THE HIGH COURT'S JURISDICTION IN CRIMINAL PROCEEDINGS

OBSERVATIONS OF THE COUNCIL OF HM CIRCUIT JUDGES

1 We agree that there is a distinction to be drawn between the Crown Court's appellate jurisdiction, in relation to appeals against the decisions of Magistrates Courts and a limited number of other bodies, and the jurisdiction as a Court of Trial at first instance.

2 The decisions of the Crown Court under its appellate jurisdiction have been the subject of review by the High Court since the inception of the Crown Court in 1971. As the Commission's paper points out this pursues a pattern of review in relation to inferior Courts following on from the Quarter Sessions jurisdiction. We accept that such a power of review is both necessary and desirable.

3 Currently the decisions of the Crown Court when exercising the appellate jurisdiction may be challenged by Case Stated or by Judicial Review. We agree that an appropriate simple consolidated appeal procedure is necessary. We also agree that there is little purpose served by maintaining two different routes by which that might be achieved. Thus in relation to appeals from the appellate jurisdiction of the Crown Court we support the view that a new statutory appeal procedure would be a desirable step.

4 We agree that if the existing procedures of appeal by Case Stated and Judicial Review are incorporated in a new statutory appeal procedure such a procedure must apply to all cases where Case Stated and Judicial Review were previously available including those limited situations where decisions of the Crown Court as a Court at first instance were subject to review. Those situations, as the consultation paper indicates, did not apply to "*its jurisdiction in matters relating to trial on indictmen*t". The Commission criticises this an imprecise term although it has been used as the defining criteria since 1971 and, as we indicate below, reference to "*no adequate remedy"* in the Commissions paper may well be subject to the same criticism

5 We would be concerned by an extension of that principle. As Judges of first instance who try the vast majority of criminal cases passing through the Crown Court it is the Circuit Bench that would have to cope with the practical implications. Such may be far greater than the consultation suggests. Ongoing case management alone, particularly in jury trials where jurors are generally expecting to serve for two weeks, would present real practical difficulties. In addition, of course, much work has been done in recent times to improve the efficiency of the trial process, which was previously considered to be slow and cumbersome. Implementation of more extensive challenges during the course of proceedings risks undermining that work.

6 It is not without significance that the present procedures for challenging interlocutory decisions in the Crown Court are limited in extent. For example an appeal lies to the Court of Appeal from decisions taken in Preparatory Hearings. It is necessary to look at what those Preparatory Hearings are intended to achieve and then consider the types of cases to which they apply to appreciate the reasoning. Preparatory Hearings are

generally ordered in cases of complexity in order to effectively manage long trials. The matters dealt with are largely matters of law or evidence that might be determined prior to the trial commencing. Thus the matters that might delay the progress of the trial can be conveniently dealt with before the jury is sworn. Of course a general right of appeal against the verdict also lies but in a long trial where expense is substantial and the cost of retrial prohibitive it is clearly necessary to provide a route for the disposal of appeals in relation to these matters before the expense is incurred. It is an exceptional procedure to meet the needs of exceptional cases.

7 A point of similar validity might be made in relation to Prosecution appeals against terminating rulings. If an application to obtain a ruling that effectively ends the proceedings by the defence is unsuccessful the defence may still argue the case before a jury and if that fails may still pursue the general right of appeal to the Court of Appeal. The Prosecution do not have such avenues open to them. There is not quite the imbalance that the consultation document might suggest. Theoretically if there was a right to appeal all "determinations, judgments, orders and rulings" available to the defence, who have a general right of appeal against conviction, a series of unsuccessful appeals against interlocutory decisions, including case management decisions, could seriously frustrate the trial process. A simple provision for leave would not prevent since any such provision would have to include a right to renew where leave is refused. It will be appreciated that "sanctions" in the criminal courts have few, if any, real teeth.

8 It must also be borne in mind that a procedure that might delay the start of a Trial could have serious implications for the conduct of criminal litigation and the efficient operation of the Courts. Unless there was provision for very speedy resolution of pre trial challenges, which would present an already overburdened Court of Appeal with substantial challenges, the current protection of Custody Time Limits would have to be reviewed. Cases might be unreasonably delayed, to the advantage of a defendant who seeks to frustrate the process to increase the strain placed upon victims and witnesses or merely take advantage of failing memories. Further there would be listing implications which could seriously interfere with the efficient disposal of Court business introducing unacceptable delays.

9 The consultation is right to point out that the underlying principle adopted by the Courts, and to a large extent by the legislators, has been that trials should not be unduly delayed by satellite litigation or by the exercise of additional rights of appeal where there is an existing avenue for appeal. Whilst we accept that there may be arguments of the sort postulated at the end of paragraph 1.31 it must surely be necessary to weigh against those the rights of all involved in the process to a conclusion of the proceedings within a reasonable time. Human Rights issues are questions of proportionality which require balancing the interests of all involved in the process including victims and witnesses.

10 Whilst we can understand the logic of identifying the appropriate avenues for appeal by reference to the stage the proceedings have reached we are far from satisfied that would address the concerns expressed above. Currently avenues for challenging rulings, with the exception of

terminating rulings, are such that those challenges are, in practice, against rulings made before a jury is sworn, for example in the course of preparatory hearings[1]. There have been relatively few appeals against terminating rulings and we understand that there are strict protocols observed by the CPS in relation to challenges. Any proposal that results in additional means of challenge once a jury is sworn and a trial underway risk serious disruption to the proper and efficient progress of trials, problems and inconvenience for jurors and stress for victims and witnesses. It must never be forgotten that a general right of appeal can be exercised after conviction.

11 The abolition of present forms of High Court jurisdiction in relation to appeals from the appellate decisions of the Crown Court and those, presently limited, cases where there is challenge to rulings in the Crown Court has much to commend it. The difficult decision is whether any new statutory appeal procedure should be to the High Court or to the Court of Appeal. Both jurisdictions will, with justification, claim to be overburdened already. Our view is that whilst the burden should fall on the High Court, if only because the delay to appeals in more serious cases in the Court of Appeal might otherwise be further extended, the practical consequences will be to provide that these appeals go to the Court of Appeal. We deal with how such appeals might arise below but in our experience the delays presently experienced with a restricted process give real cause for concerns. If there was to be any additional burden in relation to interlocutory matters we doubt that the system could cope.

12 Although the Commission's paper indicates in Part 6 that the terms of reference do not extend to Magistrates Courts we are bound to indicate that if the appeals procedure is to be subject to restructure then the opportunity should be taken to consider the avenues of appeal from Magistrates Courts. Part 2 makes comment on the fact that currently an appellant may be faced with a choice of three potential course of action; appeal to the Crown Court, appeal to the High Court by Judicial Review or appeal to the High Court by Case stated. A comparison of the flow charts on pages 59 and 84 illustrates the complexity of the present procedures. If there is to be a statutory right of appeal against the decisions of the Crown Court in its appellate capacity there is no logical justification for retaining appeals from the Magistrates Court to the High Court by Judicial Review or Case stated. We believe that the better option would be to provide that all appeals from the Magistrates Court, including those permitted to the Prosecution against terminating rulings, should proceed to the Crown Court. This would result in a simpler procedure and the criminal Courts having jurisdiction in relation to criminal appeals at all levels. Of course there would be need to consider whether all such appeals should proceed by way of re hearing or whether those on matters of law alone should be heard by a Judge sitting alone.

[1] Examples of these and other procedures are set out in Part 2

QUESTION 1
Do the consultees agree that section 28(1) of the Supreme Court Act should be amended to preclude all orders, judgments or other decisions of the Crown Court made in criminal proceedings being challenged in the High Court?

13 We agree.

QUESTION 2
Do consultees agree that section 29(3) of the Supreme Court Act by which certain orders, judgments or other decisions of the Crown Court may be challenged by judicial review should be repealed?

14 We agree

QUESTION 3
Do consultees agree that the Criminal Appeal Act should be amended so as to enable all appeals against conviction and/or sentence of the Crown Court (whether exercising its first instance jurisdiction, its appellate jurisdiction or its sentencing jurisdiction) lie to the Court of Appeal.

15 We agree.

QUESTION 4
Do consultees agree that extending the Criminal Appeal Act to enable defendants to challenge convictions and sentences of the Crown Court when exercising its appellate jurisdiction would be an adequate substitute for challenging such convictions and sentences by case stated and judicial review?

16 We agree.

QUESTION 5
Do consultees agree that an appeal to the Court of Appeal against conviction or sentence following a rehearing in the Crown Court should require leave?

17 We agree. This would mirror the general position in relation to appeals from the Crown Court as a Court of first instance.

Question 6
Do consultees believe that there should be a more stringent leave requirement than that currently contained in the Criminal Appeal Act in case where a conviction results from or a sentence is imposed by the Crown Court exercising its appellate jurisdiction?

18 We recognise the force in the argument that, when exercising appellate jurisdiction, the Crown Court will not be the first Court to consider the case and will be considering an appeal against the first instance decision. In such a situation we agree that more stringent leave requirements are appropriate.

Question 7
Do consultees agree that section 58 of the Criminal Justice Act 2003 should be extended to all terminating rulings made by the Crown Court irrespective of whether the ruling was made in relation to an offence being tried on indictment?

19 We agree. We agree the logic of paragraph 4.29 in relation to prosecution appeals.

Question 8
Do consultees agree that section 36 of the Criminal Justice Act 1972 (Attorney¬General's reference on a point of law following acquittal) should be extended so as to permit the Attorney-General, following an acquittal by the Grown Court when exercising its appellate jurisdiction, to refer to the Court of Appeal a point of law which has arisen in the case?

20 We agree but this rather underlines the point we have made at paragraph 11 above. It will be a unusual case where the Crown Court makes a terminating ruling on appeal when the point was not taken and argued before the Magistrates Court. If there is but one route of appeal appeals against such rulings, whether in the Magistrates Court or in the Crown Court, such appeals would follow the same path as in logic they should.

Question 9
Do consultees agree that if the prosecution is unable to overturn an acquittal of the Crown Court when exercising its first instance jurisdiction (other than one resulting from a terminating ruling), it should also be unable to overturn an acquittal of the Crown Court when exercising its appellate jurisdiction?

21 We agree.

Question 10
Do consultees agree that section 36 of the Criminal Justice Act 1988 (Attorney - General's reference of an unduly lenient sentence following a trial on indictment) should not be extended to sentences imposed by the Crown Court when exercising its appellate jurisdiction?

22 We agree.

Question 11
Do consultees agree that there should be a new statutory appeal in the Court of Appeal to enable the Court of Appeal to entertain challenges to determinations, judgments, orders or rulings made by the Crown Court on the grounds that the decision or ruling:
(1) is wrong in law:
(2) involves a serious procedural or other irregularity or
(3) is one that no competent and reasonable tribunal could properly have made?

23 (a). The question is posed in a very general form. Insofar as it is necessary to replace appeals to the High Court by Case Stated or Judicial Review we agree that a new statutory procedure is desirable. In saying that we do not agree that this should convey additional rights of appeal in other situations particularly in relation to the first instance jurisdiction of the

Crown Court. Currently the circumstances where such challenges are permitted are sensibly and necessarily limited and we believe that should remain the case.

(b) We believe that such a procedure should be principally directed toward appeals from the Crown Court exercising its appellate frunctions.

(b). If a new statutory appeal is introduced as set out at (a) above we agree that the grounds identified in the question are appropriate.

Question 12
Do consultees agree that the new statutory appeal should be subject to leave being granted by the Crown Court?

24 We agree.

Question 13
Do consultees agree that the new statutory appeal should not be capable of being invoked to challenge any conviction, sentence or acquittal arising out of any proceedings in the Crown Court?

25 We agree.

Question 14
Do consultees agree that the new statutory appeal should not be capable of being invoked to challenge any decision or ruling of the Crown Court against which an appeal lies to the Court of Appeal by virtue of any other enactment?

26 We agree.

Question 15
Do consultees agree that the Court of Appeal when determining the proposed statutory appeal should not have the power to make prerogative orders but instead should be able to confirm, reverse or vary a decision?

27 We agree.

Question 16
Do consultees agree that the Court of Appeal. when determining the proposed statutory appeal should have the power to reverse a decision and remit the case to the Crown Court with its opinion for a further decision to be made?

28 We agree.

Question 17
Do consultees agree that, subject to obtaining leave from the Crown Court, any person directly affected by a determination or order made after the jury has been discharged in a trial on indictment (other than a determination or order which is a 'sentence" for the purposes of the Criminal Appeal Act 1968 or against which an appeal lies to the Court of Appeal by virtue of any other enactment) should be able to appeal to the Court of Appeal on the grounds that the determination or order:
(1) is wrong in law:
(2) involves a serious procedural or other irregularity or

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

29 We agree that this is appropriate on the basis that a refusal of leave may result in a renewed application to the Court of Appeal.

Question 18
Do consultees agree that:
(1) a defendant or directly affected third party
(2) subject to obtaining the leave of the Crown Court,
(3) should be able to appeal forthwith to the Court of Appeal against any determination, judgment, order or ruling made after the jury has been sworn and before it has been discharged (other than one against which an appeal lies by virtue of any other enactment).
(4) on the grounds that the determination, judgment, order or ruling:
(a) is wrong in law;
(b) involves a serious procedural or other irregularity; or
(c) is one which no competent and reasonable tribunal could properly have made
(5) If
(a) being unable to appeal forthwith he or she would have no other adequate remedy in respect of the determination, judgment, order or ruling and
(b) the determination, judgment, order or ruling is one which
(i) affects the liberty of the defendant or third party or
(ii) the defendant or third party seeks to challenge as being unlawful by virtue of section 6(i) of the Human Rights Act 1998

30 We have set out some observation at paragraph 10 above. Paragraph 5.43 in the Commission's paper correctly identifies the issue. An unsuccessful Defendant has a right of appeal against the verdict at the conclusion of the trial and that right will remain although affected to a degree by the proposals in section 42 of the Criminal Justice and Immigration Bill which we have opposed in consultations.

(a) Paragraph 5.47 identifies bail decisions as a potential problem. The reality is that decisions about bail will have been made before the trial commences. There may be occasions when the particular circumstances require a review of that decision by the trial Judge, for example where there is interference with witnesses or grounds for believing that the defendant has decided the case is going so badly his continuing attendance would do him no good. The concept of delaying the ongoing trial whilst an appeal against such a decision is determined is quite unacceptable and disproportionate as is recognised in paragraph 5.49.

(b) We consider that the concept of "no adequate remedy" is imprecise and could potentially give rise to problems. It is important to bear in mind that unintended consequences may flow from measures introduced with the best of intentions.

(c) There is, of course, a right to appeal in relation to determination of contempt proceedings which may be invoked by those affected and which does not disrupt the trial process.

(d) Decisions concerning the identity of parties, publicity and the like are generally taken either before the trial begins or at the conclusion of proceedings. There is no necessity to introduce theses proposals, risking the consequences of satellite litigation in general, to cater for the few cases where those decisions are made.

(e) We believe that the introduction of such a general and imprecise basis for challenge during trial is quite unnecessary and undesirable. The consequences are likely to result in disruption and uncertainty. It would open Pandora's Box.

Question 19 Alternatively; do consultees agree that:
(1) a defendant or a directly affected third party,
(2) subject to obtaining the leave of the Crown Court,
(3) may appeal forthwith to the Court of Appeal against any determination, judgment. order or ruling made on or after the day on which the trial proper is listed to start and before the jury is discharged (other than one against which an appeal lies by virtue of any other enactment),
(4) on the grounds that the determination, judgment, order or ruling:
(a) is wrong in law:
(b) involves a serious procedural or other irregularity; or
(c) is one that no competent and reasonable tribunal could properly have made,
(5) if
(a) unless he or she is able to appeal forthwith he or she would have no adequate remedy in respect of the determination, judgment, order or ruling~ and
(b) the determination. judgment, order or ruling is one which:
(i) affects the liberty of the defendant or the third party: or
(ii) the defendant or third party seeks to challenge as unlawful by virtue of section 6(1) of the Human Rights Act 1998.

31 The reservations contained in paragraph 5.92 of the Commissions paper are well founded and identify potentially serious practical difficulties.
(a) A regime exists for those cases where pre trial rulings are anticipated and required and the efficient conduct of the trial process makes final determination necessary. In such cases the trial is deemed to commence with the Preparatory Hearing even though the jury may not be sworn until some time later.
(b) The vast majority of trials take no more than a few days and the disruption caused by delay in those very few, and largely unidentified, cases where this might apply would not be justified or proportionate.
(c) Our experience of the practicalities suggests that encouraging the parties to seek pre trial rulings well in advance of trial would not meet with much success. First that may require the co operation of the Defendant which will not be forthcoming in many cases. Second it is often the case that issues crystalise on the day of trial when all those who are going to attend are there and changing circumstances dictate the rulings that might be sought.
(d) We recognise that there are, from time to time, some cases where a third party might wish to intervene and R(TB) v The Combined Court at Stafford [2006] EWHC 1645 (Admin) is a good example of that. Please see our comments at paragraph 32 below.
(e) As indicated above the range of determinations. judgments, orders or rulings is small and the risks of disruption by satellite litigation are disproportionate.

Question 20
Do consultees believe that a defendant or directly affected third party should also be able to appeal forthwith against a determination, judgment, order or ruling made after the jury has been sworn and before it is discharged if:
(1) the appeal would not significantly interrupt the proceedings before the jury; and/or
(2) it would be in the interests of justice

32 We do not believe this to be a practical proposition in the firm in which it is set out. The only basis upon which we could see a purpose for such a provision would be to deal with those few cases, such as R(TB) v The Combined Court at Stafford [2006] EWHC 1645 (Admin) where a third party might wish a determination. Thus we would be inclined to consider something along the lines set out above available to an affected third party where that third party seeks to invoke Articles 8 or 9 of the Human Rights Act 1998

Question 21
Do consultees agree that a defendant or third party has an 'adequate' remedy in respect of a determination judgment, order or ruling if:
(1) he or she can resort to a specific statutory appeal in respect of the determination, judgment, order or ruling; or
(2) no adverse effect:
(a) would materialise from the determination, judgment. order or ruling in the event of the defendant being acquitted; and
(b) no adverse effect, other than any sentence passed following conviction, would materialise from the determination, judgment, order or ruling if the appeal against conviction was successful?

33 We believe that the term "adequate remedy" is imprecise and the concept is undesirable as set out in paragraph 30 above. The provisions of (2) above do nothing to alleviate our concerns.

Question 22
Do consultees agree that:
(1) a defendant or a directly affected third party
(2) subject to obtaining the leave of the Crown Court
(3) should be able to appeal forthwith to the Court of Appeal against any determination, judgment, order or ruling made before the jury has been sworn (other than one against which an appeal lies by virtue of any other enactment),
(4) on the grounds that the determination, judgment, order or ruling:
(a) is wrong in law;
(b) involves a serious procedural or other irregularity; or
(c) is one that no competent and reasonable tribunal could properly have made:
(5) if:
(a) being unable to appeal forthwith, he or she would have no adequate remedy in respect of the determination, judgment, order or ruling; or
(b) he or she, even if unable to appeal forthwith, would have another adequate remedy in respect of the determination, judgment order or ruling but the potential advantages of permitting an appeal forthwith are such as to make it the right course?

34 We do not consider that there is any basis for including a right to appeal against a determination, judgment, order or ruling made before the jury is sworn in circumstances where no such appeal would lie after the jury is sworn save in those limited cases where the Preparatory Hearing regime applies. The rationale for that regime is set out in paragraph 5.76

(a) As indicated at paragraph 31(c) above such rulings are, in practice, usually made so close to the start of a trial as to be part of the trial process.

(b) We do not believe that the delay to the trial process would be proportionate for the reasons we have set out above in paragraph 31

(c) The defendant has an existing remedy by way of appeal against conviction. We believe that references to an "adequate remedy" are imprecise and would encourage satellite litigation and delay. This would have the effect of wearing down victims and witnesses as a tactic by the unscrupulous, of whom there are many in the criminal sphere.

Question 23

Alternatively, do consultees agree that:

(1) a defendant or directly affected third party,

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

(3) may appeal forthwith to the Court of Appeal against any determination, judgment, order or ruling (other than one against which an appeal lies by virtue of any other enactment) made before the day on which the trial proper is listed to start,

(4) on the grounds that it is:

(a) wrong in law:

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

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

(5) if:

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

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

35 The subtle change in timing does not alter our views.

Question 24

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

36 In effect at paragraphs 5.78 to 5.81 the paper postulates the need for an appeal process as a safeguard against interlocutory decisions by a capricious judge. If such a safeguard was required then prohibiting an application to the Court of Appeal for renewal of an appeal after that judge's refusal of leave would be quite inappropriate. Indeed the decision to refuse might itself be open to challenge. The fact that a renewal of an application for leave might further delay the proceedings is an indication that the procedure itself would be disproportionate.

Question 25
Do consultees agree that, apart from decisions relating to custody time limits, the prosecution should not be able to invoke the new statutory procedure in order to challenge any determination judgment, order or ruling made prior to the jury being discharged.

37 We do not believe it to be appropriate to extend the Prosecutions rights to challenge determinations judgments, orders or rulings beyond those already provided in law.

Question 26
Do consultees agree that decisions and rulings made by the trial judge in relation to the composition of the jury should be treated as having been made after the jury has been sworn?

38 We agree.

Question 27
Do consultees agree that the prosecution should be able to invoke the new statutory appeal in order to challenge any decision relating to custody time limits?

39 We agree.

Question 28
Do consultees believe that special provision should be made for cases tried on indictment without a jury. If yes, what form should such provision take?

40 No

Question 29
Do consultees agree that, subject to obtaining leave from the Crown Court, any person directly affected by a determination or order made by the Crown Court after it has determined an appeal by way of rehearing (other than a determination or order which is a 'sentence' for the purposes of the Criminal Appeal Act 1968 or against which an appeal lies to the Court of Appeal by virtue of any other enactment) should be able to appeal to the Court of Appeal on the grounds that the determination or order:
(1) is wrong in law;
(2) involves a serious procedural or other irregularity; or
(3) is one that no competent and reasonable tribunal could properly have made?

41 We agree

Question 30
Do consultees agree that
(1) a defendant or a directly affected third party
(2) subject to obtaining the leave of the Grown Court
(3} should be able to appeal forthwith to the Court of Appeal against any determination, judgment, order or ruling made by the Crown Court prior to determining an appeal by way of rehearing
(4) on the grounds that the determination, judgment. order or ruling

(a) is wrong in law:
(b) involves a serious procedural or other irregularity: or
(c) is one that no competent and reasonable tribunal could properly have made
(5) if:
(a) being unable to appeal forthwith, he or she would have no adequate remedy in respect of the determination, judgment, order or ruling; and
(b) the determination, judgment, order or ruling is one which:
(i) affects the liberty of the defendant or third party; or
(ii) the defendant or third party seeks to challenge as being unlawful by virtue of section 5(1) of the Human Rights Act 1996.

42 (a) We do not believe this to be necessary. We are here considering appeals from summary trials. Such hearings are unlikely to exceed a day in length and very many will be substantially shorter. There will be the rights of appeal provided by the statutory appeal procedure to which we refer at paragraph 23 above.

Part 6

43 See paragraph 12 above.

HH Judge David Swift
Chairman
Criminal Sub Committee
Council of HM Circuit Judges
18th February 2008