walsh and Hederman JJ agreed in separate judgments, took the view that whatever the common law may have been before the enactment of the Constitution, it could not have the effect of modifying the plain words of Article 34.4.3^o. Furthermore, there was nothing special about Article 38.5 which could qualify Article 34.4.³²

1.19 While the majority held that the Court had jurisdiction to consider appeals against acquittals, it acknowledged that, in reality, considered verdicts of acquittal returned by a jury would not be disturbed.³³

1.20 Following *O'Shea*, the Director of Public Prosecutions successfully appealed to the Supreme Court against a directed acquittal in *People (DPP) v Quilligan (No.1)*.³⁴

1.21 Following the Supreme Court's decision in *Quilligan (No. 1)* the question arose whether the Court had the power to order the retrial of the accused. In *People (DPP) v Quilligan (No. 2)*³⁵ the Supreme Court split on this issue. Walsh and McCarthy JJ stressed that the constitutional right of appeal carried with it the necessary inherent jurisdiction to give effect to that right of appeal and that this extended to the right to order a retrial, where this was necessary in the interest of justice. Henchy and Griffin JJ were of the view that the constitutional right of appeal under Article 34.4.3 did not carry with it "a concomitant or ancillary jurisdiction to order a retrial." Such a

³⁰ [1982] IR 384.

³¹ See also *People (AG) v Conmey* [1975] IR 341. See further Casey "Confusion in Criminal Appeals - The Legacy of *Conmey*" [1975] 10 Ir Jur 300.

³² The true meaning of the pre-1922 jurisprudence was "not that an acquittal recorded by a criminal jury may not be appealed, but rather that no acquittal, apparently on the merits, on any criminal charge, whether it be tried by a jury or summarily, could be so appealed. I think this, with exceptions which are immaterial, was the relevant and firmly rooted principle of the common law." [1982] IR 384, 402 per O'Higgins CJ. He considered that the earlier cases of *The Queen v The Justice of Antrim* [1895] 2 IR 603, *The King (Hastings) v Justices of Galway* [1906] 2 IR 499, *The King (McGrath) v Justices of Clare* [1905] 2 IR 510, were concerned with summary prosecutions and orders for certiorari, and he distinguished *State (AG) v Binchy* [1964] IR 395.

³³ On this point see paragraph 1.28, below.

³⁴ [1986] IR 495. Walsh, Henchy, Griffin, Hederman, and McCarthy JJ. The court did not deal specifically with *O'Shea*, but confined itself to the question of the exercise of the power of arrest of a person suspected of having committed a scheduled offence under Part V of the *Offences Against the State Act 1939*.

³⁵ [1989] IR 46.

power could only be legislatively conferred and even then they doubted whether this would be constitutionally valid because it might be thought to be incompatible with “what is inherent in the constitutional guarantee of trial by jury”. Hederman J reserved his position on the wider issue of principle, but stated that no retrial should be ordered in that case. The positions adopted in *Quilligan (No. 2)* were therefore similar to those in *O’Shea*, in which only O’Higgins CJ and Walsh J expressed the opinion that the Court would have jurisdiction to order a new trial; Hederman J reserved his position and Henchy J and Finlay P dissented.

1.22 The Commission is of the view that the significance of *O’Shea* and *Quilligan (No 1)* is that the Court in both cases held that legislation providing for ‘with prejudice’ prosecution appeals from the Central Criminal Court to the Supreme Court would not necessarily be unconstitutional. However the point has not been conclusively resolved. In this context the Commission notes the strength of the dissent in *O’Shea*, its subsequent reception in *Quilligan (No 2)* and the abolition of the appeal by the *Criminal Procedure Act 1993*.³⁶ Therefore, the Commission considers that one could not state with confidence that the broader issue of prosecution appeals from jury acquittals has been decisively resolved. The Commission now turns to the question of when an accused is in jeopardy.

(4) *When is an Accused Person in Jeopardy in the Irish Criminal Justice System?*

1.23 If the accused person can successfully plead *autrefois acquit* it will be a complete bar to further proceedings with respect to the court in question.³⁷ There are two ingredients in the plea of *autrefois acquit*, according to the test set out in *People (AG) v O’Brien*³⁸

- (a) That the Court had jurisdiction to try the charge; and
- (b) That there has been a fair trial on the merits.³⁹

1.24 For the purposes of this Report, the key issue arising out of *O’Brien* is what is meant by a trial on the merits. Two different situations

³⁶ Section 11.

³⁷ Walsh *Criminal Procedure* (Thomson Round Hall 2002) at 784.

³⁸ [1963] IR 92, 100.

³⁹ “At common law a man who has been tried and acquitted for the same crime may not be tried again for the same offense if he was ‘in jeopardy’ on the first trial. He was so ‘in jeopardy’ if (1) the Court was competent to try him for the offense; (2) the trial was upon a good indictment, on which a valid judgment of conviction could be noted; and (3) the acquittal was on the merits, i.e. by verdict on the trial, or in summary cases by dismissal on the merits followed by a judgment or order of acquittal.”: 2 Russell, *Crimes* (8th edition 1923) 1818, cited in Miller “Appeals by the State in Criminal Cases” (1927) *Yale Law Journal* 486 at 492, footnote 36.

arise. First, if the accused has not been put in charge of the jury on arraignment he or she is not in jeopardy.⁴⁰ Second, even if the accused has been arraigned and there is a jury verdict of ‘not guilty by direction’, a court may look behind this, and if the court lacked jurisdiction to try the case, the ‘not guilty by direction’ verdict will not be treated as an acquittal for the purposes of *autrefois acquit*.⁴¹ This is particularly relevant in the context of prosecution appeals from rulings made at pre-trial hearings, where the appeal is decided in favour of the prosecution.⁴²

1.25 As to ‘with prejudice’ appeals from verdicts of ‘not guilty by direction’ it could be argued that these would not be in conflict with the double jeopardy principle, but there remain constitutional doubts over the power to provide for prosecution appeals resulting in a retrial.

(5) Further Considerations

1.26 The Commission considers that in light of the decision in *O’Shea* the Constitution does not prohibit a court from considering jury verdicts. However, the Commission notes that, as a matter of practicality, an appellate court will not do so. There are several reasons for this, principally the difficulty of challenging the sufficiency of evidence leading to an acquittal, as in civil cases⁴³ or in challenging the judge’s directions or rulings on law. First, the appellate process is based on an assessment of the evidence given in the trial court, which is based on transcripts rather than rehearing witnesses. Second, even if the appellate court identified failures of due process in the original trial, it is impossible to hold conclusively that the jury would have been satisfied to the requisite standard of beyond a reasonable doubt *had it not been for the misdirection or other failure of due process*. Third, the common law system attaches a value to perverse verdicts in

⁴⁰ Ryan and Magee have questioned the Walsh and McCarthy *dicta* in *Quilligan (No. 2)*: “It is difficult to see how the accused was not in jeopardy from the time that he was put in charge of the jury on a valid indictment.” Ryan and Magee *The Irish Criminal Process* (Mercier Press 1983) at 439.

⁴¹ *People (AG) v O’Brien* [1963] IR 92. *State (AG) v Judge Binchy* [1964] IR 395. See also the judgment of O’Higgins CJ in *People (DPP) v O’Shea* [1982] IR 384, 405.

⁴² Indeed, as matter of historical criminal procedure, a refusal of information under procedure that applied prior to the introduction of the preliminary examination in the *Criminal Procedure Act 1967* did not amount to an acquittal and this was not a bar to further proceedings: *Re Singer (No. 2)* (1964) 98 ILTR 112, 129.

⁴³ In *Northern Bank Finance Corporation Limited v Charlton* [1979] IR 149 the Supreme Court held that where an appellant challenges in the Supreme Court the validity of a finding of fact made by a trial judge on his assessment of the credibility of witnesses which have given conflicting oral evidence on that fact, it is the existence or sufficiency of such evidence which is considered by the Supreme Court and not its own view, obtained from reading the transcript, of the credibility of the evidence. See also *O’Connor v Bus Átha Cliath* [2003] IESC 66.

ensuring the criminal law only punishes those that society condemns.⁴⁴ For these reasons, and because juries does not have to provide reasons for their decisions, it is difficult for an appellate court to say that no reasonable jury could have acquitted.

1.27 Therefore, in *O'Shea*, having examined the practice regarding civil trials, O'Higgins CJ stated that verdicts arrived at properly and supported by the evidence, would not be disturbed. The Supreme Court would be bound by findings of fact made at the trial. It is clear, of course, that a conviction is open to challenge on the sufficiency of the evidence relied on to support it, or on the trial judge's directions or rulings on law. But an acquittal recorded by a jury on a consideration of the evidence would be immune. The importance attached to jury verdicts is endorsed by the view that appellate courts are slow to interfere with them.⁴⁵ However, in the case of directed acquittals, O'Higgins CJ in *O'Shea* stated that the Court would consider the appeal in the same manner as a similar appeal in civil actions. If the direction should not have been given, the verdict would be set aside, and as in civil actions, a new trial would be ordered.

1.28 Similarly, Walsh J in *O'Shea* considered that an acquittal obtained by coercion or intimidation of jurors should be subject to appeal. If they were allowed to go unchecked it would bring about the destruction of the jury system of trial.

C Prosecution Appeals in Summary Cases

1.29 As noted in the Introduction, this Report also considers the related question of correct outcomes in terms of sentences imposed by the District Court. In the *Consultation Paper on Prosecution Appeals from Unduly Lenient Sentences in the District Court*, the Commission provisionally recommended that the prosecution be given the general right to appeal against unduly lenient sentences.⁴⁶

⁴⁴ See *R v Ponting* [1985] Crim LR 318 in which the defendant was acquitted by a jury on a charge under the *Official Secrets Act 1911*. The defendant had argued that he had disclosed certain information in the public interest, but the trial judge directed the jury that "*the public interest is whatever the government says it is.*" Nonetheless, the jury acquitted the defendant.

⁴⁵ "[I]n reading the record of the evidence, the appellate Court cannot assess the credibility of witnesses nor the cogency of evidence of primary facts, or of inference of fact which are dependant upon the credibility of a witness or witnesses.": *Director of Public Prosecutions v Egan* [1990] ILRM 780 per McCarthy J quoting Griffin J in *People (DPP) v Mulligan* (1982) Frewen 16, 20-23. Indeed, a judge cannot direct a jury to convict no matter how convincing the weight of the evidence against the defendant might seem: see *R v Wang* [2005] 1 WLR 661.

⁴⁶ LRC CP 33-2004.

1.30 Subject to limited exceptions,⁴⁷ there is no general right of the prosecution to appeal sentences imposed in summary cases in the District Court. This is in contrast to the Director of Public Prosecution's power to appeal sentences imposed in indictable cases on the ground that they are unduly lenient.⁴⁸ The constitutionality of prosecution appeals on points of law has been upheld.⁴⁹

1.31 Indeed, there is already provision for prosecution appeals by way of case stated on a point of law at the request of any party to the proceedings heard and determined in the District Court.⁵⁰ The High Court can reverse, amend or affirm the determination of the District Court judge or may refer the matter back to the judge for determination on the basis of its ruling. The decision of the High Court can be appealed to the Supreme Court. The constitutionality of the section was recently upheld.⁵¹ There does not seem to be any impediment to the prosecution bringing an appeal against sentence under the case stated procedure.

D Pre-trial Hearings in Cases brought on Indictment

1.32 In the *Consultation Paper on Prosecution Appeals in Cases brought on Indictment*,⁵² the Commission noted that pre-trial hearings, which would include a prosecution right of appeal, could provide a valuable way of improving the quality of trial rulings.⁵³

1.33 Appeals from such rulings may provide an effective way of clarifying the law and ensuring it is correctly applied so that the jury's verdict is based on the correct interpretation of the law. However, there

⁴⁷ These are the right under section 310(1) of the *Fisheries (Consolidation) Act 1959*; section 83 of the *Safety, Health and Welfare at Work Act 2005*, and section 18(2) of the *Courts of Justice Act 1928*. There is also a right of appeal by way of case-stated, which is discussed in Chapter 2, below.

⁴⁸ Pursuant to section 2 of the *Criminal Procedure Act 1993*.

⁴⁹ This was confirmed by the Supreme Court in *Considine v Shannon Regional Fisheries Board* [1997] 2 IR 404, which concerned Section 310(1) of the *Fisheries (Consolidation) Act 1959*. See the 2004 Consultation Paper at paragraphs 3.09-3.13.

⁵⁰ Section 2 of the *Summary Jurisdiction Act 1857*, as amended by section 51 of the *Courts (Supplemental Provisions) Act 1961*. See the Consultation Paper at paragraphs 3.19-3.26

⁵¹ In *Fitzgerald v Director of Public Prosecutions* [2003] 2 ILRM 537. The scope of the case stated mechanism is clearly limited to a question of law.

⁵² LRC CP 19-2002.

⁵³ See the 2002 Consultation Paper at paragraphs 3.083-3.087. The Commission discusses this issue in detail in Chapter 3, below.

remains a question about the constitutionality of such hearings and whether they could be made mandatory.

1.34 The Commission's consideration of the pre-trial determination of issues as a way of further enhancing the reliability of jury verdicts has highlighted the usefulness of a pre-trial questionnaire. The Commission considers that pre-trial questionnaires could be a valuable addition to criminal procedure. This is discussed in more details in Chapter 4.

E Conclusions

1.35 The Commission considers that while it appears that there is not a constitutional prohibition on prosecution appeals from jury acquittals, it is clear that the courts are not willing to entertain appeals from findings of fact by a jury. As noted in the Introduction to this Report, the Commission's aim in examining the area of prosecution appeals was to correct the situation that existed prior to the Consultation Paper, in which erroneous rulings by trial judges could not be corrected for future cases. As the Commission notes in Chapter 2, the *Criminal Justice Act 2006* has broadened the avenues of 'without prejudice' prosecution appeal on points of law arising during a trial. The Commission has decided not to recommend the introduction of 'with prejudice' appeals for cases brought on indictment at this time.

(1) Report Recommendation

1.36 *The Commission does not recommend that a 'with prejudice' right of prosecution appeal from cases brought on indictment should be introduced at this time.*

1.37 The Commission considers the desirability of 'without prejudice' appeals in Chapter 2.

CHAPTER 2 PROSECUTION APPEALS IN INDICTABLE CASES

A Introduction

2.01 In this Chapter, the Commission considers the desirability of a ‘without prejudice’ right of prosecution appeal. Section B discusses the existing provisions concerning appeals by the prosecution in indictable cases, focussing on the ‘without prejudice’ appeal in section 34 of the *Criminal Procedure Act 1967* and the case stated appeal on a point of law under section 16 of the *Courts of Justice Act 1947*. Section C sets out the provisional recommendations for reform contained in the 2002 Consultation Paper. Section D discusses the developments since the Consultation Paper, including the provisions in the *Criminal Justice Act 2006* which extend the range of ‘without prejudice’ prosecution appeals along the lines contemplated in the Consultation Paper. In Section E the Commission sets out its recommendations to safeguard the acquitted person’s anonymity and the provision of legal aid under the extended avenues of appeal.

B The Existing Powers of Appeal

2.02 In its *Consultation Paper on Prosecution Appeals in Cases brought on Indictment*¹ the Commission examined the limited avenues of prosecution appeals. These are the power to appeal without prejudice to the verdict to the Supreme Court from a question of law arising from a directed acquittal under section 34 of the *Criminal Procedure Act 1967* and the power to appeal by way of case stated under section 16 of the *Courts of Justice Act 1947*.²

(1) *Without Prejudice Appeals under Section 34 of the Criminal Procedure Act 1967*

2.03 At the close of the prosecution’s case, the defence may make a submission to the trial judge that there is no case to answer. If the court accedes to this submission, the jury is directed to find the defendant not

¹ LRC CP 19-2002.

² See the 2002 Consultation Paper at Chapter 1. The Paper also discussed the abolished constitutional right of appeal at paragraphs 1.38-1.44.

guilty. Equally the judge may decide to direct an acquittal by his or her own volition. Up until recently, only the point of law on which the acquittal was directed could be appealed, as provided for by section 34 of the *Criminal Procedure Act 1967*.³ Appeals by the prosecution are ‘without prejudice’ to the acquittal. In the 2002 Consultation Paper, the Commission noted that because of the narrow scope of section 34 of the 1967 Act it was not widely used.⁴ Section 34 of the 1967 Act applies to jury trials only and not to trials in the Special Criminal Court.⁵

(2) Case Stated under Section 16 of the Courts of Justice Act 1947

2.04 Section 16 of the *Courts of Justice Act 1947* empowers a judge of the Circuit Court to refer questions of law to the Supreme Court by way of case stated. Although section 16 of the 1947 Act can be invoked by the prosecution, the Supreme Court held in *People (AG) v McGlynn*⁶ that a Circuit Court judge had no jurisdiction to state a case mid-trial. In coming to this conclusion, the Court emphasised the unitary nature of criminal trials. Therefore, section 16 is not very useful in cases prosecuted on indictment. However, the section has proved very useful in clarifying points of law which have emerged in the course of appeals from convictions in the District Court. Time is saved both because the DPP can go direct to the Supreme Court and also because once a point is decided it has implications for other similar cases. The DPP’s office has found the case stated route from the Circuit Court particularly useful in drink driving cases where once a point of challenge is raised by the defence it can quickly become an issue in many cases.⁷ The DPP also utilises the case stated mechanisms from the District Court in order to clarify points of law. This is discussed in more detail in Chapter 3.

³ *People (AG) v Crinnion* [1976] IR 29. It did not affect prior questions of law such as admissibility, which because of their effect on the evidential content of the trial may have a bearing on that point of law. The position was changed by section 21 of the *Criminal Justice Act 2006*: see paragraphs 2.14 – 2.17, below.

⁴ See the 2002 Consultation Paper at paragraph 1.33.

⁵ The *Criminal Justice Act 2006* extended section 34 to cover rulings in the Special Criminal Court: see paragraphs 2.14-2.17, below.

⁶ [1967] IR 232. This involved a case stated by the President of the Circuit Court on application by counsel for the accused. The application was made at the conclusion of the evidence for the defence and before counsel addressed the jury. The Supreme Court held that the power conferred by section 16 of the 1947 Act is not exercisable in respect of questions of law arising after an accused has been given in charge to the jury and before the verdict.

⁷ See for example the case of *People (DPP) v Moorehouse* [2005] IESC 52 which was a case stated under section 16 of the 1947 Act requested by the Director. The DPP was successful.

C Consultation Paper Proposals

2.05 Having examined the existing avenues of prosecution appeals, the Commission concluded that they were inadequate and that a broader right of prosecution appeal should be available. The Commission canvassed a number of options for reform aimed at striking a balance between the rights of the acquitted person and the public interest in subjecting trial rulings on important points of law to review at the appellate level. The models proposed are the following:

(1) Narrow ‘Without Prejudice’ Model

2.06 The Commission’s proposed ‘narrow without prejudice’ model envisaged a broadening of the current right of appeal under section 34 of the 1967 Act to include appeals from points of law that terminate the trial.⁸

(2) Broad ‘Without Prejudice’ Model

2.07 The Commission’s broad ‘without prejudice’ model envisaged prosecution appeals on questions of law and questions of mixed law and fact arising from terminating and non-terminating rulings, whether arising pre-trial or during trial.⁹

(3) Narrow ‘With Prejudice’ Model

2.08 Under the Commission’s proposed narrow ‘with prejudice’ model, the prosecution could appeal points of law determined in terminating rulings whether arising pre-trial or during trial on a ‘with prejudice’ basis.¹⁰

(4) Broad ‘With Prejudice’ Model

2.09 The suggested broad ‘with prejudice’ model would allow appeals from questions of law and question of mixed law and fact arising from both terminating and non-terminating rulings on a ‘with prejudice’ basis.¹¹

(5) Comprehensive ‘With Prejudice’ Model

2.10 The suggested comprehensive ‘with prejudice’ model would allow prosecution appeals against unreasonable jury acquittals or even provide for a full rehearing of the evidence at trial.¹²

⁸ 2002 Consultation Paper at paragraph 5.04.

⁹ *Ibid* at paragraph 5.10. Examples of terminating and non-terminating rulings are given at paragraph 2.20, below.

¹⁰ *Ibid* at paragraph 5.14.

¹¹ *Ibid* at paragraph 5.19.

¹² *Ibid* at paragraph 5.23.

D Developments since the Consultation Paper

2.11 Since the publication of the Consultation Paper the matter has been the subject of further public debate and the Commission considers it important to note these here.

(1) *The Report of the Working Group on the Jurisdiction of the Courts: The Criminal Jurisdiction of the Courts*

2.12 The Report of the Working Group on the Jurisdiction of the Courts: The Criminal Jurisdiction of the Courts¹³ recommended extending the range of points of law covered by section 34 of the Criminal Procedure Act 1967.¹⁴ This would align it with the ‘without prejudice’ appeal under the English Criminal Justice Act 1972.¹⁵ The Report also recommended that the prosecution should have the same right as the defence to appeal on a point of law of exceptional public importance from the Court of Criminal Appeal to the Supreme Court.¹⁶ The Report’s recommendations are implemented in sections 21 and 22 of the Criminal Justice Act 2006.

(2) *Oireachtas Committee Report on a Review of the Criminal Justice System*

2.13 In its *Report on a Review of the Criminal Justice System*,¹⁷ the Oireachtas Joint Committee on Justice, Equality, Defence and Women’s Rights noted that the *Report of the Working Group on the Criminal Jurisdiction of the Courts* recommendations regarding prosecution appeals¹⁸ and the Commission’s 2002 Consultation Paper. The Committee recommended that prosecution appeals be extended in a meaningful way and

¹³ (Courts Service 2003). The Working Group was chaired by Fennelly J.

¹⁴ At paragraph 692.

¹⁵ Section 36(1). Under the Attorney General’s Reference Scheme, the right of appeal extends to any question of law arising from an acquittal, not just directed acquittals.

¹⁶ Pursuant to section 29 of the *Courts of Justice Act 1924*. The Report noted the anomalous practice whereby appellants to the Supreme Court under section 29 are entitled on the hearing of the appeal to argue every point in the appeal, including points already decided and rejected by the Court of Criminal Appeal. However, the point of law referred to the Supreme Court under section 29 of the 1924 Act must be a point of law that was argued before the Court of Criminal Appeal: *People (DPP) v Kenny* [2004] IECCA 2.

¹⁷ (Government Publications July 2004).

¹⁸ At paragraph 103.

welcomed the provision in the *Criminal Justice Bill 2004*¹⁹ for ‘without prejudice’ prosecution appeals on a point of law.²⁰

(3) *The Criminal Justice Act 2006*

2.14 Section 21 of the *Criminal Justice Act 2006*, which was initiated as the *Criminal Justice Bill 2004*, amends section 34 of the *Criminal Procedure Act 1967* to extend the range of points of law covered to any question of law arising during the trial, including trials before the Special Criminal Court. The appeal will remain on a ‘without prejudice’ basis and apply in the case of any acquittal, and not merely those arising by reason of a direction and whether the acquittal concerned the whole or part of the indictment. Section 21 of the 2006 Act further provides that the question of law to be appealed to the Supreme Court will be decided on by the Director of Public Prosecutions or the Attorney General after consultation with the trial judge. The section also allows for the acquitted person to appear or be represented at the appeal.²¹ Counsel may be assigned by the Court to argue in support of the decision if the acquitted person waives his or her right to be represented and/or the Court considers it desirable in the public interest to do so.²² Finally, section 21 of the 2006 Act amends section 34 of the 1967 Act to provide that the identity of the acquitted person be protected, in far as it is reasonably practicable to do so.²³

2.15 Section 22 of the *Criminal Justice Act 2006* amends section 29 of the *Courts of Justice Act 1924* to provide for a ‘without prejudice’ prosecution right of appeal from the Court of Criminal Appeal to the Supreme Court.²⁴ This reverses the effect of the decision in *People (AG) v Kennedy*²⁵ which has been affirmed in recent decisions of the Supreme

¹⁹ The relevant provisions were commenced on 1 August 2006 as part of the *Criminal Justice Act 2006*. See paragraphs 2.14-2.17, below.

²⁰ In his submission to the Joint Committee, the DPP noted that “[t]here is no equality of arms in the Irish criminal justice system between the prosecution and the defence in relation to the rights of appeal.”: paragraph 29 of his submission; *Report of a Review of the Criminal Justice System* (Government Publications July 2004) at 36.

²¹ As with the existing section 34 of the 1967 Act, legal aid may also be granted. Furthermore, the Supreme Court may assign counsel to argue in favour of the original decision if the acquitted person waives his or her right to representation, or if the Court considers it desirable in the public interest to do so.

²² Section 34(4) as inserted by the 2006 Act.

²³ Section 34(5) as inserted by the 2006 Act.

²⁴ Section 29(3) as inserted by section 22 of the 2006 Act.

²⁵ [1946] IR 517. The Court held that section 29 of the 1924 Act did not confer a power on the Attorney General or the Director of Public Prosecutions to appeal from a decision of the Court of Criminal Appeal quashing a conviction. See the 2002 Consultation Paper at paragraph 1.23. It was noted in *Kennedy* that formerly, under

Court.²⁶ If the Supreme Court considers that the means of the acquitted person are insufficient for him or her to obtain legal aid or if legal aid was granted for the original trial the Court may grant a certificate for legal aid.²⁷ The procedure envisaged in section 22 of the 2006 Act is similar to that in operation in England and Wales under the *Criminal Appeal Act 1968*.²⁸

2.16 Section 23 provides for the extension of the time limit governing applications by the DPP under section 2 of the *Criminal Justice Act 1993* for a review on the grounds of undue leniency. The appeal must be made within 28 days, or on application to the Court of Criminal Appeal, a period not exceeding 56 days, from when the order was made.²⁹

the procedure by writ of error, matters of law appearing on the face of the record could be reviewed by the Court of King's Bench either in the case of a conviction or an acquittal. *Kennedy* is also referred to in the 2004 Consultation Paper at paragraph 3.08, as support for the proposition that section 50 of the *Courts (Supplemental Provisions) Act 1961* which provides for an appeal against sentences from the District Court applies only to the accused person.

²⁶ Section 29 was considered in two recent decisions of the Supreme Court. In *People (DPP) v O'Callaghan* [2004] 1 IR 22, the Court held that neither the Attorney General nor the Director of Public Prosecutions had a right of appeal under section 29 where a conviction had been quashed and a retrial ordered. In *People (DPP) v Campbell* [2004] IESC 26, Fennelly J described the result as "unfortunate and undesirable" and noted that the limitations of the section "could easily be remedied by amending legislation." However, in its treatment of the 2004 Bill, the Human Rights Commission recommended that it would be more appropriate if the Attorney General or the Director of Public Prosecutions felt that a trial judge had erred on a question of law, then he or she should submit that question for legislative reform. The Commission respectfully disagrees with this view. The demands on legislative time would inhibit the operation of such a model and it would not be possible for legislation to correct a possibly erroneous finding by a trial judge. Such a finding would be based on specific facts in the case and could only be corrected on appeal.

²⁷ Sections 34(7) and 34(8).

²⁸ In England and Wales, either the prosecution or the defence can appeal to the House of Lords against a decision of the Court of Appeal under sections 33 and 34 of the *Criminal Appeal Act 1968*. This is subject to two conditions: (1) The Court of Appeal must certify that a point of law of general public importance is involved and (2) Leave to appeal is given by the Court of Appeal or by the Appeals Committee of the House of Lords. It should be noted that even if a conviction is quashed by the Court of Appeal, that conviction could be reinstated by the House of Lords. Under Section 36(1) of the *Criminal Justice Act 1972* the Attorney General can refer a point of law which arose during a trial on indictment that ended in an acquittal, to the Court of Appeal for determination. The acquittal is left untouched. The reference can refer to questions of law alone or questions of mixed fact and law: See for example *Attorney General's Reference (No 1 of 1975)* [1975] Q.B. 773.

²⁹ See O' Malley *Sentencing Law and Practice* (Thomson Round Hall 2006) at 642 for a discussion of the provisions governing extension of time. He notes that the provisions do not extend the 28 period simpliciter, but grants discretion to the Court of Criminal Appeal to allow an application to proceed once the first 28 days have elapsed.

2.17 Section 24 of the *Criminal Justice Act 2006* provides that where a person is acquitted of an offence on indictment the Director of Public Prosecutions or the Attorney General may appeal an order of costs against him or her to the Court of Criminal Appeal.³⁰

E Discussion

2.18 The central thesis of the 2002 Consultation Paper was that a broadened form of prosecution appeal is necessary. The Commission concluded that it is inappropriate for important issues of law to be determined during a criminal trial where they are not subject to review by a superior court. Following the consultation process, the Commission has re-examined all of the models proposed in the Consultation Paper. As noted in Chapter 1, the Commission is of the view that a ‘with prejudice’ form of prosecution appeal which would involve a rehearing of the evidence would raise serious constitutional questions. The Commission reiterates that its focus in examining prosecution appeals was to enhance the reliability of jury verdicts by ensuring the erroneous rulings made by trial judges could be corrected by appellate courts for future cases, that is, without prejudice to the original acquittal. In keeping with that focus the Commission has not recommended the introduction of a ‘with prejudice’ form of prosecution appeal.³¹ The Commission notes that a ‘without prejudice’ model would provide an opportunity for the appellate courts to clarify the law. The Commission has therefore concluded that a ‘without prejudice’ form of prosecution appeal is desirable, and so recommends.

(1) Report Recommendation

2.19 *The Commission recommends that a ‘without prejudice’ prosecution appeal is desirable.*

2.20 The amendments to section 34 of the 1967 Act contained in the *Criminal Justice Act 2006* retain its ‘without prejudice’ nature. It is clear that the 2006 Act expands the scope of section 34 to all points of law arising during the trial, that is, all terminating and non-terminating rulings. Examples of terminating rulings would include a stay on the grounds of abuse of process or delay and a trial judge’s decision to direct the jury to return a not-guilty verdict. Examples of non-terminating rulings would

O’Malley argues that the importance of finality in sentencing coupled with the accused person’s right not to be kept in undue suspense over the possibility of a prosecution appeal means that there should be good reasons for granting an extension.

³⁰ An appeal must be made on notice to the acquitted person within 28 days or, on application to the trial court, a period not exceeding 56 days, from when the order was made.

³¹ See paragraph 1.36, above.

include the granting of an adjournment, and an order for joinder or severance.³²

2.21 The Commission considers that this extension of the 1967 avenue of appeal is a welcome development. Indeed, it corresponds to the Commission's provisional recommendation in the 2002 Consultation Paper of a 'without prejudice' prosecution appeal and its final recommendation in this Report.³³

2.22 As stated above, sections 21 and 22 of the 2006 Act provide that the identity of the accused person be protected as far "as it is reasonably practicable to do so". However, this statutory protection is not explicit in its protection of the acquitted person's identity. The Commission considers that safeguards such as those in operation in England under the Attorney General's Reference Scheme should be introduced.

2.23 The Commission welcomes the extension of section 34 of the *Criminal Procedure Act 1967* contained in section 21 of the *Criminal Justice Act 2006*. The Commission considers that a number of procedural safeguards should be introduced to protect the acquitted person's anonymity. The Commission considers that section 21 of the *Criminal Justice Act 2006* should be amended to protect the acquitted person's identity.³⁴ The Commission considers that section 21 of the *Criminal Justice Act 2006* be amended to include a requirement that no reference is made in the appeal to any person or place likely to lead to the identification of the acquitted person and that the court shall ensure that the identity of the acquitted person is not disclosed.

2.24 Furthermore, since the referral of a question is in the interest of justice and therefore the public generally, and given that the participation of the accused is conducive to the public interest, the accused should be entitled to free legal representation irrespective of his or her means. Such a provision would ensure that the appeal retains an element of reality.³⁵ It is central to the public interest that there is a *legitimus contradictor*. The provision of counsel as of right would also ensure that the same counsel who

³² See the 2002 Consultation Paper at paragraph 3.063.

³³ See paragraph 2.19, above.

³⁴ Part 69.1 of the *Criminal Procedure Rules 2005* (S.I. No 384) states that: "[...] no mention shall be made in the reference of the proper name of any person or place which is likely to lead to the identification of the respondent." Part 69.4 states: "The court shall ensure that the identity of the respondent is not disclosed during the proceedings on a reference except where the respondent has given his consent to the use of his name in the proceedings."

³⁵ Under section 36(5) of the *Criminal Justice Act 1972*, if the acquitted person is represented by counsel, he or she is entitled to his costs.

represented the acquitted person at the original trial would appear at the appeal.

2.25 The Commission considers that a statutory right to legal aid under the *Criminal Justice (Legal Aid) Act 1962*, and/or costs should be introduced (along the lines of the right to costs under the *Criminal Justice Act 1972* in England and Wales³⁶), regardless of the acquitted person's means.

2.26 The Commission welcomes the amendment of section 29 of the Courts of Justice Act 1924 contained in section 22 of the *Criminal Justice Act 2006* to provide for a 'without prejudice' right of appeal by the prosecution from a decision of the Court of Criminal Appeal. However, as with its analysis of section 21 of the 2006 Act, the Commission considers that procedural safeguards should be introduced to protect the acquitted person's anonymity.

2.27 The Commission considers that section 22 of the *Criminal Justice Act 2006* be amended to include a requirement that no reference is made in the appeal to any person or place likely to lead to the identification of the acquitted person and that the court shall ensure that the identity of the acquitted person is not disclosed.

2.28 The Commission also considers that section 22 of the *Criminal Justice Act 2006* be amended to provide for a statutory right to criminal legal aid under the *Criminal Justice (Legal Aid) Act 1962* and/or costs for acquitted person, regardless of the person's means.

(2) Report Recommendations

2.29 *The Commission recommends that section 21 of the Criminal Justice Act 2006 be amended to include a requirement that no reference is made in the appeal to any person or place likely to lead to the identification of the acquitted person and that the court shall ensure that the identity of the acquitted person is not disclosed.*

2.30 *The Commission considers that section 21 of the Criminal Justice Act 2006 be amended to provide for a statutory right to criminal legal aid*

³⁶ Section 36(5) of the English *Criminal Justice Act 1972* states that "Where, on a point being referred to the Court of Appeal under this section, or further referred to the House of Lords, the acquitted person appears by counsel for the purposes of presenting any argument to the court or the House, he shall be entitled to his costs, that is to say to the payment out of central funds of such sums as are reasonably sufficient to compensate him for expenses properly incurred by him for the purpose of being represented on the reference or further reference; and any amount recoverable under this subsection shall be ascertained, as soon as practicable, by the registrar of criminal appeals, or as the case may be, such officer as may be prescribed by order of the House of Lords."

under the Criminal Justice (Legal Aid) Act 1962, and/or costs, regardless of the acquitted person's means.

2.31 *The Commission recommends that section 22 of the Criminal Justice Act 2006 be amended to include a requirement that no reference is made in the appeal to any person or place likely to lead to the identification of the acquitted person and that the court shall ensure that the identity of the acquitted person is not disclosed.*

2.32 *The Commission recommends that section 22 of the Criminal Justice Act 2006 be amended to provide for a statutory right to criminal legal aid under the Criminal Justice (Legal Aid) Act 1962, and/or costs, regardless of the acquitted person's means.*

F Case Stated Appeals

2.33 As already noted, section 16 of the *Courts of Justice Act 1947* empowers a judge of the Circuit Court to refer questions of law to the Supreme Court by way of a case stated. The Commission accepts that, as the Supreme Court held in *People (AG) v McGlynn*,³⁷ the case stated appeal is not appropriate to a trial on indictment once the trial has begun. A prosecution appeal after the jury has been empanelled is more harmful to the defence's case. If there is a retrial, prosecution witnesses may have benefited from the 'dry run' and the prosecution would have a chance to 'mend its hand' in the second trial. Once the accused is arraigned and a jury has been empanelled, it is important that the trial should not be disrupted and adjourned pending the outcome of an appeal on a point of law.

2.34 The Commission has concluded that, rather than seeking to reform the case stated procedure under section 16 of the 1947 Act it is preferable that reform in this area should focus on the development of the pre-trial stage of prosecutions on indictment. These proposals are discussed in Chapter 4.

³⁷ [1967] IR 232.

CHAPTER 3 PROSECUTION APPEALS FROM SENTENCES IMPOSED IN THE DISTRICT COURT

A Introduction

3.01 In this Chapter, the Commission discusses the question of prosecution appeals from unduly lenient sentences in the District Court and related matters. Section B sets out the existing law on prosecution appeals from sentences imposed in the District Court, while section C describes the provisional recommendations in the 2004 Consultation Paper. In Section D the Commission sets out its views as to whether the prosecution should have a right to appeal unduly lenient sentences imposed in the District court. Section E contains the Commission's analysis of current sentencing practice and contains proposals for reform. Section F sets out the Commission's views on the use of prison and the appropriateness of alternative sanctions. Section G considers the right of prosecution appeal from unduly lenient sentences imposed on indictment, in particular the rights of appeal from a determination of the Court of Criminal Appeal on an application for a review of sentence under section 2 of the *Criminal Justice Act 1993*.

B Existing Law on Prosecution Appeals

3.02 In its *Consultation Paper on Prosecution Appeals from Unduly Lenient Sentences in the District Court*¹ the Commission examined the existing law on prosecution appeals from the District Court in the context of whether the prosecution should be empowered to appeal on the grounds of alleged undue leniency a sentence imposed in the District Court. In the 2004 Consultation Paper, the Commission defined a sentence to include all sanctions imposed by the District Court on a finding of guilt of an individual including a term of imprisonment, a fine, an order under the *Probation of Offenders Act 1907*, a community service order, curfew and exclusion orders, a payment into the Court Poor Box and entering into a recognisance. The Commission considered that any order made by a District Court judge in the absence of a finding of guilt should be treated as an acquittal for the purposes of the Paper.² The sentencing jurisdiction of the District Court is

¹ LRC CP 33-2004.

² See the 2004 Consultation Paper at paragraph 2.12.

generally limited to a maximum sentence of 12 months and a maximum fine of €3,000.³

3.03 There are a few situations where the prosecution has a statutory right of appeal from acquittals in the District Court.⁴ The form of these appeals fall into 4 categories: appeals de novo; case stated; consultative case stated; and judicial review.

(1) Appeals de novo

- Section 18(2) of the *Courts of Justice Act 1928* preserves any right of prosecution appeal which existed prior to the introduction of the 1928 Act, such as in excise cases.⁵
- Appeals under section 310(1) of the *Fisheries (Consolidation) Act 1959*. The constitutionality of the section was upheld in *Considine v Shannon Regional Fisheries Board*.⁶
- Appeals by the Health and Safety Authority under section 83 of the *Safety, Health and Welfare at Work Act 2005*.⁷

3.04 In the 2004 Consultation Paper the Commission did not recommend any extension of these limited exceptions.

(2) Case Stated

(a) Summary Jurisdiction Act 1857

3.05 Under Section 2 of the *Summary Jurisdiction Act 1857*,⁸ a case may be stated to the High Court by a District Court judge on a point of law at the request of either the prosecution or the defence.⁹ The High Court can

³ A cumulative sentence of 2 years can be imposed where the person has already been sentenced to a term of imprisonment (section 5 of the *Criminal Justice Act 1951*) and where a person who commits an offence while serving a sentence (section 13 of the *Criminal Law Act 1976* as amended by section 12 (2) of the *Criminal Justice Act 1984*).

⁴ The 2004 Consultation Paper also discussed the right of the accused to appeal from the District Court: See paragraphs 3.03-3.08.

⁵ Woods *District Court Practice and Procedure in Criminal Cases* (James V Woods 1994) at 450. See the 2004 Consultation Paper at paragraph 3.14.

⁶ [1997] 2 IR 404. See the 2004 Consultation Paper at paragraphs 3.09-3.13.

⁷ See the 2004 Consultation Paper at paragraphs 3.16-3.18.

⁸ As extended by section 51 of the *Courts (Supplemental Provisions) Act 1961*.

⁹ The judge may refuse to state the case if the application is regarded as being frivolous, unless the application is made by the Attorney General, the Director of Public Prosecutions, a Minister of the Government, a Minister of State or the Revenue Commissioners, in which case the judge has no discretion to refuse. See the 2004 Consultation Paper at paragraphs 3.19-3.26.

reverse, amend or affirm the determination of the District Court judge or may refer the matter back to the District Court for determination on the basis of its ruling. In *Director of Public Prosecutions v Nangle* Finlay P held that “[...] there can be no valid distinction in principle which could make it [the case stated procedure] inapplicable to a like appeal against an acquittal.”¹⁰

3.06 This can include orders made under the *Probation of Offenders Act 1907*.¹¹ The decision of the High Court can be appealed to the Supreme Court.¹² As the question whether there is any evidence on which the Judge could have based his or her decision is itself a question of law this clearly opens up a wide power of review of District Court dismissals of summons. The constitutionality of section 2 of the 1857 Act was upheld in *Fitzgerald v Director of Public Prosecutions*.¹³ The District Court (Case Stated) Rules 2006¹⁴ provide for the monitoring of cases stated from the District Court to the Circuit Court and to the High Court. This implements a recommendation in the *Report of the Working Group on the Jurisdiction of the Courts: The Criminal Jurisdiction of the Courts*.¹⁵ The Rules amend Order 102 rule 12 to provide arrangements to monitor proceedings for appeal by way of case stated during the period between the date of application to the Court to state a case and the date of signing and dispatch of the case stated.

(b) Consultative Case Stated - Courts (Supplemental Provisions) Act 1961

3.07 Under section 52 of the *Courts (Supplemental Provisions) Act 1961* an application may be made by the prosecution or the defence to refer any question of law arising during the District Court case to the High Court. Unlike the case stated procedure under the 1857 Act, the District Judge is obliged to make the reference to the High Court when requested. The decision of the High Court can be appealed to the Supreme Court, but only with the leave of the High Court.

¹⁰ [1984] ILRM 171, 172.

¹¹ See *Gilroy v Brennan* [1926] IR 482, discussed in the 2004 Consultation Paper at paragraph 3.15.

¹² For example, see *People (AG) v Burns* [2004] IESC 99.

¹³ [2003] 2 ILRM 537. The scope of the case stated mechanism is clearly limited to a question of law. *Fitzgerald* is discussed in the 2004 Consultation Paper at paragraphs 3.23-3.26. In England and Wales the case stated from the Magistrates’ Court to the Divisional Court of the High Court has been used to determine important points of law. See *R v Smith* [2006] 2 Cr App R 1 where the Divisional Court of the High Court held that cutting a person’s hair constitutes an assault occasioning actual bodily harm.

¹⁴ SI No. 398 of 2006.

¹⁵ (Courts Service 2003). See paragraphs 3.56-3.58, below.

3.08 It is clear that the DPP uses the case stated mechanism frequently. Since 2003, 38 appeals by way of case stated have been brought.¹⁶ 22 of these cases stated were sought by the DPP. The DPP was successful on 20 of the 38 cases. Some are still pending.

3.09 The Commission is aware that the Office of the DPP hopes to have an electronic reporting mechanism between it and the State Solicitors around the country in order facilitate updates and progress tracking in classes of cases, including cases stated.

(3) Judicial Review

3.10 In the 2004 Consultation Paper the Commission also examined how the judicial review procedure could be used to challenge sentences imposed in the District Court.¹⁷ Indeed, the courts in England have accepted, albeit cautiously, that a sentence that was so far outside normal discretionary limits as to involve a clear error of law may be quashed on judicial review. This would be done on the well-established *Wednesbury* principles.¹⁸ Moreover, it has been suggested that these principles could be applicable in the context of the case stated,¹⁹ though the Commission accepts that this would be a rare event. The Commission considers that judicial review would only be useful in the most extreme cases.

(4) Comparative Review

3.11 The position adopted in other common law jurisdictions which allow for prosecution appeals from sentences imposed in summary cases is similar. In Scotland the prosecutor in summary cases can appeal to the High Court on the grounds of undue leniency.²⁰ An example of the appeal in practice is *Her Majesty's Advocate v Kirk*²¹ which involved a charge of careless driving. The facts included that a death had resulted. In the Sheriff's Court the accused pleaded guilty and received the Scottish

¹⁶ This figure includes both types of case stated. 21 cases were consultative cases stated (consultative from the District Court and from the Circuit Court): Communication received from the Office of the DPP.

¹⁷ See the 2004 Consultation Paper at paragraphs 3.23-3.26 where the Commission discussed *Meagher v O'Leary* [1998] 4 IR 33 where Moriarty J suggested the example of a custodial sentence being imposed, on an elderly female shoplifter with no previous convictions, following a guilty plea. See further Spencer "Does Our Criminal Appeals System Make Sense?" [2006] Crim LR 677 at 681 where the author notes that judicial review is available in certain circumstances.

¹⁸ See *St. Albans Crown Court, ex parte Cinnamond* (1980) 2 Cr App R (S) 235, discussed in Wasik "Sentencing and the Divisional Court" [1984] Crim LR 272.

¹⁹ See *Wasik* at 27.

²⁰ Section 175(4) of the *Criminal Procedure (Scotland) Act 1995*.

²¹ [2003] ScotHC 62.

equivalent of a probation order and the minimum number of penalty points. The High Court concluded that the sentence imposed failed to take account of the gravity of the circumstances and imposed the appropriate penalty. The Commission notes that in Scotland between 1998 (when the power came into force) and 2005 the right of appeal was exercised in nine cases, six of which resulted in an increased sentence being imposed.²² In the 2004 Consultation Paper, the Commission noted that this low level of appeals is due at least in part to the test applied in the Scottish courts, which is similar to that applied in Ireland in the case of appeals under the 1993 Act.²³ New Zealand also allows for a right of prosecution appeal from unduly lenient sentences in summary cases²⁴ and the appellate courts will only interfere with sentence in exceptional circumstances, so that appeals by the Crown are rare.²⁵

C Consultation Paper Recommendation

3.12 The 2004 Consultation Paper examined previous reports which had dealt with the issue of an appeal from unduly lenient sentences in the District Court. The Paper discussed the Committee on Court Practice and Procedure's Twenty-Second Interim Report,²⁶ which concluded that a right of prosecution appeal against sentence was desirable in all cases, including summary cases. The Paper also considered the Law Reform Commission's *Report on Sentencing*,²⁷ which recommended that "the prosecution should have the power to seek review of District Court sentences", and the *Report of the Working Group on the Jurisdiction of the Courts: The Criminal Jurisdiction of the Courts*.²⁸ That Report recommended that no prosecution right of appeal on grounds of undue leniency should lie from sentences imposed in the District Court.²⁹

²² Figures supplied by the Justice Department of the Scottish Executive.

²³ See the 2004 Consultation Paper at paragraphs 5.05-5.11.

²⁴ Section 115 A of the *Summary Proceedings Act 1957*. See the 2004 Consultation Paper at paragraphs 5.12-5.22.

²⁵ See the 2004 Consultation Paper at paragraphs 5.12-5.19. The Commission noted that a filter process operates in that the consent of the Solicitor-General is required.

²⁶ Twenty-Second Interim Report of the Committee on Court Practice and Procedure, *Prosecution Appeals* February 1993. See the 2004 Consultation Paper at paragraphs 6.18-6.19.

²⁷ LRC 53-1996 at paragraph 7.6.

²⁸ (Courts Service 2003). The Working Group was chaired by Fennelly J.

²⁹ *Ibid* at paragraph 348.

3.13 In the 2004 Consultation Paper, the Commission provisionally recommended that the prosecution should have a right to appeal against unduly lenient sentences in the District Court.³⁰ The appeal would be to the Circuit Court, which would examine whether there had been an error in principle in the sentence imposed in the District Court. The form of the appeal would be similar in to that in section 2 of the *Criminal Justice Act 1993*.³¹ As an additional safeguard, the Director of Public Prosecutions would have to approve and take the appeal.³²

3.14 The Commission also addressed the issue of appeals from acquittal on the merits, and concluded that the case stated procedure under section 2 of the *Summary Jurisdiction Act 1857* should continue to be used.³³

D Discussion

3.15 Ireland has a highly discretionary sentencing system. The discretion afforded to sentencing judges allows them to tailor the sentence imposed to the specific circumstances of the offender and the offence committed. However, discretion in the absence of information can lead to inconsistent sentencing decisions and a perceived arbitrariness and unfairness at the heart of the criminal justice system.³⁴

3.16 As noted in the Consultation Paper, the relevant case law on prosecution appeals in the indictable jurisdiction is governed by the principle that nothing but a substantial departure from what would be regarded as an appropriate sentence justifies intervention by the court. Indeed it seems that exceptional circumstances or an error of principle must be established by the prosecution, for example where the trial judge failed to take account of an aggravating factor. It is clear that an appellate court may regard a sentence as being lenient, and it may even have imposed a different sentence. However, the prosecution must go further than this and show that there are exceptional circumstances or an error of principle at the sentencing stage.³⁵

3.17 The Commission is of the view that, in principle, sentences imposed in the District Court that are unduly lenient should be subject to review by an appellate court. The Commission considers that when a

³⁰ 2004 Consultation Paper at paragraph 6.46.

³¹ *Ibid* at paragraph 7.14. However, unlike the *Criminal Justice Act 1993* the appeal would include appeals against dispositions not involving a conviction-*e.g.* conditional discharge under the *Probation of Offenders Act 1907*.

³² *Ibid* at paragraph 7.06.

³³ *Ibid* at paragraph 7.21.

³⁴ O'Malley *Sentencing Law and Practice* (2nd ed Thomson Round Hall 2006) at ix.

³⁵ See the 2004 Consultation Paper at Chapter 4.

sentencing judge fails to arrive at a sentence that is proportionate to circumstances of the offence and the circumstances of the offender, there has been a failure of due process. As noted in the Introduction to this Report, the interest in achieving just outcomes in the criminal process is not limited to the correct verdict but also extends to the proportionate sentence to be imposed. In addition, the Commission notes that the vast majority of criminal cases are heard in the District Court.³⁶ Furthermore, the Commission considers that the wider community has an interest in ensuring that the District Court, which hears the majority of criminal cases deals justly with offenders. Moreover, the Commission accepts that there is at least a perception that inconsistent sentences are imposed by the District Court.³⁷

3.18 The Commission accepts that there is an issue of perception, but equally there is an absence of reliable data on this point. In addition, there is a lack of information on sentencing practices generally in the District Court. Furthermore, there are no mechanisms in place which would show how the appeal was operating in practice. This is particularly problematic given that if an appeal was to the Circuit Court, inconsistency could still arise given the number of judges on Circuit. Furthermore, if the appeal was to the High Court, the lack of resources available to provide a speedy hearing of the appeal would mean that in many cases the person would have served his sentence, which could give rise to arguments of unfairness.³⁸

3.19 Indeed, the limited evidence that is available in relation to sentences imposed at District Court instance, suggests an overuse of custodial sanctions for minor offences.³⁹ The Commission notes in this respect that a more serious current concern for the District Court is the introduction of more non-custodial sanctions as recommended in the Commission's Report *The Court Poor Box: Probation of Offenders*.⁴⁰

(1) Proportionality and the Information Deficit

3.20 The Commission considers that judicial discretion is inextricably linked to the principle of proportionality. The Commission considers that it

³⁶ In 2005, the District Court disposed of 343,508 cases and the Circuit Court disposed of 4,281: Courts Service, *Annual Report 2005* (2006) at 87-88.

³⁷ See for example, Amnesty International, *Report: Justice and Accountability - Stop Violence against Women* (2005) at 35 which recommended that judicial guidelines identifying domestic violence as an aggravating factor should be introduced. The Report also urged the Commission to consider the issue of an appeal from an unduly lenient sentence at District Court instance (at 42).

³⁸ See paragraph 3.22, below.

³⁹ See Section F, below.

⁴⁰ LRC 75-2005 at paragraph 2.31.

would be extremely difficult for an appellate court to assess whether the sentence imposed by the District Court judge amounted to a substantial departure from the appropriate sentence, given the lack of sentencing information in this jurisdiction, though it accepts that in principle this could be justified in the context of a reformed sentencing framework in the District Court, which included the range of non-custodial options that the Commission recommended in its *Report on the Court Poor Box: Probation of Offenders*.⁴¹

(2) *Lapsed Appeals*

3.21 The 2004 Consultation Paper also examined the procedure in New Zealand. It was noted that where a sentence involves a term of imprisonment and an appeal is lodged, if the appeal has not been heard on the date the defendant is released, whether the sentence has expired or not, the appeal lapses and is deemed to have been dismissed by the High Court for non-prosecution.⁴² The Commission considers that it would be very difficult to have appeals against sentences heard before the defendant has served his or her sentence. In addition, the Commission considers that an appeal would run contrary to the idea of summary justice, and furthermore it would most likely give rise to questions of fairness since the appeal would occur after the accused person had served his or her sentence.

3.22 The Commission has concluded that it is not appropriate at this time to confer a power on the DPP to appeal unduly lenient sentences imposed in the District Court. However, the Commission notes that this is a matter which should be kept under review.

(3) *Report Recommendation*

3.23 *The Commission recommends that it is not appropriate to confer a power on the DPP to appeal unduly lenient sentences in the District Court.*

3.24 Nonetheless, the Commission considers that, as in the case of prosecution appeals in cases brought on indictment, it is appropriate to examine whether other methods of reform would enhance the reliability of the sentencing process in the District Court. The Commission now turns to examine this matter.

⁴¹ LRC 75-2005 at paragraph 2.31.

⁴² Section 115A (3) of the *Summary Proceedings Act 1957*. On appeals from the District Court in New Zealand, see the 2004 Consultation Paper at paragraphs 5.12-5.19.

E Further Reform

3.25 In addition to considering the question of the desirability of a right of prosecution appeal from unduly lenient sentences in the District Court, the Commission also examined a range of possible reforms aimed at creating consistency in sentencing decisions.⁴³ In this section, the Commission expands on that discussion.

3.26 It is well accepted that a sentence must be proportionate to the gravity of the offence and the personal circumstances of the offender. Irish law cannot therefore be said to follow a pure ‘just deserts’ approach where attention is focussed exclusively on the offending conduct. It is also accepted that mitigating factors, relating to either the offence or the offender, must be applied to the *proportionate* sentence, rather than the maximum sentence.⁴⁴ The sentencing judge must complete two steps in determining sentence. He or she must first decide where on the scale of gravity the particular offence lies, and then, having identified a proportionate sentence, make further adjustments in light of mitigating factors.⁴⁵ It would appear that the courts will also have regard to the possibility of rehabilitation.⁴⁶ In order for sentencing judges to properly locate an offence on a scale of relative gravity, it is essential that he or she has access to judgments, preferably on appeal, of sentences in cases with similar fact matrices. Information on sentence imposed is practically useless if the sentences imposed cannot be placed in the context of the facts of the offence and the details of the personal circumstances of the offender. These details are essential in order to properly structure proportionality and achieve consistency in sentencing.

3.27 The Commission notes three factors which are central to coherent sentencing practice. These are: the role of prosecuting counsel in sentencing; the provision of sentencing information; and the provision of reasons by sentencing judges.

⁴³ The Commission emphasised that sentencing disparity should not be confused with sentencing inconsistency: see paragraphs 6.06-6.14.

⁴⁴ O'Malley *Sentencing Law and Practice* (2nd ed Thomson Round Hall 2006) at Chapter 5.

⁴⁵ In *People (DPP) v Kelly* [2004] IECCA 14; [2005] 2 IR 321, the Court of Criminal Appeal noted that the trial judge had made no attempt to locate the case on the scale of available penalties, before applying the mitigating factors. This was held to be an error of principle and a departure from established authority. This approach was applied in *People (DPP) v Aherne* [2004] IECCA 13 (a manslaughter case) and in *People (DPP) v O'Dwyer* [2005] IECCA 94 (careless driving).

⁴⁶ In *People (DPP) v M* [1994] 3 IR 306, 314 Egan J noted that rehabilitation, where reasonably possible, was an essential ingredient in sentencing.

(1) The Role of Prosecuting Counsel

3.28 The assistance of the prosecution counsel in providing relevant judgments in similar cases is crucial. For example, in *People (DPP) v Kelly*⁴⁷ counsel for the prosecution provided the Court with 50 sentences imposed in the Central Criminal Court (on pleas to, or convictions for) manslaughter. However, it was counsel for the accused's reference to another sentence for manslaughter in a specific reported case which the Court found "a useful comparator". This was because the full circumstances of the crime were clear from the report, so that the Court could compare the sentences imposed in that case with the one under appeal.

3.29 In the 2004 Consultation Paper the Commission discussed the role of the prosecutor in sentencing and the Court of Criminal Appeal's decision in *People (DPP) v Botha*.⁴⁸ In that case, the trial judge asked for information regarding sentences imposed in similar cases, however he only received anecdotal evidence based on counsel's personal experience. The Court of Criminal Appeal stated that the trial judge was entitled to ask both sides, particularly the prosecution, for information regarding sentencing precedents. The lack of assistance was regrettable.⁴⁹

(a) Guidelines for Prosecutors

3.30 The 2nd edition of the *Guidelines for Prosecutors*,⁵⁰ published in June 2006, sets out the prosecutor's role in sentencing process in much the same way as that defined in the 2001 *Statement of Guidelines for Prosecutors*⁵¹ which was discussed in the Consultation Paper.⁵² However,

⁴⁷ *People (DPP) v Kelly* [2004] IECCA 14; [2005] 2 IR 321.

⁴⁸ [2004] IECCA 1; [2004] 2 IR 375. See also the 2004 Consultation Paper at paragraph 8.32

⁴⁹ In England Wales it is well established that the prosecution should be willing to provide assistance to sentencing judges. In *Attorney General's Reference (No. 7 of 1997) (R v Fearon)* [1998] 1 Cr.App.R. R(S) 268 Lord Bingham CJ said that the practice of reticence by prosecuting counsel in matters of sentencing began before the introduction of the Attorney General's powers to refer unduly lenient sentences to the Court of Appeal, when sentencing provisions were less complex, and before sentencing decisions were as fully reported as they are now. In *R v Beglin* [2003] 1 Cr. App. R (S) 21 the Court of Appeal held that it is the obligation of counsel for the prosecution to bring to the attention of the court any matters of law relevant to the sentence. See also *Attorney General's Reference (No. 52 of 2003) (R v Webb)* [2004] Crim. L.R. 306 the Court of Appeal held that it is the duty of prosecuting counsel to draw relevant guideline cases to the attention of the court and that it would be wrong for a judge to suggest that counsel should not do his duty.

⁵⁰ Office of the Director of Public Prosecutions, *Guidelines for Prosecutors* (2006).

⁵¹ See the 2004 Consultation Paper at paragraphs 8.28-8.37.

⁵² *Ibid* at Paragraphs 8.33-8.37.

there are two important differences. First, the Guidelines confer a duty on prosecuting counsel to endeavour to ensure that all matters pleaded in mitigation by counsel for the defence have been proved:

Where the defence advances matters in mitigation of which the prosecution has not been given prior notice or the truth of which the prosecution is not in a position to judge, the prosecutor should invite the court to insist on the matters in question being properly proved if the court is to take them into account in mitigation.⁵³

3.31 The Guidelines are clear that the prosecutor may not advocate a particular sentence, a position that is consistent with the revised *Code of Conduct of the Bar of Ireland* which was adopted in March 2006.⁵⁴ However, the Guidelines state that the prosecutor may at the request of the court draw the court's attention to any relevant precedent.⁵⁵

(b) Balance in the Criminal Law Review Group

3.32 The Tánaiste and Minister for Justice, Equality and Law Reform has set up an expert review group to consider changing the law to allow submissions by the prosecution before sentencing.⁵⁶ The Commission welcomes this development and considers that the emphasis should be on providing information to sentencing judges as opposed to recommendations as to sentence.

(c) Discussion

3.33 The Commission welcomes the developments since *Botha* to give an increased role to the prosecutor in sentence to provide sentencing judges with relevant precedents as to the appropriate sentence to be imposed.

(2) The Information Deficit in Sentencing

3.34 The debate surrounding sentencing and the effectiveness of custodial sanctions has been hampered by the dearth of statistical information. In its *Report on a Review of the Criminal Justice System*,⁵⁷ the Oireachtas Joint Committee on Justice, Equality, Defence and Women's

⁵³ Paragraph 8.18 of the 2004 Consultation Paper.

⁵⁴ "Prosecuting barristers should not attempt by advocacy to influence the court in regard to sentence. If, however, an accused person is unrepresented it is proper for a prosecuting barrister to inform the court of any mitigating circumstances as to which they are instructed.": *Code of Conduct for the Bar of Ireland*, adopted on 13 March 2006, at paragraph 10.24.

⁵⁵ Paragraph 8.20 of the *Guidelines for Prosecutors*.

⁵⁶ See the speech by Minister McDowell on 20 October 2006, "Rebalancing Criminal Justice", available at www.justice.ie.

⁵⁷ (Government Publications July 2004).

Rights recommended that resources be provided on an urgent basis for the collection of data on the operation of the criminal justice system.⁵⁸

3.35 The Commission notes that there have been some efforts made to collect information on sentencing in this jurisdiction. During 2005 the office of the Court of Criminal Appeal completed a project to track and collate judgments in trials of murder, manslaughter and offences under section 15A of the *Misuse of Drugs Act 1977* for the benefit of practitioners and trial judges.⁵⁹

3.36 A steering committee was established in October 2004 by the Courts Service Board, to plan for and provide information on sentencing. The committee, which is chaired by Mrs Justice Susan Denham of the Supreme Court, is composed of a judge from each jurisdiction and a university law faculty expert in sentencing law. The project, known as the Irish Sentencing Information System ("ISIS"), involves an examination of the feasibility of providing a computerised information system on sentences and other penalties imposed for offences in criminal proceedings, to assist judges when considering the sentence to be imposed in an individual case. A sentencing information system enables a judge, by entering relevant criteria, to access information about the range of sentences and other penalties imposed for particular types of offence in previous cases.

3.37 The committee has carried out an examination of sentencing information systems developed in other common law jurisdictions. Currently, the committee is compiling research on sentencing jurisprudence within this jurisdiction, and is examining a range of issues, including data protection considerations, with a view to evaluating the extent of the information which it would be feasible to make available on sentencing decisions.

(a) Discussion

3.38 The Commission welcomes the establishment of the Irish Sentencing Information System. The Commission considers that the provision of sentencing information is an important development in improving sentencing consistency. The Commission notes that the *Judicial Council Bill* is expected to propose a Judicial Council with responsibility for

⁵⁸ At 39. In this context, it should be noted a recent publication by the Institute of Public Administration provides important statistical information on crime, prisons, the courts and the Probation and Welfare Service. The Report notes that it is not at present possible to link information across the criminal justice system, because there is no standardisation of data collection and presentation. O'Donnell, O'Sullivan and Healy (eds) *Crime and Punishment In Ireland 1922 to 2003: A Statistical Sourcebook* (Institute of Public Administration 2005).

⁵⁹ Courts Service *Annual Report 2005* (2006) at 37. Furthermore, arrangements were made for transcripts in all cases under appeal to be provided in electronic format.

developing a code of judicial ethics. The Council would also be responsible for managing judicial studies and the drawing up of Bench Books. The Bill will be published in 2007.⁶⁰

3.39 The Commission notes that in January 2005 digital audio recording was implemented in the Supreme Court and the Court of Criminal Appeal. Work is continuing to introduce a digital audio recording system across all court jurisdictions. Furthermore, a system of Criminal Case Management has been implemented in all District Court offices, which facilitates the introduction of an automated penalty points system.

(3) Provision of Reasons by the Sentencing Judge

3.40 The third factor affecting the development of a system of coherent and consistent sentencing is the provision of reasons by sentencing judges.

3.41 In *People (DPP) v Cooney*⁶¹ the Court of Criminal Appeal held that it is a “desirable practice” for a sentencing judge to give reasons for the particular sentence he or she imposes. McGuinness J, giving the judgment of the court, cited a number of reasons in favour of the duty to give reasons: first, public confidence in the criminal justice system is enhanced when reasons for sentence are clearly expressed. Second, the giving of reasons facilitates the review of the sentence by an appellate court. Finally, the court cited an article by the English expert on sentencing, D.A. Thomas;

The imposition of the intellectual discipline of formulating reasons, a discipline to which the judge is accustomed, would assist the judge to ignore factors which are irrelevant but which might otherwise, perhaps unconsciously, influence the choice of sentence.⁶²

(a) England and Wales

3.42 Section 174 of *the Criminal Justice Act 2003* imposes a general statutory duty on courts to give reasons for and to explain the effect of the sentence passed. The court is required to explain its reasons for passing a sentence in non-technical terms. The aim of this is to ensure that the offender and other interested parties such as the victim understand why the sentence was chosen. The court is also required to explain to the offender what the sentence requires him or her to explain what will happen if he or she fails to comply and any power that exists to vary or review the sentence. Where the Sentencing Guidelines Council has issued definitive guidelines

⁶⁰ See the Government Legislation Programme, published 26 September 2006, available at the website of the Department of the Taoiseach, www.taoiseach.gov.ie

⁶¹ [2004] IECCA 19.

⁶² Thomas “Sentencing - the Case for Reasoned Decisions” (1963) Crim LR 243.

relevant to the sentence and the court departs from those guidelines, it must give reasons for doing so.⁶³ In the case of a custodial or a community sentence, the court must explain why it regards the offence as being sufficiently serious to warrant such a sentence. Furthermore, where a court allows a discount on account of a plea of guilty, the court must state that fact.⁶⁴ The court must also mention any aggravating or mitigating factors which the court has regarded as being of particular importance.⁶⁵

(b) *Irish Penal Reform Trust Report on Sentencing in the District Court*

3.43 In June 2003 the Irish Penal Reform Trust (“IRPT”) undertook a research study on patterns of sentencing in the Dublin District Court.⁶⁶ The purpose of the study was to identify how judges use the sentencing options open to them and the patterns if any in their choices, and to determine how often reasons are given for sentences.⁶⁷ The study recorded details and outcomes for 356 defendants,⁶⁸ and is useful as a snapshot of sentencing practice. The Report found that reasons were given by judges for the sentence imposed in respect of 32% of cases, and this number rose to only 42% for custodial sentences. The questionnaires and interviews with practitioners revealed that there was a feeling that peace bonds, probation bonds and community service orders are underused by judges. Judges were criticised by practitioners for not giving adequate consideration to an offender’s means, resulting in custodial sentences. Interestingly, there was a strong consensus that the provision of reasons by sentencing judges would result in greater clarity, transparency and consistency in sentencing.

(c) *Discussion*

3.44 The Commission considers that the imposition of a sentence by a judge is a decision made by a public body and as such fairness demands that

⁶³ Section 174(2) of the *Criminal Justice Act 2003*.

⁶⁴ Section 174(2)(d).

⁶⁵ Section 174(2)(e).

⁶⁶ For a synopsis see the IPRT Newsletter Winter 2005 available at www.iprt.ie. The study was carried out over an 8 week period in the summer of 2003, when two IPRT researchers observed proceedings in the Dublin Metropolitan District Court.

⁶⁷ The phrase “verbal reasons” was given a very broad definition - any explanation offered by the judge for imposing a particular sentence was recorded.

⁶⁸ The following information was recorded: age, sex, nationality, plea, previous convictions, the offence category and the sentence. The individual defendant was taken as the unit of study, not the offence. The quantitative research was supplemented by interviews and questionnaires with criminal solicitors and court staff.

it should be as transparent as possible.⁶⁹ The provision of reasons legitimates the sentencing process for those affected by the sentence and allows the sentenced person to decide whether to appeal. Furthermore, the provision of reasons facilitates the appellate court's assessment of the factors taken into consideration in arriving at that sentence. In addition, public confidence in the sentencing process is enhanced by the provision of reasons.⁷⁰

3.45 In its *Report on Penalties for Minor Offences* the Commission recommended that a District Court judge should be required to give concise, written reasons for any decision to impose a prison sentence rather than a non-custodial sentence.⁷¹ As part of this requirement, the Commission recommended that District Court judges should record aggravating and mitigating factors which influenced the decision, with particular emphasis on why the non-custodial options available to the judge are not appropriate.

(4) Report Recommendations

3.46 *The Commission welcomes the changes in the role of prosecuting counsel as indicated in the Director of Public Prosecutions' Guidelines for Prosecutors.*

3.47 *The Commission reiterates its previous recommendation in the Report on Penalties for Minor Offences that a judge when passing sentence should provide reasons for the imposition of the custodial sentence. The Commission welcomes the phased introduction of digital recording which would facilitate this.*

3.48 *The Commission welcomes the proposed introduction of a sentencing information system.*

F The Use of Prison and Alternatives to Imprisonment

3.49 The District Court sends more people to prison than any other court. According to the Courts Service *Annual Report 2005*, the District Court imposed custodial sentences in 18,452 cases, whereas the Circuit Court imposed a sentence of imprisonment in 579 cases.⁷² The Commission acknowledges that the District Court is empowered to impose a sentence of

⁶⁹ See further, O'Malley *Sentencing Law and Practice* (2nd ed Thomson Round Hall 2006) at 561-564.

⁷⁰ This is particularly important given that the objectives of sentencing are not enshrined in statute. In England and Wales section 142(1) of the *Criminal Justice Act 2003* sets out the purposes of sentencing as: punishment; reduction of crime; rehabilitation; protection of the public and reparation to victims.

⁷¹ LRC 69-2003 at paragraph 3.17.

⁷² The figure for the Central Criminal Court is not entirely clear, but it is approximately 67. See Courts Service *Annual Report 2005* (2006) at 85.

up to 12 months imprisonment for many summary offences, and one of up to 2 years on multiple charges⁷³ and that the District Court deals with the bulk of criminal cases.

3.50 It is clear from an examination of the Annual Reports of the Courts Service 2003-2005, that the majority (70%) of summary cases dealt with in the District Court are Road Traffic Offences. Figures for indictable offences dealt with summarily are not available for 2004 and 2003; however the 2005 Report shows that 51% of indictable offences dealt with in the District Court were larceny offences.⁷⁴ The most commonly used sanction in summary offences over the 3 year period was the imposition of a fine.⁷⁵ For indictable offences dealt with summarily, imprisonment was the most commonly used sanction, with an average of 18% of offenders receiving a term of imprisonment. Interestingly a mere 2% of offenders received a community service order over this period. In summary cases this figure was as low as 0.45%.

3.51 It would be appear that there is widespread use of imprisonment in the District Court particularly for indictable offences dealt with summarily. Furthermore, community service is underused as a sanction.⁷⁶

3.52 The Commission considers that custodial sentences are a sanction of last resort. Not only is it highly ineffective in terms of rehabilitation and deterrence,⁷⁷ it is extremely expensive: the average cost of keeping a convicted person in prison is €90,900 per year.⁷⁸ On the other hand, the

⁷³ See footnote 3, above.

⁷⁴ Courts Service *Annual Report 2005* (2006) at 90.

⁷⁵ An average of 28.5% of offenders received fines.

⁷⁶ According to Walsh the under-use of community service can be linked to the restrictive time limit placed on Community Service Orders by legislation and the lack of choice in community based sanctions: Walsh "The Principle Deficit in Non-Custodial Sanctions" [2005] 5(2) JSIJ 69.

⁷⁷ The recent report commissioned by the Probation and Welfare Service *A Study of the Number, Profile and Progression Routes of Homeless Persons before the Court and in Custody* (Government Publications 2005) examined the relationship between crime and homelessness in the Dublin Metropolitan Area. The Report found that 78% of prisoners homeless on committal had spent more than 2 years in prison in their lives. Almost two-thirds of such prisoners had been in prison more than twice in the 5 years prior to the current committal and almost one quarter had been in prison 6 or more times over the same period, suggesting a pattern of short-term committals.

⁷⁸ Prison Service *Annual Report 2005* (2006) at 5. According to recent information from the European Commission the cost of detention in Ireland is the highest in Europe, at over twice the average cost in the 11 countries surveyed. The Commission's figures for the cost of detaining a person for a year in Ireland was €76,128 while the average for the 11 countries surveyed was €36,996 per year: *Proposal for a Framework Council Decision on the European supervision order in*

average probation client cost the State a fraction of this.⁷⁹ The Commission reiterates its recommendation in its *Report on the Court Poor Box*⁸⁰ that consideration should be given to the introduction of a comprehensive range of non-custodial sanctions in this jurisdiction. These non-custodial sanctions should include those orders recommended by the *Final Report of the Expert Group on the Probation and Welfare Service 1999*.⁸¹ Furthermore, the Commission reiterates its recommendation in its *Report on Penalties for Minor Offences*⁸² that a term of imprisonment of between 6 and 12 months should only be imposed on a person following a jury trial.⁸³

(1) Enforcement of Fines Bill

3.53 The Commission notes that the published Government Legislation Programme contains plans to publish an Enforcement of Fines Bill.⁸⁴ The purpose of the Bill will be to minimise imprisonment for non-payment of a fine and to provide new ways of enforcing fines.⁸⁵ It will propose to increase the maximum fine to be imposed in the District Court to €5,000 and will provide for an assessment of means and instalment orders.⁸⁶

(2) Criminal Justice Act 2006

3.54 Part 10 of the *Criminal Justice Act 2006* contains a number of provisions in relation to sentencing. Section 99 provides a statutory mechanism for the courts to suspend the execution of a sentence in whole or on part subject to the person entering into a recognisance to comply with the conditions of, or imposed in relation to, the order. Section 101 creates a new order called a Restriction on Movement Order (“RMO”) that can be imposed

pre-trial procedures between Member States of the European Union MEMO/06/314, 29 August 2006., available at the European Union web portal, europa.eu.

⁷⁹ *Report of the Expert Group on the Probation and Welfare Service* (Stationery Office 1998) at 53. See also National Economic and Social Forum *Re-integration of Prisoners. Forum Report No.22* (Stationery Office 2002).

⁸⁰ *The Court Poor Box: Probation of Offenders* (LRC 75-2005) at paragraph 2.31.

⁸¹ Stationery Office, 1999.

⁸² LRC 69-2003.

⁸³ See paragraph 2.31.

⁸⁴ See the Government Legislation Programme, published 26 September 2006, available at the website of the Department of the Taoiseach, www.taoiseach.gov.ie

⁸⁵ On the international experience in dealing with fine defaulting see Seymour *Alternatives to Custody* (Business in the Community Ireland 2006) and O'Malley *Sentencing Law and Practice* (2nd ed Thomson Round Hall 2006) at 499.

⁸⁶ The Bill will implement the Commission's *Report on the Indexation of Fines: Review of Developments* (LRC 65-2002) and the *Report on the Indexation of Fines* (LRC 37-1991).

on offenders convicted of certain summary offences in the District Court.⁸⁷ This order may require the offender to be in a specified location or may require the offender to stay away from a place, or both. An RMO may be made for a maximum of six months. The order “may specify such conditions as the court considers necessary for the purposes of ensuring that while the order is in force the offender will keep the peace and be of good behaviour and will not commit any further offences”.⁸⁸

3.55 Section 102 provides for the electronic monitoring of an offender who is subject to an RMO. Section 112 allows for the Minister for Justice, Equality and Law Reform to make arrangements for the monitoring of the compliance of offenders with RMOs. Under Section 105 of the Act if the offender does not comply with the RMO, the court may direct the offender to comply with the conditions of the order, or may revoke the order, make another restriction on movement order, or deal with the case in any other way in which it could have been dealt with before the order was made. The provisions on RMOs may also be applied by the Minister for Justice, Equality and Law Reform as conditions for prisoners on temporary release.

(3) Discussion

3.56 In the 2004 Consultation Paper the Commission recommended the proposed introduction of electronic tagging.⁸⁹ The Commission welcomes the introduction of Restriction on Movement Orders in the *Criminal Justice Act 2006*.

3.57 The Commission is conscious that there is a growing appreciation of the importance of alternatives to imprisonment. The Department of Justice Equality and Law Reform’s *Strategy Statement 2005-2007* contains a commitment to the early implementation of measures to support more effectively the rehabilitation and the reintegration of offenders. The Commission also notes that the Minister for Justice, Equality and Law Reform is at the time of writing, to set up an expert group to review restorative justice models both in Ireland and internationally and to make proposals for further expansion of the use of restorative justice principles in the criminal justice system. Furthermore, the Commission welcomes the forthcoming report of the Oireachtas Joint Committee on Justice, Equality and Women’s Rights on the issues relating to restorative justice in Ireland. The Committee is currently examining the possibility of further development of successful restorative justice programmes and also the potential for

⁸⁷ The offences include offences under the *Criminal Justice (Public Order) Act 1994*, as well as the following offences under the *Non Fatal Offences Against the Person Act 1997*: assault, assault causing harm, coercion and harassment.

⁸⁸ Section 102(4).

⁸⁹ Paragraph 2.61.

establishing the restorative justice approach on a national basis. The major attraction of the restorative justice approach is the low recidivism rates it achieves.⁹⁰

(4) Report Recommendations

3.58 *The Commission recommends that custodial sanctions should be an option of last resort.*

3.59 *The Commission welcomes the introduction of Restriction of Movement Orders in the Criminal Justice Act 2006. The Commission considers Restriction of Movement Orders to be a useful tool in developing alternatives to custody.*

3.60 *The Commission reiterates its recommendation in its Report on Penalties for Minor Offences that a term of imprisonment of between 6 and 12 months should only be imposed following a jury trial.*

3.61 *The Commission reiterates its recommendation in its Report on the Court Poor Box: Probation of Offenders that consideration should be given to the introduction of a comprehensive range of non-custodial sanctions in this jurisdiction. These non-custodial sanctions should include those orders recommended by the Final Report of the Expert Group on the Probation and Welfare Service 1999.*

3.62 *The Commission welcomes the introduction of an Enforcement of Fines Bill.*

G Prosecution Appeals against Sentences on Indictment

3.63 The 2004 Consultation Paper also examined the power accorded to the Director of Public Prosecutions under the *Criminal Justice Act 1993* to appeal sentences imposed in cases brought on indictment and the position in other common law jurisdictions. Section 2 of the *Criminal Justice Act 1993* provides that if it appears to the Director of Public Prosecutions that the sentence imposed by the trial judge in the Circuit Court, the Central Criminal Court or the Special Criminal Court is unduly lenient, the Director may apply to the Court of Criminal Appeal to review the sentence.⁹¹ It is clear

⁹⁰ For example, the Nenagh Community Reparation Project, Baseline Study noted that more than 75% of offenders completed their reparation in full and there was only one incidence of re-offending during the six month period of the study: See the Commission's Report *The Court Poor Box: Probation of Offenders* (LRC 75-2005) at paragraphs 4.24-4.32.

⁹¹ See the Chapter 4 of the 2004 Consultation Paper. Section 23 of the *Criminal Justice Act 2006* amends section 2(2) of the 1993 Act to provide that the application for review should be made within 28 days of the sentence being imposed or such longer period not exceeding 56 days as the court may, on application to it, determine.

from the case law of the Court of Criminal Appeal that there must have been an “error in principle”⁹² by the trial judge when imposing sentence. Unless this error is present, the court will not alter the sentence imposed.⁹³

3.64 In 2005, the DPP lodged 37 new appeals against sentences imposed in indictable cases.⁹⁴ The Court of Criminal Appeal disposed of 29 such appeals.⁹⁵ A comparison between the appeals by the DPP against sentences to the Court of Criminal Appeal and appeals by convicted persons against sentence is useful in examining the ‘success rates’ of the prosecution right of appeal from sentence. In 2005, the Court of Criminal Appeal refused 9 out of 29 applications by the DPP. In the same year, the Court refused 38 out of 111 applications for review of sentence by convicted person. This means that there is a strong correlation between both rates of refusal. However, it appears that a higher proportion of applications by the DPP are successful when compared with convicted persons’ appeals against sentence. Only 40 of the 111 appeals by convicted persons resulted in a new sentence, whereas 18 out of 29 of the DPP appeals resulted in a new sentence being imposed. This means that 36% of appeals against sentence by convicted persons were successful, whereas 62% of DPP applications were successful. This, combined with the low number of section 2 appeals, suggests that the DPP is appealing only sentences that are likely to be increased on appeal. This is because the Court of Criminal Appeal will only interfere with a sentence imposed if there is a substantial departure from the appropriate sentence amounting to an error of principle.⁹⁶

(1) *Appellate Rights of the Convicted Person following a Review on the Grounds of Undue Leniency*

3.65 In its comparative examination of prosecution appeals under section 2 of the *Criminal Justice Act 1993*, the Commission has identified an anomaly in the appellate rights of the prosecution compared to those of the convicted person. Under section 3 of the 1993 Act, an appeal lies to the Supreme Court by the convicted person or the DPP from a determination of the Court of Criminal Appeal on an application brought by the DPP for a review of sentence. However, this appeal is subject to the Supreme Court, or

⁹² *People (DPP) v McCormack* [2000] 4 IR 356, 359.

⁹³ See the 2004 Consultation Paper at paragraph 4.15. Under section 36 of the *Criminal Justice Act 1988* the Attorney General may with the leave of the Court of Appeal, appeal a sentence if the offence is triable only on indictment.

⁹⁴ This is up from 2004 when the DPP lodged 21 new appeals. See Courts Service, *Annual Report 2004 (2005)* at 86.

⁹⁵ *Ibid* at 82.

⁹⁶ For a discussion of the operation of the prosecution right of appeal from sentences imposed on indictment see the 2004 Consultation Paper at Chapter 4.

the Attorney General, or the DPP certifying that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court.⁹⁷ In effect the conditions for appealing to the Supreme Court are the same as those governing criminal appeals to that court by virtue of section 29 of the *Courts of Justice Act 1924*.

3.66 The anomaly becomes especially apparent given that the DPP, unlike a convicted person, does not have to go through the process of applying for leave to appeal. This is undoubtedly because prosecution appeals are intended to be used sparingly and the Director, as a senior law officer, can be presumed to act accordingly.⁹⁸ However, the Commission notes that the Court of Criminal Appeal may impose a substantial custodial sentence on a person who has already served a short sentence or has been given a suspended sentence, if it considers that the original sentence was unduly lenient under the 1993 Act.⁹⁹

3.67 Therefore, the DPP has, in effect, an appeal as of right to the Supreme Court from a decision of the Court of Criminal Appeal on an application for a review of an unduly lenient sentence, whereas the convicted person, whom the decision of the Court directly affects, may only appeal if the Court or the Attorney General or the DPP grants a certificate to bring an appeal. The Commission considers this an unjustifiable anomaly and that this could be addressed either by removing the right of the DPP or the Attorney General to certify the point, or by removing the requirement that the point must be one of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court. The Commission has concluded that the right of the DPP or the Attorney General to certify that the decision of the Court of Criminal Appeal on an application by the DPP under section 2 of the *Criminal Justice Act 1993* involves a point of law of exceptional public importance should be removed.

(2) Report Recommendation

3.68 *The Commission recommends that the right of the DPP or the Attorney General to certify that the decision of the Court of Criminal Appeal on an application by the DPP under section 2 of the Criminal Justice Act*

⁹⁷ An example of such an appeal to the Supreme Court by the convicted person is the case of *People (DPP) v Heeney* [2001] 1 IR 736. In that case, the Supreme Court discharged the increased sentence of 10 years imposed on appeal by the Court of Criminal Appeal and substituted the original effective sentence of 6 years of the Circuit Criminal Court.

⁹⁸ O'Malley *Sentencing Law and Practice* (2nd ed Thomson Round Hall 2006) at 642.

⁹⁹ For example, in *People (DPP) v Isenborger* Court of Criminal Appeal 25 January 1999 the Court substituted a sentence of 5 years imprisonment for a suspended sentence of 4 years.

1993 involves a point of law of exceptional public importance should be removed.

CHAPTER 4 PRE- TRIAL HEARINGS IN INDICTABLE CASES

A Introduction

4.01 As the Commission noted in Chapter 1, the purpose of criminal appeals, whether by the defence or by the prosecution, is to improve the criminal trial process by correcting errors made at trial. In the case of defence appeals the errors can be either in the fact finding process or in the interpretation and application of the law. Equally, as noted in Chapter 2, the Commission considers that the ‘without prejudice’ rights of prosecution appeal introduced by the *Criminal Justice Act 2006* are an important addition to criminal procedure, allowing the law to be clarified in order to prevent erroneous rulings in future cases.

4.02 But an appeal process, whether initiated by the defence or the prosecution is clearly not the only way to improve the quality of the trial process. In its *Consultation Paper on Prosecution Appeals in Cases brought on Indictment*,¹ the Commission noted that pre-trial hearings could provide a valuable way of improving the quality of trial rulings.² The discussion in this chapter centres around two objectives: that cases come to trial as thoroughly prepared and well presented as possible; and that interruptions to jury trials are kept to a minimum. In preparing this Report, the Commission considered that this matter merited further analysis, particularly because it was aware of developments in this area and in many other jurisdictions. The Commission considers that changes can be made to the criminal process to:

- Ensure that trial rulings are based on a correct interpretation of the law, and
- That the jurors have a clear understanding of the main issues involved and hear the evidence in a continuous flow, subject to minimal interruptions

4.03 The Commission considers that further developments based on existing principles of case management would be a valuable tool in achieving these objectives. Case management may take a variety of forms, ranging from a basic statement of readiness for trial, through to a preparatory

¹ LRC CP 19-2002.

² See the 2002 Consultation Paper at paragraphs 3.083-3.087.

hearing with attendant appeal mechanisms. In section B, the Commission considers the case management techniques currently employed. In section C, the Commission examines proposals for the introduction of case management and pre-trial hearings in Ireland and the different types of case management procedures in operation in other jurisdictions. In Section D, the Commission discusses how case management might improve the reliability of trial verdicts in Ireland. In Section E, the Commission discusses some issues relating to pre-trial hearings and sets out the Commission's conclusions regarding the desirability of pre-trial hearings.

B Current Pre-trial Procedure: Case Management

4.04 Until 2001 the District Court conducted a preliminary examination which had to be held before a person could be returned for trial on indictment.³ Part III of the *Criminal Justice Act 1999*, which came into effect in 2001, effectively abolished the preliminary examination in the District Court and conferred jurisdiction on the trial court to conduct a similar examination but only where an application is made to dismiss the charges.⁴ The consent of the DPP and the serving of the Book of Evidence within 42 days of the accused's first appearance in court are now the only preconditions to being sent forward.⁵ The trial court may dismiss the

³ See Part II of the *Criminal Procedure Act 1967* which dealt with the preliminary examination of indictable offences in the District Court. In the Oireachtas debates on what became the *Criminal Justice Act 1999*, the Minister for Justice justified the abolition of the preliminary examination on the basis of the delays to the criminal justice system caused by it. The fact that an accused cannot now be tried on indictment without the consent of the DPP was said to compensate for the abolition of the preliminary examinations. (492 Dáil Debates 535). See the Annotations to the 1999 Act, Costello, ICLSA 1999. The Minister acknowledged that the abolition of the preliminary examination involved the rejection of the views expressed in the 24th Interim Report of the Committee on Court Practice and Procedure *Preliminary Examination of Indictable Offences and the Criminal Procedure Act 1967* (Stationery Office 1997) which found that the preliminary examination did not significantly delay the criminal process, and was too significant to be abolished. Under the system introduced by the 1999 Act it is now for the accused to make an application to dismiss the charges against him or her, rather than it being a pre-condition to the District Court sending the matter forward.

⁴ Section 4E of the *Criminal Procedure Act 1967* as inserted by section 9 of the *Criminal Justice Act 1999*. The test to be applied is whether the evidence upon which the State intends to rely, if adduced properly and lawfully, discloses a *prima facie* case against the accused: *Phibbs v Hogan*, High Court 27 May 2004. A discharge following a pre-trial review has the same effect as an acquittal and precludes the DPP from instituting fresh charges. However, the DPP can appeal the discharge to the Court of Criminal Appeal, while the defendant has no equivalent appeal.

⁵ Section 4B(1) of the *Criminal Procedure Act 1967* as inserted by section 9 of the *Criminal Justice Act 1999*. See also the District Court Rules 1997, Ord.24, rule (7) as amended by the District Court (Criminal Justice) Rules 2001. The District Court

charges if it appears to that there is not a sufficient case to put the accused on trial. The decision of the trial judge to dismiss may be appealed by the prosecution to the Court of Criminal Appeal within 21 days. At any time after the accused has been sent forward for trial, the prosecutor or the accused may apply to the trial court for an order requiring a person to appear before the District Court to give a sworn deposition. This is a useful mechanism whereby the accused or the prosecutor can test the credibility of a potential witness before the trial begins. The admissibility of evidence is not dealt with in this context, nor indeed was it under the preliminary examination procedure.⁶

4.05 The Commission considers that a well-conducted jury is fundamental to the requirements of due process, and that once the jury has been empanelled to hear a case, all interruptions should be kept to a minimum.⁷ In the past, juries have been empanelled and sent out for days while legal argument is conducted in their absence. While the jury is sent out, a ‘trial-within-a-trial’ or *voir dire* is conducted before the trial judge. The *voir dire* may involve arguments on important points of law relating to the admissibility of evidence such as an alleged confession, or the validity of search warrants.⁸ Interruptions of this kind will often happen a number of times during a trial.⁹ Not only is such legal argument an inefficient use of court resources and time, it also militates against the decision-making process.¹⁰ Clearly such interruptions make the jury’s role as the arbiter of

judge must also give the alibi warning when the accused is being sent forward: Section 20 of the *Criminal Justice Act 1984*.

⁶ *People (DPP) v Windle and Walsh* [2001] ILRM 75.

⁷ The Supreme Court has held that an uninterrupted ‘unitary’ jury trial is essential to the requirements of due process; see *People (AG) v McGlynn* [1967] IR 232 at paragraph 2.04, above.

⁸ Typical issues argued in the absence of the jury are as follows: the probative versus the prejudicial value of evidence; relevance of evidence; receivability of evidence (if it is tainted in origin); the hearsay rule; documentary evidence presented without its author; illegally obtained evidence such as searches and confessions; unconstitutionally obtained evidence and ‘causal nexus’ requirements - there must be a causal connection between the infringement of the right and the obtaining of evidence.

⁹ However, it should be noted that the Commission understands that the video-recording of interviews with suspects has led to a reduction in the number of *voir dices*.

¹⁰ Lengthy *voir dices* can surely damage juror’s recollection of evidence. For example, in recent case, which lasted 58 days, one *voir dire* alone lasted 12 days. See *People (DPP) v Yu Jie* [2005] IECCA, 28 July 2005, per McCracken J. The *voir dire* concerned the admissibility of the memorandum of a Garda interview with the accused and the recording of that interview. See also *People (DPP) v Murphy* [2005] IECCA 1 where the Court of Criminal Appeal noted that *People (AG) v McGlynn*

fact more difficult; memories of testimony and other evidence become hazy, and the danger of outside factors influencing jurors' judgment is more apparent. In addition, trial judges are often forced to make important rulings on difficult areas of law in the rushed and pressured atmosphere of the voir dire, creating the potential for error.¹¹

4.06 The Commission considers that, so far as possible, jurors should hear evidence without lengthy interruptions due to *voir dire*s conducted in their absence. Furthermore, the Commission considers the use of case management procedures could have benefits in reducing the stress caused to witnesses and victims.¹² As the Commission has noted, the community has a shared interest in a fair trial in accordance with the Constitution. The position of victims and their families is also a factor to be taken into consideration.¹³

(1) Case Management Today

4.07 Informal case management practices are in operation in the Central Criminal Court.¹⁴ Under the current system, a practice has emerged

[1967] IR 232 concerned jury trials and that trials in the Special Criminal Court are "less open to difficulties resulting from any interruption than jury trials."

¹¹ The Supreme Court in *People (DPP) v Murphy* [2005] IECCA 1 quashed the appellant's conviction and ordered a retrial in circumstances where the "court of trial fell into error in relying upon either the material contained in the voir dire or in counsel's questions to admit as probative evidence which was manifestly inadmissible."

¹² See also Lord Steyn's remarks in *Attorney-General's Reference (No 3 of 1999)* [2001] 2 AC 91, 118: "It must be borne in mind that respect for ... privacy ... is not the only value at stake. The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public."

¹³ *People (DPP) v Gilligan* [2005] IESC 78. Furthermore, in *People (DPP) v Scully* [2005] 1 IR 242, 252 Hardiman J, giving the judgment of the Supreme Court, appeared to identify the integrity of the jurisdiction as an additional interest to the public interest when he discussed judicial review applications which are brought with the aim of tripping up gardaí rather than in discovery of evidence. "Applications on this basis must be discountenanced in the interest of the public right to prosecute, but also in the interest, of the integrity of the jurisdiction, in a proper case, to restrain a prosecution on the basis that significant evidence has been ignored or destroyed."

¹⁴ The presiding judge of the Central Criminal Court, Mr Justice Carney has stated that the problem of lengthy *voir dire*s is largely a thing of the past. Case management practices have become established in the Central Criminal Court and it is now routine for defence lawyers to indicate at the beginning of a trial that there was no breach of the custody regulations, that there was no ill-treatment of the defendant during detention, and that exhibits were properly transmitted. Furthermore, submissions of

in the Central Criminal Court under which once a jury is sworn, counsel asks that the substantive trial not begin until the following day. The remainder of the day is then used to narrow the issues, decide what witnesses can be dispensed with and whose evidence can be read. The Commission notes that these changes have been brought about through co-operation and are not mandatory.

4.08 In contrast, in the context of civil litigation, case management has been introduced in some areas on a compulsory basis, notably in the context of the Commercial Court List of the High Court. The Commercial Court Rules¹⁵ permit judges to manage the progress of cases to ensure that they proceed justly, expeditiously and at minimum cost. At or after the initial direction hearing the court may identify issues of law or fact to be decided, and may order discovery or inspection of documents, or the exchange of expert reports or the holding of conferences of experts. The judge may direct that documents or information be exchanged between parties or submitted to court electronically. At the compulsory pre-trial conference, each party must lodge a response to a pre-trial questionnaire confirming preparedness and giving details as to how it proposes to conduct the trial. The Court will then give directions as to when and how the case will proceed. The plaintiff must also lodge a trial booklet and case summary. Cost penalties may be imposed for obstruction or delay. The Commission notes that the Commercial Court case management reforms, which involve some elements of compulsion, have resulted in significant improved efficiencies in the resolution commercial claims. While improved efficiency in the conduct of civil commercial litigation is to be welcomed, the Commission would of course note that different considerations apply in the context of criminal procedure. The consequences of procedural errors in the criminal process should not be equated to those in a commercial context. Indeed, the Commission notes that informal case management in the Central Criminal Court appears to have resulted in the increased focus on key issues and the avoidance of unnecessary delay through lack of preparedness. In that respect the Commission is inclined to the view that existing case management arrangements should be allowed to develop on the basis of a co-operative, informal approach. But the Commission is equally aware that an informal, voluntary arrangement is subject to the limits of the organisational skills of personnel currently involved in such a system. In addition, the Commission is conscious that proposals to introduce a more formal, mandatory approach have been made in recent years in Ireland and that these reflect developments elsewhere. The Commission therefore turns

no case to answer by the defence seem to be relatively rare. See *Irish Times* July 18 2006.

¹⁵ Order 63A of the Rules of the Superior Courts, as inserted by Rules of the Superior Courts (Commercial Proceedings) 2004 (S.I. No 2 of 2004).

to examine these proposals and the development of mandatory pre-trial hearings in other jurisdictions.

C Proposals for Reform of Pre-Trial Processes and Comparative Developments

(1) *The Report of the Working Group on the Jurisdiction of the Courts: The Criminal Jurisdiction of the Courts*

4.09 The *Report of the Working Group on the Jurisdiction of the Courts: The Criminal Jurisdiction of the Courts* contains an extensive examination of the pre-trial procedures in operation in the United Kingdom and Australia. The Report concluded that the introduction of pre-trial hearings could reduce the number of trials within trials, in particular on issues of admissibility of evidence. The Report recommended the introduction of a ‘preliminary hearing’ for cases presented on indictment which could encompass the following matters:

- Determine whether the prosecution has made a full disclosure;
- Identify which evidence should be agreed or admitted under the *Criminal Justice Act 1984*;
- Clarify whether any evidence might have to be taken by video-link, and to make arrangements for doing so;
- Enable the determination of admissibility of evidence;
- Make any necessary arrangements regarding technology, interpreters, and so forth;
- Deal with a guilty plea or fix a hearing for sentencing;
- Identify any issues of fitness to plea which may arise; and
- Estimate the likely length of the trial.¹⁶

4.10 The Report recommended that co-operation by the accused person with the preliminary hearing should be a mitigating factor to be considered at sentencing.¹⁷ The Report also recommended that the preliminary hearing should take place within two weeks of the arraignment in order to facilitate

¹⁶ This list is not meant to be exhaustive. The Report also envisages applications for stay or dismissal, transfer of trial venue, etc., being made up to and including trial. See the Report at paragraphs 771-781.

¹⁷ The Report confirmed that the accused person would be fully represented by solicitor and counsel in accordance with the relevant constitutional and statutory requirements. The Report stresses that counsel attending the hearing should be familiar with the case, scheduled to attend the trial, and sufficiently instructed in the matter as to indicate the client’s position.

the early identification of issues, and also to prevent pleas currently made on arraignment being deferred to the later hearing.¹⁸ The Report recommended that the preliminary hearing should ideally be before the trial judge, but accepted that this might not always be possible.

(2) Oireachtas Committee Report

4.11 The Report of the Joint Committee on Justice, Equality, Defence and Women's Rights, *A Review of the Criminal Justice System*¹⁹ also considered the introduction of a pre-trial procedure.

4.12 The Committee recommended that consideration be given to the introduction of a plea and directions hearing consistent with the constitutional rights of the accused.²⁰ This would be similar to the procedure introduced in England and Wales by the *Criminal Procedure and Investigations Act 1996*.²¹ The Committee noted that the *Report of the Working Group on the Criminal Jurisdiction of the Courts* recommended that a preliminary hearing should be introduced in all cases on arraignment.

(3) Report on Videoconferencing

4.13 The *Report of the Committee on Videoconferencing*²² considered the issue of pre-trial hearings in the context of the benefits which could flow from the introduction of videoconferencing technology in pre-trial hearings such as remand and uncontested bail hearings. The Report recommended the introduction of videoconferencing facilities for such hearings. Section 11 of the *Prisons Bill 2005* proposes to implement this recommendation.²³

¹⁸ At paragraph 779.

¹⁹ (Government Publications July 2004).

²⁰ *Ibid* at paragraph 74.

²¹ See paragraphs 4.22-4.28, below.

²² (Government Publications January 2005). The South African Law Reform Commission recommended the use of audio-visual technology in remands, applications for bail, application for leave to appeal and in appeals or reviews in its report *The Use of Electronic Equipment in Court Procedure*, (July 2003). Videoconferencing in criminal trials is widespread in Australia and New Zealand. The County Court of Victoria makes extensive use of videoconferencing in its case management regime.

²³ Section 11(10) of the *Prisons Bill 2005*, as initiated, defines a pre-trial hearing as: “[a hearing] that takes place before the arraignment of the accused person—

(a) of an application for bail,

(b) before the sitting of the court to which the accused person has been remanded under section 24 (inserted by section 4 of the Criminal Justice (Miscellaneous Provisions) Act 1997) of the Act of 1967,

(c) of an application for the transfer of the trial of a criminal issue under section 19(1) of the Criminal Justice Act

(4) Report of the National Crime Council

4.14 The report of the National Crime Council, *An Examination of Time Intervals in the Investigation and Prosecution of Murder and Rape Cases in Ireland from 2002-2004*²⁴ is the first in-depth research into the time intervals involved in the processing of criminal cases in Ireland. The Report analysed data collected from An Garda Síochána, the Courts Service, the Northern Ireland Courts Service and the Department for Constitutional Affairs. In addition the subgroup of the Council overseeing the research held meetings with a number of key professionals and academics to ascertain their views in relation to the time cases took to reach conclusion. The research examined all murder²⁵ and rape²⁶ cases disposed of by the Central Criminal Court between 2002 and 2004. All of the cases were tracked from the date of the initial arrest of the suspect until final disposal by the Central Criminal Court.

4.15 The Report found that the total time from arrest to start of trial in the typical murder case was 90 weeks. This rose to 118 weeks in the typical rape case. The Report noted that the longest delay occurred between the date the case was listed for trial and the scheduled trial date.²⁷ It is clear that the longest delays were actually happening before the trial started. This was due to the back log of cases in the Central Criminal Court and the fact that many trials did not start as scheduled.²⁸ The Council recommended that, save in exceptional circumstances, all ‘murder’ and ‘rape’ trials should commence within six months of the return for trial.

4.16 Since the research period, the waiting time between return for trial and trial in the Central Criminal Court has fallen to six months.²⁹

1951,
(d) of an application under section 4E, 4F or 4L (inserted by section 9 of the Criminal Justice Act 1999) of the Act of 1967,
(e) of an application under section 21(5)(b) of the Criminal Justice Act 1984, or
(f) of an application for an adjournment of any proceedings.”
²⁴ (Government Publications 2006).

²⁵ Including attempted murder.

²⁶ Including attempted rape and aggravated sexual assault.

²⁷ The typical ‘murder’ case was scheduled for trial 50 weeks after the listing date. The typical ‘rape’ case was scheduled for trial 53 weeks after the listing date. See the Report at page 25.

²⁸ During the research period, 26% of jury trials did not commence as scheduled.

²⁹ Communication from the Courts Service. The Commission understands that this is due to improvements in case management. It should also be noted that there has been a significant reduction in the number of new murder and rape cases received from 155 in 2000 to 68 in 2004: Courts Service, *Annual Report 2004* (2005) at 87.

Nevertheless the Commission understands that the waiting time for cases in the Dublin Circuit Court is one year.³⁰

4.17 The Council found that on average, during the research period, cases took significantly longer in Ireland (71 weeks) than in either England and Wales (26 weeks) or Northern Ireland (15 weeks) to progress between return for trial and the first main hearing.³¹ The Council found that the likely reasons for the additional time taken in Ireland between return for trial and first main hearing are connected to the stage at which cases are returned for trial and the overall case management procedures.

4.18 The Council was of the opinion that out of court processes and preliminary hearings increase the efficiency of cases in England and Wales. The Council found that the following factors increased efficiency in England and Wales:

- All parties are actively involved in the management of the case, so earlier identification of issues occurs
- More realistic scheduling of the trial date
- More and earlier opportunities for the accused to plead guilty

4.19 In making the recommendation in the report, the Council was conscious of the fact that there was a need to maintain any improvements in time intervals and to prevent an increase in time intervals in the future. The Report concluded that consideration be given to the introduction of pre-trial hearings.³²

4.20 In addition, the report found that a mere 5% of murder and rape cases conformed to the statutory 42 day rule for service of the Book of Evidence. Indeed, the Council did not envisage circumstances under which it would be possible for the majority of cases to conform to the rule. Under the time intervals recommended by the Council, the Book of Evidence would be served on all “murder” suspects within 180 days of their first District Court appearance and within 60 days of the first District Court appearance of the majority of “rape” suspects. The Report recommended that consideration be given to reviewing Rule 7(1) of the District Court (Criminal Justice) Rules 1997 in line with the research findings and recommended time intervals. The Report also recommended that the senior

³⁰ Communication from the Courts Service.

³¹ The first main hearing is either the start of the trial or the hearings at which the defendant pleads guilty.

³² National Crime Council *An Examination of Time Intervals in the Investigation and Prosecution of Murder and Rape Cases in Ireland from 2002-2004* (Government Publications 2006) at page 41.

Garda officer in charge of all murder and rape investigations and a nominated officer from the Office of the DPP should be responsible for the adherence to the recommended time intervals set out in the report from arrest to service of the Book of Evidence.³³ From the Commission's inquiries, it is not clear whether compliance with the 42 day rule has altered since the National Crime Council's report.

(5) Pre-trial Procedures in Other Jurisdictions

4.21 In this section, the Commission examines pre-trial procedures in other jurisdictions and considers the available evidence as to whether they enhance the reliability of the trial verdict.

(a) Pre-trial Hearings in England and Wales

(i) Preparatory Hearings

4.22 Prior to 1987 the position in England and Wales concerning trials on indictment was virtually identical to the position in Ireland: there had to be a conviction for an appeal.³⁴ The *Criminal Justice Act 1987* introduced preparatory hearings for serious or complex fraud cases.³⁵ Section 7 of the 1987 Act provides that the purpose of the hearing is to identify issues which are likely to be material to the determinations and findings which are likely to be required during the trial; assisting the jury with their comprehension of the issues; assisting the judge's management of the trial; or considering questions such as severance and joinder.³⁶ It is of prime importance that a

³³ National Crime Council *An Examination of Time Intervals in the Investigation and Prosecution of Murder and Rape Cases in Ireland from 2002-2004* (Government Publications 2006) at 20.

³⁴ Section 3 *Criminal Appeal Act 1907*; section 1(1) *Criminal Appeal Act 1968*. See also Pattenden, "Prosecution Appeals Against Judges Rulings" [2000] Crim LR 971.

³⁵ Sections 7-10. The Court of Appeal considered the Act to have two purposes- "to ensure that immensely long and expensive trials, as serious fraud cases tend to be, do not get under way on a wrong view of the law": *R v Hunt* [1994] Crim LR 747 per Stuart Smith LJ and "that it is important that criminal trials get under way as expeditiously as possible and are not bedevilled by appeals to this Court in relation to interlocutory matters which are very much the province of the trial judge.": *R v Maxwell*, per Swinton Thomas LJ (94/7352/S2), referencing *R v Hedworth* [1997] 1 Cr App R 421, 429. The preparatory hearing can continue even though leave to appeal has been granted but no jury can be sworn in until the appeal has been determined or abandoned: *Criminal Justice Act 1987*, section 9(13). There is another form of interlocutory appeal - any "person aggrieved" any appeal with leave to the Court of Appeal against an order made in relation to a trial on indictment, restricting or preventing reporting of the trial or of restricting public access to a trial or a part of it - *Criminal Justice Act 1988*, 159(1).

³⁶ Matters outside the scope of a preparatory hearing include a motion to quash the indictment; an issue as to the power of the prosecution to bring a particular prosecution; applications regarding abuse of process and applications to sever.

case statement (which sets out the basis for such a hearing) is served on the court and the defence at least 7 days before the preparatory hearing.³⁷ The judge presiding at a preparatory hearing must, unless there are exceptional circumstances, be the judge who is to conduct the trial. There is an appeal to the Court of Appeal from questions of admissibility of evidence and any other question of law relating to the case.

4.23 The provisions of the 1987 Act were substantially expanded in Part 3 of the *Criminal Procedure and Investigations Act 1996* which provided for preparatory hearings in any case tried on indictment of such complexity, or seriousness,³⁸ that substantial benefits are likely to accrue from such a hearing.³⁹ Section 16 of the *Terrorism Act 2006* amends the

³⁷ *Re Case Statements made under section 9 of the Criminal Justice Act 1987*, 97 Cr App R 417.

³⁸ Section 309 of the *Criminal Justice Act 2003* amended section 29(1) of the *Criminal Procedure and Investigations Act 1996* by adding seriousness to the criteria justifying a preparatory hearing. Section 29(2) as amended by the *Criminal Justice Act 2003* sets out the purposes of the preparatory hearing:

(a) Identifying issues which are likely to be material to the determinations and findings which are likely to be required during the trial (subsection (a) was amended by the CJA 2003);

(b) If there is to be a jury, assisting their comprehension of those issue and expediting the proceedings before them;

(c) determining an application to which section 45 of the *Criminal Justice Act 2003* applies.

(d) assisting the judge's management of the trial; and

(e) considering questions as to the severance or joinder of charges.

³⁹ Magistrates' Courts already had introduced pre-trial hearings on an administrative basis: where a guilty plea is anticipated, an 'early first hearing' is scheduled; where a not guilty plea is expected, there will be an 'early administrative hearing'. Where the defendant is charged with an 'either way' offence and indicates a not guilty plea and consents to summary trial, a date for pre-trial review may be set, if necessary. Pre-trial reviews are intended to assist the court in assessing the readiness of the parties for trial. The *Courts Act 2003* built on existing practice and empowered magistrates to make binding rulings and directions at pre-trial hearings in criminal cases to be tried in the magistrates' courts, where it is in the interests of justice to do so. It will only be possible to make such rulings once a 'not guilty' plea has been entered, the power will be exercisable at any stage up to the commencement of the trial once the accused has entered a 'not guilty' plea. The magistrate will be able to give binding rulings on questions of law and admissibility of evidence. A pre-trial ruling made by a magistrates' court will remain binding until the case is disposed of or is sent to the Crown Court. There is no separate right of appeal against a pre-trial ruling – if the accused is convicted, he or she can appeal to the Crown Court in the usual way; in the case of an acquittal, the prosecution could ask the magistrates to state a case to the Divisional Court. Schedule 3, Section 8C of the 2003 Act imposes restrictions on the reporting of pre-trial hearings in order to avoid prejudicing the right to a fair trial. This is particularly important if the case is ultimately tried in the Crown Court.

1996 Act to make preparatory hearings mandatory in terrorism cases. Where a preparatory hearing is held under Part 3 of the 1996 Act, the trial will have begun and there is no power to hold a statutory pre-trial hearing; the only statutory power to make rulings as to law and admissibility of evidence in advance of the proceedings before the jury is then under the provisions relating to preparatory hearings.⁴⁰

4.24 Under the 1996 Act, the judge may make a ruling as to any question as to the admissibility evidence; any other question of law relating to the case; or any question as to the severance or joinder of charges.⁴¹ He or she may also order the prosecutor to give the court and the accused a written statement of the facts, witnesses, exhibits, or any proposition of law upon which the prosecution proposes to rely.⁴² The judge may also require the prosecutor to prepare the prosecution evidence and any explanatory material in such a way as to aid comprehension by the jury and to give it in that form to the court and the accused. The judge may also order the prosecutor to give the court and the accused written notice of documents that the prosecution seek to have admitted and of any other matters that the prosecutor considers ought to be agreed. Likewise, the judge may order the accused to give the court and the prosecution a written statement setting out his or her defence in general terms and indicating the main matters of contention. The accused may also be ordered to give the court and the prosecution written notice of any point of law (including any point as to the admissibility of evidence) that he or she wishes to take, and any authority on which he or she intends to rely for that purpose. The accused may also be required to state in writing the extent to which he or she agrees with the documents to be tendered by the prosecution and the reasons for any disagreement.

4.25 An order or ruling made by the judge in the preparatory hearing applies throughout the trial, unless it appears to the judge that he or she should vary or discharge it “in the interest of justice.”⁴³ The case, as disclosed by the prosecution and the accused in the preparatory hearing, is central to the truth finding process of the trial, and any abuse of the process

⁴⁰ *R v Claydon* (2004) 1 Cr App. R. 474. Once leave has been granted the preparatory hearing may continue but the trial of the facts cannot commence until any appeal is finally determined or abandoned.

⁴¹ Section 31 of the *Criminal Procedure and Investigations Act 1996*.

⁴² The judge may order the prosecutor to make any amendments that appear to be appropriate, having regard to the objections of the accused. Under section 31(5)(e) of the 1996 Act the judge may also order the prosecutor to give a statement of the consequences in relation to any of the counts on indictment that appear to the prosecutor to flow from the other matters in the statement.

⁴³ Section 31(11) of the *Criminal Procedure and Investigations Act 1996*.

will have adverse consequences; if any party departs from the case disclosed⁴⁴ the judge, or with leave of the judge, any other party, may “make such comment as appears appropriate” and the jury may draw such inference as appears proper.⁴⁵

4.26 A preparatory hearing cannot be ordered simply to enable points of law to be decided and then tested by way of interlocutory appeal. However, where a judge specifically considers section 29 of the 1996 Act and then decides that the legal issue is complex and that its resolution would assist the progress of the case he or she is entitled to order such a hearing.⁴⁶

4.27 The experience of preparatory hearings under the 1996 Act is that, where the criteria are met, the procedure can be highly beneficial.⁴⁷ The process of disclosure can be conducted and evidence can be prepared with direct reference to the live issue. Issues such as the correct interpretation of legislation or the direction(s) to be given to the jury are also resolved.⁴⁸

(I) *Appeals from Preparatory Hearings*

4.28 The prosecution may appeal to the Court of Appeal against a ruling on “any question as to the admissibility of evidence” and “any other question of law relating to the case”⁴⁹ provided that the order appealed was

⁴⁴ Or fails to comply with a requirement imposed by section 31 of the 1996 Act.

⁴⁵ Section 34(2) of the 1996 Act. In deciding whether to give leave the judge must have regard to the extent of the failure or departure, and whether there is any justification for it: See section 34(3) of the 1996 Act.

⁴⁶ *R v Pennine Acute Hospitals N.H.S. Trust* [2004] 1 All ER 1324. However in *R v Ward* [2003] EWCA Crim 814; [2003] 2 CrAppR. 315, a case involving allegations of making, possession, and distribution of indecent photographs that was estimated to last up to five days, was not deemed to be sufficiently long to trigger a preparatory hearing. Furthermore, despite there being issues as to how the photographs were to be shown to the jury and the defence wished to obtain preliminary rulings as to the effect of a genuine mistake on the part of the defendants as to the age of the children shown in the photographs, the Court held that this was not “complex”. Since the judge did not have jurisdiction to hold a preparatory hearing, the Court of Appeal concluded that it did not have jurisdiction to hold an interlocutory appeal.

⁴⁷ Archbold *Criminal Pleading and Practice* (Thomson Sweet and Maxwell 2005) at paragraph 4-84h. See also the judgment of Lord Woolf CJ in *Attorney General’s Reference (No 1 of 2004)* [2005] All ER 459 and that of Lord Bingham of Cornhill in *R v Shayler* [2002] UKHL 11; [2002] 2 All ER 477, 490.

⁴⁸ However, rulings are confined to questions of law relating to the case: section 31(3)(b) of the 1996 Act. In *R v Shayler* [2002] UKHL 11; [2002] 2 All E.R. 477 the House of Lords held that where the defendant’s case had not raised any question of necessity or duress of circumstances and where such issues therefore did not relate to the case but where other issues of what defences were open to the defendant did relate to the case, they could be ruled upon in a preparatory hearing.

⁴⁹ This is subject to leave being granted. The Court of Appeal is more likely to grant leave than the trial judge: See Pattenden “Prosecution Appeals Against Judges

made within the statutory purpose of the preparatory hearing.⁵⁰ A further appeal lies to the House of Lords on a point of general public importance.⁵¹ A prosecution appeal in this form, unlike an Attorney General's Reference under the *Criminal Justice Act 1972*,⁵² is 'with prejudice'.⁵³ It should also be noted that Part 9 of the *Criminal Justice Act 2003* confers a right to appeal against terminating and evidentiary rulings.⁵⁴

(ii) Statutory Pre-trial Hearings

4.29 In cases to be tried before the Crown Court which are not lengthy or serious or complex, pre-trial hearings can also be held in accordance with the 1996 Act. The Court may rule on any question as to the admissibility of evidence, or any other question of law relevant to the case. Any ruling is

Rulings" [2000] Crim LR 971 at 973. Section 9(3) *Criminal Justice Act 1987*; section 31(3) *Criminal Procedure and Investigations Act 1996*. The Court of Appeal in *Attorney General's Reference (No 1 of 2004) R v Edwards and other appeals* [2004] EWCA Crim 1025; [2005] All ER 457 held that since the empanelling of the jury must be postponed until the appeal is abandoned or determined, there is a risk of delay due to the possibility of an interlocutory appeal. This distinguishes the statutory regime of a preparatory hearing from the different statutory regime of a pre-trial hearing and ruling. In respect of the appeal against evidentiary rulings under Part 9 of the 2003 Act, the Court noted that there is a risk that increased use of interlocutory appeals could gradually permeate the criminal justice system so that the need for trials to be driven forward to their eventual conclusion will somehow be perceived to be less imperative. As against this risk it needs to be recognised that appeals against preparatory hearings have a real advantage for long or complex cases. They can, for example, avoid the unnecessary quashing of convictions and retrials because of misdirections and they can substantially shorten trials." per Woolf CJ, 458.

⁵⁰ *R v Hedworth* [1997] 1 CrAppR. 421,430; *R v van Hoogstraten* [2004] Crim LR 498.

⁵¹ Under sections 33 and 34 of the *Criminal Appeal Act 1968* either the prosecution or the defence can appeal to the House of Lords against a decision of the Court of Appeal. This is subject to two conditions: (1) The Court of Appeal must certify that a point of law of general public importance is involved and (2) Leave to appeal is given by the Court of Appeal or by the Appeals Committee of the House of Lords. It should be noted that even if a conviction is quashed by the Court of Appeal, that conviction could be reinstated by the House of Lords.

⁵² Section 36(1) of the *Criminal Justice Act 1972*. Under Section 36(1) of the *Criminal Justice Act 1972* the Attorney General can refer a point of law which arose during a trial on indictment that ended in an acquittal to the Court of Appeal for determination. The acquittal is left untouched. The reference can refer to questions of law alone or questions of mixed fact and law: See for example *Attorney General's Reference (No. 1 of 1975)* [1975] QB 773, (1975) 61 Cr App R 118.

⁵³ As in *R v Z* [2000] 2 AC 483. However, if a person is acquitted by a jury at the Crown Court, that acquittal cannot be challenged, although the prosecution can ask the Court of Appeal to clarify the law.

⁵⁴ See paragraphs 3.18-3.19, below.

binding for the whole of the trial unless the judge⁵⁵ varies or discharges that ruling.

(iii) Plea and Case Management Hearings

4.30 Plea and Case Management Hearings (“PCMH”) are obligatory in all indictable cases.⁵⁶ They replace the former Plea and Directions Hearings which were introduced in statutory form by the 1996 Act.⁵⁷

4.31 At the PCMH,⁵⁸ the accused person must be asked to enter a plea. If it is a guilty plea, the court should proceed to sentencing whenever possible. If the plea is not guilty, the hearing is used to identify the issues between the parties, establish the pleas of the defendant, assess the likely duration of the trial and the likely time-scale for the case to be ready for trial. It provides a forum for parties to indicate legal issues which may arise at the trial, establish what expert or unusual evidence will be called by either side, make provisions for the television/video facilities necessary for the trial and generally aims to organise the effective case management of the trial.

4.32 In the past, Plea and Directions Hearings were followed by a number of further shorter hearings. However, since the introduction of Plea and Case Management Hearings, this practice has changed. Now, one Plea and Case Management Hearing is held, which tends to be much longer and deal with all the issues in one go. Plea and Case Management Hearings tend to take longer to actually come up for hearing, but this ensures that the parties are ready to proceed.⁵⁹ The Plea and Case Management Hearing form should be completed by a Crown Court case progression officer. According to the Practice Direction, “active case management at the PCMH should reduce the number of ineffective and cracked trials and delays during the trial to resolve legal issues.”⁶⁰ The Practice Direction recognises that the

⁵⁵ Upon application by the prosecution or the defence or of his or her own motion. No application may be made for a ruling to be discharged or varied unless there has been a change in circumstances since the ruling was made.

⁵⁶ Consolidated Criminal Practice Direction 28 March 2006, Lord Chief Justice Auld. *Practice Direction (Criminal Proceedings: Case Management)* [2005] 1 WLR 1491. Preliminary hearings may be held for cases sent to the Crown Court under Section 51 of the *Crime and Disorder Act 1998*.

⁵⁷ Section 39 of the 1996 Act and *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 1 WLR 2870; [2002] 3 All ER 904.

⁵⁸ It should normally take place within six weeks of the defendant being sent for trial if he is on bail, or four weeks if he or she is in custody. The Plea and Directions Hearing is normally conducted by the trial judge.

⁵⁹ Communication from the Office of the Crown Court.

⁶⁰ Paragraph IV.41.8 of the Consolidated Practice Direction. Consolidated Criminal Practice Direction 28 March 2006, Lord Chief Justice Auld. *Practice Direction (Criminal Proceedings: Case Management)* [2005] 1 W.L.R. 1491.

effectiveness of the PCMH depends largely on the preparation of the parties and the presence of the barrister who is to act in the trial, or a barrister who is able to make decisions that the trial barrister could be expected to make. The matters listed in the PCMH form for consideration at the hearing include receiving a plea of guilty,⁶¹ the estimated length of the prosecution and defence cases; the parties' readiness for trial; which prosecution witness will be called to give evidence; whether the defence statement has been served; whether there has been full prosecutorial disclosure, and any legal or factual issues which should be resolved pre-trial.⁶²

(iv) Criminal Procedure Rules 2005

4.33 The Criminal Procedure Rules 2005 are intended to ensure that all parties in the criminal process are responsible for the efficient progression of the case, under the supervision of the Court.⁶³ The rules are a consolidated version of all previous rules governing practice and procedure in the criminal courts. Participants in a criminal case must inform the court and all parties of any significant failure to take any procedural step required by the rules, any practice direction or any direction of the court.⁶⁴ Under the Rules the judge is required to exercise an extensive managerial role.⁶⁵ The rules define 'active case management as including:

- the early identification of the real issues;
- the early identification of the needs of witnesses;
- achieving certainty as to what must be done, by whom, and when, in particular by the early setting of a timetable for the progress of the case;
- monitoring the progress of the case and compliance with directions;

⁶¹ The hearing was also envisaged that the normal time for any indication as to sentence to be sought: *R v Goodyear* [2005] 3 All ER 117. In that case, a five-judge Court of Appeal considered that a process by which a defendant may instruct his counsel to seek an indication from the judge of his current view of the maximum sentence which would be imposed on the defendant in the event of a guilty plea was not in conflict with the principle that a plea must be made voluntarily and free from improper pressure.

⁶² See Archbold, *Criminal Pleading Evidence and Practice 2006* (Thomson Sweet and Maxwell 2005) at paragraphs 4.84k-4.84j.

⁶³ The rules follow on from the recommendation contained in the *Review of the Criminal Courts in England and Wales* (Stationery Office 2001) that a criminal procedural code be established. Sections 69-74 of the *Courts Acts 2003* provide for the creation of the Rules, the creation of the Criminal Procedure Rule Committee and the making of practice directions.

⁶⁴ See section 1.2 of the Criminal Procedure Rules 2005.

⁶⁵ Section 3.2(2).

- ensuring that evidence, whether disputed or not, is presented in the shortest and clearest way;
- discouraging delay, dealing with as many aspects of the case as possible on the same occasion, and avoiding unnecessary hearings;
- encouraging the participants to co-operate in the progression of the case; and
- making use of technology.

4.34 The Rules further stipulate that the judge must nominate a court officer responsible for the progression of the case. This person, known as the ‘case progression officer’ monitors compliance with directions and ensures that the court is kept informed of events that may affect the progress of the case.⁶⁶ The Rules set out the procedure to be followed in preliminary proceedings, including preparatory hearings and appeals from preparatory hearings to the Court of Appeal. The Rules are supplemented in respect of heavy fraud and other complex criminal cases by guidance set out in a protocol issued by Lord Woolf CJ⁶⁷

(v) Criminal Case Management Framework

4.35 The Criminal Case Management Framework complements the Criminal Procedure Rules and is a guide for practitioners on the efficient management of cases. It deals with case management through the criminal process, from the pre-charge stage to sentencing, setting out the responsibilities of those involved, and the expectations of the judiciary.⁶⁸

(vi) Delivering Simple, Speedy, Summary Justice Review

4.36 In July 2006, the Home Office, the Attorney General’s Office and the Department for Constitutional Affairs produced a review entitled *Delivering Simple, Speedy, Summary Justice*.⁶⁹ The review proposes a number of measures aimed at improving the criminal justice system, particularly on improving the preliminary hearings in the Crown Court.⁷⁰

⁶⁶ Section 3.4(4).

⁶⁷ Protocol for the Control and Management of Heavy Fraud and Other Complex Criminal Cases, 22 March 2005. See also the Protocol for the Management of Terrorism Cases, issued by Sir Igor Judge P, 18 January 2006.

⁶⁸ The second edition of the framework was issued on 21 July 2005. An interactive version of the framework is available at www.cjsonline.gov.uk/framework

⁶⁹ (Department for Constitutional Affairs 2006).

⁷⁰ The Review also focuses on improving the speed and effectiveness of the magistrates’ court. The National Criminal Justice Board will pilot the concept of “next day justice”, which is focused on taking specific offences such as shop theft, quality of life crimes and, domestic violence and breach of court orders to courts between 24-72

The National Criminal Justice Board,⁷¹ with the judiciary will govern the implementation of these proposals. The review found that examined more than 500 case files from 8 court centres. The review found that in the sample of cases, indictable cases sent to the Crown Court took between 24 and 36 weeks from charge to conclusion; cases committed for trial between 22 and 42 weeks. The target is for 78% of committed cases to be commenced within 16 weeks. Crucially, there were far too many hearings prior to trial. There were approximately 200, 000 “mention hearings” a year in the Crown Court. These are used to ensure that the parties comply with rules and orders of the court. The review found that the mean number of pre-trial hearings was about six per case; 15 of the cases took more than 10 hearings to reach a conclusion. Most of the hearings were not necessary. The review aims to reduce the number of pre-trial hearings from an average of 6 to no more than 2 – that is, the Preliminary Hearing and the Plea and Case Management Hearing, in most cases, except for complex and difficult cases.⁷² Where mention hearings are held, clear reasons will have to given and the outcome monitored. However, in this context the changes regarding the Plea and Case Management Hearings, discussed above should be noted.

(vii) Criminal Justice Act 2003

4.37 Part 9 of the *Criminal Justice Act 2003*⁷³ introduces an interlocutory prosecution right of appeal against 2 categories of ruling by a Crown Court judge:

hours after the offence was committed. The aim is to reduce the number of hearings from an average of 5 or 6 to one for guilty pleas and 2 for contested cases.

⁷¹ This was set up following the Auld Report *A Review of the Criminal Courts of England and Wales* (Stationery Office 2001). Ministers of the Home Office, Department for Constitutional Affairs, and the Attorney General sit together with heads of the main agencies, representative of the Association of Police Authorities and a representative of the judiciary. The Board monitors progress towards Public Service Agreement targets to bring offences to justice and raise public confidence. The Board holds agencies and areas to account where they fall short. The National Board is supported by 42 Local Criminal Justice Boards across England and Wales.

⁷² The use of telephone and e-mail hearings will also be tested.

⁷³ Part 9 of the 2003 Act implements the recommendations in the *Review of the Criminal Courts in England and Wales* (Stationery Office 2001) (‘the Auld Report’) and the Law Commission’s *Report on Double Jeopardy and Prosecution Appeals* (No 267), 2001. However it does not entirely accord with the Auld Report in that it does not exclude any submissions of no case to answer from the prosecution right of appeal against terminating rulings. It also goes further than the Law Commission recommendation by including rulings that are, in effect, terminating rulings where key prosecution evidence is excluded (section 62). Part 9 was also influenced by the proposals contained in the *Report of the Royal Commission on Criminal Justice* (1993), and the government White Paper *Justice for All* (Stationery Office 2002).

(a) rulings, made either at a pre-trial hearing or at any time during the trial before the start of the summing up, that have the effect of terminating the trial;⁷⁴ and

(b) evidentiary rulings made in certain trials for qualifying offences, where the rulings significantly weaken the prosecution case.⁷⁵

4.38 Part 9 empowers the prosecution to appeal against, for example, an order staying the proceedings, or requiring the charge to “lie on the file”; an order directing an acquittal; a ruling of no case to answer; and a ruling that a key piece of evidence is inadmissible. The prosecution is thus given formidable powers to test the correctness of a judge’s ruling. The Court of Appeal may not reverse a judge’s ruling unless it is satisfied that the ruling was wrong in law, that the ruling involved an error of law or principle, or that the ruling was one which it was not reasonable for the judge to have made.⁷⁶

4.39 Unlike the procedure for interlocutory appeals against preparatory hearings, no right of interlocutory appeal is granted to the defence. If the judge rules that there is a case to answer, or that the contested prosecution evidence is admissible, there is nothing the defence can do until the end of the case. This has been criticised on two grounds:⁷⁷ first, if the judge’s refusal to terminate proceedings was incorrect, the accused person will have to undergo the hardship of a trial and spend time in prison; and, second, the defendant will have a more difficult task to persuade the Court of Appeal that his or her conviction was “unsafe”- that the breach actually made a difference to the outcome.⁷⁸ Furthermore, the new provisions have been

⁷⁴ Section 58 of the 2003 Act. These provisions came into force on 4 April 2005.

⁷⁵ Section 62. See further, Crown Prosecution Service, *Guidance for Prosecutors*, available at www.cps.gov.uk/legal/19

⁷⁶ Section 67 of the *Criminal Justice Act 2003*.

⁷⁷ See Spencer “The New Law on Criminal Appeals: Does it Strike a Fair Balance between the Prosecution, the Defence and the Public Interest?” Paper presented at the Criminal Appeals Conference, London, 13 May 2005.

⁷⁸ This point becomes even more apparent in light of recent developments. In September 2006 the Office for Criminal Justice Reform published the consultation paper *Quashing Convictions-Report of a Review by the Home Secretary, Lord Chancellor and Attorney General*. The review examined the concept of an “unsafe conviction” and the relevant Court of Appeal case law. The Review concluded that legislation should be introduced to prevent appellants being released where the defect in the trial is procedural and the Court is satisfied that the appellant committed the offence of which he was convicted. At the time of writing, the British Government is consulting on what form such amending legislation will take. The consultation process will last until 18 December 2006. See also *Rebalancing the Criminal Justice System in Favour of the Law-Abiding Majority* (Home Office July 2006).

criticised for increasing the burden on an already overloaded Court of Appeal.

4.40 The Commission understands that at the end of 2005, the right of prosecution appeal had only been used once.⁷⁹

(b) Scotland

4.41 There are two types of mandatory pre-trial hearing in solemn proceedings in Scotland. These are the “first diet” in the Sheriff Court⁸⁰ and the preliminary hearing in the High Court of Justiciary.⁸¹ Both types of hearings enable the court to ascertain the state of preparation of the parties and whether the case is ready to proceed to trial.⁸² The court may obtain a guilty plea, and if a not-guilty plea is entered the court may dispose of case-management preliminary issues. The court must ascertain which witnesses in the Crown’s list are required by the parties and whether a vulnerable accused or witness requires any special measure to give their evidence. The court can also determine whether the defence and the prosecution have complied with their statutory duty to seek agreement of evidence. Other preliminary case management issues such as pleas in bar and applications relating to separation and joinder and objections to the admissibility of any evidence are also dealt with.⁸³ Decisions at preliminary hearings and first diets are appealable to the High Court.

⁷⁹ The first appeal from terminating rulings under section 58 was heard in December 2005. The appeal was dismissed: *R v A (Prosecutor’s Appeal)* [2005] EWCA Crim 3533; [2006] 1 Cr App R 433.

⁸⁰ Section 71 of the *Criminal Procedure Act 1995*.

⁸¹ The preliminary hearing was made mandatory by the *Criminal Procedure (Amendment) (Scotland) Act 2004*. The Act was preceded by the ‘Bonomy Report’ *Improving Practice: 2002 Review of the Practices and Procedure of the High Court of Justiciary* (Stationery Office 2002) and a White Paper, “Modernising Justice in Scotland: The Reform of the High Court of Justiciary” (Scottish Executive 2003). The Bonomy Report identified a problem with an increase in adjournments in the High Court: in 1995, only about 7% of cases listed were adjourned at least once, while in 2001 this figure was 33%. Case management has also been employed to reform police and prosecution practices: see *A Case Study-Joint Thematic Inspection of Case Management* (Scottish Executive) 2006

⁸² According to the Bonomy Report most practitioners believe that first diets are most successful when those appearing are fully instructed and the sheriff plays an active role in establishing that the case is ready for trial. Indeed, many practitioners conceded that “attending court for the first time acts as a trigger to action on matters which have not been attended to as expeditiously as they ought to have been.”: Bonomy Report at 43.

⁸³ In keeping with the drive towards more efficient trials, where objections to the admissibility of evidence have not been raised at the preliminary diet or the first diet, the party must give written notice to the other parties of the intention to do so. If written notice is not given, the Court may grant leave to object only if it considers that

4.42 Research conducted in 2000 found that the increased use of intermediate⁸⁴ and first diets led to a significant decrease in the number of trial diets held, although the increased use of intermediate and first diets also meant that there was generally an increase in the total number of court diets held.⁸⁵ Furthermore, analysis of case files indicated that the greater use of intermediate and first diets led to significant increases in the proportion of prosecution witnesses countermanded.⁸⁶ According to the *Crown Office and Procurator Fiscal Service Review 2004-2005*,⁸⁷ more accused persons are pleading guilty since the introduction of the mandatory preliminary hearings.⁸⁸

4.43 The 2004 Act also provides that a court is to appoint a fixed trial diet or a floating one. The trial must be commenced within 12 months of first appearance and within 140 days if the accused is in custody. Where a fixed trial that is to be held in the High Court does not commence on the scheduled day, the indictment will fall.⁸⁹

(c) New Zealand

4.44 In indictable cases a preliminary hearing is conducted under the *Summary Proceedings Act 1957* to establish whether there is a *prima facie* case against the accused. If so, the defendant is committed for trial; if not the defendant is discharged.⁹⁰ In practice, preliminary hearings serve to inform the defence of the prosecution case.

the objection could not reasonably have been brought at an earlier stage: Section 79 A of the 1995 Act as inserted by section 14 of the *Criminal Procedure (Amendment) Scotland Act 2004*.

⁸⁴ Intermediate diets are held in summary cases.

⁸⁵ *Intermediate Diets, First Diets and Agreement of Evidence in Criminal Cases: An Evaluation* (Scottish Executive 2000). The research was commissioned by the Scottish Office to investigate the impact of changes introduced by the *Criminal Justice (Scotland) Act 1995*, relating to intermediate diets, first diets and the agreement of evidence. The research covered 11,000 hearings in 11 courts.

⁸⁶ This is where the witnesses are not required by the prosecution.

⁸⁷ (2005) at 2.

⁸⁸ An evaluation of the procedural reforms introduced following the Bonomy Report, including the mandatory preliminary hearing, is scheduled to be published in 2007.

⁸⁹ Section 5 of the *Criminal Procedure (Amendment) Scotland 2004*.

⁹⁰ If all the evidence consists of written papers a defendant who is represented may waive the hearing and accept committal. Over half of all preliminary hearings proceed on the papers without any oral evidence: Harry and Sutton "Preliminary Hearings: Processes, Outcomes and Discharges" unpublished paper prepared for Department for Courts cited in Law Commission *Criminal Prosecutions* (Wellington 2000).

4.45 In the indictable jurisdiction in New Zealand, pre-trial callovers have been implemented to improve trial case management (in particular to reduce last minute cancellations) and also to address problems of systemic delay.⁹¹ The principal aim of callovers is to set a case “on a firm and predictable path as soon as it enters the system.”⁹² The focus is mainly on timetabling, identification of issues, requirements for trial and the formal disposition of pre-trial applications.⁹³ However, there seems to be a problem with the over use of callovers - in the Auckland callover study in the 2004 Evaluation, there was an average number of six appearances between the first callover and resolution.⁹⁴ Indeed the evidence is at best equivocal about whether callovers are efficient.⁹⁵

(i) Appeals

4.46 The New Zealand appellate jurisdiction in respect of pre-trial determinations is unusual in its breadth.⁹⁶ Since 1967 the prosecution or the accused person can appeal a pre-trial ruling before verdict.⁹⁷ The prosecution or the accused can also apply to a judge for a pre-trial ruling as to the admissibility of any evidence,⁹⁸ and these rulings can be appealed before the trial.⁹⁹

⁹¹ Law Commission *Reforming Criminal Pre-trial Processes: A Discussion Paper* (Wellington 2004) at 4. The process of callover differs from High and District Court and from centre to centre.

⁹² *Criminal Jury Trials Case Flow Management, Practice Notes* issued by the Chief Justice, 7 December 1995. The practice note envisages a first callover after 7 weeks after committal and a period of committal and trial of 11 weeks or 22 weeks maximum where there are pre-trial applications.

⁹³ 2004 Discussion Paper at 10.

⁹⁴ Ministry of Justice and the Law Commission *Status Hearings Evaluation: A New Zealand Study of Pre-trial Hearings in Criminal Cases* (Wellington 2004).

⁹⁵ 2004 Discussion Paper at 20 and Law Commission, *Criminal Pre-trial Processes: Justice Through Efficiency* (Wellington 2005) at xi. The New Zealand government has committed to developing an integrated approach to case management. See Ministry of Justice *Government Response to Law Commission Report on Criminal Pre-trial Processes- Justice Through Efficiency* (March 2006).

⁹⁶ Section 380 of the *Crimes Act 1961* provides that at any time either during or after a trial, whether the result of the trial is a conviction or an acquittal, the judge may reserve for opinion of the Court of Appeal any question of law related to the case. If the result of the trial is acquittal the accused is discharged, subject to re-arrested if the Court of Appeal orders a new trial; Section 380 (4) *Crimes Act 1961*.

⁹⁷ Section 8 (3) of the *Crimes Amendment Act 1966*.

⁹⁸ Section 344A of the *Crimes Act 1961* as inserted by section 3 (1) of the *Crimes Amendment Act 1980*.

⁹⁹ Section 3(2) of the *Crimes Amendment Act 1980*. In its Report *Criminal Prosecution*, (NZLC R66) (Wellington 2000) the Law Commission recommended a Crown appeal

(d) Canada

4.47 Sections 535-551 of the Canadian Criminal Code deal with the conduct of preliminary hearings and the rights of an accused at preliminary hearings. The purpose of the preliminary inquiry is to determine whether there is any evidence upon which a jury, properly instructed, could convict.¹⁰⁰ Both the defence and the prosecution may call evidence, however the defence rarely does. Part XXI of the Canadian Criminal Code excludes all pre-trial appeals except an appeal in respect of a stay or an order quashing an indictment. *Bill C 15-A* (the *Criminal Law Amendment Act 2001*) introduced changes intended to shorten preliminary hearings.¹⁰¹ The Canadian Department of Justice is monitoring the impact of these changes amid a vigorous debate on whether preliminary hearings should be scaled back in favour of pre-trial disclosure rules.¹⁰²

4.48 According to an analysis of preliminary inquiry statistics from 1998-2001,¹⁰³ 55.1% of all indictable cases in Quebec had a preliminary inquiry, compared to 9.9% for the rest of Canada. Interestingly, the time between the first appearance and the final appearance varied significantly with the type of proceedings. For indictable cases with no preliminary inquiry, the median time elapsed was 15 weeks. For indictable cases with a preliminary inquiry, the median time elapsed was 34 weeks, that is more than twice as long.¹⁰⁴

on a point of law against discharges under section 347 of the Crimes Act 1961 (which is deemed to be an acquittal and can occur either before or during the trial). The *Criminal Procedure Bill* implements this recommendation: Part 1, Clause 9, Section 381A. The Law and Order Committee has recommended expanding the prosecution right of appeal to an order of the court staying a prosecution on a point of law.

¹⁰⁰ Section 482 of the Criminal Code provides for courts to make specific rules for case management.

¹⁰¹ See also Steering Committee on Justice, Efficiencies and Access to the Justice System, *Report on the Management of Cases Going to Trial* (Department of Justice 2005) and its *Final Report on Mega-Trials* (Department of Justice 2005). Both reports are available at www.justice.gc.ca

¹⁰² See *The Globe*, 21 August, 2006.

¹⁰³ Hung, "Analysis of Preliminary Inquiry Statistics from the Adult Criminal Court Survey 1998/99 through 2000/01", paper prepared for the Canadian Department of Justice Research and Statistics Division, 2002. The trends do not seem to have changed significantly since this compilation.

¹⁰⁴ The study also found that the preliminary inquiry may have had some effect on increasing the likelihood of a guilty plea. However, such an effect, if any, was observed only in Quebec, and not in the rest of Canada.

(e) New South Wales

4.49 Case conferencing is a case management system that applies to indictable matters at committal stage. It commenced across New South Wales on 1 January 2006. As part of the scheme face to face conferences are held between the prosecution and the defence to consider the evidence and the appropriateness of a plea of guilty as early as possible.¹⁰⁵ Case conferencing is not compulsory apart from in legally aided cases where attendance at a case conference is a condition of the grant of legal aid.¹⁰⁶

4.50 Arraignment hearings are held each month during Law Term. The arraignment hearing takes place approximately one-two months after committal. The aim of the arraignment procedure is to minimise the loss of judicial time that occurs when trials are vacated after they are listed for hearing, or when a guilty plea is entered immediately prior to, or on the day of, the trial's commencement. The arraignment procedure allows both the prosecution and defence counsel to consider a range of issues that may provide an opportunity for an early plea of guilty, or shorten the duration of the trial.

(f) Victoria

4.51 Judges manage cases under the *Crimes (Criminal Trials) Act 1999*. The Act envisages a continuum from committal to trial with case being managed by a judge of the trial court. It provides for:

- full and complete disclosure by the prosecution;
- a summary of the Crown opening speech given by the prosecution to the defence before trial
- a response to that opening given by the defence pre-trial and to state what matters are in issue in the trial; and
- a mechanism by which the Crown may serve a notice of pre-trial admissions on the defence requiring the defence to respond to that notice.

4.52 In Victoria, a case conference is conducted by a Listing Judge and is informal in nature. It addresses general case management issues such as identifying the main issues and providing direction for the future regression of the case. It is an opportunity for the defence to discuss the charges with the prosecution and for the defence to make plea offers. However, the

¹⁰⁵ The Office of the Director of Public Prosecutions advises the New South Wales police as to the appropriateness of proceeding with particular charges and the nature of the charges to be laid.

¹⁰⁶ See also the *Criminal Procedure Amendment (Pre-trial Disclosure) Act 2001*, the stated purpose of which is to “reduce delays in complex criminal trials”: section 47A.

Listing Judge will not give sentence indications. A date for the conduct of Directions Hearings will be set for approximately four weeks before the trial. A Listing Judge, where practicable the same listing judge as the one who conducted the Case Conference, will conduct the Directions Hearings. At the Directions Hearings the accused is arraigned and general case management issues are dealt with, such as the number of witnesses, the estimated duration of trial and legal aid. The Court will also determine questions of law, of fact and of mixed law and fact that can be determined pre-trial by the judge.¹⁰⁷ Under the Act, a party who wishes to raise a point of law at trial must disclose the point of law at least 14 days before the trial is due to commence.¹⁰⁸ If the parties agree, the judge can decide the point based on written submissions, otherwise a directions hearing must be held.¹⁰⁹

D Discussion

4.53 In *R v Jisl; R v Tekin*,¹¹⁰ the Court of Appeal set out the current judicial approach in England and Wales to Preparatory Hearings, Statutory Pre-trial Hearings and Non-Statutory Plea and Direction Hearings. The Court observed that while the defendant is entitled to a fair trial, the prosecution are equally entitled to a reasonable opportunity to present the evidence against the defendant. The Court said that it is not a concomitant of the entitlement to a fair trial that either or both sides are entitled to take as much time as they like, or as long as counsel and solicitors or defendants themselves think appropriate. Resources are limited and time itself is a resource. Active case-management is now regarded as an essential part of a judge's duty. The profession must understand that this has become and will remain part of the normal trial process, and that cases must be prepared and conducted accordingly. This approach was echoed by the Supreme Court in

¹⁰⁷ See section 5 of the *Crimes (Criminal Trials) Act 1999*. A significant related development is the Criminal Justice Enhancement Program which aims to introduce business processes, new technology and a culture change in Victoria's criminal justice system. The project focuses on key elements of the criminal process, including court case management practices. The case and list management project has improved case management in the County Court through improved judicial supervision of cases. It has involved the development of a new IT system, which contains: the accused person's information; resentments data; case lists; court resources data; hearing information; party details; criminal and civil orders and a documents library. See Department of Justice, *Criminal Justice Enhancement Program Case Study* (Melbourne 2006). Available at www.justice.vic.gov.au

¹⁰⁸ Section 10 (1) of the *Crimes (Criminal Trials) Act 1999*.

¹⁰⁹ On case management practices in Australia, see Australian Institute of Judicial Administration *Report on Case Management* (Melbourne 2005).

¹¹⁰ [2004] EWCA Crim 696. See paragraphs 114-116 of the judgment of Judge LJ.

*People (DPP) v Scully*¹¹¹ where the Court stated that where it is necessary to make very late applications for prohibition, the reasons for this necessity should be specifically addressed in the statement of grounds or affidavit.¹¹² In light of these comments by the Supreme Court, which indicate the importance of good preparation at the pre-trial stage, the Commission has concluded that it would be preferable to continue the development of case management procedures for the present. The Commission considers that, if it could be shown that mandatory pre-trial procedures, in which the trial judge could make binding rulings, would improve the jury's understanding of the evidence presented and the arguments made in a trial, then such a procedure should be introduced.¹¹³

(1) Judicial Case Management – Reallocating Responsibilities

4.54 As stated above, the overriding objective in introducing case management procedures is to ensure that case comes to trial as thoroughly prepared and as well presented as possible. The Commission considers that sensible reforms to the pre-trial process could produce real benefits for defendants, victims, witnesses and the public. Proper preparation and identification of issues through case management could improve the quality of trial rulings and the jury's appreciation and understanding of the evidence.

4.55 The Commission considers that this could be done on the basis of a pre-trial questionnaire, which would provide a focal point for case preparation. This could be similar in format to the questionnaire used for Plea and Case Management Hearings in England and Wales. Issues to be considered by the questionnaire could include the following:

1. Whether it is intended that an application will be made under section 6(3) of the *Criminal Justice (Administration) Act 1924* for a separate trial of any count or counts on the indictment, or, where there is more than one accused, for the separate trial of any of the accused

¹¹¹ [2005] 1 IR 242, per Murray CJ, McGuinness and Hardiman JJ. The Court dismissed the appeal against the High Court's refusal to grant an order of prohibition, on the grounds, *inter alia*, that the lapse of time between the charging of the applicant and his application for relief on the eve of the trial was, in all the circumstances of the case, excessive.

¹¹² [2005] 1 IR 242, 259, per Hardiman J. See also *Fitzgerald v Director of Public Prosecutions* [2003] 2 ILRM 537 where the Supreme Court held that it was perfectly legitimate for the legislature to proceed on the basis that the law officers would not have the same motives for prosecuting time wasting appeals as others.

¹¹³ See paragraphs 4.82-4.83, below.

2. Whether it is intended that an application be made under section 4E of the *Criminal Procedure Act 1967* for the dismissal for any charge against the accused¹¹⁴
3. Applications for prohibition or stay
4. Whether it is intended that a challenge will be made to the validity of any warrant
5. A statement of compliance with the Judges' Rules; and whether the defence will seek to challenge this statement
6. Where the accused wishes to adduce evidence in support of an alibi, whether notice has been given by the accused of the particulars of the alibi as required by section 20 of the *Criminal Justice Act 1984*
7. Whether it is anticipated that legal representation will be required for a complainant under section 4A of the *Criminal Law (Rape) Act 1981*
8. Whether it is intended that an application under section 21(5) and (6) of the *Criminal Justice Act 1984* requiring attendance before court of person who has made a written statement admissible under section 21 of the 1984 Act
9. Whether the prosecution has made full disclosure statement
10. Whether there are any issues as to the medical/psychological condition of the defendant
11. The estimated length of trial
12. Statement of readiness for trial
13. Establish what evidential material (facts or documents) are admitted from one side or the other.
14. Whether all the witnesses included in the Book of Evidence will be required by the prosecution
15. Whether the attendance of witnesses can be staggered over the course of the trial
16. Whether any evidence will be required to be taken by video link
17. Whether an interpreter is required

¹¹⁴ In relation to applications for dismissal, application under section 4E of the *Criminal Procedure Act 1967* must be made to trial court. Notice of the application must be given to the prosecutor not less than 14 days before the date the application is to be heard unless the trial court orders otherwise.

18. Applications to take evidence on deposition under section 4F of the *Criminal Procedure Act 1967*
19. Applications for transfer of trial under section 32 of the *Courts and Court Officers Act 1995*
20. Arrangements regarding communications technology

4.56 While video-evidence has reduced the frequency of *voir dire*s, the impact on trial of replaying in its entirety of, or extended excerpts from, a videotape of an interview can present practical difficulties in the conduct of the trial. The Commission considers that the Courts Service should consider including in the proposed pre-trial questionnaire, whether there is agreement as to the relevant sections of the recorded interview to be replayed in court.

4.57 The Commission is aware that it not always be appropriate to deal with certain matters in advance of trial. For example, applications relating to stays and prohibition can be made up to and including the trial. However, the Pre-trial Questionnaire would be a useful means of concentrating the efforts of the prosecution and accused in resolving those issues that would be proper to finalise in advance of trial.

4.58 Further possible areas which might be dealt with in a pre-trial questionnaire could include:

- Whether the defence will seek to establish a failure to afford entitlements under the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations Regulations) 1987¹¹⁵
- Whether the video of the interview could be edited for the trial
- Whether there is any agreement on the facts or evidence which can be admitted under section 21 of the *Criminal Justice Act 1984* (proof by written statement) and section 22 (proof by formal admission), including the admission of expert reports

4.59 Practitioners, having had an opportunity to consult with their clients, could complete a questionnaire for submission to the trial judge. The questionnaire should be completed not less than 21 days prior to the trial date. The requirement that the questionnaire be completed could be introduced by practice direction of the Presidents of the High Court and the Circuit Court.

4.60 The Commission considers that a requirement to complete the pre-trial questionnaire would enhance the communication between counsel and the instructing solicitor in order to get the case ready for trial. Following submission of the pre-trial questionnaire, the barrister will have an

¹¹⁵ S.I. No. 119 of 1987.

opportunity to consider what further steps need to be taken by his instructing solicitors to get the case ready for trial. Furthermore, counsel could determine which witnesses will be required for the trial. These changes could enhance the reliability of trial verdicts. A further consequential benefit would be the reduction of the number of quashed convictions and retrials.

(a) Costs

4.61 The Commission is aware that under counsel who appear for defendants under the Criminal Legal Aid Scheme receive no fee for pre-trial consultations. The Commission is of the view that if a new culture of case management and pre-trial preparation is to be achieved, practitioners must be afforded an opportunity to consider with their clients the issues in the case in advance of the trial date and to advise and take instructions from them. This could be done by providing for a separate fee for consultation for the purposes of addressing the issues in the Pre-Trial Questionnaire.

(b) Guilty Pleas

4.62 Research conducted by the National Crime Council showed that in 26% of ‘murder’ case and in 51% of ‘rape’ case, the defendant pleaded guilty to one or more counts at their arraignment. The prosecution accepted these pleas in the majority of cases. This high rate of guilty pleas is a feature of the criminal justice system overall.¹¹⁶ An argument could be made that a judge at a pre-trial hearing might give a sentence indication in the event of a guilty plea.

4.63 The Commission does not consider it necessary to require an indication that a plea is to be made: sufficient opportunity exists at present for pleas to be entered subsequent to return for trial and a sufficient incentive exists under statute and in the practice of the courts to encourage the making of a plea at an early stage prior to trial.

4.64 The Commission considers that consideration could be given to provision in the pre-trial questionnaire for an indication of an intention to plead guilty, if appropriate.

(2) Report Recommendation

4.65 *The Commission recommends that consideration be given by the Courts Service to the introduction of a pre-trial questionnaire.*

¹¹⁶ The guilty plea rate of the Circuit Court differs considerably between the Dublin Circuit and the provincial Circuits: in 2005, 85% of defendants in the Dublin Circuit Court pleaded guilty, compared to 67% in the Provincial Circuits. Courts Service, *Annual Report 2005* (2006). It could be speculated that this might be linked to the fact that 11% of all defendants outside of Dublin were acquitted by juries, compared to a mere 4% acquitted by juries in the Dublin Circuit Court.

E Pre-trial Hearings

4.66 As noted above, the Commission is concerned at the lack of continuity and efficiency in criminal trials. The Commission considers that there could be number of benefits for defendants. If a ruling on the admissibility of a confession, for example, is adverse to the accused, he or she could obtain the full benefit of a guilty plea. Not only could this provide the accused with a discount at the sentencing stage but the injured party would also be spared having to take the stand and the jury would not have to be empanelled.

4.67 The Commission recognises that there are difficulties with the introduction of pre-trial hearings.¹¹⁷ It is settled in Irish case law that the admissibility of the particular evidence to be adduced in a criminal trial may only be decided upon by the trial judge. Its admissibility may not be challenged in advance of the trial.¹¹⁸ Questions regarding issue estoppel in criminal cases would also arise in the context of appeals from rulings made by trial judges at pre-trial hearings.¹¹⁹ In addition, the Commission notes that in other jurisdictions, such as in England and Wales, appeals from rulings made at pre-trial hearings have been introduced. The Commission is conscious that serious questions arise as to whether such appeals could be introduced in this jurisdiction. The Commission considers that questions regarding appeals from pre-trial hearings should be dealt with in the broader context of the desirability of ‘with prejudice’ appeals.¹²⁰

4.68 The Commission has considered the issue of pre-trial hearings in other jurisdictions and has come to the conclusion that the evidence in

¹¹⁷ For example, see *People (DPP) v Conroy* [1986] IR 460 where Walsh J (dissenting) held that “the time to raise all questions of admissibility is when the evidence is offered, not before.” However the opposite opinion was voiced by O’Flaherty J in *People (DPP) v Quinn* Court of Criminal Appeal 23 March 1998 who noted: “if [the jury] are away for seven days is it fair to ask them to recollect what had been given on the first or second day of the trial? That is one of the difficulties which this procedure involves and perhaps the time has come to introduce a system that will be more efficient and more conducive to the proper administration of justice so that just verdicts are returned.”

¹¹⁸ See *Cruise v Judge O’Donnell* [2004] IEHC 376 (Quirke J); *Blanchfield v Harnett* [2001] 1 ILRM 193.

¹¹⁹ See the decision on the availability of issue estoppel in criminal trials in *People (DPP) v O’Callaghan* [2001] 1 IR 584 and in contrast, that in *Lynch v Judge Moran* [2006] IESC where the Supreme Court held that section 2 of the *European Convention on Human Rights Act 2003*, when read in conjunction with Article 2(1) of Protocol No. 7 to ECHR meant that issue estoppel in favour of the prosecution has no place in the criminal justice system.

¹²⁰ See Chapter 1, above.

support of their introduction is inconclusive.¹²¹ However, the Commission considers that the Courts Service should consider looking at the introduction of mandatory pre-trial hearings. No formal recommendation is made as to the introduction of pre-trial hearings. This is because the Commission considers that the Pre-Trial Questionnaire should be introduced first, with a view to evaluating its success. The Commission considers that the lessons learned from the introduction of the Pre-Trial Questionnaire would prove invaluable in assessing the feasibility of mandatory pre-trial hearings in this jurisdiction.

(1) Issues Relating to Pre-trial Hearings

4.69 In this section, the Commission examines developments in England and Wales regarding pre-trial disclosure with a view to informing the debate on pre-trial hearings. The Commission also discusses the current law regarding pre-trial applications for prohibition, in an attempt to ascertain the courts' attitude towards the pre-trial determination of issues.

(a) England and Wales

4.70 The conduct of a criminal trial in England and Wales has changed radically in recent years.¹²² The defence is now required to identify to the Court and the Crown any issue of fact or law expeditiously. This was signalled by Lord Justice Auld in the *Report of the Criminal Courts Review*:

“A criminal trial is not a game under which a guilty defendant should be provided with a sporting chance. It is a search for truth in accordance with the twin principles that the prosecution must prove its case and that a defendant is not obliged to inculpate himself, the object being to convict the guilty and acquit the innocent. Requiring a defendant to indicate in advance what he disputes about the prosecution case offends neither of those principles.”¹²³

¹²¹ Figures obtained from the Department for Constitutional Affairs do not provide a clear argument in favour of pre-trial hearings. Indeed, the length of the average murder trial has doubled since 2005. The greater the number of hearings the longer the trial. While this is surprising it could be due to the increasing complexity of cases. It is clear however that more research needs to be conducted into the effectiveness of pre-trial hearings.

¹²² See Dempster, J. “Show Your Hand Or Have it Cut Off?” 2 Criminal Bar Association News, June 2005.

¹²³ (Stationery Office 2001) at Chapter 10, paragraph 154. The courts are giving effect to the Auld Report's intention that the courts should not be viewed as a game, with defendants being given a sporting chance. In future, cases will be decided on the basis of evidential merits as opposed to technical brilliance. See *R v Clarke and McDaid* [2006] EWCA Crim 1196, [2006] All ER (D) 358 a reference by the Criminal Cases Review Commission, where the appellants argued that the convictions

4.71 Prior to 1996 the defence did not have to disclose its case prior to trial, apart from the alibi defence,¹²⁴ expert evidence¹²⁵ and complex fraud cases.¹²⁶ The *Criminal Procedure and Investigations Act 1996* introduced a compulsory general disclosure requirement for cases in the Crown Court. The court may order the accused to give the court and the prosecution a written statement setting out his or her defence in general terms and indicating the main matters of contention. The accused may also be ordered to give the court and the prosecution written notice of any point of law (including any point as to the admissibility of evidence) which he or she wishes to take, and any authority on which he or she intends to rely for that purpose and to state in writing the extent to which he or she agrees with the prosecution documents and the reasons for any disagreement. The *Criminal Justice Act 2003* further extends the requirements.¹²⁷ Under the Act, the defence must disclose details of any particular defences and any points of law on which they intend to rely. The defence must provide names, addresses and dates of birth of any witnesses it proposes to call, as well as details of any experts consulted, whether or not it intends to call them at trial. The Defence Statement can be shown to the jury.¹²⁸

4.72 A failure to disclose a case statement before trial or departure from the case statement at trial can now be sanctioned with adverse inferences. If any party, including the prosecution, departs from the case disclosed the judge, or with leave of the judge, any other party, may make such comment as appears appropriate and the jury may draw such inferences as appears proper.¹²⁹ However, these provisions do not seem to be used very

recorded were a nullity as the indictment had not been signed. The Court refused to follow the older authorities and instead revisited the question in light of recent authorities, and ruled that the following test (contained in *R v Ashton* [2006] EWHC Crim 794) applied: “absent a clear intention that Parliament intended jurisdiction automatically to be removed following procedural failure, the decision of the court should be based in a wide assessment of the interests of justice, with a particular focus on whether there was a real possibility that the prosecution or the defendant may suffer prejudice. If that risk is present, the court should then decide whether it is just to permit the proceedings to continue.” In this case there was no injustice to the appellants and the convictions were safe.

¹²⁴ Section 11, *Criminal Justice Act 1967*.

¹²⁵ Section 81, *Police and Criminal Evidence Act 1984*.

¹²⁶ Section 9(5), *Criminal Justice Act 1987*.

¹²⁷ Sections 34 and 35 of the *Criminal Justice Act 2003*.

¹²⁸ Only in exceptional cases will the hearing be adjourned to enable instructions to be taken on the outline defence. The Judge is then encouraged to require discussion about the prosecution case, the scope for common ground and the real issues to be tried.

¹²⁹ Section 11(5) of the *Criminal Procedure and Investigations Act 1996* as amended by section 39 of the *Criminal Justice Act 2003*.

often.¹³⁰ Under the *Criminal Justice Act 2003*, defence statements are now presumed to have been given with the authority of the accused- this is aimed at encouraging the use of adverse inferences where appropriate. However the usefulness of these provisions is not clear. In particular it is not clear what inferences could be drawn by the jury, since the failure to disclose stems from a legal obligation, and therefore, the inference that the defence is fabricated is weak.¹³¹

4.73 Questions about how far the defendant should be under an obligation to cooperate with the prosecution were central to the case of *R v Gleeson*.¹³² There the defendant had a technical defence to the charge made out on the indictment. Counsel for the defendant waited until the end of the prosecution case and then made a submission of no case to answer. The judge agreed that it was a sound defence but he permitted the prosecution to redraft the indictment so that the charge was statutory conspiracy to which impossibility is not a defence. The judge gave the defence an opportunity to have witnesses recalled. The judge made it clear in his ruling that, if this was done; he would tell the jury that it came about solely because of the fault of the prosecution. In fact no witnesses were recalled. The appellant gave evidence along the lines of his defence statement and the jury convicted. On appeal the Court of Appeal concluded that no unfairness had resulted. Auld LJ indicated that the defence counsel ought to have drawn attention to the proposed legal challenge to the indictment. Had he done so, he could have had no valid objection to the Crown correcting the error at that stage.

4.74 The decision in *Gleeson* was upheld in *R v Phillips*¹³³ where the Court of Appeal held that although a defendant was entitled to keep his cards close to his chest and was under no obligation to inform the prosecution, this was not a valid reason for preventing a full and fair hearing of the issues. The Court spoke of the balance to be achieved between the interest of an appellant having a fair opportunity to meet the prosecution case and the interests of justice. It is clear that the English position regarding ambush defences is that the defendant has no legitimate interest in getting an acquittal by catching the prosecution off guard.¹³⁴

¹³⁰ See Redmayne “Criminal Justice Act 2003 - Disclosure and its Discontents” [2004] Crim. L. R. 441 at 445.

¹³¹ It is also difficult to see how a sanction could be imposed for failing to disclose the details of an expert witness consulted but not called.

¹³² [2003] EWCA Crim 3357.

¹³³ [2004] EWCA Crim 2288.

¹³⁴ Indeed, in *R v Howell* [2003] EWCA Crim 1; [2003] Crim LR 405, which involved silence based on legal advice, the Court of Appeal allowed an adverse inference to be drawn as a means of encouraging defendants to cooperate with the police - even when advised not to. In the recent Irish case of *People (DPP) v O’Callaghan* IECCA 72,

(b) Applications for Prohibition

4.75 In an attempt to delineate the possible procedural framework for pre-trial hearings, it is useful to examine the current arrangements for applications for prohibition.¹³⁵ Pre-trial hearings are similar to applications for prohibition by way of judicial review, which are made before the formal trial process begins.¹³⁶ Judicial review permits challenges to decisions made in the course of criminal trials, but only in the most exceptional cases.¹³⁷ Where a trial has been excessively delayed as to prejudice the accused's chance of obtaining a fair trial, the appropriate remedy is an order of prohibition.¹³⁸ It is also notable that the DPP can appeal from the High Court against the granting of an order of prohibition.¹³⁹

per Murray CJ, in refusing leave to appeal a conviction, ruled that even though the appellant had received "improper professional advice" from his solicitor, the trial judge had already held that the responses had been given voluntarily. Once admitted in evidence it was still open to the applicant to explain before the jury what was meant by the statements, to deny making the statements or to otherwise seek to put the statements into context.

¹³⁵ In *People (DPP) v BF* [2001] 1 IR 656 it was held that where no judge is named as the respondent, the appropriate relief was an injunction restraining the Director of Public Prosecutions from proceeding further with the prosecution rather than an order of prohibition. This approach was approved by the Court of Criminal Appeal in *People (DPP) v O'C. (P)*. [2003] IECCA 27 January. See also *People (DPP) v O'C* [2006] IESC 54 where the Supreme Court held that the Central Criminal Court does not have jurisdiction to hear an application at the commencement of a trial, or preliminary to a trial to stay or quash an indictment, on the grounds of delay. The correct procedure is to apply to the High Court for leave to apply for judicial review.

¹³⁶ *People (DPP) v BJ* [2003] 4 IR 525 illustrates the importance of interlocutory review; in that case, the distortion of a vital participant's memory would never have become apparent were it not for judicial review proceedings being taken.

¹³⁷ *Director of Public Prosecutions v Special Criminal Court* [1999] 1 IR 60. *People (DPP) v Kelly* [2005] IEHC 185 per Quirke J: "The defendant's right to a trial in due course of law will be violated if the accused person is exposed to a real and serious risk that he or she will not receive a fair trial. If such a risk can be proved by way of evidence and on the balance of probabilities then a trial must be prohibited. That is an overriding principle which applies to all criminal trials."

¹³⁸ This principle flows from the right to a speedy trial as a facet of a trial in due course of law under Article 38.1 of the Constitution: *State (O'Connell) v Fawsitt* [1986] ILRM 639. See also: *State (Healy) v Donoghue* [1976] IR 325; *Hogan v The President of the Circuit Court*, Supreme Court, 21 June 1994; and Walsh, *Criminal Procedure* (Thomson Round Hall, 2002) at 16-34.

¹³⁹ Interestingly, judicial review proceedings may be brought by the prosecution in order to quash a *faulty conviction*. For example, in *DPP v McDonagh*, *Irish Times* 17 January 2006, the High Court overturned a conviction and three month sentence for a public order offence and ordered a retrial in the District Court following proceedings brought by *both* the defence and the DPP.

4.76 The recent case of *McFarlane v Director of Public Prosecutions*¹⁴⁰ is an example of an appeal by the prosecution against an order of prohibition granted by the High Court. The applicant was charged in 1998 with 2 firearms offences and false imprisonment arising out of an incident some 15 years previously. He sought to prohibit his trial on the ground of prejudicial pre-trial delay and on the basis that certain exhibits had been lost in the intervening period. Hardiman J¹⁴¹ upheld the appeal brought by the prosecution and set aside the order granted by the trial judge prohibiting the trial.¹⁴² Such a ruling is analogous to a successful prosecution appeal against a terminating ruling. Interestingly, the Court's decision depended partly on an assessment of the case set out in the Book of Evidence.¹⁴³

4.77 The case of *People (DPP) v JO'C*¹⁴⁴ concerned an appeal by the DPP from the granting of an order of prohibition by the High Court. The applicant was charged with 16 counts of indecent assault which were alleged to have occurred some 20 years previously. The High Court¹⁴⁵ accepted the accused's argument that having regard to the lapse of time since the alleged offences, it would be impossible for him to be afforded a trial in due course of law. The Supreme Court,¹⁴⁶ applying the established approach to applications of this nature as set out by Keane J in *People (DPP) v P.C.*,¹⁴⁷ upheld the appeal against the order of prohibition and ordered that the trial

¹⁴⁰ [2006] IESC 11.

¹⁴¹ Murray CJ, Geoghegan, Fennelly JJ concurring; Kearns J dissenting.

¹⁴² The Court held that the delay was attributable to a lack of grounds for charging the applicant and that the applicant had suffered no prejudice as a result of the delay. The burden on the applicant to establish prejudice involved engaging with the evidence presented against him: "[I]n order to demonstrate [the risk of an unfair trial due to delay] there is obviously a need for an applicant to engage in a specific way with the evidence actually available so as to make the risk apparent ... This is not a burdensome onus of proof: what is in question, after all, is the demonstration of a real risk, as opposed to an established certainty, or even probability of an unfair trial."

¹⁴³ However, the Court emphasised that "different considerations may arise" at trial and that the trial court would be able to assess whether there was any unfairness to the applicant which was incapable of remedy by the court, for which the prosecution was responsible.

¹⁴⁴ [2000] 3 IR 478.

¹⁴⁵ Morris P.

¹⁴⁶ Keane CJ, Denham and Murphy JJ; Barron and Hardiman JJ dissenting.

¹⁴⁷ [1999] 2 IR 25. See also Keane J's tripartite test in *People (DPP) v PO'C* [2000] 3 IR 87.

proceed.¹⁴⁸ These cases are analogous to prosecution appeals from a terminating ruling.

4.78 However, it is not clear whether the courts would be willing to allow the pre-trial determination of certain issues. In the recent case of *H v Director of Public Prosecutions*,¹⁴⁹ the Supreme Court discussed the jurisprudence regarding cases involving allegations of child sexual abuse and the principles which have emerged in relation to this new category of law over the last decade. It concluded that "... having regard to the Court's knowledge and insight into these case it considers that there is no longer a necessity to inquire into the reason for a delay in making a complaint. In all the circumstances now prevailing such a preliminary issue is no longer necessary." The Court was reluctant to continue to hear pre-trial applications of prohibition where judges make findings of fact, holding that this was more suited to the trial process itself.¹⁵⁰

(2) Conclusion

4.79 The Commission considers that a reconfigured criminal procedure incorporating pre-trial hearings with appeal rights could be an important step in making the criminal justice system fairer and more accountable to all citizens. It is also unacceptable that people who are presumed innocent should have their names and reputation damaged because they are put on trial on the basis of inadmissible evidence. However, the Commission realises that there are important issues surrounding pre-trial disclosure and the right of an accused person to a fair trial. Accordingly, the rights of defendant cannot be sacrificed in pursuit of efficiency. It is important not to place undue emphasis on the full co-operation of defendants. The Commission recognises that our system is adversarial and the defendant's role is not to facilitate the prosecution.

4.80 It is essential that any pre-trial hearing be conducted after arraignment in order to properly safeguard the accused person's rights to due process and fair procedures. Reporting restrictions are a crucial component of any system of prosecution appeals that adheres to the principle of due process. The Commission considers that safeguards would be necessary to

¹⁴⁸ See also *People (DPP) v TH* [2006] IESC 48 where the Supreme Court overturned an order of prohibition preventing the prosecution of the accused.

¹⁴⁹ [2006] IESC 55, per Murray CJ, Denham, Hardiman, Geoghegan and Fennelly JJ.

¹⁵⁰ However, see the comments of Denham J in *CC v Ireland* [2005] IESC 48 where she noted the importance of the judicial review remedy in determining prior to trial whether a legal defence was available: "[T]he alternative options, including an appeal to the Court of Criminal Appeal and perhaps ultimately on a point of law of exceptional public importance to the Supreme Court, or a case stated, may not enable a fair and just trial."

protect the identity of the accused person during any appeal from a pre-trial hearing in order to avoid prejudicing the trial proceedings.

4.81 Another consideration to be borne in mind is the possible delays involved in appeals from pre-trial hearings. This problem is particularly important given the State's obligations under the European Convention on Human Rights.¹⁵¹ In deciding whether or not the delay infringes Article 6, the Court will examine the complexity of the case; the conduct of the defence and the conduct of the prosecution. However, the workload of the courts and insufficient state resources are not excuses.¹⁵² In England, where appeals from pre-trial rulings are commonplace, judges are increasingly willing to impose cost on parties for unnecessary delays.¹⁵³ Furthermore, the Commission considers that only rulings that involve a substantial point of law should be subject to appeal to the Court of Criminal Appeal. This is because of the need to encourage effective case management and to avoid frivolous appeals.¹⁵⁴

4.82 Furthermore, the discussion of pre-trial applications for prohibition highlights judicial unease that such applications are used as a way of resolving factual disputes.

4.83 The Commission considers that it is not appropriate to recommend a system of pre-trial hearings at this stage. However, it considers that a study should be conducted into the effects on jurors' appreciation of the evidence in a criminal case caused by *voir dire*s

¹⁵¹ See *Corigliano v Italy* (1983) 5 EHRR 334. In *Doran v Ireland* (2006) 42 EHRR 13, the total delay was 8 years and 5 months. The Court held that the courts are not exempt from Article 6(1) of the Convention. Since the proceedings were not determined within a reasonable period, there was violation of Article 6(1). The Court also held that it is for the State to organise its legal system to ensure the reasonably timely determination of legal proceedings and that a claim based on the constitutional right to justice and the right to litigate was not an effective domestic remedy for the purposes of Article 13 of the Convention. See also *Salesi v Italy* (1998) 26 EHRR 187 at [24]. In addition, the lack of an effective remedy in domestic law constituted a violation of Article 13 of the Convention.

¹⁵² *Zimmerman and Steiner v Switzerland* (1984) 6 EHRR 17.

¹⁵³ Furthermore, in *R v Kuimba* [2005] EWCA Crim 955 at [18], the Court of Appeal held that having regard to delays caused to the hearing of meritorious appeals by unmeritorious applications, the fact that warnings are given before an applicant signs his notice and grounds of appeal, and the fact the ECtHR has considered the compatibility of the court's powers with the European Convention on Human Rights, there should be greater use of the court's powers to make directions for loss of time. Since the publication of the *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 1 WLR 2870, lost time orders are made more commonly, though are generally limited to a few weeks in length.

¹⁵⁴ See *People (DPP) v Scully* [2005] 1 IR 242, discussed at paragraph 3.09, above.

conducted in their absence.¹⁵⁵ This would allow for an examination of jurors' understanding of the evidence in a trial, and would ascertain whether substantial benefits would accrue from introducing mandatory pre-trial hearings on points of law.

(3) Report Recommendation

4.84 *The Commission recommends that a study be conducted into the effects on jurors' appreciation of the evidence in a criminal trial caused by voir dire conducted in their absence.*

¹⁵⁵ The Commission is aware that such a study would require legislation.

CHAPTER 5 SUMMARY OF RECOMMENDATIONS

5.01 The recommendations in this Report may be summarised as follows:

5.02 The Commission does not recommend that a ‘with prejudice’ right of prosecution appeal from cases brought on indictment should be introduced at this time. [Paragraph 1.36]

5.03 The Commission recommends that a ‘without prejudice’ prosecution appeal is desirable. [Paragraph 2.19]

5.04 The Commission recommends that section 21 of the *Criminal Justice Act 2006* be amended to include a requirement that no reference is made in the appeal to any person or place likely to lead to the identification of the acquitted person and that the court shall ensure that the identity of the acquitted person is not disclosed. [Paragraph 2.29]

5.05 The Commission considers that section 21 of the *Criminal Justice Act 2006* be amended to provide for a statutory right to criminal legal aid under the *Criminal Justice (Legal Aid) Act 1962*, and/or costs, regardless of the acquitted person’s means. [Paragraph 2.30]

5.06 The Commission recommends that section 22 of the *Criminal Justice Act 2006* be amended to include a requirement that no reference is made in the appeal to any person or place likely to lead to the identification of the acquitted person and that the court shall ensure that the identity of the acquitted person is not disclosed. [Paragraph 2.31]

5.07 The Commission recommends that section 22 of the *Criminal Justice Act 2006* be amended to provide for a statutory right to criminal legal aid under the *Criminal Justice (Legal Aid) Act 1962*, and/or costs, regardless of the acquitted person’s means. [Paragraph 2.32]

5.08 The Commission recommends that it is not appropriate to confer a power on the DPP to appeal unduly lenient sentences in the District Court. [Paragraph 3.23]

5.09 The Commission welcomes the changes in the role of prosecuting counsel as indicated in the Director of Public Prosecutions’ *Guidelines for Prosecutors*. [Paragraph 3.46]

5.10 The Commission reiterates its previous recommendation in the *Report on Penalties for Minor Offences* that a judge when passing sentence should provide reasons for the imposition of the custodial sentence. The Commission welcomes the phased introduction of digital recording which would facilitate this. [Paragraph 3.47]

5.11 The Commission welcomes the proposed introduction of a sentencing information system. [Paragraph 3.48]

5.12 The Commission recommends that custodial sanctions should be an option of last resort. [Paragraph 3.58]

5.13 The Commission welcomes the introduction of Restriction of Movement Orders in the *Criminal Justice Act 2006*. The Commission considers Restriction of Movement Orders to be a useful tool in developing alternatives to custody. [Paragraph 3.59]

5.14 The Commission reiterates its recommendation in its *Report on Penalties for Minor Offences* that a term of imprisonment of between 6 and 12 months should only be imposed following a jury trial. [Paragraph 3.60]

5.15 The Commission reiterates its recommendation in its *Report on the Court Poor Box: Probation of Offenders* that consideration should be given to the introduction of a comprehensive range of non-custodial sanctions in this jurisdiction. These non-custodial sanctions should include those orders recommended by the *Final Report of the Expert Group on the Probation and Welfare Service 1999*. [Paragraph 3.61]

5.16 The Commission welcomes the introduction of an Enforcement of Fines Bill. [Paragraph 3.62]

5.17 The Commission recommends that the right of the DPP or the Attorney General to certify that the decision of the Court of Criminal Appeal on an application by the DPP under section 2 of the *Criminal Justice Act 1993* involves a point of law of exceptional public importance should be removed. [Paragraph 3.68]

5.18 The Commission recommends that consideration be given by the Courts Service to the introduction of a pre-trial questionnaire. [Paragraph 4.65]

5.19 The Commission recommends that a study be conducted into the effects on jurors' appreciation of the evidence in a criminal trial caused by *voir dire*s conducted in their absence. [Paragraph 4.84]