Law Commission

Reforming the law

Criminal Appeals

A consultation paper

Consultation Paper 268

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27 February 2025

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THE LAW COMMISSION – HOW WE CONSULT

About the Law Commission: The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Law Commissioners are: The Rt Hon Lord Justice Fraser (Chair), Professor Nicholas Hopkins, Professor Penney Lewis and Professor Alison Young. The Chief Executives are Joanna Otterburn and Roshnee Patel.

Topic of this consultation: We are conducting a review the law governing appeals in criminal cases, including appeals against conviction and sentence, with a view to ensuring that courts have powers that enable the effective, efficient and appropriate resolution of appeals.

Geographical scope: This consultation applies to the law of England and Wales.

Duration of consultation: We invite responses from 27 February 2025 to 30 May 2025.

Responses to the consultation may be submitted using an online form at: https://consult.justice.gov.uk/law-commission/criminalappeals.

Where possible, it would be helpful if this form was used.

Alternatively, comments may be sent:

By email to criminal.appeals@lawcommission.gov.uk
OR
By post to Criminal Appeals Team, Law Commission, 1st Floor, Tower, 52 Queen Anne's Gate, London, SW1H 9AG.

If you send your comments by post, it would be helpful if, whenever possible, you could also send them by email.

Availability of materials: The consultation paper and a summary of it is available at: https://lawcom.gov.uk/project/criminal-appeals/.

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After the consultation: We will analyse the responses to the consultation, which will inform our final recommendations for reform to Government, which we will publish in a report.

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Glossary

This is not a comprehensive glossary of terms relating to criminal appeals, nor is it a glossary of legal terms. It includes only terms that have been used throughout this consultation paper and defines them as they are commonly understood in the criminal appeals context. Italicised words in definitions are defined elsewhere in the Glossary.

acquittal: A formal finding by a *court* that a person accused of a crime is not guilty.

Administrative Court: A specialist *court* within the King's Bench Division of the High Court which can review decisions made by people or bodies with a public law function, including some courts. *Judicial review* proceedings and appeals by way of *case stated* are heard in the Administrative Court.

appellant: Narrowly, a person exercising a legal right to *appeal* against a decision, having been granted *leave to appeal* (if needed). Broadly, anyone who is seeking to challenge a decision. In criminal appeals, appellants are overwhelmingly *defendants*, but the *prosecution* or third parties may also be appellants.

appeal: A review of a decision by a higher *tribunal* according to law. Principally, appeals challenge conclusions or decisions reached by *courts* (including judges and/or juries) in light of the evidence before them, but unused or new evidence can be used as a ground of challenge. The intensity of review depends on the *appeal court* and the circumstances of the case, meaning that sometimes the appeal court only assesses whether a conclusion was reasonable, but sometimes it will rehear the evidence and remake the lower court's decision.

appeal court: A type of *court* that (either only or in relation to certain cases) deals with an *appeal*, rather than *first instance* proceedings.

applicant: A person who has made an application to bring an appeal who requires *leave to appeal* (but where leave has not yet been granted), or an application to the *Criminal Cases Review Commission (CCRC)* to refer a case to an *appeal court*.

arraignment: The formal process by which the court clerk reads out the list of offences the *defendant* has been charged with (the *indictment*) and asks the *defendant* to plead 'guilty' or 'not guilty'.

Attorney General: A government minister who acts as the principal legal adviser to the Government. The Attorney General, or their deputy, the Solicitor General, may refer a case to the *Court of Appeal Criminal Division (CACD)* if they think that a sentence is unduly lenient or if they think the law needs to be clarified after an *acquittal*.

burden of proof: The onus that is imposed on a party to prove a fact or facts. The party who bears the burden of proof will be required to prove those facts to a particular degree, known as the *standard of proof*. In criminal cases, the burden of proof is generally on the *prosecution*, although sometimes it will be on the *defendant* who seeks to rely on a particular *defence*. See *standard of proof*.

case stated, **appeal by way of**: A challenge to a decision of a *magistrates' court*, or the *Crown Court* sitting as an *appeal court*, made by asking the *court* that made the decision to "state" the case (ie provide an account of its findings) to the *High Court*.

children (and young people): We refer to all those under 18 as children. When referring to "children and young people", we may refer to those under 25.

common law: A body of law formed and developed by judges through binding precedential decisions of the *courts*.

complainant: A person who makes a formal complaint that an offence has been committed against them. They will usually act as the *prosecution's* witness in the trial process.

convicted person: We use this term in place of *offender* to refer to a person who has been convicted of an offence but who does not necessarily agree that they are guilty.

conviction: A formal finding by a *court* that a person accused of a crime is guilty.

court: A body or *tribunal* set up by law to decide disputes between parties. In criminal law, these disputes are usually between the state (the *prosecution*) and an individual (the *defendant*). In this paper, "court" in lower case refers generally to any court which has *jurisdiction* over England and Wales.

Court of Appeal: The highest *court* of England and Wales in the United Kingdom. Set up in 1875, it did not deal with criminal appeals until 1966, when the *Court of Criminal Appeal* was merged with it to create one court with two divisions: the Court of Appeal Civil Division and the *Court of Appeal Criminal Division (CACD)*.

Court of Appeal Criminal Division (CACD): The criminal division of the *Court of Appeal* (the other division being the Civil Division). The CACD is entirely statutory, meaning that all of its powers and *jurisdiction* come from legislation, principally the *Criminal Appeal Act 1968* and the Senior Courts Act 1981. The CACD sits as an *appeal court* for multiple *first instance* courts, but primarily for the *Crown Court*. Some applications can also be made straight to the CACD.

Court of Criminal Appeal: The predecessor *court* to the *Court of Appeal Criminal Division (CACD)*. Created by the Criminal Appeal Act 1907, the Criminal Appeal Act 1966 merged it with the *Court of Appeal*.

Criminal Appeal Act 1968: This Act consolidated legislation concerning appeals to the *Court of Appeal Criminal Division*, and is the main legislation governing appeals to that Court.

Criminal Appeal Act 1995: This Act made changes to the *Criminal Appeal Act 1968*, and created the *Criminal Cases Review Commission (CCRC).* It is the main legislation governing the CCRC.

Criminal Appeal Office (CAO): The office which supports the *Court of Appeal Criminal Division (CACD)*. It is part of HM Courts and Tribunals Service, a body independent of Government that administers courts and tribunals, and is headed by the *Registrar of Criminal Appeals*.

Criminal Cases Review Commission (CCRC): The statutory body responsible for investigating alleged miscarriages of justice in England, Wales and Northern Ireland.

Crown Court: The *court* which hears criminal trials on *indictment*, normally as a judge sitting with a jury. It also hears *appeals* against *conviction* and *sentence* in *summary* proceedings, normally with a judge sitting with two or more magistrates. A *magistrates' court* may send a *summary* conviction to the Crown Court for sentencing if the magistrates' court's sentencing powers are insufficient.

Crown Prosecution Service (CPS): The principal independent body responsible for prosecuting criminal offences in England and Wales on behalf of the state, after an investigation by the police or another investigative body. Often referred to as the *prosecution*.

double jeopardy: Narrowly, being *prosecuted* and *acquitted* for an instance of offending and then being prosecuted again for the same offending. Broadly, subjecting someone to criminal proceedings for the same offending, be that prosecution or *sentencing*. We talk about the 'principle against double jeopardy' as the principle of avoiding or preventing double jeopardy.

defence: Narrowly, a legal or factual argument that results in a *defendant* not (fully or partially) being guilty of a certain criminal offence. Broadly, the side representing the defendant, including their lawyers or witnesses, facing the *prosecution*.

defendant: A person formally charged with committing a criminal offence.

Director of Public Prosecutions (DPP): The head of the *Crown Prosecution Service (CPS)*. Though technically ranking below and 'superintended' by the *Attorney General* (and their deputy, the Solicitor General), the DPP is operationally independent of Government. The power to prosecute certain offences or challenge certain rulings can only be exercised with the DPP's consent.

Divisional Court: A constitution of the *High Court* consisting of at least two judges. The *Administrative Court* usually sits as a Divisional Court when hearing *appeals* relating to criminal proceedings.

either-way offence: An offence that can be tried either on *indictment* in the *Crown Court* or *summarily* in a *magistrates' court*.

European Convention on Human Rights (ECHR): An international treaty between the states of the Council of Europe which lays out the human rights of people in these countries. The UK helped draft the ECHR and was among the first states to ratify it in 1951.

European Court of Human Rights (ECtHR): An international *court* which rules on applications brought by individuals or states regarding possible violations of the rights set out in the *European Convention on Human Rights (ECHR)*.

expert evidence: Evidence given by an expert witness on any admissible matter which calls for expertise and which they are qualified to provide.

first instance, **courts of**: A *court* in which a case is first determined, as opposed to an *appeal court*. Although almost all criminal cases begin in a *magistrates' court*, the *Crown Court* remains a court of first instance for trials on *indictment* as it hears the substantive proceedings which result in a *verdict* and any *sentence*.

High Court: A *court* with limited appellate *jurisdiction* relating to criminal proceedings not tried on *indictment*. Cases are heard in the *Administrative Court*, a specialist court within the *King's Bench Division of the High Court*.

indictment: The document containing the charges against the *defendant* for trial in the *Crown Court*. An information and charge sheet fulfil an equivalent purpose in a *magistrates' court*.

judicial review: A type of *court* proceeding in which a court reviews the lawfulness of a decision made by, or action of, a public body.

jurisdiction: Narrowly, the extent of a *court's* legal authority or power to hear a case. Broadly, the geographical area in which a legal system operates and its laws are enforced.

King's Bench Division (KBD): A division of the *High Court*. The KBD hears, among other things, *appeals* by way of *case stated* from decisions of *magistrates' courts* and the *Crown Court*. The *Administrative Court* is a specialist court within the KBD. When the Sovereign is female, the division is known as the Queen's Bench Division (QBD).

Law Commission: A statutory independent body that is required to keep the law in England and Wales under review and recommend reform where it is needed.

leave (to appeal): Permission granted by a *court* or other body. Frequently, a party will need permission before they can make an *appeal* against a decision; if leave is refused, the appeal itself cannot be heard.

magistrates' court: A *court*, usually composed of three magistrates (otherwise known as justices of the peace), where *summary* trials occur.

no case to answer: A submission of no case to answer can be made following the conclusion of the *prosecution's* evidence at trial. It is a submission that the conduct alleged does not amount to an offence or that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it. If the application is successful, the *defendant* will be *acquitted* of the offence.

offender: This term refers to a person who has been *convicted* in criminal proceedings. In cases which are the subject of an *appeal*, or where a *miscarriage of justice* is alleged, it may be in question whether the person was guilty. We therefore generally refer instead to the *convicted person*, unless their guilt is not in question (for instance, where a person had admitted guilt, but is appealing against their *sentence*).

Parole Board: An independent body that carries out risk assessments on certain prisoners to determine whether they can be safely released into the community.

Preparatory hearing: A pre-trial hearing ordered by the judge in complex, lengthy or serious cases to identify legal issues necessary to manage the trial or to assist jurors with their understanding of the case. With *leave*, both the *prosecution* and *defence* may *appeal* against the judge's decision in a preparatory hearing to the *Court of Appeal Criminal Division (CACD)*.

prosecution: The institution and conducting of legal proceedings, usually on behalf of the state, against the *defendant* in relation to a criminal charge. The term is also used to refer to the organisation instituting those proceedings, and its representatives in the proceedings, which, in most cases, is the *Crown Prosecution Service (CPS)*.

quash: The process of a *court* destroying or cancelling a decision or conclusion reached at some earlier stage by a different court or body.

Queen's Bench Division (QBD): see *King's Bench Division (KBD)*.

refer / **reference**: We use these terms to describe the power of the *Attorney General* to formally refer a *sentence* or *acquittal* to the *Court of Appeal Criminal Division (CACD)* for consideration as a type of *appeal*. We also use the terms to describe the *Criminal Cases Review Commission's (CCRC)* power to formally refer *convictions* or *sentences* of the *magistrates' court* or *Crown Court* to the Crown Court and CACD respectively for consideration on appeal.

Registrar of Criminal Appeals: The judge with overarching responsibility for the *Criminal Appeal Office (CAO)*. They exercise functions under the *Criminal Appeal Act 1968* and other legislation, and under the Criminal Procedure Rules.

Royal Commission on Criminal Justice (1991-93), The "Runciman Commission": the Commission chaired by Viscount Runciman and established in 1991 by the Home Secretary to examine the English criminal justice system and make recommendations to increase the efficiency and effectiveness of the system.

Royal Prerogative of Mercy: The legal power of the Sovereign, exercised on the advice of the Justice Secretary, to decrease or cancel a person's *sentence*. Historically, this power was used to give 'mercy' to those sentenced to death. The exercise of the power has no effect on the fact of a person's *conviction*.

sentence: The order(s) made by a court when dealing with an offender following their *conviction*, including the punishment judges or magistrates order following a *conviction*. Under section 50 of the Criminal Appeal Act 1968, for the purposes of an *appeal* to the *Court of Appeal Criminal Division (CACD)*, "sentence" can include a hospital order, a recommendation for deportation or a confiscation order.

Sentencing Council: The Sentencing Council of England and Wales is the body responsible for developing *sentencing guidelines* in England and Wales.

sentencing guidelines: Guidelines prepared by the *Sentencing Council* of England and Wales. They set out different levels of *sentence* based on the harm caused to the *victim* and the blameworthiness of the *offender*, as well as factors *courts* should take into account when sentencing. Sentencing guidelines help to ensure that there is consistency in sentencing across courts in England and Wales.

stakeholder: We use this as an umbrella term to refer to any person or entity affected by, or simply interested in, a project. This includes, for example, individuals, charities, campaigning groups, think-tanks, academics, lawyers and professional associations. It also includes bodies and individuals that are associated with the state, such as government departments, independent statutory bodies or appointees, police, *prosecutors*, and parliamentarians.

standard of proof: The degree to which a party which bears the *burden of proof* must prove an allegation in order for the *court* to find in their favour on that issue. In civil proceedings, the standard of proof is normally "on the balance of probabilities" (ie more likely than not). In criminal proceedings, the *prosecution* must prove their case "beyond reasonable doubt". For the benefit of the jury in the *Crown Court*, this is usually expressed as requiring the jury to be "satisfied so that [it is] sure" of the *defendant's* guilt.

summary or **summary-only offence:** An offence normally triable only in a *magistrates' court*; in contrast to an *indictable* or *either-way* offence.

tribunal: A body that decides on legal disputes, including but not limited to *courts*. In jury trials, the judge is the tribunal of law, deciding all legal issues, and the jury is the tribunal of fact, deciding all factual issues.

verdict: A decision at the end of a trial as to whether the *defendant* is guilty or not guilty.

victim: A person against whom an offence has been committed. In cases which are the subject of an *appeal*, or where a miscarriage of justice is alleged, it may be in question whether any offence was committed. We may therefore refer instead to the *complainant* or alleged victim.

Westminster Commission: The Westminster Commission on Miscarriages of Justice was established by the All-Party Parliamentary Group on Miscarriages of Justice in 2019, to review the work of the *Criminal Cases Review Commission (CCRC)*.

Chapter 1: Introduction

1.1 A person who has been convicted of a criminal offence can seek to challenge either their conviction or sentence by way of an appeal. Appeals serve a vital corrective function for individuals, whether this is to correct a miscarriage of justice (for instance, the conviction of someone who is factually innocent) or to correct a legal error (for instance, the imposition of a harsher sentence than is legally permissible). They also serve important public functions in ensuring that the criminal law is interpreted and applied consistently and predictably, and in developing the common law. Literature on criminal appeals identifies these functions as including:

(1) to act as a safeguard against wrongful convictions;[1]

(2) to remedy violations of the right to a fair trial in earlier proceedings;[2]

(3) to provide legal consistency by correcting anomalous application of the law[3] and resolving conflicting interpretations of the law;[4]

(4) to encourage better decision-making through the prospect of review;[5] and

(5) to enable the development of substantive and procedural doctrines relating to criminal justice.[6]

1.2 However, there can be a tension between the principle of justice – in the criminal context this is particularly concerned with acquitting the innocent and convicting the guilty – and the principle of finality – that limits must be placed on the ability of parties to legal proceedings to reopen disputes.[7]

1.3 Criminal justice, perhaps to a greater extent than civil justice, tends to favour justice over finality. In the 1933 case of *Behari Lal v King Emperor*,[8] Lord Atkin commented:

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1 A Clooney and P Webb, *The Right to a Fair Trial in International Law* (2021); P D Marshall, "A Comparative Analysis of the Right to Appeal" (2011) 22 *Duke Journal of Comparative and International Law* 1, 3.

2 A Clooney and P Webb, *The Right to a Fair Trial in International Law* (2021).

3 P D Marshall, "A Comparative Analysis of the Right to Appeal" (2011) 22 *Duke Journal of Comparative and International Law* 1, 3.

4 Above, 4.

5 Above, 3.

6 American Bar Association, Standard 21-1.2(a)(ii).

7 *The Ampthill Peerage* [1977] AC 547, HL.

8 Lord Dyson has made the point that the criminal law in England and Wales also demonstrates a preference for justice over finality in having no time limits on the prosecution of serious offences: Lord Dyson, "Time to call it a day: some reflections on finality and the law", speech at Edinburgh University (14 October 2011).

> It would be remarkable indeed, if what may be a "scandal and perversion of justice" may be prevented during the trial, but after it has taken effect the Courts are powerless to intervene. Finality is a good thing, but justice is better.[9]

THIS PROJECT

1.4 In July 2022, the Law Commission was asked to conduct a review of the law relating to criminal appeals. This reference followed a number of calls from respected bodies for a review of various aspects of the law:

(1) The "real possibility" test applied by the Criminal Cases Review Commission ("CCRC"): In 2015, the House of Commons Justice Committee published a report on the CCRC. The report considered calls for a change in the "real possibility" test which the CCRC is obliged to use when considering whether to refer a case to the Court of Appeal Criminal Division ("CACD") (or, for cases tried summarily, the Crown Court).[10] This requires the CCRC to conclude that there is a "real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made … because of an argument, or evidence, not raised in the proceedings which led to it or on any appeal or application for leave to appeal against it".[11] Noting that "[a]ny change would have to be undertaken in light of a change to the Court of Appeal's grounds for allowing appeals", the Justice Committee recommended that the Law Commission should review the CACD's grounds for allowing appeals.[12]

In 2021, the "Westminster Commission", set up by the All-Party Parliamentary Group on Miscarriages of Justice, conducted a further inquiry into the CCRC. The Commission recommended that the "real possibility" test be replaced with a "non-predictive" test.[13]

In their response to the Westminster Commission, the CCRC supported a review by the Law Commission of their referral test.[14]

(2) The "safety" and "substantial injustice" tests applied by the CACD: In its 2015 report, the Justice Committee also recommended that the Law Commission should review the Court of Appeal's grounds for allowing an appeal against conviction.[15] The Westminster Commission made a similar recommendation in 2021.[16] The Westminster Commission also recommended that the Law

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9 (1933) 50 TLR 1, [1933] UKPC 60, 4.

10 House of Commons Justice Committee, *Criminal Cases Review Commission*, Report of the House of Commons Justice Committee (2014-15) HC 850.

11 Criminal Appeal Act 1995, s 13(1).

12 The Criminal Cases Review Commission, Report of the Justice Committee (2014-15) HC 850, para 28.

13 Westminster Commission on Miscarriages of Justice, *In the Interests of Justice: An inquiry into the Criminal Cases Review Commission* (2021) ("Westminster Commission Report").

14 CCRC, "CCRC releases official response to the Westminster Commission report" (2 June 2021).

15 House of Commons Justice Committee, *Criminal Cases Review Commission*, Report of the House of Commons Justice Committee (2014-15) HC 850, para 28.

16 Westminster Commission Report, p 43.

Commission should review the "substantial injustice" test applied by the CACD when considering whether to grant leave for an appeal brought out-of-time on the basis of a change in the common law.[17]

(3) The law on disclosure of reasons by the CCRC: In its response to the Westminster Commission, the CCRC supported a review by the Law Commission of the provisions in the Criminal Appeal Act 1995 covering disclosure of information obtained by the CCRC to enable more information to be published about decisions in individual cases.[18]

(4) The law on retention of court records: In the "Shrewsbury 24" case,[19] the CACD suggested that consideration should be given as to "whether the present regimen for retaining and deleting digital [court] files is appropriate, given that the absence of relevant court records can make the task of this court markedly difficult when assessing – which is not an uncommon event – whether an historical conviction is safe".

Terms of reference

1.5 The terms of reference for this project are therefore wide, and are as follows:[20]

The Law Commission will conduct a review of the law governing appeals in criminal cases and consider the need for reform with a view to ensuring that the courts have powers that enable the effective, efficient and appropriate resolution of appeals. The review will be particularly concerned with inconsistencies, uncertainties and gaps in the law. It will consider, but is not limited to, the following:

Appeals against conviction and sentence in the Court of Appeal (Criminal Division) ('CACD')

(1) Whether the CACD has adequate and appropriate powers to: (a) order a re-trial, substitute a conviction, or substitute a sentence; and (b) make directions regarding time spent in custody pending appeal.

(2) Whether there is evidence which suggests that the test for allowing an appeal on the grounds that a conviction is unsafe may hinder the correction of miscarriages of justice, including with regard to

(a) the approach to fresh evidence;

(b) the approach to "lurking doubt" or grounds not attributable to fresh evidence or a material irregularity; and

(c) the test of "substantial injustice", which applies in cases where there is an appeal on the basis of a subsequent change in the common law.

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17 Westminster Commission Report, p 63.

18 CCRC, "CCRC releases official response to the Westminster Commission report" (2 June 2021).

19 *R v Warren* [2021] EWCA Crim 413 at [102], by Fulford LJ VPCACD.

20 Law Commission, "Criminal Appeals – Law Commission Review: Terms of Reference".

(3) Whether the law in relation to grounds of appeal provides sufficient certainty to allow a convicted person to receive clear advice about the prospects of an appeal.

(4) Whether the Attorney-General's powers to refer a matter to the CACD are adequate and appropriate.

(5) Whether codification of common law tests in relation to grounds for appeal against conviction and sentence may be warranted.

(6) Whether the composition of judicial panels in the CACD is an efficient and effective use of court resources and judicial time, while serving the interests of justice.

Appeals against matters other than conviction and sentence in the CACD

(7) Whether the CACD has adequate and appropriate powers to deal with appeals relating to findings on fitness to plead.

Appeals against conviction and sentence in the Magistrates' Court and Crown Court

(8) Whether the rights to appeal and processes for appeals in summary matters are an efficient and effective use of court resources and judicial time, while serving the interests of justice.

(9) Whether the Crown Court has adequate and appropriate sentencing powers in a new trial that is a result of an appeal.

(10) Whether the conditions for referring cases to the CACD under the Criminal Appeal Act 1995 allow the CCRC to fulfil its functions.

(11) Whether appeals (both from CCRC referrals and generally) are hampered by inadequate laws governing the retention and disclosure of evidence, including post-conviction, and retention and access to records of proceedings.

(As a result of a number of representations we received in response to the Issues Paper relating to compensation for miscarriages of justice, in 2024 we agreed with the Ministry of Justice that this project would be expanded to consider also the law relating to compensation and support for the wrongly convicted.)

Compensation and support following a miscarriage of justice

(12) Whether the law governing compensation and support for wrongly convicted persons, following the quashing of their conviction(s), is satisfactory, having regard to the UK's obligations under international law.

Consolidation of statutory provisions

(13) Whether consolidation of rights to appeal, which are currently spread across a number of statutes, may make the law clearer and more consistent.

1.6 Though they are broad, it is important to clarify what the terms of reference do not include.

(1) We do not consider challenges in relation to extradition proceedings or confiscation proceedings under the Proceeds of Crime Act 2002 (although confiscation orders can be appealed against as part of appeals against sentence, which are within our terms of reference).[21]

(2) It is our view that "[c]ontempt of court is not a criminal offence",[22] and therefore we do not deal with appeals against contempt proceedings; consultees can see our discussion of contempt appeals in Chapter 11 of our 2024 Contempt of Court consultation paper.[23]

(3) The substantive criminal law is not within our terms of reference. For instance, though we do deal in Chapter 10 with the "substantial injustice" test applied to applications for leave to appeal out of time on the basis of a development in the law (so called "change of law" cases), which has been particularly salient in recent years in relation to convictions under the law of joint enterprise, and especially in relation to murder, we do not consider the substantive law of joint enterprise in this paper. (However, we recently announced a review of the law of homicide,[24] which "will consider the implications of the current law on joint enterprise … for any reform of the law of homicide".)[25]

(4) We do not consider the costs regime or public funding for bringing appeals.[26]

1.7 Appeals in respect of proceedings in the military courts (that is, the Court Martial and the Service Civilian Court) are outside the terms of reference of this project. However, we recognise that, in practice, the law in respect of appeals in military proceedings mirrors (with appropriate adjustments) the law of England and Wales in respect of criminal proceedings, and the CCRC's role extends to these proceedings. In practice, the Court Martial Appeal Court is usually composed of judges of the CACD (although it may also include members of the Scottish and Northern Irish judiciary). Were changes made to the law relating to criminal appeals effected as a result of this project, consideration would presumably be given as to whether similar changes should be made in respect of appeals from military courts. We would therefore welcome responses to this consultation from those with experience of these courts.

1.8 We are concerned with the law of England and Wales. However, the responsibilities of the CCRC extend to Northern Ireland. Although it would be legally possible to have a

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21 See, for information, Confiscation of the proceeds of crime after conviction (2022) Law Com No 410.

22 Contempt of Court (2024) Law Commission Consultation Paper No 262, para 1.2.

23 Above, paras 11.1-11.114.

24 See Law Commission, "Reviewing the Law of Homicide", project page.

25 Law Commission, "Reviewing the Law of Homicide: Terms of Reference".

26 One anomaly is that while an individual can recover their costs from central funds following a successful appeal to the Crown Court, CACD or Supreme Court (although recovery is limited to legal aid rates), there is no provision for these costs to be recovered where the appeal is to the High Court by way of case stated, even though the criminal costs regime applies in these cases (Prosecution of Offenders Act 1985, s 16A; *Lord Howard of Lympne v Director of Public Prosecutions* [2018] EWHC 100 (Admin), [2019] RTR 4).

different reference test in respect of Northern Irish cases, some aspects of the law relating to the CCRC (for instance, provisions relating to its membership) could not be dealt with separately in England and Wales and Northern Ireland. Additionally, as with the military courts, provisions relating to criminal appeals in Northern Ireland have largely mirrored provisions relating to England and Wales. We would therefore welcome responses from those with experience of the criminal appeals system in Northern Ireland.

Issues Paper

1.9 In July 2023, we published an Issues Paper,[27] which mostly concentrated on policy issues. We held a three-month public consultation. We received 158 responses to this consultation, including from serving prisoners. During the course of this project, we have met and heard from a wide range of stakeholders, both organisational and individual. We have met many lawyers, including those who specialise in criminal appeals, those who prosecute and those who defend (and those who do both). We have also met several individuals who are acknowledged to have been victims of miscarriages of justice, as well as others who claim to have been wrongly convicted but who have not successfully appealed their convictions. The CCRC and organisations who provide assistance to those who are or claim to be victims of miscarriages of justice have also provided valuable input to the consultation.

1.10 The responses to the Issues Paper consultation that we have received informed the formulation of the provisional proposals and open questions in this consultation paper.

Technical issues

1.11 In addition to the policy issues raised in the Issues Paper, in this consultation paper we also consider a number of more technical or procedural issues with a view to enabling courts to deal with appeals in criminal cases effectively, efficiently and appropriately.[28] For example, Chapters 6, 9 and 15 deal with the law and procedure in relation to CACD time limits, the procedure for retrial and rearraignment, and retaining and obtaining access to evidence post-trial and post-conviction respectively.

Concurrent developments

Developments following the exoneration of Andrew Malkinson

1.12 In August 2023, the then Lord Chancellor, Rt Hon Alex Chalk KC MP, announced an independent inquiry into the wrongful conviction of Andrew Malkinson (see Appendix 2).[29] The terms of reference for the inquiry include the investigation, discovery, handling and disclosure of evidence, and decisions made and actions taken by the

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27 Law Commission, Criminal Appeals: Issues Paper (July 2023).

28 For instance, Criminal Appeal Act 1968, s 23A permits the CACD to direct the CCRC to investigate and report to the court on any matter relevant to the determination of an appeal. The Criminal Justice Act 2003 extended this power to include applications for leave to appeal. However, no corresponding change was made to the restriction on which powers might be exercised by a single judge, so while a single judge may grant or refuse leave, where the assistance of the CCRC is required to inform that decision, that direction must be made by the full court.

29 Ministry of Justice, "Government orders independent inquiry into handling of Andrew Malkinson case" (24 August 2023).

main agencies involved, including the police, Crown Prosecution Service and the CCRC.

1.13 The CCRC also commissioned an independent investigation into its own handling of the case by Chris Henley KC. This reported in July 2024.[30] Following publication of the report, the Lord Chancellor, Rt Hon Shabana Mahmood MP, stated that she considered that the Chair of the CCRC was unfit to fulfil her duties, and convened a panel to advise her on whether to Advise the King to exercise the power under section 2(7) of schedule 1 of the Criminal Appeal Act 1995 to remove the Chair. The Chair resigned on 14 January 2025 after the panel concluded (by a majority, with one of the three members dissenting) that she should be removed.

1.14 We have taken the findings of Chris Henley KC's investigation into account in considering reform of the law relating to the CCRC (see Chapter 11).

Developments relating to the Post Office Horizon convictions

1.15 In the Issues Paper, we discussed the Post Office Horizon scandal. At that point, 57 convictions had been overturned by the Crown Court or the CACD. After we published, the CCRC continued to refer cases to those Courts resulting in many more convictions being quashed.

1.16 However, in January 2024, following the broadcast of the ITV drama *Mr Bates v The Post Office,* the Government announced unprecedented action to quash Horizon-related convictions by primary legislation. The Post Office (Horizon System) Offences Bill was introduced in Parliament on 13 March 2024, and received Royal Assent on 24 May 2024. We discuss this development in detail in Chapter 17 and Appendix 3.

1.17 In June 2023, Mr Justice Fraser, as he then was, was appointed Chair of the Law Commission. He took up the role in December 2023, and was appointed a Lord Justice of Appeal. Sir Peter Fraser was, when a High Court judge, the Managing Judge in the Group Litigation *Bates and others v Post Office Ltd*. He handed down six judgments.[31] Although involved in this project as a member of the Law Commission, no part of this consultation paper should be interpreted as containing any comment by Sir Peter Fraser on the subject matter of that case or the content of those judgments.

Independent Review of the Criminal Courts

1.18 In December 2023, the Lord Chancellor, Rt Hon Shabana Mahmood MP, announced a review of the Criminal Courts, to be led by Sir Brian Leveson, the former President of the Queen's Bench Division of the High Court and Head of Criminal Justice. The terms of reference for that inquiry include the possibility of an "intermediate court" sitting between magistrates' courts and the Crown Court, and the implications for appeal routes of the various options which it has been asked to consider.[32]

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30 CCRC, "Criminal Cases Review Commission (CCRC) publishes report on its handling of the Andrew Malkinson case" (18 July 2024).

31 [2017] EWHC 2844 (QB), [2017] 6 Costs LO 855; No.2 [2018] EWHC 2698 (QB); No.3 "Common Issues" [2019] EWHC 606 (QB); No.4 "Recusal" [2019] EWHC 871 (QB); No.5 "Horizon Issues Costs" [2019] EWHC 1373 (QB); and No.6 "Horizon Issues" [2019] EWHC 3408 (QB).

32 Ministry of Justice, "Independent Review of the Criminal Courts" (10 February 2025).

STRUCTURE OF THE CONSULTATION PAPER

Overview

1.19 The following 16 chapters of this paper can be divided broadly into six parts.

(1) In Chapters 2 to 4, we discuss the historical concerns with, developments of and legislative reforms made to the criminal appeals system; the current structure of the criminals appeals system; and core principles that we provisionally propose should govern the criminal appeals system and our approach to reform of it.

(2) In Chapter 5, we consider appeals against and challenges to convictions and sentences in magistrates' courts (which include youth courts).

(3) In Chapters 6 to 9, we explore the frameworks in place for dealing with appeals against conviction and sentence in the CACD.

(4) In Chapters 10 and 11, we focus on two areas where appeals are often historic and feature claims of changes of circumstances: the "substantial injustice" test the CACD applies when deciding whether to hear out-of-time appeals, and the law governing the CCRC, the body mainly set up to consider historic miscarriages of justice.

(5) The theme of Chapters 12 to 14 is less common appeals which nonetheless can have significant impacts on defendants, victims and the law: appeals in relation to events in the course of a trial and by third parties, prosecution challenges to or inquiries into acquittals, and appeals to the UK Supreme Court.

(6) Chapters 15 to 17 concern subjects connected, consequential or essential to the operation of the criminal appeals system: retention and disclosure of evidence, compensation and support for the wrongly convicted, and wider issues, including those created by the criminal trial system or experienced by particular groups.

1.20 Appendices 1 to 4 supplement this paper and specific chapters. They include discussion of case studies or issues in more detail than set out in the main chapters.

Chapter 2: The development of the criminal appeals system in England and Wales

1.21 We acknowledge throughout this paper that the criminal appeals system exists within the wider criminal justice system, and this is especially clear in Chapter 2, when we consider the development of the former. In outlining the present division of criminal trials between magistrates' courts and the Crown Court, we discuss historic rights of appeal, focusing on the Criminal Appeal Acts of 1907, 1968 and 1995. We explore reviews of the criminal appeals system in detail. Finally, throughout the chapter we acknowledge the effects of notorious miscarriages of justice on public opinion and pressure for reform, up to the Post Office (Horizon System) Offences Act 2024.

1.22 We do not ask any consultation questions in Chapter 2.

Chapter 3: The appellate structure of criminal courts (Consultation Questions 1 to 2)

1.23 Chapter 3 summarises the present appellate routes in criminal cases in England and Wales, and reviews of the appellate structure by Lord Justice Auld in 2001 and by the Law Commission in 2004 to 2010. We also consider specific issues with the route of appeal from magistrates' courts decisions, and proposals which have been made relating to the court system in Wales.

1.24 We ask two consultation questions, inviting views on the appropriate route for appeals against summary (magistrates' courts') proceedings and on the present structure of appellate courts in respect of criminal proceedings.

Chapter 4: Principles of criminal appeals (Consultation Questions 3 to 4)

1.25 Our criminal appeals and criminal justice systems have many core principles in common. It is also the case that principles can take different forms, from rights (such as to a fair trial) to justifying procedural rules. Chapter 4 first explores the meaning of the term "miscarriages of justice", then outlines rights of appeal under international law, before discussing core principles of the criminal justice system and the tensions between them. We single out two propositions: first, that the acquittal of the guilty is preferable to the conviction of the innocent; secondly, that, in principle, a convicted person should not be at risk of a greater penalty simply by exercising a right of appeal (the "no greater penalty" principle).

1.26 We ask two consultation questions. We provisionally propose that the seven core principles relevant to criminal appeals law reform are: acquittal of the innocent; conviction of the guilty; fairness; recognising juries' roles in trials on indictment; upholding the criminal justice system's integrity; ensuring access to justice; and finality. We also make a provisional proposal in favour of the no greater penalty principle.

Chapter 5: Appeals from magistrates' courts' decisions (Consultation Questions 5 to 15)

1.27 Chapter 5 focuses on appeals against summary convictions and sentences – those determined in magistrates' courts in respect of summary-only offences and those either-way offences which are not tried in the Crown Court. It outlines the three present routes for challenging magistrates' courts' convictions and sentences: (1) appeal to the Crown Court; (2) appeal to the High Court by way of "case stated"; and (3) judicial review by the High Court. On (1), it explores the present system of rehearing – as opposed to merely reviewing – the case, time limits, and the absence of a "no greater penalty" on appeal rule. On (2) and (3), it discusses the advantages, disadvantages and overlap between the procedures.

1.28 We ask 10 consultation questions in Chapter 5. We provisionally propose that the right of rehearing in appeals to the Crown Court be retained, that there should be the same time limit for appeals to the Crown Court as for appeals to the CACD, that the "no greater penalty" principle should apply in appeals from magistrates' courts' proceedings, and that appeal by way of case stated should be abolished and effectively replaced by judicial review.

1.29 In light of the fact that in all but the most serious cases, children (under-18s) are tried in youth courts (a type of magistrates' court), at the end of Chapter 5 we discuss

appeals from youth courts and generally by children and young people. We ask versions of our general questions in Chapter 5 specifically in relation to young people. We discuss the sentence of Detention at His Majesty's Pleasure ("DHMP"), imposed on children convicted of murder, which is explored further in Chapter 7.

Chapter 6: Appeals to the Court of Appeal Criminal Division – general issues (Consultation Questions 16 to 22)

1.30 The CACD is the most common court where miscarriages of justice are corrected. Chapter 6 introduces the CACD and focuses on issues which apply in appeals against both conviction and sentence, including: the need for leave (permission) to appeal; time limits; the admission of "fresh" evidence on appeal; the potential for court-appointed experts on appeal; so-called "loss of time" orders which exceptionally increase the time a convicted person spends in prison; and the absence of a rule to correct mistakes in judgments (a "slip rule").

1.31 We ask seven consultation questions. We make provisional proposals that the time limit for bringing an appeal should be increased to 56 days from the date of sentence, that "loss of time" orders should be strictly defined, and that the CACD should have a "slip rule". We also invite views on whether the CACD should be able to appoint its own experts.

Chapter 7: Sentence appeals in the Court of Appeal Criminal Division, and sentence reviews (Consultation Questions 23 to 33)

1.32 Our law recognises that injustice and unfairness result not only from wrongful convictions, but where a convicted person has received a wrong or unlawful sentence, or one disproportionate to their offending. The vast majority of maximum or minimum sentences today have been set by democratically elected representatives. It is important that Parliament's will in setting those limits is respected by ensuring that people are sentenced consistently and according to those limits, and that, therefore, sentences are neither manifestly excessive nor unduly lenient.

1.33 Chapter 7 discusses the introduction of Sentencing Guidelines in England and Wales, appeals against sentence by convicted persons, references by the Attorney General ("AG") to determine whether sentences are "unduly lenient" and review of sentences after circumstances change. It also discusses the need for review of minimum terms of DHMP sentences and the sentence of imprisonment for public protection ("IPP").

1.34 Our 10 consultation questions include provisional proposals that there should be no change to the current arrangements for defendants' appeals against sentence to the CACD; that it should continue to be for the AG to make unduly lenient sentence references; that children serving sentences of detention for life should have the same right to review as those sentenced to DHMP; and that reviews of the minimum terms of children's indeterminate sentences should be heard in the CACD rather than the High Court as presently. We invite views from consultees on matters including whether the tests applied by the CACD in defendants' appeals against sentence should be codified; whether sentences for additional offences should be referrable as unduly lenient by the AG; and whether the AG's strict 28-day time limit for referring sentences to the CACD should be allowed to be extendable.

Chapter 8: Conviction appeals in the Court of Appeal Criminal Division (Consultation Questions 34 to 40)

1.35 A quashed conviction is, in law, the equivalent of an acquittal. Even if a retrial results in conviction for a second time or a conviction is substituted, the CACD essentially holding that a conviction (and therefore, almost always, a jury's verdict) was wrong or unlawful is of significance.

1.36 Therefore, a considerable discourse in relation to criminal appeals centres on the test the CACD applies on conviction appeals: whether it thinks that the conviction "is unsafe". There is also a tension, going to the heart of the CACD's role, between the CACD considering the safety of a conviction objectively and the need to respect the verdict of the jury, which especially comes into focus when the CACD is asked to consider evidence that the jury did not see, or when jurors are accused of misconduct.

1.37 In Chapter 8 we ask seven consultation questions, including in relation to the safety test; the power to order a retrial; so-called "lurking doubt" appeals; appeals in cases of nullity; and the law in relation to juror misconduct.

Chapter 9: Powers of the Court of Appeal Criminal Division when a conviction is quashed (Consultation Questions 41 to 52)

1.38 Cases where appeals are allowed on the basis of "proven innocence" – that a person did not commit a crime – are infrequent. Sometimes appeals are allowed when the defendant should have been convicted of a different, often less serious, offence. The CACD may be able to substitute a conviction for that offence.

1.39 More frequently, fresh evidence or identified errors may lead the CACD to conclude that a conviction is unsafe, but there remains evidence upon which a reasonable jury could convict a successful appellant of an offence. In those circumstances, the CACD can order a retrial. In Chapter 9 we explore various technical issues that arise after the CACD quashes convictions, including the substitution of convictions; the procedure for retrials, including the need for timely arraignment (bringing a person before court to hear the charge against them); and sentencing a person when they are convicted following a retrial. Lastly, we discuss the CACD's powers in cases of unfitness to plead and insanity in more detail, after introducing them in Chapter 6.

1.40 We ask 12 consultation questions, including on expanding the ability of the CACD in relation to substituting convictions and retrials, other consequential powers, cases when the prosecution fails to arraign a defendant in time after the CACD orders a retrial and powers of substitution and retrial in cases of unfitness to plead and insanity.

Chapter 10: The "substantial injustice" test for appeals based on a development in the law (Consultation Question 53)

1.41 Generally, our law restricts appeals made on the basis of a development in the common law, because allowing changes in standards or changes in substantive law in an individual case to provide a ground of appeal could lead to a 'flood' of appeals being made in circumstances when, potentially, the person would either be convicted in any event or has not substantially suffered from the conviction or its effects.

1.42 Therefore, when convicted persons seek to appeal outside of time limits or through a CCRC reference based solely on a development in the law, the CACD applies the test of "substantial injustice" in asking whether their appeal should be heard (or, in CCRC references, determined in an appellant's favour). We explore the development of this test in Chapter 10 and the commentary surrounding its application.

1.43 In Consultation Question 53 we invite views on how the law governing appeals based on a development in the law might be reformed.

Chapter 11: The CCRC (Consultation Questions 54 to 70)

1.44 When a convicted person's appeal is dismissed by the highest court they can appeal to, or that court refuses to hear it, they cannot bring a second appeal. The two avenues open to a convicted person are the Royal Prerogative of Mercy (which is rarely used) and an application to the CCRC to refer their conviction or sentence back to the relevant court (the Crown Court in cases of convictions in magistrates' courts and the CACD in cases of convictions in the Crown Court).

1.45 In Chapter 11, we discuss the CCRC at length, including certain issues raised with us about its operation and culture. We make clear that while we note these concerns, we do not make provisional proposals in relation to them as they are not matters within our terms of reference or suitable for resolution by a law reform body.

1.46 We ask 17 consultation questions in Chapter 11. Our provisional proposals include replacing the "real possibility" test applied by the CCRC when deciding whether to refer convictions with a non-predictive test, clarifying that the Crown Court should be able to hear CCRC references in cases where a convicted person has died, and retaining the CCRC's discretion not to refer a case. We invite views on matters including whether the law should enable the CCRC to explain publicly a decision not to refer a case, whether the legislation governing CCRC Commissioners' qualifications and terms of appointment should be changed and whether refused applications should be capable of challenge to the First-tier Tribunal.

Chapter 12: Pre-trial, interlocutory and third-party appeals (Consultation Questions 71 to 75)

1.47 The vast majority of criminal appeal rights relate to 'final' outcomes of criminal trials, convictions and sentences, and are exercised by or on behalf of the defendant or the prosecution. A minority relate to decisions before and during trials which can have dramatic effects on those involved in or connected to proceedings, in relation to preparatory hearings, rulings that literally or effectively halt the prosecution (so-called "terminating rulings") or orders concerning restrictions on reporting of proceedings.

1.48 In Chapter 12 we discuss current and potential pre-trial, interlocutory (effectively mid-trial) and third-party appeal rights. Because, atypically, these rights (except the defendant's right to appeal against adverse bail decisions) do not relate directly to outcomes adverse to the defendant, the discussion is governed by the dual principles of fairness *between* prosecution and defence, and fairness *to* the defendant.

1.49 We ask five consultation questions, including provisional proposals that provisions for appeals against "terminating rulings" should be retained, but that uncommenced provisions providing for prosecutions against evidentiary rulings should be repealed, that there should be no right to appeal against decisions to refuse to impose or lift

reporting restrictions, and that the list of prosecuting bodies permitted to appeal against bail decisions should be reviewed and updated.

Chapter 13: Challenging acquittals (Consultation Questions 76 to 86)

1.50 For centuries, a core rule of our criminal justice system was that a person could not be tried more than once for the same offence – this is referred to as the rule against "double jeopardy" and expressed itself in pleas of *autrefois convict* (formerly convicted) and *autrefois acquit* (formerly acquitted) by defendants to stop re-prosecutions. The strict rule was relaxed by the CACD's power to order retrials since 1964, and abolished in 2005 in relation to serious offences. The broader principle that courts should treat those subjected multiple times to criminal proceedings (including sentencing) more leniently has weakened in recent years. Since 2005, prosecutors have been able to apply to quash an acquittal for certain offences and retry a defendant if there is new and compelling evidence in relation to the offence of which the defendant was formerly acquitted. In addition, the prosecution is able to appeal against acquittals in summary proceedings on a point of law, applications can be made to quash so-called "tainted acquittals" when there was an interference with the administration of justice (such as intimidating witnesses) in proceedings resulting in an acquittal. The AG can also refer acquittals to the CACD for clarification on the law, though this does not affect the acquittal and cannot lead to it being quashed.

1.51 In Chapter 13, we describe these various methods, their efficacy and whether they are in need of reform We also consider whether the prosecution should be able to appeal against acquittals in the Crown Court on a point of law.

1.52 We ask 11 consultation questions. Among other things, we provisionally propose that the prosecution's ability to challenge magistrates' courts acquittals by judicial review and Crown Court acquittals on the basis of new and compelling evidence should be retained, that the list of offences covered by the latter procedure should be extended, and that the prosecution should not have a general right to appeal against an acquittal in the Crown Court on a point of law. We invite consultees' views on matters including whether the CACD should have the power, following an order for a retrial, to allow exceptionally the (re)arraignment of the defendant out of time, and whether the tainted acquittal and new and compelling evidence procedures might be consolidated.

Chapter 14: Appeals to the Supreme Court (Consultation Questions 87 to 89)

1.53 Unlike in some other jurisdictions, the UK Supreme Court deals with appeals on points of law, not fact, including in criminal cases. Additionally, although every defendant has the right to appeal against (or at least attempt to challenge) their conviction and/or sentence, this right does not extend to a further right of appeal to the Supreme Court. Although appellants in civil proceedings also lack an automatic right of appeal to the Supreme Court, both the court whose decision is sought to be appealed against and the Supreme Court may grant permission for the Supreme Court to hear civil appeals. In contrast, in criminal appeals, the court below must certify that the case involves a point of law of general public importance before permission can be sought from either court. When challenging magistrates' courts decisions, the court below is the High Court (which hears appeals on a point of law from magistrates' courts and from the Crown Court when it hears appeals from magistrates' courts); when challenging Crown Court decisions, the court below is the CACD. This means that unless the High

Court or CACD (as the case may be) certifies a point of law, the Supreme Court cannot directly hear that point of English and Welsh criminal law.

1.54 In Chapter 14 we discuss the restrictions on appeals on points of law, the fact that additional points to those for which leave is granted cannot be argued on appeal, and the High Court and CACD's effective control of appeals to the Supreme Court.

1.55 We ask three consultation questions in Chapter 14. We provisionally propose that criminal appeals to the Supreme Court should continue to be limited to those which raise arguable points of law of general public importance that ought to be considered by the Supreme Court. We further provisionally propose that the Supreme Court should have a power to remit cases to the court below to apply the Supreme Court's answer to the legal question asked to the facts as well as to address outstanding grounds of appeal. Lastly, we provisionally propose that the Supreme Court itself should be able to grant leave to appeal when the CACD or High Court does not certify a point of law of general public importance.

Chapter 15: Retention and disclosure of evidence (Consultation Questions 90 to 98)

1.56 All appeals except an appeal against a decision of a magistrates' court to the Crown Court (which acts as a rehearing) start from the position that the decision below was correct. They exist to review, rather than retry, the decision. In the original proceedings, the presumption of innocence, the standard of proof (beyond reasonable doubt) and the burden of proof (being on the prosecution) all require the prosecution to prove facts and neither require the defendant to prove nor disprove anything (unless they chose to raise certain defences). On appeal, however, the onus is on the defendant to prove or highlight errors or raise new or previously underappreciated evidence undermining the correctness of the decision below. Furthermore, it could be said that in most cases, including trials themselves and appeals by way of rehearing in the Crown Court, and because of the prosecution's burden, the preponderance of evidence adduced at trial will suggest the defendant's guilt instead of their innocence.

1.57 Therefore, both in trials and on appeal, defendants have always relied on the police and other state authorities' retention and disclosure of evidence that may, following it being subjected to techniques or examination, or following the discovery of new techniques, undermine the prosecution's case or, if they have one, support the defendant's. Patently, if that evidence is lost or not disclosed to a defendant, it cannot be used by them on appeal. Consequently, the law places a duty of disclosure on the prosecution and on authorities to retain certain evidence for time periods depending on the nature of a conviction and its sentence. In Chapter 15 we discuss the perceived inadequacy of these duties, how they operate and rights of access to evidence, including for the purpose of responsible journalism.

1.58 We ask nine consultation questions, making provisional proposals that evidence be retained to cover at least the full term of a convicted person's sentence (and not just their time in prison), that unauthorised destruction, disposal or concealment of evidence should be a specific criminal offence and that various principles should govern post-trial disclosure of, and access to, evidence. We also ask open questions on the creation of a national Forensic Archive Service for long-term storage of forensic evidence and provision for disclosure of material for the purposes of responsible journalisms to reveal possible miscarriages of justice.

Chapter 16: Compensation and support for the wrongly convicted (Consultation Questions 99 to 103)

1.59 When the judicial power of the state is used to wrongly convict someone, even in the absence of bad faith, by definition that person has suffered a wrong inflicted by the state. Historically, the state recognised this and discretionarily compensated those wrongly convicted. More recently, the United Kingdom, as a party to article 14(6) of the International Covenant on Civil and Political Rights, has committed to compensate a person whose conviction has been reversed or who has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice (so long as the non-disclosure was not wholly or partly attributable to the person). The UK legislated for this in section 133 of the Criminal Justice Act 1988. In addition, the Miscarriage of Justice Support Service provides support to those who have suffered miscarriages of justice in England and Wales.

1.60 In Chapter 16 we describe amendments made to the compensation regime in England and Wales, including requirements that a new or newly discovered fact showing that there has been a miscarriage of justice shows "beyond reasonable doubt that the person did not commit the offence" and that the conviction must be quashed on an out of time appeal. We also discuss the monetary cap on compensation and the perceived deficiencies in the post-appeal support regime.

1.61 We ask five consultation questions, making provisional proposals that applicants for compensation should only have to show on the balance of probabilities that they are factually innocent, that victims of miscarriages of justice should be entitled to further support and that HM Courts and Tribunals Service should liaise with police services to ensure that the Police National Computer is updated to remove quashed convictions.

Chapter 17: Wider criminal appeals issues (Consultation Questions 104 to 108)

1.62 Our final chapter asks five consultation questions. It addresses three topics essentially connected to or affected by the criminal appeals system: (1) dealing with systemic miscarriages of justice, (2) preventing miscarriages of justice, and (3) impacts on particular groups.

1.63 On (1), in conjunction with Appendix 3, we explore several examples of systemic miscarriages of justice and provisionally propose that reviews of systemic problems that call into question the safety of convictions should normally fall to the CCRC.

1.64 On (2), in conjunction with Appendix 4, we look, on the one hand, at the potential role of miscarriage of justice inquiries and, on the other, at specific issues with types of evidence or procedures at trial coincident with historic miscarriages of justice. We provisionally propose greater use of inquiries following proven miscarriages of justice and invite views on reforms which might reduce the incidence of miscarriages of justice.

1.65 On (3), we cover impacts on three groups in general terms – women, ethnic minorities and children and young people – and then invite consultees to provide opinions or evidence in relation to impacts on particular groups, whether protected by the Equality Act 2010 or not. We also invite consultees' views on any issues relevant to the criminal appeals project not dealt with in answers to previous consultation questions.

Appendices 1 (Case studies, pre-PACE), 2 (Case studies, post-PACE), 3 (Systemic miscarriages of justice: specific cases and background) and 4 (Procedural and evidential issues at trial)

1.66 While Appendices 3 and 4 directly inform and should be read with Chapter 17, Appendices 1 and 2 cover historic miscarriages of justice respectively before and after the coming into force of the Police and Criminal Evidence Act 1984 ("PACE") in 1985-1986. Beyond their informational purpose, the first two appendices help contextualise concerns with the criminal appeals system in the past half-century and the legislative and other actions which were taken to remedy perceived imperfections in that system.

1.67 Rather than focusing on specific individuals, Appendix 3 looks at systemic cases, where thematic issues with evidence, state and/or prosecutorial authorities led to widespread miscarriages of justice, and how these systemic issues were addressed and remedied when they came to light.

1.68 Finally, Appendix 4 highlights issues incidental to criminal trials (the *Galbraith* test on a submission of no case to answer,[33] the absence of reasoned verdicts by juries, weaknesses with certain types of evidence, and deficiencies in relation to pre-trial prosecution disclosure of evidence) that are common to convictions which are eventually revealed to be wrongful or constitute miscarriages of justice.

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1.69 The Commissioners would like to record their thanks to the following members of staff who worked on this consultation paper: David Connolly (team manager), Dr Robert Kaye (lead lawyer), Emira Al-Dimashki (research assistant), Jocelyn Ormond (research assistant) and Henry Screaton (research assistant).

[33] *R v Galbraith* [1981] 1 WLR 1039, CA.

Chapter 2: The development of the criminal appeals system in England and Wales

CRIMINAL APPEALS IN ENGLAND AND WALES: A HISTORY

2.1 The right to appeal in criminal proceedings in England and Wales is relatively recent. Until 1907 there was no appeal against the verdict of a jury in a criminal trial. During the Victorian period, a series of Bills were considered by Parliament[1] that would have created an appellate court, but these faced considerable opposition, especially from judges.[2]

2.2 In this chapter we outline the development of the sometimes complex law governing appeals in criminal proceedings. In order to understand the present arrangements, it is necessary to have some understanding of the development of the division of work between the various courts having a criminal jurisdiction.

2.3 It will be seen that one of the drivers of change, arguably the key driver, has been and continues to be the revelation of miscarriages of justice, and the difficulties faced by those wrongly convicted in successfully challenging their convictions.

2.4 In this chapter we will cover:

(1) the history of criminal courts and routes of challenge, especially to decisions of magistrates' courts, until the creation of the Crown Court by the Courts Act 1971;

(2) the predecessors to and the origins of the current Court of Appeal Criminal Division ("CACD") from 1907 to 1968;

(3) pressures to reform criminal appeals in the mid-to-late 20th century;

(4) developments in the 1990s, including the Royal Commission on Criminal Justice, the Criminal Appeal Act 1995, and that Act's creation of the Criminal Cases Review Commission ("CCRC"); and

(5) subsequent developments.

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1 L Orfield, "History of Criminal Appeal in England" (1936) 1 *Missouri Law Review* 326, 336-338 states that 28 separate bills were presented in the period to 1907. S Roberts, "Reviewing the function of criminal appeals in England and Wales" (2017) 1 *Institute of Law Journal* 3, 4 suggests an approximate figure of 31 bills.

2 S Roberts, "Reviewing the function of criminal appeals in England and Wales" (2017) 1 *Institute of Law Journal* 3, 4:

> The main protagonists against reform in the nineteenth century proved to be the judges and various reports from the period reveal that the judges were not opposed to a criminal appeal system as such as the judiciary did not object to their decisions being reviewed in relation to sentences or questions of law but were clearly very hostile to an appeal system based on errors of fact.

The criminal courts in England and Wales and routes of challenge

2.5 Historically, the main criminal courts (although they also had limited civil and administrative responsibilities) were:

(1) the petty sessions (magistrates' courts);

(2) the quarter sessions; and

(3) the assizes.

2.6 Courts of petty session consisted of local magistrates, also known as "justices of the peace". They dealt with minor offences summarily and were also responsible for deciding whether to refer a case to the quarter sessions. Quarter sessions were local courts held quarterly in each borough and county. The chair did not have to be legally qualified until 1962. The quarter sessions exercised a first instance jurisdiction, trying defendants on indictment for indictable offences. They also exercised an appellate jurisdiction, hearing appeals from magistrates' courts.

2.7 The assizes were a superior court of record which heard the most serious cases. They had a limited civil jurisdiction until 1873, but mainly dealt with criminal cases. The courts were itinerant, with judges travelling a "circuit", although the Central Criminal Court (known by its location, the Old Bailey) was established as a permanent court for London and Middlesex, and Crown Courts were established in Manchester and Liverpool in 1956.

2.8 The Courts Act 1971 replaced the courts of assize and the quarter sessions with the Crown Court, with exclusive jurisdiction over trials on indictment. The appellate jurisdiction of the quarter sessions from the magistrates' courts passed to the Crown Court.

2.9 Until 1967, the law distinguished between misdemeanours, felonies and treason. This distinction was abolished by the Criminal Law Act 1967. However, a distinction remains between offences which may only be tried summarily; those which may only be tried on indictment; and offences triable "either way". Summary only offences will be tried before magistrates (either a lay bench or a single, legally-qualified district judge). Indictable only offences are tried in the Crown Court before a judge and (almost always)[3] a jury.

2.10 Many offences are triable "either way". An adult defendant has a right to elect for trial by jury in the Crown Court for such offences. The prosecution can also ask the court (with a small number of exceptions) to proceed by way of a trial on indictment.[4] The magistrates' court may also choose to send an either-way offence to the Crown Court if they consider that, for example, the potential sentence would be outside the court's maximum sentencing powers, or the case would involve particular complexity.

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[3] Other than where there is a real and present danger of jury tampering, or jury tampering appears to have happened during a trial: Criminal Justice Act 2003, ss 44-46.

[4] For instance, although theft is triable either-way, low-value shoplifting (where the goods are valued at less than £200) is a summary only offence; however, an adult defendant has the right to elect to be tried in the Crown Court (Magistrates' Court Act 1980, s 22A).

2.11 The common law did not, historically, provide a right of appeal in criminal proceedings, although there were "various archaic forms of review … available to defendants".[5] As noted above, there was an appeal from the magistrates' court to the quarter sessions. Magistrates' courts were also subject to the supervisory jurisdiction of the Court of King's Bench.[6] The quarter sessions were susceptible to judicial review, including in their appellate capacity, but not when trying a defendant on indictment. Assize courts, as superior courts of record, were not normally susceptible to judicial review.[7]

2.12 A practice also developed whereby the quarter sessions could seek an opinion on a question of law from a judge of assizes. This developed into a practice of making the request to the Court of King's Bench. This practice was formalised in the 19th century. The Court of Crown Cases Reserved was created in 1848.[8] A trial judge could be asked to state a case for the Court on a point of law. If the Court of Crown Cases Reserved considered that the point of law had been wrongly decided, it could quash a conviction.

2.13 However, there was no *right* to appeal by way of case stated until 1925. The Criminal Justice Act 1925 gave either party to concluded appellate proceedings in the quarter sessions the right to apply to the court to have a case stated for the opinion of the High Court. The court could refuse to state a case if it considered the request frivolous (unless the application was made by or on behalf of the Attorney General). If the court refused to state a case, the applicant could then apply to the High Court for a ruling calling on the court of quarter sessions and the other party to show why a case should not be stated; the High Court could make any order, including one requiring the court to state a case.

2.14 The creation of the Crown Court by the 1971 Act brought together business from both the quarter sessions (an inferior court) and the assizes (a superior court of record). In establishing the Crown Court, Parliament placed a restriction on the High Court's jurisdiction in relation to decisions made by the Crown Court when exercising its first instance jurisdiction. Both judicial review and appeal by way of case stated were excluded in relation to trial on indictment. However, the High Court's jurisdiction over magistrates' courts, and the Crown Court in its appellate capacity over the magistrates' courts, was retained.

The Criminal Appeal Act 1907 and the Court of Criminal Appeal

2.15 Other than the limited ability to request the court to state a case to the Court of Crown Cases Reserved, historically there was no appeal where a person was convicted in a trial on indictment.

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5 P D Marshall, "A Comparative Analysis of the Right to Appeal" (2011) 22 *Duke Journal of Comparative and International Law* 1. See also L B Orfield, "History of Criminal Appeal in England" (1936) 1(4) *Missouri Law Review* 326; R Pattenden, *English Criminal Appeals 1844-1994: Appeals against Conviction and Sentence in England and Wales* (1996).

6 That Court became a Division of the High Court as a result of the Supreme Court of Judicature Act 1873.

7 The supervisory jurisdiction of the High Court is now exercised in the Administrative Court, a specialist court within the former court's King's Bench Division.

8 Crown Cases Act 1848.

2.16 Until 1907, the main way in which a person convicted in a trial on indictment could seek to challenge their conviction was to petition the Home Secretary[9] for a pardon under the Royal Prerogative of Mercy. A full pardon does not formally quash a conviction but frees the person concerned from all penalties and consequences arising from the conviction.

2.17 A series of cases of miscarriages of justice in the late Victorian and Edwardian period, including those of Florence Maybrick,[10] George Edalji,[11] and Adolf Beck,[12] led to the passage of the Criminal Appeal Act 1907. The Act created the Court of Criminal Appeal (and abolished the Court of Crown Cases Reserved).

2.18 The Court of Criminal Appeal was empowered to hear both appeals against conviction and against sentence in cases tried on indictment. The test used is discussed in more detail in Chapter 8. The Court was empowered to allow an appeal against conviction "if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice".[13] Thus, the Court from its inception had the power to find, even without fresh evidence or the identification of an error of law, that the jury's verdict could not stand. However, in practice it was highly reluctant to exercise this power.

2.19 The Court did not have a power to order a retrial. It followed that if the conviction was quashed, the strict application of the double jeopardy principle would mean that the appellant would not again face prosecution for the offence.

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9 The power to Advise the Sovereign on the exercise of the Royal Prerogative of Mercy passed to the Secretary of State for Justice in 2007.

10 Florence Maybrick, an American woman, was convicted in Liverpool in 1889 of murdering her British husband and sentenced to death. Her husband's body was found to contain non-lethal levels of arsenic. The Home Secretary and Lord Chancellor subsequently commuted her sentence to life imprisonment on the basis that the evidence established that she administered poison with intent to kill, but there was reasonable doubt as to whether that had in fact caused his death. The case was widely seen at the time as a miscarriage of justice, with Maybrick's admitted adultery being seen as having influenced the jury.

11 George Edalji, a solicitor (whose father was of Parsi heritage) was convicted in 1903 of maiming a pony (following a series of similar attacks in the surrounding area) and sentenced to seven years' hard labour. In 1907, after a public campaign led in part by Sir Arthur Conan Doyle, Home Secretary Herbert Gladstone appointed a special committee of inquiry, which concluded that Edalji was not guilty of the mutilation offence, and he was pardoned.

12 Beck was convicted of fraud in 1896 and sentenced to seven years' imprisonment, having been wrongly identified by various women as being the man who had defrauded them out of watches and jewellery. After his release, further similar incidents occurred, and Beck was again identified by the victims and convicted. However, while he was in prison awaiting sentencing, a further similar incident occurred which Beck could not have committed. The perpetrator of that offence, Wilhelm Meyer, was apprehended and the victims who had identified Beck at his second trial identified Meyer as the man who had defrauded them. Beck was pardoned and received compensation of £5000.

13 Criminal Appeal Act 1907, s 4(1).

2.20 The grounds for a successful appeal against conviction were subject to a "proviso" (discussed at paragraphs 6.9 to 6.58) that the Court could refuse an appeal if they considered that "no substantial miscarriage of justice had actually occurred".[14]

2.21 The 1907 Act did not abolish the Home Secretary's power to confer a full pardon, but section 19(a) of the Act made provision for the Home Secretary to refer a case to the Court of Criminal Appeal, which would then hear the case as an appeal by the convicted person. Where the Home Secretary referred a case, there was no requirement for leave to be obtained. This was a mechanism by which an appeal might be brought out of time, and in particular where the convicted person had already made an unsuccessful appeal to the Court of Criminal Appeal.

2.22 In practice, the Home Secretary came to be supported by an office known as "C3 Division", whose functions included assisting the Home Secretary in discharging responsibilities in relation to the Royal Prerogative of Mercy, references to the appellate Court, and payments of compensation to the wrongly convicted.[15]

1964 to 1968: The Donovan Committee and the Court of Appeal Criminal Division

2.23 A series of reforms to the law of appeals took place between 1964 and 1968. The intention was to enable more appeals to succeed.[16]

2.24 The Criminal Appeal Act 1964 gave the Court of Criminal Appeal a limited ability to order a retrial, where the ground for quashing the conviction was one of fresh evidence.

2.25 In 1964 the Government set up an interdepartmental Committee under Lord Donovan to consider:

(1) whether it would be in the public interest to transfer the hearing of all or some of the cases now heard by the Court of Criminal Appeal (namely appeals and applications for leave to appeal against conviction, appeals against sentence and references by the Home Secretary) to the Court of Appeal or some other Court; and if so as to the manner in which that Court should be constituted, the powers it should have and the procedure to be followed; and

(2) if in the view of the Committee the Court of Criminal Appeal should retain the whole or part of its current jurisdiction whether any and if so what changes are desirable:

(a) in the constitution, powers, practice and procedure of the Court; and

(b) in the system and procedure for giving notice of appeals and applications and in the functions and practice of the Criminal Appeal Office.

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14 Criminal Appeal Act 1907, s 4(1).

15 *Hansard* (HL), 17 May 1993, vol 545, col 75WA.

16 Introducing the Criminal Appeal Bill in Parliament in 1966, the then Attorney General said that the Bill was "extending the grounds on which an appeal against conviction is to be allowed": *Hansard* (HL), 11 July 1966, vol 731, col 1110.

2.26 The Committee reported in August 1965 and its recommendations were accepted by the Government. The recommendations were implemented in the Criminal Appeal Act 1966. The main reforms enacted by the 1966 legislation were that:

(1) The Court of Criminal Appeal and the Court of Appeal (which hitherto dealt only with civil matters) merged to become a single Court of Appeal, with two Divisions.

(2) The test for quashing convictions was expanded "with intention of widening the scope of effective appeal, particularly where the primary dispute concerns fact issues".[17]

(3) Provisions relating to the receipt of fresh evidence by the Court of Appeal were relaxed.

(4) Time spent in prison awaiting appeal would count towards a person's sentence unless the Court of Appeal ordered otherwise (reversing the previous position, under which it did not count, unless the Court of Criminal Appeal ordered that it should).

(5) The power to increase a person's sentence on an appeal was removed.

2.27 Specifically, when deciding whether to allow an appeal against conviction, the Court was required to quash a conviction if it thought:

(1) that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory; or

(2) that the judgment of the court of trial should be set aside on the ground of a wrong decision of any question of law; or

(3) that there was a material irregularity in the course of the trial.

In any other case it would dismiss the appeal.

2.28 The "proviso" was retained but the reference to a "substantial" miscarriage was replaced by a simple reference to "no miscarriage of justice ha[ving] occurred". Thus, the proviso was "that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice has actually occurred".

2.29 In relation to the receipt of fresh evidence, the CACD retained a broad discretion to receive fresh evidence if to do so was in the interests of justice. There was a new *requirement* for the Court to exercise this power if:[18]

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17 D A Thomas, "The Criminal Appeal Act 1966" (1967) 30 *Modern Law Review* 64.

18 Criminal Appeal Act 1968, s 5 (as enacted).

(a) it appears to them that the evidence is likely to be credible and would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and

(b) they are satisfied that it was not adduced in those proceedings but there is a reasonable explanation for the failure to adduce it,

unless "they are satisfied that the evidence, if received, would not afford any ground for allowing the appeal".

2.30 The provisions of this Act and the 1907 and 1964 Acts were subsequently consolidated in the Criminal Appeal Act 1968, which, as subsequently amended, remains the governing legislation for appeals to the CACD.

Pressure for reform

"C3 Division" and the Home Secretary's role in referring cases to the CACD

2.31 Before the Criminal Appeal Act 1995 and the creation of the CCRC, where the CACD had rejected an appeal, or had refused leave to appeal, the only way of bringing a case (whether an appeal against conviction or sentence) was by a petition to the Home Secretary. Under section 17 of the Criminal Appeal Act 1968, where a person had been convicted on indictment (or had been found not guilty by reason of insanity or been found by a jury to be "under disability", meaning that they were unfit to be tried) the Home Secretary had the right to refer a case to the CACD, which would then "be treated for all purposes as an appeal to the Court by that person".[19]

2.32 There was no such power in relation to convictions of a person tried summarily, so such cases were dealt with under the Royal Prerogative of Mercy.

2.33 "C3 Division" was a part of the Home Office, the principal functions of which were:[20]

(1) to assist Ministers in discharging the Home Secretary's duties and powers under mental health legislation in relation to offenders who are detained in psychiatric hospitals whose leave, transfer or discharge is subject to Home Office consent … and

(2) to assist Ministers in discharging the Home Secretary's responsibilities in relation to the Royal Prerogative of Mercy, references to the Court of Appeal under Section 17 of the Criminal Appeal Act 1968, and the payment of compensation to persons who are wrongfully convicted.

2.34 Although there was no legal restriction on the Home Secretary's power to refer cases, the Home Secretary's policy reflected constitutional sensitivities involved in the executive intruding into the province of the judiciary. Accordingly, a longstanding policy was that the Home Secretary would only refer a case where there was fresh evidence not available before the trial court, because successive Home Secretaries "thought it wrong for Ministers to suggest to the Court of Appeal that a different

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19 Criminal Appeal Act 1968, s 17.

20 *Hansard* (HL), 17 May 1993, vol 545, col 75WA.

decision should have been reached by the courts on the same facts".[21] They had also "taken the view that there is no purpose in their referring a case where there is no real possibility of the Court of Appeal taking a different view than it did on the original appeal".[22]

2.35 Professor Michael Zander KC (Hon) has suggested that, in practice, the Home Secretary did not actually apply a "real possibility" test:[23]

> Whenever the political pressure was so great that he could not resist, he referred. That was really what it came to. You needed a Ludovic Kennedy[24] or a "Rough Justice"[25] programme to get momentum for the Home Secretary to do anything about it.

2.36 It was observed in 1993 that "[t]he scrupulous observance of constitutional principles ha[d] meant a reluctance on the part of the Home Office to enquire deeply enough into the cases put to it".[26]

The "Irish cases"

2.37 On 14 March 1991, the Home Secretary announced the establishment of a Royal Commission on Criminal Justice, chaired by the 3rd Viscount Runciman of Doxford CBE FBA ("the Runciman Commission"; see paragraphs 2.54 and following below). The announcement came shortly after the CACD had earlier that day quashed the convictions of the "Birmingham Six".[27]

2.38 The Court had already, in October 1989, quashed the convictions of the "Guildford Four".[28] In the aftermath of the Guildford Four being cleared, the Home Secretary commissioned a review by Sir John May into the convictions, and the related

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21 Report of the Royal Commission on Criminal Justice (1993) Cm 2263, p 181. The Royal Commission, chaired by Viscount Runciman, was set up in 1991 in the wake of the quashing of the convictions of the "Birmingham Six", and following other cases including those of the "Guildford Four" and the "Maguire Seven" See further discussion at para 2.54 below.

22 Above, p 181.

23 House of Commons Justice Committee, Oral Evidence Tuesday 20 January 2015, Q 56.

24 Sir Ludovic Kennedy was a journalist and broadcaster. He published several books on miscarriages of justice, including *10 Rillington Place* (1961), on the wrongful conviction of Timothy Evans (see Appendix 1), which was made into a successful film in 1970. Home Secretary William Whitelaw remitted the sentences of David Cooper and Michael McMahon for the Luton Post Office murder (see Appendix 1) after reading a manuscript of Kennedy's book *Wicked Beyond Belief: The Luton murder case* (1980) about the case.

25 *Rough Justice* was a programme broadcast by the BBC between 1982 and 2007 which investigated alleged miscarriages of justice. It played a role in overturning the convictions of at least 18 people in at least 13 cases.

26 Report of the Royal Commission on Criminal Justice (1993) Cm 2263, p 182.

27 Hugh Callaghan, Patrick Joseph Hill, Gerard Hunter, Richard McIlkenny, William Power and John Walker were convicted in 1975 in relation to the IRA bombings of two pubs in Birmingham, in which 21 people were killed. The convictions were upheld by the CACD in 1976 and 1988. In 1991, the Crown indicated that it would not defend the appeals, and their convictions were quashed, the CACD finding that evidence of police misconduct in the case and new scientific evidence both independently rendered the convictions unsafe.

28 See Appendix 1.

convictions of the "Maguire Seven".[29] In 1990, Sir John had published an interim report which cast doubt on the safety of the convictions of the Maguire Seven: their convictions were referred by the Home Secretary and were quashed in June 1991.

2.39 Later in 1991, the Home Secretary referred the conviction of Judith Ward for the M62 coach bombing to the CACD.[30] Ward's conviction was quashed in 1992.[31] These cases have been collectively referred to as the "Irish cases", although not all of those convicted were Irish, Northern Irish or of Irish heritage, because they all involved wrongful convictions in relation to acts of terrorism connected to the activities of the Provisional IRA.

2.40 Lord Dyson has noted that:[32]

> The wrongful conviction of the 'Birmingham Six' … inevitably generated media hostility. Lord Chief Justice Lane, who had presided over the men's unsuccessful appeal in 1988, became the target of acute criticism. The Times published an article about Lord Lane which deprecated the "narcissistic arrogance" of his "worthless certainty" about the correctness of the jury's verdict.[33] It called for him to step down.

2.41 The call for the Lord Chief Justice to resign was also made in a Parliamentary motion signed by 140 MPs, including the most recent former leaders of the Labour and Liberal parties. Public criticism was also directed at the then-Master of the Rolls, Lord Donaldson, who had presided at the trial of the Guildford Four and had at the time expressed regret that they had not been charged with treason (which, unlike murder, still carried the death penalty).

2.42 The acquittal of the Birmingham Six also focused attention on the actions and comments of Lord Donaldson's predecessor, Lord Denning, who as Master of the Rolls had refused them permission to bring a civil action against the police for their mistreatment, on the ground that it was a collateral attack on the jury's verdict, saying:[34]

> If they won, it would mean that the police were guilty of perjury; that they were guilty of violence and threats; that the confessions were involuntary and improperly admitted in evidence; and that the convictions were erroneous. ... That was such an appalling vista that every sensible person would say, "It cannot be right that these actions should go any further".

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29 See Appendix 1.

30 In February 1974, nine soldiers were killed, along with the wife and two sons of one of them, when a bomb exploded on a coach taking them to army bases in North-East England.

31 See Appendix 1.

32 Lord Dyson MR, "Criticising Judges – fair game or off limits?", 3rd Annual Bailii Lecture (27 November 2014).

33 Specifically, he said "the longer this case has gone on, the more convinced this court has become that the verdict of the jury was correct".

34 *McIlkenny v Chief Constable of the West Midlands* [1980] QB 283, CA, 323D, by Lord Denning MR.

2.43 In 1988, he went further and suggested:[35]

> We shouldn't have all these campaigns to get the Birmingham Six released if they'd been hanged. They'd have been forgotten, and the whole community would be satisfied.

2.44 In the light of the relationship between the CCRC and the CACD in the late 2000s and early 2010s (which we discuss at paragraphs 11.277 to 11.330 below), it is important to recognise that at this point there was not only substantial and justified criticism of the conduct of the police and of the Government's ability to investigate miscarriages of justice. There was also substantial and justified criticism of the record of the senior judiciary in dealing with those alleged (and now proven) miscarriages of justice even once they were referred. Lord Devlin, writing in 1991, described the cases as "the greatest disasters that have shaken British justice in my time".[36] It would not be unfair to say that the CACD faced an existential crisis. It was for this reason that the CCRC was set up to be independent of both the Government *and* the CACD.

2.45 Dr Hannah Quirk has observed:[37]

> the Court of Appeal is the one aspect of the criminal justice system that has never reflected on its role in miscarriages of justice. We've had significant reforms from the police, of the Crown Prosecution Service being established, defence solicitors improving their behaviour. The Court of Appeal has never, to my knowledge, acknowledged its role in any of these cases.

2.46 These cases risked bringing the reputation of the justice system of England and Wales into disrepute. It is likely that the damage could have been much worse but for a perception among some sections of the public that convictions had been quashed on the basis of police misconduct and procedural deficiencies at trial, rather than doubts about the guilt of those acquitted. It has been suggested that this perception was encouraged by some within the police and legal professions, including members of the senior judiciary. Chris Mullin – a journalist who exposed the wrongful convictions and would later become a Government minister and chair of the House of Commons Home Affairs Committee – has said:[38]

> A whispering campaign started from the moment the first convictions were quashed. It could be heard wherever two or three lawyers or police officers were gathered. The Birmingham Six, the Guildford Four, Mrs. Maguire and her family are all guilty, it said. They were released on a technicality.

2.47 In the course of research for this project, we have found some evidence to substantiate the perception outlined above. For instance, in a confidential submission

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35 A N Wilson, "England, His England", *The Spectator* (18 August 1990).

36 P Devlin, "The Conscience of the Jury" (1991) 107 Law Quarterly Review 398.

37 The comparative studies of miscarriages of justice in light of the English experience, UCL symposium, 7 February 2023.

38 Chris Mullin, "The Truth about the Birmingham Bombings", *Chris Mullin*.

to the Runciman Commission (see paragraphs 2.54 and following below), now declassified under the Twenty-Year Rule, a High Court judge at the time wrote:

> Often the police will be morally certain that they have the right man but frustratingly will be unable to prove it because they cannot use the requisite evidence. For example, it may have come from a trusted and valuable informant; or it may be inadmissible owing to some rule of law; or the witness may have been put in such fear by threats directed against himself or his family that he refused to testify. *This, I believe, happened in the case of the Guildford Four*, where a witness who could have provided compelling evidence announced at an early stage that under no circumstances would he testify. (emphasis added)

2.48 In the interview mentioned at paragraph 2.43 above, Lord Denning had commented of the Guildford Four, "they'd probably have hanged the right men".[39]

2.49 Members of the "Balcombe Street Gang"[40] had admitted responsibility for the Guildford and Woolwich attacks, and there was evidence at the time of the Gang's trial linking them, at least, to the Woolwich bombing.[41] At the inquest into the deaths of the Birmingham victims, a representative of the IRA named four other men as responsible for the bombings (one, Michael Murray, had been tried alongside the Birmingham Six on lesser charges).[42] The identity of those behind the M62 bombing is not known, but no one would now seriously suggest that it might have been Judith Ward.

Other cases

2.50 While the so-called "Irish cases" were fundamental to the crisis, other cases at the time also caused concern. In advance of the announcement of the Runciman Commission, a document was prepared for Ministers anticipating questions they might be asked about particular alleged miscarriages of justice.[43] In addition to the Irish cases, the document referenced the convictions of Colin Wallace;[44] Michael and

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39 I Freeman, *Lord Denning – a Life* (1994) p 412.

40 The "Balcombe Street Gang" was an IRA unit who were captured following a siege in Balcombe Street, Marylebone, London in December 1975. Four members of the group were convicted in February 1997 of offences including seven counts of murder and several bombings, and each sentenced to life imprisonment with a recommendation that they serve a minimum of 30 years. ("Balcombe Street gang's reign of terror", *BBC News* (9 April 1999)).

41 In his report into the Guildford and Woolwich bombings, Sir John May found that two of the Balcombe Street Gang had confessed to the Woolwich bombings upon their arrest. However, he concluded that the police probably reasoned that this was not inconsistent with Paul Hill, one of the Guildford Four, also being present at Woolwich. He also concluded that the police could not be criticised for not pressing the Balcombe Street Gang about the Guildford bombings at this time, as they "had no reason to doubt the correctness of the Four's convictions for Guildford". (Sir John May, Return to an address of the Honourable the House of Commons dated 30 June 1994 for a report of the inquiry into the circumstances surrounding the convictions arising out of the bomb attacks in Guildford and Woolwich in 1974 (1993-94) HC 449, p 303.)

42 "Birmingham Pub bombings: Victims were unlawfully killed", *BBC News* (5 April 2019).

43 The National Archives, Royal Commission on Criminal Justice (Runciman Commission): Records: Additional evidence: Individuals, BS 26/522.

44 Wallace was a British Army intelligence officer in Northern Ireland, who had been forced to resign in 1975. He was convicted of manslaughter in 1981. It was alleged that he had killed the husband of one of his colleagues, with whom he had been in a relationship. The conviction was quashed in 1996, on the basis that

Vincent Hickey;[45] Derek Bentley;[46] and Paul and Wayne Darvell.[47] All subsequently had their convictions quashed.

2.51 Two other cases emerged while the Runciman Commission was ongoing, resulting in convictions being quashed in 1991. In both cases, DNA evidence has subsequently identified that another person was responsible for the offence.

2.52 First, in May 1991, the Home Secretary referred the conviction of Stefan Kiszko for the sexually-motivated murder of 11-year-old Lesley Molseed in 1975. Kiszko's conviction was quashed by the CACD in 1992 after semen samples taken at the time showed that he could not have committed the offence. He died in 1993, two years after his release. In 2006, the samples were matched to Ronald Castree, who was convicted of the murder in 2007.[48]

2.53 Second, throughout 1991 concern increased over the convictions in 1990 of the "Cardiff Three" for the murder of Lynette White.[49] This case was somewhat different from the "Irish cases" and the conviction of Stefan Kiszko, in that the Cardiff Three were cleared on a regular "in time" appeal against their convictions (although they had each spent four years in prison on remand and following conviction). However, the cause of the miscarriage of justice was not dissimilar – oppressive questioning leading a vulnerable person to make a false confession which was then deployed in evidence against them at the trial. In December 1992, the convictions of all three were quashed on the basis that the questioning of Miller was so oppressive that the confession should have been excluded. Lord Taylor of Gosforth, Chief Justice, said that "short of physical violence, it is hard to conceive of a more hostile and intimidating approach by officers to a suspect".[50] (In 2002, DNA found at the murder scene was matched to Jeffrey Gafoor, who subsequently pleaded guilty to the murder of Lynette White.)

(i) newspapers had published pictures of him in SAS uniform, undermining an agreement with prosecutors that his SAS history would not be raised and (ii) evidence from a pathologist that the victim had died from a karate blow (suggesting a link to Wallace's SAS background) was not consistent with the victim's injuries. His defence was always that he had been framed due to his intelligence activities.

45 See Appendix 1.

46 See Appendix 1.

47 Brothers Paul and Wayne Darvell were convicted of murdering the manageress of a Swansea sex shop in 1985. Their conviction was quashed in 1992. Evidence showed that Wayne was highly suggestible, that aspects of his confession were unreliable, and that supposedly contemporaneous notes of interviews had been compiled later and the originals destroyed. Statements by two detectives who claimed to have seen the brothers near the murder scene were shown to be false.

48 See Appendix 1.

49 See Appendix 2.

50 *R v Paris, Miller and Abdullahi* (1993) 97 Cr App R 99, CA, 103, by Lord Taylor of Gosforth CJ. See Appendix 2.

The Runciman Commission, the Criminal Appeal Act 1995 and the Criminal Cases Review Commission

2.54 Viscount Runciman, a sociologist and hereditary peer, was appointed to head the Royal Commission on Criminal Justice.[51] The remit of the Commission was deliberately wide-ranging, including the conduct of police investigations, the role of the prosecutor, arrangements for disclosure of material (including unused material) to the defence, the role of experts in criminal proceedings, the relationship between forensic science services and the police, arrangements for the defence of accused persons, access to legal advice and expert evidence, the powers of the courts in directing proceedings, the courts' duty in considering evidence, the role of the CACD, and the arrangements for considering and investigating alleged miscarriages of justice.

2.55 In respect of appeals, the review recommended, among other things, that:

(1) the grounds for quashing a conviction should be redrafted;

(2) (in the view of the majority) the grounds of appeal against conviction should be replaced by a single test of whether the conviction "is or may be unsafe";

(3) as part of that re-drafting, it should be made clear that the CACD should quash a conviction, notwithstanding that the jury reached the verdict having heard all the evidence and without any error of law or material irregularity, if, after reviewing the case, it concluded that the conviction is or may be unsafe;

(4) appeals against acquittal should be available where a person is convicted of conspiracy to pervert the course of justice by jury tampering in relation to a trial;

(5) the Home Secretary's powers to refer cases to the CACD should be transferred to a new authority, independent of both Government and the court structure; and

(6) that authority should consist of several members, with both lawyers and lay members.

2.56 Those recommendations were taken forward, although with some changes, in the Criminal Appeal Act 1995. The grounds for an appeal against conviction were replaced with a single "safety test" (see Chapter 8). A new Criminal Cases Review Commission was introduced to take over the Home Secretary's role in referring cases to the CACD and the investigatory functions of the Home Office's "C3 Division".

2.57 The CCRC commenced operations in 1997.

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[51] The other members were Sir John May (a Court of Appeal judge who had been leading the inquiries into the convictions of the Guildford Four and the Maguire family); Sir Robert Bunyard (the former Chief Contable of Essex Constabulary and an Inspector of Constabulary); Sir John Cadogan (a chemistry professor); Professor John Gunn (a professor of forensic psychiatry); Yve Newbold (a corporate lawyer); Usha Prashar (then director of the National Council for Voluntary Organisations and a former director of the race relations thinktank the Runnymede Trust); Anne Rafferty QC (a criminal barrister who later became a Court of Appeal judge); Sir John Wickerson (a solicitor and former President of the Law Society); Sir Philip Woodfield (a former senior civil servant); and Professor Michael Zander (a legal academic).

Subsequent reviews

The Auld Review

2.58 In 1999, Lord Justice Auld was invited by the Government to review the operation of the criminal courts in England and Wales. His remit was to review:[52]

> the practices and procedures of, and the rules of evidence applied by, the criminal courts at every level, with a view to ensuring that they deliver justice fairly, by streamlining all their processes, increasing their efficiency and strengthening the effectiveness of their relationships with others across the whole of the criminal justice system, and having regard to the interests of all parties including victims and witnesses, thereby promoting public confidence in the rule of law.

2.59 On appeals, Lord Justice Auld aimed to improve justice and efficiency by establishing broadly similar grounds of appeal at each jurisdictional level, simplifying overlapping appellate procedures and jurisdictions, and better matching the appellate tribunal to the seriousness and complexity of the case. In particular, he recommended:

(1) reforming appeals in summary cases, so that there was a single route of appeal from the magistrates' court to the Crown Court. This would be subject to a requirement for leave. On appeal from the magistrates' court, the Crown Court would not rehear the case, but would apply the same tests as the CACD uses for appeals in indictable cases. These proceedings would be heard by a judge sitting alone;[53]

(2) that the existing methods of challenging magistrates' court decisions in the High Court should be abolished;[54]

(3) that the jurisdiction of the CACD should be expanded so that it could hear appeals from the Crown Court presently dealt with by the High Court on an appeal by way of case stated or by way of judicial review;[55] and

(4) that simpler cases in the CACD could be heard by two High Court judges, or a High Court judge and a circuit judge.[56]

2.60 These reforms were not implemented. However, with a view to their implementation, the Government asked the Law Commission to review the High Court's jurisdiction in relation to criminal proceedings. This review is discussed further in Chapter 3.

Sir Brian Leveson's Review of Efficiency in Criminal Proceedings

2.61 In February 2014, Sir Brian Leveson, President of the (then) Queen's Bench Division of the High Court, was asked to conduct a review into the efficiency of criminal proceedings. The review was limited to reforms which could be undertaken without

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52 Rt Hon Lord Justice Auld, *A Review of the Criminal Courts of England and Wales* (2001) p 1.

53 Above, p 622.

54 Above, p 622.

55 Above, p 624.

56 Above, p 647.

legislation, although it did include a chapter identifying reforms which would require legislation.

2.62 Although out of scope, the review considered reform of the right of appeal in summary proceedings, including the possibility of replacing the right to a rehearing with a review of the type conducted in the CACD, with a requirement to seek leave. He did however note a countervailing consideration:[57]

> reasons provided by the bench would be subject to much greater scrutiny and could require more detail than is presently provided. In that event, more time would be taken fashioning and deploying them: to that extent, the restriction could be counter-productive.

Recent developments

2.63 Although the recommendations of the Auld and Leveson reviews were not implemented in full, a series of changes that have been made in recent years have implications for how the CACD fulfils its functions in respect of appeals against conviction and sentence.

2.64 First, judges now have more detailed guidance on how to direct juries, with the Crown Court Compendium providing example directions. Since 2022, the Criminal Procedure Rules relating to jury directions state that the court should "give those directions orally and, as a general rule, in writing as well".[58]

2.65 Second, it is now expected that juries in all but the simplest cases will be provided with a written route to verdict.[59] This is a series of questions for them to consider in sequence, so that they decide the different legal and factual elements of the case in a particular order to help guide them.

2.66 Third, it is now commonplace for judges to share both draft directions and draft routes to verdict with counsel for their comment and agreement. This should reduce the scope for error. Where a defendant's counsel has agreed to the judge's directions in advance, it is harder for an appellant subsequently to cite defects in them as a ground of appeal.[60]

2.67 Fourth, sentencing guidelines have been published for the most commonly prosecuted offences. In addition, Parliament has provided a statutory framework for setting the minimum term of the mandatory life sentence for murder. Historically, the CACD, through sentencing appeals, played an important role not only in ensuring sentencing consistency, but in providing authoritative sentencing guidance for trial courts. However, since 2003, the Court's role in setting sentencing guidance has been reduced, with the Sentencing Council now responsible for drafting, consulting on and

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57 Rt Hon Sir Brian Leveson, *Review of Efficiency in Criminal Proceedings* (January 2015).

58 Criminal Procedure Rules 2020, r 25.14(3)(b).

59 *R v Grant* [2021] EWCA Crim 1243, [2022] QB 857 at [47], by Fulford LJ VPCACD.

60 Complaints about the defendant's representation can result in a conviction being unsafe. While, in earlier cases, the CACD required "flagrant incompetence", or actions taken "in defiance of or without proper instructions", the focus now is on the issue of whether the incompetence rendered the trial unfair or the conviction unsafe. See *R v Ensor* [1989] 1 WLR 497, CA and *R v Donnelly* [1998] Crim LR 131, CA.

issuing guidelines.[61] At the same time, because the guidelines are issued in a more technical format than guideline appeal judgments typically were, the Court is more likely to be faced with appeals which turn on the application of those guidelines – for instance, whether an offence was properly categorised for the purposes of the guidelines. We discuss the impact of this reform on sentencing appeals in the CACD in Chapter 7.

Recent concerns

2.68 In 2015, the House of Commons Justice Committee published a report on the CCRC.[62] The report considered calls for a change in the "real possibility" test which the CCRC is obliged to use when considering whether to refer a case to the CACD (or, for cases tried summarily, the Crown Court). This requires the CCRC to conclude that there is a "real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made … because of an argument, or evidence, not raised in the proceedings which led to it or on any appeal or application for leave to appeal against it".[63]

2.69 In that report, the Justice Committee also recommended that the Law Commission should review the CACD's grounds for allowing an appeal against conviction.

2.70 In 2021, the "Westminster Commission", set up by the All-Party Parliamentary Group on Miscarriages of Justice, conducted a further inquiry into the CCRC.[64] The Commission recommended that the "real possibility" test be replaced with a "non-predictive" test. Noting that "[a]ny change would have to be undertaken in light of a change to the Court of Appeal's grounds for allowing appeals", it recommended that the Law Commission should review the CACD's grounds for allowing appeals. The Westminster Commission also recommended that the Law Commission should review the "substantial injustice" test applied by the CACD when considering whether to grant leave for an appeal brought out-of-time on the basis of a change in the common law.

2.71 In April 2021, in *Hamilton and others v Post Office Limited*,[65] the CACD quashed the convictions of 39 appellants (former sub-postmasters and sub-postmistresses) convicted of offences as a result of the Post Office Horizon scandal. Two of these

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61 Under the Crime and Justice Act 1998, the Sentencing Advisory Panel ("SAP") was introduced to draft and consult on sentencing guidelines, which were then referred to the CACD to inform the issue of a guideline judgment. Under the Criminal Justice Act 2003, s 167, the Sentencing Guidelines Council ("SGC") was created: the SAP would continue to consult and draft but it would make proposals to the SGC, rather than the CACD, and the SGC would then issue the guidelines. The Coroners and Justice Act 2009 replaced both the SAP and the SGC with the Sentencing Council.

62 House of Commons Justice Committee, *Criminal Cases Review Commission*, Report of the House of Commons Justice Committee (2014-15) HC 850 ("Justice Committee CCRC Report").

63 Criminal Appeal Act 1995, s 13. "Verdict" refers to a verdict of not guilty by reason of insanity (s 9(5)) and "finding" to a finding of fact that the person did the act of commission charged, where they were found unfit to plead (s 9(6)). In the case of an appeal against sentence, the second part of the test refers to "an argument on a point of law, or information, not so raised". Section 13(2) provides that nothing in this test "shall prevent the making of a reference if it appears to the Commission that there are exceptional circumstances which justify making it".

64 Westminster Commission on Miscarriages of Justice, *In the Interests of Justice: An inquiry into the Criminal Cases Review Commission* (2021) para 63.

65 [2021] EWCA Crim 577, [2021] Crim LR 684.

cases had previously been considered and rejected by the CACD. A fuller description of the Horizon scandal is found in Chapter 17 and Appendix 3.

2.72 In 2022, the Law Commission was asked by the Government to undertake the Criminal Appeals project. We published an Issues Paper on 26 July 2023,[66] and now publish this consultation paper.

2.73 Earlier that day, the CACD had quashed the conviction of Andrew Malkinson for rape and strangulation with intent to rape, on the basis of evidence not available at trial or at his first appeal showing the presence of another man's DNA on crime-specific locations on the victim's clothing. He had served 17 years of a life sentence. In the following days, it emerged that the police, the Crown Prosecution Service and the CCRC had been in possession of that evidence within four years of his conviction. The CCRC announced an independent review of its treatment of Mr Malkinson's applications, and the Lord Chancellor Alex Chalk KC announced a full judicial inquiry into the handling of Mr Malkinson's case on 24 August 2023.

2.74 In an interview with Radio 4 the day after his release, Mr Malkinson also drew public attention to the rules on compensation for victims of miscarriages of justice, and in particular the practice of the Government of making a deduction for living expenses that a person has saved by being imprisoned (which he described as a charge for "board and lodging"[67]). Within days, the Government announced that these deductions would no longer be made (see Chapter 16).

2.75 From 1 to 4 January 2024, ITV broadcast "Mr Bates v the Post Office", a dramatisation of the experiences of postmasters wrongly accused by the Post Office, and of the Bates litigation. Within a week, Prime Minister Rishi Sunak announced legislation to quash the convictions of those convicted on the basis of Horizon evidence. The Post Office (Horizon System) Offences Act 2024 was introduced in Parliament on 13 March 2024 and received Royal Assent on 24 May 2024 (we discuss this further in Chapter 17's section on systemic miscarriages of justice).

2.76 The number of Horizon appellants who were cleared on appeal (by the CACD and the Crown Court (for those convicted in a magistrates' court)) prior to the passing of the Post Office (Horizon System) Offences Act 2024 exceeded 100.[68]

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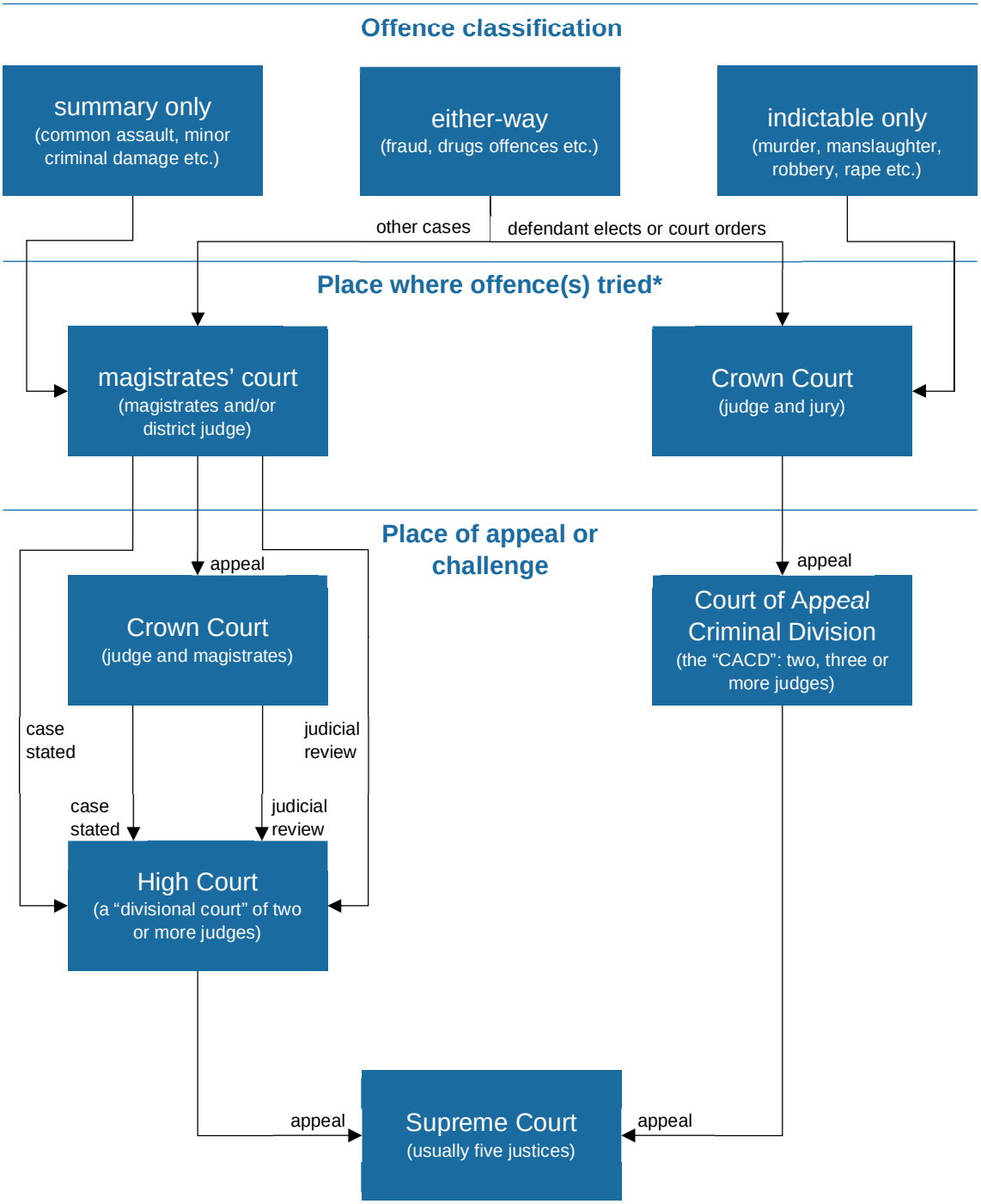
66 Law Commission, Criminal Appeals: Issues Paper (July 2023).

67 C May, "Andrew Malkinson: Why are some wrongfully convicted prisoners charged jail living costs?", *BBC News* (27 July 2023).

68 According to former Lord Chief Justice, Lord Burnett of Maldon: *Hansard* (HL), 13 May 2024, vol 838, col 426.

Chapter 3: The appellate structure of criminal courts

Appeal routes: defendant appeals against conviction or sentence



This diagram is not exhaustive and does not mention requirements for leave (permission) or extensions of time.

* some summary only offences can be tried with indictable ones in the Crown Court, but appeals against these offences will be to the CACD. Separately, if a person is convicted in a magistrates' court, they can be committed (sent) for sentencing by a judge in the Crown Court; in those circumstances, an appeal against conviction will be to the Crown Court but an appeal against sentence will be to the CACD.

THE ISSUE

3.1 There is a single hierarchy of courts in most areas of law. For instance, a civil case heard at first instance in the High Court can be appealed to the Court of Appeal Civil Division, and thereafter the Supreme Court. Initial appeals may go to a more senior judge or larger panel within the same court (for example, appeals from by a District Judge in County Court go to a Circuit Judge in County Court).

3.2 In criminal cases, however, there are two parallel appeal systems. Cases heard in magistrates' courts can be appealed either by way of rehearing in the Crown Court,[1] or, more rarely, can be reviewed by the High Court on a point of law (by way of case stated or judicial review). Appeals heard in the Crown Court can be appealed similarly to the High Court on a point of law. From there, there is the possibility of an appeal on a point of law of general public importance to the Supreme Court. Where cases are heard in the first instance in the Crown Court, an appeal lies to the Court of Appeal Criminal Division ("CACD") and then, on a point of law of general public importance, to the Supreme Court.

3.3 What determines the route of appeal, however, is not simply in which court the case is decided. Nor is it the mode of trial (indictable only, either-way or summary only), since sentences imposed by the Crown Court in summary proceedings, on sending for sentence by the magistrates' court, are appealed to the CACD.

3.4 Further, one of the routes of appeal (appeal to the High Court by way of case stated or judicial review) involves the Administrative Court rather than a specialist criminal court. There is an argument for this in relation to judicial review – because public law principles govern judicial review proceedings – but it is harder to explain this in relation to appeals by way of case stated. These will generally turn on issues of criminal law, not public law.[2]

3.5 Moreover, unlike in most civil proceedings, criminal appeals from the High Court go direct to the Supreme Court. They do not go to the Court of Appeal (because there is no appeal from the High Court to the Criminal Division, and there is no appeal to the Civil Division in a criminal cause or matter).

3.6 In this chapter we consider whether the current parallel routes of appeal should be consolidated, so that all appeals to courts higher than the Crown Court would be routed through the CACD – either directly (by transferring the High Court's jurisdiction to the CACD) or indirectly (retaining the High Court's jurisdiction but routing onward appeals to the CACD rather than directly to the Supreme Court).

3.7 We have assumed for these purposes (as did the Auld Review which we discuss in the next section) that there would be no change in the arrangements for appealing against decisions of the Crown Court in its first instance jurisdiction – that is, when

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1 A rehearing in the Crown Court on an appeal from a trial in the magistrates' court involves evidence being heard again and the possibility of introducing new evidence; the defendant benefits from the presumption of innocence, and the prosecution must satisfy the Crown Court beyond reasonable doubt of the defendant's guilt. A fuller discussion of appeal by way of rehearing is found at paras 5.46 and following.

2 Judges of the Administrative Court are however drawn from the King's Bench Division of the High Court, meaning that they also sit in the CACD and preside over complex or high-profile criminal trials.

hearing trials on indictment and when sentencing cases sent by the magistrates' court for sentencing. These would continue to be appealed to the CACD.

BACKGROUND: PREVIOUS REVIEWS

The Auld Review

3.8 In his review of the criminal courts (for more detail of which, see Chapter 2), Lord Justice Auld recommended that there should be a unified criminal court system comprising the Magistrates' Division, District Division and Crown Division.[3]

3.9 The Magistrates' Division and Crown Division would deal largely with the cases currently heard by magistrates' courts and the Crown Court respectively, other than those which would instead go to the District Division. Summary only cases would continue to be heard by magistrates; indictable only cases would continue to be heard by a jury in the Crown Division.

3.10 In the District Division, a judge would sit with two magistrates (as is normally the case for appeals in summary cases heard by the Crown Court). The jurisdiction would be limited to either-way offences subject to general sentencing maxima "turning on the seriousness of the circumstances of the case or cases charged as distinct from the legal maxima for a case or cases of that category" (he suggested a maximum of two-years' imprisonment).[4]

3.11 Lord Justice Auld recommended a single right of appeal. From the Magistrates' Division or District Division appeals would lie to the Crown Division, which would involve a single judge sitting alone. The right to a rehearing would be abolished. Instead, the appeal would be on the same basis as the current appeal from the Crown Court to the CACD. Appeals by way of case stated and judicial review of criminal cases would be abolished.

3.12 Appeals from the Crown Division sitting in both its appellate and first instance capacities would be to the CACD. The CACD's jurisdiction would be enlarged, if necessary, to cover matters currently provided by case stated and judicial review.

3.13 The Government accepted in principle Lord Justice Auld's recommendation that appeals from the Crown Court in its appellate capacity should be to the CACD and should be limited to cases involving an important point of principle or practice or where there is some other compelling reason for the Court to hear it. It also accepted the recommendation that there should be no appeal from the Crown Court by way of case stated or judicial review.

The previous Law Commission review

3.14 In 2004, we were asked to review the High Court's criminal jurisdiction over the Crown Court, with a view to giving effect to Lord Justice Auld's recommendations to abolish appeal by way of case stated and judicial review and to transfer the High Court's jurisdiction to the CACD. Specifically, we were asked to examine:

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3 Rt Hon Lord Justice Auld, *A Review of the Criminal Courts of England and Wales* (2001) ch 7.

4 Above, p 277.

(1) the origins and nature of, and the limitations upon, the High Court's criminal jurisdictions by case stated and judicial review over the Crown Court …;

(2) how those jurisdictions are best transferred to the Court of Appeal, simplified and, if appropriate, modified;

(3) the implications of (a) and (b) for the High Court's criminal jurisdiction over the magistrates' court, and for courts-martial;

and to make recommendations.[5]

The 2007 consultation paper

3.15 In 2007, we published a consultation paper.[6] We made the following provisional proposals.

(1) All appeals against conviction and sentence from the Crown Court should be to the CACD – that is, the Criminal Appeal Act 1968 should be extended to cover appeals against sentences in the Crown Court under its appellate jurisdiction.

(2) Appeals from the Crown Court in its appellate jurisdiction would require leave of the CACD.

(3) Section 58 of the Criminal Justice Act 2003 should be extended so that all 'terminating' rulings of the Crown Court could be appealed to the CACD, irrespective of whether the ruling was made in relation to a trial on indictment.

(4) The power of the Attorney General to refer a point of law to the CACD following an acquittal should be extended to cover rulings made by the Crown Court in its appellate capacity.

(5) Section 28(1) of the Senior Courts Act 1981 should be amended to preclude any orders of the Crown Court in criminal proceedings being challenged by way of case stated.

(6) Section 29(3) of the Senior Courts Act 1981, by which certain other orders of the Crown Court may be challenged by way of judicial review, should be repealed.

(7) There should be a new statutory (right of) appeal to the CACD to challenge determinations, judgments, orders or rulings of the Crown Court on the grounds that the decision:

(a) is wrong in law;

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

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5 The High Court's Jurisdiction in Relation to Criminal Proceedings (2007) Law Commission Consultation Paper No 184, para 1.1.

6 The High Court's Jurisdiction in Relation to Criminal Proceedings (2007) Law Commission Consultation Paper No 184.

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

(8) This statutory appeal should require the leave of the CACD.

(9) The CACD would be able to confirm, reverse or vary a decision. It would have the power to remit the case to the Crown Court with its opinion for a further decision to be made.

The 2010 final report

3.16 However, the conclusions our Final Report[7] were very different. We noted:

> in brief, consultees did not object to the removal of case stated as proposed, but some were concerned about the removal of judicial review as proposed, and all had serious concerns about the new statutory appeal that was proposed.[8]

3.17 One consideration was the obvious reluctance of the Criminal Appeal Office ("CAO") towards dealing with summary only offences, in particular motoring offences (especially because a disqualification would be suspended pending appeal).[9] The then Registrar of Criminal Appeals, Master Venne, said:[10]

> It seems to me that there is a real possibility that we would have a lot of sentence appeals from the Crown Court sitting in its appellate jurisdiction. My particular concerns are driving matters especially drink driving and "totting [up]" procedures.[11] It is also right that the magistrates' courts deal with a very wide range of offences – tacographs, axle weights etc. It is not appropriate in my view that the CACD should be required to deal with the minutiae of these offences. Moreover, the lawyers in the Criminal Appeal Office would need to have the kind of extensive knowledge that magistrates' court legal advisers have in relation to summary offences and their sentences.

3.18 We concluded accordingly that the Criminal Appeal Act ("CAA") 1968 should not be expanded to include challenges to sentences imposed by the Crown Court in its appellate capacity. Therefore, an appeal to the High Court would have to remain available for these cases.

3.19 Further, it would not make sense to allow challenges to *conviction* from the Crown Court in its appellate capacity under the CAA 1968 because that would involve

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7 The High Court's Jurisdiction in Relation to Criminal Proceedings (2010) Law Com No 324.

8 Above, para. 1.24.

9 Under the Road Traffic Offenders Act 1988, s 40(4), where a person ordered to be disqualified makes an application to appeal by way of case stated, the High Court may suspend the disqualification. Section 40(5) provides that similar powers are available when the decision is challenged by way of judicial review.

10 The High Court's Jurisdiction in Relation to Criminal Proceedings (2010) Law Com No 324, para. 4.14.

11 "Totting up" refers to the statutory requirement that where a person receives more than 12 points on their driving licence within three years, a driving ban of six months or more must be imposed unless a ban would cause "exceptional hardship". Road Traffic Offenders Act 1988, s 35.

splitting them from sentencing appeals. Therefore, an appeal to the High Court would have to remain for that purpose.

3.20 If an appeal to the High Court were to remain in respect of Crown Court decisions in its appellate capacity, then that avenue would remain available for use by the prosecution. Accordingly, there was no need to extend the power for the Attorney General to appeal on a point of law from decisions of the Crown Court in its appellate capacity.

3.21 The overall conclusion was that "the case for abolishing judicial review in relation to the appellate jurisdiction is not made out. This weakens any argument for removing judicial review in respect of any other jurisdiction of the Crown Court".[12]

3.22 In the Final Report therefore we recommended as follows:

(1) Appeal from the Crown Court by way of case stated would be abolished.

(2) The current exclusion from judicial review of the jurisdiction of the Crown Court in relation to matters relating to trial on indictment would be relaxed, although judicial review during a trial[13] would be restricted to decisions to refuse bail (whether affecting the defendant or a witness).

(3) There would be a new statutory appeal to the CACD if a judge refuses to make reporting restrictions in relation to a child.

(4) There would be a new statutory appeal to the CACD where there is a real and immediate risk to life.[14]

TO WHICH COURT SHOULD APPEALS IN SUMMARY CASES LIE?

3.23 In Chapter 5 at Consultation Question 11, we provisionally propose that appeal to the High Court by way of case stated should be abolished, and challenges in summary proceedings (whether from first instance or appellate proceedings) should be by way of judicial review. If judicial review remains as the route of challenging decisions of magistrates' courts on a point of law, without reform, it will be to the High Court, specifically the Administrative Court, a part of the King's Bench Division.

3.24 There are arguments, which were largely built into the terms of our 2004-10 review, that appeals in all criminal cases should go to the CACD. However, in our 2010 Report, we essentially concluded against the CACD dealing with summary only

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12 The High Court's Jurisdiction in Relation to Criminal Proceedings (2010) Law Com No 324, para 4.35.

13 The exclusion period would start with the defendant being committed, or the case being transferred or sent for trial at the Crown Court (or a voluntary bill of indictment being preferred) and the charge being dismissed, the defendant being convicted or acquitted, the charge being stayed, etc.

14 The High Court's Jurisdiction in Relation to Criminal Proceedings (2010) Law Com No 324, para 11.10.

offences – in particular motoring offences – on the grounds that this would not make best use of the Court's (and the CAO's) expertise and experience.[15]

3.25 Conversely, however, some of the issues that are currently challenged by way of case stated or judicial review are well within the expertise and experience of the CACD. In cases involving the rights of protestors to freedom of expression and assembly and their liability under criminal law, for instance, there is a considerable overlap. While some offences commonly charged in such cases are summary only (obstructing the highway, for example), an offence like criminal damage could easily be considered by the CACD (if it were tried on indictment).[16] It is potentially anomalous that the court which decides an abstract issue *of law* could be either the High Court or the CACD depending on whether the case was prosecuted summarily or on indictment (which may turn on the estimated value of the damage).

APPEALS FROM THE HIGH COURT TO THE CACD

3.26 As appeals in civil cases from the High Court will normally lie to the Court of Appeal, and only exceptionally direct to the Supreme Court, it might be asked whether there should be an appeal from the High Court to the CACD. At present, no appeal from the High Court to the Court of Appeal (meaning the Civil Division) is possible in respect of any "criminal cause or matter".[17] Instead, appeal lies direct to the Supreme Court.

3.27 Although the CACD does not have considerable experience of the "minutiae" of provisions relating to the trial and punishment of summary offences (see the quote from Master Venne at 3.17), this is no doubt also true of the Supreme Court. The CACD does deal frequently with the either way offences that magistrates' courts and thereafter the High Court deal with. Channelling High Court appeals through the CACD could allow for greater consistency in development of the law.

3.28 There would need to be a high threshold for allowing such appeals (given that the case would already have been considered by two – and perhaps three[18] – courts). The normal rule in the Civil Division is that the permission of the previous appeal court is required.[19] In addition, the Court of Appeal Civil Division will only hear the case if it considers that the appeal has a real prospect of success and raises an important point of principle or practice, or that there is some other compelling reason for the Court of Appeal to hear it. Were such a threshold adopted, it might address the worry

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15 In his reply to our consultation paper on the High Court's Jurisdiction, the then Registrar of Criminal Appeals, Master Venne, said "the magistrates' courts deal with a very wide range of offences – tacographs, axle weights etc. It is not appropriate in my view that the CACD should be required to deal with the minutiae of these offences. Moreover, the lawyers in the Criminal Appeal Office would need to have the kind of extensive knowledge that magistrates' court legal advisers have in relation to summary offences and their sentences" (see The High Court's Jurisdiction in Relation to Criminal Proceedings (2010) Law Com No 324, para 4.14).

16 For instance, *Attorney General's Reference on a Point of Law (No 1 of 2022)* [2022] EWCA Crim 1259, [2023] KB 37 (the Colston statue case).

17 Senior Courts Act 1981, s 18. An exception is made by the Administration of Justice Act 1960 for contempt of court and *habeas corpus*.

18 Where the High Court was ruling in an appeal by way of case stated or judicial review from a decision of the Crown Court in appellate proceedings.

19 Access to Justice Act 1999, s 54(4).

expressed by Master Venne that the CACD would have to deal with – for instance – the minutiae of totting up provisions; such cases would rarely raise an important point of principle or practice.

3.29 This would be lower than the threshold at present for appeals from the High Court to the Supreme Court, which is that the High Court must certify that the case raises a point of law of general public importance.

3.30 However, as we discuss in Chapter 14 on appeals to the Supreme Court, the CACD possesses an "effective veto" on cases tried on indictment reaching the Supreme Court. While it retains this effective veto, we do not think it would be appropriate for appeals from the High Court in criminal cases to be routed to the CACD, since this would give the CACD an "effective veto" on any criminal cases being considered by the Supreme Court.[20]

Consultation Question 1.

3.31 We invite consultees' views as to the appropriate route for appeals in summary proceedings, including whether appeals on a point of law in summary proceedings should go to the Court of Appeal Criminal Division after, or instead of, the High Court, or whether the current parallel arrangements should be maintained.

DECENTRALISATION OF THE COURT OF APPEAL

3.32 We received two submissions which referred to transferring the work of the Court of Appeal to national or regional courts.

Wales

3.33 In their submission, the Bar Council drew attention to the proposals of the Commission on Justice in Wales, chaired by the former Lord Chief Justice, Lord Thomas of Cwmgiedd. The Commission recommended that the Senedd should be empowered to legislate for a separate Welsh judiciary, and that legislation should provide for a separate Court of Appeal of Wales.[21]

3.34 Although the CACD can, and does, sit in Wales – usually in Cardiff or Swansea – the Commission found that there had been a decline in the number of sittings in Wales. It considered that one reason might be the need to hear cases more quickly than would be possible if the appeal was left to one of the sittings in Wales.[22]

3.35 The Commission's recommendations on a Court of Appeal were made in the context of a recommended wholesale devolution of the courts up to and including the Court of

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20 Criminal issues might still reach the Supreme Court in civil cases. For instance, the Supreme Court may have to make decisions on matters of criminal law where this is relevant to a decision in, for example, public law proceedings.

21 Commission on Justice in Wales, *Justice in Wales for the People of Wales* (2019) p 500.

22 Above, pp 191-92.

Appeal. It may be that the case for devolving the functions of the CACD is contingent on the devolution of the lower courts. In this respect, we note that most of the caseload of the CACD deals with offences which are currently reserved to Westminster, including homicide and other offences against the person triable only on indictment; sexual offences, including those relating to indecent and pornographic images; and drug offences. Matters relating to fundamental principles of criminal law, including criminal responsibility and capacity, the meaning of intention, recklessness and dishonesty, and inchoate and secondary criminal liability, are also reserved.

3.36 We also note that, given the size of the jurisdiction, were there to be a separate Court of Appeal for Wales, then splitting the Court into two separate Divisions might not be warranted. In Northern Ireland, the Court of Appeal is not divided.

Regional appellate courts

3.37 In an article from 2006 to which he drew our attention in his response, Professor John Spencer argued:[23]

> I think that the root of the problem is that all appeals from decisions of the Crown Court have to be dealt with by a court that sits (at least usually) in London. In most of the other countries of Europe, the court system is arranged in such a way that each area has its own Court of Appeal. In my view, a better way to reform the system of criminal appeals would be to set up regional Courts of Appeal for criminal cases, which would handle all appeals against sentences imposed in the Crown Court, except for the small minority that involve points of legal principle, and which would also deal with the simpler appeals against conviction.
>
> They could be staffed, I believe, by senior circuit judges—possibly presided over by a High Court judge. Such a court, I believe, would be well able to cope with the type of work that would be sent to it. The Court of Appeal (Criminal Division) in London would then sit to deal with the most difficult and important cases only: so relieving the senior and experienced judges who sit in it of a mass of relatively routine work, so enabling them to devote their time to work that is worthy of their talents.

Consultation Question 2.

3.38 We invite consultees' views on the current structure of the appellate courts in respect of criminal proceedings in England and Wales.

[23] J Spencer, "Does our criminal appeal system make sense?" [2006] *Criminal Law Review* 677, 694.

Chapter 4: Principles in criminal appeals

4.1 Fundamental principles, including those reflected in the common law and in the European Convention on Human Rights ("ECHR"), come into play in two distinct ways in relation to criminal appeals. First, the appeals system itself is bound to observe those principles. Appeals, for instance, must be fair between the parties, with a broad "equality of arms". However, not all principles will apply or apply in the same way. For instance, most[1] appellants have no right to the presumption of innocence, because that presumption ceases to apply once they have been found guilty.[2]

4.2 Second, the appeals system, being a component of the wider criminal justice system, should give effect to fundamental principles of that system. For instance, the single test of "safety", used in relation to appeals against conviction by the Court of Appeal Criminal Division ("CACD"), has been interpreted so that convictions will be "unsafe" if the prosecution of the convicted person amounted to an abuse of process[3] on the basis that it offends against the court's sense of justice and propriety.

THE FUNCTIONS OF THE RIGHT OF APPEAL

4.3 As discussed in the Issues Paper,[4] criminal appeals serve a number of overlapping functions, both private and public. Literature on criminal appeals identifies these functions as including:

(1) to safeguard against wrongful convictions;[5]

(2) to remedy violations of the right to a fair trial in earlier proceedings;[6]

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1 A person who appeals against their conviction from the magistrates' to the Crown Court enjoys the presumption of innocence within those proceedings.

2 However, see A Clooney and P Webb, *The Right to a Fair Trial in International Law* (2021) p 703, and *Konstas v Greece* App No 53466/07 in which the European Court of Human Rights ("ECtHR") held that there had been a violation of the right to be presumed innocent where a government spokesperson had made comments relating to the applicant's guilt while an appeal against her conviction was pending.

3 The Crown Court has the power to stay a prosecution to avoid unfairness (*Connelly v DPP* [1964] AC 1254, HL; *DPP v Humphreys* [1977] AC 1, HL). This includes so-called "category 2" abuse of process "where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case" (*R v Maxwell* [2010] UKSC 48, [2011] 1 WLR 1837 at [13], by Dyson JSC).

4 Law Commission, Criminal Appeals: Issues Paper (July 2023), para 2.5 and following.

5 A Clooney and P Webb, *The Right to a Fair Trial in International Law* (2021) p 656; P D Marshall, "A Comparative Analysis of the Right to Appeal" (2011) 22 *Duke Journal of Comparative and International Law* 1, 3.

6 A Clooney and P Webb, *The Right to a Fair Trial in International Law* (2021) p 656.

(3) to provide legal consistency by correcting anomalous application of the law[7] and resolving conflicting interpretations of the law;[8]

(4) to encourage better decision-making through the prospect of review;[9] and

(5) to enable the development of substantive and procedural doctrines relating to criminal justice.[10]

4.4 The existence of a system of criminal appeals is thus designed to give effect to broader principles of criminal justice – including the rule of law – and not only to deal with the guilt or innocence of the appellant.

4.5 This chapter first outlines debates on the meaning of the term "miscarriage of justice". It then considers core principles of the criminal appeals system in England and Wales, looks at where they can be in conflict and provisionally proposes a list of principles which should govern our review and criminal appeals generally.

WHAT ARE "MISCARRIAGES OF JUSTICE"?

4.6 The terms of reference for this project require us to consider whether the tests applied by the CACD may hinder the correction of "miscarriages of justice". Because miscarriages of justice play so prominent a part in the history and operation of the criminal appeals system, it is important for us to discuss their nature and attempts that have been made to define them.

4.7 Discourse on the nature of miscarriages of justice has been said to be "highly polarised",[11] especially when considered in the context of our adversarial system of law, which necessitates "an evidential contest" in criminal trials, rather than a pursuit for truth, certain guilt or certain innocence.[12]

4.8 The paradigmatic criminal miscarriage of justice could be said to involve the conviction of the factually innocent. However, difficulties with the term immediately arise. Some would say that the conviction of anyone due to the criminal justice system working less than perfectly is wrongful and a miscarriage of justice. Others would say that there needs to be something more, such as corruption, wilful ignorance, or arms of the state collaborating in suppressing the truth.[13]

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7 P D Marshall, "A Comparative Analysis of the Right to Appeal" (2011) 22 *Duke Journal of Comparative and International Law* 1, 3.

8 Above, 4.

9 P D Marshall, "A Comparative Analysis of the Right to Appeal" (2011) 22 *Duke Journal of Comparative and International Law* 1, 3.

10 American Bar Association, Standard 21-1.2(a)(ii).

11 M Naughton, *Rethinking miscarriages of justice: Beyond the tip of the iceberg* (2007) p 14.

12 Above, p 18.

13 In *R (Allen) v Secretary of State for Justice* [2008] EWCA Civ 808, [2009] 2 All ER 1 at [39], Hughes LJ said that he "would be inclined to accept, for example, that many would, in ordinary parlance, describe a conviction achieved by police corruption or by falsified police evidence, as a miscarriage of justice".

4.9 More broadly, miscarriages of justice have been argued to occur outside "the confines of the court system".[14] They have been proposed to occur "whenever suspects or defendants or convicts are treated by the State in breach of their rights",[15] or even when the "'moral integrity of the criminal process' suffers harm".[16]

4.10 For others, a miscarriage of justice can also include the wrongful acquittal of the guilty. If a crime has been committed against a victim (especially one resulting in death), and the authorities refuse, or through incompetence or bias fail, to find or prosecute the offender, this can not only be a miscarriage of justice, but can in some circumstances amount to a breach of human rights law.[17] More frankly, the then-Prime Minister Rt Hon Tony Blair MP suggested in 2002 that "it's perhaps the biggest miscarriage of justice in today's system when the guilty walk away unpunished".[18] This injustice is particularly stark when a person who murders another person avoids prosecution and conviction.[19]

4.11 Nonetheless, as we discuss in Chapter 4, a core principle of the criminal justice system is to prefer the acquittal of the guilty to the conviction of the innocent. Thus some have suggested that the notion of miscarriages of justice "cannot relate to the

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14 S Poysner, "Introduction – what is a miscarriage of justice?", in S Poysner, A Nurse and R Milne (eds), *Miscarriages of Justice: Causes, Consequences and Remedies* (2018) pp 4-5.

15 C Walker, "Miscarriages of Justice in Principle and Practice", in C Walker and K Starmer (eds), *Miscarriages of Justice: A Review of Justice in Error* (1999) p 33; Walker goes on to give six examples of direct causes of miscarriages of justice:

> A miscarriage occurs as follows: whenever suspects or defendants or convicts are treated by the State in breach of their rights, whether because of, first, deficient processes or, second, the laws which are applied to them or, third, because there is no factual justification for the applied treatment or punishment; fourth, whenever suspects or defendants or convicts are treated adversely by the State to a disproportionate extent in comparison with the need to protect the rights of others; fifth, whenever the rights of others are not effectively or proportionately protected or vindicated by State action against wrongdoers or, sixth, by State law itself.

16 Above, p 37.

17 In *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11, [2019] AC 196 the Supreme Court ruled that where the law prohibits conduct amounting to a breach of torture or inhuman treatment, there is a positive duty to enforce the law and investigate complaints, and both systematic and seriously deficient investigations can amount to a breach of article 3 of the European Convention on Human Rights. Similar considerations apply in respect of the right to life under article 2 of the Convention.

18 "Full text of Blair's speech", *Guardian* (18 June 2002).

19 In the Issues Paper we cite the example of *R v Weir* [2000] 5 WLUK 751, (2000) 97(27) LSG 37; *R v Weir* [2001] 1 WLR 421; *Attorney General's Reference No 3 of 1999* [2001] 2 AC 91, HL. Weir's conviction for murder was quashed by the CACD on the basis that the judge should not have allowed the admission of evidence of a match between DNA found at the scene and a sample previously taken from Weir which should have been destroyed. The House of Lords heard an appeal on this issue from an Attorney General's Reference on a point of law that had been heard by the CACD alongside Weir's appeal. However, as the prosecution had notified its intention to appeal the CACD's ruling in respect of Weir one day outside the time limit (then 14 days), it could not quash Weir's acquittal. In 2018, under later legislation allowing for retrials for certain serious offences where there is compelling new evidence (which we discuss in Chapter 13), the CACD quashed Weir's acquittal on the basis of a palmprint subsequently matched to him, and he was later convicted of the murder (and a second murder, committed in the same year).

wrongful acquittal of the guilty in any practical or strict legal sense", as this undermines the presumption of innocence.[20]

4.12 Under section 133(1ZA) of the Criminal Justice Act 1988, eligibility for compensation following the quashing of a criminal conviction or grant of a pardon is dependent on a narrow definition of a "miscarriage of justice": there will have been a "miscarriage of justice … if and only if [a] new or newly discovered fact shows beyond reasonable doubt that [an applicant] did not commit the offence". However, this restrictive definition of a miscarriage of justice governs the giving of compensation, rather than the formal acknowledgement that a miscarriage of justice has occurred (for which see greater discussion in Chapter 17). It nonetheless hints at the fact that "a miscarriage of justice cannot be said to have occurred" in a strictly legal sense "unless, and until, the appeal courts quash a criminal conviction"; before that point it "remain[s] 'alleged'".[21]

4.13 The above considerations about the scope of potential miscarriages of justice may inform criminal appeals reform, but we prefer to define a miscarriage of justice broadly. For this paper's purposes, it is a "failure of a court or judicial system to attain the ends of justice".[22] This broad definition ensures respect for the principle "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".[23]

4.14 This would include the acquittal of the factually guilty, where this results from, for instance, legal error or misconduct (but not where it reflects the proper application of the principle that it is for the prosecution to prove the defendant's guilt to the criminal standard of proof). It would also cover situations where a person was convicted (regardless of their guilt or innocence) but did not receive a fair trial, or the prosecution amounted to an affront to justice.

4.15 Nonetheless, we recognise that the conviction of a factually innocent person, particularly where this results from misconduct by agents of the state or legal error, remains for many the paradigmatic example of a miscarriage of justice.

RIGHTS OF APPEAL UNDER INTERNATIONAL LAW

4.16 The International Convention on Civil and Political Rights ("ICCPR"), which the UK ratified in 1976 (and is bound by, but has not incorporated into domestic law), includes a right to an appeal in criminal proceedings. Article 14(5) provides: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law". Requiring leave to appeal does not

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20 M Naughton, *Rethinking miscarriages of justice: Beyond the tip of the iceberg* (2007) p 16.

21 M Naughton, "Redefining miscarriages of justice: a revived human-rights approach to unearth subjugated discourses of wrongful criminal conviction" (2005) 45(2) *British Journal of Criminology* 165.

22 "miscarriage, n", *OED Online* (last modified March 2024) 2.c., https://www.oed.com/dictionary/miscarriage_n?tab=meaning_and_use#36628907. See also C Walker, "Miscarriages of Justice in Principle and Practice", in C Walker and K Starmer (eds), *Miscarriages of Justice: A Review of Justice in Error* (1999) p 31: "A miscarriage of justice is … a failure to attain the desired end result of 'justice'".

23 *R v Sussex Justices, ex p McCarthy* [1924] 1 KB 256, HC, 259, by Lord Hewart CJ.

violate this right, "as long as the examination of an application for leave to appeal entails a full review of the conviction and sentence and as long as the procedure allows for due consideration of the nature of the case".[24] Nor does the imposition of time limits for bringing an appeal violate this right, provided that they are not so short as to prevent defendants being able effectively to appeal. Certain fair trial rights which apply at the initial trial may be disapplied on appeal,[25] and defendants' rights to adduce new evidence may be limited.[26]

4.17 The ECHR does expressly mention the right to an appeal in the main text. Article 2 of Protocol 7 ("A2P7") provides a similar right to an appeal in criminal proceedings as the ICCPR. However, the UK has not ratified Protocol 7 (and consequently it is not incorporated into domestic law by the Human Rights Act 1998 ("HRA 1998")). The existence of a right to appeal under A2P7 also makes it less likely that the European Court of Human Rights ("ECtHR") would develop a right to an appeal out of the general right to a fair trial found in article 6 of the main text of the ECHR.

4.18 Article 13 of the ECHR provides that "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority".[27] Article 13 does not guarantee a right of appeal, and, as this is separately recognised by A2P7, it is questionable whether the ECtHR would interpret article 13 as requiring a right to an appeal in criminal proceedings.[28] Moreover, a person who has been properly convicted of an offence of which they are factually innocent has not necessarily had their rights violated.

4.19 However, a person who has been convicted following a trial which is unfair has, by definition, had their rights to a fair trial violated (although they may, in fact, be guilty). To this extent, where a person has suffered a breach of their article 6 rights, there must be a remedy, and a fair and effective right of appeal can amount to an effective remedy for this purpose.[29]

4.20 Where domestic law *does* provide a right of appeal (as it does in England and Wales), the proceedings must comply with article 6 – that is, there must be a fair and public hearing within a reasonable time, by an independent and impartial tribunal established by law.[30]

4.21 Article 6(3) of the Convention requires that an accused person has the right:

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24 Human Rights Committee, *Lumley v Jamaica* (1999) UN Doc CCPR/C/65/D/662/1995.

25 A Clooney and P Webb, *The Right to a Fair Trial in International Law* (2021) p 698.

26 Above, p 700.

27 Article 13 is not incorporated into domestic law in the HRA 1998 since the Act is itself a way in which the UK secures the Convention rights and provides an effective remedy in case of a breach of those rights.

28 *Pizzetti v Italy* App No 12444/86 (Commission decision) at [41].

29 The ECtHR held in *Condron v UK* (2000) 31 EHRR 1 (App No 35718/97) that proceedings in the CACD had not provided a remedy to the breach of the appellants' right to a fair trial because they were "concerned with the safety of the appellants' conviction, not whether they had in the circumstances received a fair trial".

30 *Meftah and others v France* App Nos 32911/96, 35237/97 and 34595/97 (Grand Chamber decision) at [40].

to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

to have adequate time and facilities for the preparation of his defence;

to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; and

to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

4.22 Other elements seen as part of the right to a fair trial include the principle of "equality of arms",[31] the entitlement to disclosure of evidence, the right to remain silent and the privilege against self-incrimination.

4.23 However, the courts have been clear that not every procedural error will mean that the defendant did not receive a fair trial. The ECtHR has held that there can be a breach of article 6, by virtue of a breach of a right associated with article 6, without this meaning that the defendant did not receive a fair trial overall.[32]

4.24 Nonetheless, where a person did not receive a fair trial overall, then a conviction will not be "safe" – however strongly probative of guilt the evidence is.[33] The right to a fair trial applies to the plainly guilty as much as it does to the innocent. As the Privy Council stated in *Michel*:[34]

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31 The ECtHR has described the principle of "equality of arms" as requiring that "each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent" (*Bulut v Austria* App No 17358/90 at [47]; *Foucher v France* App No 22209/93 at [34]; *Öcalan v Turkey* App No 46221/99 at [140]).

Professor Paul Roberts criticises the term "equality of arms", saying "the seductive image of 'equality of arms' is apt to mislead, inasmuch as it implies that genuine parity of resources between the parties is the desired objective. In reality, the bulk of criminal accused could never be equipped with sufficient resources to match the state apparatus of criminal investigation and prosecution, and nor should they be. The real objective imperfectly expressed by the 'equality of arms' slogan is to find ways of mitigating the unavoidable structural imbalance between prosecution and defence", P Roberts and A Zuckerman, *Roberts and Zuckerman's Criminal Evidence* (3rd ed 2022) p 65.

32 *Ibrahim v UK* App Nos 50541/08, 50571/08, 50573/08 and 40351/09 (Grand Chamber decision) at [250]; *O'Halloran and Francis v UK* App Nos 15809/02 and 25624/02 (Grand Chamber decision) at [53]; *Schatschaschwili v Germany* App No 9154/10 (Grand Chamber decision) at [101].

33 *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45; *R v Randall* [2002] UKPC 19, [2002] 1 WLR 2237; *R v Edgar* [2018] EWCA Crim 1857. Insofar as *R v Abdurahman* [2019] EWCA Crim 2239, [2020] 4 WLR 6 suggests otherwise, see the discussion at para 8.48 and following below.

34 *Michel v The Queen* [2009] UKPC 41, [2010] 1 WLR 879 at [27], by Lord Brown of Eaton-under-Heywood.

> Put shortly, there comes a point when, however obviously guilty an accused person may appear to be, the Appeal Court reviewing his conviction cannot escape the conclusion that he has simply not been fairly tried.

4.25 The ECtHR has accepted that the fact that a person did not receive a fair trial does not mean that the conviction must be overturned, and it may be possible to provide adequate redress through a declaration or compensation.[35]

4.26 The ICCPR also includes a right to compensation for a victim of a miscarriage of justice whose conviction has been quashed (or who has been pardoned) on the basis that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, by its article 9.5.

4.27 In Chapter 16, we consider the domestic law on compensation for miscarriages of justice, and conclude that it does not meet the spirit of the obligations that the UK has accepted under the ICCPR.

CORE PRINCIPLES OF THE CRIMINAL JUSTICE SYSTEM

The Criminal Procedure Rules

4.28 The Criminal Procedure Rules ("CrimPR") are a set of rules and practices that apply, in general, to all criminal cases in the magistrates' court, Crown Court, and extradition cases in the High Court, as well as all cases in the CACD.[36] The Rules first came into force in 2005, following Lord Justice Auld's recommendations in the *Review of the Criminal Courts of England and Wales*.[37] The aim was to create clear and consolidated rules that were accessible to the court user to be applied at all levels of the criminal justice system.[38] The most current version, and the ones subsequently referred to, are the Criminal Procedure Rules 2020.

4.29 Rule 1.1 sets out the overriding objective of the procedural code which is to ensure "that criminal cases be dealt with justly".[39] In order to ensure a criminal case is dealt with in a just manner, the code identifies eight principles:[40]

(a) acquitting the innocent and convicting the guilty;

(b) treating all participants with politeness and respect;

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35 N Mole and C Harby, *The right to a fair trial: A guide to the implementation of Article 6 of the European Convention on Human Rights* (2nd ed 2006) p 70:

> Frequently, particularly in Article 6 cases, [the ECtHR] makes no monetary award at all, holding that the finding of a violation constitutes sufficient just satisfaction.

In *Assanidze v Georgia* App No 71503/01 (Grand Chamber decision), the ECtHR exceptionally directed the appellant's release from prison.

36 Criminal Procedure Rules 2020, r 2.1.

37 Criminal Procedure Rules 2005, Explanatory Memorandum, [4].

38 Above, [7].

39 Criminal Procedure Rules 2020, r 1.1.

40 Above, r 5.

(c) dealing with the prosecution and the defence fairly;

(d) recognising the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights;

(e) respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case;

(f) dealing with the case efficiently and expeditiously;

(g) ensuring that appropriate information is available to the court when bail and sentence are considered; and

(h) dealing with the case in ways that take into account—

(i) the gravity of the offence alleged,

(ii) the complexity of what is in issue,

(iii) the severity of the consequences for the defendant and others affected, and

(iv) the needs of other cases.

4.30 Intertwined with the considerations in Rule 1.1 are further principles that have been identified in the literature as well as through the common law. These principles include:

(1) the right to a fair trial before an impartial tribunal;

(2) the principle of finality[41] and the "one trial" principle (that is, a party is not entitled to deploy one case at trial while "holding back" an alternative case to be deployed upon appeal);[42]

(3) respect for the rule of law;

(4) legal protections against "double jeopardy", including the principle that a person should not (with limited exceptions) be retried for an offence of which they have been finally acquitted.

4.31 Finally, it is recognised that in England and Wales criminal justice is delivered through adversarial proceedings and, for the overwhelming majority of trials on indictment,

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41 As Lord Dyson has noted ("Time to call it a day: some reflections on finality and the law", lecture at Edinburgh University (14 October 2011)), the principle of finality is given greater expression in civil than criminal law with greater use of mechanisms such as limitation periods (which generally only apply in criminal courts in England and Wales in relation to summary proceedings), estoppel, and *laches* (although delay may sometimes be invoked to stay criminal proceedings as an abuse of process).

42 For instance, in *R v Kyte* [2001] EWCA Crim 3 at [31], Laws LJ said: "It cannot be consistent with the elementary imperative of fair trial that a defendant should be allowed to say on appeal that his/her conviction is unsafe because, on what we must assume were good tactical or strategic grounds, he/she declined to call a piece of available evidence".

with a jury.[43] Although jury trials represent only a small fraction of criminal proceedings, they involve the most serious offences. We also recognise that as well as being a means to an end, in England and Wales, the right to trial by jury where serious criminality is alleged is seen as an important underlying principle of the criminal justice system in its own right. More than 80% of British citizens strongly support the right to trial by jury.[44]

4.32 The fact that juries are ultimately responsible for deciding the guilt of the defendant, and the unique nature of a jury's verdict, has consequences for the appeals system (see Chapter 8). The ultimate responsibility of the jury for deciding the defendant's guilt has implications for a range of issues. These include the test for ruling on a submission of no case to answer; the role of the CACD in assessing safety where fresh evidence emerges or an error of law is identified; and the appropriateness of the CACD finding a conviction unsafe on the basis of "lurking doubt". However, respect for the integrity of trial by jury does not obviate the need for the appeals system to respect the fundamental principles.[45] For instance, in Chapter 8 we consider whether rules on the admissibility of evidence from jurors inhibit the correction of miscarriages of justice, and potentially the right to a fair trial. The system of criminal appeals at least as far back as 1907 is premised on a recognition that jurors, properly directed and acting in accordance with their oaths, may sometimes come to the wrong verdict.[46]

Acquitting the innocent, convicting the guilty and "Blackstone's ratio"

4.33 As noted above, acquitting the innocent and convicting the guilty is the first aspect of delivering justice identified in the Criminal Procedure Rules.[47] There are two outcomes

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43 Non-jury trials may take place where there is a risk of jury-tampering or jury-tampering has taken place: Criminal Justice Act 2003, ss 44 to 50. Such trials are very rare.

44 D Willmott, D Boduszek and N Booth, "The English jury on trial" (2017) 82 *Custodial Review* 12.

45 *R v Mirza* [2004] UKHL 2, [2004] 1 AC 1118 at [19]:

> In my view it would be an astonishing thing for the ECHR to hold, when the point directly arises before it, that a miscarriage of justice may be ignored in the interests of the general efficiency of the jury system. The terms of article 6(1) of the European Convention, the rights revolution, and fifty years of development of human rights law and practice, would suggest that such a view would be utterly indefensible.

46 On this, it is worth recognising that convictions can be quashed because the appeal court holds that the judge should have acceded to a submission of no case to answer. Leaving aside unusual cases (for instance, where the defendant should have been acquitted on the evidence at the end of the prosecution case, but went on to make admissions during cross-examination), the fact that juries convict in many cases where the CACD holds that the trial judge wrongly refused a submission of no case to answer made on the basis of insufficient evidence suggests that juries do not always convict only when there is proof beyond reasonable doubt. For instance, in the case of Annette Hewins (see Appendix 2), who charged with arson with intent to endanger life, the CACD found that "there was no sufficient evidence to prove the case against her" (*R v Clarke and Hewins* [1999] EWCA Crim 386, [1999] Lexis Citation 2712 at [16], by Kennedy LJ) yet the jury had convicted her.

47 *R v Coutts* [2006] UKHL 39, [2006] 1 WLR 2154 at [12], by Lord Bingham of Cornhill:

> In any criminal prosecution for a serious offence there is an important public interest in the outcome. The public interest is that, following a fairly conducted trial, defendants should be convicted of offences which they are proved to have committed and should not be convicted of offences which they are not proved to have committed.

that offend against this principle: the conviction of the innocent and the acquittal of the guilty.

4.34 It is an inevitable consequence of the imperfections of the trial system that even if a trial is properly and fairly conducted, there is no misconduct by the police or prosecution, and the jury is properly directed and tries the case on the evidence before it, it is possible for a factually innocent person to be convicted. Witnesses may be honest but mistaken, they may be dishonest, or there may be an overwhelming body of circumstantial evidence pointing to an innocent defendant. For some crimes such as sexual offences, there may be a complainant and a defendant's evidence only; no other evidence; and a stark difference in their evidence. The verdict may, in effect, come down to a choice for the jury of which account is accepted.

4.35 While it is likely that no criminal justice system will be able to avoid both conviction of the innocent and acquittal of the guilty perfectly, given the potential for human error, it can nevertheless strive to minimise these offending outcomes. The appeals system allows for this minimisation to occur through rectifying errors and correcting injustices that might have occurred in earlier proceedings.

4.36 Another mechanism for minimising one of these outcomes can be seen in the longstanding practice of the criminal justice system in England and Wales of favouring the acquittal of the guilty over the conviction of the innocent.[48] Many other tenets of the criminal justice system reflect and enforce this practice. These include:

(1) the presumption of innocence;

(2) the burden of proof being on the prosecution;[49]

(3) the standard of proof requiring acquittal if there is reasonable doubt as to the defendant's guilt, rules on the admission of prejudicial evidence;[50] and

(4) the more extensive appeal rights that are afforded to a convicted person than the prosecution.

Fairness

4.37 The third principle in the Criminal Procedure Rules is "dealing with the prosecution and the defence fairly".

4.38 In our consultation paper on prosecution appeals in 2000, we noted that achieving accuracy of outcome is not the "sole aim" of the criminal justice system:[51]

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48 Sometimes referred to as "Blackstone's ratio", after a maxim of Sir William Blackstone, in his *Commentaries on the Laws of England*, that "it is better that ten guilty persons escape than one innocent suffer".

49 It is recognised that there can be derogations from this principle in the interests of justice – for instance, the application of "reverse burdens" of proof in relation to some defences.

50 F Allhoff, "Wrongful Convictions, Wrongful Acquittals and Blackstone's Ratio" (2018) 43 *Australian Journal of Legal Philosophy* 39. See also Police and Criminal Evidence Act 1984, s 78.

51 Prosecution Appeals Against Judges' Rulings (2000) Law Commission Consultation Paper No 158, para 3.4 (emphasis in original).

> Accuracy of outcome is not to be single-mindedly pursued whatever the means … The arrangements for the investigation and prosecution of crime must reflect respect for, and uphold the fundamental rights and freedoms of, the individual. This constitutes an aim distinct from the instrumental aim of accuracy of outcome. It is a *process aim* …

4.39 We noted that while some rules (such as providing the defendant with the opportunity to be heard, equality of arms, an independent tribunal and advance notice of the prosecution case) further the aims of both accuracy of outcome and fairness, sometimes the two are in conflict.[52]

4.40 We also noted that fairness of the trial has come largely to be associated with fairness exclusively to the defendant, and that this is the sense in which it is used in article 6 of the ECHR.[53] However, fairness also includes fairness to the prosecution.[54]

4.41 We argued that fairness justified allowing the prosecution rights of appeal against terminating rulings[55], but did not justify allowing the prosecution to appeal against interlocutory rulings, with no equivalent right for the defendant. We concluded that the defendant's general right to appeal against the verdict was not equivalent to a prosecution right of appeal against a particular non-terminating ruling. We revisit this issue in Chapter 12.

4.42 However, "fairness" does not relate simply to the rights of the defendant or even the balance between the interests of the defence and prosecution.

4.43 For instance, in relation to appeals against sentence, one principle is fairness between co-defendants. However, this can be in tension with the need for fairness between people convicted in different trials. For example, it may be necessary to give a lesser sentence to one co-accused to reflect the fact that their role in a joint enterprise was less substantial or culpable than that of a co-defendant, their assistance to the prosecution, or their personal mitigation.

4.44 Fairness may also be required between those defendants at trial and appellants in an appeal. For instance, it would be unfair if some particular fact constituting an abuse of process required a prosecution to be stayed if known about at or before trial, but led to no redress if discovered after trial.

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52 Prosecution Appeals Against Judges' Rulings (2000) Law Commission Consultation Paper No 158, para 3.6.

53 Above, para 3.1.

54 *R v Hayward, R v Jones, R v Purvis* [2001] EWCA Crim 168, [2001] QB 862; *DPP v Meakin* [2006] EWHC 1067 (QB) at [23], by Openshaw J.

55 By "terminating ruling" we meant "a ruling by the judge which has the effect of terminating the proceedings [including] a ruling at the close of the prosecution's case that there is no case to answer" (Double Jeopardy and Prosecution Appeals (2001) Law Com No 267, para 1.14). The term has come to have a wider meaning covering any ruling subject to an appeal by the prosecution where the prosecution has given the "acquittal guarantee"; see Chapter 12.

Finality, the "one trial" principle and public confidence in the criminal justice system

4.45 The principle of finality typically requires a conviction to be considered final unless particular circumstances or reasons require it to be overturned.[56]

4.46 In a lecture in 2011, Lord Dyson suggested that:[57]

> fairness and justice lie at the heart of the law on finality in civil as in criminal proceedings. But … obviously, the stakes are different. Society's interest in the prosecution of crime is different from its interest in seeing that civil wrongs are remedied.

4.47 Lord Dyson was referring to the fact that the criminal justice system of England and Wales does not generally apply statutes of limitation in respect of serious crime, because of the importance to society of seeing that serious crime is punished. However, a corollary of this is that the law does not generally place finality above the correction of miscarriages of justice. Although there are time limits for bringing an appeal, leave can be given to appeal out of time where it is in the interests of justice to hear the appeal. Likewise, where fresh evidence emerges a long time after conviction, the CACD has a discretion to admit it,[58] and will often do so, notwithstanding delay, where it discloses a miscarriage of justice. In contrast, in the civil courts, time limits may be more rigidly enforced, even to the point of excluding material which shows clearly that a previous ruling was wrongful.[59]

4.48 One might add that the interests of the defendant to a criminal prosecution are also different to those of the parties to a civil case. Most civil cases concern the allocation of resources, or at least proceed on the basis that an award of damages can satisfactorily address a non-financial harm (obvious exceptions to this include family proceedings and immigration cases).[60] Criminal prosecutions are usually conducted by the state, and members of the public have an interest in convictions being safe,

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56 E Freer, "Leaving the gloss off: a critique of the appellate courts' approach to reinterpretation of law cases" (2022) 138 *Law Quarterly Review* 239, 240.

57 Lord Dyson, "Time to call it a day: some reflections on finality and the law", Edinburgh University (14 October 2011).

58 Criminal Appeal Act 1968, s 23.

59 An exception to this may be where a judgment was obtained by fraud. In *Takhar v Gracefield Developments Ltd* [2019] UKSC 13, [2020] AC 450 the Supreme Court reaffirmed the principle that "fraud unravels all": an action to set aside a judgment for fraud is a cause of action in its own right and therefore there is no question of cause of action estoppel.

60 In *R (Cart)* [2011] UKSC 28, [2012] 1 AC 663 at [47], Baroness Hale of Richmond JSC noted that immigration cases pose a particular issue that does not arise in most civil cases:

> In most tribunal cases, a claimant will have little to gain by pressing ahead with a well-nigh hopeless case. He may have less money than he otherwise would, but he will not have to leave the country and may make another claim if circumstances change. But in immigration and asylum cases, the claimant may well have to leave the country if he comes to the end of the road. There is every incentive to make the road as long as possible, to take every possible point, and to make every possible application. This is not a criticism. People who perceive their situation to be desperate are scarcely to be blamed for taking full advantage of the legal claims available to them.

Similar considerations will often apply to an appellant in a criminal appeal – especially one serving a life sentence.

and victims in seeing offences committed against them being properly sanctioned. Criminal convictions involve a moral condemnation, and may well have enduring, life-changing consequences and lead to deprivation of liberty.

4.49 That said, the CACD's approach to the balance between finality and the correction of wrongful convictions has fluctuated over time in respect of its willingness to address "historical" convictions.

4.50 On the one hand, in several cases, the Court has quashed convictions posthumously, many years after a person's conviction. Such cases include those of Derek Bentley[61] and Michael McMahon and David Cooper.[62] In the recent case of Saliah Mehmet and Basil Peterkin, the CACD quashed convictions of two men, both deceased, who had been jailed on evidence from the corrupt British Transport Police officer Derek Ridgewell,[63] with Lord Justice Holroyde saying, "We cannot turn back the clock, but we can, and do, quash the convictions".[64]

4.51 On the other hand, there have been earlier cases where, having rejected an appeal against a "historic" conviction, the Court has been critical of the Criminal Cases Review Commission ("CCRC") for having referred it at all. We discuss criticism of the CCRC in the cases of Ruth Ellis,[65] Lisa Gore,[66] and William Knighton[67] in Chapter 11.

4.52 There are many arguments as to why the principle of finality should continue to have some form of application to the appellate system. A number of the reasons refer to the considerations set out in the Criminal Procedure Rules, Rule 1.1 (see paragraph 4.29) namely respecting the interests of witnesses, victims and jurors as well as dealing with the case efficiently and expeditiously. A retrial will cause significant uncertainty and distress for victims and witnesses.

4.53 Moreover, there is a wider consideration of the interests of justice as well as fairness. One of these is what is sometimes termed the "one trial" principle. In a criminal trial, the burden is on the prosecution to prove the defendant's guilt to the criminal standard (so that the finder of fact is sure). It is open to the defence to put the prosecution to proof, and to argue that it has failed to make out its case to the requisite standard. There is no general obligation on the defence to make a positive case.[68] However, if

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61 See Appendix 1.

62 See Appendix 1.

63 The Ridgewell cases are discussed in more detail in Appendix 3.

64 *R v Peterkin* [2024] EWCA Crim 309 at [24], by Holroyde LJ VPCACD.

65 [2003] EWCA Crim 3556.

66 [2007] EWCA Crim 2789, [2008] Crim LR 388.

67 [2002] EWCA Crim 2227, [2003] Crim LR 117.

68 Sometimes where a statutory or common law defence is available, once the prosecution has established core elements of the offence to the criminal standard, the defendant then bears a burden of proof either to provide sufficient evidence for the defence to be considered by the court (an evidential burden), after which the prosecution must disprove it to the criminal standard, or to provide sufficient evidence to make out the defence on the balance of probabilities (a persuasive burden).

the defendant chooses to do so, they are expected to advance the whole of their defence. In *Jones*, the Lord Chief Justice, Lord Bingham of Cornhill, referred to:[69]

> the crucial obligation on a defendant in a criminal case to advance his whole defence and any evidence on which he relies before the trial jury. He is not entitled to hold evidence in reserve and then seek to introduce it on appeal following conviction.

4.54 Allowing the defence to run, in effect, different strategies at the trial and on appeal – the success of either of which might lead to acquittal with (subject to limited exceptions) no possibility of retrial – tips the balance arguably unfairly in favour of the defence. Courts are understandably reluctant to allow someone to run one defence at trial and, that defence having failed, to run on appeal a defence that they had previously chosen not to run.[70] A case which is considered meritless or vexatious may cause further delays to the justice system, impacting its ability to deal with other cases in an efficient and expeditious manner.

4.55 A similar issue arises where a person appeals against a conviction having pleaded guilty. There are undoubtedly circumstances in which an innocent person might plead guilty, including: misunderstanding the scope of the offence with which they are charged, so not realising that they are in fact not guilty of it;[71] poor legal advice; an incorrect legal ruling; mental or psychological vulnerability;[72] or improper pressure.[73]

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69 [1997] 1 Cr App R 86, CA, at [93], by Lord Bingham of Cornhill CJ.

70 See for instance *R v Richardson* (1991, unreported) cited in *R v Sales* [2000] 2 Cr App R 431, CA and *R v CCRC, ex p Richardson* [2000] 1 Cr App R 141, DC; and *R v Ahluwalia* [1992] 4 All ER 889, CA.

One exceptional case where the court did permit an appeal to be brought on a wholly different basis to the defence at trial is *R v Solomon* [2007] EWCA Crim 2633. The appellant was convicted of rape and buggery of two girls. At trial he had denied any sexual activity at all. Following his release from prison, police searched his home and found a hidden recording of the sexual activity which formed the basis of the charge. The recording was inconsistent with the girls' account of crying and attempting to fight him off, and although he was clearly guilty of indecent assault (on account of the girls' ages) the recording suggested that the conduct did not amount to rape. Upon a reference by the CCRC, the CACD held that there were exceptional circumstances in this case. This was not a case where the appellant sought to change his defence after conviction, but rather the evidence had come to light when police discovered it; his decision to suppress the evidence had led to him being convicted of more serious offences than those he had actually committed; and he had fully served the sentence for those offences. Quashing the convictions for rape and buggery and substituting verdicts of indecent assault would therefore, at [30] by Lord Phillips of Worth Matravers CJ, "simply be to permit the record to be put straight".

71 For example, *R v Boal* [1992] QB 591, CA, where the appellant's solicitors had failed to recognise that a junior manager of a bookstore was not a "manager" for the purposes of the Fire Precautions Act 1971 and would have had a complete defence to the charge. "Senior officer liability" clauses are discussed more fully in Corporate Criminal Liability: an options paper (2022) Law Com, Ch 9.

72 For example, *R v Tredget* [2022] EWCA Crim 108, [2022] 4 WLR 62: in 1981, the appellant had pleaded guilty to 11 charges of arson, and 26 manslaughter charges. One arson conviction (and 11 related manslaughter convictions) had been quashed after a public inquiry found the fire in question was accidental. In 2022, the CACD quashed two further convictions for arson and three related manslaughter convictions, concluding that it would have been impossible for the appellant to have committed them, and his guilty pleas were therefore false. However, it concluded that the remaining convictions were safe.

73 For example, *R v Nightingale* [2013] EWCA Crim 405, [2013] 2 Cr App R 7, where the judge at a court martial had given an unsolicited indication that in the event of a guilty plea to two offences under the Firearms Act 1968, he could find exceptional circumstances so as not to apply the mandatory five-year

An innocent person may plead guilty because they realise that, realistically, there is little hope of successfully contesting the charge and that by pleading guilty they will receive a reduced sentence – a guilty plea may well make the difference between a custodial and non-custodial sentence.

4.56 Indeed, the Post Office Horizon scandal has revealed many cases where individuals pleaded guilty because they believed that the computer evidence to be presented by the Post Office could not effectively be challenged and would be accepted by the jury or magistrates as proof of their guilt.[74]

4.57 However, the effect of a guilty plea is that, as a result of a decision taken by the defendant, the evidence is not tested. The CACD has thus held that where a person has pleaded guilty, a conviction will not be found unsafe on the basis of "lurking doubt", and positive evidence that the person was factually innocent will be required.[75]

4.58 Clearly, the finality principle serves to further the objectives of the criminal justice system as set out in the Criminal Procedure Rules. Indeed, there are compelling reasons for the principle as noted above.

4.59 However, where there are compelling reasons to indicate that a verdict is not safe, adherence to finality risks undermining the public's confidence in the criminal justice system. As alluded to above at paragraph 4.32, the appellate system by its very nature may be considered as an affront to the principle of finality on one view given the conviction is no longer final unless confirmed in a retrial. In considering justice and finality in the context of double jeopardy, Professor Ian Dennis has argued:[76]

> The interests of finality of legal process ought to be subordinate to the interests of the legitimacy of the process. There seems to be little merit in drawing a line under an outcome which we now have good reason to believe to be wrong, particularly in the most serious cases where the safety of the community is most strongly engaged.

4.60 There are several measures intended to allow some convicted persons to move forward with their lives unencumbered by previous convictions, in particular the Rehabilitation of Offenders Act 1974, and amendments to it, allowing some convictions to be treated as "spent". In contrast, for those previously convicted of certain offences, a series of measures have been introduced which impose potentially lifelong restrictions. These include the introduction of registration of sex offenders in 1997,[77] mandatory criminal records checks for certain occupations following the Bichard Report,[78] the creation of the statutory "barred lists" for working with children

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sentence. See also the recent cases of *R v AB, CD, EF and GH* [2021] EWCA Crim 2003, [2022] 2 Cr App R 10, and *R v Rees* [2023] EWCA Crim 487.

74 These cases are discussed in Chapter 17 and Appendix 3.

75 *R v Tredget* [2022] EWCA Crim 108, [2022] 4 WLR 62.

76 I Dennis, "Rethinking double jeopardy: justice and finality in criminal process" [2000] *Criminal Law Review* 933, 945.

77 Sex Offenders Act 1997 (repealed). The relevant legislation is now Part 2 of the Sexual Offences Act 2003.

78 The Bichard Inquiry followed the murders of Holly Wells and Jessica Chapman by Ian Huntley, a school caretaker, in 2003. See The Bichard Enquiry Report (2003-04) HC 653.

and vulnerable adults,[79] and the possibility of indefinite restrictions on liberty, such as Sexual Harm Prevention Orders.[80]

4.61 If the overall objective of the appeals system is to ensure that only the guilty are convicted, and remain convicted, enforcing finality without exceptions would not achieve this. In circumstances where wrongful convictions have enduring effects, the impact may simply be to compound and perpetuate injustice. To repeat Lord Atkin's dictum, "Finality is good but justice is better".[81]

Double jeopardy

4.62 Appeals, especially prosecution ones (including appeals from acquittal on appeal)[82] raise issues in relation to the principle against "double jeopardy". The rule against double jeopardy is a particular, one-sided, form of finality, which potentially conflicts with justice. The rationale for the rule reflects the imbalance between the individual and the state, and the potential for repeated prosecution for the same offence to be used as an instrument of oppression. In *Green v United States*, Justice Black said:[83]

> The underlying idea, one that is deeply ingrained in at least the Anglo-American systems of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

4.63 It is worth noting that, in this quotation, Justice Black also acknowledged the possibility of wrongful conviction, and that the risk of this increases if repeated prosecutions are permitted.

4.64 Double jeopardy encompasses a general principle and a specific rule. The specific rule is against trying a person for an offence of which they have been "finally" acquitted. More generally, it encompasses other forms of potentially oppressive conduct, such as trying or sentencing a person for an offence when they have already been acquitted of another offence arising out of substantially the same set of facts.

4.65 As noted above, the rule against double jeopardy is no longer absolute. In summary cases, the prosecution may appeal an acquittal by way of case stated or apply for

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79 Safeguarding Vulnerable Groups Act 2006. Until 2002, the Department of Education maintained a list – known as "List 99" – of those banned from working in schools. The maintenance of a list became a statutory requirement under the Education Act 2002, s 142.

80 Sexual Offences Act 2003, ss 103A-103K.

81 *Behari Lal v King-Emperor* (1930) 50 TLR 1, [1933] UKPC 60.

82 In general, there is no prosecution right to appeal an acquittal in a court of first instance (subject to certain exceptions, which are discussed in Chapter 13, including the ability of the prosecution to challenge a decision made in summary proceedings in the High Court). However, where a person is acquitted in appellate proceedings in the CACD or the High Court, the prosecution can appeal against the ruling to the Supreme Court, which can reinstate the conviction (Criminal Appeal Act 1968, ss 33-35; Administration of Justice Act 1960, s 1). It follows that a person who has been acquitted in the CACD or the High Court has not been "finally" acquitted until the possibility of a further appeal to the Supreme Court is extinguished.

83 (1957) 335 US 184.

judicial review. In relation to indictable offences, the Criminal Justice Act 2003 allows the CACD to quash an acquittal for certain serious offences and order a retrial where there is compelling new evidence (discussed in Chapter 13).[84] An acquittal may also be quashed where it is "tainted" by witness or juror intimidation.[85]

4.66 Until 1964, the Court of Criminal Appeal did not have the power to order a retrial. Putting a defendant on trial for an offence for which they had previously been tried and convicted was seen as breaching the principle against double jeopardy. However, a consequence of this was arguably a reluctance to quash a conviction when a person could have been properly convicted on the remaining evidence and might – had a retrial been a possibility – be convicted at a retrial if the verdict were quashed.[86]

4.67 A wider application of this principle can be found in the practice of courts "discounting" a sentence to reflect the fact that a person has faced trial on more than one occasion. It was previously commonplace for courts to discount a sentence imposed following a retrial to reflect the fact that the defendant had had to face a second trial. Likewise, where a sentence was successfully challenged as "unduly lenient" by the Attorney General, the courts frequently imposed a sentence which reflected the fact that the offender had had to go through further court proceedings.[87]

Access to justice

4.68 Many of the principles discussed above, as well as the appellate system itself, would be rendered hollow without access to justice. A principle which promotes access to justice encapsulates a number of the concerns identified by consultees as well as factors previously identified in the Issues Paper.[88]

4.69 The principle of access to justice finds expression at least as far back as 1215 and Chapter 40 of the Magna Carta which states "We will sell to no man, we will not deny

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84 Criminal Justice Act 2003, ss 77-79.

85 Criminal Procedure and Investigations Act 1996, ss 54-57.

86 S Roberts, "Fresh evidence and factual innocence in the Criminal Division of the Court of Appeal" (2017) 81(4) *Journal of Criminal Law* 303, 308:

> The court was given the power to order a retrial in fresh evidence appeals in s. 1(1) of the CAA 1964, and it was hoped by some that this would succeed in liberalising the court's approach to these appeals, by the court ordering a retrial where previously it would have [rejected] the appeal. …

87 The "discount" was abolished in respect of references brought by the Attorney General in relation to the minimum term for a life or indeterminate sentence in the Criminal Justice Act 2003, s 272 and the Criminal Justice and Immigration Act 2008, s 46. In *Attorney General's Reference (No 45 of 2014)* [2014] EWCA Crim 1566, Lord Thomas of Cwmgiedd CJ said at [20] that "although the principle of "double jeopardy" remains for consideration in the kind of case identified in *Attorney General's Reference Nos 14 and 15*, subject to the observations we have made, the practice has evolved that no reference is made to it, save in the category of case in which it is likely to arise … those cases have become, and are likely to remain, rare".

In *Attorney General's Reference Nos 14 and 15 of 2006* [2006] EWCA Crim 1335, [2007] 1 All ER 718 at [61], Lord Phillips of Worth Matravers CJ had said that the case for a reduction to reflect double jeopardy was "particularly great where the decision of the Court resulted in a defendant being placed in prison, where originally no custodial sentence was employed, where a custodial sentence had been completed, where the defendant was young, or where the defendant was about to be discharged from prison".

88 Law Commission, Criminal Appeals: Issues Paper (July 2023), Ch 2.

or defer to any man either Justice or Right". In more modern times, Lord Reed, the current President of the Supreme Court noted:[89]

> At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced ... In order for the courts to perform that role, people must in principle have unimpeded access to them.

4.70 As noted by Lord Reed, access to justice is not only of fundamental importance to the individual concerned but to the wider public through ensuring consistency and predictability within the law.

4.71 The above comments highlight how access to justice as a constitutional right is already deeply interwoven within the common law. It is further supported through various provisions in domestic law, including statutory requirements for the provision of legal aid funding for criminal cases.[90] Although outside the scope of this project, the adequacy of this funding (both in relation to appeals specifically and for trials generally) has been raised by several consultees.

4.72 While access to justice is a clear and vital principle in the criminal justice system, the right is not absolute and may be subject to some limitations. The rules governing bringing an appeal are evidence of these limitations (such as time limits and leave requirements). There are practical and resource considerations which justify limiting appeals, particularly in cases which lack substantive merit.

Consideration of those vulnerable or otherwise disadvantaged

4.73 As raised by some consultees, a criminal justice system which seeks to correct injustices and be considered as legitimate must necessarily treat all those who come before it fairly.[91] To enable access to justice and to uphold the fundamental rights noted above, there might need to be special consideration for those most vulnerable to ensure no barriers act to exclude certain groups or people.

4.74 The Equality Act 2010 sets out several protected characteristics.[92] These are:

(1) age;

(2) disability;

(3) gender reassignment;

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89 *R (Unison) v Lord Chancellor* [2017] UKSC 51, [2020] AC 869 at [68], by Lord Reed JSC.

90 Legal Aid, Sentencing and Punishment of Offenders Act 2012, ss 13-16.

91 N Sakande, *Righting Wrongs: What are the barriers faced by women seeking to overturn unsafe convictions or unfair sentences in the Court of Appeal (Criminal Division)?* (2020, the Griffins Society).

92 Equality Act 2010, s 4.

(4) marriage and civil partnership;

(5) pregnancy and maternity;

(6) race

(7) religion or belief;

(8) sex; and

(9) sexual orientation.

4.75 Certain conduct is prohibited on the basis of these characteristics, including direct discrimination, indirect discrimination, harassment and victimisation.[93]

4.76 Throughout the consultation on the Issues Paper, three key characteristics emerged as requiring special consideration in the context of the appellate system. These were race, sex and age (largely in relation to children and young people). The ways in which the appeals system may disproportionately affect particular groups are discussed in passing in subsequent chapters and generally in Chapter 17. However, for the purposes of this chapter, we recognise that in upholding access to justice, different levels of support may be necessary to address any potential inequities.

The "no greater penalty" principle

4.77 Professor John Spencer has written:[94]

> A rule relating to appeals that is sometimes advocated is *nulla reformatio in peius* [no change for the worse]: an appeal court may reject an appeal by the defence, but in doing so should not make the appellant's situation worse – because to do this would be [to] turn the right of appeal into a trap. In continental Europe, this rule has long been regarded as an important principle.

4.78 The possibility of an increased sentence upon appeal may act as a practical constraint on the right to appeal if potential appellants are dissuaded from bringing meritorious appeals by the prospect of additional punishment if unsuccessful.

4.79 Professor Spencer points out that the application of this principle within the system of criminal appeals is inconsistent. The principle does not apply when appealing against a conviction or sentence imposed in the magistrates' court. Where a person appeals against their conviction or sentence, it is open to the Crown Court, on rehearing the case, to impose a heavier sentence than that given by the lower court.

4.80 The principle does, however, apply to appeals to the CACD against a conviction or sentence in the Crown Court (including where a summary conviction was sent up for sentencing to the Crown Court). While the Attorney General may in some circumstances refer a sentence to the CACD on the grounds that it is unduly lenient (see discussion of the unduly lenient sentence ("ULS") scheme in Chapter 7), there is

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93 Equality Act 2010, ss 13, 19, 26 and 27.

94 J R Spencer, "Does our present criminal appeal system make sense?" [2006] *Criminal Law Review* 677, 681.

no power to increase a convicted person's sentence on that person's appeal, whether against conviction or sentence. Nor is there a power to impose a more severe penalty when resentencing when the Court has substituted a conviction for an alternative offence,[95] or has quashed one or more convictions, but the person remains convicted of other offences. Where the CACD quashes a conviction and orders a retrial, if the person is convicted at the retrial the Court is unable to impose a more severe sentence than that imposed in the original trial.[96]

4.81 There is, however, an important exception to this. While the default rule is that time spent in custody pending an appeal is to count against time served, the CACD can exceptionally order otherwise (see discussion of "loss of time" orders in Chapter 6).[97]

4.82 Professor Spencer concluded: "The *nulla reformatio in peius* principle may be right, or it may be wrong: but plainly, it cannot be both right and wrong simultaneously".[98]

Legitimacy in decision making and the integrity of the justice system

4.83 A further principle identified in the literature and raised throughout the consultation on the Issues Paper is maintaining legitimacy in decision making and the wider integrity of the justice system. As argued by Professor Ronald Dworkin:[99]

> The criminal justice system is not merely about convicting the guilty and ensuring the protection of the innocent from conviction. There is an additional and onerous responsibility to maintain the moral integrity of the criminal process.

4.84 Many procedural rules and requirements are designed to protect the integrity of the justice system. Where there is adherence to that procedure, the overall decision making, and the eventual outcome, will likely be considered as more legitimate. Therefore, such adherence serves to protect the moral integrity of the justice system.

4.85 This principle finds expression in rules controlling the admission of evidence obtained in contravention of the Police and Criminal Evidence Act 1984 ("PACE") and the ability of judges to stay a case for abuse of process, as noted above, where it would "offend the court's sense of justice and propriety to be asked to try the accused".[100]

4.86 The integrity of the justice system is most often considered in the context of abuse of process cases. As discussed by Lord Dyson:[101]

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95 Criminal Appeal Act 1968, s 3.

96 Above, s 8(2) and sch 2, para 2(1). For this reason, if the Attorney General refers a sentence on the grounds that it is unduly lenient, while the convicted person appeals against the conviction, the former will be heard first. Otherwise, were the appeal against conviction successful, but the person convicted at a retrial, the court sentencing at the retrial would be constrained to impose a sentence that was no more severe than the original – possibly unduly lenient – sentence.

97 Criminal Appeal Act 1968, s 29.

98 J R Spencer, "Does our present criminal appeal system make sense?" [2006] *Criminal Law Review* 677, 682.

99 R Dworkin, *A Matter of Principle* (1986) p 72.

100 *R v Horseferry Road Magistrates Court, ex p Bennett (No 1)* [1994] 1 AC 42, HL, 74G, by Lord Lowry.

101 *R v Maxwell* [2010] UKSC 48, [2011] 1 WLR 1837 at [13], by Dyson JSC.

> It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will offend the court's sense of justice and propriety … or will undermine public confidence in the criminal justice system and bring it into disrepute.

4.87 A recurring issue in relation to criminal justice is how far procedural rules in criminal cases should penalise unlawful or otherwise impermissible conduct by the prosecution. Put another way, to what degree can one be willing to tolerate potential procedural breaches where the outcome is nonetheless likely to be correct? In appellate cases, the question is to what extent an appeal should be allowed on the basis of misconduct by those charged with investigating and prosecuting crime.

4.88 The majority of the Royal Commission on Criminal Justice ("the Runciman Commission", see Chapter 2) took the view that the process of trying defendants was distinct from punishing malpractice by police and prosecutors, concluding:[102]

> the Court of Appeal should not quash convictions on the grounds of pre-trial malpractice unless the court thinks that the conviction is or may be unsafe.[103] In the view of the majority, even if they believed that quashing the convictions of criminals was an appropriate way of punishing police malpractice, it would be naïve to suppose that this would have any practical effect on police behaviour. In any case, it cannot in their view be morally right that a person who has been convicted on abundant other evidence and may be a danger to the public should walk free because of what may be a criminal offence by someone else.

4.89 Compared with other jurisdictions, in English and Welsh criminal courts are relatively flexible in admitting evidence obtained unlawfully. Section 78 of PACE gives courts a discretion to exclude prosecution evidence if it appears that, having regard to all the circumstances (including those in which the evidence was obtained) admission of the evidence would have such an adverse effect on the fairness of the proceedings that it ought not to be admitted. However, a confession is only *required* to be excluded where it is or may have been obtained by oppression of the person who made it, or in consequence of anything said or done which was likely, in the circumstances existing at the time, to render the confession unreliable.[104] Consequently, unlawfully obtained evidence may potentially be admissible in a criminal trial. There is no equivalent to the

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102 Report of the Royal Commission on Criminal Justice (1993) Cm 2263, p 172, paras 48 and 49.

103 As we discuss at para 8.30 below, the Runciman Commission used this phrase in the context of the possibility of factual innocence alone, and not the wider meaning of "unsafe" that the CACD has applied to include situations where even though there is no doubt about guilt, a conviction cannot stand because the appellant did not receive a fair trial or the prosecution was an affront to justice.

104 PACE, ss 74-76. Where an issue as to oppressive conduct is raised, it is for the prosecution to prove to the criminal standard that the evidence was not obtained by oppression.

"fruit of the poisonous tree" doctrine[105] in England and Wales, which is based upon the principle that evidence obtained by unlawful means, however indirectly, cannot be used. Under section 76 of PACE, evidence discovered as a result of a confession is admissible even if the interview itself is excluded.[106]

4.90 However, the law contemplates situations where, even though the defendant could receive a fair trial, it is necessary to stay proceedings as an abuse of process (or quash a conviction if discovered post-trial) to protect the integrity of the justice system. In *Bennett*, for instance, the circumstances included the defendant being forcibly abducted and brought to the UK in disregard of extradition laws.[107]

4.91 *Mullen*[108] concerned similar allegations to those in *Bennett*. There had been an international conspiracy to have the appellant deported to the UK, which involved depriving him of the legal protections he would have had if he were to have been extradited (including access to legal advice), and deliberately circumventing protections he might have had as a dual national by dishonestly casting doubt on the authenticity of his passport. The Court held that, in such circumstances, the conviction would be quashed as "unsafe", notwithstanding the evidence of guilt, because the conduct was such an affront to the rule of law that the conviction could not be allowed to stand.

4.92 Following this ruling the then Government consulted on possible reform to prevent convictions from being quashed in such circumstances.[109] Reform was not, ultimately, pursued. (We discuss this issue further at paragraph 8.52 and following below.)

4.93 A particular difficulty with the argument that procedural impropriety should not afford grounds for an appeal if it does not cast doubt on the person's factual guilt, is that it raises issues of fairness. If police or prosecutorial misconduct is the basis for a stay on grounds of abuse of process at trial, but not for quashing a conviction, there would be an unfairness between cases in which the abuse is identified and dealt with properly at trial, and cases in which the abuse is not identified until after conviction, or is identified before or during the trial but the trial is wrongly allowed to proceed. Put another way, even if it is not accepted that legitimacy should be a factor in relation to appeals in its own right, while legitimacy remains relevant in respect of trials, the principle of fairness may require it to be available in relation to appeals.

Trial by jury

4.94 A final and fundamental consideration is that in England and Wales, the most serious crimes are tried by a judge and jury. Although the vast majority of criminal cases are tried by magistrates, and the majority of trials on indictment are dealt with by guilty pleas, it is recognised that the criminal justice system of England and Wales places great importance on the role of the jury in indictable cases. For most either-way

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105 *Silverthorne Lumber Co v United States* (1920) 251 US 385; *Nardone v United States* (1939) 308 US 338.

106 PACE, ss 76(4) to (6).

107 *R v Horseferry Road Magistrates Court, ex p Bennett (No 1)* [1994] 1 AC 42, HL.

108 [2000] QB 520, CA.

109 Office for Criminal Justice Reform *Quashing Convictions: Report of a review by the Home Secretary, Lord Chancellor and Attorney General* (2006).

offences, the prosecution can choose to proceed by way of indictment, and the defendant has a right to trial by jury if it does not do so.[110] The magistrates' court can also send an either-way offence to the Crown Court, even if the defendant objects.

4.95 The jury is the primary finder of fact in trials on indictment, and the courts have been concerned to ensure that the trial judge does not intrude on the jury's role. However, the fact that the jury is the primary finder of fact, and delivers the verdict of the court, has certain consequences for the appeal process. Some of these stem from the fact that the trial judge is obliged to allow a case to go to the jury if a properly directed jury could *properly* convict on the evidence – the judge is not permitted to withdraw a case on the grounds that a conviction would be unsafe.[111] Some stem from the fact that the jury's verdict is unreasoned.[112] Others stem from the privacy afforded to juror deliberations[113] meaning that some allegations that juror misconduct may have caused a miscarriage of justice cannot form the basis of an appeal.

4.96 The compatibility of unreasoned jury verdicts with the right to a fair trial has been considered by the ECtHR. In *Saric v Denmark*,[114] it held that article 6(2) does not prevent a defendant being tried before a jury which gives unreasoned verdicts. However, for the requirements of a fair trial to be satisfied, the defendant must be able to understand the reasons for the jury's verdict. Directions from the judge, coupled with a presumption that the jury has followed them, will often be sufficient for the convicted person to know the basis on which they have been convicted.

4.97 The primacy of the jury has consequences for criminal appeals. In *Pendleton*,[115] the House of Lords grappled with the tension between the fact that under the Criminal Appeal Act 1968 it is the CACD which must decide whether a conviction is safe, and the risk that in doing so where fresh evidence is available, the Court may effectively usurp the role of the jury as the primary finder of fact. While the Court was bound by, and observed, the House of Lords' decision in *Stafford and Luvaglio*,[116] which held that the decision for the Court on an appeal must be the effect of the fresh evidence on its own mind, not that of a jury, it endorsed employing a "jury impact test".[117]

> First, it reminds the Court of Appeal that it is not and should never become the primary decision-maker. Secondly, it reminds the Court of Appeal that it has an

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110 Some either-way offences are triable only summarily in certain circumstances: for instance, criminal damage, where the value of the damage was less than £5,000, except in cases involving arson, or damage to a memorial; low-value shoplifting (where the goods are valued at less than £200, but an adult defendant has the right to elect to be tried by the Crown Court (Magistrates' Courts Act 1980, s 22A). Trials on indictment may also take place without a jury where there is a danger of jury tampering or jury tampering has taken place (Criminal Justice Act 2003, ss 44-50).

111 *R v Galbraith* [1981] 1 WLR 1039, CA.

112 Coen and Doek note that "[u]ntil the eighteenth century judges sometimes asked juries to provide the rationale for verdicts, particularly in instances in which they disagreed with the outcome": M Coen and J Doek, "Embedding Explained Jury Verdicts in the English Criminal Trial" (2017) 37 *Legal Studies* 786.

113 *R v Connor*; *R v Mirza* [2004] UKHL 2, [2004] 1 AC 1118.

114 App No 31913/96.

115 [2001] UKHL 66, [2002] 1 WLR 72. See Appendix 1.

116 [1974] AC 878, HL.

117 *R v Pendleton* [2001] UKHL 66, [2002] 1 WLR 72 at [19], by Lord Bingham of Cornhill.

> imperfect and incomplete understanding of the full processes which led the jury to convict. The Court of Appeal can make its assessment of the fresh evidence it has heard, but save in a clear case it is at a disadvantage in seeking to relate that evidence to the rest of the evidence which the jury heard. For these reasons it will usually be wise for the Court of Appeal, in a case of any difficulty, to test their own provisional view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict. If it might, the conviction must be thought to be unsafe.

4.98 Subsequent rulings of the CACD have limited the role of the "jury impact test", with some suggesting that it is only to be employed in "difficult" cases. We discuss this issue further in Chapter 8.

CONSULTATION RESPONSES

4.99 In the Issues Paper, we asked consultees:

> What principles should govern the system for appealing decisions, convictions and sentences in criminal proceedings?

4.100 Many consultees emphasised the importance of transparency, fairness, trust and legitimacy in decision making. This included institutional stakeholders such as Transform Justice, the Criminal Appeals Lawyers Association, the Law Society, the London Criminal Courts Solicitors' Association and the Magistrates' Association. Some individuals also highlighted these principles, including Dr Lucy Welsh and solicitor Mark Newby. Similar responses emphasising these principles came from a number of prisoners.

4.101 Dr Lucy Welsh wrote:

> There are a number of principles that should govern appellate criminal justice, and the system should be striving to find the just balance between them. These principles include accurate fact finding, and legitimacy in decision-making. Legitimacy in decision-making may arise through a number of methods, such as the application of fair trial principles with regard to Art. 6 ECHR, and consistency in decision-making.

4.102 Dr Jackson Allen noted:

> [T]ruth-seeking … goes by many names, sometimes being referred to by the more anodyne phrase 'accurate fact-finding'. But the substance of the principle is the same: we believe that one key function of the criminal trial is to get to the bottom of what actually happened, and make an authoritative judgment of this. This means that even if all the procedures were rigorously followed at trial, when new evidence comes to light that suggests the outcome was wrong (whether ending in acquittal or conviction), there is a sense that this should not be ignored. Respect for the truth of the defendant's guilt or innocence, then, should be the second principle.

4.103 The Magistrates' Association argued that the appeals system should allow:

(1) a fair process that is robust enough not to just create a "second opinion" option;

(2) challenges to the legality of proceedings;

(3) challenges to the fairness of proceedings; and take account of

(4) changes in circumstances since decisions made.

4.104 Several consultees, including the Bar Council, the Law Society and the Serious Fraud Office, considered that the purpose of the appeals system is to prevent miscarriages of justice and rectify errors.

4.105 Paul Taylor KC, who submitted a response along with Edward Fitzgerald KC and Kate O'Raghallaigh, stated that the purpose of the criminal appeals system:

> is to rectify errors / omissions that occurred at first instance. This should include intervening where there has been a procedural irregularity, an unfair trial or where the CACD has a "lurking doubt". It should not be limited to intervening only where the innocence of the appellant is established.

4.106 Accepting this goal, the Serious Fraud Office was also concerned about the impact of the appeals system on victims:

> While the appeals process is primarily designed to protect defendants from miscarriages of justice, it should also work for victims (by limiting the likelihood that a guilty person is not convicted and that they have certainty of outcome) and for law enforcement (by limiting resources spent on vexatious appeals) and by extension, the tax payer.

4.107 Some stakeholders suggested that special provision ought to be made to ensure those who are disadvantaged are protected.

4.108 The Law Society stated:

> The appeals system should have as its overarching aim the need to be able to correct injustice. In doing so, special provision should be made to ensure that people with protected characteristics within the meaning of the Equality Act 2010 are not disadvantaged. Unlike civil proceedings, children and vulnerable adults do not have the benefit of the possibility of a litigation friend or equivalent in criminal proceedings. It is therefore essential that any reform of the appeals system considers the need to pay special attention to young and vulnerable individuals and guard against the risk that those with protected characteristics will be disadvantaged.[118]

4.109 A few consultees raised the principle of finality. Graham Burns observed:

> it would not be desirable for, as seems to be the case in some jurisdictions, the original criminal trial to lack any real sense of finality pending the outcome of an appeal. That must apply whether the trial ends in a conviction or in an acquittal.

[118] Solicitor Mark Newby made a similar point.

4.110 Whilst other stakeholders agreed that finality is important, some believed that finality should not be given priority over other principles. For example, Dr Lucy Welsh wrote:

> The principle of finality appears to have become increasingly important to the appellate courts. While finality is important, it seems to me that the principle should be regarded as less important than overall fairness, accurate fact finding, and legitimacy in the process. Arguments which prioritise the principle of finality appear to have at their heart concerns around floodgates, overburdening the appeals system, and creating uncertainty. While it is right that cases cannot and should not be allowed to continue to appeal ad infinitum – for this would be also be damaging [to] public confidence, to parties to cases, and to how the system functions – where there is tension between finality and trial fairness/legitimacy, fairness should always be seen to very clearly prevail (especially over resources, which is a separate issue).

4.111 Similarly, the Bar Council argued:

> the principle of finality should not lightly be invoked to defeat the principle of justice. As noted by the Law Commission, there can at times be a tension between these principles. The favouring of the principle of justice is however an inevitable feature of the appellate system, and rightly so.

DISCUSSION

4.112 The principles outlined above are all necessary to the appeals system. However, there are conflicts between them and no one principle should be considered absolute.

Acquittal of the innocent and conviction of the guilty

4.113 We suggest that the starting point of the appeals system as set out in in Criminal Procedure Rule 1.1 should be to ensure that only the guilty stand convicted and the innocent are acquitted. We recognise that this aim is unlikely always to be achieved given the innate fallibility of any system. Nevertheless, the appeals system ought to strive to minimise outcomes which offend against this.

4.114 The trial process is designed to prioritise acquittal of the innocent over conviction of the guilty: the former is considered a better outcome than the latter. The appeals system should reflect a similar principle, that if there is doubt about the safety of a conviction, the conviction should be quashed, even at the risk of acquitting a guilty person, or indeed an unknown number of guilty persons.

4.115 This principle seems to have been accepted by Parliament as recently as May 2024 when the Post Office (Horizon System) Offences Act 2024 was passed, quashing the convictions of anyone convicted of a relevant offence while working in a Post Office using the Horizon system.[119]

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[119] Ministers stated that, in their view, an unknown number of those who had been convicted, and whose convictions would be quashed, *could* have been guilty. However, they argued that ensuring that those who had been wrongly convicted were cleared meant quashing the convictions of an unknown number of guilty people: *Hansard* (HC), 10 January 2024, vol 743, col 302.

Finality

4.116 A number of the consultees who raised the principle of finality felt that whilst it may have a place in the appeals system, for example to prevent vexatious litigation, it should not be prioritised over other competing principles and interests. Further, they considered that finality (which is often justified by the "floodgates" argument noted by Dr Lucy Welsh above) should not prevail over the wider interests of justice. Thus, the objective of the appeals system as stated above, should not be defeated by the principle of finality in and of itself.

4.117 While accepting the importance of finality, we recognise that wrongful convictions have an enduring impact on the lives of those convicted – long after they have completed their sentence, and even where the conviction can be treated as "spent". In short, it might be said that there is never finality in a miscarriage of justice.

Trial by jury

4.118 We acknowledge that the principle that there is a right to trial by jury where a person is accused of a serious offence is a principle that is valued in its own right by the public, quite apart from any argument that juries are particularly well-placed to identify the guilt or innocence of a defendant.

4.119 We agree with APPEAL, who, in their response to the consultation, distinguished between deference to the principle of trial by jury and deference to a given jury's verdict ("which may of course be wrong").

4.120 The principle requires respect for the verdict of a properly directed jury which has heard all the evidence. Where there is fresh evidence, or legal error at trial is identified, allowing appeals against the jury's verdict does not challenge or undermine the principle of trial by jury. If the jury was not properly directed, or did not hear all the evidence, then respect for the principle of trial by jury can be observed (arguably better observed) by returning the case to a new jury.

4.121 The fact that the criminal justice system employs trial by jury for trials on indictment, and that the jury (at present) usually returns a simple unreasoned verdict has implications for criminal appeals. However, we do not consider that the fact of trial by jury can justify perpetuating miscarriages of justice. In particular, as we discuss in Chapter 8, we think that a distinct challenge is posed by restrictions on evidence of juror deliberations where that evidence might disclose a miscarriage of justice. This is particularly acute where disclosure would demonstrate the defendant did not receive a fair trial before an impartial tribunal.

Fairness

4.122 The right to a fair trial is a fundamental principle of the criminal justice system, as well as being protected by article 6 of the ECHR. We recognise, however, that fairness should not be equated with fairness to the defendant alone. While the defendant must, of course, receive a fair trial, fairness itself is multifaceted and includes fairness

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Hamilton v Post Office Ltd [2021] EWCA Crim 577, [2021] Crim LR 684 suggests (and demonstrates for the quashed convictions in that case) that many Post Office Horizon convictions would have been found unsafe on the grounds of abuse of process, regardless of the guilt or innocence of the convicted person.

between prosecution and defence, fairness between co-defendants and fairness between people convicted of comparable offences.

4.123 Although much of this discussion so far has focused on the role of appeal proceedings in relation to wrongful convictions, "fairness" plays an important role in relation to a much broader range of appeals. An important rationale for sentencing appeals is to ensure consistency in sentencing – that is, fairness between offenders in comparable situations. The role of appeals in ensuring consistent application of the law is also necessary to ensure that participants in criminal proceedings are treated fairly.

Legitimacy of decision making and the integrity of the justice system

4.124 As we discuss at paragraphs 4.83 to 4.93 above, we think that there are cogent reasons why the criminal appeals system has a role to play in maintaining the integrity of the criminal justice system. This is not because we think that allowing appeals because of police or prosecutorial misconduct will of itself necessarily deter such conduct. Rather, we think that a criminal justice system which allows convictions to stand which have been procured by misconduct risks bringing itself into disrepute.

4.125 In Chapter 8 we discuss the "safety test" applied by the CACD and how it incorporates aspects relating to the integrity of the justice system (including by treating "category 2" abuse of process – see footnote 3 above – as rendering a conviction unsafe).

4.126 Moreover, even if one rejects the argument regarding integrity, the principle of fairness may require appeals to succeed if an issue of misconduct, had it been raised before or during the trial, would have led to a defendant being acquitted. Otherwise, the result is an arbitrary unfairness between defendants where the abuse is detected before conviction and those where it is detected afterwards.

Access to justice and consideration of those vulnerable or otherwise disadvantaged

4.127 Access to justice was seen as an important feature of the criminal justice system, particularly by prisoner consultees. However, access to the justice system necessarily requires some limitations, not only to recognise the principle of finality but also in view of wider resource and practical considerations.

4.128 The principle of access to justice means that it is necessary to examine not only the formal availability of a system of appeals, but factors which might, in practice, militate against access to that system.

4.129 We think that it is important that the appeals system takes into account the needs of particular groups in order to ensure that they are fairly treated and can access justice. In the remainder of this consultation paper, we have sought to ensure that our consideration of the law includes any impacts that the law is likely to have on particular groups. Chapter 5 (and the last section in Chapter 17) examines in detail issues specifically arising in relation to children and young people.

"No greater penalty"

4.130 We think that the prospect of a person receiving a more serious punishment as the result of bringing an appeal has the potential to act as a constraint on the right of appeal, potentially discouraging people from bringing meritorious appeals.

4.131 Professor Michael Zander found that the number of applications to the CACD had "dropped dramatically" (from around 12,000 to 6,000) following a practice direction issued by the Lord Chief Justice in 1970, stating that single judges could, and should, make use of the power to impose loss of time directions.[120] Professor Zander concluded that "[t]hey [potential appellants] gave up not because they were persuaded they were wrong but because they feared the loss of time".[121]

4.132 There is evidence, moreover, that this deterrent effect is more pronounced for certain groups, including women[122] and children and young people.

4.133 The dilemma cannot be resolved simply by limiting the application of a more severe penalty to cases where the appeal is wholly unmeritorious, since an applicant will not know whether their appeal will be held to be unmeritorious, and is unlikely to believe it to be so. (Though if they renew a refused application for leave to appeal, they will be on notice that their application could be judged as wholly unmeritorious.) Conversely, a person with arguable grounds for appeal, or even a strong case, may worry that the court will nonetheless find their case to be without merit.

Double jeopardy

4.134 Parliament has legislated for certain exceptions to the principle against double jeopardy, including those relating to tainted acquittals, retrial after a conviction has been quashed by the CACD, and retrial for certain serious offences where there is compelling new evidence. Moreover, the ICCPR and ECHR allow limited exceptions to the principle against double jeopardy (see Chapter 13).

4.135 We recognise the principle against double jeopardy and the need to ensure that any possible reforms to the law relating to criminal appeals take it into account. We will consider whether the existing law as well as any proposed reforms impermissibly interfere with the protection against double jeopardy.

CONCLUSIONS

4.136 We consider that the overriding aim of the trial process should be to acquit the innocent and to convict the guilty. Trial by jury is the means by which this function is performed in the most serious cases, and represents an important principle in its own right, and the criminal appeals system should respect the fact that the jury is the primary finder of fact. However, the existence of trial by jury should not prevent the correction of miscarriages of justice.

4.137 The principle of finality has a place in the appeals system to prevent the unnecessary retraumatisation of victims and the needless prolongation of proceedings. However,

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120 M Zander, "Legal Advice and Criminal Appeals: A Survey of Prisoners, Prisons and Lawyers" [1972] *Criminal Law Review* 132, 133. We note, however, that the modern practice is for the single judge only to warn the applicant of the risk of a loss of time order if they were to renew their application to the full court. This practice is described at paras 6.128-6.157 below.

121 Above, 167.

122 N Sakande, *Righting Wrongs: What are the barriers faced by women seeking to overturn unsafe convictions or unfair sentences in the Court of Appeal (Criminal Division)?* (2020, Griffins Society).

this should not be prioritised over the principles of justice and the integrity of the criminal justice system.

4.138 The criminal justice system must strive not only to ensure that only the guilty are convicted, but it must also maintain and promote the integrity of the system as a whole. This principle should be reflected in the law on criminal appeals: convictions which amount to an affront to justice should not stand.

4.139 The system of criminal appeals must incorporate the principle of fairness. This is a multifaceted concept, including not only fairness to the convicted person, but fairness as between appellant and respondent, fairness between co-defendants, and a general fairness between persons convicted of comparable offences. It is axiomatic that a conviction should not stand where the person convicted did not receive a fair trial.

4.140 The criminal justice system, and by implication the criminal appeals system, should be accessible to all, with special consideration for those who may face additional barriers within the appellate system.

Consultation Question 3.

4.141 In considering whether reform to the law relating to criminal appeals is necessary, we provisionally propose that the relevant principles are:

(1) the acquittal of the innocent;

(2) the conviction of the guilty;

(3) fairness;

(4) recognising the role of the jury in trials on indictment;

(5) upholding the integrity of the criminal justice system;

(6) ensuring access to justice (incorporating the “no greater penalty” principle and consideration of the needs of particular groups); and

(7) finality.

We provisionally propose as an overriding principle that the convictions of those who are innocent or did not receive a fair trial should not stand.

Do consultees agree?

4.142 We have provisionally concluded that the prospect of receiving an increased sentence as a result of bringing an appeal may be dissuading some convicted persons from bringing meritorious appeals.

4.143 We discuss in the following chapter the fact that sentencing is currently “at large” where a conviction in summary proceedings is appealed to the Crown Court. In

Chapter 6, we discuss the possibility of “loss of time” orders where a conviction or sentence is challenged in the CACD.

Consultation Question 4.

4.144 We provisionally propose that in principle a person should not be at risk of having their sentence increased as a result of seeking to appeal their conviction or sentence.

Do consultees agree?

Chapter 5: Appeals from convictions and sentences imposed in magistrates' courts

5.1 The law on criminal appeals in England and Wales distinguishes between cases tried summarily (in magistrates' courts, whether by a lay bench or by a District Judge (Magistrates' Courts) ("DJ(MC)"), and cases tried on indictment (in the Crown Court, almost always before a judge and jury).

5.2 The vast majority of criminal cases in England and Wales are dealt with in summary proceedings in magistrates' courts.[1] These include less serious offences which are "summary only", plus most "either-way" offences.[2]

5.3 The majority[3] of trials involving children (under-18s), including offences which would only be triable on indictment against an adult defendant, take place in youth courts, which are specialised magistrates' courts.[4] We discuss issues relating specifically to children and young people at the end of this chapter from paragraph 5.204 onwards. However, most of the issues applying to appeals from proceedings in magistrates' courts will also apply to youth courts.

5.4 Magistrates' courts are not courts of record, meaning that proceedings are not routinely recorded. While the magistrates will give reasons for their verdict (unlike a jury in the Crown Court) and sentence, reasons may be given extemporaneously.

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1 In the year ending 2024, 1,096,074 people were convicted in magistrates' courts, compared to 53,537 in the Crown Court: Ministry of Justice, "Criminal Justice statistics quarterly: June 2024" (21 November 2024).

2 "Either-way" offences are those which may be prosecuted either summarily or on indictment. If the defendant indicates that they will plead not guilty or gives no indication, the magistrates' court will consider whether the case is more suitable for summary trial or trial on indictment. If the magistrates' court accepts jurisdiction, the defendant may elect to be tried in the Crown Court or consent to be tried summarily.

3 Direct evidence is not available in the most recent 2023-24 data, but in 2022-23, just 4% of all sentencing occasions of children were in the Crown Court: Youth Justice Board, "Youth Justice Statistics: 2022 to 2023 (accessible version)" (25 January 2024). It should be noted that the 4% figure may underrepresent the number of child defendants in the Crown Court, as cases tried in the Crown Court can be remitted to a magistrates' court for sentencing under the Sentencing Code, s 25.

4 Youth courts are a type of magistrates' court, dealing with most cases involving defendants aged 10 to 17. The main exceptions to this are:

1. homicide offences and firearms offences where the minimum term provisions apply, which must be heard in the Crown Court;
2. "grave crimes", including certain sexual offences and offences carrying a sentence of 14 years or more when committed by an adult, which may be sent to the Crown Court if there is a real possibility that the defendant will be sentenced to a custodial term of two years or more;
3. specified offences punishable in the case of an adult by life imprisonment or imprisonment for 10 years or more, which must be sent to the Crown Court if there is a significant risk to members of the public of serious harm occasioned by the commission by the defendant of further serious offences; and
4. offences for which the child defendant is to be tried alongside an adult, in which case the child defendant will be tried in the same court as the adult defendant(s).

5.5 Typically, appeals in summary proceedings are by way of rehearing in the Crown Court, before a judge, normally sitting alongside two magistrates. Less commonly, they make take place through an appeal by way of "case stated" or challenge by way of judicial review to the High Court.[5]

5.6 The jurisdiction of the Court of Appeal Criminal Division ("CACD") is generally limited to appeals from trials on indictment. There are, however, certain exceptions. A sentence imposed by the Crown Court in a summary case (whether after an appeal from a magistrates' court or where a magistrates' court has committed the case to the Crown Court for sentencing) can be appealed to the CACD.

5.7 Where a decision in summary proceedings is appealed to or challenged in the High Court, any onward appeal lies directly to the Supreme Court.

APPEALS FROM MAGISTRATES' COURTS

5.8 There are currently three potential avenues for challenging conviction and sentence in magistrates' courts:[6]

(1) an appeal to the Crown Court;

(2) an appeal to the High Court by way of case stated; and

(3) an application to the High Court for judicial review.

5.9 The majority of appeals from magistrates' courts by a defendant are by way of appeal to the Crown Court.[7]

5.10 These avenues are substantively and procedurally different, but there is some overlap between them.

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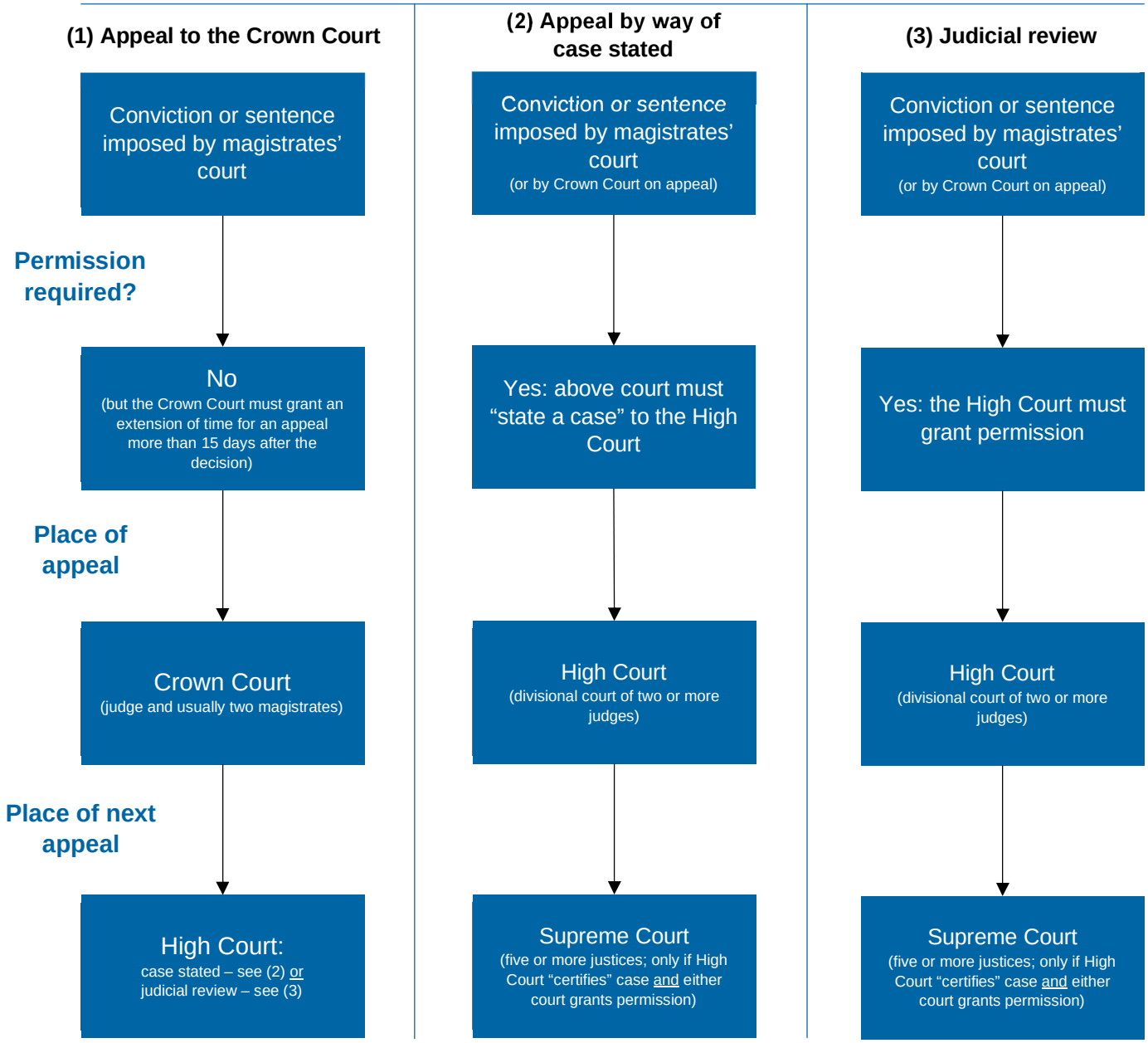
5 Under the Senior Courts Act 1981, ss 74(1) and (3), and the Criminal Procedure Rules 2020, r 34.11, when hearing an appeal the Crown Court must comprise a judge of the High Court, a Circuit judge, a Recorder or a qualifying judge advocate, and between two and four magistrates. However, in certain circumstances, the judge can sit with one magistrate, or alone.

6 This term includes youth courts (see s 148 of the Magistrates' Courts Act 1980).

7 In 2022, there were 6153 appeals to the Crown Court (Ministry of Justice, "Criminal court statistics quarterly: October-December 2022" (30 March 2023), table C1), compared with 150 applications for judicial review in a criminal case (Ministry of Justice, "Civil Justice Statistics Quarterly: October-December 2022" (2 March 2023)), and 39 appeals by way of case stated (Ministry of Justice, "Royal Courts of Justice Statistics Guidance document" (6 June 2024), table 5.6)

Routes of appeal and challenge to magistrates' court decisions*



* when a person is convicted in a magistrates' court, but, for whatever reason, the court decides that they should be sentenced in the Crown Court, they are committed (sent) for sentence to the Crown Court. The sentence the Crown Court then imposes can be appealed to the Court of Appeal Criminal Division, *not* the Crown Court, and the person can seek judicial review of the sentence from the High Court, but cannot appeal against it by way of case stated.

Appeal to the Crown Court

Right of appeal

5.11 A person convicted of an offence after a trial in a magistrates' court may appeal against the conviction and any resulting sentence to the Crown Court.[8] Alternatively, if they pleaded guilty to the offence of which they have been convicted, they may usually only appeal against their sentence.[9] However, the Crown Court has the power to vacate a guilty plea in summary proceedings if:

(1) the guilty plea had been equivocal;[10]

(2) the guilty plea had been entered as a result of duress;[11] or

(3) the person had been previously convicted or acquitted of the offence – that is, they had a "double jeopardy" defence ('autrefois acquit' or 'autrefois convict').[12]

5.12 Where a person has pleaded guilty and their case does not fall within the limited exceptions set out above, they may apply to the Criminal Cases Review Commission ("CCRC") for a reference of their appeal to the Crown Court. The CCRC may make a reference regardless of the plea entered by the applicant in relation to the offence.[13] In *Crown Prosecution Service v Crown Court at Preston*,[14] it was established that when the CCRC refers a case to the Crown Court in which the defendant had pleaded guilty, it is not necessary for the defendant to apply to the Crown Court to vacate their plea before the appeal can be heard.

5.13 The right of appeal to the Crown Court ceases where an application has been made to the magistrates' court to state a case for the opinion of the High Court (see paragraph 5.25 and following below).[15] Therefore, a person may not appeal both to the Crown Court and to the High Court by way of case stated in respect of the same conviction or sentence. However, where the prosecution challenges the decision in the High Court, whether by way of case stated or judicial review, the defendant's right to appeal to the Crown Court persists.[16]

5.14 The exercise of the right of appeal against conviction or sentence does not result in the suspension of the sentence imposed in relation to an offence pending the

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8 Magistrates' Courts Act 1980, s 108(1). The right of appeal against sentence includes any order made by a magistrates' court on conviction, with the exceptions of orders for the payment of costs, in relation to the destruction of an animal under s 37(1) of the Animal Welfare Act 2006 and where the court does not have a discretion in respect of the making, or the terms, of the order (see s 108(3) of the Magistrates' Courts Act 1980).

9 Magistrates' Courts Act 1980, s 108(1)(a).

10 *R v Plymouth Justices, ex p Hart* [1986] QB 950, DC.

11 *R v Huntingdon Justices, ex p Jordan* [1981] QB 857, DC.

12 *Cooper v New Forest District Council* [1992] COD 442, DC.

13 Criminal Appeal Act 1995, ss 11(1)(a) and (2).

14 [2023] EWHC 1957 (Admin), [2024] KB 348.

15 Magistrates' Courts Act 1980, s 111(4).

16 *Cuciurean v CPS* [2024] EWHC 848 (Admin), [2024] 1 WLR 4070.

determination of the appeal.[17] This includes an order in relation to the payment of costs or a fine.[18] Therefore, the sentence remains enforceable pending the determination of the appeal.[19]

Notice of appeal

5.15 The appellant must give notice of appeal not more than 15 business days after:

(1) if appealing against conviction, either the date of the resulting sentence, the date that the sentence is deferred or the date of committal for sentence, whichever is earlier;

(2) if appealing against a sentence, the date of the sentence.[20]

5.16 The Crown Court may shorten the time limit, or extend it (including after it has expired).[21] The appellant does not require leave (permission) from the Crown Court to appeal where notice of appeal is given within 15 business days. As such, there is an automatic right of appeal within that time limit. However, leave from the Crown Court is required to appeal out of time. The Crown Court has a broad discretion to grant an extension of time in which to appeal and may take into account a range of factors, including the length of and reason for the delay, the strength of the case and the practicalities of there being an effective rehearing.[22]

5.17 The time limit for bringing an appeal against a decision in a magistrates' court is more restrictive than the limits applying to those seeking to appeal conviction or sentence from the Crown Court.[23] The Westminster Commission[24] expressed concern that the 28-day limit for appeals from the Crown Court to the CACD caused difficulties for vulnerable offenders when a custodial sentence is given. Similar concerns may arise where a person is imprisoned following magistrates' court proceedings.

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17 *R v May* [2005] EWCA Crim 367 at [5], by Keene LJ.

18 *R (Natural England) v Day* [2014] EWCA Crim 2683, [2015] 1 Cr App R (S) 53 at [56], by Lord Thomas of Cwmgiedd CJ.

19 This also applies in relation to appeals by way of case stated and applications for judicial review. Where a custodial sentence has been imposed, a magistrates' court, the Crown Court or the High Court, depending on the type of challenge, has the power to grant bail pending the determination of the appeal (see s 113(1) of the Magistrates' Courts Act 1980, s 81(1) of the Senior Courts Act 1981, s 37(1) of the Criminal Justice Act 1948 and s 22(1) of the Criminal Justice Act 1967). The magistrates' court and the appellate court may also have the power to suspend certain orders pending the determination of the appeal – for example, a driving disqualification order may be suspended (see ss 39(1) and 40(2) of the Road Traffic Offenders Act 1988).

20 Criminal Procedure Rules 2020, r 34.2(2).

21 Criminal Procedure Rules 2020, r 34.10(a).

22 *R (Customs and Excise Commissioners) v Maidstone Crown Court* [2004] EWHC 1459 (Admin) at [33], by Newman J; *R (Khalif) v Isleworth Crown Court* [2015] EWHC 917 (Admin) at [12], by Burnett LJ.

23 The time limit for appeals from the Crown Court to the CACD against conviction or sentence is 28 days from the conviction or sentence respectively. Criminal Appeal Act 1968, ss 1(2)(b), 11(1A) and 18(2).

24 See para 1.4 above. The Westminster Commission was established by the All-Party Parliamentary Group on Miscarriages of Justice, and chaired by Baroness Stern and Lord Garnier.

Determination of the appeal

5.18 The Crown Court hearing an appeal against conviction or sentence must consist of a High Court judge, a Circuit judge, a Recorder or a "qualifying judge advocate"[25] and usually at least two[26] magistrates who did not take part in the original proceedings.[27]

5.19 An appeal to the Crown Court operates by way of rehearing, which means that an appeal against conviction proceeds as a new trial and an appeal against sentence as a new sentencing hearing.[28]

5.20 In the case of rehearings in summary criminal proceedings at the Crown Court, evidence is heard afresh, and both the appellant and the respondent may present evidence that was not presented at the original trial or sentencing hearing.[29] In contrast to appeals against conviction and sentence on indictment, the Crown Court does not undertake a review of the magistrates' court's decision, but instead formulates its own view based on the evidence presented to it by the parties.[30] In relation to appeals against sentence, this means that the Crown Court is required to determine the appropriate sentence and the extent to which that differs from the original sentence.[31] If the sentence differs to a "significant degree" from the original sentence, the Crown Court should allow the appeal.[32]

5.21 Upon hearing the appeal, the Crown Court may:

(1) confirm, reverse or vary any part of the magistrates' court's decision appealed against, including a determination not to impose a separate penalty in respect of an offence;

(2) remit the matter with its opinion to the magistrates' court; or

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25 The Judge Advocate General or a person appointed under s 30(1)(a) or (b) of the Courts-Martial (Appeals) Act 1951 (see s 151(1) of the Senior Courts Act 1981).

26 The Crown Court may proceed or continue to hear an appeal with only one magistrate if the presiding judge decides that otherwise the start of the appeal hearing would be delayed unreasonably, or one or more of the magistrates who started hearing the appeal is absent. An appeal may be heard by a single High Court judge, a Circuit judge, a Recorder or a qualifying judge advocate if the appeal is against conviction and the respondent (the prosecutor, where the convicted person appeals) agrees that the court should allow the appeal. Criminal Procedure Rules 2020, r 34.11(2).

27 Senior Courts Act 1981, s 74(1); Criminal Procedure Rules 2020, r 34.11(1)(a). If the appeal is from a youth court each magistrate must be qualified to sit as a member of a youth court (see r 34.11(1)(b) of the Criminal Procedure Rules 2020).

28 Senior Courts Act 1981, s 79(3) provides that "the customary practice and procedure with respect to appeals to the Crown Court, and in particular any practice as to the extent to which an appeal is by way of rehearing of the case, shall continue to be observed".

29 *Sagnata Investments Ltd v Norwich Corporation* [1971] 2 QB 614, CA.

30 *R v Swindon Crown Court, ex p Murray* (1998) 162 JP 36, DC.

31 *R v Knutsford Crown Court, ex p Jones* [1985] 7 Cr App R (S) 448, DC.

32 Above.

(3) make such other order as the court thinks just, exercising any power that the magistrates' court may have exercised.[33]

5.22 This includes the power to vary the sentence imposed by the magistrates' court (or the Crown Court, where the appellant was sentenced by the Crown Court following a committal for sentence by the magistrates' court, but has successfully appealed one or more of their convictions).[34] However, the Crown Court is limited to the sentencing powers of the magistrates' court in respect of the offence.[35] In contrast to the CACD's powers following the determination of an appeal against conviction or sentence on indictment, the Crown Court may increase the original sentence imposed, provided that such sentence would have been within the sentencing powers of the magistrates' court.[36] Our provisional proposal on the "no greater penalty" principle in Consultation Question 4 in Chapter 4 above would prevent the Crown Court from imposing an increased sentence upon an appeal by the convicted person.

5.23 The Crown Court's power to vary the original sentence is not limited to appeals against sentence; it extends to all aspects of the magistrates' court decision that is before the Crown Court.[37] Therefore, the Crown Court may vary the sentence (whether imposed by the magistrates or the Crown Court) in cases where the appellant unsuccessfully appeals only against their conviction by the magistrates.

5.24 However, where the increase in sentence that the Crown Court would impose would be "trifling or insignificant", the Crown Court should confirm the sentence passed by the magistrates' court.[38]

Appeal by way of case stated

5.25 Both the defendant and the prosecution may appeal against the decision of a magistrates' court to the High Court by way of case stated on the ground that the decision was wrong in law or in excess of jurisdiction.[39] Additionally, any person "aggrieved by the conviction, order, determination or other proceeding" of a

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33 Senior Courts Act 1981, s 48(2).

34 Senior Courts Act 1981, s 48(4); *Jones v Crown Prosecution Service* [2019] EWHC 2826 (Admin), [2020] 1 WLR 99 at [12], by Hamblen LJ. In *Jones*, a conviction for careless driving was substituted for dangerous driving. However, the Crown Court also reduced the sentence imposed for another offence, despite the appeal being unsuccessful. The High Court confirmed that it was open to the Crown Court to vary a sentence in matters where the appeal had been unsuccessful, including where another Crown Court had sentenced on those matters on a committal for sentence heard prior to the appeal.

35 Senior Courts Act 1981, s 48(4). In relation to references by the CCRC, the Crown Court may not impose a sentence of greater severity than the original sentence imposed by the magistrates' court (see also s 11(6) of the Criminal Appeal Act 1995).

36 Senior Courts Act 1981, s 48(4).

37 Senior Courts Act 1981, ss 48(4) and (5); *Jones v Crown Prosecution Service* [2019] EWHC 2826 (Admin), [2020] 1 WLR 99 at [14]-[16], by Hamblen LJ.

38 *R v Knutsford Crown Court, ex p Jones* [1985] 7 Cr App R (S) 448, DC.

39 Magistrates' Courts Act 1980, s 111(1).

magistrates' court may challenge the court's decision by way of case stated to the High Court.[40]

5.26 Appeals by way of case stated may only be made in respect of a final decision, such as a conviction, acquittal or sentence.[41] Interlocutory decisions (see Chapter 12) may not be challenged by way of case stated.

5.27 Where the defendant makes an application to appeal by way of case stated, their right to appeal in respect of the same decision to the Crown Court ceases (see paragraph 5.13 above).[42]

Application to the magistrates' court to state a case

5.28 An application for an appeal by way of case stated must be made within 21 days after the day on which the decision was given by the magistrates' court or, where the hearing is adjourned after conviction, the day on which sentence is passed or the court otherwise deals with the defendant.[43] The magistrates' court does not have the power to extend this time limit.[44] However, the High Court has a power to extend the time limit for lodging the stated case with the High Court.[45]

5.29 If the application to state a case is considered to be "frivolous", the magistrates' court may refuse to state a case.[46] An application will be considered "frivolous" if it is "futile, misconceived, hopeless or academic".[47] However, the magistrates' court must not refuse to state a case where the application is made by or under the direction of the Attorney General.[48] Additionally, the magistrates' court may also require the applicant to enter into a recognizance, with or without sureties, to prosecute the appeal without delay and pay any costs that the High Court may award.[49]

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40 Magistrates' Courts Act 1980, s 111(1). A "person aggrieved" may be a body corporate, such as a local authority, or any person who has a decision decided against them, except where the decision is an acquittal of a criminal offence (*Cook v Southend-on-Sea Borough Council* [1990] 2 QB 1, CA, 7).

41 *Loade v Director of Public Prosecutions* [1990] 1 QB 1052, DC.

42 Magistrates' Courts Act 1980, s 111(4).

43 Magistrates' Courts Act 1980, ss 111(2) and (3).

44 *R (Mishra) v Colchester Magistrates' Court* [2017] EWHC 2869 (Admin), [2018] 1 WLR 1351 at [39], by Sharp LJ.

45 Civil Procedure Rules 52.15 and 3.1 and Civil Practice Direction 52E.

46 Magistrates' Courts Act 1980, s 111(5).

47 *R v North West Suffolk (Mildenhall) Magistrates' Court, ex p Forest Heath DC* [1998] Env LR 9, CA.

48 Magistrates' Courts Act 1980, s 111(5). However, this does not extend to the Director of Public Prosecutions (DPP) or a Crown Prosecutor. In *DPP v Highbury Corner Magistrates' Court* [2022] EWHC 3207 (Admin), [2023] 4 WLR 22, the DPP successfully obtained a judicial review of a refusal by the District Judge to state a case after dismissing a case against a protestor for aggravated trespass. The High Court held that the refusal to state a case was unlawful as the request to state a case was not frivolous; in fact, it was well-founded. The High Court also quashed the District Judge's finding of "no case to answer" and remitted it for retrial before a different judge.

49 Magistrates' Courts Act 1980, s 114.

5.30 The decision of the court to refuse to state a case may be challenged by way of judicial review in order for the High Court to make a mandatory order requiring the magistrates' court to state a case.[50]

Determination of the appeal

5.31 The High Court is required to determine whether the magistrates' court has reached a decision which was not reasonably open to it to reach.[51] The High Court can:

(1) reverse, affirm or amend the magistrates' court's decision; or

(2) remit the matter to the magistrates' court, with the opinion of the High Court.[52]

5.32 As such, the High Court may uphold or quash both acquittals and convictions and, where appropriate, substitute them for a conviction or acquittal respectively. The High Court may also make such other order in relation to the matter as it thinks fit.[53] This includes the power to order a rehearing, before the same or a different bench, where a fair trial is still possible.[54]

Appeal against the decision of the High Court

5.33 The appellant or the respondent may appeal against the decision of the High Court to the Supreme Court, where leave to appeal has been granted by the High Court or the Supreme Court.[55] Leave to appeal must only be granted by the courts where:

(1) the High Court has certified that the appeal involves a point of law of general public importance; and

(2) it appears to the court that the point ought to be considered by the Supreme Court.[56]

5.34 The party seeking to appeal against the decision of the High Court must apply to the High Court for leave to appeal within 28 days, beginning with:

(1) the date of the court's decision; or

(2) where reasons are given by the court after its decision, the date on which the court gives its reasons.[57]

5.35 Where the application for leave to appeal is refused by the High Court, leave may be sought from the Supreme Court within 28 days, beginning with the date on which

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50 Magistrates' Courts Act 1980, s 111(6).

51 *DPP v Ziegler* [2021] UKSC 23, [2022] AC 408 at [23] and [29], by Lord Hamblen and Lord Stephens JJSC.

52 Senior Courts Act 1981, s 28A(3).

53 Senior Courts Act 1981, s 28A(3).

54 *Griffith v Jenkins* [1992] 2 AC 76, HL, 84A-B, by Lord Bridge of Harwich.

55 Administration of Justice Act 1960, ss 1(1) and (2). An appeal may not be made from the High Court to the Court of Appeal in a criminal cause or matter (see s 18(1)(a) of the Senior Courts Act 1981).

56 Administration of Justice Act 1960, s 1(2).

57 Above, ss 2(1) and (1A).

leave is refused by the High Court.[58] The High Court or the Supreme Court may extend the time limit where the defendant applies for an extension of time.[59]

5.36 For the purposes of the appeal, the Supreme Court may exercise any powers of the High Court or remit the case to the High Court.[60]

Judicial review

5.37 Both the defendant and the prosecution may apply to the High Court for judicial review of a magistrates' court decision on public law grounds (ie illegality, irrationality and procedural impropriety). It is not necessary for the defendant to have exhausted their right of appeal to the Crown Court before making an application for judicial review.[61] Interlocutory decisions may be challenged by way of judicial review; however, such challenges will only be considered by the Court in rare cases if the trial is under way.[62]

5.38 In contrast to appeals by way of case stated, an application for judicial review may only be made where leave has been granted by the High Court.[63] The application for judicial review must be made "promptly" and no later than three months from the date on which the grounds for the claim first arose.[64] Where permission is refused by the High Court, or permission is only given on certain grounds or subject to conditions, the claimant may request that the decision be reconsidered at a hearing within seven days of service of the Court's reasons.[65] Such request may not be made where the Court refuses permission on the basis that the application is totally without merit.[66]

5.39 The High Court has the power to grant a quashing, mandatory or prohibiting order.[67] Where the High Court quashes a decision it can, in exceptional circumstances, remit the matter to the magistrates' court and direct it to reconsider the matter and reach a

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58 Administration of Justice Act 1960, s 2(1).

59 Above, s 2(3).

60 Above, s 1(4).

61 *R v Hereford Magistrates' Court, ex p Rowlands* [1998] QB 110, CA, 125F-G, by Lord Bingham of Cornhill CJ.

62 *R (Parashar) v Sunderland Magistrates' Court* [2019] EWHC 514 (Admin), [2019] 2 Cr App R 3 at [43]. The High Court noted that the threshold of exceptionality is lower in cases where a pre-trial decision is being challenged. The circumstances where a judicial review may be appropriate in such cases are set out at [42] of the judgment: (i) where it is properly arguable that the ability of the defendant to present their defence is so seriously compromised by the decision under challenge that an unfair trial is inevitable; (ii) where an important point of principle is raised, likely to affect other cases; or (iii) where the case has some other exceptional feature which justifies the intervention of the High Court.

63 Senior Courts Act 1981, s 31(3).

64 Civil Procedure Rules 1998, r 54.5(1).

65 Above, r 54.12(1), (3) and (4).

66 Above, r 54.12(7). An application will be "totally without merit" if it is "bound to fail" (see *R (Grace) v Secretary of State for the Home Department* [2014] EWCA Civ 1091, [2014] 1 WLR 3432 at [13], by Maurice Kay LJ, and [19], by Lord Dyson MR).

67 Senior Courts Act 1981, s 31(1)(a). Under s 29A(1), these orders can be suspended or have effect only prospectively.

decision in accordance with the judgment of the Court, or it may substitute its own decision.[68]

5.40 The appellant or the respondent may appeal against the decision of the High Court to the Supreme Court (see paragraphs 5.33 to 5.36 above).

Further appeals against decisions in summary proceedings

5.41 Where a decision of a magistrates' court has been appealed to the Crown Court, and the Crown Court has given a decision, that decision of the Crown Court may be further appealed. Such appeals are to the High Court by way of case stated on the ground that the decision is wrong in law or in excess of jurisdiction.[69] Alternatively, the Crown Court's decision may be challenged by way of judicial review.[70] Where the appellant's appeal has been unsuccessful in the Crown Court, they may also apply to the CCRC for a reference of their appeal back to the Crown Court.[71]

5.42 Where a defendant is sentenced in the Crown Court in appellate proceedings, or a sentence imposed by the magistrates' court is upheld, there is no further appeal. However, the defendant may seek to challenge the Crown Court sentence in the High Court through an appeal by way of case stated or judicial review.[72]

Choosing how to challenge a decision of a magistrates' court

5.43 There is some overlap between the three avenues of challenge from a magistrates' court. The High Court has sought to provide some guidance on which may be most appropriate in certain circumstances. In *Rowlands*, the High Court said:

(1) an appeal to the Crown Court is the ordinary avenue of appeal where an appeal is sought on the basis that a magistrates' court has reached the wrong decision on a question of fact, or a mixture of law and fact; and

(2) an appeal to the High Court by way of case stated is the ordinary avenue of appeal where an appeal is sought on the basis that a magistrates' court has made an error of law.[73]

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68 Senior Courts Act 1981, s 35(5). The High Court may only substitute its own decision in such cases if the quashing order is made on the ground that there has been an error of law and without the error there would have been only one decision which the magistrates' court could have reached (see s 31(5A) of the Senior Courts Act 1981).

69 Above, s 28(1).

70 Above, s 29(3).

71 Criminal Appeal Act 1995, s 11(1).

72 *Taylor on Criminal Appeals* (3rd ed 2022) para 3.118 states that "whilst the High Court has power on a case stated to vary a sentence under s 28(3)(a) [of the Senior Courts Act] 1981, the case stated procedure should not be used for challenging a sentence imposed in the Crown Court" with a footnote saying that "the issue would only arise of course on a committal for sentence as otherwise the High Court would not have jurisdiction, as the matter would arise out of a trial on indictment". However, there is a third scenario where the sentence is neither on committal for sentence nor does it arise out of a trial on indictment, which is where the Crown Court sentences in summary proceedings in its appellate capacity.

73 *R v Hereford Magistrates' Court, ex p Rowlands* [1998] QB 110, CA, 118, by Lord Bingham of Cornhill CJ.

5.44 According to the High Court in *Lloyd*, judicial review will be the appropriate avenue where it is alleged that a magistrates' court acted in excess of its jurisdiction.[74] Judicial review may also be more appropriate where an issue has to be decided which a magistrates' court cannot decide for themselves, such as where there has been unfairness in the way a magistrates' court conducted the case.[75]

5.45 Appeals against sentence should usually be made to the Crown Court. Sentencing decisions can only be challenged by way of case stated or judicial review where there are "clear and substantial reasons" for believing that such avenue of challenge would dispose of the matter in the interests of the defendant.[76]

APPEAL BY WAY OF REHEARING IN THE CROWN COURT

5.46 A key question for this project has been whether to retain the right to a rehearing in the Crown Court for appeals from magistrates' courts. This involves two distinct but related questions: whether the appeal should be by way of rehearing, and whether there should be a requirement for leave to appeal. A leave requirement could be introduced whether or not appeal by way of rehearing was retained. However, if appeal by way of rehearing were to be replaced by a review, then it seems that it would be necessary to introduce a leave requirement in order that only valid grounds of appeal were pursued in the appellate proceedings.

Previous reviews of appeal routes from magistrates' courts

5.47 Lord Justice Auld reviewed the appeal routes from magistrates' courts in his 2001 report on the Criminal Courts of England and Wales.[77] In discussing the automatic right of rehearing, he observed that it must have originated from a perceived lack of confidence in magistrates' courts.[78] He considered that, given there was significantly more training of magistrates, who must also provide reasons for their decisions, coupled with the introduction of legal advisors, the original justification for rehearing no longer stood.[79] He therefore recommended that the right to a rehearing and the routes of appeal to the High Court ought to be removed and only one direct appeal to the Crown Court should be permitted, subject to leave being granted by a Crown Court judge.[80] He further considered that it should be limited to a point of law or on other grounds which made the conviction 'unsafe' or meant the sentence was unlawful, manifestly excessive or wrong in principle.[81]

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74 *R (Lloyd) v North Essex Justices* [2001] 2 Cr App R (S) 15, DC, at [11], by Lord Woolf.

75 *R (P) v Liverpool City Magistrates* [2006] EWHC 887 (Admin), [2006] ACD 73 at [6] and [7], by Collins J. For example, where it is alleged that there has been bias or the defendant was prevented from properly putting their case.

76 *Allen v West Yorkshire Probation Service Community Service Organisation* [2001] EWHC Admin 2, (2000) 165 JP 313 at [17], by Newman J.

77 Rt Hon Lord Justice Auld, *A Review of the Criminal Courts of England and Wales* (2001) p 538, para 55 ("Auld Review"). See Chapter 2 for more detail.

78 Above, p 617, para 17.

79 Above, p 617, para 17.

80 Above, p 621, para 32.

81 Above, p 621, para 32.

5.48 Sir Brian Leveson reviewed these recommendations in his 2015 review concerning efficiency in criminal proceedings.[82] He considered that, whilst magistrates' courts are not courts of record, both magistrates and district judges must give reasons for their decisions and notes of evidence are required which could be challenged on appeal if the right of rehearing was removed. Further, the current unfettered right of rehearing required witnesses to attend a further trial, which could be limited to only appropriate cases if a leave requirement were introduced.[83]

5.49 However, he observed that there was a countervailing argument that a limitation on appeals would subject proceedings to greater scrutiny, which may in turn require more detail from the bench.[84] This would necessarily be more time consuming and could make limits on appeal counter-productive to the efficiency of the courts.[85]

Consultation responses

5.50 In responding to the Issues Paper, three consultees considered that a leave requirement should be introduced. These included the Crown Prosecution Service ("CPS") and the Serious Fraud Office ("SFO"). Paul Goldspring, the Chief Magistrate, also supported the proposal in pre-consultation discussion. The CPS considered a number of factors, including the impact on victims and witnesses who have to go through the trial process again, the costs, particularly where there is non-attendance, and the delays involved. It noted:

> Defendants are entitled to a fair trial but not repeated fair trials. In introducing a leave requirement, a rehearing could still be allowed where appropriate, however, a system which required leave to appeal from a single Crown Court judge would sift out unmeritorious cases from the system, and consideration could be given to the rehearing taking place in the magistrates' court rather than the Crown Court.

5.51 The SFO considered that a leave requirement would reduce the number of unmeritorious cases. It recognised that its involvement in magistrates' courts is limited to 'section 2' notice[86] offences in the Criminal Justice Act 1987 or freezing, seizure and forfeiture of cash, listed assets and money in accounts under the Proceeds of Crime Act 2002 ("POCA"). The SFO suggested that a leave requirement could be introduced for cases under POCA.

5.52 Concerns were observed in the Issues Paper and raised during the consultation, including by the Chief Magistrate, about attrition rates where victims, complainants or other witnesses no longer wish to participate in the rehearing. There has been some suggestion that the automatic right to an appeal by way of rehearing may encourage

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82 Rt Hon Sir Brian Leveson, *Review of Efficiency in Criminal Proceedings* (January 2015) ("Leveson Review"). Whilst potential improvements that would require legislative changes were outside the terms of reference for the review, Sir Brian Leveson sought to highlight a few such options. For further detail, see Chapter 2.

83 Above, p 86, para 331.

84 Above, p 86, para 331.

85 Above, p 86, para 331.

86 A 'section 2' notice is a notice under s 2 of the Criminal Justice Act 1987 requiring a person to provide information to the SFO. Failure to comply without reasonable excuse is a criminal offence, and is tried summarily. A more serious offence of knowingly or recklessly making a false statement in purported compliance with a 'section 2' notice is triable either way.

those convicted on the basis of evidence given at trial to "take a chance" on a witness failing to attend to give evidence at the rehearing.

5.53 The problem of attrition may be particularly acute in relation to offences involving domestic violence, for reasons we discuss at paragraphs 5.90 to 5.98 below.

5.54 However, the position of most respondents was that no leave requirement should be introduced and the right to a rehearing ought to remain. 16 consultees who responded to the relevant questions in the Issues Paper and the summary argued that no leave requirement should be introduced. This included the Magistrates' Association and various organisations and practitioners who regularly engage with magistrates' courts. The concerns raised are canvassed in the following sections.

Inadequate empirical evidence

5.55 One of the primary arguments against introducing a leave requirement was the lack of empirical evidence indicating that such a measure is necessary. A number of stakeholders raised the lack of evidence as negating the need to amend the automatic right of rehearing. The number of appellants who have appealed against conviction, sentence or both from a magistrates' court to the Crown Court for the five years to 16 October 2023 is as follows.[87]

Year	Appeal Against	Legally Aided	Private	Unrepresented	Total	Overall Total
2018 -19	Conviction	452	709	539	1700	**8011**
	Sentence	786	1499	1259	3544	
	Conviction and Sentence	378	786	1603	2767	
2019 - 20	Conviction	360	560	410	1330	**7260**
	Sentence	848	1501	1292	3641	
	Conviction and Sentence	332	664	1293	2289	
2020 - 21	Conviction	229	254	269	752	**4437**
	Sentence	527	964	918	2409	
	Conviction and Sentence	186	373	717	1276	

87 These statistics were provided by Justice Minister Mike Freer MP following a question to the Secretary of State for Justice. The data was extracted from the Crown Court case management systems on 16 October 2023. The data is based on the number of defendants, not a count of cases, and excludes appeals that are non-criminal, for example licensing appeals. The data pertains to the Financial Year being April – March and is based on the date that the appeal was received by the Crown Court.

2021 - 22	Conviction	298	457	318	1073	**6062**
	Sentence	569	1320	1126	3015	
	Conviction and Sentence	304	601	1069	1974	
2022 -23	Conviction	286	473	302	1061	**5834**
	Sentence	542	1289	1176	3007	
	Conviction and Sentence	236	533	997	1766	

5.56 To put these figures into perspective, magistrates' courts dealt with approximately 1.3 million cases in 2024.[88]

5.57 Of the 16 consultees who supported retaining the right to a rehearing, five raised the issue of empirical data. This included some members of 23 Essex Street Chambers, a chambers of barristers, who noted:

> the numbers taking up the right of appeal to the Crown Court are not significant, and although reviews have sometimes advocated the abolition of this right of appeal, the arguments are not underpinned by any evidence of problems with the current system. For example, it has been asserted that defendants could use the right of appeal to "revictimize" a complainant, but there is no evidence of that actually happening.

5.58 Transform Justice similarly argued there were too few appeals from magistrates' courts to justify a leave requirement:

> There is no evidence that a high proportion of appeals are unworthy. Indeed, the success rate indicates the opposite. We think the tiny proportion of court resources which may be used by appeals represents good value and provides a crucial service to defendants and for accountability to the wider system.

Lack of records

5.59 A further barrier to the introduction of a leave requirement and appeal by way of review is the fact that proceedings in magistrates' courts are not routinely recorded. It was largely accepted over the course of the consultation that a prerequisite to removing the automatic right of rehearing would be for proceedings in magistrates' courts to be recorded. The Leveson review acknowledged:

> reasons provided by the bench would be subject to much greater scrutiny and could require more detail than is presently provided. In that event, more time would be

[88] Court statistics for England and Wales, Commons Library Research Briefing (2024) CBP 8372, p 8, para 2.1.

taken fashioning and deploying them: to that extent, the restriction could be counter-productive.[89]

5.60 We observed in the Issues Paper that, during pre-consultation engagement with legal stakeholders, several suggested that the impact on magistrates' courts themselves would be profound. There was a concern that the system would collapse if magistrates were required to provide detailed reasons for their decisions, including their verdicts, and legal advisers were required to provide robust written advice that would withstand judicial scrutiny on appeal.[90]

5.61 Following consultation on the Issues Paper, a range of views were expressed on whether magistrates' courts could feasibly become courts of record.

5.62 The Chief Magistrate was very supportive of magistrates' courts becoming courts of record, and was of the view that the technology was already available.

5.63 The CPS seemingly agreed that the technology was available. It also agreed there would be costs and suggested:

> the cost of introducing such a system may be significant and impractical for all offences. It is acknowledged that such appeals cover a wide range of offences, from road traffic offences (such as no insurance) and other low-level offending, through to very serious offences in the Youth Court such as rape and burglary. It may well be proportionate and cost effective to introduce it for specific offences.

5.64 The Bar Council was very supportive of magistrates' courts becoming courts of record, although it was not in favour of the introduction of a leave requirement. It identified a number of advantages including: assessing the consistency of witnesses who have previously given evidence; clarity for a decision that is being challenged through a case-stated appeal or judicial review; and disincentivising defendants from appealing in the hope that the witness or complainant will not attend, given that the transcript could be used in lieu of such evidence. It was not persuaded by the concern about the introduction of delay that was raised in the Leveson review (see paragraph 5.49 above), arguing that even "if some loss of pace were to be a consequence of more careful decision-making, that would not in our view be a disadvantage which outweighed the potential benefits of recording".

5.65 The Law Society also suggested limiting recording to specific offences, given the issue of resources, and stated:

> it is possible to introduce the recording of hearings relatively easily. The Parole Board has done so recently. There may be an argument for at least serious matters concerning children to be recorded.

5.66 Mark Newby also considered resource and practical implications and added:

> There would need to be an effective system of evidence retention in the Magistrates if such a change is to be implemented. This would raise additional issues relating to

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89 Leveson Review, p 86, para 335.

90 Law Commission, Criminal Appeals: Issues Paper (July 2023) para 3.58.

how this would be secured, how long such recordings should be stored and clarity on the rules relating to a review hearing and admissibility of fresh evidence. The move to a review process would not be straight forward and may not be a priority for the Government at a time of crisis and backlogs in the current system.

Summary justice

5.67 As we noted above at paragraph 5.46, Lord Justice Auld considered that the original justification behind the right of rehearing, a lack of trust in the system, no longer held weight. This was primarily due to the training now offered to magistrates, the introduction of legal advisers and the fact that district judges now share jurisdiction with magistrates.

5.68 However, four consultees raised concerns about the summary nature of justice in magistrates' courts. Most of these consultees were of the view that the automatic right to a rehearing provided an additional layer of protection from the "speedy" justice required in magistrates' courts. For example, the Magistrates' Association stated:

> While speedy summary justice is efficient, it may occasionally result in rough edges and potential errors. Retaining the option to appeal is seen as a crucial safeguard, enabling individuals to seek redress and a comprehensive review of their cases.

5.69 Dr Lucy Welsh expressed similar sentiments, noting that the automatic right acted as a safeguard and emphasising the importance of the right in the face of "demands for ever more efficient case progression in those courts on a shoestring budget and … the increasing difficulties that defendants face accessing good legal representation in magistrates' courts".

5.70 Members of 23 Essex Street Chambers were also of the view that the automatic right provided a safeguard against the type of proceedings in magistrates' courts and therefore should be retained. They argued:

> Summary proceedings are by nature rapid. Litigators and advocates on both sides receive less support than in the Crown Court. No adequate record is kept of proceedings. The degradation of the criminal justice system has hit magistrates' courts hardest, with substantial numbers of unrepresented or poorly represented defendants appearing before them.

Barriers to appeals from magistrates' courts

5.71 A further argument against the need to limit appeals from magistrates' courts is that there are already barriers in place which operate to disincentivise appeals with little merit. Consultees identified barriers including a lack of funding and the risk of a more severe sentence being imposed by the Crown Court.

5.72 As noted above at paragraph 5.22, the Crown Court may impose a more severe sentence on an appeal from a magistrates' court so long as the sentence does not exceed the sentencing powers of the magistrates' court in respect of the offence. Several consultees suggested that appellants' concerns over a more severe sentence

have acted as a disincentive for potential appellants in making an appeal from magistrates' courts.[91]

5.73 The Law Society further highlighted the lack of funding and concern of a more severe sentence, stating:

> The chilling effect of the fear of a more severe sentence, the very limited funding of a fixed fee for appeals to the Crown Court and relatively modest penalties generally imposed by Magistrates, may explain the relatively small proportion of cases where there is an appeal. However, that does not mean these cases are not important. Further consideration should be given to reforming the law to remove barriers in terms of funding and fear of a greater sentence.

5.74 Transform Justice cited their research from 2013 which sought to identify systemic barriers to appeals from magistrates' courts.[92] It found that the risk of having to pay privately for a lawyer if legal aid was not provided, and having to pay prosecution costs if the appeal was unsuccessful, acted as a barrier to appeals. Further, the low fees paid to legally aided solicitors were also a barrier, given that those lawyers had said that the fees did not even cover their costs. The research also noted the high proportion of unrepresented defendants, many of whom would be ill-equipped to understand potential grounds for appeal. Transform Justice argued these barriers and disincentives ought to be removed, and certainly not exacerbated by the addition of a leave requirement.

Children and young people

5.75 The CPS, the Law Society and the Magistrates' Association argued that any change to the appeal route from magistrates' courts required special consideration for children and young people given that youth courts are a type of magistrates' court.

5.76 The CPS considered that the right to an appeal by way of rehearing from youth courts created significant delays which ought to be avoided due to youth justice principles requiring expediency.

5.77 The Magistrates' Association disagreed with the CPS and argued that the introduction of a leave requirement would in fact cause further delays.

5.78 Considerations relating to children and young people in criminal appeals are discussed later in this chapter. However, it is noted that any change to the routes of appeal from magistrates' courts will need to have the rights of children and young people at the fore given it deals with the majority of offences where children are defendants.

Conclusions on the right to a rehearing

5.79 It is clear that a minute proportion of cases are appealed from magistrates' courts to the Crown Court. In 2023, only 5,817 appeals were disposed of by the Crown Court,

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91 Including, for instance, Dr Lucy Welsh and Transform Justice.

92 J Jacobson, "By mistakes we learn? – A review of criminal appeals against sentence" *Transform Justice* (2013).

out of well over a million magistrates' court cases.[93] The available empirical data would, therefore, suggest that very few defendants are in fact exercising the right to a rehearing. Given that a number of consultees have raised the overburdening of magistrates' courts, and that more detailed reasons would be required if the right to a rehearing were removed, a leave requirement could possibly cause significant delays to the system.

5.80 Lord Justice Auld and Sir Brian Leveson noted that a rehearing requires witnesses to attend a subsequent trial. Evidently this is capable of being exploited by a guilty defendant who appeals in the hope that witnesses may not show up for a second time. We recognise that the right to a rehearing has implications for victims and witnesses, who may be required to give evidence again. However, a large proportion of appeals are in relation to sentence only, which would not normally require witnesses to give evidence. One reform option would be to introduce appeal by way of review rather than rehearing for certain specified offences only, where the complainant and/or witnesses are particularly vulnerable.[94] This would help in alleviating these concerns and reduce the potential of appeals being made in the hope of witnesses and complainants not attending a second trial.

5.81 There are obvious benefits to magistrates' courts becoming courts of record, including accurate documentation of the proceedings. Further, there may be greater benefits to defendants who are unrepresented. Based on the data provided at paragraph 5.55, a large number of those appealing against decisions of magistrates' courts have no legal representation. If proceedings were to be recorded, there would be clear evidence of what transpired during the hearing which might otherwise be lacking. It may also serve to help the Crown Court assess the credibility of witnesses in a subsequent trial if the appeal in the form of a rehearing is retained.

5.82 Despite the benefits of magistrates' courts becoming courts of record, it remains doubtful whether the system as it currently stands would be able to withstand such a change and whether the cost could be met. As a number of consultees observed, such a change would require funding for the administrative support that would be required. However, perhaps more importantly, to facilitate an appeal by way of review, there would need to be more detailed decisions and legal advice. For example, Dr Lucy Welsh stated:

> Anecdotal evidence suggests that court legal advisers are already overburdened and face difficulties with case logging on the Cloud platform. To require them to also engage in recording proceedings and advising magistrates in relation to whether a decision might be appealable would add to their workload.

5.83 According to the most recent data published by the Ministry of Justice, at the end of December 2023 there were 370,731 outstanding cases in magistrates' courts.[95] Clearly, there are significant pressures on magistrates' courts that would be exacerbated if they were to become courts of record.

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93 Ministry of Justice, "Criminal court statistics quarterly: October to December 2023" (12 December 2024).

94 These trials would then need to be recorded, and the defendant would need to obtain leave to appeal.

95 Ministry of Justice, "Criminal court statistics quarterly: October to December 2023" (12 December 2024).

5.84 We consider that while there are potential benefits of recording proceedings in magistrates' courts, requiring recording and its implications for the work of the courts need to be considered in their own right. The small number of cases appealed to the Crown Court should not, of itself, drive such a large and potentially disruptive change.

5.85 Stakeholders argued persuasively against replacing the right to a rehearing with an appeal by way of review. They believed that it could result in increased work for magistrates and their legal advisers; that while this might well improve the quality of decision-making, in present circumstances such an increase in work might be unmanageable; and that the right to a rehearing is a safeguard against the rapid nature of summary proceedings (see paragraphs 5.67 to 5.70 above). We therefore provisionally conclude that the right to a rehearing should be retained.

Consultation Question 5.

5.86 We provisionally propose that the right to an appeal against conviction and/or sentence by way of rehearing following conviction in summary proceedings should be retained.

Do consultees agree?

Possible exceptions to the right of appeal by way of rehearing

5.87 In the Issues Paper we canvassed the possibility that the right to a rehearing might only be replaced with appeal by way of review for certain classes of offence or offender.

Regulatory offences

5.88 One issue that was raised in pre-consultation discussions was that certain specialist regulatory offences are dealt with, in practice, in specialist magistrates' courts. That is, all offences of a particular type might be listed in a particular magistrates' court before a DJ(MC) who has specialist expertise in the offences concerned. For instance, the Companies Act 2006 creates a large number of offences relating to regulatory requirements, many relating to requirements to file documents with Companies House.[96] Prosecutions brought by Companies House for failure to comply with these requirements are usually brought in Cardiff Magistrates' Court, as Companies House is headquartered in Cardiff.

5.89 In discussion with regulators who have a prosecutorial function, some noted that if the convictions in those cases were appealed against, they would be heard by a judge sitting with two lay magistrates, none of whom would necessarily have the level of specialist knowledge of the DJ(MC).

[96] There are also some 'non-regulatory' criminal offences, such as fraudulent trading, contained in the Companies Act 2006. These are prosecuted by a range of authorities, including the CPS, the SFO, trading standards departments and private prosecutors.

Domestic violence

5.90 These offences are likely to give rise to a particular risk of attrition because of the possibility of intimidation and the possibility that a complainant might not want to pursue the case because of emotional ties or dependence on the defendant. The CPS observed that in domestic abuse cases:

> giving evidence may be very difficult for the victim, and may cause additional challenges for them, for example, fear of reprisals; safety of their children; increased family pressures or serious financial repercussions; fear of being 'outed'; fear of a lack of support by the criminal justice system, or specialist support organisations or emotional attachment or loyalty towards the offender, leading to uncertainty about the course of action they should take.

5.91 Transform Justice identified key reasons for attrition in domestic abuse cases:

(1) the complainant's reluctance to give evidence at all stages of the process;

(2) the need for cases which come to trial to have good enough evidence to meet the criminal standard of proof; and

(3) insufficient support for victims before and in court.[97]

5.92 It suggested that the most significant issues affecting prosecutions were the alleged victim withdrawing their complaint and/or not attending court. It noted that "[s]ome campaigners and lawyers suggest that those accused of abuse sometimes deliberately opt to go to trial because they predict their alleged victim will not turn up to give evidence and their case will thus be dismissed".[98] Appeal by way of rehearing, which is likely to require any witness who gave evidence at the first trial to do so again at the rehearing, gives those accused of abuse a second opportunity to do this. However, in some circumstances it may be possible for the prosecution to proceed without the complainant testifying, relying on alternative evidence.[99]

5.93 Much domestic abuse is prosecuted using "general" criminal offences such as common assault or criminal damage (as opposed to an offence such as controlling or coercive behaviour, which is restricted to an intimate or family relationship).[100] It might, therefore, be difficult to create exceptions for particular *offences* for a distinct appellate process for domestic abuse cases (and the necessary trial arrangements to enable that process in the event of an appeal).

5.94 However, it might be easier to carve out certain *courts* – specifically existing specialist domestic violence or domestic abuse courts ("SDVCs") – for bespoke arrangements.

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97 P Gibbs, "Love, fear and control – does the criminal justice system reduce domestic abuse?", *Transform Justice* (2018) p 7.

98 Above.

99 For instance, the CPS note that it may be possible to proceed using other evidence, such as adducing statements by the victim as hearsay or relying on body-worn video footage (see https://www.cps.gov.uk/legal-guidance/domestic-abuse).

100 CPS, "Domestic Abuse" (5 December 2022).

5.95 SDVCs are magistrates' courts. SDVCs offer specially trained court personnel, prosecutors and police, special measures including separate entrances, exits and waiting areas, and tailored advice from Independent Domestic Violence Advisors. Domestic abuse cases are grouped together into hearings heard overseen by a DJ(MC) or lay bench, with court officials who have received specialist training. If provision were put in place to ensure that a full record of proceedings from these courts were available, it might therefore be possible for subsequent appeals to be by way of review in order to address problems of attrition and revictimisation.

Conclusion on possible exceptions to the right to a rehearing

5.96 We think that the two categories of offence for which a case might be made for replacing the right to a rehearing with appeal by way of review are (i) specialist regulatory offences and (ii) domestic abuse offences. We would welcome consultees' views of whether there is merit in doing so, and whether there are other categories of offence where it might be appropriate to do so.

Consultation Question 6.

5.97 We invite consultees' views as to whether there are any particular categories of offence heard in summary proceedings where it would be appropriate to replace the right to an appeal by way of rehearing with an appeal by way of review.

5.98 We would invite views particularly on whether this might be appropriate in relation to (i) certain regulatory offences and (ii) specialist domestic violence or domestic abuse courts.

Time limits

5.99 As discussed at paragraphs 5.15 to 5.16 above, there is a time limit of 15 business days for lodging a notice of appeal, although this can be extended with the leave of the Crown Court. Unlike appeals to the CACD from the Crown Court, the time limit for an appeal against conviction runs from the date of sentencing (or the date when sentencing is deferred) rather than the date of conviction itself.

5.100 In their response to our Issues Paper, the Bar Council said of the 28-day limit for appealing against conviction on indictment:

> In light of the difficulties with securing public funding, legal representation and "second opinions", we consider that there is merit in the Law Commission exploring further whether the present limit of 28 days for appealing against conviction on indictment is too short, and should be extended to 56 days.

5.101 The Westminster Commission said that "the 28-day time limit for lodging an appeal should be extended to reflect the difficulties faced by applicants, some of whom are unrepresented and vulnerable".

5.102 The Association of Prison Lawyers recently drew attention to the challenges that lawyers can face in obtaining video-link and in-person access to prisoners. These include:

(1) Prisons with no video-link facilities.

(2) Prisons which do not allow video-link facilities to be used for legal visits.

(3) Prisons restricting legal visits to one or two specified hours per week.

(4) A prison allowing only one one-hour visit per week and limiting the lawyer to seeing one prisoner on that visit.

(5) A prison where no video-link slots were available for over two months.[101]

5.103 In circumstances in which lawyers' access to prisoners to their clients is so restricted, time limits are likely to have a much greater impact than in the circumstances of much greater access that prevailed when these time limits were set.

5.104 We recognise that the same considerations do not necessarily apply to magistrates' courts as they do to the Crown Court. In particular, while the right to appeal by way of rehearing is retained, legal advice to the convicted person on the prospect of an appeal may be simpler, given that the process of appealing is more straightforward and does not require grounds of appeal. If appeals were by way of review, cogent legal argument would be necessary at the point of lodging the appeal to show that there were arguable grounds.

5.105 Nonetheless, we consider that the time limit of 15 business days may cause difficulties for some prospective appellants, especially where a sentence of immediate imprisonment has been imposed. Although the form that convicted people are given concerning their right to appeal states there is a time limit, absorbing that information sufficiently may not be possible. Naima Sakande's research has shown that the time limit may create particular difficulty for women who receive sentences of immediate imprisonment (by implication, especially where they had been on bail beforehand). Although her research was specifically about appeals to the CACD, her finding that there is "an adjustment period when first arriving in custody when [offenders] had to come to terms with being in prison and entered 'survival mode' for any mental health needs they had"[102] is likely to apply just as much to women sentenced to immediate custody by magistrates or DJ(MC)s. She found that "[w]omen who are recovering from trauma, who are unable to get hold of their representatives, who have no information about where else they can go for help are unable to meet this arbitrary deadline".[103]

5.106 The fact that it is possible to obtain leave out of time is not, in our view, a sufficient remedy for this issue, not least because it is not clear that convicted people will be aware that the time limit is not rigidly applied.

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101 The Association of Prison Lawyers, "Justice Still Barred" (29 May 2024).

102 N Sakande, *Righting Wrongs: What are the barriers faced by women seeking to overturn unsafe convictions or unfair sentences in the Court of Appeal (Criminal Division)?* (2020, Griffins Society) p 46.

103 Above, p 47.

5.107 We also consider that, given the extent of potential reliance on fellow prisoners' informal advice, there is a particular risk that those who are sentenced to immediate imprisonment may well become aware of the 28-day limit applying to appeals to the CACD and wrongly conclude that they have 28 days to appeal to the Crown Court.

5.108 We consider that the time limit for appeals from magistrates' courts to the Crown Court should be the same as for appeals from the Crown Court to the CACD. This would be 56 days; although the CACD time limit is currently 28 days, we provisionally propose in Consultation Question 16 that that limit should be raised to 56 days.

Consultation Question 7.

5.109 We provisionally propose that the time limit for appeals from magistrates' courts to the Crown Court should be the same as the time limit for appeals from the Crown Court to the Court of Appeal Criminal Division.

Do consultees agree?

The prospect of an increased sentence on appeal

5.110 In Chapter 4, we discussed the "no greater penalty" principle and provisionally proposed that a person should not face an increased sentence as a result of appealing against their conviction or sentence, in order to avoid deterring meritorious appeals (Consultation Question 4).

5.111 We received evidence that the prospect of a convicted person receiving an increased sentence if they challenged their conviction could act as a deterrent to bringing a meritorious appeal. As noted at paragraph 5.73 above, the Law Society referred to "the chilling effect of the fear of a more severe sentence" as a possible explanation of "the relatively small proportion of cases where there is an appeal".

5.112 There is an argument that sentencing at an appeal following a rehearing should be "at large"[104] because the Crown Court may be sentencing on a different factual basis to the magistrates' court.

5.113 We do not find this argument persuasive. Similar considerations may apply when a person is convicted following a retrial ordered by the CACD. The evidence adduced at the retrial might mean that the Crown Court is sentencing on the basis of more severe findings as to harm or culpability. For instance, it may be apparent at the time of a retrial that physical injuries or psychological harm sustained by the victim are more serious or longer lasting than had been envisaged when the offender was first sentenced. Nonetheless, the Crown Court will still be bound to impose a sentence that is no more severe than that imposed at the original trial.

5.114 We are persuaded that the prospect of a more severe sentence in the event of an unsuccessful appeal to the Crown Court could dissuade people (especially women

[104] That is, the Crown Court can impose any sentence that would have been available to the court from which the appeal lay.

and children, as highlighted above) from bringing meritorious appeals and thereby hinder the correction of miscarriages of justice.

5.115 We acknowledge that this means that, if the sentence imposed by magistrates is unduly lenient, the Crown Court will be bound by it. However, if the magistrates' sentence is unduly lenient, the prosecution is able to challenge it by way of judicial review on the basis that the sentence is irrational or must have involved some error of law.[105] We also acknowledge that a "no greater penalty" rule on appeals to the Crown Court may increase the number of appeals, with consequent resource implications.

Consultation Question 8.

5.116 We provisionally propose, in order that appellants are not discouraged from bringing meritorious appeals by the possibility of an increased sentence, that the Crown Court and High Court should not be able to impose a more severe sentence as a result of an appeal against conviction or sentence by the convicted person.

Do consultees agree?

Appeals following a guilty plea

5.117 As discussed at paragraph 5.11 above, under section 108 of the Magistrates' Court Act 1980, there are two situations where there is an automatic right of appeal from a magistrates' court to the Crown Court. The first is where the appellant pleaded not guilty. In such cases there is an automatic right of appeal against both conviction and sentence. Where an appellant pleaded guilty, the automatic right of appeal under this provision is on the sentence only.

5.118 Whilst the general rule is that the Crown Court may not entertain an appeal on a guilty plea,[106] there are three exceptions to this rule, namely where:[107]

(1) the guilty plea was equivocal;[108]

(2) the guilty plea was entered as a result of duress;[109] or

(3) the person had previously been convicted or acquitted of the offence (ie, 'autrefois convict' or 'autrefois acquit' arises).[110]

5.119 If a plea falls under one of these three exceptions, the Crown Court has the power to direct that the case go back to the magistrates' court for the appellant to change their

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105 *R (DPP) v Stratford Youth Court* [2016] EWHC 2047 (QB); *R v Truro Crown Court, ex p Adair* [1997] COD 296, DC.

106 *R v Birmingham Crown Court, ex p Sharma* [1988] Crim LR 741, DC.

107 Magistrates' Courts Act 1980, s 108(1)(a).

108 *R v Plymouth Justices, ex p Hart* [1986] QB 950, DC.

109 *R v Huntingdon Justices, ex p Jordan* [1981] QB 857, DC.

110 *Cooper v New Forest DC* [1992] COD 442, DC.

plea to one of not guilty. However, a case may only be remitted to the magistrates' court if the appellant makes an application before sentence has been passed. The Crown Court has no jurisdiction to remit a sentenced appellant to the magistrates' court for a change of plea.

5.120 An equivocal guilty plea typically falls into two scenarios. The first is where the appellant pleads guilty but follows this up with a caveat. These are sometimes referred to as 'guilty but …' pleas. As noted in *Taylor on Criminal Appeals*, an example of this may be where the defendant says, "guilty, but I was acting in self-defence".[111] In such cases, whilst the defendant is pleading guilty, they are indicating they may have had a complete defence to the offence. The second scenario is where the defendant pleads guilty and it later transpires that there may have been a defence. *Taylor* gives the example of an unrepresented defendant who pleads guilty, but in arguing mitigation of sentence, facts emerge which give rise to a potential defence such as "I thought the article [alleged to have been stolen] was mine".[112] However, a plea will not be deemed equivocal simply because there has been a mistake of fact, it is based on incorrect evidence or the appellant has changed their mind.

5.121 A guilty plea will be made under duress where the plea was not made of the defendant's own free will; for example, where the defendant felt pressured to plead guilty by counsel so as to avoid a custodial sentence,[113] or they had been threatened by someone else to plead guilty.

5.122 The third exception is where the person had previously been convicted or acquitted of the offence. This exception upholds the rule against double jeopardy, discussed in more depth in Chapter 4, which is a fundamental principle that ensures that no one may be convicted of the same offence twice. If the Crown Court finds that the appellant has previously been convicted or acquitted of the offence, it will have jurisdiction to consider an appeal against conviction on this ground.

5.123 If the person's guilty plea does not fall within these limited exceptions, or they have been sentenced, the only way they may appeal is through an application to the CCRC who may refer the application regardless of the plea entered in the Crown Court.[114] Where a CCRC reference is made following a guilty plea, it is not necessary for the appellant to apply to vacate the guilty plea.[115]

5.124 A common example where a CCRC reference is often necessary is cases involving 'no passport' offences.[116] This may occur where a person arrives in the UK seeking

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111 *Taylor on Criminal Appeals* (3rd ed 2022) p 27.

112 Above, p 27.

113 This would require more than mere advice on the likely sentence imposed or the potential advantages in pleading guilty in terms of sentencing discounts.

114 Criminal Appeal Act 1995, ss 11(1)(a) and (2).

115 *R (CPS) v Preston Crown Court* [2023] EWHC 1957 (Admin), [2024] KB 348. It was held that the effect of s 11 of the Criminal Appeal Act 1995 meant that the requirement of vacating a guilty plea was not necessary where there was a CCRC reference of a conviction from a magistrates' court to the Crown Court.

116 According to the CCRC's recently established 'Case Library' which records every reference made since it was created in 1997, 62 decisions relate to cases involving immigration offences and are considered as asylum, slavery and human trafficking references: CCRC "Case Library".

asylum and is charged with not having an immigration document or having a false identity document. Such individuals may plead guilty to the offences without knowing that they have a statutory defence of reasonable excuse. Because they have pleaded guilty in a magistrates' court and often have already been sentenced, they must seek a CCRC reference to appeal.

5.125 The general bar on appeals following a guilty plea in magistrates' courts to the Crown Court is not present in the route of appeal from the Crown Court to the CACD. Appeals against conviction to the CACD do not distinguish between whether a conviction was entered as a result of a guilty plea or a guilty verdict.[117] However, an appellant seeking to appeal to the CACD following a guilty plea will have to rebut the presumption that their plea was an acknowledgement of their guilt.[118] Further, case law has established that an appeal against a guilty plea to the CACD may only be brought in three categories:[119]

(1) the guilty plea was equivocal, unintended or vitiated by wrong legal advice or ruling or improper pressure;

(2) there was an abuse of process such that the appellant should not have been brought to trial; or

(3) it is established the defendant did not commit the offence.

5.126 Some consultees raised concerns about the need for a CCRC reference where the applicant has pleaded guilty and has been sentenced, or does not fall within the exceptions listed above.

5.127 For example, the Law Society submitted that the current route of appeal following a guilty plea in magistrates' courts was anomalous and should be reformed. It further argued:

> Defendants can often be unrepresented in the lower court; on occasions they may receive poor advice in the pressure to get through cases; or they may be subject to a disability or vulnerabilities which have not been fully appreciated. Under the current law, if they have pleaded guilty they are denied an opportunity to appeal their conviction. This is particularly problematic in cases concerning children or vulnerable adults who were unaware that they may have been able to run a Modern Slavery defence at the time they entered their plea.

5.128 The Law Society submitted that the test should be the same as the one used by the CACD, which considers the circumstances in which the guilty plea was made.

5.129 The Criminal Appeals Lawyers Association ("CALA") also considered that this was an area requiring reform. It noted that, at present, CALA is relatively unclear as "to the

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117 Criminal Appeal Act 1968, s 1 provides for a right of appeal to "a person convicted of an offence on indictment may appeal to the Court of Appeal against his conviction". If the appeal is brought within 28 days, this is subject to a certificate that the case is fit for appeal by the trial judge or, if outside the 28-day limit, an additional granting of leave by the CACD.

118 See *Taylor on Criminal Appeals* (3rd ed 2022) p 299.

119 *R v Tredget* [2022] EWCA Crim 108, [2022] 4 WLR 62.

scope of the Crown Court's powers to vacate a guilty plea from the Magistrates' Court". CALA argued that experience shows that often guilty pleas are entered when they should not be.

5.130 We note in particular the difficulties for an unrepresented defendant, or someone who is particularly vulnerable due to mental or physical health difficulties, language difficulties or their age, who has pleaded guilty.[120]

5.131 However, an unrestricted right to appeal following a guilty plea could cause some difficulties. For instance, if every defendant was entitled to plead guilty but still receive a hearing before a judge and two magistrates, this might be used as a means of obtaining what was, essentially, a first trial before a judge sitting with magistrates.

5.132 Moreover, if our provisional proposal that an appellate court should not be able to impose a more severe penalty on an appeal by the defendant were implemented, and there were a right to a rehearing in the Crown Court following a guilty plea in a magistrates' court, this could create a perverse incentive to "lock in" a discount for a guilty plea at a magistrates' court before challenging the conviction at a rehearing in the Crown Court.

Consultation Question 9.

5.133 We invite consultees' views as to the circumstances in which there should be a right to appeal against conviction following a guilty plea in a magistrates' court.

Prosecution appeals by way of rehearing

5.134 Unusually, the prosecution has a right to appeal to the Crown Court against any decision of magistrates' courts in cases under the Customs and Excise Management Act 1979 and other customs and excise legislation.[121] A similar right to appeal to the Crown Court is available in respect of proceedings under the Animal Health Act 1981.[122]

5.135 Professor John Spencer has described this latter exception as "even more bizarre" than the exception for revenue and customs proceedings and asked:[123]

> What is it that is so peculiarly dangerous about smuggling, and obstructing government officials inspecting hen-houses, that justifies a prosecution appeal, when none lies against acquittals for theft, murder, fraud, or indecent assaults on children? ... The truth of the matter, of course, is that there are no reasons for these peculiarities, because nobody ever consciously intended them: the best we can

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120 We discuss the disproportionate effect this may have on children in youth courts later in this chapter.

121 Customs and Excise Management Act 1979, ss 147(3) and 1(1).

122 Animal Health Act 1981, s 78. Proceedings for an offence under s 4 of that Act are excluded.

123 J R Spencer "Does our criminal appeal system make sense?" [2005] *Criminal Law Review* 677, 682.

expect are explanations. In broad terms, the explanation is that our system of appeals was never planned, but simply happened.

5.136 We cannot see a justification (as opposed to an explanation) for the prosecution right to appeal to the Crown Court in revenue and customs proceedings and proceedings under the Animal Health Act 1981. We provisionally propose that these provisions be repealed.

Consultation Question 10.

5.137 We provisionally propose that prosecution rights of appeal to the Crown Court by way of rehearing in revenue and customs and animal health cases should be abolished.

Do consultees agree?

APPEALS TO THE HIGH COURT

5.138 In the Issues Paper we considered the three routes of challenging decisions taken in magistrates' courts: rehearing in the Crown Court, appeal by way of case stated and judicial review. We largely confined analysis of appeals from the Crown Court to appeals to the CACD (that is, appeals from convictions on indictment, and sentencing appeals for summary convictions in magistrates' courts committed to the Crown Court for sentencing).

5.139 It is also possible to appeal against some decisions of the Crown Court to the High Court by way of case stated, or to challenge them by way of judicial review, but not "in matters relating to trials on indictment".[124] In this section we consider appeals to the High Court in summary proceedings, both from a magistrates' court and from the Crown Court in its appellate capacity.

5.140 The High Court's jurisdiction in relation to criminal proceedings in the Crown Court was the subject of the Law Commission's review of the High Court's jurisdiction in criminal proceedings undertaken between 2004 and 2010 described at paragraphs 3.14 to 3.22 above.[125] Despite its apparently broad title, the project did not look at the High Court's jurisdiction in relation to criminal proceedings in magistrates' courts.

5.141 Respondents to the Issues Paper were mostly against removing the right to appeal by way of rehearing. However, there was more openness to reform of the two ways of appealing magistrates' decisions to the High Court, although most stakeholders considered that one route to appeal on a point of law should be retained.

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[124] Senior Courts Act 1981, s 28(2).

[125] The High Court's jurisdiction in relation to criminal proceedings (2010) Law Com No 324.

5.142 The CPS felt it was important to do so, since the option of a rehearing in the Crown Court is not available to prosecutors[126] and third parties. Several other stakeholders considered it important to be able to challenge legal errors in a court able to make reasoned rulings, which would be reported and become binding upon trial courts.

5.143 It would be possible – as proposed by the Auld Review[127] – for all appeals from magistrates' courts to go to the Crown Court, and for appeals on a point of law to be dealt with by a single judge. This would be workable even if the current arrangements for a rehearing are retained for appeals which do not turn on a point of law.

5.144 The drawback of this approach is that the relatively small number of appeals by way of case stated or judicial review deal with questions of law on which it is generally useful to have case law which will be of precedential value. This would not occur if such cases are decided in the Crown Court, where the ruling will not be binding, and is unlikely to be published.

5.145 We provisionally conclude, therefore, that a form of review on a point of law to the High Court (or possibly to the Court of Appeal) should be retained.

The issue with the present system of appeal by way of case stated and judicial review

5.146 The Auld Review of the criminal courts noted a number of unsatisfactory features of the present system. These included (i) that there are three partially overlapping rights of appeal; (ii) that it is anomalous that there should be a right of appeal by way of rehearing capable of turning on points of law; and (iii) that it is equally anomalous that there should be a right of appeal on issues of fact when:[128]

> District Judges and increasingly well trained magistrates now give reasons for their decision which require them to justify why and on what evidence they decided the matter and, where there was a conflict of evidence, why they preferred one version to the other.

5.147 If, as we provisionally propose, the right to an appeal by way of rehearing is retained this would not address (iii), but it would still be possible partially to address (i) by dealing with the overlap between case-stated appeals and judicial review. We would also have to consider whether it was desirable to deal with (ii). It is hard to see how one could prevent the Crown Court dealing with questions of law during a rehearing, thereby giving the party dissatisfied with the magistrates' decision on a point of law an effective appeal. The judge[129] would have to address matters of law that arise at the rehearing which had not been addressed at first instance (for instance, because they were not relevant to how the trial proceeded there). It would be anomalous if they could not also address matters of law which had arisen at the first trial. It would be hard to argue that a judge sitting in the Crown Court should be bound by a decision on

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126 There are two main exceptions to this principle: in customs and excise cases, and certain animal health offences. We discuss these at paras 5.134-5.137 above.

127 Auld Review, especially paras 29-35.

128 Above, para 26.

129 Although the Crown Court generally sits as a panel of one judge and two magistrates when hearing appeals, questions of law are a matter for the judge alone.

a matter of law by a DJ(MC), still less one decided by lay magistrates following guidance from their legal adviser.

Does the law require simplification?

5.148 If both the right to a rehearing in the Crown Court and a route of appeal on a point of law are retained, the benefits of simplification may be reduced. The effect of such a change would only be to replace three routes of appeal with two.

5.149 There is no real advantage in having *two* additional routes of challenge to the right to a rehearing in the Crown Court. The appellant does not have a practical choice in which mechanism to use (since judicial review is not generally possible if appeal by way of case stated is available). Appellants instead face a sometimes complex task of ascertaining whether appeal by way of case stated is possible, in order to establish whether they can instead challenge the decision of a magistrates' court by way of judicial review.

5.150 Respondents were not unanimous on whether, if there were to be a single route of appeal to a court capable of making precedential rulings on a point of law, it should be appeal by way of case stated or judicial review.

Background: previous reviews

The Auld Review and the Law Commission's review of the High Court's jurisdiction in criminal proceedings

5.151 Lord Justice Auld recommended a single right of appeal in all criminal proceedings.[130] The right to a rehearing would be abolished. Instead, the appeal, which would be heard by a single judge in the Crown Division, would be on the same basis as the current appeal from the Crown Court to the CACD.

5.152 The recommendation was that appeals from the Crown Division sitting in both its appellate and first instance capacities would lie to the CACD. Appeals by way of case stated and judicial review would be abolished for all criminal proceedings. The jurisdiction of the CACD would be enlarged, if necessary, to cover matters currently provided for by case-stated appeals and judicial review.[131]

5.153 In 2004, we were asked to review the High Court's criminal jurisdiction over the Crown Court. This was with a view to giving effect to Lord Justice Auld's recommendation to transfer the High Court's jurisdiction to the CACD, and to abolish appeal by way of case stated and judicial review. In our Final Report, we noted that "consultees did not object to the removal of case stated as proposed, but some were concerned about the removal of judicial review as proposed, and all had serious concerns about the new statutory appeal that was proposed".[132]

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130 Auld Review, p 622.

131 Above, p 624.

132 The High Court's Jurisdiction in Relation to Criminal Proceedings (2010) Law Com No 324, para 1.24.

5.154 One consideration was the Criminal Appeal Office's understandable reluctance to the CACD dealing with summary only offences, particularly motoring offences.[133] We concluded that the jurisdiction of the CACD should not be expanded to include challenges to sentences imposed by the Crown Court in its appellate capacity. Since judicial review would have to remain available for these cases, it would not make sense for appeals against conviction in these cases to go to the CACD.

5.155 The overall conclusion was that "the case for abolishing judicial review in relation to the appellate jurisdiction is not made out. This weakens any argument for removing judicial review in respect of any other jurisdiction of the Crown Court".[134]

5.156 In relation to the abolition of appeal from the Crown Court by way of case stated, we reasoned as follows:[135]

(1) Respondents were generally content to see appeal by way of case stated abolished.

(2) Appeal by way of case stated from the Crown Court is rarely invoked.

(3) If appeal by way of case stated is not serving a distinctive purpose, abolishing it could simplify the criminal law.

(4) Judicial review has expanded substantially since 1981.

5.157 Against this, we noted:[136]

(1) The courts have said that it can be advantageous to use appeal by way of case stated because the factual basis is clearer for the court.

(2) There might be cases which could be appealed by way of case stated but not judicial review; however, we were unable to identify any.

(3) It might not be worth the change, given that we were not recommending abolition of appeal by way of case stated from magistrates' courts or from the Crown Court in its civil jurisdiction. This consideration is obviously not relevant if the question now is whether we should abolish appeal by way of case stated from *both* the Crown Court and magistrates' courts.

5.158 In the Final Report, therefore, we recommended that appeal from the Crown Court by way of case stated would be abolished, and the current exclusion from judicial review of the jurisdiction of the Crown Court in relation to matters relating to trial on indictment would be relaxed.[137] There would, however, be restrictions on judicial

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133 Under the Road Traffic Offenders Act 1988, s 40(4), where a person ordered to be disqualified makes an application to appeal by way of case stated, the High Court may suspend the disqualification. Section 40(5) provides that similar powers are available when the decision is challenged by way of judicial review.

134 The High Court's Jurisdiction in Relation to Criminal Proceedings (2010) Law Com No 324, para 4.35.

135 The High Court's Jurisdiction in Relation to Criminal Proceedings (2010) Law Com No 324, paras 7.18-20.

136 Above, paras 7.22-27.

137 Above, parts 7-8, 10-11.

review during a trial, which would be restricted to decisions to refuse bail[138]. There would be new statutory appeals to the CACD where a judge refused to make reporting restrictions in relation to a child, or where there was a "real and immediate" risk to life.

Responses to the Issues Paper

5.159 Most respondents concentrated on the wider issue of whether appeal to the Crown Court by way of rehearing should be retained. We did not ask a question about appeals by way of case stated or judicial review from the Crown Court.

5.160 On the whole, those stakeholders who addressed the issue of case-stated appeals and judicial review from magistrates' courts agreed that it was important that there remained a way of challenging decisions on a point of law distinct from the option of rehearing in the Crown Court. Reasons included: (i) that this represented the only way in which the prosecution and other interested third parties could seek to challenge decisions; (ii) it was important to retain a route of appeal on a purely legal point; and (iii) that there should be a route of appeal to a court superior to the Crown Court so that the ruling would have precedential value.

Should appeal by way of case stated and judicial review be retained?

5.161 In general, most stakeholders, including CALA, the Bar Council and the CPS, supported abolishing either case-stated appeals or judicial review, but not both.

5.162 For example, the Bar Council suggested:

> Thought might be given to whether there is a need for two separate routes of challenge to matters of law, by way of case stated and judicial review. Change would, however, not be desirable if it had the effect of limiting a defendant's ability to challenge legally flawed procedures. We also consider that the prosecution should retain its ability to challenge errors of law at first instance by way of an appeal to the High Court.

5.163 The CPS agreed with the Bar Council on the need for "a mechanism for the prosecution to challenge decisions of the magistrates' court, and the Crown Court acting in its appellate capacity, that give rise to points of law, which include (in the *Wednesbury* sense) conclusions of fact …".

Does having two separate routes of challenge cause difficulties?

5.164 Stakeholders suggested that having to decide between appeal by way of case stated and judicial review could cause difficulties. The Law Society described "confusion" over which route to choose, though "if the wrong route is chosen, the High Court can deem the proceedings to be under the correct route".[139]

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[138] The exclusion period would start with the defendant being committed, or the case being transferred or sent for trial at the Crown Court (or a voluntary bill of indictment being preferred) and the charge being dismissed, the defendant being convicted or acquitted, the charge being stayed, etc.

[139] However, note that the strict time limits applying to case stated may cause difficulties. If the appropriate route was case stated, but the applicant is out of time to bring an appeal by way of case stated, the High Court will not grant leave to bring judicial review proceedings just because the applicant is within the more generous time for seeking judicial review.

5.165 Paul Taylor KC, with Edward Fitzgerald KC and Kate O'Raghallaigh, echoed this concern:

> It is our experience that appeals by way of case stated remain relatively uncommon but are typically plagued by confusion – the legal and procedural distinctions between case stated appeals and judicial review are by and large, poorly understood.

5.166 Mark Newby noted that having two potential routes could lead to "lost opportunities to put matters right".

If there is a single route, should it be appeal by way of case stated or judicial review?

5.167 On this issue, stakeholders were more divided. Some identified problematic responses to requests to state a case, including confusion,[140] and unjustified dismissal of the request as "frivolous".[141]

5.168 CALA was more ambivalent:

> As to whether both Judicial Review and Case Stated jurisdictions and procedures should be retained, at present, a Case Stated is generally the preferred choice in challenging decisions of magistrates and has the advantage in identifying the findings of fact made by the magistrates. However, a claim in judicial review fills the gap where an error is not apparent from the case, for example where it is a procedural error or a breach of natural justice. A claim in judicial review allows pursuing an appeal on interlocutory matters whereas a Case Stated does not. A further advantage of a claim in judicial review over a Case Stated is that a claim in judicial review does not preclude an appeal to the Crown Court.

5.169 It concluded:

> If it is considered that it is unnecessarily complicated to have both judicial review and Case Stated jurisdictions and procedures … it may be that the Case Stated procedure should be expanded so that it incorporates those aspects of challenge that it does not currently meet which resort to judicial review does. That would be relatively easy to do by amending s. 111 of the 1980 Act.

Discussion

5.170 In her response, barrister Flora Page described the two routes of appeal as "an unnecessary relic of historical procedures". The existence of parallel routes of appeal to the High Court needs to be understood in its historical context. As we discussed in Chapter 2, appeal by way of case stated was the original route of appeal in a criminal case heard in the Quarter Sessions or the Assizes, at a time when the scope of judicial review was extremely limited.

5.171 In 1971, the Courts Act merged the Assizes and the Quarter Sessions into the Crown Court. However, the Quarter Sessions were inferior courts and, at least in their appellate jurisdiction, subject to the supervisory jurisdiction of the High Court (that is,

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140 Paul Taylor KC.

141 The CPS.

the High Court's power to review decisions of inferior courts). The Assizes, however, were a superior court of record. The way through this was that under the 1971 Act, the Crown Court became a superior court of record, but the supervisory jurisdiction of the High Court was retained, other than in relation to matters relating to trial on indictment.

5.172 In 2010, we noted:[142]

> Whereas appeal by way of case stated would have been an important right at the time of the [Supreme Court Act] 1981, judicial review has developed enormously since then and has in effect supplanted case stated.

5.173 Appeal by way of case stated fulfilled an important function in the absence of judicial review. However, judicial review has expanded massively. The main impediment to it expanding to address the deficiencies which case stated addresses are:

(1) the prohibition in section 29(3) of the Senior Courts Act 1981 in relation to matters relating to trial on indictment, and

(2) the existence of case stated: judicial review is a discretionary remedy and will not generally be available when a person has some other remedy.

5.174 If it is accepted that one route would be sufficient, it is necessary to examine the advantages and disadvantages of each.

5.175 The following are advantages of case-stated appeals (and disadvantages of judicial review):

(1) the High Court is aware of the findings of fact made by the magistrates,

(2) there is no need to apply for funding as the procedure can be set in train with a letter to the magistrates' legal adviser,

(3) judicial review is a discretionary remedy, and

(4) historically, the scope for judicial review was very limited.

5.176 The following are advantages of judicial review (and disadvantages of case-stated appeals):

(1) the possibility of an appeal to the Crown Court is not barred, whereas a defendant must choose between rehearing in the Crown Court and appeal to the High Court by way of case stated, and

(2) judicial review is available in respect of interlocutory matters (appeal by way of case stated is not).[143]

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142 The High Court's Jurisdiction in Relation to Criminal Proceedings (2010) Law Com No 324, para 7.20.

143 *Loade v DPP* [1990] 1 QB 1052, DC.

5.177 *Taylor on Criminal Appeals*[144] suggests that appeal by way of case stated is preferable to judicial review in challenging the following categories of cases: a refusal to exercise jurisdiction,[145] a ruling of no case to answer,[146] where the facts found below are unclear,[147] acquittals or successful defence appeals in the Crown Court,[148] convictions unsupported by evidence and "special reasons" decisions in road traffic cases (such as where a person claims to be drink driving after being a victim of spiking).[149]

5.178 The overall impression created by the case law is that appeal by way of case stated is preferable where it is available. If it is not, judicial review has to be used.

Would judicial review be adequate?

5.179 In our 2010 Report we concluded:[150]

> We have considered whether there are cases which could be appealed by way of case stated but which could not be brought within the scope of the legal bases for judicial review. We have not found any where this was the case, nor were any suggested to us on consultation.

Providing a statement of the facts found by the trial court

5.180 We did note one advantage of appeal by way of case stated which would not apply to judicial review, which is that the appellate court has the advantage of a statement of the trial court's findings. In *ex parte Ward*, the High Court said:[151]

> Our task in this case was made unnecessarily difficult because the applicants did not adopt the procedure prescribed by Parliament for referring a point of law which has arisen in a magistrates' court to the High Court for decision. If the justices had stated a case for our opinion, we would have known what their findings of fact had been and their reasons for the decisions they took and they would have identified the relevant points of law for our decision.

5.181 We queried "whether this is in practice a frequent problem as regards cases coming from the Crown Court".[152]

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144 *Taylor on Criminal Appeals* (3rd ed 2022) para 1.27.

145 Citing *R v Clerkenwell Metropolitan Stipendiary Magistrate, ex p DPP* [1984] QB 821, DC.

146 Citing and comparing *Sykes v Homes* [1985] Crim LR 791, DC, *Loade v DPP* [1990] 1 QB 1052, DC and *Scottow v CPS* [2020] EWHC 3421 (Admin), [2021] 1 WLR 1828.

147 No authority is cited for this proposition.

148 Citing *DPP v Coleman* [1998] 1 WLR 1708, DC, *DPP v M* [2020] EWHC 3422 (Admin), [2021] 1 WLR 1669 and *R (Bussetti) v DPP* [2020] EWHC 3004 (Admin), [2021] ACD 7.

149 Citing Road Straffic Offenders Act 1984, s34(1), *Haine v Walklett* (1983) 5 Cr App R (S) 165, DC and *Chatters v Burke* [1986] 1 WLR 1321, DC.

150 The High Court's Jurisdiction in Relation to Criminal Proceedings (2010) Law Com No 324, para 7.25.

151 Above, para 7.22.

152 Above.

5.182 Where judicial review is brought against a court, the court does not seek to defend the proceedings, or take any part in them. The nominal parties to the judicial review are the Crown and the court, but in practical terms it is the aggrieved party (as applicant) and the other party in the trial (defendant or prosecution) as interested party.

5.183 However, we think it would be possible for the court to take part in the proceedings by providing a statement which laid out the facts that it found – just as it would for a case-stated appeal – and an explanation of how it had come to its decision, but taking no further part in the appeal. This would retain the single cited advantage of case-stated appeals within proceedings for judicial review.

"*Locking in" findings of fact*

5.184 There is a further advantage, generally to the defendant, which would be lost if appeal by way of case stated was abolished. Appeal by way of case stated allows a defendant to "lock in" favourable findings. The appeal is limited to the point of law raised on the findings of fact found by the trial court. This may be advantageous if, for instance, the defendant was found guilty but the facts suggested a lower level of culpability than the prosecution had argued, and the defence had (unsuccessfully) argued that was not enough to make out the offence. The prosecution would not be able to go behind this finding (unless it separately sought judicial review on the grounds that the finding was irrational), so the legal argument would be fought on facts broadly favourable to the appellant defendant.

5.185 We suggest that this advantage to the appellant defendant is essentially strategic and does not justify retaining appeal by way of case stated. It is highly unlikely that the court, in hearing a judicial review, would be coming to its own separate factual findings. In any event, if the judicial review were brought by the prosecution, the defendant would be able to use their statutory right to a rehearing.

Conclusions

5.186 This analysis suggests that the existence of two separate routes of appeal to the High Court is capable of causing difficulties. Principally, this is because of the need to identify whether a case should be challenged by way of case stated or judicial review.

5.187 The analysis also suggests that, were appeal by way of case stated to be abolished, judicial review would be available in respect of errors of law made by the trial court. While requiring a defendant to bring their challenge through judicial review rather than a case-stated appeal might be more expensive, this is mitigated by the fact that the defendant seeking to challenge the decision of a magistrates' court would have the alternative of an appeal by way of rehearing in the Crown Court. This would not be available to a person convicted on rehearing in the Crown Court, but such a person has already had one appeal.

5.188 The advantages of appeal by way of case stated – in particular, the fact that the High Court has an explanation of the findings – are not so great as to justify retaining case-stated appeals for some, but not all, appeals on a point of law. It is likely that this particular advantage could, in practice, be retained by enabling the trial court to provide a statement of the facts it found and its reasoning in a respondent's notice to the judicial review. This could be achieved without the trial court taking an active role in defending the proceedings.

Consultation Question 11.

5.189 We provisionally propose that appeal to the High Court by way of case stated should be abolished. Judicial review would be retained and would be available in respect of decisions which must currently be challenged by way of case stated.

Do consultees agree?

Appeal to the High Court followed by Appeal to the Crown Court

5.190 Professor Peter Hungerford-Welch has drawn our attention to an arguable anomaly arising from a ruling of the Administrative Court in the recent case of *Cuciurean*.[153]

5.191 Mr Cuciurean was acquitted of aggravated trespass in the magistrates' court, after the Deputy District Judge accepted a defence submission that the prosecution had failed to satisfy the court that conviction would be a proportionate interference with the defendant's rights to freedom of expression and association under articles 10 and 11 of the European Convention on Human Rights.

5.192 On an appeal by way of case stated brought by the prosecution, the Administrative Court concluded that the offence was not one where a separate proportionality assessment was necessary.[154] The case was remitted to the magistrates' court with a direction to convict.

5.193 Mr Cuciurean immediately appealed his conviction to the Crown Court. The Recorder of London, however, refused to list the appeal on the grounds that the Court did not have jurisdiction. Mr Cuciurean challenged this decision by way of case stated.

5.194 Dame Victoria Sharp President of the King's Bench Division ("PKBD") noted:[155]

> At first blush, it may seem odd that following a successful appeal by the prosecution against an acquittal by the magistrates' court, a direction by the Divisional Court to the magistrates' court to convict, can be followed by an appeal by the defendant thus convicted (by way of rehearing) to the Crown Court… .
>
> However, in our judgment, the preservation of a defendant's right of appeal to the Crown Court in such circumstances follows inexorably as a matter of construction, from the various statutory provisions engaged… .
>
> [a defendant's right of appeal] would be subverted … if a successful appeal by a prosecutor on a point of law to the Divisional Court, followed by a direction to convict, could deprive a defendant of any appeal rights at all (regardless of the merits or otherwise of the magistrates' original findings of fact) including the ability

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153 *Cuciurean v CPS* [2024] EWHC 848 (Admin), [2024] 1 WLR 4070.

154 *DPP v Cuciurean* [2022] EWHC 736 (Admin), [2022] QB 888.

155 *Cuciurean v CPS* [2024] EWHC 848 (Admin), [2024] 1 WLR 4070 at [42] and [48], by Dame Victoria Sharp PKBD.

the defendant would otherwise have had to challenge those findings of fact had the magistrates not erred in law in the first place.

5.195 The effect of the ruling is that while a defendant's appeal to the High Court by way of case stated extinguishes the defendant's right to a rehearing in the Crown Court, an appeal to the High Court by the prosecution does not.

5.196 This is consistent with both law and principle. An appeal by way of case stated is an examination of whether the magistrates or DJ(MC) were correct to come to the conclusion they did on the basis of the facts that they found. If a defendant wishes to challenge those facts, the correct approach is an appeal to the Crown Court by way of rehearing. If a defendant wishes to "lock in" those facts and appeal on a point of law, they can do so through an appeal by way of case stated.

5.197 It would be unfair, however, if the *prosecution* were able to "lock in" the factual findings of the magistrates' court in this way, effectively neutering the defendant's right to challenge those findings through an appeal by way of rehearing.

5.198 The problem, as Professor Hungerford-Welch has identified, is that the powers of the High Court are not limited to sending the case back to the magistrates' court with a direction to convict; it can also substitute a conviction itself. Allowing the Crown Court to overturn a verdict imposed by the High Court, he suggests, "appears to fly in the face of the well-established hierarchy of the courts".[156]

5.199 The case stated in *Cuciurean* also asked whether it would have made any difference if the Divisional Court had itself substituted a conviction for the acquittal. The PKBD held that "it would have made no difference if the Divisional Court had substituted a conviction for the acquittal and remitted the sentence only to the magistrates' court".[157]

5.200 We have provisionally proposed abolition of the case-stated procedure, but the same issues would arise in respect of judicial review. This is due to the fact that, upon quashing a decision of a magistrates' court or Crown Court, the High Court can either remit the matter to the lower court or substitute its own decision.[158]

5.201 Although the process may appear anomalous, it is important to recognise, as Professor Hungerford-Welch does, that the High Court is ruling on the application of the law to the facts found by the magistrates or DJ(MC). Appeal to the High Court, whether by way of case stated or judicial review, is an appeal as to the law, not the facts. It is important that the defendant retains the right to appeal against magistrates' courts' findings of fact. To that extent, where the Crown Court comes to a different verdict to that directed or substituted by the High Court it is not challenging the High Court's findings in substance, but those of a magistrates' court.

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156 P Hungerford-Welch, "Appeal by way of case stated: Cuicurean v Director of Public Prosecutions King's Bench Division (Divisional Court): Sharp PQBD and Linden J: April 17, 2024; [2024] EWHC 848 (Admin)" [2024] *Criminal Law Review* 543 (note), 546.

157 Above, at [56].

158 Senior Courts Act 1981, s 5A.

5.202 Moreover, a defendant's appeal to the Crown Court could not overrule the High Court's ruling on the law. Were the Crown Court to do so, its decision would be susceptible to challenge by way of case stated or judicial review by the prosecutor. This would be the case if, for instance it found the facts to be same as those found by the magistrates' court but acquitted on the application of the law to those facts.

Consultation Question 12.

5.203 We provisionally propose that a person convicted in a magistrates' court should retain a right to appeal by way of rehearing where the conviction has been substituted or directed by the High Court in judicial review proceedings (or, if retained, on an appeal by way of case stated) brought by the prosecution, and that the Crown Court should remain empowered to acquit the defendant on the facts.

Do consultees agree?

APPEALS FROM YOUTH COURTS AND BY CHILDREN AND YOUNG PEOPLE

5.204 Children[159] are treated differently, and very often separately, by the criminal justice system compared to most adults. At paragraphs 7.47 to 7.62 and 7.153 to 7.177 below, we explore issues with the sentence of Detention at His Majesty's Pleasure, a sentence only imposed in relation to those aged under 18 when an offence was committed. In Chapter 17, we consider age and criminal appeals issues in general.

5.205 Here, we outline the appeals system for the vast majority of defendants under 18, which will be appeals from youth courts, a type of magistrates' court. As from magistrates' courts, youth court decisions can be challenged by appeal to the Crown Court, and appeal by way of case stated or judicial review to the High Court, either from youth courts or from the Crown Court sitting on appeal from youth courts. For the avoidance of doubt, all of our provisional proposals and open questions which apply to challenges of magistrates' courts' decisions also apply to youth courts, except as specified below.

Background to the youth justice system

5.206 The Children and Young Persons Act 1908 created juvenile courts, which had summary jurisdiction over criminal and welfare matters involving children.[160] The Children and Young Persons Act 1933, the Children Act 1989 and the Criminal Justice Act 1991 are among a number of Acts that have reformed the youth justice system. The latter renamed juvenile courts as 'youth courts', the term still used today.[161] The

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159 As we explain in Chapter 17, the Children and Young Persons Act 1933 defines a "child" as under 14 and a "young person" as aged 14 to 17. The UN Convention on the Rights of the Child ("UNCRC") however, defines anyone under 18 as a child. We use "child" to refer to anyone under 18, including those classed as "young persons" under the 1933 Act.

160 Children and Young Persons Act 1908, s 111.

161 Criminal Justice Act 1991, s 70.

present system is predicated on a general welfare principle that requires every court that deals with a child to have regard for their welfare.[162]

5.207 The Crime and Disorder Act 1998 set out the overarching aim of the youth justice system as "to prevent offending by children and young persons".[163] It imposed a duty on all persons and bodies who play a role in the functioning of the youth justice system to have regard to this aim, in addition to any other duties they may have.[164] The Youth Justice Board ("YJB"), which was also created by this Act, has identified six further objectives of the youth justice system. These are:

(1) swift administration of justice;

(2) confronting young offenders with their offending behaviour;

(3) intervention that tackles the particular factors that lead youths to offend;

(4) ensuring that punishment is proportionate to the offending;

(5) encouraging reparation; and

(6) reinforcing the responsibility of parents/guardians.

Impacts of our proposed magistrates' courts changes on youth courts

5.208 As discussed in footnote 4 above, children may be tried in the Crown Court in very limited circumstances, including when they are tried alongside an adult defendant, or for certain 'grave crimes'.

5.209 In 2023, 11,911 children were sentenced in criminal courts, but just 4% of all sentencing occasions of children that year were in the Crown Court.[165] Nonetheless, given that a youth court is a type of magistrates' court, the methods by which a child can appeal depends on whether a youth court retains jurisdiction, or the case is remitted to the Crown Court.

Guilty pleas

5.210 One of the main concerns raised by consultees in relation to children is the route of appeal following a guilty plea. Above, we asked whether the route of appeal following a guilty plea in magistrates' courts should be reformed, noting at paragraph 5.130 that this may particularly affect people who are vulnerable. This includes those who are vulnerable due to age. 58% of child defendants in the Crown Court pleaded guilty at

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162 Children and Young Persons Act 1933, s 44.

163 Crime and Disorder Act 1998, s 37(1).

164 Above, s 37(2).

165 Youth Justice Board for England and Wales, "Youth Justice Statistics 2022 to 2023 England and Wales" (25 January 2024), para 5.4.

their first hearing (and 61% overall); 47% pleaded guilty in youth court first hearings in 2019.[166]

5.211 Unlike adults, who must be tried in the Crown Court for indictable offences and can be sent to the Crown Court or elect for a jury trial for either-way offences, the vast majority of children are dealt with in youth courts, including for very serious offences. This means that guilty pleas by children in youth courts may be made in relation to allegations of very serious offending.[167]

5.212 Amongst the consultees who raised this as a concern, the consensus was that the limited ability to appeal following a guilty plea was an anomaly in the appeals system which ought to be rectified. Consultees who attended an event hosted by us concerning children in the appeals system expressed similar sentiments. They considered that the route of appeal following a guilty plea was an important issue for children, particularly given the length of time that making an application to the CCRC might take.

5.213 Just for Kids Law ("JfKL") argued that children may be far more likely to plead guilty compared with adults. This may be because there are more incentives to plead guilty in the youth justice system, such as the prospect of referral orders.[168] It further noted that there may be a lack of specialist knowledge in youth courts, given that advocates practising in youth courts do not need to have specific training on children.[169] JfKL argued this may lead to incorrect legal advice, including on guilty pleas.

5.214 JfKL also expressed concern about the length of time it may take the CCRC to consider a reference. It noted this delay, and that the perverse consequences of a conviction impacting children at a crucial time in their lives – be that on their school years, when applying to university or on their first job. It said:

> The CCRC is a poor remedy for the children who incorrectly plead guilty, given few children use it, and typically it takes some years for a case to be decided. We represent a client who spent years speaking to solicitors and trying to challenge his childhood guilty plea, only to find out, almost 10 years after his conviction, that the CCRC even exists and is his only option to appeal. Having submitted the referral,

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166 Cited by R K Helm, "Guilty pleas in children: legitimacy, vulnerability, and the need for increased protection" (2021) 48(2) *Journal of Law and Society* 179, 179. See, also and more recently, R K Helm, "Incentivized Legal Admissions in Children Part 2: Guilty Pleas", *Evidence Based Justice Lab* (2024).

167 See *BH v Norwich Youth Court* [2023] EWHC 25 (Admin), [2023] 1 WLR 1927, where a youth court retained jurisdiction of a child charged with three counts of rape. Though this case did not involve a guilty plea, it is cited here as an example of the seriousness of offences that a youth court may retain.

168 A referral order is available for all children who have pleaded guilty to an offence. If the defendant who has pleaded guilty has no previous convictions, a referral order must be made unless the Court is considering an absolute discharge, conditional discharge, any order under the Mental Health Act 1983 or custody. If the defendant has previous convictions, a referral order may be made, but it is not a requirement. If an order is imposed, the defendant is required to attend meetings of a youth offender panel and comply with a programme of behaviour known as a youth offender contract. Sentencing Code, ss 83-90.

169 JfKL cited a report from the UN Committee on the Rights of the Child which had called on the UK Government to ensure that "officials working with children in the justice system … have been adequately trained on children's rights and child-friendly proceedings". United Nations Committee on the Rights of the Child, "Concluding observations on the combined sixth and seventh periodic reports of the United Kingdom of Great Britain and Northern Ireland" (22 June 2023) CRC/C/GBR/CO/6-7 at [17].

the CCRC rejected it on the basis, among other reasons, that he had pleaded guilty to the offence as a child and that the case records have since been destroyed, rendering the appeal ineffective.

5.215 The National Association for Youth Justice ("NAYJ") cited similar concerns, adding that there may be perceived pressures from others to plead guilty. Their response also noted that there may be a lack of specialist legal representation provided to children, as well as a lack of understanding by children of the consequences that flow from pleading guilty. NAYJ also submitted that children may not realise they have an available defence, for example, where they are victims of human trafficking or lacked the requisite intent. It observed that the speedy justice that is delivered in youth courts may mean that relevant diagnoses are missed, or specialist reports are not commissioned that might affect a court's assessment of a child defendant's culpability.

5.216 Both NAYJ and JfKL cited research by Dr Rebecca Helm which looked at the legitimacy of the current guilty plea procedure with a focus on child defendants.[170] Dr Helm noted that decisions to plead guilty may not necessarily be an admission of guilt, as there could be a range of factors that persuade an innocent person to plead guilty, including the potential for a one-third reduction in sentence for children who plead in the first stage of the proceedings.[171] Dr Helm stated:

> Understanding and monitoring guilty pleas in children is vital, because children have immature cognitive, social, and neurobiological systems that influence their decision making. Psychological research, supported by accumulating plea-specific research in the US context (which involves a different plea system but many of the same underlying psychological constructs), suggests that as a result of these immaturities, children are more susceptible to pressures to plead guilty, and also more likely than adults to plead guilty when innocent (meaning when they have not in fact committed the crime to which they are pleading guilty). …
>
> … when evaluating guilty plea practice and procedure, particularly for children, it is necessary to go beyond examining whether pleas are entered autonomously and instead to focus more holistically on whether guilty pleas result in accurate convictions reached in a fair way that respects rights. This is consistent with vulnerability theory, according to which the state has an obligation to mitigate human vulnerability and ensure that institutions are functioning in a fair way.

5.217 Dr Helm published further research in 2024, making several recommendations with respect to guilty pleas in the context of children.[172]

5.218 Given the concerns discussed above, there is evidence that the limitation on appeals from guilty pleas from magistrates' courts may have disproportionate detrimental effects on children. As we note below in the context of the risk of a more severe

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170 R K Helm, "Guilty pleas in children: legitimacy, vulnerability, and the need for increased protection" (2021) 48(2) *Journal of Law and Society* 179, 181 and 185.

171 Sentencing Council, *Sentencing Children and Young People: Definitive Guideline* (2017) The level of reduction progressively decreases as the proceedings go on.

172 R K Helm, "Incentivized Legal Admissions in Children Part 2: Guilty Pleas" *Evidence Based Justice Lab* (2024).

penalty, the limitation on appeals from guilty pleas also creates some anomalies given a child who has pleaded guilty in the Crown Court would be able to appeal to the CACD irrespective of plea. By contrast, a child who has pleaded guilty in a youth court would have to go through the CCRC.

5.219 In Consultation Question 9, we invited views on whether the appeal route following a guilty plea in magistrates' courts should be reformed. If the route were amended this would necessarily impact children as well. We therefore seek the views of consultees as to the scope for the route of appeal for children being reformed, even if it is not reformed for adults or more generally.

Consultation Question 13.

5.220 We invite consultees' views on whether the route of appeal following a guilty plea by a child should be reformed, even if the route of appeal following a guilty plea in magistrates' courts is not.

More severe penalty

5.221 One issue raised during pre-consultation is the ability of the Crown Court to impose a more severe penalty on appeal from a youth court. The concern that the risk of a more severe penalty was deterring potentially meritorious appeals from magistrates' courts led us to provisionally propose in Consultation Question 8 that where the Crown Court upholds the conviction of a person on an appeal from a magistrates' court or following an unsuccessful appeal against sentence, it should not be able to impose a penalty greater than that imposed at the original trial.

5.222 Responding to the Issues Paper, JfKL and NAYJ stated that the risk of a more severe penalty could have a significant impact on children, with NAYJ explaining:

> Where a person appeals from the Crown Court, the Court of Appeal is prohibited from dealing with them "more severely" at sentence on appeal (see s11(3) of the Criminal Appeal Act 1968). The same is not true in respect of appeals from the magistrates' court: the Court can impose any sentence that the court below could have imposed, and in the case of children this can be up to 2 years' detention even though the maximum sentence for adults in the magistrates' courts is 6 months.

5.223 JfKL expressed the view that the risk of a sentence being increased on appeal was a factor which may dissuade children from appealing. It told us that it would welcome a rule preventing an appellate court from increasing the sentence.

5.224 Given the stage of developmental growth of some child defendants, an increase in sentence may feel more severe than it would for an adult. Therefore, this risk may act as even more of a deterrent to potentially meritorious appeals than it would for adult defendants. The risk of a more severe penalty may also create anomalies within the youth justice system. If a child's case has been remitted to the Crown Court, for example, where they have been charged along with an adult co-defendant, they would not risk a more severe penalty on appeal given that the CACD cannot deal with appellants more severely.

5.225 We therefore provisionally propose that even if the Crown Court were to remain able to impose a penalty greater than that imposed at the original trial on an appeal from a magistrates' court, this should not be possible on an appeal from a youth court.

Consultation Question 14.

5.226 We provisionally propose that, even if the Crown Court remains able to impose a more severe penalty on appeal from a magistrates' court, the Crown Court should not be able to impose a more severe penalty on appeal from a youth court.

Do consultees agree?

Turning 18 and the loss of anonymity

5.227 Once an individual has turned 18, they are no longer considered a child for the purposes of the youth justice system or under international obligations.

5.228 Turning 18 has a number of effects on proceedings and on the options for sentencing. There have been increasing concerns about the risks of turning 18 during court proceedings, given the systemic delays in the criminal justice system and backlogs in the courts. This has been exacerbated by delays caused by the COVID-19 pandemic. In a research briefing, the Youth Justice Legal Centre noted that for a growing number of children there may be a significant period of time before a charging decision is made.[173]

5.229 Consultees were particularly concerned about the loss of anonymity that follows when a child turns 18. There are automatic reporting restrictions on proceedings which involve children. Under section 49 of the Children and Young Persons Act 1933, no matter relating to a child can be included in any publication where it could lead to the identification of that child. A court may dispense with such reporting restrictions if it is considered to be in the public interest to do so.[174]

5.230 Reporting restrictions also apply where a child appeals to the Crown Court, or to the High Court by way of case stated (but not judicial review).[175]

5.231 However, where first instance proceedings involving a child take place in the Crown Court, restrictions are not automatic. The power to restrict reporting in these circumstances can be found in section 45 of the Youth Justice and Criminal Evidence Act 1999. Section 45 permits the court to make a direction, where a defendant is

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173 Youth Justice Legal Centre, *Timely Justice: Turning 18* (June 2020), p 1.

174 A recent example of this is the lifting of the anonymity of Axel Rudakubana, convicted of murdering three girls and the attempted murder of 10 others in Southport in July 2024 (to which he pleaded guilty in January 2025). Reporting restrictions on naming Rudakubana were lifted in August 2024, when Rudakubana was 17. One of the reasons the order was lifted was the public interest in identifying the individual as a result of the widespread misinformation that had contributed to public disorder in several areas. It was noted that Rudakubana would soon turn 18, at which point the order would have no longer been effective. See R Vinter, "Southport murder accused named as Axel Rudakubana" *Guardian* (1 August 2024).

175 Children and Young Persons Act 1933, s 49(3)(b).

under 18, that no matter which may lead to their identification may be included in a publication. In order to make such a direction, the court must be satisfied it would be in the interests of justice to do so, having regard to the person's welfare. The court must give further consideration to a number of factors when contemplating making such a direction. These include the interest in open reporting, the prevention or exposure of miscarriages of justice, the welfare of any person to whom the order would apply, and any views expressed by that person if they have attained the age of 16 or an appropriate person on their behalf if they are under 16.[176]

5.232 The restriction on publication gives effect to international standards, including the "Beijing Rules",[177] and obligations under the European Convention on Human Rights.[178] As noted in the Youth Court Bench Book, whilst the principle of open justice necessitates that proceedings ought to be administered in public, those involving children are a statutory exception to this rule.[179]

5.233 An application to lift restrictions may be made in limited circumstances. These are where publication would avoid injustice to the child, where the child is unlawfully at large and is charged or guilty of certain specified offences and it is necessary to bring them back before the court, and where the child has been found guilty of serious persistent offending and it would be in the public interest to publish.[180]

5.234 If a defendant attains the age of 18, they are no longer considered to be a child and the reporting restrictions cease to have effect.[181] There is jurisdiction under civil law to grant an injunction which would prohibit publication of personal details in perpetuity.[182] This is sometimes referred to as the "'Venables jurisdiction", as it was first established in a decision that protected the new identities of Jon Venables and Robert Thompson, two ten-year-old boys who were convicted of murdering two-year-old James Bulger in 1993. However, this form of civil injunction has been used very rarely and requires the child or their representatives to make an application prior to the child turning 18.

5.235 During pre-consultation, we were told that the loss of anonymity created a barrier to appeals where the child has turned 18 prior to the appeal being heard and, therefore, lost the anonymity they had previously been afforded.

5.236 This was noted by JfKL in their response to our Issues Paper, and was raised by stakeholders in a consultation event on the experiences of children in the appeals system. Stakeholders argued that losing anonymity meant that some young people

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176 Youth Justice and Criminal Evidence Act 1999, s 52(2).

177 The United Nations Standard Minimum Rules for the Administration of Juvenile Justice, adopted by the General Assembly of the United Nations in 1985. Rule 8 provides that "The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling" and that "In principle, no information that may lead to the identification of a juvenile offender shall be published".

178 See for example *T v UK and V v UK* (1999) 30 EHRR 121.

179 Judicial College, *Youth Court Bench Book* (January 2024), p 7.

180 Above.

181 *T v DPP* [2003] EWHC 2408 (Admin), (2004) 168 JP 194.

182 A recent example of this is *RXG v Ministry of Justice* [2019] EWHC 2026 (QB), [2020] QB 703.

may not bring potentially meritorious appeals, because they wanted to retain the anonymity that they had automatically received as a child.

5.237 As noted above, this may be impacted by factors outside of the defendant's control, such as systemic delays which have been exacerbated by the COVID-19 pandemic. Furthermore, anonymity may be lost not because the child has appealed, but because the prosecution has sought to appeal against the sentence or has made an application for judicial review.[183]

5.238 Issues about anonymity were raised by Charles Taylor, then Chair of the Youth Justice Board, when conducting a review of the youth justice system in 2016. The review recommended further consideration of reform to youth reporting restrictions including whether the automatic anonymity in youth courts should be lifelong, replicated in the Crown Court, and extended to involvement in criminal investigations.[184] In response to Charles Taylor's review, the Government stated that it would discuss the proposals with interested parties to understand if there was a need for change and the most appropriate reform.[185] However, as noted by NAYJ, there have been no such reforms to publishing restrictions for children.[186]

5.239 In practice there may be little media interest in concluded criminal proceedings involving a child, even after they have turned 18 (when the press would be able to name them). However, where an appellant who has turned 18 and lost their anonymity appeals, the fact that they are appealing may generate fresh interest. In this regard, the fact that there is an appeal creates a greater risk of the appellant's identity being revealed, which may disincentivise potentially meritorious appeals.

5.240 We recognise that any extension of reporting restrictions or anonymity engages the open justice principle and the general rule that justice ought to be administered in public.[187] We have heard the concerns raised by the media to this effect. However, anonymity would only continue to the first appeal and would only apply if the child still retained their anonymity at the time of appeal. It would make little sense to impose an anonymity order in relation to a child who had already been named.

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183 A particularly stark example of this is *R (CPS) v Crown Court at Preston* [2023] EWHC 1957 (Admin), [2024] KB 348. The CCRC referred the conviction of a person convicted of offences relating to indecent images of children. At the time of the alleged offence, to which he had pleaded guilty, the defendant was a boy of 15. The CCRC referred the conviction on the basis that the circumstances in which he was incited to download the images made him a victim of sexual exploitation rather than an offender. Had this been known and properly taken into account, he might not have been prosecuted, or the prosecution might have been stayed as an abuse of process, or he might have had a defence. Although he was an adult by the time the case was referred, the CCRC decided to maintain his anonymity in announcing its decision to refer the case.

The CPS did not seek to uphold the conviction at appeal. However, it sought judicial review of the Crown Court's ruling that the appellant was not required to seek to vacate his guilty plea (we discuss this issue at paras 5.117-5.133 above). Therefore, despite the argument (seemingly conceded by the CPS) that he was a victim of sexual grooming as a child, the appellant was named throughout the Administrative Court's judgment.

184 C Taylor, *Review of the Youth Justice System in England and Wales* (December 2016) p 32.

185 Above, p 19.

186 L Janes, "Open justice and children in the criminal justice system", *NAYJ* (February 2024) p 11.

187 See above.

Consultation Question 15.

5.241 We provisionally propose that where a person has been convicted as a child and their anonymity has not been lost as a result of an excepting direction or their being publicly named after turning 18, that person should retain their anonymity during appellate proceedings.

Do consultees agree?

5.242 We invite consultees' views on how maintaining the anonymity of a person convicted as a child could best be achieved.

Chapter 6: Appeals to the Court of Appeal Criminal Division – general issues

INTRODUCTION

6.1 In Chapters 7 and 8 we will consider the approach of the Court of Appeal Criminal Division ("CACD") to appeals against sentence and conviction respectively. However, some of the issues arising apply to both types of appeal, so we discuss these together in this chapter. These include the Court's power to admit evidence,[1] time limits, the rules on admitting fresh evidence, and the Court's power to make a loss of time order.

PERMISSION TO APPEAL

6.2 An appeal against conviction or sentence may only be brought where:

(1) a certificate that the case is fit for appeal has been granted by the trial or sentencing judge in the Crown Court within 28 days from the date of conviction or sentence (see paragraphs 6.14 to 6.16 below);[2] or

(2) leave has been granted by the CACD (usually by a single judge exercising powers of the CACD under section 31 of the Criminal Appeal Act 1968 or, if it is refused initially, by the full court – see paragraph 6.8 below).

6.3 A certificate should only be issued by the trial judge in exceptional circumstances.[3] An example may be where there is a difficult and important point of statutory construction. For instance, in *Bradley*,[4] the judge had admitted bad character evidence under newly commenced provisions of the Criminal Justice Act 2003, but there was uncertainty as to when proceedings should be taken to have begun, and thus whether the case had

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1 One specific aspect of fresh evidence – the law relating to evidence of juror deliberations – will only be relevant to appeals against conviction so we discuss this in Chapter 8.

2 Criminal Appeal Act 1968, ss 1(2), 11(1) and (1A). A certificate should only be issued by the trial judge in exceptional circumstances. An example may be where there was a difficult and important point of statutory construction.

3 The possibility of obtaining a certificate from the trial judge was used in *R v Malkinson* [2006] EWCA Crim 1891, (2006) 150 SJLB 1288. The trial judge certified the case as fit for appeal because several months after Mr Malkinson's conviction, the forensic scientist in the case informed the court that swabs used to take intimate samples had been contaminated with a substance which could falsely indicate the presence of lubricant from condoms. The presence of this lubricant had been used to indicate that Malkinson was "forensically aware", and had used a condom, and to explain away the absence of any DNA evidence connecting him to the victim. See discussion of Mr Malkinson's case in Appendix 2.

Under changes to the Criminal Appeal Act 1968 brought in by the Criminal Justice and Immigration Act 2008, sch 8, the trial judge would have been unable to certify the case as more than 28 days had passed, and Malkinson would have had to persuade the CACD to admit the fresh evidence and grant leave to appeal out of time.

4 [2005] EWCA Crim 20, [2005] 1 Cr App R 24.

begun before the Act had come into force and the evidence should not therefore have been admitted.

6.4 Leave to appeal against conviction must be sought from the CACD (with the appellant specifying the grounds of appeal) within 28 days from the date of conviction.[5] This means that where sentencing takes place at a later date than conviction (which it frequently does), the time limit for an appeal against conviction will begin to run (and may expire) before sentencing takes place.

6.5 The purpose of the requirement to seek leave and specify the grounds of appeal was explained by the Lord Chief Justice, Lord Bingham of Cornhill, in *Cox*:[6]

> The purpose of the leave requirement in our judgment, like any other leave requirement, is to act as a filter: to weed out appeals that would have no reasonable prospect of success if leave were to be granted, and to enable the Court to concentrate its judicial resources on cases that have something in them. The purpose of requiring grounds to be specified is to require appellants and their advisers not only to make clear that they are aggrieved at an outcome but also to specify the grounds upon which their grievance is based.

6.6 The 28-day time limit may be extended, before or after it expires, by the Court.[7] The test that applies is whether it is in the interests of justice to do so.[8]

6.7 An applicant who wishes to appeal against their conviction outside the time limit on the ground that their conviction is unsafe as a result of a change in the law will need to seek exceptional leave.[9] Such leave will only be granted where the applicant is able to demonstrate that they would otherwise suffer "substantial injustice" (see Chapter 10).

Determination of the application for leave

6.8 Applications for leave to appeal and for an extension of the time limit may be determined by a single judge of the CACD (usually High Court judges of the King's Bench Division, who sit as judges of the CACD).[10] Leave to appeal will be granted where the application discloses an "arguable" ground of appeal.[11] A ground will be "arguable" if it has a "reasonable or real" prospect of success.[12]

6.9 If the application for leave to appeal is refused by a single judge, the applicant may renew their application to the full court.[13] Renewed applications for leave to appeal

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5 Criminal Appeal Act 1968, ss 1(2) and 11(1) and (1A).

6 *R v Cox* [1999] 2 Cr App R 6, CA at [9], by Lord Bingham of Cornhill CJ.

7 Criminal Appeal Act 1968, s 18(3).

8 *R v Thorsby* [2015] EWCA Crim 1, [2015] 1 WLR 2901; *R v Paterson* [2022] EWCA Crim 456; *R v Brennand* [2023] EWCA Crim 1384, [2024] 1 Cr App R 14.

9 *R v Jogee* [2016] UKSC 8, [2016] UKPC 7, [2017] AC 387 at [100], by Lord Hughes and Lord Toulson JJSC.

10 Criminal Appeal Act 1968, ss 31(2)(a) and (b) and 45(2).

11 *R v Gohil* [2018] EWCA Crim 140, [2018] 1 WLR 3697 at [125], by Gross LJ.

12 Above.

13 Criminal Appeal Act 1968, s 31(3).

must be made within 10 business days from the date that leave is refused by the single judge.[14] A renewed application can potentially result in a loss of time order (see paragraphs 6.128 to 6.157 below).

6.10 Where leave has been granted by the single judge only in relation to some of the grounds of appeal, the applicant may only appeal in respect of those grounds. If the applicant wishes to appeal on the grounds in respect of which leave has not been granted, they must renew their application for leave in relation to those grounds to the full court, which will usually be heard together with the appeal on the grounds in respect of which leave has been granted.[15]

Vexatious or frivolous applications

6.11 Where the application for leave to appeal does not show any "substantial ground" of appeal, the Registrar of the CACD may refer the case for summary determination by the Court.[16] The Court may, in such cases, if it considers the application for leave or the appeal to be "frivolous or vexatious", dismiss the application for leave or the appeal without the attendance of the parties.[17]

Refusal of leave to appeal

6.12 If an application for leave to appeal has been refused by the single judge (and the application has not been renewed to the full court) or the full court, the applicant may not apply for leave to appeal a second time.[18]

6.13 There is no appeal against the full court's decision in respect of an application for leave.[19] Therefore, absent any exceptional circumstances that would enable the reopening of the refusal of leave to appeal, where the applicant has exhausted their statutory right of appeal, their only option will be to apply to the Criminal Cases Review Commission ("CCRC") for the reference of their appeal to the CACD (see Chapter 11).

Certificate of fitness to appeal

6.14 Where a certificate that the case is fit for appeal is sought from the trial or sentencing judge in the Crown Court, the application must be made:

(1) if applying orally, immediately after the conviction or sentence; or

(2) if applying in writing, within 10 business days from the date of conviction or sentence.[20]

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14 Criminal Procedure Rules 2020, r 36.5(2)(b).

15 *R v Hyde* [2016] EWCA Crim 1031, [2016] 1 WLR 4020 at [16], by Davis LJ.

16 Criminal Appeal Act 1968, s 20.

17 Above, s 20.

18 *R v Pinfold* [1988] QB 462, CA, 464, by Lord Lane CJ; *R v Hughes* [2009] EWCA Crim 841, [2010] 1 Cr App R (S) 25 at [6], by Hughes LJ.

19 *R v Garwood* [2017] EWCA Crim 59, [2017] 1 WLR 3182.

20 Criminal Procedure Rules 2020, r 39.4(1).

6.15 A certificate that the case is fit for appeal will only be granted in exceptional circumstances, where the trial or sentencing judge is satisfied that there is a "compelling" ground of appeal.[21]

6.16 If a certificate is not granted by the trial or sentencing judge, an application for leave to appeal may be made to the CACD.

Appellants who have died

6.17 Where a person who might have appealed has died, or a person who has already begun an appeal dies, the CACD can approve a person to begin or take over the appeal on their behalf. This person must be a surviving spouse or civil partner; a personal representative (that is, for the purposes of administering their estate); or any other person appearing to the CACD to have, by reason of a family or similar relationship with the dead person, a substantial financial or other interest in the determination of the appeal.[22]

6.18 An application must be made within a year of death unless the appeal follows a reference by the CCRC.

TIME LIMITS

6.19 A number of consultees raised concerns with the 28-day limit for appealing against conviction on indictment.

6.20 For example, the Bar Council said of the 28-day limit:

> In light of the difficulties with securing public funding, legal representation and 'second opinions', we consider that there is merit in the Law Commission exploring further whether the present limit of 28 days for appealing against conviction on indictment is too short, and should be extended to 56 days.

6.21 The Westminster Commission had previously said that "the 28-day time limit for lodging an appeal should be extended to reflect the difficulties faced by applicants, some of whom are unrepresented and vulnerable".[23]

6.22 As we noted in paragraph 5.105 research by Naima Sakande suggests that the time limit may create particular difficulty for women who receive a custodial sentence. As we discussed earlier, Sakande found that there is "an adjustment period when first arriving in custody" and that:[24]

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21 *R v Atta-Dankwa* [2018] EWCA Crim 320, [2018] 2 Cr App R 16 at [18], by Holroyde LJ. In this case the judge certified the case as fit for appeal as it was clear that he misdirected the jury as to the requisite mental element (he had directed them to the mental element for the alternative count of unlawful wounding and not the count of wounding with intent that the jury had asked about, and on which they convicted the defendant).

22 Criminal Appeal Act 1968, s 44A.

23 The Westminster Commission on Miscarriages of Justice, *In the Interests of Justice: An Inquiry into the Criminal Cases Review Commission* (2021), p 68.

24 N Sakande, *Righting Wrongs: What are the barriers faced by women seeking to overturn unsafe convictions or unfair sentences in the Court of Appeal (Criminal Division)?* (2020, Griffins Society) pp 46-47.

> Women who are recovering from trauma, who are unable to get hold of their representatives, who have no information about where else they can go for help are unable to meet this arbitrary deadline.

6.23 Sakande and Professor Nicola Padfield KC (Hon) have argued for extending time limits in this context.[25]

6.24 A female consultee who spent time in prison told us that it took months to get over being in custody, and that there was a lack of information inside prison about how to initiate an appeal. A review by the NHS and HM Prison and Probation Service ("HMPPS") of health and social care provision in women's prisons found:[26]

> For many women, reception into prison and the early days in custody was traumatic, deeply distressing and bewildering. This was especially the case for mothers separated from their children and pregnant women.

6.25 Some consultees observed that the time limit was especially challenging in appeals involving fresh evidence, which is discussed below at paragraphs 6.34 to 6.116.

6.26 For example, Mark Alexander, a prisoner who has been convicted of murder but maintains his innocence,[27] argued:

> The 28-day time limit within which to bring appeals against conviction is clearly problematic, since it is quite impossible to find fresh evidence within that time, particularly in light of the fact that legal aid funding expires at the point of conviction. From my own experience, the only way to obtain the renewed funding required to actually obtain fresh evidence following my conviction was to resurrect the case in the Court of Appeal; but the Court of Appeal will not do so without fresh evidence first, dooming such applications to failure. This chicken-egg / horse-cart conundrum leaves appellants without recourse to the assistance they actually need within those 28 days.

6.27 Dr Stephanie Roberts noted that the time limit for bringing an appeal makes fresh evidence appeals difficult: "it is very difficult to find fresh evidence within twenty eight days so the appellant's grounds of appeal at first instance tend to be those alleging procedural errors".[28]

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25 N Sakande, *Righting Wrongs: What are the barriers faced by women seeking to overturn unsafe convictions or unfair sentences in the Court of Appeal (Criminal Division)?* (2020, Griffins Society) p 46; N Sakande and N Padfield, "Time to appeal – an argument for extending time limits" [2020] *Criminal Law Review* 935.

26 NHS and HMPPS, *A review of health and social care in women's prisons* (2023) p 8.

27 Mark Alexander was convicted in 2010 of the murder of his father Samuel Alexander. He was refused leave to appeal against his conviction in 2011 (by the single judge, and again on renewal to the full court). He has completed bachelor's and master's degrees in law while in prison. In 2023, he succeeded in judicial review proceedings against the Ministry of Justice challenging a refusal of consent for him to be interviewed by an investigative journalist: *R (Alexander) v Secretary of State for Justice* [2023] EWHC 1407 (Admin), [2023] ACD 95.

28 S Roberts, "Fresh Evidence and Factual Innocence in the Criminal Division of the Court of Appeal" (2017) 81 *Journal of Criminal Law* 303, 305.

6.28 Joint Enterprise Not Guilty by Association ("JENGbA"), an organisation which advocates for reform of the law governing joint enterprise, relied on Dr Roberts' work, as well as the "difficulty in obtaining public funding for litigators to investigate the availability of fresh evidence" mentioned by Mark Alexander. JENGbA concluded that it is "all but impossible for such appeals to be brought within the 28 day time limit, and very difficult for them to be brought at all".

6.29 We also note that legally aided defendants are entitled to advice from their representatives as to whether they have grounds for appeal; not only does this process itself take time,[29] but if their representatives' advice is negative, defendants may well have very little time to formulate their own grounds, or to seek alternative advice.

Discussion

6.30 We are persuaded that the current time limits for bringing an appeal against conviction and sentence are potentially capable of causing injustice. It is possible that they may be deterring meritorious appeals – for instance, because a convicted person only realises that they had grounds to appeal after the deadline, and does not realise that they are able to seek leave to appeal out of time. However, even if this is not the case, it is possible that the fact that appeals are expected to be made while a person may be undergoing an extreme "adjustment process" may mean that people are not able to make their best appeal.

6.31 Given that both the single and the full court already consider the merits of a case before refusing leave to appeal out of time, we do not consider that increasing the time limit for bringing an appeal would have an adverse impact. Increasing the time available for a person to bring an in-time appeal could also increase the quality of applications by allowing applicants and their representatives more time to formulate and articulate grounds of appeal.

6.32 We recognise that increasing the time to lodge an appeal beyond 28 days would mean that an appellant would be able to bring an appeal – especially an appeal against sentence – after the time had expired for the Attorney General to challenge a sentence as unduly lenient (unless this was also increased). However, we do not consider this to be problematic. First, while it is possible that convicted persons may engage in a strategic appeal against sentence when faced with an Attorney General's reference (although there is no evidence that this has any effect on the outcome), there is no evidence that the Attorney General's decision to refer is influenced by an appeal. Moreover, we consider that there are particular reasons of finality that apply when an individual's sentence is challenged by the state (see Chapters 12-13).

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[29] Opportunities to consult with legal advisers in this period may be limited. A survey by the Association of Prison Lawyers found that in one prison, a solicitor seeking a video-conference with a prisoner was informed that these were only allowed on Friday, Saturday and/or Sunday afternoons, and that the next available Friday was not for two months (Association of Prison Lawyers, *Justice Barred* (2024) p 6).

Consultation Question 16.

6.33 We provisionally propose that the time limit for bringing an appeal against conviction or sentence to the Court of Appeal Criminal Division should be increased to 56 days from the date of sentence.

Do consultees agree?

ADMISSION OF FRESH EVIDENCE

6.34 The CACD is a court of review. However, since the inception of the modern appellate jurisdiction in the Criminal Appeal Act 1907, it has had wide powers to receive fresh evidence, including receiving oral testimony from witnesses.

6.35 Section 23 of the Criminal Appeal Act 1968 enables the admission of evidence for the purposes of determining an application for leave to appeal or an appeal against conviction or sentence. Where necessary or expedient in the interests of justice, the CACD may:

(a) order the production of documents or other materials connected with the proceedings, which appear to be necessary for the determination of the case;[30]

(b) order the attendance of witnesses, including witnesses who have not been called in the Crown Court proceedings; and

(c) receive evidence not adduced in the Crown Court proceedings.[31]

6.36 When considering the exercise of this power, the CACD must have regard to whether:[32]

(a) the evidence appears to be capable of belief;

(b) it appears that the evidence may provide any ground for allowing the appeal;

(c) the evidence would have been admissible in the Crown Court proceedings on an issue which is the subject of the appeal; and

(d) there is a reasonable explanation for the failure to adduce the evidence in the Crown Court proceedings.

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30 This power may also be exercised by a single judge (see s 31(2)(i) of the Criminal Appeal Act 1968).

31 Criminal Appeal Act 1968, s 23(1).

32 Above, s 23(2).

6.37 The fact that the fresh evidence would afford grounds for an appeal is not of itself determinative. In *Slade and others*, the CACD said:[33]

> The impression sometimes is given by appellants … that if only the fresh evidence may afford a ground for allowing an appeal then that of itself justifies its reception into evidence. But demonstrably the consideration has to be wider than that: the ultimate question being whether it is necessary or expedient in the interest of justice to receive the evidence.

6.38 Fresh evidence cases can potentially conflict with the "one trial" principle discussed at paragraph 4.53 above. The CACD has been very concerned to ensure that in allowing defendants to adduce fresh evidence they do not thereby encourage defendants to "hold back" material for a subsequent appeal, or to submit evidence supporting one defence at trial, but rely on evidence supporting a wholly different defence on appeal.

6.39 There has also been a concern, in relation to expert evidence, that defendants might engage in "expert shopping",[34] or seek "bigger and better" experts to make arguments already rejected by the jury at trial.[35] Indeed, drawing these fears together, in *Kai-Whitewind*, Lord Justice Judge (as he then was) warned that allowing expert evidence to be admitted at appeal in support of points made by another expert at trial by jury would mean that "the trial process would represent no more, or not very much more than what we shall colloquially describe as a 'dry run'".[36]

6.40 The four considerations listed at paragraph 6.36 above are intended to reflect some of the principles discussed in Chapter 4 – in particular, the "one trial" principle. The fourth consideration in particular discourages a defendant from relying on their own decision (often following legal advice) not to deploy evidence at trial as a basis for an appeal.

6.41 Fresh evidence can be relevant to sentencing appeals (for instance, at paragraphs 7.146 to 7.151 we discuss appeals based on pregnancy or illness which were subsisting but not identified at the time of sentencing). However, fresh evidence is most likely to be relevant where claims of factual innocence (that is, denials of having committed the crime) are made. Here, the ground of appeal is not that the jury were wrong to convict on the basis of the evidence adduced at trial (something notoriously hard to sustain unless the judge was wrong to leave the case to the jury or misdirected them). Rather, it is that had the jury heard the evidence now available but not adduced at trial, they would – or could – have acquitted the defendant.

6.42 As Dr Stephanie Roberts notes:[37]

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33 [2015] EWCA Crim 71 at [125], by Davis LJ.

34 *R v Horton* [2007] EWCA Crim 607, cited in C Hoyle and M Sato, *Reasons to Doubt: Wrongful Convictions and the Criminal Cases Review Commission* (2019) p 123.

35 C Hoyle and M Sato, *Reasons to Doubt: Wrongful Convictions and the Criminal Cases Review Commission* (2019) pp 123-124.

36 *R v Kai-Whitewind* [2005] EWCA Crim 1092, [2005] 2 Cr App R 31 at [97], by Judge LJ.

37 S Roberts, "Fresh Evidence and Factual Innocence in the Criminal Division of the Court of Appeal" (2017) 81 *Journal of Criminal Law* 303, 304.

these appeals are particularly problematic because they require the Court to trespass on the fact-finding role of the jury somewhat in assessing new evidence on appeal against the evidence presented at trial in order to determine whether the conviction is unsafe.

6.43 The Court is understandably reluctant to do so where the appellant could have adduced the evidence before the jury, but for some reason did not. Indeed, it is arguable that such evidence is not "fresh" at all.

6.44 In the Issues Paper[38] we asked:

> Is there evidence that the Court of Appeal's approach to the admission of fresh evidence hinders the correction of miscarriages of justice? (Question 4)

6.45 Most of the responses that we received focused on the application of the rules governing fresh evidence in section 23(2) of the Criminal Appeal Act 1968, which we discuss below from 6.47. Consultees were also concerned about how the CACD considers evidence *de bene esse*[39] before deciding whether to admit it. A number of consultees considered this was somewhat circular.

6.46 Dr Stephanie Roberts described the Court's approach to fresh evidence as "confusing":

> It clearly uses s.23(2) when it wants to be restrictive and uphold the [conviction] but a more liberal approach can be seen in those cases where s.23 is not referred to at all or the evidence is heard de bene esse. This does not necessarily result in the conviction being overturned but it does at least mean that the Court is willing to hear the evidence [before] deciding rather than using s.23(2) not to hear it in the first place.

The considerations in section 23(2)(a) to (d)

6.47 The current format of section 23 was intended to simplify the process and to prevent relevant evidence from being excluded on narrow technical grounds. Before 1995, section 23(1) *permitted* the Court to admit evidence if it was in the interests of justice to do so. Section 23(2) *required* the Court to admit the evidence unless satisfied that it would not afford any ground for appeal, if (i) it was likely to be credible and (ii) would have been admissible in the proceedings from which the appeal lay and (iii) it was not adduced in those proceedings but there was a reasonable explanation for the failure to do so.

6.48 The second limb of the test had been introduced to give effect to the recommendations of the Donovan Committee in 1966. The Committee wanted to relax the Court of Criminal Appeal's self-imposed practice against receiving evidence which could have been adduced at trial, recommending that evidence should be admitted if it was "relevant and credible, and if a reasonable explanation is given for the failure to place it before the jury". The provision was first included in the Criminal Appeal Bill in

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38 Law Commission, Criminal Appeals: Issues Paper (July 2023).

39 *de bene esse* roughly translated means "for what it is worth". In practice this means that the Court will consider the merits of the fresh evidence before deciding whether formally to admit it.

1966 (which transferred the role of the Court of Criminal Appeal to the Court of Appeal). The new provision was headed "duty to admit fresh evidence".

6.49 The Royal Commission on Criminal Justice ("the Runciman Commission")[40] had found "subject to one point" that "these powers seem to us to be adequate", but said "what is in question, however, is whether the court has construed them too narrowly":[41]

> It has been suggested to us that the attitude of the Court to these questions has on occasion been excessively restrictive. We would urge that in general the court should take a broad, rather than narrow, approach to them.

6.50 The Government, following consultation with the then Lord Chief Justice, Lord Taylor of Gosforth, tabled provisions in the Criminal Appeal Bill which would consolidate the provisions in section 23(1) and 23(2) with a single power to admit fresh evidence, involving a requirement to have regard to the factors that had previously triggered the requirement to admit fresh evidence under 23(2).

6.51 The Minister in charge of the Criminal Appeal Bill (1995) told the House of Lords that the change in the Bill "lowers the threshold for the admission of fresh evidence by the Court of Appeal along the lines recommended by the Royal Commission".[42]

6.52 Lord Taylor told the House of Lords:[43]

> The case law has now reached the position that the duty to admit evidence in pursuance of Section 23(2) is effectively subsumed within the requirement in subsection (1) to satisfy the interests of justice. New Clause 4 will replace this rather awkward two-pronged provision with a unified test for the admission of fresh evidence which will be both clear and comprehensive. The new test will eliminate the rather sterile arguments which have been raised over the years about the distinction between and the application of the power in Section 23(1) and the qualified duty in Section 23(2) …

6.53 At first glance, these statements are contradictory. The previous legislation did not contain any restriction on the *power* of the Court to admit evidence that would not be in the amended legislation. The amendments did remove a *duty* on the Court to admit evidence in certain circumstances, but insofar as this "relaxed" the threshold for the admission of evidence, it relaxed the law in favour of a greater discretion to *exclude* evidence, not to admit it. Indeed, this may be why Lord Taylor went on to reassure the House of Lords that "the duty in Section 23(2) is, in my view, mandatory in appearance only".[44]

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40 See paras 2.54-2.57 above for discussion of the Runciman Commission.

41 Report of the Royal Commission on Criminal Justice (1993) Cm 2263, p 173.

42 *Hansard* (HL), 15 May 1995, vol 564, col 299.

43 *Hansard* (HL), 26 June 1995, vol 565, col 568.

44 It is not clear from this why the duty should have been interpreted by the judiciary to be "mandatory in appearance only". There was nothing in the language of the provision to suggest it was not mandatory (the provision was headed "duty to receive fresh evidence") and it is clear from the history of the provision that

6.54 However, even if that is correct, the best that can be said is that the provision did not – in fact – restrict the admission of fresh evidence. The changes made in 1995 replaced a general power to admit fresh evidence and a requirement to do so if certain criteria were met with a general power to admit fresh evidence.

6.55 In *Erskine*, the CACD surveyed a wide range of authorities, including the decision of the Divisional Court in *Pearson*,[45] where it had said:[46]

> the statutory discretion conferred by section 23 cannot be constrained by inflexible, mechanistic rules. But the cases do identify certain features which are likely to weigh more or less heavily against the reception of fresh evidence: for example, a deliberate decision by a defendant whose decision-making faculties are not impaired not to advance before a jury a defence known to be available; evidence of mental abnormality or substantial impairment given years after the event and contradicted by evidence available at the time of the offence; expert evidence based on factual premises which are unsubstantiated, unreliable or false; or which is for any other reason unpersuasive. But even features such as these need not be conclusive objections in every case. The overriding discretion conferred on the court enables it to ensure that, in the last resort, defendants are sentenced for the crimes they have committed … .

6.56 The Lord Chief Justice, Lord Judge, went on to say in *Erskine*:[47]

> The decision whether to admit fresh evidence is case and fact specific. The discretion to receive fresh evidence is a wide one focusing on the interests of justice. The considerations listed in [section 23](2)(a)-(d) are neither exhaustive nor conclusive, but they require specific attention. The fact that the issue to which the fresh evidence relates was not raised at trial does not automatically preclude its reception. However, it is well understood that, save exceptionally, if the defendant is allowed to advance on appeal a defence and/or evidence which could and should have been put but were not put before the jury, our trial process would be subverted. Therefore … unless a reasonable and persuasive explanation for one or other of these omissions is offered, it is highly unlikely that the "interests of justice" test will be satisfied.

6.57 In *Hanratty*, the Lord Chief Justice, Lord Woolf, affirmed that the considerations listed at paragraph 6.36 above are not "conditions" or "criteria" or "tests" which must be met, and the Court is free to admit evidence where they consider it necessary or expedient in the interests of justice to do so:[48]

> Subsection (2) is subordinate to subsection (1). It is subsection (1) which confers a general discretion on the Court to be exercised in the interests of justice. Subsection

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Parliament deliberately inserted it because it viewed the appellate Court's previous practice under its existing discretion as too restrictive.

45 *R v CCRC, ex p Pearson* [1999] 3 All ER 498, DC, 517E-H, by Lord Bingham of Cornhill CJ.

46 *R v Erskine* [2009] EWCA Crim 1425, [2010] 1 WLR 183.

47 *R v Erskine* [2009] EWCA Crim 1425, [2010] 1 WLR 183 at [29], by Lord Judge CJ.

48 *R v Hanratty (dec'd)* [2002] EWCA Crim 1141, [2002] 3 All ER 534 at [102], by Lord Woolf CJ.

(2) identifies the considerations to which this Court is required to have regard when exercising its discretion under subsection (1).

6.58 As the Court noted, if the considerations were conditions, section 23(2)(b) could never provide a basis for admitting evidence from the prosecution, since it refers only to evidence which may afford grounds for an appeal, not evidence which may go against the appeal: "The prosecution are not going to submit evidence which will undermine the conviction".[49]

6.59 It went on to hold that to treat the considerations in sections 23(2)(a) to (d) as preconditions "would mean that the Court would be unable to admit evidence even if the admission of that evidence is very much in accord with the interests of justice and its rejection could result in injustice".

6.60 In *Sales*, the Court concluded that section 23(2):[50]

> speaks of having regard to these matters, rather than identifying them as necessary preconditions when considering whether to receive evidence. Accordingly, it is possible for this Court to receive evidence, when all four matters are not satisfied, provided the Court has regard to them.

6.61 However, there are occasions when the Court has nonetheless treated the considerations set out in section 23(2) as requirements which an appellant must "meet" or "satisfy" in order to adduce fresh evidence.[51] For instance, the Court has stated that "the applicant must satisfy" it of the four considerations,[52] or that applicants "must satisfy four *conditions*".[53]

6.62 Even leaving aside those judgments in which it explicitly required appellants to "satisfy" four "conditions" in order to adduce fresh evidence, when applying the considerations within the context of the overriding interests of justice test, the CACD continues to refer to the four considerations as "conditions", "criteria", "tests", or "requirements", and addresses whether the appellant "meets the criteria"[54] or "fulfils the requirements"[55] of section 23, or whether it agreed with a respondent that "the relevant criteria in section 23(2) … simply are not satisfied".[56]

6.63 We heard from some stakeholders that the current approach to section 23 was satisfactory. For example, the Crown Prosecution Service stated that "the conditions

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49 *R v Hanratty (dec'd)* [2002] EWCA Crim 1141, [2002] 3 All ER 534 at [101].

50 *R v Sales* [2000] 2 Cr App R 431, CA, 437D-E, by Rose LJ. The Court could admit evidence having considered each of the factors, even if none was satisfied.

51 The Court also frequently refers to the four factors as "requirements" or "conditions" or talks of "satisfying" the criteria in s 23(2).

52 *R v DSK* [2017] EWCA Crim 2214 at [23].

53 *R v Singh* [2017] EWCA Crim 466, [2018] 1 WLR 1425 at [40]-[41]; *R v Middlemass* [2018] EWCA Crim 1512 at [10]; *R v Carmichael* [2018] EWCA Crim 213 at [21] (emphasis added).

54 *R v Lahrar* [2022] EWCA Crim 1342 at [16].

55 *R v Gaiziunas* [2024] EWCA Crim 246 at [17].

56 *R v Camara* [2022] EWCA Crim 884 at [29]-[30] (though paraphrasing the respondent).

set out in section 23(1) of the Criminal Appeal Act 1968 are sensible" and that it "does not have any concerns about the Court of Appeal's approach to the admission of fresh evidence". The Law Society also agreed and said that that CACD "seems to apply the criteria in s23 of the Criminal Appeal Act 1968 appropriately, ie, not as requirements that must all be met, but as matters to be considered".

6.64 However, we also heard from a number of stakeholders that the language of section 23 risks the considerations in section 23(2) being seen (and possibly treated) as mandatory preconditions which must be met if evidence is to be admitted.[57] As we discuss below, much of the concern lay with the fourth consideration: whether there was a reasonable explanation as to why the evidence was not previously adduced at the trial.

6.65 For example, Dr Stephanie Roberts, who has conducted research into fresh evidence appeals, stated in her consultation response that "the evidence would appear to suggest that fresh evidence appeals are very rare and the chances of succeeding are very slim".

6.66 There was also concern that while the test itself may be broad, the approach taken by the Court had considerably narrowed this. JENGbA argued that while the discretion to admit fresh evidence is "supposedly a wide one focussing on the interests of justice", in practice:

> The discretion is very rarely granted because the barriers to admission are so high. In fact, the default position appears to be that fresh evidence will not be admitted unless the defendant is able to convince the court that they and/or their legal representatives are not in any way at fault in failing to adduce it at trial.[58]

6.67 The Bar Council suggested that we "explore whether reframing the test as a broad one, with reference to 'interests of justice', would be preferable to the present position".

6.68 We are therefore satisfied that both the statutory framework for admitting fresh evidence, and how broadly that could or should be applied generally warrant some reconsideration.

Capable of belief

6.69 As noted above, the Runciman Commission was satisfied with the existing law on the admissibility of fresh evidence "subject to one point". That one point was that the requirement to admit evidence in certain circumstances rested on whether it was "likely to be credible". The Runciman Commission thought that this was too restrictive and should be changed to "capable of belief", which would be a "slightly wider formula giving the court greater scope for doing justice":[59]

> It would also have the advantage of reducing the occasions when the court has to exclude evidence that is relevant on the ground that the court is not persuaded of its

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57 Including, for example, the Bar Council.

58 Dr Stephanie Roberts made a similar point.

59 Report of the Royal Commission on Criminal Justice (1993) Cm 2263, p 174.

credibility, while at the same time leaving the court fully able to refuse to receive fresh evidence if it is not capable of belief.

6.70 In his response to the Issues Paper, barrister Chandra Sekar said:

> The rules are too restrictive on what constitutes fresh evidence and what is deemed by the CA itself to disqualify it from being received by the Court, particularly where the Court's assessment of "credibility" (fundamentally an issue of fact for a jury) is invoked to disqualify it.

6.71 Professors Nobles and Schiff suggest that the criterion "has been criticized for importing into the preliminary decision, about whether the evidence can be heard, an issue that should be judged once the application to hear has been granted".[60] Similarly, Dr Stephanie Roberts notes that in *Moate*, *Robinson*, and *Pratt*,[61] the Court appeared to suggest that it considered whether the conviction was unsafe as part of process of deciding whether evidence should be admitted.[62]

6.72 We start from the presumption that if there is relevant fresh evidence that could have led the jury to acquit, whether it is to be believed is ideally a matter for the jury at any retrial. We agree with the Runciman Commission that only if the fresh evidence is wholly incapable of belief should it not be admitted for the purposes of an appeal.

6.73 We see force in the criticism that the CACD has interpreted the consideration as to whether the fresh evidence is "capable of belief" narrowly, weighing the fresh evidence against other evidence in the trial with the approach that if, on balance, it prefers the other evidence, the fresh evidence is incapable of belief. We are also concerned that the CACD may have elevated an understandable scepticism towards certain types of evidence into a presumption of unreliability and inadmissibility.

6.74 We think the correct approach for the Court to take is the approach that it took in *Aslam*.[63] Having received fresh evidence which undermined the account given by the complainant at trial, that her husband had raped her repeatedly over a long period, the prosecution sought to have her give evidence to the CACD. The CACD refused:[64]

> while it is our duty to judge the force of the fresh evidence for ourselves, we are not to try the case. In our judgment [the] application to call the complainant came close to an invitation that we should do so. We should not merely have been assessing the new evidence. We would have been drawn towards conclusions as to the appellant's guilt or otherwise. … We acknowledge that there are cases in which the court has received evidence adduced by the Crown to rebut fresh evidence called for an appellant. They include instances where objective scientific material is

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60 R Nobles and D Schiff, *Understanding Miscarriages of Justice: Law, the Media and the Inevitability of a Crisis* (2000) p 76.

61 [2016] EWCA Crim 350.

62 S Roberts, "Fresh Evidence and Factual Innocence in the Criminal Division of the Court of Appeal" (2017) 81 *Journal of Criminal Law* 303, 324.

63 [2014] EWCA Crim 1292.

64 Above, at [18]-[19], by Laws LJ.

available which refutes the new testimony, or may do so. This case is in a different category.

6.75 We acknowledge that there will be cases where the fresh evidence of a witness will be impossible to reconcile with highly reliable evidence received at trial. If, for instance, a witness's account contradicts evidence from CCTV, it may well be reasonable for the Court to find that it is not credible. Much depends on the nature of the case and the type of fresh evidence. However, there are cases where evidence has been rejected as not being capable of belief because it did not accord with the evidence of other witnesses,[65] or even with the strength of the circumstantial case against the appellant.[66] In our view, that approach risks the Court asking not whether evidence is capable of belief, but whether the Court believes it, and thereby straying into an area which should be the province of the jury at a retrial. In this respect, we agree with the Runciman Commission[67] that if the evidence is relevant and capable of belief, and could have affected the outcome of the case, the Court should order a retrial unless this is not possible or practicable. We discuss this further in Chapter 8 on appeals against conviction from paragraph 8.90 below.

Admissibility

6.76 Admissibility was the one consideration which did not attract substantial criticism. That said, it is possible to conceive of fresh evidence which might not have been admissible in the proceedings below, but which would be admissible at an appeal (especially where those earlier proceedings preceded the changes to the law on hearsay and character evidence in the Criminal Justice Act 2003). That being so, we consider that evidence that was inadmissible at trial should not necessarily be inadmissible as fresh evidence in an appeal.

6.77 This reflects the CACD's existing practice in respect of "conclusive grounds decisions" by the Single Competent Authority that a person was a victim of modern slavery. Such determinations are not admissible at trial (on the basis that they are non-expert opinion evidence) but may be admitted for the purposes of an appeal.[68]

Reasonable explanation

6.78 The consideration as to whether there is a reasonable explanation for why the evidence was not produced in the proceedings from which the appeal lies received significant criticism from consultees.

6.79 Many felt that this consideration unfairly prejudiced the appellant for actions and decisions taken by their legal representatives. For example, the Cardiff University Innocence Project submitted:

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65 See for instance the case of Sam Hill ("Judges reject murder appeal", *The Independent* (28 May 1993)), where the fresh evidence was a confession given on oath to the CACD by another man saying that he had committed the murder in question. The conviction was later quashed by the CACD in 1995 after being referred back to the Court by the Home Secretary (*The Times*, 21 November 1995).

66 [2002] EWCA Crim 941, [2003] 1 Cr App R 11.

67 Report of the Royal Commission on Criminal Justice (1993) Cm 2263, p 175.

68 *R v Brecani* [2021] EWCA Crim 731, [2021] 1 WLR 5851.

> This makes the defendant pay the price for the lawyer's decisions, which is made more problematic by the fact that appealing on the basis of inadequate defence is extremely restricted. This is another Catch 22 in effect and one that is very hard for clients to accept or understand as fair.

6.80 Dr Stephanie Roberts, who, as noted above, has conducted research into fresh evidence appeals, stated that this is the "most problematic limb" as:

> [t]he Court is reluctant to hear the evidence if it is available at the trial because of its liking of the adherence to the principle of finality and also its dislike of lawyers potentially holding something back for the appeal. This causes problems in fresh evidence cases.

6.81 The Bar Council also acknowledged the need for finality and that it was important for the appeals process to not be exploited by appellants whose case strategy had failed at trial. However, against this it argued that the "reasonable explanation" consideration had little weight against the interests of justice. It stated:

> Put simply, if there were to be in existence material evidence, that was plainly capable of belief, admissible on a key issue, and which might reasonably provide a ground for allowing the appeal, the just outcome would clearly be to admit that evidence before the court and properly evaluate its impact, regardless of prior failings by the defence. To punish a defendant for what may have been a poor tactical decision taken at first instance by refusing to entertain an otherwise meritorious appeal would not obviously serve the interests of justice.

6.82 The Criminal Appeals Lawyers Association ("CALA") also recognised the need to deter appellants "from having a second bite at the cherry on appeal" but highlighted that the overarching test was the interests of justice, and that this consideration should not be used to defeat a possible meritorious appeal. CALA submitted that this consideration could be amended or removed.

6.83 The Law Society also suggested that the "reasonable explanation" consideration should be removed and highlighted that:

> There can be a variety of reasons why appellants did not have the evidence at their original trial. This can include failures on the part of the original legal team, fresh expert evidence or material that was not disclosed, or the significance of which was not appreciated.

6.84 JENGbA argued that the concern that an appeal would be used as a second attempt was disproportionate:

> The repeatedly expressed concerns … that defendants will use the trial as a "dry-run" for an appeal are, in our view, very much overstated. Defendants are well aware that their best chance of acquittal is before a jury and there is already every incentive for them to deploy such defence evidence as they have at trial.

6.85 While appreciating that defendants may sometimes be forced by the trial process to make a tactical decision which will not always pay off, we think there is force in in what JENGbA says for the reasons it gives.

6.86 However, we recognise that there will be circumstances where the law creates incentives not to deploy exculpatory evidence at trial. For instance,

(1) where the evidence would show that the defendant was clearly guilty of a lesser offence of which it would be open to the jury to convict the defendant;[69] or

(2) where adducing the evidence would enable the prosecution or a co-defendant to adduce bad character evidence against the defendant.[70]

6.87 In the New Zealand case of *Lundy*,[71] the Privy Council said that it is "important to recognise the need to hold the balance between the 'one trial' principle and the interests of justice". It quoted with approval the words of Justice Tipping in *Bain* that "the public interest in preserving the finality of jury verdicts means that those accused of crimes must put up their best case at trial and must do so after diligent preparation".[72] However, it went on to say that "where the new evidence presents a direct and plausible challenge to one of the central elements of the prosecution case, this factor ceases to be of such importance".[73]

Affording any ground for appeal

6.88 We agree with the CACD that this consideration cannot be determinative, or else it would exclude the prosecution from adducing fresh evidence. We think that in principle any evidence that is relevant to the determination of the appeal, whether in support of the appellant or the prosecution, should be admissible.

6.89 However, as discussed below, we do not consider that this means that the CACD should effectively be able to retry the appellant on a whole new evidential basis. In general, where the evidence on which a person has been convicted cannot stand, but there is new evidence of guilt on which they might properly be convicted, the correct approach – even where that evidence is overwhelming – should be a retrial so that a jury can assess the balance of the evidence as it now stands. To do otherwise means that the primary role of the jury in deciding the balance of evidence as to a person's guilt is usurped.

6.90 As discussed above, we agree with the Runciman Commission that only where a retrial is not possible should (indeed, must) the Court decide the matter for itself. We consider that it would be likely to bring the administration of justice into disrepute were a person's conviction to be quashed, with no possibility of retrial, where there is now overwhelming evidence of guilt – the situation that faced the CACD in *Hanratty*.[74]

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69 For instance, in *R v Solomon* [2002] EWCA Crim 941, [2003] 1 Cr App R 11 the defendant had a video recording which would have shown he was not guilty of rape but was guilty of sexual activity with a child.

70 Criminal Justice Act 2003, ss 101(1)(d)-(g), and 103-106.

71 [2013] UKPC 28 at [128], by Lord Kerr of Tonaghmore.

72 [2004] 1 NZLR 638, NZCA, at [22], by Tipping J.

73 [2013] UKPC 28 at [128], by Lord Kerr of Tonaghmore.

74 [2002] EWCA Crim 1141, [2002] 3 All ER 534.

Fresh prosecution evidence

6.91 In *Fitzgerald*, the Court said:[75]

> While this court can receive fresh evidence from the Crown, not only in rebuttal of the appellant's fresh evidence but also to demonstrate the safety of the conviction generally (see *Hanratty*), it is not open to the Crown to seek to put in fresh evidence so as to enable it to advance an entirely new basis for a conviction which was never put before the jury. That would require this court to act as if it were the jury and would run counter to the House of Lords' decision in *Pendleton*,[76] where it was said by Lord Bingham of Cornhill that the Court of Appeal "is not and should never become the primary decision-maker".

6.92 We agree with this principle. We would also note that the new prosecution evidence in *Hanratty* – his DNA, obtained after the CCRC secured the exhumation of his body, matched DNA found on the victim's underwear – was highly probative. Moreover, because Hanratty had been executed, a retrial was not possible.[77]

6.93 We think there are some circumstances in which the prosecution might try to adduce fresh evidence which, while not advancing an "entirely new basis for a conviction", might strengthen the prosecution's case in the face of fresh exculpatory evidence. This risks the CACD acting as if it were the jury.

Fresh expert evidence

6.94 In *Jones*, the CACD accepted that "it seems unlikely that section 23 was framed with expert evidence prominently in mind".[78] In particular,

> the requirement in subsection (2)(a) that the evidence should appear to be capable of belief applies more aptly to factual evidence than to expert opinion, which may or may not be acceptable or persuasive but which is unlikely to be thought to be incapable of belief in any ordinary sense.

6.95 In response to the Issues Paper, the Cardiff University Innocence Project said:

> Where fresh evidence is sought through new expert opinion, defendants are often accused of "expert shopping." However, this is again sometimes necessary to show how errors have occurred at the trial stage, or to explore new developments in scientific or psychological understanding.

6.96 JENGbA argued that the current test allows the CACD to refuse to admit fresh expert evidence:

> in *R v Janhelle Grant-Murray and Alex Henry*,[79] the defendant [Henry] called evidence from Professor Baron-Cohen, one of the country's foremost experts on

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75 [2006] EWCA Crim 1655, (2006) 150 SJLB 985 at [35], by Keene LJ.

76 *R v Pendleton* [2001] UKHL 66, [2002] 1 WLR 72 at [19], by Lord Bingham of Cornhill.

77 See *R v Hanratty (dec'd)* [2002] EWCA Crim 1141, [2002] 3 All ER 534.

78 *R v Jones* [1997] 1 Cr App R 86, CA, 93.

79 [2017] EWCA Crim 1228, [2018] Crim LR 71.

autism to the effect that (1) he was suffering from that condition, (2) that his condition had been undiagnosed at the time of the trial and (3) that had the jury known about his condition it may have affected the jury's assessment of his credibility and the way they interpreted his answers when giving evidence. In refusing to admit the evidence, the Court of Appeal, whilst acknowledging Professor Baron-Cohen's "expertise and integrity" went on to effectively discount his diagnosis and the evidence that he gave about the impact that knowledge of an autism diagnosis may have had on the jury (this despite the fact that the Crown called no expert evidence in rebuttal). Many prospective appellants will wonder how they could ever succeed in convincing the Court of Appeal that it was in the interests of justice to admit fresh evidence when the Court of Appeal refused to admit the evidence of one of the most senior experts in his field.

6.97 Drawing together these issues, the London Criminal Courts Solicitors Association ("LCCSA") suggested that the Court's approaches to credibility, expert evidence, and whether evidence could have been adduced at trial created a formidable obstacle for convicted persons whose conduct was arguably attributable to their being a victim of abuse.

> With respect to capable of belief, in the context of expert evidence, the Court of Appeal will often reject newly obtained expert evidence when the expert's opinions are based on the account of the applicant. In the context of coercive control/domestic violence cases where women kill their abusers this can be unjust as there is an emerging body of evidence which shows that women defendants in particular often are only able to set out exactly what happened at the time of the index offence after their trial and sentence. This is because, having been remanded into custody on arrest, over time and usually after the trial they start to heal and recover from trauma and with support are able to set out their account which an expert will be asked to consider. We are aware that the Commission is conducting a separate review in relation to victims who are prosecuted[80] and there is clearly an overlap here.

6.98 We accept that a defendant whose expert evidence was not accepted by the jury should not be able simply to seek to present evidence before the CACD as "fresh evidence" where it merely reaffirms expert evidence given on behalf of the defendant at trial. It is recognised that expert evidence may be "interchangeable" in a way in which witness testimony is usually not.

6.99 However, ultimately the test for the CACD is the safety of the conviction. In *Kai-Whitewind*, Lord Justice Judge (as he then was) said:[81]

> The fact that the expert chosen to give evidence by the defence did not give his evidence as well as it was hoped that he would, or that parts of his evidence were exposed as untenable … thereby undermining confidence in his evidence as a whole does not begin to justify the calling of further evidence.

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80 See Law Commission, "Defences for victims of domestic abuse who kill their abusers". This review now forms part of our wider homicide project: Law Commission "Reviewing the law of homicide".

81 [2005] EWCA Crim 1092, [2005] 2 Cr App R 31 at [97], by Judge LJ.

6.100 The test in section 23 is "in the interests of justice", and we do not consider that the interests of justice are served by rejecting expert evidence that could expose a wrongful conviction where expert evidence had previously been (but which the jury by its verdict must be assumed to have rejected). We are strengthened in this by the fact that many miscarriages of justice have resulted because experts who *did* give their evidence "as well as it was hoped that [they] would" were subsequently shown to have been wrong and speaking beyond their expertise.[82] There is a risk that jurors may conflate an expert's self-expressed confidence and certainty with the reliability of their evidence. (We note that in civil cases, when a judge is assessing the credibility of an expert witness, it will usually be to the expert's credit if they make appropriate concessions; we do not know whether jurors approach expert evidence in this way.)

6.101 A particular challenge that defendants may face is that a conviction in a case could prompt further scientific debate and inquiry. Science does not conform to the timescales associated with a trial, and it may only be when the assertions of the expert witness have percolated through the relevant profession, the media, and perhaps specialist networks, that the flaws in expert testimony will emerge.[83]

6.102 In respect of post-conviction diagnoses, it is not unknown for a person to be diagnosed with a condition (such as Autistic Spectrum Disorder or Attention Deficit Hyperactivity Disorder) only after they come into contact with the criminal justice system.[84] Knowledge that the defendant had such a condition, had it been known about at trial, might have cast a different light on the evidence against them, the evidence that they gave, or their appearance or credibility at trial. Had the judge known about it, it may have been highly relevant to their culpability or provided mitigation.

6.103 For instance, in *Sossongo*,[85] the Court quashed the conviction of a 14-year-old (at the time of the trial) for murder on the basis of joint enterprise. Sossongo was not present at the scene, but was convicted on the basis that he had been a secondary party by virtue of staying with a taxi nearby during the attack, thereby enabling it to be used to escape afterwards. Sossongo was subsequently diagnosed with autism and ADHD (Attention Deficit Hyperactivity Disorder). The CACD held that because the jury was unaware of his diagnosis, it may have wrongly rejected his explanations of what he was doing and what he perceived to be happening, and may have been unable to

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82 See discussion in Chapter 17 and Appendix 3.

83 An example of this is *R v Bowler* (1997) (unreported). Mrs Bowler was convicted of the murder of her elderly aunt, who both prosecution and defence had believed would have been incapable of making her own way to the area in which her body was found, and must therefore have been murdered (the dispute being as to who had murdered her). Mrs Bowler's conviction "received considerable press and television coverage" and "members of the public wrote letters recording incidents in which elderly relatives suffering incipient dementia and believed to be incapable of significant movement had performed physical feats of which even those who knew them best believed them to be incapable". The Court of Appeal admitted, upon a reference by the Home Secretary, expert evidence that the hypothesis that the deceased had left the car where Mrs Bowler had left her, and made her own way to the river where she was found drowned, could not be ruled out. At a retrial, Mrs Bowler was found not guilty.

84 See for instance S Young and others, "Identification and treatment of offenders with attention-deficit/hyperactivity disorder in the prison population: a practical approach based upon expert consensus" (2018) 18 *BMC Psychiatry* 281.

85 [2021] EWCA Crim 1777.

assess his credibility. In this case, the Court considered that it was notable that a co-accused who had played a greater role in the offence, but whose diagnosis (for autism and ADHD) *was* before the jury, was acquitted. The conviction was quashed, and a retrial ordered, at which the jury acquitted the defendant.

6.104 In some cases, a person's circumstances may disinhibit frank disclosure before or during trial. One example is where a person is a victim of domestic abuse (see paragraph 6.97 above). That person may not even realise that they have been a victim of abuse until they are separated from their partner – for instance, because they have been incarcerated, or because they have killed their partner.

6.105 It can be common for victims of domestic abuse not to disclose the abuse until after conviction; some may do so only after they are sentenced or imprisoned.[86] This may be through sharing experiences with other prisoners who have experienced abuse, given the high prevalence of women in prison with histories of domestic abuse.[87] Victims may also participate in programmes in prison such as the Freedom Programme which help them to understand and recognise their experience as abuse.[88]

6.106 The CACD is understandably reluctant to admit fresh expert evidence where that evidence is reliant on an account from the convicted person differing from that given at trial. However, there may be good reasons why a person gives one exculpatory account at trial, but a different exculpatory account later. The fact that the jury rejects the first does not necessarily mean that the second is untrue. As the *Lucas* direction, which judges are required to give juries when a witness has lied, states, the fact that a person has lied about one thing does not mean that they have lied about everything.[89]

Conclusion

6.107 We think that the approach to fresh evidence in section 23 of the Criminal Appeal Act 1968 is broadly sound: the Court should admit the evidence when it is in the interests of justice, having regard to the four listed considerations.

6.108 There is force in the concern of consultees that the Court frequently expresses, and occasionally applies, the four considerations as though they are tests which *must* be met if evidence is to be admitted.

6.109 Like the Runciman Commission – and despite the changes to the wording in the Criminal Appeal Act 1968 that were implemented in response to its concerns – we are

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86 N Sakande, *Righting Wrongs: what are the barriers faced by women seeking to overturn unsafe convictions or unfair sentences in the Court of Appeal (Criminal Division)?* (2020, Griffins Society); Centre for Women's Justice, *Women Who Kill: how the state criminalises women we might otherwise be burying* (2021) p 54.

87 The Prison Reform Trust found that 57% of women in prison in England and Wales report having been victims of domestic abuse as adults. (Prison Reform Trust, "There's a reason we're in trouble: Domestic abuse as a driver to women's offending" (2017) p 7). The figure for women generally is 27% (ONS, Domestic abuse prevalence and victim characteristics: year ending March 2023, Table 1a, available at https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/domesticabuseprevalenceandvictimcharacteristicsappendixtables).

88 See P Craven, *Living with the Dominator: A Book About the Freedom Programme* (2008).

89 *R v Lucas* [1981] QB 720, CA.

concerned that the Court may give the appearance of too readily concluding that evidence is not *capable of belief* because it does not believe it. This risks the Court being seen to stray into matters which should be the province of a jury at a retrial.

6.110 We have considered whether it would be better to impose a duty to admit fresh evidence in certain circumstances – essentially to return to the position that existed before 1995. However, we note that the same concerns were expressed when the law did impose such a duty. That the courts had interpreted the duty in section 23(2) of the 1968 Act (as initially enacted) as being "mandatory in appearance only" provisionally persuades us that any problems there may be are those of practice, and the Court's approach to fresh evidence, rather than the formulation of the legal test itself.

6.111 Additionally, we acknowledge submissions made to us that the section 23 test can be especially challenging for female offenders who have suffered abuse. Drawing on their report *Women who Kill*,[90] the Centre for Women's Justice told us that its experience showed that women may find it very difficult to disclose abuse they have suffered or may not realise the full scope of the abuse to which they have been subjected. We recently published a background paper, Defences for victims of domestic abuse who kill their abusers, which noted issues with fresh evidence, appeals and abuse.[91]

6.112 APPEAL raised similar concerns, arguing that the restrictiveness of the test means that the Court "avoids seeing the greater picture that demonstrates miscarriage of justice", and that in the case of *AWJ*,[92] who it represented on appeal, the appellant was improperly subjected to cross-examination, including questioning as to why she had not left her partner and why her accounts had changed:

> The "reasonable explanation for failure to adduce" consideration can be difficult to overcome for appellants where their trial representatives did not obtain evidence that was available for them to obtain at the time of trial, such as records of abuse. In *R v AWJ*, APPEAL obtained an expert report from a clinical psychologist which offered an explanation for why our client had not initially disclosed such abuse. There was also an application by a charity organisation that supports women who have been victims of abuse to submit a Third-Party Intervenor's Statement. This report explained in detail the extensive research into how long it takes victims of abuse to make disclosures of such abuse, and how it can be even longer for women from minority ethnic backgrounds, such as our client.

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90 Centre for Women's Justice, *Women Who Kill: how the state criminalises women we might otherwise be burying* (2021) p 21.

91 Defences for victims of domestic abuse who kill their abusers (2024) Law Commission Background Paper. As alluded to above, this review now forms part of the wider homicide project.

92 *R v AWJ* [2021] EWCA Crim 1776. In this case, the appellant had been convicted of causing or allowing the serious physical harm of a child. Initially, she had claimed that the injury had been caused by accident. On appeal she argued that she had been punched in the head by her physically, sexually and emotionally abusive partner, causing her to drop her child. APPEAL was critical of the Court's decision not to admit the fresh evidence pertaining to this alleged abuse which included reports from two doctors as well as evidence from the appellant herself, and to exclude the evidence of the intervenor.

6.113 The approach in *AWJ* can be considered with the CACD's approach in *Martin*, where the Court admitted fresh psychiatric and psychological evidence in relation to domestic abuse, observing:[93]

> It is right to say that the appellant did not before trial refer to a rape that she now says occurred when she was 15 years old. However, the fresh expert evidence identifies the mental health difficulties of the appellant at the time of the killing and whilst in custody. Dr Anagnostakis also states that there is a recognised psychological difficulty in someone disclosing that he/she has been a victim of sexual abuse as part of a "symptom cluster known as avoidance". The relevant material has therefore developed over time.

6.114 Therefore, though appellants who disclose abuse after conviction face the additional hurdle of explaining why such information was not adduced at trial, *Martin* suggests an increased openness of the Court to recognise that there are good reasons why such evidence was not adduced at trial.

6.115 Our provisional proposal below therefore aims to ensure that the section 23 factors are treated as considerations and not preconditions. We are provisionally of the view that to achieve this does not require legislative reform, but welcome consultees' views on that issue.

Consultation Question 17.

6.116 We provisionally propose that the test for admitting fresh evidence in section 23 of the Criminal Appeal Act 1968 should remain "in the interests of justice", provided that the considerations in subsection (2) are treated as such rather than as criteria which must be met before fresh evidence can be admitted.

Do consultees agree?

COURT-APPOINTED OR "INDEPENDENT"[94] EXPERTS ON APPEAL

6.117 In preparing this paper, we identified a potential issue in the lack of a bespoke power of the CACD to appoint its own experts to assist it in determining appeals.

6.118 Section 23 of the Criminal Appeal Act 1968 is permissive. Section 23(1)(b) allows the CACD to order "any witness" to attend and be examined. Section 23(1)(c) allows it to receive "any evidence which was not adduced in the proceedings from which the

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93 *R v Martin* [2020] EWCA Crim 1798 at [25], by Carr LJ.

94 As we said in Expert evidence in criminal proceedings in England and Wales (2011) Law Com No 325 at footnote 1 to para 6.1:

> By an "independent" expert we simply mean an expert witness called by the judge rather than by a party. All expert witnesses have an overriding duty to give objective, unbiased evidence, so in truth all expert witnesses are independent witnesses for the court. …

Similarly, when below we describe issues with the expert evidence regime, we focus on the deployment of that evidence by parties and the potential difficulties judges face, not on issues with experts themselves.

appeal lies". (It should be noted that sections 31 and 31A grant the single judge and Registrar respectively the power to order witnesses to attend for examination and make orders for the production of documents, exhibits or other things under section 23(1)(a).) Additionally, section 23A enables the CACD to direct the CCRC to investigate and report to the Court on certain matters relevant to or necessary to resolve appeals (and applications for leave to appeal) against conviction.

6.119 However, inevitably in an adversarial system, these provisions tend to be used in response to prepared applications by applicants/appellants and respondents. This often means parties applying under section 23 to adduce the evidence of experts instructed by them, or appearing to present evidence amenable to them.[95]

6.120 Often, the Court will be in the situation where it must evaluate the admissibility and impact of expert evidence adduced by one side that appears to favour that side, but this is not always the case. As with many trials themselves, not only may one expert prevent equivocal or qualified views, but both sides may instruct competing experts and this might be seen as addressing concerns about expert evidence being used to favour one side or the other.[96] In addition, expert evidence is regulated by the Criminal Procedure Rules 2020 and the Criminal Practice Directions 2023, which provide for requirements of statements of truth. Those rules make clear that an expert's overriding duty is to the court and not to the party instructing that expert.

6.121 Rule 19.7 of those Rules provides for the possibility for the court to appoint a single joint expert. However, these experts are as between co-defendants, not defendants and the prosecution.

6.122 Unlike Criminal Procedure Rule 19.7, rules 35.7(1) of the Civil Procedure Rules and 25.11(1) of the Family Procedure Rules permit the court itself to appoint a single joint expert where "two or more parties wish to submit expert evidence on a particular issue".

6.123 In our 2011 report, Expert Evidence in Criminal Proceedings in England and Wales, we recommended a statutory power for a Crown Court judge to "appoint an independent expert to assist him or her when determining whether a party's proffered expert opinion evidence is sufficiently reliable to be admitted".[97] The Government did

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95 For instance, in the recent case of *R v Campbell* [2024] EWCA Crim 1036, despite the fact that experts' reports had been ordered by the CCRC and not the appellant, the appellant successfully applied to adduce the two experts' oral evidence, which he used to argue that the application of modern procedure, standards and scientific understanding would have affected the jury's decision to convict him in 1991: [109]-[111], by Holroyde LJ VPCACD. The prosecution did not seek to adduce expert evidence on appeal.

96 Or experts instructed by the appellant and respondent on appeal may largely agree. In *R v ABQ* [2024] EWCA Crim 310, [2024] MHLR 169 an appeal against sentence, both experts gave evidence largely supporting the appellant's argument that her mental state made the sentence imposed at trial manifestly excessive. Though the Court allowed the appeal to a limited extent, it disagreed with the experts in two respects as to the appellant's understanding of the wrongfulness of her actions, meaning that it was not persuaded at [30] "that any very substantial reduction in sentence is appropriate" and, at [42] (by Holroyde LJ VPCACD), formally declined to receive their evidence.

97 Expert evidence in criminal proceedings in England and Wales (2011) Law Com No 325, para 6.78.

not adopt our recommendations on court-appointed experts, citing concerns with efficiency and the cost of setting up, maintaining and administering such a scheme.[98]

6.124 Though the notion of court-appointed experts was supported by consultees and several academics[99] at the time, consultees also saw the potential power as a rarely-needed one, and our recommended court-appointed expert process was criticised as "rather cumbersome and labour-intensive" and seen as analogous with United States courts' ability to appoint experts, a power said to be "hardly ever exercised".[100]

6.125 We acknowledge the potentially disproportionate time and monetary costs of any court-appointed expert power, but think that such a power may have a particular utility in CACD proceedings rather than in first instance Crown Court trials. This is because in criminal appeals it is the Court's own assessment of the reliability of expert evidence presented to it that can be central to finding that a conviction is unsafe or a sentence wrong in principle or manifestly excessive. In such cases, CACD judges might well consider that they would be assisted by a report prepared for the Court, rather than for one of the parties, namely the appellant or the prosecution. There could be restrictions put on the exercise of such a power, for example by limiting it to certain grave offences. We understand that court-appointed experts in the civil jurisdiction are more the exception than the rule. We consider that it is a potentially significant omission in the powers of the CACD that the Court cannot presently do this. We seek consultees' views accordingly.

6.126 (At paragraphs 11.195 to 11.199 below, we also discuss the possibility of the CACD making greater use of the CCRC to investigate and report to it, where this would be useful to the determination of an appeal. This might provide an additional route to the CACD having before it expert evidence which had not been solicited by one of the parties to the appeal.)

Consultation Question 18.

6.127 We invite consultees' views on whether the Court of Appeal Criminal Division should have a power to appoint its own experts in order to assist it in determining appeals, what the nature of such a power might be and what constraints (if any) there should be on the exercise of such a power.

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98 Ministry of Justice, "The Government's response to the Law Commission report: *'Expert evidence in criminal proceedings in England and Wales'* (Law Com No 325)" (21 November 2013) paras 22-25.

99 See C Pamplin, "Underwhelming Developments" (2006) 156 *New Law Journal* 1082 and A Roberts, "Drawing on Expertise: Legal Decision-making and the Reception of Expert Evidence" [2008] *Criminal Law Review* 443, 446, both cited in A Wilson "Expert Opinion Evidence: The Middle Way" (2009) 73(5) *Journal of Criminal Law* 430.

100 G Edmond, "Is reliability sufficient? The Law Commission and expert evidence in international and interdisciplinary perspective (Part 1)" (2012) 16 *International Journal of Evidence and Proof* 30, 38 and 49.

LOSS OF TIME ORDERS

6.128 In Chapter 4, we provisionally proposed at Consultation Question 4 that, in principle, a person should not be at risk of having their sentence increased as a result of appealing against their conviction or sentence, as this could discourage meritorious appeals (and will not necessarily discourage unmeritorious appeals).

6.129 The CACD may not impose a "more severe" sentence when resentencing a person following a successful appeal against conviction (leaving them convicted of one or more offences). Nor may a court hearing a retrial following a successful appeal against conviction impose a heavier penalty than was imposed in the original proceedings. A person who *successfully* appeals against their sentence (or their conviction, and who is then resentenced for other offending of which they were convicted) is therefore protected from receiving a more severe penalty.

6.130 The CACD may, however, in some circumstances, make a "loss of time" order where an application for leave to appeal is found to be unmeritorious.[101]

6.131 In general (and unlike the situation that pertains in some legal systems), time spent in custody pending determination of an appeal is treated as part of the sentence.[102] However, the CACD may direct that this time, or some part of it, is not treated as such. However, it cannot do so where (i) leave to appeal had been granted, (ii) the trial judge had certified the case as being fit for appeal, or (iii) the case was referred by the CCRC.[103]

6.132 Such orders are intended to enable the Court to discourage unmeritorious applications by directing that time spent in custody by the appellant pending the determination of their appeal may not count towards their sentence[104] – effectively extending the time to be served.

6.133 A loss of time order may be made by the single judge or the full court.[105] Single judges have not exercised the power to make a loss of time direction since 2007 and it is the CACD's stated practice for them not to do so.[106] However, following the determination of the application for leave, if they consider that the application is wholly without merit the single judge may indicate (by initialling a box on the refusal of leave) that the full court should consider making a loss of time order if the application is renewed.[107]

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101 *R v Gray* [2014] EWCA Crim 2372, [2015] 1 Cr App R (S) 27 at [1]-[10], by Hallett LJ VPCACD.

The form that is returned to the applicant makes it clear that there are potential loss of time order consequences for an unmeritorious renewal to the full court.

102 Criminal Appeal Act 1968, s 29(1).

103 Above, s 29(2).

104 Above, s 29(1).

105 Above, s 31(2)(h).

106 Judiciary of England and Wales, *Guide to Proceedings in the Court of Appeal, Criminal Division* (January 2024) para C.5.1.

107 *R v Gray* [2014] EWCA Crim 2372, [2015] 1 Cr App R (S) 27 at [7], by Hallett LJ VPCACD.

6.134 The full court, in turn, is only likely to make a loss of time direction if the single judge has made that indication. However, the fact that the single judge has not done so does not preclude the full court from making a loss of time order in an appropriate case.[108]

6.135 A loss of time order may also be made by the Court where an application to reopen a final determination of the Court (see paragraphs 6.174 to 6.182 below) is found to be unmeritorious.[109]

6.136 In practice, loss of time orders are rare, and tend to be for a small number of weeks (14 or 28 days seems to be typical, with 56 days for particularly egregious cases). However, research undertaken for the CCRC found that this was not well understood by prisoners and the prospect of a loss of time order could be acting to deter meritorious appeals, with a significant number of prisoners believing that they could be required to begin their sentence again.[110]

Consultation responses

6.137 We did not ask a specific consultation question on loss of time orders. However, several respondents did raise the issue of loss of time orders in their responses.

6.138 Paul Taylor KC said:

> Whilst we recognise that unmeritorious applications for leave require the resources of the Criminal Appeal Office, we do not think that an applicant who seeks to challenge his conviction or sentence should be penalised by a loss of time direction – particularly where public funding for a second opinion advice is almost non-existent and many applicants are unrepresented.
>
> There is evidence that the prospect that the Court of Appeal might increase an appellant's time to be served because of an unsuccessful appeal is deterring cases which might be meritorious, notwithstanding that in practice the Court rarely imposes this penalty, does so only when an appeal was totally without merit, and rarely uses this power where the single judge who refused leave to appeal has not warned the applicant by ticking the box on the refusal warning of the risk of a loss of time order.

6.139 APPEAL described loss of time orders as "disproportionate penalties, arbitrarily imposed, and unfair to unrepresented applicants in particular". For APPEAL,

> the mere possibility of such an order being made risks having an unacceptable "chilling effect" on meritorious applicants, who may be deterred from lodging proceedings with the Court of Appeal.

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108 *R v Hart* [2006] EWCA Crim 3239, [2007] 1 Cr App R 31; *R v Gray* [2014] EWCA Crim 2372, [2015] 1 Cr App R (S) 27.

109 *R v CC* [2019] EWCA Crim 2101, [2020] 1 WLR 1203 at [47], by Lord Burnett of Maldon CJ.

110 K Telhat, *Loss of Time Orders: Research Report* (Criminal Cases Review Commission, 2021).

6.140 APPEAL also drew attention to research by Naima Sakande, which had found:[111]

> that many [legal professionals] thought the loss of time order had a "chilling effect on taking proper appeals", with "the lower the sentence, the more chilling effect the risk of adding on time to deter an appeal".

6.141 The CCRC proposed that the single judge should no longer be able to make a loss of time order, because their own research "suggests that although not exercised in practice, this power acts as a significant deterrent to potentially meritorious applications to the Court of Appeal".

Conclusion on loss of time orders

6.142 We are provisionally persuaded that the current statutory regime for loss of time orders may be discouraging some meritorious appeals. This may well be attributable in part to the fact that the Court's stated practice is not well understood by prisoners – something which could possibly be addressed by providing more clarity about how they are used.

6.143 However, it seems possible that some prisoners may be deterred from bringing a meritorious appeal, even though they are correctly advised that the risk is very low. For instance, in *Holland*,[112] the appellant had abandoned an appeal against conviction for gross negligence manslaughter and an associated health and safety offence. He had been sentenced to nine months' imprisonment after one of his workers had died in an accident. At an application to reinstate the appeal, his lawyer explained that Mr Holland – who had been due to be released 11 days after the scheduled appeal hearing – "was very concerned that he may have to spend additional time in prison if his appeal failed even though he was reassured this was a very small risk". The Court concluded that "he was focused particularly on the risk, small though he was advised it was, that if he lost, the court would have power to order a loss of time against him".

6.144 The potentially chilling effect of loss of time orders may also reflect the fact that the theoretical maximum loss of time could be considerable. At present, although loss of time orders are generally limited to 28 days, or in exceptional cases 56 days, in theory the whole time from lodging the appeal to its being heard is capable of being lost.[113]

6.145 Just as a lawyer advising a client would be required to explain that there is a risk of a loss of time order even though that risk may be very small, they would also have to explain that although, in practice, the Court would only order loss of time of a few weeks, in theory it might order the whole time between lodging an application and it being determined not to count.

6.146 This may not have amounted to much when appeals were typically disposed of within weeks. However, it can now be many months before an appeal is heard. The average time for an application for leave to appeal against conviction to be dealt with where the

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111 N Sakande, *Righting Wrongs: What are the barriers faced by women seeking to overturn unsafe convictions or unfair sentences in the Court of Appeal (Criminal Division)?* (2020, Griffins Society) p 39.

112 [2021] EWCA Crim 1056.

113 However, as explained above, the Court's practice is in effect to make the order from the time between the application being *renewed* and finally determined, not *lodged* and finally determined.

applicant renews their application before the full court (in practice, the only scenario where an order would be made) is over a year. This problem could be addressed by making the statutory power align much more closely with the practice of the Court.

6.147 We note the evidence that the threat of a loss of time order may have a particularly adverse effect on convicted women. We also acknowledge that loss of time orders may disproportionately discourage prisoners serving shorter sentences. As Professor Kate Malleson has noted, this group of prisoners may have their time in prison increased by a greater proportion than longer-sentenced prisoners.[114] As women typically serve shorter sentences than men, loss of time orders may disproportionately dissuade the former from issuing appeals.

6.148 Moreover, we note that the National Association for Youth Justice argued that, given the barriers to accessing justice faced by children, including difficulties obtaining specialist representation and a lack of appeal advice, children should not be penalised for trying to appeal convictions and sentences.

6.149 We have given consideration to a proposal by Paul Taylor KC that the power should be proportionate to the length of the convicted person's sentence, subject to a maximum loss of time of two weeks. We can see that the possible loss of time which equates to a high proportion of the sentence to be served is likely to act as a disincentive. However, Paul Taylor also proposes that the maximum loss of time should be limited to two weeks even for those on the longest sentences; if that is the case, any reduction for proportionality would mean that the maximum loss of time order for someone on a short sentence might be trivial. In addition, it is very unlikely that an appeal against conviction involving a prisoner serving a sentence of a few months would be dealt with while the prisoner remained incarcerated. (The situation may be different for a sentencing appeal, as these are often dealt with much more quickly.) Where the convicted person has completed their sentence, there is no power to make a loss of time order. Accordingly, the practical ability to impose a loss of time order where a short prison sentence has been imposed is severely limited – although a prisoner considering making, or renewing, an application for leave may not appreciate this. Finally, most of those serving a sentence of a few months will have been convicted and sentenced in the magistrates' court, and the appeal would not lie to the CACD in any event.

6.150 We think the case for removing the power to impose a loss of time order from the single judge who hears an application for leave to appeal is strong, and would prevent applicants with meritorious claims from being deterred by the prospect of spending additional time in custody. As we said at paragraph 6.133, single judges have not exercised that power since October 2007. However, regardless of whether loss of time orders are wrong in principle, we believe that there is a problem with the potentially broad and draconian legal power to make a loss of time order, when compared with the actual practice of the CACD.

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[114] K Malleson, "Miscarriages of Justice and the Accessibility of the Court of Appeal" [1991] *Criminal Law Review* 323.

6.151 We are conscious that (i) legal advisers would have to advise their clients as to the worst-case scenario; and (ii) many prisoners will be reliant upon informal advice from fellow prisoners.

6.152 Applicants are warned in standard forms used when making an application to appeal of the high threshold applied before making a loss of time order (in the Easy Read application form they are warned of both the high threshold and the usual length of 14 to 56 days). The form used where the single judge refuses leave to appeal also warns the applicant where their application has been found to lack merit, and of the possibility of a loss of time order. Nonetheless, it remains legally possible for the time the applicant has spent in custody between application and its determination to be ordered not to count towards their sentence; and for the full court to make an order despite the single judge not putting the applicant on notice by initialling the box on the form they return to the applicant. It is also legally possible to impose a loss of time order even though the single judge has not indicated (by ticking the relevant box on the refusal of leave) that the applicant is at risk of one.

6.153 We therefore provisionally conclude that the maximum loss of time and the circumstances in which a loss of time order may be imposed should be more closely aligned with the actual practice of the CACD.

6.154 We provisionally conclude that greater clarity and explicit limits are needed. The present limit in practice of 56 days should be a formal one. The fact the CACD *can* make much longer orders is likely to deter some meritorious appeals and may contribute to the widespread misunderstanding of loss of time orders that has been recorded. Additionally, we provisionally conclude that loss of time orders should only be available where:

(1) first, an applicant's application for leave to appeal has been refused by the single judge as wholly without merit;

(2) secondly, the applicant has been warned that, if they renew their application to the full court, they are at risk of a loss of time order; and

(3) thirdly, the applicant renews their application before the full court, which rejects it as totally without merit.

Consultation Question 19.

6.155 We provisionally propose that the power of the Court of Appeal Criminal Division to make a loss of time direction, ordering that time counted between the making of an application for leave to appeal and its determination not be counted as part of an applicant's sentence, should be limited to a period of up to 56 days of that time.

Do consultees agree?

Consultation Question 20.

6.156 We provisionally propose that the CACD should only be able to make a loss of time direction where:

(1) the application for leave to appeal has been refused by the single judge as wholly without merit;

(2) the applicant has been warned that, if they renew their application before the full court, they are at risk of a loss of time order; and

(3) the application is renewed to the full court and rejected as wholly without merit.

Do consultees agree?

Consultation Question 21.

6.157 We invite consultees' views on whether the CACD should no longer be able to make loss of time directions.

A "SLIP RULE" FOR THE CACD

6.158 The term "slip rule" refers to the ability of a court to correct an accidental slip or omission in a judgment or order. Although it is common to refer to a "slip rule" across different courts, there are in fact separate provisions governing different jurisdictions and courts.

6.159 A magistrates' court has a power under section 142 of the Magistrates' Court Act 1980 to vary or rescind a sentence or other order imposed or made by it when dealing with an offender if it appears to the court to be in the interests of justice to do so. This power extends to replacing a sentence or order which for any reason appears to be invalid. The power cannot be exercised if an appeal to the Crown Court has been determined or the High Court has determined an appeal by way of case stated. This power was extended by the Criminal Appeal Act 1995, including allowing magistrates' courts to amend a sentence or other order imposed following a guilty plea, allowing the power to be exercised by a different constitution of the magistrates' court, and abolishing a 28-day time limit. (These changes were effected to avoid cases having to be dealt with by the Home Office under the Royal Prerogative of Mercy.)

6.160 Under section 385 of the Sentencing Code, the Crown Court may vary (downwards or, exceptionally, upwards) or rescind a sentence at any time within the period of 56 days beginning with the day on which the sentence was imposed. Section 385 does not apply where an appeal against that sentence, or an application for leave to appeal against that sentence, has been determined. The Crown Court's powers under the

"slip rule" are limited to varying or rescinding "a sentence imposed, or other order made, by the Crown Court when dealing with an offender".

6.161 The power must be exercised by the same constitution of the court (excluding any magistrates). In practice, therefore, the power will lie with the sentencing judge or with the judge who sat with magistrates to hear an appeal against conviction or sentence from the magistrates' court.

6.162 Amendment of a sentence under the "slip rule" restarts the 28-day limit for bringing an in-time appeal against sentence or a reference by the Attorney General against an unduly lenient sentence.

6.163 The High Court's jurisdiction in criminal appeals by way of case stated is governed by the Criminal Procedure Rules; when exercising its supervisory jurisdiction in a criminal case, however, it is governed by the Civil Procedure Rules. Thus, upon an appeal by way of case stated, it is not clear whether the High Court has the power to correct a ruling. In a judicial review, however, the power is available under rule 40.12 of the Civil Procedure Rules.

6.164 As stated, the CACD does not have a "slip rule". However, as discussed below at paragraphs 6.174 to 6.182 below, it has the ability to reopen a determination before it is recorded by the Crown Court, and – in limited circumstances – afterwards.

6.165 In addition to its powers to substitute a conviction for a lesser offence on allowing an appeal against conviction, the CACD has wide powers to sentence a person afresh after quashing one or more convictions, leaving one or more other convictions in place. Moreover, when it resentences a person, following a successful appeal against either conviction or sentence, it may have to consider ancillary issues that would normally be addressed by the trial court, such as imposition of the Victim Surcharge, driving disqualification or a Sexual Harm Prevention Order. In some cases, a change in the offences of which the person stands convicted or the sentence imposed may affect which orders are available or applicable. For instance, where a sentence for a driving-related offence is amended, this may necessitate changes to the period of disqualification. Where a sentence is reduced on appeal, or a conviction on one count being quashed results in the overall reduction of a sentence imposed, the CACD may be required to reduce the Victim Surcharge that is payable. It is therefore entirely possible that a technical difficulty with the relevant order may not be noticed when the sentence is first amended.

6.166 The CACD is understandably anxious that its present power to reopen a determination should not be used so as to afford an unsuccessful appellant a way of challenging any decision with which they disagree. In *Melius*, where an attempt was made to reopen a case with a view to challenging sentences, Lady Justice Hallett, Vice-President of the CACD, said:[115]

> [*Yasain*[116]] was not intended to open the doors to a flood of misconceived applications to reopen appeals. Those who believe they have grounds for a

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115 [2016] EWCA Crim 1538 at [7], by Hallett LJ VPCACD.

116 *R v Yasain* [2015] EWCA Crim 1277, [2016] QB 146.

rehearing of an appeal may, in appropriate circumstances, make an application to the CCRC. An application to reopen an appeal is not the appropriate avenue. Only, we repeat, only in exceptional circumstances will this court consider an application to reopen an appeal.

6.167 In addition, circumstances where an error is made will not always amount to "real injustice" so as to justify applying the exceptional power to reopen a determination. Indeed, in some cases, they may make no substantive difference at all; for instance, where a court redistributes the length of consecutive sentences, or the balance of consecutive and concurrent sentences, in order to ensure that each is lawful, without changing the overall time to be served.

6.168 It is also unlikely that an appeal in such a circumstance would raise a point of law of general public importance, so as to justify an appeal to the Supreme Court. It would be open to the defendant to pursue an application to the CCRC. However, we think that this would be an onerous and unnecessary requirement which is to be avoided, if at all possible, for a minor amendment. Moreover, this route would not be available if the error favoured the convicted person.

6.169 We have provisionally concluded that there is a case for the CACD to have a "slip rule", as the lack of a power analogous to that of magistrates' courts or the Crown Court is an anomaly that necessitates use of the power to reopen final determinations or time-consuming CCRC applications. Moreover, in light of the CACD's breadth of powers when allowing or dealing with appeals against conviction and sentence, we consider that a "slip rule" for the CACD should apply to any order made by it and not simply those made in respect of sentences. Two questions then arise: by whom should it be exercised; and should there be a time limit (as there is in the Crown Court)?

6.170 As noted above, in the Crown Court, the power can only be exercised (in practice) by the judge who presided at the trial or the appeal. An identical requirement in the CACD, however, would create difficulties. First, although section 385 of the Sentencing Code refers to the "composition" of the Crown Court, in practice – because any magistrates are discounted – it means a single judge. In the CACD, however, this would require reconvening the same judges (usually three) who had heard the appeal. A second option would be for the power to be exercisable by any judge who had heard the appeal. A third option would be for the power to be exercisable by the senior judge who presided over the appeal. A fourth would be for the power to be exercisable by any ex officio[117] or ordinary judge of the CACD. This would enable the Court to then allocate one or more members to exercise the power.

6.171 In relation to time limits, we can see a case for emulating the restriction in section 385 for the power to be exercised within 56 days, in line with the time limit in the Crown

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117 The judges who are judges of the Court of Appeal by virtue of the offices they hold (*ex officio*) are: (i) the Lord Chief Justice; (ii) the Master of the Rolls; (iii) the President of the Queen's Bench Division; (iv) the President of the Family Division; (v) the Chancellor of the High Court; (vi) any person who was Lord Chancellor before 12 June 2003; and (vii) any judge of the Supreme Court who at the date of their appointment was, or was qualified for appointment as, an ordinary judge of the Court of Appeal or held one of the offices at (i)-(iv) (Senior Courts Act 1981, s 2).

Court, and which we provisionally propose in Consultation Question 16 for defence appeals following conviction.

Consultation Question 22.

6.172 We provisionally propose that the Court of Appeal Criminal Division should have the power to correct an accidental slip or omission in a judgment or order, within 56 days of that judgment being handed down or the order made.

Do consultees agree?

6.173 We invite consultees' views on which members of the Court should be able to exercise this power. For instance, should it be:

(1) all of the same judges who made the judgment or order;

(2) the most senior judge (the presider) who made the judgment or order;

(3) any one of the judges who made the judgment or order; or

(4) any judge who is either an ordinary judge of the Court or is a judge of the Court by virtue of the office that they hold?

REOPENING A FINAL DETERMINATION

6.174 Although the CACD has no inherent jurisdiction, it does have a power to reopen a determination. The main uses of this power seem to be (i) to correct a sentence imposed by the CACD on an appeal, whether as a result of resentencing following a partly successful appeal against conviction or when amending a sentence following a sentencing appeal, and (ii) to correct a judgment made on an erroneous basis.

6.175 In *Yasain*,[118] the appellant sought leave to appeal against convictions for rape and kidnapping. On reviewing the papers, the single judge identified that no verdict had been taken on the count of kidnapping and granted leave to appeal. The conviction was quashed. Subsequently, the transcript of the trial was sent to the trial judge, revealing that a verdict of guilty had been taken, but not included in the transcription.

6.176 The CACD held that, unlike the High Court, its powers were entirely statutory, and it did not have any inherent jurisdiction. However, it has an implied power to revise any order before it is recorded. The CACD does not have its own system for recording its orders; instead, they take effect as a direction to the Crown Court. It is therefore only when the Crown Court records the determination onto the Common Platform system that the order becomes final.

[118] [2014] EWCA Crim 1416, and [2015] EWCA Crim 1277, [2016] QB 146.

6.177 A similar issue arose in *Sakin*.[119] The appellant contended that the judge had failed to summarise the defence case (a co-accused's case had been summarised before the Court rose for the day, and the appellant's case was due to be dealt with when the Court resumed the next day). The transcript of the summing up, and trial counsels' notes, confirmed this, and the CACD quashed the conviction. However, Mr Sakin's counsel informally mentioned this development to the trial judge, who checked the audio recording and found that she had given the necessary account. The order quashing Sakin's conviction had not been issued by the Registrar, and the Court therefore reopened its determination and upheld the conviction.

6.178 Once the Court's judgment has been recorded, the power is strictly limited. The exceptions are (i) where the order was a nullity, and (ii) where a defect in procedure might have led to some "real injustice". The latter was based on the judgment of the Lord Chief Justice, Lord Woolf, in *Taylor v Lawrence*,[120] where he held that the Court of Appeal (in that case, its Civil Division) possessed a "residual jurisdiction … to avoid real injustice in exceptional circumstances".

6.179 In *Yasain*, the Lord Chief Justice, Lord Thomas of Cwmgiedd, held that in criminal cases there was "the strongest public interest in finality" and therefore the jurisdiction was strictly limited, "particularly as there are alternative remedies for fresh evidence cases through the Criminal Cases Review Commission".[121] This remedy, however, is only available to the convicted person. It would not be available to the prosecution; nor, in a fresh evidence case, would the option of an appeal to the Supreme Court be available, since this must turn on a question of law of general public importance.

6.180 In *Hockey*, Sir Brian Leveson, President of the Queen's Bench Division, expressed concern about an increase in applications to reopen a determination "which are, almost invariably, wholly without merit and liable to be rejected summarily".[122] He laid out a procedure to be adopted when seeking to reopen a determination, which has since been adopted in rule 36.15 of the Criminal Procedure Rules.

6.181 The jurisdiction to reopen is extremely limited and "often insurmountable",[123] especially for the convicted person, who has the alternative remedy of the CCRC.

6.182 Above (at paragraphs 6.158 to 6.173 and Consultation Question 22), we provisionally propose the introduction of a "slip rule" for the CACD to deal with errors in judgments and orders and this should reduce the need to invoke the inherent jurisdiction to reopen a determination. However, we have provisionally concluded that the Court needs to retain such a power in order to deal with situations such as occurred in *Yasain* and *Sakin*. Use of this power, and especially the jurisdiction to reopen a determination after it has been recorded by the Crown Court, should remain

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119 [2021] EWCA Crim 291, and [2021] EWCA Crim 411.

120 [2002] EWCA Civ 90, [2003] QB 528 at [54], by Lord Woolf CJ.

121 [2015] EWCA Crim 1277, [2016] QB 146 at [40], by Lord Thomas of Cwmgiedd CJ.

122 [2017] EWCA Crim 742, [2018] 1 WLR 343 at [23], by Sir Brian Leveson PQBD.

123 S Bergstrom, "Re-opening an appeal or other final determination of the Court of Appeal Criminal Division" [2019] 3 *Archbold Review* 4. Sarah Bergstrom is Senior Legal Manager at the Criminal Appeal Office, but was here writing in a personal capacity.

exceptional. In particular, it will rarely be appropriate for an unsuccessful appellant who has the option of an application to the CCRC to seek to reopen a determination.

APPEALS IN CASES OF INSANITY AND UNFITNESS TO PLEAD

6.183 The criminal law on insanity and unfitness to plead is concerned with how the criminal justice system engages with people whose mental condition means that they should not be held criminally responsible for their actions or are unable to stand trial. Although the processes involved are distinct, both result in the criminal courts making findings other than a criminal conviction: a "special verdict" of not guilty by reason of insanity in the case of the former, and findings as to whether the accused "did the act or omission" in the latter.

6.184 "Insanity" is a defence for people who, as a result of their mental condition, should not be held responsible for what would otherwise be criminal conduct, and the present form of that defence dates from 1843.[124] To establish the defence of insanity the defendant must prove that at the time of committing the act the defendant was:[125]

> labouring under a defect of reason from a disease of the mind as not to know the nature and quality of the act they were doing or if they did know it that they did not know that what they were doing was wrong.

Whether this has been proved is a matter for the jury.

6.185 Unfitness to plead is concerned with the defendant's mental state at the time of their trial and not at the time of the offence. If a person is unfit to plead, they cannot be tried in the same way as a person who is fit. Whereas a person who pleads the defence of insanity goes through the normal criminal trial process, where a person is found unfit to plead, there is no trial. However, there can be hearing, sometimes referred to as a "trial on the facts".

6.186 Where the issue of unfitness to plead arises, the court does not consider a defendant's guilt, but two distinct issues. First, there is the question of whether the defendant is "under a disability" (physical or mental) which renders it inappropriate for them to be tried. This is a matter for the trial judge, and can only be determined on the basis of expert evidence from two or more medical practitioners, one of whom must be duly approved.[126] Second, if the court finds that the defendant is under such a disability, a "trial of the facts" can follow, at the end of which the jury must determine whether or not the defendant did the act or made the omission charged.[127]

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124 In 2013, we provisionally proposed reforms to the law of insanity. These included replacing the special verdict of "not guilty by reason of insanity" with a verdict of "not criminally responsible by reason of recognised medical condition". Criminal Liability: Insanity and Automatism (2013) Law Commission Discussion Paper.

125 *R v M'Naghten* (1843) 10 Cl & F 200, HL, 210, by Maule J.

126 Criminal Procedure (Insanity) Act 1964, s 4(5)-(6).

127 However, consideration as to whether the defendant is under a disability may be postponed until any time up to the opening of the case for the defence (Criminal Procedure (Insanity) Act 1964, s 4(2)). This enables the defendant to be fully acquitted if the prosecution does not show a case to answer.

6.187 Following a verdict of insanity or a finding that a defendant who was unfit to plead did the act or made the omission, the only orders that the trial court may impose are a hospital order, a supervision order, or an absolute discharge.

Appeals against verdicts and findings

6.188 A person who has been found not guilty by reason of insanity may appeal against that verdict with the leave of the Court of Appeal, or if the trial judge issues a certificate (within 28 days of the verdict) that the case is fit for appeal.[128] The test is whether the verdict is unsafe. The CACD is able to dismiss the appeal if one of the grounds is that the finding of insanity "ought not to stand" and the CACD concludes that the proper verdict would have been that the defendant was guilty of an offence (whether the offence charged or any other offence of which the jury could have found the defendant guilty). If the Court considers that the appellant should have been found unfit to plead, but that they did the act or made the omission concerned, the Court can substitute findings to that effect.

6.189 Where a person has been found unfit to stand trial, and has subsequently been found to have done the act or made the omission charged, they may appeal either or both of these findings. Where the Court concludes that the finding of unfitness is unsafe, the person may then be tried for the offence.[129] Where the CACD concludes that the finding that the person did the act or made the omission is unsafe, they must direct a verdict of acquittal.[130]

Appeals against disposal

6.190 Sections 16A and 16B of the Criminal Appeal Act 1968 allow appeals against a hospital order or supervision order made following a verdict of not guilty by reason of insanity or a finding that a person who was unfit to plead did the act or made the omission charged.

6.191 At paragraphs 9.136 to 9.159 we discuss the powers of the CACD following a successful appeal against a finding or verdict in cases of insanity and unfitness to plead. We make provisional proposals to alter the powers of the CACD when dealing with such cases (Consultation Questions 48 to 52).

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128 Criminal Appeal Act 1968, s 12.

129 Above, s 16(3).

130 Above, s 16(4).

Chapter 7: Sentence appeals in the Court of Appeal Criminal Division, and sentence reviews

7.1 In this chapter we are principally concerned with sentence appeals in the Court of Appeal Criminal Division ("CACD"). Appeals against sentence from the magistrates' court to the Crown Court are addressed in Chapter 5 on appeals in summary proceedings.

7.2 However, the CACD's jurisdiction extends to appeals against sentence in summary proceedings where the Crown Court sentences an offender for an offence of which they were convicted in the magistrates' court. This can happen where the offence was triable either-way and the magistrates' court concludes that its sentencing powers are inadequate,[1] or when the offender has been convicted of an offence triable either-way on a guilty plea, but one or more other related offences has been sent for trial at the Crown Court.[2]

PRINCIPLES

7.3 Sentence appeals are not concerned with guilt or innocence, but whether a sentence was legally appropriate. Therefore, to some extent, the principles which we articulated in Chapter 4 need to be adapted in this different context. Acquitting the innocent and convicting the guilty are not directly relevant to this issue. The broader principle of accuracy, however, requires that the sentence should be in accordance with the law and the facts as found by the tribunal of fact. The principle of fairness also has application in sentence appeals given the need for sentencing to be consistent between offences and offenders.

7.4 Whereas guilt and innocence are legally binary, the negative impact of an excessive sentence is arguably one of degree. It may be, therefore, that in sentence appeals the balance between accuracy and finality is different. However, this does not make finality a 'trump card'. Errors in sentencing must be corrected as a matter of justice. In addition, the fact that a criminal conviction has consequences for a person's life long after the sentence has been served, and potentially long after the conviction has become "spent"[3] means that errors in sentencing can have lifelong consequences. Indeed, whether or when a conviction becomes spent depends on the nature and length of a sentence, as does the time for which a person is subject to a notification requirement under Part Two of the Sexual Offences Act 2003.[4]

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1 Sentencing Code, ss 14-17.

2 Sentencing Code, ss 18 and 19.

3 Under the Rehabilitation of Offenders Act 1974, eligible convictions or cautions become "spent" after a specified period of time, known as the "rehabilitation period".

4 Under Part Two of the Sexual Offences Act 2003, when an offender is convicted of a sexual offence listed in sch 3 of that Act, the offender is required to provide specific information to the police in order to assist with the offender's long-term monitoring. Under s 82, the notification period relates to the nature the sentence imposed, and, in the case of imprisonment, its duration.

7.5 It should also be recognised that "sentencing is an art, not a science".[5] There is scope for discretion; there is scope for mercy;[6] and judges (or magistrates) must take the offender's personal circumstances into account in imposing an appropriate sentence. The fact that the sentencing judge (or magistrates) will usually have conducted the trial (if the offender did not plead guilty) and therefore have had the opportunity to observe the offender during the trial means that they will normally be better placed to decide the appropriate sentence than an appellate court.

7.6 In Chapter 4, we provisionally proposed that the "no greater penalty" principle should apply to all proceedings, and a convicted person should not be at risk of an increased sentence as a result of challenging their conviction or sentence. Within this chapter, we discuss references in respect of "unduly lenient" sentences. These do not breach the "no greater penalty" principle, since the increase in sentence does not happen as a result of the convicted person challenging their conviction or sentence, and therefore should not operate as a deterrent against meritorious appeals.

BACKGROUND

7.7 Where a person appeals against a sentence passed in the Crown Court, there is no statutory rule governing how an appeal against sentence is to be decided. Therefore, the process is governed by common law rules. The CACD will determine whether the sentence imposed by the Crown Court is "not justified by law", "manifestly excessive" or "wrong in principle" and not simply review the reasons of the sentencing judge.[7] It is not a resentencing exercise.

7.8 Since 1988, the Attorney General has had the power to refer certain sentences to the CACD if they consider a sentence that has been passed to be "unduly lenient".[8]

7.9 Historically, the CACD had an important role in setting sentencing guidance through sentence appeals. However, the role of the CACD has been affected by recent changes in the law.

Sentencing guidelines

7.10 The Crime and Disorder Act 1998 created the Sentencing Advisory Panel ("SAP") to draft and consult on proposals for sentencing guidelines and gave the CACD a statutory power to frame guidelines and hand them down as part of a judgment. The SAP could propose to the CACD that guidelines be framed or revised either of its own volition, or if directed to do so by the Secretary of State. The CACD was given a statutory power to set guideline sentences where it had received a proposal by the SAP or when "seised of an appeal"[9] relating to a particular category of offence. When

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5 *Attorney General's Reference (No 4 of 1989)* [1990] 1 WLR 41, CA, 46B, by Lord Lane CJ.

6 Above.

7 *R v Chin-Charles* [2019] EWCA Crim 1140, [2019] 1 WLR 5921 at [8], by Lord Burnett of Maldon CJ.

8 Criminal Justice Act 1988, ss 35-36.

9 The CACD was "seised of an appeal" where the Court – including the single judge – had given leave to appeal, or the trial judge had certified that the case was fit for appeal and notice of appeal had thereafter been given to the CACD. (Crime and Disorder Act 1998, s 80(7) (repealed)).

considering whether to set guidelines in a case of which it was seised, the CACD was required to notify the SAP in advance so it could make its views known.

7.11 The Criminal Justice Act 2003 created a Sentencing Guidelines Council ("SGC"), chaired by the Lord Chief Justice. The SAP continued in existence. The SGC could set sentencing guidelines. The SAP could propose to the SGC that sentencing guidelines be framed or revised, just as it could previously to the CACD. However, although the CACD lost its statutory role in setting sentencing guidelines, it could continue to lay down guidance through judgments in appeals against sentence.

7.12 The Coroners and Justice Act 2009 replaced both the SAP and the SGC with the Sentencing Council, which is responsible for developing sentencing guidelines and monitoring their use.

7.13 Under the Criminal Justice Act 2003, the sentencing court was required to "have regard" to any relevant guidelines. This requirement was strengthened in the Coroners and Justice Act 2009. The relevant provisions, now found in the Sentencing Code, state that courts must "follow any relevant sentencing guidelines … unless the court is satisfied that it would be contrary to the interests of justice to do so".[10]

7.14 However, the CACD has repeatedly stated that sentencing guidelines are "guidelines, not tramlines".[11] It has also ruled that sentencing courts are required to apply the guidelines taking into account the subsequent thinking of the CACD and of the legislature on sentencing issues which may impact on existing guidelines.[12]

7.15 The introduction of sentencing guidelines for most offences, now produced by the Sentencing Council (and statutory provisions[13] governing the "starting point"[14] when setting the minimum term of imprisonment to be served as part of a life sentence for murder) has changed the nature of sentence appeals. They now often turn on consideration of whether, in the circumstances of a case, offences have been properly categorised (for instance, in terms of harm, culpability or an offender's role in a joint enterprise) and the relevant guidelines properly followed.

7.16 However, the CACD does have a continuing role to play in laying down guidance for sentencing courts. One recent example is *Cook*,[15] in which the Court granted leave to

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10 Sentencing Code, s 125(1).

11 See for instance *R v Thornley* [2011] EWCA Crim 153, [2011] 2 Cr App R (S) 62, the point being that a tram cannot deviate from the tramlines.

12 *R v Thornley* [2011] EWCA Crim 153, [2011] 2 Cr App R (S) 62 at [14], by Lord Judge CJ: "The weight to be attached to decisions of this court on sentencing issues or policy is, in our judgment, undiminished by the issue of guidelines… If it had been the intention of Parliament to indicate that somehow or other the authority of this court had been reduced in any way, the language would have had to have been express and unequivocal. It is not".

13 Sentencing Code, s 322 and sch 21.

14 The "starting point" is the minimum term before consideration of aggravating and mitigating factors.

15 [2023] EWCA Crim 452, [2024] 4 WLR 71.

an appellant to contest his sentence of 15 months' imprisonment for non-fatal strangulation, a new offence created by the Domestic Abuse Act 2021:[16]

> Because this is a new offence without any guideline, and without any previous assistance from this court on the proper approach to sentencing for the offence, we shall give leave. We shall thereby b[e] in a position to give such general guidance as we can in relation to the appropriate level of sentence pending any consideration by the Sentencing Council.

7.17 A further example is *Ahmed and others*.[17] A CACD comprised of the Lord Chief Justice, the Vice President of the CACD and the Chair of the Sentencing Council heard five sentence appeals together in order to establish the principles that should apply when sentencing an adult for offences committed when they were a child. This is an important consideration particularly when sentencing offenders in historic sexual abuse cases, where the prosecutions may take place many years after the offending.

Mandatory minimum sentences

7.18 A further change affecting the role of the CACD is the greater use of mandatory sentencing provisions. These have now been consolidated in Part 10, Chapter 7 of the Sentencing Code.

7.19 Leaving aside the mandatory life sentence for murder, which has been in place since the abolition of the death penalty for murder,[18] sentencing legislation now includes mandatory minimum sentences in the following circumstances:

(1) mandatory minimum of seven years' imprisonment for a third (or subsequent) class A drug trafficking conviction;[19]

(2) mandatory minimum of three years for a third (or subsequent) domestic burglary conviction;[20]

(3) mandatory minimum of five years for certain prohibited firearms offences;[21]

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16 [2023] EWCA Crim 452, [2024] 4 WLR 71 at [12], by William Davis LJ. The CACD upheld the sentence, finding that "it was, if anything, lenient" and that the proper sentence would have been 18 months' detention.

The offence created by the Domestic Abuse Act 2021 is in the Serious Crime Act 2015, s 75A.

17 [2023] EWCA Crim 281, [2023] 1 WLR 1858.

18 The Homicide Act 1957 abolished the death penalty other than in specific categories of murder, replacing it with a mandatory life sentence. The Murder (Abolition of Death Penalty) Act 1965 abolished the death penalty for murder altogether, replacing it with the mandatory life sentence.

19 Sentencing Code, s 313. The provision only applies to an offender aged over 18 at the time of the offence. "Drug trafficking" here includes offences of production and of possession with intent to supply.

20 Sentencing Code, s 314. The provision only applies to an offender aged over 18 at the time of the offence.

21 Sentencing Code, s 311. The minimum term is three years where the offender was under 18 when the offence was committed.

(4) mandatory minimum of six months for a second conviction for possession of a knife, an offensive weapon or a corrosive substance.[22]

7.20 These provisions require the court to impose the appropriate custodial sentence of at least the required minimum term unless there are "exceptional circumstances" which relate to the offence or to the offender which justify not doing so.[23]

7.21 Sometimes, when considering an appeal by the convicted person, it will be apparent that the sentencing court has failed to impose a mandatory requirement, such as a mandatory minimum sentence, driving ban or financial surcharge. This can also be the case in unduly lenient sentence references by the Attorney General (discussed at paragraphs 7.37 to 7.41 and 7.79 to 7.89 below). In some cases, this means that the CACD has to restructure the sentence imposed to give effect to the mandatory minimum. In *Thompson*, the CACD said:[24]

> On appeal, it is open to this court to restructure a sentence particularly where … the sentence passed has been unlawful having failed to comply with mandatory sentencing provisions.

7.22 However, when doing so upon an appeal by the defendant, the overall sentence cannot be more severe than that imposed at trial (even if that sentence was itself lower than a statutory minimum term).[25] In *Thompson*, the CACD said this:[26]

> requires a detailed consideration of the impact of the sentence to be substituted which must involve considerations of entitlement to automatic release, parole eligibility and licence.

7.23 For instance, in *Malik*,[27] the defendant appealed against an overall sentence of six years and nine months' imprisonment for offences including possessing a prohibited firearm, possessing a controlled drug with intent to supply and possessing criminal property. The sentence was made up of four years and six months' imprisonment on the first charge, and sentences of (i) 27 months' imprisonment and (ii) six months' imprisonment on the second and third charges respectively, to run consecutive to the sentence on the first charge, but concurrent to each other.

7.24 However, the first count attracted a mandatory five-year sentence. Accordingly, although the Court found that the overall sentence was proportionate to the offending,

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22 Sentencing Code, s 315. The minimum sentence is a four months' detention and training order where the offender was 16 or 17 at the time of sentencing.

23 Prior to 2022, the minimum term requirements relating to repeat convictions for domestic burglary, possession of a knife, offensive weapon or corrosive substance, and relevant firearms offences used a lower threshold of "particular circumstances" which relate to the offence or to the offender and which justify not imposing the appropriate custodial sentence.

24 [2018] EWCA Crim 639, [2018] 1 WLR 4429 at [23], by Sir Brian Leveson PQBD.

25 Criminal Appeal Act 1968, ss 4(3) and 11(3).

26 [2018] EWCA Crim 639, [2018] 1 WLR 4429.

27 [2023] EWCA Crim 1476.

it substituted the mandatory five year sentence for the first charge and reduced the sentence on the second charge to 21 months.

7.25 Mandatory provisions also apply to some driving offences, which carry a mandatory minimum period of disqualification. The period is generally at least 12 months, but a higher minimum applies where the defendant has certain previous convictions or disqualifications. In addition, the period of disqualification must be extended where a custodial sentence is imposed to take account of the time which will be spent in custody.

7.26 The Victim Surcharge was introduced in 2007 and applies to offending taking place after its introduction. It must be paid by the defendant and is used to fund victim support services. The relevant surcharge will depend on several factors including: the penalty imposed; the date of the relevant offence(s); which court imposed the sentence;[28] and the age of the offender at the time of the offence.

7.27 We have observed that in many cases where a sentence appeal (or an appeal against conviction) is considered by the CACD, the Criminal Appeal Office ("CAO") will identify that the Victim Surcharge has been incorrectly calculated.[29] It should be recognised that where the offender's advisers do identify the error, it will often be possible to correct it under the "slip rule".[30] Therefore, it may be that there are many more cases where the wrong surcharge is imposed which are corrected without bringing an appeal. The CACD cannot impose or increase surcharges identified as being less than the amount mandated, unless it reduces some other element of a sentence (see paragraphs 7.81(5) and 7.87 below).[31]

Dangerousness provisions

7.28 The Criminal Justice Act 2003 introduced "dangerousness" provisions. Where a person was convicted of a "specified offence"[32] that was a "serious offence",[33] and the Court considered there was a significant risk to members of the public of serious harm occasioned by the commission of further specified offences, the Court was required to impose a sentence of life imprisonment or, after it was introduced in 2005, imprisonment for public protection ("IPP").[34] If the offence was a "specified offence" but not a "serious offence", the Court was required to impose an extended sentence.

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28 A sentence of immediate custody imposed in a magistrates' court does not attract the Victim Surcharge where any one of the offences in question was committed prior to 2014.

29 See for instance *R v WHD* [2024] EWCA Crim 99; *R v Rees* [2022] EWCA Crim 1710; *R v Cushing* [2022] EWCA Crim 406; and *R v Abbott* [2020] EWCA Crim 516, [2020] 1 WLR 3739.

30 Discussed above at paras 6.158-6.173.

31 *R v Bailey* [2013] EWCA Crim 1551, [2014] 1 Cr App R (S) 59.

32 Listed in sch 15 of that Act.

33 That is, punishable by imprisonment for life or for 10 years or more.

34 This sentence allowed the Court to impose an indeterminate sentence on an offender who had been convicted of one or more specified sexual or serious violent offences where the offence did not warrant a life sentence but, where the offender was considered as posing a significant future risk of harm. In effect, the offender would have to serve a minimum period (a tariff) before they became eligible for parole. If the Parole

7.29 There have been significant changes to this regime since 2003, including first replacing the duty to impose an IPP with a discretion, and restrictions on the circumstances where the Court could impose an IPP.[35] IPPs were eventually abolished in 2012.[36] A European Court of Human Rights ("ECtHR") ruling had held such a sentence as being in violation of article 5 (the right to liberty) of the European Convention on Human Rights ("ECHR").[37] However, the abolition of IPPs was not made retrospective and as of 30 June 2024, there were 2,734 IPP prisoners in England and Wales: 1,132 of these have never been released by the Parole Board (the remainder have been released but subsequently recalled). Of those who have never been released, 64% have been held for at least 10 years after serving their minimum term.[38]

7.30 In *Roberts*,[39] the CACD refused to quash sentences of IPP that had been imposed several years earlier. The Court acknowledged:[40]

> the substantial criticism that many years after the expiry of minimum terms, sometimes of a very short period, many sentenced to IPP remain in custody or have been recalled to custody for breach of their licence conditions.

However, it ruled:[41]

> This court considers the material before the sentencing court and any further material admitted before the court under well established principles. It considers whether on the basis of that information the sentence was wrong in principle or manifestly excessive. It does not, years after the sentence, in the light of what has happened over that period, consider whether an offender should be sentenced in an entirely new way because of what has happened in the penal system … This court was not established to perform the function suggested; it is not constituted to carry out the suggested function; and it could not do so as presently constituted.

7.31 Whilst a court may no longer impose an IPP, the trial court remains under a duty to consider dangerousness for certain violent, sexual or terrorism offences under

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Board determined they no longer were a risk, they could be released on a licence. However, if the offender breached their licence or committed further offences they could be recalled and could only be released by a later decision of the Parole Board.

Between 2005 and 2008, the Court was obliged to impose an IPP for a "serious offence" if the dangerousness conditions were met and the Court did (or could) not impose a life sentence. Between 2008 and 2012, an IPP was discretionary in such circumstances if (i) the offender had previously been convicted of certain serious offences or (ii) the Court considered that the appropriate tariff (disregarding time to be deducted as having been served on remand) was two years or more.

35 Criminal Justice and Immigration Act 2008, s 13.

36 Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 123.

37 *James, Wells and Lee v UK* (2013) 56 ERR 12 (App Nos 2411/09, 57715/09 and 57877/09).

38 Ministry of Justice and HM Prison and Probation Service, "Offender management statistics quarterly: January to March 2024" (25 July 2024).

39 *R v Roberts* [2016] EWCA Crim 71, [2016] WLR 3249.

40 Above, at [44], by Lord Thomas of Cwmgiedd CJ.

41 Above, at [20].

Chapter 6 of the Sentencing Code, which may lead to it imposing an "extended sentence".[42]

THE LAW

Appeals against sentence by the convicted person

7.32 As noted above at paragraph 7.7, where a person appeals against a sentence handed down in the Crown Court (including sentences in summary proceedings where the case has been committed to the Crown Court for sentencing), the CACD will determine whether the sentence imposed by the Crown Court is "not justified by law", "manifestly excessive" or "wrong in principle". It will not simply review the reasons of the sentencing judge.[43]

7.33 Where the appellant has been convicted of multiple offences, the court is required to examine their sentence as a whole, by considering each element of the sentence individually and cumulatively. Therefore, in such cases the court is required to determine whether the overall sentence is "manifestly excessive" or "wrong in principle".[44]

7.34 "Sentence" includes fines, community orders such as a requirement to do unpaid work, custodial sentences, hospital orders, recommendations for deportation and orders for conditional or absolute discharge.[45]

7.35 Judicial rulings and some pieces of legislation have also extended "sentence" to include other orders made when dealing with an offender including:

(1) preventative orders available on conviction, including Violent Offender Orders[46] and Sexual Harm Prevention Orders;[47]

(2) victim surcharge orders;[48]

(3) disqualifications, including disqualification from holding or obtaining a driving licence[49] and disqualification from working with children;[50] and

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42 Under s 279 of the Sentencing Code, an extended sentence of imprisonment comprises a custodial term *and* an extension period of at least one year for which the offender is to be subject to a licence.

43 *R v Chin-Charles* [2019] EWCA Crim 1140, [2019] 1 WLR 5921 at [8], by Lord Burnett of Maldon CJ.

44 *R v McGarrick* [2019] EWCA Crim 530, [2019] 2 Cr App R (S) 31 at [15], by Warby J.

45 Criminal Appeal Act 1968, s 50. The definition does not include the mandatory life sentence for murder, but does include any minimum term imposed in relation to that sentence, or a "whole life" order.

46 Criminal Justice and Immigration Act 2008, s 106(1).

47 *R v Rowlett* [2020] EWCA Crim 1748, [2021] 4 WLR 30.

48 *R v Stone* [2013] EWCA Crim 723.

49 *R v McNulty* [1965] 1 QB 437, CCA.

50 Safeguarding Vulnerable Groups Act 2006, ss 2 and 3.

(4) compensation,[51] confiscation[52] and restitution orders[53].

7.36 Although the right to appeal against a sentence is generally limited to the convicted person, a parent or guardian may appeal against an order made against them under section 380 of the Sentencing Code to pay a fine or compensation upon conviction of a child.

Unduly lenient sentences

7.37 Under the Criminal Justice Act 1988, a sentence may be referred to the CACD where it appears to the Attorney General that the sentence was "unduly lenient". This includes cases where the judge erred in law as to the sentencing options available or failed to comply with a mandatory sentencing provision. Requests for the Attorney General to consider referring a sentence to the CACD as unduly lenient may come from the prosecution itself, members of the public or members of Parliament, victims, or the bereaved. Media coverage may also prompt the Crown Prosecution Service ("CPS") to consider the case.[54]

7.38 The power to refer is limited to offences triable only on indictment and certain other offences specified by order. The current list of offences is contained in the Criminal Justice Act 1988 (Reviews of Sentencing) Order 2006 (as amended).

7.39 The reference must be made within 28 days of the sentence.[55] This time limit is absolute. One issue with it is that there is a power to alter a sentence made by the Crown Court under the "slip rule" within 56 days. Where the sentence is legally deficient, for instance where a mandatory minimum sentence is not imposed, it is preferable for this to be addressed under the "slip rule".[56] However, if the CPS seeks to have a sentence corrected under the "slip rule", it risks losing the ability to refer it to the CACD if the sentence is not corrected.

7.40 A sentence will be unduly lenient "where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate".[57]

7.41 Where the sentence was passed following a retrial, the CACD cannot impose a sentence more severe than that passed at the original trial (reflecting the general rule

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51 Sentencing Code, s 380(6).

52 See for example *R v Newhall* [2020] EWCA Crim 224; *R v Ghulam* [2018] EWCA Crim 1691, [2019] 1 WLR 534; *R v McCool* [2018] UKSC 23, [2018] 1 WLR 2431; *R v Hockey* [2017] EWCA Crim 742, [2018] 1 WLR 343 and *R v Ryder and Green* [2020] EWCA Crim 1110, [2021] Env LR 6. However, this does not include a determination as to the extent of the defendant's interest in property or a variation based upon inadequacy of the available amount.

53 Sentencing Code, s 149.

54 CPS, "Unduly Lenient Sentences" (3 April 2024).

55 Criminal Justice Act 1988, sch 3, para 1.

56 Where the trial judge fails to impose a mandatory minimum sentence, this can be corrected under the slip rule. However, this cannot be done in the defendant's absence if the effect is that the defendant is dealt with more severely (Criminal Procedure Rules, r 28.4).

57 *Attorney General's Reference (No 4 of 1989*) [1990] 1 WLR 41, CA.

applying to sentencing on retrials in section 8(4) of the Criminal Appeal Act 1968).[58] This applies even if the judge at the original trial failed to impose a mandatory minimum sentence: the court at the retrial and the CACD are required to observe the principle that the sentence cannot be increased.[59]

7.42 The sentence must be unduly lenient by reference to the facts as found or admitted at trial. In *Pybus*, the CACD said:[60]

> It is not the function of this Court to substitute its own view as to what the sentence should be in the light of new material, which was not before the sentencing judge… It is not open to Her Majesty's Attorney General to rely upon further evidence to justify the application to make a reference, nor lest it be satisfactorily explained in detail why, to advance the case in a different way, or to seek to depart from concessions made by the prosecution in the court below.

7.43 However, where the CACD finds that the sentence *was* unduly lenient, it has the discretion whether to increase the sentence, and if so by how much:[61]

> then it will be at liberty to look at any fresh material that is supplied, or to consider arguments as to the sentencing exercise that were not made below but will only do so [as] far as that material is relevant to the facts or circumstances of the case.

7.44 Conversely, it may choose to increase the sentence to a level which was still more lenient than would have been warranted at the original sentencing. Indeed, the CACD traditionally applied a "double jeopardy" discount. In 2006, the Lord Chief Justice, Lord Phillips of Worth Matravers, characterised the fact that a defendant has to face proceedings in which their sentence may be increased as falling within the principle against double jeopardy:[62]

> the procedure subjects the defendant to anxiety which should normally be reflected by some discount in the sentence which would otherwise be imposed.

7.45 As a result of statutory changes in 2003 and 2008, a discount does not apply when the CACD is determining the minimum term for a life sentence, where the original term was considered unduly lenient.[63] The practice of discounting the replacement

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58 *Attorney General's Reference (No 82a of 2000)* [2002] EWCA Crim 215, [2002] 2 Cr App R 24.

59 *R v Reynolds* [2007] EWCA Crim 538, [2008] 1 WLR 1075.

60 *R v Pybus* [2021] EWCA Crim 1787, [2022] Crim LR 263 at [10], by Macur LJ.

61 Above.

62 *Attorney General's References (Nos 14 and 15 of 2006)* [2006] EWCA Crim 1335, [2007] 1 All ER 718 at [57]. The possibility of "double jeopardy" as a reason not to increase an unduly lenient sentence was reaffirmed by Lord Judge CJ in *R v Appleby* [2009] EWCA Crim 2693, [2010] 2 Cr App R (S) 46. The legislation only prohibits the CACD from applying a discount when considering what minimum term to set where it has quashed the term set by the trial judge. It does not prevent the CACD from taking "double jeopardy" into account when deciding whether to quash the original minimum term.

63 Criminal Justice Act 2003, s 272, Criminal Justice and Immigration Act 2008, s 46 and Criminal Justice Act 1988, s 36(3A). The reform in 2003 was limited to minimum terms under the mandatory life sentence for murder. It was subsequently extended to other life and indeterminate sentences. The rationale was that a prisoner serving a life or other indeterminate sentence has no expectation of release at the completion of the minimum term.

sentence is increasingly rare. However, it remains the case that the CACD will occasionally find that a sentence was unduly lenient but decline to increase it. An example might be where the correct sentence would have been immediate custody, but the offender has, by the time of the appeal, undertaken rehabilitative and reparative activity as part of a suspended or community sentence. In this circumstance it might be that imposing the custodial sentence (which would have to be reduced to reflect the extent to which the offender had been appropriately punished in the community) would not be appropriate.[64]

7.46 There is no power in relation to sentences passed in other courts. A possible anomaly here is that the youth court can hear trials relating to indictable only offences. Because the youth court is a magistrates' court, a sentence cannot be referred under the unduly lenient sentence scheme even if it is for an indictable only offence such as rape. However, in such cases it would be possible for the prosecution to challenge the conviction and sentence by way of case stated or judicial review.

Reviews of Detention at His Majesty's Pleasure ("DHMP")

7.47 Detention at His Majesty's Pleasure ("DHMP") is (broadly) the equivalent of the mandatory life term for murder where the offender was aged under 18 at the time of the offence.[65] As with other life or indeterminate sentences, the sentencing judge will set a minimum term, or "tariff", to be served before the offender is eligible for parole.

7.48 However, DHMP is a "unique"[66] or "distinct"[67] sentence. Historically, it was introduced as a measure for dealing with those convicted of murder, treason or felony but found to be insane.[68] It was extended to children in 1908 who were defined as those aged between 10 and 16.[69] In 1933 it was again extended to include children under the age of 18.[70]

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64 See for example *R v Feve* [2024] EWCA Crim 286, [2024] 1 WLR 3450. The Court held that a suspended sentence for perverting the course of justice in relation to a murder inquiry was unduly lenient; appropriate punishment could only be achieved by immediate custody, but it went on ([26] by Holroyde LJ VPCACD):

> We bear in mind the offender's compliance to date with the suspended sentence order, including his diligent performance of the unpaid work requirement, and his deteriorating health. We also bear in mind the likely housing and other long-term consequences for him and his children of our now imposing immediate imprisonment. We conclude that we can properly exercise our discretion in the offender's favour.

65 The change was made by s 60 of the Criminal Justice and Court Services Act 2000, and the provision is now found in the Sentencing Code, s 259.

66 *R (Quaye) v Secretary of State for Justice* [2024] EWHC 211 (Admin), [2024] 1 WLR 3303.

67 *Singh v UK* App No 21928/93 (Commission decision) at [63].

68 Detention at His Majesty's Pleasure is no longer available where a person is found not guilty by reason of insanity. The only options are a hospital order (with or without restriction), supervision order, or absolute discharge. Criminal Procedure (Insanity) Act 1964, s 5.

69 Children Act 1908, s 103.

70 Children and Young Persons Act 1933, s 53(1).

7.49 The offender is eligible to have the minimum term that must be set by the trial judge (and possibly amended by the CACD) reviewed, and potentially reduced.[71] There are three possible grounds on which the tariff may be reduced:[72]

(1) the offender has made exceptional and unforeseen progress during sentence;

(2) the offender's welfare may be seriously prejudiced by their continued imprisonment and the public interest in the offender's welfare outweighs the public interest in a further period of imprisonment lasting until expiry of the current tariff; or

(3) there is a new matter which calls into question the basis of the original decision to set the tariff at a particular level.

7.50 The power to set and to review a minimum term (both under DHMP and for life sentences generally) historically lay with the Home Secretary. In 1999, the ECtHR ruled that it was a violation of both article 6(1) and article 5(4) of the ECHR that the initial tariff was set by the Home Secretary and that there was no judicial supervision of the setting of the tariff. A transitional procedure was introduced whereby the Lord Chief Justice reviewed the minimum term of each person serving a sentence of DHMP whose minimum term had been set by the Home Secretary.

7.51 Following these changes, the then Home Secretary concluded that there was no longer any duty on him to review the minimum term. However, in *Smith v Home Secretary*, the High Court ruled that this was unlawful. This decision was upheld by the House of Lords, Lord Bingham ruling that a tariff should be reconsidered "if clear evidence of exceptional and unforeseen progress is reasonably judged to require it".[73]

7.52 The minimum term is now set by the trial judge in a criminal court.[74] However, in DHMP cases, while the convicted person can appeal their minimum term to the CACD (subject to the usual leave requirements), they can also request a review of the minimum term by the High Court during their detention.[75] Under section 27B of the Crime (Sentences) Act 1997, the High Court may reduce the minimum term set by the trial judge.

7.53 As we discuss below, the rationale for allowing offenders sentenced to DHMP to have their minimum term reviewed relates to their reduced culpability at the time of the offence, meaning that as they serve their sentence, their ongoing maturation may mean that it is appropriate to review the punishment.

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71 Unlike for those aged 18 and over, whole life orders cannot be made in respect of those aged under 18: Sentencing Code, s 321.

72 *R (Smith) v Secretary of State for the Home Department* [2005] UKHL 51, [2006] 1 AC 159 at [3], by Lord Bingham of Cornhill. The criteria were originally promulgated by the Home Secretary in an answer to a Parliamentary question: Written Answer, *Hansard* (HC) 10 November 1997, vol 300, cols 421-422.

73 [2005] UKHL 51, [2006] 1 AC 159 at [16], by Lord Bingham of Cornhill.

74 Sentencing Code, s 322.

75 Police, Crime, Sentencing and Courts Act 2022, s 128.

7.54 However, this gives rise to an anomalous position. First, similar considerations would also apply to other child offenders who receive a sentence of detention for life for serious offences or for those on determinate sentences,[76] who do not enjoy a similar right of review. Secondly, because DHMP is imposed based on the date of commission of the offence, a person may be sentenced to DHMP as an adult – potentially one who is fully mature[77] – but until recently would have had an ongoing right to seek a review (which adult life-sentenced offenders do not have).

7.55 In 2021, the Justice Secretary adopted a new policy:[78]

> Where the sentence of DHMP was imposed on the offender on or after his 18th birthday, the offender would no longer be eligible to apply for a review.
>
> Those under the age of 18 at the date of sentence would remain eligible to apply for a review at the halfway point of their sentence.
>
> Those offenders would be eligible to apply for a further review only if they remain under the age of 18 at the time of any further application.

7.56 This policy was given legislative expression through provisions in the Police, Crime, Sentencing and Courts Act 2022, which amended the Crime (Sentences) Act 1997 accordingly.

7.57 Under the 2022 Act, the right to a review was restricted to those who were under 18 when sentenced. Offenders would have the right to a review once half the minimum term had been served. Any further application could only be made once a further two years had been served, and provided the offender was under the age of 18. In practice, it would be very difficult for any person to receive more than one review under this mechanism – since they would have had to have served more than half of their minimum term before reaching the age of 16, meaning that they were both very young when sentenced, and received a relatively short tariff.

7.58 In *Quaye v Justice Secretary*,[79] the Divisional Court held that this provision was incompatible with the right to liberty in article 5 and the protection against discrimination enshrined in article 14 of the ECHR. The Court held that there was "no objective justification for the differential treatment of offenders sentenced to DHMP who are under 18 at the date of sentence". The Court noted that because of the length of tariffs normally given when sentencing a person to DHMP for murder, any review "rarely will be concerned with the development and maturation of the offender between the date of the offence and the offender's 18th birthday"; the halfway point of the tariff will normally be reached sometime after the offender turns 18, and the time between commission of the offence and the offender turning 18 will be short.

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76 See, for instance, discussion of positive changes while in custody in *R v Z* [2019] EWCA Crim 260 at [38] and following, by Holroyde LJ.

77 We discuss the process of developmental maturation at paras 7.53-7.62 and 7.153-5.174 below.

78 *R (Quaye) v Secretary of State for Justice* [2024] EWHC 211 (Admin), [2024] 1 WLR 3303 at [6].

79 *R (Quaye) v Secretary of State for Justice* [2024] EWHC 211 (Admin), [2024] 1 WLR 3303.

7.59 The Court therefore found that the provision discriminated on the basis of age between an offender who committed murder aged under 18 who was sentenced before their 18th birthday and one who committed murder aged under 18 but who was sentenced after their 18th birthday. This infringed both articles 5 and 14.[80]

7.60 The Court also held that removal of the right of review created a risk of arbitrary detention sufficient to engage the right to liberty under article 5, because the right to review was inherent in the unique DHMP sentence.

7.61 Section 128 of the Police, Crime, Sentencing and Courts Act 2022 inserted sections 27A(1) and 27A(11) of the Crime (Sentences) Act 1997. Because it is primary legislation, the Court held that the sections in the 1997 Act are incompatible with article 5 and article 14 (in respect of article 5) of the ECHR, but this does not affect the validity, continuing operation or enforcement of the provisions.

7.62 We note that at the time of writing an appeal against this decision is pending.

Discussion: Court of Appeal Criminal Division tests on sentence appeals

7.63 In the Issues Paper[81] we asked a specific question on sentence appeals:

> Are the powers of the Court of Appeal in respect of appeals against sentence adequate and appropriate?

7.64 We also asked:

> Are the powers of the Attorney General to refer a matter to the Court of Appeal adequate and appropriate?

7.65 In responding to this question some consultees raised the topic of the Attorney General's power to refer unduly lenient sentences to the CACD.

7.66 We found that many consultees were broadly satisfied with CACD's approach to sentence appeals. The Law Society did not identify any major problems with sentence appeals, although it did suggest some minor reforms including a more streamlined approach for technical sentence appeals. The London Criminal Courts Solicitors' Association also thought that the current framework was broadly satisfactory but raised some concern about IPP sentences.

7.67 Whilst consultees generally seemed satisfied, some issues (including those briefly identified above) were raised as warranting consideration. We discuss these along with additional issues that we have identified below.

"Manifestly excessive"

7.68 Although few respondents to the Issues Paper expressed concern about the CACD's approach to sentence appeals, in discussion with some individual judges, some

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80 Under article 14 of the ECHR, discrimination based on a number of grounds is prohibited. "Age" is not a listed ground; however, ECtHR case law has determined that it comes within the broad ground of "other status". See for example, *Schwizgebel v Switzerland* App No 25762/07 at [85].

81 Law Commission, Criminal Appeals: Issues Paper (July 2023).

concern was expressed as to the CACD's approach to sentence appeals, and in particular the requirement that the sentence was "manifestly excessive".

7.69 From the case law it would appear that what the Court is prepared to accept as being "manifestly excessive" can depend on a variety of factors including whether any reduction would appear minor in proportion to the overall sentence.

7.70 In *Ladwa*, the Court would not interfere with a sentence which it described as "undoubtedly severe" noting that:[82]

> The sentence of 27 months was undoubtedly severe and certainly some judges would have opted for a lesser sentence. But we cannot bring ourselves to say in all the circumstances that the sentence was manifestly excessive. Any reduction would involve tinkering only.

7.71 A three-month reduction was also rejected by the CACD in *Rule*, with the Court concluding that "to alter the sentence in relation to that 30 months on the basis of a calculated 3 months disparity would be no more than tinkering".[83]

7.72 However, in *Stone*, the Court amended a sentence of three years' imprisonment to one of two years and eight months, observing that:[84]

> to reduce a total sentence of 3 years to one of 2 years and 8 months might in some circumstances be seen as "tinkering". But in our judgment if a sentence needs to be adjusted by a modest percentage, to reflect an error in principle, such as that which we believed occurred in this case, it will.

7.73 In *Jex*, the Court was also prepared to amend a sentence by four months, noting:[85]

> That is only 4 months less than the judge imposed, and it may be thought that there is an element of "tinkering" in making this reduction. We do not agree. First, a reduction of 25% in the length of a custodial sentence is not negligible, particularly from the point of view of the appellant. Secondly, where the court is required to follow a guideline unless it would be unjust to do so, and departs from it without an adequate justification this may produce a sentence which is demonstrably or "manifestly" excessive.

7.74 By comparison, the Court in *Axford* considered that reducing a starting point by one year (some 8 months more than in *Jex*), only *just* meant that the sentence was manifestly excessive. The Court stated:[86]

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82 *R v Ladwa* [2017] EWCA Crim 590 at [19], by Gross LJ.

83 *R v Rule* [2024] EWCA Crim 752 at [18], by Cockerill J.

84 *R v Stone* [2014] EWCA Crim 1375 at [17], by HHJ Goldstone QC, Recorder of Liverpool.

85 *R v Jex* [2021] EWCA Crim 1708, [2022] 1 WLR 4015 at [79], by Edis LJ.

86 *R v Axford* [2017] EWCA Crim 2651 at [19], by Stuart-Smith J.

At the risk of being accused of tinkering we consider that the difference between 5 years and 8 months and 6 years 8 months can, just, lead to the conclusion that the higher sentence is not merely severe but manifestly excessive.

7.75 Given the need for some flexibility in sentencing, we have not been persuaded that there is a need to reform the test for appeals by the convicted person against sentence in the CACD.

7.76 Our terms of reference require us to consider whether codification of the common law test in relation to appeals against sentence is warranted. Given the varied application of the "manifestly excessive" test, codification might offer an opportunity to clarify the meaning of the expression.

Consultation Question 23.

7.77 We provisionally propose no change to the current arrangements for defence appeals against sentence in the Court of Appeal Criminal Division ("CACD").

Do consultees agree?

7.78 We invite consultees' views on the tests applied by the CACD in appeals against sentences, specifically whether a sentence was "manifestly excessive", and on whether the tests could and should be codified.

Failure to impose mandatory sentences

7.79 In engaging with stakeholders for this project, we identified a concern that restrictions on the CACD's power to increase a sentence meant that some offenders were treated more leniently than Parliament intended, in particular where the trial court failed to impose a mandatory minimum sentence. When resentencing a person following a successful appeal against conviction (where they remain convicted of one or more offences), the CACD must not pass any sentence such that the appellant's sentence (taken as a whole) for all the related offences of which he remains convicted will, in consequence of the appeal, be of greater severity than the sentence (taken as a whole) which was passed at the trial for all the related offences.[87]

7.80 Section 11(3) of the Criminal Appeal Act 1968 makes similar provision when the Court resentences a person following a successful appeal against sentence.

7.81 In practice, this means that in some circumstances the CACD cannot pass a sentence required by law where the trial judge omitted to do so. There have been recent examples where the trial judge has omitted to impose a mandatory order resulting in the offender being dealt with more leniently than Parliament intended. The following examples highlight the practical problems arising from the current law:

(1) In *LF*, the Court observed that judges and practitioners had failed to apply the provisions relating to offenders of particular concern under section 236A of the

[87] Criminal Appeal Act 1968, s 4.

Criminal Justice Act 2003 ("CJA 2003"). This is a mandatory provision which applies where a person aged 18 or over is convicted of an offence listed in Schedule 18A of the CJA 2003 on or after 13 April 2015 and the court does not impose a life sentence or an extended sentence. In these circumstances, section 236A(2) requires the court to impose a sentence equal to the aggregate of the appropriate custodial term and a further one-year licence period. In *LF*, the Court were unable to impose this additional one year licence period and observed that the defendant had been dealt with more lightly than Parliament intended.[88]

(2) In *Aldridge and Eaton*,[89] the judge imposed a Sexual Offences Prevention Order ("SOPO") for a period of three years. Upon hearing that the minimum period was five years, the judge purported to vary the order to a term of five years. Unfortunately, the variation took place outside of the period allowed under the "slip rule".[90] The term could not be extended as E would have been treated more severely. The order was quashed, leaving no SOPO in place.

(3) In *Thompson*,[91] the issue was whether section 11(3) of the Criminal Appeal Act 1968 permitted the Court to replace a standard determinate sentence with either:

(a) a sentence under section 236A of the CJA 2003 which mandates the imposition of a special custodial sentence for offenders of particular concern;

(b) an extended sentence under section 226A or 226B of the CJA 2003; or

(c) a hospital order with a restriction or hybrid order under subsections 37 and 41 or 45A of the Mental Health Act 1983.

The Court held that such cases required a detailed consideration of the impact of the sentence to be imposed in substitution for the original sentence. In the case of *TC*, the Court could not extend the sentence as to do so would be to pass a more severe sentence, which would fall foul of section 11(3).[92]

(4) In *Needham*,[93] the Court considered sections 35A and 35B of the Road Traffic Offenders Act 1988. The purpose of the legislation was to prevent offenders who were disqualified from driving and had a custodial sentence imposed at the same time from serving all or part of their disqualification while in custody. The clear intention of Parliament was that periods of disqualification should be served by an offender while they were at liberty in the community. In the case of the appellant TA, he had pleaded guilty to causing death by dangerous driving

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88 [2016] EWCA Crim 561, [2016] 1 WLR 4432 at [40], by Treacy LJ.

89 [2012] EWCA Crim 1456.

90 Criminal Justice Act 2003, s 155.

91 [2018] EWCA Crim 639, [2018] 1 WLR 4429.

92 Above, at [46]-[55], by Sir Brian Leveson PQBD.

93 [2016] EWCA Crim 455, [2016] 1 WLR 4449.

and a sentence of 5 years and 6 months was imposed. In addition, the judge imposed a period of disqualification from driving for 7 years. To give proper effect to section 35A, the judge should have added an extension period of 33 months to the disqualification period. The Court stated that it had no power to make that order because of section 11(3), meaning the applicant would serve a significant part of his disqualification whilst in custody.

(5) In *Bailey*,[94] the Court dealt with issues arising out of the Victim Surcharge.[95] The Court held that section 11(3) prevented the court from imposing or increasing a surcharge which was less than the order mandated, unless it reduced some other element of the sentence.

(6) In *Channon,*[96] the issue related to the judge's failure to endorse the appellant's licence with penalty points. Had the Court not reduced the sentence overall, it would not have been able to correct the error.

Discussion

7.82 While we accept that it is far from ideal that the CACD may find itself having to affirm a sentence which failed to comply with statutory requirements, we do not think that the answer is to give it a power which would result in sentences being increased on an appeal by the convicted person. First, were it possible to increase a sentence in these circumstances, there would be a risk that a person might be deterred from bringing a meritorious appeal (for instance, on the basis that the mandatory minimum did not apply, or that there were exceptional reasons). This is because of the risk that, if they were unsuccessful, the CACD would increase their sentence to the mandatory minimum. Second, whether a sentence was 'corrected' to comply with the statutory requirements would depend arbitrarily on whether the offender chose to appeal their sentence or conviction: unlawful sentences would remain in place where the convicted person does not appeal against their conviction or sentence.

7.83 We think that where a court has failed to impose a mandatory sentence or other order the duty is on the prosecution to identify and challenge the error, either under the "slip rule", or by seeking to have the sentence referred as unduly lenient by the Attorney General. This, does, however, require consideration of whether there are lacunae whereby some unlawful sentences cannot be challenged by means of the provision for challenging unduly lenient sentences.

7.84 Of the cases we discuss in paragraph 7.81 above, we note that the offences in *LF*,[97] *Thompson*[98] and *Needham*[99] are covered by the ULS provisions, but in the latter case

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94 [2013] EWCA Crim 1551, [2014] 1 Cr App R (S) 59.

95 See paras 7.26-7.27, 7.81(5) and 7.85-7.87 in this chapter.

96 [2018] EWCA Crim 1655.

97 [2016] EWCA Crim 561, [2016] 1 WLR 4432 at [40], by Treacy LJ at [40]. The defendant was convicted of indecent assault.

98 [2018] EWCA Crim 639, [2018] 1 WLR 4429. The defendant was convicted of causing grievous bodily harm with intent.

99 [2016] EWCA Crim 455, [2016] 1 WLR 4449. The defendant was convicted of causing death by dangerous driving.

the Court might consider it an inappropriate use of the ULS powers merely to extend the disqualification period of an otherwise not lenient sentence.

7.85 The remainder of the cited cases involved failures to extend driving bans, to impose the correct Victim Surcharge and to endorse an applicant's driving licence with penalty points. These were undoubtedly less serious than the failures to impose the correct custodial sentences in the case of LF and TC – both of which could have been corrected through an Attorney General's reference.

7.86 We do, however, have a concern over the case of *Eaton*, when the CACD held that "as the 3 year SOPO passed in this case was unlawful, we cannot now extend its term nor can we vary it; consequently it must be quashed".[100]

7.87 If this is correct, it would seem to be a problem restricted to certain ancillary orders. Certainly, where the trial court imposes an unlawful custodial sentence because it fails to impose a mandatory minimum it does not follow that the sentence was "unlawful" and therefore must be quashed. Instead, as in *LF*, the CACD will merely leave the unduly lenient sentence in place. Likewise, where the trial court imposes the wrong surcharge, and the correct amount cannot be substituted because of the "no greater penalty" rule, the existing order remains in place.

7.88 If the CACD does not have the power to leave certain unduly lenient orders in place, and must instead quash them altogether, then this is unsatisfactory. We think it would, in general, be preferable to leave the existing order in place, albeit that one which was longer or more severe should have been imposed. To the extent that the CACD may not already have that power we see force in the argument that it should have it.

Consultation Question 24.

7.89 We provisionally propose that the Court of Appeal Criminal Division should have the discretion not to quash an unlawful order where to substitute the correct order would breach the rule against imposing a more severe sentence than was imposed at trial.

Do consultees agree?

Unduly lenient sentences

7.90 There was little concern over the current law enabling the Attorney General to refer an unduly lenient sentence ("ULS") to the CACD.

7.91 For example, the CPS was of the view that the power of the Attorney General to refer a sentence to the CACD where it is considered to be unduly lenient is adequate and appropriate. The Law Society similarly agreed and stated that there was nothing to suggest there was a problem with the system of ULS appeals.

[100] [2012] EWCA Crim 1456 at [39], by Lord Judge CJ.

Mandatory minimum sentences

7.92 The issue of the CACD's ability to correct failures to impose mandatory minimum sentences was raised by some respondents. In practice, however, almost all mandatory minimum sentences are covered by the ULS provisions, either because they are indictable only offences, or because they have been added to the ULS scheme by secondary legislation.

7.93 The exception is the mandatory sentence for a second offence of possession of a knife, corrosive substance, or offensive weapon.[101]

7.94 Where a sentence is imposed in a magistrates' court or by the Crown Court (in its appellate capacity or because the defendant has been committed to the Crown Court for sentencing) in summary proceedings in contravention of the mandatory minimum provision, the sentence can be challenged by the prosecution by way of judicial review or case stated. However, because the offence is an either-way offence, it may also be tried in a Crown Court – for instance, because the defendant chooses to elect for jury trial. It may also be the case that such an offence is dealt with at Crown Court because it is tried alongside other charges (of which the defendant might be acquitted).

7.95 In general, where a mandatory minimum sentence has not been imposed, the prosecutor should seek to have it corrected under the 56-day "slip rule". However, as discussed in the section on time limits, this can cause a difficulty if the sentence is not corrected during the 28 days in which notice of a ULS reference must be made. Moreover, it does not provide an answer in cases where the trial judge thereafter fails to impose the sentence under the "slip rule".

7.96 We can therefore see a case for extending the ULS scheme to cover a failure to impose any mandatory minimum sentence. In practice (at present) this extension would only apply to the mandatory minimum sentence for a second conviction for possession of a knife, corrosive substance or other offensive weapon. Alternatively, this particular issue could be addressed by adding this specific offence to the list of offences covered by the ULS scheme. The former approach would have the advantage of applying to any future mandatory minimum sentences for which the offence is not covered by the ULS scheme.

Consultation Question 25.

7.97 We provisionally propose including a failure to impose a mandatory minimum sentence as a ground for referring a sentence as unduly lenient to the Court of Appeal Criminal Division.

Do consultees agree?

[101] Sentencing Code, s 315(1).

Offences

7.98 No one suggested the addition of any specific offences to the ULS scheme. However, we are aware of public campaigns to add the offence of causing death by careless driving to the scheme. The exclusion of the offence has been raised by parliamentarians[102] and other public figures: the Olympic cyclist, Chris Boardman, whose mother was killed by a careless driver, has said that all driving crimes where a person was killed should be covered by the scheme.[103]

7.99 Causing death by dangerous driving, causing death by driving while under the influence of drink or drugs, and causing death by driving while disqualified are all triable only on indictment, and therefore are covered by the ULS scheme. However, causing death by careless driving and causing death by driving while unlicensed or uninsured are either-way offences. They have not been added to the ULS scheme.

7.100 Other driving offences which are not covered by the ULS scheme and which may warrant consideration are the "causing serious injury" offences (whether by dangerous or careless driving, or while driving while disqualified).[104]

7.101 We recognise that causing death by careless driving can be a difficult offence to sentence. The level of culpability can be very low but the level of harm is always high – death has resulted. Relatives of the victim in particular may well feel that the sentence is inadequate to reflect the harm done. There may also be scope for emotive reporting of such cases which may not necessarily reflect the broad tenor of the evidence before the court.

7.102 We acknowledge the argument that the Attorney General may well come under pressure to refer a case because a victim's family do not feel that the sentence properly reflected the harm done, but where the judge had rightly taken into account a driver's culpability when sentencing. We see the case for adding death by careless driving to the ULS scheme, and seek consultees' views.

7.103 There may also be a case for extending the scheme to cover animal cruelty offences. The Animal Welfare (Sentencing) Act 2021 increased the maximum penalty for certain offences under the Animal Welfare Act 2006 from six months to five years, and made them either-way offences. However, where a previously summary only offence becomes either-way, this can have the effect of reducing the ability to challenge a sentence as unduly lenient, because it means that rather than all trials taking place in the magistrates' court (where the sentence would be amenable to judicial review) some will take place in the Crown Court (where, unless included in the ULS scheme by secondary legislation, it will be unchallengeable).

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102 See for instance comments by Selaine Saxby MP (*Hansard* (HC), 24 March 2022, vol 711, col 429), Lee Anderson MP (*Hansard* (HC), 5 October 2020, vol 681, col 715), Sharon Hodgson MP (*Hansard* (HC), 21 November 2023, vol 741, col 185).

103 See R England, "Unduly lenient sentences review scheme 'inadequate'", *BBC News* (9 July 2019).

104 There are no "serious injury" equivalents to the offences of causing death by driving while uninsured, unlicensed, or (perhaps most surprisingly) driving while under the influence of drugs or alcohol.

7.104 Animal cruelty offences (specifically, causing unnecessary suffering and animal fighting offences) were added to the ULS scheme in Northern Ireland in 2016.[105] This followed a recommendation of the Review of the Implementation of the Welfare of Animals (Northern Ireland) Act 2011 in February 2016.

7.105 We recognise the need for careful consideration before any such offences are included. Such cases can arouse strong emotions, and some members of the public may not fully understand the reasons behind a sentence which is in fact appropriate and proportionate having had regard to the offence and the personal circumstances of the defendant. We are, therefore, interested in consultees' views as to whether the offences above should be included or if there are other offences that should be brought within the scheme.

Consultation Question 26.

7.106 We invite consultees' views on whether the following offences should be included within the unduly lenient sentence scheme:

(1) offences involving a fatality which are not currently covered, such as causing death by careless driving; and/or

(2) animal cruelty offences.

7.107 We invite consultees' views on whether there are any additional offences that should be included within the unduly lenient sentence scheme.

The requirement for leave

7.108 Section 36(1) of the Criminal Justice Act 1988 provides that the Attorney General "may, with leave of the Court of Appeal, refer the case to them". The test that the Court should apply when deciding whether to grant leave is not spelled out.

7.109 In practice, the CACD will invariably consider the merits of the case when deciding whether to grant leave.

7.110 In their consultation response, the AGO raised a concern about the requirement for leave to be granted by the CACD following a ULS reference. The AGO observed:

> the test for granting leave is not clear and there appears to be inconsistency in its application. Whilst some constitutions of the Court will grant leave where a point is arguable, even if the sentence might not be changed, others are stricter, and refuse leave unless the sentence is increased. There is a practical impact, in that it appears from the statute that an appeal to the Supreme Court only lies where leave is granted.

7.111 We recognise that the inconsistent practice of granting leave may create difficulties for the AGO in deciding whether to refer a sentence and whether to appeal to the

[105] Criminal Justice Act 1988 (Reviews of sentencing) Order (Northern Ireland) 2016.

Supreme Court. However, the leave requirement could potentially be a useful way of indicating whether the reference should have been made or not. Thus, the Court might decline leave where the reference was not arguable. It might give leave where the reference was arguable, even if it did not, in the event, decide that the sentence was unduly lenient.

7.112 We have found it difficult to identify a clear practice as to when the Court will decline leave or grant leave but decline to find the sentence unduly lenient. Given this, we are of the provisional view that there is scope to put the test for leave to appeal on the ground a sentence is unduly lenient on a statutory footing. This would provide greater clarity for the AGO in deciding whether to refer as well as further guidance for those considering whether to make a request to the AGO to refer.

Consultation Question 27.

7.113 We provisionally propose that there should be a statutory leave test for unduly lenient sentence references.

Do consultees agree?

7.114 If there is to be a test, we invite consultees' views on whether it should be whether it is arguable that the sentence was unduly lenient.

Should the power lie with the Attorney General or the Director of Public Prosecutions?

7.115 Some stakeholders indicated a concern that there was a 'political' aspect to the Attorney General's decisions in ULS references. For example, the Cardiff University Law School Innocence Project stated:

> as the Attorney General is a member of the government appointed by the Prime Minister there needs to be caution that decisions are not influenced by political motives.

7.116 One reference that has been criticised is that of the sentence of a hospital order with restrictions imposed on Valdo Calocane on 20 February 2024.[106] Mr Calocane was originally charged with the murder of Barnaby Webber, Grace O'Malley-Kumar and Ian Coates following a knife attack.[107] Mr Calocane further attempted to kill three others by running them down in a van. Following psychiatric reports, it was found that Mr Calocane was suffering from paranoid schizophrenia which had impaired his ability to make rational judgements or exercise self-control. As a result, the CPS accepted that the partial defence of diminished responsibility was available to Mr Calocane. Mr Calocane subsequently entered guilty pleas to amended charges of manslaughter by

106 AGO, "Attorney General refers Nottingham stabbing sentence to Court of Appeal" (20 February 2024).

107 HM Crown Prosecution Service Inspectorate, "An inspection of Crown Prosecution Service actions in the Valdo Calocane case" (March 2024) p 13.

reason of diminished responsibility.[108] These guilty pleas were accepted by the prosecution along with guilty pleas of attempted murder for the van incident.[109]

7.117 Mr Calocane was sentenced on 24 January 2024 to a hospital and restrictions order[110] pursuant to the Mental Health Act 1983 for each offence to be served concurrently.[111] The Attorney General received numerous referrals from the public that the sentence was unduly lenient.[112] On 20 February 2024, the Attorney General confirmed she had referred the sentence to the CACD.[113] She also requested that HM Crown Prosecution Service Inspectorate ("HMCPSI") review the actions of the CPS in the case.[114]

7.118 In determining the appeal,[115] the CACD noted that given the mental impairment of Mr Calocane and the psychiatric reports, the sentencing options were limited[116] to either a hospital and restrictions order or a hybrid order.[117] The Court concluded that:[118]

> This is a challenge to the decision of a highly experienced judge who was immersed in the procedural history and detailed evidence of the case. His decision was reached after two days of submissions and oral evidence from three appropriately qualified medical experts.

7.119 It concluded that there had been no error in the judge's approach. The Court refused not only the reference but leave to refer as well: it did "not consider it arguable that the resulting sentences were unduly lenient".[119]

7.120 Given the CACD's judgment, as well as the report from HMCPSI which found the charging decisions were all correct, some critics have questioned whether the

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108 *R v Calocane* [2024] EWCA Crim 490, [2024] 4 All ER 1063 at [42], by Baroness Carr of Walton-on-the-Hill CJ.

109 Above, at [43].

110 Where a Court makes a hospital order, it may also make a restriction order which requires the consent of the Secretary of State before the offender is discharged, granted a leave of absence or moves hospitals. Further, the Secretary of State (who is advised by the responsible clinician) can order the offender's detention or return to hospital once they have been released.

111 Mental Health Act 1983, ss 37 and 41.

112 AGO, "Attorney General refers Nottingham stabbing sentence to Court of Appeal" (20 February 2024).

113 Above.

114 HMCPSI concluded that the CPS' original charging decision of murder was correct as was the subsequent decision to accept pleas of guilty to manslaughter by way of diminished responsibility. The Inspectorate further concluded that the CPS could not have proceeded with the murder charges given the psychiatric evidence from the prosecution and defence experts. It recommended, however, that the CPS should undertake a review of their engagement with victims.

115 *R v Calocane* [2024] EWCA Crim 490, [2024] 4 All ER 1063.

116 Above, at [76], by Baroness Carr of Walton-on-the-Hill CJ.

117 Described above at [62]. A hybrid order means that the offender will be subject to a hospital order, but if they no longer require treatment will likely be remitted to prison for the remainder of their sentence to be served; they will in effect be serving a normal sentence of imprisonment thereafter and can only be released by the Parole Board.

118 Above, at [74].

119 Above, at [94].

decision to refer was in part influenced by the families' (and public) anger with the sentence.[120]

7.121 In our report on consents to prosecution in 1998, we considered a scheme for deciding whether the power to consent to a prosecution should lie with the Attorney General or the Director of Public Prosecutions ("DPP"). We concluded that, in general, consent requirements should require the consent of the DPP, and that only offences which require consent because they involve national security, or an international element should require the consent of the Attorney General.[121]

7.122 However, we are persuaded that the power to refer should remain with the Attorney General. We note that in our previous report the issue was whether a prosecution should be commenced. A ULS reference is fundamentally different, not only because it is about the sentence imposed and not a question of conviction, but because it is a form of appeal and, therefore, requires a review of the previous proceedings. In such cases, we can see that there is merit in these decisions lying with the Attorney General rather than the DPP, given that the CPS will (normally) have been the unsuccessful party in the trial. Moreover, while the DPP's powers are normally delegable to any Crown prosecutor, the powers of the Attorney General are normally exercisable only by the Attorney General or the Solicitor General. This ensures that references should only be made where they have been subject to a heightened degree of scrutiny.

7.123 Given that most consultees considered the powers of the Attorney General to be working well and we received little evidence to suggest, beyond that which we have discussed above, that references were being unfairly politicised, we have not been persuaded another body would be better placed to make such references.

Consultation Question 28.

7.124 We provisionally propose that the right to refer sentences to the Court of Appeal Criminal Division as unduly lenient should remain with the Attorney General.

Do consultees agree?

Time limits

7.125 As we stated above at paragraph 7.39, the reference must be made within 28 days of the sentence. This limit may cause some difficulties. First, because it is shorter than the 56 days allowed under the "slip rule", it will sometimes happen that the prosecution expects an error – such as a failure to impose a mandatory minimum sentence – to be corrected under the "slip rule".[122] However, in case the judge does

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120 For example, A Benn, "Sentence: manslaughter (diminished responsibility): *R v Calocane (Valdo)*" [2024] *Criminal Law Review* 669; H Quirk, "Unduly Lenient Sentence" [2024] *Criminal Law Review* 205.

121 Consents to Prosecution (1998) Law Com No 255, para 7.13.

122 CPS, "Unduly Lenient Sentences" (3 April 2024).

not correct the sentence, the prosecution may feel compelled to request the Attorney General to refer the case on a provisional basis.

7.126 Second, in certain circumstances, reporting restrictions will be placed on the outcome of a trial – for instance, where the convicted person faces retrial on other charges, or proceedings are continuing against other persons in a connected case. In this situation, it was (until recently) CPS policy to refer all such cases to the Attorney General's Office for review, on the basis that without media reporting, the public would not have the opportunity to draw the attention of the Attorney General's Office to the sentence. We understand this is no longer its practice.[123]

7.127 Third, because there is no flexibility, there will be some circumstances in which the Attorney General is approached towards the end of the 28-day period. For example, a case may be referred to them on the 27th day after sentence, in which case they only have one day to review the case and decide whether or not to refer. In consultation, we heard that the time limit is often not well understood, particularly by members of the public, and the AGO often receives requests to review near the end of the limit. In these cases, sometimes the AGO will lodge a protective application. In other cases, it will be too late for the AGO to take action.

7.128 Because the ULS scheme arguably involves an element of double jeopardy (see paragraph 7.44 above), in that the person who has been convicted faces a further hearing, and the possibility of an increased sentence, time limits have an elevated importance. Strict time limits mean that a person who is sentenced is only at risk of an increase in their sentence for a limited period. This is particularly important where the AG is challenging a non-custodial sentence, or a short custodial sentence. In the former scenario, the person will not only have had an expectation that they are not going to prison but may well have undertaken rehabilitative work. In the second, the person may have been released by the time that the sentence is reviewed by the CACD. It is open to the CACD in such circumstances to hold that the sentence was unduly lenient but to decide, in its discretion, not to interfere with it.[124]

7.129 In its response, the AGO stated:

> In practice, we have observed that the slip rule and ULS time limits operate well. We often get CPS referrals where a slip-rule hearing is pending, but the lodging of a ULS reference preserves the ability to challenge the sentence.

7.130 We are of the view that it would be better for the AGO to have sufficient time to review a case and make a fully informed decision as to whether to refer, rather than having to make protective applications so that it can preserve its ability to appeal. We consider that this puts undue stress on the defendant given their case may in fact not be referred once the AGO has fully reviewed their file. Further, it creates more work for the CAO upon receipt of the reference which may then be abandoned.

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123 CPS, "Unduly Lenient Sentences" (3 April 2024).

124 See, for example *R v Anjum* [2024] EWCA Crim 1373, [2025] 1 Cr App R (S) 19 at [43]-[48], by Holroyde LJ VPCACD.

7.131 In Chapter 6, we provisionally propose that the time limit for defence appeals should be increased to 56 days.

7.132 We do not think the 28-day limit to make a request to the AGO to refer should be extended. This would lengthen the period of uncertainty for all offenders in relation to whom the ULS scheme is applicable as they start their sentence.

7.133 Moreover, extending the period for making a reference to the CACD would not address the problem of the AGO receiving requests for consideration of a sentence close to the deadline for making a reference. Whatever length of time is allowed for making a reference, it will always be possible that requests will be made to the AGO close to that deadline – although a longer period might alleviate the problem somewhat.

7.134 One possibility would be to give the CACD discretion to extend the time period where there is good reason. Another alternative would be to provide the Attorney General with the possibility to make a reference outside the time period where there is a good reason for the delay.

7.135 Because of the considerations relating to the convicted person's interest in finality, and the consequences of uncertainty for those all those starting their sentences where there is the possibility of a reference, we consider that any possibility of an extension should be strictly limited, both in terms of the length of extension, and the test which must be met for a reference to be considered out of time.

Consultation Question 29.

7.136 We invite consultees' views as to whether the Attorney General should have the ability to refer a sentence to the Court of Appeal Criminal Division as unduly lenient outside of the 28-day limit. If so, under what circumstances might this be permissible, and should there be a maximum period of extension?

A power for sentence appeals to be determined by a single judge

7.137 Some consultees suggested that some types of sentence appeals could be fully determined by a single judge, instead of two or more as is currently required.

7.138 For example, Mark Newby, a solicitor, argued:

> The current sentencing regime for sentence appeals seems to operate satisfactorily, save … where some technical appeals arise which are outside any slippage rule for example uncredited remand time. It seems unhelpful that these must go through a whole appeal process when they could be fixed on paper or by a single justice of appeal.

7.139 The Law Society made a similar recommendation in relation to appeals where there has been a failure to consider remand time, arguing that this would make a "clearer and streamlined route for appeals".

7.140 Professor John Spencer also questioned whether some sentence appeals needed to be dealt with by a full bench of the CACD. His suggestion was slightly more radical than those of the consultees referred to above:

> I think [the CACD's] powers are adequate but once again there is a structural problem … Most appeals against sentence would be more efficiently dealt with by regional Courts of Appeal, staffed by senior Circuit Judges, possibly presided over by a High Court Judge: so reserving the Court of Appeal (Criminal Division) in London for the important sentencing cases that raise genuine issues of principle.

7.141 We have further considered whether some ULS references need to be heard by the full court. There is a case for saying that some could be dealt with by the single judge, for example where the basis for a reference is a simple one such as a failure to impose a mandatory minimum sentence in the absence of exceptional circumstances.

Consultation Question 30.

7.142 We invite consultees' views as to whether some types of sentence appeals and references by the Attorney General to the Court of Appeal Criminal Division could be dealt with by a single judge rather than by the full court.

POST-SENTENCING REVIEW

7.143 Several consultees who responded to our Issues Paper noted some tension in the approach to sentencing where there had been a change of circumstance between sentencing and appeal. While a change of circumstances does not generally provide grounds for an appeal against sentence, (i) it can provide grounds for a review of the minimum term in respect of DHMP, and (ii) where a person successfully appeals their sentence, the CACD can take into account post-trial material when resentencing.

7.144 This goes to a wider issue of the circumstances in which the Court will be willing to reconsider a sentencing decision based on developments subsequent to sentencing.

7.145 The Bar Council suggested:

> it might be clarified that, in line with the court's existing practice (at least in some cases), if the court considers that the defendant should be sentenced differently, it can take into account post-sentence material, for example psychiatric and prison reports, that was not before the sentencing judge. Consideration might need to be given as to how to prevent appeals against sentence becoming opportunities for a second attempt to procure a lower sentence, and this is an area in which time limits may have a significant part to play.

Sentence appeals based on subsequent deterioration in health or pregnancy

7.146 In general, the CACD will not allow an appeal against a sentence because of the subsequent discovery of a health condition.

7.147 In *Minhas*,[125] the Court concluded that "in cases of serious ill health this court may have regard to a significant deterioration in a medical condition which was known at the date of sentencing. The cases in which it will be appropriate to do so are however rare".

7.148 In *Watson*,[126] the CACD was asked to quash sentences on the basis that the applicant's health had deteriorated subsequently and suddenly to such a degree that, as an act of mercy, the Court should quash it. Two days after sentence he had suffered an aneurysm which led to two major strokes. At the time of lodging his appeal, he was incapable of speech and needed to use a wheelchair. By the time of the appeal, he was able to walk using a tripod walking stick.

7.149 The CACD, relying in part on *Roberts*, distinguished between information "building on or undermining what was seen below as matters material to the seriousness of the offending or by way of aggravating or mitigating factors" and "entirely separate events which occurred only after sentence and of which the Judge was wholly unaware".[127] The fact that the events took place very shortly after the defendant was sentenced made no difference. Watson's application for leave to appeal against his sentence was refused.

7.150 However, in at least two cases the CACD has allowed an appeal against sentence where a woman has discovered she was pregnant following sentencing. In both cases the pregnancy was held to be an existing fact not known to the court.

(1) In *Charlton*,[128] the CACD quashed the mandatory sentence of three years' imprisonment for a third domestic burglary, substituting a sentence of two years' imprisonment, suspended for two years, with a drug rehabilitation requirement.

(2) In *Bassaragh*,[129] the CACD quashed the mandatory minimum sentence of five years' imprisonment imposed on a woman convicted of possession of a prohibited firearm. It held that her pregnancy, and particular risks relating to her pregnancy constituted "exceptional circumstances" which justified not imposing the mandatory minimum sentence; that a sentence of three years was commensurate with the seriousness of the offence; reduced this to two years after making the appropriate reduction for a guilty plea; and concluded that, exceptionally, the sentence could be suspended.

7.151 Thus, at least in respect of pregnancy, the Court seems to accept that a condition which is present but unknown is relevant to the exercise of its power to review the sentence.[130] The special approach in relation to pregnancy is reinforced by the

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125 [2018] EWCA Crim 318, [2018] 1 WLR 5344 at [20], by Holroyde LJ.

126 [2021] EWCA Crim 1248, [2022] 1 Cr App R (S) 39.

127 Above, at [17], by Carr LJ.

128 *R v Charlton* [2021] EWCA Crim 2006, [2022] 2 Cr App R (S) 18.

129 *R v Bassaragh* [2024] EWCA Crim 20, [2024] 2 Cr App R (S) 11.

130 This recognition may have some correlation with the recent dedicated mitigating factor identified by the Sentencing Council as "pregnancy, childbirth and post-natal care". As of 1 April 2024, courts may consider the medical needs (including mental health) of the defendant as well as the effect the sentence may have on

Sentencing Council's creation of a dedicated mitigating factor of "pregnancy, childbirth and post-natal care" from 1 April 2024,[131] and the CACD's determination of considerations arising from pregnancy as "nevertheless highly material" in *Byron*,[132] an appeal which preceded the creation of the dedicated mitigating factor. It is not clear, however, whether the CACD's exceptional practice of reviewing sentences on the discovery of unknown pregnancies applies to other conditions.

Post-conviction assistance to law enforcement authorities

7.152 In *A and B*,[133] the CACD affirmed the longstanding practice of reducing a sentence on the basis that the offender had provided information and assistance to law enforcement authorities after conviction. However, while information provided prior to sentencing might justify an appeal if it was not taken into account by the sentencing judge, the Lord Chief Justice, Lord Bingham of Cornhill, rejected the possibility that post-sentence information would have the same effect:[134]

> The Court of Appeal Criminal Division would not ordinarily reduce a sentence to take account of information supplied to the authorities after sentence… The reason for this rule was clear. The Court of Appeal Criminal Division was a court of review; its function was to review sentences imposed by the courts of first instance, not to conduct a sentencing exercise of its own from the beginning.

Reviews of sentences of Detention at His Majesty's Pleasure ("DHMPs")

7.153 We have outlined the law that sets out the DHMP sentence above (see paragraphs 7.47 to 7.62). We consider that, as the review provisions enable the minimum term set by the sentencing judge to be amended by a superior court, upon an application by the offender and on the basis of new evidence, the procedure amounts, in substance, to an appeal. It is in this respect no different to the situation where a sentence is amended upon an application to the CACD on the basis of fresh evidence.[135]

7.154 DHMP is a "unique"[136] sentence: one aspect of this is that it is possible to apply for a review of the minimum term set by the trial judge.

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the physical and mental health of the defendant and any effect on the child. For the purposes of the mitigating factor a post-natal woman is someone who has given birth within the previous 12 months. See Sentencing Council, "Sentencing pregnant women and new mothers" (1 April 2024).

131 Above.

132 [2024] EWCA Crim 818 at [22], by May J.

133 *R v A and B* [1999] 1 Cr App R (S) 52, CA.

134 Above, at [53], by Lord Bingham of Cornhill CJ.

135 As we discuss at para 7.50 and following above, the procedure has evolved from one in which the trial judge had no formal role in setting the minimum term (but might make a recommendation); where the minimum was set, and could be reduced, by the Home Secretary; and where the High Court's role was limited to judicial review of the Home Secretary's decision. As it previously operated, the review mechanism might be characterised as being more related to the administration of the sentence by the executive than an appellate process. However, responsibility for setting the minimum term has now passed to the trial judge, and the Secretary of State's role upon receiving an application (unless they consider the request frivolous or vexatious) is limited to referring it to a court. Thus, the procedure is now, in most respects, concerned not with the administration of a sentence but with review, by a court, of a judicial ruling.

136 *R (Quaye) v Secretary of State for Justice* [2024] EWHC 211 (Admin), [2024] 1 WLR 3303.

7.155 As we have explained above, the justifications for the minimum term of DHMP being subject to review are based on the fact that a child's lack of maturity acts to reduce their culpability for the offence, and the fact that the sentence will normally (but not always) be served by someone who remains young and will be maturing.

7.156 For instance, in *Smith v Home Secretary*, Lord Bingham said:[137]

> The requirement to impose a sentence of HMP detention is based not on the age of the offender when sentenced but on the age of the offender when the murder was committed, and *it reflects the humane principle that an offender deemed by statute to be not fully mature when committing his crime should not be punished as if he were. As he grows into maturity a more reliable judgment may be made*, perhaps of what punishment he deserves and certainly of what period of detention will best promote his rehabilitation.

7.157 In *Singh v United Kingdom*, the European Commission of Human Rights said:[138]

> The application of the term of detention at Her Majesty's pleasure to juveniles would appear to the Commission to reflect an intention of imposing a distinct regime of detention geared to the special considerations which apply in dealing with very young offenders who are potentially dangerous but who still have formative years ahead of them and may change with maturation.

7.158 DHMP thus reflects the fact that children are not fully mature. However, the law also recognises that turning 18 is not a "cliff-edge":[139]

> Reaching the age of 18 has many legal consequences, but it does not present a cliff edge for the purposes of sentencing… Full maturity and all the attributes of adulthood are not magically conferred on young people on their 18th birthdays. Experience of life reflected in scientific research is that young people continue to mature, albeit at different rates, for some time beyond their 18th birthdays. The youth and maturity of an offender will be factors that inform any sentencing decision, even if an offender has passed his or her 18th birthday.

7.159 This principle is also reflected in the statutory sentencing framework for murder, which makes a qualitative distinction between those aged 21 and over, those aged over 18 but under 21, and those aged under 18.[140]

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137 *R (Smith) v Secretary of State for the Home Department* [2005] UKHL 51, [2006] 1 AC 159 at [12], by Lord Bingham of Cornhill (emphasis added).

138 App No 21928/93 (Commission decision).

139 *R v Clarke* [2018] EWCA Crim 185, [2018] 1 Cr App R (S) 52.

140 Where a person aged 21 or over is convicted of murder (unless committed as a child) the sentence is one of life imprisonment; where the person is 18, 19 or 20, the sentence is one of custody for life; but where the offence was committed as a child, the sentence is one of DHMP. There are quantitative differences between in relation to the minimum term when a person is sentenced to DHMP, as the starting point when calculating the minimum term differs according to the categorisation of the offence and whether the offender was 17; 15 or 16; or 14 or under (Sentencing Code, sch 21).

7.160 There is a strong body of evidence from behavioural neuroscience that young adults continue to develop neurologically up to the age of 25 and probably beyond.[141] It is therefore appropriate to distinguish between young adults and older, "fully mature", adults. In *ZA*, Mrs Justice May said:[142]

> It has been recognised for some time that the brains of young people are still developing up to the age of 25, particularly in the areas of the frontal cortex and hippocampus. These areas are the seat of emotional control, restraint, awareness of risk and the ability to appreciate the consequences of one's own and others' actions; in short, the processes of thought engaged in by, and the hallmark of, mature and responsible adults.

7.161 The justifications for the unique facets of DHMP (noted at paragraph 7.48 above) conflate reduced culpability and the prospect of the offender maturing while incarcerated. However, an anomaly arises out of the fact that whereas sentencing provisions generally relate to the age of the offender at the point of sentencing, the mandatory DHMP provision relates to the age of the offender at the time of the offence. This makes sense in the context of the first part of the justification (reduced culpability), but when a person is sentenced to DHMP as an adult for a murder committed as a child, the second part of the justification – that a more reliable assessment can be made of what sentence will best promote the offender's rehabilitation – is of less weight.

7.162 The anomaly is at its most acute when one contrasts the position of a person serving a sentence of DHMP (particularly one sentenced as a fully mature adult) with that of a child sentenced to detention for life under section 258 of the Sentencing Code. A child sentenced to detention for life for an offence (necessarily one other than murder) under section 258 is not entitled to have their minimum term reviewed. However, until the restriction on DHMP reviews in the Police, Crime, Sentencing and Courts Act 2022, an adult sentenced to DHMP for murder could apply to have their minimum term reviewed.

7.163 Given that the rationale for allowing DHMP reviews is that the child will be "growing into maturity" and a "more reliable judgment may be made", it is strikingly out of line with this principle that an adult sentenced to DHMP (who may be fully mature) was until recently entitled to a review of their minimum term but a child sentenced to detention for life (who *is* growing into maturity) is not. If the principle enunciated in *Smith* is correct, then it is hard to see any justification for excluding others sentenced to detention for life for offences committed as a child.

7.164 We are provisionally of the view that a better way to give effect to the principle enunciated in *Smith* is to provide that child offenders sentenced to an indeterminate sentence with a minimum term, whether this is a discretionary sentence of custody for life or the mandatory sentence of DHMP, should have similar rights to have their minimum term reviewed on grounds of exceptional progress.

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141 Parole Board, "Young Adults: Member Guidance" (August 2021), Annex B.

142 [2023] EWCA Crim 596, [2023] 2 Cr App R (S) 45 at [52], by May J.

7.165 We therefore conclude that children serving a sentence of detention for life should have the same right to a review of the minimum term as is available to a child sentenced to DHMP, as the same considerations apply to both groups.

7.166 Conversely, where a fully mature adult is sentenced to DHMP for a murder committed as a child, the trial judge is as well placed to make a reliable judgment of the required punishment as when sentencing an offender to the mandatory life sentence for murder. Accordingly, we conclude that the right to request reviews of DHMP should not apply to a person sentenced to DHMP as a mature adult.

7.167 However, we also recognise that the age of 18 "is not a cliff edge"[143] and that young adults will continue to mature.

7.168 We accept the evidence that young adults are in a qualitatively different position in respect of maturation when compared both with children and with adults over the age of 25. Accordingly, we can see a case for allowing DHMP reviews up to the age of 21 or 25, with a corresponding right for those sentenced to detention or imprisonment for life for offences committed as a child.

Would this be compatible with the Convention rights?

7.169 We recognise, however, that:

(1) This would maintain the discrimination between a person sentenced to DHMP as a child (and potentially as a young adult), and a person sentenced to DHMP as a mature adult which was found to be contrary to article 14 of the ECHR in *Quaye*.

(2) Given the "unique" nature of a DHMP sentence, without a review for offenders aged over 25 at the date of sentence the DHMP would risk arbitrary detention, contrary to article 5 of the ECHR.

7.170 We think the first of these can be objectively justified. The judgment in *Quaye* (that is subject to appeal) made much of the fact that 18 does not represent a cliff-edge and itself drew a distinction between a person who has reached 18 and a "mature adult". The Ministry of Justice's own analysis in setting the new policy referred to "increasing neuroscientific evidence that young adults continued to mature up to the age of 25".[144]

7.171 It is correct that the Court did note that:[145]

> It is not uncommon for the crucial progress to be made when an offender has passed their 25th birthday. The case of *Herbert* is a paradigm of this phenomenon. In those circumstances, there is no logic in distinguishing between offenders aged 18 at the date of sentence and those under 18 at that point. The distinction is without reasonable foundation.

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143 *R v Clarke* [2018] EWCA Crim 185, [2018] 1 Cr App R (S) 52 at [5], by Lord Burnett of Maldon CJ.

144 *R (Quaye) v Secretary of State for Justice* [2024] EWHC 211 (Admin), [2024] 1 WLR 3303 at [25], by William Davis LJ and May J.

145 Above, at [51].

7.172 However, we think this statement, while recognising that maturation can continue after the age of 25, serves mainly to illustrate why it would be wrong to distinguish between children and adults aged 18-25. It provides much less secure support for treating children and those over 25 in similar ways. Once it is accepted that there is a case for a special regime for children, and that the same considerations do not apply to fully mature adults, some degree of discrimination is unavoidable. The question is where the most appropriate place is to draw the line.

Consultation Question 31.

7.173 We provisionally propose that children serving a sentence of detention for life should have the same right to a review of the minimum term as is available to a child sentenced to Detention at His Majesty's Pleasure ("DHMP").

We provisionally propose that this right should extend to young adults sentenced to DHMP or life imprisonment for offences committed as a child.

Do consultees agree?

7.174 We invite consultees' views on how far into adulthood this right should extend. Should it be:

(1) 21 years old (the age at which a person leaves a young offender institution);

(2) 25 years old (the age at which most people will be neurologically mature); or

(3) some other age?

The High Court's role in reviews of Detention at His Majesty's Pleasure

7.175 It is a historical anomaly that it is the High Court which hears requests for a review of the minimum term of a sentence of DHMP. This seems to reflect the fact that this was a process which was originally a matter for the Home Secretary, subject to the supervisory jurisdiction of the High Court.

7.176 The High Court generally has no role in relation to the sentencing of the most serious criminal offences. It is acknowledged that the High Court hears appeals against conviction and sentence in a youth court by way of case stated or judicial review, even where the case concerns an offence for which an adult would be tried in the Crown Court. However, murder is always tried in the Crown Court, even when the defendant is a child, so it is particularly anomalous that in these cases of murder, it is the Administrative Court which reviews the minimum term.[146] We therefore consider that these appeals should be brought before the CACD rather than the High Court.

[146] It should be noted that the Administrative Court forms part of the King's Bench Division of the High Court. Judges of the King's Bench Division both sit in the CACD and as judges in some Crown Court trials.

Consultation Question 32.

7.177 We provisionally propose that reviews of minimum terms for children and young people on indeterminate sentences should be heard by the Court of Appeal Criminal Division.

Do consultees agree?

Indeterminate sentences for public protection

7.178 Several respondents who considered post-sentencing review raised concerns about IPPs (see the law set out above at paragraphs 7.28 to 7.31).

7.179 In particular, consultees who raised concerns largely felt that the current powers afforded to the CACD in dealing with sentence appeals hindered the Court's ability to deal with IPP prisoners.

7.180 For example, the Criminal Appeals Lawyers Association ("CALA") argued that the Court's powers prohibited it from being proactive in correcting sentences that were unlawful or where a principle has fundamentally changed. CALA cited IPP cases as an example of this:

> Whilst many who continue to serve these sentences have unsuccessfully appealed against the sentences, a significant number of prisoners serving IPPs have never appealed against their sentences either because they remain unaware of the mechanisms for doing so, because they believe they cannot so many years out of time, because they fear a loss of time order, or because they struggle to access assistance, given the low numbers of practitioners undertaking this work. At present, the Court of Appeal has no power to consider any sentence where an application has not been made by the offender themselves.

7.181 CALA went on to suggest:

> Consideration should be given to the Court of Appeal of its own volition reviewing particular classes of sentence in particular circumstances. In the case of IPP sentences, if the Court of Appeal were permitted to be proactive it could ask to consider all cases where IPP sentences had been imposed allowing those affected to make application.

7.182 APPEAL similarly raised the difficulties faced by the CACD in dealing with IPP appeals:

> While recognising the unique difficulties faced by those serving those sentences, [the CACD] has often felt unable to interfere with sentences which were lawful at the time of imposition. The Court has expressed the view that it is a matter for Parliament to rectify the injustices of IPP sentences, but it is equally possible for Parliament to legislate to give the Court greater powers to rectify these unjust sentences itself. ...

> The existing grounds of appeal in relation to sentence should be set out in legislation, along with a further ground allowing the Court of Appeal to reduce a sentence where it is in the interests of justice to do so, taking into account evolving standards of decency. This would allow the Court to take a more active and direct approach to dealing with sentencing appeals where an individual has been given a sentence that has since been repealed and strongly criticised for its cruelty and disproportionality.

7.183 The London Criminal Courts Solicitors' Association ("LCCSA") also argued for greater powers to deal with IPP cases, suggesting the expansion of the role of the Criminal Cases Review Commission ("CCRC") where a sentence appeal has previously been dismissed by the CACD:

> In our view, urgent consideration ought to be given to these cases and potentially the statutory introduction of "exceptional circumstances" in sentence appeals so that, where previous appeals have been before the Court of Appeal and not succeeded, the individuals concerned can re-argue their unsuccessful grounds in fresh applications to the CCRC. At present the CCRC's powers relating to "exceptional circumstances" in this specific context only arise in relation to conviction appeals.

7.184 Solicitor Mark Newby made similar arguments about the need to review such sentences. In addition, he suggested that there should be a review of all indeterminate sentences which would include all those serving a life sentence:

> There is currently no mechanism for the examination of a prisoner's progress in custody, in order to determine the lawfulness of their continued detention, in England and Wales – with the exception of those serving sentences of detention at Her Majesty's Pleasure… I believe the Court of Appeal should be given the power to hear applications from indeterminate sentenced prisoners, to give an effective remedy in cases where there are legitimate penological grounds for reducing the period of detention originally prescribed by the Courts.
>
> As the [European Court of Human Rights] recognised in *Vinter*[147]
>
> > …What may be the primary justification for detention at the start of the sentence may not be so after a lengthy period into the service of the sentence. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence, that these factors or shifts can be properly evaluated.

7.185 In the course of preparing this consultation paper, several reforms have been made or announced in respect of the IPP regime. The Victims and Prisoners Act 2024 contains several provisions on IPPs, most of which are not yet in force. On 1 November 2024, section 66, which expands the power to terminate IPP licences and section 67, which requires the Secretary of State to provide an annual report on the support and rehabilitation of IPP prisoners and their progress towards release from prison or licence termination, were brought into force. Lord Chancellor Shabana Mahmood MP

147 *Vinter v UK* (2016) 63 EHRR 1 (App Nos 66069/09, 130/10 and 3896/10) at [111].

announced[148] further measures to take effect from 1 February 2025. However, the Ministry of Justice informed the House of Commons Justice Committee on 31 October 2024 that the Government would not "resentence" those serving IPP sentences to provide a definite release date and time-limited licence on release.[149] That letter recorded that the then unreleased IPP prison population was 1,132 and the recalled population was 1,602.

7.186 We acknowledge that the issue of how to manage and process existing IPPs is not a criminal appeals issue. It is arguable that the question of their existence and management has always been for the legislature and executive, rather than the judiciary (although individual sentencing decisions are for the judiciary). Nonetheless, the response in the letter referred to above highlights the tension between a blanket (legislative) approach to IPPs and a case-by-case (judicial) one. Though the legislation creating IPPs is widely agreed to have been wrong, most IPPs will have been correctly imposed under that legislation when it was in force, and it is therefore difficult, under the regular sentence appeals regime, to challenge IPPs as wrongly made *at the time*. We therefore seek views on whether there should be a bespoke right for those sentenced to IPP to challenge the sentence on an individual basis on appeal and, if so, what the test should be for quashing the IPP.

7.187 More generally, we are cognisant of the need for finality in sentencing and, as aptly observed by the Bar Council, it is important that a sentence appeal does not become a second bite at the cherry. As such, we are of the view that any change in circumstance would need to be sufficiently material, perhaps even exceptional. We are interested in consultees' views as to whether the CACD should be able to take into account a change in circumstance in certain sentence appeals.

Consultation Question 33.

7.188 We invite consultees' views on whether the current powers afforded to the Court of Appeal Criminal Division in relation to sentence appeals are sufficient to deal with a change of circumstance post-sentence? This includes a change in law (for example, the repeal of a type of sentence) or a change in the personal circumstances of the defendant.

7.189 We invite consultees' views specifically on whether those currently serving sentences of imprisonment for public protection ("IPP") should be entitled to challenge their IPP on an individual basis on appeal and, if so, what the test for quashing an IPP should be.

148 Imprisonment for Public Protection: Changes to Licence, Statement made on 5 September 2024 by Shabana Mahmood, Lord Chancellor and Secretary of State for Justice, Statement UIN HCWS72.

149 Letter from Sir Nic Dakin MP (Parliamentary Under Secretary of State at the Ministry of Justice) and Lord Timpson (Minister of State for Prisons, Probation and Reducing Offending) to Andy Slaughter MP, Chair of the Justice Select Committee (31 October 2024).

Chapter 8: Conviction appeals in the Court of Appeal Criminal Division

INTRODUCTION

8.1 A person convicted of an offence on indictment by the Crown Court may appeal against the conviction to the Court of Appeal Criminal Division ("CACD") pursuant to section 1(1) of the Criminal Appeal Act 1968 ("CAA 1968"). Unlike sentencing appeals, where the test applied by the CACD is non-statutory, in appeals against conviction the test is statutory – the Court must quash a conviction if it is "unsafe" – however, that statutory test has been the subject of a great deal of case law.

8.2 Unlike in appeals against conviction in summary cases, the right of appeal may be exercised irrespective of the plea entered by the person in relation to the offence. However, the appellant's plea will be taken into consideration by the Court in the determination of the appeal.[1] In general, there is a high threshold before a conviction will be found unsafe where the appellant had pleaded guilty, although this does not apply where it is found that the prosecution was an abuse of process.

8.3 An appeal against conviction will be determined by a court which "consists of an uneven number of judges not less than three".[2]

THE "SAFETY TEST"

8.4 Since 1995, the sole ground for an appeal against conviction is that the conviction is "unsafe".[3] Section 2 of the 1968 Act provides:

> (1) Subject to the provisions of this Act, the Court of Appeal—
>
> (a) shall allow an appeal against conviction if they think that the conviction is unsafe; and
>
> (b) shall dismiss such an appeal in any other case.
>
> (2) In the case of an appeal against conviction the Court shall, if they allow the appeal, quash the conviction.

8.5 However, in some circumstances, the CACD will declare that a procedural defect relating to the trial was so fundamental that the trial was a "nullity",[4] regardless of

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1 *R v Tredget* [2022] EWCA Crim 108, [2022] 4 WLR 62.

2 Senior Courts Act 1981, s 55(2) and (4).

3 Criminal Appeal Act 1968, s 2(1).

4 The Court's power to do so is not found in the Criminal Appeal Act 1968. In *R v Crane* [1921] 2 AC 299, HL it was held that the power came from s 7 of the Criminal Appeal Act 1907 which stated: "The Court of Criminal Appeal shall be a superior court of record, and shall, for the purposes of and subject to the

whether the conviction was safe or unsafe. This includes cases where a plea was not properly taken, or where a guilty plea was made under undue pressure, or a necessary consent for the prosecution was not obtained. At paragraphs 8.168 to 8.175 below, we discuss a particular manifestation of this: where a retrial ordered by the CACD is held to have been a nullity because the defendant was arraigned out of time without the consent of the CACD.[5]

The meaning of "safety"

8.6 The "safety" test is thus the sole ground for an appeal against conviction. In *Pearson*, the CACD said:[6]

> The expression "unsafe" in section 2(1)(a) of the 1968 Act does not lend itself to precise definition. In some cases unsafety will be obvious, as (for example) where it appears that someone other than the appellant committed the crime and the appellant did not, or where the appellant has been convicted of an act that was not in law a crime, or where a conviction is shown to be vitiated by serious unfairness in the conduct of the trial or significant legal misdirection, or where the jury verdict, in the context of other verdicts, defies any rational explanation. Cases however arise in which unsafety is much less obvious: cases in which the court, although by no means persuaded of an appellant's innocence, is subject to some lurking doubt or uneasiness whether an injustice has been done. If, on consideration of all the facts and circumstances of the case before it, the court entertains real doubts whether the appellant was guilty of the offence of which he has been convicted, the court will consider the conviction unsafe.

8.7 "Unsafe" is thus an umbrella term, apt to cover both factual innocence and the possibility of factual innocence. However, as discussed below, it can also in some circumstances cover serious procedural irregularity or other unfairness, and abuse of process.

8.8 In contrast, prior to 1995, the circumstances in which a conviction could be overturned were discrete, and whether a conviction was "unsafe" was only one of the grounds. However, it is also clear that since 1995 "unsafe" now covers grounds which previously fell under a different heading. Thus, safety under the 1995 test must be interpreted as having a broader meaning than pre-1995 (and case law read accordingly).

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provisions of this Act, have full power to determine, in accordance with this Act, any questions necessary to be determined for the purpose of doing justice in the case before the court". The CACD inherited the powers of the Court of Criminal Appeal by virtue of the Criminal Appeal Act 1966; in addition, as part of the Court of Appeal it is a superior court of record by virtue of the Senior Courts Act 1981, s 15.

5 For instance, in the recent related cases of *R v Llewellyn* [2022] EWCA Crim 154, [2023] QB 459 and *R v Supersad* [2022] EWCA Crim 1166, the appellants had been convicted following a retrial after their earlier convictions had been quashed, but they were not arraigned for the retrial within two months and the prosecution did not obtain the CACD's consent to arraign out of time. The convictions from the retrial were therefore quashed, and no further retrial was ordered. In *R v Lalchan* [2022] EWCA Crim 736, [2022] QB 680 a conviction for stirring up racial hatred was quashed because the Attorney General's consent to prosecute had not been obtained.

6 *R v Criminal Cases Review Commission, ex p Pearson* [1999] 3 All ER 498, DC, 503A-C, by Lord Bingham CJ.

Background

8.9 The Criminal Appeal Act 1907 required the Court of Criminal Appeal to quash a conviction if:[7]

> they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence,
>
> or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law
>
> or that on any ground there was a miscarriage of justice.

8.10 This was subject to a qualification – the "proviso" – that:[8]

> the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

8.11 In 1965, the Donovan Committee[9] recommended that the first limb of this test – "unreasonable or cannot be supported having regard to the evidence" – should be replaced with "unsafe or unsatisfactory". The Committee suggested that "the advantage to be gained from the provision … is that the safeguards for an innocent person, wrongly identified and wrongly convicted, are sensibly increased".

8.12 This change was effected in the Criminal Appeal Act 1966. This legislation also replaced the third limb – "there was a miscarriage of justice" – with "there was a material irregularity in the course of the trial".

8.13 Consequently, from 1966, the test for an appeal against conviction was that:[10]

> the Court of Appeal shall allow an appeal against conviction if they think—
>
> (a) that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory; or
>
> (b) that the judgment of the court of trial should be set aside on the ground of a wrong decision of any question of law; or
>
> (c) that there was a material irregularity in the course of the trial…

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7 Criminal Appeal Act 1907, s 4(1).

8 Above, s 4(1).

9 The Interdepartmental Committee on the Court of Criminal Appeal, chaired by Lord Donovan, reported in 1965. The Committee recommended replacement of the Court of Criminal Appeal with a new criminal division of the Court of Appeal, along with changes to the test for quashing a conviction. These recommendations were implemented in the Criminal Appeal Act 1966. See Chapter 2 and para 6.48.

10 Criminal Appeal Act 1966, s 4(1). Italics and strikethrough denote additions to and subtractions from the 1907 test respectively.

Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no ~~substantial~~ miscarriage of justice has actually occurred.

8.14 Prior to 1964 the CACD could not order a retrial. Therefore, the consequence of a finding that the conviction should be set aside was that the conviction would be quashed, the appellant would be acquitted, and no further trial would be possible under the principle against double jeopardy. Lowering the threshold for a successful appeal reflected the fact that where there was doubt over a conviction, this could now be addressed by quashing the conviction and ordering a retrial.

8.15 A minor change was made in the Criminal Justice Act 1977, when the reference to "the verdict of the jury" in the first limb was replaced with references to "the conviction".[11]

The Runciman Commission and the safety test

8.16 The Royal Commission on Criminal Justice ("the Runciman Commission") considered the grounds for appeal against conviction. There was agreement that the test should be amended, but the Commission was split on how this should be done. The majority favoured a single ground, that the conviction "is or may be unsafe".[12]

8.17 It went on to suggest that if the CACD found that the conviction *is* unsafe, it should allow the appeal outright, but that if it found the conviction *may be* unsafe, it should order a retrial if possible. This suggests that the Commission was equating "is unsafe" with actual innocence or the view that no jury could convict on the evidence, whereas the conviction "may be unsafe" if there was evidence on which a jury at a retrial might convict. Accordingly, there would be no need for the proviso.[13]

8.18 That the Commission favoured this interpretation is implicit in its approach to new evidence. It concluded that once the Court had decided that the new evidence was relevant and capable of belief it should, if possible, order a retrial (that is, in the light of the new evidence, the conviction might be unsafe). If the Court was satisfied that the fresh evidence caused the conviction to be unsafe, it should quash it without ordering a retrial (suggesting that by unsafe the Commission meant that the new evidence showed that the appellant could not now be convicted). Only where a retrial would be impractical or otherwise undesirable should the CACD decide the matter for itself.

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11 This addressed a problem that had been highlighted in *DPP v Shannon* [1975] AC 717, HL. Under the 1907 test, the conviction of a person who had pleaded guilty might be quashed where it amounted to a miscarriage of justice. However, in *Shannon*, the Court held that under the 1968 test this was no longer possible: the first limb of the test required a jury verdict, while the third limb now required there to have been a procedural irregularity. A conviction following a guilty plea might be quashed under the second limb (a wrong decision on a rule of law) in some circumstances (for instance, where the count to which the appellant had pleaded guilty did not amount to an offence) but this did not apply here. The Court considered that Parliament had not intended to prevent a person from appealing a conviction following a guilty plea, and recommended that this could be addressed in the manner that was adopted in 1977.

12 Report of the Royal Commission on Criminal Justice (1993) Cm 2263, p 162, para 2.

13 Above, p 168, para 32.

8.19 The minority thought that it was confusing to wrap all three grounds for appeal in the one word "unsafe", which implied there was "something wrong" with the jury's verdict.[14]

8.20 The majority of the Commission felt that the CACD should not quash a conviction on the grounds of pre-trial malpractice unless the Court thinks the conviction unsafe:[15]

> In the view of the majority, even if they believed that quashing the convictions of criminals was an appropriate way of punishing police malpractice, it would be naïve to suppose that this would have any practical effect on police behaviour. In any case, it cannot in any view be morally right that a person who has been convicted on abundant other evidence and may be a danger to the public should walk free because of what may be a criminal offence by someone else.

8.21 The Runciman majority view probably reflected the particular concerns of the time over police malpractice, which had partially provoked the setting up of the Commission itself. It did not address the possibility of failings within a trial that might mean that it would not be appropriate for a conviction to stand, notwithstanding that those failings would not necessarily cause the factual guilt of the convicted person to be brought into question.

8.22 There are two situations in which this might be thought to arise. First, where the appellant did not receive a fair trial (that is, a fair trial overall; it is accepted that there might be particular failings associated with rights under article 6 of the European Convention on Human Rights ("ECHR") that do not render the trial as a whole unfair).[16] It might have been assumed that if the person did not receive a fair trial, their factual guilt must be in doubt. However, it is not difficult to consider possible scenarios where a person did not receive a fair trial, but – had they received one – they would have been convicted because the weight of evidence was overwhelming.

8.23 Secondly, (which the Runciman Commission may have had in mind) where the prosecution was an affront to justice, in that to maintain the conviction would bring the administration of justice into disrepute. A classic example of this is where the authorities use force or "disguised extradition" to bring someone into the jurisdiction circumventing legal protections.[17] More recently, in the Post Office Horizon appeals, many convictions have been quashed on the basis that it was an affront to justice for the Post Office to prosecute sub-postmasters without disclosing known issues about the reliability of the Horizon computer system.[18]

Implementing the Runciman Commission's recommendations

8.24 It would appear that the Government initially accepted the Runciman Commission's recommendations, but that in drafting what became the Criminal Appeal Act 1995, its

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14 Above, p 169, para 34.

15 Above, p 172, para 49.

16 *R v Forbes* [2001] 1 AC 473, HL at [24], by Lord Bingham of Cornhill. See discussion of the right to a fair trial in Chapter 4.

17 See, for example, *R v Mullen* [2000] QB 520, CA, discussed below from para 8.34.

18 These cases are discussed in detail in Chapter 17 and Appendix 3.

approach changed at the prompting of the Lord Chief Justice, Lord Taylor of Gosforth, who sought, effectively, to maintain the status quo, notwithstanding a change in drafting. An internal memorandum for Ministers on the draft Bill said:

> With the agreement of the Lord Chief Justice, the Bill provides for the Court of Appeal to quash a conviction if it thinks it "is unsafe". [Cabinet][19] approval was based on the Government's earlier broad welcome for the Royal Commission's formula "is or may be unsafe" and its linked proposal that the Court of Appeal should order a retrial if it thinks a conviction "may be unsafe". The Lord Chief Justice considers that the latter formula goes wider than the current practice of the Court and is too uncertain in its effect. He believes that the current provisions of the Bill consolidate the existing practice of the Court, which has always been the Government's intention.

8.25 Thus, it appears that the Government intended both:

(1) to implement the Runciman Commission's recommendations; and

(2) to maintain the existing practice of the Court of Appeal.

8.26 In Parliament, in moving the second reading of the Bill, the Home Secretary said, "In substance, it restates the existing practice of the Court of Appeal and I am pleased to note that the Lord Chief Justice has already welcomed it".[20] In the Standing Committee considering the Bill, the Minister of State said "The Lord Chief Justice and members of the senior judiciary have given the test a great deal of thought and they believe that the new test restates the existing practice of the Court of Appeal".[21]

8.27 Professor Sir John Smith presciently noted that:[22]

> The importance of these reported statements is that, if the Court should consider that the new section is ambiguous and that it is necessary to resort to the debates, they will find that Parliament passed the clause on being assured that it restated existing practice; so that it is Parliament's intention that that practice should continue.

8.28 In *Davis, Johnson and Rowe*, the CACD said:[23]

> It seems to be generally accepted that the 1995 amendment was not intended to disturb the previous practice of the Court. That was certainly the view of the Royal Commission on Criminal Justice, which recommended the change, and of the then Secretary of State for Home Affairs and the Lord Chief Justice …

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19 The original text here refers to "ED(H)", the Cabinet Committee on Home Affairs at the time (ie "Economic and Domestic (Home Affairs)"); the body is now known as the Home Affairs Committee or "HAC".

20 *Hansard* (HC), 6 March 1995, vol 256, col 24.

21 Standing Committee B, 21 March 1995, col 26.

22 J Smith, "The Criminal Appeal Act 1995: Part 1: Appeals against conviction" [1995] *Criminal Law Review* 920.

23 [2001] 1 Cr App R 8, CA at [52], by Mantell LJ.

8.29 We agree that the effect of the 1995 Act was to preserve the existing practice of the CACD. However, we disagree with the proposition of the CACD that this was "certainly the view of the Royal Commission on Criminal Justice". We do not think that it was the view of the Runciman Commission. It *was* the view of the Lord Chief Justice, and his view ultimately prevailed upon the Home Secretary. We are satisfied that the Runciman Commission had expressed itself clearly and wanted a change from the previous practice of the CACD (see paragraph 8.16 and following above).

8.30 We agree, however, with Sir John Smith's analysis that the Commission's use of the words "is or may be unsafe" led people wrongly to think that it was proposing a different test. As we discussed in the Issues Paper,[24] when the Commission uses the term "unsafe", it seems to be referring to factual innocence.[25] This is why the report says that where the Court "is satisfied that the fresh evidence causes the verdict to be unsafe … it should quash the conviction". When it talks of a conviction that "is or may be" unsafe, it seems that it is using the term in the way that the CACD applies "is unsafe" – that the person was, or might have been, wrongly convicted.

8.31 In the event, the Government favoured an umbrella term, but using the test that the conviction "is unsafe" (superficially more restrictive than that proposed by the Runciman Commission). The Lord Chief Justice (Lord Taylor) had argued that "is or may be unsafe" would be broader than the CACD's then-existing practice. In subsequent Parliamentary proceedings, however, Ministers made clear that they were not intending this to represent a narrowing of the grounds for a successful appeal:[26]

> The present formula involves three overlapping grounds and is widely felt to cause confusion. Under the Bill, the Court of Appeal will allow any appeal where it considers the conviction unsafe and will dismiss it in any other case. That simple test clarifies the terms of the existing law. In substance, it restates the existing practice of the Court of Appeal.

8.32 They also stated that the adoption of "is unsafe" in place of "is or may be unsafe", as recommended by the Runciman Commission, would not prevent the CACD from allowing an appeal in "lurking doubt" cases.[27]

8.33 It is clear that "is unsafe" in the 1995 Act is not limited to the narrow meaning used by the Runciman Commission and is capable of applying to situations in which, for instance, a jury might have – but need not have – acquitted had the fresh evidence been available, or had they not been misdirected. (If "is unsafe" in the 1995 Act were read in the way that the Runciman Commission appears to have been using it, a conviction would only be quashed if the CACD concluded that the appellant could not have been guilty; and the provisions for a retrial would make no sense.) As will be seen, however, the Court has adopted an even broader understanding of "unsafe", which includes not just the possibility of factual innocence, but also cases where the

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24 Law Commission, Criminal Appeals: Issues Paper (July 2023) paras 4.53-4.61.

25 Or at least, if not factual innocence, that there is not sufficient evidence of guilt to sustain a conviction.

26 *Hansard* (HC), 6 March 1995, vol 256, col 24.

27 *Hansard* (HL), 15 May 1995, vol 564, col 326.

prosecution was an abuse of process or the defendant did not receive a fair trial, even though there may be no doubt about their guilt.

The safety test: factual innocence, the possibility of factual innocence, and beyond

8.34 Appeal courts do not pronounce on innocence.[28] However, factual innocence, and the possibility of it, are a component of safety. In *Rowe, Davis and Johnson*,[29] the CACD said, "A conviction can never be safe if there is doubt about guilt".[30] Thus, it is clear that the courts use the phrase "is unsafe" in the sense in which the Runciman Commission used "is or may be unsafe": a conviction "is" unsafe if the convicted person was, or may have been, not guilty.

8.35 However, the fact that some fresh evidence might have led the jury to acquit, had they known of it, does not mean that a conviction must be quashed, if the CACD itself considers the conviction "safe".

8.36 We discuss this issue further at paragraphs 8.92 to 8.127, provisionally proposing at Consultation Question 35 reform so that, unless impossible or impractical, maintaining a conviction will depend on the verdict of a properly directed jury which has heard all the necessary and admissible evidence (including fresh evidence adduced on appeal).

8.37 Early commentary on the new test in 1997, submitting that "unsafe" was "clearly intended to refer to the correctness of the conviction" in terms of factual innocence,[31] was endorsed in *Chalkey*, where the CACD appeared to suggest that questions of process could not, without more, render a conviction unsafe:[32]

> In our view, whatever may have been the use by the court of the former tests of "unsatisfactor[iness]" and "material irregularity" … they are not available to it now, save as aids to determining the safety of a conviction. The court has no power under the substituted section 2(1) to allow an appeal if it does not think the conviction unsafe but is dissatisfied in some way with what went on at the trial.
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> … procedural unfairness not resulting in unsafety of a conviction may be marked in some manner other than quashing the conviction …

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28 *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, [2012] 1 AC 48 at [116], by Baroness Hale of Richmond JSC: "Innocence as such is not a concept known to our criminal justice system. We distinguish between the guilty and the not guilty".

29 *R v Davis, Rowe and Johnson* [2001] 1 Cr App R 8, CA at [56], by Mantell LJ.

30 See also *R v Graham* [1997] 1 Cr App R 302, CA, 308B-C, by Lord Bingham of Cornhill CJ: "if, for whatever reason, the Court concludes that the appellant was wrongly convicted of the offence charge, or *is left in doubt* whether the appellant was rightly convicted of that offence or not, then it must of necessity consider the conviction unsafe" (emphasis added); *R v CCRC, ex p Pearson* [1999] 3 All ER 498, DC, 503C, by Lord Bingham of Cornhill CJ: "If, on consideration of all the facts and circumstances of the case before it, the court entertains real doubts whether the appellant was guilty of the offence of which he has been convicted, the court will consider the conviction unsafe".

31 *Archbold Criminal Pleading, Evidence and Practice* (1997) para 7-46.

32 [1998] QB 848, CA, 868D-E and G, by Auld LJ.

8.38 *Chalkley* suggested that "safety" would not cover an abuse of process case such as *Bloomfield*, [33] appearing to narrow the scope of the new test.

8.39 However, the subsequent case of *Mullen* made clear that "safety" could still cover serious procedural deficiencies, even where they did not suggest that the person was or might have been innocent.[34] In *Mullen*, the conviction of the appellant for conspiracy to cause explosions was quashed because the UK authorities had conspired with Zimbabwean authorities to have the appellant deported to the UK to stand trial, circumventing protections that would have been available to a person facing extradition. The CACD concluded, having had regard to Hansard and the discussions cited at paragraph 8.26 above, that "'unsafe' bears a broad meaning and one which is apt to embrace abuse of process".[35]

8.40 This was restated in the 2001 case of *Davis, Rowe and Johnson* (referred to above):[36]

> A conviction can never be safe if there is doubt about guilt. [However] a conviction may be unsafe even where there is no doubt about guilt but the trial process has been 'vitiated by serious unfairness or significant legal misdirection'.

8.41 It was confirmed in *Togher*,[37] which followed the enactment of the Human Rights Act 1998 and its incorporation of the ECHR, and specifically the right to a fair trial found in article 6 of the ECHR, into domestic law, that safety could be given an expanded meaning encompassing convictions that were unsafe due to a defendant not receiving

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33 In *R v Bloomfield* [1997] 1 Cr App R 135, CA prosecuting counsel indicated that the Crown would offer no evidence, having accepted that the defendant was the victim of a "set-up". However, owing to the presence in court of someone who was part of the wider police operation who would "smell a rat", the prosecutor asked the court to adjourn the matter so that the prosecution could be dropped at a later hearing. The following month, however, the Crown Prosecution Service ("CPS") changed its position. When the judge refused to stay proceedings for abuse of process, the defendant pleaded guilty. On appeal, the CACD held that it would bring the administration of justice into disrepute for the CPS to treat the court in that way, and the conviction was quashed.

34 In *Mullen*, the CACD said that *Chalkley* "cannot, in our judgment, properly be regarded as having concluded the matter": [2000] QB 520, CA, 539B-C, by Rose LJ.

35 [2000] QB 520, 540E.

36 *R v Davis, Rowe and Johnson* [2001] 1 Cr App R 8, CA at [56], by Mantell LJ; "vitiated by serious unfairness" is a quotation from *R v CCRC, ex p Pearson* [1999] 3 All ER 498, DC, 503A-B, by Lord Bingham of Cornhill CJ.

In the European Court of Human Rights ("ECtHR") case *Condron v UK* (2001) 31 EHRR 1 (App No 35718/97), the ECtHR held that the appellant had been denied a fair trial, and observed (at [65]), in relation to the fact that the CACD had not found the convictions unsafe, that:

> The Court of Appeal was concerned with the safety of the applicants' conviction, not whether they had in the circumstances received a fair trial. In the Court's opinion, the question whether or not the rights of the defence guaranteed to an accused under Article 6 of the Convention were secured in any given case cannot be assimilated to a finding that his conviction was safe in the absence of any enquiry into the issue of fairness. …

However, the ECtHR's statement that safety in domestic law did not cover whether the appellant received a fair trial should be understood in the context of the fact that *Condron*'s appeals preceded *Mullen*.

37 [2001] 3 All ER 463, CA.

a fair trial, as well as abuse of process cases. Following *Mullen*, and rejecting *Chalkley*, the CACD held:[38]

> As a matter of first principles, we do not consider that either the use of the word 'unsafe' in the legislation or the previous cases compel an approach which does not correspond with that of the [European Court of Human Rights ("ECtHR")]. The requirement of fairness in the criminal process has always been a common law tenet of the greatest importance ... since the 1998 Act came into force, the circumstances where there will be room for a different result before this Court and before the [ECtHR] because of unfairness based on the respective tests we employ will be rare indeed. Applying the broader approach identified [in *Mullen*], we consider that if the defendant has been denied a fair trial, it will almost be inevitable that the conviction will be regarded as unsafe.

Can fairness be outweighed by the strength of the prosecution evidence?

8.42 In *Condron*,[39] in 1996, the CACD found that the judge's direction on the drawing of adverse inferences from the defendants' silence at interview was deficient. However, it did not find the conviction to be unsafe bearing in mind the weight of evidence against the defendants. This reflected established case law which stated that in deciding whether a conviction was safe, the strength of the prosecution case could override concerns about whether the appellant had had a fair trial.

8.43 Against this were some authorities suggesting that while individual deficiencies may not render a conviction unsafe, where they amounted to a failure to provide a fair trial, no conviction could be considered safe. In the Scottish case of *Brown v Stott*, heard by the Judicial Committee of the Privy Council, Lord Steyn suggested that:[40]

> it is fair that a court of appeal should have the power, even when faced by the fact of irregularities in the trial procedure, to dismiss the appeal if in the view of the court of appeal the defendant's guilt is plain and beyond doubt.

However, he did so referring to "irregularities *not amounting to denial of a fair trial*":

> once it has been determined that the guarantee of a fair trial has been breached, it is never possible to justify such breach by reference to the public interest or on any other ground.

8.44 The judgment of the ECtHR in *Condron* suggests that the right to a fair trial cannot be outweighed by the strength of the case against the defendants.[41] Thus, while "safety" is capable of encompassing more than just factual guilt or innocence, when fair trial issues are in play, a separate consideration as to whether they render the conviction unsafe is required; there cannot simply be an overall consideration of the strength of

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38 Above, at [33], by Lord Woolf CJ.

39 [1997] 1 WLR 827, CA.

40 [2003] 1 AC 681, PC (Scotland), 708F-H, by Lord Steyn (emphasis added).

41 *Condron v UK* (2001) 31 EHRR 1 (App No 35718/97).

the prosecution case balanced against the irregularities vitiating the fairness of the trial.

8.45 In *A (No 2)*, Lord Steyn ruled that:[42]

> the guarantee of a fair trial under article 6 is absolute: a conviction obtained in breach of it cannot stand. … *The only balancing permitted is in respect of what the concept of a fair trial entails*: here account may be taken of the familiar triangulation of interests of the accused, the victim and society.

8.46 That said, not every procedural defect associated with the right to a fair trial or another Convention right will render a conviction unsafe.[43] Breach of the substantive right can be marked through a declaration or, in an appropriate case, compensation for the interference.[44]

8.47 Taking into account the above case law, we conclude that under the current legal interpretation of the safety test:

(1) A conviction should always be considered unsafe where the person was, or might have been, wrongly convicted.

(2) A conviction will always be unsafe where the trial as a whole was unfair.

(3) However, not every breach of a right associated with a right to fair trial will mean that the appellant did not receive a fair trial. Such breaches can be recognised in other ways than by quashing a conviction.

(4) A conviction will also be unsafe where the prosecution amounted to an abuse of process or the conduct of the authorities fell seriously below acceptable standards, so as to amount to an affront to justice. This includes situations such as entrapment, "disguised extradition" and where the prosecution reneges on an agreement.

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42 [2001] UKHL 25, [2002] 1 AC 45 at [38], by Lord Steyn (emphasis added). Professors Ashworth and Redmayne concluded that both *Togher* and *R v A* must now be considered bad law, citing *R v Lewis* [2005] EWCA Crim 859, [2005] Crim LR 796 and *Dowsett v CCRC* [2007] EWHC 1923 (Admin). However, in *Lewis*, although the ECtHR had concluded that there had been a breach of article 6, it had gone on to say "the finding of a violation of Article 6(1) in the present case does not entail that the applicants were wrongly convicted". Thus, this case may best be seen as one where although there was a breach of article 6, it was not such as to render the trial as a whole unfair.

In *Dowsett*, the ECtHR had found unequivocally that the appellant did not receive a fair trial due to non-disclosure, yet the High Court upheld a decision of the CCRC not to refer the case to the CACD. However, it did so on the basis that the defect was curable by the CACD, and that in deciding not to refer the case, the CCRC must have concluded that the disclosure defects that had rendered the first trial unfair could be addressed by the CACD, but that they would still find the conviction safe.

43 *Ibrahim v UK*, App Nos 50541/08, 50571/08, 50573/08 and 40351/09 (Grand Chamber decision) at [250]; *O'Halloran and Francis v UK*, App Nos 15809/02 and 25624/02 (Grand Chamber decision) at [53]; *Schatschaschwili v Germany*, App No 9154/10 (Grand Chamber decision) at [101].

44 *R v Dundon* [2004] EWCA Crim 621, [2004] UKHRR 717 at [15], by Rose LJ VPCACD; see also *Attorney General's Reference (No.2 of 2001)* [2003] UKHL 68, [2004] 2 AC 72 and *Bunkate v Netherlands* (1995) 19 EHRR 477 (App No 13645/88) at [25]).

Possible uncertainty

8.48 However, while we think that this is the position as established in the case law, we acknowledge that some rulings of the CACD do not accord with this position. In particular, in *Abdurahman*, Dame Victoria Sharp, then President of the Queen's Bench Division ("the PQBD")[45] said: [46]

> It is clear on the domestic authorities (especially *Lambert*[47] and *Dundon*[48]) that a conviction may be regarded as safe where the evidence against the appellant is overwhelming, even though the trial has been unfair for the purposes of Article 6.

8.49 In the Issues Paper, we suggested that, if this is taken to mean that the conviction could be safe even though the trial *as a whole* was unfair, that this could not be reconciled with other jurisprudence of the CACD, or with the case law of the House of Lords and rulings of the ECtHR.[49] The overall tenor of the case law, we suggested, was that a conviction will be unsafe if the trial as a whole was unfair, regardless of the strength of the case against the defendant.

8.50 It is striking, however, that *Taylor on Criminal Appeals* offers conflicting guidance. In Chapter 5,[50] it is asserted that "[i]f the trial *as a whole* is found to have been unfair, the conviction must be unsafe"[51] – citing *A*,[52] *McInnes*,[53] and *Brown v Stott*[54] – and that "where the trial *as a whole* is unfair, evidence of guilt is irrelevant"[55] – citing *Mullen*,[56] *Randall*,[57] *Early,*[58] and *Wang*.[59] In Chapter 17,[60] however, it is noted – citing *Abdulrahman*[61] – that "a conviction could be safe where the evidence was overwhelming, even though the trial had been unfair".

8.51 These conflicting authorities reflect continuing uncertainty. We consider that the weight of authority establishes that where a person did not receive a fair trial, judging

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45 Now President of the King's Bench Division, or "PKBD".

46 [2019] EWCA Crim 2239, [2020] 4 WLR 6 at [124], by Dame Victoria Sharp PQBD.

47 [2001] UKHL 37, [2002] 2 AC 545.

48 [2004] EWCA Crim 621, [2004] UKHRR 717.

49 Law Commission, Criminal Appeals: Issues Paper (July 2023) paras 2.28-2.33.

50 *Taylor on Criminal Appeals* (3rd ed 2022), "Appeals against conviction", p 145.

51 Above.

52 *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45.

53 *McInnes v HM Advocate* [2010] UKSC 7, 2010 SC (UKSC) 28.

54 [2003] 1 AC 681, PC (Scotland).

55 *Taylor on Criminal Appeals* (3rd ed 2022) p 146.

56 [2000] QB 520, CA.

57 [2002] UKPC 19, [2002] 1 WLR 2237.

58 [2002] EWCA Crim 1904, [2003] 1 Cr App R 19.

59 [2005] UKHL 9, [2005] 1 WLR 661.

60 *Taylor on Criminal Appeals* (3rd ed 2022), "Taking a criminal appeal to 'Europe'", p 720.

61 [2019] EWCA Crim 2239, [2020] 4 WLR 6.

the trial as a whole, then no conviction can stand. We would also endorse that as a matter of principle. However, we think that this uncertainty should be addressed.

Quashing convictions when guilt is not in question

8.52 Despite this uncertainty, there are clearly circumstances in which a conviction will be found to be unsafe, notwithstanding that there is no question that the defendant was guilty. Such cases have given rise to concern, and in 2006 the Government consulted on changes to prevent the CACD from quashing the convictions of the plainly guilty.

8.53 This review seems to have been particularly prompted by *Mullen* (see above from paragraph 8.39) and *Smith.*[62] In *Smith*, the appellant's conviction was quashed because the judge had wrongly dismissed a submission of no case to answer at the halfway stage. The defendant had gone on to admit guilt in cross-examination. The CACD ruled that the defendant had been entitled to be acquitted after the evidence against him had been heard. This remains the approach on all appeals where the basis is that a submission of no case to answer ought to be upheld.

8.54 The Government stated in its consultation paper *Quashing Convictions*:[63]

> The dominant and settled legal interpretation of the [CAA 1968] test … appears to mean that the [CACD] may quash a conviction if they are dissatisfied with some aspect of procedure at the original trial, even if the person pleaded guilty or the Court are in no doubt that he committed the offence for which he was convicted.

8.55 We think that to say that the CACD may quash a conviction "if they are dissatisfied with some aspect of procedure" fundamentally misrepresents the approach that the CACD did and does adopt when faced with a procedural irregularity. More than mere dissatisfaction with "some aspect of procedure" is required.[64]

8.56 The then Government suggested three possible routes of addressing this perceived problem of the safety test allowing the quashing of the convictions of the plainly guilty:

(1) to reintroduce the proviso, so as to provide that the appeal should not be allowed, even if there is a procedural irregularity, if the Court considers no

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62 *R v Smith* [2000] 1 All ER 263, CA.

63 Office for Criminal Justice Reform, *Quashing Convictions* (September 2006) para 31.

64 As Professor John Spencer said at the time (J R Spencer, "Quashing convictions for procedural irregularities" [2007] *Criminal Law Review* 835, 837):

> Behind the proposal is the notion that, as the law now stands, defendants who are clearly guilty regularly escape punishment because the [CACD] quashes their convictions on account of footling procedural irregularities. But in fact this is not so. In the first place, for most procedural irregularities the [CACD] will uphold the conviction if it is convinced that the defendant is really guilty, and would still have been convicted even if the irregularity had not taken place. An abundant case law makes it clear that it is only for the most serious procedural irregularities that the [CACD] will quash the conviction of a defendant who is plainly guilty. And secondly, in those comparatively rare cases where the [CACD] considers the procedural flaw too grave for the conviction of a visibly guilty person to be allowed to stand, it will usually order a retrial where – as is usually the case – a new trial can "cure" the problem.

In *Mullen*, a retrial would not have "cure[d]" the abuse, as had the abuse of process (his 'disguised extradition' to the UK) not occurred, Mullen would never have present in the jurisdiction and no trial, or retrial, would have been possible.

miscarriage of justice actually occurred (going further than the discretionary power of the previous proviso);

(2) to replace the proviso with another formulation, perhaps addressing more directly the Court's view of the appellant's guilt (this appeared to be the favoured reform);

(3) to recast the test so as to require the CACD to undertake a substantial reexamination of the evidence, akin to the task of a jury.

8.57 Following the consultation, in 2007 the Government introduced measures in the Criminal Justice and Immigration Bill which would have amended the grounds of appeal in the CAA 1968 to state that a conviction is not unsafe if the CACD is satisfied that the appellant is guilty of the offence. A further condition would have said that this does not prevent the Court from allowing an appeal against conviction where they think that it would be incompatible with the ECHR to dismiss the appeal.

8.58 In the end, no reform was pursued and this provision was withdrawn from the Bill.

When should a conviction be quashed even though there is no doubt about the appellant's guilt?

8.59 In 2006, Professor John Spencer said that:[65]

> the present law is not free from difficulty, because at present neither statute, nor case law, nor legal writers have laid down any clear rules to identify those cases which [should] be quashed, irrespective of the defendant's factual guilt or innocence.

8.60 Professor Spencer suggested that certain due process errors would justify the quashing of a conviction, including where:[66]

(1) the trial court had no jurisdiction to try the offence;

(2) the trial court fundamentally misapplied the substantive criminal law;

(3) the rules of natural justice were broken;

(4) there had been disregard of other procedural rules of major importance that exist for the particular protection of the defendant;

(5) some formal bar to prosecution existed; or

(6) there was gross misconduct in the course of investigating the offence.

8.61 Professor Spencer suggested that the in the case of the first four, a retrial should be possible, but not the last two.[67]

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65 J R Spencer, "Quashing convictions for procedural irregularities" [2007] *Criminal Law Review* 835, 837.

66 Above, 842-847.

67 We presume that in the first case (no jurisdiction) the reference to a retrial means a trial in the correct and competent forum.

8.62 In his Review of the Criminal Courts, Lord Justice Auld asked:[68]

> Would it not be better to clarify in statutory form the Court of Appeal's power and duty in this respect? In my view, consideration should be given to amendment of the present statutory test to make clear whether and to what extent it is to apply to convictions that would be regarded as safe in the ordinary sense of that word but follow want of due process before or during trial.

8.63 In the Issues Paper we asked:

> Question 3: Does the single test of "safety" adequately reflect the range of grounds that should justify the quashing of a conviction?
>
> In particular, under what circumstances, if any, should a conviction be quashed because of serious impropriety which does not cast doubt on the guilt of the appellant?

8.64 Many of the answers to Question 3 engaged issues which really go to whether the approach to "safety" taken by the CACD satisfactorily enables the correction of miscarriages of justice. We deal with these separately later.

8.65 The Crown Prosecution Service ("CPS") considered the safety test appropriate and argued that the case law shows the range of grounds that may be relied on to justify the quashing of a conviction. It noted that the test had been interpreted broadly and allowed for convictions to be quashed where there was doubt as to the defendant's guilt and where there was serious impropriety that went "to the heart of the criminal justice system".

8.66 The Criminal Appeal Lawyers Association ("CALA") suggested that there was merit in amending the test explicitly to include grounds that "the appellant did not receive a fair trial" and "the indictment should [have been] stayed as an abuse of the process of the court".

8.67 APPEAL also suggested a number of specified grounds for an appeal, including that "the prosecution may have amounted to an abuse of process, or the conduct of the authorities may have fallen seriously below acceptable standards" and that "the right to a fair trial was breached".

8.68 John Cartwright also argued that the safety test lacked clarity and noted that it was "in danger of being misinterpreted, misunderstood or misrepresented as 'he got off on a technicality' rather than 'he didn't do it'". However, he did not think the test was too broad and instead thought that the Court should be able to say more explicitly whether someone was innocent rather than being limited to determining if the conviction was safe.

Conclusions

8.69 We are in no doubt that where a person is or may be innocent, a conviction is unsafe and should be quashed (possibly followed by a retrial in the latter case).

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[68] Auld Review, p 614, para 10.

8.70 However, we think there are circumstances where a conviction should be quashed whether or not there is any doubt over the guilt of the defendant. We think that these circumstances broadly correspond to the two types of abuse which can lead to a stay on the grounds of abuse of process (see Chapter 4's paragraph 4.2 and its footnote).

8.71 The first type of abuse of process is where a case is stayed because the appellant could not receive a fair trial. We consider that this common law right to a trial that is fair overall is fundamental and that no conviction should stand if the appellant did not receive a fair trial regardless of the strength of the evidence of guilt.

8.72 This does not mean, however, that every breach of a right associated with the common law or ECHR right to a fair trial would be grounds for a successful appeal. Rather, as the case law makes clear, the issue is whether the trial as a whole was fair.

8.73 The second type of abuse of process is where a prosecution would "offend the conscience of the court" or amount to an "affront to the public conscience". It is clear that such circumstances are rare.

8.74 In *Hamilton v Post Office Ltd*,[69] the CACD quashed the convictions of 39 of 42 appellant sub-postmasters who had been convicted in prosecutions brought by the Post Office using data from the discredited Horizon accounting system. The Court found that in these cases there had been this second category of abuse of process.

8.75 We recognise the strength of the argument that convictions should not be quashed merely because of some procedural error. That goes against the primary principle that we outlined in Chapter 4 of acquitting the innocent and convicting the guilty. However, we think that there are compelling arguments for why, in the above two limited circumstances, a conviction should be quashed on procedural grounds.

8.76 First, the ability to appeal is one way of securing compliance with the UK's commitments under the ECHR. If a person's rights are breached during the trial process, the appellate process is one way of providing redress. The ECtHR has recognised that there are other ways that a breach of the right to a fair trial can be reflected – such as a declaration or an award of damages.[70] However, there are limited avenues for obtaining these forms of relief where a person has been convicted. A convicted person would not be able to sue for damages for breach of their article 6 right to a fair trial under the Human Rights Act 1998. Section 9 of the Human Rights Act provides that proceedings for damages in respect of a judicial act may only be brought by exercising a right of appeal, and damages are only payable for a judicial act done in good faith if it results in unlawful detention. It is possible that a declaration in unsuccessful appeal proceedings that the defendant's article 6 rights were breached, notwithstanding that the breach did not render the trial as a whole unfair and therefore the conviction unsafe, might be sufficient to comply with the requirement to provide a domestic remedy.

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69 [2021] EWCA Crim 577, [2021] Crim LR 684.

70 *R v Dundon* [2004] EWCA Crim 621, [2004] UKHRR 717 at [15], by Rose LJ VPCACD; see also *Attorney General's Reference (No.2 of 2001)* [2003] UKHL 68, [2004] 2 AC 72 and *Bunkate v Netherlands* (1995) 19 EHRR 477 (App No 13645/88) at [25].

8.77 If, however, the person did not receive a fair trial *as a whole*, it is unlikely that a declaration to that effect where the conviction was not quashed because it was not "unsafe" would be an appropriate remedy.

8.78 Second, it would be unfair if the lack of a fair trial or gross abuse amounting to an affront to justice were to be grounds to stay a prosecution but not to quash a conviction. This would mean that whether a person was or remained convicted depended arbitrarily on whether the facts rendering trial unfair or abusive were discovered before or after conviction.

8.79 There is one additional category in Professor Spencer's list we would note. This is where the trial court had no jurisdiction to try the offence. However, we are satisfied that in these circumstances, the trial would be a nullity and accordingly the conviction could effectively be quashed (strictly speaking, a declaration of nullity means that there never was a conviction).[71]

Discussion: separate grounds of appeal or an umbrella term?

8.80 We therefore consider that a conviction should be quashed where:

(1) the applicant was, or might have been, not guilty;

(2) the applicant did not receive a fair trial; or

(3) the prosecution amounted to an affront to justice.

8.81 All three are currently subsumed within the test of "safety".

8.82 A question then arises as to whether these should be separate grounds of appeal or should continue to be covered by a single "umbrella" test; and if there is to be a single test, should it be "safety" or some other term. Might there be another term which simply implies that the conviction is not one the law can or should recognise, for example, "the conviction cannot stand" or "the conviction must be set aside"?

8.83 "Miscarriage of justice" – which is the test used in some jurisdictions, including Scotland[72] – could be thought to present the same difficulty as "unsafe": it is apt to cover more than just factual innocence, and clearly is intended in other contexts (for example, the 1907 Act) to cover procedural failings. However, it also has a strong connotation of conviction of the innocent. Indeed, the only legislation currently using

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71 There is a separate question, raised by Professor Spencer, as to whether the distinction between nullities and unsafe convictions should be abolished.

The problem was more acute before the unrestricted power of the CACD to order a retrial was introduced in 1988 (Criminal Justice Act 1988, s 43; see the discussion of this issue in the next chapter). Until then, the Court could only order a retrial where a conviction was quashed on the basis of fresh evidence. Where the conviction was quashed on the basis of a procedural error, no retrial was possible. However, if the procedural error was sufficiently fundamental that the proceedings amounted to a nullity, there had never been a trial, the defendant was free to be retried and the CACD could issue a write of venire de novo. This had the paradoxical consequence that where there was a procedural error, the CACD might have to quash the conviction with no retrial, but in cases of the most egregious errors, there would be no obstacle to the acquitted person being retried.

72 Criminal Procedure (Scotland) Act 1995, s 194C.

the term in England and Wales – governing compensation for a miscarriage of justice – confines it to factual innocence.[73]

8.84 We recognise that there was criticism of the distinct grounds for appeal that existed between 1907 and 1995 (although some of this criticism reflected the ambiguous way that the grounds were drafted and how they interacted with the proviso).

8.85 At the same time, part of the rationale for having a single ground of appeal was the desire of the majority of the Runciman Commission to focus solely on the question of whether the person was or might have been innocent, which is not how the test has come to be applied (and probably could not be so restricted without breaching the UK's obligations under the ECHR).

8.86 In his response to the Issues Paper, Lord Justice Holroyde, Vice-President of the CACD, noted:

> We would ask you to keep in mind that any change in terminology would be likely to result in a period of uncertainty amongst practitioners as to the extent (if any) to which the scope of the new formulation is intended to, and does, differ from the scope of the old, with a consequent spike in the workload of the court. You may think that is an additional, practical, reason why a necessity for reform should clearly be demonstrated by evidence before any change could be considered.

Conclusion

8.87 We think there is a great deal of force in Lord Justice Holroyde's concerns. We note, for instance, that a period of uncertainty followed the changes to the test in 1995, in which the parameters of the safety test were uncertain and applied inconsistently, notwithstanding clear statements that the legislative change was not intended to change the practice of the CACD.

8.88 Given that the situations in which we recommend that a conviction should be quashed essentially represent those grounds which we think are included under the current safety test, and our position would merely clarify existing law, we think that uncertainty can best be avoided by retaining "unsafe" as the test for quashing a conviction.

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[73] Criminal Justice Act 1988, s 133. We discuss this provision in Chapter 16.

Consultation Question 34.

8.89 We provisionally propose that the single ground that a conviction is unsafe should continue to be the test for quashing a conviction, but that the circumstances in which a conviction will be unsafe should be set out non-exhaustively in legislation.

We provisionally propose that these circumstances should include the following, which we consider represent the current practice of the Court of Appeal Criminal Division:

(1) where the Court considers that the appellant's trial, as a whole, was unfair; or

(2) where the Court considers that the conviction of the appellant involved abuse of process amounting to an affront to justice.

Do consultees agree?

APPEALS ON THE BASIS OF FRESH EVIDENCE OR ERROR OF LAW

8.90 Circumstances where a conviction is unsafe even though there is no question about the appellant's guilt are unusual. In this section of the chapter, we discuss situations where fresh evidence or identification of a legal error raises a question as to whether the defendant was properly convicted. Later, we discuss the residual category where even though there is no fresh evidence or legal error, there remains a question as to the safety of the appellant's conviction – so-called "lurking doubt" cases.

8.91 Most of the case law has concentrated upon the impact of fresh evidence. However, the same questions arise in relation to an error of law. In both situations the issue is that had the jury heard the fresh evidence, or had there been no error of law, the jury might have returned a different verdict. While most of this section will concentrate on fresh evidence, the same considerations will generally apply to errors of law. For these purposes, the paradigm error of law will be a misdirection by the judge, because – as with fresh evidence – the question easily resolves into consideration of what the jury might have done but for the misdirection. The same considerations apply to other legal errors, however, such as an incorrect decision on admissibility or joinder of defendants or counts – the key issue is whether the decision could have affected the jury's decision to convict.[74]

Fresh evidence

8.92 In Chapter 6, we discussed the law and practice of the CACD in relation to the admission of fresh evidence. Below, we consider how fresh evidence is treated in assessing whether a conviction is safe.

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[74] One exception to this is a decision not to accede to a submission of no case to answer. If the judge wrongly turns down a submission of no case to answer, the conviction is unsafe (*R v Smith* [2000] 1 All ER 263, CA; *R v Broadhead* [2006] EWCA Crim 1705). No question of jury impact arises, however, because had the submission been accepted, the case would have been withdrawn from the jury.

8.93 In *Stafford and Luvaglio*,[75] the House of Lords affirmed the principle that whether a conviction was safe in the light of new evidence was a matter for the Court and it was not required to find a conviction unsafe just because a jury might not convict. Viscount Dilhorne, giving the leading judgment, said that it was not necessarily wrong for an appellate court to ask "Might this new evidence have led to the jury returning a verdict of not guilty?": [76]

> If the court thinks that it would or might, the court will no doubt conclude that the verdict was unsafe or unsatisfactory … but I do not think that it is established as a rule of law that, in every fresh evidence case, the court must decide what they think the jury might or would have done if they had heard that evidence …
>
> It would, in my opinion, be wrong for the court to say: 'In our view this evidence does not give rise to any reasonable doubt about the guilt of the accused. We do not ourselves consider that an unsafe or unsatisfactory verdict was returned but as the jury who heard the case might conceivably have taken a different view from ours, we quash the conviction' for Parliament has, in terms, said that the court should only quash a conviction if, there being no error of law or material irregularity at the trial, 'they think' the verdict was unsafe or unsatisfactory.

8.94 The tension in those paragraphs, between the Court asking what impact the fresh evidence would have had on a jury, and deciding for itself whether "they think" the conviction is unsafe has continued since *Stafford and Luvaglio*.

Pendleton and the "jury impact" test

8.95 In *Pendleton*, Lord Bingham noted the key practical challenge facing an appellate court: [77]

> the Court of Appeal can rarely know, save perhaps from questions asked by the jury after retirement, at what points the jury have felt difficulty. The jury's process of reasoning will not be revealed and, if a number of witnesses give evidence bearing on a single question, the Court of Appeal will never know which of those witnesses the jury accepted and which, if any, they doubted or rejected.

8.96 He suggested that:[78]

> The Court of Appeal can make its assessment of the fresh evidence it has heard, but save in a clear case it is at a disadvantage in seeking to relate that evidence to the rest of the evidence which the jury heard. For these reasons it will usually be wise for the Court of Appeal, in a case of any difficulty, to test their own provisional view by asking whether the evidence, if given at the trial, *might* reasonably have affected the decision of the trial jury to convict. If it might, the conviction must be thought to be unsafe.

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75 [1974] AC 878, HL.

76 Above, 893A-E, by Viscount Dilhorne.

77 [2001] UKHL 66, [2002] 1 WLR 72 at [16], by Lord Bingham.

78 Above, at [19] (emphasis added).

8.97 Thus, while recognising that it is ultimately for the Court to decide whether a conviction is safe, *Pendleton* can be read as supporting the cautious approach advocated by the Runciman Commission, which said that:[79]

> The Court of Appeal, which has not seen the other witnesses in the case nor heard their evidence, is not in our view the appropriate tribunal to assess the ultimate credibility and effect on a jury of the fresh evidence.

8.98 It concluded:[80]

> Once the court has decided to receive evidence that is relevant and capable of belief, and which could have affected the outcome of the case, it should quash the conviction and order a retrial unless that is not practicable or desirable.
>
> It should normally not decide the question of the weight of the evidence itself unless it is satisfied that the fresh evidence causes the verdict to be unsafe [in the narrow sense that no conviction could be based on the evidence] in which case it should quash the conviction.

8.99 The authors of *Ashworth and Redmayne* have suggested that:[81]

> Where the jury impact test may be useful is in guarding against the sort of approach the Court of Appeal took to notorious cases such as the Birmingham Six appeals, where it would do its best to explain away any flaw revealed in the prosecution evidence.

8.100 Likewise, the Criminal Cases Review Commission ("CCRC") (in 2006) expressed concern that:[82]

> Faced with the transcripts of trial, and the verdict of the jury, the Court may in some cases too readily form its own view that the appellant is "plainly guilty" and it is widely considered that this is what happened in some of the miscarriage of justice cases that preceded the establishment of the Royal Commission on Criminal Justice under the chairmanship of Lord Runciman.

A retreat from *Pendleton*?

8.101 In *Hakala*, Lord Justice Judge (as he then was) said: [83]

> Lord Bingham's conclusion that it was not possible to be sure of the safety of the conviction followed an analysis of the fresh evidence in its factual context. The judgment in "fresh evidence" cases will inevitably therefore continue to focus on the facts before the trial jury, in order to ensure that the right question – the safety, or otherwise, of the conviction – is answered.

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79 Report of the Royal Commission on Criminal Justice (1993) Cm 2263, p 175, para 62.

80 Above, at p 175, para 62.

81 A Ashworth, L Campbell and M Redmayne, *The Criminal Process* (2019) p 384.

82 CCRC, "Quashing Convictions": Response of the Criminal Cases Review Commission (December 2006).

83 [2002] EWCA Crim 730, [2002] Crim LR 578.

8.102 *Hakala* has been seen as leading to a "'post-*Pendleton*' approach",[84] confirmed in the Privy Council case of *Dial and Dottin*, which cited Lord Justice Judge's comments in *Hakala* with approval. In *Dial and Dottin*, seeking to summarise *Pendleton*, the Privy Council said:[85]

> if the court regards the case as a difficult one, it may find it helpful to test its view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict.

8.103 In *L (Stuart)*, Lord Justice Moses observed:[86]

> *Pendleton* [2002] emphasises [that] the task of this court is to consider whether, in the light of the fresh evidence, the conviction is unsafe. Thus, whilst we acknowledge the difference in the process of reasoning of … the jury had the file been revealed to them, it by no means follows that the verdict is unsafe.

8.104 Former CCRC Commissioner Laurie Elks has suggested that Lord Justice Moses "appeared to stand the Court's judgment in *Pendleton* on its head".[87]

8.105 In *Burridge*,[88] Lord Justice Leveson summarised *Stafford* and *Pendleton* as establishing that the jury impact test "was only a mechanism in a difficult case for the Court of Appeal to 'test its view' as to the safety of a conviction".

8.106 Thus, there has been a subtle creep in the threshold as to when the jury impact test should be used, as the courts have moved from "*any* difficulty" ("save in a clear case") to "a difficult [case]", and potentially to '*only* in a difficult case'.

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84 L Elks, *Righting miscarriages of justice? Ten years of the Criminal Cases Review Commission* (2008) p 64. Elks has described the CCRC's reference in *Hakala* as "poorly judged". At his trial, Hakala had accepted the police account of what he had said at interview as true, but that he "was angry with the police officer and said the first thing that came to mind". His appeal was brought on the basis of expert evidence which showed there had been some limited rewriting of the interviews. The suggestion that his confession might therefore have been fabricated, however, was irreconcilable with his evidence at trial.

85 [2005] UKPC 4, [2005] 1 WLR 1660 at [31], by Lord Brown of Eaton-under-Heywood.

Dial and Dottin has been described by Elks (2008) as "very shocking" (p 65): it was a capital case, and the critical identification witness, the only person who identified the two appellants as the killers, the victim's brother, was conclusively shown to have lied in his evidence. At trial, the prosecutor had asked the jury whether the witness struck them as a man who was lying, and said that if they discounted him or were in any doubt as to his identification, they should set both men free. Nonetheless, the Privy Council, with powerful dissenting judgments from Lord Steyn and Lord Hutton, upheld the Trinidadian Court of Appeal's finding that the convictions were safe.

86 [2005] EWCA Crim 3119 at [22], by Moses LJ.

87 L Elks, *Righting miscarriages of justice? Ten years of the Criminal Cases Review Commission* (2008) p 65.

88 [2010] EWCA Crim 2847, [2011] 2 Cr App R (S) 27 at [101], by Leveson LJ.

8.107 In the wake of *Dial and Dottin*,[89] Lord Judge, by then Lord Chief Justice, wrote to the Chair of the CCRC drawing attention to the case to "encourage some further thought about fresh evidence cases".[90]

8.108 In 2014 Stephen Heaton said:[91]

> The former Lord Chief Justice, Lord Judge, clearly did not approve of the use of a jury impact test. He made that clear in his judgment in the case of *Hakala* and then sought to interpret the decision of the Privy Council in the case of *Dial* as authority for a different approach from *Pendleton*. The result has been confusion amongst the members of the Court with some applying a "*Pendleton*" jury impact test and others declaring it inappropriate following the decision in *Dial*. One can argue about the correct interpretation and precedent value of the decision in *Dial*, but whatever the position is, it cannot be satisfactory for the Court, as an entity, to be unclear about the correct approach to follow on a consistent basis.

8.109 However, despite this potential confusion, the PQBD stated in 2021 that the "test to be applied in considering a fresh evidence appeal remains as stated by Lord Bingham in *Pendleton*";[92] this was affirmed by the Vice-President of the CACD in 2024, who also said that *Pendleton*'s principle "was stated in similar terms" in *Dial and Dottin*.[93]

The Runciman Commission's conclusions on fresh evidence

8.110 In relation to the CACD's approach to fresh evidence cases, the Runciman Commission noted criticisms by Lord Devlin and others of the ruling in *Stafford*, suggesting that it leads the CACD to usurp the role of the jury, concluding:[94]

> In our view, the criticism made by Lord Devlin and others has force insofar as it concerns a decision by the court to hear and evaluate itself the fresh evidence and despite it to reject the appeal. In our view, once the court has decided to receive fresh evidence that is relevant and capable of belief, and which could have affected the outcome of the case, it should quash the conviction and order a retrial unless that is not practicable or desirable. The Court of Appeal, which has not seen the other witnesses in the case nor heard their evidence, is not in our view the appropriate tribunal to assess the credibility and effect on a jury of the fresh evidence. It should not normally decide the question of the weight of the fresh evidence itself unless it is satisfied that the fresh evidence causes the verdict to be unsafe, in which case it should quash the conviction.

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89 [2005] UKPC 4, [2005] 1 WLR 1660.

90 Professor Graham Zellick, then Chair of the CCRC, pointed out in his reply to Lord Judge that it was questionable whether a decision of the Privy Council could, as a matter of domestic law, overrule the clear authority of the House of Lords (L Elks, *Righting miscarriages of justice? Ten years of the Criminal Cases Review Commission* (2008) p 69).

91 In written evidence submitted to the Justice Committee (December 2014), available here.

92 *R v Hunnisett* [2021] EWCA Crim 265, [2021] MHLR 337 at [36], by Dame Victoria Sharp PQBD.

93 *R v Campbell* [2024] EWCA Crim 1036 at [81]-[83], by Holroyde LJ VPCACD.

94 Report of the Royal Commission on Criminal Justice (1993) Cm 2263, p 175.

> Where a retrial is impracticable or otherwise undesirable… there is no sensible alternative in these circumstances but to leave the Court of Appeal with the function … of deciding the matter for itself.

Implementing the Runciman Commission's recommendations

8.111 At paragraphs 8.16 to 8.32 above, we discuss how far the changes to the safety test followed the Runciman recommendations. However, there were no changes to the structure of the Criminal Appeal Act 1968 to reflect Runciman's proposed procedure. Under the CAA 1968, as amended in 1995, it remains for the CACD to decide whether the conviction is safe – something Runciman proposed should only happen if a retrial was impracticable or otherwise undesirable.

8.112 If the Court always applied a jury impact test, these two approaches would converge, because whenever there was fresh evidence that was relevant and capable of belief, and which could have affected the outcome, the conviction would be unsafe.

8.113 However, this is not the approach of the Court. The Court continues to use the *Pendleton* test in many cases (see paragraph 8.109 above). Nonetheless, we think there is force in the argument that the Court is not consistent in its approach, and will often uphold a conviction on the basis that *it* is satisfied of the strength of the evidence against the appellant without considering the potential effect of the evidence on a jury.

8.114 Sometimes, the Court deals with cases where there is fresh evidence which might have made a difference to the jury's verdict and where a retrial would be possible (which therefore would have resulted in a retrial under the Runciman test), but the Court considers the conviction "safe" and upholds it.

Consultation responses

8.115 We asked the following questions in the Issues Paper:[95]

> Does the single test of "safety" adequately reflect the range of grounds that should justify the quashing of a conviction? In particular, under what circumstances, if any, should a conviction be quashed because of serious impropriety which does not cast doubt on the guilt of the appellant? (Issues Paper, Question 3)
>
> Is there evidence that the Court of Appeal's approach to assessing the safety of a conviction following the admission of fresh evidence or the identification of legal error hinders the correction of miscarriages of justice? (Issues Paper, Question 5)
>
> Is there evidence that the Court of Appeal's approach to assessing the safety of a conviction hinders the correction of miscarriages of justice? (Issues Paper Summary, Question 2)

8.116 Dr Stephanie Roberts highlighted her doctoral research on grounds from 300 appeals, which found that the test adequately reflected the range of grounds, however, she concluded:

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95 Law Commission, Criminal Appeals: Issues Paper (July 2023).

> that the problems with the Court lie […] more in the interpretations of those powers rather than the powers themselves which were initially very wide when it was created in 1907. In my view it is the Court's review function and process of review that is more problematic than the powers necessarily as outlined here.

8.117 APPEAL also raised concerns about the jury impact test and stated that where the CACD does accept fresh evidence, it will often uphold a conviction based on its own subjective view of the guilt of the appellant rather than how it may have affected the jury's decision. APPEAL stated:

> Where the considerations listed in [section] 23(2) are given a restrictive interpretation and treated as conditions, and fresh evidence is viewed in isolation by the Court of Appeal, the Court avoids seeing the greater picture that demonstrates the miscarriage of justice.

8.118 It gave as an example cases where the appellant seeks to introduce fresh evidence regarding domestic abuse.

8.119 CALA considered the law as being deeply unsatisfactory and argued that:

> It is illogical for a different test to be applied in fresh evidence cases and runs the obvious risk, as recognised by Lord Bingham in *Pendleton*, that the appeal court decides for itself whether the defendant is guilty as opposed to whether the conviction is unsafe.

8.120 Cardiff University Law School Innocence Project also considered the change in the test from "safe and satisfactory" to "safe" and similarly preferred the former, criticising the latter:

> In short, the test of 'safety' alone has become a mechanism by which unsatisfactory practice can be ignored because 'it would not have made a difference to the jury decision'.

8.121 23 Essex Street Chambers advocated the reintroduction of the 1907 "miscarriage of justice" test,[96] and argued that along with a greater use of retrials, it would "keep the jury's verdict at the heart of our justice system, while ensuring that verdicts which have been secured through a miscarriage of justice will not stand".

8.122 Several respondents were concerned that the CACD does not take a holistic approach, especially when fresh evidence results in a case being considered by the CACD on successive occasions. Mark Alexander, a prisoner who maintains his

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96 As discussed in Chapter 2, under the Criminal Appeal Act 1907, until amended in 1966, the test for an appeal against conviction was that the Court "shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law *or that on any ground there was a miscarriage of justice* … provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that *no substantial miscarriage of justice* has actually occurred" (emphasis added).

innocence, argued that the Court fails to take a cumulative view of each appeal point, often in the context of a circumstantial case:

> At present however, practitioners have observed that the Court of Appeal has a tendency to analyse the impact of each thread on the case individually, without taking a holistic view of the cumulative effect of those frayed threads taken together.

Discussion

8.123 We think there is force in the view of some respondents that the CACD sometimes takes too narrow a view of whether fresh evidence or identification of a legal error which could have led the jury to acquit renders a conviction unsafe – characterised by APPEAL as deference to a given jury's verdict of guilty, rather than deference to the principle of trial by jury.

8.124 We think that the Runciman approach (that where there is fresh evidence that could have led the jury to acquit there should, if possible, be a retrial) better accords with the principle that it is for juries in trials on indictment to decide guilt or innocence. If the trial jury's verdict was reached in ignorance of relevant evidence or following a misdirection, then the principle requires that, if possible, a properly directed jury with access to all the evidence should decide on the appellant's guilt or innocence.

8.125 Dr Stephanie Roberts has suggested that allowing the Court to consider first whether to order a retrial might encourage the Court to be more willing to order retrials. The underlying assumption in Dr Roberts' analysis (which may be correct) is that the CACD does not consider "safety" in a vacuum, and may be more inclined to view a conviction as safe if the consequence of finding it unsafe would be that the person would walk free than it would if the consequence would merely be a retrial.

8.126 We have provisionally concluded that the principle outlined by the Runciman Commission in 1993 was essentially sound:[97]

> Once the court has decided to receive evidence that is relevant and capable of belief, and which could have affected the outcome of the case, it should quash the conviction and order a retrial unless that is not practicable or desirable.

Consultation Question 35.

8.127 We provisionally propose that where, in an appeal against conviction, the Court of Appeal Criminal Division admits fresh evidence that could have led the jury to acquit, then the Court should order a retrial unless a retrial is impossible or impractical.

Do consultees agree?

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[97] Report of the Royal Commission on Criminal Justice (1993) Cm 2263, p 175.

"LURKING DOUBT": APPEALS IN THE ABSENCE OF NEW EVIDENCE OR ERROR OF LAW

8.128 "Lurking doubt" cases raise the very opposite issue to fresh evidence cases. If the CACD quashes a conviction to which a properly directed jury came on the same evidence, it might be said that this amounts to "trial by jury in the first instance and trial by judges of the Court of Appeal in the second".[98]

8.129 It can be seen from the text of the 1907 Act that Parliament intended the appellate court to be able to quash a decision of a jury even in the absence of new evidence or any error of law or procedural irregularity: the Court was permitted to quash the jury's verdict where it was "unreasonable or [could not] be supported having regard to the evidence".[99]

8.130 However, historically the appeal court has been extremely reluctant to interfere with a jury's verdict, especially where there is no new evidence or identifiable error of law that might vitiate its verdict.

8.131 The term "lurking doubt"[100] was coined in *Cooper*. In *Cooper*, the appellant was picked out in an identification parade by the victim of a violent assault. His case was that while he had been out with the other two men who had been involved in the surrounding circumstances, he was not the one who carried out the assault. The Court noted of the man who, according to the appellant, had carried out the assault:[101]

> doubts are raised in this case by reason of the fact that there is unquestionably a close physical similarity between the defendant and Burke. We have been supplied, as were the jury, with a photograph of Burke; and it is unnecessary to say more than that the physical resemblance is really quite striking.

8.132 However, all this was gone over in the original trial:[102]

> all the material to which I have referred was put before the jury. No one criticises the summing-up, and, indeed, Mr. Frisby for the defendant has gone to some lengths to indicate that the summing-up was entirely fair and that everything which could possibly have been said in order to alert the jury to the difficulties of the case was clearly said by the presiding judge. It is, therefore, a case in which every issue was before the jury and in which the jury was properly instructed, and, accordingly, a case in which this court will be very reluctant indeed to intervene.

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98 *R v Pendleton* [2001] UKHL 66, [2002] 1 WLR 72 at [17], by Lord Bingham of Cornhill.

99 Criminal Appeal Act 1907, s 4(1).

100 L H Leigh, "Lurking doubt and the safety of convictions" [2006] *Criminal Law Review* 809 recognises that "lurking doubt" "often serves as no more than a rhetorical flourish". Hereafter "lurking doubt" is used to refer only to cases in which the CACD quashes a conviction where there is no procedural impropriety or error of law, but the CACD is prepared to accept that the jury, although properly directed, might have returned a wrongful conviction.

101 *R v Cooper* [1969] 1 QB 267, CA, 270F-G, by Widgery LJ.

102 Above, 271B-C.

8.133 It is perhaps of relevance that *Cooper* came quite shortly after passage of the revised safety test, the Court noting that:[103]

> until the passing of the Criminal Appeal Act, 1966 – provisions which are now to be found in section 2 of the Criminal Appeal Act, 1968 – it was almost unheard of for this court to interfere in such a case.

8.134 It would have been hard for the Court to conclude in a case like this that the jury's verdict was "unreasonable or unsupported by the evidence" – they had the identification, and had seen the witness cross-examined. However, the Court came to the conclusion that under the new test they should set aside the conviction:[104]

> our powers are [now] somewhat different, and we are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. That means that in cases of this kind the court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the court experiences it.

8.135 References to "lurking doubt in our minds" and a "reaction [to] the general feel of the case" suggest a subjective approach by the CACD. *Taylor* notes that the "judicial hunch" was "the starting point taken in earlier decisions which spoke of a subjective reaction produced by the general feel of the case based on the experience of the judges".[105]

8.136 In the Northern Irish case of *Pollock*, the Court of Appeal said that:[106]

> [its] task is to review the jury verdict rather than to second-guess it. On the other hand, if the court feels substantial unease about the safety of the conviction, it should allow the appeal.

8.137 Leigh suggests that "substantial unease" represents a narrowing of the test.[107] However, even if this is accepted, "substantial unease" still suggests a subjective test for the appellate court itself, and the Court in *Pollock* recognised that *Galbraith* means that the judge's view as to whether the case should go to a jury cannot bind the CACD in its retrospective evaluation of the safety of the verdict.

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103 Above, 271D-E.

104 Above, 271E-G.

105 *Taylor on Criminal Appeals* (3rd ed 2022) para 9.439.

106 [2004] NICA 34 at [36], by Kerr LCJ.

107 L H Leigh, "Lurking doubt and the safety of convictions" [2006] *Criminal Law Review* 809.

8.138 In *Pope*, however, Lord Judge appeared to reject the subjective approach which *Cooper* had suggested, saying:[108]

> If therefore there is a case to answer and, after proper directions, the jury has convicted, it is not open to the Court to set aside the verdict on the basis of some collective, subjective judicial hunch that the conviction is or maybe unsafe.
>
> Where it arises for consideration at all, the application of the "lurking doubt" concept requires reasoned analysis of the evidence or the trial process, or both, which leads to the inexorable conclusion that the conviction is unsafe.

8.139 Shortly after *Pope*, in *D*, Lord Justice Treacy said:[109]

> The use of the expression "lurking doubt" is one which is to be deprecated or used very sparingly in modern times. It certainly should not reflect the subjective feeling of members of this court and should only come into play in conjunction with a properly reasoned analysis of the evidence.

8.140 Similarly, in *Heron*,[110] the CACD seemed to suggest that where there was a case to be left to the jury, "it is difficult to see how the court can be persuaded that there is a lurking doubt about the safety of a conviction in the absence of some specific factor to create one".[111]

8.141 "Lurking doubt" seems most clearly to play a role in identification cases like *Cooper*. Eyewitness identification evidence can be notoriously unreliable,[112] especially when

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108 [2012] EWCA Crim 2241, [2013] 1 Cr App R 14 at [14], by Lord Judge CJ.

109 [2013] EWCA Crim 1592 at [30], by Treacy LJ.

110 [2005] EWCA Crim 3245 at [37], by Scott Baker LJ (emphasis added).

111 See also *R v Tredget* [2022] EWCA Crim 108, [2022] 4 WLR 62, where the CACD, at [171] (by Fulford LJ VPCACD) held that "lurking doubt" had no application in cases where a guilty plea had been entered:

> It can … exceptionally occur that a reasoned legitimate doubt may be entertained by this court about the verdict reached by the jury following disputed evidence, and this may be sufficient to establish that the conviction is unsafe. But following a freely made guilty plea, the conviction does not depend on the jury's assessment of disputed evidence. The evidence has never been heard, still less tested. It cannot be appropriate to enquire how it might have emerged and might have been assessed if there had been a trial. A submission that the evidence leaves a doubt about the guilt of the defendant is simply inappropriate. In such a case, of a free and informed plea of guilty, unaffected by vitiating factors, it will normally be possible to treat the conviction as unsafe only if it is established that the appellant had not committed the offence, not that he or she may not have committed the offence. Therefore, the test is not that of "legitimate doubt", still less a "lurking doubt", but instead it must be demonstrated that the appellant was not culpable.

112 In 1974, the Home Secretary asked Lord Devlin to review the law relating to identification following the wrongful convictions of Luke Dougherty and Lazlo Virag. The Report (Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases (1976) Cmnd 338) found (at para 1.24) that:

> The problem peculiar to identification is that the value of the evidence … is exceptionally difficult to assess. The weapon of cross-examination is blunted. A witness says he recognizes the man, and that is that or almost that. There is no story to be dissected, just a simple assertion to be accepted or rejected. If a witness thinks that he has a good memory for faces when in fact he has a poor one, there is no way of detecting the failing.

the witness and the identified person are from different racial groups.[113] Where a case depends wholly or substantially on the correctness of one or more identifications which the defendant maintains are mistaken, the judge is required to warn the jury of the special need for caution, that mistaken witnesses can be convincing witnesses, and that a number of witnesses can all be mistaken.[114]

8.142 In summary, although the 1907 test did envisage that the Court of Criminal Appeal might overrule a jury even in the absence of new evidence or an error of law, in practice the legislation was read down so that where a properly directed jury could properly convict, the Court would not interfere with the jury's verdict. Under the 1968 test, a conviction could be unsafe even though it was properly open to the jury to convict. However, the CACD has been very reluctant to use this power; even more so since *Pope*, in which the Court held that the use of the power will require reasoned analysis leading to the "inexorable conclusion that the conviction is unsafe".

8.143 The problem is acute because, in accordance with *Galbraith*,[115] a judge is obliged to allow a case to go before a jury if it could properly convict, even if the judge believes that a conviction would be unsafe. This reflects the constitutional principle that in trials on indictment, it is the jury, not the judge, which is charged with determining whether the guilt of the defendant has been proved.[116] However, it also turns on a possible distinction between whether a jury could properly convict and whether a jury could safely convict. The CACD noted that "[unsafe] may mean unsafe because there is insufficient evidence on which a jury could properly reach a verdict of guilty" (if so, there is no real distinction). However, "it may on the other hand mean unsafe because in the judge's view, for example, the main prosecution witness is not to be believed" (thus, the judge might feel that while the jury could properly convict on the evidence, a conviction would be unsafe).[117] As we discuss below, in some circumstances a judge is required to assess the quality of certain types of evidence, and to withdraw the case if a conviction based on it would be "unsafe".

8.144 As we noted in the Issues Paper, some commentators argue that this approach is "sound" because the CACD can quash an "unsafe" conviction.[118] However, in practice, the CACD is highly unlikely to do so if a properly directed jury has convicted on the evidence. Thus, without fresh evidence or identification of a legal error, there is no distinction in appellate proceedings between "properly" and "safely": if the jury could properly convict, the conviction is safe.

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113 See, for instance, C Harwood, "The own-race bias in witness identification", *Harm and Evidence Research Collaborative* (October 2017).

114 *R v Turnbull* [1977] QB 224, CA. In their response to the Issues Paper, 23 Essex Street Chambers noted that the decision in *Turnbull* post-dates *Cooper*. They speculated that had *Turnbull* come first, the jury in *Cooper* would have received a comprehensive direction on the right approach to disputed eyewitness identifications, and the CACD might not have had recourse to "lurking doubt".

115 *R v Galbraith* [1981] 1 WLR 1039, CA.

116 In *R v Jonathan Huw Jones* [1998] 2 Cr App R 53, 56, (see Appendix 2), the CACD held that "whether he" – that is, the judge – "would himself have convicted the defendant … was, and is, of no more relevance or materiality than that of an intelligent bystander in the public gallery who saw all the witnesses, heard all the evidence and understood the issues in the case".

117 *R v Galbraith* [1981] 1 WLR 1039, CA, 1042A, by Lord Lane CJ.

118 A Samuels, "No case to answer: the judge must stop the case" (1996) 9 *Archbold News* 6.

8.145 However, reform of the safety test – or even exhorting the CACD to be more willing to quash convictions on the basis of "lurking doubt"– is not necessarily the only way of dealing with this issue. As we noted in the Issues Paper, and discuss in Chapter 17 and Appendix 4, another approach would be to require the trial judge to withdraw a case from the jury if a conviction on the evidence would be unsafe. Such an approach already applies in respect of the admissibility of unconvincing hearsay evidence,[119] contaminated bad character evidence,[120] and poor and unsupported identification evidence.[121] The Runciman Commission in 1993 recommended that the CACD's decision in *Galbraith* should be "reversed so that a judge may stop any case if he or she takes the view that the prosecution evidence is demonstrably unsafe or unsatisfactory or too weak to be allowed to go to the jury"[122] (though a case would arguably currently be stopped under *Galbraith* in the latter situation). We would also observe that doing so would qualify as a "terminating ruling" and the prosecution would have the ability to challenge such a decision on appeal (see Chapter 12).

8.146 Were such a change to the law made, one effect might be that there would be less need to bring cases to the CACD because some unsafe cases would be weeded out before conviction. It would also be the case that the judge who has sat through the evidence alongside the jury would be better placed to assess whether a conviction would be unsafe than an appeal court looking at the matter retrospectively without having observed the evidence and cross-examination of witnesses (and conscious that the jury had convicted). Another effect would be that, if the "no case to answer" test were reformulated to include unsafety, defendants could appeal on the basis that a submission of no case to answer should have been accepted. This is an existing ground of appeal. However, if the test were reformed, the appellant would have to show only that the submission should have been accepted because no jury could safely have convicted, rather than that no jury could properly have convicted.

Consultation responses

8.147 Question 6 of the Issues Paper asked:

> Is there evidence that the Court of Appeal's approach to "lurking doubt" cases (not attributable to fresh evidence or material irregularity at trial) hinders the correction of miscarriages of justice?

8.148 The CPS and a submission from members of 23 Essex Street Chambers expressed concern that a wide application of lurking doubt would impinge on the role of the jury. For example, the CPS considered that:

> While 'lurking doubt' is a slightly nebulous concept, its application has been restricted by the court and is consistent with the principle that quashing a decision

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119 Criminal Justice Act 2003, s 125.

120 Above, s 107.

121 *R v Turnbull* [1977] QB 224, CA, 229-230, by Lord Widgery CJ.

122 Report of the Royal Commission on Criminal Justice (1993) Cm 2263, p 59, para 42. (Under the second limb of the *Galbraith* test, a case which is "too weak" – that is, where no jury could properly convict the defendant – would not be allowed to go the jury at present.)

and ordering a retrial in the absence of any procedural irregularity, error of law, or fresh evidence would usurp the function of the jury.

Rarely used

8.149 Several consultees observed that lurking doubt was very rarely used by the CACD to quash a conviction. For example, Dr Lucy Welsh cited a number of previous studies to highlight that the doctrine is only used in exceptional circumstances. This included a study of murder and rape cases between 2010 and 2016 which found that lurking doubt claims succeeded in 3 out of 30 cases.[123]

8.150 CALA similarly noted:

> Since *Cooper*, "lurking doubt" has rarely been deployed as a basis for quashing a conviction and its death knell was seemingly sounded in *Pope*[124] where Lord Judge CJ stated in terms that where there is a case to answer and there has been no legal error at trial, it was not open to the Court of Appeal to quash a conviction on the basis of some subjective, collective judicial hunch that the verdict is or may be unsafe.

8.151 APPEAL considered that "a ground of appeal that could and should form a vital safeguard in our criminal justice system has all but fallen into extinction".

8.152 Rupert Grist, a solicitor and former case review manager at the CCRC, cited his article "Lurking Doubts Remain", which noted that subsequent case law cast doubt on the ability of the CACD to quash convictions based on a "lurking doubt".[125] However, he pointed out that *Cooper* continued to be cited with approval by the courts with leave being granted on this ground of appeal. He wrote in his article that:[126]

> Some lurking doubt appeals succeed, albeit rarely. It is notable that a number of such successful appeals concern prosecution cases that were arguably insufficient to leave to a jury. But, in case of any doubt as to the ambit of *Cooper*, some of these cases are clear that it sets out the power to overturn a verdict solely on the basis that the court disagrees with the jury... Furthermore, the existence of such a power was specifically endorsed by the 1995 Royal Commission on Criminal Justice … and it seems clear that the change to s 2 of the Criminal Appeal Act 1968 following the Royal Commission did not remove it.

Role of the Court

8.153 Several consultees addressed the potential conflict between lurking doubt appeals and the jury being the primary finder of fact. The Bar Council observed that the decision in *Cooper* predated the decisions in *Turnbull* and *Galbraith*. It noted that the

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123 P Dargue, "The Safety of Convictions in the Court of Appeal: Fresh Evidence in the Criminal Division through an Empirical Lens" (2019) 83(6) *Journal of Criminal Law* 433.

124 [2012] EWCA Crim 2241, [2013] 1 Cr App R 14.

125 R Grist, "Lurking Doubts Remain" (2012) 176 *Criminal Law & Justice Weekly* 313.

126 Above, 313.

subjective concept of "lurking doubt" may not have been needed had the Court been informed by the approach in the later cases. The Bar Council stated that:

> There may therefore be some support for a suggestion that a "lurking doubt" safeguard is not in fact needed, because it has been overtaken (at least in identification cases, which as the Law Commission notes is the dynamic in which it most clearly has a role to play) with a case-specific test that is applied at the close of the prosecution case.

8.154 The Bar Council highlighted the tension between the test in *Galbraith* in a "no case to answer" submission and the ability of the CACD to quash a conviction on the grounds of a subjective "lurking doubt". It observed that this tension risked undermining the primacy of the jury and as has been developed through the "jury impact test", a degree of restraint is required where the appellate court is making a decision without having heard or seen some of the evidence at first instance. Nevertheless, the Bar Council also recognised that:

> The function of the CACD is, so far as possible, to correct actual or possible miscarriages of justice, as well as performing a supervisory role as to the fairness of the process adopted, and the broadest possible scope should be afforded the court to ensure that it can perform those functions effectively. The concept of "lurking doubt" may be thought to have a role to play in helping the court perform that function.

8.155 Paul Taylor KC along with Edward Fitzgerald KC and Kate O'Raghallaigh argued that the role of the CACD is to rectify miscarriages of justice and that the "lurking doubt" test could be a "powerful tool" in rectifying them:

> the CACD ought to retain a special/residual jurisdiction (however it be defined) to quash a conviction in the absence of fresh evidence/judicial misdirection/jury irregularity. In short, the Court must retain the ability to grapple with cases which cannot be brought within the paradigm 'grounds of appeal' established since the CAA 1968. Such a jurisdiction is in the interests of justice.

8.156 They considered that the hostility of the Court to the phrase "lurking doubt" was difficult to reconcile with the language of the safety test given the test allows the Court to quash a conviction where they "think" the conviction is unsafe.

8.157 The London Criminal Courts' Solicitors Association ("LCCSA") accepted that "lurking doubt" as a ground of appeal is conceptually difficult. Nevertheless, it considered the function of the CACD as being to remedy miscarriages of justice:

> we are of the view that as a last resort in exceptional cases notwithstanding the perceived sensitivity relating to judges interven[ing] in the jury's territory, "lurking doubt" should be available as a last resort to prevent miscarriages of justice.

8.158 APPEAL recognised that:

> On the surface, it may be thought that there is some tension between APPEAL's criticism of the Court upholding convictions based on its subjective opinion of an

> appellant's guilt, while simultaneously inviting the Court to quash convictions where it subjectively assesses that there is real doubt about the appellant's guilt.

8.159 However, it argued that in the former scenario, "the Court is effectively usurping a jury's monopoly on making findings of guilt in serious criminal cases: it is making a finding of guilt to prevent a jury considering the case again (at a retrial)"; in the latter, the Court is "fulfilling its function of remedying miscarriages of justice".

8.160 Rupert Grist argued that in lurking doubt cases, the Court should only find a conviction unsafe if "the evidence was insufficient for a reasonable jury to reach a guilty verdict". He expressed a concern about:

> cases where the evidence is objectively sufficient for a jury to convict, but a particular panel of judges takes the subjective view that they would have found the appellant not guilty had they been on the jury…. Overturning a conviction in such circumstances usurps the role of the jury [and] would also lead to inconsistency and the risk of some miscarriages not being corrected, given that it depends on the subjective responses of particular judges to the evidence.

Discussion

8.161 It is not our intention to restrict the ability of the CACD to find a conviction unsafe and quash it on the basis of "lurking doubt". We accept that where a panel of three senior criminal judges have a sense of unease about the safety of a conviction, this may well indicate that there has been, or could have been, a miscarriage of justice.

8.162 However, we recognise that for the CACD to quash a conviction on this basis runs contrary to the principle that it is for the jury to decide whether the evidence amounts to proof of guilt.

8.163 It might be argued that this problem would be less acute if the Court were to order a retrial, since a retrial puts the matter back in the hands of a jury. However, this creates a further problem. Assuming that the evidence remains as it was at trial, and it is again left to the jury, then it is quite possible that the jury would return the same verdict, and the Court could, presumably, still have a lurking doubt.

8.164 In 2015, the House of Commons Justice Committee expressed concern about the Court's approach to "lurking doubt" and worried that "there is no clear or formal mechanism to consider quashing convictions arising from decisions which have a strong appearance of being incorrect".[127] The Committee queried how Lord Judge's comment in evidence that if "the court is left in doubt about the safety of the conviction it must and will be quashed" could be reconciled with his judgment in *Pope*.[128]

8.165 We consider that the decision in *Pope* significantly narrows the scope for the Court to quash a conviction on the basis of lurking doubt. If the Court's "doubt" arises as a result of a detailed analysis leading to an inexorable conclusion that a conviction is

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127 House of Commons Justice Committee, *Criminal Cases Review Commission*, Report of the House of Commons Justice Committee (2014-15) HC 850, para 27.

128 Above, para 26.

unsafe, then we would question whether this is a lurking doubt at all – it is a properly reasoned demonstration that the conviction is unsafe.

8.166 There is no reason to think, however, that reversing *Pope* would incline the CACD to find a lurking doubt in more cases.

Consultation Question 36.

8.167 We provisionally propose that the Court of Appeal Criminal Division should continue to be able to find a conviction unsafe if it thinks that the evidence, taken as a whole, was insufficient for a reasonable jury to be sure of a defendant's guilt.

Do consultees agree?

NULLITY AND VENIRE DE NOVO

8.168 The CACD has a further jurisdiction which it has inherited, through the Court of Criminal Appeal, from the Court of Crown Cases Reserved. This is the power to declare a conviction a nullity. Where a conviction is declared a nullity, the Court has a power to issue a writ of venire de novo, discussed in Chapter 9 on remedies following the quashing of a conviction. In summary:

(1) the jurisdiction to issue a writ of venire de novo is limited to circumstances in which there was an irregularity in procedure which resulted in there being no valid trial, and where it came to an end without a verdict being delivered by a properly constituted jury, but not where there was a procedural error between the trial being validly commenced and the discharge of the jury;[129]

(2) an application for a declaration that a conviction was a nullity is subject to the same requirements for leave as for standard CAA 1968 conviction appeals: both the quashing of a conviction and a writ of venire de novo are remedies in an appeal against conviction and must be sought by way of an appeal;[130] and

(3) if a defendant is arraigned out of time without leave of the CACD following an order for a retrial when a conviction is quashed, the retrial proceedings are a nullity (see paragraphs 9.97 to 9.125 and 13.67 to 13.72).[131]

8.169 A writ of venire de novo is not an order for retrial because the initial proceedings are deemed so fundamentally flawed that they did not happen. Where the Court allows the appeal on the grounds that the proceedings or the conviction were a nullity but does not issue a writ of venire de novo, it makes an order that the conviction and

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129 *R v Rose* [1982] AC 822, HL.

130 *R v Stromberg* [2018] EWCA Crim 561, [2019] QB 14.

131 *R v Llewellyn* [2022] EWCA Crim 154, [2023] QB 459.

judgment be set aside and that there be no trial. It cannot quash the conviction as, in law, it never existed.[132]

8.170 In *Williams*,[133] the Lord Chief Justice, Lord Thomas of Cwmgiedd, expressed the hope "that in the future the court would take the view that the highly technical law in relation to nullity is an outdated concept that should no longer prevail, that a modern approach should be taken, which is to decide on the fairness of the trial, the prejudice to a defendant and the safety of the conviction".

8.171 Paul Taylor KC has argued that the CACD has not been consistent in its use of the terms "nullity" and "unsafe". He gives the example of *Nightingale*[134] (although strictly speaking, the CACD was here sitting as the Court Martial Appeal Court).

8.172 We agree that some of the circumstances which have previously been treated as rendering a trial or conviction a nullity might be better dealt with under the safety test. *Nightingale*, for instance, could be seen as a case where improper pressure to plead guilty meant that the defendant did not receive a fair trial. However, we consider that where there has been a defect so fundamental that no trial took place, the appropriate course is to recognise this by declaring the conviction a nullity.

8.173 Another circumstance which we consider should render the trial a nullity is where a necessary consent to prosecution was not obtained. This is because the requirement for consent is to guard as much against wrongful prosecutions as it is wrongful convictions. While conceivably a prosecution where the necessary consents were not obtained might amount to an abuse of process as an affront to justice, it is not clear that this high threshold, which is intended to be exceptional, would be reached – especially where the necessary consent was obtained during the trial.

Consultation Question 37.

8.174 We provisionally propose that the Court of Appeal Criminal Division's ability to make a declaration of nullity and to issue a writ of venire de novo should be retained.

Do consultees agree?

8.175 We invite consultees' views on how greater clarity might be achieved as to which procedural errors should render a trial or conviction a nullity.

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132 *R v Booth, Wood and Molland* [1999] 1 Cr App R 457, CA.

133 [2017] EWCA Crim 281, [2017] 4 WLR 93.

134 [2013] EWCA Crim 405, [2013] 2 Cr App R 7. At a Court-Martial in 2012, Sergeant Danny Nightingale pleaded guilty to two counts of possession of a prohibited firearm and possession of ammunition. Nightingale's counsel had requested time to discuss a potential defence. However, the Judge Advocate General gave an uninvited indication that he would find exceptional circumstances not to apply the mandatory five-year minimum sentence, and referred implicitly to a sentence of two years' detention that had been imposed in another, more serious, case. The Court Martial Appeal Court held (at [17], by Lord Judge CJ) that the defendant's "freedom of choice was … improperly narrowed" and his guilty plea a nullity.

APPEALS AGAINST CONVICTION FOR CERTAIN TERRORISM AND NATIONAL SECURITY OFFENCES

8.176 Several statutes passed between 2000 and 2023 contain provisions enabling a person to have their conviction quashed when they have been convicted of one of certain offences related to terrorism and national security, following a successful appeal against a relevant decision of the Home Secretary. These are:

(1) the Terrorism Act 2000, section 7;

(2) the Terrorism Prevention and Investigation Measures Act 2011, schedule 3 (superseding measures under the Prevention of Terrorism Act 2005);

(3) the Counter-Terrorism and Security Act 2015, schedule 4; and

(4) the National Security Act 2024, schedule 9.[135]

Terrorism Act 2000, sections 11-13, 15-19, and 56

8.177 Schedule 2 of the Terrorism Act 2000 contains a list of proscribed organisations, including the Irish Republican Army (IRA), the Ulster Volunteer Force (UVF), and the Ulster Defence Association (UDA); and Al-Qa'ida and the Islamic State of Iraq and the Levant (Islamic State of Iraq and al-Sham) (ISIS). The Home Secretary[136] may add or remove an organisation to that schedule ("proscription") or amend an entry. Recent additions have included National Action, Hizb ut-Tahrir, and the Wagner Group. Recent amendments have included extending the proscription of the military wings of Hezbollah and Hamas to cover both organisations as a whole.[137]

8.178 It is an offence:

(1) for a person to belong to a proscribed organisation (section 11);

(2) to invite support for a proscribed organisation (section 12);

(3) to wear or publish an image of the uniform of a proscribed organisation so as to arouse suspicion that they are a member or supporter of a proscribed organisation (section 13);

(4) to fundraise for a proscribed organisation (section 15);

(5) to use or possess money or property for purposes of terrorism (section 16);

(6) to enter into arrangements to make money or property available for purposes of terrorism (section 17);

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135 The now-repealed Prevention of Terrorism Act 2005, s 12, made similar provision.

136 The power is given to "the Secretary of State", and under the Interpretation Act 1978, sch 1. This is taken as a reference to any Secretary of State. In practice, powers under these provisions are exercised by the Home Secretary.

137 Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2019 and Terrorism Act 2000 (Proscribed Organisations) (Amendment) (No 3) Order 2021.

(7) to make a payment under an insurance contract relating to a payment made in response to a demand made for the purposes of terrorism (section 17A),

(8) to be involved in money laundering in relation to terrorist property (section 18); and

(9) to fail to disclose knowledge or suspicion that a person has committed on these offences where this knowledge or suspicion arises in the context of the person's trade, profession, business or employment (section 19).

8.179 The Act contains provisions enabling applications to be made the Home Secretary to have the organisation deproscribed.[138] A refusal to deproscribe can be appealed to the Proscribed Organisations Appeal Commission, which will review the Home Secretary's decision using judicial review principles.[139]

8.180 Under section 7 of the Act, where a person has been convicted of a relevant offence relating to a proscribed organisation, and the offence took place between the Home Secretary's refusal to deproscribe the organisation, and the decision of the Proscribed Organisations Appeal Commission that the organisation should be deproscribed, the person may appeal their conviction (regardless of plea and regardless of whether they have already appealed) to the CACD, if convicted on indictment, or Crown Court, if convicted by magistrates.

8.181 The "safety test" does not apply to such appeals. If the person meets the conditions to make an appeal under section 9, the appeal must be allowed.

Prevention of Terrorism Act 2005 and Terrorism Prevention and Investigation Measures Act 2011

8.182 The Prevention of Terrorism Act 2005 introduced "control orders" to manage the risk to the public posed by suspected terrorists. There were rights to appeal against decisions of the Home Secretary to renew or modify the orders, or to not revoke or modify them on an application by a controlled person. There were also rights to appeal against convictions for breaches of orders (or obligations under them).

8.183 The Terrorism Prevention and Investigation Measures Act 2011 replaced control orders with terrorism prevention and investigation measures ("TPIMs"). Section 23 of the Act creates an offence of contravening a measure in a TPIM notice without reasonable excuse, effectively recreating the offence in section 9(1) of the 2005 Act.

8.184 Section 16 sets out rights to appeal to the High Court against a decision to extend or revive a TPIM notice or to amend it without the consent of the person concerned.

8.185 Subsection 3 of Schedule 3 provides that a person convicted of an offence under section 23 has a right to appeal against that conviction if the TPIM notice, or the measure in question, is subsequently quashed. The right of appeal arises where the

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138 Terrorism Act 2000, s 4.

139 Above, ss 5-6, 9.

individual could not have been convicted had the quashing occurred before proceedings for the offence were brought.

Counter-Terrorism and Security Act 2015

8.186 Section 2 of the Counter-Terrorism and Security Act 2015 allows the Home Secretary to impose a "temporary exclusion order" ("TEO") on a person suspected of involvement in terrorism who has a right of abode in the UK, and whom the Home Secretary believes to be outside the UK. A person subject to a TEO may only return to the UK in accordance with a permit to return issued by the Home Secretary, or as a result of deportation.

8.187 Section 9 allows the Home Secretary to impose the same obligations upon a person who is subject to a TEO and has returned to the UK as could be imposed under a TPIM notice.

8.188 Under section 10(1), a person commits an offence if they return to the UK in contravention of a TEO. Under section 10(3) a person commits an offence if they fail to comply with measures imposed under section 9.

8.189 Schedule 4 provides that a person who has been convicted of an offence under section 10(1) or 10(3) may appeal against that conviction if the TEO, or a notice under section 9, or a condition of a notice under section, is quashed, where the individual could not have been convicted if the quashing had occurred before the proceedings began.

National Security Act 2023

8.190 Part 2 of the National Security Act 2023 allows the Home Secretary to issue a "Part 2 notice", imposing prevention and investigation measures upon a person suspected of involvement in "foreign power threat activity", such as espionage, sabotage, or interference with the democratic process.

8.191 Under section 56 of the Act, a person subject to a Part 2 notice commits an offence if they contravene any measure in the notice without reasonable excuse.

8.192 Schedule 9 provides that a person who has been convicted of an offence under section 56(1) may appeal that conviction if the Part 2 notice, or the extension or revival of a Part 2 notice, or a measure in a Part 2 notice, is quashed, where the individual could not have been convicted if the quashing had occurred before the proceedings began.

Discussion

8.193 In general, a person who is subject to a legal obligation is required to obey that obligation unless and until such time as it is successfully appealed against. The fact that an order might be subsequently revoked does not generally render lawful breaches of that order committed in the meantime. However, where an order is quashed because the decision to make it was unlawful, the order is normally treated as having never existed. For instance, if an order creating a bylaw is unlawful, the effect can be that is treated as though it was never law and accordingly any conviction for breaching it would be at least unsafe, and may be a nullity – for instance where the bylaw created a specific offence which was the subject of the information or

indictment. In *DPP v Hutchinson*,[140] the House of Lords quashed convictions under a bylaw which excluded all civilians from Greenham Common (which was being used as a US airbase). The enabling statute did not permit the Minister to make bylaws which would exclude persons having rights of commons (although the appellants, who were protestors, did not claim to enjoy such rights).

8.194 Given that the provisions in the 2005, 2011, 2015 and 2023 Acts seem to have been modelled on those in the 2000 Act, we have primarily considered the case for the measures in that Act.

8.195 We considered whether the provision might have been introduced so as not to prejudice the right of appeal against a refusal of deproscription. The right to appeal against a refusal to deproscription would be rendered nugatory if a person who exercised that right thereby committed an offence by acting on behalf of a proscribed organisation. However, this protection is already provided by section 10 of the 2000 Act, which provides that evidence of anything done in relation to an application for deproscription, or an appeal to the Proscribed Organisations Appeal Commission, or an appeal from that Commission to the Court of Appeal, is not admissible in proceedings for an offence under sections 11 to 13, 15 to 19 or 56 of the Act (although it may be adduced as evidence for the defence). That said, the fact that this could not be adduced by the prosecution in proceedings for these offences does not make the conduct lawful.

8.196 Moreover, the provision would not fully address that issue, because the right to appeal only relates to convictions for conduct between the point at which the Home Secretary refuses to deproscribe the organisation and the successful appeal against this decision. It would not, therefore, protect a person who commits an offence by taking actions to challenge the proscription in the first place. Moreover, it would offer no protection for a person who brought an unsuccessful appeal. In any case, even if this were the explanation, it would not explain why similar provision was included for control orders, TPIMs, TEOs, and Part 2 orders. These can all be appealed without breaching the obligations contained therein.

8.197 Another explanation may be that in considering whether to overrule the Home Secretary's decision, the Commission is required to apply judicial review principles. This suggests that the drafters may have had in mind that in some circumstances the Home Secretary's decision may have been unlawful, and the measure therefore unlawful. Moreover, in the case of decisions relating to TPIMs, TEOs and Part 2 orders, not only is ordinary judicial review ousted, but the validity of the measures may not be questioned in any legal proceedings other than those provided in the relevant legislation for challenging the decisions. This has the effect that the validity of the measures cannot be raised as a defence in criminal proceedings.

8.198 Thus, provisions allowing the person to appeal where an order is made following an application to quash a TPIM, TEO or Part 2 might therefore be justified on the basis that the conviction is for breaching an order which was itself unlawful. However, it should be noted that in *Majera*, Lord Reed, President of the Supreme Court, said that the statement that "when an act or regulation has been pronounced by the court to be

[140] [1990] 2 AC 783, HL.

unlawful, it is then recognised as having had no legal effect at all" is "an over-simplification" and "subject to important qualifications". [141]

8.199 In any case, however, we do not think that this logic works when the decision which is quashed is, for instance, a refusal to deproscribe an organisation, or not to remove requirements in a TPIM notice. The quashing of a refusal to deproscribe an organisation does not mean that the proscription was never lawful. Quashing a refusal to deproscribe does not have a legal effect that the organisation is treated as deproscribed from the moment of the refusal; indeed, the legislation requires the Home Secretary to make a deproscription order as soon as possible, which would not be necessary if it did. Likewise, while an unlawful decision to *extend* a TPIM might arguably mean that the TPIM ought to be treated as never having been extended, an unlawful decision *not to revoke* a TPIM could not cause the court to treat the TPIM as having been revoked.

8.200 There is little case law on the operation of these provisions. It may be that the requirement to show that the person could not have been convicted if the organisation had been deproscribed or the relevant measure had been quashed before the proceedings in which the person was convicted limits the application of these provisions. That is, it may in fact be hard to meet this test, because in many cases although the relevant decision was quashed, even if this had happened immediately before the proceedings this would not have prevented the person being convicted for committing the relevant offence at the time they did the relevant act.

8.201 The fact that an organisation should have been deproscribed earlier does not justify a person joining or fundraising for a proscribed organisation while an appeal is pending. The correct route for a person who is subject to a TPIM or TEO or a Part 2 notice is to challenge that order through the appellate process while continuing to observe it.

8.202 If the effect of a wrongful decision by the Home Secretary is that the order was not legally effective while the order was being challenged then this can be appealed through the normal appellate process (involving the CCRC if the affected person has already had an unsuccessful appeal). Although the 2011, 2015 and 2024 Acts contain ousters preventing the relevant measures from being questioned in other proceedings, this would not prevent the fact of them having been quashed from being raised.

8.203 A further anomaly is that these appeals are covered by the provisions on compensation for a miscarriage of justice. Quite apart from the argument that there is no miscarriage of justice where a person is properly convicted of breaching an order that was lawfully in place at the time it was breached, section 133(1ZA) of the Criminal Justice Act 1988 provides that compensation for a "miscarriage of justice" is only available "if the new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence". However, appeals brought under these provisions do not require fresh evidence; the Court is required to grant the appeal if the conditions for bringing it apply, and it is therefore hard to see how the fresh evidence condition in section 133(1ZA) could ever therefore be made out.

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[141] *R (Majera) v Secretary of State for the Home Department* [2021] UKSC 46, [2022] AC 461 at [27], by Lord Reed PSC.

Consultation Question 38.

8.204 We invite consultees' views on the provisions requiring the Court of Appeal to quash a person's conviction on an appeal under:

(1) section 7 of the Terrorism Act 2000;

(2) schedule 3 to the Terrorism Prevention and Investigation Measures Act 2011;

(3) schedule 4 to the Counter-Terrorism and Security Act 2015; and

(4) schedule 9 to the National Security Act 2023.

APPEALS BASED ON JUROR DELIBERATIONS

8.205 A convicted person may seek to appeal against their conviction on the basis that the conduct of members of the jury rendered the conviction unsafe.

8.206 The CACD may quash convictions on the basis of improper juror behaviour outside the jury room.[142] However, where allegations have been made concerning what occurred within the jury room, other than where it involves the use of "extraneous" material (such as threats or the fruits of a juror's independent research) the CACD has been highly reluctant to consider what was said or done in the course of juror deliberations as affording any ground of appeal.

The law

8.207 The Contempt of Court Act 1981, section 8, made it a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings. The provision included exceptions for disclosure for the purposes of enabling the jury to arrive at their verdict (such as disclosures in a question from the jury to the judge), and disclosure in evidence in any subsequent proceedings for an offence alleged to have been committed in relation to the jury in the first proceedings.

8.208 In *Mirza and Connor and another*,[143] the House of Lords made clear that the courts may not inquire into the jury's deliberations, subject to two exceptions, even where

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142 In *R v Young* [1995] QB 324, CA four jurors who were sequestered in a hotel while deliberations were ongoing met in a hotel room, conducted a séance using a Ouija board and attempted to communicate with the deceased. They asked the deceased questions and purported to receive answers relating to issues in the case. The CACD quashed the convictions on the narrow basis that it was entitled to inquire into what happened at the hotel, but would not be entitled to inquire into what happened thereafter in the jury room.

143 *R v Mirza, Connor and Rollock* [2004] UKHL 2, [2004] 1 AC 1118. In *Mirza*, a letter sent subsequent to the trial claimed that some jurors had wrongly taken into account the fact that the defendant was using an interpreter. There was evidence to support this: the jury at one point sent a note to the interpreter asking, "would it be typical for a man of the defendant's background to require your services, despite living in this country as long as he has?". Although the judge gave directions that they were not to draw adverse

allegations have been made that the jury's verdict was tainted by inappropriate considerations. These two exceptions are:

(1) Where there has been a "complete repudiation by the jury of their oath to try the case according to the evidence, for example if a jury were to reach its verdict by tossing a coin"; and

(2) "Where extraneous material, not the subject of evidence adduced during the trial, has been introduced into the jury's deliberations".

8.209 In *Scotcher*,[144] counsel for the appellant noted that "in practice the line between intrinsic and extrinsic factors relating to the jury's deliberations [is] not clear cut".

The Law Commission's review and reforms in the Criminal Justice and Courts Act 2015

8.210 In 2012 the Law Commission was asked by the Attorney General to undertake a review of the law relating to contempt of court.[145]

8.211 We published a Report on Juror Misconduct and Internet Publications in 2013,[146] an aspect of which related to disclosure of juror deliberations. We recommended a statutory defence to the Contempt of Court Act 1981 where, after the conclusion of the trial, a juror, in genuine belief that they are exposing a miscarriage of justice, discloses the content of jury deliberations to a court official, the police or the CCRC.

8.212 The Government broadly accepted our recommendations in this regard. It did not accept the inclusion of the CCRC on the list of persons and organisations to whom a disclosure might lawfully be made. No explanation was given for rejecting this recommendation.[147]

8.213 These recommendations were given effect in the Criminal Justice and Courts Act 2015. The provisions in section 8(1) of the Contempt of Court Act 1981 were repealed in England and Wales. Instead, a new offence of disclosing jury deliberations was inserted as section 20D of the Juries Act 1974, with new defences included in sections 20E and 20F. Section 20E concerns defences where a disclosure is made during the trial. Section 20F provides a defence where:

(1) the disclosure is made after the jury in the proceedings has been discharged,

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inferences from this, the letter writer claimed that they continued to do so and that she was shouted down when she reminded them of the judge's direction.

In *Connor*, a juror told the judge that the jury might have convicted two appellants jointly despite the possibility that only one was guilty because "this would teach them a lesson, things in this life were not fair, and sometimes innocent people would have to pay the price".

144 *Attorney General v Scotcher* [2005] UKHL 36, [2005] 1 WLR 1867. In this case, a juror wrote to the mother of the convicted person alleging that "many [jurors] changed their vote late on simply because they wanted to get out of the courtroom and go home" and suggested that he believed that the defendant had been "fitted up" by police officers (cited in [7] by Lord Rodger of Earlsferry).

145 We are currently undertaking a further review of the law of contempt: Contempt of Court (2024) Law Commission Consultation Paper No 262. However, that project is not reviewing juror disclosure offences.

146 Law Com No 340.

147 Hansard (*HL*), 30 July 2014, vol 755, col WS149.

(2) the person making the disclosure reasonably believes that —

(a) an offence or contempt of court has been, or may have been, committed by or in relation to a juror in connection with those proceedings, or

(b) conduct of a juror in connection with those proceedings may provide grounds for an appeal against conviction or sentence; and

(3) the disclosure is made to

(a) a member of a police force;

(b) a judge of the Court of Appeal;

(c) the registrar of criminal appeals;

(d) a judge of the court where the trial took place; or

(e) a member of staff of that court who would reasonably be expected to disclose the information only to a person mentioned in (b) to (d).

8.214 Other defences were included in section 20F to enable a court to make onward disclosure for the purposes of investigation, including to the CCRC, and for police officers to make disclosure for the purposes of obtaining legal advice.

The rationale for jury secrecy

8.215 In *Ellis v Deheer*, in 1922, Lord Justice Atkin (as he then was) said:[148]

> The reason why that evidence is not admitted is twofold, on the one hand it is in order to secure the finality of decisions arrived at by the jury, and on the other to protect the jurymen themselves and prevent their being exposed to pressure to explain the reasons which actuated them in arriving at their verdict.

8.216 These justifications were reaffirmed in *Mirza*, where Lord Hope of Craighead said:[149]

> the law also recognises that confidentiality is essential to the proper functioning of the jury process, that there is merit in finality and that jurors must be protected from harassment.

8.217 Lord Slynn of Hadley agreed:[150]

> [T]he need to encourage jurors to speak frankly without fear of being quoted or criticised has been very much relied on. Jurors need to be protected from pressures to explain their reasons and it is important to avoid an examination of conflicting accounts by different jurors as to what occurred during the deliberation. It has also

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148 [1922] 2 KB 113, CA.

149 [2004] UKHL 2, [2004] 1 AC 1118 at [61], by Lord Hope of Craighead.

150 Above, at [47], by Lord Slynn of Hadley.

been said on a number of occasions that the need for finality once a verdict has been given justifies the rule being applied strictly.

8.218 However, in a powerful dissent in *Mirza*, Lord Steyn argued:[151]

> In earlier times courts sometimes approached the risk of a miscarriage of justice in ways which we would not nowadays find acceptable. It would be contrary to the spirit of these developments to say that in one area, namely the deliberations of the jury, injustice can be tolerated as the price for protecting the jury system.
>
> A jury is not above the law. As a judicial tribunal it must comply with the requirements of article 6(1) of the European Convention on Human Rights ...
>
> The question is whether the rule about the secrecy of jury deliberations is indefeasible in all circumstances, however extreme, and even in the face of evidence disclosed after a verdict demonstrating a real risk that the jury was not an impartial tribunal …
>
> Public confidence in the legitimacy of jury verdicts is a foundation of the criminal justice system. And there must be a general rule making inadmissible jury deliberations. But it is difficult to see how it would promote public confidence in the criminal justice system for the public to be informed that our appellate courts observe a self denying rule never to admit evidence of the deliberations of a jury even if such evidence strongly suggests that the jury was not impartial. In cases where there is cogent evidence demonstrating a real risk that the jury was not impartial and that the general confidence in jury verdicts was in the particular case ill reposed, what possible public interest can there be in maintaining a dubious conviction?

The Court of Appeal and juror disclosures

8.219 In the 2013 Report we agreed with Lord Steyn:

> We recognise that reforming section 8 to allow jurors to disclose aspects of their deliberations in order to uncover a miscarriage of justice would necessarily require reform of the admissibility of such evidence. Disclosure would be fruitless if the court were unable to consider it in assessing the safety of the conviction.
>
> We consider, despite the finding of the majority of the House of Lords in *Mirza*, that there may be merit in reforming section 8 in order to protect against the risk of a miscarriage of justice. Indeed, as we have explained, it may be necessary in order to render the law ECHR compliant.

8.220 As criminologist Dr Nicholas Goldrosen highlights, however:[152]

> The [Criminal Justice and Courts] Act's focus on allowing jurors to break the seal of the jury room on some occasions only goes part of the way towards addressing juror

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151 Above, at [4]-[22], by Lord Steyn.

152 N Goldrosen, "What happens in the Jury Room Stays in the Jury Room: *R v Mirza*, the Criminal Justice and Courts Act, and the Problem of Racial Bias" (2021) 6 *Cambridge Law Review* 236, 253-254.

misconduct... [T]he 2015 Act is heavily focused on enabling prosecution of jurors for misconduct. Even if a juror is free to report misconduct to the Court of Appeal or others without fear of prosecution, the Act contains no guarantee that the court will admit that testimony. The law leaves a gap here. Moreover, there have been few, if any, test cases under the new statute regarding post-verdict testimony. As such, the obstacle for defendants is that a court might hold that the 'long line of authorities,' as Lord Justice Kennedy wrote, bar admission of juror testimony. The 2015 Act, given its failure to explicitly address admissibility, would be unlikely to change this feature of the common law.

8.221 This prediction has been borne out. The CACD remains bound by the judgment of the House of Lords in *Mirza*.[153] In *Essa*, the Court said:[154]

> The reason for the common law principle to which we have referred is that it is a necessary and integral part of the jury system that the deliberations of a jury must remain confidential. Without that general rule, the jury system would be seriously undermined. Those summoned to perform jury service would do so in a state of constant anxiety as to whether anything said during their deliberations would, without more, become the subject of speculation and perhaps investigation. The exceptions to the rule are accordingly narrowly defined, and it will only be in the most exceptional circumstances that this court will direct an inquiry into how a jury's verdict was reached.

8.222 Thus, as Dr Goldrosen concluded: "the Act only allows jurors to speak; it does not allow courts to listen".[155]

The European Court of Human Rights and juror secrecy

8.223 The jury is a judicial body, and the right under article 6 to a trial before "an independent and impartial tribunal" includes trial by jury.

8.224 In *Gregory*,[156] the European Court of Human Rights held that any tribunal – including a jury – must be impartial from a subjective, as well as objective, point of view.

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153 The CACD is bound by the House of Lords' decision in *Mirza*. It would be open to the Supreme Court to overrule the judgment in *Mirza* – for instance on the grounds that it was premised on a higher degree of secrecy than now applies – but it could only do so if the CACD were to certify a point of law of public importance to enable the Supreme Court to consider it.

154 [2023] EWCA Crim 608 at [32], by Holroyde LJ VPCACD. In this case, two jurors had (separately) made contact with two co-defendants. A female juror had indicated that she had tried to acquit, and also accused some jurors of making racist comments. A male juror had given another co-defendant details of how the jury was split, and offered to meet up in person.

155 N Goldrosen, "What happens in the Jury Room Stays in the Jury Room: *R v Mirza*, the Criminal Justice and Courts Act, and the Problem of Racial Bias" (2021) 6 *Cambridge Law Review* 236, 257.

156 (1998) 25 EHRR 577 (App No 22299/93). During a trial at Manchester Crown Court the judge was passed a note by the jury saying "Jury showing racial overtones. 1 member to be excused". The judge did not discharge the jury (or the single member) but issued a strong direction to the jury to "decide the case according to the evidence and nothing else". Leave to appeal against the conviction to the CACD was refused by the single judge and the full court.

However, it found that juror secrecy was a "crucial and legitimate feature" of English trial law which "guarantees open and frank deliberations among jurors".[157]

8.225 In *Mirza*, the House of Lords took comfort from the ECtHR's ruling in *Gregory*, inferring from it that the rule against disclosure of juror deliberations would be held by the ECtHR to be compatible with the right to a fair trial under article 6.

8.226 However, it is also worth noting that in applying the objective test of impartiality in *Gregory*, the ECtHR had regard to the steps that the trial judge took upon receipt of the juror's concerns. In *Gregory*:

(1) it was not disputed that there was no evidence of actual or subjective bias on the part of one or more jurors.

(2) The judge did not dismiss the allegation outright.

(3) The trial judge sought to impress on the jury that their sworn duty was to try the case on the evidence alone and that they must not allow any other factor to influence their decision.

(4) The European Court of Human Rights concluded that, *in the instant case*, no more was required under article 6 to dispel any objectively held fears or misgivings about the impartiality of the jury than was done by the judge.

8.227 The Court thus distinguished the case from *Remli v France*,[158] where the trial judge had failed to react to an allegation of juror bias, and the ECtHR held that there had been a breach of the Convention. In *Remli*:[159]

> it was the failure of the trial court in that case to examine or check in any way a statement presented to the court which was central to the finding of a violation.

8.228 The appellate court was unable to provide a remedy because no appeal lay against the Assize Court's judgment other than on points of law.

8.229 The difficulty with the House of Lords' taking comfort from *Gregory* is that where an allegation of racial bias on the part of the jury is made *post-trial*, the trial judge will *not* have had the opportunity to take steps like those taken in *Gregory*. If the CACD is then unable to consider the matter because of juror secrecy, the situation is more akin to that in *Remli* than *Gregory*. *Gregory* says nothing about how the ECtHR would treat a case where there was evidence of actual or subjective bias, where any juror prejudice was not addressed by the trial court adequately or at all (perhaps because it was not raised at the time), and the appellate court refused outright to consider evidence of what had happened in the jury room.

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157 Above, 594.

158 (1996) 22 EHRR 253 (App No 16839/90).

159 (1998) 25 EHRR 577 (App No 22299/93), 590 (Dissenting Opinion of Mr C L Rozakis, Mrs J Liddy and Mr E Busuttil).

8.230 It was this that led Lord Steyn, in his dissent in *Mirza*, to say that if faced with an appeal turning on an appellate court's refusal to admit evidence of a jury's lack of impartiality:[160]

> the [ECtHR] will in my view be bound to uphold the fundamental guarantee of a right to a trial before an impartial tribunal under article 6(1). It would have to act so as to give effective protection to that fundamental right. An indication of the likely approach of the [ECtHR] is to be found in *Remli v France*… In my view it would be an astonishing thing for the [ECtHR] to hold, when the point directly arises before it, that a miscarriage of justice may be ignored in the interests of the general efficiency of the jury system. The terms of article 6(1) of the European Convention, the rights revolution, and fifty years of development of human rights law and practice, would suggest that such a view would be utterly indefensible.

8.231 As we indicated in our Report on Juror Internet Publications,[161] we see a good deal of force in Lord Steyn's view, and we think that it is unwise to conclude from *Gregory* that the ECtHR would sanction a rule which prevents an appellate court from overturning a conviction where the person has not received a fair trial because of jury bias.

8.232 In his review of the criminal courts, Lord Justice Auld also expressed concern that the rule of jury secrecy was "highly vulnerable" to a challenge at the ECtHR.[162] He recommended changes to the law to enable the Court of Appeal to enquire into juror misconduct, including allegations of "impropriety of reasoning".[163]

8.233 In addition to *Remli*, in *Sander v United Kingdom*,[164] the ECtHR held that the defendant's right to a fair trial had been breached where an allegation of racial bias was made by a juror during the course of the judge's summing up. The judge had "told the jury to search their conscience overnight and to let the court know if they felt that they were not able to try the case solely on the evidence [and] having received assurances by letter the next morning that they would do so without racial bias, he allowed the trial to proceed".

8.234 In *Mirza*, Lord Hope noted that in a dissenting judgment in *Sander*, Sir Nicholas Bratza had referred to *Gregory* and the finding that juror secrecy was a crucial and legitimate feature of English trial law. Lord Hope held that it was "significant, in view of that dissent, that … nothing was said in the [majority's] judgment which casts doubt on its validity".[165]

8.235 However, the majority judgments in *Sander* and *Remli* suggest that a person will not be held to have received a fair trial if a claim of racial bias (for instance) is not properly

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160 [2004] UKHL 2, [2004] 1 AC 1118 at [18]-[20], by Lord Steyn.

161 Contempt of Court (1): Juror Misconduct and Internet Publications (2013) Law Com No 340.

162 Auld Review, pp 172 and 173, para 98.

163 Above, at p 173, para 98.

164 App No 34129/96.

165 [2004] UKHL 2, [2004] 1 AC 1118 at [109], by Lord Hope of Craighead.

investigated at all – whether that happens at the trial stage, or – where misconduct is alleged after the conclusion of proceedings – at an appeal.

Analysis

8.236 We do not doubt that the general provisions for juror secrecy promote candour. The prohibitions on disclosure now found in the Juries Act 1974 (and previously in the Contempt of Court Act 1981) mean that jurors can deliberate in the knowledge that they cannot be named or identified with opinions expressed during deliberations.

8.237 At the start of a trial, jurors receive a leaflet which says:

> Once the trial is over and you are no longer serving on the jury, you CAN DISCUSS the case with anyone. But there is ONE EXCEPTION.
>
> Even after the trial is over, you MUST NOT DISCUSS what was said or done by you or any other member of the jury while the jury was in the DELIBERATING ROOM trying to reach a verdict, unless it is for the purpose of an official investigation into the conduct of any juror.

8.238 Thus, any juror will know that although their deliberations will be confidential, they may be disclosed for the purposes of an investigation into the conduct of a juror. Having been alerted to the possibility that juror deliberations might be the subject of an investigation where juror misconduct is alleged, it is unlikely that a juror would realise that although all types of misconduct may be *investigated*, only those involving external influence or total repudiation would be considered by a court.

8.239 Moreover, there are already limited exceptions to the rule against the admissibility of juror deliberations. Even if jurors are familiar with the limited exceptions in the Juries Act 1974, it is highly unlikely that they know in which circumstances material thereby disclosed might be considered by a court.

8.240 The common law rule affirmed in *Mirza* reflected matters of public policy that rested on the virtual total secrecy afforded to juror deliberations before the changes enacted in 2015. Jurors now deliberate knowing that disclosures might be made in very limited circumstances. In considering whether changes to the admissibility of evidence from juror deliberations would have a chilling effect, it is important to recognise that the confidentiality of juror deliberations is not absolute. The question is whether a juror – knowing that deliberations might be disclosed to the police, the trial judge, court officials, the CACD, or the Criminal Appeal Office if they disclosed grounds for an appeal, and knowing that they might be admissible before the CACD if they disclosed either evidence of external influence or of a total repudiation of the juror's oath – would be any more inhibited if those deliberations might also be considered by the CACD in deciding whether a conviction was safe for some other reason. We do not consider that a modest change in these circumstances would have any appreciable effect on the candour of jurors' deliberations.

8.241 In making the changes to the Juries Act 1974, Parliament was giving effect to our recommendation that disclosure to uncover a miscarriage of justice would be in the public interest. This in turn implies that disclosures should, in some circumstances, afford grounds for an appeal. We think jurors would be surprised to learn that they

may legally disclose the contents of jury deliberations if it demonstrates grounds for an appeal, but that the Court will then refuse to consider that information on the grounds of jury secrecy – which will by that point have been breached anyway.

8.242 In our report on Juror Misconduct and Internet Publications we said:[166]

> Both of these exceptions to the confidentiality of jury deliberations exist in order to protect, first and foremost, the administration of justice. We consider that an exception for disclosure of a (potential) miscarriage of justice serves the same purpose: it cannot be in the interests of justice that cases where something has gone seriously amiss in the jury room remain undiscovered because jurors fear prosecution for disclosing what occurred.

8.243 We consider that the same considerations apply to the use of such disclosures by appellate courts.

8.244 We continued:[167]

> Jurors, the public and the defendant should have nothing to fear from one of these organisations knowing the content of deliberations. Indeed, we imagine that most jurors' desire for confidentiality arises from concerns that the general public and/or press will be able to identify them or their views.

8.245 We have concluded that the bar on the CACD receiving evidence of juror deliberations risks perpetuating miscarriages of justice. A defendant has the right to a fair trial before an impartial tribunal and if the jury has not acted as an impartial tribunal, the defendant has not received a fair trial and the conviction is not safe. The Courts' current approach risks failing to comply with the right to a fair trial guaranteed by article 6 of the ECHR. A modest reform to enable such evidence to be adduced before the Court (with appropriate reporting restrictions to protect the identity of jurors) would not, in our view, have any chilling effect on their deliberations.

Consultation Question 39.

8.246 We provisionally propose that the law be amended to enable the Court of Appeal Criminal Division to admit evidence of juror deliberations where the evidence may afford any ground for allowing the appeal (which includes the defendant not having received a fair trial before an impartial tribunal).

Do consultees agree?

Disclosures to the CCRC

8.247 In our 2014 Report, we recommended that the CCRC should be one of the bodies to which disclosure of juror deliberations might be made by a juror.

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166 Contempt of Court (1): Juror Misconduct and Internet Publications (2013) Law Com No 340, para 4.24.

167 Above.

8.248 We noted:

> The CCRC, which probably has the most expertise on this issue in practice, undertakes interviews with jurors when examining potential miscarriages of justice, within the confines of section 8 [of the Contempt of Court Act 1981]. The CCRC explained in their response that jurors "often do not understand what they can/cannot do or say…".

8.249 The senior judiciary disagreed that this was the effect of section 8, saying that:

> If the court has sanctioned disclosure in an individual case to some other body making enquiry on its behalf, for example the Criminal Cases Review Commission… [that] other person or body would for these purposes be acting as the agent of the court.

8.250 However, noting that the CCRC itself takes a different view, we concluded:

> This lack of clarity about whether the current law would allow an agent of the court to solicit disclosure of deliberations is a further reason why introducing a statutory defence of disclosure to the police, a court official or the CCRC would be of benefit.

8.251 In the event, however, the Government decided not to include the CCRC in the list of persons to whom a disclosure might be made. In a written statement, the Minister of State for Justice, Lord Faulks QC, said:[168]

> The Government does not intend to take forward the recommendations concerning a specific defence for disclosure of juror deliberations to the Criminal Cases Review Commission ...

No reason for this decision was given.

8.252 It may well be that the reason that the Government decided not to include the CCRC in the list of persons to whom a disclosure might be made was that it accepted the argument that this was sufficiently covered by the existing law (where the CCRC was acting on behalf of the CACD). Indeed, section 20F(6) makes provision for this, permitting disclosure when the CCRC is undertaking an investigation on behalf of the CACD.[169]

8.253 We think section 20F(6) was necessary precisely because, while it might not be contempt of court to make a disclosure to a body acting as an agent of a court, in implementing our recommendations the Government created a new criminal offence. The relevant part of the defence is disclosure to a *judge* of the Court of Appeal, not to the Court itself, and certainly not to an agent of it. We think it is impossible to interpret section 20F as meaning that a disclosure to the CCRC when it was acting on behalf of the Court of Appeal would constitute a disclosure to a "judge of the Court of Appeal".

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168 Hansard (*HL*), 30 July 2014, vol 755, col WS149.

169 The drafting of section 20F(6) is not entirely satisfactory: the trigger is not, as might have been expected, that the relevant investigator is undertaking the investigation, but that the person making the disclosure reasonably believes that the CACD (or the registrar) has itself already made such a disclosure.

8.254 The result is that while a disclosure might lawfully be made to the CCRC once the CACD has directed it to undertake an investigation on its behalf (or strictly speaking, once the CACD has itself disclosed some aspect of the deliberations), the law is now clear that a juror who discloses details of deliberations directly to the CCRC to expose a miscarriage of justice would be committing a criminal offence.

8.255 In conclusion, given the role of the CCRC in dealing with miscarriages of justice, we think the reasons for including the CCRC on the list of bodies to whom a disclosure can lawfully be made remain valid.

Consultation Question 40.

8.256 We provisionally propose that the Criminal Cases Review Commission should be added to the list of persons in section 20F(2) of the Juries Act 1974 to whom a person may lawfully make a disclosure of the content of a jury's deliberations.

Do consultees agree?

Chapter 9: Powers of the Court of Appeal Criminal Division when a conviction is quashed

9.1 When a conviction is quashed, it is open to the Court of Appeal Criminal Division ("CACD") in certain circumstances (i) to substitute a conviction for an alternative offence; or (ii) to order a retrial for the offence in question or some other offence.

9.2 The CACD did not have the power to order a retrial until 1964; to do so was considered a breach of the rule against double jeopardy. A power to order a retrial was introduced in the Criminal Appeal Act 1964, limited to cases where the conviction was quashed on the basis of fresh evidence. It was considered that the inability to order a retrial was leading the Court to be reluctant to quash a conviction where there was fresh evidence that suggested that the appellant might have been wrongly convicted – but did not prove that they had been. If the Court were to quash a conviction in such circumstances, with no possibility of retrial, this would risk letting a person who might have been factually guilty go free just because the fresh evidence might have made a difference, even if there remained powerful evidence of guilt.

9.3 The power to order a retrial in other cases was introduced later in 1988.

ALTERNATIVE VERDICTS

9.4 A common aspect of the substitution and retrial provisions is the notion of an offence of which "the jury could on the indictment have found the appellant guilty". This is a precondition of substituting a conviction for an alternative offence; it is also one of the categories of offence in respect of which the Court may order a retrial (the others being the offence(s) of which the appellant was originally convicted, and any offence(s) for which the appellant was tried but where no verdict was taken by reason of the now-quashed conviction).

9.5 Before discussing these remedies, therefore, it is important to understand of which convictions other than those charged, a defendant may be convicted at trial.

9.6 The indictment is the document containing the charges against the defendant for trial in the Crown Court. It must contain a statement of the specific offence or offences with which the accused person is charged, together with "such particulars as may be necessary for giving reasonable information as to the nature of the charge".[1] The indictment may be amended before or during the trial by order of the Court.[2] For instance, the indictment may be amended to add a count,[3] or to join a defendant.[4] The indictment may contain alternative counts.

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1 Indictments Act 1915, s 3.

2 Above, s 5(1).

3 *R v Martin* [1962] 1 QB 221, CCA; *R v Hall* [1968] 2 QB 788, CA.

4 *R v Ismail* (1991) 92 Cr App R 92, CA.

9.7 There are two main circumstances in which the jury might have found an appellant guilty "on the indictment" of an offence other than that of which they were convicted. The first is where the offence was included on the indictment as an alternative.

9.8 The second is where it was open to the jury to convict the person as an alternative verdict, even though the offence was not included on the indictment. The general rule governing alternative verdicts is found in section 6(3) of the Criminal Law Act 1967.[5] This provides:

> Where, on a person's trial on indictment for any offence except treason or murder, the jury find him not guilty of the offence specifically charged in the indictment, but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence or of an offence of which he could be found guilty on an indictment specifically charging that other offence.

9.9 In some cases, the offence itself will necessarily "include" some other offence: the offence of causing death by dangerous driving includes the offence of dangerous driving, for example.

9.10 However, in some cases, although the offence charged would not always include commission of some other offence, it may be that the particulars on the indictment mean that it necessarily would. Thus, for instance, a charge of burglary does not expressly include an allegation of theft: it can be committed by entering premises as a trespasser with intent to steal even if, in fact, no theft takes place. However, if the indictment charging burglary does include an allegation that the trespasser stole items, then it includes an allegation of theft. It would be open to the jury to acquit the defendant of burglary but convict them of theft if, for instance, they were not satisfied that the person entered the premises as a trespasser.[6]

9.11 There are also specific provisions allowing certain alternative verdicts. In relation to murder, section 6(2) of the Criminal Law Act 1967 provides that a person found not guilty of murder may be found guilty of:

(a) manslaughter;

(b) any offence specifically provided for under another enactment, or an attempt to commit such an offence; or

(c) attempted murder;

but not of any other offence.

9.12 Under section 6(4) any allegation of an offence includes an allegation of attempting to commit that offence.

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5 The general rule applies only to juries. Magistrates have no similar power unless express provision is made in relation to particular offences.

6 *R v Maxwell* [1988] 1 WLR 1265, CA.

9.13 Legislation creating an offence may also provide for a jury to return an alternative verdict. For instance, on a charge of theft, a jury may return a verdict of taking a motor vehicle without consent[7] (for instance, where it is not satisfied that there was an intention permanently to deprive the owner of it).

9.14 Section 24 of the Road Traffic Offenders Act 1988 generally allows a jury to convict of a range of decreasingly serious driving offences to the one on the indictment. For instance, a person charged with manslaughter in connection with driving may be convicted of causing death by dangerous driving, causing serious injury by dangerous driving, causing death by careless driving while under the influence of alcohol or drugs, or dangerous driving.

SUBSTITUTING CONVICTIONS

9.15 The CACD may, instead of allowing or dismissing the appeal, substitute a conviction for an alternative offence in certain limited circumstances.

9.16 Section 3 of the Criminal Appeal Act 1968 ("CAA 1968") provides that if the appellant had pleaded not guilty to the offence of which they have been convicted, the Court may substitute a conviction for an alternative offence where:

(1) the jury could on the indictment have found the appellant guilty of the alternative offence; and

(2) on the finding of the jury, it appears to the Court that the jury must have been satisfied of facts which proved the appellant guilty of the alternative offence.[8]

9.17 In addition, section 3A provides that if the appellant had pleaded guilty to the offence of which they have been convicted, the Court may substitute a conviction for an alternative offence where:

(1) if the appellant had not pleaded guilty, the appellant could on the indictment have pleaded or been found guilty of the alternative offence; and

(2) it appears to the Court that the guilty plea indicates an admission of facts by the appellant which proves them guilty of the alternative offence.[9]

9.18 Section 3A was added because the references in section 3 to the jury, and to the offences of which the jury could have found the appellant guilty, meant that it could not be used where the appellant had pleaded guilty.

9.19 Where the conditions outlined in paragraphs 9.16 or 9.17 above are met, the Court may substitute a verdict of guilty for the alternative offence and pass sentence for that

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7 Theft Act 1968, s 12(4).

8 Criminal Appeal Act 1968, s 3(1).

9 Above, s 3A(1).

offence.[10] However, the sentence must be permitted by law, and it must not be of greater severity than the original sentence imposed by the Crown Court.[11]

9.20 Where a conviction for an alternative offence is substituted, this does not constitute a "reversal" of the conviction for the purposes of section 133 of the Criminal Justice Act 1988, which governs compensation for miscarriages of justice. No compensation is therefore available, even if the conviction is for a less serious offence and the penalty imposed substantially less severe.

The issue

9.21 Most of the difficulties with the application of sections 3 and 3A arise because of the requirement that the offender could have been convicted of the alternative offence *on the indictment*.

9.22 Sometimes the Court will be able to substitute a conviction because the alternative verdict was available to any jury faced with an indictment for that offence. However, the Court must still be sure that, on the facts that the jury must have found, the jury could have convicted of the particular offence. In some circumstances, it will be clear that the jury must have rejected facts which would have been necessary for the person to have been convicted of the offence.[12] In some circumstances, the jury's verdict would establish that they were not so satisfied.[13]

9.23 Sometimes, the evidence will be such that the jury cannot be assumed to have found the facts necessary to convict of the alternative offence.[14]

9.24 The difficulty that these requirements pose is that the indictment will be drafted with the particular offences charged in mind. It might not, therefore, include details that would be necessary in order to prove a different offence. It might, nonetheless, be clear on the basis of the evidence adduced at trial and the jury's verdict that the appellant must have been guilty of that offence.

9.25 Where the case against the defendant develops at trial so as to indicate that they were not guilty of the offence charged but of some other offence, it may be possible to

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10 Above, ss 3(2) and 3A(2).

11 Above.

12 For instance, where a person is charged with an offence, it is open to a jury to convict of attempting to commit that offence (for instance, where the intent is made out, but not the relevant conduct or consequences). If the CACD quashed a conviction for causing GBH *with intent*, for example, on the basis that the injury was not sufficiently serious to constitute GBH, it would be possible to substitute a conviction for ABH or for attempting to cause GBH. The latter might be appropriate if, for instance, the seriousness of the intended injury was such that a sentence outside the maximum for ABH was appropriate.

13 Conversely, if on an indictment for causing GBH with intent, the jury returned a verdict of simple GBH, it would not be open to the CACD to substitute a conviction for attempting to cause GBH if the injury was not sufficiently serious to constitute GBH. The jury, by their verdict, would have implicitly found that they could not be sure that there was intent to cause GBH.

14 For instance, where a person has been convicted of conspiracy, conviction for the substantive offence itself cannot be substituted: conspiracy is complete at the point of agreement, so a finding of conspiracy does not amount to a finding that the substantive offence was carried out (*R v K S, R and X* [2007] EWCA Crim 1888, [2007] 1 WLR 3190).

amend the indictment.[15] However, once the person is convicted, the indictment is fixed for the purposes of the CACD's powers.

9.26 The issue arose in *Preddy*, where the House of Lords held that mortgage fraud could not amount to obtaining property by deception where the funds were made available by way of electronic transfer:[16] providing a mortgage created a new chose in action, not a transfer of property.[17] Parliament responded by creating a separate offence of obtaining a money transfer by deception;[18] however, this could not assist with existing convictions for obtaining property by deception because this new offence would not have been available to the jury, and therefore the CACD could not substitute a conviction for it.

9.27 In some of the post-*Preddy* cases, although it was clear that if the indictment had been amended during the trial, the appellant could have been convicted of an alternative offence, it was not possible to say that the appellant could have been convicted of the alternative offence(s) on the unamended indictment as it stood at the end of the trial.

Use of the power

9.28 The power seems to be rarely used. Examples include the following.

(1) Substituting a verdict of manslaughter by reason of diminished responsibility for one of murder.[19]

(2) Substituting a conviction for affray for a conviction for violent disorder.[20]

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15 Indictments Act 1915, s 5(1). Where a defendant has pleaded guilty, the indictment may be amended at any point until sentencing (*R v Love and Hyde* [2013] EWCA Crim 257, [2013] 1 WLR 1987). In *R v Collison* (1980) 71 Cr App R 249, CA the CACD upheld a conviction for unlawful wounding where the count had been added to an indictment alleging wounding with intent while the jury was in retirement. Although unlawful wounding was available as an alternative to the offence of wounding with intent, the jury could not agree to find the defendant not guilty of that offence, so could not find him guilty of the lesser charge. The CACD held that the amendment was lawful as all it did was "allow the jury to deliver a verdict upon which they were all agreed of guilty of a charge which was already before them".

16 *R v Preddy* [1996] AC 815, HL. However, where the funds were provided by a cheque the offence would be made out because the physical cheque constituted property.

17 The problem with substituting an alternative conviction was exacerbated because the CACD had earlier ruled (in *R v Halai* [1983] Crim LR 624, CA) that obtaining a mortgage could not amount to obtaining services by deception either. (It overturned this finding in *R v Graham* [1997] 1 Cr App R 302, CA.)

18 Theft (Amendment) Act 1996.

19 *R v Bath* [2006] EWCA Crim 862. In *R v Spratt* [1990] 1 WLR 1073, CA the Court substituted a conviction of manslaughter on the basis of diminished responsibility, even though the jury had rejected diminished responsibility. They did so on the somewhat narrow basis that juries return a verdict of murder or manslaughter, not of manslaughter by reason of diminished responsibility, and that the facts they had found were enough to establish manslaughter. (It might also be argued that because the burden of proving diminished responsibility lies with the defendant, the verdict was not a positive finding that the defendant did not suffer from diminished responsibility, rather just that he had not proved that he did.)

20 *R v Fleming and Robinson* (1989) 153 JP 517, [1989] Crim LR 658, CA. Violent disorder requires the involvement of three or more people (Public Order Act 1986, s 2). In this case, only two of the defendants were convicted and the judge did not direct the jury that if they acquitted one they must acquit all three unless they were sure that another person, not indicted, was also taking part.

(3) Substituting a conviction for causing grievous bodily harm with intent for one of murder.[21]

(4) Substituting in place of convictions for obtaining property by deception, convictions for dishonestly procuring the execution of a valuable security[22] and obtaining services by deception.[23]

(5) Substituting a conviction for attempting to possess a controlled drug with intent to supply for the substantive offence when the drug turned out not to be the controlled drug.[24]

(6) Substituting a conviction for the summary-only offence of stalking for the offence of stalking involving fear of violence or serious alarm or distress, where the victim did not give evidence of serious alarm or distress, and the judge should have acceded to a submission of no case to answer, rather than allowing the prosecution to reopen their case and recall the victim.[25]

Conviction must have been possible on the indictment

9.29 Responding to the Issues Paper,[26] the Registrar of Criminal Appeals, Master Beldam, noted that where issues arose with the use of the power to substitute convictions, it was generally because of the requirement that the jury could have convicted the appellant of the alternative offence on the indictment.

9.30 In *Lawrence,*[27] the Court was unable to substitute a conviction for possession of a firearm without a certificate for one of possession of a prohibited weapon, where it turned out the weapon was not prohibited, but required a firearms certificate. The indictment did not allege the absence of a firearms certificate – "whatever the overwhelming likelihood".[28] The Court rejected a prosecution submission that "the indictment" should be read as meaning "the indictment in a potentially amended form".[29]

9.31 In *Darroux*, the appellant was convicted of theft after submitting false claims for overtime to her employer. The charge should have been fraud, because (as

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21 *R v Boreman* [2006] EWCA Crim 2265. The conclusion that the injuries inflicted by the defendant, and not a subsequent fire, caused the death of the victim could not be sustained in view of serious criticisms of the pathologist. There was no evidence that the fire had been started deliberately.

22 *R v Peterson* [1997] Crim LR 339, CA.

23 *R v Cooke* [1997] Crim LR 436, CA.

24 *R v Prosser* [2019] EWCA Crim 836. The substance, which the appellant had believed to be heroin, turned out to be paracetamol and caffeine.

25 *R v Tanner* [2024] EWCA Crim 1576.

26 Law Commission, Criminal Appeals: Issues Paper (July 2023).

27 [2013] EWCA Crim 1054, [2014] 1 WLR 106.

28 Above, at [6], by Judge Cooke QC.

29 Above, at [8]. This issue continues to cause problems: in *R v Vincent and Vincent* [2024] EWCA Crim 258, the convictions of two (unrelated) people for possession of prohibited ammunition were quashed because the ammunition was not prohibited but required a certificate; the Court was unable to substitute a conviction for possession of unauthorised ammunition.

established in *Preddy*) the bank transfer did not amount to appropriation of property (and the Fraud Act 2006 offence having been in part intended to address this issue):[30]

> The question is not just whether on the facts the jury could have convicted of some other offence. The question also is whether on the indictment the jury could have so convicted... It is difficult to see how that requirement could be satisfied in the present case.

9.32 In *Shields*, the defendant was charged with breaching a Sexual Offences Order made under the Crime and Disorder Act 1998; he had in fact breached a Sexual Offences Prevention Order ("SOPO") made under the Sexual Offences Act 2003. The CACD held that they could not substitute a conviction for the latter as the jury could not on the indictment have convicted him of that offence.[31]

9.33 It may be possible, however, to substitute a conviction where the details included on the indictment do provide a factual basis for concluding that the jury could have convicted of the other offence. In *Graham*,[32] the indictment for attempting to obtain property by deception asserted that the defendants had obtained a cheque in the sum specified, and the judge directed the jury that they must be sure the cheque was obtained; accordingly, a conviction for obtaining a valuable security by deception could be substituted.

9.34 However, the Court cannot go outside the indictment and consider facts which the jury must by their verdict have found. In *Cooke*,[33] another post-*Preddy* case, the Court was unable to substitute convictions for supplying false information under section 17(1)(b) of the Theft Act 1968 because the indictment made no mention of any declarations which had been made (although the prosecution had necessarily demonstrated to the jury that they had been made in order to establish deception).

9.35 Because the indictment will be drafted with the offence charged in mind, whether it includes additional information which might be necessary in order for the CACD to substitute a conviction will often be arbitrary.

9.36 Against this, we note the recent case of *BTU*.[34] Here, a man was convicted of (among other things) two counts of incest contrary to section 10 of the Sexual Offences Act 1956, relating to sexual intercourse with his adult daughter. The indictment alleged that the offences took place between 1989 and 1997. They actually took place in 2007, and should have been charged as sex with an adult relative (penetration) under section 64 of the Sexual Offences Act 2003.

9.37 The Court, considering the text of section 3A of the CAA 1968, concluded that:[35]

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30 [2018] EWCA Crim 1009, [2019] QB 33 at [69], by Davis LJ.

31 [2011] EWCA Crim 2343, [2012] 1 Cr App R 9.

32 [1997] 1 Cr App R 302, CA.

33 [1997] Crim LR 436, CA.

34 [2024] EWCA Crim 1006.

35 Above, at [15]-[16], by Sir Robin Spencer.

(1) had the error been discovered at the time, the indictment could have been amended to add counts alleging the correct equivalent offence contrary to s.64 of the 2003 Act;

(2) if the appellant had not pleaded guilty to the incorrect offences of incest, he could on that indictment (suitably amended) have been found guilty of those other offences contrary to s.64;

(3) his pleas of guilty to the counts of incest indicate an admission by the appellant of facts which prove him guilty of the s.64 offences.

Accordingly, instead of allowing or dismissing the appeal against conviction, this Court is entitled to, and does, substitute for the appellant's plea of guilty to each of the counts of incest a plea of guilty to the equivalent offence contrary to s.64 Sexual Offences Act 2003. …

9.38 This ruling is difficult to reconcile with the case law on substitution. In particular, the citation of the wrong statutory provision was not a mere typographical or similar error: the wrong statute was cited because of an error relating to when the conduct took place.

9.39 This case was unusual: the appellant had actually appealed against his sentence (which also related to several other offences) and it was prosecution counsel who identified the error with the offences of which he stood convicted. The appeal against conviction was only lodged in response to this in order to remedy the error. Because the case proceeded by agreement in relation to this issue, the Court does not appear to have been directed to the case law restricting the use of sections 3 and 3A of the CAA 1968 in this situation.

9.40 The fact that the appellant could have been convicted on a "suitably amended" indictment does not overcome the restriction. If it did, the requirement that a person could have been convicted "on the indictment" would be nugatory: if the facts that the jury must have found would have constituted some other indictable offence, it would necessarily follow that the appellant could have been convicted on a "suitably amended" indictment.

No power where the jury's findings are vitiated

9.41 If the jury's findings of fact may have been affected by an error at trial – for instance because they heard inadmissible evidence – it will not be possible to substitute a conviction.[36]

No power where the jury formally acquitted

9.42 Under section 7(2)(c) of the CAA 1968, where a verdict was not taken as a result of the defendant being convicted, the CACD can substitute a verdict of that offence. However, it cannot substitute where a verdict of not guilty was formally recorded.

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[36] *R v Deacon* [1973] 1 WLR 696, CA.

No power to substitute a conviction for a summary only offence

9.43 Unless there is a specific power for a jury to convict a person of a summary only offence as an alternative for the indictable offence charged, it will not be possible for the CACD to substitute a conviction for the offence.

9.44 There are certain summary only offences which may be joined in an indictment if the offence is founded on the same facts or evidence.[37] These are common assault, assaults on custody officers; taking a motor vehicle without consent; driving while disqualified; and criminal damage (where it would only be triable summarily). If these were included on the indictment as alternatives it would be possible to substitute a conviction. However, if the summary only offence were not included on the indictment it would only be possible to substitute if there was a statutory provision allowing a conviction for this offence as an alternative to the offence charged (as there is for taking a motor vehicle without consent when the offence charged is theft, for instance).[38]

9.45 In *O'Neill*,[39] the CACD quashed a prisoner's conviction for escape but was unable to substitute a conviction for remaining unlawfully at large after temporary release, as this is a summary only offence.

Consultation responses

9.46 We asked a general question as Question 7 of the Issues Paper and Question 3 of the Summary Issues Paper:

> Are the options and remedies available following the quashing of a conviction by the Court of Appeal adequate and appropriate?

9.47 Few respondents commented on the powers of the Court to substitute a conviction. (Most focused on compensation for miscarriages of justice, for which see Chapter 16.)

9.48 The Registrar of Criminal Appeals observed that "[t]he constraints as to the matters for which the Court may substitute a conviction … ha[ve] given rise to issues, albeit infrequently".

9.49 Professor John Spencer argued that there needed to be "a wider power to substitute a conviction for a different offence", pointing to his 2006 article, where he wrote:[40]

> Despite various improvements over the years, the system still fails to provide an appropriate solution in some of the situations where the defence succeeds on appeal on some "due process" ground. A clear example is the unsatisfactorily limited nature of the court's power under s. 3 of the Criminal Appeal Act [1968] to substitute a conviction for a different offence in a case where on appeal it becomes clear that the defendant is guilty of something, but not of the offence of which he was

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37 Criminal Justice Act 1988, s 40.

38 Theft Act 1968, s 12(4).

39 [2007] EWCA Crim 3490.

40 J R Spencer, "Does our present criminal appeal system make sense?" [2006] *Criminal Law Review* 677, 691.

> convicted … The Court of Appeal [is] unable to substitute a conviction for a different offence in a range of cases where common sense suggests it ought to be able to do so: for example, where the prosecutor alleged offence X in the indictment but proved the facts of offence Y at trial, or where he alleged X and Y in the alternative, at trial offence X was established – but the jury, following the incorrect direction of the judge, wrongly acquitted him of X and wrongly convicted him of Y.

Discussion

9.50 The rules governing the ability to substitute a conviction can have a significant impact, depending on factors including:

(1) what details were included on the indictment, rather than evidence of them just being adduced in proceedings; and

(2) whether a verdict was formally taken in respect of alternative counts that were included on the indictment.

9.51 It is arguable that the restrictions on the power of the Court to substitute convictions inhibit the Court in finding a particular conviction unsafe. As in *Hawkins*,[41] and other "substantial injustice" cases,[42] it may be that rather than grapple with complex issues of substitution, the Court will prefer to leave the conviction for the wrong offence in place, holding that no substantial injustice has thereby been done.

9.52 This can be seen with regard to *Preddy*,[43] which generated a large number of appeals, and the Court was not always able to substitute alternative convictions. So, in *Hawkins*, it developed the "substantial injustice" test. If, however, it had been clear that the Court would be able to substitute the appropriate convictions where a person challenged a conviction for obtaining property by deception on *Preddy* grounds, it is likely that there would have been far fewer appeals: for many convicted persons it is unlikely to have been worth appealing if the outcome was merely that the offence recorded on their criminal record was changed to another of similar seriousness. Also, if people did appeal on this basis, acknowledging that it would result in substitution of an alternative offence, the Court may have been able to correct the record without having to expend substantial judicial resource.

When might substitution be inappropriate?

9.53 Hannah Hinton has suggested that substitution may be inappropriate because of the power of the jury to return a "perverse verdict" or exercise "jury equity".[44] To hold that "the jury must have been satisfied of facts which proved [the appellant's] guilt" for the substitute offence, would be to overlook the possibility that the jury, having found those facts, might have exercised its power to acquit in the face of those findings.[45]

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41 [1997] 1 Cr App R 234, CA.

42 See Chapter 10 on the "substantial injustice" test.

43 [1996] AC 815, HL.

44 H Hinton, "A sane world?" [2019] *Archbold Review* 5.

45 Above.

9.54 When the CACD is considering substituting an alternative conviction, the jury will have convicted on the primary charge and therefore the suggestion that it might have chosen to exercise jury equity would be hard to countenance – since it had had that opportunity and not done so.

What might an alternative test look like?

9.55 Given that the key issue seems to be the requirement that the jury could have convicted "on the indictment", we considered whether the first limb of the test should simply be removed.

9.56 In New Zealand, section 234 of the Criminal Procedure Act 2011 allows the appeal court to

> direct that a judgment of conviction for a different offence (offence B), including an offence that the trial court could, in accordance with section 136(1), have substituted for offence A, be entered if satisfied that –
>
> (a) the person could have been found guilty, at the person's trial for offence A, of offence B; and
>
> (b) the trial judge or the jury, as required, must have been satisfied of facts that prove the person guilty of offence B.

9.57 Section 136(1) of the Act enables the amendment of a charge during the trial if the amendment "will make the charge fit with the proof". This can only happen if the defendant has not been and will not be misled or prejudiced by the amendment.

9.58 An identical provision is found in Western Australia's Criminal Appeals Act 2004, section 30(5), and Victoria's Criminal Procedure Act 2009, section 277.

9.59 We have considered whether such a test might be more appropriate than that currently used in the CAA 1968.

9.60 However, in a fresh evidence case, the phrase "the jury must have been satisfied of facts" would need to reflect the fact that the Court may have rejected some of those findings in finding the original conviction unsafe. While it would be undesirable for the CACD to become a new finder of fact going to guilt for an alternative offence, it would be necessary to ensure that the CACD left out of the mix any facts of which the jury must have been sure but on which the fresh evidence casts doubt. Likewise, any facts of which the jury must have been sure but arrived at as a result of a misdirection should be excluded.

9.61 We have considered whether there should be a wider power still, so that if there is a matter which the jury did not have to consider for its verdict, but which would be relevant to a finding on an alternative charge, the Court could come to its own conclusion. We think that this would involve becoming the finder of fact on a matter which has not been considered by the jury. Had this matter been in issue at trial, the trial might have taken a different course. The appropriate course here is a retrial on the alternative offence.

9.62 There may be situations where the Court would still be unable to substitute a conviction even if the "on the indictment" requirement were removed. For instance, in cases such as *Lawrence*[46] or *Vincent and Vincent*[47] where the weapon or ammunition turns out not to be prohibited but requires a licence, the issue is not just that the indictment makes no mention of the defendant not having the required licence; it might be that the issue did not come up in evidence either. For instance, while in *Lawrence*, the Court thought it was unlikely that the appellant had a licence for the weapon she was convicted of possessing, the matter was not canvassed before the jury as it was not relevant if the weapon was prohibited.

9.63 It might be that in cases involving a reverse burden where the jury's findings establish that the necessary elements for a conviction have been made out, the Court could use its own powers to take evidence to decide whether the appellant had met the reverse burden. This is potentially attractive for cases like *Lawrence* or *Vincent and Vincent* where the jury has, by its verdict, established that the appellant possessed the weapon or ammunition in question and it would be a simple matter for the appellant to demonstrate whether they had the necessary certificate (of course, had they possessed authorisation to have the weapon, it is inconceivable that the question as to whether it was a prohibited weapon would not have been raised at trial).

9.64 Nonetheless, while superficially attractive for cases like *Lawrence*, in many cases where a reverse burden is included it will turn on issues such as knowledge or suspicion, or reasonableness, which would rightly be matters for a jury. It would be more appropriate in such circumstances for there to be a retrial on that charge.

9.65 In *Deacon*, the Court said:[48]

> It may be that there is a lacuna in the Act, and that this court ought to be given power to substitute a verdict on more general grounds when it is satisfied that the alternative verdict would have been inevitable had the case been properly presented to the jury.

9.66 The difficulty in that case was that the jury had heard inadmissible evidence so their findings could not stand. Those findings, therefore, could not be used as the basis for substituting an alternative conviction. Again, however, we think that giving the Court a power to take into account findings that the jury would have come to, had the case been presented differently, would involve the CACD becoming a primary finder of fact, and run contrary to the principle that this is the jury's role.

9.67 Accordingly, we think that the test, when considering whether to substitute a conviction, must be one based on the findings that the jury must have come to (except to the extent that those findings cannot stand in view of new evidence or some procedural error). If a substitution is not possible, a retrial may be. The difficulty, as we discuss later in this chapter, is that there are similar restrictions on the Court's ability to order a retrial for an alternative offence.

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46 [2013] EWCA Crim 1054, [2014] 1 WLR 106.

47 [2024] EWCA Crim 258.

48 [1973] 1 WLR 696, CA, 700A-B, by Lord Widgery CJ.

Consultation Question 41.

9.68 We provisionally propose that where the Court of Appeal Criminal Division quashes a conviction, it should have a power to substitute a conviction for any offence of which the jury could have convicted the appellant if it is satisfied that the jury must have been sure of facts:

(1) which are not affected by the Court's findings in relation to the safety of the conviction which it has quashed; and

(2) which would prove the appellant to have been guilty of that offence.

Do consultees agree?

Substitution following a guilty plea

9.69 Section 3A of the CAA 1968 was intended to address a lacuna in the CACD's powers. The Court could only substitute an alternative conviction under section 3 of the Act where it appeared to the CACD "on the finding of the jury … that the jury must have been satisfied of facts which proved him guilty of the other offence". Where the appellant had pleaded guilty, there was no finding of the jury. If, therefore, the conviction could not stand, there was no alternative but to quash it without substituting an alternative conviction.

9.70 Section 3A now provides that where the appellant was convicted on a guilty plea, and they could, on the indictment have been convicted of some other offence, the Court may substitute a conviction if:

(1) the appellant could on the indictment have pleaded, or been found, guilty of some other offence; and

(2) it appears to the Court that the plea of guilty indicates an admission by the appellant of facts which prove the appellant guilty of the other offence.

9.71 Where there has been a guilty plea, there generally will have been no further findings of fact, so the issue does not arise of facts being established during the trial which were not on the indictment, but which indicate guilt. The plea of guilty is an admission to the facts on the indictment and nothing more.

9.72 However, there will still be cases where although the guilty plea did not expressly or implicitly demonstrate acceptance of certain facts, the evidence which would have been adduced at trial would have tended to demonstrate facts indicating that the person was guilty of another offence. For instance, the appellant may have effectively admitted to the alternative offence in their police interviews. A person found in possession of a firearm, for example, might admit in interview that they understand the firearm to be a prohibited weapon and that they do not have a licence to possess any firearm. If they pleaded guilty to possession of a prohibited firearm, the fact that they had no licence would not be included on the indictment, as it is unnecessary to prove the offence. As there would be no trial, the admission would not be adduced in

evidence. If that weapon were later found not to be a prohibited weapon, and the conviction for that offence successfully appealed, it would not be possible to substitute a conviction for possession of an unlicensed weapon.

9.73 Moreover, there will be cases where although the person pleaded guilty, they did so on a basis which was not accepted by the prosecution and therefore there will have been a *Newton* hearing.[49] Where the judge accepts the defendant's basis of plea, the facts in that admission will satisfy the requirement in section 3A(1)(c) that "the plea of guilty indicates an admission by the appellant of facts" and if these prove the defendant guilty of the alternative offence, it can be substituted.

9.74 However, where the judge, acting as trier of fact rejects the defendant's basis of plea, and comes to different factual conclusions which would indicate that the appellant was guilty of an alternative offence, then – where those findings have not been successfully appealed – these cannot satisfy the requirement in section 3A(1)(c) as they do not involve an "admission by the appellant" of those facts. It is not clear why the CACD when applying the test for substitution should not be able to take account of findings of the trial judge as trier of fact following a guilty plea, just as they would findings that a jury had made (or must be taken to have made). Arguably the case where the trial judge made findings is even stronger as the findings will be made expressly, whereas a jury's findings must be inferred from their verdict.

9.75 In Victoria and Western Australia, this is dealt with by the qualification that the substitute test "in the case of a plea of guilty to offence A [is that] the trial judge must have been satisfied of facts that prove the appellant was guilty of offence B".[50]

Consultation Question 42.

9.76 We provisionally propose that, where a conviction is quashed by the Court of Appeal Criminal Division following a guilty plea, the test for substitution should be whether the trial judge must have been satisfied of facts (i) which are not affected by the Court's findings in relation to the safety of the conviction and (ii) which prove that the appellant was guilty of the alternative offence.

Do consultees agree?

RETRIAL

9.77 Under section 7 of the CAA 1968, upon quashing a person's conviction, the CACD may order a retrial on:

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[49] *R v Newton* (1983) 77 Cr App R 13, CA. Westlaw's *Practical Law* defines a Newton hearing as:

> A short hearing held before a judge without a jury present, which is generally held to resolve serious factual issues between the prosecution and defence that could affect sentencing … At the hearing the sitting judge or magistrates will hear evidence from both parties and make findings of fact on which any sentencing will be based.

[50] Criminal Procedure Act 2009 (Vic), s 277(1)(c)(ii); Criminal Appeals Act 2004 (W Aust), s 30(5)(c)(ii).

(1) the offence of which they were convicted at the original trial and in respect of which their appeal has been allowed;

(2) an offence of which they could have been convicted at the original trial on an indictment for the first-mentioned offence; or

(3) an offence charged in an alternative count of the indictment in respect of which no verdict was given in consequence of their being convicted of the first-mentioned offence.

9.78 The Court cannot order a retrial for an offence if the jury could not have convicted on the indictment. Thus, in *Lawrence* (discussed above at paragraph 9.30 in the context of substitution) the Court could not order a retrial on a charge of possession of a weapon without a certificate,[51] but concluded that there was nothing to prevent a new charge of possession of a firearm without a certificate from being brought.[52] However, in some circumstances, the principle against double jeopardy would prevent a trial on those charges.[53]

9.79 The Court cannot order a retrial on an alternative charge where the jury returned a verdict of not guilty on that charge because they had convicted of the offence for which the conviction has now been quashed.[54]

9.80 When substituting convictions, the Court is strictly bound by the indictment, and cannot substitute a conviction for an offence of which the jury might have found the appellant guilty on a suitably amended indictment. When a retrial is ordered, by contrast, it is possible to amend the indictment. This means that a jury at a retrial might be able to convict of an alternative offence which would not have been available to the jury at the original trial and hence to the CACD to substitute. However, there still remains a need to identify a charge under subsections 7(2)(a)-(c) in order for the CACD to make an order for retrial. It is not, for instance, open to the Court to order a retrial on the conviction it had quashed where the person was not properly convicted of that offence, and could not properly be convicted of it at retrial, just to allow the indictment to be amended at trial to incorporate another charge of which the defendant might properly be convicted.

9.81 Thus, in *Lawrence*, the Court accepted that if it ordered a retrial on the prohibited weapon charge, the indictment could be amended at trial to substitute a charge of possession of a firearm without a licence. However, the Court concluded that it could not order a retrial on the prohibited weapon count where it was clear there could be no conviction for that offence, just in order to circumvent the restrictions in section 7(2) of the 1968 Act.[55]

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51 [2013] EWCA Crim 1054, [2014] 1 WLR 106.

52 Above, at [10], by Judge Cooke QC.

53 *R v TF* [2018] EWCA Crim 2823, [2019] 1 WLR 3217.

54 CAA 1968, s 7(2)(c).

55 [2013] EWCA Crim 1054, [2014] 1 WLR 106 at [9], by Judge Cooke QC.

9.82 It is arguable that the offences in respect of which the Court may order a retrial could be broader than those where it could substitute a conviction. This is because substituting a conviction risks, in some circumstances, the Court becoming a primary finder of fact where this responsibility ought to lie with the jury. However, where a retrial is ordered, the matter does go before a jury.

Consultation responses

9.83 Unlike substitutions, the Court's powers to order a retrial were mentioned by several respondents, most of whom argued that the Court should be more willing to order retrials in place of upholding convictions.

9.84 The Criminal Appeals Lawyers Association observed:

> In truth, there is no reliable way of determining what would have happened if fresh evidence had been available to a jury, except to order a retrial. To ensure that miscarriages of justice are reliably corrected, this is precisely what should be done in all fresh evidence appeals where there is a real – as opposed to entirely fanciful – chance that the evidence may have affected the jury's verdict. In our submission, that will always be the case where the fresh evidence is materially relevant to the issues the jury had to consider. Far from undermining the primacy of the jury, such an approach re-affirms the principle that only juries can find a defendant guilty of a serious criminal offence, following a fair trial in which the defendant has been able to prepare and present their defence, fairly and fully, with access to all the relevant evidence …
>
> The appropriate role for the Court in cases where serious impropriety comes to light is to quash the conviction and let the prosecution pursue a retrial if it remains persuaded of the appellant's guilt. If a retrial is not possible in the circumstances, that is not a good reason for upholding the conviction; that would be to unfairly punish an appellant for the impropriety of others.

9.85 However, some respondents queried whether retrials were too readily ordered, in circumstances where the appropriate course would be to quash the conviction without a retrial. For example, the Cardiff University Law School Innocence Project cited "evidential problems with re-running trials long after the conviction and the problem of prejudice from past publicity".

9.86 Another respondent felt that retrials were being ordered too readily where a conviction was held to be unsafe, in circumstances where it would be in the interests of justice to quash the conviction with no retrial:

> We question whether the interests of justice test for ordering a retrial is being too narrowly construed. In our experience, it is increasingly rare for the court to decline to order a retrial, even where a substantial portion of a successful appellant's sentence has been served. The Law Commission may therefore wish to consider whether [section] 7 [of the] Criminal Appeal Act [1968] would benefit from amendment by particularisation of the basis on which the interests of justice test is exercised.

9.87 On this point, although we do not have statistics, our impression is that retrials are not "nodded through". The Court does reject Crown Prosecution Service ("CPS") applications for a retrial, for instance where the sentence has been fully served and any sentence at retrial would therefore be fully abated. Where the CPS is not in a position to say immediately whether it is seeking a retrial, the Court may give a strong steer that it is sceptical about the need.

9.88 There may be circumstances where it is appropriate to order a retrial, even though any sentence has been served, and there could be no substantive punishment if the person was reconvicted, including:

(1) the need to ensure accuracy of the record;

(2) the need to ensure that ancillary orders such as a Sexual Harm Prevention Order ("SHPO") can be put in place; and

(3) the possibility of securing confiscation or compensation orders.

9.89 Where the interests of justice lie in a particular case is likely to be very fact specific.

Discussion

9.90 In general, as we have provisionally proposed in Chapter 8 (Consultation Question 35), we consider that a retrial should be the default where there is fresh evidence or an error of law which vitiates the original verdict of the jury. This reflects the principles in Chapter 4 of acquitting the innocent and convicting the guilty, and that deciding whether a defendant is guilty is primarily a task for the jury.

9.91 There do appear to be issues relating to the constraints on the Court's ability to order a retrial on alternative charges where the person was convicted of the wrong offence and may not have been guilty at all (so substitution would be inappropriate). If the range of offences for which the Court might substitute a conviction were to be expanded, there would be a strong case for corresponding changes to the powers to order retrial.

9.92 The power for the Court to order a retrial for an alternative offence of which the appellant could have been convicted at the original trial involves substantially the same test as governs the ability to substitute convictions. If, as we have provisionally proposed, the Court's powers to substitute a conviction are expanded, it would seem to make sense to make a similar change to the second (and possibly third) category of offence for which a retrial could be ordered (see paragraph 9.78 above).

9.93 That the Court cannot order a retrial on an alternative charge where the jury returned a not guilty verdict on that charge as a result of their guilty verdict on the principal charge can also have undesirable effects. It means that if, having convicted on one count the jury formally acquitted the defendant of a lesser charge, there cannot be a retrial for this offence (or substitution of it).[56] This may cause difficulties where the

[56] Where an indictment contains one or more counts relating to the same conduct, charged as alternatives, the judge should first take the verdict on the most serious charge, and if convicted can direct that the jury do not return a verdict on lesser charges. If the jury returns a guilty verdict on a less serious count, intended as an

appeal establishes that the jury could not have convicted of the more serious charge but there remained a case to answer on the lesser charge.

9.94 We provisionally consider that there is an argument for allowing the Court to order a retrial on a lesser offence of which the person has been formally acquitted by the jury, where the reason for that acquittal was that they were convicted of another, more serious, offence. This is nominally a case of double jeopardy (*autrefois acquit*), since the person would face trial for an offence of which they had previously been acquitted by a jury. However, retrials themselves involve a breach of the (*autrefois convict*) principle and, arguably, if a retrial on the greater charge is permissible, retrial on a lesser charge would not be unjust.

Consultation Question 43.

9.95 We invite consultees' views as to whether the Court of Appeal Criminal Division should have a power to order a retrial on a broader range of offences than those of which the jury could have convicted the appellant "on the indictment", and how such a provision might be framed.

Consultation Question 44.

9.96 We provisionally propose where the Court of Appeal Criminal Division quashes a conviction, and the jury had, as a result of that conviction, delivered a not guilty verdict on a lesser alternative charge, the Court should have a power to quash that acquittal:

(1) in order to enable that alternative charge to be available to a jury in a retrial on the conviction which has been quashed; or

(2) so that it might direct a retrial on the alternative charge.

Do consultees agree?

Arraignment out of time

9.97 Section 8 of the CAA 1968 says that where the CACD orders a retrial the person may not be arraigned after two months from the date of the order for retrial unless the CACD gives leave.

9.98 After that two-month period, the person may apply to the CACD to set aside the order for retrial and direct the trial court to enter an acquittal.[57] Alternatively, the prosecution may seek the Court's leave to arraign out of time. In either case, the Court may grant

alternative, and then returns a guilty verdict on the more serious charge, the offender will have more than one conviction relating to the same conduct: see *R v McEvilly* [2008] EWCA Crim 1162, [2008] Crim LR 968.

[57] CAA 1968, s 8(1A).

leave to arraign out of time or set the order for retrial aside and direct an acquittal. However, the CACD can only grant leave to arraign out of time if satisfied that:

(1) the prosecution has "acted with all due expedition"; and

(2) there is a "good and sufficient cause for a retrial in spite of the lapse of time since the order [for retrial] was made".[58]

9.99 The tests are cumulative, and the Court cannot grant leave to arraign out of time where the prosecution has not acted with all due expedition, even where there remains a good and sufficient cause for the retrial.[59]

9.100 In *Pritchard*, Lord Justice Gross said:[60]

> The purpose of the section is to ensure that the retrial takes place as soon as possible. The purpose is intended to be achieved by a focus on arraignment. Once arraignment has taken place, the case will be back under judicial control and the matter can be left to the judge to ensure that the retrial occurs at the earliest practical opportunity…

9.101 We appreciate that there is a public interest in ensuring arraignment as soon as possible, and in discouraging slowness or inaction, especially following a court order. We also acknowledge examples of undue delay, such as in the case of *Al-Jaryan*,[61] where the CACD observed, in a case where the defendant was not arraigned in time following an order for retrial:[62]

> In simple terms it seems to us that nothing was done beyond 2 April 2020 by the Crown Court or the CPS, or indeed the defence, to secure a date for arraignment in court. Even when 18 May 2020 [the arraignment deadline] approached, it appears that nothing was done to alert the court to the fact that an important deadline was imminent. Even after the deadline passed, nobody sought to remedy the situation. …
>
> We appreciate that Isleworth Crown Court and all the parties in this appeal were labouring in difficult circumstances … during the early stages of the response to the Covid-19 pandemic. That may account for some of the failings, but simply to overlook the deadline and thus a mandatory order of the Court of Appeal is unacceptable, and we have concluded that it cannot be characterised as anything approaching reasonable speed on the part of the prosecution. … We are not satisfied that the prosecution acted with all due expedition. In our judgment, the prosecution should have taken urgent and purposeful steps to call the attention of the court to the absence of a firm date for arraignment well before 15 May 2020, but

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58 CAA 1968, s 8(1B)(b).

59 *R v Pritchard* [2012] EWCA Crim 1285; *R v Al-Jaryan* [2020] EWCA Crim 1801, [2021] 1 Cr App R 25.

60 *R v Pritchard* [2012] EWCA Crim 1285 at [5(1)], by Gross LJ.

61 [2020] EWCA Crim 1801, [2021] 1 Cr App R 25.

62 Above, at [29]-[30], by Simler LJ.

at the very latest on 15 May 2020. The conduct after that date reveals the absence of any semblance of urgency.

9.102 In that context, it may be argued that the bluntness of the present regime appropriately pressurises state and prosecuting authorities. In our view, however, the potential injustice if a person is not tried at all because of a failure by the prosecution to act with all due expedition, where the CACD has ordered a retrial, is a strong one. In *Pritchard*, for instance, it meant that a retrial of a man accused of rape that had been ordered by the CACD did not proceed, and he was acquitted, because of delays by the CPS. It is also to be noted that although the CPS had failed to appreciate that the date set for trial was outside the time limit for arraignment, there had been two hearings within the period, at which the defendant would have been arraigned, but he had failed to attend.[63]

9.103 The fact that the CACD has ordered a retrial is a very strong indication that it is in the public interest that the allegations should be tried by a jury. If, because of delay, or for some other reason, it is no longer in the interests of justice for the retrial to go ahead, then the CACD can refuse leave to arraign out of time.

9.104 We think that where it is in the interests of justice, it should be possible to extend the time for arraignment. Although lack of any prejudice to the defendant is a potential factor, the prosecution should be acting with due expedition in any event. When considering whether to quash an acquittal and order a retrial because of compelling new evidence, the Court is required to *have regard* to whether the police or prosecution have failed to act with due expedition.[64] However, a failure to do so is not fatal to a retrial. The test is whether, despite this, it is in the interests of justice. This may be a better test that will reduce the possibility of a defendant who should face retrial being acquitted on the basis of technical failures by the prosecution which have caused no prejudice to the defendant.

Consultation Question 45.

9.105 We invite consultees' views on whether, where it has ordered a retrial, the Court of Appeal Criminal Division should have the power to give leave to arraign out of time where it remains in the interests of justice for there to be a retrial, despite any failure by the prosecution to act with all due expedition.

9.106 If the Court were to have such a power, we provisionally propose that any failure by the prosecution to act with all due expedition should be a factor for the Court to consider when deciding whether to grant leave to arraign out of time.

Do consultees agree?

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63 *R v Pritchard* [2012] EWCA Crim 1285 at [3], by Gross LJ.

64 See Chapter 13 on challenging acquittals, including double jeopardy appeals.

When should a retrial be rendered a nullity?

9.107 The CACD has ruled that where the defendant at a retrial is not arraigned within two months and the prosecution does not obtain leave to arraign out of time, the subsequent proceedings are a nullity. This has arisen in three recent cases.

(1) In *Llewelyn*,[65] the appellant's conviction for causing grievous bodily harm with intent was quashed in May 2020, with an order for retrial. He was rearraigned in September 2020, two months out of time. (It will be noted that these events all took place during the COVID-19 pandemic.) In February 2021, his counsel sought to have the arraignment quashed as a nullity. The trial judge ruled that as the defendant had been arraigned without objection, it was arguable that he had waived any right to raise the irregularity; and that there was authority that lack of arraignment or a defective arraignment did not render invalid subsequent proceedings on the indictment. Llewelyn was tried and convicted.

(2) *Supersad*[66] involved Llewellyn's co-defendant, who was reconvicted in the same circumstances.

(3) In *Layden*,[67] the appellant's conviction for joint enterprise murder was quashed in March 2015, with an order for retrial. He was retried in September 2015. Before the jury was empanelled, there was a discussion as to whether the defendant needed to be rearraigned. The prosecution submitted it was not necessary, defence counsel took no point and the trial proceeded. Layden was convicted.

9.108 Llewelyn's case was considered by the CACD. It held that the protections in section 8 of the CAA 1968 were "critical protections for an accused". If a trial proceeded when the CACD had not considered whether there remained a good and sufficient cause for retrial, the protections would be lost. The retrial court's abuse of process jurisdiction would not provide a solution, because the tests are different from those applied by the CACD in considering an application to arraign out of time.[68]

9.109 The retrial court, the CACD held, only had jurisdiction because of the order for retrial, but this is contingent on compliance with the requirements. Once the two months has passed there is no jurisdiction for the retrial unless the CACD grants leave to arraign out of time. Accordingly, non-compliance with the requirement renders the proceedings a nullity. The CACD therefore quashed Llewelyn's conviction. Subsequently, Supersad's conviction was quashed.[69]

9.110 The CPS attempted to argue the matter again in *Layden* in 2023, arguing that *Llewelyn* was wrongly decided: the failure to arraign was a procedural irregularity, not a jurisdictional one. However, the CACD affirmed *Llewelyn*. The general case law on failures to arraign or where the arraignment was defective was irrelevant since those

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65 *R v Llewelyn* [2022] EWCA Crim 154, [2023] QB 459.

66 *R v Supersad* [2022] EWCA Crim 1166.

67 *R v Layden* [2023] EWCA Crim 1207, [2024] 3 All ER 689.

68 *R v Llewelyn* [2022] EWCA Crim 154, [2023] QB 459.

69 *R v Supersad* [2022] EWCA Crim 1166.

cases did not involve express statutory provisions governing the timing of an arraignment. They did not involve questions of jurisdiction, whereas the jurisdiction of the retrial court was dependent upon the order of the CACD (and compliance with it). There was no authority to arraign out of time without leave of the CACD.

9.111 The acquittals of Llewelyn, Supersad and Layden were on purely technical grounds, after they had been convicted by a properly directed jury. Moreover, as the CACD noted, these were not cases which were liable to be stopped on the grounds of abuse of process: the defendants could have (and did) receive a fair trial, and the non-compliance was not so flagrant as to amount to "category 2" abuse of process (that is, that it would be an affront to justice for them to be tried). There was no issue in the appeals as to the correctness of the reconvictions, in terms of whether the defendants had committed the offences of which they had been reconvicted.

9.112 Further, had the issue been identified at the time of the retrial, it would have been open to the CPS to seek to have the time for arraignment extended, and the CACD could either have extended the time or ordered an acquittal. It is only where the issue is not identified until after the retrial has concluded that the CACD does not have this choice: it must direct an acquittal.

9.113 *Llewelyn* creates a perverse incentive for a person facing retrial. If the prosecution has not arraigned in time, the defendant can go back to the CACD to have the order for retrial revoked. This may not be successful, and instead the CACD might extend the time. If, however, the defendant lets the case proceed to trial without the prosecution seeking leave to arraign out of time, they are guaranteed the opportunity to seek to quash the conviction.[70]

9.114 Where the reconviction is quashed in these circumstances there is no possibility of the CACD ordering a third trial. Any retrial could only be under the authority of the original order for retrial. Even if it remains in the interests of justice for there to be a trial, it is impossible to see how the prosecution could claim to have acted with all due expedition where it had caused a defective trial and conviction by failing to arraign in time or to seek an extension.

9.115 It is also anomalous that a complete failure to arraign does not normally render a trial invalid,[71] but late arraignment on a retrial ordered by the CACD renders the proceedings invalid.

9.116 We think that the strict application of this rule risks leading to the release on purely technical grounds of people who are factually guilty and have been found to be so by a properly directed jury on evidence which has not been challenged. This is not in line with the principle of acquitting the innocent and convicting the guilty,[72] and is liable to bring the justice system into disrepute.

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70 Unless the prosecution realises their error during the retrial and seek leave to arraign the defendant out of time, which under the test discussed above at paras 9.98-9.99 above, can only be granted if the CACD is satisfied that the prosecution has acted "with all due expedition". CAA 1968, s 8(1B).

71 Including a retrial where the jury at the earlier trial failed to reach a verdict.

72 See paras 4.33-4.36 and 4.113-4.115 above.

9.117 We consider that were *Llewelyn* to be overturned, defendants could retain sufficient protection of their interests through the ability to apply to have the order for retrial set aside.

9.118 There is precedent for this in the treatment of unsigned indictments. In *Clarke and McDaid*, the House of Lords affirmed that if an indictment had not been signed by the officer of the court, it had not become an indictment; there could be no valid trial without a valid indictment; and that accordingly any such trial and conviction was a nullity.[73]

9.119 The Coroners and Justice Act 2009 made provision to deal with this issue, removing the requirement for an officer to sign the indictment, and also providing that no objection to an indictment could be made after the commencement of the trial (that is, when the jury is sworn, or a guilty plea accepted).

9.120 The change was made retrospective: section 26(1) of the 2009 Act provides that in any proceedings before a court, including proceedings on an appeal, the amendments are deemed always to have had effect. Thus, no appeal against a conviction prior to the change could be based on a failure to sign the indictment, since the requirement to sign the indictment would be deemed never to have existed.

9.121 Far fewer cases are likely to be affected by the issue in *Llewelyn* than was the case with the ruling in *Clarke and McDaid*, since the number of retrials ordered following a successful appeal is tiny relative to the total number of trials on indictment. It is, however, notable that after *Llewelyn* and *Supersad*, at least one murder case has now been identified.[74]

9.122 If the law were to be amended so that a failure to arraign out of time without leave no longer made proceedings a nullity, we do not think this would amount to retrospective criminalisation (contrary to article 7 of the European Convention on Human Rights or otherwise): the conduct alleged would have been criminal at the time. Moreover, the convicted person would retain the right to appeal against their conviction on the basis that it was unsafe, including where it was unsafe because they had not received a fair trial, where the safety of the conviction or the fairness of the trial had been affected by the delay in arraigning them, or where the delay rendered the prosecution abusive. Accordingly, it would only be cases based purely on a technicality, rather than the possible innocence of the appellant, which would be closed off.

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73 [2008] UKHL 8, [2008] 1 WLR 338.

74 *R v Layden* [2023] EWCA Crim 1207, [2024] 3 All ER 689.

Consultation Question 46.

9.123 We invite consultees' views on amending the law so that where the Court of Appeal Criminal Division ("CACD") orders a retrial, a failure to arraign within two months without obtaining an extension from the CACD would not render a retrial a nullity.

9.124 We invite consultees' views as to whether such a change should have retrospective effect, so that existing convictions could not be challenged purely on the basis that leave to arraign out of time was not obtained.

9.125 We think that a similar problem may apply in relation to "double jeopardy" retrials where there is compelling fresh evidence following an acquittal. The wording of the legislation governing these retrials is modelled on the provisions in the CAA 1968 and it is likely therefore that the Court would interpret the relevant provision as having the same effect as in *Llewelyn*. We discuss this in at paragraph 13.67 to 13.86 below.

Sentencing on retrial

9.126 If the appellant is reconvicted at the retrial, the trial court is prevented from imposing a sentence that is more severe than that imposed at the original trial.[75]

9.127 The case of *Bett* provides a recent example in practice.[76] The appellant was retried for an offence of causing death by dangerous driving. The Judge considered the appropriate sentence to be 44 months, having heard the evidence at trial. He had to reduce the appropriate sentence to 42 months despite his assessment that the correct sentence was higher than that imposed at the original trial.

9.128 There are three examples of unintended consequences arising from this provision.

(1) Where the appellant pleaded guilty and was given appropriate credit for his plea, and that conviction is quashed but the person is reconvicted after a retrial. In *Skanes*,[77] the appellant's appeal was allowed on the basis he was put under improper pressure to plead guilty. A retrial was ordered, and he was convicted of serious sexual and violent offences. The proper construction of section 8 was not decided in *Skanes* and it remains unclear.

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75 CAA 1968, s 8(4) and sch 2, para 1.

76 *R v Bett* [2017] EWCA Crim 1909, [2018] 1 Cr App R (S) 28.

77 [2006] EWCA Crim 2309. In *Skanes*, the defendant had pleaded guilty to one count of rape, and five other charges were left to lie on file; he was sentenced to seven years' imprisonment. The CACD had allowed an appeal on the basis that he was put under undue pressure to plead guilty. The rape conviction was quashed and a retrial ordered on all six counts. At the retrial he was convicted of the rape and two other offences. He received a sentence of ten years' imprisonment for the offence of rape (and shorter concurrent sentences of two years' imprisonment for indecent assault and three years' imprisonment for assault occasioning actual bodily harm). The CACD expressed "strong reservations" about the view that "if a defendant has pleaded guilty and received credit for his plea, that sentence provides the upper limit if the conviction and sentence are quashed and if he subsequently fights the case and is convicted". However, it held that in the circumstances of the case, the issue could be addressed by reducing the sentence for rape to seven years, but ordering the sentence for ABH to be served consecutively.

(2) Where the Attorney General seeks leave to refer the sentence passed after the first trial as "unduly lenient" and an offender also appeals against the original conviction, there is a risk that if both cases are not heard together, the judge in any subsequent trial may be restricted to the term of the original sentence despite it being found to be unduly lenient. This is only avoided by listing practice and represents a problem if such a case were missed at the administrative stage.

(3) In relation to dangerous offenders, it is possible that the sentencing judge at a first trial finds the defendant not to be dangerous, perhaps wrongly. Following a retrial ordered by the CACD, a second sentencing judge may consider the defendant to be dangerous but may be restricted from imposing the appropriate sentence. For example, it remains mandatory to impose imprisonment for life where an offender, who has been assessed as dangerous, falls to be sentenced for a serious offence which carries life imprisonment and the court considers that the seriousness of the offence justifies the imposition of a life sentence.[78] Such a scenario, as yet untested, would present difficulties under the current law and would be a matter of public interest.

9.129 We consider that in relation to this third point, the answer lies in the power of the Attorney General to refer the sentence as unduly lenient if the judge at the first trial has wrongly assessed the offender not to be dangerous.

9.130 We can see force, however, in the argument that it is wrong that a person who has pleaded guilty and thereby obtained a discount on their sentence, but who subsequently challenges their conviction successfully, should be entitled to the benefit of that earlier guilty plea at a retrial where they plead not guilty.

9.131 We do not think that amending the law to provide a limited exception to enable the court at retrial to sentence in excess of the original sentence (where this reflects the not guilty plea at the retrial) would infringe the "no greater penalty" principle discussed in Chapter 4.[79] The person who faces a greater penalty in these circumstances would not face a greater penalty as a result of their bringing the appeal, but as a result of their decision to plead not guilty at the subsequent retrial. The possibility of a greater penalty may well create a dilemma for that defendant, but it is not different to that facing any defendant.

9.132 However, we think that the "no greater penalty" principle would be breached if, as a result of succeeding at appeal and facing a retrial, the defendant faced the risk of a more severe penalty *even if they pleaded guilty*. In this circumstance, the defendant who brings an appeal having previously pleaded guilty might face the risk of a more severe sentence purely as a result of succeeding at the appeal, regardless of their decision on plea. This could, therefore, deter convicted persons from bringing meritorious appeals.

9.133 In practice, the circumstances where the Court will quash a conviction where the appellant has pleaded guilty are very limited. If the conviction was quashed because

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78 Sentencing Code, s 285(3).

79 See paras 4.77-4.82 and 4.130-4.133 and Consultation Question 4.

they could not have been lawfully convicted of the offence, there is no prospect that the CACD would order a retrial. If the prosecution amounted to an abuse of process, it is highly unlikely that the Court would order a retrial. If the conviction was quashed because the appellant provided evidence which showed that they were factually innocent, there would be no question of the Court ordering a retrial.

9.134 That being so, we question whether reform to address this issue would be of sufficient value to justify a change in the law.

Consultation Question 47.

9.135 We invite consultees' views as to whether the maximum sentence available to a court at a retrial following a successful appeal against conviction should be limited to that imposed at the first trial, when the sentence at the original trial reflected the defendant's guilty plea.

THE COURT'S POWERS IN CASES OF UNFITNESS TO PLEAD AND INSANITY

Unfitness to plead and insanity

9.136 We discuss the law about unfitness to plead and insanity at paragraphs 6.183 to 6.191 above. Unfitness to plead is concerned with whether or not a defendant is able to stand trial. Where the issue of unfitness to plead arises, the court does not consider the defendant's guilt, but rather two distinct issues: whether the defendant is "under a disability" which renders it inappropriate for them to be tried, and secondly, if the court finds that the defendant is under such a disability, whether or not the defendant did the act or made the omission charged (a "trial of the facts").

9.137 Insanity concerns the culpability of a person at the time of the offence. To establish the defence of insanity the defendant must prove that at the time of committing the act the defendant was "labouring under a defect of reason from a disease of the mind as not to know the nature and quality of the act they were doing or if they did know it that they did not know that what they were doing was wrong".

Substitution where there has been a finding of insanity or unfitness to plead

9.138 Where an appellant is found not guilty by reason of insanity, they can appeal the verdict as unsafe. The CACD may find the verdict unsafe on grounds relating to the question of the insanity of the appellant or on other grounds (for instance, relating to the events in question).

9.139 Where the CACD finds that the finding of the jury as to the appellant's insanity "ought not to stand", and the Court is satisfied that "the proper verdict would have been that [they were] guilty of an offence", it must substitute a guilty verdict and sentence the appellant for that offence accordingly.[80]

[80] CAA 1968, s 13(4).

9.140 Where the CACD finds that an appeal against the verdict of not guilty by reason of insanity would fall to be allowed for reasons not relating to the insanity of the appellant, but the Court considers that, but for the appellant's insanity they would have been guilty of another offence, they may dismiss the appeal.[81] There is no power to quash the verdict of not guilty by reason of insanity and substitute a finding of not guilty by reason of insanity of the other offence.

9.141 Under section 14 of the CAA 1968, where the Court allows an appeal against a verdict of not guilty by reason of insanity, but considers (on the evidence of two or more registered medical practitioners) that the defendant was unfit to stand trial, then if the Court considers that the case is not one where there should have been a verdict of (full) acquittal, it may make the same orders that would have been available on a finding by the jury that the defendant had done the act or made the omission charged.

9.142 Although a verdict of not guilty by reason of insanity is not a finding of guilt, it still amounts to a finding that the person carried out the conduct alleged. It has consequences for the appropriate order that will be made. If the defendant actually carried out conduct amounting to a lesser offence, we think that it ought to be possible to substitute a finding of not guilty by reason of insanity for the correct offence, and to make appropriate orders.

9.143 For instance, a finding that a person is not guilty of a specified sexual offence by reason of insanity will result in that person being subject to notification requirements under Part Two of the Sexual Offences Act 2003. If the CACD concludes that they were not, in fact, guilty of the specified sexual offence but were guilty of a non-sexual offence, the Court can quash the verdict outright (so there would be no finding that the person had carried out the non-sexual offence), or the Court may leave the verdict in place (requiring the person to register as a sex offender despite no sexual offence having been committed).

9.144 In general, where the Court finds that a conviction was unsafe because the appellant was unfit to plead, it will quash the conviction and may make findings that the appellant did the acts or made the omissions charged: the Court is entitled to rely on the findings of fact that the jury must have made in coming to its verdict.[82] It can then make a hospital order, a supervision order, or an order for the person's absolute discharge.[83]

9.145 The Court cannot substitute "findings" for a verdict when a person who should have been found unfit to plead pleaded guilty. It cannot rely on the guilty plea in the way that it can rely on the verdict of the jury:[84]

> Pleas of guilty, entered by a person who was unfit, are not evidence against him. The appellant's guilty pleas are of no relevance to our task. We are not in a position to determine that the appellant should not be acquitted. It is not for this court to

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81 Above, s 13(3).

82 *R v Ismael* [2024] EWCA Crim 301, [2024] Crim LR 576 at [67], by Thirlwall LJ.

83 CAA 1968, s 6.

84 *R v Ismael* [2024] EWCA Crim 301, [2024] Crim LR 576 at [72], by Thirlwall LJ.

> embark upon a consideration of the statements to determine whether the appellant did the acts charged ...

9.146 Where the CACD finds the findings made by the jury in a "trial of the facts" to be unsafe, there is no power for the Court to substitute alternative findings, or findings that a person did the acts or made the omissions amounting to a different offence. This contrasts with the very broad powers it has to substitute a conviction for any offence where it overturns a jury's verdict of not guilty by reason of insanity.

Consultation Question 48.

9.147 We provisionally propose that where the Court of Appeal Criminal Division quashes a finding of not guilty by reason of insanity, it should have a power to substitute a finding of not guilty of an alternative offence by reason of insanity.

Do consultees agree?

Consultation Question 49.

9.148 We provisionally propose that where the Court of Appeal Criminal Division quashes a finding that an appellant who was unfit to plead did the act or made the omission charged, it should have a power to substitute a finding that the appellant did the act or made the omission amounting to an alternative offence.

Do consultees agree?

Retrials following a determination of unfitness to plead

9.149 Where a person has been found unfit to stand trial but to have done the act or made the omission charged (following a "trial of the facts"), and the CACD determines that the finding that the person was unfit to stand trial was unsafe, trial on the charged offence(s) may go ahead.

9.150 However, as we noted in our 2016 report on Unfitness to Plead,[85] if the Court determines that the finding that the person was unfit was correct, but the findings on the facts are unsafe, there is no similar power to order a second "trial of the facts"; it must order an acquittal.

9.151 In *Norman*, the CACD said:[86]

> Under present legislation, this court cannot order a retrial … save in very limited circumstances. Although in this case the public interest is protected, there could well be cases where it would not be and serious public concern could arise where this

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85 Unfitness to Plead (2016) Law Com No 364.

86 [2008] EWCA Crim 1810, [2009] 1 Cr App R 13 at [34](iv), by Thomas LJ.

court considered a verdict unsafe and was compelled to enter an acquittal, but nothing further could be done. We would hope that Parliament might give consideration to this lacuna in the statutory provisions and consider granting this court power to order a re-trial of the issue as to whether the defendant did the act with which he is charged.

9.152 In the absence of a power to order a retrial, the CACD is required to enter a verdict of acquittal.[87] One example which demonstrates the risks to the public is the case of *MB*.[88] MB had been found unfit to stand trial on charges which related to serious sexual and physical abuse of his children and grandchildren. He was found to have committed the acts in question. The CACD allowed MB's appeal against the finding that he did those acts and was required to enter verdicts of acquittal, despite fresh evidence that the appellant was now fit to stand trial. The CACD urged further action to remedy this gap in the law which remains unaddressed:[89]

> Now that we are compelled to enter a verdict of acquittal, he cannot be retried even if he be fit although this is a matter of controversy to be tried. We thus have now seen the consequences of the lacuna, and we repeat that the lacuna needs to be filled. The only comfort there may be is that there is evidence that this appellant remains unfit to be tried and thus the concern which would be merited at the injustice which follows from our conclusion might in some respects be allayed.

9.153 In their consultation response, the CPS noted:

> Section 15 of the Criminal Appeal Act 1968 allows a defendant to seek leave to appeal a determination of unfitness to stand trial made under s 4A of the Criminal Procedure (Insanity) Act 1964 (CPIA). However, if the appeal is allowed, the court can direct an acquittal under s 16(4) … but cannot order a retrial. It is suggested that the option of allowing a retrial following a successful appeal of a determination of unfitness should be considered. This amendment would address concerns about public protection in cases where an acquittal may not be appropriate where the defendant has been charged with a serious offence and continues to pose a risk [to] the public.

9.154 It is not clear why there is no power for the Court to order a second trial of the facts corresponding to its ability to order a retrial where a conviction is unsafe. There would seem to be a strong argument for giving the Court an equivalent power; indeed, such a power was one of our recommendations for an entirely new unfitness to plead regime in 2016.[90] It is unsatisfactory that in these circumstances, where the findings of fact may be unsafe but not clearly factually wrong, the only option is acquittal.

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87 See also *R v McKenzie* [2011] EWCA Crim 1550, [2011] 1 WLR 2807.

88 *R v MB* [2010] EWCA Crim 1684, [2011] MHLR 163.

89 Above, by Moses LJ.

90 Unfitness to Plead (2016) Law Com No 364, para 8.24.

Consultation Question 50.

9.155 We provisionally propose that the Court of Appeal Criminal Division be given a power to order a further "trial of the facts" where the appellant is unfit to stand trial, but the findings of the jury are unsafe.

Do consultees agree?

Consultation Question 51.

9.156 We provisionally propose that the Court of Appeal Criminal Division should be given a power to order an appellant to stand trial where it finds that the findings of the jury in a "trial of the facts" are unsafe and the appellant is now fit to stand trial.

Do consultees agree?

9.157 Where the CACD finds that an appeal against a verdict of not guilty by reason of insanity would fall to be allowed for reasons not relating to the insanity of the appellant, the verdict must be quashed but there is no power to order a retrial.

Consultation Question 52.

9.158 We provisionally propose that where the Court of Appeal Criminal Division quashes a verdict of not guilty by reason of insanity, it should have the power to order a retrial.

Do consultees agree?

Chapter 10: The "substantial injustice" test for appeals based on a development in the law

BACKGROUND

10.1 In general, where the criminal law changes as a result of statute, this does not affect the convictions of those who were properly convicted under the old law, nor does it prevent a person from being prosecuted and convicted under the old law for conduct prior to the date of the change.[1] (An example of the former is the fact that the decriminalisation of homosexuality did not affect convictions of gross indecency or buggery of adult men who had sexual intercourse; an example of the latter are convictions of the now-obsolete offence of indecent assault in relation to historic sexual offending.)

10.2 However, the situation is complicated in the case of development of the common law. The common law develops by considering cases which concern events which have already happened (and in criminal law, generally by considering cases which have already been decided by trial courts). The 'declaratory principle' asserts courts are not changing the law prospectively, but correcting a prior misunderstanding or misapplication of the law.

10.3 As Ireland's Chief Justice Murray put it in *A v Governor of Arbour Hill Prison*:[2]

> Judicial decisions which set a precedent in law do have retrospective effect. First of all, the case which decides the point applies it retrospectively in the case being decided because obviously the wrong being remedied occurred before the case was brought.

10.4 In the context of criminal convictions, change of law cases can arise in diverse situations. Professor John Spencer identifies three distinct types of appeal based on a change of law.[3] First, "where it is now clear that the conduct for which [the defendant] was previously convicted was, under the law as now restated, no crime at all". Second, where "the law reveals that [the defendant] was not wholly innocent, but that he was merely convicted of the wrong offence". Third, where "the later legal change affects not the conviction, but the sentence or order resulting from it".

10.5 It is possible to conceive of at least two further situations. The fourth is where the change in the law means that the defendant *might not* have been convicted under the corrected law. If a ruling reduces the scope of an offence (by changing its legal elements), it may not be clear – depending on how clearly the conduct of a defendant convicted under the "old" law was defined at trial – whether they might or might not have fallen within the revised scope of the offence.

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1 Interpretation Act 1978, s 79.

2 [2006] 4 IR 88 at [36], by Murray CJ.

3 J R Spencer, "Criminal appeals founded on a change of law" (2014) 73 *Cambridge Law Journal* 241, 242-3.

10.6 The fifth, identified by Professor David Ormerod KC (Hon), is where there has been a "change in the law's attitude which has been prompted by purely legal developments",[4] such as development of the law in relation to admissibility of evidence, disclosure or criminal procedure. Again, in such cases it will often be unclear whether, had the procedures under the "developed" law been applied at trial, the defendant would or would not have been convicted.

10.7 Change of law cases arise in a variety of circumstances. In *Preddy*,[5] the House of Lords held that obtaining a mortgage by deception did not amount to obtaining property by deception.[6] In *Gosney*,[7] the Court of Appeal Criminal Division ("CACD") held that dangerous driving was not a wholly strict liability offence; while there was no need to prove a particular mental element, it was necessary to prove that the driver was "at fault".[8] In *Saik*,[9] the House of Lords held that the mental element required for offences of conspiracy to launder money was knowledge or intent that the money was, or would be, the proceeds of crime and not – as for the substantive offence – mere suspicion. Preddy, Gosney and Saik all therefore had their convictions quashed.

10.8 What, however, of others who have been convicted under that same misconception of the law? In theory, it would be possible to declare that any conviction based upon the misapplied law was unsafe. However, this raises several practical problems.

10.9 First, it will very often be impossible to say whether the change of law would have made a difference in a particular case. This is especially so where courts are found, as in *Saik*, to have been allowing a broader basis for a conviction than they should have done. For instance, before the Supreme Court ruling in *Jogee*[10] (in the context of joint enterprise), a person who was a party to an offence (sometimes called the "secondary party") could be convicted as a party to a more serious offence committed by their co-party if they intended or foresaw that their co-party might commit the more serious offence. *Jogee* established that intention was necessary; foresight was not sufficient, but could be evidence from which intention (whether to participate, assist or encourage the more serious crime) *might* be inferred. However, where the law has been interpreted more narrowly than it previously was, it will often be impossible to say whether the defendant would still have been convicted had the case been put on the narrower basis.

10.10 Second, had the corrected law been in place at the time, the trial would have been conducted differently. Different legal directions would have been given. Additionally, the prosecution would have focused its attention on proving what would have been

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4 D Ormerod, "Appeal: Leave to Appeal" [2000] *Criminal Law Review* 835, 839.

5 *R v Preddy* [1996] AC 815, HL.

6 On the basis that the mortgage obtained was not property "belonging to another", and that when a balance is transferred this is not the transfer of property but the extinguishing of one liability and the creation of another.

7 *R v Gosney* [1971] 2 QB 674, CA.

8 In this case deficient signage had led a perfectly competent driver onto the wrong carriageway of a dual carriageway road.

9 *R v Saik* [2006] UKHL 18, [2007] 1 AC 18.

10 *R v Jogee, Ruddock v The Queen* [2016] UKSC 8, [2016] UKPC 7, [2017] AC 387.

necessary under the corrected interpretation of the law. Indeed, in several of the post-*Jogee* appeals, the prosecution had in fact proceeded on the basis that the secondary defendant intended to cause death or serious harm, and foresight was only raised because the judge's directions or route to verdict used foresight as the applicable test.

10.11 Third, had the corrected law been in place at the time, the prosecution might have been able to charge different but related offences (particularly in the second category of cases identified by Professor Spencer described above at paragraph 10.4 above).

10.12 Fourth, commentators have identified a concern that if convictions can be appealed on the basis of a change of law, this will "open the floodgates", resulting in an unmanageable number of appeals (and potential retrials for successful appeals). Referring to the fifth category of case, Professor Ormerod warned, in 2000, that:[11]

> If the Court of Appeal is prepared to quash convictions as "unsafe" because the law has changed its perception of what is "fair" to defendants, irrespective of whether that also undermines the reliability of the conviction, this really opens up the floodgates.

10.13 It is perhaps notable that Professor Ormerod was writing in 2000, as the coming into effect of the Human Rights Act 1998 ("HRA") in 2000, heralded a potential expansion of this category of cases. Some academic commentators warned that the retrospective application of the HRA to criminal appeals created "a real risk of floods of applications".[12] The concern was particularly acute during a period between the HRA's commencement in July 2000 and the House of Lords ruling in *Lambert*,[13] in July 2001, that the HRA did not have retrospective effect.

10.14 It is perhaps also worth stating that such a fear might be more justified in relation to changes of law as to what constitutes a fair trial.[14] This is for two reasons. First, as held in *Bentley*,[15] whether an applicant received a fair trial is to be judged by contemporary standards of fairness (that is, contemporary to the hearing of the appeal). Second, the right to a fair trial cannot be balanced against the weight of

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11 D Ormerod, "Appeal: Leave to appeal" [2000] *Criminal Law Review* 835, 839.

12 K Kerrigan, "Unlocking the Human Rights Floodgates?" [2000] *Criminal Law Review* 71, 81.

13 *R v Lambert* [2001] UKHL 37, [2001] 3 All ER 577.

14 See *R v Campbell* [2024] EWCA Crim 1036, concerning a 1991 conviction, at [126]-[127], by Holroyde LJ VPCACD:

> … Particular difficulty arises, in our view, where an appellant relies, as this appellant does, on changes in expert thinking about, and approach to, a relevant topic, rather than on a specific scientific discovery or development. It will in general be insufficient for an appellant to rely on evidence and argument which merely shows that a trial today would look very different from the actual trial which resulted in the conviction. Such comments could be made about almost any case heard many years ago, or indeed about many cases heard before the provisions of the Criminal Justice Act 2003 came into effect.
>
> We add that we are inclined to accept Mr Price's submission that an appellant who seeks a long extension of time to advance a ground of appeal based on a change of practice, or on changes in standards of fairness, must satisfy the "substantial injustice" test, as he would have to do if relying on a change in the applicable substantive law. We need not, however, decide that point, because in our view the most important considerations relate not to changes in practice or in standards, but rather to the fresh expert evidence.

15 *R v Bentley (dec'd)* [2001] 1 Cr App R 21, CA.

evidence (notwithstanding some dicta suggesting otherwise; see Chapter 8): even the plainly guilty have a right to a fair trial. It follows that if contemporary requirements of fairness change with the result that some defendants are held retrospectively not to have received a fair trial, the convictions must be held to be unsafe even if those convicted were factually guilty. Moreover, while not every breach of the fair trial guarantees protected by article 6 of the European Convention on Human Rights ("ECHR") mean that, overall, a trial was unfair, it is acknowledged that some facets of historical criminal justice procedure (such as the defendant being prevented from giving evidence in their own defence, which only changed at the end of the 19th century) could be sufficiently fundamental that they would render all such trials unfair according to contemporary standards.[16]

10.15 Finally, if appellate courts are concerned that restating the law might lead to an overwhelming number of appeals based on the corrected understanding of the law, this might deter judges from developing the law; instead, they could leave reform to Parliament, where reforms could be made to apply only prospectively.

The Court of Appeal Criminal Division's approach to change of law cases

10.16 Given that the vast majority of appeals based on a change in the common law will be brought out of time, the CACD has attempted to mitigate the issue of retrospectivity by distinguishing between in-time and out-of-time appeals. Where a person has brought their appeal within the statutory period of 28 days, it will be dealt with according to the "corrected" interpretation of the law.

10.17 Where, however, the appellant requires an extension of time in order to bring an appeal,[17] the Court will only grant the extension, and therefore allow the application for leave to appeal to proceed, if the appellant can demonstrate "substantial injustice".

What is a change of law?

10.18 It may not always be clear whether a case involves a "change" or "development" in the law, as the declaratory principle means that the Court is declaring effectively what the law always was. Unless a previous binding ruling is explicitly overturned, whether a ruling amounted to a "change" of law may be difficult to determine.

10.19 In 2008, in *Rowe*,[18] an appellant successfully challenged his convictions following a Criminal Cases Review Commission ("CCRC") reference for possession of indecent images of children, where some of the images had been deleted from a computer disk, but police investigators had been able to access the images using specialist software (which the appellant would not have had). In 2006, in *Porter*,[19] the CACD had ruled that an appellant was not in possession of an image if that image had been put beyond their reach by being deleted.

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16 See discussion of these topics in Chapters 4 and 8.

17 That is, for the CACD to extend the time for giving notice in accordance with s 18(3) of the Criminal Appeal Act 1968.

18 [2008] EWCA Crim 2712, (2008) 172 JP 585.

19 [2006] EWCA Crim 560, [2006] 1 WLR 2633.

10.20 The prosecution suggested that *Rowe* was appealing on the basis of a change in the law. However, the Lord Chief Justice, Lord Judge, ruled that this was not a *change* of law case:[20]

> Before the decision in *Porter* this court had not addressed the problem of possession of indecent images of children in the context of items deleted from a computer or computers in a defendant's possession. *Porter* explained the principles… If, following his application, the appellant had been granted leave to appeal, whether by the single judge, or, following refusal by the single judge, if he had applied to this court, we must assume that the principles now explained in *Porter* would have been decided in this case some time before *Porter* was decided. Until *Porter* was decided, however, the law had simply not been defined.

10.21 Conversely, in *Tierney*,[21] the CCRC referred the conviction of two appellants for assault occasioning actual bodily harm on the basis that an alternative of common assault should have been left to the jury, despite defence counsel having opposed this. In 2006, in *Coutts*,[22] the House of Lords had held that a judge in a murder case should have left manslaughter available despite the defendant opposing this (because the defendant had claimed that he had accidentally killed the victim), because the prosecution's case had been that the killing was intentional. The defendant had opposed this, claiming that he had accidentally killed the victim.

10.22 The CCRC referred the convictions in *Tierney* to the CACD on the basis that *Coutts* did *not* represent a change in the law but merely reaffirmed well-known principles. The CACD disagreed with Lord Judge saying:[23]

> In reality *Coutts* represented and required of criminal courts that a new approach should be taken to the problem of alternative verdicts. The previous way in which this issue was addressed is exemplified by the decision of the Court of Appeal in *Coutts* itself. For all practical purposes the House of Lords in *Coutts*, while not expressly overruling the earlier House of Lords' decision in *R v Maxwell*,[24] effectively deprived it of authority.

10.23 He went on to make clear that accordingly, the CCRC should apply the "substantial injustice" test to any new applications on this basis:[25]

> It seems apparent that as a matter of reality the law has changed. In our judgment this court would normally approach any application for leave to appeal out of time, following a trial which had taken place before *Coutts* was decided in the House of Lords, and based on the ground that the judge had failed to leave an alternative verdict to the jury as if it represented a change of law case. The conflict between these two approaches indicates that it will not always be at all clear whether a legal

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20 [2008] EWCA Crim 2712, (2008) 172 JP 585 at [20], by Lord Judge CJ.

21 [2009] EWCA Crim 2220.

22 [2006] UKHL 39, [2006] 1 WLR 2154.

23 [2009] EWCA Crim 2220 at [25], by Lord Judge CJ.

24 [1988] 1 WLR 1265, CA.

25 [2009] EWCA Crim 2220 at [25], by Lord Judge CJ.

ruling represents a change of law rather than a restatement of existing principle, or a change of law rather than clarification of a hitherto unaddressed question – and therefore whether the substantial injustice test will be applied by the Court.

The legal basis of the "substantial injustice" test

10.24 The "substantial injustice" test was established in *Hawkins*, in which the CACD ruled:[26]

> It is plain, as we read the authorities, that there is no inflexible rule on this subject, but the general practice is plainly one which sets its face against the reopening of convictions recorded in such circumstances. Counsel submits—and in our judgment submits correctly—that the practice of the Court has in the past, in this and comparable situations, been to eschew undue technicality and ask whether any substantial injustice has been done.

10.25 It should be noted that here the Court repeatedly refers to a "practice" rather than a "test". It is not clear that the Court was intending to lay down a rule of law. Indeed, it refers to "general practice" in explicit contradistinction to an "inflexible rule".

10.26 As we explained in the Issues Paper, the authorities cited do not clearly support the conclusion drawn.[27] The case cited which most directly addressed the issue was *Ramsden*,[28] which, rather than laying down or applying a rule, stressed the Court's discretion. Indeed, the Court in *Ramsden* held that:[29]

> Where a subsequent decision of a superior court has produced an apparent change in the law, that coupled with other circumstances may be a factor which will induce the court to grant leave to appeal out of time.

10.27 None of the authorities cited in *Hawkins* in support of the "substantial injustice" test established that the CACD had routinely applied such a test to appeals out of time in change of law cases.[30]

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26 *R v Hawkins* [1997] 1 Cr App R 234, CA, 240. Hawkins had pleaded guilty to obtaining property by deception, before the House of Lords in *Preddy* held that the debiting of a bank's account and the crediting of the borrower's account could not amount to obtaining property. In other post-*Preddy* cases, the CACD had been able to substitute a conviction for an alternative offence. However, as the law then stood, this was not possible where the applicant had pleaded guilty. The CACD ruled that there was no injustice in Hawkins' conviction as alternative charges could have been laid although those suggested by the prosecution were "by no means simple or free from controversy".

27 See Law Commission, Criminal Appeals: Issues Paper (July 2023) paras 6.18-19. *R v Lesser* (1940) 27 Cr App R 69, CCA, *R v Ayres* [1984] AC 447, HL, and *R v Pickford* [1995] QB 203, CA were not change of law cases, and *Pickford* was an in-time appeal. *R v Mitchell* [1977] 1 WLR 753, CA was a change of law case, but the appellant had an in-time appeal against sentence pending, and if the conviction was upheld, the Court would have had to determine the appropriate sentence for an offence of which the defendant should not have been convicted. *R v McHugh* (1977) 64 Cr App R 92, CA was not clearly an out-of-time appeal (the judgment which formed the grounds of the appeal came less than four weeks after McHugh's conviction) and the single judge had granted leave so the question of whether to grant leave did not arise.

28 *R v Ramsden* [1972] Crim LR 547, CA.

29 Above, by Bridge J.

30 The remaining case cited was *R v Molyneaux* (1981) 72 Cr App R 111, CA. This was a change of law case. *R v Duncalf* [1979] 1 WLR 918, CA, decided shortly after Molyneaux's conviction, held that conspiracy to

10.28 While it would be correct to observe that those cases showed that the CACD had regularly declined appeals where there was no substantial injustice, until 1995 the "proviso" had explicitly permitted the Court to do just that (see discussion of the "proviso" at paragraphs 2.20 and 2.28 above). The proviso was abolished by section 2 of the Criminal Appeal Act 1995. As counsel in the case of *Kansal* put it, "[a]ll the authorities referred to by Lord Bingham CJ in *R v Hawkins* and in *R v Graham*, were decided at a time when the proviso still existed".[31]

The "substantial injustice" test after Hawkins

10.29 The rule was reaffirmed in *Ramzan*, in which the CACD said:[32]

> It is the very well established practice of this Court, in a case where the conviction was entirely proper under the law as it stood at the time of trial, to grant leave to appeal against conviction out of time only where substantial injustice would otherwise be done to the Defendant … We have no doubt that the practice is very fully established, endorsed by successive Lords Chief Justice, binding upon us and soundly based in justice.

10.30 *Hawkins* effectively established the "substantial injustice" test as the CACD's practice, and it has been endorsed and applied by the CACD in several cases.[33] It was also endorsed by the Supreme Court in *Jogee*.[34] It is now established law.[35]

Criminal Justice and Immigration Act 2008

10.31 In 2008, the test was given Parliamentary approval when the Criminal Justice and Immigration Act 2008 enabled the CACD to apply the same test to cases referred by the CCRC as it would apply when considering an application for leave to appeal out of time. The test itself is not laid out in the Act. Section 16C of the Criminal Appeal Act 1968 now allows the CACD to turn down an appeal against conviction which has been referred by the CCRC where the only ground of appeal is a change in the law.

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steal is not an offence under common law but under the Criminal Law Act 1977. However, in *Molyneaux* the CACD held that this error only meant that the indictment was defective for citing the wrong basis of the offence, not a nullity, so it applied the proviso.

31 *R v Kansal (No 2)* [2001] EWCA Crim 1260, [2001] 3 WLR 751 at [14], by Rose LJ VPCACD.

32 *R v Ramzan* [2006] EWCA Crim 1974, [2007] 1 Cr App R 10 at [30] and [37], by Hughes LJ.

33 *R v Johnson* [2016] EWCA Crim 1613, [2017] 4 WLR 104; *R v Ramzan* [2006] EWCA Crim 1974, [2007] 1 Cr App R 10.

34 *R v Jogee, Ruddock v The Queen* [2016] UKSC 8, [2016] UKPC 7, [2017] AC 387.

35 The Supreme Court has not, and probably cannot, assess the "substantial injustice" test as a matter of law. In *R v Garwood* [2017] EWCA Crim 59, [2017] 1 WLR 3182 the CACD held that it cannot certify a point of law of general public importance – which is required in order that leave can be obtained to appeal to the Supreme Court – where it has refused leave to hear the appeal: an appeal can only be taken to the Supreme Court against a decision on the substantive appeal, not a decision not to hear the appeal. Where a person cannot prove "substantial injustice", and is therefore refused leave, there will be no decision on the appeal itself, and therefore no decision which can be appealed to the Supreme Court. A challenge could therefore only be brought if the CCRC had referred a case and the CACD used the power in s 16C Criminal Appeal Act 1968 to dismiss the appeal.

10.32 The CCRC (while saying that it did not oppose the legislation in principle) expressed concern that it did not explicitly lay out the "substantial injustice" test:[36]

> The present wording gives the Court no guidance whatever as to the circumstances in which a development in the common law may be disregarded and it does not follow that the statutory provision is to be applied in line with the Court's long-established practice in respect of applications for leave to appeal out of time based on a change in the law.
>
> The absence of the link to substantial injustice means that change of law could be disregarded in cases where in our view it should be taken into account and we believe that it is right for Parliament to give this guidance to the judges of the Criminal Division and thereby limit the scope of the discretion …
>
> The inclusion of a reference to 'substantial injustice' should prompt the Court over time to elucidate and clarify its meaning which is essential if a provision of such importance is to be understood by all those affected by it or who have to deal with it.
>
> The Criminal Cases Review Commission, in particular, needs to know the basis on which legal developments will be disregarded if it is to be able properly and sensibly to apply the 'real possibility' test in the Criminal Appeal Act.
>
> The absence of a reference to substantial injustice and the enactment of the clause in its present open-ended form would preclude or seriously inhibit the House of Lords from ever being able to offer guidance as to the proper scope of the new clause.
>
> It is true that the expression 'substantial injustice' even in this context suffers from some uncertainty, but that is a reason for including it in the statutory provision so that it can be adequately defined or shaped by the Court in the light of past experience and future cases. It is not a reason for a clause that is wholly destitute of guidance.

Director of Revenue and Customs Prosecutions ("DRCP") v CCRC[37]

10.33 In this case, the Revenue and Customs Prosecution Office ("RCPO") sought to challenge the CCRC's practice of referring cases to the CACD on the basis of the ruling in *Saik*. The RCPO sought to establish that the CCRC was required to have regard to the CACD's own practice in respect of change of law cases. The RCPO was unsuccessful on this point. The Administrative Court held that the test was "a practice of the CACD which operates at a stage with which the Commission is not concerned". (We discuss this aspect of the case in Chapter 11, from paragraph 11.288.)

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36 Letter from Prof Graham Zellick (Chair of the CCRC) to Lord Garnier, quoted in *Hansard* (HC), 20 November 2007, vol 483, col 401.

37 [2006] EWHC 3064 (Admin), [2008] 1 All ER 383.

10.34 The Court noted that Lord Justice Hughes (as he then was) had referred to the "well-established practice" of the CACD in *Ramzan*. It went on to note, however, that "substantial injustice" was absent from the rulings in *Ramsden* and *Mitchell*:[38]

> Nor can it be said that the CACD has consistently applied the "substantial injustice" test since *Hawkins* … In addition to a degree of inconsistency in the adoption of the substantial injustice test, there has also been a discernible unpredictability in its application … In our judgment, even accepting (as we do) that there is a practice in the CACD of refusing extensions of time and leave to appeal in change of law cases, that practice is not always applied with consistency and, to the extent that it requires consideration of substantial injustice, which is not always referred to, it can be unpredictable.

10.35 *DRCP v CCRC* was overruled by the CACD in *Cottrell and Fletcher*.[39] However, the Lord Chief Justice did not demur from the Administrative Court's findings as to how the test had been applied by the CACD, saying:[40]

> We do not doubt that there have been occasions when the practice has not been followed, but they do not undermine the essential policy reasons on which the principle is based. As applied in this Court, it is inherent that the policy permits of exceptions.

Establishing "substantial injustice": the temporal aspect

10.36 The Court in *Hawkins* gave no guidance as to how "substantial injustice" was to be assessed. In *Hawkins* itself, there was no substantial injustice because, on the facts, the defendant was clearly guilty of conduct which could have been prosecuted under alternative charges. However, the practice was framed as "backward-looking", asking whether any substantial injustice *had been done*.[41] (This perhaps points to the practice's basis in the proviso, which allowed the Court to dismiss an appeal where "no miscarriage of justice *ha[d] actually occurred*".[42])

10.37 However, in *Ramzan*, Lord Justice Hughes referred to the "very well established practice of this court, in a case where the conviction was entirely proper under the law as it stood at the time of trial, to grant leave to appeal against conviction out of time only where substantial injustice *would otherwise be done to the defendant*".[43]

10.38 Whether injustice *had been done* to the defendant and whether substantial injustice *would otherwise be done* to the defendant are different questions, but will sometimes

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38 [2006] EWHC 3064 (Admin), [2008] 1 All ER 383, at [41], by Maurice Kay LJ.

39 As discussed in Chapter 11 at paras 11.288 and following, in *R v Cottrell and Fletcher* [2007] EWCA Crim 2016, [2007] 1 WLR 3262 Lord Judge CJ took the opportunity to overrule a decision of the High Court on the scope of the CCRC's discretion. As the CCRC was not a party to that case, it was unable to appeal the decision to the House of Lords. (Had the DRCP sought leave to appeal the decision in *DRCP v CCRC*, the CCRC would have been a party to that appeal.)

40 *R v Cottrell and Fletcher* [2007] EWCA Crim 2016, [2007] 1 WLR 3262 at [47], by Lord Judge CJ.

41 [1997] 1 Cr App R 234, CA, 240, by Lord Bingham CJ.

42 Criminal Appeal Act 1907, s 4(1); Criminal Appeal Act 1968, s 2(1).

43 *R v Ramzan* [2006] EWCA Crim 1974, [2007] 1 Cr App R 10 at [30], by Hughes LJ (emphasis added).

amount to the same thing. For instance, as the CACD recognised in *Ordu*,[44] when considering substantial injustice in relation to a murder conviction, if substantial injustice is established on the basis of the strength of the case that the change of law would have made a difference, it is unnecessary to consider the continuing impact of the conviction separately, because the person would have received a life sentence, and even if they had been released, would be subject to lifelong restrictions and the possibility of recall to prison.

10.39 Thus, as recognised in *Ordu*,[45] although the test is variously framed in forward- and backward-looking terms in *Johnson*,[46] this distinction would make no difference as all the appellants were serving life sentences for murder. If there was substantial injustice in the person having been convicted, the consequences would be ongoing and there would be substantial injustice if leave to appeal were not allowed.

10.40 There appears to be some inconsistency of practice as identified in *DRCP v CCRC*.[47] *Ordu*[48] is a notable exception, where the Court noted that the applicant would have had a defence had the corrected law been applied, but held that there would be no substantial injustice were leave to appeal out of time refused.

The backward-looking substantial injustice test: what must be shown?

10.41 *Hawkins* did not go beyond asking whether a "substantial injustice" has occurred. This is perhaps not surprising as the Court in *Hawkins* was, it said, explaining its practice and eschewing undue formality, not laying down a test.[49] Professor Spencer, however, seemed in no doubt that for his first category of case, "where it is now clear that the conduct for which D was previously convicted was, under the law as now restated, no crime at all … the conviction surely should be set aside".[50]

10.42 However, as mentioned above at paragraph 10.35, in *Cottrell and Fletcher*, the Lord Chief Justice said:[51]

> In short, the principle is that the defendant seeking leave to appeal out of time is generally expected to point to something more than the mere fact that the criminal law has changed, or been corrected, or developed. If the appeal is effectively based on a change of law, and nothing else, but the conviction was properly returned at the time, after a fair trial, it is unlikely that a substantial injustice occurred.

10.43 It is not entirely clear what the Lord Chief Justice had in mind by "something more". On one reading, "something more" could mean that the mere fact that the law has

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44 *R v Ordu* [2017] EWCA Crim 4, [2017] 1 Cr App R 21 at [21], by Edis J.

45 Above, at [21], by Edis J.

46 *R v Johnson* [2016] EWCA Crim 1613, [2017] 4 WLR 104, at [15], [21], [23] and [57] it is framed as backward-looking; at [19], [20], [25], [28], [182] and [191] it is framed as forward-looking.

47 [2006] EWHC 3064 (Admin), [2008] 1 All ER 383 at [41], by Maurice Kay LJ.

48 *R v Ordu* [2017] EWCA Crim 4, [2017] 1 Cr App R 21.

49 *R v Hawkins* [1997] 1 Cr App R 234, 240, by Lord Bingham CJ.

50 J R Spencer, "Criminal appeals founded on a change in case-law" (2014) 73 *Cambridge Law Journal* 241, 243.

51 [2007] EWCA Crim 2016, [2007] 1 WLR 3262 at [46], by Lord Judge CJ.

changed is not enough – the appellant must show that it was material to their conviction. However, such an interpretation seems unlikely, as this always would be a prerequisite for concluding that the conviction was unsafe. On another reading, it could mean that if the person was convicted in line with the law as it was understood at the time, then even the fact that they would not have been convicted under a correct application of the law is not enough – there must still be "something more".

Ordu and the dual test

10.44 In *Ordu*,[52] the Court appeared to suggest that the two interpretations of "substantial injustice" were cumulative: it was not enough that, had the law been correctly applied as subsequently case law established it should have been, the appellant would have been acquitted.[53] Ordu was able to demonstrate that there had been a substantial injustice: he had been convicted of an offence even though he had a defence which ought to have led to his acquittal. However, he was additionally required to demonstrate that there would be further substantial injustice were the appeal not heard. His appeal was therefore rejected on the basis that:[54]

> he has now lived through all the adverse consequences and the conviction and emerged to a happier, more settled and safe life in the United Kingdom. The conviction and sentence is now a long time ago and quashing the conviction will not remedy the unpleasant memories which are now its only legacy.

10.45 Against this, in some recent cases where it was contended that a conviction would have been stayed on grounds of abuse of process because the defendant was a victim of trafficking and had committed the offence due to compulsion, the CACD has accepted that the consequences of a conviction for a person's future employment[55] and/or immigration status[56] could amount to substantial injustice requiring the conviction to be quashed.

10.46 *Ordu*, moreover, reads down the clear statement in *Johnson* that "it is not … material to consider the length of time that has elapsed. If there was a substantial injustice, it is irrelevant whether that injustice occurred a short time or a long time ago. It is and

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52 *R v Ordu* [2017] EWCA Crim 4, [2017] 1 Cr App R 21.

53 Ordu was convicted in 2007 of possessing a false or improperly obtained identity document with intent: he had fled Turkey and attempted to enter the UK on a false passport. When he was detained at passport control, he disclosed his full name and made a (subsequently) successful claim for asylum. Section 31 of the Immigration and Asylum Act 1999 provides a defence for a person who commits a relevant offence in coming to the UK "directly from a country where his life or freedom was threatened", but it was thought not to apply as Ordu had come via Germany – rather than directly from Turkey.

In *R v Asfaw* [2008] UKHL 31, [2008] 1 AC 1061, the House of Lords held that the defence was available to a person who was seeking asylum in another country and only transiting through the UK, and by analogy, *R v Mateta* [2013] EWCA Crim 1372, [2014] 1 WLR 1516 held it was available to a person who had arrived in the UK having transited a safe country.

54 *R v Ordu* [2017] EWCA Crim 4, [2017] 1 Cr App R 21 at [33], by Edis J.

55 *R v O* [2019] EWCA Crim 1389.

56 *R v GS* [2018] EWCA Crim 1824, [2018] 4 WLR 167. The CACD ruled that the appellant's precarious immigration status was capable of demonstrating substantial injustice. However, the CACD was not persuaded that her case would have been stayed on grounds of abuse of process had the law been correctly applied.

remains an injustice".[57] In *Ordu* (a case brought many years after the conviction) it is suggested that this observation applies only to "that class of case, and no doubt, murder cases generally" – the statement follows from the mandatory life sentence for murder.

10.47 *Ordu* and *Hawkins* appear to be in conflict. *Hawkins* says clearly that the test is whether any substantial injustice has been done; *Ordu* says that the test is whether any substantial injustice would be done and the fact that a substantial injustice had been done is only relevant where the consequences are such that not quashing the conviction would amount to a substantial injustice.

"Substantial injustice" and alternative convictions

10.48 In *Hawkins*, the first issue the CACD considered in asking whether there had been any substantial injustice in his conviction was the fact that it was "plain that other counts could have been laid … and that if objection had been taken on the present grounds to the counts laid … such additional counts would in all probability have been preferred".

10.49 Professor Spencer has suggested that in such cases, the "substantial injustice" test is "not wholly logical, but it is probably the best that can be done".[58] One particular issue is that, as we discuss in Chapter 9, there are constraints on the CACD's ability to substitute an alternative conviction. The conviction must be one that would have been possible on the indictment. However, the indictment might well have omitted detail which would have been required had the prosecution been seeking a verdict on the alternative charge. It might well be the case that the evidence at trial, combined with the jury's verdict, puts beyond any doubt that the person would have been convicted of the alternative charge, but it might not have been possible on the basis of the indictment. However, if the error of law had been identified during the trial, it would probably have been possible to amend the indictment to include the required considerations.

10.50 It is also worth noting that at the time of *Preddy*, for reasons associated with the wording of the Criminal Appeal Act 1968,[59] the Court was unable to substitute a conviction where the appellant had pleaded guilty. (This anomaly was addressed in the Criminal Justice Act 2003.)[60]

10.51 It is also questionable whether it is an appropriate use of the CACD's resources to reopen longstanding convictions under a corrected understanding of the law when the result would be a technical rectification of the offender's record to specify precisely of which offence they were guilty.

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57 *R v Johnson* [2016] EWCA Crim 1613, [2017] 4 WLR 104 at [21].

58 J R Spencer, "Criminal appeals founded on a change of law" (2014) 73(2) *Cambridge Law Journal* 241, 243.

59 Criminal Appeal Act 1968, s 3 provides that in order to substitute a conviction for an alternative offence the CACD to find that the *jury* must have been satisfied of facts which proved the defendant guilty of the other offence. If the defendant pleaded guilty to the relevant charge, there will not have been a jury trial (unless the defendant pleaded not guilty to one or more other charges).

60 Criminal Appeal Act 1968, s 3A, inserted by Criminal Justice Act 2003, s 316(3).

10.52 The question of how far it should be possible to appeal on the basis of a subsequent development in the law, where a person was undoubtedly guilty of another offence, is particularly problematic in relation to appeals based on the ruling of the Supreme Court on joint enterprise – and specifically "parasitic accessory liability" in *Jogee.*[61] This case identified the common law as having taken a "wrong turn" in relation to the circumstances in which a party to a joint enterprise could be convicted of a more serious offence committed by another party in pursuance of that joint enterprise; and particularly in cases where the accessory or secondary party was convicted of murder. The complication is that the Supreme Court anticipated that in almost all circumstances where an accessory was convicted of murder under parasitic accessory liability, they would – if not guilty of murder – be guilty of manslaughter.[62]

JOINT ENTERPRISE

10.53 When two or more parties commit a crime together, they are all liable to be convicted of the offence. This includes those who encouraged, assisted, or procured commission of the offence.[63] For instance, three people rob a bank together: one threatens the staff with a gun; the second bags up the money; the third acts as a lookout, and drives the getaway vehicle. Although only one of the three has threatened violence, and only one has physically handled the cash, all are guilty of robbery.

10.54 This is the usual form of joint enterprise: it is not a form of "guilt by association". It requires that the defendant engaged in a course of criminal conduct (including by encouragement or assistance), and that they possessed any necessary mental element. For instance, in the case of murder, the necessary mental element is intention to cause death or serious injury. For joint enterprise, a secondary party would be required intentionally to encourage or assist the principal party in the commission of the murder, with the intention that the principal party cause the victim either death or serious harm.

10.55 Where a person is a party to an offence as an accessory, "conditional" intent is sufficient. For instance, if the bank robbers agree that they – specifically the conspirator with the gun – will shoot a member of staff if this is necessary to secure compliance, then all can be convicted in relation to the shooting if it is carried out. Whether this is murder, or assault causing grievous bodily harm, or assault causing actual bodily harm, will depend on what actually transpires (for instance, whether the victim dies) and what the secondary party intended. (For instance, in order for the secondary party to be convicted of murder, it would need to be shown that the

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61 *R v Jogee, Ruddock v The Queen* [2016] UKSC 8, [2016] UKPC 7, [2017] AC 387.

62 This assumption has been questioned by, for instance, Prof Dennis Baker, who argues that if a person is a party to a joint enterprise to cause actual bodily harm, but another party (the principal) inflicts serious harm resulting in death, the secondary party is not guilty of manslaughter. They cannot be guilty as a secondary party to manslaughter (as the principal has committed murder, not manslaughter. However, the act which they did assist or encourage – the infliction of actual bodily harm – cannot be shown to have resulted in death in circumstances where the principal has done an act of inflicting greater harm; D Baker, "Lesser included offences, alternative offences and accessorial liability" (2016) 80 *Journal of Criminal Law*, 446.

63 Accessories and Abettors Act 1861.

secondary party intended that if the shooter had cause to discharge their weapon, they would do so intending to kill or cause serious harm.)

Parasitic accessory liability

10.56 Parasitic accessory liability was a special form of joint enterprise liability, which would generally only arise in relation to violent offences. This doctrine is usually attributed to the judgment of the Privy Council in *Chan Wing-Siu*, where Sir Robin Cooke referred to a:[64]

> wider principle whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend… The criminal culpability lies in participating in the venture with that foresight.

10.57 Under the doctrine of parasitic accessory liability, it was ruled that it was sufficient if the defendant foresaw that the other party might intentionally kill or seriously harm the victim to fix a party to a joint enterprise with liability for murder.[65]

Jogee: Parasitic accessory liability abolished

10.58 In the combined cases of *Jogee and Ruddock*, a bench sitting as both the UK Supreme Court and the Privy Council held that the common law had taken a "wrong turn": it was not enough that the accessory might have foreseen the more serious offence, they must have intended it. Foresight was no more than evidence from which a jury might infer the requisite intention. If the jury is satisfied:

(1) that there was a common purpose to commit an offence, and

(2) that the defendant must have foreseen that a co-accused might well commit a more serious offence,

then it could in an appropriate case conclude that the defendant had the conditional intent that the more serious offence be committed, and accordingly convict. However, that would be a question of fact for the jury.[66]

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64 *Chan Wing-Siu v The Queen* [1985] AC 168, PC (Hong Kong), 175G, by Sir Robin Cooke. Note that the intended joint enterprise need not involve the actual infliction of violence. In the case of *Chan Wing-Siu* the conviction was for the use of knives to threaten. In *R v Daley (Kyrone)* [2015] EWCA Crim 1515, [2015] 7 WLUK 505, the defendant was convicted on the basis that he knew the killer had a gun and therefore was an accessory to an offence of possession of a firearm.

65 A further aspect of parasitic accessory liability was a focus on knowledge that the co-accused had a weapon (*Chan-Wing Siu v The Queen* [1985] AC 168, PC (Hong Kong)); in *R v Powell, R v English* [1999] 1 AC 1, HL, 28B, Lord Hutton made clear that a defendant B would not be guilty under the doctrine if the co-accused A "suddenly produces and uses a weapon of which B knows nothing and which is more lethal than anything B contemplates A or any other participant may be carrying". As held in *R v Tas* [2018] EWCA Crim 2603, [2019] 4 WLR 14 at [37], by Sir Brian Leveson PQBD, "one of the effects of *Jogee* is to reduce the significance of knowledge of the weapon so that it impacts as evidence … going to proof of intention, rather than being a pre-requisite of liability".

66 *R v Jogee, Ruddock v The Queen* [2016] UKSC 8, [2016] UKPC 7, [2017] AC 387.

Joint enterprise after *Jogee*

10.59 Despite the abolition of parasitic accessory liability in *Jogee*, joint enterprise laws have continued to cause controversy.

10.60 The act of assistance or encouragement need not make a material contribution to the offence carried out. Although "mere presence" is not enough to ground liability, even presence coupled with knowledge (of foresight) of the principal offender's intention, a person may assist or encourage by their presence at the scene "by contributing to the force of numbers".[67] Dr Beatrice Krebs has questioned whether "where there is little, if any, evidence of accessorial involvement beyond presence and knowledge (or foresight) [it would] be appropriate to infer the requisite intent solely from evidence of presence and knowledge or foresight". She has argued that doing so "risks slipping back to parasitic accessory liability".[68]

10.61 Moreover, the intent that is required for a joint enterprise conviction under the law post-*Jogee* can be conditional intent – for instance, that violence will be used if the victim puts up any resistance.

10.62 This means that a jury may decide a secondary party's guilt taking into account their association with a primary offender who they knew to carry weapons or to be prepared to engage in violence, especially where they are present at the crime.

10.63 While the doctrine of joint enterprise as discussed in paragraphs 10.53 to 10.55 is generally uncontentious, there has been unease in some quarters over the way in which the doctrine has been applied in practice. Some commentators have expressed concern as to whether the principle is used inappropriately or disproportionately in relation to young black men and boys, with some suggesting that racial stereotyping may lead to inferences as to the necessary knowledge and intent being made inappropriately.

10.64 In his review of the treatment of Black and Minority Ethnic individuals in the criminal justice system for the previous government, the Rt Hon David Lammy MP wrote:[69]

> Despite the [Supreme] Court ruling [in *Jogee*], experts in the field remain concerned about some of the legal practice on Joint Enterprise. Many are not convinced that the line between 'prohibitive' and 'prejudicial' information is drawn appropriately in the evidence put before juries when cases reach trial. People must be tried on the basis of evidence about their actions, not their associations – and the evidence put before juries must reflect this.

10.65 In 2023 the Crown Prosecution Service ("CPS") commenced a pilot to review Joint Criminal Enterprise homicide and attempted homicide cases.[70] This was in part due to

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67 *R v Jogee, Ruddock v The Queen* [2016] UKSC 8, [2016] UKPC 7, [2017] AC 387 at [89], by Lord Hughes and Lord Toulson JJSC; *R v N* [2019] EWCA Crim 2280, [2020] 4 WLR 64.

68 B Krebs, "Written jury directions and contributing to the force of numbers" (2020) 84 *Journal of Criminal Law* 172, 174.

69 *The Lammy Review* (8 September 2017) p 20.

70 *Crown Prosecution Service Joint Enterprise Pilot 2023: Data Analysis* (29 September 2023).

campaigning from organisations Liberty and JENGbA[71] as well as recommendations in the Lammy Review.[72] According to the CPS data, which drew on an overall sample of 190 cases and 680 defendants, 271 or 39.85% were aged between 18-24, 632 or 93% were male and 205 or 30.15% were Black despite this group only amounting to around 4.04% of the population. The CPS data shows that the proportion of black boys and young men who were prosecuted in joint enterprise prosecutions was significantly greater than their proportion of the population as a whole.

10.66 Nisha Waller, an academic and researcher at APPEAL, citing the CPS data above, observes that young adults are in particular affected by joint enterprise and "[a]round 500 people under 25 have received life sentences for murder or manslaughter in multidefendant cases in the past decade".[73]

10.67 We discuss this in more detail in Chapter 17.

THE "SUBSTANTIAL INJUSTICE" test in post-*Jogee* appeals

10.68 *Johnson* concerned a group of appeals by appellants seeking to appeal convictions based on joint enterprise following the ruling of the Supreme Court in *Jogee*.[74] In *Johnson*, the CACD appears to have accepted that the "substantial injustice" test could be met where the corrected application of the law would have made a difference to whether the appellant would have been convicted.

10.69 It said:[75]

> the court will primarily and ordinarily have regard to the strength of the case advanced that the change in the law would, in fact, have made a difference. If crime A is a crime of violence which the jury concluded must have involved the use of a weapon so that the inference of participation with an intention to cause really serious harm is strong, that is likely to be very difficult. At the other end of the spectrum, if crime A is a different crime, not involving intended violence or use of force, it may well be easier to demonstrate substantial injustice. The court will also have regard to other matters including whether the applicant was guilty of other, though less serious, criminal conduct.

10.70 The first sentence does not explain how the test is to be applied: it does not say where along the spectrum the Court will find "substantial injustice" to be made out. Taken in isolation, the first sentence might indeed be interpreted as meaning that the appellant

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71 In 2012, the House of Commons Justice Committee had recommended that the CPS should record and monitor data about the use of joint enterprise in prosecutions: Joint Enterprise, Report of the Justice Committee (2010-12) HC 1597, para 25. In 2023, JENGbA, represented by Liberty, legally challenged the CPS failure to do so. As a result, the CPS agreed to pilot a six-month study: S Hatterstone, "Joint enterprise prosecutions to be monitored for racial bias", *Guardian* (16 February 2023).

72 Recommendation 1 in the Lammy Review is "A cross-[criminal justice system] approach should be agreed to record data on ethnicity…This more consistent approach should see the CPS and the courts collect data on religion so that the treatment and outcomes of different religious groups can be examined in more detail in future": *The Lammy Review*, p 7.

73 N Waller, *The legal dragnet: Joint enterprise law and its implications* (2024), p 1.

74 [2016] UKSC 8, [2016] UKPC 7, [2017] AC 387.

75 [2016] EWCA Crim 1613, [2017] 4 WLR 104 at [21].

needs to show that it *would* have made a difference to the outcome had the jury been directed in accordance with *Jogee*. This may be a difficult threshold to meet since the jury must, at a minimum, have found that the person foresaw serious harm being caused, and since it is open to a jury to infer (conditional) intent from foresight, it would always have been *possible* for a jury which convicted on the basis of the law pre-*Jogee* to have properly convicted the defendant post-*Jogee*; it just does not follow that they would have done so given the evidence in the case.

10.71 However, the remainder of the paragraph anticipates that a person might demonstrate substantial injustice "at the other end of the spectrum" (even though it would still have been open to a jury faced with such circumstances to infer conditional intent that serious harm be caused).

10.72 In *Mitchell (Laura)*, the CACD ruled that *Jogee*-compliant directions would not have made a difference as "it would have been open" to the jury to infer from her foresight that someone would cause the victim serious injury (which the jury must at a minimum have found the defendant had) that the defendant had had the necessary conditional intent that the victim be caused serious harm.[76]

10.73 This formulation appears to suggest that an appellant must show that the jury, directed in accordance with Jogee, *would not have* convicted the appellant of murder. If an appellant is required to prove this in order to demonstrate "substantial injustice" – as some have suggested *Mitchell (Laura)* suggests – then it may well be impossible.

10.74 To date, only two appeals based on the change of law in *Jogee* have been successful, and only one of these was required to meet the "substantial injustice" test.[77] In *Crilly*,[78] a murder conviction was overturned where the defendant had been convicted on the basis of violence used by the defendant's co-accused during a burglary. The CACD found that the case was at the "middle to lower" end of the spectrum. The planned offence, burglary, was not in itself an act of violence. There was evidence that the appellant believed the property was unoccupied. The group did not take weapons. It was only when the property was found to be occupied that the burglary became a robbery. The robbery was brief and spontaneous. Lastly, the appellant was not directly involved in the violence. The conviction was based entirely on the appellant's foresight (and only at the point in time that the burglary became a robbery) that his co-accused might cause serious harm to the victim if the victim put up resistance.

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76 *R v Mitchell (Laura)* [2018] EWCA Crim 2687 at [12], by Hallett LJ VPCACD.

77 There was a successful appeal based on *Jogee* in *R v Deszer* [2018] EWCA Crim 454, [2019] Crim LR 624, but this was an in-time appeal (the application was lodged twenty-eight days after conviction, on the same day that the Supreme Court handed down the ruling in *Jogee*).

There was another successful appeal in the joint enterprise murder case of *R v Sossongo* [2021] EWCA Crim 1777. However, this was on the basis of fresh evidence of autistic spectrum disorder and ADHD, not the change of law. The Court concluded that without this evidence, the jury could not fairly judge the defendant's credibility and his involvement in the joint enterprise. Crucially, a co-accused (who had the same conditions, but whose diagnosis was before the jury) was acquitted. The jury cannot have concluded that everyone present was a party to the murder, and had it known Sossongo had the same conditions, it might not have inferred that he had the understanding of the nature of the others' intentions that it must, in order to have convicted, have inferred.

78 [2018] EWCA Crim 168, [2018] 4 WLR 114.

10.75 Lady Justice Hallett Vice-President of the CACD found:[79]

> The evidence against him was not so strong that we can safely and fairly infer the jury would have found the requisite intent to cause really serious bodily harm had the issue been left to them by the judge.

10.76 As articulated in *Crilly*, the test appears to suggest that a conviction should be quashed unless the CACD is satisfied that the jury, directed in accordance with *Jogee*, *would have* convicted the appellant of murder.

10.77 Although, in a later case,[80] Lady Justice Hallett, Vice-President of the CACD, confirmed *Johnson*, her finding in *Crilly* has been interpreted by some as reversing the normal approach in applying *Johnson*. Her phrasing reads as very much closer to suggesting that a correct application of the law *could* have made a difference than *would* have made a difference. It could be seen as a relaxation of the test applied in *Johnson* and other cases rather than as a reformulation. The idea that a different test was applied in *Crilly* would also explain why *Crilly* alone was successful.

When will an appellant be required to demonstrate "substantial injustice"?

10.78 The CACD developed the "substantial injustice" test through its ability to grant or refuse leave to appeal out of time. While the use of time limits may seek to create a "bright line" rule, the line may, in practice, be blurred. For instance, in *Johnson*, the CACD had to consider in which cases (of those it was considering following *Jogee*) the applicant would be required to demonstrate substantial injustice. It said:[81]

> One type of case is where an application for leave to appeal was made within 28 days on non-*Jogee* grounds and either granted (as in the appeal of Lewis and Asher Johnson) or refused, but renewed to the Full Court, as in the appeal of Garwood. Subsequently, an application was made to add grounds based on the decision in *Jogee*.
>
> A second type of case is where the application was made within 28 days on non-*Jogee* grounds, but the issue of leave to appeal [was] not determined by either the Single Judge or the Full Court, as progress in the case was adjourned by the Registrar pending the decision in *Jogee*. An application was then made on *Jogee* grounds …
>
> The final scenario is one in which one appellant appealed on *Jogee* grounds in time and a co-defendant (who did not) then seeks to appeal on similar grounds out of time.

10.79 The CACD ruled that for the first of these, while the case could be considered on the basis for which leave had already been granted, the application to amend the grounds to include the change of law would be subject to the "substantial injustice" test. In the

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79 Above, at [40], by Hallett LJ VPCACD.

80 *R v Johnson-Haynes* [2019] EWCA Crim 1217, [2019] 4 WLR 133 at [42], by Hallett LJ VPCACD: "That test [in *Johnson*], albeit formulated in different ways, has stood the test of time … and, in our judgment, has been applied consistently since the decision".

81 *R v Johnson* [2016] EWCA Crim 1613, [2017] 4 WLR 104 at [25]-[28].

second category, the appeal of two appellants was allowed; however, the Court held it relevant that here "counsel … drew the attention of the trial judge to the fact that the Court of Appeal had certified a question for the Supreme Court in the appeal of *Jogee* … Counsel was therefore, in effect, asking the trial judge to reserve the question" of parasitic accessory liability. In respect of the final category, it held that the potential substantial injustice between co-defendants who had and who had not brought their appeals in time was likely to require leave to be permitted.[82]

10.80 Where *Jogee* grounds were raised unsuccessfully prior to the ruling in *Jogee*, the CACD has also required appellants to demonstrate "substantial injustice". In *Daley*,[83] the appellant brought an in-time appeal, arguing that parasitic accessory liability should not have been applied when the offence which formed the basis of his parasitic accessory liability for murder was not – as in the cases establishing parasitic accessory liability – participation in a violent assault, but rather possession of a weapon. The CACD refused his appeal saying that it was "in truth … not so much about the judge's directions but about the very existence of parasitic joint accessory liability". Counsel for the appellant at this appeal explicitly sought to "to preserve the position of the appellant while awaiting the decision of the Supreme Court in *Jogee*". The CACD rejected this appeal on the basis of the existing law. It seems clear that had Daley appealed (or been given leave to appeal) to the Supreme Court, he would have been successful on this point, as per *Jogee*.[84]

10.81 However, when the CCRC then referred Daley's case back to the CACD on the basis of *Jogee*, the CACD rejected it because he was required to demonstrate substantial injustice and had not done so.[85]

CRITICISM OF THE "SUBSTANTIAL INJUSTICE" TEST

10.82 Application of the "substantial injustice" test has received a significant degree of criticism from academics, commentators and respondents to the Issues Paper, especially in relation to post-*Jogee* appeals.

10.83 In Consultation Question 11, we asked:

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82 The position of co-defendants had previously been considered in *R v Ramzan* [2006] EWCA Crim 1974, [2007] 1 Cr App R 10, but an argument along the lines of that accepted in *Johnson* was rejected at [70], by Hughes LJ: "It is submitted for M that leave should be granted because (a) he would otherwise be treated differently to his co-accused R ... We do not consider that the fact that R is by chance here on referral by the CCRC, because of his previous application for leave, should cause us to decide M's application otherwise than we would have done if R had been in the same position as M". R was not required to demonstrate substantial injustice (under the law as it stood pre-2008, since it was a CCRC reference); M was; the fact that the co-defendants were treated differently did not amount to substantial injustice in itself.

83 *R v Daley* [2015] EWCA Crim 1515. The appellant presumably framed the appeal on these narrow grounds correctly judging that the CACD would not rule out parasitic joint accessory liability wholesale.

84 However, had he been successful on the *Jogee* point, the CACD would still have had to consider whether this defect made the conviction unsafe.

85 *R v Daley* [2019] EWCA Crim 627. (As explained in the next section, where the appeal is by way of a reference by the CCRC, the "substantial injustice" test is applied by the CACD at the decision stage, rather than the leave stage (because the reference replaces the leave stage).)

> Is there evidence that the application of the "substantial injustice" test to appeals brought out of time on the basis of a change in the law is hindering the correction of miscarriages of justice?

10.84 Only two consultees considered that there was no evidence that the application of the "substantial injustice" test brought out of time on the basis of a change in the law was hindering the correction of miscarriages of justice. The CPS asserted that it "has no evidence to suggest that the application of the "substantial injustice" test is hindering the correction of miscarriages of justice".

10.85 The rest of the consultees considered that the "substantial injustice" test applied to appeals brought out of time on the basis of a change in the law was hindering the correction of miscarriages of justice. In the following sections, we consider these criticisms made by both consultees and commentators.

Inconsistency

10.86 First, it has been suggested that the CACD has been inconsistent in its application of the test. Dr Elaine Freer, for instance, notes that the fact that a person would inevitably have been convicted of other offences was taken as highly material as demonstrating no substantial injustice in post-*Jogee* cases.[86] Conversely, in the 1977 case of *Mitchell*,[87] the only case cited as authority for the "substantial injustice" practice in both *Hawkins* and *Ramzan*, "it was expressly contemplated by that court that, where there had been no criminality under the law as interpreted … that should lead to an appeal being allowed".[88]

10.87 Yet Dr Freer points out that this is inconsistent with *Ordu*,[89] where an extension of time was not granted on the grounds that he had suffered no substantial injustice, even though he would have had a full defence to the charge:[90]

> Whilst commentators have pointed to *Ordu* as an aberration that stands alone, I argue that the fact it exists serves to illustrate the arbitrariness and inconsistency caused by the application of "glosses" by the court when considering reinterpretation-based appeals.

10.88 Many consultees also considered that the "substantial injustice" test lacked precision and was applied in an inconsistent manner.

10.89 The Howard League for Penal Reform focused on the impact of this inconsistency on those providing legal advice to potential appellants:

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86 E Freer, "Leaving the gloss off: a critique of the appellate courts' approach to reinterpretation of law cases" (2022) 138 *Law Quarterly Review* 239, 244.

87 *R v Mitchell* [1977] 1 WLR 753, CA.

88 E Freer, "Leaving the gloss off: a critique of the appellate courts' approach to reinterpretation of law cases" (2022) 138 *Law Quarterly Review* 239, 244.

89 *R v Ordu* [2017] EWCA Crim 4, [2017] 1 Cr App R 21.

90 E Freer, "Leaving the gloss off: a critique of the appellate courts' approach to reinterpretation of law cases" (2022) 138 *Law Quarterly Review* 239, 245.

> There is also some inconsistency of approach by the CACD in applying the test of "substantial injustice", which the Issues Paper acknowledges in paragraphs 6.46 and 6.68-6.70. This makes it more difficult to anticipate – for both lawyers and the CCRC – whether an application for leave to appeal is likely to be successful. Clarity in this area is much needed.

10.90 JENGbA summarised the case law following *Johnson*, arguing that:

> These authorities demonstrate that there is little or no consistency in how the *Johnson* test has been applied. Indeed, it is not clear that there is any real consensus about what that test actually is (other than a useful tool to ensure that floodgates remain firmly shut). Whilst the application [of the] safety test usually requires that the Court of Appeal consider whether the decision of the jury might reasonably have been affected (*R v Pendleton*), the Courts have not been consistent about whether this is a question that need be asked when determining the strength of the case that the change in the law would have made a difference. Where the question has been asked, it has been in markedly different terms. In *Crilly*, it was on a basis that can scarcely be distinguished from the traditional safety test (and it is therefore not surprising that *Crilly* is the only post-*Jogee* appeal to have succeeded). In every other such appeal, the Court of Appeal has been at pains to say that it is not enough merely to demonstrate that the conviction is unsafe, without ever suggesting what might practically suffice.

10.91 It concluded:

> The record of post-*Jogee* appeals demonstrates that in fact the test is one that, in almost every case, cannot be met. However, it is also clear that in many of the cases which have come before the Court of Appeal after *Jogee*, the argument that the convictions were unsafe was at least as strong as in *Jogee* itself (and in some cases stronger).

Conviction of the demonstrably innocent

10.92 The decision in *Ordu* has also attracted criticism for the suggestion that the conviction of someone provably innocent might not amount to a "substantial injustice" justifying the grant of an extension of time in which to apply for leave to appeal. Professor John Spencer has described the decision in *Ordu* as "demonstrably unjust and, unlike some harsh outcomes, … not one forced upon [the CACD] whether by binding precedent, or compelling practical considerations":[91]

> It is completely unrealistic to say that a criminal conviction loses its potency to harm the convicted person as soon as it is spent… In truth, a conviction is a stain upon on the convicted person's character which only completely disappears if it is quashed.

10.93 In its response to the Issues Paper, the Howard League for Penal Reform argued:

> The idea that the conviction of someone provably innocent may not amount to a "substantial injustice" (as in *Ordu*) seems fundamentally unfair, as well as out of touch with the reality of a criminal conviction (as noted in paragraph 6.71 of the

[91] J R Spencer, "Upholding the Conviction of the Innocent" [2017] 3 *Archbold Review* 8, 9.

Issues Paper). The "stain" of a conviction (as described by Professor John Spencer) can have both practical and psychological impacts, which do not simply disappear when the conviction is spent.

10.94 Professor John Spencer went further, suggesting:

> If the change of law means makes it clear that the convicted defendant was really innocent, then justice obviously requires that the conviction should be quashed… If the change of law means that there is a decent chance that the jury at a jury trial would have acquitted then it seems equally obvious to me that the appellant suffers a "substantial injustice" unless he or she is given the chance of a retrial.

The burden of proving "substantial injustice"

10.95 Other commentators have argued that the "substantial injustice" test places an undue burden on appellants to prove their innocence. Dr Beatrice Krebs notes that in *Mitchell (Laura)*,[92] the CACD held that *Jogee*-compliant directions would not have made a difference as "it would have been open" to the jury to infer from her foresight that someone would cause the victim serious injury (which the jury must at a minimum have found the defendant had) that the defendant had had the necessary conditional intent that the victim be caused serious harm. In doing so, she says:[93]

> The court raises the bar for substantial injustice. That test is almost impossible to meet if it suffices for a conditional intent that the jury *could have,* rather than *must have*, so inferred. There is all the difference between an *entitlement to infer* and a finding that the jury *must have inferred*.

10.96 This criticism is echoed by Sir Richard Buxton, a former Court of Appeal judge, who notes that "in the case of *Hall,* one of the applicants in *Johnson* … the court, at [91], considered that there was not a "sufficiently strong" case that the defendant would not have been convicted if the law in *Jogee* has been applied".[94]

10.97 Several consultees also considered that the test is too hard to meet, particularly in joint enterprise cases.

10.98 For example, the Law Society argued:

> The 'substantial injustice' test … should be reviewed with a view to reform. Generally, changes of law are not retrospective. However, cases such as *Jogee* relate not to changes in the law but to an understanding that the law has been misapplied in previous cases. We would submit that the threshold is simply too high and has operated to effectively impose an unsustainable bar for applicants in very complex and difficult cases.

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92 *R v Mitchell (Laura)* [2018] EWCA Crim 2687.

93 B Krebs, "For want of a shoe her freedom was lost: judicial law reform and dashed hopes in *R v Mitchell*" (2019) 83 *Journal of Criminal Law* 20, 22 (emphasis in original).

94 R Buxton, "Joint Enterprise: *Jogee*, substantial injustice and the Court of Appeal" [2017] *Criminal Law Review* 123, 124, citing *R v Johnson* [2016] EWCA Crim 1613, [2017] 4 WLR 104 at [91].

10.99 The Cardiff University Law School Innocence Project observed:

> The fact there has only been one successful appeal against conviction (*R v Crilly*) based on the misapplication of the law suggests the bar is too high. There is a significant difference between foresight of serious harm and intention to cause serious harm. It is possible that in many cases, such as *Laura Mitchell*, the jury may have found differently had they been directed appropriately. The Court of Appeal cannot know the potential impact this may have had on the jury.

10.100 Dr Louise Hewitt has conducted a study with the CCRC in order to provide a statistical portrait of those who have applied to the CCRC who were convicted under joint enterprise liability.[95] In her response she said that the Court's approach to secondary parties "is so restrictive that the CCRC are effectively unable to provide access to justice for this category of applicant".

Rebutting the fear of opening the floodgates

10.101 A number of consultees rejected the floodgates concern that has been noted by some commentators (see above, at paragraphs 10.12 to 10.13) and which was discussed in the Issues Paper.[96]

10.102 Cardiff University Law School Innocence Project noted:

> Whilst there may be a legitimate resource concern in trying to control the potential number of appeals, a conviction for murder [carries] a mandatory life sentence … The impact this will have had on the lives of the individuals wrongly convicted under *Chan Wing Siu* is significant. Whilst there may need to be a test to control leave to appeal, this should not be as restrictive – even removal of the word 'substantial' may be sufficient to enable a fairer fact specific decision on a case-by-case basis.

10.103 The London Criminal Courts' Solicitors Association argued that reliance on the floodgates argument risked perpetuating miscarriages of justice:

> the fear of "opening the floodgates" on appeals in certain areas appears to have led to a very restrictive view of cases meeting this test. If the floodgates need to be opened because there may have been miscarriages of justice that can be corrected, then that should not be something to be feared or prevented.

10.104 The Howard League for Penal Reform agreed:

> in the Court of Appeal (Criminal Division) Annual Report 2017-18,[97] it was noted by the then-Registrar of Criminal Appeals that, "there is an inherent tension in the competing public interests of finality and certainty in the administration of criminal justice as against the injustice of securing convictions based on an erroneous understanding of the criminal law." The low number of successful appeals post-

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95 L Hewitt, *The impact of R v Jogee: An examination of applications to the Criminal Cases Review Commission (CCRC)* (February 2023).

96 Law Commission, Criminal Appeals: Issues Paper (July 2023) para 6.14.

97 Judiciary of England and Wales, *In the Court of Appeal (Criminal Division) 2017-18* (2018), p 11.

Jogee suggests that the right balance between these 'competing interests' has not been found.

The "substantial injustice" test and summary cases

10.105 The "substantial injustice" test was developed by the CACD, initially in relation to its own practice in permitting an appeal to be brought out of time. Section 16C of the Criminal Appeal Act 1968 now provides a statutory basis for the CACD to apply that test in cases referred by the CCRC (which do not require leave). However, these apply only in relation to the CACD. There is no similar provision for magistrates' court appeals.

10.106 *Khalif*[98] establishes that "substantial injustice" is one of the factors that the Crown Court must take into account when deciding whether to allow leave to bring an appeal out of time but does not present it as a test in the same way that it is applied in the CACD.

10.107 How the CCRC is to approach appeals from magistrates' courts based on a development in the law is therefore uncertain. When deciding whether to refer a summary case for appeal, the CCRC is not generally obliged to consider whether the Crown Court would itself grant permission for an out-of-time appeal.[99]

10.108 As we discuss at paragraphs 11.288 to 11.296, in *Cottrell and Fletcher*[100] the CACD ruled that the CCRC is obliged to have regard to the practice of the CACD when considering whether to refer a conviction to that Court on the basis of a change in the law, and therefore to apply the "substantial injustice" test. Even if the CCRC is similarly obliged to have regard to the practice of the Crown Court when considering a reference to that Court, it is not clear that it is required to apply the "substantial injustice" test, since that is not the practice of the Crown Court.

10.109 In the case of *RC*, whose conviction for failing to provide a valid immigration document was referred by the CCRC to the Crown Court in 2019, the CCRC noted that the Court might find that the defence advice "was wrong only because of a subsequent change in the law". It therefore made clear that it had taken the view that even if this was correct, "substantial injustice may still be considered [because the conviction's] longer term implications for the appellant are arguably significant".[101] The applicant had been granted asylum but was unable to obtain indefinite leave to remain on account of his conviction.

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98 *R (Khalif) v Isleworth Crown Court* [2015] EWHC 917 (Admin).

99 This is supported by *R (CPS) v Preston Crown Court* [2023] EWHC 1957 (Admin), [2024] KB 348, where the High Court affirmed that where a conviction founded on a guilty plea is referred to the Crown Court by the CCRC, the appellant does not need to apply to the Crown Court to vacate the guilty plea. The High Court considered the challenge that the applicant would face in persuading the CCRC to refer their case at [43] (by Bennathan J) but did not suggest that the CCRC was required to apply a test akin to that which the Crown Court would apply.

100 [2007] EWCA Crim 2016, [2007] 1 WLR 3262.

101 CCRC, "Commission refers conviction of Mr C for appeal" (30 July 2019).

The distinction between murder and manslaughter

10.110 The Howard League for Penal Reform also questioned the suggestion that there is no substantial injustice where a person is convicted of murder when they might have been convicted of manslaughter:

> Similarly, the suggestion (as made by the CACD in *Johnson*) that there is no substantial injustice where, for example, a person is convicted of murder, where they would otherwise fall to be convicted of manslaughter, is difficult to understand. There are profound differences, not least in the mandatory imposition of a life sentence for murder (as noted by Dr Freer and Sir Richard Buxton, cited in paragraphs 6.74 and 6.75 of the Issues Paper). Our experience of working with, and talking to, young people convicted of murder on a joint enterprise basis tells us that these differences are not simply material, in terms of time spent in custody and on licence, but psychological. Secondary liability often comes at a high personal cost, including mistrust of 'the system' and difficulty in engaging with systems and programmes in prison that require acceptance of guilt/ personal responsibility.

10.111 Matthew Hicks and Ayaz Hussain, who are prisoners, jointly responded:

> How can it be just to allow the CACD to say that they "are reluctant to consider that conviction for murder and the consequent mandatory life sentence – amounts to a substantial injustice if the person would otherwise be guilty of manslaughter".

Race, joint enterprise prosecutions and the "substantial injustice" test

10.112 Some consultees suggested that the application of the "substantial injustice" test in cases based on the change of law relating to joint enterprise has a disproportionate effect on minority groups, especially young black men and boys.

10.113 APPEAL noted that:

> The "substantial injustice" requirement, which has no mandate from Parliament and thus no democratic legitimacy, is in particular hindering the correction of miscarriages of justice which, at their core, are about racism. Recently released data from the CPS, while limited in its scope, reveals significant racial disparities in 'joint enterprise' prosecutions. This data, though specific to post-*Jogee* cases, aligns with prior research findings covering both the pre- and post-*Jogee* period, consistently indicating racial disproportionality in prosecutions and convictions, most notable amongst young black men.

10.114 The Howard League for Penal Reform cited the work carried out by Dr Louise Hewitt and the CPS, discussed at paragraphs 10.100 and 10.65 respectively above:

> Research also (tentatively) indicates that the barriers to appealing a potentially wrongful conviction due to a change in law may be more significant for those who are Black. A study conducted in partnership with the CCRC and published earlier [in 2023] indicated that "there remains a lower number of applicants to the CCRC convicted under joint enterprise liability identifying as Black British, when considered in the context of existing sources that show the disproportionate representation of Black secondary suspects convicted of murder and/or manslaughter" (Hewitt,

2023).[102] It has long been established that defendants from Black and other racially minoritised backgrounds lack trust in the criminal justice system and it is suggested that this lack of trust may extend to the appeals process. This is particularly concerning considering the racial disparities that exist in joint enterprise cases, with data from a recent CPS pilot showing that 30% of defendants in joint enterprise cases were Black, most aged 18-24, despite Black people making up only 4% of the general population (CPS, 2023).[103] It is vital that the operation of appeals processes is examined in the context of the racial disparities and disproportionalities that permeate the criminal justice system.

10.115 The review mentioned in the Howard League's response was a pilot study by the CPS, in six areas, concentrating on homicides and attempted homicides which had been flagged as joint enterprises. The study found that 30.15% of those in the cases flagged as joint enterprise homicides/attempted homicides were black, compared with 4.04% of the population of England and Wales as a whole. (A comparison figure of the population of the six areas was not calculated.)[104] A further report is planned for May 2025.[105]

DISCUSSION

10.116 We think that the development of the test in *Hawkins* and its later development may have become an obstacle to the correction of miscarriages of justice.

An informal practice has become a test

10.117 In *Hawkins* the CACD referred to a "practice" under which it would "eschew undue technicality".[106] Instead, however, the practice has become a "test" that the applicant must surmount.

The test has become a "high threshold"

10.118 In *Johnson*,[107] the Lord Chief Justice, Lord Thomas of Cwmgiedd, described the "substantial injustice" test as a "high threshold", pointing to *Mitchell*,[108] where the Court was dealing with a case in which it "[w]ould be keeping him in prison, so to speak, when we as a court were convinced that he had not committed an offence".

10.119 It is not clear that the Court in *Hawkins*, in articulating the "substantial injustice" test, intended it be a "high threshold". As discussed above, at paragraph 10.28, it reflected the old proviso, which applied where "no (substantial) miscarriage of justice had

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102 L Hewitt, *The impact of R v Jogee: An examination of applications to the Criminal Cases Review Commission (CCRC)* (February 2023).

103 *Crown Prosecution Service Joint Enterprise Pilot 2023: Data Analysis* (29 September 2023).

104 Above.

105 Justice Committee, "Oral Evidence: Work of the Director of Public Prosecutions" (3 December 2024) Q 64.

106 *R v Hawkins* [1997] 1 Cr App R 234, 240, by Lord Bingham CJ.

107 *R v Johnson* [2016] EWCA Crim 1613, [2017] 4 WLR 104 at [20].

108 *R v Mitchell* [1977] 1 WLR 753, CA.

occurred".[109] Indeed, a natural reading of "substantial", in *Hawkins*, is one of "real" or "actual" injustice. The Court did not obviously intend it to mean "weighty" or "fundamental".

The test has expanded

10.120 Under *Hawkins* the Court would ask simply whether any substantial injustice had been done. It seemed clear at the time that having been convicted of an offence when the appellant was not guilty of any offence would easily pass the threshold for the applicant to be given leave to appeal.

10.121 Post-*Johnson* and *Ordu*, the Court now asks first whether the change in law would have made a difference to the outcome at trial, and then whether there would be any substantial injustice in allowing the conviction to stand; whether there is a "continuing impact of a wrongful conviction".

10.122 Despite the Court considering substantial injustice on a "forward looking basis" (in particular in trafficking and refugee cases) where an applicant can show that a conviction has consequences for – for instance – their residency or employability, the Court has continued to affirm *Ordu*.[110] This is notwithstanding the criticism of that decision which we have referred to above.

Section 16C is deficient

10.123 We agree with the CCRC that section 16C of the Criminal Appeal Act 1968 could have been better drafted and that by not putting the test into a statutory formulation it prevents clarification of that test. Had the legislation spelled out the test which was to be applied, we think the ambiguity in the courts' approach to the "substantial injustice" test would have been identified and the test to be applied clarified.

10.124 We also think that there is ambiguity in the phrase "development in the law". It is not a phrase which appears elsewhere in the statutory law of England and Wales.[111]

10.125 By seeking to leave maximum discretion to the CACD (saying that it "may", not "must", dismiss the appeal) the legislation also fails to address the problem identified by Nobles and Schiff – that where there is scope for the CACD to depart from its usual practice, there is a "real possibility" of it doing so for the purposes of the CCRC's referral test. Although the change effected in 2008 is intended to give the Court scope to dismiss appeals and thereby deter the Commission from referring cases (we discuss the evident tension between the CACD and the CCRC on this point in the next chapter) by trying to maximise the Court's discretion, the statutory provision leaves this tension in place.

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109 The proviso referred to "substantial miscarriage of justice" until 1966, and thereafter to "miscarriage of justice" without the qualification.

110 See the CACD's recent citation of *Ordu* in *R v Musa* [2024] EWCA Crim 307 at [21] and [25], by Holroyde LJ VPCACD and *R v AUS* [2024] EWCA Crim 322 at [25], by Holroyde LJ VPCACD.

111 The only statute employing this phrase (other than that reflecting the change in the Criminal Justice and Immigration Act 2008) is a provision in the Agriculture and Rural Communities (Scotland) Act 2024, s 3 requiring Scottish Ministers to have regard to developments in EU law when preparing a rural support plan.

The Court of Appeal Criminal Division's application of the test is unpredictable

10.126 As described above, the CACD's application of the test appears inconsistent. A person can demonstrate "substantial injustice" by pointing to the consequences of a conviction for their employability or immigration status. However, in post-*Jogee* cases, the fact that the consequence of a refusal to hear the application is that the person will remain subject to a life sentence for murder does not appear to be sufficient on its own.

Murder and manslaughter

10.127 We think that it amounts to a substantial injustice if a person is convicted of murder when, had the jury been properly directed, it could have returned a verdict of manslaughter. Quite apart from the fact that murder carries a much greater stigma, it carries with it a mandatory life sentence, whereas manslaughter does not, and while a life sentence would always potentially be *available* for manslaughter, it is far from inevitable where a defendant is convicted as a secondary party.

10.128 Indeed, *Ordu*, in a section discussing murder and manslaughter, appeared to have proceeded on the basis that this disparity will inevitably amount to a substantial injustice, and that where a person can show that they *had* suffered a substantial injustice in being convicted of murder rather than manslaughter, the "forward-looking" part of the test will always be satisfied.[112]

The "floodgates" argument

10.129 Some respondents queried the Court's fears of a "flood" of cases were appellants not required to demonstrate "substantial injustice".

10.130 There are previous examples of unwarranted "floodgates" arguments following from decisions of superior courts. For instance, in 2010, the UK Supreme Court held, in *Cadder*, that Scots law enabling suspects to be detained and questioned for up to six hours without receiving legal advice was contrary to article 6 of the ECHR. This led to the passing of emergency legislation, the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. The legislation received Royal Assent three days after the Supreme Court ruling. As well as addressing the incompatibility identified in *Cadder*, the legislation made provision intended to restrict appeals on the basis of this ruling. It imposed a requirement on the Scottish CCRC ("SCCRC") to "have regard to the need for finality and certainty in the determination of criminal proceedings" when considering whether it was in the interests of justice to refer a

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112 [2017] EWCA Crim 4, [2017] 1 Cr App R 21 at [21], by Edis J, analysing [21] in the case of *R v Johnson* [2016] EWCA Crim 1613, [2017] 4 WLR 104:

> That paragraph expressly contemplates a situation with which the court in *Johnson* was concerned, namely people who had been convicted of murder having voluntarily decided to commit some other crime jointly with the principal offender, "crime A". It is identifying the factors relevant to determining whether a substantial injustice would occur if leave were refused in that class of case and, no doubt, murder cases generally. *In that situation it is unnecessary to consider what the continuing impact of the conviction on the defendant is, or how long ago it occurred. This is because they had all been convicted of murder and were subject to life sentences.* In many cases they were still detained, but even if they had been released the impact of a life sentence is highly significant. If that sentence had been imposed on someone who was not guilty of murder this would clearly be a substantial injustice and that would be so whenever the sentence had been imposed. [emphasis added].

case.[113] It also provided a power for the High Court to reject an appeal referred by the SCCRC if the Court considered it was not in the interests of justice that any appeal should proceed, having regard to the need for finality and certainty in the determination of criminal proceedings.[114] However, a year later, the Carloway Review found that "the "flood" of referred cases that was feared following *Cadder* has not materialised".[115] Both of these provisions were repealed by the Criminal Justice (Scotland) Act 2016.

10.131 It should also be noted that the "substantial injustice" test has not necessarily reduced the CACD's workload because it has, in practice, had to examine the various types of appeal raised in *Johnson* to decide whether the appellant has demonstrated that there is a sufficiently strong case that they would not have been convicted had the jury been directed in line with *Jogee*. It is unlikely, because of the Court's practice of hearing argument de bene esse[116] before deciding whether to grant leave, that this is any more or less onerous than it considering the decision. We recognise, however, that the firm response in *Johnson* may have deterred other applications, and may have deterred the CCRC from referring further cases post-*Johnson*.

10.132 What the high threshold has prevented, however, is the need for the Court to consider whether to substitute a manslaughter conviction (and resentence the appellant) or to send the case for a retrial (with the implications for the prosecution, witnesses, the victim's family and friends and Crown Court resources that this would entail). It is correct to say – especially in the context of post-*Jogee* appeals – that relaxation of the test could lead to a large number of retrials, potentially of any defendant who had been convicted in a joint-enterprise situation where there has been an assault, fight, attack or killing. The situation is further complicated in that in many cases, there would be convicted co-defendants who might be yet to appeal their convictions, but where it would be in the interests of justice for defendants to be retried together.

The "Guy Fawkes" argument

10.133 In *Kansal*, the CACD expressed concern about the possibility of appeals being brought on the basis of a contemporary standards of fairness, and said ("sardonically" according to former CCRC Commissioner Laurie Elks):[117]

> Leaving aside colourful historical examples such as Sir Thomas More, Guy Fawkes and Charles I, all of whom would have benefited from convention rights, until the Criminal Evidence Act 1898, no defendant was permitted to give evidence on his own behalf. That is a clear breach of Article 6. Many examples in the 20th century of other rules and procedures which, viewed with the wisdom of hindsight, were in

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113 Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, s 7(3), amending s 194C of the Criminal Procedure (Scotland) Act 1995.

114 Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, s 7(4), inserting s 194D into the Criminal Procedure (Scotland) Act 1995.

115 Lord Carloway, *The Carloway Review* (2011) para 8.2.23.

116 "for what it's worth": the CACD's practice of hearing evidence sought to be adduced and received before deciding whether it is admissible and/or to formally receive it.

117 *R v Kansal (No 2)* [2001] EWCA Crim 1260, [2001] 3 WLR 751 at [24], by Rose LJ VPCACD.

> breach of the Convention could be given. But we resist that temptation lest, by succumbing, we exacerbate the problem to which we are drawing attention. For over 20 years, this court has adopted a pragmatic approach, confirmed by successive Lord Chief Justices, whereby a refusal to extend time to apply for leave to appeal has filtered out those seeking to take advantage of a change in the law since they were convicted... Subject to the outcome of further consideration of the breadth of the CCRC's discretion, it appears that Parliament, consciously or unconsciously, has completely emasculated that approach. If so, the consequential prospective work-load for the CCRC and for this court is alarming. If this is what Parliament intended, so be it. If not, the sooner the matter is addressed, by Parliament or by the House of Lords on appeal from this court, the better.

10.134 Elks suggests, however, the Guy Fawkes point is misplaced, as

> [Section] 44A [of the] Criminal Appeal Act 1968 requires that any appeal on behalf of a deceased appellant, including any appeal following reference by the Commission, may be brought only by (i) the deceased's widow or widower (ii) the deceased's personal representative or (iii) a person who by reason of family or similar relationship has a *substantial interest* in the outcome of the appeal.

10.135 In *Plantagenet Alliance*,[118] the High Court concluded that the collateral relatives of Richard III were unlikely to meet the (lower) test for personal standing applying for judicial review, a "*sufficient* interest in the matter to which the application relates". (The Plantagenet Alliance were granted standing as a "public interest" litigant.)

10.136 Given our provisional proposal that section 44A should be amended to allow the CCRC to refer a case without an appellant in exceptional circumstances, the force of this argument would necessarily be reduced (Consultation Question 70). However, we think that this is a power that the CCRC would rarely exercise. It is unlikely that the CCRC would consider there to be a public interest in referring such historical cases. Moreover, the CCRC has discretion to refuse to refer a historical case even though there is a person living who might be recognised by the CACD as having a substantial interest, and a real possibility that the Court would quash the conviction.[119]

OPTIONS FOR REFORM

10.137 We are provisionally satisfied that the "substantial injustice" test risks hindering the correction of miscarriages of justice, especially in relation to some of those who were convicted of murder during the "wrong turn" of parasitic accessory liability. It is possible that the high threshold applied to cases based on *Jogee* may be deterring applicants from seeking leave to appeal their convictions, or the CCRC from referring cases.

10.138 We acknowledge the evidence and arguments made which we set out above in respect of race, and particularly young black men and boys, in relation to joint enterprise, and the relevance of this to "substantial injustice", and invite consultees'

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[118] *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin), [2015] 3 All ER 261.

[119] *R (Westlake) v CCRC* [2004] EWHC 2779 (Admin). Mrs Westlake was the half-sister of Timothy Evans (see Appendix 1).

views and evidence on this in the context of criminal appeals. However, it is outside our terms of reference to consider the substantive law of joint enterprise and prosecutorial and police practice surrounding it. There is also limited data available. We recently announced a review into law and sentencing in homicide,[120] which "will consider the implications of the current law of joint enterprise (following [*Jogee*]) for any reform of the law of homicide".[121]

10.139 Having concluded that the existing test may hinder the correction of miscarriages of justice, the question arises how the test might be reformed – not only in terms of what alternative test might apply, but how any change would be effected. The "substantial injustice" test is non-statutory, although section 16C of the Criminal Appeal Act 1968 means that the CACD can apply it to cases referred to the Court by the CCRC. The test has developed out of the Court's application of the interests of justice test applied when considering whether to extend the time for giving notice of appeal under section 18(2) of the Criminal Appeal Act 1968. Given that there are time limits for bringing an appeal, the Court has discretion to grant leave to bring an appeal out of time. The normal test, as applied by the Court, is whether it is in the interests of justice to allow the appeal to be brought out of time, and finality is one of the considerations that the Court applies when considering where the interests of justice lie.

Explicitly release the CCRC from the test

10.140 One option would be repeal section 16C of the Criminal Appeal Act 1968. While the Court would retain the discretion to refuse leave to appeal out of time based on a change in the law, it would therefore be open to a person whose application to bring an appeal out of time by the CACD was refused to apply to the CCRC.

10.141 If change of law cases resulted in a large number of applications to the CCRC, especially ones that were not objectively meritorious, then the CCRC would be highly likely to develop its own policy in relation to how to approach change of law cases. In *DRCP v CCRC*, the High Court noted that the "tension" between the CACD and the CCRC was being addressed by the Commission's adoption of a new policy document on its discretion to refer despite finding a real possibility.[122] Likewise, after *Preddy*, the CCRC had adopted a policy of not referring cases where it could be foreseen that the Court would substitute an alternative conviction.

10.142 It is arguable that by requiring (in *Cottrell and Fletcher*[123] and *Neuberg*)[124] the CCRC to adopt the CACD's own approach to change of law cases, the CACD has prevented the CCRC from developing its own approach. Were the CCRC not required to apply the same test as the CACD (or indeed if the "substantial injustice" test were abolished), the CCRC could be expected to develop its own policy as to when it should refer cases based on a change of law, and when it should exercise its discretion not to refer.

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120 Law Commission, "Reviewing the law of homicide".

121 Law Commission, "Reviewing the law of homicide: Terms of Reference", para 1.3.

122 *R (DRCP) v CCRC* [2006] EWHC 3064 (Admin), [2008] 1 All ER 383 at [48], by Maurice Kay LJ.

123 [2007] EWCA Crim 2016, [2007] 1 WLR 3262.

124 [2016] EWCA Crim 1927, [2017] 4 WLR 58.

10.143 The difficulty with simply repealing section 16C, however, is the prior and subsequent case law requiring the CCRC to have regard to the practice of the CACD. In order to ensure the CCRC was truly free to refer cases which the CACD may consider ought not to be referred, there would need to be explicit provision which had the effect of overruling *Cottrell and Fletcher* and *Neuberg*. This, however, would risk reopening the tension between the Court and the CCRC that was evident in leading to *Cottrell and Fletcher* and *Neuberg*.

A statutory test

10.144 An alternative would be to define (and presumably restrict, at least to some extent) in statute the circumstances in which an appeal might be brought on the basis of a change in the law. One should note the difficulties in defining a change in the law, and in identifying whether a case involves a change of law. Although section 16C does refer to "a development in the law", this term is not defined.

10.145 If, as we provisionally propose in Chapter 9, the law on substituting convictions were to be relaxed, then the problem of change of law cases would fall away in relation to many convictions in the second class of case identified by Professor Spencer, where the person would have been guilty of other, *equally serious* offences. Concerning this class, it is unlikely that a person would challenge a conviction in circumstances where the Court would simply substitute a conviction for an alternative offence of similar gravity, where there would be no difference in sentence, and where the long-term consequences of the conviction for the offender would be the same.

10.146 We note Professor Spencer's concern about the possibility that appellants might be acquitted on a technicality where the development in the law merely means that they were convicted of a different offence (under the "old" law) to that which they "should" have been held to have committed under the "corrected" law. One option might be to give the Court and CCRC explicit discretion not to hear/refer an appeal against conviction if, had the point of law been taken in earlier proceedings, the Court would have convicted the appellant of a similar offence. It would be necessary to define in what circumstances an alternative conviction would be "similar". This could take into account not only whether the convicted person would have received a similar sentence for the alternative offence, but also whether this would have had implications in terms of the stigma associated with the offence or the implications of the offence for the person's life post-conviction.

10.147 For instance, we think that murder and manslaughter are qualitatively different, because of the mental element involved. We also think that while sexual offences are not necessarily more serious than other offences, there might be a qualitative difference between a conviction for a sexual offence and a conviction for a non-sexual offence – not least because of post-conviction restrictions and the stigmatisation involved. Likewise, there may be a qualitative difference between a conviction for an offence of dishonesty and similar conduct caught by a strict liability offence.[125] For

[125] For instance, s 5(1) of the Regulation of Railways Act 1889 makes it an offence to fail to produce a ticket showing that the appropriate fare has been paid. Section 5(3) creates a similar offence where there is intent to avoid payment. (The maximum penalty for the former is a level 3 fine. For the latter it is a level 3 fine, or in the case of a second or subsequent offence, three months' imprisonment. Although sentencing guidelines do not provide for imprisonment to be imposed, the possibility of a custodial sentence means that a community order is also available.)

instance, an offence involving dishonesty is more likely to have consequences for a regulated professional's fitness to practise.[126]

Consultation Question 53.

10.148 We invite consultees' views on how the law governing appeals based on a development of the law might be reformed, in particular to enable appeals where a person may not have been convicted of the offence (or of a comparable offence) had the corrected law been applied at their trial.

[126] See, for example, Bar Standards Board "Guidance on approach to criminal convictions incurred by regulated persons" (15 October 2019), p 5. This states that where an offence attracts a fine or lesser penalty, and there is no dishonesty element, a disciplinary sanction of a fine is likely to be sufficient, but where the offence involves dishonesty, the starting point is disbarment. The Solicitors Regulation Authority and the Bar Standards Board have both struck off professionals for offences of *deliberate* fare evasion (see for instance P Bennett, "A question of honesty: solicitor struck off for fare evasion", *Law Society* (5 July 2022) and Bar Standards Board, "Past disciplinary findings: Dr Peter Raymond Barnett" (26 September 2016).

Chapter 11: The Criminal Cases Review Commission

11.1 The Criminal Cases Review Commission ("CCRC") was established by section 8 of the Criminal Appeal Act 1995 ("CAA 1995") following the recommendation of the Royal Commission on Criminal Justice (the "Runciman Commission"). The CCRC is an independent body responsible for investigating alleged miscarriages of justice in England, Wales and Northern Ireland. It has the power to refer convictions and sentences for appeal to the appellate courts, offering an opportunity to those who have exhausted their statutory right of appeal to have their cases reconsidered by the appellate court. It was the first such state miscarriage of justice organisation in the world and remains the largest. Similar bodies have since been established in Scotland, Norway, New Zealand, and Canada.

11.2 Since its inception, the CCRC has referred over 850 cases for appeal, almost 600 of which have been successful.

11.3 The terms of reference of this project require us to consider specifically whether the conditions for referring cases to the Court of Appeal Criminal Division ("CACD") under the CAA 1995 allow the CCRC to fulfil its functions. This includes the predictive "real possibility" test which the CCRC must apply when considering whether to refer a case to an appellate court. It also includes the statutory conditions on which cases it can refer – for instance, the restriction on referring cases which have not been unsuccessfully appealed (or leave sought to appeal) and the requirements for new evidence or argument.[1]

11.4 The CCRC is a creature of statute, governed by the CAA 1995 and we therefore consider that other legislative provisions governing the CCRC are also within the wider terms of reference of this project.

11.5 However, several of the responses we received went much further, criticising the culture of the CCRC, its funding, its management structure, and leadership. To some extent these mirror criticisms made by former Commissioners.[2] While unable to make provisional proposals in respect of these, we have taken these criticisms, and the CCRC's response to similar criticisms, into account, and note the resignation of the CCRC's Chair in January 2025 (discussed at paragraph 1.13 above).[3]

11.6 We have also had regard to the findings made about the CCRC by the House of Commons Justice Committee and the Westminster Commission on Miscarriages of Justice.[4] In addition, we have taken into consideration the findings made by Chris

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1 Both these conditions are subject to a discretion for the CCRC to refer cases which do not meet the condition "if it appears to the Commission that there are exceptional circumstances which justify making" the reference (CAA 1995, s 13(2)).

2 See J Robins "How a watchdog lost its bite" (2024) 6 *Proof* 30, which includes reflections from former Commissioners Alexandra Marks, Sharon Persaud, Laurie Elks and David Jessel.

3 D Casciani, "Chair of miscarriages of justice review body quits", *BBC News* (14 January 2025).

4 The Westminster Commission was set up by the All-Party Parliamentary Group on Miscarriages of Justice. It was chaired by Lord Garnier and Baroness Stern.

Henley KC in the review he undertook for the CCRC into its handling of Andrew Malkinson's applications.[5] Chris Henley's review was initiated by the CCRC itself and was limited to the Malkinson case; he did not look at the CCRC's conduct of other cases (although he did consider the similar case of Victor Nealon). A wider inquiry into Mr Malkinson's case is being led by Her Honour Judge Sarah Munro KC. That inquiry is looking not only at decisions and actions made by the main agencies involved (including the CCRC) in Mr Malkinson's case, but also the procedures in place within the agencies concerned.

BACKGROUND

11.7 As discussed in Chapter 2 prior to the establishment of the CCRC, alleged miscarriages of justice were investigated by the "C3"[6] Division of the Home Office and could be referred to the CACD by the Home Secretary. This power was not exercised often as, despite a wide discretion to refer cases the Home Secretary "thought fit" to do so, the Home Secretary's stated policy was that references would only be made where there was new evidence or other considerations of substance not raised at the original trial and there was a "real possibility" that the appeal court would not uphold the conviction.[7] This approach was intended to avoid undue interference by the executive with judicial decisions and referring cases where the appeal had no real prospect of succeeding.[8]

11.8 There had long been calls for an independent body to take over this function:

(1) In 1968, JUSTICE[9] recommended a panel of independent lawyers who would investigate petitions submitted to the Home Office. They would report their findings to the Home Secretary who would be expected to recommend a pardon if the report established a probability of innocence. The Home Office rejected this saying that the "fatal flaw" was that this would "erect a procedure for review of decisions of the courts which would be both outside the jurisdiction of the judicial system and only nominally within Ministerial control".[10]

In the absence of such a reform, JUSTICE took it upon itself to perform a similar task.

(2) In 1976, Lord Devlin's inquiry into identification evidence recommended that the Home Office should study the feasibility of setting up an independent review

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5 Chris Henley KC, *Independent Review of the Criminal Cases Review Commission's Handling of Andrew Malkinson's Case* (2024).

6 "C3" was previously known as "C4"; it became "C3" in or around June 1998 (*Hansard* (HC), 16 June 1988, vol 135, col 698).

7 Report of the Royal Commission on Criminal Justice (1993) Cm 2263, p 181, para 6.

8 Above, pp 181-182, para 6.

9 JUSTICE is a registered charity, formed in 1957 and drawn primarily from the legal professions, whose objectives are to secure a fair, accessible and equal justice system. It is the British section of the International Commission of Jurists. Under its first secretary, Tom Sargent, it developed an expertise in investigating and disclosing individual miscarriages of justice.

10 *Hansard* (HC), 22 July 1971, vol 821, col 1652.

tribunal in which cases "unsuitable for reference to the Court of Appeal" could be handled.[11]

(3) In 1982, the House of Commons Home Affairs Committee recommended a review body under a legally qualified chair charged with advising the Home Secretary on the exercise of the Royal Prerogative of Mercy. The review body would decide for itself what further investigation was necessary, and would be able to bring in an outside police force to investigate.

(4) In 1988, Sir John Farr, a Conservative MP, tabled amendments to the Criminal Justice Bill that would have set up an independent review body along the lines proposed in the 1982 Home Affairs Committee Report. The body would "advise him on the annulment, cancellation or revocation of a conviction applicable to cases currently considered by himself and by the Court of Appeal".[12] The amendment was supported by the Opposition, but rejected by the Government on the ground that it would "supplant the Court of Appeal".[13]

11.9 It is evident that all three of the reviews listed above felt that any miscarriage of justice identified by the independent body would be addressed through the Royal Prerogative of Mercy rather than by referring the case back to the CACD.

11.10 The Government rejected the Home Affairs Committee's proposals in 1983, saying that "It is better that miscarriages of justice which occur within the judicial system should, so far as possible, be corrected by that system". The Home Secretary did, however, offer to "exercise his power of referral more readily" while the Lord Chief Justice saw "room for the Court to be more ready to exercise its own powers to receive evidence or, where appropriate and practicable, to order a retrial".[14]

11.11 In a further report in 1989, JUSTICE reaffirmed its proposal, stressing that "The review body would not have power to quash a conviction or alter the sentence; its function would be to attempt to establish the truth in a case and to advise the Secretary of State accordingly… The Secretary of State would not have to follow its advice, although he would undoubtedly have to answer searching Parliamentary questions if he rejected it".[15]

11.12 The Runciman Commission concluded that the Home Secretary's role in investigating and referring convictions conflicted with the separation of powers between the executive and the judiciary and led to a reluctance to investigate cases.[16] It therefore recommended that this power should be transferred to a new Criminal Cases Review

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11 Report to the Secretary of State for the Home Department of the departmental committee on evidence of identification in criminal cases (1976) HC 338, p 145.

12 *Hansard* (HC), 16 June 1988, vol 135, col 663-664.

13 *Hansard* (HC), 16 June 1988, vol 135, col 697.

14 Reply to the Sixth Report from the Home Affairs Committee of the House of Commons (1983) Cmnd 8856.

15 JUSTICE, *Miscarriages of Justice* (1989) p 71.

16 Report of the Royal Commission on Criminal Justice (1993) Cm 2263, p 182, para 9.

Authority ("the Authority") "set up to consider alleged miscarriages of justice, to supervise their investigation and to refer appropriate cases to the Court of Appeal".[17]

11.13 It said that the legislation establishing the Authority should give it operational independence, but that it should be required to submit an annual report to the Minister concerned, who would be answerable to Parliament about resources and whether the Authority was properly constituted for the task it was required to perform. It also recommended that "the Authority should be independent of the court structure", and for that reason it should not have a judicial chair. The Authority should consist of several members, and the Chair should be appointed for his or her personal qualities rather than any particular qualifications or background.

11.14 It recommended that there would not be a right of appeal nor a right to judicial review in relation to the decisions made by the Authority.

11.15 These recommendations were broadly given effect in the CAA 1995. The Home Secretary's power to refer appeals to the CACD was abolished.[18] The Royal Prerogative of Mercy was retained, and the Secretary of State[19] given a power to request an investigation by the CCRC of a matter relevant to the exercise of ministerial discretion to recommend the exercise of the Royal Prerogative of Mercy. In such cases, the CCRC's findings in relation to that matter must be treated as determinative by the Secretary of State.

References

11.16 In relation to cases tried on indictment, the CCRC may refer to the CACD:

(1) a conviction;

(2) any sentence, except a sentence fixed by law,[20] imposed in relation to a conviction;

(3) a verdict of not guilty by reason of insanity; and

(4) a finding that the person is under a disability and did the act or made the omission charged.[21]

11.17 The CCRC may also refer as appeals summary convictions to the Crown Court, including convictions arising from a guilty plea (which are not ordinarily appealable), and any sentence imposed in relation to such a conviction.[22] Schedule 11 of the Armed Forces Act 2006 extended the CCRC's role to cover convictions in military

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17 Above, p 182, para 11.

18 CAA 1995, s 3.

19 Then the Home Secretary, now the Justice Secretary.

20 "Sentence", for the purposes of a reference to the CACD, has the same meaning as in the CAA 1968, and so "includes any order made by a court when dealing with an offender": CAA 1968, s 30(2). Therefore, although the CCRC may not refer a sentence that is fixed by law (that is, a life sentenced imposed for murder) it can refer the minimum term or a whole-life order imposed in relation to a life sentence.

21 CAA 1995, ss 9(1), (5) and (6).

22 Above, ss 11(1) and (2).

courts. Convictions by the Court Martial and the Service Civilian Court and any sentence in respect of such convictions, may be referred by the CCRC to the Court Martial Appeal Court and the Court Martial respectively (as well as a finding of not guilty by reason of insanity or that the person is under a disability and did the act or made the omission charged).[23]

11.18 References may be made by the CCRC following an application by, or on behalf of, the individual convicted of the offence, or they may be made without such an application.[24] There is no time limit within which an application must be submitted to the CCRC, or a reference must be made by the CCRC. The CCRC has a range of statutory investigatory powers, including the power to obtain documents and appoint an investigating officer to assist with the examination of the case.[25] These are discussed at paragraphs 11.231 to 11.254 below.

11.19 A decision to make a reference to the relevant appellate court must be made by at least three Commissioners.[26] The CCRC does not require leave from the appellate court to make a reference and the CACD may not make a loss of time order (see paragraph 6.131 above) where the case has been referred by the CCRC.[27]

11.20 Such references are treated by the appellate court as an appeal by the person against the conviction, sentence or finding.[28] Therefore, the CCRC's role in the case ceases upon reference; although the CACD will have the CCRC's statement of reasons for referring the case, the case is presented by the appellant and the appeal proceeds according to the usual appeal process. In relation to references which are made to the CACD and the Court Martial Appeal Court, the appeal may only be made on a ground which is related to the reasons given by the CCRC for the reference.[29] If the appellant wishes to raise a ground of appeal which has not been raised by the CCRC, they must seek leave from the Court.[30] This restriction does not apply to cases referred to the Crown Court, where the appeal proceeds by way of a rehearing.

Conditions for making a reference

11.21 A reference may only be made by the CCRC where:

(1) it considers that there is a "real possibility" the conviction, sentence, verdict or finding would not be upheld, because of:

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23 Above, ss 12A(1), (7) and (8) and 12B(1).

24 Above, s 14(1).

25 Above, ss 17-21.

26 Above, Sch 1, paras 6(2)(a) and (3)(a).

27 Criminal Appeal Act 1968, s 29(2).

28 CAA 1995, ss 9(2), (3), (5) and (6), 11(2) and (3), 12A(3), (5), (6), (7) and (8) and 12B(2) and (3).

29 Above, s 14(4A).

30 Above, s 14(4B).

(a) in the case of a conviction, verdict or a finding, an argument or evidence not raised in the original proceedings or in any appeal or application for leave to appeal against it; or

(b) in the case of a sentence, an argument on a point of law or information not raised in the original proceedings or in any appeal or application for leave to appeal against it; and

(2) an appeal against the conviction, verdict, finding or sentence has been determined or leave to appeal against it has been refused.[31]

11.22 The CCRC may make a reference in the absence of a new argument or evidence in relation to the conviction, verdict or finding (see paragraphs 11.212 to 11.223), or where the right of appeal has not been exercised (see paragraphs 11.370 to 11.376), if there are "exceptional circumstances" justifying the reference.[32] Circumstances which might be considered exceptional include where there was a guilty plea in the magistrates' court (so an appeal against conviction is not possible),[33] where the applicant is particularly vulnerable, and where there is a need to use the CCRC's investigatory powers. Circumstances which are not considered by the CCRC to be exceptional include receiving legal advice that there are no grounds for appeal and being unable to secure legal representation.[34]

11.23 Because of the requirement that there has already been an appeal against the conviction, verdict, or finding, or leave to appeal has been refused, where exceptional circumstances do not apply, the CCRC will advise applicants to seek leave from the CACD to bring an appeal out of time. If this is refused, the CCRC will be able to consider the case.

11.24 When considering whether to make a reference in relation to a conviction on indictment or a sentence for such a conviction to the CACD, the CCRC may refer any point to the CACD for an opinion.[35]

Appellants who have died

11.25 As discussed at paragraphs 6.17 to 6.18 above, the Criminal Appeal Act 1968 ("CAA 1968") made provision for appeal proceedings to be conducted posthumously by a person approved by the CACD (whether the appeal is to the CACD following conviction on indictment or to the Crown Court following summary conviction).[36] The request for approval must ordinarily be brought within 12 months of the convicted person's death.

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31 Above, s 13(1).

32 Above, s 13(2).

33 Magistrates' Courts Act 1980, s 108(1)(a).

34 CCRC, *Exceptional Circumstances* (31 March 2023) p 3.

35 CAA 1995, s 14(3). The CCRC has only referred one question to the CACD (see *R v Duggan* [2002] EWCA Crim 2627, [2003] 1 Cr App R 26). They have also used this power to refer a question to the Northern Ireland Court of Appeal (see *R v Gordon* [1998] NI 275, NICA).

36 CAA 1968, s 44A.

11.26 The CAA 1995 does not actually require a person to make an application to the CCRC in order for it to refer a case, and therefore there is no explicit provision to enable the CCRC to take up a case on behalf of someone who has died. However, the CCRC will need to identify someone whom there is a "real possibility" of the CACD approving in order to be able to refer a case.

11.27 Where a person who might have appealed to the CACD has died and the person who would bring an appeal on their behalf did not seek to be approved by the CACD within a year of death (see paragraphs 6.17 to 6.18 above), the CCRC can refer the case to the CACD in order to enable them to be approved.[37] This power has been deployed in several recent cases, including some of the Post Office Horizon appeals, some of the "Shrewsbury 24" appeals,[38] and the recent case of *Mehmet and Peterkin*.[39]

11.28 There is generally no provision for posthumous appeals to the Crown Court. However, nor is there any restriction upon the power of the CCRC. That the CCRC has the power to refer cases posthumously to the CACD is acknowledged in section 44A of the CAA 1968. However, that section does not specifically give the CCRC the power to refer a case posthumously. Rather, the power to make a posthumous reference to the CACD must lie in its general power to refer a case "at any time" found in section 9 of the CAA 1995. This language is mirrored in section 11 for cases dealt with summarily. The CCRC has therefore concluded that it has the power to make a posthumous reference.

11.29 A similar situation prevailed in relation to posthumous appeals in the CACD prior to the introduction of explicit provision in the CAA 1995. Although there was no provision for the bringing of a posthumous appeal on behalf of a convicted person, section 17 of the CAA 1968 stated that the Home Secretary could refer a case to the CACD "at any time" and it would "then be treated for all purposes as an appeal to the Court by that person", analogous to the current position in respect of the CCRC's current power to refer a case to the CACD or the Crown Court. In 1990, the Home Secretary referred the convictions of six members of the Maguire Seven (see Appendix 1) to the CACD; the seventh, Guiseppe Conlon, had died in prison in 1980. The Home Secretary therefore also referred a point of law to the CACD under section 17(1)(b) of the CAA 1968, asking whether the Court had the power to consider a reference of the case of a person who had died. The CACD held that it did.[40] The words "at any time" were wide enough to embrace the case of a person who had died, and the Home Secretary's power could be contrasted with the right to appeal under the CAA 1968, which was personal to the convicted person. The requirement for the reference then to be treated as an appeal "by that person" did not limit this provision, since the case could be "treated as if he were still alive, a concept that presents no real difficulty".

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37 CAA 1968, s 44A(4).

38 [2021] EWCA Crim 413.

39 [2024] EWCA Crim 309.

40 *R v Maguire* [1992] QB 936, CA.

11.30 In December 2023, the CCRC referred the convictions of Peter Huxham for fraud by false representation and Roderick Dundee for false accounting to the Crown Court. Both were Post Office workers convicted in relation to Horizon-related shortfalls.[41]

11.31 Because these cases had not been dealt with by the Crown Court by the time the Post Office (Horizon System) Offences Act 2024 received Royal Assent, both convictions were quashed by statute. This means that the legal question has not been addressed. We think that there is an argument, based on the decision in respect of Guiseppe Conlon in *Maguire* (see paragraph 11.29) and the similar wording in the CAA 1995, that the CCRC has the power to refer a case posthumously to the Crown Court. There is no legislative provision for how the appeal should proceed. The CACD considered in the case of Guiseppe Conlon that this posed no difficulty because grounds of appeal could be settled by counsel appointed by the Registrar to represent the deceased. It is not clear how far similar arrangements could be effected in the Crown Court, especially given that the appeal proceeds by way of rehearing.

11.32 While we consider that there is a power for the CCRC to refer a case in the case of magistrates' court convictions posthumously, and that it would fall to the Crown Court to hear such a case, we think there would be value in making explicit provision for the hearing of such cases.

Consultation Question 54.

11.33 We provisionally propose that, in cases of magistrates' court convictions, the Crown Court should be able to hear an appeal upon a reference by the Criminal Cases Review Commission when the convicted person has died.

Do consultees agree?

Discretion to refer

11.34 It is at the discretion of the CCRC whether to refer a case to the appellate court where the conditions for reference are met; the CAA 1995 does not impose a duty on the CCRC to make a reference in such cases. The CCRC only expects to exercise its discretion not to make a reference in rare cases.[42] The discretion must be exercised in accordance with public law principles, and the CCRC takes into account a number of factors, including the public interest, the age and seriousness of the conviction and the benefits of making a reference.[43]

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41 CCRC, "Post Office cases: CCRC sends two posthumous referrals to Crown Court" (28 November 2023).

42 CCRC, *The Discretion to Refer* (15 July 2021) p 2. See pp 4 and 5 for examples of cases where the CCRC may consider exercising its discretion not to make a reference and also the CCRC's response to recommendation 8 of the report of the Westminster Commission on Miscarriages of Justice: CCRC, "CCRC releases official response to the Westminster Commission report" (2 June 2021).

43 CCRC, *The Discretion to Refer* (15 July 2021) p 3.

Challenging the CCRC's decision

11.35 The CCRC's decision whether to make a reference cannot be appealed against. However, the decision may be challenged by way of judicial review. Leave (permission) of the High Court is required to bring judicial review proceedings.

11.36 The High Court's role in judicial review proceedings is limited to reviewing the decision of the CCRC to determine whether it was lawful with reference to public law principles.[44] As such, the High Court's role is not to form its own view of whether the "real possibility" test is met and determine whether the CCRC has made the right decision, as that would usurp the CCRC's function.[45] In relation to the extent of the Court's review, the Divisional Court in *Pearson* observed that:[46]

> It is not … in our judgment appropriate to subject the Commission's reasons to a rigorous audit to establish that they were not open to legal criticism. The real test must be to ask whether the reasons given by the Commission betray, to a significant extent, any of the defects which entitle a court of review to interfere.

11.37 Where the CCRC decides not to make a reference, the applicant may reapply to the CCRC. There is no limit on the number of applications a person may make, however a new examination of the case will only be carried by the CCRC if the subsequent application raises something important that has not been considered previously.[47]

11.38 *Cleeland*,[48] overturning *Saxon v CCRC*,[49] established that a decision whether to refer a case by the CCRC is not a "criminal cause or matter". Therefore, the route of appeal against a decision of the High Court on an application for judicial review of a CCRC decision is to the *Civil* Division of the Court of Appeal, and not the CACD.

THE "REAL POSSIBILITY" TEST

11.39 Before a reference may be made by the CCRC, it must be satisfied that there is a "real possibility" that the conviction, sentence, verdict or finding would not be upheld by the appellate court.[50] This is a "predictive" test. In *Pearson*, the Lord Chief Justice, Lord Bingham, stated that the judgement the test requires the CCRC to make is a "very unusual one, because it inevitably involves a prediction of the view which another body (the Court of Appeal) may take".[51]

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44 *R v CCRC, ex p Pearson* [1999] 3 All ER 498, CA.

45 Above; *R (Mills and Poole) v CCRC* [2001] EWHC Admin 1153 at [14], by Lord Woolf CJ.

46 *R v CCRC, ex p Pearson* [1999] 3 All ER 498, CA, 521J, by Lord Bingham CJ.

47 CCRC, *Next Steps Post-CCRC Decision* (2 December 2024) p 4.

48 [2022] EWCA Civ 5, [2022] 4 WLR 8.

49 [2001] EWCA Civ 1384.

50 CAA 1995, s 13(1).

51 *R v CCRC, ex p Pearson* [1999] 3 All ER 498, CA, 505H, by Lord Bingham CJ.

11.40 The term "real possibility" is not defined by the CAA 1995; however, the meaning of the term was considered in *Pearson*. Lord Bingham, observed that:[52]

> [the test is] imprecise but plainly denotes a contingency which, in the Commission's judgment, is more than an outside chance or a bare possibility, but which may be less than a probability or a likelihood or a racing certainty. The Commission must judge that there is at least a reasonable prospect of a conviction, if referred, not being upheld.

11.41 To predict the outcome of the appeal, the CCRC must examine the approach the appellate court would take when considering the appeal.[53] As Lord Bingham said in *Pearson*:[54]

> [The CCRC] could only make that prediction by paying attention to what the Court of Appeal had said and done in similar cases on earlier occasions. It could not rationally predict the response of the Court of Appeal without making its own assessment, with specific reference to the materials in this case, of the considerations to which the Court of Appeal would be obliged to have regard and of how it would be likely to exercise its discretion.

11.42 Therefore, in the case of a conviction, for example, the CCRC must assess the prospect that the CACD would find the conviction to be unsafe by examining the Court's application of the safety test. To assist such examinations the CCRC has developed casework guidance notes, which include analysis of the case law, to enable case review managers, who are responsible for reviewing cases, to interpret the test applied by the appellate court and predict the possibility of a successful outcome.[55] The CCRC also analyses the appellate courts' response to its references to enable it better to predict the Court's response in the future.[56]

11.43 The predictive nature of the test can lead to difficulties, as recognised by the Divisional Court in *Pearson*:[57]

> Since no two cases reaching the Court of Appeal are the same, it will often be hard, if not impossible, to predict with confidence how the Court will perceive the merits of any given application in a borderline case, a point which obviously bears on the discharge of the Commission's task under section 13 of the 1995 Act. Judicial reactions, being human, are not uniform.

11.44 The CCRC has indicated that in such cases it would err on the side of reference.[58] The application of the test and the subsequent reference in such cases may be used

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52 *R v CCRC, ex p Pearson* [1999] 3 All ER 498, CA, 505E-F, by Lord Bingham CJ.

53 *R (Davies) v CCRC* [2018] EWHC 3080 (Admin), [2019] ACD 11 at [59], by Irwin LJ.

54 *R v CCRC, ex p Pearson* [1999] 3 All ER 498, CA, 521A, by Lord Bingham CJ.

55 C Hoyle and M Sato, *Reasons to Doubt: Wrongful Convictions and the Criminal Cases Review Commission* (2019) pp 29-30.

56 Above, p 30.

57 *R v CCRC, ex p Pearson* [1999] 3 All ER 498, CA, 516D-E, by Lord Bingham CJ.

58 CCRC, "CCRC releases official response to the Westminster Commission report" (2 June 2021).

to give the Court the opportunity to develop or clarify the law.[59] Given the predictive nature of the test and the requirement that there only needs to be a "real possibility" that the appeal would succeed, it is to be expected that some references will not succeed. In the view of a former chairman of the CCRC, Professor Graham Zellick KC, it is essential that a proportion of the CCRC's references do not succeed, as otherwise the CCRC would be "misapplying the statutory test and usurping the role of the Court".[60]

11.45 In addition, since the Commission cannot perfectly predict in which cases the appeal will be successful before the CACD, a very high "success" rate would inevitably mean that some cases which would have succeeded before the Court may not have been referred.

11.46 The High Court observed in *Mills and Poole* that the conditions for reference under section 13 of the CAA 1995 aim to strike a balance between the finality of proceedings and "the need for justice to be done".[61] The test acts as a filter mechanism that seeks to strike a balance between ensuring that the CCRC does not simply perform an automatic function of reference, which could overwhelm the appellate courts with meritless appeals, and that its function is not defeated by a high threshold.[62]

11.47 The same referral test applies to summary cases. We discuss the particular issues that arise in applying the "real possibility" test to appeals which proceed by way of rehearing at paragraph 11.74 and following below.

Concerns raised about the "real possibility" test

11.48 Several reviews and inquiries into the CCRC have noted concerns about the statutory framework within which it operates and how its functions are discharged, which have been echoed in the academic literature and media. These include concerns about the "real possibility" test and, in particular, about the formulation and predictive nature of the test and its application by the CCRC.

11.49 David Jessel, a journalist specialising in miscarriages of justice who later became a Commissioner at the CCRC, has described the "real possibility" test as the "baptismal curse" of the Commission.[63]

11.50 Professor Michael Zander, who was a member of the Runciman Commission, has noted that the Runciman Commission did not consider what test the new Authority should use, and has speculated it would have recommended something like the "real possibility" test.

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59 G Zellick, "The Criminal Cases Review Commission and the Court of Appeal: the Commission's perspective" [2005] *Criminal Law Review* 937.

60 Above.

61 *R (Mills and Poole) v CCRC* [2001] EWHC Admin 1153 at [10], by Lord Woolf CJ.

62 *R v CCRC, ex p Pearson* [1999] 3 All ER 498, CA, 505E-H, by Lord Bingham CJ.

63 D Jessel, "Time to reconnect" in J Robins (ed), *Wrongly Accused: who is responsible for investigating miscarriages of justice?* (2012).

> There is not a word in the [Royal] Commission's Report regarding the grounds for referring a case. Strange as it may seem, I think that the matter was never even discussed by the Royal Commission…
>
> Since it did not deal with the question, I am speculating, but I believe that the Royal Commission would have agreed with the basic approach of [section] 13 [which contains the "real possibility" test] … I believe that the Royal Commission would have taken the view that it makes no sense to suggest that the CCRC should refer conviction cases where it did not think there was a real possibility that the conviction would be reconsidered.

11.51 Against this, however, we note that the Runciman Commission endorsed a view expressed by Sir John May (one of its members) in his report on the wrongful conviction of the Maguire Seven.[64] He said of the Home Office's practice of only referring a case to the CACD if there was a "real possibility" of the Court taking a different view than it did on the original appeal:

> There is no doubt that the criterion so defined was and is a limiting one and has resulted in the responsible officials within the Home Office taking a substantially restricted view of cases to which their attention has been drawn… The very nature and terms of the self-imposed limits on the Home Secretary's power to refer cases have led the Home Office only to respond to the representations which have been made to it in relation to particular convictions rather than to carry out its own investigations into the circumstances of a particular case or the evidence given at trial… the approach of the Home Office throughout was reactive, it was never thought proper for the Department to become proactive.

11.52 Professor Zander has pointed out that the Runciman Commission's concerns (as this quotation shows) were with the quality of *investigation*. The Runciman Commission seems to have accepted, however, that that approach to investigation flowed directly from the Home Office's self-imposed "real possibility" test for references.

11.53 Where the Government had adopted the Runciman Commission's recommendations, implementation, including addressing detailed matters not dealt with in the Runciman Report, was left to civil servants. In the case of the recommendations relating to the correction of miscarriages of justice, those were the officials in C3 – the same Home Office officials in C3 who had adopted the "real possibility" test. They incorporated that test into the legislation setting up the new body. C3 could be said, to that extent, to have made the CCRC in their own image.

11.54 Concerns about the formulation of the test began to be raised shortly following the establishment of the CCRC in 1997. The House of Commons Home Affairs Committee noted in its 1999 report in relation to the CCRC that "there may be problems with the test" and recommended a formal review of the wording after five years of the CCRC being in operation.[65]

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64 See Appendix 1.

65 The Work of the Criminal Cases Review Commission, Report of the House of Commons Home Affairs Committee (1998-99) HC 106.

The formulation and predictive nature of the test

11.55 The Westminster Commission concluded in its 2021 report that the "real possibility" test is "problematic".[66] It noted the difficulty in applying the test in view of the "very fine" distinction between a "real possibility" and a "probability", as expressed in *Pearson*[67] by Lord Bingham.[68]

11.56 The Westminster Commission also said that the predictive nature of the test:[69]

> encourages the CCRC to be too deferential to the Court of Appeal and to seek to second-guess what the Court might decide, rather than reaching an independent judgement of whether there may have been a miscarriage of justice.

11.57 The CCRC disagrees with that assessment and told the Westminster Commission that it does not find that the test inhibits its ability to make references or undermines its independence, drawing a distinction between a deferential test and the CCRC itself being deferential to the Court.[70]

11.58 The Ministry of Justice's triennial review of the CCRC and the House of Commons Justice Committee's inquiry into the CCRC both received mixed responses when seeking to ascertain whether the "real possibility" test is the right test.[71] Respondents to the triennial review were also critical of the CACD's approach and were of the view that it prevented references by the CCRC in lurking doubt cases.[72] The Ministry of Justice concluded that there was insufficient evidence to justify changing the test, as the ultimate arbiter of the safety of the conviction is the appellate court and the test reflects this.[73] The review concluded that:[74]

> It would be inappropriate for the CCRC to refer cases to the Court of Appeal purely to express disagreement with conclusions which the courts had reasonably drawn on previous occasions from evidence and argument fully and properly placed before them. The statute also provides the CCRC with the option to refer a case in exceptional circumstances if it considers it appropriate to do so.

11.59 However, the Justice Committee also found "a broad agreement, or at least a perception, that something in the test or its application is not working properly", with

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66 The Westminster Commission on Miscarriages of Justice, *In the Interests of Justice: An Inquiry into the Criminal Cases Review Commission* (2021) ("The Westminster Commission Report"), p 36.

67 *R v CCRC, ex p Pearson* [1999] 3 All ER 498, CA, 505E-F, by Lord Bingham CJ.

68 The Westminster Commission Report, p 36.

69 Above, p 36.

70 Above, p 34.

71 Criminal Cases Review Commission, Report of the House of Commons Justice Committee (2014-15) HC 181 ("Justice Committee CCRC Report"), p 8, para 9; Ministry of Justice, *Triennial Review: Criminal Cases Review Commission* (June 2013) ("CCRC Triennial Review") p 9.

72 CCRC Triennial Review, p 9.

73 Above.

74 Above, pp 9 and 10.

the CCRC's reference rate being cited in support.[75] Since its inception in 1997 to July 2024 the CCRC has referred 848 cases out of the 32,109 applications it has received, around 3% of applications at the average rate of around 31 cases per year.[76]

11.60 In our pre-consultation discussions with the CCRC, it pointed out that the low reference rate is partly attributable to the fact that the denominator, the large number of applications received, includes a significant proportion of "no appeal" applications (around 40% all applications)[77] brought by people who have not tried to appeal directly through the court system, and which can therefore only be referred if there are exceptional circumstances. It also includes plainly inadmissible cases, including "appeals" by people who had been acquitted; victims and witnesses; and parties to civil proceedings.

11.61 The Justice Committee concluded that any changes to the "real possibility" test would need to be made in conjunction with changes to the test applied by the CACD.[78] It expressed concern that the CACD's approach to appeals may make it difficult for the CCRC to meet the "real possibility" test in some cases, leaving some miscarriages of justice uncorrected.[79] It also noted that whilst an alternative test may provide more scope for the CCRC to demonstrate its independence from the appellate courts, given the current formulation of the test the only additional references such a change would enable to be made are those where there is less than a "real possibility" of the appeal succeeding.[80] The Committee recommended that the Law Commission review the CACD's approach to cases where, in the absence of any new evidence or argument, there remains "serious doubt" about the conviction and if any changes are made, review their effect on the CCRC and the continuing appropriateness of the "real possibility" test.[81]

11.62 As Professor Richard Nobles has pointed out, the predictive nature of the referral test means that "restrictive announcements by the Court" – such as the curtailing of lurking doubt as a ground of appeal in *Pope* – will "have the knock-on effect of cutting down the Commission's power to refer".[82]

11.63 In her response to the Issues Paper,[83] Dr Felicity Gerry KC raised the application of the CCRC's test in relation to joint enterprise cases. She argued that because the CACD had refused permission to appeal in all but one of the applications relating to joint enterprise convictions based on the ruling in *Jogee*, the "real possibility" test meant the CCRC routinely refuses joint enterprise applications.

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75 Justice Committee CCRC Report, p 8, para 9.

76 CCRC, "Facts and figures" (December 2024).

77 CCRC, *Annual Report and Accounts 2021/22* (2022) p 10.

78 Justice Committee CCRC Report, p 11, para 16.

79 Above, p 15, para 27.

80 Above, p 11, para 16.

81 Above, pp 15 and 16, para 28.

82 R Nobles, Submission to the House of Common Justice Committee (2014).

83 Law Commission, Criminal Appeals: Issues Paper (July 2023).

11.64 In 2018, Sir Anthony Hooper, a former Court of Appeal judge said:[84]

> The CCRC knows that the test has changed. It has become much more difficult [for] an appellant to succeed. Therefore, that will no doubt influence them on what cases they will send through … It is really important that the Court of Appeal Criminal Division does not set the bar too high.

11.65 It later emerged, through disclosure relating to the *Warner* judicial review (see paragraph 13.144 below), that the CCRC was around this time concerned about the impact of a more stringent approach from the CACD and the effect on its own relationship with the Court. CCRC board minutes for 2016 noted that in 12 of the last 13 judgments the conviction had been upheld (whereas, as we note at paragraph 11.2, the majority of references usually result in the CACD quashing the conviction or sentence), and considered that the Court as "currently constituted might be taking a different approach from previous courts". The CCRC expressed concern over its "reputation with the Court of Appeal"; a "risk score" relating to this issue was changed from "moderate to severe".[85]

11.66 The CCRC acknowledged in its Annual Report for 2017/18 that "whilst the 'success rate' of our referrals is not directly relevant to the 'referral rate', a low 'success rate' may well cause an adjustment in our assessment of 'real possibility' in individual cases".[86]

The implications of the CACD's wide discretion for the "real possibility" test

11.67 Professors Nobles and Schiff have pointed out that:[87]

> The task of double-guessing the Court of Appeal is made more difficult by the need for both bodies to take account of exceptional circumstances. The CCRC is expressly authorised to overlook two of the limitations to its own authority in exceptional cases… The CCRC also has to take account of the Court of Appeal's ability to dispense with its own restrictions, in exceptional cases.

11.68 The difficulty is that most of the restrictions on the CACD, whether self-imposed or statutory, are subject to the overriding consideration of the interests of justice. It would not be unfair to say that the Court consistently leaves itself a margin of discretion. Thus, the CACD can allow an appeal on the basis of evidence or argument which was raised at trial or an earlier appeal; can admit evidence which was not admissible at trial; can admit evidence despite there being no good reason for the failure to adduce it at trial. It can give leave to appeal out of time where there is no good reason for the delay. It can give leave to appeal out of time on the basis of a change in the law if

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84 BBC TV, "Last Chance for Justice", *Panorama* (30 May 2018).

85 J Robins, "It's vital that CCRC has money and freedom to investigate miscarriages of justice properly", *The Justice Gap* (10 January 2020).

86 CCRC, *Annual Report and Accounts 2017-18* (2018) p 19. The CCRC uses the term "success" here to describe a referred case which resulted in the conviction being quashed or the sentence being amended.

87 R Nobles and D Schiff, "The Criminal Cases Review Commission: establishing a workable relationship with the Court of Appeal" [2005] *Criminal Law Review* 173-189 at 175.

there would otherwise be "substantial injustice".[88] It can depart from its previous findings in the absence of fresh evidence or argument in exceptional circumstances.[89]

11.69 This discretion means that in applying the "real possibility" test having regard to the CACD's practice, the CCRC must also have regard to the possibility that the Court may exercise its discretion to depart from its normal practice in the interests of justice.

11.70 This can cause difficulties. As we discuss at paragraph 11.302 and following below, in *Neuberg*,[90] the CCRC referred a sentencing appeal on the basis of a change in the law. It considered that there was a "real possibility" that the Court would hold that the "substantial injustice" test that the Court applies to appeals based on a change of law was made out. That is, it did as it was instructed in *Cottrell and Fletcher* (discussed at paragraphs 11.292 to 11.307 below), and had regard to the practice of the CACD when considering whether to grant leave to appeal out of time on the basis of a change in the law. The Commission was criticised by the Lord Chief Justice for having referred the case:[91]

> It is a matter of some regret that the reference was made to the court without a more careful analysis of the basis on which the reference was to proceed…
>
> In our judgment it [the question of "substantial injustice"] is an issue which the CCRC should have considered and, if it had not considered that issue, or had not done so by applying the clear law, we consider that it would have been open to the prosecuting authority affected by the decision to consider judicial review of the CCRC's decision to refer.

Application of the test by the CCRC

11.71 The Home Affairs Committee indicated in its 1999 report on the CCRC that there may be some force in concerns that the CCRC is interpreting the test too strictly.[92] Similar concerns were raised by respondents to the triennial review and the Westminster Commission and Justice Committee's inquiries, with the CCRC's low reference rate and high success rate for references being cited in support of the view that the CCRC takes an overly cautious approach.[93] Whilst the CCRC only refers around 3% of the applications that it receives, its references have a "success" rate of around 70%.[94]

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88 See, generally, Chapter 10.

89 See discussion of the doctrine of precedent as it applies to and in the CACD in *R v Hayes* [2024] EWCA Crim 304, [2024] 2 Cr App R 6 at [84]-[85], by Bean and Popplewell LJJ and Bryan J.

90 [2016] EWCA Crim 1927, [2017] 4 WLR 58. The case concerned a second appeal against a confiscation order by a person convicted of Insolvency Act offences for trading under a name that was prohibited. The CCRC had declined to refer the case in 2012 (the order was imposed in 2007) but did so in 2016, having received a second application to do so by the applicant on the basis of a change in the law.

91 Above, at [44] and [51], by Lord Thomas of Cwmgiedd CJ.

92 The Work of the Criminal Cases Review Commission, Report of the House of Commons Home Affairs Committee (1998-99) HC 106 at para 30.

93 CCRC Triennial Review, p 9; The Westminster Commission Report, p 37; Justice Committee CCRC Report, pp 8 and 9.

94 CCRC, *Annual Report and Accounts 2021/22* (2022) p 10.

11.72 The Westminster Commission recommended that the CCRC should be "bolder" in interpreting the test, "determining in each case whether there is more than a fanciful chance of the verdict being quashed, even if quashing is less likely than not".[95] The Justice Committee accepted the inherent difficulties in applying the "real possibility" test, but similarly recommended that the CCRC take a less cautious approach in applying the test, erring on the side of making a reference and not fearing disagreement with the CACD and reducing its target success rate.[96] The Justice Committee, however, found "no conclusive evidence" that the test is not applied correctly by the CCRC in the majority of cases.[97]

11.73 In response to the Westminster Commission's recommendation, the CCRC expressed the view that it is not possible to take a "bolder" approach, as the test focuses on the merits of the case and the "boldness" of the decision maker cannot compensate for meritless applications.[98] The CCRC indicated that in cases that appear to be "borderline" it always errs on the side of making a reference.[99]

The referral test in summary cases

11.74 Although the CAA 1995 makes specific provision for appeals from summary cases,[100] and the CCRC regularly refers cases to the Crown Court for appeal, it has been suggested that the referral test as formulated in the CAA 1995 does not make sense in the context of appeals against conviction in magistrates' courts. The Justice Committee noted:[101]

> the Royal Commission predominantly looked at cases in the Crown Court and did not concern itself with the magistrates' court, largely because of the nature and seriousness of the high-profile miscarriages of justice which led to its formation.

11.75 The test requires the CCRC to refer a case only if "there is a real possibility that the conviction … would not be upheld … because of an argument, or evidence, not raised in the proceedings which led to it".[102] Where the case will be referred to the CACD, there is a close relationship between the reasons for the reference and the grounds that the Court will consider. Indeed, the appellant is precluded from raising grounds other than those forming the basis of the CCRC's reference unless leave is obtained from the CACD.[103] There is thus a very close relationship between the reasons for the

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95 The Westminster Commission Report, p 37.

96 Justice Committee CCRC Report, p 12, para 20. The CCRC had a Key Performance Indicator that more than 60% but less than 80% of references should result in a conviction being quashed or a sentence varied (CCRC, *Annual Report and Accounts 2014/15* (2015) p 73). This indicator was dropped from 2015/16 (CCRC, *Annual Report and Accounts 2015/16* (2016) p 87).

97 Justice Committee CCRC Report, p 12, para 20.

98 CCRC, "CCRC releases official response to the Westminster Commission report" (2 June 2021).

99 Above.

100 CAA 1995, s 11.

101 Justice Committee CCRC Report, para 36.

102 CAA 1995, s 13(1).

103 Above, ss 14(4A) and (4B).

CCRC concluding that the conviction or sentence will not be upheld on appeal and the decision that the Court will itself have to make.

11.76 However, where a case is referred to the Crown Court, the appeal is by way of rehearing. Since the Crown Court could decide any case differently from the bench of magistrates (or the single District Judge (Magistrates' Court)) who heard it at first instance, there is always the possibility that the Crown Court will not uphold the conviction: notwithstanding the fact that the appellant has been convicted at the magistrates' court, the Crown Court (unlike the CACD) starts with the presumption of innocence, and it is for the prosecution to prove the case to the criminal standard all over again. Whereas the CACD is "constitutionally deferential"[104] to the jury, the same is not true of the Crown Court and magistrates. Professor Kevin Kerrigan notes that:[105]

> [i]t follows that when the Commission is asked to determine whether there is a real possibility of a summary appeal against conviction succeeding it is extremely difficult to say with certainty that there is no real possibility.

11.77 Professor Kerrigan concludes:[106]

> The tension lies not with the real possibility test itself but due to the synthesis of this test with that applied at the Crown Court. There are two ways of dealing with this. The first would remove the requirement to refer the case back to the Crown Court for a re-hearing. This would establish a special procedure for cases referred by the Commission. Such cases would be heard by a different appeal tribunal which would not re-hear all the evidence but rather address whether there had been injustice meaning the conviction should not stand. This would require a new statutory basis for appeal in such cases. The obvious test would seem to be that currently applied in the Court of Appeal … An alternative approach would be to keep referred appeals in the Crown Court with the current re-hearing approach but to change the test to be applied by the Commission in respect of summary applications. In addition to measuring the prospects of success in the Crown Court the Commission would be tasked with assessing whether the applicant may have suffered an injustice.

11.78 If the mode of appeal from magistrates' courts were amended, either by introducing a leave requirement or by replacing the existing rehearing with a review (following the granting of leave), then this might address the theoretical difficulties with the current test for summary offences. However, in Chapter 5 we have concluded that the case for replacing the right to a rehearing in the Crown Court has not been made out.

11.79 However, we accept that the requirement for fresh evidence or argument does not, in practice, prevent the Commission from referring summary cases. In the statutory referral tests, both for the CACD and the Crown Court, the requirement for fresh evidence or argument links to the Commission's reasons for deciding that there is a "real possibility" that the conviction or sentence will not be upheld. It does not strictly relate to the reasons that the CACD will give for not upholding the conviction or

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104 K Kerrigan, "Miscarriage of justice in the magistrates' court: the forgotten power of the Criminal Cases Review Commission" [2006] *Criminal Law Review* 124, 133.

105 Above, 134.

106 Above, 139.

sentence (although in practice the two matters are likely to be indistinguishable when considering the question in respect of a possible reference to the CACD).

11.80 There is a further issue with respect to appeals against conviction in summary cases. The CAA 1995 provides that a reference of a person's conviction "shall be treated for all purposes as an appeal by the person under section 108(1) of the Magistrates' Courts Act 1980 against the conviction (whether or not he pleaded guilty)".

11.81 Section 108(1) does not ordinarily provide for an appeal against conviction where the appellant has pleaded guilty. In *F*,[107] HHJ Openshaw QC (as he then was) held that the Crown Court "should not embark on the process of an appeal by way of re-hearing the case unless and until the plea is set aside". He held that the "mere fact of referring the case by the Commission does not alter the important constitutional principle that it is for the court and not for the Commission to set aside convictions". Accordingly, where there has been a guilty plea in summary proceedings, CCRC practice was to consider additionally whether there is a "real possibility" that the Crown Court will allow the appellant to vacate the guilty plea.

11.82 However, *CPS v Crown Court at Preston*[108] established that when the CCRC refers a case to the Crown Court in which the defendant had pleaded guilty, it is not necessary for the defendant to apply to vacate their plea before the appeal can be heard. The Court noted that the conviction is not quashed upon a reference by the CCRC; the person remains convicted until the Crown Court decides whether to uphold, reject or amend the decision of the magistrates' court.

The referral test in "change of law" cases

11.83 As discussed in the previous chapter (at paragraphs 10.31 and 10.123 to 10.148), where an appeal referred by the CCRC is based on a development in the law, the CACD has a discretion not to allow the appeal.[109] The test applied in these circumstances (reflecting the test used by the Court when considering whether to grant leave to apply out of time on such grounds) is one of "substantial injustice".

11.84 This means that in such cases (at least when tried on indictment), the CCRC, in judging whether the CACD would find the conviction unsafe, is required to assess whether the CACD would consider that the appellant had demonstrated substantial injustice (and potentially, given that is a discretionary power, whether it would allow the appeal nonetheless).

11.85 The "substantial injustice" test is a creation of the CACD in relation to its own discretion to hear a case out of time and, by statutory extension, its discretion to reject an appeal against conviction, and, by application of the "real possibility" test to that discretion, to the CCRC's decision to refer a case to the CACD. It is arguably of no relevance where the CCRC is considering referring a case to the Crown Court following conviction or sentence in the magistrates' court. Nonetheless, in such cases, the CCRC (perhaps out of an abundance of caution) considers whether the

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107 (11 October 2002) CA (unreported).

108 [2023] EWHC 1957 (Admin), [2024] KB 348.

109 CAA 1968, s 16C.

"substantial injustice" test is made out before referring a case to the Crown Court for appeal.

Consultation responses

11.86 We asked (Issues Paper Question 10, and – with the words in parentheses omitted, Summary Issues Paper Question 5):

> Is there evidence that the referral test (a "real possibility" that the conviction, verdict, finding or sentence would not be upheld) used by the Criminal Cases Review Commission when considering whether to refer an appeal hinders the correction of miscarriages of justice?
>
> If so, are there any alternative tests that would better enable the correction of miscarriages of justice?

11.87 Of the 35 consultees who addressed the question, only the Crown Prosecution Service ("CPS") stated that the test was not hindering miscarriages of justice. The CPS argued that it was not convinced there was evidence the test was a hindrance and stated it was wide enough to encompass cases which should be referred. However, it was noted that an alternative may be "whether it is properly arguable that the conviction, verdict, or sentence would be unsafe or not upheld".

11.88 Lord Justice Holroyde, responding on behalf of the CACD as Vice-President, did not express a view on the test. However, he said:

> You rightly recognise that the "real possibility" test performs a similar function to the requirement of leave in relation to the statutory right of appeal. That may be thought an important function, given that a CCRC reference takes effect as an appeal and the appellant therefore does not need to obtain either an extension of time or leave to appeal from the court. We would observe also that the predictive exercise required of the CCRC is in essence the same as is required of counsel advising as to whether arguable grounds exist for an appeal against conviction or sentence.

11.89 Professor John Spencer argued that it was not the "real possibility" aspect of the test that caused issues, rather it is the need to provide something not previously raised:

> I think the root of the problem is … that the "real possibility" must stem from "... an argument, or evidence, not raised in the proceedings which led to it or on any appeal or application for leave to appeal against it ..."
>
> Before it will consider an application the CCRC expects the applicant to "prime the pump" by handing it some new argument or piece of evidence… Requiring this of applicants does not help the applicant who thinks there is a new piece of evidence out there, if only someone would go and look for it.

Predictive nature

11.90 One of the major reasons that consultees gave for saying that the test was considered to be a hindrance was that it was predictive and allowed too much discretion to not refer cases. For example, Dr Lucy Welsh commented that the CCRC must consider how the CACD will manage possible miscarriages of justice and, it must therefore

attempt to predict the outcome. Dr Welsh commented that the high "success" rate of referred cases would suggest that the CCRC is adept at predicting such outcomes. However, she said this has led to the CCRC being overly cautious and it should be bolder in its approach. Dr Welsh also argued that the Scottish CCRC had a lower "success" rate and yet "maintained its credibility" with the appellate courts.

11.91 Cardiff University Law School Innocence Project also expressed concern over the predictive nature of the test and argued that the experience of its clients would suggest that the CCRC looks for reasons not to refer cases as opposed to looking for reasons to refer.

11.92 Members of 23 Essex Street Chambers also suggested that the CCRC looks for reasons not to refer:

> In our experience of representing applicants, the CCRC does not start with an open mind, but is always constrained by predicting opposition from the Court of Appeal. We feel that it has a mindset that is consciously or unconsciously disposed to find reasons to reject applications, rather than pursue investigations to a satisfactory conclusion.

11.93 The Bar Council noted that one of the issues with the predictive test was that "such an approach does not allow for the development of the law through previously untested arguments which find approval under proper consideration by the CACD".

The contrast between the test and the CACD's own leave test

11.94 The Law Society argued that the relationship between the Court and CCRC was

> currently out of sync in that the CACD applies a lower threshold for permission to appeal based on whether a case is arguable or not when granting permission, but the CCRC test for referring a case is based on an assessment that there is a real possibility that the Court of Appeal will not uphold the conviction.

11.95 The Criminal Appeal Lawyers Association ("CALA") also considered the current test to be higher than the test applied in the CACD:

> The test for referral is higher than the test applied by the Court of Appeal which, although not defined by statute, requires it to grant leave when there is an arguable or reasonably arguable ground. We consider that there is no good reason for the CCRC test to be stricter.

The low rate of references

11.96 A number of consultees raised the low reference rate and the high "success" rate as indicative of the CCRC applying a too rigid test and not referring potentially meritorious appeals.

11.97 APPEAL also considered the CCRC's reference rate:

> In response to recent criticism regarding the Malkinson case, the CCRC has repeatedly referred to the following statistic "In the last three reporting years (1 April 2020 to 31 March 2023), there have been 105 convictions or sentences overturned

by the courts after being referred by the CCRC." This might be thought to give the impression that through its own investigations, the CCRC is identifying a significant number of miscarriages of justice. However, analysis of the CCRC's reporting data demonstrates that at least 54 (51.4%) of these cases are related to the Post Office Horizon scandal.

11.98 Dr Steven Heaton has made a similar point, noting that between 2015/16 and 2022/23, the CCRC had referred 227 convictions. 64 related to the Post Office Horizon scandal; nine to DS Ridgewell; and 15 to the convictions of the "Shreswbury 24" for trade union related activity in the 1970s. If these cases – which were not "uncovered" by the CCRC are excluded – the reference rate is much lower.[110]

11.99 A respondent to the Ministry of Justice's CCRC triennial review of the CCRC in 2014 summed this argument up succinctly, saying the "real possibility" test "would be exactly the right test to apply if only the CRCC would exercise it. After all, there is no point in referring cases that won't amount to an acquittal. But they don't".[111]

The Henley Review

11.100 The CCRC engaged Chris Henley KC to review its handling of Andrew Malkinson's applications to the Commission.[112] His findings are relevant to the question of whether the "real possibility" test might be impeding investigation of possible miscarriages of justice (just as the Runciman Commission had found of C3's use of the same test).

11.101 As the CCRC's own Casework policy states:[113]

> When considering whether to carry out an enquiry, we will have regard to whether there is any real prospect that the investigation might produce evidence or argument capable of affecting the safety of the conviction (or the nature of the sentence).

11.102 Mr Henley found that CCRC officials misapplied the "real possibility" test. They failed to recognise that there *was* a real possibility that the CACD might quash Mr Malkinson's conviction, notwithstanding that the identity of the male whose DNA had been found was not known. Once it was established that the DNA found on the victim's clothing could not have come from Mr Malkinson – which did not require a full profile to have been obtained – there was a real possibility that the conviction would be quashed.[114]

11.103 Mr Henley found that the CCRC Commission dealing with the case ("P1") said "Just because it appears there is someone else's DNA on the complainant's vest (not her boyfriend's or the applicant's) cannot surely produce a hope of a successful reference

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110 See J Robins, "How a watchdog lost its bite" (2004) 6 *Proof* 30, 39.

111 CCRC Triennial Review (2013) p 10.

112 CCRC, *Independent review by Chris Henley KC of the CCRC's handling of the Andrew Malkinson case: Report and CCRC Response* (29 May 2024).

113 CCRC, *Casework Policy: Case Review Process* (12 August 2024) para 4.4.

114 Henley Review, para 38.

in view of all the other strong ID evidence – and the case was really based on the ID evidence which has been approved by the [CACD]".[115]

11.104 He found this to be:[116]

> strongly indicative of an approach which was not sufficiently curious, rationally reflective, or determined to fully understand the case and what the new DNA result might mean. There was a serious failure from the outset to engage with the primary evidence in this case, against which the new DNA evidence should have been judged.

Discussion

11.105 As acknowledged by the High Court in *Pearson*, and noted earlier, the predictive judgement that the referral test requires the CCRC to make is a "very unusual one, because it inevitably involves a prediction of the view which another body (the Court of Appeal) may take".[117] The unusual nature of the test is perhaps more acute in summary cases where the CCRC is required to predict the outcome of the rehearing and whether the applicant would be found guilty.[118]

11.106 Much of the discourse in relation to the "real possibility" test has focused on indictable cases and there appears to be a widespread perception that the test is inhibiting the CCRC in such cases. However, the Westminster Commission noted that such criticisms may partly be reflective of the approach taken by the appellate courts:[119]

> The evidence we heard suggests that the Court of Appeal's approach to cases may prevent some miscarriages of justice being corrected, and inhibit the CCRC's ability to raise alleged miscarriages of justice.

11.107 The predictive nature of the test has been criticised on the basis that it undermines the CCRC's independence. The Westminster Commission argued that the test "encourages the CCRC to be too deferential to the Court of Appeal and to seek to second-guess what the Court might decide, rather than reaching an independent judgement of whether there may have been a miscarriage of justice".[120] Such criticisms raise the possibility that the test may lead to cases where, "even if the CCRC thinks a conviction is unsafe, it is powerless [to make a reference] if the CACD has made its disagreement clear" through its case law.[121] Again, such concerns

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115 Above.

116 Above.

117 *R v CCRC, ex p Pearson* [1999] 3 All ER 498, CA, 505H, by Lord Bingham CJ.

118 K Kerrigan, "Miscarriage of justice in the magistrates' court: the forgotten power of the Criminal Cases Review Commission" [2006] *Criminal Law Review* 124.

119 The Westminster Commission Report, p 42.

120 Above, p 36.

121 H Quirk and D Ormerod, "The Westminster Commission on the CCRC" [2021] *Criminal Law Review* 335, 336.

similarly point to the appellate courts perhaps setting the bar too high as potentially being at the root of the problem.

11.108 The fact that the "real possibility" needs to be attributable to new evidence or argument and the applicant must have exhausted their statutory right of appeal (unless there are "exceptional circumstances") may restrict the CCRC's ability to refer certain types of cases, such as lurking doubt cases. Professor Carolyn Hoyle and Dr Mai Sato note the difficulties the fresh evidence requirement may cause in some cases:

> In a few of our cases we have seen CRMs [Case Review Managers] and commissioners tie themselves up in knots trying to fit their case – which on the face of it seemed meritorious – into the dictates of the fresh evidence requirements.[122]

The rate of references

11.109 We think that the low number of references as a proportion of all applications is, in itself, a poor indicator of the CCRC's performance. It is distorted by the large number of applications which fall outside the CCRC's remit. Not only does this figure include cases which would not be referrable unless the applicant could demonstrate exceptional circumstances, it includes "applications" which could not result in a reference of a conviction or sentence at all, such as complaints about the handling of a case by people who were acquitted, or which relate to civil proceedings.

11.110 However, we are struck by the fact that around 70% of CCRC conviction references to the CACD result in the conviction being quashed. This is hard to reconcile with a practice of referring cases where there is "more than an outside chance or a bare possibility but … less than a probability or a likelihood or a racing certainty".[123] Indeed, although they are not directly comparable, the "success rate" for CCRC references is not much less than the conviction rate for prosecutions by the CPS, which must only be brought if the CPS considers that it is more likely than not that a conviction will result.[124]

11.111 The CCRC's "success rate" thus appears consistent with its applying, in practice, a requirement that the likelihood that a reference will result in a conviction or sentence being overturned be not just more, but substantially more, than an outside chance or a bare possibility. A lesson of the Henley Report is that caseworkers – rightly or wrongly – may be applying a higher standard than "real possibility" when considering whether

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122 C Hoyle and M Sato, *Reasons to Doubt: Wrongful Convictions and the Criminal Cases Review Commission* (2019) ("Hoyle and Sato") p 337.

123 *R v CCRC, ex p Pearson* [1999] 3 All ER 498, CA, 505E-F, by Lord Bingham CJ.

124 The Code for Crown Prosecutors states that with limited exceptions, before charging a person two tests must be met: the "evidential test" and the "public interest" test, that is, whether it is in the public interest to prosecute. The evidential test is that there is a realistic prospect of conviction. Para 4.7 of the CPS, "Code for Crown Prosecutors" (26 October 2018) states:

> The finding that there is a realistic prospect of conviction is based on the prosecutor's objective assessment of the evidence … It means that an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged.

a case would be referrable; indeed, they may be asking themselves "will this lead the Court of Appeal to overturn the conviction?"

11.112 We do not believe, therefore, that scrapping the "real possibility" test would mean that the Commission would be referring cases where there was "no real possibility" of the CACD overturning the conviction or sentence. If the CCRC applied the test so that *any* possibility, other than a theoretical or fanciful one, that the Court would overturn the conviction or sentence was grounds for a reference, then this argument would have validity. However, this is clearly not how the CCRC applies the test.

The "real possibility" test and the relationship between the CCRC and the CACD

11.113 We think there is a great deal of force in the argument that the "real possibility" test means that if the CACD becomes less willing to quash convictions or amend sentences then the CCRC is less likely to find the "real possibility" test met and therefore will make fewer references.

11.114 We are also struck by the concerns expressed internally by the CCRC that too many "unsuccessful" references risks harming the CCRC's "reputation" with the CACD. We discuss this aspect of the relationship between the CCRC and the CACD at paragraph 11.277 and following.

The impact of the "real possibility" test on investigations

11.115 The Henley review seems to provide clear evidence that the "real possibility" test affects the way in which CCRC investigations proceed. That is, rather than the "real possibility" test being applied at the end of an investigatory process, to see whether there is a "real possibility" that the Court will, on the basis of the new evidence, quash the conviction (or change the sentence); the CCRC starts by considering what fresh evidence might dislodge the Court's previous appeal findings.

11.116 The core documents that the CCRC will obtain in screening an application are:[125]

(1) the indictment;

(2) the summing-up;

(3) Counsel's advice and grounds of appeal;

(4) the notice and grounds of appeal;

(5) the respondent's notice;

(6) correspondence in relation to a waiver of privilege;

(7) the Criminal Appeal Office summary;

(8) the Single Judge's ruling; and

(9) the Court of Appeal judgment.

[125] CCRC, *Casework Policy: Case Review Process* (12 August 2024), para 2.5.2 and its Appendix 1.

11.117 It seems clear to us that the two documents in this list which will give a broad overview of the case and the grounds of appeal are the trial judge's summing up and, if the case has proceeded to the full court, the CACD judgment. In practice, the CACD's judgment, if there is one, is the only narrative document which may synthesise the prosecution and defence cases at the trial and the grounds of appeal and response at the appeal. This means that the Commission starts any investigation with the grounds as to why the first appeal was refused. A judgment dismissing an appeal is not a neutral document; it is a document which should lead to the inexorable conclusion that the conviction is safe. To quote David Jessel, "the court paperwork file is just an explanation of why the person is guilty".[126]

11.118 In this respect, it is notable that Chris Henley KC found that when considering Andrew Malkinson's first application in 2009, "P1" – a CCRC Commissioner – "having only had an initial read through of the Court of Appeal papers from 2006, which provide only very basic summary detail, [REDACTED], and the applicant's submissions" responded with "heavy scepticism".[127]

11.119 Likewise, he found "P4", a case review manager – who took over responsibility for Mr Malkinson's application in 2011 ("starting all over again from scratch") – "was relying almost entirely on the limited 2006 Court of Appeal case summary 'to get a feel for the case'".[128]

11.120 We recognise that obtaining the CACD judgment is a necessary counter to the inevitably one-sided argument put forward by an applicant. However, the CACD judgment – or at least the later analysis – is not a neutral document because it will inevitably have come to a conclusion adverse to the applicant.

11.121 Where the CACD has already rejected a possible ground of appeal, the CCRC will be aware that the Court will not normally entertain fresh argument on that point (case law suggests that it will only do so in "exceptional circumstances").

11.122 There is the risk of a further distortion. If – as in *Malkinson* – the CACD has stated why they think the conviction is safe, evidence that does not challenge those reasons risks being seen as irrelevant to the safety of that conviction.

11.123 In Andrew Malkinson's case, the CACD had concluded that the jury must have found the identification evidence "compelling". This followed logically from the jury's verdict, given the standard of proof and the lack of other evidence of guilt in the case: there was no forensic evidence linking Mr Malkinson to the crime; he had no relevant criminal history; there were no admissions and no adverse inferences to be drawn from his interviews. However, we think the characterisation of the identification evidence as "compelling" risked distorting the thinking of the CCRC, and may well

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126 E Dugan, "For many, Andrew Malkinson's case a sign the CCRC has lost its way", *Guardian* (18 July 2024).

127 Henley Review, para 39.

128 Above, para 68.

explain why caseworkers failed to recognise the potential relevance of the new DNA evidence.[129]

Conclusions – the referral test

11.124 We see force in the criticism that the CCRC has adopted an approach to the assessment of "real possibility" that goes beyond that established in *Pearson*. The proportion of referred cases in which the CACD does quash a conviction is more congruent with the CCRC applying a higher threshold, namely whether it is more likely than not that the CACD will quash the conviction.

11.125 We accept that if the CCRC are satisfied that there *has* been a miscarriage of justice, they will find a way to refer the conviction to the appellate court. The "exceptional circumstances" provisions enable them to do so.

11.126 However, we think that there is evidence that the "real possibility" test has led the CCRC to focus its investigations too narrowly on those lines of inquiry which are likely to provide something persuasive to the CACD; indeed, on the basis of the evidence revealed by the Henley review, we are satisfied that the way the CCRC applied the test contributed to the long delay in securing Andrew Malkinson's exoneration.

11.127 We conclude therefore that the referral test is hindering the correction of miscarriages of justice.

11.128 There is no reason to suggest that these defects of reasoning are limited solely to Mr Malkinson's case. We note that the same defects of reasoning were exhibited at different times in Mr Malkinson's case by a Commissioner ("P1") and a Case Review Manager ("P4"). We also note that there are ongoing cases where applicants say that the CCRC is unwilling to undertake "speculative" tests which might – depending on the results of those tests – suggest that a conviction was unsafe.

11.129 Indeed, Chris Henley KC noted that the CCRC's approach to Mr Malkinson's applications mirrored the errors for which it had previously apologised for in Mr Nealon's case.[130]

11.130 Second, as suggested by the Henley review of the CCRC's handling of the Malkinson case, the test can too readily focus on what the CACD *will* do, rather than what it *might* or *may* do.

11.131 We accept that part of the reason for this practice may lie in a perception – not without some justification – that the CCRC will incur the displeasure of the CACD if it refers too many cases, which the Court itself considers should not have been referred.

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[129] Above, at para 38, the Henley review noted that a CCRC Commissioner said, "Just because it appears there is someone else's DNA on the complainant's vest (not her boyfriend's or the applicant's) cannot surely produce a hope of a successful referral in view of all the other strong ID evidence – and the case was really based on the ID evidence which has been approved by the [CACD]" (p 40). He also noted that in refusing to test the victim's clothing a member of CCRC staff said, "There is still the identification to get over" (para 65).

As Mr Henley observed (at para 31) however, "It must logically follow that if the conclusion from the new DNA evidence was that the offender might not be Mr Malkinson, then it would also follow that identification evidence might be unreliable too".

[130] Henley Review, paras 82-94.

It may also fear – again, not without justification – that there may be adverse consequences of this for the CCRC.[131] We discuss the relationship between the Court and the CCRC later in this chapter from paragraph 11.277.

11.132 This is not to say that the Commission should be sending 'weak' cases to the CACD. If further investigation could strengthen the case for referring the conviction or sentence, then it is preferable that such investigation should take place.[132] What we are concerned about is whether the "real possibility" test is the correct one.

Consultation Question 55.

11.133 We provisionally propose that the predictive "real possibility" test applied by the Criminal Cases Review Commission for referring a conviction should be replaced with a non-predictive test.

Do consultees agree?

The consequences of a new test for previously dismissed applications

11.134 In December 2024, the CCRC's Board wrote to us drawing attention to the "question of how any new test will interact with cases that the CCRC has previously turned down". It noted that any new test may mean that in excess of 25,000 former applicants could legitimately ask for their cases to be reconsidered.

11.135 In *Ali*,[133] a divisional court considered a policy of the Secretary for State for Justice, under which he would not reconsider applications for compensation for a miscarriage of justice which had been decided before the ruling of the Supreme Court in *Adams*, which had broadened the meaning of "miscarriage of justice" beyond that which the Secretary of State had been applying to such claims. The Court, cited the case of *ex parte Cheung*, where Sir John Donaldson MR had said:[134]

> 'Order, counter order, disorder' is of the essence of good public administration. If the law is changed or suddenly discovered, it is right that it should be applied in its new form thereafter but if it is to be applied retrospectively this must be subject to some

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131 See for instance the comments of the then Deputy Chair of the CCRC, Alastair MacGregor KC, quoted at para 11.281 below. Mr MacGregor notes that after the CACD expressed concerns about CCRC references on 'change of law' grounds, "members of the senior judiciary brought the matter to the attention of government", and legislation was passed which, in effect, required the CCRC to apply the same test when deciding whether to refer a case as the CACD would apply when considering whether to grant leave to appeal out of time.

132 A difficulty arises here because the Commission has previously stated that cases which satisfy the "real possibility" test should be referred "without delay", but the CCRC takes (or at least has taken) the view that once referred it cannot continue an investigation so that additional grounds can be identified that would form the basis of a supplementary reference. Thus, there is a tension between referring a case as soon as possible and providing the court with the strongest evidence for an appeal.

133 *R (Ali) v Secretary of State for Justice* [2013] EWHC 72 (Admin), [2013] 1 WLR 3536, affirmed in [2014] EWCA Civ 194, [2014] 1 WLR 3202.

134 *R v Hertfordshire County Council, ex p Cheung*, *The Times* 4 April 1986, CA, by Sir John Donaldson MR.

limitation. Quite what limitation should be applied would depend on the particular circumstances. … In the field of public law, it is controlled, in the absence of any express statutory provision, by the exercise of the court of discretion.

11.136 The divisional court in *Ali* elaborated:[135]

> The court [in *ex parte Cheung*] went on to set a "limitation period" in the exercise of its discretion, which sought to produce consistency but with an eye to the practical considerations of public administration on the facts in that case.
>
> We consider that the approach in *Ex p Cheung* was correct. A three-month "limitation" period is appropriate. Hence, only where the earlier, challenged decision was made within three months of the decisions in the *Adams* cases, would it be appropriate to accede to the challenge.

11.137 The Court therefore held that the decision-maker has discretion to refuse to reconsider an application which had been decided under the "old" law.

11.138 In the particular circumstances of *Ali* and *Cheung*, where the change of law arose from a development of the common law, the Court held that those whose refusal had been made within three months of leave being granted for the application for judicial review that led to the change of law would have a stronger case for their application to be reopened. They would have been entitled to bring the challenge themselves that led to the development in the law (which, it is assumed, would have been successful). They should not be penalised for not doing so, and instead awaiting the outcome of the test case, because "if a test case is in progress in the public law court, others who are in a similar position to the parties should not be expected themselves to begin proceedings in order to protect their positions".[136]

11.139 The same consideration does not apply where change is effected by statute. Those whose applications were unsuccessful under the old test would have no expectation that they could have challenged the decision, which was properly reached under the law as it stood.

11.140 However, in the case of the CCRC, because there is no rule against a person making multiple applications, and because any new application would be judged against the rule in force at the time of that application, it would be open to any person whose application had been rejected under the "real possibility" test to make a further application which would ultimately be subject to the new test.

11.141 As we discuss at paragraphs 11.224 to 11.230 below, the CCRC has a discretion not to refer, and to this end has developed a policy to govern when it will exceptionally exercise this discretion when the "real possibility" test is made out. The CCRC also has its own policy governing how to approach reapplications.[137]

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135 *R (Ali) v Secretary of State for Justice* [2013] EWHC 72 (Admin), [2013] 1 WLR 3536 at [211]-[212], by Beatson LJ.

136 From *R v Hertfordshire County Council, ex p Cheung* (transcript, p 5) quoted in *R (Ali) v Secretary of State for Justice* [2013] EWHC 72 (Admin), [2013] 1 WLR 3536 at [210], by Beatson LJ.

137 CCRC, *Casework Policy: Case Review Process* (12 August 2024) paras 2.3.1-2.3.5.

11.142 We therefore conclude that were a new non-predictive test to be introduced in primary legislation, it would be open to the CCRC to develop an internal policy for deciding whether to reconsider an application, when it has already considered an application under the "real possibility" test and rejected it. We envisage that there will be a limited number of cases which would merit a reference under a new non-predictive test and it would be open to the CCRC to decide which cases it thinks merit reconsideration.

Alternative tests

11.143 There have also been proposals for the adoption of tests applied by equivalent bodies in other jurisdictions. Some of these bodies are required to determine whether a "miscarriage of justice" may have occurred or if it would be in the "interests of justice" to make a reference.

11.144 It should be recognised, however, that these alternative tests operate within the context of their own appeal courts' systems and tests. For instance, the Scottish Criminal Cases Review Commission referral test is "that a miscarriage of justice may have occurred; and that it is in the interests of justice that a reference should be made".[138] This reflects the fact that the sole ground of appeal in Scottish appellate courts is "miscarriage of justice".[139]

11.145 The New Zealand Criminal Cases Review Commission is required to determine whether it would be in the "interests of justice" to make a reference and in making that determination it is required to take into account a number of factors, including the prospect of the appellate court allowing the appeal.[140]

11.146 The Westminster Commission recommended that references should be made by the CCRC where it determines:[141]

(1) in relation to a conviction, that the conviction may be unsafe;

(2) in relation to a sentence, that the sentence may be manifestly excessive or wrong in law; or

(3) it is in the interests of justice to make a reference.

11.147 In the Westminster Commission's view this would enable the CCRC to refer to the CACD all cases where a miscarriage of justice may have occurred, including lurking doubt cases.[142] Whilst the nature of the test proposed by the Westminster Commission would not be predictive, given that in indictable cases it mirrors the test applied by the CACD, the CCRC could still draw on the Court's case law and approach in its assessment of whether a conviction may be unsafe.

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138 Criminal Procedure (Scotland) Act 1995, s 194C(1).

139 Above, ss 106(3), 118 and 175(5).

140 Criminal Cases Review Commission Act 2019, ss 17(1) and (2).

141 The Westminster Commission Report, p 37.

142 Above.

11.148 A number of consultees offered suggested reforms to the referral test. Both CALA and APPEAL proposed that a conviction should be referred when:

(1) there is an arguable ground of appeal; or

(2) the conviction may be unsafe; or

(3) it is in the interests of justice to do so.

11.149 23 Essex Street Chambers submitted that cases should be referred where there is an arguable ground of appeal in that a conviction may be unsafe or a miscarriage of justice may have occurred (or both).

11.150 The Bar Council also supported a test involving an arguable ground and suggested in addition to the current test or as an alternative that:

(1) a reference should follow where the CCRC considers that the CACD ought to quash the conviction; or, perhaps

(2) where the CCRC considers that there are arguable grounds of appeal (that is, that it is arguable that the conviction is unsafe, resulted from an unfair trial, or was an abuse of process) which either (a) were not previously advanced at the permission stage, or (b) were previously advanced but are materially strengthened by the availability of fresh evidence.

11.151 Dr Lucy Welsh and Cardiff University Law School Innocence Project suggested the test could be whether a miscarriage of justice may have occurred, therefore returning to the original proposal by the Runciman Commission.[143]

11.152 The Law Society, however, argued that the miscarriage of justice test that has been used in other jurisdictions, such as Scotland, mirrored their appeal test but did not align with that in the CACD. Given this, it supported a test focusing on whether it was in the interests of justice to refer, similar to the New Zealand model. Dr Lucy Welsh also considered the interests of justice test and noted it was the less contentious option. Mark Newby also favoured an interests of justice test.

11.153 The London Criminal Courts Solicitors' Association ("LCCSA") similarly suggested an interests of justice test having regard to various factors including:

(1) in the case of a conviction, that there is an arguable ground of appeal and that the conviction may be unsafe;

(2) in the case of a sentence, that there is an arguable ground of appeal.

A new test for referring appeals against conviction

11.154 The main merit of the existing test – and for some critics its main weakness –is that it links the CCRC test to the test that will be used in the appellate court.

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[143] Report of the Royal Commission on Criminal Justice (1993) Cm 2263, p 182, para 12.

11.155 Any test needs to be 'broader' than that that will be used in the appellate court. That is to say, any case where the appellate court would quash the conviction should be capable of fulfilling the CCRC's referral test; otherwise, some cases which might be quashed by the Court would be unable to be corrected, because they would fall at the reference stage.

11.156 Our approach to this issue is therefore shaped by our provisional proposal that the CACD test for appeals against conviction should remain one of safety – that is, that the conviction is unsafe if the convicted person is, or might be, not guilty; if the convicted person did not receive a fair trial; or if the conviction amounted to an affront to justice. It must, however, also reflect our provisional proposal that the CACD should be able to order a retrial without quashing a conviction if there is fresh evidence or identification of legal error which might have led the jury to acquit.

A non-predictive test based on the test that the CACD will use

11.157 If, as we provisionally propose, the test used by the CACD in appeals against conviction remained one of safety, the CCRC could refer based on whether the conviction "may be unsafe".

11.158 In Chapter 8, we have asked whether the current meaning of "unsafe" in the test applied by the CACD should be statutorily defined so as to include (i) the possibility of factual innocence, (ii) the convicted person not having received a fair trial, and (iii) the prosecution having amounted to an affront to justice. Were these wholly disaggregated (that is, if they represented three distinct grounds for quashing a conviction) we think that a "may be" test in relation to (ii) and (iii) may be inappropriate. If these tests were wholly disaggregated, the CCRC would have to consider whether the convicted person might not have received a fair trial and whether the prosecution might have amounted to an affront to justice. These – and especially (iii) – would appear to us to be much more firmly something for a court to come to a judgment on than a non-judicial body. Therefore, if they were wholly disaggregated, we think there would be a strong case for retaining a predictive test in respect of (ii) and especially (iii).

11.159 However, under our provisional proposal, "unsafe" would be retained, but clarified. We do not think that the problem outlined in the previous paragraph is so acute if the CCRC is simply judging whether a conviction may be unsafe but having regard to this clarified definition.

An "interests of justice" test

11.160 Several respondents considered that the test ought to be, whether as the single ground or as a residual ground, that it is in the interests of justice to make a reference.

11.161 In the same way that it operates in New Zealand, the CCRC could be required to take into consideration a number of factors when applying the test, including the prospects of the appeal succeeding. Therefore, it could maintain a connection with the test applied by the CACD in indictable cases and may also provide the CCRC with more latitude to refer the types of cases that it may find harder to refer at the moment, such as lurking doubt cases.

11.162 However, similarly to the "miscarriage of justice" test, there could be potential definitional difficulties and a risk that the test could be interpreted too restrictively and become too focused on the prospects of the appeal succeeding.

11.163 Moreover, it might be questioned whether it is appropriate for a non-judicial body to be telling a court that something is "in the interests of justice".

A "miscarriage of justice" test

11.164 The test required to be applied by the Scottish Criminal Cases Review Commission is that a miscarriage of justice may have occurred and that it is in the interests of justice that a reference should be made. This reflects the test which the High Court of Justiciary in Scotland will use when deciding the appeal.

11.165 We do not think "miscarriage of justice" would be a useful test in England and Wales. The phrase "miscarriage of justice" no longer appears in the legislation governing how appeals will be decided by the CACD, and is potentially ambiguous. The only relevant legislation in England and Wales which does use, and define, the phrase "miscarriage of justice" is section 133 of the Criminal Justice Act 1988 governing compensation for miscarriages of justice. This definition is extremely restrictive (see the discussion in Chapter 16) and would be wholly unsuitable as a definition of the grounds for a reference. To this end, if "miscarriage of justice" were to be used in a referral test for the CCRC it would be necessary to provide a definition of the term, so as to ensure that there was no prospect of the definition of the phrase being read across from section 133. If, however, it was possible to provide a definition of "miscarriage of justice" for this purpose, then there would be no need to use the shorthand of "miscarriage of justice"; the definition could be used as the referral test.

Conclusion

11.166 Of these options, we think that the most appropriate test for the CCRC to employ when deciding that a conviction should be referred to the appellate court would be that the conviction "may be unsafe".

11.167 We recognise that although the CACD uses the safety test, appeals in summary proceedings proceed by way of rehearing and do not involve a safety test. Nonetheless, we think "may be unsafe" would be an appropriate test for applications relating to summary proceedings. It provides a rational basis for deciding whether a case should be referred that avoids the problem of applying "real possibility" to proceedings that will proceed by way of rehearing and are therefore highly unpredictable.

11.168 We think that it is important to acknowledge that changing the referral test will not necessarily make a difference in the vast majority of cases. Indeed, Dr Hannah Quirk, while advocating replacement of the predictive test, has said that "in 95 per cent of cases" changing the test would make no difference.[144] We received several responses which criticised aspects of the culture and working arrangements of the CCRC. Changing the test would not necessarily affect these.

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144 "The Problem with Criminal Justice", *Double Jeopardy*, Episode 51 (27 Mar 2024).

Consultation Question 56.

11.169 We provisionally propose that the Criminal Cases Review Commission should refer a case to the appellate court when it considers that a conviction may be unsafe.

Do consultees agree?

11.170 We invite consultees' views on any alternative non-predictive referral tests.

11.171 For the purposes of this provisional proposal, "unsafe" would have the same meaning that we have discussed in Chapter 8. That is, a conviction would be unsafe if the applicant was or might be not guilty; if the applicant did not receive a fair trial; or the prosecution amounted to an affront to justice.

11.172 In addition, for the purposes of the referral test, a conviction would be unsafe if the trial and/or conviction was a nullity. For reasons explained in Chapter 8, where the proceedings at which a person was convicted are found to be a nullity, the conviction is not "unsafe", because there is no conviction. However, because it is not possible to bring a freestanding application for a writ of venire de novo, there would need to be a power for the CCRC to refer a case where it believed that the proceedings might be found to be a nullity.

The referral test in sentencing cases

11.173 We received few comments relating to the test in relation to referring appeals against sentence.

11.174 APPEAL suggested that the CCRC should refer a sentence appeal where:

(1) there is an arguable ground of appeal;

(2) the sentence may be unlawful, manifestly excessive, wrong in principle or against the interests of justice, taking into account evolving standards of decency; or

(3) it is otherwise in the interests of justice to do so.

11.175 In (2), the reference to "unlawful, manifestly excessive [or] wrong in principle" reflects the tests that are currently used by the CACD when deciding an appeal against sentence. The final limb of "against the interests of justice, taking into account evolving standards of decency" reflects its submission on the test for sentencing appeals and is principally aimed at providing a route to challenge sentences of indeterminate imprisonment for public protection under repealed provisions of the Criminal Justice Act 2003.[145]

11.176 We think that there is a key difference between an appeal against conviction and an appeal against sentence. Sentencing is an inherently judicial act: there is no

[145] Criminal Justice Act 2003, s 225. Repealed by Sentencing Act 2020, sch 28.

objectively "correct" sentence (although there may be unlawful sentences, such as the non-imposition of the mandatory life sentence for murder). However, while "safety" incorporates some considerations which are a matter of judicial judgment (for instance, whether the prosecution amounted to an affront to justice) insofar as it also covers whether a person is factually innocent or guilty, this is usually[146] an objective fact (even if there is no way of knowing the objective "truth").

11.177 In our view, while it makes sense for an independent expert commission to judge whether a miscarriage of justice may have occurred, the same considerations do not apply to sentencing appeals. The CCRC does not, by and large, possess an expertise in sentencing practice, and nor is it particularly constituted in order to make normative judgements as to what an appropriate sentence should be.

11.178 In this respect, the role of the CCRC in considering sentencing appeals is much more a technical function and will often turn on legal techniques of looking at the relevant law and guidelines, and making comparisons with comparable cases. We therefore think that it is appropriate to retain a predictive test for sentencing appeals.

11.179 We believe that the current predictive test remains appropriate for appeals against sentence. While we think it would be perfectly possible to have a non-predictive test for sentencing, this could risk the Commission coming close to making a judgement on what is essentially a judicial matter. For instance, we do not think it would be appropriate for the Commission to be judging whether a sentence "may be excessive" or "may be unlawful".

11.180 We note that the final limb of APPEAL's proposed test for sentencing references was primarily intended to address the issue of prisoners who received Indeterminate Sentences for Public Protection between 2005 and 2012. We do not consider, however, that the CCRC is a body particularly well-placed to judge "evolving standards of decency". We think that the issue of how to address IPP cases is, as we discuss in Chapter 7, primarily one for Parliament.

Consultation Question 57.

11.181 We provisionally propose that the current test applied by the Criminal Cases Review Commission for referring a sentence – that there is a real possibility that the appellate court will not uphold the sentence – should be retained.

Do consultees agree?

[146] Some aspects of guilt and innocence are a matter of judgement. For instance, whether conduct is "dishonest" is ultimately a matter for the jury to adjudge, based on their view of the standards of decent, ordinary people. However, whether the defendant actually engaged in the conduct alleged to be dishonest is an objective fact.

THE POWER OF THE COURT OF APPEAL CRIMINAL DIVISION TO DIRECT A CCRC INVESTIGATION AND THE REQUIREMENT FOR A FIRST APPEAL

11.182 We consider these two issues together as they both turn on a similar matter: that some cases might be best addressed by using the investigatory approach of the CCRC from the outset rather than relying on the adversarial process of the CACD at a first appeal.

The requirement for a first appeal

11.183 Section 13(1)(c) of the CAA 1995 states that a reference cannot be made by the CCRC unless an appeal against the conviction, verdict, finding or sentence has been determined or an application for leave to appeal refused, unless (under section 13(2)) it appears to the Commission that there are exceptional circumstances which justify making the reference.

11.184 The exception in section 13(2) was made in response to fears expressed by members of the House of Lords (including Viscount Runciman) during passage of the Bill that the restrictions now found in section 13(1)(c) would prevent consideration of meritorious cases – for instance, where "it seems to the commission that there is a real possibility that the conviction was unsafe but the relevant argument or evidence had been raised in some rudimentary or insufficient fashion either at the original trial or subsequent appeal".[147] At the same time, the Government and the Lord Chief Justice were concerned that without a restriction like that in section 13(1), there was a danger of a large number of appeals – especially sentencing appeals – swamping the CCRC and the CACD.

11.185 We accept this point, especially in relation to sentencing appeals. We would add that in our experience the Criminal Appeal Office has an expertise in relation to sentencing issues, and frequently identifies issues that the convicted person's legal advisers have failed to identify.[148]

11.186 Likewise, where an appeal against conviction turns on a narrow point of law, such as whether a legal direction was correct, or whether the judge should have acceded to a submission of no case to answer, these cases can be dealt with by the CACD at a first appeal.

11.187 Two consultees raised the requirement for an applicant to have first made an appeal and for that appeal to have been declined before being able to make an application to the CCRC, unless there are exceptional circumstances that justify making the reference. APPEAL suggested removing this requirement and stated that it was concerned particularly:

> [I]n a climate where post-conviction legal aid provision is so minimal … the requirement places many potentially wrongly convicted individuals in a "Catch-22"

147 *Hansard* (HL), 8 June 1995, vol 261, col 1511.

148 See Judiciary of England and Wales, *A Review of the Year In the Court of Appeal, Criminal Division: October 2023 – September 2024* (2025) p 1, where the Vice-President of the CACD stated that he was "particularly grateful to the [Criminal Appeal Office] staff for their vigilance in spotting unlawful sentences which, regrettably, have previously gone unnoticed".

whereby "until you've lost your first appeal, you can't go to the CCRC… so you can't get any evidence to go for your first appeal.

11.188 The Westminster Commission expressed concern about requiring applicants to have made an appeal in this way, as some applicants may not have "the legal assistance or access to evidence needed to properly pursue a first appeal".[149] A CCRC investigation may provide stronger support for a particular ground of appeal. Therefore, there may be a risk that if the applicant is required to take their (weaker) case to the CACD, it might then not be possible for the CCRC to refer the case on that same ground. Additionally, whilst a loss of time order (see paragraphs 6.128 to 6.157 above) may not be made by the CACD in respect of a CCRC reference,[150] there remains a risk of such an order being made where the applicant exercises their right of appeal. As noted in paragraph 6.136 above, research suggests that this possibility may deter some applicants from pursuing meritorious appeals.

11.189 In discussions with victims and claimed victims of miscarriages of justice, convicted persons talked of the process requiring them to "burn through" their grounds of appeal. That is, a person might be forced to take some point to the CACD in their first appeal. Even if the CCRC subsequently identifies additional grounds of appeal, it is unlikely to refer on the ground that has already been rejected by the CACD. It may be that that point, while not sufficient to render the conviction unsafe, had it been considered together with the additional grounds identified by the CCRC, might have been enough to affect the outcome. However, these consultees and their legal representatives argued that the CACD will often take an "atomistic" approach. It will only depart from its previous conclusion on an issue in exceptional circumstances. Consultees felt that there were often cases where, had the CACD considered all the grounds holistically they would have found a conviction unsafe, but considered sequentially, the new grounds were rarely enough on their own to displace the previous finding that the conviction was safe.

11.190 The problem is likely to be especially acute where the applicant does not lodge an in-time appeal, and the CCRC requires them to make an out-of-time application to the CACD before it will consider the case. In this circumstance, the grounds of appeal will be considered by the single judge alongside the requirement to justify the Court granting leave to appeal out of time. If the application fails at this stage, the CCRC will be reluctant to consider the case on the basis of the arguments that failed before the single judge.

The power to direct the CCRC to undertake an investigation

11.191 Section 23A of the CAA 1968 permits the CACD to direct the CCRC to undertake investigations on its behalf.

11.192 The power was introduced pursuant to a recommendation of the Runciman Commission. The Runciman Commission had noted that under the Criminal Appeal Act 1907, the Court of Criminal Appeal had the power to appoint a special commissioner to conduct an inquiry into documents and to appoint as assessors any persons with special expert knowledge where such knowledge was likely to be

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149 The Westminster Commission Report, p 38.

150 CAA 1968, s 29(2)(c).

required for the determination of a case. The powers were, however, little used and were not reenacted in the CAA 1968.

11.193 This power is generally only used where allegations of juror misconduct or interference with the jury is alleged. The CCRC is able to interview jurors.

11.194 We are concerned that the power in section 23A to "direct" the CCRC to undertake an inquiry does not reflect the principle that the CCRC is to be independent of both the Government[151] and the CACD. The difference may be largely semantic, but given the need for the CCRC to be seen to be independent of the CACD, there would be merit in replacing the power to "direct" the CCRC with a power to request its assistance.

11.195 We also think, however, that the power to draw upon the resources of the CRCC could be used more broadly. We think that there are some first appeals that would benefit from the investigatory resources and approach of the CCRC, rather than going straight back to adversarial proceedings in the CACD. For instance, where a first appeal turns on fresh expert evidence or a new witness, rather than relying on the adversarial processes of the CACD, there may be value in referring the case to the CCRC so that it can undertake further inquiries. The CCRC would be able to commission further expert evidence, or investigate the claims made by the new witness.

11.196 An example of the power being used in this way was the case of *Joof and others*.[152] Five men convicted in January 2008 of the murder of Kevin Nunes made an in-time application for leave to appeal against their conviction. In July 2009, the CACD directed the CCRC to investigate issues raised in the applications. The CCRC, in turn, required the Chief Constable of Derbyshire Constabulary to appoint an investigating officer, to investigate the actions of Staffordshire Police Sensitive Policing Unit ("SPU"), who had been responsible for the handling of a key witness in the case.

11.197 That investigation found serious misconduct in the handling of the key witness in the case, including concealing from the CPS and the defence criminal conduct by the witness while under police protection, and making inappropriate payments to his family. The investigation found that the police deliberately avoided investigating some misconduct so that it would not have to be disclosed. It also found that one of the police handlers had been having an affair with the disclosure officer in the case, and she had met the witness. This was of importance as it could have provided the defence with an alternative explanation of how the witness had come to know certain facts which, on the prosecution case, suggested he had been present when the murder was committed.

11.198 The CACD quashed the convictions of all five men, concluding the way in which the witness had been handled and the failure to make disclosures to the defence appeared to be a "serious perversion of the course of justice".

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151 There is a similar provision in s 16 of the CAA 1995 which requires the CCRC to consider and report on any matter referred by the Secretary of State in relation to the exercise of the Royal Prerogative of Mercy (although it is not referred to in terms of a "direction" to the CCRC).

152 *R v Joof* [2012] EWCA Crim 1475.

11.199 Under section 23A(1) of the CAA 1968, the Court can only refer a matter to the CCRC if "an investigation of the matter by the Commission is likely to result in the Court being able to resolve it" and "the matter cannot be resolved by the Court without an investigation by the Commission". We think that these conditions may be too stringent and should be relaxed, so that the Court may refer a matter to the CCRC for investigation in a broader range of circumstances.

11.200 At present, the power to direct a CCRC investigation is not a power which can be exercised by a single judge, and therefore requires a hearing before the full court. If it were possible for a single judge to make such a request, we would anticipate that, (unlike decisions to grant leave to appeal which are typically taken by a judge of the King's Bench Division sitting as a member of the CACD), these decisions would be taken by a serving or former Lord or Lady Justice of Appeal.

Consultation Question 58.

11.201 In order to reflect the independence of the Criminal Cases Review Commission ("CCRC"), we provisionally propose that the power of the Court of Appeal Criminal Division ("CACD") to *direct* the CCRC to undertake an investigation on its behalf should be replaced with a power to *request* an investigation.

We provisionally propose that the conditions for the CACD to refer a matter to the CCRC for investigation should be relaxed so that the CACD can make use of this power in a wider range of circumstances.

We provisionally propose that the power to request the CCRC to undertake an investigation on its behalf should be exercisable by a single judge.

Do consultees agree?

11.202 However, even if these conditions were relaxed, we do not know whether the CACD would be open to making greater use of the CCRC in this way. We think, therefore, that there is merit in expanding the circumstances in which the CCRC can examine potential miscarriages of justice that have not been the subject of a first appeal. This would enable the CCRC to investigate a case where the nature of the case was such that the application would benefit from the investigatory resources and approach of the CCRC.

11.203 We recognise that the requirement to have brought a first appeal (or to show exceptional circumstances) currently means that around 40% of applications can be peremptorily rejected, and that removing this requirement could lead to a large increase in the number of applications which need to be considered by the CCRC.

11.204 However, we do not think that this would result in a large increase in applications to the CCRC for several reasons. First, it is clear that many people already apply to the CCRC without having made a first appeal, and the CCRC will normally tell them that they must first apply to the CACD. Although the CCRC is able to point to the statutory restriction at present, were this to be removed it would remain open to the CCRC to

require applicants to make an application for leave to appeal in appropriate cases under its own discretion. We envisage that the CCRC would continue to expect that an applicant would make a first appeal direct to the Court unless there was a reason why it was more appropriate to invoke the CCRC's investigatory powers.

11.205 Second, where there are good arguable grounds for an appeal, it is unlikely that a convicted person will want to give up the opportunity for an appeal to the CACD, since they would have a right to apply for a CCRC investigation afterwards in any case.

11.206 We do not think that the restriction would need to be lifted in relation to appeals in summary cases. Because the appeal in the Crown Court proceeds by way of rehearing, it is reasonable to expect an applicant to use that avenue first. We also do not think that it should apply to appeals against sentence, the vast majority of which are more appropriate for consideration by the CACD in the first instance, and indeed subsequently, without the need for the investigatory resources of the CCRC. (Indeed, in Chapter 7 on appeals against sentence in the CACD, we have proposed a power for the Registrar to refer a case back to the Court for a second or subsequent appeal where the Registrar considers that the sentence may be unlawful, so that such cases would not need to be dealt with by the CCRC.)

11.207 We would anticipate that the CCRC would develop casework policies to decide when to undertake an investigation where there had been no first appeal, and when to require the applicant to seek leave to appeal from the CACD. For instance, where an application was primarily about a question of law, such as the judge's directions or a decision on admissibility, it would normally be appropriate to seek leave to appeal from the CACD.

Consultation Question 59.

11.208 We provisionally propose that the requirement that there must have been a first appeal or an unsuccessful application for leave to appeal before the Criminal Cases Review Commission can refer a case should not apply to appeals against conviction in trials on indictment.

Do consultees agree?

11.209 We think that the *Malkinson* case – ironically, given the flaws in the CCRC's handling of his case identified in the Henley review – might be an example of where this approach could have resulted in a much swifter correction of a miscarriage of justice. Mr Malkinson's first appeal was focused on three issues. First, fresh evidence showed contamination of the swabs which had indicated that the attacker had used a condom (and therefore undermined the prosecution case that the absence of Mr Malkinson's DNA was down to him being "forensically aware").[153] Second, it was submitted that the identification evidence of one eyewitness, Beverley Craig, should not have been

[153] The swabs used to examine the victim's body were contaminated with a substance which could return a false positive for the presence of condom lubricant. However, other uncontaminated swabs had been used on the victim's clothing and separately indicated condom use.

admitted because of a failure to comply with procedural requirements relating to the conduct of the identification parade. Third, it was submitted that the summing-up was unbalanced.

11.210 It seems to us unlikely that the first and third grounds would have been any different had there been a CCRC investigation before the appeal. However, such an investigation might well have identified that the two eyewitnesses had previous convictions for offences of dishonesty which had not been disclosed to the defence (which formed the second ground on which the CACD quashed Mr Malkinson's conviction in 2023). It might also have identified the suspicious circumstances by which that eyewitness and her partner came to give evidence against Mr Malkinson.[154] Further, a thorough investigation at that point might have identified a photograph of the victim's hands (which was not disclosed to the defence) which supported her account of having scratched her attacker. At trial, the judge told the jury that that they could only convict Mr Malkinson if they were satisfied that she was mistaken on this point.

11.211 Had the CACD in 2006 even known only about the issues with the eyewitnesses' convictions, it might well not have concluded that the identification evidence was "compelling"[155] – a conclusion which seems to have strongly influenced the CCRC's failure properly to investigate Mr Malkinson's subsequent applications.

THE REQUIREMENT FOR FRESH EVIDENCE OR NEW ARGUMENT

11.212 Section 13(1)(b) of the CAA 1995 states that a reference cannot be made unless the decision that there is "real possibility" that the Court would not uphold the conviction, verdict, or finding is attributable to "an argument, or evidence, not raised in the proceedings which led to it or on any appeal or application for leave to appeal against it".

11.213 Again, section 13(2) allows the CCRC to refer a case where this condition is not met if it appears to the CCRC that there are exceptional circumstances which justify making the reference.

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154 This was the fourth ground of appeal in Mr Malkinson's 2023 appeal, which the CACD refused leave to argue. The Court accepted that "There are a number of unsatisfactory features about the sequence of events relating to Michael Seward… We understand why it is suggested that the timing of his eventual participation in the identification procedure, viewed against the dates of court appearances in respect of the criminal charges which he was then facing, might be thought suspicious": [2023] EWCA Crim 954 at [72], by Holroyde LJ VPCACD. However, it concluded "this amounts to no more than speculation. There is an absence of detail about the various charges which makes it impossible to draw any inference [so] as to raise concerns". The point here is that had these investigations taken place much earlier, it might have been possible to establish the facts relating to any relationship between the evidence given by that eyewitness and his court appearances, and whether it suggested that the evidence given at trial was unsatisfactory.

155 Given the ambivalent nature of the victim's own identification evidence (the jury had to accept that she was right in her identification of Mr Malkinson but mistaken in her account of having scratched him) we do not think that the CACD, taking into account the need for caution when dealing with eyewitness evidence (*R v Turnbull* [1977] QB 224, CA) would have concluded that her identification on its own was "compelling".

11.214 The LCCSA noted that it had been led to understand that the CCRC had never deployed "exceptional circumstances" to refer a case without fresh evidence or argument and stated this ought to be considered further.

11.215 In his criticism of the "real possibility" test, former CCRC Commissioner David Jessel has said:[156]

> What miscarriage of justice campaigners were all about was banging on the doors of the Court of Appeal and sending cases back until they got it bloody right – whether it was Carl Bridgewater or the Birmingham Six. Sending it back until the penny dropped.

11.216 We consider that this problem applies as much to the requirement for fresh evidence or argument as it does to the "real possibility" test itself.

11.217 Although the CCRC has the power to refer without fresh evidence or argument, the approach of the CACD is to require exceptional circumstances to depart from its previous findings; accordingly, it is inherently unlikely that the "real possibility" test could be made out without fresh evidence or argument.

11.218 However, if, as we provisionally propose, the "real possibility" test is replaced with a non-predictive test, it is questionable whether this restriction would be appropriate.

11.219 There will be some cases where, despite the absence of fresh evidence or argument, the CCRC concludes that a miscarriage of justice may have occurred. One example may be where the jury was presented with a wholly circumstantial case at trial. The CCRC may be concerned that other possible suspects or scenarios were not investigated properly in line with the requirement to pursue all reasonable lines of enquiry and that, had they been, the evidence available at trial might have been very different. However, it might not now be possible to conduct those enquiries so as to establish fresh evidence, and a failure to pursue alternative lines of enquiry would not in itself be a ground of appeal.

11.220 If, in such circumstances, the CCRC concludes that a conviction may be unsafe, we consider that it should be able to refer the case to the CACD. We also consider that where the CCRC, as an expert body, has expressed such concern, the CACD should take it into account in deciding whether the conviction is safe.

11.221 We think it is important that the CCRC can refer a case where, as an expert body, it considers that the conviction may be unsafe, even if there is no new evidence or argument. We also think it should have the power, in appropriate cases, to keep sending a case back to the CACD "until the penny drops". We consider that the CCRC has sufficient power to do that.

11.222 If our provisional proposal for reform of the referral test were to be implemented, the CCRC would have greater freedom to refer a conviction which it considered to be unsafe, notwithstanding that the CACD had already found the conviction to be safe.

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156 Quoted in J Robins, "'The baptismal curse': a two-part history of the CCRC", *Justice Gap* (7 July 2017).

Consultation Question 60.

11.223 We provisionally propose that the replacement for the "real possibility" test applied by the Criminal Cases Review Commission for referring a conviction should not be subject to a requirement for fresh evidence or argument.

Do consultees agree?

THE CCRC'S DISCRETION NOT TO REFER

11.224 The CCRC has a discretion not to refer a case for appeal, even where the case has passed the threshold for making a reference.

11.225 The CCRC's own guidance suggests that such exceptional cases might include where the applicant complains of a serious irregularity or abuse of process, but publicly admits their guilt.[157] In *Westlake*,[158] the CCRC declined to refer the conviction of Timothy Evans for the murder of his daughter (see Appendix 1) on the basis that the only benefit of a reference would be that it would formally quash the conviction (compensation had already been paid) and that Evans' good character had already been restored as a result of the Royal Pardon he had received.

11.226 In relation to public interest considerations, the Lord Chief Justice, Lord Woolf, gave the following guidance in *Smith* (which we discuss further at paragraphs 11.283 to 11.287 below):[159]

> If a conviction will not be upheld but the conviction of another offence will be substituted, usually there will be no purpose in making a reference in relation to the conviction. The position as to sentence may be different in some cases.

11.227 The Westminster Commission concluded that the discretion of the CCRC not to refer a case should be removed, and that any case which met the reference criteria should be referred. It said:[160]

> We understand why in some extremely rare cases it may be considered against the interests of justice to refer a verdict that the CCRC determines has a real possibility of being overturned. Having said this, we are uncomfortable with the CCRC having such a power, because of the risk, however remote, of preventing a miscarriage of justice case being heard by the Court of Appeal. We also note that any referrals based upon due process failures, even in such circumstances, bring attention to

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157 CCRC, *The Discretion to Refer* (15 July 2021).

158 *R (Westlake) v CCRC* [2004] EWHC 2779 (Admin).

159 *R v Smith* [2004] EWCA Crim 631, [2004] QB 1418 at [29], by Lord Woolf CJ. In referring *Smith*, the CCRC considered that it was "not within their remit to make any determination concerning alternative verdicts and that this [was] a matter solely for the Court of Appeal": *R v Smith* [2004] EWCA Crim 631, [2004] QB 1418 at [28], by Lord Woolf CJ.

160 The Westminster Commission Report, pp 39 and 40.

flaws within the criminal justice system and can thus contribute to the prevention of future miscarriages of justice.

11.228 We are satisfied, however, that there is a case for the CCRC to retain such a power. We can conceive of cases where it would bring the CCRC or the criminal justice system into disrepute to refer a case for appeal, even though the conviction or sentence might be quashed. Such cases might include:

(1) referring certain historical convictions where the person convicted was long dead and there was no public interest in the appeal being heard; and

(2) referring a minor conviction of a person serving a long prison sentence for serious offences, where quashing the conviction or reducing the sentence would make no difference to the time they would spend in prison.

11.229 We think Lord Woolf's comment may overstate matters: some cases merit a reference even though an alternative conviction would be substituted. As we said in the last chapter, we think there is a fundamental difference between a conviction for murder and a conviction for manslaughter, and if the likely result of a reference would be a substitution of the latter for the former, we think a reference should be made. Likewise, the consequences of substituting a conviction for assault for a conviction for *sexual* assault would be profound, and a reference should be made. On the other hand, we accept that some offences are sufficiently similar that it would be justifiable not to expend the limited resources of the courts on correcting them – for instance, where the result of a reference would be to substitute a conviction for an attempt to commit an offence with one for conspiracy to commit the same offence (or vice versa). We note in this respect that the CCRC takes the view that:[161]

> [if the effect of substitution] might be a material effect on a sentence (for example, the removal of a particular obligation such as a compensation order), a referral would be a meaningful exercise. Likewise, if the referral of the conviction or sentence would affect the sentencing options of a court when dealing with the applicant in the future, a real benefit may arise.

Consultation Question 61.

11.230 We provisionally propose that the Criminal Cases Review Commission should retain the discretion not to refer a case.

Do consultees agree?

THE CCRC'S INVESTIGATORY POWERS

11.231 When it was created, the CCRC was given a power to require public bodies to provide documents, found in section 17 of the CAA 1995. It can issue an order requiring the body not to destroy, damage or alter the document. There is wide-

[161] CCRC, *The Discretion to Refer* (15 July 2021) para 3.3.

ranging provision which disapplies any obligation of confidence or secrecy (including one imposed by statute) that would prevent the public body from making the disclosure.

11.232 The definition of "public body" is found in section 22 of the CAA 1995. It covers not only the disclosure provisions, but also the powers of the CCRC to require a public body to appoint an investigating officer to undertake inquiries on behalf of the Commission, prepare a report, and submit it to the Commission and to the person by whom they were appointed.

11.233 The Commission was long concerned that it did not have any similar powers in relation to private bodies. Although successive Governments were committed in principle to legislation, it was not until 2016 that, through a Private Member's Bill with Government support, such powers were introduced.

11.234 Section 18A of the CAA 1995 (inserted by the Criminal Cases Review Commission (Information) Act 2016) allows the CCRC to apply to the Crown Court for an order requiring a person to give the CCRC access to a document or material that is in that person's control. The Crown Court may only make such an order if it thinks that the document or material may assist the CCRC in the exercise of any of its functions. The disapplication of any duties of secrecy in section 17 also apply to section 18A.

11.235 Section 18A cannot be used if section 17 could be used.

The definition of "public body"

11.236 Under section 22, a public body is:

(1) any police force;

(2) any government department, local authority or other body constituted for the purposes of the public service, local government or the administration of justice; or

(3) any other body whose members are appointed by His Majesty, any Minister or any government department or whose revenues consist wholly or mainly of money provided by Parliament or appropriated by Measure of the Northern Ireland Assembly.

11.237 The definition of a public body under section 17 was written prior to devolution to Scotland (which is not covered in any case by the Act) and Wales. The reference to the Northern Ireland Assembly in the Act is the Assembly established in 1973, which collapsed in 1974, but remained technically suspended until it was replaced by the new Assembly under the Northern Ireland Act 1998.[162] The current Northern Ireland Assembly does not pass measures but Acts.

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[162] The Northern Ireland Assembly established under the Northern Ireland Assembly Act 1973 quickly collapsed and its powers were transferred back to Westminster under the Northern Ireland Act 1974. This transfer was intended to be temporary. Accordingly, subsequent legislation, including the 1995 Act, continued to make reference to the Northern Ireland Assembly. However, this Assembly was not restored and the Northern Ireland Act 1998 created a new Northern Ireland Assembly and the 1973 Act was repealed.

11.238 It is not clear how far the CCRC's powers extend to a public body established by the (current) Northern Ireland Assembly or the Senedd.

11.239 It seems likely that most Welsh public bodies would fall with the definition of section 22, being bodies set up for public service, or bodies whose members are appointed by Ministers. The reference to Ministers in section 22 is likely to cover appointments by Welsh Ministers; under section 85 of the Government of Wales Act 2006, references to a Minister or to a Government department are construed as including Welsh Ministers. In addition, because the Senedd is largely funded by a block grant from money appropriated by Parliament, any body whose funding comes from the Senedd would seem to be a body whose revenues are wholly or mainly provided by Parliament.

11.240 However, there may be some public bodies whose status under the Act is not clear. We understand, for instance, that the BBC has questioned whether it is covered by section 17. While we think it is clear that the BBC is covered by section 17,[163] we think that the position may be less clear for other public bodies such as Channel 4.[164]

Section 17 and section 18A powers are mutually exclusive

11.241 This lack of clarity may cause difficulties because section 18A cannot be used if a body is covered by section 17. This means that any uncertainty needs to be resolved before the CCRC can use its section 17 or section 18A powers.

Section 17 powers are unenforceable

11.242 If a body fails to comply with an order of the Crown Court made under section 18A, proceedings can be brought for contempt of court.

11.243 There are no powers where a body fails to comply with an obligation under section 17. We think it is likely that the CCRC could seek a mandatory order from the High Court, or challenge a decision by the public body not to comply by means of judicial review.

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163 Given that the Royal Charter says that the members of the Board of the BBC are the members of the Corporation, and those members are appointed by the King, it seems clear that the BBC is a body whose members are appointed by His Majesty on the advice of Ministers.

It is also hard to see how the BBC is not a "body constituted for the purposes of public service"; its Charter says that "the BBC's Object is the fulfilment of its Mission and the promotion of the *Public Purposes*" (emphasis added; 'Public Services' has a bespoke meaning in the Charter relating to specific BBC outputs). It is submitted that the BBC's public purposes under the Charter – providing impartial news and information; supporting learning; showing creative and distinctive output; reflecting and serving the diverse communities of the UK and supporting the creative economy; and reflecting the UK to the world – all constitute 'public service'.

Finally, the BBC's funding comes mainly from money voted by Parliament. (Although the bulk of the BBC's funding is attributable to the TV licence fee, the money received from this is collected by the BBC and paid into the Consolidated Fund and an equivalent amount is provided by Parliament to the Department for Culture, Media and Sport under annual Appropriation Acts to fund the BBC.)

164 Channel 4's members are not appointed by Ministers but by Ofcom (although subject to Ministerial approval); Ofcom is not a Government department (Office of Communications Act 2002, s 1(8)). Channel 4's funding comes from commercial activities, not money voted by Parliament. Accordingly, Channel 4 would only be covered if it is considered a "body constituted for the purpose of the public service".

11.244 However, it may be more satisfactory to give the CCRC powers to obtain an order from the Crown Court in relation to a public body.

Conclusion

11.245 The simplest way to give the Commission the power to seek binding orders for disclosure from bodies under section 17, just as it does for non-public bodies under section 18A, would be to remove the restriction on the use of section 18A against a public body.

11.246 Were the prohibition on exercise of the section 18A powers against a public body lifted or relaxed, where a public body failed to comply with a request under section 17, the CCRC would be able to seek an enforceable order from the Crown Court for disclosure and retention of the material.

11.247 We would envisage that the Commission would normally attempt to obtain disclosure under section 17.

Consultation Question 62.

11.248 We provisionally propose that the Criminal Cases Review Commission's powers to seek an order for disclosure and retention of material under section 18A of the Criminal Appeal Act 1995 should be extended to cover public bodies.

Do consultees agree?

Section 18 of the Criminal Appeal Act 1995

11.249 Under section 18 of the CAA 1995, the powers under section 17 do not apply to material which is held as a result of the Home Secretary considering the case for a reference to the CACD or exercise of the Royal Prerogative of Mercy prior to the CAA 1995 coming into effect. However, section 18(3) does require the Secretary of State to provide to the Commission any document or other material which contains representations made about any such case, and any information received in relation to such a case other than from a Government department.

11.250 Section 18 therefore does not prevent the disclosure of most material relating to a case considered by the Home Secretary, but does enable the Home Office to resist disclosure of internally generated material – in particular, papers relating to the consideration of the case by C3, and the eventual advice to the Home Secretary.

11.251 The expressed intention behind section 18 was that the Commission should not be influenced by the analysis and advice that had previously led to the Home Secretary deciding whether or not to refer the case.

11.252 We think that section 18 is now largely redundant. Almost all the material which it protects from being disclosed in response to a direction from the CCRC is now over 25 years old and should either have been transferred to the National Archives under

the twenty-year rule[165] or destroyed. Therefore, any legitimate expectation of secrecy that officials had would have expired.

11.253 Section 18 also, however, covers material which was held by the Secretary of State (presumably the Defence Secretary) pursuant to the power to refer a case to the Court Martial Appeal Court ("CMAC").[166] The CCRC's jurisdiction has been expanded to enable it to refer cases to the CMAC.[167] However, unlike the Home Secretary's power to refer to a case to the CACD, which was abolished by the CAA 1995, the Defence Secretary's power to refer a case to the CMAC has been retained. Therefore, the section 18 powers relating to the Defence Secretary's powers continue to have effect (and are outside the scope of this project).

Consultation Question 63.

11.254 We invite consultees' views as to whether the restriction on the Criminal Cases Review Commission's power to obtain material held in relation to the Home Secretary's former power to refer a case to the Court of Appeal Criminal Division should be revoked.

THE CCRC'S POWER TO RELEASE INFORMATION

11.255 The CCRC's extensive powers to obtain disclosure of information, even in breach of privacy obligations, means that it is subject to stringent restrictions on disclosure of information.

11.256 Under section 23 of the CAA 1995, it is an offence for a member or employee of the CCRC to disclose information obtained by the CCCRC in the exercise of their functions, and no member of the CCRC shall authorise such disclosure, unless it is exempt under section 24. It is also an offence for a person who has been appointed as an investigating officer by the CCRC to disclose any information that they have obtained unless it is exempt under section 24.

11.257 Section 24 permits such information to be disclosed for the purposes of criminal, disciplinary or civil proceedings or to assist with an application for miscarriage of justice compensation. It may be disclosed between members and employees of the CCRC and investigating officers, and may be disclosed in any statement or report required under the Act (including its Annual Report).

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165 Under the Public Records Act 1958, s 3(4), "Public records selected for permanent preservation under this section shall be transferred not later than 20 years after their creation either to the Public Record Office" – now the National Archives – "or to such other place of deposit appointed by the Secretary of State". Public records may be retained by the department longer if they are required for administrative reasons or ought to be retained for some other "special reason".

166 In practice, the CMAC is usually the CACD sitting in a separate jurisdiction. However, as service law is UK-wide, and extraterritorial, the CMAC can also include Scottish and Northern Irish judges.

167 CAA 1995, ss 12A and 12B, as amended by Armed Forces Act 2006, s 321.

11.258 There is a power for the Secretary of State to permit disclosure by order. We are only aware of one occasion where this was used. In 2019, the Criminal Cases Review Commission (Permitted Disclosure of Information) Order 2019 allowed any member or employee of the CCRC to disclose information to the Daniel Morgan Independent Panel. The panel was set up to investigate the circumstances of Daniel Morgan's murder, its background and the handling of the case over the period since 1987.[168] During its investigations, the Panel identified several CCRC cases that might contain relevant information and wrote to the CCRC requesting access to this material. The CCRC explained that it was unable to disclose the information as the CAA 1995 prohibits the disclosure to a third party, unless one of the exceptions in section 24 applied. The Order brought disclosure to the Panel within the exceptions in section 24.

11.259 There is a power to disclose information "in or in connection with the exercise of any function under this Act".[169]

11.260 The CCRC considers that the restrictions in section 23 are problematic. In its response to the Issues Paper, it commented:

> The CCRC suggests that an ability to publish its decisions (or extracts, or summaries) would enhance transparency and may improve confidence in the application of this (or any other) test … However, the CCRC does not consider that publication of decisions would be appropriate or desirable in all cases. To require publication of all decisions in all cases could discourage people from applying, while suitably redacting or summarising all decisions would generate a disproportionate amount of work. The CCRC considers that primary legislation is required to overcome concerns relating to the statutory offence created by section 23 of the Criminal Appeal Act 1995 as well as issues connected with the privacy rights of various parties and legal privilege. Where the CCRC judges that the public interest is satisfied, it should, it is suggested, be possible for the CCRC to publish the decision – or a summary of it – either in full or in part with any suitable redactions.

11.261 The CCRC cites the academic and former CCRC Case Review Manager Dr Hannah Quirk, who has said:[170]

> Some have criticised the CCRC for not referring 'enough' cases. Such criticisms have tended to be non-specific and this is an impossible assessment to make without detailed knowledge of each case… Publication of the statements of reasons (the decision-making document completed for each case) might go some way towards addressing these concerns. Publication could offer a useful resource to researchers interested in the area, make the process more transparent and allow for

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168 Daniel Morgan was a private investigator murdered with an axe in the car park of pub in Southeast London in 1987. In 2009, five men were charged in connection with the murder, but the trial collapsed when evidence from a police informant was ruled inadmissible. The Metropolitan Police have admitted that police corruption was a "debilitating factor" in the original investigation and that there is no likelihood of any successful prosecutions being brought in the foreseeable future. See comments from Detective Chief Superintendent Hamish Campbell, then-head of Scotland Yard's homicide command, quoted in V Dodd and S Laville, "Scotland Yard admits Daniel Morgan's killers shielded by corruption", *Guardian* (11 March 2011).

169 CAA 1995, s 24(1)(f).

170 H Quirk, "Governing in prose" in J Robins (ed), *Wrongly accused: who is responsible for investigating miscarriages of justice?* (2012) p 31.

trends in its decision making to be observed. Names could be redacted in sensitive cases, as happens in Court of Appeal judgments.

11.262 We think there is a good deal of force in the CCRC's submission. In most cases where the CCRC declines to refer a case, that will be the end of it. However, in some cases, particularly those where a public campaign has been ongoing, the inability of the CCRC to give more than the briefest outline of its reasoning may mean that disquiet about the conviction will continue; the CCRC's decision may be presented as wrong or irrational. Explaining the reason would mean that campaigners would have to show why the decision of the CCRC was wrong or irrational, and not just point to the 'obvious' innocence of the applicant.

Consultation Question 64.

11.263 We invite consultees' views as to whether the law should be reformed to enable the Criminal Cases Review Commission to explain publicly a decision not to refer a case.

THE CCRC'S INDEPENDENCE FROM GOVERNMENT AND THE COURT OF APPEAL CRIMINAL DIVISION

11.264 The Runciman Commission dealt with the "Relationship of the Authority with the Government and with the Court of Appeal" together.[171] Having outlined the need for an investigatory body independent of the executive, it said:[172]

> We have already explained why we believe that the Authority should be independent of the Government … We believe that there are cogent arguments for the Authority to be independent of the Court of Appeal.

11.265 It recommended:[173]

> Given the importance of the Authority being seen to be independent of the courts in the performance of its functions, that the Chairman should not be a serving member of the judiciary.

The CCRC's relationship with Government

11.266 The CCRC was set up by Part II of the CAA 1995, in particular section 8. Section 8(2) effectively states the independence of the Commission by making clear that it is not to be regarded as the servant or agent of the Crown.

11.267 Such provisions are relatively commonplace when setting up arm's length bodies. However, if necessary, additional provisions may be included to require the body to

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171 Report of the Royal Commission on Criminal Justice (1993) Cm 2263, p 183, para 13.

172 Above, p 183, para 15.

173 Above, p 184, para 20.

comply with directions of a Minister or to have regard to guidance issued by Ministers.[174] There is no such power in respect of the CCRC.[175]

11.268 Writing in 2008, former Commissioner Laurie Elks said:[176]

> the Commission has had to endure a difficult relationship with its sponsoring unit: the Office for Criminal Justice Reform (OCJR).[177] ... The Commission is in an unusual position in that generally, when government devolves functions to an independent agency or quango, the sponsoring ministry views the activities of the hived-off body as desirable, or at least as a necessary evil, even if politicians no longer wish to be answerable for them. The position of the Commission may be different because it has sometimes appeared that the sponsoring unit regards the Commission as an unnecessary evil, and this view seems firmly to reflect the current political zeitgeist. This has been an uncomfortable relationship for all concerned, and the Commission has had to endure quite obtrusive regulation involving cuts in funding; reductions in the number and role of Commissioners; and persistent criticisms at times of aspects of the way it performs its business.

11.269 He suggested that matters improved after 2007, when sponsorship of the CCRC transferred to the Ministry of Justice.

11.270 The CCRC had previously questioned whether it was appropriate for the Home Office to sponsor the Commission, and whether it was appropriate for the Commission to come under a unit one of whose ministerial heads (the Attorney General) was responsible for the CPS. It did say, however, that the Home Office had "never made any attempt to interfere with the caseworking role of the Commission".[178]

The judgment in *Warner*

11.271 In *Warner v Justice Secretary*,[179] the Administrative Court considered the independence of the CCRC from Government. The case came as a challenge to a refusal by the CCRC to refer a case to the CACD. Warner argued that the decision was tainted by bias or apparent bias because of the CCRC's lack of independence,

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174 For instance, the Civil Contingencies Act 2004, s 24 (emergency co-ordinators); Museums and Galleries Act 1992, s 2(7) and schs 1-4.

175 The only exceptions are (i) that the Secretary of State may refer a matter to the Commission in respect of the exercise of the Royal Prerogative of Mercy and the Commission must then consider the matter and give the Secretary of State a statement of their conclusions, (ii) where a person ceases to be a Commissioner, the Secretary of State may order compensation to be paid if they consider that there are exceptional circumstances which make it right to do so, and (iii) the Commission must comply with directions given by the Minister for the Civil Service in relation to pension contributions for staff (Criminal Appeal Act 1995, s 16 and schedule 1, s 3). Additionally, the consent of the Secretary of State is required in relation to staff numbers and the terms and conditions of their employment (Criminal Appeal Act 1995, schedule 1, s 4).

176 L Elks, *Righting miscarriages of justice? Ten years of the Criminal Cases Review Commission* (2008) p 335.

177 The Office for Criminal Justice Reform was a cross-departmental team reporting to the Home Office, the Attorney General's Office (AGO) and the Lord Chancellor's Department. It was established in 2004, and was hosted by the Home Office. When the Ministry of Justice was created in 2007, the OCJR moved to the Ministry of Justice, but continued to report to the Home Office, AGO and the Ministry of Justice. It was dissolved in 2010.

178 CCRC, Memorandum submitted to the Home Affairs Committee (8 September 2006).

179 [2020] EWHC 1894 (Admin), [2021] 1 WLR 151.

relying on similar past case law relating to decisions of the Parole Board. He was unsuccessful, the Administrative Court holding that the current arrangements did achieve the necessary independence.[180] Moreover, there were important differences between the work of the Parole Board and that of the CCRC, not least that the Parole Board exercises what is essentially a judicial function.[181]

11.272 The challenge turned on a "recasting" of the Commissioner role, involving Commissioners being appointed on a three-year fee-paid appointment with a lack of security in reappointment and the reservation of reappointment decisions to the Secretary of State.

11.273 The Administrative Court rejected claims that a "recasting" of the Commissioner role undermined the independence of the CCRC, and said that alleged "misuse" of the sponsorship role of the Ministry of Justice ("MoJ") was not made out.

11.274 However, the Court found that there were "unsatisfactory aspects of the relationship between the CCRC (by its Chair and Commissioners) and the [Arm's Length Bodies Centre of Excellence] (for MoJ)" between 2016 and 2018. The Chair and Commissioners had expressed concern about changes being proposed by the MoJ and their potential impact on the CCRC's ability to perform its functions. The Court said that these "were genuine concerns which should have been taken seriously by MoJ" but the Court had seen no evidence of MoJ "seeking to engage in a constructive dialogue". MoJ "pressed ahead with changes to the terms of newly recruited Commissioners in mid-2018, advising the Minister that these changes were justified by recommendations which officials anticipated would appear in the Tailored Review in due course", despite concerns of the CCRC's Chair.

11.275 Two particular aspects of this dysfunctional relationship were especially troubling. First, a Commissioner asked the head of the MoJ's Arm's Length Bodies Centre of Excellence what would happen if implementation of the recommendations was resisted and she told him (wrongly) that Commissioners could in those circumstances lose their jobs. Second, one Commissioner was not reappointed, against a recommendation of the Chair that he should be. Officials had advised against reappointment, noting the Commissioner's opposition to the proposed changes.

11.276 The Court held, however, that what happened with this Commissioner was an "isolated incident" and concluded that the reappointment system was intrinsically sound.[182] It concluded that these changes were "legitimate policy choices about how the CCRC should be constituted" and did not "represent an unlawful diminution of the CCRC's independence or integrity". It noted that the CCRC did, in fact, reject a number of recommendations in the Government's review, confirming that they were just recommendations.[183]

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180 Above, at [67] and [73], by Fulford LJ VPCACD and Whipple J.

181 Above, at [13] and [41].

182 Above, at [66].

183 Above, at [77]-[78].

The CCRC's relationship with the Court of Appeal Criminal Division

11.277 The CCRC was intended to be equally independent of both Government and the judiciary. When considering the relationship between the CACD and the CCRC, we have found it a useful approach to consider whether interventions by the CACD would have been considered proper – or indeed lawful – had they been carried out by a Minister.

11.278 It is clear from comments of former CCRC Commissioners that they think that the CACD has tried to influence the CCRC in its exercise of its discretion to refer cases to the Court.

11.279 Laurie Elks, for instance, has said that the judiciary has "imposed its own limitations upon the Commission (without any assistance from politicians)". He cites "negative feedback from the Court in a number of referrals … based on arguments of legal incompetence" and "very strong indications against referral of old capital cases in *Knighton*[184] and *Ellis*.[185]" He also notes that "a senior member of the Court [of Appeal] has also gone to the lengths of (discreetly) advising the Commission to be cautious about following the majority opinion [of the House of Lords] in *Pendleton*".[186]

11.280 David Jessel has argued that the CACD has used the "real possibility" test to influence the CCRC in its decisions to refer. He cites, in particular, sentencing references, historical cases, and "shaken baby syndrome" cases. On historical cases, he says, "the CCRC used to refer historical cases … until it received the clearest sign that such cases were not welcome by the Court of Appeal".[187] He said of "shaken baby" cases:[188]

> The impartial scientific truth about these cases is that in many cases we do not know why these babies died. We do know that many babies die in totally unsuspicious circumstances and display, on post mortem, the same symptoms that some expert witnesses claim are diagnostic of abuse. Cases referred by the CCRC were helping to nudge the Court of Appeal towards engaging with the problem that the finest scientific experts say that science has yet to establish the cause of death in these cases. The Court of Appeal recently decided that such cases were too difficult to adjudicate and upheld a conviction, thus demonstrating that there is no 'real possibility' and therefore no real point in the CCRC sending such cases back to the Court of Appeal. As a result, innocent people who have already suffered the tragedy of a child's death may remain in prison because the Court of Appeal believes that the integrity of the jury must always prevail, even if its verdict is based on flawed and dogmatic science.

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184 [2002] EWCA Crim 2227, [2003] Crim LR 117.

185 [2003] EWCA Crim 3556.

186 L Elks, *Righting Miscarriages of Justice? Ten years of the Criminal Cases Review Commission* (2008) p 336.

187 M Naughton and G Tan, *Innocence Network UK (INUK) Symposium on the Reform of the Criminal Cases Review Commission (CCRC)* Report (2012) p 28.

188 Above.

11.281 A former deputy chair of the CCRC has said:[189]

> To recognise that there can be downsides in the making of over-ambitious referrals is neither to run scared of ambition nor to be excessively in thrall to the Court of Appeal. It is simply to recognise the realities of the situation and, in particular:
>
> - that under the existing system it is only the Court of Appeal – and not the commission – that can actually remedy miscarriages of justice;
>
> - that, as every advocate knows, one's ability to influence a court is largely dependent upon the extent to which that court respects and trusts one's good faith and judgement;
>
> - that the commission's power to require the Court of Appeal to consider a case as a normal appeal must be coupled with a responsibility to exercise that power sensibly, in good faith and with proper concern for the interests of others who have a right to call on the court's time; and
>
> - that if that important power is abused, there is good reason to fear that it may be lost altogether.

11.282 This comes close to an acknowledgment that the CCRC fears that over-ambitious references may incur the displeasure of the CACD, something which may even threaten the CCRC's independence, and possibly even its existence. That is not a healthy state of affairs. It is also not without foundation. As he noted, and as discussed in the previous chapter, when the CACD was concerned that the CCRC was referring cases based on a change of law where the Court – had it been exercising its own discretion – would have refused leave, "members of the senior judiciary brought the matter to the attention of the government", and legislation was swiftly passed to give the Court discretion to refuse those appeals, thereby effectively preventing the CCRC from referring them.

Change of law cases

11.283 In *Wallace Duncan Smith (No 4)*, the then Lord Chief Justice, Lord Woolf, wrote:[190]

> The Commission's role is to refer those cases to this Court where the Commission considers that there may have been some real injustice or there are other exceptional circumstances which justify referring the case.

11.284 In this particular case, the CCRC had felt that it could not take into account the possibility that the CACD might substitute an alternative conviction if it did not uphold the conviction referred. Lord Woolf corrected the Commission on this (legal) point. In our view, he was correct. Although the reference test in section 13 of the CAA 1995 does not make provision for the possibility of the appellate court substituting a conviction (referring only to whether it would "not be upheld"), this does not restrict the CCRC's discretion not to refer when it is *permitted* to do so by section 13.

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189 A MacGregor, "Unrealistic expectations", *The Justice Gap* (9 March 2012).

190 [2004] EWCA Crim 631, [2004] QB 1418 at [27], by Lord Woolf CJ.

11.285 However, Lord Woolf's reference to "real injustice [or] other exceptional circumstances" risks being read as adding a gloss to the Commission's role. Nowhere in the CAA 1995 is the Commission's role restricted to cases involving "some real injustice".

11.286 He also said that:[191]

> in exercising its discretion whether to refer a case, the Commission when it comes to exercising its discretion should have well in mind the comments of Lord Bingham CJ in *Hawkins*.

11.287 *Wallace Duncan Smith (No 4)* was a change of law case. As discussed in the previous chapter, in *Hawkins*,[192] the CACD developed the "substantial injustice" test which it would apply to applications for leave to appeal brought out of time on the basis of a change in the law.

11.288 In 2006, in *Director of Revenue and Customs Prosecutions v CCRC*,[193] (hereafter "*DRCP*") the High Court considered an application for judicial review brought by the Director of Revenue and Customs Prosecutions[194] against a decision of the CCRC to refer the case of four men who had been convicted of conspiracy to launder the proceeds of crime. Since their conviction, the House of Lords had ruled (in *Saik*)[195] that the offence of conspiracy required that the persons knew, not just suspected, that the property was the proceeds of crime. The CACD, "with no enthusiasm whatsoever" then allowed the appeal of *Ramzan*[196] on this ground following a reference from the CCRC. It allowed another appeal where the trial judge had given a certificate that the case was suitable for appeal. However, it turned down the appeals of five others who had applied to the Court for leave to appeal, applying the "substantial injustice" test.

11.289 The Director of Revenue and Customs Prosecutions submitted that in exercising its discretion to refer the CCRC was "bound to apply an identical filter to that applied by the Court of Appeal when deciding whether to grant leave to appeal out of time", which later developed into a weaker submission that the CCRC was required to have regard to the practice of the CACD.

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191 Above, at [43].

192 [1997] 1 Cr App R 234, CA.

193 [2006] EWHC 3064 (Admin), [2008] 1 All ER 383.

194 The Revenue and Customs Prosecution Office was created by the Commissioners for Revenue and Customs Act 2005 which merged the Inland Revenue and HM Customs and Excise, headed by the Director of Revenue and Customs Prosecutions. The Office was effectively merged into the CPS from 2009: first the then DPP Sir Keir Starmer was additionally appointed Director of Revenue and Customs Prosecutions, then the two bodies were administratively merged. In 2014 the distinction was formally abolished by the Public Bodies (Merger of the Director of Public Prosecutions and the Director of Revenue and Customs Prosecutions) Order 2014.

195 [2006] UKHL 18, [2007] 1 AC 18.

196 [2006] EWCA Crim 1974, [2007] 1 Cr App R 10.

11.290 The High Court came to a "clear conclusion that the independent Commission was under no obligation to have regard to, still less to implement, a practice of the CACD which operates at a stage with which the Commission is not concerned".[197]

11.291 In response, the CCRC adapted its policy on "change of law" cases, to state (in line with the High Court's ruling) that "regard will not be had to … the Court of Appeal's practice in relation to applications for an extension of time in which to appeal change-of-law cases".

11.292 However, in *Cottrell and Fletcher*,[198] Sir Igor Judge, President of the Queen's Bench Division, expressed concern over the judgment in *DRCP*, and the CCRC's newly-stated policy, saying that the "more we considered this new policy, the more questionable in principle it appeared to be".[199] (In *Rowe*,[200] by then Lord Chief Justice Judge made clear that he had formally overruled *DRCP* in *Cottrell and Fletcher*.)

11.293 He stressed the importance of the CCRC's independence, describing it as:[201]

> an independent body, which subject only to possible, and very rarely successful judicial review proceedings, is independent of the Court. Its independence, both when it is exercising its responsibilities, and in the public perception of the way in which those responsibilities are exercised, is one of its most valuable characteristics.

11.294 However, he went on to note that "for the sound constitutional reasons appreciated by the Runciman Commission, the Commission was not vested with jurisdiction to quash criminal convictions". This, he said, meant that:[202]

> if the Court is obliged to quash old convictions, returned in ignorance of subsequently "discovered" law, simply because the convictions are referred to it by the Commission … the Court may therefore find itself obliged to quash a conviction simply because it is referred by the Commission. That infringes the constitutional proprieties.

11.295 This reasoning is difficult to follow. A reference by the Commission might be a precondition to the Court quashing the conviction, but it is not the decision to refer which entails that the conviction must be quashed; it is the operation of the law on what constitutes an unsafe conviction. It no more offends against the constitutional proprieties than, for instance, does the fact that the CPS has discretion whether or not to prosecute a strict liability offence: if the facts are made out, the court will be compelled to convict; that does not mean that the CPS is usurping the role of the court in deciding guilt. If the Court finds itself obliged to quash a conviction in circumstances where, had it the discretion to decline to hear the case it would do so – that is not

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197 [2006] EWHC 3064 (Admin), [2008] 1 All ER 383 at [28], by Maurice Kay LJ.

198 [2007] EWCA Crim 2016, [2007] 1 WLR 3262.

199 Above, at [49], by Sir Igor Judge PQBD.

200 [2008] EWCA Crim 2712, (2008) 172 JP 585 at [30], by Lord Judge CJ.

201 [2007] EWCA Crim 2016, [2007] 1 WLR 3262 at [47], by Sir Igor Judge PQBD.

202 Above, at [52].

constitutionally improper: it reflects the constitutional principle that the courts themselves are subject to the rule of law.

11.296 Lord Judge went on to identify a duty upon the CCRC to have regard to how the CACD exercises its discretion to grant leave to appeal when exercising its own discretion to refer a case:[203]

> If it were intended that the Commission should ignore any aspect of the law and practice of the court, in particular for present purposes, in relation to "change of law" cases, its authority to do so would have been expressly provided in the legislative structure which created it. The legislation was clearly not intended to have this effect.

11.297 Professors Nobles and Schiff have been strongly critical of this reasoning:[204]

> It is, we believe, correct to say that neither Parliament nor the Runciman Royal Commission addressed itself to the precise issue of whether the CCRC should have regard to the practices of the CACD in deciding to grant or withhold leave when deciding to refer. And the CACD feels strongly that it must retain control of its own procedures and ensure that it, and not the CCRC, should determine which kind of cases will be recognized as miscarriages of justice through the process of quashing convictions. But calling such strongly felt belief a constitutional question and calling that the onus is on Parliament to expressly provide positive authority for any practice which deviates from it is simply to use rhetoric as a substitute for substantive analysis.

11.298 We agree with Professors Nobles and Schiff. The Court's reasoning that a positive duty could be inferred from the fact that the Act does not state that the Commission is free to ignore the practice of the CACD (at a stage of the process with which the CCRC is not concerned, as the High Court recognised) is somewhat strained.[205] The Act is not silent on how the Commission should exercise its discretion: section 14(2) of the CAA 1995 explicitly listed those factors to which the Commission is required to have regard when considering whether to make a reference. If Parliament had intended to require the Commission, when exercising its discretion to refer a case, to have regard to how the CACD exercises its own discretion to grant leave, it would have expressly provided for this in the legislative structure which created it.

11.299 As Professor David Ormerod noted, reading Parliamentary intent into the statute in this way is also hard to square with the Court's comment that the issue was "unforeseen" by the Runciman Commission and Parliament.[206] Professor Ormerod also observed that while "the court acknowledges that one of the CCRC's 'most

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203 Above, at [54].

204 R Nobles and D Schiff, "Absurd Asymmetry: A Comment on *R v Cottrell and Fletcher* and *BM, KK and DP (Petitioners) v Scottish Criminal Cases Review Commission*" (2008) 71 *Modern Law Review* 464.

205 *R (DRCP) v CCRC* [2006] EWHC 3064 (Admin), [2008] 1 All ER 383 at [28], by Maurice Kay LJ.

206 *R v Cottrell and Fletcher* [2007] EWCA Crim 2016, [2007] 1 WLR 3262 at [50], by Sir Igor Judge PQBD.

valuable characteristics' is its independence,[207] the result of this decision may well be that the CCRC feels its independence is diminished".[208]

11.300 At paragraph 11.277 above, we drew a parallel between the independence of the CCRC from Government and the independence of the CCRC from the CACD. In this vein, it is also worth considering how the courts would have treated an assertion by a Minister that the Commission was required to have regard to Ministerial guidance or practice, and that had Parliament intended the Commission not to have to do so, it would explicitly have stated this. We think it is unlikely that the courts would have accepted such an argument. Indeed, we think that the Administrative Court would have held that any attempt by a Minister to direct the CCRC in this way would exceed the Minister's jurisdiction.

11.301 As we discussed in the last chapter at paragraphs 10.131, in response to *Cottrell and Fletcher*, the Government introduced provision in the Criminal Justice and Immigration Bill to allow the CACD to reject an appeal against conviction where the only ground was that there had been a change in the law. This had the effect – through the "real possibility" test – of requiring the CCRC to consider whether the Court would find the "substantial injustice" test made out.

11.302 The statutory amendment applied only to appeals against conviction. In *Neuberg*, the Lord Chief Justice, Lord Thomas of Cwmgiedd, noted that "there is no corresponding power in a CCRC reference on a sentence". Using the reasoning in *Cottrell and Fletcher*, therefore, he ruled:[209]

> In such a case, it is the essential duty of the CCRC to consider the law in relation to substantial injustice as set out in the decisions to which we have referred and to apply that law when considering whether to refer the case to the court.

11.303 Lord Thomas went on implicitly to invite the CPS to challenge any decision by the CCRC to refer a "change of law" appeal by means of judicial review:

> In our judgment it is an issue which the CCRC should have considered and, if it had not considered that issue, or had not done so by applying the clear law, we consider that it would have been open to the prosecuting authority affected by the decision to consider judicial review of the CCRC's decision to refer.
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> It is well accepted that the decision of the CCRC to refer cases to this court can be the subject of judicial review at the suit of the proposed appellant. We see no reason why, if the CCRC were to fail to consider the issue of substantial injustice in a sentence appeal or were to misapply the principles established by this court, then its decision would be unlawful and could be set aside by a Divisional Court.

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207 Above, at [47].

208 "Appeal: change in law since conviction – Court of Appeal's approach to conviction under previous law" [2008] *Criminal Law Review* 50.

209 *R v Neuberg* [2016] EWCA Crim 1927, [2017] 4 WLR 58 at [50], by Lord Thomas of Cwmgiedd CJ.

> We make those observations to emphasise the importance of the CCRC carrying out its statutory duty.[210] We have no doubt that in the future it will carry out its duty in relation to substantial injustice with great care, but, in the unlikely event that it does not, it will be for a court to decide whether the decision of the CCRC can be judicially reviewed and, if so, whether the decision was one arrived at lawfully.

11.304 Before referring *Neuberg*, the CCRC had, in fact, carefully addressed the question of "substantial injustice". The CCRC had concluded that the appellant would suffer a substantial injustice if her confiscation order was not quashed or reduced.[211] Nonetheless, Lord Thomas had concluded that in "the present case it appears that the CCRC may have thought that the issue of substantial injustice was one for the court".[212]

11.305 We are troubled both by the substance of the rulings in *Cottrell and Fletcher* and *Neuberg*, and the way that these decisions came about. In *Cottrell and Fletcher*, conscious that the Court's "decision might impinge on the responsibilities and practice of the Commission", the Court invited the CCRC to take part in proceedings, albeit that it was not a party, and the Chair, Professor Graham Zellick, was invited to address the Court.

11.306 Nonetheless, the effect of making a ruling on the CCRC's powers in a case to which the CCRC was not a party, was that the Commission had no ability to seek leave to challenge the decision in the Supreme Court – which may well have concluded that the High Court was correct in *DRCP*. In our view, the correct way to challenge the decision of the High Court in *DRCP* was for the Director of Revenue and Customs Prosecutions to ask the High Court to certify a question for the Supreme Court and to seek leave to appeal to that Court.

Consultation Question 65.

11.307 We provisionally propose that the requirement for the Criminal Cases Review Commission ("CCRC") to follow the practice of the Court of Appeal Criminal Division should be replaced with provision that in exercising its discretion to refer a case, the CCRC may have regard to any practice of the relevant appellate court.

Do consultees agree?

The Commission's approach to *Pendleton*

11.308 A second way in which the CACD has sought to influence how the CCRC goes about its work relates to the Court's own approach to the safety test. This is, of course,

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210 As explained above at para 11.39 and following, the duty to have regard to the practice of the CACD is not found in the CAA 1995.

211 Point (iii), quoted in [2016] EWCA Crim 1927, [2017] 4 WLR 58 at [19], by Lord Thomas of Cwmgiedd CJ.

212 Above, at [51].

something to which the CCRC is statutorily required to have regard when considering whether to refer a case under section 9 of the CAA 1995.

11.309 As we discussed in Chapter 8 on appeals against conviction in the CACD, at paragraphs 8.101 to 8.109, Lord Judge, in particular, sought to interpret the Privy Council's ruling in *Dial and Dottin* as authority for a retreat from *Pendleton*. In *Noye*,[213] as we discuss in that chapter, Lord Judge quoted Lord Brown of Eaton-under-Heywood in *Dial and Dottin* as authority for the proposition that it is for the CACD to evaluate the importance of any fresh evidence, and that the primary question is for the Court itself and is not what effect the fresh evidence would have on the jury. As Dr Stephen Heaton has pointed out,[214] that quote from *Dial and Dottin* omits Lord Brown's subsequent words (using terminology similar to Lord Bingham in *Pendleton*):[215]

> That said, if the court regards the case as a difficult one, it may find it helpful to test its view 'by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict'.

11.310 Laurie Elks has revealed that after the judgment in *Dial and Dottin*, Lord Judge wrote privately to the Chair of the CCRC drawing attention to the judgment to "encourage some further thought on fresh evidence cases".[216] The letter seems to have suggested that the CCRC had "fallen into the habit of habitually citing *Pendleton* as though that were the last word on the subject".[217] In his reply, Professor Zellick pointed out that *Pendleton* was a ruling of the House of Lords, and there was uncertainty as to whether the a ruling of the Privy Council could override it.[218]

11.311 Again, it is questionable whether such an intervention, had it been made by a Minister, would have been considered proper.

Historic cases

11.312 We have referred above at paragraph 11.280 to David Jessel's comment that the Court sent the "clearest sign" that historical convictions were "not welcome".

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213 [2011] EWCA Crim 650, (2011) 119 BMLR 151 at [27], by Lord Judge CJ.

214 S Heaton, "A critical evaluation of the utility of using innocence as a criterion in the post conviction process" (Doctoral thesis, Norwich Law School 2013) pp 195-196.

215 [2005] UKPC 4, [2005] 1 WLR 1660 at [31], by Lord Brown of Eaton-under-Heywood.

216 This quote is taken from Lord Judge's letter; these words were quoted in Professor Zellick's reply, which was in turn quoted in L Elks, *Righting Miscarriages of Justice? Ten years of the Criminal Cases Review Commission* (2008) p 69. Lord Judge's full letter has not been published.

217 This reflects the wording of Professor Zellick's reply and is not a quote from Lord Judge's letter.

218 *Willers v Joyce* [2016] UKSC 44, [2018] AC 843 subsequently established that in one very limited circumstance, it is open to justices of the Supreme Court, sitting in the JCPC, to make binding rulings on the law of England and Wales. This is where the Privy Council is invited to depart from a decision of the House of Lords, the Supreme Court or the Court of Appeal of England and Wales on a question of English law. *Dial and Dottin* was not such a case, and concerned the interpretation of a Trinidadian statute whose wording was, moreover, materially different from that in the CAA 1968 (it reflected the wording of the Criminal Appeal Act 1907).

11.313 The very first case to be referred by the CCRC to the CACD was a historical miscarriage of justice. Mahmood Mattan was executed in 1952 for the murder of Lily Volpert. The CCRC discovered during its investigation that evidence given in court by the key prosecution witness, Harold Cover, that he had seen Mattan emerging from the shop at the time of the murder, was materially different from a statement he made to the police the day after the murder. Cover had identified the man in the shop doorway as another man, Tahir Gass, who was subsequently convicted of murder (he was found "guilty but insane"). Cover himself was later convicted of attempting to murder his daughter. The CACD quashed Mattan's conviction in 1998.[219]

11.314 However, there was a run of cases starting with *Knighton*[220] in 2002, where the Court expressed evident displeasure at having to hear historical cases. In *Knighton*, the CCRC was criticised for taking into account the fact that Knighton had been executed (which "had no bearing on [the conviction's] safety") in deciding to refer the case. The case had been referred by the CCRC upon an application by Knighton's niece, who was a child when her uncle (then aged 22) was executed. The Court said:[221]

> We have studied all the material drawn to our attention by the CCRC. Having done so, we are troubled that this conviction was referred at all. William Knighton has been dead for 75 years. His father did not long survive him. Suspicion has been directed from William Knighton against, not an outsider, but his own father. In exercising its discretion to refer the case, the CCRC took account of the wishes of the appellant's niece, and another named descendant of George Knighton, who are said to have a strong sense of grievance about the conviction. We were told at the hearing that his niece appreciated that the appeal would create suspicion against her grandfather, and raise publicly a number of matters to his discredit. We understand that many of the descendants of Ada and George Knighton are ignorant of this bleak period in their family history. It has now been opened to the public gaze. For them, this appeal will have been profoundly disturbing.

11.315 We note in this respect that the decision of the CCRC not to refer the notorious wrongful conviction of Timothy Evans – see paragraph 11.225 above – was made just six days after the Court had criticised it for referring *Knighton*.[222]

11.316 Likewise, in 2003, the Court made clear its displeasure at the CCRC referring the case of Ruth Ellis:[223]

> We have to question whether this exercise of considering an appeal so long after the event when Mrs Ellis herself had consciously and deliberately chosen not to appeal at the time is a sensible use of the limited resources of the Court of Appeal… In this case, there was no question that Mrs Ellis was other than the killer and the only issue was the precise crime of which she was guilty. If we had not been obliged to

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219 *The Times* 5 March 1998, CA.

220 [2002] EWCA Crim 2227, [2003] Crim LR 117.

221 Above, at [73], by Judge LJ.

222 *R (Westlake) v CCRC* [2004] EWHC 2779 (Admin).

223 [2003] EWCA Crim 3556. The case of Ruth Ellis was referred in February 2022, before the criticism in *Knighton*. Ruth Ellis was the last woman to be executed in the United Kingdom, for the murder of David Blakely.

> consider her case we would perhaps in the available time have dealt with 8 to 12 other cases, the majority of which would have involved people who were said to be wrongly in custody.[224]

11.317 The Court referred to this comment in the posthumous (though much more recently so) case of Lisa Gore (who had pleaded guilty to infanticide in 1996, and had died of cancer in 2003):[225]

> We are surprised that the Commission should have seen fit to refer this case to us. This was not a case where the system failed a distressed defendant. On the contrary, it was a case where a young woman was treated with considerable compassion and sensitivity. She never wanted to resurrect this matter and it is unfortunate that, given there can be no benefit whatsoever to her, her parents' expectations have been raised only to be dashed. They should have been left to grieve for their daughter, not forced[226] to relive the tragic circumstances of the death of their grandchild. The Commission might have been well advised to heed the wise words of Kay LJ … in the appeal of Ruth Ellis.

11.318 There is evidence of a different approach by the Court to historical cases in recent years. In the recent case of *Mehmet and Peterkin*,[227] posthumously quashing the convictions of two men who had been convicted on the evidence of DS Derek Ridgewell,[228] Lord Justice Holroyde, Vice-President of the CACD, said, "[w]e cannot turn back the clock. But we can, and do, quash the convictions".[229]

11.319 It is worth recognising that the *Mehmet and Peterkin* convictions, however, had been identified by the CCRC as a result of investigating the conduct of DS Ridgewell, prompted by applications from people who were still alive and who therefore remained affected by their convictions.

Criticism of the CCRC by the Court

11.320 Some commentators have pointed to criticism that the CCRC has received from the CACD as having possibly intimidated the CCRC or having influenced its willingness to refer cases.

11.321 The former Director of Public Prosecutions, Lord Macdonald of River Glaven, has said:

> There was a period a few years ago when the CACD judges were very critical of the CCRC and would criticise them in fairly trenchant terms in hearings when cases had been referred which the Court of Appeal didn't think should have been referred and I

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224 William Knighton was convicted in February 1927 of the murder of his mother. An application for leave to appeal was unsuccessful. The case was referred to the Court of Criminal Appeal by the Home Secretary but an appeal was dismissed on 12 April 1927, and he was executed two weeks later.

225 [2007] EWCA Crim 2789, [2008] Crim LR 388.

226 It should be noted that Ms Gore's parents chose to take her case to the CCRC and then to the CACD.

227 [2024] EWCA Crim 309.

228 DS Ridgewell was a corrupt police officer responsible for several wrongful convictions: see Appendix 3.

229 [2024] EWCA Crim 309 at [24], by Holroyde LJ VPCACD.

think that's unfortunate. I think it creates an atmosphere in which the CCRC can feel somewhat intimidated.

11.322 Solicitor Glyn Maddocks[230] has described the Commission as:[231]

> in the main subservient to the [CACD] and a little frightened of it and is not happy to take criticism from the [CACD]… If the [CACD] doesn't like what the CCRC has done, it will just reject an Application using what is politely termed judicial reasoning. It will also make fairly carping comments about the CCRC, which are not particularly helpful.

11.323 Professors Nobles and Schiff have observed that:[232]

> Only by straining at the standards of the court, by sending up some cases that are unlikely to be successful, can the CCRC give the court the opportunity to relax its normal resistance to the quashing of convictions… This can be expected on occasions to result in criticism, and even public rebuke, from the Court of Appeal.

11.324 In 2015, the Justice Committee said that "[t]he Commission should definitely never fear disagreeing with, or being rebuked by, the Court of Appeal".[233]

Conclusion

11.325 The CCRC was set up, in large part, in response to a series of failures by both the Home Office and the CACD. It was intended to be a specialist expert body, with a very broad discretion to choose which cases to refer. The Administrative Court – which exercises a supervisory jurisdiction over the CCRC – has recognised and endorsed that discretion. However, the CACD – which was not given a supervisory role over the CCRC – has repeatedly sought to direct the CCRC as to how that discretion should be exercised. Given that the CCRC's discretion was granted by Parliament, for another body to seek to fetter its discretion in the way the CACD has done is arguably not just improper but unconstitutional. We are concerned that senior judicial figures in the past should not only have done this, but considered it wholly appropriate.

11.326 It could be argued that the CACD is encouraged to behave in this way because the referral test effectively subordinates the CCRC to the CACD.

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230 Glyn Maddocks is Joint-Secretary to the All-Party Parliamentary Group on Miscarriages of Justice. He represented Paul Blackburn in his successful appeal against his conviction for attempted murder and attempted buggery in 1978. Blackburn's convictions were quashed in 2005. Aged 15, he had confessed to the attack after prolonged questioning without a solicitor or parent present. He was one of several people to have confessed to the attack under questioning (*R v Blackburn* [2005] EWCA Crim 1349, [2005] 2 Cr App R 30). Glyn Maddocks also represented Oliver Campbell in his recent appeal against a conviction for murder which was based primarily on incriminating statements given by Mr Campbell to the police. The Court quashed his conviction on the basis that fresh evidence showed that Mr Campbell, who had suffered a head injury as a child which left him with cognitive difficulties, was unusually suggestible (*R v Campbell* [2024] EWCA Crim 1036).

231 Glyn Maddocks, Written evidence to the House of Commission Justice Committee (20 February 2014).

232 "The Criminal Cases Review Commission: Establishing a Workable Relationship with the Court of Appeal" [2005] *Criminal Law Review* 173, 189.

233 Justice Committee CCRC Report, para 20.

11.327 We agree with Lord Macdonald that public criticism of the Commission by the Court is unfortunate and can create an atmosphere in which the CCRC can feel intimidated. We accept Lord Macdonald's characterisation of this period as being "a few years ago". We are not aware of public rebuke of the criticism or attempts to influence the exercise of its discretion in recent years. There have been no similar critical statements in recent times. The statement by Lord Justice Holroyde, Vice-President of the CACD, in *Mehmet and Peterkin* above,[234] suggests that the CACD is content with the CCRC referring historic injustices. We would describe that as the helpful and modern approach.

11.328 We recognise that – as with the problems in the relationship with the Ministry of Justice identified in *Warner*[235] – these issues may now have been resolved. However, we are concerned that they may have been resolved by, or at least resulted in, the CCRC changing its approach to the exercise of its discretion.

11.329 The Court has made clear that it is receptive to references based on an arguable change of law in relation to trafficking cases, so the CCRC refers them. It has made clear, in *Johnson*,[236] that it is not receptive to joint enterprise cases based on the Supreme Court's ruling in *Jogee*,[237] so this might be why the CCRC rarely refers them. Although it has continued to send "historic" cases of convictions several decades old, these are almost exclusively a narrow group concerning recently revealed misconduct by agents of the state, not cases like *Knighton*.[238]

11.330 Attempts by the CACD to influence the exercise of the CCRC's discretion (and in some past cases to issue public rebukes) have, we conclude, had an adverse effect on the way the CCRC operates. We think these may have contributed to the culture at the CCRC which facilitated, in turn, the failings identified in the Henley Review.

COMPOSITION OF THE COMMISSION

11.331 The composition of the Commission is governed by subsections 8(3)-8(6) of the CAA 1995 and paragraph 2 of Schedule 1 of that Act. Section 8 provides that there must be at least 11 Commissioners, who are appointed by the King on the recommendation of the Prime Minister. At least a third of the Commissioners must be legally qualified, having a ten-year general qualification (or the Northern Irish equivalent).

11.332 Making the Commissioners appointable by the Sovereign was intended to "giv[e] them a status equivalent to that of High Court judges [which] would be helpful in establishing their position in relation to the Court of Appeal".[239]

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234 See paras 11.318-11.319 above.

235 [2020] EWHC 1894 (Admin), [2021] 1 WLR 151.

236 [2016] EWCA Crim 1613, [2017] 4 WLR 104.

237 [2016] UKSC 8, [2016] UKPC 7, [2017] AC 387.

238 [2002] EWCA Crim 2227, [2003] Crim LR 117.

239 Memo from C3 on RCCJ Proposals for the Reform of the Court of Appeal and the Creation of a Criminal Cases Review Authority, 20 January 1994, The National Archives, HO 291/2629.

11.333 At least two thirds of the Commissioners must be people appearing to the Prime Minister "to have knowledge or experience of any aspect of the criminal justice system" and "for the purposes of this subsection the criminal justice system includes, in particular, the investigation of offences and the treatment of offenders".

11.334 Paragraph 2(2) of Schedule 1 to the CAA 1995 provides that appointments as a Commissioner may be full- or part-time.

11.335 Above, at paragraphs 11.272 to 11.273, there is discussion of the "recasting" of the Commissioner role that occurred in 2016-18. As the Court said in *Warner*:[240]

> From 1997 until 2012, the Commissioner role was salaried with holiday, sick pay and a pension. In 2012 the pension component was removed. Most Commissioners were engaged full time or almost full time.
>
> Until 2017, generally Commissioners were appointed for an initial period of 5 years, with the possibility of appointment for another 5 years.
>
> In 2015, the [Secretary of State] proposed a reduction in the term from 5 to 3 years, with the possibility of extension for another 3 years. This change was opposed by the Commission. The [Secretary of State] pressed ahead in 2016 and 2017 with recruitment exercises for the shorter period on the basis that Commissioners would be fee paid.

11.336 The Westminster Commission observed that the Government's approach to reform of the CCRC:[241]

> … has undermined the spirit and purpose of the legislation, without solving the underlying problem. An extra-statutory management board has been created and Commissioners have been reduced to a very part-time fee-paid role. Most, therefore (including the Chair) combine this role with other, usually non-executive, roles, so that CCRC work is only part of a larger portfolio. This was done administratively, through a Ministry of Justice 'tailored review' and has significantly shifted the balance of power towards the executive.

11.337 The Westminster Commission recommended that the Chair of the CCRC should be appointed for a five-year term, for a minimum of three days per week.[242] The CCRC agreed with this recommendation.[243] The Westminster Commission also concluded that there should be a mix of full- and part-time Commissioners, on a salaried basis, for a minimum of three days per week.[244]

11.338 We recognise that there is value in Commissioners bringing to the CCRC a range of experience. We also recognise that in practice that will mean that the CCRC may

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240 [2020] EWHC 1894 (Admin), [2021] 1 WLR 151 at [43]-[45], by Fulford LJ VPCACD and Whipple J.

241 The Westminster Commission Report, p 64

242 Above, p 65.

243 CCRC's response to recommendation 1 of the report of the Westminster Commission on Miscarriages of Justice: CCRC, "CCRC releases official response to the Westminster Commission report" (2 June 2021).

244 The Westminster Commission Report, p 66.

need to appoint people who need to continue to practice their profession in order to keep their skills up to date and potentially in order to retain a licence to practice.

11.339 If the Commissioners are still envisaged as having a "status equivalent to that of High Court judges" which we agree "would be helpful in establishing their position in relation to the Court of Appeal", then this requires changes to the terms of their appointment.

Consultation Question 66.

11.340 We invite consultees' views on whether changes are needed to the legislation governing the qualifications and terms of appointment of Commissioners of the Criminal Cases Review Commission.

ACCOUNTABILILTY

Appeals and inspection

11.341 Mechanisms to hold to account bodies which are required to be independent of Government are common. In the criminal justice context, police forces are subject to a quality control regime overseen by HM Inspectorate of Constabulary and Fire and Rescue Services ("HMICFRS"). The CPS and the Serious Fraud Office ("SFO") are subject to oversight by HM Crown Prosecution Service Inspectorate ("HMCPSI").

11.342 In its response to the Issues Paper, APPEAL suggested that an Inspectorate of the CCRC should be set up to carry out detailed inspections.

11.343 Cardiff University Law School Innocence Project were also concerned by the lack of accountability:

> The conclusion that the CCRC should not be open to rigorous audit is not defensible. We cannot conceive of such a conclusion being reached in relation to other public bodies, such as the NHS, the building industry, or any other responsible agency.

11.344 We agree with APPEAL that the presence of non-executive directors on the CCRC Board is unlikely to provide a sufficient check. As APPEAL point out, none seem to have a criminal justice expertise or background, and their main function seems to be concerned with corporate performance.

11.345 We conclude that there would be value in ensuring that there is an inspectorate which can review the quality of investigations by the CCRC. However, we appreciate that the size of the CCRC, compared to other bodies which have their own inspectorate, means that it would probably not be appropriate for there to be a dedicated inspectorate which only covered the CCRC. Rather, we think that there would be value in one of the existing criminal justice inspectorates having an oversight role in relation to the CCRC.

11.346 The CCRC undertakes two key functions. In investigating the circumstances in which offences are alleged to have taken place, it may be said to be performing a role similar to one undertaken by the police, who are subject to inspection by HMICFRS.

11.347 In assessing evidence from those investigations (and previous investigations) before judging whether there is a case to go to a court, it might be said to be performing a role similar to that which prosecutors undertake – the difference being that instead of assessing that case with a view to possible conviction, they are considering the prospect of acquittal.

11.348 HMCPSI oversees the CPS and the SFO. The SFO has an investigatory, as well as prosecutorial, function in relation serious fraud, and HMCPSI oversees this aspect of its function. HMCPSI also undertakes reviews of other organisations on a "by invitation" basis: in 2024/25 it is reviewing the Service Prosecuting Authority.

11.349 We have discussed this issue with HMCPSI and it considers that it would be able to inspect the CCRC. It would currently be possible for HMCPSI to inspect the work of the CCRC on a voluntary basis. However, the Inspectorate is limited in its capacity to take on work outside of its core functions, and currently only inspects one body per year on a voluntary basis. If HMCPSI were given a statutory responsibility to inspect the work of the CCRC, it would be necessary for appropriate funding to be put in place to cover this work.

Consultation Question 67.

11.350 We provisionally propose that the Criminal Cases Review Commission should be subject to inspection by one of the criminal justice inspectorates. We think there is a strong case for HM Crown Prosecution Service Inspectorate, which inspects the Crown Prosecution Service and the Serious Fraud Office, to take on this role.

Do consultees agree?

Challenging CCRC decisions

11.351 A further concern raised by consultees was the lack of accountability or form of review of CCRC decisions beyond judicial review. CALA noted that the nature of the predictive test made judicial review "nigh on impossible, given the wide discretion that the test allows the CCRC to exercise". CALA argued that:

> Separately, as things stand, the only route to challenging the CCRC's decision to refuse to refer is by judicial review. Even if a change were made to the referral test, there would still be no other way of challenging their decision. Consideration ought to be given to the setting up of a system of independent review of refusal decisions so that there is some accountability and check on the CCRC's decision making.

11.352 APPEAL was critical of judicial review as being the only remedy, noting the complex, lengthy and costly nature of it. It observed that other individuals facing regulatory decisions could challenge these decisions on appeal, but possible victims of miscarriages of justice could not. APPEAL recommended a tribunal be set up where

decisions including refusals to refer cases, carry out investigations and disclose material could be reviewed by tribunal members including lay persons with knowledge or experience in the criminal justice system.

11.353 The LCCSA similarly considered that there ought to be a mechanism to challenge decisions given judicial review is typically inaccessible to applicants who have had their cases refused by the CCRC.

11.354 Against this, we note the views expressed by the Runciman Commission, which opposed even the possibility of judicial review of the Authority's decisions:[245]

> An applicant who is told by the Authority that it will not intervene in his or her case should always be free to try again, although he or she is likely to need to present fresh evidence or argument to stand any better chance of success. We therefore do not believe that there should be any right of appeal from the Authority's decisions to investigate or not to investigate the cases put to it and to refer or note to refer them to the Court of Appeal. In our view, the Authority's decisions should also not be subject to judicial review.

11.355 In the event, no 'ouster' provision to prevent judicial review of the CCRC was included and the High Court has held that the Commission is subject to judicial review, albeit that few reviews have been successful.[246] We are mindful of the possibility that there will inevitably be a large number of people who are dissatisfied with the decision of the CCRC not to refer their case.

11.356 We think that therefore any challenge to a decision of the CCRC not to refer or not to investigate should be limited to the grounds of judicial review. There is a separate question, however, as to whether an application for judicial review by the Administrative Court should be the only mechanism for seeking a review of a decision of the CCRC. We can see force in the argument that much less "serious" administrative decisions can be reviewed in statutory tribunals. Judicial review is an expensive process which may be inaccessible for many dissatisfied applicants. If there were to be a jurisdiction for appealing relevant decisions, the First Tier Tribunal (General Regulatory Chamber) would seem to be the most appropriate body.

11.357 However, the Commission is itself intended to be an expert body, which is charged with making highly sensitive decisions. A decision by the CCRC is not a first instance decision, but one which *follows* at least one, and normally at least two, judicial determinations.

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245 Report of the Royal Commission on Criminal Justice (1993) Cm 2263, p 184, para 19.

246 See *R v CCRC, ex p Pearson* [1999] 3 All ER 498.

Consultation Question 68.

11.358 We invite consultees' views on whether applicants to the Criminal Cases Review Commission ("CCRC") should be able to challenge decisions of the CCRC in the First-tier Tribunal.

11.359 We provisionally propose that any mechanism to challenge decisions of the CCRC relating to the investigation or reference of a case should be limited to judicial review grounds.

Do consultees agree?

OTHER MATTERS RAISED

Grounds of appeal not included in the reference

11.360 In *Chard*,[247] the House of Lords held that since section 17(1)(a) of the CAA 1968 allowed the Home Secretary to refer the "whole case" to the CACD, it was not open to the Home Secretary to limit the grounds of a reference.[248] Accordingly, once a case had been referred the appellant was not limited to any particular grounds.

11.361 In line with this practice, provision was therefore made in section 14(5) of the CAA 1995, stating that where a reference is made by the Commission, the appeal may be on any ground, whether or not the ground is related to any reason given for making the reference.

11.362 However, an amendment made in 2003 limited this to appeals in summary cases (and appeals to the Northern Ireland Court of Appeal). A new provision was added[249] requiring that where an appeal is made to the CACD, the appeal may not be on any ground which is not related to any reason given by the CCRC for making the reference.[250] However, the CACD may give leave for the appeal to be on a ground unrelated to the Commission's reasons.[251] It is not clear what test the CACD employs when granting leave to appeal on a ground not covered by the CCRC reference; in *Winzar*,[252] the Court stated that there was no requirement to demonstrate "substantial injustice". In *James*,[253] the Court suggested that when seeking leave to *amend* grounds of appeal from those allowed by the single judge the Court would consider five factors. The first three are not relevant to an application for leave to argue

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247 [1984] AC 279, HL.

248 If the Home Secretary wished to refer a discrete point, it was open to him to do so under s 17(1)(b). The Court would then furnish the Home Secretary with its opinion on that point. A similar power, although little used, is available to the CCRC to refer a question to the CACD under s 14(3) of the CAA 1995.

249 CAA 1995, s 4A.

250 Above, s 14(4A).

251 Above, s 14(4B).

252 [2020] EWCA Crim 1628, [2021] 4 WLR 2.

253 [2018] EWCA Crim 285, [2018] 1 WLR 2749 at [38], by Hallett LJ VPCACD.

additional grounds on a CCRC reference, but the final two are: the overriding objective of acquitting the innocent and convicting the guilty and dealing with the case efficiently and expeditiously; and the interests of justice. It is submitted that in considering whether to grant leave in these circumstances, the Court will principally consider whether it is in the interests of justice to allow the additional grounds to be argued. In practice, the Court will normally allow counsel to argue the substantive grounds of appeal provisionally before considering whether leave should be given.

11.363 This issue has been of importance in the *Malkinson* case. The CCRC only referred the case on the basis of fresh DNA evidence, upon which the Court found the conviction unsafe. However, the CACD allowed Malkinson's counsel to address the Court on four other grounds, in relation to two of which it granted leave. It found the conviction separately unsafe on a second ground that an undisclosed photograph suggesting that the victim had damaged a fingernail on her left hand, and had not, in any event, damaged one on her right, would have undermined evidence adduced at trial to suggest that the victim was mistaken in her recollection of scratching her attacker. In respect of a third ground, the failure to disclose the criminal records of the eyewitnesses, the Court concluded that while this would not on its own have rendered the conviction unsafe, taken with the second ground, the appeal should succeed.

11.364 As the Henley review noted:[254]

> Criticism has been made of the decision not to refer the case additionally and separately in relation to the non-disclosure of the photographs and the non-disclosure of the previous convictions of [the eyewitnesses]. I share those concerns.

11.365 He went on to observe that "prosecution counsel explicitly relied upon the CCRC's failure to make them a separate ground for referral in his submissions resisting arguments from Mr Malkinson's counsel that these disclosure failures provided a sufficient basis for freestanding grounds of appeal".[255]

11.366 Given this, we have considered whether the ability to argue grounds of appeal outside of those connected to the reasons given by the CCRC in referring the case should be restored. However, we have concluded that this is not necessary. First, it is possible to obtain leave to plead additional grounds of appeal where it would be in the interests of justice. Secondly, the Court's practice of allowing counsel to argue the substantive grounds of appeal before considering whether leave should be given under section 14(4B) means that in practice it will normally be open to a person to argue grounds not connected with the reference if they are capable of bearing on the safety of the conviction.

11.367 On balance, therefore, we think that the restriction in section 14(4A) is not hindering the correction of miscarriages of justice.

11.368 However, we do think that where there are grounds of appeal that give rise to a belief that a conviction may be unsafe, then (unless there is reason for the Commission to

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254 Henley Review, para 129.

255 Above, para 131. It is not clear why the CPS resisted the grounds of appeal relating to pre-trial disclosure failings; this may be something that the public inquiry by Her Honour Judge Sarah Munro considers.

exercise its discretion not to refer) the reference should include them. The CCRC should not refuse to refer on a ground just because it thinks that another ground is so strong that the Court will find a conviction unsafe: that risks injustice if the Court does not find the conviction unsafe on the main ground. It also means that serious procedural or other failures – such as those involved in the second and third appeal grounds in *Malkinson* – might not be addressed by the Court.

Consultation Question 69.

11.369 We provisionally propose that leave of the Court of Appeal Criminal Division should continue to be required for an appellant to argue any grounds of appeal not related to the reasons given by the Criminal Cases Review Commission for referring a case.

Do consultees agree?

"No application" cases

11.370 Section 14 of the CAA 1995 enables the Commission to investigate a case without an application. However, in practice, because a reference proceeds as an appeal, where the appeal is to the CACD, before referring a case, the CCRC needs to be satisfied that there will be a person to take forward the appeal, either the convicted person, or if they have died, that there is a person whom there is a "real possibility" that the CACD would recognise under the provisions for posthumous appeals.[256]

11.371 The Horizon Compensation Advisory Board ("HCAB")[257] has described the interaction between section 14 and the referral test as creating an anomaly which "should be removed".[258] Given that Parliament clearly intended that the CCRC should be able to refer cases without an application, the operation of the referral test in combination with the rules governing posthumous appeals seems to defeat that intention.

11.372 If our provisional proposal to change the referral test were implemented, and the "real possibility" element removed, it would no longer be necessary for the Commission to consider who was to take forward an appeal in its decision whether to refer. However, this would still leave open the question of how such an appeal could proceed.

11.373 We note that in several recent cases where systemic miscarriages of justice have occurred, the CCRC has had to concentrate its resources on trying to locate the convicted person(s) or, where they have died, their relatives, in order to proceed with

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256 CAA 1968, s 44A. These provisions are discussed briefly in this chapter at paras 11.27-11.28 and at paras 6.17-6.18.

257 The HCAB is an independent advisory board set up to advise ministers about the "Group Litigation Order" compensation scheme, set up to provide further compensation to the *Bates* litigants. Its remit was subsequently extended to cover other Horizon-related compensation schemes. Its membership comprises two legal academics and two parliamentarians who had previously been involved in pursuing the Horizon scandal. We discuss the Horizon cases in detail in Chapter 17 and Appendix 3.

258 Horizon Compensation Advisory Board, "Concerns on the systems for criminal prosecutions and overturning convictions" (30 October 2023), p 7.

a reference in a case where there is clear evidence (generally of police misconduct) casting doubt on the safety of the conviction.[259]

11.374 We think that there would be value in making provision for the CACD to consider "no appellant" cases, on a reference by the CCRC in exceptional circumstances, which could be used if the convicted person could not be traced or was unwilling to participate in appeal proceedings.

11.375 The issue, however, is not without complications. First, the convicted person may simply not want the issue to be revived. Indeed, they may know that they are, in fact, guilty (although this argument is of less validity if the ground of appeal is that the person did not receive a fair trial or the prosecution amount to an affront to justice). Second, the appeal once referred may not be successful. It would be important to ensure that a convicted person whose conviction is considered safe by the CACD upon a unilateral reference by the CCRC was not thereby prejudiced if they later seek to bring their own appeal.

11.376 However, we have concluded that in principle there is a public as well as private interest in correcting miscarriages of justice, and therefore in very exceptional circumstances it might be appropriate to refer a case without an appellant.

Consultation Question 70.

11.377 We provisionally propose that it should be possible for an appeal to be heard upon a reference by the Criminal Cases Review Commission ("CCRC") without an appellant, where there does not appear to be any person with a sufficient interest in the outcome to take forward the appeal, and:

(1) the convicted person cannot be located;

(2) the convicted person has died; or

(3) there is some other reason why the convicted person cannot take forward the appeal.

We provisionally propose that the CCRC should only be empowered to refer a case in such circumstances where it considers that there is a compelling public interest in the appeal being heard.

We provisionally propose that in such cases, the Registrar of Criminal Appeals should have the power to appoint legal representation to represent the convicted person's interests for the purposes of the appeal.

Do consultees agree?

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[259] For instance, in the case of *R v Mehmet and Peterkin* [2024] EWCA Crim 309. the CCRC investigation involved searching ancestry and property websites and seeking information from local authorities to locate the families of the two men. Following the judgment in *Harriot, Green and Davison* (see Appendix 3), the CCRC put out a public appeal to find other members of the "Stockwell Six", which was seen by the sister of Texo Johnson, who had since moved overseas.

Chapter 12: Pre-trial, interlocutory and third-party appeals

12.1 Appeals against conviction and sentence take place after a trial has concluded. Generally, defendants do not have a right to challenge substantive decisions relating to a trial until its conclusion. They may challenge certain ancillary decisions, for example, a decision refusing bail, but generally rulings which will affect the ultimate decision as to whether the defendant is found guilty or not guilty cannot be challenged until the end of the trial. The defendant must wait until after the trial and, if they are convicted, appeal against their conviction. This general rule is subject to one exception; the defence (and the prosecution) may appeal against decisions made in preliminary "preparatory hearings",[1] which are discussed from paragraph 12.35 below.

12.2 In proceedings on indictment, prosecution rights of appeal are limited to those provided by statute, and there is no mechanism to appeal against an acquittal.[2] However, the prosecution may appeal against rulings made at a preparatory hearing and "terminating" rulings. This latter provision is not limited to rulings which would have the effect of ending the prosecution. It can apply to certain other rulings provided that the prosecution agrees that if leave to appeal to the Court of Appeal Criminal Division ("CACD") is not obtained, or the appeal is abandoned before it is determined by the CACD, it will drop the prosecution. Therefore, unlike the defendant, the prosecution has some right to challenge a decision that is made during trial; for example, where the judge accedes to a submission by the defence of no case to answer.[3] Such appeals are dealt with expeditiously, and if they succeed, the trial

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1 Preparatory hearings are held in relation to serious or complex fraud cases (Criminal Justice Act 1987, s 8); lengthy, serious or complex cases in other areas (Criminal Procedure and Investigations Act 1996, Part 3). They are required to be held in terrorism cases (Criminal Procedure and Investigations Act 1996, s 29). The preparatory hearing represents the start of the trial. They are distinguished from Plea and Trial Preparation hearings, at which a plea is taken in the Crown Court, and pre-trial hearings in the magistrates' courts.

2 However, as we discuss in Chapter 13, it may be possible to seek the quashing of an acquittal if it was "tainted" by intimidation or interference with jurors or witnesses, or, for a small number of very serious offences, where there is "compelling" new evidence.

3 The prosecution does not have a comparable right to challenge a successful application in the Crown Court to quash the indictment on the basis that it discloses no case to answer. As noted in *SFO v Barclays plc* [2018] EWHC 3055 (QB), [2020] 1 Cr App R 28 at [6], by Davis LJ:

> Parliament has not, for whatever reason, seen fit to provide an appeal to the Court of Appeal (Criminal Division) in such cases, notwithstanding the availability of an appeal route in the case of terminating rulings subsequently conferred by the relevant provisions of the Criminal Justice Act 2003.

The prosecution can instead apply to a High Court judge for a voluntary bill of indictment under s 2(2)(b) of the Administration of Justice (Miscellaneous Procedures) Act 1933. It was held at [8] of *Barclays*, by Davis LJ, that:

> the exceptional course of preferring a voluntary bill, following a successful application in the Crown Court to dismiss, will ordinarily only be permitted by the High Court if:
>
> (i) the Crown Court has made a basic or substantive error of law which is clear or obvious; or
>
> (ii) new evidence has become available to the prosecution which was not available before; or

resumes (which will usually be after about a week or so whilst the CACD hear the appeal).

12.3 The key reason for preventing interlocutory appeals – that is, appeals during the course of the trial – is a practical one. Interlocutory appeals disrupt the trial process. It may, in practice, be impossible to hear appeal proceedings sufficiently quickly to avoid having to discharge the jury. This also means that there is potential for abuse: appeals with little merit could be pursued precisely because they might result in a trial that was going badly for the appealing party having to be started afresh.

12.4 This consideration is of less importance in respect of decisions made in preparatory hearings because they are held well before the trial commences (and only in trial for certain offences), which may allow sufficient time for an appeal to be heard without delaying the trial. Even if there is a delay, this is substantially less disruptive than having to adjourn or stop a trial in which the jury has been sworn and witnesses may have been heard.

12.5 In certain circumstances, a third party who is not a party to proceedings may be able to appeal against an order made in criminal proceedings where they are affected by it. This may include, for example, complainants, witnesses or journalists. A particular case is the right to challenge decisions to impose reporting restrictions. Given these appeals will often occur during the trial, the discussion of third-party appeals is included in this chapter.

12.6 Independently of prosecution rights of appeal, there are certain appeal mechanisms which are available to the state, reflecting the public interest in outcomes of criminal trials, in particular for legal certainty and public safety. These are largely powers of the Attorney General and are discussed in Chapters 7 on sentence appeals (for unduly lenient sentence appeals) and 13 on challenges following acquittal.[4]

THE LAW COMMISSION'S WORK ON PROSECUTION APPEALS: PRINCIPLES

12.7 In 2001, we published a final report on prosecution appeals against judges' rulings during the course of a trial which may result in premature termination of the trial.[5] This project was concerned exclusively with trials on indictment.

(iii) there was a serious procedural irregularity.

Although in *SFO v Evans* [2014] EWHC 3803 (QB), [2015] 1 WLR 3526, Fulford J said at [72] that this "is not an exhaustive list because there will be other exceptional circumstances", it is clear that the proceedings for a voluntary bill of indictment where the Crown Court quashes the indictment are in the nature of review, focusing on the decisions (including those of the prosecution) which led to the indictment being quashed.

4 These are principally the Attorney General's powers to refer a sentence to the CACD on the ground that it is unduly lenient, and to refer a question of law to the CACD following an acquittal.

5 Double Jeopardy and Prosecution Appeals (2001) Law Com No 267. This followed the consultation paper: Prosecution Appeals against Judges' Rulings (2000) Law Commission Consultation Paper No 158. The final report combined work on the prosecution appeals project with our work on double jeopardy (discussed later in this chapter), noting at para 1.11 that "The issues of double jeopardy and prosecution appeals, though distinct, are clearly related. They both concern the circumstances in which an acquittal at a trial may be revisited at the instigation of the prosecution. Some of the arguments apply to both".

12.8 In that project we applied a test based on twin principles of *accuracy of outcome* and *process aims*. By accuracy of outcome, we meant essentially the principles that we have applied in this project of acquitting the innocent and convicting the guilty.[6] By process aims, we meant arrangements and procedures for the investigation and prosecution of crime that reflect respect for, and uphold, the fundamental rights and freedoms of the individual.[7]

12.9 We noted that while accuracy of outcome would benefit the prosecution or the defence depending on whether the defendant was or was not guilty, some process aims by their nature only work in favour of the defendant.[8] Some rules – such as providing defendants with the opportunity to be heard, "equality of arms"[9] with the prosecution, advance notice of the case – further both aims, but sometimes the two aims are in conflict. The standard of proof, for instance, benefits the defendant at the expense of accuracy of outcome: it deliberately favours the acquittal of some guilty people to avoid the conviction of a smaller number of innocent people.

12.10 Although we have used different terms within this project, we think these same principles should apply in our analysis in this project: allowing appeals before the conclusion of the trial has the potential to further the aim of acquitting the innocent and convicting the guilty (accuracy of outcome). However, it would only be acceptable where it could be fair as between prosecution and defendant; and without undermining the principle that priority should, if necessary, be given to acquitting the innocent over convicting the guilty; and in a way which is practicable.

12.11 Fairness between prosecution and defendant does not require that each side has directly corresponding rights. To give one example, in summary proceedings, the defendant has a right to a rehearing, or can challenge the conviction in the High Court on a point of law. The prosecution can only challenge an acquittal on a point of law in the High Court. It would not necessarily be unfair if the defence were no longer able to challenge a decision of a magistrates' court to convict on a point of law in the High Court. This is because the convicted person has an equivalent right to argue that point of law at a rehearing in the Crown Court (and to challenge the decision of the Crown Court in the High Court). The prosecution would not thereby necessarily have rights that the defendant would not have.

12.12 However, as we explain later in this chapter, the right of a defendant to appeal against conviction in a trial on indictment is not comparable to a right of the prosecution to appeal against decisions made during the course of a trial. This is because in an appeal against conviction the appellant must show not only that a decision was wrong, but that the conviction is consequently unsafe.[10]

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6 Prosecution Appeals against Judges' Rulings (2000) Law Commission Consultation Paper No 158, para 3.3.

7 Above, para 3.4.

8 Above, para 3.5.

9 See the discussion of criticism of this term at Chapter 4's para 4.22 and its footnote.

10 Prosecution Appeals against Judges' Rulings (2000) Law Commission Consultation Paper No 158, para 4.17.

12.13 Applying this analysis, we concluded in our 2000 prosecution appeals project that the preparatory hearings regime, under which *either* side may appeal a ruling in advance of the start of the trial before the jury is sworn, was fair and practical.[11]

12.14 We concluded that allowing the prosecution to appeal against terminating rulings during the trial would also be acceptable.[12] Therefore, a right to appeal against a terminating ruling is broadly comparable to the right of a defendant to appeal against their conviction and would be fair between prosecution and defence.

12.15 A successful appeal against a terminating ruling would mean that the case would have to return to court and start all over again. An unsuccessful prosecution appeal, however, would mean that the trial would conclude immediately.[13] Thus, the disruption of a retrial would only arise where the value of ensuring accuracy of outcome outweighed the principle of finality and avoiding disruption.

12.16 However, we concluded that allowing the prosecution to appeal against *non*-terminating rulings during the trial would not be acceptable. This was primarily for two reasons: first, the defence would not have a comparable right of appeal.[14] This asymmetry would be acceptable if *any* error of law recognised post-trial resulted in an appeal against conviction being allowed, since the protection afforded to a defendant against a wrong decision in law would be at least as great as that afforded to the prosecution. However, this is not the case.[15]

12.17 The asymmetry could alternatively be remedied by giving defendants a similar right to appeal against adverse rulings (although defence rights of appeal were outside the terms of reference for the project). However, we could see no practical way in which this could be done.[16]

12.18 Second, it appeared to us that in almost every case where the prosecution appealed, successfully or unsuccessfully, the result would be a delay to the prejudice of the defendant. It would generally not be possible to keep the same jury, which would mean that the case would have to restart.[17]

12.19 We therefore provisionally proposed that there should be a prosecution right of appeal against a terminating ruling made before the start of the trial proper, or during the trial up to the conclusion of the prosecution evidence.[18] These new prosecution rights of

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11 Above, para 5.16.

12 Above, para 6.7. Examples of terminating rulings may include a ruling that there is no case to answer, the successful application of autrefois acquit or autrefois convict (where the defendant cannot be tried for an offence of which they have already been convicted or acquitted) or a stay of proceedings on the grounds of abuse of process.

13 Only for the defendants concerning whom the prosecution had sought to appeal in a multi-defendant trial.

14 Above, para 4.13.

15 Above, para 4.17.

16 Above, para 4.16.

17 Above, paras 4.10-4.11.

18 Above, para 6.7.

appeal should only apply to offences in respect of which the Attorney General would have the power to refer a sentence as unduly lenient.[19]

12.20 We provisionally concluded that there should be no right of appeal by the prosecution against a ruling of no case to answer made at the conclusion of the prosecution case.[20]

12.21 In our Final Report, we recommended that the prosecution should have the right to appeal against a terminating ruling.[21] We noted that the Criminal Bar Association and the Bar Council said that this could only be fair if the defendant had a corresponding right of appeal (that is, a right to appeal against the rejection of a submission of no case to answer). However, we affirmed our view that "there is effective and practical parity in that, if the defendant is convicted, then the general right of defence appeal against conviction includes an appeal against the refusal of an application for a terminating ruling".[22] We did not recommend that there should be a prosecution right of appeal against non-terminating rulings during the trial.[23]

12.22 We did not recommend that there should be a prosecution right of appeal against a jury's verdict, even where this had followed a misdirection by the judge which favoured the defence.[24]

Government response

12.23 In the event, the approach of the Government differed from what we had recommended and, in several respects, went further.

12.24 First, in its White Paper *Justice for All,* the Government rejected the idea that the prosecution right of appeal should be limited to certain serious offences, as we had recommended.[25]

12.25 Second, the Government adopted a different approach to identifying terminating rulings. Rather than, as we had recommended, limit it to certain types of ruling, in the Criminal Justice Act 2003, the right was framed as a general right of appeal. However, its exercise requires the prosecution to give an "acquittal guarantee", under which, if the appeal is withdrawn or leave to appeal is refused by the CACD, the defendant should be acquitted.[26] If leave to appeal is given but the CACD affirms the ruling, the CACD must acquit the defendant.[27]

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19 Above, para 7.9.

20 Above, para 6.20.

21 Double Jeopardy and Prosecution Appeals (2001) Law Com No 267, para 7.49.

22 Above, para 7.41.

23 Above, paras 7.38-7.39.

24 Above, para 7.78.

25 Justice for All (2002) Cm 5563, para 4.68.

26 Criminal Justice Act 2003, s 58.

27 Above, s 61(3).

12.26 Third, the Government introduced provisions for expedited appeals, whereby the trial would be adjourned pending the appeal without the jury being discharged. The judge would also have discretion to adjourn the case where the appeal was not expedited.[28]

12.27 Fourth, apparently rejecting our conclusion that this could not be fair to the defendant, the Government introduced legislation (not trailed in the White Paper) providing for the prosecution to appeal against evidentiary rulings which significantly weaken the prosecution case. This would be without the need to give the "acquittal guarantee", and with no corresponding rights for the defendant.[29] (These provisions have not been brought into force.)

CURRENT LAW

Prosecution appeals in summary cases

12.28 The statutory appeal from a magistrates' court to the Crown Court is available only to the defendant.[30] However, the prosecution can challenge both an acquittal and sentence by way of case stated to the High Court.[31] The magistrates' court may only refuse to state a case if they are satisfied that it is "frivolous".[32]

12.29 Where a defendant has successfully appealed to the Crown Court in summary proceedings, the prosecution may appeal against acquittal in the Crown Court by way of case stated to the Divisional Court,[33] but only on grounds that the decision was wrong on a point of law or in excess of jurisdiction.

12.30 There is no power to state a case in relation to an interlocutory ruling.[34]

12.31 Because the High Court exercises a supervisory jurisdiction over magistrates' courts, challenges to decisions made during the course of a trial can be made by way of judicial review. Therefore, the prosecution may also challenge decisions in summary proceedings by way of judicial review (judicial review is not available in relation to

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28 Above, s 59. In *R v AMF and AZJ* [2024] EWCA Crim 899 at [7], by William Davis LJ, the CACD was critical of a decision to accede to a submission of no case to answer (after two complainants had given evidence) without investigation of whether it might be possible to mount an expedited appeal.

However, the prosecution had then failed to serve the appeal notice until eight days after they were required to do so, and without satisfactory explanation, and by the time the case was considered had accepted that the defendants could not have been convicted of two of the four counts which were the subject of the appeal. In these circumstances, despite expressing concern that the matter in question should have been left to the jury, the CACD rejected the appeal against the terminating ruling.

29 Criminal Justice Act 2003, ss 62-66.

30 Magistrates' Courts Act 1980, s 108.

31 Above, s 11.

32 "Frivolous" means "futile, misconceived, hopeless or academic": *R v North West Suffolk (Mildenhall) Magistrates' Court, ex p Forest Heath DC* (1997) 161 JP 401, [1998] Env LR 9, CA. The Court cannot refuse a request to state a case on this ground if it is made by or on behalf of the Attorney General.

33 Senior Courts Act 1981, s 28(1).

34 *R (Highbury Poultry Farm Produce Ltd) v Telford Magistrates' Court* [2018] EWHC 3122 (Admin), [2019] PTSR 633.

trials on indictment).[35] This includes a refusal by a magistrates' court or Crown Court (in summary proceedings) to state a case.[36]

12.32 In *Crown Prosecution Service* ("CPS") *v Newcastle*,[37] the CPS did not indicate that it was considering judicial review of a decision of a district judge (magistrates' courts) to retain a rape charge in the youth court for six days, and then did not inform the court for a further four weeks. The High Court reiterated that an application for judicial review "must be brought promptly",[38] "particularly where the underlying proceedings to which the application relates are criminal proceedings; all the more so where … the application for judicial review relates to what is essentially an interlocutory decision".[39]

12.33 In general, the prosecution cannot obtain the quashing of an acquittal by judicial review merely on the grounds that the prosecution was prejudiced by a decision of the court – even if the defendant, if similarly prejudiced, would have been able to secure the quashing of a conviction. However, an order quashing an acquittal is available where the magistrates' court had no jurisdiction to acquit.[40]

12.34 On the basis of *ex parte Rowlands*[41] – albeit that this concerned a defence appeal – the general rule can be inferred that where the prosecution alleges that the magistrates' court made an error of law or acted in excess of jurisdiction, the appeal should be by way of case stated. However, where the allegation is one of unfairness, bias or procedural irregularity, the challenge should be by way of judicial review. As with defence appeals, there will be cases in which there is sufficient overlap that the prosecution has a choice as to which route to take.

Trials on indictment

Appeals from preparatory hearings

12.35 Other than in terrorism cases, where they are mandatory,[42] preparatory hearings for case management, unlike other pre-trial hearings, can only be ordered by a judge in

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35 Senior Courts Act 1981, s 29(3).

36 Magistrates' Courts Act 1980, s 11(6); Senior Courts Act 1981, s 28(1). See for example *DPP v Stratford Magistrates' Court* [2017] EWHC 1794 (Admin), [2018] 4 WLR 47; *DPP v Highbury Corner Magistrates' Court* [2022] EWHC 3207 (Admin), [2023] 4 WLR 22.

37 [2010] EWHC 2773 (Admin).

38 Above, at [27], by Langstaff J.

39 Above, at [36], by Munby LJ.

40 *R v West* [1964] 1 QB 15, CCA (the defendant was acquitted by magistrates on a charge of being an accessory after the fact, an offence which was not triable summarily); *Cardiff Magistrates' Court, ex p Cardiff City Council*, *The Times* 24 February 1987, [1987] 1 WLUK 370, DC (the offence was triable either-way and the acquitted defendant had not elected summary trial); *R v Hendon Justices, ex p DPP* [1994] QB 167, DC (the court had acquitted the defendant without hearing the prosecution witnesses, the High Court finding that this was an improper exercise of its powers being used to punish the prosecution); *DPP v Barton* [2024] EWHC 1350 (Admin), [2024] 2 Cr App R 15 (the Divisional Court found that the District Judge unreasonably stayed the prosecution as an abuse of process where the prosecution sought to rely on comments made by the defendant's wife, the alleged victim, and recorded on a police officer's body camera, but not call the witness, where it thought she would give untruthful evidence favourable to the defendant; it was open to the defence to call her).

41 [1998] QB 110, DC.

42 Criminal Procedure and Investigations Act 1996 ("CPIA 1996"), s 29(1B).

certain cases (either serious fraud cases or where the case is complex, lengthy or serious[43]). They can only be ordered where "substantial benefits" arise from ordering the hearing, such as identifying material issues, assisting juror comprehension or managing the trial.[44]

12.36 Under section 35 of the Criminal Procedure and Investigations Act ("CPIA") 1996, there is a right to appeal, with leave of the Court of Appeal, against a decision made at a preparatory hearing. The preparatory hearing cannot be concluded until the appeal is decided or abandoned.[45]

12.37 When ordered, preparatory hearings are held before the jury is sworn in. Under section 31(3) of the CPIA 1996, the judge at the hearing can make rulings on:

(a) any question as to the admissibility of evidence;

(b) any other question of law relating to the case; and

(c) any question as to the severance or joinder of charges.

12.38 Either the prosecution or the defence may appeal against such a ruling,[46] with leave from the judge or the CACD.[47]

12.39 This also extends to the decision of a judge under sections 44 and 45 of the Criminal Justice Act 2003 to order, or to refuse to order, a trial without a jury on the grounds that there is a danger of jury tampering.[48]

12.40 Where the appeal is brought by the prosecution there is no requirement to give the "acquittal guarantee" once the trial is under way (see the following section).

12.41 Additionally, while rulings at preparatory hearings can relate to the admissibility of evidence, not all evidential rulings can, or must, be made at a preparatory hearing. Other preliminary hearings (which do not attract rights of appeal) are used to make such rulings, but often such rulings are dealt with at the trial itself.

Prosecution appeals from terminating rulings

12.42 As noted above, the ability of the prosecution to bring appeals in relation to trials on indictment was extended following recommendations of the Law Commission in 2001.

12.43 Our recommendations were implemented with modification in Part 9 of the Criminal Justice Act 2003. In particular, the Act went further in allowing appeals against rulings relating to disclosure where this could lead to a prosecution being abandoned. Under section 58 of the 2003 Act, where a judge makes a ruling in relation to a trial on

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43 Above, s 29(1); Criminal Justice Act 1987, s 9.

44 CPIA 1996, ss 29(1) and (2); Criminal Justice Act 1987, s 7(1).

45 CPIA 1996, s 35(2).

46 Above, s 35(1); Criminal Justice Act 1987, ss 9(11) to (14); Criminal Procedure Rules 2020, Part 37.

47 CPIA 1996, s 35(1); Criminal Justice Act 1987, s 9(11).

48 CPIA 1996, s 35(1).

indictment that would have the effect of terminating the proceedings, the prosecution may appeal against the ruling to the CACD. The prosecution can only do so if it first informs the trial court that, if leave to appeal is not obtained or the prosecution appeal is abandoned, the defendant should be acquitted (the "acquittal guarantee").

12.44 Although these are often described as "terminating rulings", the right of the prosecution to appeal is not limited to those rulings which formally end the proceedings, such as a ruling of no case to answer, or a stay of proceedings on the grounds of abuse of process. The prosecution's right to appeal also covers rulings in other circumstances which will have the practical effect of leading to the abandonment of the prosecution, for instance where a judge orders the disclosure of sensitive evidence which the prosecution is not prepared to disclose. It is the "acquittal guarantee" which makes them terminating rulings.

12.45 The prosecution's right to appeal does not apply to a ruling to discharge a jury, nor to any ruling which could be appealed to the CACD by other means.[49]

12.46 The prosecution is required to inform the court immediately following the ruling of its intention to appeal, or – if time is needed to consider whether to appeal – must immediately request an adjournment to consider appealing against the ruling.[50]

12.47 When the prosecution appeals against a ruling of no case to answer it may also nominate one or more other rulings in the proceedings to be considered in the appeal. This is so that the CACD can consider the cumulative effect of the rulings. The reason for this is that the ruling of no case to answer will often follow a series of prior rulings – for instance relating to admissibility of evidence – which cumulatively led to the result that there is, on the evidence adduced or on the basis of rulings of law previously made, no case to answer.

12.48 An appeal cannot be made once the judge has started summing-up. Consequently, there is no means of appealing against a misdirection to the jury in the judge's summing-up (though advocates must bring alleged misdirections to the judge's attention at the first opportunity, which may allow the judge immediately to correct the misdirection to the jury). Nor is there any means of appealing against a misdirection in response to a question from the jury once it has started deliberation.

12.49 Where appeals are brought against rulings during a trial, the process may or may not be expedited. If it is not, the jury may be discharged while the appeal is heard but a fresh trial may be ordered.

12.50 There is a high threshold for the CACD to grant the prosecution leave to appeal: it must be seriously arguable that it was unreasonable for the judge's discretion to be exercised as it was.[51]

12.51 At the substantive hearing, the CACD may not reverse a ruling unless satisfied that it was wrong in law, involved an error of law or principle, or was not a ruling that was

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49 Criminal Justice Act 2003, s 61.

50 Above, s 58(4).

51 *R v B* [2008] EWCA Crim 1144.

reasonable for a judge to have made (therefore largely respecting the exercise of the trial judge's discretion unless it was unreasonable).[52]

12.52 It is worth noting that there is no corresponding right for the defendant, though the positions of the defence and the prosecution are not directly comparable as the defendant, unlike the prosecution, can seek to appeal if convicted. The defendant would be doing so as a convicted person – they would have to show that the ruling made the conviction unsafe.

Prosecution appeals against evidentiary rulings

12.53 Section 62 of the Criminal Justice Act 2003 also introduced a power for the prosecution to appeal against evidentiary rulings, though this has not been brought into force. The provision would enable the prosecution to appeal to the CACD against a ruling which significantly weakens the prosecution's case. It would apply only to a narrow range of very serious offences. There would be no requirement to give the "acquittal guarantee". There would be no corresponding right for the defence to appeal against an adverse evidential ruling.

CONSULTEES' RESPONSES

12.54 Chapter 7 of the Issues Paper considered appeals by the prosecution, third parties and the state.[53] We asked:

> Are the powers available to prosecutors to appeal decisions made during criminal proceedings adequate and appropriate? (Question 12)

12.55 Only a limited number of consultees responded to this question as most consultees had limited experience of such appeals.

12.56 It was largely considered by consultees that the current approach was operating well and this area did not need reform. An exception to this was the Serious Fraud Office ("SFO") which argued that the provision in section 62 of the Criminal Justice Act 2003 should be brought into force and its scope "expanded to economic crimes, given how much more prevalent and harmful fraud appears to be in 2023 compared to 2003".

12.57 However, other consultees, including the CPS, did not think that reform or bringing section 62 into force was necessary. The CPS stated:

> The powers in Part 9 of the Criminal Justice Act 2003 (CJA) are adequate and appropriate. The focus rightly is on those rulings which in effect terminate the proceedings before the jury considers its verdict. Applications made by the prosecution are carefully considered given the possible consequences. The mechanism works and practitioners are familiar with the statutory procedure.
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> Section 62 of the CJA (evidentiary rulings) has still not been brought into force. Given the potential difficulties with this provision (i.e. what is meant by significantly weakens the case), and the risk of an increase in interlocutory appeals, the

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52 Criminal Justice Act 2003, s 67.

53 Law Commission, Criminal Appeals: Issues Paper (July 2023).

government at the time decided to review this provision. Further, if evidence significantly weakens the case and the prosecution thinks this has the effect of terminating the case it can appeal under s58. If not, it can continue with the prosecution. It is now 18 years since these provisions were passed and there does not appear to have been calls for its introduction. There seems little point in retaining this provision.

12.58 Cardiff University Innocence Project expressed concern with Part 9 of the Criminal Justice Act 2003, which relates to prosecution appeals. It stated:

> judges should be more willing to grant 'no case to answer' applications in cases where evidence is weak. Prosecution appeals will militate against this and potentially lead to more wrongful convictions.

12.59 The Bar Council observed that whilst it had not gathered a wide range of views, "there is not generally widespread disquiet at the scope for prosecutorial appeals".

12.60 Some consultees were concerned with the delay that interlocutory appeals may cause to trial proceedings. For example, the Bar Council stated that such appeals are highly disruptive given they must be resolved before a jury returns their verdict. It observed that:

> This is the position even where an appeal is not ultimately pursued, because the mere existence of the possibility frequently requires delays in a trial while the prosecution consider their position following an adverse ruling. When an appeal is pursued, the "acquittal guarantee" can be of little comfort where, for instance, the ruling relates to only one count on a multiple count indictment and/or one defendant in a multi-handed case. In those circumstances even when the appeal is unsuccessful it may still have the effect of having necessitated the discharge of the jury and a subsequent re-trial.
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> Given the current pressure on the criminal justice system in terms of court capacity, any measures that cause further disruption to the trial process would need to be considered very carefully.

12.61 The Law Society similarly considered that the appeals against terminating rulings or preparatory hearing rulings were necessarily limited. It argued:

> restriction is necessary to prevent large numbers of interlocutory appeals, which would otherwise take up significant resources in the CACD and delay trials. It would not be appropriate to create further additional tiers of appeals. It would result in criminal cases becoming over-litigated and diminish the role of the jury and the issue of finality.

12.62 One consultee, Dr Felicity Gerry KC, considered that both the defence and prosecution should have the same rights of appeal. She argued that "[t]here should be a functioning interlocutory appeal process for both sides in all criminal cases as there is in Victoria Australia".

12.63 However, the SFO defended the difference in appeal rights and pointed out that where a decision to dismiss the charge has been made, the prosecution has no ability

to appeal that decision (although they can institute fresh proceedings or apply for a voluntary bill of indictment).[54] The SFO noted that:

> In contrast to the defendant who usually retains the right to challenge an unfavourable verdict through the appeal process, the absence of an appeal option prevents the prosecution from appealing in circumstances where a Judge might have misconstrued or erroneously applied the facts to the legal context. As set out in *SFO v Evans* [2014] EWHC 3803 (QB) Parliament has not provided a route to appeal against the dismissal of a charge under sections 58-61 of the Criminal Justice Act 2003, furthermore, the decision to dismiss the charge is not susceptible to judicial review.

COMPARATIVE ANALYSIS

Australia

12.64 Most Australian jurisdictions permit prosecution decisions against terminating rulings, and in some cases against interlocutory rulings which do not terminate proceedings but substantially weaken the prosecution case.

12.65 In Western Australia, the prosecution can appeal against certain, mostly terminating, rulings in a trial on indictment, including a stay of proceedings or a judgment of acquittal after a decision by the judge that the accused has no case to answer.[55]

12.66 In Queensland, there is no general right to appeal against an interlocutory decision, but the Crown law office may appeal against an order staying proceedings (or further proceedings) on an indictment.[56] There is a right of appeal from a decision of the judge refusing to change the venue, but the appellate court will not interfere lightly with the exercise of discretion.[57]

12.67 In New South Wales, the Attorney General or Director of Public Prosecutions may appeal to the Court of Criminal Appeal against interlocutory judgments or orders,[58] and they may appeal against any decision or ruling on the admissibility of evidence if it eliminates or substantially weakens the prosecution case.[59] Any other party to proceedings may appeal against interlocutory judgments or orders with the Court's leave or if the trial court certifies the case as proper for determination on appeal.[60]

12.68 In Victoria, as noted by Dr Felicity Gerry KC, there is a general right for both the prosecution and defence to bring interlocutory appeals.

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54 A voluntary bill of indictment is a relatively rare process under the Administration of Justice (Miscellaneous Provisions) Act 1933 and is limited in its applicability.

55 Criminal Appeals Act 2004 (W Aust), s 26(2).

56 Criminal Code Act 1899 (Qld), s 669A(1A).

57 *Re Robert Paul Long* [2001] QCA 318.

58 Criminal Appeal Act 1912 (NSW), s 5F(2).

59 Above, s 5F(3A).

60 Above, s 5F(3).

12.69 A party to a proceeding for prosecution of an indictable offence in Victoria's County Court or Trial Division of the Supreme Court may appeal against an interlocutory decision with the Court of Appeal's permission. However, this is only if the trial judge certifies that (1) if the decision concerns the admissibility of evidence, that the evidence, if admitted, would eliminate or substantially weaken the prosecution case, or (2) if it does not concern admissibility, that the decision is of sufficient importance to the trial to justify it being determined on interlocutory appeal.[61] If the decision is made after the trial commences, the judge must also certify either that (1) the issue was not reasonably able to be identified before the trial or (2) that the party seeking to appeal was not at fault in failing to identify the issue.[62] If the judge refuses to certify the appeal, the Court of Appeal can be asked to review that decision, and must be asked within two days of the refusal to certify if the trial has commenced.[63]

12.70 The Court may only give leave if satisfied that it is in the interests of justice, with regard to:

(1) potential delay or disruption to the trial, if leave is given;

(2) whether determination of the issue may:

(a) render the trial unnecessary,

(b) substantially reduce the time required for the trial, resolve an issue of law, evidence or procedure necessary for the proper conduct of the trial,

(c) reduce the likelihood of a successful appeal if the accused is convicted; and

(3) any other matter it considers important.[64]

It has been held that only defendants can appeal against decisions concerning submissions of no case to answer, because to allow the prosecution to do so would "offend the fundamental principle that the Crown does not have a right of appeal from an acquittal".[65]

DISCUSSION: PROSECUTION APPEALS

12.71 In our view, the framework for analysis that we adopted in the Prosecution Appeals project remains sound. Extending rights of appeal should, other things being equal, further the principle of accuracy – acquitting the innocent and convicting the guilty – because it provides for the correction of legal errors.

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61 Criminal Procedure Act 2009 (Vic), s 295.

62 Above.

63 Above, s 296.

64 Above, s 297.

65 *DPP v Singh* [2012] VSCA 167 at [8], by Bongiorno JA.

12.72 However, this is only acceptable where it is a possible to do so in a way which is both fair between prosecution and defence (and potentially to third parties) and practicable.

12.73 We consider that the provisions for appeals against decisions made in preparatory hearings meet these criteria. They do not discriminate between prosecution and defence. They do not disrupt the trial proper (which has yet to start), and the ability to continue the preparatory hearing while the appeal is pending means that the preparatory hearing can continue undisrupted.

12.74 It is our provisional view that the provisions for appeals against "terminating" rulings also meet these criteria. We accept that there is parity between a ruling which terminates the proceedings to the detriment of the prosecution and a conviction which terminates the proceedings to the detriment of the defendant. The appeal rights of the prosecution in respect of the former do not exceed (and are substantially more restricted than) the defendant's right of appeal in respect of the latter. The exercise of the right has the potential to disrupt trials. However, the most serious disruption – where a trial has to be abandoned and a retrial held – would only arise in circumstances where the terminating ruling was incorrect. In such cases, a successful appeal followed by retrial furthers the principle of convicting the guilty, by ensuring that a person is not acquitted as a result of a legal error.

12.75 The uncommenced provisions in sections 62 to 66 of the Criminal Justice Act 2003, however, arguably do not meet these criteria. They would potentially operate unfairly in that they give the prosecution an opportunity to appeal against adverse evidentiary rulings in a way which is not available to defendants. The fact that the defendant can appeal against their conviction after they are convicted does not adequately address this because the defendant will have to show not only that the evidentiary ruling was wrong, but also that it rendered the conviction unsafe.

12.76 Only one consultee, the SFO, suggested that section 62 should be brought into force and expanded to include economic crimes. However, the primary rationale put forward was how much more harmful and prevalent fraud has become since 2003. Be that as it may, we have not been persuaded that this justifies bringing into force section 62 given the greater disparity it creates between prosecution and defence. Furthermore, defining what would constitute a ruling that "significantly weakens the prosecution's case" may be difficult, as the CPS pointed out. Given consultees were largely of the view that prosecution appeals were working well and that any further amendments that may cause further delays in trials should be avoided, we have provisionally concluded that bringing section 62 into force is not justified, and that instead the uncommenced provisions should be repealed.

12.77 We discuss at paragraph 12.93 and following below the possibility of appeals against evidentiary rulings by a third party (most likely, a complainant or witness). Whereas giving prosecutors a right to appeal evidentiary rulings which is not available to the defence is inherently unfair, giving a third party a right to appeal an evidentiary ruling is not. Whether admission or exclusion or the evidence would benefit the prosecution or the defence would depend entirely on the nature of the evidence. Provided that any court considering the matter gives due regard to the need to ensure that the defendant will still receive a fair trial, such appeals are capable of being fair.

12.78 Some stakeholders have expressed concerns that the restrictions on prosecution appeals in relation to terminating rulings can lead to injustice. For instance, where a judge makes a misdirection in the summing-up, or in response to jury questions, there is no ability for the prosecution to appeal against the ruling – even where it would be prepared to offer the "acquittal guarantee". If the defendant is then acquitted on the basis of those directions, there would be no way of appealing the acquittal.

12.79 Stakeholders were also concerned about cases where the judge makes a misdirection but the error is not so serious that the prosecution would want to jeopardise the prosecution by offering the "acquittal guarantee". For instance, the judge might wrongly leave a partial defence available in a murder case. The prosecution would not want to risk losing the case altogether by offering the guarantee (since the evidence might well be strong enough to secure a conviction on the murder charge). However, the jury might, in consequence, acquit the defendant of murder and instead convict them of manslaughter on the basis of the partial defence wrongly left available to them.

Could the defence and prosecution be given similar interlocutory appeal rights?

12.80 In our Consultation Paper on Prosecution Appeals we noted:[66]

> were it considered to be desirable to allow the prosecution a right of appeal against non-terminating rulings, one answer to the problem presented by the requirement for equality of arms would be to give *both* sides a right of appeal against a non-terminating ruling …

We did not consider this to be a realistic option, however, because of the disruption to trials that this would entail.

12.81 As discussed above, some consultees who responded to this issue in the Issues Paper raised concerns as to the potential delay that prosecution appeals may have on trial proceedings even where that appeal is not ultimately pursued.

12.82 In its response to our consultation on the High Court's Jurisdiction in Criminal Proceedings,[67] the Council of HM Circuit Judges said:

> 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 [this] 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 ...
>
> 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

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66 Prosecution Appeals against Judges' Rulings (2000) Law Commission Consultation Paper No 158, para 4.16.

67 (2007) Law Commission Consultation Paper No 184.

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.

12.83 CPS guidance describes the prosecution's right to appeal against terminating rulings as a "formidable power to test the correctness of a judge's ruling … of such significance … that it should only be taken at an appropriate Area level by those with sufficient experience, responsibility and ownership of the consequences".[68] In practice, the decision will be taken by a Chief Crown Prosecutor or Deputy Chief Crown Prosecutor, who is required to consider whether it is likely that the CACD will reverse the ruling and whether it is in the public interest to appeal the ruling.

12.84 We agree that defence counsel could not be expected to use a power to appeal against interlocutory decisions as sparingly as CPS prosecutors might. Defence counsel are under a professional duty to act fearlessly and by all proper means in the best interests of their client and could potentially be in breach of their duty were they not to challenge an adverse ruling.

12.85 We also recognise that a client's personal investment in wanting to challenge an adverse decision made by the trial judge is wholly different to the professional detachment that a prosecutor would be expected to exercise. The fact that defence counsel may also demonstrate professional detachment is unlikely to be a sufficient safeguard: if an appeal is arguable, and not wholly without merit, the client is entitled to instruct their counsel to pursue it.

12.86 One can imagine circumstances in which a trial was going badly for the defendant, that there was merit in bringing an appeal against a ruling that had little hope of success, in the hope that disruption of the trial would mean it would have to be restarted whether the appeal was successful or not. It might be that in such circumstances, counsel might be able to refuse to pursue the appeal because of their overriding duty to the court. Whether or not this is correct, however, there would still be nothing to stop the client (who is under no similar duty) from terminating their instructions and pursuing the appeal as a litigant-in-person.

12.87 Accordingly, we cannot see how the prosecution and defence could fairly be given rights to appeal against rulings in the course of trial without these being used in a way which would severely disrupt the trial, and potentially in ways which could frustrate trials altogether.

CONCLUSIONS

12.88 We are left with the same issue that we faced in the project on Prosecution Appeals. The defendant's right to appeal against a conviction as unsafe is broadly comparable to the prosecution's right to appeal against a terminating ruling (indeed, it is broader, since the appeal can be brought on more extensive grounds than an error of law, such as fresh evidence). Accordingly, allowing the prosecution alone to bring appeals

[68] CPS, "Appeals – Prosecution Rights" (19 December 2019).

against terminating rulings in the course of trial is (1) broadly fair *between* prosecution and defence, and (2) fair *to* the defendant.

12.89 However, the defendant's right to appeal against a conviction as unsafe is not comparable to a right of the prosecution to appeal against non-terminating rulings. Although broader in some ways (such as the ability to appeal on the basis of fresh evidence), it is more restrictive in others. The prosecution would be able to appeal against errors which merely prejudiced the prosecution. The defence would not, as a post-conviction appeal requires the additional stage of proving that errors made the conviction unsafe. As such, allowing the prosecution to appeal against non-terminating rulings would not be fair *between* prosecution and defence, nor fair *to* the defendant.

12.90 We do not think that it is possible to develop a general right to appeal against interlocutory rulings which is both practical and fair between prosecution and defence. Restraint by the prosecution might mean that an asymmetrical right available to the prosecution *might* be practical, but it could not be fair. The defendant's interest in securing their acquittal means that a symmetrical right available to both parties would be fair but impractical.

12.91 Despite our conclusions in 2001, the Government brought forward legislation providing for an asymmetrical right of the prosecution to appeal against non-terminating interlocutory rulings. It is striking that over 20 years later, these provisions have not been brought into effect. Since we do not believe these provisions could be brought into effect in a way which is both practical and fair, we provisionally propose that these provisions should be repealed.

Consultation Question 71.

12.92 We provisionally propose that the provisions for appeals against so-called "terminating rulings" should be retained but that the uncommenced provisions in sections 62 to 66 of the Criminal Justice Act 2003, which provide for prosecution appeals against evidentiary rulings, should not be brought into effect and should instead be repealed.

Do consultees agree?

THIRD-PARTY APPEALS

12.93 The right of a third party to appeal against rulings in trials on indictment is very limited. There are, however, a small number of statutory provisions allowing a person who is not a party to the criminal proceedings to appeal against an order made in those proceedings. These include:

(1) a wasted costs order made against a legal or other representative of one of the parties, as a result of improper, unreasonable or negligent acts or omissions;[69]

(2) a third-party costs order made by the Crown Court or CACD;[70]

(3) a parenting order made where a child is convicted of an offence;[71] and

(4) reporting restrictions in the Crown Court and other proceedings relating to a trial on indictment.[72]

12.94 In contrast, the right to seek to bring an appeal by way of case stated from a magistrates' court is not limited to parties but extends to "any person … aggrieved by the conviction, order, determination or other proceeding".[73] In *Smith*,[74] the parents of a motorcyclist killed[75] in a road traffic collision were permitted to bring an appeal by way of case stated against the magistrates' court's decision not to adjourn the prosecution of the driver of the other vehicle until after the inquest into the motorcyclist's death.

12.95 The right to bring an appeal by way of case stated against a decision of the Crown Court in summary proceedings is limited to parties to the proceedings.[76]

12.96 Judicial review of magistrates' court decisions and Crown Court decisions not relating to trial on indictment (including when exercising its appellate jurisdiction) is also available where the third party can demonstrate standing.[77]

12.97 In most disputes, the interests of the prosecution and the defendant are necessarily in opposition. However, the same considerations do not necessarily apply in respect of the defendant and a third party. Indeed, as the proceedings are only adversarial between the prosecution and the defence, it may make little sense to talk of fairness 'between' the defendant and the third party.

12.98 Nonetheless there may, and often will, be a conflict between the interests of the defendant and the third party, the most obvious being the tension that may exist between the interests of the complainant and those of the defendant. There may be a

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69 Prosecution of Offenders Act 1985, s 19A.

70 Senior Courts Act 1981, s 51. For instance, a director of a company might be subject to an order if they were considered the "real party to the litigation" in a private prosecution brought by the company.

71 Sentencing Code, s 366(9). A person subject to a parenting order has the same rights of appeal as if they had committed the offence themselves and the order were a sentence passed for the offence.

72 Criminal Justice Act 1988, s 159. The appeal may be brought by any "person aggrieved" by the restrictions.

73 Magistrates' Courts Act 1980, s 111.

74 *Smith v DPP* (2000) 164 JP 96, [2000] RTR 36, DC.

75 The collision would not ordinarily have been fatal, but the victim refused a blood transfusion on the grounds of their religious beliefs.

76 Senior Courts Act 1981, s 28.

77 In order to bring judicial review, a party must have "sufficient standing in the matter to which the application relates" (Senior Courts Act 1981, s 31(3)). In our Report on the High Court's jurisdiction in relation to criminal proceedings, we noted "[w]hether a victim of a crime has sufficient interest to bring judicial review proceedings is not a settled point", The High Court's Jurisdiction in relation to Criminal Proceedings (2010) Law Com No 324, para 5.61.

tension between protecting the interests of the third party and ensuring that the trial is fair to the defendant.

12.99 Conversely, in some cases the defendant and the third party may have a shared interest. Further, the interests of the prosecution and third parties may pull in different directions, even where neither is aligned with the interests of the defence. In our 2023 consultation paper on Evidence in Sexual Offences Prosecutions, we noted that:[78]

> the prosecution do not represent the complainant, their role is not as the advocate for the complainant, and where the complainant's position differs from that of the prosecution they may understandably not be able to advocate for the complainant's position.
>
> The public interest requires prosecutors to be independent and to take impartial and objective decisions in order to "secure justice for victims, witnesses, suspects, defendants and the public."

12.100 As this last comment implies, to talk of "the public interest" as though it were a single, clear interest may be misleading. There may be multiple, conflicting "public" interests. For instance, when considering reporting restrictions, the court may have to balance prosecution arguments about the public interest in the administration of justice and the rights of victims and witnesses, against arguments from the media about the public interest in open justice and the rights to freedom of expression and to receive information. Usually, the prosecution will present a neutral position on press reporting.

Previous and ongoing Law Commission projects

Third-party appeals where fundamental rights affected by a decision

12.101 In our project on the High Court's jurisdiction in relation to criminal proceedings, we considered a provision whereby a defendant could appeal against certain trial rulings that would have implications for their enjoyment of their Convention rights.

12.102 In the consultation paper, we said:[79]

> We believe that third parties should enjoy the same level of protection as defendants against erroneous decisions. Accordingly, a third party should be able to invoke the new statutory appeal in order to appeal against a decision or ruling made after the jury has been sworn and before it is discharged if:
>
> (1) unless he or she is able to appeal forthwith, he or she would have no other adequate remedy in respect of the decision or ruling; and
>
> (2) the decision or ruling is one:
>
> (a) which affects the liberty of the third party; or

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78 Evidence in Sexual Offences Prosecutions (2023) Law Commission Consultation Paper No 175, paras 8.34-8.35.

79 The High Court's Jurisdiction in relation to Criminal Proceedings (2007) Law Commission Consultation Paper No 184, para 5.57.

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

12.103 We gave as an example *TH v Wood Green*,[80] where the trial judge remanded a prosecution witness in custody in order to compel their attendance at trial. This decision could not be challenged by way of judicial review (as it concerned a trial on indictment). In its response to the Consultation Paper, the Criminal Sub-Committee of the Council of Circuit Judges gave the example of *TB v Combined Court at Stafford*[81] where an order was made for disclosure of medical records of a 15-year-old girl who was the main prosecution witness in the trial of a man charged with sexual offences against her.[82]

12.104 We also suggested that an example of a case with "no adequate remedy" would be a decision to allow the media to name a child defendant.[83]

12.105 In the Final Report of our project on the High Court's jurisdiction in relation to criminal proceedings, however, we noted concerns that had been raised by respondents. Primarily, these included the breadth of the idea of a "directly-affected third party" and the increase in litigation which could result. We therefore concluded:[84]

> We now think that where there are gaps which give rise to injustice, they are best corrected on a case-by-case basis, and not by a general right of appeal (or of review). This approach would allow the right to be tailored as appropriate. For example, in some situations all the third party might need would be to be heard on an application made by others, whereas in other situations a full right of appeal might be appropriate. We also conclude that if a judge makes a ruling which directly affects a fundamental right of a person it may be justifiable for that person to be able to challenge the decision even if he or she is not a party to the proceedings.

12.106 The primary reason for rejecting the provisional proposal was that the proposal was intended to make a minor change within the wider appeals system. However, we were conscious of the general perception that the appeals system is beset with arbitrariness and uncertainty.[85] As such, we were concerned that the change could have undue consequences and it was "not possible to recommend changes made in isolation

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80 *R (TH) v The Crown Court at Wood Green* [2006] EWHC 2683 (Admin), [2007] 1 WLR 1670.

81 *R (TB) v The Combined Court at Stafford* [2006] EWHC 1645 (Admin), [2007] 1 WLR 1524.

82 The claimant in that case could not appeal the order, but sought a declaration by way of judicial review that she was entitled to be given notice of the application and to make representations. The High Court held that she was. It held that the application was not a "matter relating to trial on indictment".

83 The High Court's Jurisdiction in relation to Criminal Proceedings (2007) Law Commission Consultation Paper No 184, para 5.51.

84 Above, paras 5.86-5.87.

85 In that report we cited D Ormerod [2008] *Criminal Law Review* 466, 469, commenting on *R v Y* [2008] EWCA Crim 10, [2008] 1 WLR 1683 and referring to J R Spencer, "Does Our Present Criminal Appeal System Make Sense?" [2006] *Criminal Law Review* 677, 689, which in turn refers to the report of the Rt Hon Lord Justice Auld, *A Review of the Criminal Courts of England and Wales* (2001).

which will be worth the cost and effort without a broader overhaul of the whole appellate system".[86]

12.107 Given we are now providing a holistic review of the whole appellate system, we are in a better position to make provisional proposals as to third-party appeal rights which form part of a package of potential reforms.

12.108 One of our key concerns in that project was that without some limited rights of appeal, a third party may face an immediate and irreversible interference with fundamental rights. These include those required to be protected under the European Convention on Human Rights ("ECHR"), as a result of criminal proceedings to which they were not a primary party. This could be a direct threat to their life – for instance, where naming a witness puts the life of that witness at risk – or an irreparable breach of their privacy – such as disclosing sensitive personal information. In such cases, even if financial compensation might subsequently be awarded, this would not fully remedy or repair the harm.

Complainant appeals in sexual offences prosecutions

12.109 In our Consultation Paper on Evidence in Sexual Offences Prosecutions,[87] we considered the position of complainants in sexual offence cases. In Scotland, the Dorrian review had recommended that complainants in sexual offence prosecutions should have the right to appeal against the admissibility of their sexual behaviour evidence. This recommendation has been carried forward into the Victims, Witnesses, and Justice Reform (Scotland) Bill (in its form as introduced).[88] We noted that where sexual behaviour evidence or personal records are admitted, the right to respect for private life is breached as soon as the evidence is adduced at trial. This means that any appeal would have to be heard before the evidence was adduced but also that such appeals would have the most impact on the timing of the trial. We asked whether the existing rights of appeal, including those relating to preparatory hearings and terminating rulings, should be extended so that all parties to an application would be able to appeal a decision on an application to admit evidence relating to either the complainant's sexual behaviour or personal records. We had provisionally proposed that complainants should have a right to be heard regarding applications relating to the admission and disclosure of their personal records and sexual behaviour evidence and would, therefore, automatically be included in "all parties to an application".

12.110 We provisionally proposed that complainants who had a right to be heard on applications concerning the admissibility of evidence of their personal records or sexual behaviour should have the same right to appeal a decision on such an application as the prosecution and defendant. In practice, this would be limited to rulings made at preparatory hearings.

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86 The High Court's Jurisdiction in relation to Criminal Proceedings (2010) Law Com No 324, para 5.91.

87 Evidence in Sexual Offences Prosecutions (2023) Law Commission Consultation Paper No 259, Ch 11.

88 Victims, Witnesses and Justice Reform (Scotland) Bill, cl 275ZA(5) amends the Criminal Procedure (Scotland) Act 1995, s 74, which provides for appeals in connection with preliminary diets and includes an appeal from a complainer's legal representative against a decision to grant an application to admit evidence used to show the complainer is not of good character, demonstrate their previous sexual behaviour or that they are likely to have consented to the acts or are not a credible or reliable witness.

12.111 We also asked for views on whether the complainant should have a further right of appeal against decisions relating to their personal records or sexual behaviour that is not limited to preparatory hearings, and whether (if so) that should be limited to pre-trial decisions or include a decision on admissibility made during the trial.

12.112 Because we have recently consulted on these specific questions, we do not consult on these issues here, and will address these issues in our forthcoming final report on Evidence in Sexual Offence Prosecutions.

Consultation responses

12.113 Question 15 of the Issues Paper asked the following question:

> Do you have any views on the circumstances in which a third party might appeal a decision made in criminal proceedings?

12.114 Few respondents addressed the issue of third-party appeal rights, and those that did stressed that appeals should only be possible for third parties "directly affected" by a ruling. For example, Mark Newby (solicitor) said, "I believe this should only arise where the third party is directly affected by the decision".

12.115 The Law Society said:

> A third party should have a right of appeal only where they are directly affected by the decision in question, such as a determination of property rights under s 10 of the Proceeds of Crime Act 2002. Allowing, for example, complainants to appeal against evidential rulings would be to cast the net far too wide.

12.116 Some consultees discussed the previously mentioned consultation paper on Evidence in Sexual Offences Prosecutions and were of the view that third-party appeals either should be available in very limited situations as set out in that consultation paper or would not be appropriate at all.

12.117 However, there will be some rulings of a court which directly affect a third party – like the example of the decision to name a child defendant which affects the media. Such cases may engage rights under the ECHR, such as the right to respect for private and family life in article 8.

12.118 In some cases, the interference with that person's rights is immediate and a right to challenge the ruling after the event would not be adequate to protect those interests. This problem is even more stark in the case of disclosure amounting to interference with a right to respect for a person's private life. Once something is made public, the harm cannot be undone.

12.119 On this basis, we provisionally conclude that there may be some scope for a limited third-party appeal right where they are directly affected by the ruling. We would welcome views on whether such a right should exist and how it may be limited.

Consultation Question 72.

12.120 We invite consultees' views on whether a third party should have the right to appeal against decisions or rulings made in the course of a trial where unless they were to appeal forthwith, they would have no other adequate remedy in respect of the decision or ruling; and the decision or ruling is one:

(1) which affects the liberty of the third party; or

(2) which would amount to a contravention of their rights under the European Convention on Human Rights.

Appeals against reporting restrictions

12.121 Under section 159 of the Criminal Justice Act 1988, a "person aggrieved" may appeal to the CACD against orders restricting or preventing reports of proceedings or restricting the access of the public to the trial.[89] Where an appeal is brought against reporting restrictions, the appellate court retakes the decision afresh; it is not a review of the trial judge's decision.[90] There is no comparable right of appeal against a refusal to make an order imposing reporting restrictions. Further, there is no power to appeal against a decision to leave in place reporting restrictions that have already been imposed. Such a decision must instead be challenged, if possible, by way of judicial review (but it should be noted that, on a regular appeal, the CACD can reconstitute itself as the High Court and hear an application for judicial review itself).[91]

12.122 Although the right of appeal refers to a "person aggrieved", and appeals can be made by a prosecutor or defendant, this provision is typically used by representatives of media organisations. Under the Criminal Procedure Rules, courts are required to hear the media's representations before making such an order.[92]

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89 We deal with this issue in this section, although the appeal provisions also extend to orders made at the conclusion of a trial.

90 *R v Sherwood, ex p Telegraph Group* [2001] EWCA Crim 1075, [2001] 1 WLR 1983*; R v Central Criminal Court, ex p the Telegraph plc* [1993] 1 WLR 980, CA.

91 *R v Oulton* (also known as *Re Pembrokeshire Herald*) [2021] EWCA Crim 1165, [2021] 1 WLR 5531.

Unlike the CACD, the High Court has inherent jurisdiction, meaning that, unless statute or other rules limit it, it has unlimited control over the proceedings before it and the remedies it can give in respect of them. This means that the High Court has jurisdiction over (many) matters that the CACD does not. Most judges of the CACD are entitled to sit in the High Court so, to provide a remedy when the Court feels the circumstances demand it, judges of the CACD "reconstitute" themselves as a divisional court of the High Court to grant High Court remedies.

The procedural quirks were demonstrated in *R v Marshall* [2023] EWCA Crim 964, [2024] 1 Cr App R (S) 12, where two judges (Dingemans LJ and Jeremy Baker J) were entitled to sit in the CACD and High Court, but the third, and judgment-giver, Sir Robin Spencer, was entitled to sit in the former but not the latter. Sir Robin Spencer gave the main judgment, physically withdrew from the Bench, Dingemans LJ gave divisional court relief, Jeremy Baker J sat as a magistrate under the Courts Act 2003, s 66, Dingemans LJ invited Sir Robin Spencer back, and the CACD, sitting as three, then concluded the case.

92 Criminal Procedure Rules 2020, r 6.2(3); Criminal Practice Directions 2023, r 6.3.55.

12.123 Reporting restrictions are an interference with the right to freedom of expression under article 10 of the ECHR; a post-trial right of appeal may not be an adequate remedy for that interference. While in theory that interference might only be temporary if the media could challenge the order after the trial, in practice "news is a perishable commodity".[93]

12.124 Because of the "perishability" of news, any such appeal needs to be dealt with quickly. If the appeal is against reporting restrictions, there will be an interference with the right to freedom of expression which persists while the trial continues, with restrictions in place, before the appeal.

12.125 If the appeal is successful and dealt with quickly, the consequences may be remediable; if the trial is still ongoing, or sufficiently recent, the news may be sufficiently "fresh" to be reportable. If, however, the appeal is not dealt with quickly, there may be little news value in the story once restrictions have been lifted. Moreover, as the then-Lord Chief Justice, Lord Burnett of Maldon, noted in *Sarker*,[94]

> the practical effect of even a relatively short postponement order is likely to reduce the chances of any reporting at all. In order to publish a postponed report of a trial, the media organisation would have to commit the resources of a journalist attending the trial in the certain knowledge that only a fraction of what would have been published in daily reports will be likely to be published when the order is lifted. In the modern era of communications, it is truer than ever that 'stale news is no news'.

12.126 Although in meetings with representatives of the media we were informed of many difficulties posed by reporting restrictions (including the difficulty of establishing whether a case is subject to restrictions), we did not receive any evidence suggesting problems with the right of appeal in such cases. Representatives did, however, express concern that the costs associated with appealing meant that the right was rarely exercised. As the then-Lord Chief Justice, Lord Bingham of Cornhill, noted in *ex parte News Group Newspapers*:[95]

> the problem is exacerbated in the ordinary run of cases where the story itself, although something that a local newspaper would wish to publish, is not one of the highest public interest such as to justify the expenditure of large sums of money in seeking to have the order rectified.

12.127 Moreover, as Lord Burnett noted in *Sarker*, it may be impractical for a reporter to follow a case in the hopes that they succeed on appeal and are able to eventually report on their work; media organisations are likely to be unwilling to commit resources to cover a trial which they may be unable to report.

Appeals against a refusal to impose reporting restrictions

12.128 There is no comparable right for a person to appeal against a decision *not* to impose reporting restrictions, and we have therefore considered whether such a rule might be

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93 *Sunday Times v UK (No 2)* (1992) 14 EHRR 229 (App No 13166/87), 242 (para 51).

94 [2018] EWCA Crim 1341, [2018] 1 WLR 6023.

95 *R v Snaresbrook Crown Court, ex p News Group Newspapers Ltd* [2002] EMLR 9, CA at [26], by Lord Bingham of Cornhill CJ.

desirable (or even necessary, to give effect to the right to respect for private and family life under article 8 of the ECHR).

12.129 There may be an argument for an appeal to lie against a refusal to impose reporting restrictions (or against a decision to lift automatic reporting restrictions that are in place, such as where a judge allows the naming of a child defendant).[96]

12.130 In practice, unless reporting restrictions are temporarily imposed while the decision not to do so is appealed against, a successful appeal will be unable to rectify the harm done. Because reporting restrictions can be left in place while the trial continues, an appeal against a refusal to impose reporting restrictions need not disrupt the trial proceedings. However, it would represent an ongoing interference with freedom of expression. That interference may not be remediable if the interference meant that the news only became reportable once it was "stale". Worse, the interference may mean that the effect of the restrictions was that news organisations could not commit resources to cover a trial where the restrictions might not be lifted upon appeal.

12.131 We received persuasive evidence from media stakeholders that such a right of appeal could be abused. If a trial were to continue while the appeal was in train, it would be necessary for the reporting restrictions to be put in place until the appeal was heard, so as not to render the appeal academic. A defendant (or third party) might request reporting restrictions, then appeal the refusal to impose restrictions while the trial is heard. Even if the appeal were unsuccessful, the effect will have been to diminish the impact of contemporary reporting (potentially meaning that the media will not cover the case at all) and to reduce the currency and salience of the story by the time that restrictions are lifted. This could mean that a reporting restriction would last throughout the trial at which point there would be a real risk the trial or matter would no longer command public attention.

12.132 Given this, we have not been persuaded that there is a need for an appeal against a refusal to impose reporting restrictions. Our provisional conclusion is that there is no need for reform.

Consultation Question 73.

12.133 We provisionally propose that there should be no right to appeal against:

(1) a refusal to impose reporting restrictions; or

(2) a decision to lift reporting restrictions.

Do consultees agree?

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96 An "excepting order", allowing the naming of a child who has been convicted of an offence, can be challenged by way of judicial review. In *R v Leicester Crown Court, ex p S (A Minor)*, [1993] 1 WLR 111, DC, the High Court held that such a decision was not a matter relating to trial on indictment, since making such an order is neither an integral part of the trial process, nor does it affect the course or conduct of the trial.

APPEALS AGAINST BAIL DECISIONS

Defence appeals against the refusal of bail

12.134 A defendant who has been remanded in custody by a magistrates' court, whether pending trial or sentencing, may appeal against the refusal of bail to the Crown Court under section 81 of the Senior Courts Act 1981. Under this provision, the Crown Court may only grant bail to a person who has been remanded pending trial in the magistrates' courts if the magistrates' court which remanded the person in custody has certified that it heard full argument on their application for bail before it refused the application.

12.135 A defendant may also appeal against any conditions of bail to the Crown Court under section 16 of the Criminal Justice Act 2003.

12.136 Where bail is refused, it is the court's duty to reconsider the issue at every subsequent hearing. At the first hearing following the refusal of bail, the defendant may make any argument of fact or law. However, at subsequent hearings, the court is not obliged to hear arguments which it has heard previously.[97] In practice, therefore, the defendant is likely to have to point to a change of circumstances. In our report on Bail and the Human Rights Act,[98] we suggested that courts should be willing, at regular intervals of 28 days, to consider arguments that the passage of time constitutes a change of circumstances so as to require full argument.

12.137 The inherent power of the High Court to entertain an application for bail where a magistrates' court or the Crown Court has decided not to grant bail was repealed by section 17 of the Criminal Justice Act 2003. It remains possible to bring an application for judicial review, but case law indicates that the High Court should exercise this jurisdiction sparingly.[99]

12.138 Moreover, depending upon the stage of the proceedings, a Crown Court decision as to bail will in some circumstances amount to a "matter relating to trial on indictment" and therefore not be amenable to judicial review.[100] A decision as to bail at an early stage in the proceedings is not such a matter as the decision is not "one arising in the issue between the Crown and the defendant formulated by the indictment".[101] However, at the other end of the process, a decision by the Crown Court to remand a convicted person pending sentencing is a matter relating to trial on indictment.[102]

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97 Bail Act 1976, sch 1, part IIA.

98 Bail and the Human Rights Act 1998 (2001) Law Com No 269, para 12.23.

99 *R (M) v Isleworth Crown Court* [2005] EWHC 363 (Admin).

100 Senior Courts Act 1981, s 29(3).

101 *R (M) v Isleworth Crown Court* [2005] EWHC 363 (Admin).

102 It will be noted that this is in distinction to a decision made at the conclusion of a trial to make an "excepting direction" to name a child offender, which is not a matter relating to trial on indictment.

Prosecution appeals against the grant of bail

12.139 Under the Bail (Amendment) Act 1993, the prosecution can appeal against a grant of bail by a magistrates' court (to the Crown Court) or by the Crown Court (to the High Court).

12.140 Since 2003, such an appeal has been available only for an offence which is punishable by imprisonment (or, in the case of a child, would be punishable by imprisonment if committed by an adult). As originally enacted, the right was only available where the offence carried a maximum sentence of over five years' imprisonment or (reflecting contemporary concerns over 'joyriding') an offence of taking a motor vehicle without consent.

12.141 The right is only available to the CPS or a person in a class authorised by an order of the Secretary of State: currently those authorised are the SFO, HM Revenue and Customs ("HMRC"), the Department of Business and Trade, the Department for Work and Pensions, and the Post Office.[103] HMRC and the Post Office no longer bring prosecutions,[104] and in the wake of the Horizon scandal, it seems unlikely that the Post Office will resume doing so in the foreseeable future. We are also not aware of any instances of the Post Office having appealed against a bail decision. However, given that the Post Office is not a public prosecutor (it brought prosecutions as a private prosecutor), and the findings of serious abuse of process in *Hamilton*,[105] we consider that the Post Office should no longer be included on the list of bodies able to appeal against a decision to grant bail.

12.142 It can be seen that the prosecution enjoys more extensive rights of appeal against a decision to grant bail than a defendant does to appeal against a refusal of bail. Where the Crown Court remands a defendant, there is no appeal. Where the Crown Court bails a defendant, the prosecution has the right to appeal against that decision.

12.143 We recognise that there are good reasons, including public safety and the proper administration of justice, justifying a prosecution right to appeal against a grant of bail. We also recognise that there may be practical reasons for restricting a defendant's right to appeal against a bail decision. Since the grant or refusal of bail does not directly affect the fairness *of the trial*, it may be that the unfairness of this situation does not amount to an interference with the right to a fair trial under article 6 of the ECHR. Any interference is instead with the defendant's right to liberty under article 5 of the ECHR. The issue is not, therefore, with the right of the prosecution to appeal against a bail decision itself, but with the fact that it can result in a potentially lengthy period of arbitrary detention.

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103 These are the successor authorities to those listed in the Bail (Amendment) Act 1993 (Prescription of Prosecuting Authorities) Order 1994: The Director of the Serious Fraud Office and any person designated under section 1(7) of the Criminal Justice Act 1987; the Secretary of State for Trade and Industry; the Commissioners of Customs and Excise; the Secretary of State for Social Security; the Post Office; and the Commissioners of Inland Revenue.

104 The role of Director of Revenue and Customs Prosecutions merged with that of Director of Public Prosecutions in 2009, and the Revenue and Customs Prosecutions Office closed in 2014.

The Post Office has not brought any prosecutions since 2015.

105 *R v Hamilton* [2021] EWCA Crim 577, [2021] Crim LR 684.

Custody time limits when the prosecution appeals against a grant of bail

12.144 Oral notice of the intention to appeal must be given to the court at the conclusion of the proceedings at which bail has been granted, and written notice must be served within two hours. A magistrates' court must then remand the defendant in custody until the appeal is determined.

12.145 The Bail (Amendment) Act 1993 states that the hearing must be commenced within 48 hours of the date (not time) on which oral notice was given, excluding weekends, Christmas Day, Good Friday or a bank holiday. The High Court has ruled that the 48-hour period runs from the *end* of the day on which bail was granted.[106] Nor, where the CPS had given oral notice of an appeal but did not give written notice within two hours, did the appeal fail.

12.146 In *Hammond v Governor of HMP Winchester*,[107] the Administrative Court, exercising its power to issue a writ of *habeas corpus*, ordered the release of a prisoner who had been bailed by Southampton Magistrates' Court on the afternoon of Saturday 23 December 2023. The CPS had almost immediately indicated that it would appeal against the grant of bail. He was therefore remanded in custody pending the appeal. The timing of the application meant that the prisoner was liable to be remanded in custody until the end of 28 December, that is, for over five days. In fact, the appeal was not listed until 2 January 2024. However, on 29 December 2023, the High Court acceded to an application for a writ of *habeas corpus* and ordered the release of the defendant.

12.147 In *Hammond*, the Administrative Court ruled that (i) it is plain that strict non-compliance need not prove fatal to the prosecution's appeal, (ii) a "narrow band of flexibility" extends to the commencement of the appeal proceedings, and (iii) the absence of prejudice to the defendant is not determinative. However, it is extremely doubtful that the "narrow band of flexibility" would extend to a situation where the person would be detained for four full days beyond the permitted 48 hours (especially where the two days had been statutorily extended by three days due to the Christmas holidays).

12.148 We considered the compatibility of bail law and the Convention rights in our 2001 Report on Bail and the Human Rights Act 1998.[108] We concluded that, although the legislation could be applied so that the Convention rights are not violated, it was desirable that the legislation spell out, accurately, the grounds upon which pre-trial detention may be justified rather than depending on the courts' interpretative powers

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106 *R v Middlesex Guildhall Crown Court, ex p Okoli* [2001] 1 Cr App R 1, DC. The defendant had initially been granted bail at 11.50am, which was then revoked upon the prosecutor's notice of an appeal. The hearing was not commenced until 51 hours later. Okoli argued that the time limit expired at 11.50am on the second day following, but this was rejected on the basis of the general principle that in computing a period of time, no regard is had to fractions of a day, and that the legislation must be interpreted "so as to accord as far as possible with the practical realities in which it is intended to work".

107 [2024] EWHC 91 (Admin), [2024] ACD 39.

108 (2001) Law Com No 269.

under section 3 of the Human Rights Act. These changes were made in the Criminal Justice Act 2003.[109]

12.149 We did not, however, consider the appeal provisions in the Bail (Amendment) Act 1993 and whether they were, or could be operated in a way which was, compatible with article 5 (and possibly 6) of the ECHR.

12.150 The prosecution appeal provisions are an interference with a person's liberty under article 5, in circumstances where a court has already decided that the infringement of that liberty is not justified. They result in a person being automatically detained by virtue of a decision of a prosecutor.

12.151 The period of detention, 48 hours, which can effectively be authorised by a prosecutor, is already greater than the 42 hours that an arrested person can be detained in police custody before they must be brought before a court.[110] It is extended by the fact that the clock does not run until the end of the day that bail was granted and the prosecutor indicated that they would seek to appeal. It is extended further by the flexibility allowed on the day that the case must be commenced in court. It can be extended by up to a further four days by weekends and public holidays.[111]

12.152 In practice, this means that detention before the appeal is heard can exceed the statutory maximum for pre-charge detention of 96 hours. That 96-hour maximum may reflect the judgment of the ECtHR in *Brogan v UK*:[112] ordinarily the period before a person should be brought before a judge or other officer should normally be no longer than four days to ensure compliance with article 5 of the ECHR. (In England and Wales the 96-hour maximum includes 60 hours which do require judicial authorisation in any event.)

12.153 The contrast with police powers to detain is even starker when one considers that the 42 hours that the police may detain someone is *before* a court considers whether to allow further detention. In contrast, the six days or more possible under the Bail (Amendment) Act 1993 arises in circumstances where a court has already decided that continued detention is *not* necessary. If four days' detention without a hearing constitutes arbitrary detention, it is not clear that a longer period is less arbitrary because the detention *was* considered by a court, when the decision of that court was to release the prisoner.

12.154 It seems entirely possible that the ECtHR would hold that detention over four days without judicial scrutiny, in circumstances in which a court had already held that detention could not be justified, breaches the right to liberty in article 5 in the light of *Brogan*. Once the time in detention prior to this is added, it is highly questionable

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109 Criminal Justice Act 2003, ss 14-16 and 19.

110 An arrested person can ordinarily be detained for up to 24 hours (Police and Criminal Evidence Act 1984 ("PACE"), s 41(1)). After the first six hours, detention must be reviewed by an officer of the rank of inspector (PACE, s 40(1)-(3)). Detention up to 36 hours can be authorised by an officer of the rank of superintendent (PACE s 42), at which point a warrant of further detention must be sought from a magistrates' court (PACE, s 42) – there are six further hours allowed to facilitate the making of applications for this (PACE, s 43(5)).

111 *R v Middlesex Guildhall Crown Court, ex p Okoli* [2001] 1 Cr App R 1, DC.

112 *Brogan and others v UK* (1989) 11 ECHR 117 (App Nos 11209/84, 11224/84, 11266/84 and 11386/85).

whether the prolonged period of detention without judicial authorisation that may arise as the combined result of the Police and Criminal Evidence Act 1984 and the Bail (Amendment) Act 1993 would be compatible with the right to liberty in article 5.

12.155 When the 1993 Bill was going through Parliament, the Government indicated that it intended to consult with the judiciary. This was with a view to ensuring that where, but for the provisions extending the time limit in such cases, the time limit would expire on a Saturday or public holiday, everything possible would be done to expedite the hearing and consideration would be given to making special local arrangements to enable the hearing to be heard on a Saturday or public holiday.

12.156 *Hammond* has exposed an anomalous situation in which a person who has been granted bail by a court may be lawfully detained without (indeed following a refusal of) judicial authorisation for more than six days in certain circumstances – longer even than the maximum 96 hours detention that is possible *with* authorisation from a magistrates' court under PACE. It is not clear how frequently such cases arise. However, shortly after *Hammond*, the Administrative Court ruled in the case of *Molina v Crown Court at Snaresbrook*.[113] The defendant was granted bail on the afternoon of Friday 11 November 2022. The appeal against the grant of bail was not listed to be heard until the morning of Tuesday 15 November, a little under four days later.[114] Since Molina had been arrested on Thursday 10 November, this amounted to around five days' detention without judicial authorisation. This does not appear to be uncommon.[115]

12.157 Stakeholders have suggested to us that this is not an issue that often arises in practice. Nevertheless, given the potential for anomalous and harsh periods of detention we would welcome views on whether a shorter time limit for bail appeals should be introduced.

12.158 For the reasons expressed at paragraph 12.141 above, we provisionally conclude that the Post Office should no longer be on the list of those few non-CPS bodies able to appeal against decisions to grant bail.

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113 [2024] EWHC 816 (Admin), [2024] 4 WLR 40.

114 In fact, Molina was not detained as the CPS official had not made an oral application to the magistrates, but merely indicated to their legal adviser, who had silently mouthed "bail appeal" to the magistrates. By the time the legal adviser was able to explain properly to the bench that an appeal was being made, the custody officers had removed the defendant and, being unaware of the application, released him. This meant that the CPS advocate could not effect written notice upon him, so the magistrates indicated that the appeal had been disposed of.

115 Although case law on the timing of bail appeals is limited, in several cases we have found an appeal made before a weekend was not heard for four days. For instance, in *Allen v UK* (2010) 51 EHRR 22 (App No 18837/06); *Re Houghton* [2003] EWHC 3096 (Admin) and *R v Isleworth Crown Court, ex p Clarke* [1998] 1 Cr App R 257, DC bail was granted on a Friday, but the defendant was held pending prosecution appeal until following Tuesday. In *R v Simao* (4 May 2000) DC (unreported), [2000] 5 WLUK 60, bail was granted on Thursday, but the defendant was held pending prosecution appeal until the following Monday.

Consultation Question 74.

12.159 We invite consultees' views on the law relating to appeals concerning bail decisions. We invite views particularly on whether the time limit for detaining a person pending a prosecution appeal against a grant of bail should be reduced.

Consultation Question 75.

12.160 We provisionally propose that the list of prosecuting bodies able to appeal against a decision to grant bail should be reviewed and updated, and that the Post Office should no longer be included.

Do consultees agree?

Chapter 13: Challenging acquittals

INTRODUCTION

13.1 The circumstances in which an acquittal might be challenged by way of an appeal or otherwise are strictly limited. This reflects the importance attached to the principle against "double jeopardy".

13.2 Double jeopardy encompasses a general principle and a specific rule. The specific rule is against trying a person for an offence of which they have been "finally" acquitted (*autrefois acquit*) or convicted (*autrefois convict*). More generally, it encompasses other forms of potentially oppressive conduct, such as trying a person for an offence when they have already been acquitted of another offence arising out of substantially the same set of facts, or resentencing them for the same offending.[1]

13.3 Double jeopardy restrictions run counter to one of the core principles identified in Chapter 4 – acquittal of the innocent and conviction of the guilty.[2] The principle against double jeopardy means that where a guilty person is acquitted at trial it may be impossible to correct the error. The justification for this normally rests on principles of finality and the need to prevent the state from using its superior resources in an oppressive manner.

International law on double jeopardy

13.4 Article 14(7) of the International Covenant on Civil and Political Rights ("ICCPR"), to which the UK is a party, states:

> No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

13.5 Protocol 7 to the European Convention on Human Rights ("ECHR") makes similar provision. However, the UK has not signed this protocol.[3] Notably, unlike the ICCPR, Protocol 7 includes a proviso:

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1 In *Connelly v DPP* [1964] AC 1254, HL, 1360 Lord Devlin said that "a second trial on the same or similar facts is not always and necessarily oppressive and there may be in a particular case special circumstances which make it just and convenient in that case".

2 The "error" can occur in two distinct ways. First, a person who is factually guilty might be correctly acquitted, for instance because the evidence of guilt does not meet the standard of proof. Second, a person who is factually guilty might be incorrectly acquitted, for instance because the jury has been misdirected or the court has made a legal error which has resulted in evidence of guilt being wrongly excluded.

3 The government of 1997-2010 was committed to signing this protocol. The protocol also covers equality between spouses. Therefore, signing up to the protocol required prior legislative change to abolish the common law duty of a husband to maintain his wife, and the presumption of advancement in respect of gifts between husband and wife, and to amend s 1 of the Married Women's Property Act 1964 in respect of housekeeping allowance to make it neutral between husband and wife. The necessary changes were made in the Equality Act 2010, ss 198-200, but these provisions have not yet been commenced.

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.

13.6 There are three distinct ways in which the prosecution may challenge an acquittal. The prosecution may:

(1) have rights of appeal;

(2) seek to have the original proceedings reopened after all avenues for appeal have been exhausted or the time limit for an appeal has expired; or

(3) seek to bring new proceedings.

13.7 Under Protocol 7 of the ECHR, the first of these is permitted: in many jurisdictions, although not England and Wales, a conviction only becomes "final" once an appeal is heard. An acquitted defendant is therefore at risk of conviction while an appeal is pending, and conviction upon an appeal against the acquittal by the prosecution does not amount to a breach of the principle.

13.8 The second is permitted under Protocol 7 of the ECHR in the circumstances described in paragraph 13.5 above. The third is prohibited.

Challenging acquittals under domestic law

13.9 In England and Wales there is no general right for the prosecution to appeal against an acquittal. The "standard" appeal routes – that is, a rehearing in the Crown Court for those convicted in summary proceedings, and review by the Court of Appeal Criminal Division ("CACD") for those convicted on indictment – are only open to a person who has been convicted. (They are also open to those found to have carried out the acts in question, where there has been a finding that they were unfit to plead or a verdict of not guilty by reason of insanity.)

13.10 However, there are specific ways in which a challenge may be made following an acquittal in certain circumstances.

(1) The prosecution may appeal against an acquittal in summary proceedings (including acquittal by the Crown Court in its appellate jurisdiction) on a point of law, by way of case stated.

(2) The prosecution may seek judicial review of a decision of a magistrates' court (or the Crown Court in its appellate jurisdiction) to acquit a defendant.

(3) The prosecution may apply to the CACD to have an acquittal for certain serious offences quashed where there is compelling new evidence, and a retrial is not contrary to the interests of justice. We refer to these cases as "double jeopardy" retrials.

(4) Where a person is convicted of an "administration of justice" offence in relation to criminal proceedings, and there is a real possibility that an acquittal in those

proceedings resulted from that interference or intimidation, the High Court may quash the acquittal. We refer to these cases as tainted acquittals.

(5) The Attorney General may refer a point of law to the CACD. This does not result in the acquittal being quashed, but allows the error of law in the trial court to be 'corrected' in the sense of being authoritatively overruled.

The relationship between appeals against acquittal and other prosecution appeals

13.11 In Chapter 12, we consider the law relating to appeals against rulings in preparatory proceedings, and appeals against interlocutory rulings – including prosecution appeals against "terminating rulings". Part of the rationale for allowing the prosecution to make such appeals – especially where the defendant does not enjoy a corresponding right – is that the prosecution (unlike the defendant) is not able to appeal against the jury's verdict. If a misdirection by the judge results in a defendant being convicted, that conviction can be appealed against. If, however, it results in their acquittal, it cannot.

13.12 Moreover, because jury decisions are not reasoned, a prosecution right to appeal against an acquittal following a misdirection by the judge faces an evidential difficulty. It would be difficult to show that the jury's verdict resulted from the error. This is especially given that a jury has the ability to return a "perverse acquittal" in the face of the evidence (although whether it has the *right* to do so is contested – see paragraphs 13.138 to 13.147 below).

Consultation responses: general

13.13 In the Issues Paper and its summary, we asked:

> Do you have any views on the circumstances in which an acquittal might be quashed, including the law relating to acquittals tainted by interference with the course of justice? – Question 14 / Summary Question 7
>
> Are the powers of the Attorney General to refer a matter to the Court of Appeal adequate and appropriate? – Question 13 / Summary Question 8

13.14 Few respondents commented on these questions, and among those that did there was a general satisfaction with the status quo.

13.15 Two respondents queried whether the Attorney General should be able to ask the CACD to quash a conviction when a case is referred on a point of law. The Crown Prosecution Service ("CPS") asked:

> In respect of referring a point of law should the Attorney General be able to ask the court to quash an acquittal and seek a retrial where the legal directions to the jury were seriously flawed? It is not proposed that the Attorney General should be able to appeal any acquittal, but there may be an argument that because of the flawed legal directions that the jury are directed to follow then the jury's verdict is not an accurate and true verdict according to law. Such a power would be analogous to that of a defendant where the conviction is quashed because of flawed legal directions.

13.16 Professor John Spencer said:

> I think it would be sensible if, when the [Attorney General] refers a judge's legal ruling to the Court of Appeal following an acquittal, the Court had power to quash the acquittal and order a retrial, if it thought the interests of justice require this.

13.17 The Bar Council could not see "any compelling reason for reform in this area":

> To the extent that there is a difference between the tests to be applied following jury interference as against fresh evidence, with the latter reflecting a lower bar than the former, this is something the Commission may wish to address in its consultation, but realistically this applies to an extremely small number of cases.

13.18 The Law Society said:

> Attorney-General's references on a point of law, to clarify the law, are used infrequently but are useful in appropriate cases. There are very few tainted acquittal or double jeopardy appeals and there does not seem to be any evidence that these provisions have caused problems.

APPEALS AGAINST ACQUITTAL IN SUMMARY PROCEEDINGS

13.19 The prosecution may challenge a decision of a magistrates' court to acquit through an appeal by way of case stated or judicial review.

13.20 In general, case stated is the preferred approach[4] and only where the acquittal followed a trial which was a nullity is judicial review preferred.[5]

13.21 Appeal by way of case stated does not permit the prosecution to challenge the facts found by the magistrates but the prosecution may ask whether, on the basis of the facts found, the court came to the right conclusion in acquitting.

Conclusion on appeals against acquittal in summary proceedings

13.22 We think that allowing appeals against acquittals by a magistrates' court can be more easily justified than allowing appeals against acquittals by a jury. Unlike juries, magistrates' courts provide reasons for their judgments. Accordingly, it is possible to identify errors in their reasoning that could have led it to a wrongful acquittal. It may be possible to identify legal errors in the course of a jury trial that may have led the jury to return a wrongful acquittal. However, in the absence of reasoned verdicts, it is unlikely to be possible to state that the acquittal was attributable to the error.

13.23 Moreover, whether or not the jury has a right to return a "perverse" verdict of not guilty, it is not generally argued that magistrates' courts have a similar right or ability to acquit in the face of the evidence. Magistrates' courts are subject to the supervisory jurisdiction of the High Court, and therefore their decisions are not wholly "final".

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4 *R v Morpeth Ward Justices, ex p Ward* (1992) 95 Cr App R 215, DC.

5 *Re Harrington* [1984] AC 743, HL.

13.24 Should our provisional proposal to abolish appeal by way of case stated in respect of summary proceedings be implemented, we would need to ensure that adequate rights for the prosecution to appeal against wrongful acquittal remained available.

13.25 We are satisfied that the ability to seek judicial review would provide a suitable remedy for the prosecution. Where an appeal by way of case stated is available but judicial review is not, the reason that judicial review is unavailable is generally attributable only to the principle that judicial review is a residual remedy, and that if an appeal by way of case stated is available it should be used.

13.26 Specifically, were appeal by way of case stated abolished:

(1) it would be open to the High Court to conclude that an acquittal by a magistrates' court could not follow on the facts it had found because it was not a conclusion open to a reasonable court; and

(2) it would be open to the High Court to quash an acquittal founded on an error of law.

Consultation Question 76.

13.27 We provisionally propose that the prosecution's ability to challenge an acquittal by a magistrates' court by way of judicial review be retained.

Do consultees agree?

"DOUBLE JEOPARDY" RETRIALS

13.28 We use the term "double jeopardy" retrials to refer to retrials held following an application by the prosecution to have an acquittal for a serious offence quashed under part 10 of the Criminal Justice Act 2003 ("CJA 2003").

13.29 Under this legislation, a person may face retrial for certain serious offences following acquittal where there is new and compelling evidence against the person in relation to the offence.

13.30 The reform followed a suggestion from the Stephen Lawrence[6] Inquiry,[7] and recommendations in our final report on Double Jeopardy and Prosecution Appeals.[8] In that report, we had recommended that the proposed exception to double jeopardy be limited to acquittals for murder and genocide consisting in the killing of any person. We did not recommend that it extend to manslaughter, considering that "many cases of manslaughter are not so serious as to justify inclusion in such an exception".[9] However, we concluded that were our previous recommendation to introduce an offence of "reckless killing" implemented, the exception should apply to this offence.[10]

13.31 We recommended that the measure should have retrospective effect, meaning that acquittals (such as those for the murders of Stephen Lawrence and Julie Hogg[11]) occurring before the change would be subject to the exception.[12]

Part 10 of the Criminal Justice Act 2003

13.32 Part 10 of the CJA 2003 (headed "retrial for serious offences") contains the provisions for double jeopardy appeals and retrials.

13.33 Section 75 and schedule 5 set out the offences which may be retried under this provision. The list is broader than we recommended, and includes murder, manslaughter, corporate manslaughter, attempted/soliciting murder, kidnapping, rape, attempted rape, sexual assaults involving penetration, importation and production of Class A drugs, arson endangering life, causing explosions, directing terrorism, and genocide.

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6 Stephen Lawrence and his friend Duwayne Brooks were attacked by a group of five or six white young people while waiting for a bus in southeast London. Stephen was stabbed at least twice during the attack, severing arteries and penetrating a lung. Five suspects had previous links to attacks on members of racial minorities in the area. Two suspects were eventually charged, but following serious operational failings by the police the Crown Prosecution Service dropped all charges, citing insufficient evidence.

In September 1994 Stephen's parents Neville and Doreen Lawrence commenced a private prosecution against five suspects. The case against three was abandoned before trial and the remaining two – Jamie Acourt and Gary Dobson – were acquitted by the jury.

In 2010, following reforms to the law on double jeopardy, the Director of Public Prosecutions successfully applied to have the acquittal of Dobson quashed, citing new forensic evidence. In 2012, Gary Dobson and David Norris were convicted of murder.

7 The Inquiry, chaired by Sir William Macpherson, said:

> The result of the unsuccessful prosecution was that the three men who were acquitted can never be tried again, even if final appeals for fresh witnesses were to bear fruit, or if the three men were to admit their guilt. Any change in the law in this respect would be solely a matter for Parliament. A suggestion made to us is that the Court of Appeal might be given jurisdiction to consider whether a second prosecution could be brought, particularly if fresh evidence supported such a course. The suggestion deserves examination.

Report of the Stephen Lawrence Inquiry (1999) Cm 4262-I, para 43.37.

8 Double Jeopardy and Prosecution Appeals (2001) Law Com No 267.

9 Above, para 4.37.

10 Above, paras 4.29-4.42.

11 See para 13.39(1) and (3) and their footnotes below.

12 Double Jeopardy and Prosecution Appeals (2001) Law Com No 267, para 4.56.

13.34 Section 76 allows a prosecutor to apply to the CACD for an order quashing the acquittal and ordering a retrial.

13.35 Under sections 77 to 79, the CACD may only make an order quashing a conviction and ordering a retrial if:

(1) there is "new and compelling evidence" against the acquitted person in respect of the offence; and

(2) it is in the interests of justice for the Court to make the order.

13.36 "New" means that the evidence was not adduced in the proceedings in which the person was acquitted (or, where the person was acquitted in appeal proceedings, in the proceedings to which the appeal related). "Compelling" means that the evidence is reliable, substantial, and in the context of the outstanding issues, it appears highly probative of the case against the acquitted person. The Court must be satisfied that it is in the interests of justice to quash the acquittal, having regard to:

(1) whether existing circumstances make a fair trial unlikely;

(2) the length of time since the offence was allegedly committed;

(3) whether it is likely that the new evidence would have been adduced in the earlier proceedings but for a failure by an officer or prosecutor to act with due diligence or expedition; and

(4) whether, since those proceedings,[13] any officer or prosecutor has failed to act with due diligence or expedition.

13.37 An application may only be brought with the written consent of the Director of Public Prosecutions ("DPP"), or a person authorised by them, and no more than one application may be brought in relation to an acquittal. If successful, the CACD makes an order quashing the acquittal and ordering a retrial.

13.38 The introduction of retrials for serious offences was controversial when first raised.

13.39 However, the reform has enabled several notorious offenders to be brought to justice. The vast majority of these were guilty of murder.

(1) Billy Dunlop was tried twice for the murder of his ex-girlfriend Julie Hogg in 1989. When the second jury failed to reach a verdict, he was formally acquitted. With the rule against double jeopardy in place, he subsequently confessed to the killing, believing that he could not be tried again. He was, however, jailed for perjury.[14] Julie Hogg's mother Ann Ming campaigned for reform of the double

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[13] Or, if later, since commencement of the provision – this presumably is intended to reflect the fact that prior to its commencement, there would have been no prospect of a retrial, so inaction by police and prosecutors following the acquittal would be understandable and justified.

[14] *R v Dunlop* [2001] 2 Cr App R (S) 27, CA.

jeopardy rule. In 2006, the CACD quashed his acquittal.[15] He pleaded guilty in 2007 and was sentenced to life imprisonment with a minimum term of 15 years.

(2) Mario Celaire was found not guilty of killing Cassandra McDermott in 2002. Six years later he attacked another ex-girlfriend Kara Hoyte in similar circumstances, leaving her with brain damage, after he had admitted to her that he had killed McDermott. The prosecution sought to have his acquittal for killing Cassandra McDermott quashed so that he could be tried for both attacks together.[16] Celaire pleaded guilty to the manslaughter of Cassandra McDermott and the attempted murder of Kara Hoyte in 2009.

(3) Gary Dobson was retried after a microscopic stain on his coat was found to match Stephen Lawrence's blood, and fibres and hairs found in the evidence bag containing his clothing were found to have come from Stephen Lawrence.[17]

(4) Gary Allen was acquitted in 2000 of having murdered Samantha Class in 1997. He admitted the murder to an undercover police officer in 2010. In 2019 he was charged with the murder of Alena Grlakova in December 2018 or January 2019. The DPP applied to have his acquittal in 2000 quashed,[18] and he was tried and convicted of both murders.

(5) Michael Weir's case was discussed in the Issues Paper.[19] In 1999 his conviction for the murder of Leonard Harris was quashed by the CACD on the basis that DNA evidence which had previously been taken by police should not have been retained and therefore was not admissible at his trial. The House of Lords overruled the CACD on this point in another case, but as the prosecution had sought leave to appeal Weir's acquittal to the House of Lords a day out of time, his acquittal was not considered. In 2011 he was retried after a palm print found at the murder scene was matched to him.

(6) Dennis McGrory was acquitted of murdering Jacqueline Montgomery in 1975. In 2022 he was convicted on the basis of fresh evidence including DNA evidence showing that he had sexually assaulted Jacqueline.

(7) David Smith was acquitted of the murder of Sarah Crump in 1993. In 1999 he murdered Amanda Walker in similar circumstances. In 2023 he was retried and convicted of the murder of Sarah Crump.[20]

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15 *R v D* [2006] EWCA Crim 1354, [2007] 1 WLR 1657.

16 *R v Celaire* [2009] EWCA Crim 633.

17 *R v Dobson* [2011] EWCA Crim 1255, [2011] 1 WLR 3230.

18 *R v Allen* [2020] EWCA Crim 1351.

19 Law Commission, Criminal Appeals: Issues Paper (July 2023) p 128.

20 "Sarah Crump murder: man jailed for life for 1991 killing", *BBC News* (26 May 2023).

(8) Irvine Watt was convicted of rape in 2018. Watt, a taxi driver, had been acquitted of the rape of a 17-year-old girl in 1989. He was retried after DNA evidence was matched to him.[21]

(9) Russell Bishop was acquitted in 1987 of the murder of two nine-year-old girls, Karen Hadaway and Nicola Fellows.[22] In 1990 he was convicted of a similar attack on a seven-year-old girl (who survived) and was sentenced to life imprisonment with a minimum term of 14 years, for kidnapping, indecent assault and attempted murder. In 2017, the CACD quashed his previous acquittal on the basis of new DNA evidence,[23] and he was found guilty of both murders in 2018 and sentenced to life imprisonment with a minimum term of 36 years.

Consultation responses

13.40 The CPS said: "The law relating to double jeopardy and Part 10 of the CJA is adequate and appropriate". It noted, however, that "there have been no changes to the offences in Part 10 since the passing of the Criminal Justice Act 2003. Consideration could be given to reviewing the list of offences".

Analysis

13.41 No consultation responses raised particular issues pointing to difficulties with the double jeopardy retrial provisions.

13.42 Although controversial when proposed, we did not receive any responses suggesting that the provisions should be repealed. The limited number of cases in which they have been used suggests that they have been used in a reasonable and fair way.

Consultation Question 77.

13.43 We provisionally propose that the prosecution should retain the ability to seek to have an acquittal quashed where there is new and compelling evidence of the commission by the acquitted person of one of a limited number of serious offences (as currently provided for in the double jeopardy provisions in part 10 of the Criminal Justice Act 2003).

Do consultees agree?

Extension to sexual assaults not currently covered by the provisions

13.44 Although we did not receive any consultation responses calling for an extension of the exceptions to double jeopardy, the CPS suggested that it might be appropriate to review the list of offences, and we are aware of previous calls for the double jeopardy

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21 "DNA convicts Telford man of rape after 29 years", *BBC News* (4 July 2018).

22 Bishop's girlfriend, Jennifer Johnson, gave evidence at his first trial. She admitted in 2019 that she lied in court. In 2021, she was sentenced to six years' imprisonment for making a false statement and perverting the course of justice; see *R v Johnson* [2022] EWCA Crim 832.

23 [2018] EWCA Crim 27, [2019] 1 WLR 2489.

provisions to be extended to cover a wider range of sexual offences. The offences currently covered include rape and assault by penetration and other sexual offences where the act involves penetration.

13.45 The Survivors Trust, for instance, in 2019 supported a petition to make all sexual abuse offences exceptions to the double jeopardy rule.[24]

13.46 Calls for reform have focused on the fact that the law does not extend to non-penetrative sexual assaults. However, there are also some penetrative sexual offences which are not caught. The list of offences (in part 1 of schedule 5 to the CJA 2003) does include sexual offences under both the Sexual Offences Act 2003 and the now-repealed Sexual Offences Act 1956, including some which are covered only if the act involved penetration. However, not all offences in the 1956 Act which might involve penetration are included. The selection seems to have been limited to those which are inherently non-consensual (such as rape) and those where consent would not be in issue (and would not for the same conduct today) as the victim was under 13. Consequently, it does not include all penetrative offences.

13.47 Prior to 2003, oral rape was not covered by the offence of rape, and prior to 1994, anal rape was not covered. They would have been charged as indecent assault and buggery respectively. Buggery could include both consensual and non-consensual intercourse. Indecent assault on a woman would include both non-consensual sexual activity with a woman or girl and sexual activity with a girl aged between 13 and 16 which was consensual in fact (and which would now be charged as sexual activity with a child, but would not constitute rape or sexual assault).

13.48 These offences remained in force until 2005. It is not uncommon for prosecutions for sexual offences committed before 2005 to be brought today, and therefore there might well be cases where a prosecution for historic sexual offences could take place but for the fact that the person had already been prosecuted and acquitted.

13.49 An example of this is *A*.[25] Andrews was cleared of rape and indecent assault in 2004. The alleged offences involved a 15-year-old and allegedly occurred in 1991 (so were charged under the Sexual Offences Act 1956). One of the indecent assault charges involved digital penetration. After reading about the trial, his ex-wife contacted police and revealed that he had previously been arrested for indecent assaults while working at a school. Andrews was charged with 17 offences, against several complainants, some before and some after the offences of which he had been acquitted. The CACD quashed the acquittal for rape, but could not quash the acquittals for indecent assault, even though – had the offences been committed after 2005 – it could have quashed a conviction for assault by penetration. (At the subsequent trial, Andrews was cleared of rape, but convicted of eight other offences and jailed for three years.)

13.50 In principle, we consider that penetrative sexual assaults committed prior to 2005 should be caught where the activity would constitute one of the offences in the Sexual Offences Act 2003 to which the double jeopardy provisions apply. That is, we can see

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24 The Survivors Trust, "Petition: Make all sexual abuse offences exceptions under the double jeopardy rules" (13 August 2019).

25 [2008] EWCA Crim 2908, [2009] 1 WLR 1947.

a case for rationalising the double jeopardy provisions so that they cover the offences in the 1956 Act of buggery (section 12), gross indecency with a man (section 13), indecent assault on a woman (section 14), and indecent assault on a man (section 15) where the conduct involved penetration and the other person (i) was aged under 13[26] or (ii) otherwise did not consent to it.

13.51 The former Victims' Commissioner Dame Vera Baird has argued for the double jeopardy exception to be extended to non-penetrative sexual assaults. She referred to the case of Bob Higgins, a football coach who was jailed in 2019 for indecently assaulting 24 boys.[27] Higgins had been prosecuted in 1990 for indecent assault against six boys but was acquitted at the direction of the judge.

13.52 The All-Party Parliamentary Group on Adult Survivors of Sexual Assault has also recommended that "the Government should legislate to extend the list of offences exempt from double jeopardy law to include all offences relating to non-penetrative child sexual abuse":[28]

> Survivors do not differentiate between the severity of different 'forms' of child sexual abuse. All forms of child sexual abuse can have a devastating and lifelong impact on survivors' lives, including on their mental health, relationships, education and career. It is essential that survivors of child sexual abuse offences such as inappropriate touching, masturbation and all physically sexual offences before penetrative acts take place should be able to seek a new trial where new evidence has emerged in their case.

13.53 The issue was considered by the Government. In July 2019, Lord Chancellor Rt Hon David Gauke MP responded to the Victims' Commissioner's call to extend the list of offences:[29]

> Extending the list of qualifying offences in Schedule 5 to the 2003 Act is … not something we would undertake lightly; any amendment would be certain to prompt requests for other offences of arguably equal seriousness to be added as well, but the list cannot be regarded as being set in stone.

13.54 In November 2019, the new Lord Chancellor Rt Hon Robert Buckland MP said that he had "reluctantly concluded" that extending the law "would not be right", "would inevitably lead to demands for the inclusion of other offences" and that "there is a risk

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26 Thirteen because the double jeopardy principles apply to non-consensual sexual offences and to other sexual offences where the victim is aged under 13. They do not apply to the offence of sexual activity with a child, which would be charged where the complainant was aged 13-16 and the activity was consensual in fact, or where absence of consent (or a reasonable belief in consent) could not be proven.

27 "Bob Higgins case: Child sex abuse retrials urged by commissioner", *BBC News* (13 August 2019).

28 All-Party Parliamentary Group on Adult Survivors of Childhood Sexual Abuse, *Can adult survivors of childhood sexual abuse access justice and support?: Third Report* (October 2019) pp 24, 52.

29 Rt Hon David Gauke MP, letter to Victims' Commissioner (15 July 2019).

that retrial would come to be regarded not as an extremely rare exception to the double-jeopardy rule but as a species of prosecution appeal".[30]

13.55 The question of extending the class of offences to non-penetrative sexual offences is different to that of amending the list of offences to ensure that acquittals for certain penetrative sexual offences are not excluded on technical grounds. The former requires additional considerations of suitability.

13.56 We recognise that non-penetrative offences will not necessarily be less serious than penetrative assaults.

13.57 We also recognise that there may be cases where there could be new and compelling evidence (for instance DNA or a video recording) of a non-penetrative sexual offence of which a person had previously been acquitted.

13.58 There are two potential differences, evidentially, in non-penetrative sexual offence cases as opposed to penetrative ones. The first is that most of the cases in which the double jeopardy process has been used have involved the identification of DNA evidence. Such evidence will often be compelling.[31] DNA evidence can be crucial in cases of non-penetrative sexual assault, just as it can in cases of penetrative sexual assault.

13.59 We think that, generally, it is less likely that there will be retained DNA evidence in cases of non-penetrative sexual assaults, and if there is such evidence, it may be less strongly probative. For instance, while DNA evidence may be transferred by touching, the possibility of it having come from innocent transfer is likely to be much higher where what is found is – for example – skin cells on the complainant's outer clothing[32] rather than semen found within the complainant's body.

13.60 Second, in cases which are cited in support of the reform (such as that of Bob Higgins) the evidence specific to the allegations in respect of which quashing of the acquittal is sought is not fresh, and could have been (and may have been) raised at trial. What generally is fresh is the weight of additional evidence of other offences.

13.61 In practice, it may only be when a person is tried and acquitted of a sexual offence that other victims come forward with evidence of other offences which, had they been tried together, might have been mutually supportive. In such cases if a prosecution is

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30 Quoted in J Reed, "Government refuses law change on child-abuse retrials", *BBC News* (21 November 2019).

31 It should be recognised that although DNA evidence will often amount to virtual proof that a sample came from a particular person, this is not the same as proof of guilt. There may be contamination or innocent transfer. Even where DNA evidence confirms the presence of a person at a particular place, it does not mean that they were there at a particular time, still less that they carried out the offence. Where DNA proves that the person did the act in question, it does not mean they did so with the necessary fault: for instance, DNA from semen may prove that intercourse took place, but it does not prove that this was non-consensual.

32 See for instance RAH Oorschot, B Szkuta, GE Meakin, B Kokshoorn and M Goray, "DNA Transfer in Forensic Science: a review" (2019) 38 *Forensic Science International: Genetics* 140; F Sessa, C Pomara, M Esposito, P Grassi, G Cocimano and M Salerno, "Indirect DNA Transfer and Forensic Implications: A Literature Review" (2023) 14 *Genes* 2153; A Lowe, C Murray, J Whitaker, G Tully, P Gill, "The Propensity of Individuals to Deposit DNA and Secondary Transfer of Low Level DNA from Individuals to Inert Surfaces" (2002) 129 *Forensic Science International* 25.

brought for the offences revealed after the acquittal, the evidence of the complainants in the former may be admitted as propensity evidence, despite the acquittal.[33] However, the threshold for such evidence is whether it is "relevant to an important matter in issue between the defendant and the prosecution"[34] including "the question whether the defendant has a propensity to commit offences of the kind with which he is charged".[35] This will be far easier to meet than the threshold in section 78(3) of the CJA 2003 that to be "compelling", the evidence must be reliable, substantial and *highly* probative.

13.62 Were the provision extended to non-penetrative sexual assaults, evidence that the acquitted person had committed similar offences against others might be admissible as evidence against them at a subsequent retrial. However, it is not clear that the CACD would find it sufficiently compelling evidence of guilt in relation to the offence of which they were acquitted to quash the acquittal.

13.63 Therefore, it might be that if the list of offences was extended to cover non-penetrative sexual assaults, although potentially a large number of additional offences would be in scope, in practice, few cases would meet the stringent requirements for an acquittal to be quashed.

13.64 The other form of evidence which might be sufficiently compelling is video, or perhaps photographic, evidence which supports the account given by the complainant at the trial which ended in acquittal. We think that in such cases the test that the evidence must be reliable, substantial and highly probative could be met. In these cases, it is likely, though not certain, that it would be possible to bring additional charges relating to the making, possession or distribution of the image(s).[36] However, a conviction for an offence relating to the images is not the same as a conviction for the substantive offence, and cannot be regarded as an adequate alternative to the latter.

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33 *R v Z* [2000] 2 AC 483, HL.

34 Criminal Justice Act 2003, s 101(1)(d). The bad character provisions in the Criminal Justice Act 2003 were the implementation of our recommendations in Evidence of Bad Character in Criminal Proceedings (2001) Law Com No 273.

35 Criminal Justice Act 2003, s 103(1)(a).

36 For instance, where the images are indecent images of children (under the Protection of Children Act 1978, s 1), extreme pornography (under the Criminal Justice and Immigration Act 2008, s 63) or intimate images taken without consent of the person depicted (Sexual Offences Act 2003, s 67). A prosecution for these offences where the defendant had previously been acquitted of the substantive sexual offence would be unlikely to engage the rule against double jeopardy.

Consultation Question 78.

13.65 We provisionally propose that the list of offences covered by the double jeopardy provisions in part 10 of the Criminal Justice Act 2003 should be extended to include the following:

(1) oral and anal rape, where not currently covered by the provisions;

(2) other penetrative sexual assaults under legislation predating the Sexual Offences Act 2003; and

(3) non-penetrative sexual assaults on children.

Do consultees agree?

13.66 We invite consultees' views on whether the list of offences covered by the double jeopardy provisions should be extended to include non-penetrative sexual assaults on adults and/or any other offences.

Double jeopardy retrials and arraignment out of time

13.67 Section 84 of the CJA 2003 requires a person whose retrial has been authorised by the CACD under the double jeopardy provisions to be arraigned within two months. The person may not be arraigned after this time without the leave of the CACD.

13.68 This provision is identical to the provision governing retrials ordered by the CACD following the quashing of a conviction on an appeal by the convicted person. It seems highly likely, therefore, that the Court would hold, as it did in *Llewelyn* (see discussion at paragraphs 9.107 to 9.125 above), that if the person is arraigned out of time without leave, the proceedings, and any conviction, would be a nullity.[37]

13.69 We consider there is a risk that a retrial for a very serious offence that the CACD had ordered because there is new and compelling evidence of guilt could collapse irretrievably because of a failure by the prosecution to comply with a time limit, in circumstances where no prejudice to the defendant had been caused. This is for the same reasons as we have set out in the earlier discussion of *Llewelyn*.

[37] *R v Llewelyn* [2022] EWCA Crim 154, [2023] QB 459.

Consultation Question 79.

13.70 We invite consultees' views on whether, where it has ordered a retrial under the double jeopardy provisions in part 10 of the Criminal Justice Act 2003, the Court of Appeal Criminal Division ("CACD") should have the power to give leave to arraign out of time where it remains in the interests of justice for there to be a retrial, despite any failure by the prosecution to act with all due expedition.

13.71 If the CACD were to have such a power, we provisionally propose that any failure by the prosecution to act with all due expedition should be a factor for the CACD to consider when deciding whether to grant leave to arraign out of time.

Do consultees agree?

13.72 We invite consultees' views on amending the law so that where the CACD orders a retrial under the double jeopardy provisions, a failure to arraign within two months without obtaining an extension from the CACD would no longer render a retrial a nullity.

Double jeopardy retrials where the defendant was convicted of an alternative offence

13.73 A possible problem with the double jeopardy retrials has recently arisen with the case of *Ivashikin aka Hounsome*.[38] The difficulty arises from the fact that the rule against double jeopardy engages the defences of both *autrefois acquit* and *autrefois convict*. The limited exception to the rule against double jeopardy enacted in the CJA 2003 was premised on the idea that convicting the guilty and acquitting the innocent might justify an exception to *autrefois acquit* where there was new and compelling evidence that an acquitted person was guilty. No consideration seems to have been given to the possible interference with the latter principle; but this can arise where a person has been acquitted of one offence, but convicted of an alternative offence.

13.74 In Ivashikin's case, he had, in May 2019, pleaded not guilty to murder but guilty of manslaughter by reason of diminished responsibility, and his plea was accepted by the prosecution. The reason he gave for the killing (of his stepfather) was voices and commands causing him to attack his stepfather, as well as "something taking control of his limbs". Experts agreed that he was suffering a severe form of psychosis.

13.75 In 2022, while detained in a secure psychiatric unit, and apparently having recovered from his mental illness, Ivashikin claimed that he had made up the stories about voices and an outside force taking control of his body. He was arrested, detained and charged with perverting the course of justice. The CPS applied successfully to have the acquittal for murder quashed, and the CACD quashed the acquittal and ordered a retrial.[39]

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38 The facts are taken from Saini J's sentencing remarks at the Crown Court at Southampton, 19 July 2024.

39 [2024] EWCA Crim 41.

13.76 At the retrial, however, the seven expert witnesses all agreed that Ivashikin had been suffering from auditory hallucinations and had been perceiving external control of his limbs. The prosecution declined to accept the plea and instead required the issue of diminished responsibility to go before a jury. On the basis of the uncontradicted medical evidence, the jury acquitted Ivashikin of murder and convicted him of manslaughter on the basis of diminished responsibility. He was sentenced to a hospital order without limit of time.

13.77 Ivashikin has thus twice been convicted and sentenced for manslaughter by reason of diminished responsibility.

13.78 The consequences of quashing Ivashikin's acquittal for murder on his conviction for manslaughter were addressed by Dame Victoria Sharp, President of the King's Bench Division ("the PKBD") in the judgment on the DPP's application to quash the acquittal. She noted:[40]

> The provisions of Part 10 of the 2003 Act do not address the effect of quashing an acquittal upon a conviction for a lesser offence where an offender can only be convicted and sentenced for the lesser offence upon his acquittal of the charge which was the subject of the application under section 76.

13.79 The Court went on to hold:[41]

> by operation of law, the acquittal for murder and the conviction for manslaughter occurred at the same moment. The AP's [acquitted person's] conviction for manslaughter came about because the Crown and the court accepted his plea without the need for a trial on the charge of murder.[42] When the sentence was passed, the AP stood convicted of manslaughter and was acquitted of murder.
>
> In those circumstances, the quashing of the acquittal means that the conviction and sentence for manslaughter cannot stand. It is rendered a nullity and will be expunged from the record.

13.80 *Ivashikin* is an exceptional case. However, the issue it raises could arise in many cases in which the prosecution seeks to quash an acquittal in circumstances where the person had been convicted of an alternative offence.

13.81 It is not clear what exactly is encompassed by "a lesser offence where an offender can only be convicted and sentenced for the lesser offence upon his acquittal of the charge".[43] It could refer to:

(1) those partial defences to murder (manslaughter by reason of diminished responsibility, manslaughter by reason of loss of control and manslaughter in

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40 Above, at [112], by Dame Victoria Sharp PKBD.

41 Above, at [114]-[115], by Dame Victoria Sharp PKBD.

42 This is because Ivashikin was convicted on the basis that the prosecution accepted his guilty plea; in these circumstances, the conviction takes effect upon sentencing (*R v Cole* [1965] 2 QB 388, CCA). Where the conviction arises from the verdict of a jury, the conviction takes effect at that point.

43 *R v Ivashikin* [2024] EWCA Crim 41 at [112], by Dame Victoria Sharp PKBD.

pursuit of a suicide pact) where the defendant can only be convicted upon acquittal for murder;

(2) lesser offences of which a jury may convict a person as an alternative to the offence charged without their being included on the indictment; and/or

(3) lesser offences included on the indictment as an alternative charge.

13.82 In the case of the third of these, it is difficult to see that the conviction is returned "by operation of law" and "at the same moment". It may well be that the jury returns an acquittal on the offence charged but continues to deliberate before returning a verdict on the alternative charge.

13.83 However, if the category extends to (2) but not (3), this risks creating an arbitrary distinction between cases where the prosecution includes the alternative charges on the indictment, and cases where the alternative charge is left to the jury by the judge. Moreover, if the alternative charge is on the indictment, it does not make sense to try to distinguish between the two separate routes by which the jury may find the defendant guilty of the lesser offence. These routes are by returning a verdict on the count; or by using their statutory power to convict of an alternative offence.

13.84 Even if the analysis in *Ivashikin* is confined to (1), this still leaves a difficulty in the case of infanticide, as this is both a partial defence and an offence in its own right. A woman can be acquitted of murder or manslaughter but convicted of infanticide "by operation of law". This can occur when she raises a defence that at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation, and the prosecution does not disprove this. However, infanticide is also a freestanding offence.[44]

13.85 We do not think that the implications of the double jeopardy provisions in cases where the person was convicted of an alternative offence were fully appreciated when the legislation was passed. As the PKBD noted above, they are not addressed in the legislation. Nor was this issue addressed in our Report on Double Jeopardy and Prosecution Appeals.[45] They are capable of leading to curious results. In *Ivashikin*, for instance, they resulted in (i) Ivashikin's conviction for manslaughter being quashed despite no appeal against that conviction having been made, and (ii) Ivashikin being convicted of, and sentenced for, manslaughter, even though he had already served a sentence for that offence.

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44 *R v Gore* [2007] EWCA Crim 2789, [2008] Crim LR 388.

45 Our report only recommended a limited exception to double jeopardy for murder. However, we did not address the implications of this reform if the defendant had successfully pleaded one of the partial defences to murder (that is, diminished responsibility, loss of control, or suicide pact – all of which reduce the offence to manslaughter – or infanticide).

Consultation Question 80.

13.86 We invite consultees' views on whether the existing law permitting the quashing of an acquittal and an order for retrial under part VII of the Criminal Procedure and Investigations Act 1996 works satisfactorily where at that retrial the defendant would be liable to be convicted of an alternative offence for which they already stand convicted.

TAINTED ACQUITTALS

13.87 The "tainted acquittal" procedure was introduced by the Criminal Procedure and Investigations Act 1996 ("CPIA 1996"). It is worth recognising that it represented an early inroad into the principle against double jeopardy, which may explain the rigidity of some of the restrictions involved (especially when compared with the later double jeopardy retrial provisions).[46]

13.88 Section 54 of the CPIA 1996 provides that where a person has been acquitted of an offence, and that person or another person has been convicted of an "administration of justice offence"[47] in relation to proceedings leading to the acquittal, an application may be made to the High Court for the acquittal to be quashed. The High Court may only quash the acquittal if:

(1) it appears likely that, but for the interference or intimidation, the acquitted person would not have been acquitted;

(2) it does not appear that, because of lapse of time or for any other reason, a retrial would be contrary to the interests of justice;

(3) the acquitted person has been given a reasonable opportunity to make representations to the Court; and

(4) it appears to the Court that the conviction for the administration of justice offence "will stand".[48]

13.89 We previously recommended some reforms to these provisions in our report on Double Jeopardy and Prosecution Appeals,[49] which were not implemented. Subsequent measures have made a further intrusion into the principle against double

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46 As noted above at para 13.5, the restriction on double jeopardy in Protocol 7 to the ECHR contains a proviso that means that the prohibition does not apply where there has been a "fundamental defect" in the proceedings. However, the UK is not a party to this Protocol.

47 Perverting the course of justice, intimidating witnesses, jurors or others, and aiding, abetting, counselling, procuring, suborning or inciting another person to commit perjury.

48 The fourth condition means that the Court, taking into account all the information before it, but ignoring the possibility of new information coming to light, must be satisfied that the conviction for the administration of justice offence will not be quashed. s 55(6) gives the example that the Court should not therefore make an order if the time for bringing an appeal against the conviction for the administration of justice offence has not expired, or there is an appeal pending.

49 Double Jeopardy and Prosecution Appeals (2001) Law Com No 267, para 5.19.

jeopardy. In view of these measures, we reconsider these recommendations below, and consider whether a still less restrictive approach might be appropriate where an acquittal was possibly obtained as a result of interference with the course of justice. In the following section, we consider how far provisions relating to tainted acquittals might be consolidated with the provisions for "double jeopardy" retrials.

Responses

13.90 The only consultee who raised issues about the "tainted acquittal" provisions was the CPS, which said:

> Since 2010 [when] the Appeals and Review Unit was set up there has only been one case in which these provisions have been used…
>
> It may be that if the offences under Part 10 [containing the double jeopardy retrial provisions] were enlarged to include administration of justice offences (where new and compelling evidence came to light following a person's acquittal) the procedure in Part 10 could be used in place of the tainted acquittals legislation. Any amalgamation and simplification of these types of appeal rights would be beneficial. However, there may be some circumstances where this might not be possible which would militate against this.

13.91 Given these concerns, we have considered whether the requirements in the legislation are necessary, and whether they should be relaxed to enable more retrials where an acquittal may have resulted from interference or intimidation.

Offences

13.92 When the provisions introducing the tainted acquittal procedure were introduced in Parliament, an amendment was tabled which would have included perjury as one of the relevant administration of justice offences which could trigger the procedure.

13.93 The Government rejected this, arguing that this would widen the scope of the extension too much, saying "it would, for example, increase substantially the potential scope for acquittals to become the subject of further investigation".[50]

13.94 We can see force in the argument that including perjury as one of the offences could undermine the finality of the trial process. Where a defendant successfully deployed evidence to secure an acquittal, it could encourage police and prosecutors to seek to find fresh evidence to counter that evidence with a view to having the acquittal quashed. That is, they would be looking not for evidence relating to a further administration of justice offence, but further evidence relating to the offence already tried.

13.95 In 2001 we did recommend a limited extension to the list of those administration of justice offences conviction for which can trigger the tainted acquittal procedure. We recommended that the tainted acquittal procedure should be extended to apply where the administration of justice offence involves interference with or intimidation of a

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50 *Hansard* (HL), 19 December 1995, vol 567, col 1581.

judge, magistrate or magistrates' clerk (now legal adviser).[51] We also recommended that the list should be expanded to include corruption offences and conspiracy to commit any administration of justice offence.[52]

13.96 We also now consider that there might be a case for including the offence of misconduct in public office. For instance, if a police officer advised a witness to stay away from court so as to ensure that they would not give evidence in a trial, they might well be prosecuted for misconduct in public office rather than intimidating a witness. This may especially be the case if they did so in such a way that it could be defended as not having amounted to a threat.[53]

13.97 As we noted in our comments in the final report on Double Jeopardy and Prosecution Appeals,[54] in the context of a recommendation to extend the provisions to cover conspiracy to commit an administration of justice offence, the list of offences might thereby cover interferences which did not come to fruition. Alongside misconduct in public office and corruption, it might also cover offences which might not actually involve interference in the administration of justice.

13.98 In such a case, however, it would be impossible to satisfy the separate requirement that, but for the offence, the jury would probably have convicted. The practical point is that, where the conspiracy did lead to actual interference or intimidation, one or more convictions for the conspiracy (as distinct from the full offences) would suffice to trigger the procedure.

13.99 However, this in turn suggests that the list of offences should not be considered wholly in isolation from the procedure for deciding whether to quash an acquittal. This is because as long as a conviction for an administration of justice offence is necessary (an issue which we consider below), the list should be as comprehensive as possible. This is in order to capture all the circumstances where the procedure ought to be available, given that a person who might have interfered with the administration of justice could have been prosecuted for a range of offences.

13.100 If, however, the test were different, it might not be necessary to expand the list of offences. For instance, rather than requiring conviction for a particular administration of justice offence, it could suffice that the person had committed, or was convicted of, an offence and the Court was satisfied that the offending amounted to interference with the course of justice.

13.101 Were such an approach adopted, it might not be necessary to have a restricted list of offences at all. This would ensure that the provisions could be used if a person secured an acquittal by criminal means, even if the offence charged was not an administration of justice offence. For instance, a person might secure an acquittal by

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51 Double Jeopardy and Prosecution Appeals (2001) Law Com No 267, para 5.5.

52 Above, para 5.9.

53 For our recommended reform to the common law offence of misconduct in public office, see Misconduct in Public Office (2020) Law Com No 397.

54 Double Jeopardy and Prosecution Appeals (2001) Law Com No 267, para 5.7.

destroying evidence through an arson attack on a forensic science provider.[55] In these circumstances, it might be appropriate to charge arson (which is punishable by life imprisonment), given the gravity of the offence, and the risk to the public involved. However, it might be appropriate for this to be sufficient to allow a retrial under the tainted acquittal provision if the result was to secure an improper acquittal.

Threshold

13.102 The CPIA 1996 requires both the court of trial for the administration of justice offence and the High Court to consider whether the conduct constituting the administration of justice offence might have led to the acquittal. The trial court certifying the conviction of the person for the administration of justice offence must certify that there is a "real possibility that, but for the interference or intimidation, the acquitted person would not have been acquitted". The High Court, in turn, must be satisfied that it is likely that, but for the administration of justice offence, the acquitted person would not have been acquitted.[56]

13.103 The trial court must also certify that it would not be contrary to the interests of justice for the acquitted person to be tried. The High Court must also be satisfied that it would not be contrary to the interests of justice for the proceedings to take place against the acquitted person.

13.104 We question whether this duplication is necessary. The court which tried the person who committed the administration of justice offence will not necessarily be the court which tried the acquitted person. The person who commits the administration of justice offence need not be, and often would not be, the acquitted person. Indeed, the administration of justice offence may not be intended to secure the acquittal of the acquitted person: it might, for instance, be aimed at the acquittal of a co-defendant. The court trying the administration of justice offence may thus not be in any position to know what the possible impact of the administration of justice offence would have been. Nor would it be in any special position to know whether it was in the interests of justice for the person acquitted at the previous trial for that different offence to face new proceedings. The person facing retrial will not necessarily have any involvement in the administration of justice proceedings and therefore be unable to make representations to that court.

13.105 We think the need for the High Court to be satisfied that the interference is likely to have led to the person being acquitted when otherwise they would not have been acquitted may be setting the bar too high. Concentrating on the paradigm case where the person who committed or commissioned the interference or intimidation is the person who was acquitted, it is highly arguable that if their commission of the administration of justice offence even possibly resulted in their acquittal then they have no right to expect protection from retrial. It might therefore be that the "real possibility" test that the court trying the administration of justice offence must apply would be more appropriate. The test is whether there is a "real possibility that, but for

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55 In 1996, Forensic Science Service premises in Wetherby, North Yorkshire, were subjected to a "determined and prolonged" attack, which involved petrol being pumped into the premises. This was believed to have been intended to destroy evidence stored at the premises (*The Times*, 14 Nov 1996).

56 "Would not have been acquitted" is not the same as convicted, and it seems likely that this test will be met if, had the administration of justice offence been committed, the jury would have been deadlocked.

the interference or intimidation, the acquitted person would not have been acquitted".[57]

Procedure

13.106 We recognised in the consultation paper on Double Jeopardy and the final report on Double Jeopardy and Prosecution Appeals that the requirement for a person to have been convicted of an administration of justice offence could raise difficulties. There might be circumstances in which it was not possible to pursue a prosecution, such as whether the person alleged to have done the interference had died.

13.107 In the consultation paper we had presented three options. The first was to retain the present position. The second was that the court hearing the application to quash the acquittal would have to be satisfied that someone had in fact committed an administration of justice offence, but it would not be necessary that that person should actually have been convicted. The third was to require a conviction for the administration of justice offence except where it would be impossible to try the person alleged to be guilty of the administration of justice offence. This might be because that person was dead, overseas or untraceable. Under this third option, the High Court could quash the conviction if satisfied to the criminal standard that the offence had been committed.[58]

13.108 We rejected the second option, noting that this option "raises the spectre of the conviction of the tainted acquittal defendant at the retrial, followed by a later acquittal of the alleged interferer" for the administration of justice offence.[59] There might also be a risk of the police and prosecution not seeking to prosecute the administration of justice offence because of the risk that an acquittal for that offence would undermine the basis on which the previously acquitted person had been convicted at retrial.

13.109 We therefore recommended that other than where a person had been convicted of an administration of justice offence, the tainted acquittal procedure should only be available where the court hearing the application is satisfied (to the criminal standard) that an administration of justice offence has been committed and that:

(a) the person who committed it is dead;

(b) it is not reasonably practicable to apprehend that person;

(c) that person is overseas, and it is not reasonably practicable to bring that person within the jurisdiction in a reasonable time; or

(d) it is not reasonably practicable to identify that person.[60]

13.110 These recommendations were not implemented by the Government.

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57 Criminal Procedure and Investigations Act 1996, s 54(2)(a).

58 Double Jeopardy and Prosecution Appeals (2001) Law Com No 267, para 5.10.

59 Above, para 5.14.

60 Above, para 5.19.

13.111 Since the introduction of the tainted acquittal procedure there have been significant developments, not least the introduction of "double jeopardy" retrials for serious offences. The high burden of proof for securing a retrial in a case which has been tainted by interference or intimidation (the need to secure a conviction for the administration of justice offence) is anomalous when compared to the relatively lower burden which applies for double jeopardy retrials. The fact that the tainted acquittal procedure has almost never been used suggests that fears of the consequences were the requirements relaxed might not have been justified. Indeed, it may suggest that the requirements are too onerous.

13.112 We can see little justification for the fact that tainted acquittal applications are heard by the High Court and "double jeopardy" applications by the CACD. It may be that it was considered that the former is a largely administrative process, since the fact of conviction will be proved by the record of trial court for the administration of justice offence. In double jeopardy appeals, conversely, it will be necessary to consider the weight of the fresh evidence in relation to the evidence adduced at trial. However, even in the tainted acquittal procedure it is necessary for the High Court to consider the impact that the intimidation or interference was likely to have had on the verdict, which itself requires analysis of the evidence heard at trial. In practice, we doubt that this is very different to the process that the CACD must engage in when considering the impact of a misdirection or fresh evidence in an appeal against conviction.

13.113 On reflection, we think that our recommendation in 2001, where we attempted to specify the circumstances in which the tainted acquittal procedure might be permitted where a prosecution for the administration of justice offence was possible but not practicable, may have been overly prescriptive. There may well be other circumstances which we did not anticipate which would not be caught by the limited scenarios we spelled out in the recommendation. These may include, for instance, where the person who committed the administration of justice offence is alive, and not overseas, and could be apprehended but was unfit to plead.

13.114 There may also be circumstances where a prosecution for the administration of justice offence is neither impossible nor impracticable but not in the public interest. One example might be where a person was willing to admit to an administration of justice offence in return for immunity from prosecution, and the CPS was willing to agree to this in order to secure a retrial for very serious offences for which the acquitted person had stood trial.

13.115 If the requirement for a conviction for an administration of justice offence was replaced with a requirement that the CACD be satisfied, to the criminal standard, that a relevant administration of justice offence had been committed, (that is, our previous "option 2"), then this would address both (i) situations where a person had been convicted of a different offence, such as bribery or misconduct in public office, but in circumstances of interference with the administration of justice, and (ii) situations where a prosecution for the relevant administration of justice offence was impossible, impracticable or not in the public interest.

13.116 Were this approach adopted, it would not be necessary to expand the list of offences – for instance to include bribery, or to include interference with a judge or magistrate. All that would matter would be that a criminal offence had been committed, and that

the conduct alleged would have amounted to an offence of perverting or conspiracy to pervert the course of justice, or intimidation of or interference with a witness or juror.

Retrospectivity

13.117 Unlike the double jeopardy retrial provisions, the tainted acquittal procedure was not made retrospective.

13.118 In our final report on Double Jeopardy and Prosecution Appeals we suggested that the comparison between the two was not perfect because:[61]

> there are differences of principle between that procedure and the one we propose. The tainted acquittals procedure was rightly made prospective only as it involved a new adverse consequence of committing the relevant criminal offence. Had the tainted acquittals procedure been retrospective, it would have been analogous to a retrospective increase in maximum sentence for the administration of justice offence which triggered the application, no less so whether the acquitted defendant, thereby put at further risk, was the person who committed the administration of justice offence or the beneficiary of the commission of that offence.

13.119 However, we now question whether the tainted acquittal procedure was "analogous to a retrospective increase in maximum sentence for the administration of justice offence". As noted in the final part of that passage, the person who committed the administration of justice offence might have been a third party who thereby received no additional penalty for it. Conversely, the person who was retried, and therefore did receive an additional penalty, might not even have been the intended beneficiary. This might be the case where they were a co-accused of the person the interference was intended to benefit.

13.120 On reflection, we think retrospectivity could be justified in relation to tainted acquittals, especially where the person who was acquitted was a party to the administration of justice offence.

13.121 A person who was acquitted as a result of interference with the course of justice has been wrongly acquitted, whether or not the law made provision for their retrial. If they had, in fact, committed the offence, they were liable to be prosecuted and punished for it, whether or not the law at the time made provision for them to be retried if they were later found to have been acquitted as a result of improper interference.

13.122 As we said in the final report on Double Jeopardy and Prosecution Appeals:[62]

> The crucial question, in our view, is whether the effect of the change in the law is to expose the defendant to greater liability than he or she might reasonably have expected at the time of the alleged offence – not some later time when the defendant has been acquitted of it.

13.123 Provisions for tainted acquittals do not expose either the person who committed the original offence or the person who committed the administration of justice offence to a

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61 Above, para 4.54.

62 Above, para 4.53.

greater liability than they might have expected at the time of that alleged offence. If a person who has been acquitted is subsequently convicted at a retrial because it emerges that they personally committed an administration of offence in order to secure acquittal, it is correct that they face two penalties. However, that is because they have committed separate offences and the penalty for each is no more than it carried when they committed each offence.

13.124 If changes are made to the tainted acquittal procedure, we do not think they need to be protected from having retrospective effect.

Discussion

13.125 We provisionally propose that tainted acquittal applications should go to the CACD. We would welcome views on whether the requirement for there to have been a conviction for an administration of justice offence should be modified so that the CACD would only have to be satisfied that an offence had been committed and that the conduct amounted to an offence of perverting or conspiracy to pervert the course of justice or intimidation or interference with a witness or juror.

13.126 If this were adopted, the requirement for a court convicting a person of an administration of justice offence to certify that it appeared that but for that interference or intimidation, the acquitted person would not have been convicted would no longer be necessary. The fact that a person had been convicted of an administration of justice offence would be a matter of public record to which the CACD could have regard when considering the strength of the application to have the acquittal quashed.[63]

13.127 We have considered whether the Court should be satisfied to the criminal standard or the civil standard that an administration of justice offence has been committed. Beyond reasonable doubt is the criminal standard applied when the person will face criminal conviction and punishment. However, the result of proceedings to quash a tainted acquittal is not that the person will face conviction and punishment. It is simply that they will face further proceedings which may result in conviction and punishment. These will in turn require that the original offence is proved to the criminal standard.

13.128 However, we consider that it might be appropriate for the Court to have to be satisfied to the criminal standard. This is because the Court would be concluding that a criminal offence had been committed, and the consequences that follow (the retrial of the acquitted person) are consequent upon that conclusion. Although the provisions relating to double jeopardy do not require anything to be proved to the criminal standard, they do require that the "new and compelling" evidence be "highly probative" of the case against the acquitted person.

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63 Police and Criminal Evidence Act 1984, s 74 provides that the fact that a person other than the accused has been convicted of an offence by or before any court in the UK is admissible evidence that they committed the act, and they are taken to have committed the act unless the contrary is proved.

Consultation Question 81.

13.129 We provisionally propose that appeals to quash a tainted acquittal under part VII of the Criminal Procedure and Investigations Act 1996 should be transferred from the High Court to the Court of Appeal Criminal Division ("CACD").

Do consultees agree?

13.130 We invite consultees' views as to whether the CACD should be able to quash an acquittal where it is satisfied, to the criminal standard, that a criminal offence has been committed that involves interference with the course of justice, and it is likely that, but for the interference or intimidation, the acquitted person would not have been acquitted.

13.131 If, contrary to the provisional proposal above, the requirement for a conviction is retained, whether in all circumstances or in all but specified circumstances, we think that the list of administration of justice offences should be extended to include bribery and misconduct in public office. We would also provisionally propose that the court that tried the administration of justice offence should no longer be required to find that retrial of the acquitted person was in the interests of justice; instead, this should be for the CACD to decide.

CONSOLIDATION OF TAINTED ACQUITTAL AND DOUBLE JEOPARDY PROVISIONS

13.132 In Scotland, a single Act – the Double Jeopardy (Scotland) Act 2011 – deals with three separate exceptions to double jeopardy: tainted acquittals (section 2), admissions (section 3), and fresh evidence (section 4).[64] (In England and Wales, subsequent admissions are dealt with as fresh evidence, as in the case of Billy Dunlop – see above at paragraph 13.39(1).) This has prompted us to consider whether the provisions for tainted acquittals and double jeopardy retrials might be consolidated.

13.133 In Scotland, for instance, this has enabled some common procedural provisions to be consolidated for all three exceptions. However, it is important to recognise that the tests for quashing an acquittal remain distinct and are dealt with in their respective sections.

13.134 We do not think it would be possible to consolidate the tests for tainted acquittals and double jeopardy retrials fully. The former is available for all offences, the latter only for serious offences. We do not think it would be possible to consolidate the 'but for' element of the test. That element is whether it is likely that 'but for' the interference or intimidation the acquitted person would not have been acquitted (for tainted acquittals), and whether the new evidence is compelling (for double jeopardy applications). Even were the threshold of the 'but for' test lowered so that an acquittal

[64] The Act also deals with other issues involving questions of double jeopardy such as where a person is either convicted or acquitted of causing physical injury to a person and subsequently that person dies (s 11).

was tainted where there was proven interference which might have resulted in the acquittal, this would not align with the "new and compelling evidence" test.

13.135 As we said in the final report on Double Jeopardy and Prosecution Appeals:[65]

> The tainted acquittal procedure focuses on the legitimacy of the first trial. What happened at the first trial, and what might have happened at the first trial but for the conduct complained of, is of the essence of the exercise…
>
> By contrast, the new evidence exception applies where there has been a proper first trial at which a legitimate verdict was reached. Thus the focus of the question should be whether the effect of the new evidence is such that the first jury's verdict (legitimately reached after a proper trial) cannot in the interests of justice be allowed to stand. What the first jury would, or might, have done if the case presented to it had been different is neither here nor there. Its task is done.

13.136 However, it might be that it would be possible to align some aspects, including:

(1) the interests of justice element of the test (CPIA 1996, section 2 and CJA 2003, section 79);

(2) procedural requirements, such as the effect on time limits for prosecution of an order for retrial; and

(3) restrictions on publication (CPIA 1996, section 57 and CJA 2003, section 82).

Consultation Question 82.

13.137 We invite consultees' views as to how far the tainted acquittal provisions in part VII of the Criminal Procedure and Investigations Act 1996 and the double jeopardy provisions in part 10 of the Criminal Justice Act 2003 might be consolidated.

"JUROR EQUITY" AND "PERVERSE ACQUITTALS"

13.138 So-called "perverse acquittals" arise when the jury acquits in the face of the evidence. The trial judge has no right to direct a jury to convict[66] and therefore it will always be open to a jury to acquit even if the prosecution evidence is overwhelming, and the defendant offers no defence. For instance, in *Ponting*,[67] the defendant, who admitted leaking documents relating to the sinking of the Belgrano during the Falklands War, was acquitted of breaching the Official Secrets Act 1911 despite his admitting the conduct and the judge directing the jury that he had no defence in law for his conduct. His argument that the prosecution was required to show that he did not reasonably and honestly believe that the communication was in the interests of the

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65 Double Jeopardy and Prosecution Appeals (2001) Law Com No 267, para 4.61.

66 *R v Kelleher* [2003] EWCA Crim 3525, (2003) 147 SJLB 1395; *R v Wang* [2005] UKHL 9, [2005] 1 WLR 661.

67 [1985] Crim LR 318, Central Criminal Court.

State was rejected: the only mental element that the prosecution was required to prove was an intention to make the communication.[68]

13.139 Many, though not all, "perverse acquittals", represent an exercise of "juror equity" or "jury nullification", when the jury deliberately acquits despite considering the defendant to be guilty. This may represent a view that the law is unjust or too harsh.

13.140 Lord Justice Auld addressed "perverse verdicts" in his review of criminal courts:[69]

> There are many, in particular the Bar, who fervently support what they regard as the right of the jury to ignore their duty to return a verdict according to the evidence and to acquit where they disapprove of the law or of the prosecution in seeking to enforce it …

13.141 He noted that while some perverse verdicts have the "attractive notion of a 'blow for freedom'", there are other prejudices which may lead to perverse acquittals, including those relating to consent in sexual offence prosecutions. Although Lord Justice Auld understood the emotional attachment to the right of the jury to acquit in the face of the evidence "as a useful long-stop against oppression by the state, and as an agent, on occasion, of law reform", he concluded:[70]

> I regard the ability of jurors to acquit … in defiance of the law and in disregard of their oaths, as more than illogicality. It is a blatant affront to the legal process … I think it unreal to regard the random selection, not election, of 12 jurors from one small area as an exercise in democracy, 'a little parliament', to set against the national will. Their role is to find the facts and, applying the law to those facts, to determine guilt or no. They are not there to substitute their view of the propriety of the law for that of Parliament or its enforcement for that of its appointed Executive, still less on what may be irrational, secret and unchallengeable grounds.

13.142 However, he ultimately proposed nothing more than a declaratory legislation, stating that juries have no right to acquit defendants in defiance of the law or in disregard of the evidence, and that judges and advocates should conduct criminal cases accordingly.[71] He considered that reforms he proposed elsewhere allowing judges to require reasoned verdicts would reduce the scope for perverse verdicts.[72]

13.143 In *Goncalves*,[73] Lord Justice Thomas (as he then was) said, "a jury is entitled to acquit and its reasons for so doing are unknown. It is their right which cannot be questioned".

13.144 In *Warner*, the High Court refused permission for the Solicitor General to bring contempt proceedings against an activist who had held a placard outside a court

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68 Above.

69 Rt Hon Lord Justice Auld, *A Review of the Criminal Courts of England and Wales* (2001) para 99.

70 Above, para 105.

71 Above, para 107.

72 Above, para 106.

73 [2011] EWCA Crim 1703, [2014] 1 WLR 775 at [38], by Thomas LJ.

saying “Jurors, you have an absolute right to acquit a defendant according to your conscience”. Mr Justice Saini held:[74]

> It is probably best to describe jury equity as a principle of our law. It is an established feature of our constitutional landscape and has been affirmed, as set out below, in the highest courts.
>
> There is however a clear tension between that principle and the well-established legal duty of a jury to apply the law as directed by a trial judge, to the facts as they find them, and to deliver a verdict accordingly.

13.145 As Professor John Spencer has pointed out:[75]

> As juries give no reasons for their verdicts it is difficult to know whether a surprise acquittal was an exercise in “jury equity” or a credulous jury – or perhaps an unusually perceptive one – discovering a reasonable doubt that no one else could see. Juries rarely express their defiance of the law explicitly.

13.146 Allowing an appeal against acquittal on the basis that it was perverse would be a radical step and for some would represent an infringement of a historic right of juries.

13.147 Given the lack of consensus as to whether the jury has – or should have – the right to deliver a perverse verdict, we do not think that it should be open to the prosecution to appeal a verdict on the grounds that it is perverse. The question as to whether juries should have the right to deliver a perverse verdict must be settled first and, in our provisional view, this criminal appeals project is not the appropriate place to settle it.

ATTORNEY GENERAL’S REFERENCES ON A POINT OF LAW

13.148 Section 36 of the Criminal Justice Act 1972 allows the Attorney General to refer a point of law to the CACD where a person has been acquitted in proceedings on indictment. This provision enables the Attorney General to seek to have an error of law corrected for posterity in circumstances where an appeal is not possible because the defendant was acquitted.

13.149 Because of juror secrecy laws, it will generally be impossible to know whether the jury acquitted because of the alleged error of law or would have acquitted anyway. This is because either another route to acquittal was possible on the judge’s directions, or they were determined to acquit in any case, in the face of the evidence if necessary.

13.150 The two most recent Attorney General’s References arose in circumstances where the jury may have acquitted in line with what were later held to be misdirections by the trial judge but where the jury might well have acquitted in any event.

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74 [2024] EWHC 918 (KB), [2024] 2 Cr App R 19 at [14]-[15], by Saini J.

75 J R Spencer, “Jury Equity – a changing climate?” [2023] 9 *Archbold Review* 8, 9.

13.151 In the Colston Four case, which involved toppling a statue in Bristol of a historical figure who was involved in the slave trade:[76]

(1) The defence claimed that they were using force to prevent the public display of indecent matter and/or the display of a visible representation which is abusive within the sight of a person likely to be caused distress by it.

(2) Two of the defendants argued that they honestly believed that those who they believed were entitled to consent to the damage (the people of Bristol) would have consented had they known of the damage and its circumstances.

(3) The defence argued that the jury had to be sure that convicting the defendants would be a proportionate interference with their right to freedom of thought and conscience and their right to freedom of expression.

13.152 The Attorney General referred the case to the CACD questioning the judge's decision to leave the third of these to the jury. She asked whether the offence of criminal damage was one which represented a proportionate interference with the right to freedom of expression without the need for consideration of proportionality in the individual case. If not, she asked under what circumstances the question should be withdrawn from a jury.

13.153 The Attorney did not refer the second of the defences listed above. However, in 2023, the Attorney General referred – effectively – the second defence to the CACD in respect of a different case.[77] In that case, protestors had thrown paint on the offices of organisations that they saw as culpably inactive on climate change, namely Greenpeace, Amnesty International, Christian Aid and Friends of the Earth, and later, the Labour, Conservative, Liberal Democrat and Green Parties.

13.154 The trial judge had withdrawn defences of lawful excuse (protection of property), duress/necessity of circumstances, and lawful excuse relying on freedom of expression and freedom of assembly under the ECHR. However, due to the subjectivity of the lawful excuse defence in section 5(2)(a) of the Criminal Damage Act 1971 (that is, belief in consent), he felt it was impossible to rule on its applicability until evidence was heard.

13.155 In the event, the CACD held that "the damage and its circumstances" meant that the "circumstances" related only to the damage, such as its time, place and extent, but would not include the personal or philosophical beliefs of the person causing it. The facts or effects of climate change could not amount to circumstances of the damage.

13.156 In these cases, because the judge allowed an impermissible defence to be left to the jury, it is possible that they applied their consideration to those defences and acquitted in accordance with them. It is also possible that, if properly directed, they would still have acquitted. As Professor Spencer notes, the recent contempt cases turning on arguments of "jury equity" or "jury nullification" have arisen in respect of trials of people whose alleged offences were committed as part of a public protest. It is

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76 *Attorney General's Reference (No 1 of 2022)* [2022] EWCA Crim 1259, [2023] KB 37.

77 *Attorney General's Reference (No 1 of 2023)* [2024] EWCA Crim 243, [2024] 1 WLR 3205.

possible that juries who acquitted in the Colston Four case and the paint throwing case would have done so in any case.

13.157 Where the acquitted person does not take part in the proceedings, the CACD will normally ask the Attorney General to appoint an advocate to the Court (who is instructed by the Treasury Solicitor). In both cases, not only was an advocate appointed, but the Attorney General and acquitted person(s) were represented by counsel (and in the Colston Four reference, Liberty was joined as an interested party).

Should the right to make a reference lie with the Attorney General or the Director of Public Prosecutions?

13.158 In answer to the question whether the powers of the Attorney General to refer a matter to the CACD were adequate and appropriate, Cardiff University Law School Innocence Project said: "As the Attorney General is a member of the government appointed by the Prime Minister there needs to be caution that decisions are not influenced by political motives".

13.159 In our report on consents to prosecution, we considered a scheme for deciding whether the duty to consent to a prosecution should lie with the Attorney General or the DPP. We concluded that, in general, consent requirements should require the consent of the DPP, and that only offences which require consent because they involve national security, or an international element should require the consent of the Attorney General.[78]

13.160 However, in the case of references on a point of law following an acquittal (and to a certain extent references of unduly lenient sentences), we can see that there is merit in these decisions lying with the Attorney General and not the DPP. This is because the CPS, which is led by the DPP, will (normally) have been the unsuccessful party in the trial. The purpose of the reference procedure is to address the public interest in correcting an error of law or even just to establish legal certainty, not to act as a mechanism to appeal against an unsuccessful case at trial.

Consultation Question 83.

13.161 We provisionally propose that the right to refer a point of law to the Court of Appeal Criminal Division following an acquittal should remain with the Attorney General.

Do consultees agree?

Procedural matters

13.162 Unlike appeals against unduly lenient sentences, there is no time limit on bringing a reference on a point of law. Arguably, since the reference does not have any consequences for the individual defendant (since they have been acquitted), the

[78] Consents to Prosecution (1998) Law Com No 255, para 7.13.

protection that applies in the case of unduly lenient sentence references need not apply.

13.163 However, the right for the acquitted person to take part in proceedings on the reference demonstrates that they do have an interest in the outcome of the reference. That being so, we think that there is a case for saying that time limits should apply to any reference. We think that in principle there is a case for parity, as far as possible, with the time limits that apply to unduly lenient sentence referrals.

13.164 Nonetheless, we do not think the same arguments for strictness lie in respect of references on a point of law as apply to unduly lenient sentences (where the person serving their sentence has a stronger interest in finality).

13.165 Accordingly, we consider that (subject to any recommendations we might make in respect of appeals against conviction) the Attorney General should be required to bring a reference on a point of law within 28 days of the acquittal (the same time limit as for unduly lenient sentence references). However, we think that the CACD should have the power to give the Attorney General leave to make a reference out of time.

Consultation Question 84.

13.166 We provisionally propose that a reference on a point of law following acquittal should be subject to a time limit of 28 days, subject to a right to apply for leave to make a reference out of time where it is in the interests of justice.

Do consultees agree?

Onward reference to the Supreme Court.

13.167 Under section 36(3) of the Criminal Justice Act 1972, the CACD may, of their own motion or in pursuance of an application, refer a point of law referred by the Attorney General to the Supreme Court "if it appears to the Court of Appeal that the point ought to be considered by the Supreme Court". This provision is different to those governing appeals from the CACD to the Supreme Court. There is no requirement to certify that the point of law is one "of general public importance". There is no leave requirement for a party applying for the point to be referred to the Supreme Court. The CACD has total discretion to allow or to refuse an application to have the matter considered by the Supreme Court.

13.168 We provisionally propose that procedures should be reformed in respect of onward appeal to the Supreme Court where an appeal is brought against conviction or sentence (see the next chapter). Given this, we consider that there should be similar rights for both the Attorney General and the acquitted person to seek the leave of the Supreme Court to have the reference considered when the case is brought on a reference following acquittal. The fact that the Attorney General made the reference in the first place would tend to suggest that there is a degree of uncertainty (which the CACD judgment may not have settled) and there is public interest in the matter.

13.169 We provisionally conclude that the acquitted person should have a similar right to appeal. This is because of the interest that person might have in the Attorney General's reference and finality, notwithstanding that the reference does not affect their acquittal, which is currently recognised by their right to participate in proceedings.

Consultation Question 85.

13.170 We provisionally propose that the Attorney General and the acquitted person should have the same rights to appeal against the Court of Appeal Criminal Division's judgment following a reference on a point of law as the prosecution and defendant would have on an appeal against conviction.

Do consultees agree?

Should the prosecution be able to appeal against an acquittal following a reference on a point of law?

13.171 In their response, the CPS asked:

> In respect of referring a point of law, should the Attorney General be able to ask the court to quash an acquittal and seek a retrial where the legal directions to the jury were seriously flawed? It is not proposed that the Attorney General should be able to appeal any acquittal, but there may be an argument that because of the flawed legal directions that the jury are directed to follow then the jury's verdict is not an accurate and true verdict according to law. Such a power would be analogous to that of a defendant where the conviction is quashed because of flawed legal directions. The court would only order a retrial if it was in the interests of justice. While the principle of finality is important, ensuring the law has been correctly applied is also important in maintaining the interests of justice.

13.172 Professor John Spencer made a similar point:

> I think it would be sensible if, when the A-G refers a judge's legal ruling to the Court of Appeal following an acquittal, the Court had power to quash the acquittal and order a retrial, if it thought the interests of justice require this.

13.173 Given that both the CPS and Professor Spencer have raised this possibility, we have given it serious consideration. However, we have provisionally concluded that the question of whether the prosecution should have the right to appeal against an acquittal founded on a misdirection of law should be separate from the question of Attorney General's references. The ability for the Attorney General to refer a point of law following acquittal exists precisely because a prosecution appeal is not possible. The considerations which will inform the Attorney General's decision whether to bring a reference on a point of law are concerned with the need for legal certainty. There will be cases where it is appropriate to make a reference, to clarify the law, even though it would not be right to pursue a retrial, even if it were possible (for instance, because there were other reasons why the jury might have acquitted). There will also be situations where, although the jury might have acquitted because of an erroneous

legal ruling, the law is clear (and it is clear that the ruling was erroneous), and therefore it will not be necessary to make a reference.

13.174 If it is considered desirable to be able to retry cases because the trial judge made an error of law, this is an argument for introducing a prosecution right of appeal against acquittal, rather than retaining a procedure premised on there being no appeal and trying to bolt onto this a provision to enable one.

PROSECUTION APPEALS AGAINST ACQUITTAL ON A POINT OF LAW?

13.175 However, the suggestion by the CPS and Prof Spencer raises a broader question of whether the prosecution should have a general right to appeal against an acquittal on a point of law. As noted at the outset, a prosecution right to appeal is not unusual in many jurisdictions. It is rare, but not unheard of, in common law jurisdictions.

13.176 In Canada, acquittals can be appealed against on a point of law. The prosecution did not have such a power at common law. In 1930, an amendment to the Criminal Code was introduced to permit Crown appeals on a "question of law alone". The right of appeal lies with the Attorney General. By section 676(1) of the Criminal Code:

> The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal
>
> (a) against a judgment or verdict of acquittal or a verdict of not criminally responsible on account of mental disorder of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone …

13.177 The Crown must show that "the error (or errors) of the trial judge might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal".[79]

13.178 It is worth noting that in Canada, unlike in England and Wales,[80] the prosecution does not have a right to appeal against pre-trial or interlocutory rulings. Therefore, where the judge makes an error of law prior to the summing up, the prosecution cannot challenge that error.

Fairness

13.179 The position on post-trial appeals between defendant and prosecutor is not currently equal. The convicted person can appeal against their conviction; the unsuccessful prosecutor has no right to appeal against an acquittal. This unfairness is deliberate, reflecting the principled priority given to acquitting the innocent over convicting the guilty.

13.180 However, in England and Wales the convicted person cannot appeal simply because the judge made an error of law; they must also demonstrate that the conviction is thereby "unsafe". A requirement, like the Canadian test, that the prosecutor show that

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79 *R v Graveline* 2006 SCC 16 at [14], by Fish J.

80 See Chapter 12.

the error might reasonably be thought to have made a difference, would mean that it was easier for a prosecutor to appeal against an acquittal than it is for a convicted person to appeal against their conviction on the corresponding ground.

13.181 Conversely, a requirement to show that but for the error of law the person probably would not have been acquitted would rarely be capable of being met.

13.182 One way through this would be to use the same test for prosecution appeals as for appeals by convicted persons. So, using the current test, which we provisionally propose should be retained, the prosecution could be required to demonstrate that, as a result of the error, the acquittal was "unsafe". That would not involve any unfairness.

13.183 It is worth acknowledging that the current inability to appeal against an acquittal based on an error of law leads to an anomaly when that error of law leads to the exclusion of evidence at trial: it is possible to quash an acquittal and order a retrial under the double jeopardy provisions when compelling evidence emerges *after* an acquittal, but not if the same compelling evidence was available at trial but wrongly excluded (as a matter of law) by the trial judge.

Conclusion

13.184 A prosecution right to appeal against an acquittal on a point of law is potentially fair, provided that the threshold for overturning an acquittal is not such that it is more difficult to appeal against a conviction than an acquittal.

13.185 However, the circumstances in which an appeal against acquittal would be used would be limited. The fact that the prosecution can appeal against "terminating rulings" means that, in practice, one would only expect the power to be used in circumstances where the error was not so fundamental that the prosecution was willing to give the "acquittal guarantee" and make an appeal on this basis. (In Canada, where the prosecution has a limited right to appeal an acquittal on the basis of an error of law, there is no right to appeal against interlocutory rulings.) Consequently, we provisionally conclude that the absence of the right to appeal against an acquittal may be more a problem of appearance than reality.

13.186 It is also notable that both of the recent cases in which the Attorney General made a reference on a point of law related to criminal damage in the course of a protest. Those acquittals were also in circumstances in which there is reason to think that the acquittal of the defendant may well have been an exercise of "jury equity". It is not at all clear that legal errors favourable to defendants are leading to wrongful acquittals, rather than juries exercising their power to acquit in the face of the evidence. This then gives rise to the possibility that appeals against acquittal on a point of law might be sought where the acquittal was, in fact, due to members of the jury exercising their power to acquit because they did not think the defendant should be convicted.

13.187 The right to appeal against an acquittal on a point of law (rather than merely to make a reference in respect of it, which does not affect the acquittal) would be a radical step and we do not think the case for this reform has been made out.

Consultation Question 86.

13.188 We provisionally propose that the prosecution should not have a right to appeal against a defendant's acquittal in the Crown Court on a point of law.

Do consultees agree?

Chapter 14: Appeals to the Supreme Court

INTRODUCTION

The role of the Supreme Court

14.1 The Supreme Court is the final court of appeal in England and Wales, a role it inherited from the Appellate Committee of the House of Lords under the Constitutional Reform Act 2005. Until 2009, the House of Lords served as the final court of appeal in civil cases throughout the UK, and in criminal cases in England and Wales and Northern Ireland (but not Scotland).

14.2 The Court is composed of 12 justices. However, at the request of the President of the Supreme Court, a person who holds office as a senior judge in England and Wales (a Lord or Lady Justice of Appeal), Scotland or Northern Ireland may act as a judge of the Supreme Court.[1] The Supreme Court also maintains a supplementary panel of recently retired senior judges who can be called upon if required to form a panel.[2] A panel hearing a particular case will consist of an odd number of justices, with a minimum of three judges of which a majority must be permanent judges.[3]

14.3 Until 1960, appeals to the House of Lords in criminal cases were relatively rare. This was because the Attorney General was required to certify that the case raised a point of law of exceptional public importance, and that it was in the public interest that a further appeal should be brought. This requirement was removed by the Administration of Justice Act 1960. Commentators felt that the House "got off to a rather bad start … Three decisions, *Sykes*,[4] *Shaw*[5] and *Smith*,[6] were given almost universally hostile receptions".[7] There followed a largely inactive period. Although the Appellate Committee became more active in the 1960s, it had a poor reputation by the early 1980s. Professor John Smith said, in 1981, that it "has a dismal record in criminal cases", while Professor Glanville Williams suggested that its criminal jurisdiction should be transferred to the Court of Appeal Criminal Division ("CACD").[8]

14.4 A criminal case may reach the Supreme Court on appeal by the defendant or the prosecution from the CACD or on appeal from the High Court (for instance, where it had heard the case on appeal by way of case stated or judicial review). Section 18(1)(a) of the Senior Courts Act 1981 (which reproduces a provision introduced in the

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1 Constitutional Reform Act 2005, s 38.

2 Above, s 39.

3 Above, s 42.

4 [1962] AC 528, HL – the House confirmed that misprision (failing to report) a felony was an offence at common law. It was abolished by the Criminal Law Act 1967.

5 [1962] AC 220, HL – the House asserted that there is an offence of conspiracy to corrupt public morals.

6 [1961] AC 290, HL – the House ruled that a person is held to intend the natural and probable consequences of their actions. Parliament overturned this in the Criminal Justice Act 1967.

7 A T H Smith, "Criminal Appeals in the House of Lords" (1984) 47 *Modern Law Review* 133.

8 G Williams, "Recklessness and the House of Lords" (1981) Criminal Law Review, 580.

Supreme Court of Judicature Act 1873) provides that there is no right of appeal to the Court of Appeal Civil Division "in a criminal cause or matter"; this means that where the High Court has a role in relation to criminal proceedings, the only appeal from that decision is to the Supreme Court.

14.5 The ability to appeal a criminal case to the Supreme Court is restricted. Where appeals lie from the High Court or the CACD, leave is required, and this can only be granted if the lower court certifies that the case involves a point of law of general public importance.[9]

14.6 In addition to the routes described in paragraph 14.4 above, there are at least three other ways in which Supreme Court justices may find themselves making rulings which may affect the criminal law of England and Wales.

14.7 First, the Supreme Court may make rulings in a civil case which touch equally on matters of criminal law. An example of this is the Court's ruling in the civil case *Ivey v Genting*,[10] which reformed the test for dishonesty. This was then accepted by the CACD in *Barton and Booth*[11] as binding the CACD in criminal law. Another example would be where a case about civil liability involved questions of criminal liability.[12]

14.8 Second, the Supreme Court hears Northern Irish criminal appeals. The law governing appeals to the Supreme Court is the same in Northern Ireland as in England and Wales. The Northern Ireland Court of Appeal must also certify that a point of law is of general public importance before the appeal can proceed.[13] However, despite the test being the same, appeals from the Northern Irish criminal courts are much more frequent, relative to total case numbers, than from those of England and Wales. These appeals will often turn on interpretation of statutory provisions which extend to both England and Wales or Northern Ireland, or to statutory provisions or common law rules which are the same in both jurisdictions.

14.9 Third, Supreme Court judges frequently rule in criminal appeals from jurisdictions outside England and Wales as members of the Judicial Committee of the Privy Council ("JCPC").[14] Members of the Supreme Court may sit simultaneously as both

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9 Administration of Justice Act 1960, s 1, in respect of appeals from the High Court. Criminal Appeal Act 1968, s 33 in respect of appeals from the CACD. In addition to the certification requirement, leave to appeal is also required. See para 14.20 and following below.

10 *Ivey v Genting Casinos Ltd t/a Crockfords* [2017] UKSC 67, [2018] AC 391.

11 *R v Barton and Booth* [2020] EWCA Crim 575, [2021] QB 685.

12 See, for instance, the recent Court of Appeal Civil Division case of *Lewis-Randall v G4S Health Services* [2024] EWCA Civ 138, [2024] KB 745, which concerned the consequences of a verdict of not guilty by reason of insanity for the defence of illegality in civil proceedings. The court was required to determine what culpability (if any) a person had for the purposes of civil proceedings, as a consequence of a finding of not guilty by reason of insanity (a verdict in criminal proceedings). The Court held that unlike a finding of diminished responsibility, where some degree of responsibility is retained, a finding of insanity extinguishes criminal liability, and therefore the defence of illegality cannot be raised where the conduct would have been unlawful but for the fact that the person was found not guilty by reason of insanity.

13 Administration of Justice Act 1960, s 18(4) and sch 2.

14 The JCPC acts as the final criminal court of appeal for the Commonwealth Realms of Antigua and Barbuda, Grenada, Jamaica, St Kitts and Nevis, Saint Vincent and the Grenadines, and Tuvalu; for the Cook Islands

the Supreme Court and the JCPC, as for instance in the combined case of *Jogee* (an appeal to the Supreme Court from the CACD) and *Ruddock* (an appeal to the Privy Council from the Court of Appeal of Jamaica).[15]

14.10 Under the rule established in *Willers v Joyce*,[16] in one very limited circumstance, it is open to justices of the Supreme Court, sitting in the JCPC, to make binding rulings on the law of England and Wales.[17]

The Privy Council

14.11 Although the JCPC is now co-located with the Supreme Court, and shares a Secretariat, formally the membership of the JCPC is broader, namely all Privy Counsellors who hold or have held high judicial office in the United Kingdom. In practice, panels are drawn from the Supreme Court justices and either senior British judges or senior judges from Commonwealth jurisdictions.

14.12 In the combined Supreme Court/JCPC cases of *Jogee and Ruddock*,[18] the panel included four justices of the Supreme Court, along with the Lord Chief Justice of England and Wales (sitting as an acting member of the Supreme Court and as a member of the JCPC in his own right).

14.13 The right of appeal to the JCPC depends on which Commonwealth country the appeal is coming from. In most countries, appeals are "as of right" which means that there is no permission requirement.[19] If there is no appeal as of right in the country, unlike the Supreme Court, the JCPC has complete discretion to grant leave to appeal. It does not require the court below to certify that a point of law of general public importance is involved. Instead, the test is whether "there is a risk that a serious miscarriage of justice may have occurred".[20]

The position in Scotland

14.14 The Supreme Court has only a limited role in relation to Scottish criminal cases. Appeals in criminal cases from Scotland are only possible where the case requires determination of a 'devolution issue' (for instance where legislation creating the offence is argued to have been outside the competence of the Scottish Parliament) or a 'compatibility issue', where the prosecution is argued to have breached the

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and Niue; for the republics of Trinidad and Tobago, Dominica, Kiribati, and Mauritius; and for the UK's Overseas Territories and Crown Dependencies.

15 *R v Jogee, Ruddock v The Queen* [2016] UKSC 8, [2016] UKPC 7, [2017] AC 387.

16 [2016] UKSC 44, [2018] AC 843.

17 This is where the Privy Council is invited to depart from a decision of the House of Lords, the Supreme Court or the Court of Appeal of England and Wales on a question of English law. It applies where, despite the fact that the jurisdiction from which the appeal has been brought to the Privy Council is not England and Wales, the issue is a question of English law (not where the law in that jurisdiction is merely the same as the law of England and Wales). The President of the Judicial Committee could take that into account when deciding on the composition of the panel and it would be open to the members of that panel to direct that their decision should be taken as representing the law of England and Wales.

18 [2016] UKSC 8, [2016] UKPC 7, [2017] AC 387.

19 Rt Hon Lady Rose of Colmworth, "An evolving Institution: The work of the Judicial Committee of the Privy Council" (21 February 2024).

20 Practice Direction 3.3.3(b) of the JCPC Rules and Practice Directions.

defendant's rights under the European Convention of Human Rights ("ECHR").[21] When hearing a case determining a 'compatibility issue', the Supreme Court must determine the 'compatibility issue' and then remit the case to the High Court of Justiciary. This mechanism is intended to preserve the position of the High Court of Justiciary as the supreme court of criminal law in Scotland.

Appeals to the Supreme Court from the High Court

14.15 Under the Senior Courts Act 1981, section 18(1)(a), no appeal lies to the Court of Appeal from the High Court in any "criminal cause or matter".

14.16 An appellant or the respondent may appeal against a decision of the High Court to the Supreme Court, where leave to appeal has been granted by the High Court or the Supreme Court.[22] Leave to appeal must only be granted by the courts where:[23]

(1) the High Court has certified that the appeal involves a point of law of general public importance; and

(2) it appears to the court that the point ought to be considered by the Supreme Court.

14.17 The party seeking to appeal against the decision of the High Court must apply to the High Court for leave to appeal within 28 days, beginning with:[24]

(1) the date of the court's decision; or

(2) where reasons are given by the court after its decision, the date on which the court gives its reasons.

14.18 Where the application for leave to appeal is refused by the High Court, leave may be sought from the Supreme Court within 28 days beginning with the date on which leave is refused by the High Court.[25] The High Court or the Supreme Court may extend the time limit where the defendant applies for an extension of time.[26]

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21 The notion of a "compatibility issue" was introduced by the Scotland Act 2012. The Lord Advocate is required by the Scotland Act 1998 to act compatibly with the Convention rights, including when bringing a prosecution. Before the 2012 Act, this meant that a prosecution could be challenged as a devolution issue before the Supreme Court, by arguing that the prosecution was outside the power of the Lord Advocate. The Scotland Act 2012 provides that an act of the Lord Advocate as prosecutor cannot be challenged in this way. Instead, such questions are to be addressed as a "compatibility issue". Leave of the High Court of Justiciary is required (unless it is referred by the High Court itself, the Lord Advocate or the Advocate General).

22 Administration of Justice Act 1960, ss 1(1) and (2).

23 Above, s 1(2).

24 Above, ss 2(1) and (1A).

25 Above, s 2(1).

26 Above, s 2(3).

14.19 For the purposes of the appeal, the Supreme Court may exercise any powers of the High Court or remit the case to the High Court.[27]

Appeals to the Supreme Court from the Court of Appeal Criminal Division

14.20 An appellant or the respondent may appeal against the decision of the CACD in respect of the appeal against conviction or sentence to the Supreme Court, where leave to appeal has been granted by the CACD or the Supreme Court.[28] Leave to appeal must only be granted where:[29]

(1) the CACD has certified that the appeal involves a point of law of general public importance; and

(2) it appears to the court that the point ought to be considered by the Supreme Court.

14.21 The party seeking to appeal against the decision of the CACD must apply to the CACD for leave to appeal within 28 days, beginning with:[30]

(1) the date of the court's decision; or

(2) where reasons are given by the court after its decision, the date on which the court gives its reasons.

14.22 It would appear that it is relatively common practice for the lower court to certify a point but then to refuse permission to appeal, thus necessitating an application to the Supreme Court". *Taylor on Criminal Appeals* argues that "it is somewhat difficult to see the logic [of this practice] other than to allow the Supreme Court to regulate the cases that come before it".[31]

14.23 Our understanding is that this is indeed the explanation: certifying a question but refusing leave allows the Supreme Court to come to its own decision whether the case raises an issue with which it wishes to deal.

14.24 A recent example supporting this is the appeal of Tom Hayes and Carlo Palombo who were both convicted of conspiracy to defraud in respect of setting the Libor and Euribor interest rate averages for banks. The Criminal Cases Review Commission ("CCRC") referred the cases of both appellants to the CACD. The CACD ultimately dismissed the appeals.[32] On the appellants' application, it certified a point of law of general public importance, but refused leave to appeal upwards because:[33]

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27 Above, s 1(4).

28 Criminal Appeal Act 1968, ss 33(1) and (2).

29 Above, s 33(2).

30 Above, ss 34(1) and (1A).

31 *Taylor on Criminal Appeals* (3rd ed 2022) para 15.15.

32 *R v Hayes* [2024] EWCA Crim 304, [2024] 2 Cr App R 6.

33 *R v Hayes* [2024] EWCA Crim 666 at [2], by Bean LJ. The question certified was:

It should be for the Supreme Court to decide whether the point of law is one which it ought to consider in the light of the consistent series of decisions of the Court of Appeal.

14.25 Where the case has been certified but the application for leave to appeal to the Supreme Court is refused by the CACD, it may not be renewed to the CACD.[34] In such circumstances, leave must be sought from the Supreme Court within 28 days beginning with the date on which leave is refused by the CACD.[35] The CACD or the Supreme Court may extend the time limit where the person who appealed against their conviction or sentence to the CACD applies for an extension of time.[36]

14.26 For the purpose of the appeal, the Supreme Court may exercise any powers of the CACD or may remit the case to the CACD.[37]

14.27 The Criminal Appeal Act 1968 only includes a provision relating to appeals against conviction and sentence.[38] However, provisions relating to other appeals before the CACD are included in the Criminal Justice Act 2003 (prosecution appeals against "terminating" rulings), section 35 of the Criminal Procedure and Investigations Act 1996 (appeals against rulings in preparatory hearings), section 47 of the Criminal Justice Act 2003 (appeals against decisions to proceed without a jury), and section 76 of the Criminal Justice Act 2003 (appeals against decisions on an application to quash an acquittal where there is compelling new evidence).

Importance of appeals to the Supreme Court

14.28 Appeals to the Supreme Court are important for the development of the common law, since the CACD itself will be bound by previous rulings of the Supreme Court or its predecessor, the Judicial Committee of the House of Lords.[39] This is of even greater

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Whether as a matter of law upon the proper construction of the [London Interbank Offered Rate ("LIBOR")] and [Euro Interbank Offered Rate ("EURIBOR")] definitions: a) if a LIBOR or EURIBOR submission is influenced by trading advantage, it is for that reason not a genuine or honest answer to the question posed by the definitions; and b) the submission must be an assessment of the single cheapest rate at which the panel bank, or a prime bank, respectively, could borrow at the time of submission rather than a selection from within a range of borrowing rates.

The Supreme Court granted leave to appeal on 22 July 2024.

34 *R v Ashdown* [1974] 1 WLR 270, CA, 274E, by Edmund Davies LJ.

35 Criminal Appeal Act 1968, s 34(1).

36 Above, s 34(2).

37 Above, s 35(3).

38 Above, s 33.

39 The CACD is also bound by its own previous rulings in most circumstances. See a discussion of the doctrine of precedent in the CACD in *R v Hayes* [2024] EWCA Crim 304, [2024] 2 Cr App R 6 at [84], by Bean and Popplewell LJJ and Bryan J. The main exceptions are (i) where the previous decision conflicts with another previous decision of the CACD; (ii) where the previous decision cannot stand with a decision of the House of Lords or Supreme Court although not expressly overruled (including where there is in effect an instruction by the Supreme Court not to follow the previous decision, albeit strictly *obiter**); and (iii) where the previous decision was reached *per incuriam***. The CACD also has an additional flexibility in criminal cases where the liberty of the subject is in issue, where departing from a previous decision is necessary in the interests of justice because the law had been misapplied or misunderstood.

importance where there may be a divergence in opinions or court rulings regarding the same subject matter from the CACD or the High Court.

14.29 In addition, it will generally only be the Supreme Court which can reconcile conflicts between settled matters of criminal and civil law. In *Ivey v Genting*,[40] the Supreme Court itself drew attention to the fact that although the test for dishonesty in criminal law was ripe for consideration, it was unlikely to reach the Supreme Court in order to be reformed, not least because the then existing test in *Ghosh* favoured defendants.[41] Therefore, the most common route for a criminal case to reach the Supreme Court – an unsuccessful appeal against conviction in the CACD by a convicted person followed by an appeal to the Supreme Court – was not viable:[42]

> Dishonesty is a simple, if occasionally imprecise, English word. It would be an affront to the law if its meaning differed according to the kind of proceedings in which it arose. It is easy enough to envisage cases where precisely the same behaviour, by the same person, falls to be examined in both kinds of proceeding. In *Starglade Properties* Leveson LJ drew attention to the difference of test as between civil cases and criminal cases, and rightly held that it demanded consideration when the opportunity arose.[43] Such an opportunity is unlikely to occur in a criminal case whilst *Ghosh* remains binding on trial judges throughout the country.

14.30 The Supreme Court sought to reform the criminal law through a judgment in a civil case, recognising that it was highly unlikely that any criminal case on the issue could reach it otherwise.

14.31 In addition, only the Supreme Court can resolve conflicts between the law of England and Wales and that of Scotland or Northern Ireland. This issue is more likely to arise in respect of Northern Ireland since its criminal law and procedure more closely resemble that of England and Wales.

14.32 The Royal Commission on Criminal Justice ("the Runciman Commission")[44] recommended that the requirement for the CACD to certify that the case raises a point of law of general public importance should be removed, saying that "it is unduly restrictive to require such a certificate to be issued in addition to the necessity of obtaining leave from the Court of Appeal or the House of Lords itself".[45]

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* *Obiter dictum* – "other things said" – refers to parts of a judgment which are not a necessary part of the judgment, and therefore not strictly binding.

***Per incuriam* – "through a lack of care" – means that the ruling was made in ignorance of a relevant provision or authority.)

40 [2017] UKSC 67, [2018] AC 391.

41 *R v Ghosh* [1982] QB 1053, CA.

42 *Ivey v Genting* [2017] UKSC 67, [2018] AC 391 at [63], by Lord Hughes JSC.

43 *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314, [2011] Lloyd's Rep FC 102.

44 See paras 2.54-2.57.

45 Report of the Royal Commission on Criminal Justice (1993) Cm 2263, p 178, para 79.

14.33 One of the primary arguments advanced against more criminal appeals going to the Supreme Court is that the Court lacks specific criminal knowledge.[46] In a recent article, legal journalist Catherine Baksi noted that "there are no specialist criminal judges on the Supreme Court, although the justices will have had experience dealing with criminal matters as members of the judicial committee of the privy council".[47] This prompted a response from Lord Reed, President of the Supreme Court, stating that although "the court does not include any judges whose experience has been confined to criminal law … the criminal expertise of our highest court is wide and deep: the 12 justices have, between them, about 180 years of experience in criminal law".[48]

14.34 As noted at paragraphs 14.6 to 14.9 above, there already exist three routes by which criminal proceedings may reach the Supreme Court or the JCPC (which typically constitutes Supreme Court Judges) beyond the normal route of appeal from the High Court where the case involves a criminal matter. Arguably, the matters which the JCPC must determine are even more complex given the need to consider the law that applies in the relevant foreign jurisdiction. Moreover, at times it has been required to make decisions of constitutional significance including on matters such as the death penalty.[49] JCPC decisions are not only binding on the jurisdictions to which they apply but have precedential value in England and Wales.[50]

14.35 We consider that the judges of the Supreme Court have both the expertise and experience to decide criminal matters.

CONSULTATION RESPONSES

14.36 In the Issues Paper we briefly discussed appeals to the Supreme Court and asked:[51]

> Does the law satisfactorily enable appropriate criminal cases to be considered by the Supreme Court? (Question 9)

14.37 The vast majority of respondents thought that the current rules prevented cases from reaching the Supreme Court. A number of consultees considered it unduly restrictive

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46 For example, a commentator on *R v Smith* [2011] UKSC 37, [2011] 1 WLR 1795 said in *Criminal Law Week* (CLW/11/28/16):

> It is submitted, with respect, that the court's conclusion on the first point flies in the face of the practice of judges and the approach of the Court of Appeal over the six years since section 225 of the [Criminal Justice Act] 2003 … came into force. This was a decision of five justices, none of whom have any significant criminal experience (although Lord Phillips was, of course, Lord Chief Justice for three years). It is barely conceivable that they could have come to this conclusion had they had greater familiarity with the mass of case law on the dangerousness provisions.

47 C Baksi, "Appeal court in dock over crime cases", *The Times* (11 April 2024).

48 Rt Hon Lord Reed of Allermuir, "Supreme expertise", *The Times* (13 April 2024).

49 *Chandler v State of Trinidad and Tobago* [2022] UKPC 19, [2023] AC 285. In this case the JCPC had to determine whether the death penalty for any person convicted of murder was contrary to the Constitution adopted by Trinidad and Tobago.

50 *Willers v Joyce* [2016] UKSC 44, [2018] AC 843 at [12], by Lord Neuberger of Abbotsbury PSC. The Supreme Court acknowledged that whilst the UKPC has no binding authority, given the identity of those who sit on it and the fact that it will often consider common law issues, any decision should be considered "as being of great weight and persuasive value".

51 Law Commission, Criminal Appeals: Issues Paper (July 2023).

that the Supreme Court could not itself certify criminal law points of general public importance. Most of these consultees thought that this should be a matter for the Supreme Court and not the CACD.

14.38 Whilst a number of consultees focused their responses on appeals to the Supreme Court from the CACD, we recognise that the arguments put forward have equal force in appeals from the High Court to the Supreme Court. We discuss our concerns along with the concerns of consultees below.

The lower court's effective control

14.39 While both the Supreme Court and the appellate court itself (whether the High Court or the CACD) may give leave to appeal to the Supreme Court, leave can only be given if the appellate court has certified that the appeal involves a question of law of general public importance. This means that, in practice, the appellate court can control appeals to the Supreme Court by declining to certify a point of law of general public importance.

14.40 In the Northern Ireland case of Anthony MacIntyre, the appellant sought to establish that the Supreme Court had jurisdiction to hear an appeal despite the Divisional Court refusing to certify a question.[52] Although the Supreme Court heard the application on a provisional basis, it held that it had no jurisdiction to hear the appeal.[53]

14.41 In civil proceedings, there is no such requirement. An appeal lies from the Court of Appeal to the Supreme Court: leave is required, but the Court of Appeal Civil Division does not need to first certify the case.[54]

14.42 In Proceeds of Crime Act 2002 proceedings, an appeal lies from an order of the CACD under section 31 (appeal by prosecutor or by a person with an interest in the property)[55] or section 43 (appeal by person who applied for an order for restraint).[56] No certification is necessary for these specific classes of appeal. This may explain the relatively large number of appeals heard by the Supreme Court which have concerned proceeds of crime proceedings. (Although at least some have been heard by the Supreme Court as a result of a question certified by the CACD.)[57] These provisions, however, do not apply to the person who has been convicted.

14.43 The fact that appellants in criminal proceedings (and, in particular, convicted persons) face an additional hurdle to those in civil proceedings raises issues of fairness under

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52 MacIntyre, a former member of the IRA who had been convicted of murder, attempted murder and hijacking, was seeking to challenge a ruling that the Police Service of Northern Ireland might access interviews he had given as part of an oral history project in the United States. The interviews had taken place on the understanding that access would be restricted until after his death (*In the matter of an application by Anthony McIntyre for judicial review* [2018] NIQB 79.

53 See *In the matter of an application by Anthony McIntyre for Judicial Review (Northern Ireland)* UKSC 2019/0031 (currently awaiting judgment).

54 Constitutional Reform Act 2005, s 40.

55 Proceeds of Crime Act 2002, s 33.

56 Above, s 44.

57 For instance, *R v Andrewes* [2022] UKSC 24, [2022] 1 WLR 3878; *R v Harvey* [2015] UKSC 73, [2017] AC 105; *R v Waya* [2012] UKSC 51, [2013] 1 AC 294; *R v Varma* [2012] UKSC 42, [2013] 1 AC 463.

human rights laws. Barrister Christopher Knight has pointed out that the European Court of Human Rights has strongly suggested that being a convicted person constitutes a "status" for the purposes of the right not to be discriminated against under article 14 of the ECHR[58] and argues that a criminal appellant and a civil appellant seeking to appeal from the Court of Appeal to the Supreme Court are in a "comparable situation".[59] Accordingly, the difference in treatment requires objective justification. He concludes:[60]

> Apart from it having been that way since 1960, there is no objective justification for the additional bar of certification in criminal appeals … It cannot be seriously suggested that their Lordships in Parliament Square will be unable to spot when an issue of fact is being disguised as a point of law without the benefit of a certificate from the court below. Precisely the same issue arises in civil appeals.

14.44 A number of consultees argued that it should be the Supreme Court who determines which appeals they hear, rather than a lower court. For example, the Bar Council provided the following additional reasons justifying why certification should lie with the Supreme Court or, in the alternative, there should be an additional route of certification by the Supreme Court:

(1) The Supreme Court has the task of considering, clarifying and if necessary correcting errors of law, that would otherwise become the "currency" in the lower courts. Without such intervention, this may lead to a significant number of miscarriages of justice. Consequently, failing to provide an alternative/additional direct route risks leaving such errors uncorrected.

(2) At present, the only alternative methods of challenging a decision after a refusal to certify are by way of an application to the [European Court of Human Rights ("ECtHR")] (which involves a significant delay), or an application to the CCRC (which may be hampered by the CCRC's unwillingness to refer a case on the same or similar grounds as those already argued).

(3) The right of direct access to the highest appellate court exists elsewhere – for example in the USA, Canada and Hong Kong.

(4) Over the past year, only 2% of all matters filed in the Supreme Court were criminal cases, according to research from Thomson Reuters (reported in *The Times* on 26 October 2023).[61] Any increase in the number of criminal cases considered would not, therefore, be likely to meaningfully increase the court's burden.

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58 *Shelley v UK* (2008) 46 EHRR SE16 (App No 23800/06).

59 Against this, it might be noted that the requirement for the appellate court to certify a question for the Supreme Court also applies when it is the prosecution seeking to appeal the decision. If applicable comparator is the prosecution, there is arguably no discrimination.

60 C J S Knight, "Second Criminal Appeals and the requirement of certification" (2011) 127 *Law Quarterly Review* 188, 191.

61 "Number of cases filed in the UK Supreme Court increases by 23%", *Solicitors Journal* (31 October 2023).

14.45 The Crown Prosecution Service ("CPS") also agreed that certification by the appellate court may not be necessary. It considered that the requirement to obtain leave, either from the Supreme Court or the CACD would be a sufficient filter.

14.46 The Law Society suggested that "[t]here is an argument that there should be an appeal against a decision of the CACD not to certify a point of general public importance".

14.47 Members of 23 Essex Chambers considered it "telling that one of the most significant modern Supreme Court rulings on the substantive criminal law did not arise from a criminal case (*Ivey v Genting Casinos*)".

14.48 APPEAL cited the Runciman Commission's view that the certification requirement was "unduly restrictive",[62] arguing that it makes it too difficult for appeals to reach the Supreme Court, which "not only hinders the development of the common law, but also deprives the Court's decision-making from an important layer of scrutiny and challenge from above". APPEAL supported the Commission's recommendation that there should be a right of appeal to the Supreme Court that is only regulated by the need for leave to appeal from either the CACD or the Supreme Court.[63]

14.49 The London Criminal Courts' Solicitors Association ("LCCSA") and Criminal Appeals Lawyers Association ("CALA") pointed to the case of *VCL*,[64] to support the argument that the current arrangement is too restrictive. In that case, the CACD had declined to certify a point of law of general public importance (relating to defences available to victims of human trafficking) meaning that the case could not be considered by the Supreme Court. Instead, the appellant took the case to the ECtHR, which held that there had been breaches of article 4 and article 6 of the ECHR.

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62 Report of the Royal Commission on Criminal Justice (1993) Cm 2263, p 178 at para 79 (this was in reference to the House of Lords as it then was).

63 Above.

64 In *R v Joseph* [2017] EWCA Crim 36, [2017] 1 WLR 3153 the CACD considered five appeals brought (or referred by the CCRC) on the basis of the law of compulsion in respect of victims of human trafficking for the purposes of exploitation. This was before the implementation of the Modern Slavery Act 2015, which created new defences where the offending was attributable to compulsion as a result of trafficking. Two appellants – VCL and AN – were Vietnamese nationals, both aged 17, who had separately been arrested in 2009 for cultivation of cannabis. The CACD rejected VCL's claim that, had the prosecution applied its policy towards victims of trafficking correctly, it would have concluded that his prosecution was not in the public interest.

VCL requested that the CACD certify two questions for the Supreme Court: whether the exercise of discretion by the CPS as to whether to prosecute a child found by the Single Competent Authority to be the victim of trafficking exhausted the UK's obligations under domestic and international law for that child; and on what standard of proof the CPS had to find the child a credible victim of trafficking for the child not to be prosecuted. The CACD refused to certify either question.

VCL then took the case to the European Court of Human Rights, arguing that their rights under article 4 (prohibition of slavery and forced servitude) and article 6 (right to a fair trial) had been breached. The ECtHR found violations of both articles. They concluded that the CPS had not shown clear reasons for departing from the conclusion of the Competent Authority that the two were victims of trafficking; that "in so far as any reasons could be gleaned, as the Competent Authority had pointed out, they went to peripheral issues"; and that "the Court of Appeal … appeared to have relied on the same reasons". *VCL and AN v UK* (2021) 73 EHRR 9 (App Nos 77587/12 and 74603/12) at [170].

Garwood: No appeal to the Supreme Court where the CACD refuses to hear a case

14.50 In *Garwood*,[65] the CACD ruled that it cannot certify a point of law of general public importance where it has refused leave to hear the appeal: an appeal can only be taken to the Supreme Court against a decision on the substantive appeal, not a decision not to grant leave to appeal.

14.51 Because of the way that the Court applies the "substantial injustice" test to out-of-time appeals based on a change of law, which was discussed in Chapter 10, this means that such cases – including those arising from the change of law relating to joint enterprise in *Jogee* – cannot be appealed to the Supreme Court. However, were the CACD to apply the "substantial injustice" test to reject an appeal referred by the CCRC, using the power the Court has under section 16C of the Criminal Appeal Act 1995, there would be a determination capable of appeal to the Supreme Court. In reality, the CCRC is unlikely to refer such a case – it would have to be satisfied that there was a real possibility that CACD would be willing to find the "substantial injustice" threshold had been met.

14.52 Writing in the context of the "substantial injustice" test, Professor David Ormerod and Dr Hannah Quirk have described the CACD's decision in *Garwood* as "a very narrow interpretation of its powers under the Criminal Appeal Act 1968 s.33(2) — something that is also worthy of review by the Law Commission".[66]

14.53 In practice, the issue is only likely to arise in relation to decisions on whether to grant leave to appeal out of time, where the test is one of the "interests of justice". When considering the substantive decision on whether to allow an appeal, the test is whether the applicant's case is arguable; it is hard to conceive of circumstances where the Court felt that the case was not arguable, yet it also involved a question of law of general public importance.

14.54 A number of consultees raised *Garwood* in their responses. APPEAL argued that the decision "narrows the right of appeal to the Supreme Court to an even more unacceptable degree".

14.55 The LCCSA observed:

> It is also notable that in some renewed applications for leave to appeal, although full argument is heard in the renewal, the Court of Appeal will often refuse leave to appeal, rather than grant leave and refuse the appeal. This further limits the ability of an appellant to argue that a point of law of general public importance arises.

Berry: appeals to the Supreme Court where a conviction is quashed on one or more grounds, leaving other grounds unaddressed.

14.56 In *Berry*, the defendant was convicted of making explosive substances in circumstances which gave rise to a reasonable suspicion that they were not being

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65 *R v Garwood* [2017] EWCA Crim 59, [2017] 1 WLR 3182.

66 D Ormerod and H Quirk, "Reforming Criminal Appeals" [2022] *Criminal Law Review* 791, 792. This is explored further in Chapter 10.

made for a lawful object.[67] The Crown alleged that he and his co-accused, Smith, were making timers to be used by terrorists in the construction of timed bombs abroad. The Crown's expert witness told the court that he was of the opinion that the timers "have most probably been specifically designed and constructed for terrorist purposes. I am unable to contemplate their use other than in a bombing context".

14.57 Berry was convicted, and sentenced to eight years' imprisonment, but the jury could not agree in respect of Smith. Smith was retried, but the judge ruled that "not for a lawful object" could only refer to unlawful objects within the jurisdiction of England and Wales; the prosecution then offered no evidence.

14.58 Berry, understandably aggrieved that his co-accused had been acquitted on grounds equally applicable to him, appealed to the CACD on this, and other grounds. The other grounds included issues relating to the expert's evidence.

14.59 The CACD agreed with the trial judge that "lawful object" was constrained in this way and quashed Berry's conviction. In consequence, it did not rule on Berry's other grounds of appeal.

14.60 The Crown appealed against this decision and the CACD certified the appeal as involving a point of general public importance. The House of Lords gave leave to appeal. They ruled that "lawful object" was not constrained in this way and restored Berry's conviction.[68]

14.61 Berry then sought to have the CACD consider the grounds of appeal which it had not considered as a result of deciding in his favour on the first ground.[69] The CACD held that it did not have jurisdiction to reconsider an appeal in this way, nor to allow a further appeal. Despite finding that it could not say that the House of Lords *would* have been prepared to consider grounds outside the certified question, had it been asked to do so, the CACD considered that Berry had had an adequate remedy to the CACD's failure to address his remaining grounds because the House of Lords *could* have considered them.

14.62 Following this, the Home Secretary referred Berry's case back to the CACD in 1993 (this power was transferred to the CCRC under the Criminal Appeal Act 1995). The CACD held that the expert had been "extremely dogmatic" and quashed Berry's convictions.[70]

14.63 The Lord Chief Justice, giving the judgment, noted that while it may have been open to the House of Lords to consider the grounds which had not been addressed in the CACD, "[i]t may well be that the House of Lords would have been reluctant to consider other grounds, particularly any turning on questions of fact, or involving fresh evidence". He suggested that:[71]

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67 *R v Berry (No 1)* [1984] 1 WLR 824, CA, reversed in [1985] AC 246, HL.

68 [1985] AC 246, HL.

69 *R v Berry (No 2)* [1991] 1 WLR 125, CA.

70 *R v Berry (No 3)* [1995] 1 WLR 7, CA, 15F, by Lord Taylor of Gosforth CJ.

71 Above, 17F-G.

Parliament clarify the position by giving the House of Lords power, either to consider any unresolved grounds additional to the certified point, or to remit them for consideration by this court. Consideration should also be given to granting this court power to reserve argument on unresolved grounds with liberty to apply when allowing an appeal on one point and certifying it for the House of Lords.

14.64 Although the House of Lords had – and the Supreme Court has – a power to remit a case back to the CACD, this is only for the purpose of "disposing of an appeal". In *Attorney-General for Northern Ireland v Gallagher*,[72] Lord Reid noted that this did not "authorise a remit to the court below directing it to reopen and rehear the case".

14.65 The ruling in *Berry* means that where the CACD quashes a conviction on one ground and therefore does not address the outstanding grounds, if the prosecution appeals to the Supreme Court, the (so far successful) appellant must seek to revive those grounds. This is so even though those grounds will not be among those for which leave has been given and may not relate to the question of law of general public importance in question. It would then be open to the Supreme Court either to address the outstanding grounds or to remit the case back to the CACD to address them.[73]

14.66 If the Supreme Court does not hear these grounds or remit the case to the CACD to do so, then arguable grounds of appeal will not have been addressed, even though leave had been given to argue them before the CACD. This is particularly problematic in a case such as *Berry* where the effect is to restore a conviction against which there were arguable but unaddressed grounds of appeal.

14.67 The appellant's only recourse would be to apply to the CCRC to refer the case back to the CACD. However, the remaining grounds would not pass the requirement that there must be "an argument, or evidence, not raised in the proceedings which led to it or on any appeal"; the arguments would have been raised, just not addressed. Consequently, it would be necessary to persuade the CCRC to refer the case under section 13(2) of the Criminal Appeal Act 1995, which permits the CCRC to make a reference in the absence of fresh evidence or argument "where there are exceptional cases which justify making it".

OTHER JURISDICTIONS

Ireland

14.68 In the Republic of Ireland, until 2014, an appeal to the Supreme Court from the Court of Criminal Appeal lay only where the Court of Criminal Appeal or the Attorney General certified that "the decision 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".[74]

14.69 In 2014, a Court of Appeal covering both civil and criminal appeals was created. (Before this, although there was a Court of Criminal Appeal, civil cases were appealed direct from the High Court to the Supreme Court). The legislation implementing this

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72 [1963] AC 349, HL, 366, by Lord Reid.

73 *R v Mandair* [1995] 1 AC 208, HL.

74 Courts of Justice Act 1924, s 29.

change provides that the Supreme Court has jurisdiction over a decision of the Court of Appeal if the Supreme Court is satisfied that (i) the decision involves a matter of general public importance or (ii) it is necessary in the interests of justice that there be an appeal to the Supreme Court. It is also possible for the Supreme Court to give leave for a 'leapfrog' appeal direct from the High Court to the Supreme Court if (i) the decision involves a matter of general public importance or (ii) it is in the interests of justice to do so.[75]

14.70 Thus, the reform of 2014 has both transferred the decision-making power from the appellate court to the Supreme Court and extended the grounds for the Supreme Court to hear an appeal to include a general "interests of justice" consideration.

New Zealand

14.71 In 2004, the Supreme Court of New Zealand was established which became the highest court and final court of appeal in New Zealand (in place of the JCPC). [76]

14.72 Appeals to the Supreme Court may be heard by the Court's own leave.[77] Leave will be granted where the Court is satisfied it would be in the interests of justice for the appeal to be heard and determined it.[78] In criminal proceedings, this will include where "the appeal involves a matter of general or public importance" or "a substantial miscarriage of justice may have occurred, or may occur unless the appeal is heard".[79]

Canada

14.73 Whilst Canada is a federation, the Supreme Court of Canada is the final appeal court and may hear appeals from both the federal court system and the provincial court systems. The criminal law is governed by federal law and is set out in the *Criminal Code*, although its administration is a matter for the provinces and territories.[80]

14.74 Under section 691 of the Criminal Code, a person whose conviction has been affirmed by a provincial court of appeal or the Federal Court of Appeal may appeal to the Supreme Court of Canada on:

(a) any question of law on which a judge of the court of appeal dissents; or

(b) any question of law, if leave to appeal is granted by the Supreme Court of Canada.

Australia

14.75 In Australia, each State and Territory has its own court system, however, the apex court that hears all final appeals from the State and Territory Supreme Courts is the

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75 Constitution of Ireland, article 34.5.3°.

76 Supreme Court Act 2003 (NZ).

77 Senior Courts Act 2016 (NZ), s 73.

78 Above, s 74.

79 Above, ss 74(2)(a) and (b).

80 Constitution Act 1867 (Canada), ss 91-92.

High Court of Australia.[81] Such appeals require the granting of leave from the High Court itself.[82] In determining leave, the High Court "may have regard to any matters that it considers relevant".[83] However, the Court must consider whether the proceedings involve a question of law which is of public importance or is required to resolve differences of opinion between other courts and it would be in the interests of the administration of justice to do so.[84]

USA

14.76 One consultee, Dr Jackson Allen, argued that the current arrangements were broadly satisfactory but sought to compare the United Kingdom Supreme Court to the approach in the United States:

> It is worth pointing out that the position with respect to criminal appeals and supreme courts is similar in other jurisdictions. For example, in the US an appeal against conviction at state level (criminal law is primarily reserved for states, rather than the federal government) can only reach the US Supreme Court if it raises an issue of federalism or US constitutional law.

14.77 Federalism in the United States makes comparison difficult. However, in relation to matters governed by state (rather than federal) criminal law, each state has its own Supreme Court, and a case will normally have gone through at least two state appeals before an appeal can be made to the US Supreme Court. In criminal appeals in England and Wales, the Supreme Court provides the second (rather than third) level of appeal in those cases that it hears.[85]

DISCUSSION

A court of law

14.78 As noted above, in Ireland, New Zealand and Australia (but not Canada), the highest court of appeal may determine appeals where it considers it would be in the interests of justice or that a miscarriage of justice may have occurred. Appeals are not necessarily limited to a point of law. That said, it is recognised that in Ireland and Australia, there is no body comparable to the CCRC to refer a case back to the appellate court.

14.79 Many consultees, including the Law Society, solicitor Mark Newby and JENGbA were of the view that appeals to the Supreme Court should remain on a point of law only.

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81 The High Court may also hear appeals from the Family Court of Australia as well as the Federal Court of Australia.

82 Judiciary Act 1903 (Cth), s 35AA.

83 Above, s 35A.

84 Above, s 35AA.

85 We have identified one scenario where the UK Supreme Court would be hearing a third appeal: this is where a person appeals from the magistrates' court to the Crown Court, and then appeals the decision of the Crown Court to the High Court by way of case stated or judicial review, and then appeals the decision of the High Court to the Supreme Court.

14.80 The Law Society said:

> The route of appeal to the Supreme Court is cumbersome; there should be a straightforward right of appeal to the Supreme Court. This should clearly be limited to a point of law so not to drag the Supreme Court into factual determinations.

14.81 We have considered whether the Supreme Court should have grounds to hear appeals beyond those which involve a point of law. However, we have not been persuaded of the need for this. We note that there is an existing principle that the Supreme Court is a court of law, not a court of retrial. We are of the view that the principle that appeals to the Supreme Court should be limited to those involving a point of law is essentially sound.

14.82 Under section 35(3) of the Criminal Appeal Act 1968, "[f]or the purpose of disposing of an appeal, the Supreme Court may exercise any powers of the Court of Appeal or may remit the case to the Court". It is not entirely clear what "disposing of" means – whether it is just the final stage (and thus relates to the CACD's powers to order a retrial, substitute a conviction, quash the conviction, etc) or also covers the hearing itself (and therefore the CACD's powers to receive fresh evidence, including hearing witnesses).

14.83 In *Stafford and Luvaglio*, the House of Lords ruled that section 35(3) meant that the House must "must come to the conclusion that the verdicts were unsafe or unsatisfactory. It will not suffice to show that the Court of Appeal has erred in its approach". However, it noted that:[86]

> This House suffers the disadvantage that it has not heard or seen any of the witnesses. It can only base its opinion on the shorthand notes of the evidence at the trial, on the conclusions that can properly be drawn from the jury's verdict of guilty, on the depositions taken before [the examiner appointed by the Court of Appeal] and the shorthand note of the evidence heard by the Court of Appeal.

14.84 The ruling in *Stafford and Luvaglio* suggests that the power of the House of Lords, and now the Supreme Court, to remit a case back to the CACD, was limited to formally disposing of the case. It could not remit the case back to the CACD to apply the legal ruling on the question of law to the case. Despite the disadvantage of not hearing witnesses and having to rely on the written records (including shorthand notes), the Appellate Committee entered into a detailed discussion of the evidence to come to its own conclusion as to the appellants' guilt.

14.85 We think it would often be appropriate for the Supreme Court to remit the case back to the CACD having addressed the legal question. It would seem to be appropriate in a case where it found that the CACD had erred, but was not in a position to evaluate the evidence itself (or was in a less satisfactory position to evaluate the evidence).

14.86 We consider that appeals to the Supreme Court should have the character of a reference on the point of law in question, and if, as a result of its decision on that point of law, the consequences for the case are at all unclear, it should remit the case back to the CACD. Only if the point of law, combined with the factual basis found in the trial

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86 [1974] AC 878, HL, 894B-C, by Viscount Dilhorne.

court and the CACD, leads to an inexorable result should the Supreme Court come to a judgment on the application of the law to the facts of the case. It should not be involved in weighing the evidence that was before the jury, along with any fresh evidence that was before the CACD, before deciding whether the conviction is safe.

14.87 This would also mean that the problem in *Berry* could be addressed. Where grounds were not addressed by the CACD, because the appeal was successful on one or more other grounds, the respondent would not have to seek leave to revive those grounds in the Supreme Court. Instead, the Supreme Court would address the point of law and, if there were grounds remaining, remit the case back to the CACD. Only if it were clear that the conviction must be quashed or upheld would it do so.

Consultation Question 87.

14.88 We provisionally propose that appeals to the Supreme Court should continue to be limited to those which raise an arguable point of law of general public importance which ought to be considered by the Supreme Court.

Do consultees agree?

Consultation Question 88.

14.89 We provisionally propose that the Supreme Court should be given a power to remit a case back to the Court of Appeal Criminal Division or the High Court so that the Supreme Court's answer to the question of law can be applied to the facts of the case, and so that the lower court can address any outstanding grounds of appeal.

Do consultees agree?

Ending the appellate courts' effective control of appeals

14.90 The vast majority of respondents, including the major professional bodies, and even the CPS,[87] felt that it is not satisfactory that the CACD (or for that matter the High Court) should be able to block otherwise potentially meritorious appeals by refusing to certify a point of law of general public importance.

14.91 The CACD will often effectively hear the merits of a case before declining to grant leave. In such circumstances, it is hard to say that no decision has been made, simply because the decision was a refusal to grant leave rather than a decision on the merits (when the Court will make clear that had it found the case made out it would have granted leave).

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87 That the CPS were aligned with those representing defendants might normally be surprising. However, unlike appeal rights from the Crown Court to the CACD, which generally favour defendants, the prosecution has the same right as a defendant to appeal against decisions of the CACD to the Supreme Court.

14.92 This is particularly acute because it means that certain classes of appeal – most notably those that turn on the application of the "substantial injustice" test – cannot be appealed onwards, even where the issue is how the CACD is applying the "substantial injustice" test. (One might add that while the Supreme Court endorsed the "substantial injustice" test in *Jogee*,[88] this does not mean that it would necessarily endorse the way in which the CACD has been applying the test since.)

14.93 It is, however, harder to see how this might be addressed. A simple ability to appeal to the Supreme Court against a decision not to grant leave to appeal upon renewal would probably be too broad. It is likely that most of the cases where the CACD refuses leave to appeal on an application for renewal are simply not arguable, or even totally without merit. Moreover, as noted in *Cooper*, the CACD need not give reasons when it refuses to certify a point of law of general public importance, which would become necessary if the decision were to be appealable.[89]

14.94 One suggestion made by stakeholders was that decisions where the CACD had heard argument on the merits before refusing leave might be appealable. However, there could be definitional difficulties in trying to limit the right to those cases where the refusal effectively followed a hearing and a decision on the merits. Moreover, whilst we take the point that this narrow interpretation has meant some cases, including those involving a change of law, will not be heard by the Supreme Court, we recognise that a balance must be struck between allowing arguable appeals and preventing wholly unmeritorious appeals from being revived in the Supreme Court.

14.95 For the reasons above, we have provisionally concluded that the Supreme Court ought to be able to determine the cases that it is to hear on appeal. This would remove the additional barrier in appeals reaching the Supreme Court, which is not present in civil appeals. This would also accord with the Court of Appeal's own view that the Supreme Court should decide which cases require its consideration which is often given as the reason for certifying a point but refusing leave as noted at paragraph 14.24 above.

Consultation Question 89.

14.96 We provisionally propose that the Supreme Court should be able to grant leave to appeal where the Court of Appeal Criminal Division or High Court has not certified a point of law of general public importance.

Do consultees agree?

88 *R v Jogee, Ruddock v The Queen* [2016] UKSC 8, [2016] UKPC 7, [2017] AC 387.

89 *R v Cooper* (1975) 61 Cr App R 215, CA.

Chapter 15: Retention and disclosure of evidence

BACKGROUND

15.1 Our terms of reference require us to consider whether criminal appeals are hampered by laws governing the retention and disclosure of evidence and retention and access to records of proceedings.

15.2 In contrast with other areas of the appeal process, this area is not entirely governed by a statutory framework. Police records are generally covered by the Code of Practice on the Management of Police Information ("MPI"). However, evidence obtained during an investigation is governed by the Criminal Procedure and Investigations Act 1996 ("CPIA 1996"), and a Code of Practice issued under section 23 of that Act. Court records are kept subject to policies of HM Courts and Tribunals Service ("HMCTS") which are intended to ensure compliance with statutory obligations in the Public Records Act 1958, the Data Protection Act 2018, the UK General Data Protection Regulation, and the Inquiries Act 2005.[1]

RETENTION AND DISCLOSURE OF EVIDENCE POST-CONVICTION

Retention of evidence

15.3 Minimum retention periods in respect of material gathered during the course of a criminal investigation are set out in the Code of Practice issued under section 23(1) of the CPIA 1996 ("CPIA Code of Practice").[2] The Code of Practice provides that following a conviction, "all material[3] which may be relevant" must be retained at least:

(1) where a custodial sentence or a hospital order is imposed, until the person is released from custody or discharged from hospital;[4] and

(2) in all other cases, for six months from the date of conviction.[5]

15.4 Where, at the end of the minimum period specified above, an appeal is pending or the Criminal Cases Review Commission ("CCRC") is considering an application for a reference, the Code of Practice requires "all material which may be relevant" to be

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1 The Inquiries Act 2005 enables a statutory inquiry to impose a suspension on the destruction of records.

2 The Criminal Procedure and Investigations Act 1996 (section 23(1)) Code of Practice (September 2020) ("CPIA Code of Practice").

3 The term "material" is defined as "material of any kind, including information and objects, which is obtained or inspected in the course of a criminal investigation, and which may be relevant to the investigation", including material generated by the investigator, such as interview records (above, para 2.1(7)).

4 Where the person is released from custody or discharged from hospital earlier than six months from the date of conviction, "all material which may be relevant" must be retained at least for six months from the date of conviction (above, para 5.9).

5 Above, para 5.9.

retained until the determination of the appeal or the decision of the CCRC not to make a reference to the appellate court.[6]

15.5 A difficulty here is that most prisoners are routinely released at the 40%,[7] halfway or two-thirds point of their sentence (depending on the particular offence and length of sentence). Or, in cases of indeterminate (or life) sentences, they may be released on licence by the Parole Board, provided that they have completed their minimum term and following the Board's assessment of risk. However, they remain liable to be recalled during this period, if they breach the terms of their licence. If evidence is destroyed because the convicted person has been released on licence, it may be unavailable for an appeal if they are subsequently recalled and then decide to appeal (for whatever reason).

15.6 Further, a person released on licence may still want to challenge their conviction, especially as during the licence period (which may be lifelong) they will be subject to ongoing restrictions on their liberty.

15.7 The National Police Chiefs' Council ("NPCC") has issued specific guidance ("the NPCC's guidance") in relation to the retention of materials by "forensic units",[8] which includes private forensic service providers and any part of a police force that provides forensic science services.[9] The NPCC's guidance specifies default retention periods in respect of case materials[10] held by the forensic units, which vary depending on the nature of the offence from 30 years in respect of the most serious offences to three years in relation to alcohol and drug driving offences.[11]

Case law on lost or destroyed evidence

15.8 In *Ebrahim v Feltham Magistrates' Court*,[12] the court ruled that when considering an application that a case should be stayed on the grounds of abuse of process, on the basis that evidence had been lost or destroyed, the trial court should apply the following considerations:

> (1) in the circumstances of the particular case, what was the nature and extent of the investigating authorities' and the prosecutors' duty, if any, to obtain and/or retain the … evidence in question? Recourse should be had in this context to

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6 CPIA Code of Practice, para 5.10.

7 Under the Criminal Justice Act 2003 (Requisite and Minimum Custodial Periods) Order 2024, the duty to release certain prisoners at the halfway stage of their sentence is to be read as a reference to 40% of the sentence. Certain sexual, domestic abuse, and national security offences are excluded.

8 The term "forensic unit" is defined as "any organisation or part of an organisation which provides forensic science services to the criminal justice system". NPCC, *Retention, Storage and Destruction of Materials and Records relating to Forensic Examination* (version 1.0, 2021) p 19.

9 Above, p 3, para 1.3.

10 This includes items submitted to, or collected or seized by, a forensic unit for examination, materials that are physically recovered or sampled from an item or person and materials prepared or created by the forensic unit during the examination of an item or scene (above, para 9.2 and p 20).

11 Above, p 10, para 11.1.4. The specified retention periods commence on 31 December of the year in which the case was first received by the forensic unit (see para 11.1.6).

12 [2001] EWHC 130 (Admin), [2001] 1 WLR 1293 at [23], [25] and [74], by Brooke LJ.

the contents of the CPIA Code of Practice and the Attorney-General's Guidelines on Disclosure;

(2) if in all the circumstances there was no duty to obtain and/or retain the evidence before the defence first sought its retention, then there can be no question of the subsequent trial being unfair on this ground;

(3) if such evidence is not obtained and/or retained in breach of the obligations set out in the Code and/or the Guidelines, then the following principles should be applied:

(a) the ultimate objective of the discretionary power to stay proceedings as an abuse of process is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution, because the fairness of a trial is not all one sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted;

(b) the trial process itself is equipped to deal with the bulk of the complaints on which applications for a stay are founded;

(4) if the behaviour of the prosecution has been so very bad that it is not fair that the defendant should be tried, then the proceedings should be stayed on that ground. There would need to be either an element of bad faith or at the very least some serious fault on the part of the police or prosecution authorities for this ground of challenge to succeed.

15.9 When considering whether to order a retrial following a successful appeal against conviction, the Court of Appeal Criminal Division ("CACD") has a wide discretion to consider whether the non-availability of evidence would mean that it is not "in the interests of justice" to order a retrial.[13] Even if the CACD orders a retrial, it would be open to the trial judge to stay a prosecution as an abuse of process if the defendant would be unable to receive a fair trial because of the loss of evidence.

The Westminster Commission report

15.10 In its submission to the Westminster Commission on Miscarriages of Justice ("the Westminster Commission"),[14] Inside Justice said:[15]

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13 See, for instance, the Privy Council case of *DPP v Lagesse (Mauritius)* [2020] UKPC 16 at [53], where Lord Sales JSC said for the Judicial Committee:

> a retrial is the fair and appropriate way forward and the decision of the Supreme Court should be upheld. Most of the relevant evidence is derived from contemporaneous documentation and there are extensive written records of the accounts given by the accused to the police prior to being charged and affidavit evidence prepared by them prior to the trial in the Intermediate Court. It is not unreasonable to expect the accused to face a retrial with the benefit of this extensive material to hand.

14 See para 1.4 above. The Westminster Commission was established by the All-Party Parliamentary Group on Miscarriages of Justice, and chaired by Baroness Stern and Lord Garnier.

15 Westminster Commission on Miscarriages of Justice, *In the Interests of Justice: An inquiry into the Criminal Cases Review Commission* (2021) ("Westminster Commission Report") p 51.

the post-conviction retention landscape within police forces is chaotic: material which could exonerate an innocent individual is routinely lost, contaminated or destroyed.

15.11 The Westminster Commission noted in its report in 2021 that "non-disclosure or destruction of exculpatory material has been a factor in a number of miscarriages of justice".[16] The Commission was "concerned to hear that current retention processes may not be being complied with, and that such material may be destroyed while someone is in custody".[17] It recommended that:[18]

(1) the Home Office contacts police forces to remind them of their legal obligation to retain all material in cases resulting in conviction and to ask them what measures they have in place to ensure compliance;

(2) HM Inspectorate of Constabulary and Fire and Rescue Services conducts a thematic inspection into police forces' current retention practices; and

(3) the Crown Court Retention and Disposition Schedule is amended to provide for audio recordings of Crown Court trials to be retained for as long as a convicted person is in custody, or for five or seven years (as it is currently), whichever is longer.

15.12 The Westminster Commission also invited the Law Commission to consider whether premature destruction of crucial evidence which could have undermined the safety of a conviction should be a standalone ground of appeal.[19]

Empirical research

15.13 In 2020, Professor Carole McCartney and Louise Shorter (the journalist and founder of Inside Justice) published a study on the retention and storage of materials in England and Wales given its central importance to the appeals system.[20] The study included an analysis of qualitative interviews with relevant stakeholders as well as responses from Freedom of Information requests that were sent to all 43 police forces in England and Wales in order to determine the existing policies as to what materials should be retained post-conviction.[21] The authors found that despite an earlier version of the National Guidance[22] on retention periods having been published in 2017 by the NPCC, only two forces were aware of this guidance in 2018.[23] They concluded that

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16 Westminster Commission Report, p 51.

17 Above, pp 51-52.

18 Above, p 52.

19 Above, p 43.

20 C McCartney and L Shorter "Police retention and storage of evidence in England and Wales" (2020) 22 *International Journal of Police Science and Management* 123.

21 The authors note that the study was inspired by the case of Roger Kearney who we discuss below at para 15.154.

22 NPCC, *National Guidance on the minimum standards for the Retention and Disposal of Police Records* (2016).

23 C McCartney and L Shorter "Police retention and storage of evidence in England and Wales" (2020) 22 *International Journal of Police Science and Management* 123, 125.

there was "woeful ignorance of the current guidance that should be followed".[24] 36 forces referred to "(a quartet of) of national guidelines" with the most commonly referred to being the "MoPI rules" which are "designed for another purpose entirely – that of preventing crime and the better detection of crime through intelligence – which applies the wrong test and imposes an unnecessary archiving burden".[25]

15.14 Police forces were found not to know which body was responsible for retaining evidence including DNA extracts. This was due to a lack of clarity, which led to reports of inappropriate destruction.[26] Significant concerns about the capacity of police to retain evidence were raised and the authors concluded that "[p]olice retention and storage of material, post-conviction, is an opaque, unaudited landscape that is not fit for purpose".[27]

15.15 A number of recommendations were made including for the NPCC Guidance to be disseminated widely and for it to be included within the HM Inspectorate of Constabulary and Fire and Rescue Services audits.[28] The authors also recommended sanctions for improper retention or storage as part of a regulatory regime.[29]

Disclosure of evidence

15.16 Until 1996, the obligations on prosecuting authorities to disclose information to suspects, defendants and convicted persons were a matter of common law. The general duty at common law was enunciated in *Ward.*[30]

15.17 Prosecution duties during proceedings were placed on a statutory basis by the CPIA 1996. Section 3 imposes a duty on the prosecution in criminal proceedings to disclose material in its possession, or which it has inspected, that might reasonably be considered capable of undermining the prosecution's case or assisting the defendant's case. The prosecution has a continuing duty to keep their disclosure obligations under review.[31] However this duty comes to an end when the defendant is acquitted or convicted. As such, disclosure post-conviction remains governed by the common law.[32]

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24 C McCartney and L Shorter "Police retention and storage of evidence in England and Wales" (2020) 22 *International Journal of Police Science and Management* 123, 132.

25 Above, 125.

26 Above, 131.

27 Above, 134.

28 Above, 133.

29 Above, 135.

30 *R v Ward* [1993] 1 WLR 619, CA. In *Ward*, the Court held (645) that "those who prepare and conduct prosecutions owe a duty to the courts to ensure that all relevant evidence of help to an accused is either led by them or made available to the defence … We would emphasise that 'all relevant evidence of help to the accused' is not limited to evidence which will obviously advance the accused's case. It is of help to the accused to have the opportunity of considering all the material evidence which the prosecution have gathered". See Appendix 1 for details of Ms Ward's case.

31 CPIA 1996, ss 7A(1)(b) and (2).

32 Above, s 21(1).

15.18 The common law disclosure obligations of the police and the prosecution post-conviction were considered by the Supreme Court in the case of *Nunn*.[33] The Supreme Court held that whilst the duty of disclosure is informed by the principle of fairness at all stages of the criminal process, fairness does not require the same level of disclosure at every stage of that process.[34] The Court noted that the position of the defendant and the public interest will be different post-conviction, as the defendant would have had an opportunity to defend themselves against the charge and there is a public interest in finality of proceedings and, in the absence of a good reason, in prioritising current police investigations, given finite resources.[35] The Court rejected the argument that the duty of disclosure post-conviction is the same as the duty of disclosure pre-conviction.

Duties while an appeal is pending

15.19 The Supreme Court held that while an appeal is pending, the duty of disclosure extends to "any material which is relevant to an identified ground of appeal and which might assist the appellant".[36]

Disclosure duties outside of an appeal

15.20 In relation to the duty of disclosure in other circumstances post-conviction, the Supreme Court considered three distinct issues: (i) disclosure duties when fresh evidence comes to the attention of the prosecution; (ii) any ongoing duty to review the state of the evidence; and (iii) any duty to engage with requests for disclosure.

15.21 The Court noted that, given the prosecution's statutory disclosure obligations during the criminal proceedings, such disclosure is only likely to arise in circumstances where material comes into the prosecution's possession after the trial or there has been a failure to disclose the material during the proceedings.

Duties when fresh evidence comes to light

15.22 The Court confirmed that where the prosecution or the police come into possession of material "which might afford arguable grounds for contending that the conviction was unsafe", they have a duty to disclose such material to the person convicted of the offence.[37] Examples might include where someone else has confessed in relation to the offence or evidence has been discovered which creates doubt regarding the original conviction.

15.23 The Court seemed to endorse, with qualification, the then Attorney General's Guidelines on Disclosure that "[w]here, after the conclusion of proceedings, material comes to light that might cast doubt upon the safety of the conviction, the prosecutor must consider disclosure of such material".[38] However, the Court interpreted that

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33 *R (Nunn) v Chief Constable of Suffolk Constabulary* [2014] UKSC 37, [2015] AC 225.

34 Above, at [22], by Lord Hughes JSC.

35 Above, at [32]-[33].

36 Above, at [25].

37 Above, at [35].

38 Above, quoted at [30].

statement to "mean that not only should disclosure of such material be *considered*, but that *it should be made unless there is good reason why not*".[39]

15.24 The current Attorney General's Guidelines on Disclosure refer to the test in *Nunn*, saying that "[w]here, at any stage after the conclusion of the proceedings, material comes to light which might reasonably be considered capable of casting doubt upon the safety of the conviction, the prosecutor should disclose such material".[40]

15.25 The current Crown Prosecution Service ("CPS") Disclosure Manual, however, repeats the pre-*Nunn* guidance, without the gloss put on the guideline by the Supreme Court.[41] It cites in support for this the High Court's ruling in *Nunn*,[42] and not the subsequent Supreme Court ruling. It is strongly arguable that without this gloss, the current Disclosure Manual understates the prosecution's post-trial disclosure duty. It is not a duty to *consider* disclosure, but a duty to disclose, subject to a possible exception only where there is good reason not to disclose.

What might be a good reason not to disclose?

15.26 The Supreme Court did not discuss the issue of what might be a good reason not to make disclosure.

15.27 We do not think that the prosecution being satisfied that, notwithstanding the fresh evidence, the conviction is safe would be a good reason not to disclose. The fact that the CPS considers that a conviction is safe does not mean that it is not arguably unsafe. It is frequently the case that in an appeal the appellant will adduce fresh evidence which, they argue, might cast doubt on the safety of the conviction, and the prosecution argues that notwithstanding this evidence, the conviction remains safe. The CACD will then have to decide the matter. If the prosecution were to determine for themselves that the conviction is safe, and therefore not disclose the fresh evidence to the convicted person, there would be no appeal and the Court would not be able to judge the matter. The prosecution's subjective view of the safety of the conviction would be determinative. In effect, the prosecution would be usurping the role of the CACD.

15.28 It should also not be determinative that (in the view of the prosecutor) the CACD would not admit the fresh evidence. It will sometimes happen that there will be fresh evidence which is capable of undermining the safety of a conviction, but which cannot, for technical reasons, be used as the basis of an appeal. Historically, one example was hearsay evidence, although the CACD had a wider discretion than trial courts to admit evidence, and relaxation of the rules on hearsay now permits a wider range of previously inadmissible evidence to be heard.[43] When faced with the problem of

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39 *R (Nunn) v Chief Constable of Suffolk Constabulary* [2014] UKSC 37, [2015] AC 225, at [30] (emphasis added).

40 Attorney-General's Office, *Attorney-General's Guidelines on Disclosure for investigators, prosecutors and defence practitioners* (29 February 2024) para 140.

41 CPS, *Disclosure Manual: Chapter 2 - General Duties of Disclosure Outside the CPIA 1996* (October 2021).

42 [2012] EWHC 1186 (Admin), [2012] Crim LR 968.

43 Evidence in Criminal Proceedings: Hearsay and Related Topics (1997) Law Com No 245; Criminal Justice Act 2003, ss 114 to 115.

inadmissible evidence which cannot be adduced on appeal, there are steps which a convicted person can nonetheless take to correct a potential miscarriage of justice. One is to use the fresh evidence as the basis for an application to the CCRC, which may be able to obtain other, admissible evidence; another is to petition for the exercise of the Royal Prerogative of Mercy.

15.29 There may be cases where the fresh evidence cannot, in practice, be disclosed to a convicted person, for instance for reasons which would give rise to public interest immunity. One example might be the prosecution learning that a person who gave evidence was an undisclosed police informant, where disclosure of this fact would put the informant at risk, or hinder future investigations. Another might be where information was received from a foreign government subject to an expectation of secrecy.

15.30 We accept that this might constitute a good reason for not making a disclosure. (In addition, the regime for public interest immunity under the CPIA 1996 should be noted.) However, it is essential that if the prosecution is unable to disclose fresh evidence to the convicted person or their representatives to enable a possible miscarriage of justice to be corrected, alternative action should be taken.

15.31 One approach would be to disclose the information to the CCRC. The prosecution could then disclose to the convicted person the fact that a disclosure of fresh evidence had been made to the CCRC. It would be open to the CCRC to consider whether the fresh evidence means that the case should be referred to the CACD. It is possible for the CCRC to make a reference to the CACD with a confidential annex, not disclosed to the appellant, which provides the additional detail.[44]

Proactive duties of enquiry under *Nunn*

15.32 The Supreme Court held that there is no ongoing duty to review the state of the evidence. However, it did hold, in the second qualification on its endorsement of the Attorney General's Guidelines on Disclosure, that there is an additional requirement that "if there exists a real prospect that further enquiry may reveal something affecting the safety of the conviction, that enquiry ought to be made",[45] in accordance with the "principle of fairness [that] informs the duty of disclosure at all stages of the criminal process".[46]

Reactive duties of enquiry under *Nunn*

15.33 The Court noted that the CCRC provides a safety net in cases where a request for the review of case materials is disputed, given that it can make enquiries to determine

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44 See for instance *R v Doubtfire* [2001] 2 Cr App R 13, CA, where the CACD quashed a conviction on the basis of information contained in a confidential annex. The Court noted (at [14], by May LJ) that "the appeal is therefore brought necessarily in ignorance of the details of why the Commission reached the conclusion that it did, but in the knowledge of its conclusion". The European Court of Human Rights subsequently held that as the conviction had been quashed, "the applicant can no longer claim to be a victim of the alleged violation of Article 6 of the Convention", *Doubtfire v UK* App No 31825/96. (Mr Doubtfire was trying to get further disclosure in order to pursue a claim for compensation for a miscarriage of justice.)

45 *R (Nunn) v Chief Constable of Suffolk Constabulary* [2014] UKSC 37, [2015] AC 225 at [42], by Lord Hughes JSC.

46 Above, at [22].

whether there is a real prospect that material which affects the safety of the conviction could emerge.[47] The Court also confirmed that this did not mean that others, such as legal representatives, may not make a request for post-conviction disclosure to the police or the prosecution.[48] It went on to say that "[p]olice and prosecutors should exercise sensible judgment when such representations are made and, if there appears to be a real prospect that further enquiry will uncover something of real value, there should be co-operation in making those further enquiries".[49]

15.34 However, the Supreme Court said that:[50]

> If there is demonstrated to be a good reason for this kind of review of a finished case, then the resource implications must be accepted. There is, however, a clear public interest that in the contest for the finite resources of the police current investigations should be prioritised over the reinvestigation of concluded cases, unless such good reason is established.

15.35 As we noted above at paragraphs 15.13 to 15.15 serious concerns were expressed by Professor Carole McCartney and Louise Shorter following their qualitative study of police forces understanding of their duties regarding post-conviction disclosure. The authors stated there was significant confusion around retention policies, and emphasised that the closure of FSS added to the confusion.[51] The current landscape and lack of clarity regarding what materials are needed to be retained and for how long will invariably make any request for a review of the case materials difficult given such evidence may have been lost or destroyed.

Use of disclosed material by appellants

15.36 The use by defendants and their representatives of material disclosed during proceedings is governed by sections 17 and 18 of the CPIA 1996. This limits the use and disclosure by the defendant of material disclosed to them. The defendant may use or disclose the object or information:

(1) in connection with the proceedings for whose purposes they were given the object or allowed to inspect it;

(2) with a view to the taking of further criminal proceedings (for instance, by way of appeal) with regard to the matter giving rise to the previously mentioned proceedings; or

(3) in connection with those further proceedings.

15.37 The defendant may also use or disclose the object to the extent that it has been displayed to the public in open court, or the information to the extent that it has been

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47 *R (Nunn) v Chief Constable of Suffolk Constabulary* [2014] UKSC 37, [2015] AC 225, at [39].

48 Above, at [41].

49 Above, at [41].

50 Above, at [33].

51 C McCartney and L Shorter "Police retention and storage of evidence in England and Wales" (2020) 22 *International Journal of Police Science and Management* 123, 132 and 135.

communicated to the public in open court. The defendant may also apply to the court for an order granting permission to use or disclose the object or information for another purpose.

15.38 Disclosures made outside of these parameters can be dealt with as contempt of court, punishable by up to two years' imprisonment.

15.39 Section 17 and 18, however, only apply to disclosures made under the Act itself, or under an order made under section 8 of the Act. *Nunn* makes clear that post-trial disclosure is not governed by the CPIA.

15.40 Any restriction on the use that might be made of material disclosed by the prosecution post-trial would presumably therefore lie in the "implied undertaking" rule.[52] However, the situation here is not clear. The implied undertaking rule generally applies in relation to material disclosed under compulsion in the course of proceedings. Where an appeal is in train and the prosecutor is making disclosure to enable the convicted person to pursue that appeal, the implied undertaking rule would seem to apply.

15.41 In *Taylor v Director of the Serious Fraud Office*,[53] the House of Lords held that the implied undertaking rule applies to material disclosed pursuant to disclosure obligations under common law,[54] reversing the decision of the Court of Appeal in *Mahon v Rahn*.[55]

15.42 This issue arose in relation to three of the Post Office Horizon appeals. Counsel acting for three of the appellants made onward disclosure of a document (the "Clarke advice") prior to its use in open court. The Clarke advice showed that the Post Office had been advised internally years earlier that the evidence of a central prosecution expert witness was not factually correct and could not be relied upon. The advice had been disclosed by the Post Office pursuant to its duty under *Nunn*: one barrister, Paul Marshall, had disclosed the advice to the Metropolitan Police for the purposes of enabling them to investigate possible commission of a criminal offence (perjury); another barrister, Flora Page, had disclosed it to her brother, a journalist, by way of background to enable him to report the matter when it was (as she intended) disclosed in open court the following day.

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52 The implied undertaking rule states that a party to whom a document has been disclosed may only use the document for the purpose of the proceedings in which it is disclosed, except where the document has been read to or by the court, or referred to, at a hearing in public; or where the court gives permission; or where the party who disclosed the document and the person to whom it belongs agree. *Harman v Secretary of State for the Home Department* [1983] 1 AC 280, HL. This now finds expression in the Civil Procedure Rules, r 31.22.

53 [1999] 2 AC 177, HL.

54 Taylor was attempting to sue the Serious Fraud Office ("SFO") for libel in respect of a letter which had been sent by the SFO to the Attorney General for the Isle of Man. Taylor was suspected by the SFO of conspiracy to defraud; he was never, however, charged. Two other suspected conspirators were charged, and Taylor became aware of the letter when it was disclosed to them. The material had been disclosed prior to the passing of the CPIA.

55 [1998] QB 424, CA.

15.43 The CACD acknowledged:[56]

> [t]hat there were issues as to whether or not counsel and solicitors who receive disclosure of unused material in criminal proceedings not governed by sections 17 and 18 of the CPIA come under any, and if so what, duty limiting the use they may properly make of that material.

15.44 They also acknowledged that there were issues as to whether a party could, by way of a statement that material was being disclosed subject to an implied undertaking, limit onward disclosure when the material was being disclosed pursuant to a common law duty. They referred the question of a possible contempt to a different constitution of the Court.

15.45 As a result of both counsel apologising to the Court, however, the separate constitution declined to institute contempt proceedings. Accordingly, the extent to which post-trial disclosures made under the *Nunn* duty are subject to an implied undertaking was never fully resolved.

15.46 Paul Marshall argues that the disclosures under *Nunn* are not subject to an implied undertaking:[57]

> There is no implied (usually referred to as 'collateral') undertaking in connection with documents disclosed in accordance with duties owed under *Nunn*. That is because the implied (or collateral) undertaking at common law is derived from the protection given to a party who only discloses a document/information that is disclosed by compulsion by virtue of the existence of legal proceedings.

15.47 Some support for this is found in *Marlwood v Kozeny*,[58] which held that the implied undertaking is "an obligation owed to the court rather than to the disclosing litigant". Where material is disclosed under *Nunn*, however, there are no proceedings, and hence no court.

15.48 A further reason for questioning the parallel with disclosure in civil litigation, and the implied undertaking between the parties, is that the rule in civil litigation exists to recognise that requiring material to be disclosed to an opposing litigant represents an invasion of the litigant's right to privacy and confidentiality. However, the prosecution and the police will generally not have a right to privacy and confidentiality in respect of evidence retained post-trial. Rather it will be the person from whom that evidence has come, often under compulsion, who will have that interest. The retained evidence may be from the victim (who may well be deceased), or from a third party, or in some cases from the convicted person themselves.[59]

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56 CACD, ruling of 19 November 2020 at [21], cited in *Felstead v Post Office Ltd* [2021] EWCA Crim 25 at [45], by Holroyde LJ.

57 P Marshall, "Supplemental Submission to the Post Office Horizon Inquiry" (23 June 2022) para 81.

58 [2004] EWCA Civ 798, [2005] 1 WLR 104 at [41], by Rix LJ.

59 For an example of this, see *Hallam* in Appendix 2, which turned in part on evidence from Hallam's phone suggesting that a supposedly false alibi was more likely to have reflected confusion over dates than lying, and which put him at a different location before and after the murder (making it unlikely, though not impossible, that he was present at the murder).

15.49 In *Mills*,[60] Lord Hutton cited with approval the judgment in the Supreme Court of Canada case of *Stinchcombe* which said that:[61]

> The fruits of the investigation which are in its possession are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done.

15.50 It is arguable that if disclosure is made because the material might show that a conviction is unsafe, then it is made for the purposes of proceedings which would be in the CACD (or in summary cases, the Crown Court) and therefore the duty is to that court.

15.51 One difficulty with this argument, however, is that the appellate court is not the only route for correcting a miscarriage of justice, and the duty to disclose is likely to persist even if the miscarriage of justice is not one which can be corrected judicially. For instance, where the fresh material would be inadmissible, it might be that the miscarriage could only be corrected using the Royal Prerogative of Mercy. In such a case, it would be hard to argue that any implied undertaking was a duty to a *court* (although it may be an implied undertaking only to use the material for the purposes of an application for exercise of the Royal Prerogative of Mercy).

CONSULTATION RESPONSES

15.52 In the Issues Paper,[62] we asked:

> Is the law governing post-trial retention and disclosure of evidence, whether used at trial or not, satisfactory? (Question 16 and Summary Question 9)

Inconsistencies and misapplication of *Nunn*

15.53 Several consultees thought the law was applied inconsistently and there was a misapplication or misinterpretation of *Nunn.*

15.54 For example, Dr Lucy Welsh cited an extract from her recent chapter "Appeal Decision-Making. Reforming the powers of the Criminal Cases Review Commission".[63] She referred to the work conducted by Professor Carole McCartney and Louise Shorter which we summarised above at paragraphs 15.13 to 15.15. Dr Welsh wrote that:

> Despite these problems, practices of post-conviction disclosure remain under-scrutinised, and McCartney and Shorter highlighted a concerning level of inconsistent practices regarding what should be retained by police forces, what can be disclosed and when.[64] These failings occurred despite guidance on retention of

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60 [1998] AC 382, HL.

61 [1991] 3 SCR 326, 332, by Sopinka J.

62 Law Commission, Criminal Appeals: Issues Paper (July 2023).

63 L Welsh, "Post Appeal Decision-Making. Reforming the powers of the Criminal Cases Review Commission" in M Bone, J Child and J Rogers (eds), *Criminal Law Reform Now* (vol 2 2024).

64 C McCartney and L Shorter "Exacerbating Injustice: Post-Conviction disclosure in England and Wales" (2019) 59 *International Journal of Law, Crime and Justice* 1.

materials contained within the Criminal Procedure and Investigations Act 1996, and guidance issued by the National Police Chiefs' Council.

Statutory and professional guidance each specifically refer to retaining materials to assist an investigation being conducted by the CCRC. Another of our significant findings was that lawyers face problems obtaining evidence, or examining gaps in existing evidence, especially since the decision in *Nunn*, in which the court ruled that the duty of disclosure post-conviction is more limited than the duty during proceedings.

15.55 Dr Welsh stated that lawyers who took part in her study felt that *Nunn* was incorrectly interpreted and used to justify withholding evidence. The lawyers felt there had been a decrease in cooperation with disclosure requests, with access to post-conviction disclosure being a "lottery".

15.56 The CCRC also considered that inconsistent approaches were taken. It further argued that there seemed to be a misunderstanding of obligations across police forces.

15.57 Dr Louise Hewitt noted that the Supreme Court's decision in *Nunn* was a positive step forward as it required the prosecution and police to disclose evidence where there was a "real prospect" that the integrity of the conviction may be affected. However, like Dr Welsh, she said that the decision was relied on as a mechanism to deny disclosure requests and that there was now a misconception that there was a minimal right to disclosure post-conviction. She similarly considered that there was no uniform approach as to what was a "real prospect", and that it was arbitrarily defined depending on the police force.

15.58 APPEAL was very critical of the Supreme Court's decision in *Nunn*, and argued that, along with the Attorney General's Guidelines on Disclosure 2022, a wrongfully convicted defendant does not have an effective means to access evidence that may be potentially exculpatory. APPEAL similarly considered that *Nunn* was misapplied and used to refuse a request. It observed that:

> in our experience, police forces are often ignorant of the current post-conviction disclosure framework and will incorrectly treat requests under *Nunn* as Subject Access Requests or Freedom of Information Act requests, and then use exemptions to refuse disclosure. Even where an individual is able to make a specific request for material, the relevant agencies show little comprehension of their common law duties and regularly refuse wholly to disclose any material or conduct further enquiries.

15.59 Mark Newby, a solicitor, argued the operation of *Nunn* and its inconsistent interpretation was problematic. He was concerned that without further clarification there was a risk that meritorious appeals would be missed. He was involved in the case of Victor Nealon (see Appendix 2) and suggested that:

> had it taken place post-*Nunn* Mr Nealon would have been denied access to the exhibits for DNA testing by the police, the CCRC having twice refused him would not have sought the exhibits and Mr Nealon would still be convicted today.

15.60 The Law Society similarly expressed concern that Mr Nealon would still be in prison if the requests for the exhibits had been made after the *Nunn* decision. It said that the *Nunn* decision has led to "considerable hostility ever since to cooperating with access to exhibits in post-conviction cases".

15.61 Unlike the consultees above however, the CPS considered that the law set out in *Nunn* was satisfactory and agreed with the Supreme Court's decision that for an enquiry to be made the defence needed to set out specific details and explain why the documents were required.

Lack of accountability, transparency or incentive to disclose

15.62 Several consultees considered that there was a general lack of transparency, and few incentives to disclose. For example, FACT[65] argued that the primary reason there were continued failures to disclose was:

> the insuperable conflict of interest of both the police and the CPS, the prosecuting bodies, with the interests of the defendant/appeal applicant. Reasons (or excuses) can be made of lack of time or resources to devote to assessing the unused evidence properly, which may be true but added to that is the absences of incentive to overcome such issues.

15.63 The Criminal Appeals Lawyers Association ("CALA") similarly argued that there was no incentive for law enforcement agencies to make relevant enquiries or disclose material relating to a conviction for which they were responsible. It further argued that this was:

> particularly where the material has been in their possession from the outset. If anything, they may be incentivised to bury potentially exculpatory non-disclosed material. Any subsequent successful appeal proceedings are likely to shine a light on their initial handling of the case and potentially open them up to future criticism and litigation. They have a vested interest in a conviction being final, which translates into an interest in preventing convicted individuals who maintain their innocence from having access to material.

15.64 APPEAL argued that, similarly to pre-trial disclosure, the police and the prosecution are the gatekeepers of the evidence. It noted that there is no incentive for agencies to make post-conviction enquiries or disclose material that may have been in their possession from the outset. Like CALA it argued that there may be an incentive to bury material that may be exculpatory and has not been disclosed.

15.65 Inside Justice provided a number of case examples in its response and cited one instance where key evidence had been destroyed by a police force. Inside Justice argued that:

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65 'Supporting Victims of Unfounded Allegations of Abuse' is also known as FACT. It supports people who work in positions of trust and responsibility and maintain that they have been falsely accused of misconduct or abuse of vulnerable people and children.

> Whilst there are no penalties for police forces who destroy exhibits there is rather an incentive for them to do so should they have concerns about an independent reexamination.

Disclosure and the CCRC

15.66 Several consultees were concerned about the reliance in *Nunn* on the CCRC as a "safety net", given a perceived reluctance on the part of the CCRC to conduct further testing or use their investigatory powers.

15.67 For example, Mark Newby argued that the Supreme Court had erred in failing to consider the resource implications for the CCRC. He noted:

> There is no standalone procedure to seek disclosure in appeals and so the CCRC can only consider the request in the context of a review which can often lead to the CCRC not considering the request to be appropriate. Even where it is considered appropriate it is the CCRC that then receives the disclosure, and an applicant is denied the opportunity to obtain their own expert evidence and build their own appeal case which can be problematic.

15.68 The Law Society also expressed the concern that there had been a failure to consider the lack of resources and that reliance on the CCRC as a safety net was misguided.

15.69 APPEAL was similarly critical of the reliance on the CCRC as a "safety net" by the Supreme Court. It considered this was flawed for two reasons. First, in cases where the first appeal has not been possible, which may be attributable to a lack of post-conviction disclosure, the applicant would not be eligible for a CCRC reference unless there were "exceptional circumstances". Second, APPEAL considered that the CCRC was too conservative in using its investigatory powers and "simply does not do the kind of comprehensive investigation needed to reliably identify non-disclosure". In support of this submission APPEAL quoted a former CCRC Commissioner who had said that "[t]here is no certainty… that the Commission's investigations will pick up non-disclosure where it has taken place".[66] It further quoted from CCRC Board minutes where a different Commissioner had said "she had recently been involved in two referral cases where material non-disclosure was the reason for referral, but she doubted whether the enquiries that led to the discovery of that non-disclosure would be made if the applications had been made today".[67]

15.70 Dr Louise Hewitt also expressed concern with the Supreme Court's reliance on the CCRC as a "catch all", in light of the Westminster Commission's subsequent conclusion that "some of its investigations lack the scope and rigour to identify potential miscarriages of justice".[68]

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66 L Elks, *Righting Miscarriages of Justice? Ten years of the Criminal Cases Review Commission* (2008, JUSTICE) p 307.

67 APPEAL cited this quote from the minutes which it had obtained under a Freedom of Information (FOI) request.

68 Westminster Commission Report, p 69.

15.71 Dr Lucy Welsh noted that the CCRC had also had difficulties in obtaining information and they had "observed that case files are being destroyed by state agencies increasingly early, creating potential problems with their investigations".

Disclosure by the CCRC to the applicant

15.72 APPEAL recommended:

> … that the Criminal Appeal Act 1995 should be amended to require the CCRC to disclose to applicants and their representatives copies of material gathered and generated in the course of its review, to the extent requested by the applicant and with appropriate restrictions on onward disclosure, except where the CCRC deems disclosure of the material would give rise to a real risk of serious prejudice to an important public interest.

Fishing expeditions and the Catch 22

15.73 A recurring criticism was that the CCRC's reluctance to conduct 'fishing expeditions' creates a 'Catch 22' for applicants. For example, APPEAL wrote:

> in the vast majority of cases, though a defendant knows they have been wrongfully convicted, they will be unable to specifically pinpoint non-disclosed exculpatory material when they have no right to possess or review case files beforehand. There is no way in which they will be able to make effective representations as to how that unknown material could undermine the safety of their conviction, and the relevant agency will refuse the request. They are trapped in a "Catch 22" – without seeing the material and knowing what it contains they cannot articulate the relevance of the material to their case.

15.74 The Cardiff University Law School Innocence Project submitted:

> The court demands that a defendant must identify fresh evidence to challenge their conviction (which is extremely difficult to do, especially when in prison), yet simultaneously places major hurdles before them in finding or presenting fresh evidence. Firstly, by preventing disclosure of exhibits post-conviction. The Supreme Court Judgment in *Nunn* effectively applies a predictive test in only allowing disclosure where this will lead to something significant. It is often stated that defendants and their representatives should not undertake "fishing expeditions". However, investigation by its nature can be speculative and requires pursuit of different lines of enquiry – *without a fishing expedition, you will not catch any fish*.[69]

Disclosure to journalists

15.75 Three consultees raised concerns about disclosure to journalists.

15.76 The CPS stated that it was important for sections 17 and 18 of the CPIA to be retained. It argued:

> It is not appropriate for material to be disclosed and used for any purpose which the recipient wants it to be. Section 17(4)-(6) provides a mechanism whereby the

[69] Emphasis added.

accused can apply to the court to use the material for the purpose the court allows. Further, the court must not make an order unless the prosecution have been given the opportunity to make representations. This process acts as a safeguard against widespread and inappropriate disclosure. It does not prevent the accused from disclosing material where the court has considered and made the order to disclose.

15.77 APPEAL in contrast, argued that sections 17 and 18 hampered the fair and accurate investigative reporting of miscarriages of justice. It argued that the provisions restricted the disclosure of case papers to journalists and prohibited the sharing of "non-sensitive unused material". It further observed that whilst it was possible under section 17 to apply to the court to facilitate such disclosure, this was onerous, particularly for an unrepresented litigant, and there was a lack of judicial guidance on how the power should be exercised. APPEAL recommended that an exception be added to section 17 to allow disclosure to journalists for fair and accurate reporting where a miscarriage is being alleged.

15.78 CALA adopted APPEAL's proposal. It argued that where a miscarriage of justice is alleged to have occurred, the media should be able to access disclosed material as of right for fair and accurate reporting.

Indefinite or extended retention period

15.79 Many consultees expressed concerns about the current minimum periods of retention as well as the inconsistencies among agencies about the periods of retention they have settled on. The majority of consultees considered the current period was too short and, given materials could now be digitised, case files could be retained for much longer. Just for Kids Law ("JfKL") also advocated for a longer retention period particularly for children.

15.80 For example, Dr Felicity Gerry KC proposed "permanent access to the full docket (subject to any judicial orders for suppression) for the client, the public and the press forever (it can all be digital so not difficult)".

15.81 FACT also recommended that given digitisation was already used in storing documentary evidence and court records, it would be a relatively small cost and could allow for digital information to be retained almost indefinitely at least in non-minor cases. It recommended that evidence and records should be retained until at least the end of the sentence, but preferably longer.

15.82 Both CALA and APPEAL recommended that the current retention period for documents and physical exhibits be extended to at least 50 years.

15.83 JfKL argued that the current minimum retention periods were insufficient to protect children's rights to an appeal in particular. It argued that children who are convicted may not understand the significance of their conviction until later, some may be incentivised to plead guilty on the understanding that their convictions will not be disclosed or have been misadvised about certain proceedings such as Referral Orders.[70] The implication of this is that a child may seek to appeal much later, which is compounded by lengthy delays particularly if they have pled guilty in the youth court

[70] See para 5.213 and its footnote 168 above.

and must, therefore, go through the CCRC in order to appeal. JfKL argued that in civil proceedings such as medical negligence claims the time limit is three years after the child has turned 18. It would welcome a similar recognition for a child's right to appeal, including extended periods of the retention of evidence and other records. It noted that, as a charity, it holds children's records for six years after they have turned 18.

15.84 However, whilst the above consultees considered that the digitisation of some evidence and material meant that it could be kept indefinitely, or at least for an extended period of time, some consultees queried whether this was feasible.

15.85 For example, Dr Lucy Welsh stated that:

> It is incongruous that police forces may retain and re-examine materials when they consider a wrongful acquittal has occurred, yet the defence are not afforded the same opportunities in the event of suspected wrongful convictions. While it would be impractical to expect the police to retain files in all cases for an indefinite period of time, [McCartney and Shorter's] research indicates that retention practices are inconsistent, suggesting that a revised formalised mechanism for disclosure would be beneficial to those seeking to have their case reviewed, and therefore to the perceived legitimacy of the criminal process.

15.86 The SFO similarly raised concerns about the indefinite retention of evidence. It noted that the cases that it is involved in can often include hundreds of gigabytes of material which may result in significant storage costs and implications for their environmental footprint. Moreover, the SFO also noted that there are requirements under the Data Protection Act 2018 which require a "lawful basis" for retaining personal data, particularly where there is no reasonable basis to believe that an appeal will be forthcoming.

Penalties for the failure to retain, or the destruction of evidence

15.87 As discussed above, a number of consultees were concerned that there were no real incentives for the police or the prosecution to conduct post-conviction enquiries or disclose potentially exculpatory material. Moreover, there was a concern that there was a lack of accountability where materials were destroyed or lost. Given this, consultees recommended that there be some kind of accountability mechanism: for example, a standalone ground of appeal, an enforceable duty to disclose, or a criminal offence of destroying evidence.

15.88 Mark Alexander noted the recommendation made by the Westminster Commission that the premature destruction of crucial evidence which may have undermined the safety of a conviction could be a standalone ground of appeal.[71] He suggested a similar provision could be used to introduce a new standalone ground of appeal where evidence has been lost or destroyed during recovery or storage or where there was a failure to secure the evidence initially.

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[71] The Westminster Commission Report, p 43.

15.89 APPEAL also supported a standalone ground of appeal in order to encourage compliance with the duty to disclose and to provide those who are unable to conduct further testing a "proper recourse to justice". It argued that:

> [t]here should be a statutory ground of appeal which makes clear that the unlawful loss or destruction of potentially exculpatory evidence including documents and physical exhibits, renders a conviction unsafe. An appellant would have to show that, if the material was still available, there is a realistic prospect that it might have given rise to evidence rendering the conviction unsafe, such that the appellant cannot effectively exercise their right of appeal or to apply to the CCRC.

15.90 In these circumstances, APPEAL argued that unlawfully destroying documents or physical exhibits should result in a retrial where the judge could give the appropriate directions on the loss or destruction of the relevant material.

15.91 CALA argued for the introduction of a criminal offence where an officer has knowingly or recklessly destroyed materials, as well as:

> a more rigorous protocol for the handling and disposal of documents and physical exhibits by police so that the process can be subject to scrutiny. This should include police forces having to notify convicted individuals or their representatives of any planned destruction of material, so representations in favour of retention can be made. A named officer should have to sign off on the disposal of an exhibit, and it must be formally recorded precisely what is being disposed of and why.

15.92 APPEAL and CALA both recommended a new statutory right of access, granting "those claiming innocence and their representatives sufficient access to carry out the comprehensive investigation needed to uncover any exculpatory evidence that might be present with police and prosecution files". This would include unused material apart from that which could justifiably be withheld on the grounds of genuine sensitivity. In such cases, the withheld evidence could be reviewed by special counsel to determine whether there was any exculpatory material present.

15.93 The group Progressing Prisoners Maintaining Innocence ("PPMI") suggested that there should be a specific duty to preserve evidence and, before it is discarded, the defendant should be given notice and provided with the opportunity to apply to the court for an order for its preservation.

Independent storage facility

15.94 A number of consultees recommended an independent storage facility either as a sole recommendation or as an alternative.

15.95 APPEAL and CALA both suggested an independent national or regional centralised storage facility, similar to the Forensic Archive Limited. They submitted that material could be transferred there at the conclusion of proceedings. The justification would be that police forces would no longer need to be concerned with having sufficient resources or space to comply with their duties and the facility would be independent with no history of involvement in the conviction and, therefore, no incentive for the deliberate loss or destruction of evidence.

15.96 PPMI also advocated that evidence should be kept independently of the prosecution as “police have no interest in retaining it [evidence], as it can only come back to bite them”.

Memorandum of understanding

15.97 Dr Louise Hewitt submitted a memorandum of understanding that had been proposed to the NPCC which set out some of the issues faced by Innocence Project London and suggested the following criteria to be applied to disclosure requests:

(1) the applicant maintains their innocence or maintains their conviction is unsafe throughout trial and appeal;

(2) the request is being made for the purpose of a prospective application for leave to appeal or in conjunction with an active application to the CCRC, or in support of an application to the CCRC;

(3) the requested materials must be sufficiently targeted rather than arbitrary and broad; and

(4) the request is submitted by an accredited Innocence Organisation run by academics and/or lawyers or a criminal justice charity where a lawyer has approved the submission, or through a law firm/in conjunction with a qualified lawyer or innocence organisation. This will ensure that arbitrary and unfounded requests by student-run organisations that do not have the necessary legal or educational training to appropriately assess materiality will be excluded.

15.98 The memorandum went on to set out a non-exhaustive list of disclosure which may have a real prospect of affecting the safety of a conviction. It requested that, where the disclosure falls into one of these categories and meets the criteria above, the police consider the disclosure request.

(1) Development in science and the availability of new testing: the requested evidence relates to new scientific methods that were not available at the time of trial. Requests to undertake scientific testing must demonstrate a real prospect of uncovering material that affects the integrity of the conviction.

(2) The evidence requested was used by the prosecution but may not have been relied upon by defence for reasons such as non-disclosure, ineffective assistance of counsel, or other disclosure issues such as late disclosure.

(3) The evidence requested may not have been thoroughly reviewed, including circumstances of ineffective assistance of counsel, or where the defence may not have had the opportunity to undertake such a review due to a lack of technological advances at the time of trial (e.g. CCTV, or video evidence, cell site data etc.) or lack of time/resources.

(4) Request of CCTV or video evidence to forensically review the standards for which that CCTV was used as evidence, including an assessment of how it has been edited and whether such a process met the standards of the time.

(5) Non-scientific methods where forensic digital testing is now more readily available to test the evidence requested.

(6) Eyewitness identification evidence where a review of that evidence would likely cast doubt on the safety of that evidence. This includes photo line-up practices and a review of the standards of the time.

The Open Justice Charter

15.99 The Open Justice Charter was written by Emily Bolton (the founder of APPEAL), James Burley (an investigator at APPEAL), Marika Henneberg (University of Portsmouth), Dennis Eady (Cardiff Law School Innocence Project) and Louise Shorter (founder of Inside Justice). This Charter sets out a number of measures to make the criminal justice system more open and transparent. Of relevance to post-conviction disclosure are the following recommendations (summarised):

(1) in preparation for an appeal or an application to the CCRC, free access to the HOLMES record for prisoners and to be able to request and receive access to any document listed;[72]

(2) where enquiries as to the safety of a conviction are obstructed or prevented due to evidence having been lost or destroyed, this should be an independent ground of appeal;

(3) those seeking an appeal should be given controlled access to exhibits and evidence for forensic examination and testing by qualified experts;

(4) the applicant seeking to examine the evidence should not have to predict what the examination would show in order to get access;

(5) where there is a concern that testing would consume the rest of the evidence, an order for sample splitting and/or an agreement with the CPS and the individual should be entered by an independent arbitrator;

(6) representatives of applicants to the CCRC should be able to inspect records obtained by the Commission that relate to the case. This inspection should be at the CCRC's premises without the documents being copied unless an independent arbitrator permits it; and

(7) all decisions of the CCRC should be made available with the applicant's permission to their representatives which includes Case Plans, schedules for work and the arrangements to use experts to examine or test the evidence.

Judicial review

15.100 Three consultees raised a concern about judicial review being the only means for challenging non-disclosure post appeal. This included the Bar Council, APPEAL and

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[72] "HOLMES" is the Home Office Large Major Enquiry System which is a computer database to aid the investigation into large scale enquiries. It is cloud based and can be accessed by all police forces.

CALA. CALA argued that judicial review is "woefully inadequate" and is not a viable option due to the cost, complexity, and risk. It stated that:

> In any judicial review proceedings, the individual seeking the disclosure will in effect yet again be attempting to put forward an argument about the potential exculpatory value of the unseen material without possession of it. This places them at a considerable disadvantage, made worse by the judicial belief that the CCRC in most cases provides an effective alternative remedy for the requestor.

15.101 CALA recommended that consideration should be given to a mechanism to challenge a decision not to provide disclosure. It recognised that this would have resource implications but argued that given non-disclosure is known to contribute to miscarriages of justice, this would be a proportionate measure.

15.102 APPEAL suggested that refusals to access material could be challenged to an independent tribunal which could be the same one as the tribunal it proposed to challenge CCRC decisions.[73]

15.103 The Bar Council also queried whether judicial review was the right mechanism for challenging refusals to disclose material. It argued that:

> [m]ore fundamentally, it is questionable whether judicial review is the right mechanism to challenge the non-disclosure of material on appeal. What is required is the correct decision on whether disclosure should be ordered, not just a reasonable one (which would be capable of surviving judicial review).

15.104 It suggested that there may be value in providing an opportunity to apply to the CACD for a disclosure order before an appeal is heard.

15.105 We note that leave must be obtained to bring judicial review proceedings and so there is an additional preliminary hurdle to be cleared before judicial review proceedings are heard.

DISCUSSION: RETENTION

15.106 We share respondents' concerns about the law and practice surrounding post-trial retention of evidence.

15.107 It is clear to us, on the basis of evidence we have received and read,[74] that investigations into claimed miscarriages of justice have been, and are being, hampered by the loss or destruction of potentially relevant evidence, and difficulties in tracing evidence where it has been retained. It appears, for example, that it was only by good fortune that relevant evidence in the Malkinson case had been retained by the Forensic Science Service, and therefore was in the Forensic Archive, Greater Manchester Police having lost or destroyed the clothing from which the samples were

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[73] See paras 11.351-11.359.

[74] For example, C McCartney and L Shorter "Police retention and storage of evidence in England and Wales" (2020) 22 *International Journal of Police Science and Management* 123.

taken. We are satisfied that that the retention failures seen in Mr Malkinson's case are not isolated ones.[75]

15.108 We have received clear evidence that the fragmentation of forensic science services since the closure of the Forensic Science Service risks material evidence not being retained or being lost. Although evidence should be returned by the forensic science provider to the police force, it has been suggested that this does not consistently occur (and is, in any case, then potentially subject to the difficulties with retention by police forces described above).

15.109 The possibility of forensic science providers ceasing to operate (whether as a result of financial failure or voluntarily leaving the market) creates further potential for loss of evidence.

15.110 We consider that in this fragmented system, requirements for the preservation of evidence need a much firmer legal foundation.

Time limits where a custodial sentence is imposed

15.111 As discussed above, the current CPIA Code of Practice requirements are linked to the point at which a convicted person is released from custody. However, prisoners on determinate sentences are released at either the 40%, halfway or two-thirds point of their sentence, but are liable to recall for the remainder of their sentence if they breach their licence. Life sentenced prisoners must serve the minimum term, or "tariff", and will only be released once the Parole Board is satisfied that they can be safely managed in the community; they remain liable to be recalled for the rest of their life on breach of their licence. If the purpose of this rule is to ensure that evidence is retained so that it can be used in an appeal while the person is incarcerated, then the rule needs to reflect the possibility of recall. What this means in practice, therefore, is that the retention period needs to reflect the length of a person's sentence, plus any extension period, which in the case of a life-sentenced prisoner would be lifelong.

15.112 However, we would question whether limiting retention to the period for which a person is incarcerated or liable to be recalled is sufficient. As the Post Office Horizon scandal and the Derek Ridgewell cases demonstrate,[76] there remains an interest in correcting miscarriages of justice, notwithstanding that any sentence has long been served.

15.113 We provisionally propose that retention periods should be extended to cover at least the full term of the person's sentence (meaning, in the event of a life sentence, the remainder of the convicted person's life, rather than their minimum term).

15.114 In addition, we have received evidence of the particular impact of retention periods on those who are sentenced as children. In its response to the Issues Paper, JfKL described factors that may lead to children seeking an appeal later in life, including not

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75 Retention of evidence is not only important for exoneration, but also in "double jeopardy" cases (see Chapter 13). If evidence is not retained it will not be available for subsequent DNA analysis that could implicate a previously acquitted suspect (see the case of Russell Bishop at para 13.39(9).) It could also lead to the conviction of a person not previously identified as a subject (see the convictions of Jeffrey Gafoor and Shahidul Ahmet for the murders of Lynette White and Rachel Manning respectively in Appendix 2).

76 See the first section of Chapter 17 and Appendix 3.

understanding the significance or the consequences of their conviction at the time; a lack of legal advice; or being incentivised to plead guilty under the misunderstanding that their convictions would not be disclosed. JfKL noted that children in care may be disproportionately affected where they do not have trusted adults to assist in scrutinising or challenging the criminal process. JfKL concluded that:

> As a charity representing children in legal proceedings, including criminal proceedings, we have a policy of retaining child clients' records for six years from the date when they turned 18 years old. We would welcome the adoption of similar rule by the police, the CPS, the courts, and criminal defence firms which accept instructions from children.

15.115 Consultees who attended our event on children in the appeals system similarly supported an extension to the period of retention for material pertaining to children.[77] They also told us that there was a lack of consistency across the system; for example, evidence of mental health history held by the Mental Health Review Tribunal was only held for three years despite it being of potential importance for an appeal.

15.116 We provisionally conclude that retention periods should be extended for children irrespective of whether our provisional proposal for a general extension of retention is adopted. We provisionally propose that there should be an extended period for bringing an appeal to enable the convicted child to exercise an independent decision to appeal when they become an adult.

15.117 We therefore provisionally propose that in the case of a person convicted as a child, material should be stored for a period that would enable them to exercise that right. We have suggested a retention period of either at least until the end of the child's sentence or at least six years after they turn 18 years old, whichever is longest, but we would welcome consultees' views on how this would work in practice.

Consultation Question 90.

15.118 We provisionally propose that retention periods should be extended to cover at least the full term of a convicted person's sentence (meaning, for a person sentenced to life imprisonment, the remainder of their life).

Do consultees agree?

15.119 We invite consultees' views on whether retention periods should be extended further, and for how long.

[77] We hosted this event in January 2024. It was attended by a representative of the CCRC as well as academics and legal practitioners with experience in representing children.

Consultation Question 91.

15.120 We provisionally propose that the retention period for children should be extended to at least the end of their sentence or at least six years after they turn 18 years old, whichever is longest.

Do consultees agree?

15.121 Where a person sentenced to life imprisonment is released on licence, the conditions of supervision mean that it should be possible to retain material until their death. However, where a person is deported following release on licence, it may not, in practice, be possible to know that the person has died. Accordingly, it would be reasonable to work on the basis of a presumed maximum lifespan of, for instance, 100 years.

15.122 APPEAL have proposed that convicted people should be contacted before any case materials are destroyed to confirm that they do not intend to challenge their convictions any further. We see a potential difficulty with such a rule given that police forces will retain a large amount of evidence, including some for relatively minor crimes where no appeal will be contemplated.

15.123 Rather, we think it is more practical that evidence should be marked where an appeal against conviction or an application to the CCRC has been made in respect of a conviction (whether or not successful). As discussed at paragraph 15.4 above, where an appeal or application is pending the material must be retained. However, we do not think that the fact that the appeal or application is unsuccessful means that disposal or destruction of the evidence should then follow. The point, rather, is that the convicted person has challenged, and may well continue to challenge, their conviction. Accordingly, the material should be retained so that it might be examined or tested in future if necessary.

Loss or destruction of evidence as a ground of appeal

15.124 The Westminster Commission proposed that the Law Commission should consider whether premature destruction of crucial evidence which could have undermined the safety of a conviction should be a standalone ground of appeal.

15.125 We do not think loss or destruction of evidence alone should suffice as a ground of appeal. There would be a grave risk that many people whose conviction was in no way unsafe would be able to challenge their conviction merely because a police force had lost or destroyed evidence.

15.126 In its submission, APPEAL argued that an appellant would have to show that, if the material was still available, there is a realistic prospect that it might have given rise to evidence rendering the conviction unsafe, such that the appellant cannot effectively exercise their right of appeal or to apply to the CCRC.

15.127 The difficulty with this is that it would still leave the applicant with a requirement to demonstrate effectively that the conviction was, or might be, unsafe, without access to the evidence that had been lost or destroyed.

An offence of destroying evidence?

15.128 In its submission, APPEAL suggested that there should be an offence of wilfully or recklessly destroying evidence.

15.129 We have considered whether such an offence would be within our terms of reference. We have concluded that, given that the terms of reference include the law relating to the retention and disclosure of evidence, the use of criminal sanctions to enforce that law is within the project's scope.

15.130 Where evidence is deliberately destroyed or concealed in order to affect criminal proceedings, whether or not instituted, including appeals, this would amount to perverting the course of justice (an existing criminal offence).[78]

15.131 If the destruction or concealment were carried out by a police officer, this could also constitute misconduct in public office. However, this requires that the officer wilfully misconducts themselves to such a degree as to amount to an abuse of the public trust. It is unlikely that it would be enough that the officer intentionally destroyed the material, let alone that they did so recklessly. Wilful here means "knowing it to be wrong or with reckless indifference as to whether it was wrong".[79] Moreover, not every neglect of duty or misconduct will constitute the offence.

15.132 Neither of these offences would cover the situation where a police officer (or other public official) causes the destruction of evidence because of serious negligence or recklessness.

15.133 We think there is a case for creating an offence of concealing, destroying or disposing of evidence without authorisation. We welcome views on the scope of such an offence, and how best to avoid overlap with the existing offence of perverting the course of justice.

Consultation Question 92.

15.134 We provisionally propose that unauthorised destruction, disposal or concealment of retained evidence should be a specific criminal offence.

Do consultees agree?

15.135 We invite consultees' views on the scope of such an offence.

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78 Criminal Law: Offences Relating to Interference with the Course of Justice (1979) Law Commission No 96, p 44; *R v Vreones* [1891] 1 QB 360, CCR; *R v Sharpe* (1938) 26 Cr App R 122, CCA.

79 *Attorney General's Reference (No 3 of 2003)* [2004] EWCA Crim 868, [2005] QB 73 at [28], by Pill LJ citing *Graham v Teesdale* (1983) 81 LGR 117, DC.

15.136 Under the Criminal Justice Act 1987, a person who knows that the police or SFO are, or are likely to be, carrying out an investigation into serious fraud, is guilty of an offence if they falsify, conceal, destroy or otherwise dispose of documents which they know or suspect would be relevant to the investigation, or permit another person to do the same.[80] The offence is triable either way and the maximum penalty is seven years' imprisonment.[81]

15.137 Under the Freedom of Information Act 2000, section 77, where a request for information has been made and the applicant would be entitled to disclosure, a person who alters, defaces, blocks, erases, destroys or conceals any record with intent to prevent the disclosure of all, or part of, that information is guilty of an offence. The offence is triable summarily and the maximum penalty is an unlimited fine.

15.138 Our initial thinking is that the offence we provisionally propose should apply only where the evidence is required to be retained under the CPIA Code of Practice or Police Information and Records Management Code of Practice. There may well be other circumstances where a person destroys evidence, but we think that the cases where this would be sufficiently culpable to justify criminalisation would be covered by the existing offences. For instance, if a police officer is shown exculpatory evidence and orders the person to destroy it, meaning that the evidence never comes into the custody of the police, this would seem clearly to constitute both perverting the course of justice and misconduct in public office.

15.139 Conversely, there could be a situation where a person outside the criminal justice system destroys evidence negligently, without the intent that would be required for it to constitute perverting the course of justice. Our provisional conclusion is that criminalisation is not warranted in such circumstances.

A National Forensic Archive service

15.140 Materials retained by the Forensic Archive following the closure of the Forensic Science Service have proved invaluable in proving that a miscarriage of justice has occurred. As described above, in the case of Andrew Malkinson, Greater Manchester Police had destroyed the victim's clothing, and it was only because samples had been sent to the Forensic Science Service for testing and subsequently retained by the Forensic Archive that the DNA of another plausible suspect was identified.

15.141 In 2013, the House of Commons Science and Technology Committee argued that the current arrangements could lead to fragmentation and suggested two options: physical consolidation of forensic archives in one place to create a National Forensic Archive (potentially by expanding Forensic Archive Limited ("FAL") to incorporate materials from all closed cases); or a "virtual" consolidation whereby all archived materials would be accessible through a common indexing system.[82]

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80 Criminal Justice Act 1987, s 2(16).

81 Above, s 2(17).

82 House of Commons Science and Technology Committee, *Science and Technology Committee - Second Report Forensic Science* (17 July 2013) para 108.

15.142 An additional consideration raised by the Committee was whether FAL would become the repository for materials in the event that a private forensic science provider failed or exited the market.[83] This has happened in one case.[84]

15.143 The Home Office's 2016 triennial review of Forensic Archive Limited considered several alternatives, including the National Archives and the British Library or an Arm's Length Body within the Home Office, such as the National DNA Database Delivery Unit ("NDU"). It concluded that at the next triennial review (in 2020), consideration should be given to winding down FAL and transferring its remaining archive to the Home Office.[85]

15.144 We see considerable benefits in transferring custody of used and unused material to a national Forensic Archive Service following a trial. This need not be a single national repository. It might be, for instance, that responsibility for some police archives could be transferred piecemeal, with the focus initially on transferring material from those forces whose own arrangements are least satisfactory.

15.145 Although there would be set-up costs involved, in principle it is hard to see why the costs of archiving material in this way would be any greater than the current costs borne by police forces in making their own arrangements. Indeed, there may well be economies of scale.

15.146 While our concern is with appeals, and the retention of evidence post-trial, it may be that there would be considerable value in transferring all material that has been sent to independent forensic science providers for testing thereafter to a national Forensic Archive Service rather than returning it to police forces.

Consultation Question 93.

15.147 We invite consultees' views on whether responsibility for long-term storage of forensic evidence should be transferred to a national Forensic Archive Service.

DISCUSSION: DISCLOSURE

15.148 Post-trial disclosure does not take place in a vacuum. Issues with pre-trial disclosure in England and Wales are long-standing. In July 2017, Richard Horwell KC, reviewing the collapse of the case of *Mouncher and others*,[86] said:[87]

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83 House of Commons Science and Technology Committee, *Science and Technology Committee - Second Report Forensic Science* (17 July 2013), para 110.

84 "Firm's collapse into receivership sees forensic scandal retests delayed" *The Yorkshire Post* (12 February 2018).

85 Home Office, *Review of the Forensic Archive Limited (FAL)* (April 2016) p 28.

86 This was the trial of police officers implicated in the wrongful convictions of the "Cardiff Three" for the murder of Lynette White (see Appendix 2). This case is also discussed in Chapter 16.

87 R Horwell KC, *Mouncher Investigation Report* (July 2017) p 5. We discuss the Mouncher Inquiry which followed the wrongful conviction of the "Cardiff Three" in Appendix 2.

> Disclosure problems have blighted our criminal justice system for too long and although disclosure guidelines, manuals and policy documents are necessary, it is the mindset and experience of those who do disclosure work that is paramount.

15.149 In July 2017, a joint inspection by HM Inspectorate of Constabulary and Fire and Rescue Services and HM CPS Inspectorate of disclosure of unused material found that:[88]

> police scheduling (the process of recording details of both sensitive and non-sensitive material) is routinely poor, while revelation by the police to the prosecutor of material that may undermine the prosecution case or assist the defence case is rare. Prosecutors fail to challenge poor quality schedules and in turn provide little or no input to the police. Neither party is managing sensitive material effectively and prosecutors are failing to manage ongoing disclosure. To compound matters, the auditing process surrounding disclosure decision-making falls far below any acceptable standard of performance. The failure to grip disclosure issues early often leads to chaotic scenes later outside the courtroom, where last minute and often unauthorised disclosure between counsel, unnecessary adjournments and – ultimately – discontinued cases, are common occurrences.

15.150 In June 2018, the House of Commons Justice Committee concluded that:[89]

> Problems with the practice of disclosure have persisted for far too long, in clear sight of people working within the system. Disclosure of unused material sits at the centre of every criminal justice case that goes through the courts and as such it is not an issue which can be isolated, ring fenced, or quickly resolved. These problems necessitate a concerted, system wide and ongoing effort by those involved, with clear leadership from the very top …
>
> When police and prosecutors do not undertake their disclosure duties correctly cases may be delayed, may collapse or a miscarriage of justice may occur.

15.151 The wider disclosure regime, including the disclosure requirements under the CPIA 1996, are outside the remit of this project. However, the unsatisfactory state of police and prosecution disclosure in the trial process has to inform our analysis. Pre-trial disclosure failings can cause miscarriages of justice and strengthen the need for adequate post-trial disclosure. At the same time, they bring into question the extent to which the police and CPS can be relied upon to deliver adequate post-trial disclosure when they will often be the bodies which have failed to comply with their disclosure duties in the first place. The problem is particularly acute for the police since many miscarriages of justice occur as a result of police misconduct or negligence: this may be deliberate non-compliance with statutory duties, including those under PACE, but it may also involve tunnel vision, a failure to explore reasonable lines of inquiry, prejudgment, or negligent failure to disclose material.

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88 HM Inspectorate of Constabulary and Fire and Rescue Services and HM CPS Inspectorate, *Making it Fair: A Joint Inspection of the Disclosure of Unused Material in Volume Crown Court Cases* (18 July 2017) para 1.3.

89 Disclosure of evidence in criminal cases, Report of the House of Commons Justice Committee (2017-19) HC 859, para 26.

15.152 Faced with post-conviction requests for disclosure of evidence, it is understandable that police forces will start from a position of scepticism. Moreover, often the only officers who are in position to advise on the relevance of requested evidence to the safety of a conviction will be those officers who were involved in the investigation.[90] Not only will these officers typically be satisfied of the convicted person's guilt, they will presumably be conscious that they may well be implicated in any misconduct or failure that might be exposed if the person's conviction is found to be unsafe.

15.153 The majority of consultees who responded to either the full Issues Paper or the summary considered that the current disclosure regime was unsatisfactory. As we have seen, many consultees argued that evidence was often lost or destroyed, and this was, therefore, considered to be a leading cause of miscarriages of justice. It was widely argued that the *Nunn* judgment was routinely being misapplied or misinterpreted. This has led to inconsistent practices among police forces with responses to disclosure requests being dependent on which force is involved. The judgment in *Nunn* is often used as a reason not to disclose material, with relevant parties being told to apply to the CCRC in order to obtain disclosure.

15.154 For instance, Inside Justice told us that in the case of Roger Kearney, the police were unwilling to disclose raw (that is, uncompressed) CCTV footage to the convicted person, but did indicate that they were happy to release the material if requested by the CCRC.[91]

Analysis

Is *Nunn* being misapplied?

15.155 In pre-consultation discussions and in their responses, several stakeholders told us that police forces are misapplying *Nunn*, essentially concentrating on the first of these "safety nets" at the expense of the second – applicants who request disclosure of evidence or access to evidence for testing are being (wrongly) informed that they must go through the CCRC. This is something which the Supreme Court expressly rejected.[92]

15.156 Further evidence that the duties arising under *Nunn* are being misunderstood or misapplied can be found in evidence disclosed as part of the Post Office Horizon inquiry. Paul Marshall has noted that, when reviewing the conviction of Seema Misra in 2015, Mr Clarke, one of the lawyers engaged to advise the Post Office on prosecutions that had taken place, had advised the Post Office that "all matters relating to issues of disclosure now fall to be determined by the CCRC and not by the

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90 Considerations applying to police officers will also apply to other investigatory and prosecutorial agencies. For instance, in the Horizon appeals (see Chapter 17 and Appendix 3) most of the relevant information was in the hands of the Post Office and its lawyers who resisted disclosure of information relating to Horizon during both civil and criminal proceedings.

91 The CCTV footage is of traffic; it is not material which raises difficult issues relating, for instance, to the privacy of victims or third parties if released to a convicted person and would clearly have been disclosable under the CPIA prior to trial.

92 *R (Nunn) v Chief Constable of Suffolk Constabulary* [2014] UKSC 37, [2015] AC 225 at [41], by Lord Hughes JSC.

[Post Office]".[93] We agree with Mr Marshall that there is no proper basis for suggesting that a prosecutor's *Nunn* obligations are displaced by the involvement of the CCRC.

15.157 We accept the evidence of respondents that *Nunn* is being misunderstood and misapplied by police forces and other bodies: the Post Office cases being a clear example. There is a separate issue as to whether the duties under *Nunn* strike the correct balance.

15.158 We are also concerned that the CPS Disclosure Manual misstates the post-trial disclosure duties in *Nunn*, by representing the Attorney General's pre-*Nunn* Guidelines as having been endorsed by the High Court, without noting either the gloss put on this duty by the Supreme Court, or the additional duty to make enquiries in some circumstances.[94] In contrast, the Attorney General's Guidelines on Disclosure 2024 correctly represent the position under *Nunn*.[95]

15.159 We accept that it would not make sense for any duty to disclose information post-conviction to be broader than the right to disclosure while proceedings are active. However, the rules on prosecution disclosure before and during proceedings are outside the scope of this review.[96] Accordingly, in practice, the test for disclosure in sections 3 and 7 of the CPIA 1996 is likely to operate as a ceiling on disclosure obligations post-conviction.

15.160 We conclude that the common law duties under *Nunn* are giving rise to misunderstanding and provisionally propose that they should be put on a statutory basis.

What principles should govern post-trial disclosure?

15.161 We think that, in principle, the following *Nunn* duties are broadly satisfactory.

(1) Where a person has given notice of an application for leave to appeal against a conviction, the prosecutor must disclose to the convicted person any prosecution material which has not previously been disclosed and which might reasonably be considered relevant to an identified ground of appeal and which might assist the appellant.

(2) When the police or prosecution become aware of fresh material that might cast doubt on the safety of a conviction there is a duty to disclose the material to the convicted person.

(3) Where there exists a real prospect that further enquiry may reveal something affecting the safety of the conviction there is a duty to make those enquiries.

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93 P Marshall, "Supplemental Submission to the Post Office Horizon Inquiry" (23 June 2022) para 66.

94 See above, para 15.25.

95 Attorney-General's Office, *Attorney-General's Guidelines on Disclosure for investigators, prosecutors and defence practitioners* (29 February 2024) para 140.

96 An independent review of disclosure and fraud offences by Jonathan Fisher KC is currently ongoing. Fisher KC shared his report with the Home Secretary on 18 November 2024: "Correspondence: Independent Review of Disclosure and Fraud Offences: report submitted to government" (18 November 2024).

15.162 We think it would be possible to put these *Nunn* principles on a statutory basis relatively easily. The Supreme Court stated fairly clearly the common law duties on police and prosecution.

15.163 The position is more difficult in respect of *requests* for disclosure of material offered at trial or *requests* for investigators to undertake further inquiries. The Supreme Court recognised, and we accept, that the duties on police and prosecutors to respond to requests for disclosure are qualified. We also note that, unlike pre-trial disclosure, which will generally be effected through the CPS and the police force's disclosure officer, when proceedings are concluded enquiries will generally be made direct to the police.

15.164 We think that it will often be reasonable, where requests for disclosure are made directly to a police force, for those requests to be passed to a Crown prosecutor for a decision on whether the material is disclosable; that is, whether it might reasonably afford grounds for an appeal. In coming to this decision, it will be incumbent on the prosecutor to judge the use that the appellant might make of the evidence at an appeal, and not whether they think that the conviction is unsafe.

15.165 It is implicit in the Supreme Court's judgment in *Nunn* that there may be some circumstances in which there is a "good reason" not to disclose evidence, even though it might suggest that a conviction is unsafe, just as there may be sensitive or highly sensitive material which cannot be disclosed to the defendant for trial.

15.166 In our view, the test for not making disclosure should be a high one: we would suggest that there must be a compelling reason.

15.167 A key difference between non-disclosure of sensitive or highly sensitive material pre-trial and refusing to disclose material post-trial is that where there is sensitive material which cannot be disclosed at trial, it is open to the prosecution to make an application for public interest immunity. If it is not possible for the individual to be tried fairly without disclosure, the prosecution can be abandoned, or the trial stayed as an abuse of process, so as to prevent a miscarriage of justice.

15.168 However, where the person has already been convicted, failing to make the disclosure risks perpetuating a miscarriage of justice. For this reason, we think that where disclosure is not possible, but a conviction may be unsafe, there remains a duty on the police and prosecution to take alternative steps to ensure that any miscarriage of justice can be corrected, and that alternative arrangements must therefore be put in place.

15.169 Most obviously, the material could be disclosed to the CCRC, who are able to initiate an investigation and make a reference to the CACD, if necessary explaining the undisclosed material in a confidential annex. In some cases, where reference to the CACD is not possible,[97] it would be open to the CCRC to refer the case to the Justice

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[97] The Runciman Commission considered that this might be necessary where there was evidence suggesting that a conviction was unsafe, but that evidence would not be admissible, although the CACD has greater flexibility than trial courts in relation to the admission of evidence. There may nonetheless be evidence which is suggestive of a miscarriage of justice but which cannot for some reason be disclosed to the Court: one possible example might be evidence received in confidence from a foreign intelligence service.

Secretary under section 16(2) of the Criminal Appeal Act 1995 to consider exercise of the Royal Prerogative of Mercy.

15.170 In such circumstances, however, we consider that while the police and prosecution might be unable to disclose the material to the convicted person, they should be under a duty to disclose the fact that they are aware of relevant material and have made the material available to the CCRC.

Consultation Question 94.

15.171 We provisionally propose that a statutory regime governing the post-trial disclosure duty should encompass the following principles.

(1) A police officer must disclose to the convicted person or to a Crown prosecutor any material which comes into their possession which might afford arguable grounds for contending that a conviction is unsafe or which might afford grounds for an appeal against sentence.

(2) A prosecutor must disclose to the convicted person any material which comes into their possession which might afford arguable grounds for contending that a conviction is unsafe or which might afford grounds for an appeal against sentence, unless there is a compelling reason of public interest.

(3) Where there is a compelling reason not to make disclosure to the convicted person or their legal representatives under (2), the prosecutor must disclose the material to the Criminal Cases Review Commission and notify the convicted person that they have made a disclosure to the Commission of material which is relevant to their conviction.

(4) A compelling reason would include material subject to Public Interest Immunity or where disclosure is prevented by any obligation of secrecy or other limitation on disclosure.

(5) Where a police officer or prosecutor considers that there is a real prospect that further inquiries will reveal material which might afford grounds for contending that a conviction is unsafe or grounds for an appeal against sentence, then there is a duty to make reasonable inquiries or to ensure that reasonable inquiries are made.

Do consultees agree?

Requests for retesting

15.172 We think there is validity in the view of campaigners that the high threshold that the CCRC applies before it will use its powers under the Criminal Appeal Act 1995 creates a ‘Catch-22’ for applicants.

15.173 Inside Justice cited the case of Kevin Nunn himself as an example. A particular issue that arose in *Nunn* was a request for testing of samples taken from the body of the

victim Dawn Walker (who had been in a relationship with Nunn). Semen containing sperm was found on the victim's body which was considered unlikely to have come from Nunn (who had had a vasectomy).

15.174 The CCRC refused to order testing of the sample. The possibility had been canvassed at trial that semen could have been transferred innocently after the victim had put her towel on a bench in a men's changing room the day before the murder.

15.175 In the High Court's consideration of Nunn's judicial review of Suffolk Constabulary's refusal (among other things) to make the samples available for retesting, Sir John Thomas, President of the Queen's Bench Division (as he then was), said:[98]

> There is nothing in all the material which has been put before us … from which we could conclude that there are items which, if tested, might reasonably be anticipated to provide a result which might affect the safety of the conviction. There is, therefore, nothing which gives rise to a duty to make disclosure of the files of the Forensic Science Service or to enable material to be re-tested… the evidence of Dr Short was that re-investigation would *not necessarily* produce material which cast doubt on the safety of the conviction.

15.176 It is possible that the CCRC has taken its cue from *Nunn* in refusing to use its powers to retest the material in question from this finding. However, we think that the High Court's finding may not adequately recognise that there is a difference between the proposition that reinvestigation would not *necessarily* produce material which cast doubt on the safety of a conviction, and the proposition that retesting *might* produce a result which *might* affect the safety of a conviction.

15.177 It is of course quite true that the identification of the person whose semen was deposited on the victim might not raise a doubt about the safety of Nunn's conviction. The presence of another man's semen would not mean that the other man had killed her, even if it was consistent only with sexual activity. However, it might very well call the safety of Nunn's conviction into question if – for instance – it matched with a known murderer, or a known sex offender (as in the case of Andrew Malkinson), or a previous suspect in the case (as in the case of Sean Hodgson).

15.178 We find the reasoning of the CCRC in refusing to require testing redolent of the flawed approach it took in *Nealon* and in *Malkinson*. We think it highly unlikely that the CCRC would have commissioned the tests that exonerated Andrew Malkinson had APPEAL not been able to obtain disclosure of critical evidence from Greater Manchester Police and to undertake DNA testing of it itself; and we accept that it was fortuitous that Greater Manchester Police did provide that evidence to APPEAL, rather than requiring them to go through the CCRC or forcing APPEAL to take them to judicial review (which may well have been unsuccessful).

15.179 There would appear to be two possible approaches:

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98 *R (Nunn) v Chief Constable of Suffolk Constabulary* [2012] EWHC 1186 (Admin), [2012] Crim LR 968 at [38], by Sir John Thomas PQBD, emphasis added.

(1) a right of the convicted person to require testing or retesting in certain circumstances; or

(2) reform of the CCRC to encourage a more proactive approach to use of its powers under the Criminal Appeal Act 1995.

15.180 In general, despite the criticism of the CCRC that we have heard, our preference would be to strengthen the CCRC (see Chapter 11).

15.181 However, we have concluded that there would be value in a limited individual right to retesting of evidence where there has been scientific development which enhances the potential probative value of the evidence. Clear examples would be where previous methods could not yield a usable DNA sample, but this is now possible.

15.182 The International Covenant on Economic, Social and Cultural Rights, which the UK has ratified, includes a right of everyone to enjoy the benefits of scientific progress and its applications.[99] Thus those who were convicted using scientific methodologies which – while possibly state of the art at the time of conviction – have now been improved upon should be able to enjoy the benefits of enhanced forensic techniques which have been developed following their conviction.

15.183 We think that it would be a legitimate ground for resisting a request for testing that testing would be destructive of material and that there is no way of retaining sufficient material for future testing. However, we do not think this should always prevent testing. For instance, if a sample that could not previously be subject to DNA analysis now could, we do not think a request for testing should be refused simply because of the possibility of a future method of testing which might be more evidentially valuable, or which could be done without wholly destroying the evidence.

[99] *R (Nunn) v Chief Constable of Suffolk Constabulary* [2012] EWHC 1186 (Admin), [2012] Crim LR 968.

Consultation Question 95.

15.184 Where a request is made for material which might afford grounds for an appeal against conviction or sentence, we provisionally propose that the following principles should apply:

(1) Where it is possible to undertake non-destructive tests on material, the convicted person should be entitled to access to the material for the purposes of testing.

(2) Where tests are proposed which are destructive of the material, but where testing would not substantially reduce the amount of material available for future testing, the convicted person should be entitled to access to some material for the purposes of testing.

(3) The police should have the right to restrict access to material to the convicted person's legal representatives or to accredited testing facilities.

Do consultees agree?

Use of disclosed material by journalists

15.185 As discussed at paragraph 15.36 and following above, the use by defendants and their representatives of material disclosed is governed by sections 17 and 18 of the CPIA 1996, where the material is disclosed under the CPIA; and by the common law under the implied undertaking rule where material is disclosed outside of CPIA.

15.186 Some stakeholders have argued that these provisions can prevent convicted people and their legal representatives from disclosing to journalists material which might disclose a miscarriage of justice. They argued that disclosure to journalists can be an important way of securing an appeal, or obtaining the fresh evidence necessary for a successful appeal (see the discussion in Appendix 2 of the role played by the BBC's programme *Rough Justice* in obtaining not only the evidence that cleared Barri White and Keith Hyatt – but also the evidence which later secured the conviction of Shahidul Ahmed).

15.187 In *ex parte Simms*,[100] the House of Lords recognised the important role that journalism had to play in revealing miscarriages of justice. That case concerned a Home Office policy requiring journalists to sign an undertaking, before meeting with a serving prisoner, agreeing that the journalist would not publish anything that passed

[100] *R v Secretary of State for the Home Department ex parte Simms, R v Secretary of State for the Home Department ex parte O'Brien* [2000] 2 AC 115, HL, 127D-E, by Lord Steyn. *Ex p Simms* was brought separately by two prisoners, one of whom was Michael O'Brien (see discussion of the "Cardiff Newsagent Three" in Appendix 2).

between them during the visit. The House of Lords held that the policy was an unlawful interference with the right to freedom of expression,[101] Lord Steyn saying:

> In recent years a substantial number of miscarriages of justice have only been identified and corrected as a result of painstaking investigation by journalists. And those investigations have included oral interviews with the prisoners in prison…
>
> There is at stake a fundamental or basic right, namely the right of a prisoner to seek through oral interviews to persuade a journalist to investigate the safety of the prisoner's conviction and to publicise his findings in an effort to gain access to justice for the prisoner.

15.188 Similar considerations arguably apply to the use of disclosed material for the purposes of exposing a miscarriage of justice. Indeed, it might be argued that onward disclosure of material for the purposes of a miscarriage of justice campaign or a journalistic investigation does not represent a wholly "collateral purpose". The fact is that many wrongful convictions have only been successfully appealed against as a result of sustained public campaigning. Such campaigning – while no doubt sometimes treated sceptically the courts[102] – has often been a necessary prerequisite to a successful appeal.[103]

15.189 Dr Dennis Eady, for instance, has noted:[104]

> In the history of the correction of miscarriages of justice, the role of the media has been crucial in discovering new evidence and creating public awareness without which the system's own mechanism for 'rectification of error' would not have been adequate. Despite the advent of the CCRC the media role remains a vital resource for investigations that might seek out new witnesses or fund expert reports and make a case that can be used by the CCRC or defence lawyers.

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101 As a result of *Simms*, new guidance was issued to prison governors. Under the current guidance:

> if a prisoner wishes to contact the media by telephone and the call is intended or likely to be published or broadcast by radio or television or posted on the Internet the prisoner must first apply in writing to the Governor for permission… This will only be allowed in exceptional circumstances where the prisoner intends to make serious representations about matters of legitimate public interest affecting prisoners, including where appropriate an alleged miscarriage of justice in the prisoner's own case… Visits by the media will only be allowed in exceptional circumstances, where there is a need for a face to face interview because:
>
> (i) the prisoner claims a miscarriage of justice and requires the assistance of a journalist to challenge the safety of their conviction or sentence; or
>
> (ii) there is some other sufficiently strong public interest in the issue sought to be raised during the visit and the assistance of a particular journalist is needed.

Prison Service Instruction 37/2010.

102 Perhaps the best-known example is Lord Lane's dismissal of the BBC's *Rough Justice* as "mere entertainment" when quashing the conviction of Antony Mycock – on the basis of evidence unearthed by the programme (C Walker and K Starmer, *Miscarriages of Justice: a review of justice in error* (1999) p 218).

103 In the Post Office Horizon scandal, for instance, the campaigning has been both by those affected (such as Sir Alan Bates) and journalists.

104 D Eady, *Miscarriages of Justice: the Uncertainty Principle* (2009) p 274.

15.190 We recognise that public campaigns by convicted persons can be distressing for the victims of crime or their families, especially where they believe the person to have been rightly convicted. Indeed, we recognise that sometimes high-profile miscarriage of justice campaigns are conducted by or on behalf of people who were rightly convicted.[105]

15.191 We also recognise that the current restrictions on disclosure by the CCRC means that the public may well receive a distorted picture of the state of evidence against a convicted person. We provisionally propose in Chapter 11 at Consultation Question 64 reform of the law to enable the CCRC to explain more fully decisions not to refer.

15.192 In its response, APPEAL proposed a limited exception to section 17 of the CPIA to allow disclosure to journalists for the purpose of fair and accurate reporting where a miscarriage of justice is alleged. (As noted above, the CPIA does not cover post-trial disclosure so similar provision would be necessary to cover material disclosed pursuant to duties under *Nunn*.)

15.193 However, a more difficult question is what use a convicted person might be allowed to make of disclosed material. A requirement that the convicted person should seek the permission of the prosecutor or the police is unlikely to be satisfactory given that the police and/or prosecution might well be implicated in any failures that led to a miscarriage of justice. A requirement to seek the permission of the Court of Appeal is unlikely to be any more satisfactory. Material can already be disclosed by the agreement of the parties, or with the authorisation of the Court. However, where the prosecution are satisfied that a conviction is safe, it is questionable whether they would wish to allow disclosure (whether by giving consent to disclosure or not challenging an application to the Court). It also seems unlikely that the Court of Appeal would sanction a media campaign to expose an alleged miscarriage of justice when there is the mechanism of an application to the CCRC available.

15.194 We also question how far it would be possible to define "journalist" for the purpose of such a provision. Journalism can take many forms: in relation to miscarriages of justice, journalists may well be activists who provide material to the media on a freelance basis. It may be hard to draw a line between mainstream journalists, "citizen journalists", and ordinary citizens making use of online publication (for instance "bloggers") to highlight a possible miscarriage of justice.

15.195 In our final report on Modernising Communications Offences,[106] we proposed a limited exemption to the communications offences in respect of journalistic content, which broadly adopted the wording in the Draft Online Safety Bill, now found in the

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105 Two commonly raised cases are those of James Hanratty and Simon Hall, who were convicted of murder in 1962 and 2003 respectively. Hanratty was executed in 1962. Separate campaigns were mounted by the families of Hanratty and Hall (and Hall himself) claiming that they were innocent, supported by members of the public, press and Parliament. Following references by the CCRC in 1999 and 2009 respectively, the CACD dismissed their referred appeals in *R v Hanratty (deceased)* [2002] EWCA Crim 1141, [2002] 3 All ER 534 and *R v Hall* [2011] EWCA Crim 4. In Hanratty's case, the CACD admitted fresh DNA evidence which, standing alone, it held at [127] (by Lord Woolf CJ) was certain proof of his guilt. In Hall's case, the CACD found no reason to doubt the safety of his conviction after fibre evidence was questioned; more significantly, however, Hall confessed to the murder he was convicted of in 2013.

106 Modernising Communications Offences: a final report (2021) Law Com 399.

Online Safety Act 2023. This exemption extended only to clearly defined providers of media, such as the BBC or those who otherwise fell within the category of a "recognised news publisher", as now defined in section 56 of the Act.[107] In theory, it might be possible to limit disclosure to recognised news publishers, using a definition such as that in section 56. However, this would fail to reflect the fact that very often disclosure must be made not to *publishers* of news material, but to journalists, often freelancers, who will investigate with a view to such material being provided to news publishers.

15.196 The Act did distinguish other categories of journalistic content for the purposes of the regulatory regime. Notably, the definition of journalistic content distinguished between "news publisher content" and "regulated user-generated content" generated for the purposes of journalism. However, "journalism" was not itself defined. Moreover, we would question whether an exemption predicated on disclosures for the purposes of journalism would be too broad when the purpose of the exemption is to provide for disclosure to journalists to expose a potential miscarriage of justice.

Consultation Question 96.

15.197 We invite consultees' views on whether provision could and should be made to enable disclosure of material for the purposes of responsible journalism to reveal a possible miscarriage of justice.

RETENTION OF AND ACCESS TO RECORDS OF PROCEEDINGS

15.198 In the "Shrewsbury 24" case, the CACD indicated that existing rules on retention and destruction of records of proceedings were no longer appropriate:[108]

> This case provides the clearest example as to why injustice might result when a routine date is set for the deletion and destruction of the papers that founded criminal proceedings (the statements, exhibits, transcripts, grounds of appeal etc.), particularly if they resulted in a conviction. At the point when the record is extinguished by way of destruction of the paper file (as hitherto) or digital deletion (as now), there is no way of predicting whether something may later emerge that casts material doubt over the result of the case.

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107 Under s 56 of the Online Safety Act 2024, a "recognised news publisher" means any of the following entities:

(a) the BBC,

(b) Sianel Pedwar Cymru (S4C),

(c) the holder of a broadcasting licence who publishes news-related material in connection with the broadcasting activities authorised under the licence, and

(d) any other entity which meets all of the conditions in subsection (2) and is not an excluded or sanctioned entity.

Subsection 2 requires (among other things) that the entity has as its principal purpose the publication of news-related material which is created by different persons, and is subject to editorial control.

108 *R v Warren* [2021] EWCA Crim 413, at [101]-[102], by Fulford LJ VPCACD. See Appendix 1.

> Given most, if not all, of the materials in criminal cases are now presented in digital format, with the ability to store them in a compressed format, we suggest that there should be consideration as to whether the present regimen for retaining and deleting digital files is appropriate, given that the absence of relevant court records can make the task of this court markedly difficult when assessing – which is not an uncommon event – whether an historical conviction is safe.

Retention of and access to records of proceedings

15.199 Records of court proceedings are governed by the Magistrates' Court and Crown Court Records Retention and Disposition Schedules issued by the Ministry of Justice.[109] The "case file" (case documents, evidence and data) for a trial on indictment is kept for seven years. Case files relating to appeals from magistrates' courts are kept for five years. Where the offence alleged is one of terrorism, homicide, sexual offences, or results in a life sentence or a sentence of longer than seven years, or the case has been appealed to the CACD, the file should be kept for permanent preservation.

15.200 Criminal proceedings are recorded in the Crown Court. Retention of audio recordings is governed by the Crown Court Record and Disposition Schedule, under which analogue audio recordings of trials are routinely destroyed after five years, while digital recordings are kept for seven years.[110] An application can be made for a transcript of the proceedings; however, the provision of the transcript will be subject to a fee, which may vary depending on the length of the proceedings that require transcription, the timescale for completion of the transcript and the prices of the transcription company. As we discuss at paragraphs 15.225 to 15.229 below, several respondents raised the high cost of obtaining transcripts, and suggested that this cost constrained convicted people's ability to challenge their convictions.

15.201 While digitisation does make longer-term storage of court records more affordable (although it is not without cost), it should also be recognised that digitisation is not always an acceptable substitute for retention of physical items. For instance, a number of miscarriages of justice have been exposed because analysis of police notebooks using electrostatic detection apparatus ("ESDA" testing) revealed that police had amended or even fabricated statements. This was only possible because the actual notebooks had been retained; the analysis would not be possible with digital records.[111]

Access to transcripts and audio recordings

15.202 Requests for court records and transcripts of proceedings are governed by the Criminal Procedure Rules 5.5(1)-(2). Where proceedings may be the subject of an appeal to the CACD, the court officer must arrange for the recording of the proceedings (unless the court orders otherwise) and for the transcription of proceedings upon request by the Registrar of Criminal Appeals or any other person

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109 Ministry of Justice, *Magistrates' Courts Records Retention and Disposition Schedule* (July 2020) and *The Crown Court Records Retention and Disposition Schedule* (August 2020).

110 Ministry of Justice, *The Crown Court Records Retention and Disposition Schedule* (August 2020) p 5, row 13 of the table.

111 See Appendix 3, para 8(3) and the accompanying footnote for more detail on ESDA testing.

eligible to receive it. A transcript must be supplied to any person who requests it in accordance with the transcription arrangements made by the court officer, and on payment of any fee, except that:

(1) if the hearing was in private, a transcript may only be provided to the Registrar or a person who was present at the hearing; and

(2) if the hearing was in public, but subject to reporting restrictions, a transcript may only be provided to the Registrar or to a recipient to whom that supply will not contravene those reporting restrictions.

15.203 In *Riley*, the CACD said that:[112]

> The provision that the judge must consider a request for transcript applies in many circumstances and could be made by a journalist or any other person interested in the proceedings and therefore it is appropriate that in those circumstances a degree of discretion should be exercised.

15.204 The Court held, however, that it was not appropriate to refuse permission for a transcript where the request was made by the Attorney General's Office for the purposes of considering a reference on the grounds that the sentence was unduly lenient.

15.205 Requests to listen to audio recordings of Crown Court proceedings are covered in rules 5.5(3)-(4) of the Criminal Procedure Rules. A person who wants to hear a recording of proceedings must apply in writing to the Registrar if an appeal notice has been served, or apply orally or in writing to the Crown Court officer, explaining the reasons for the request.

15.206 If the Crown Court officer or Registrar so directs, the Crown Court officer must allow that party to listen to the recording if it was a hearing in public, or if it was a hearing in private and the applicant was present at the hearing.

15.207 In *Lake*,[113] the CACD said that this meant that if the applicant provided a good and sufficient reason for the request, and paid any prescribed fee, access to the recording should be provided.

Documents in the custody of the defendant's advisers

15.208 Law Society guidance states that the following belong to the client:[114]

(1) original documents sent to the firm by the client;

(2) documents sent to or received from the firm on behalf of the client;

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112 [2019] EWCA Crim 816, [2019] 2 Cr App R (S) 42 at [31], by Sir Brian Leveson PQBD.

113 [2023] EWCA Crim 710, [2024] 1 WLR 2115.

114 Law Society, "Who owns the file?" (26 July 2022).

(3) final versions of documents which "go to the object of the retainer" such as written representations;

(4) final versions of documents prepared by a third party and paid for by the client.

15.209 Solicitors are expected to provide these to new representatives.

15.210 However, file copies of letters, notes regarding time taken, drafts and working papers, internal correspondence, and accounting records belong to the firm.

15.211 There are no formal retention periods.[115] However, most solicitors will retain clients' files for at least six years. Where a firm closes, it should make arrangements with former clients for return of their files. When the Solicitors Regulation Authority intervenes and closes down a firm, it will normally retain files for a period of seven years.

Consultation responses

15.212 In our Issues Paper, we asked:

> Is the law governing retention of, and access to, records of proceedings following a trial satisfactory? (Question 17 and Summary Question 10)

15.213 The Criminal Appeal Office ("CAO") noted that:

> In relation to DARTS recordings,[116] where the audio is no longer available it can impact the work of the [CACD]. The CAO orders transcripts of various parts of proceedings, most frequently summing up, legal rulings, prosecution opening of facts, sentencing remarks. An application for leave to appeal may be received several years out of time or a conviction (or sentence) referred by the [CCRC] after that period. Where the audio is no longer available attempts have to be made to see if a transcript is available from an alternative source (in a CCRC reference it may well be on file from the previous appeal) or ask counsel to agree a note. In cases where a long period of time has passed, it may be very difficult for counsel to recall and agree the details.

15.214 Of the remaining consultees who did not think the current law was satisfactory, the primary reasons put forward were the length of time for which records are kept and the lack of access to records.

Length of time

15.215 Many consultees raised concerns about the length of time records are kept. This included key institutional stakeholders such as the Law Society, the London Criminal Courts Solicitors Association ("LCCSA"), CALA, and the CPS.

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115 Law Society, "How long should I retain my closed files in storage?" (22 November 2023). In contrast, the Law Society of Scotland provides detailed guidance stating that in summary cases files should be retained for at least three years, and in solemn cases for at least three years, the length of a custodial sentence if longer, and indefinitely where a life sentence is imposed; Law Society of Scotland, "The ownership and destruction of files" (15 March 2022).

116 DARTS stands for "Digital Audio Recording Transcription and Storage".

15.216 The majority of consultees who expressed concern with the length of time for which records of proceedings are held considered that, given the information is stored digitally, it could be stored indefinitely or at least for a much longer time.

15.217 For example, Dr Felicity Gerry KC stated that in Australia trials are visually recorded and recordings can be used in a retrial. Dr Gerry considered this should happen in this jurisdiction and that recordings should be retained digitally forever.

15.218 Mark Alexander, a serving prisoner, argued in favour of the proposal made by the Westminster Commission "that Crown Court trial audio recordings are held for the duration of a prisoner's custody (or for at least 5 years, whichever is longer)".[117]

15.219 Cardiff University Law School Innocence Project highlighted that it often has cases where the appeal is obstructed because of the destruction of trial records including where the recording of the trial judge's summing up was destroyed. It argued that such destruction after five or seven years was unnecessary in the digital age.

15.220 APPEAL observed that the current period of seven years presented serious difficulties for reviewing potential wrongful convictions given the starting point is often to ascertain what went on at trial. APPEAL told us that in one case it had acted in, their ability to demonstrate the significance of fresh evidence was severely hampered by the fact that the audio recordings of an expert's testimony were not available. It recommended that transcripts be kept for at least 50 years.

15.221 The CPS expressed concern about the various retention periods throughout the criminal justice system and argued that there should be consistency between the different agencies.

15.222 Dr Stephen Coles, whose partner claims to be a victim of a miscarriage of justice, compared the current retention periods for court records to the required retention of medical records:

> Since 1998 an image of all patients' records who have not attended the hospital for four years has been recorded, this image will be retained for 30 years. Once the records have been imaged the paper copy is destroyed. However, deceased patients' records are destroyed after 8 years unless the patient is a child, and then the records will be retained until the date when the child would have reached the age of 25.

15.223 FACT cited the *Open Justice Charter*, which recommends:

(1) no records of court proceedings should be destroyed until at least seven years after the end of the prison term and any post-release license period imposed; and

(2) the transcript of the Crown Court Judge's summing up should be kept indefinitely.

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[117] Westminster Commission Report, p 52.

Greater access

15.224 Many consultees argued that there should be greater access to records of proceedings; transcript requests should be approved; and funding provided.

High cost

15.225 Cardiff University Law School Innocence Project stated:

> Where transcripts are available, the cost of obtaining these is prohibitive for most convicted people. In the digital age, recordings should be made available to a convicted person as a right. If there are serious issues of confidentiality, then these should at least be available to representatives or to clients and family with appropriate redaction. The current system makes no economic or social sense with unnecessary transcribing being farmed out to private agencies at great expense to clients. It is a blatant case of justice for only those that can afford it.

15.226 CALA, the LCCSA and the CCRC criticised the high cost of obtaining a transcript. APPEAL observed that even where someone is eligible for legal aid, often only funding for the transcript of the judge's summing up will be approved, and that unrepresented individuals applying for a transcript at public expense rarely have their application granted.

15.227 APPEAL contrasted the current position in England and Wales with the United States where a person convicted has a right to the complete transcript of the trial proceedings.[118] APPEAL stated that:

> Indeed, the unavailability of a trial transcript forms the basis for reversing a conviction. The Louisiana Supreme Court has said: "Without a complete record from which a transcript for appeal may be prepared, a defendant's right of appellate review is rendered meaningless."[119]

15.228 APPEAL also cited Malcolm Birdling, who had commented that in New Zealand full trial transcripts are produced as a matter of course.[120] It also noted that in Western Australia a full transcript is provided to the defendant free of charge. APPEAL recommended that where an individual cannot afford a transcript, there should be a statutory right to a full transcript at the public's expense. In order to alleviate the costs of this it recommended that speech-to-text technology should be fully utilised, as did barrister Chandra Sekar.

15.229 The *Open Justice Charter* cited by FACT recommends that the records of criminal court proceedings should be the property of HMCTS and should be given to any person sentenced to imprisonment free of cost and not through a private court reporting company.

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118 Mark Alexander also argued that defendants should be automatically provided with transcribed trial recordings and the digitised case file as well as the prosecution and jury bundles after their trial.

119 *State v Ford* 338 So 2d 107 (La 1976).

120 M Birdling, *Correction of Miscarriages of Justice in New Zealand and England* (2012) p 93.

Judicial permission

15.230 Although permission of a Crown Court judge is only required for private hearings,[121] there is a recent practice of requiring such permission for all Crown Court hearings (reported by the LCCSA, CALA, the CCRC and solicitor Mark Newby) which CALA understood to have been implemented to ensure that transcription companies did not release transcripts from private hearings. CALA was concerned that there was a lack of guidance as to when approval should be given or on what basis it could be refused. It argued that this had led to inconsistency and a number of cases in which the Crown Court judge had failed to respond or had refused the application without a reason (or with "no good reason"). CALA believed that applications from lawyers were treated more favourably than those from defendants or members of the public.

15.231 Mark Newby emphasised the need for greater access not only for a defendant but for solicitors and counsel who are newly instructed on appeal so that they can comply with their responsibilities to ensure the factual basis of the appeal is advanced correctly. He argued that their duties can only be discharged if practitioners are able to access the evidence and the transcripts, and suggested that the requirement to obtain the judge's permission was:

> never intended [to] operate to prevent professionals reviewing miscarriage cases from accessing transcripts essential to a complete picture of the trial; rather it was intended to stop transcripts inappropriately falling into the public domain or being wrongfully used or circulated – see *R v Lake*[122] ... and *R v Riley*[123] … which deal with misapplication of such permissions to access transcripts by the Crown Court.

15.232 The LCCSA also described evidence of judges refusing permission especially where the prospective appellant requires payment of the transcript from public funds. It argued that the funding of transcripts was not a matter of concern for the court as a solicitor must demonstrate the need for the transcript under the Advice and Assistance legal aid scheme. It stated that this process was difficult for unrepresented individuals.

15.233 CALA recommended that transcript requests should be processed within five working days and that requests should be granted in every case, regardless of who made the application, unless the request related to a hearing that was not held in public. It had been made aware of proceedings where the DARTS system was not recording, or the recording was inaudible. It recommended a fail-safe system to ensure that a trial cannot proceed unless it is being recorded.

Lack of accountability and consistency among solicitors

15.234 Cardiff University Law School Innocence Project also expressed concern about the lack of accountability and inconsistency amongst solicitors destroying or losing files. It argued for greater clarity about solicitors' responsibilities in this area.

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121 HMCTS, *Guidance for requesting a transcript* (4 October 2024).

122 [2023] EWCA Crim 710, [2024] 1 WLR 2115. Although the subject matter of *Lake* was access to the audio recordings of the trial, as the transcript had been provided.

123 [2019] EWCA Crim 816, [2019] 2 Cr App R (S) 42.

Unused material

15.235 The Cardiff University Law School Innocence Project were concerned that the Crown Court Digital System is often incomplete and does not often include unused material. It identified the absence of jury bundles as being common.[124]

15.236 Mark Newby, however, contradicted this by noting that most evidence, including unused material, for recent cases is now stored electronically on the digital case system.

Ground of appeal

15.237 The *Open Justice Charter* cited by FACT recommends that the unavailability of a complete recording of the trial should constitute a standalone ground of appeal.

Summary

15.238 All of the consultees who explicitly answered either Question 17 of the full Issues Paper or Question 10 of the summary agreed that the current law governing the retention of, and access to, records of proceedings was not satisfactory.

15.239 The majority of the consultees thought the current retention period was far too short, particularly in light of the fact court records can be stored electronically. A number of consultees thought that this meant court records should be stored indefinitely or at least for a substantially longer period than they are now.

15.240 Many consultees raised concerns about the relatively recent requirement that a Crown Court judge must give permission in order to obtain a transcript. They considered that this was obstructing justice and disproportionately affected unrepresented litigants who were less likely to have a request approved or be able to navigate the process. Consultees also expressed concern about the cost of obtaining transcripts which was thought to be out of reach for many litigants who were forced to pay privately. Consultees considered that the lack of access to trial transcripts is hindering the correction of potential miscarriages of justice and preventing freshly instructed solicitors and counsel from carrying out their duties on appeal.

DISCUSSION: RETENTION

Retention periods

15.241 Because transcriptions of proceedings are only made on request, deletion of audio recordings can mean that where appeals occur in historical cases, the appellant's advisers, the CCRC, the CAO or the CACD cannot access a transcript and effectively have to try to piece together what was said – in particular the judge's summing up – from contemporaneous notes, which may not be complete.[125]

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[124] Indeed, agreed facts are not always included in jury bundles.

[125] In *R v Sakin* [2021] EWCA Crim 411, counsel's notes did not include any reference to the judge's summing up in respect of Sakin's evidence. This meant that when the transcript also omitted this material, the lack of reference in counsel's notes appeared to confirm that it was not mentioned. The case is discussed in greater detail below, from para 15.243.

15.242 It can also be important for defendants and their legal advisers to have access to the audio recordings rather than transcripts: audio recordings may contain important context which is simply not available on the transcript. For instance, in *Lake*,[126] the defendant's successful appeal against a conviction for rape turned in part upon the failure to give adequate directions in respect of the complainant's apparent distress when testifying. Defence counsel for the appeal had been told of the complainant's apparent distress by the appellant's parents, who had heard, but not seen, the complainant testifying (because of special measures in place). Counsel's request for the audio recording, which was necessary to assess whether the complainant had exhibited distress, was twice refused by the Crown Court. It was eventually made available on a direction from the Registrar of Criminal Appeals, but this was only possible because there were other grounds of appeal accepted.

15.243 The audio recording may also make up for deficiencies in transcription. For instance, in *Sakin*,[127] the CACD overturned a judgment it had made three weeks earlier[128] quashing an appellant's conviction for rape, controlling prostitution and four counts of causing a person to engage in sexual activity without consent. Sakin and his co-defendant had appealed on several grounds, but the only successful ground was the judge's failure to deal with Sakin's evidence in her summing up. Having thoroughly reviewed the transcript, the Court originally held:[129]

> This was not a situation where the Judge failed to refer to one aspect or some detail of IS' evidence or defence. There was a wholesale (and no doubt unintentional) failure to remind the jury of the substance of IS's evidence…
>
> We have no doubt that the Judge had a summary of IS's evidence ready to deliver to the jury. Her summing up as a whole had been prepared scrupulously. She had given notice more than once in her summing up that she would sum up the evidence of IS. Had her attention been drawn to her omission, we are sure that she would have been ready there and then to deal with IS's case. As it is, the failure of all those present in court to do or say anything has had grave consequences.

15.244 The following week, Sakin's counsel appeared before the trial judge in an unrelated case. The trial judge asked about Sakin's appeal, and was informed that it had been allowed on the basis of her failure to sum up his evidence. She went back to check her notes and then listened to the audio file of the summing up. It was clear that she had summed up Sakin's evidence.

15.245 Using its inherent power to revise an order before it has been recorded in the records of the relevant court (here the Crown Court), the CACD quashed its earlier order quashing Sakin's conviction. It went on to say:[130]

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126 [2023] EWCA Crim 710, [2024] 1 WLR 2115.

127 [2021] EWCA Crim 411.

128 [2021] EWCA Crim 291.

129 Above, at [65] and [68], by Carr LJ.

130 [2021] EWCA Crim 411 at [78], by Carr LJ.

given that it would have been a most unusual omission by a Judge who was obviously otherwise well-prepared and methodical in her approach to the summing-up, it is further to be regretted that counsel did not check the audio files for themselves at least by the time of the full appeal hearing. The position was then compounded at the hearing: we asked in terms whether the (incomplete) transcript was accurate. Counsel (incorrectly) confirmed to us without equivocation that it was. They ought at the very least to have indicated that they had no direct recollection of the summing-up and that they had not themselves checked the accuracy of the transcript.

15.246 We recognise, however, that most convictions are not appealed against, and the number of convictions appealed against after a long period is very small as a proportion of the total number of convictions. *Warren and others*,[131] in which the CACD questioned the appropriateness of the current arrangements for deleting files in a digital age, was heard 46 to 47 years after the trials in question, and the longest sentence was three years' imprisonment. The sort of extensive preservation that would be necessary so that full records relating to every case resulting in similar sentences to those handed down in *Warren*, if heard today, would be available in 50 years' time, would be a massive undertaking.

15.247 We consider, however, that the time limits for retention of audio recordings are too short in the most serious cases. Where case files are retained for permanent preservation, we see no reason why digital audio files should not be retained with them.

15.248 We consider that, as with evidence, where a person is sentenced to imprisonment, the audio recording should be retained for at least as long as the person's sentence (not only the initial custodial period) and that where the person is sentenced to life imprisonment, the audio recording should be retained for the rest of their life (or, where the person is subsequently deported, until the age of 100).

15.249 We think that consideration might be given to video recording of witness testimony and cross-examination at trial to enable that evidence to be available on any future appeal. It is a common refrain of appellate judges that they do not have the advantage that the jury had of seeing and hearing the witnesses, instead having to rely on a transcript. We acknowledge that the fact that evidence is being video recorded, even if not intended for publication, might have an effect on the quality of the witness's evidence. As the use of video-conferencing and video-calling is becoming widely used, this may be expected to have less of an impact than would previously have been the case.

131 [2021] EWCA Crim 413.

Consultation Question 97.

15.250 We provisionally propose that where a person is sentenced to a term of imprisonment, audio recordings and transcripts of their trial should be retained for at least the duration of the sentence (including the time where the person is liable to be recalled to prison). Where a person is sentenced to life imprisonment, audio recording and transcripts of their trial should be retained for the remainder of their life.

Do consultees agree?

Retention of client files by legal representatives

15.251 As we discussed at paragraph 15.211 above, there are no formal retention periods for clients' files held by legal professionals, although files that belong to the client should be returned to the client if a solicitors' firm closes. The general rule that files should be retained for six years might seem unduly short when a person is convicted and sentenced to a substantial period of imprisonment.

15.252 We note that the Law Society of Scotland has issued more detailed guidance to lawyers in Scotland, which requires that files should be retained for the duration of a person's custodial sentence (or for three years where the sentence is shorter than this), and indefinitely where a person is sentenced to life imprisonment.[132]

15.253 The Law Society or the Solicitors Regulation Authority might consider issuing detailed guidance on the retention of client files in criminal cases, including appropriate preservation when a firm ceases operations. Consideration should be given to how to ensure long-term preservation in the case of clients sentenced to long prison sentences.

Approval of requests for access

15.254 Case law suggests that there has been inconsistent practice by courts when considering requests for transcription or access to audio recordings of trials. The principle of open justice means that requests for transcriptions, and requests by a party to listen to recordings, should normally be granted. This is necessary both so as not to impede access to justice by convicted persons, particularly after a change of legal representatives, but also under the wider principle of open justice. Unless proceedings took place in private or recording restrictions mean that disclosure may not be appropriate without safeguards, there should be an expectation of access.

15.255 Further, the Criminal Practice Directions 2023 state:[133]

> Given that the proceedings will have taken place in public, and despite any such suspicions, cogent and compelling reasons will be required to deny a request for transcript of such proceedings. The onus rests always on the court to justify such

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132 Law Society of Scotland, "Data retention: retention policy".

133 Criminal Practice Directions 2023, 2.6.20.

> denial, not on the applicant to justify the request. Even where there are reasons to suspect a criminal intent, the appropriate course may be to direct that the police will be informed of those reasons rather than to direct that the transcript be withheld.

15.256 The Criminal Practice Directions give as examples of when it might be reasonable to refuse a request for access, or to subject material to redaction:[134]

> where circumstances cause staff reasonably to suspect that an applicant intends or is likely to disregard a reporting restriction that applies, despite the warning notice endorsed on the transcript, or reasonably to suspect that an applicant has malicious intentions towards another person.

15.257 We consider that there may be a lack of clarity under the Criminal Procedure Rules as to when the court should not allow access to a transcript where reporting restrictions are in place. The fact that reporting restrictions are in place should not automatically prevent a person who was not a party from having access to a transcription: they could, after all, have attended the trial and would have been aware of the information to be protected (and bound by the restriction against reporting). The default position under section 2.6.19 of the Criminal Practice Directions 2023 is that a transcript should be provided, unredacted, even where reporting restrictions are in place. Exceptionally, the judge may order redaction or require further information or assurances, or that the transcript may not be supplied at all.

15.258 The obiter comment in *Riley*[135] – that because a request "could be made by a journalist or any other person interested in the proceedings … a degree of discretion should be exercised" – risks being misunderstood. The starting point remains one of open justice, and if proceedings were in public there should be a presumption in favour of disclosure. In terms of making redactions, there is no reason to suppose that a journalist who reports based on a transcript would be more likely to ignore reporting restrictions (and therefore a need to redact material subject to restrictions) than one who observes a trial in court, and a failure to do so can be dealt with by contempt proceedings in both cases.

15.259 We think there would be value in the Criminal Procedure Rule Committee considering whether the rules could be more detailed in this area, with a view to ensuring that transcriptions are generally available, especially to the media, unless there is a compelling reason to restrict access.

Costs of transcription

15.260 Many respondents were concerned at the high cost of transcriptions.

15.261 In October 2022, the House of Commons Justice Committee, in its report on Open Justice, said that the "current situation on court transcripts is unsatisfactory":[136]

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134 Criminal Practice Directions 2023, 2.6.20.

135 [2019] EWCA Crim 816, [2019] 2 Cr App R (S) 42 at [31], by Sir Brian Leveson PQBD, set out at para 15.203 above.

136 House of Commons Justice Committee, Open Justice: court reporting in the digital age (2022-23) HC 339, para 87.

> HMCTS should explore whether greater use of technology, such as AI-powered transcription, could be piloted to see whether it can be used to reduce the cost of producing court transcripts. HMCTS should also consider whether the sentencing remarks in the Magistrates' courts could be routinely recorded and transcribed on request. HMCTS should also review its existing contracts for transcription services to ensure that transcripts are more accessible to the media and the public.

15.262 The Committee noted the following recommendations of David Lammy MP in his review of treatment of, and outcomes for, Black, Asian and minority ethnic individuals in the criminal justice system:[137]

> In future, all sentencing remarks should be published in both audio and written form. This would provide a clear record for victims and offenders of the rationale for sentencing decisions. Sentencing remarks are published (in written form) for cases regarded as being of particular 'public interest'. But this conception of the public interest is too narrow. It is in the public interest for all victims and offenders to fully understand the sentencing decisions made by judges. All Crown Court cases are already audio-recorded. At a time when over £700 million has been allocated for the full digitisation of the courts through the court modernisation programme, publishing sentencing remarks would be an important step to a more comprehensible and trusted system.

15.263 There is currently a campaign to enable complainants in rape and sexual assault cases, and other violent crimes, to be able to access free transcripts of trials. The Parliamentary Under-Secretary for Justice, resisting the proposal on cost grounds, has explained that:[138]

> Preparing a court transcript is currently a manual process whereby transcription companies listen to audio files to transcribe the hearings. Although AI technology is available, the most recent pilots to test voice-to-text technology do not demonstrate sufficient accuracy—an element that is crucial where criminal trial records are concerned. Taken together, producing a full trial transcript, depending on its size, can cost in the region of thousands of pounds.

15.264 The cost of transcripts was also recently raised in Parliament by Sir David Davis MP, who called for free transcripts of all trials to be made freely available to MPs.[139] The Speaker, responding, noted that the high cost of transcripts prohibits Members of Parliament from carrying out their duty on behalf of their constituents.[140]

15.265 We accept that accuracy is crucial when transcriptions need to be relied on in legal proceedings. We also recognise that biases within the datasets from which AI "learns",

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137 D Lammy, *The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System* (2017) p 36.

138 *Hansard* (HC), 16 November 2023, vol 740, col 848.

139 *Hansard* (HC), 12 September 2024, vol 753, col 965.

140 Above.

can result in biases in accuracy between different groups.[141] However, the same high levels of accuracy are not necessarily required where the transcription is needed for preliminary work ahead of proceedings. AI might be able to produce a *largely* accurate record which would enable advisers to be able to identify whether some grounds of appeal were likely to be valid. For instance, a convicted person's claim that the judge had been biased, or had failed to refer to their evidence, might be identified as plainly false, even if the AI-generated transcription was not wholly verbatim. A claim by the convicted person that a witness had said one thing, when they had clearly said the opposite, might not need 99.5%[142] accuracy.

15.266 In *JR Farming v Hewitt*,[143] it was held that real-time transcription was not permissible without the permission of the court. In that case, the transcribers had been recording the proceedings (which were taking place virtually) without the knowledge of the solicitor who had engaged them. Recording the proceedings would be contempt of court.[144] However, the Court ruled that permission for real-time transcription was required in any case, because "the court will also wish to know and to regulate to whom transcripts are being circulated during the trial".[145]

15.267 We find it hard to see why the court has any greater right to know and regulate to whom transcripts are being circulated than it does in respect of other contemporary reports of an open trial. The only difference between a transcript and other forms of court reporting is that the former seeks to be comprehensive and verbatim.

15.268 Were legal advisers provided with access to audio recordings under Criminal Procedure Rule 5.5(3)-(4) and permitted to use this to obtain a non-admissible unofficial transcription for the purposes of investigating whether the case is suitable for appeal, we believe that this could be done much more cheaply than obtaining an official transcription (the cost of which is at present often prohibitively expensive). This would enable the advisers to narrow down the issues for which an official transcription might be necessary, while also enabling them to demonstrate a case for needing an official transcription where this would require funding.

15.269 Moreover, were legal advisers provided with greater access to audio recordings, it might make obtaining transcriptions unnecessary: they could simply check the point

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141 For instance, research in the United States has found biases in how AI software embodies raciolinguistic stereotypes in relation to Black speakers (V Hoffmann, P Kalluri, D Jurafsky and S King, "AI generates covertly racist decisions about people based on their dialect" (2024) 633 *Nature* 147). Counterintuitively, researchers have found that Zoom's transcription feature has greater accuracy when transcribing English speech from non-native speakers, something which the researchers attributed to the use of colloquialisms and non-traditional or non-conventional language by native speakers (A Hendrick, J Doung, A Timmons and C Echols, "Biases in a Digital Era: Examining the Accuracy of Transcription Tools" (2023) University of Texas at Austin).

142 This appears to be the requirement set by the Ministry of Justice. See https://thetranscriptionagency.com/court-transcription/.

143 *JR Farming v Hewitt* [2021] EWHC 1704 (Comm).

144 Contempt of Court Act 1981, s 9.

145 *JR Farming v Hewitt* [2021] EWHC 1704 (Comm) at [17], by HHJ Davis-White QC (sitting as a judge of the High Court).

that they wanted to examine on the audio recording. In many circumstances this would be sufficient to dispose of the issue.

Consultation Question 98.

15.270 We provisionally propose that legal advisers should be able to access audio recordings of the defendant's trial in order to obtain a non-admissible transcript for the purposes of investigating whether a case is suitable for appeal.

Do consultees agree?

15.271 Several consultees pointed out that in other jurisdictions, transcriptions are routinely made available overnight to parties in a case. Although the question of transcription for the purposes of ongoing trials is not within our terms of reference, we are struck by the fact that technology and procedures which are currently available in other jurisdictions would facilitate the creation and retention of transcripts for the purposes of an appeal. We intend to explore this issue further during consultation on our provisional proposals.

Chapter 16: Compensation and support for the wrongly convicted

16.1 In Chapter 4 we argued that the overriding function of the criminal justice system is to convict the guilty and acquit the innocent. However, inevitably, any system is fallible and the criminal justice system does not always achieve this aim. Where an innocent person has been wrongly convicted, there is a strong case for some form of redress to compensate them. A conviction can cause significant harm, particularly where there has been a loss of liberty, including reputational damage and financial loss. As Lord Bingham noted in the case of *O'Brien*:[1]

> The Secretary of State makes payment out of public funds to victims of miscarriages of justice not because he or his officials are or are treated as being wrongdoers, but because such victims are recognised as having suffered what may (as here) be a great injury at the hands of the state and it is accepted as just that the state, representing the public at large, should make fair recompense.

16.2 The questions, therefore, are who should be compensated, how much compensation and support should they be given and who should determine the award? We did not explicitly raise this matter or ask a question about it in the Issues Paper.[2] However, during the consultation period, compensation following a miscarriage of justice became publicly controversial, largely as a result of the quashing of Andrew Malkinson's conviction (discussed in Appendix 2). In an interview[3] following his successful appeal, Mr Malkinson referred to the Ministry of Justice's policy of making a deduction in respect of "board and lodging" incurred while he was in prison.[4] The policy, which we discuss below, was reversed 10 days later.[5] As a result, many consultees raised concerns about compensation and post-acquittal support, in both written responses and at consultation events.

16.3 Whilst compensation and post-acquittal support were not originally included within our terms of reference, these were amended to include consideration of whether the law governing compensation and support for wrongly convicted persons, following the quashing of their conviction(s), is satisfactory, having regard to the UK's obligations under international law.

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1 *R (O'Brien) v Independent Assessor* [2007] UKHL 10, [2007] 2 AC 312, at [11], by Lord Bingham of Cornhill.

2 For which see Law Commission, Criminal Appeals: Issues Paper (July 2023).

3 C May, "Andrew Malkinson: Why are some wrongfully convicted prisoners charged jail living costs?", *BBC News* (27 July 2023).

4 This was, strictly speaking, a deduction from compensation for loss of earnings to reflect the fact that the detained person had avoided living expenses which would otherwise have had to be met from those earnings. However, the Ministry of Justice recognised that, from the point of view of the wrongly-imprisoned person, it was indistinguishable from a charge for board and lodging (see the next footnote).

5 Ministry of Justice, "Wrongly-convicted no longer face being 'charged' for saved living expenses" (6 August 2024).

COMPENSATION

Legislative framework

16.4 Compensation for miscarriages of justice has long been available in the UK with the first *ex gratia*[6] payment for a wrongful conviction being recorded in the 19th century.[7] Since 1957, payments, which were non-statutory and discretionary in nature, were based on advice from an Independent Assessor.[8]

16.5 However, in 1976 the UK ratified the International Covenant on Civil and Political Rights ("ICCPR"). This imposes an obligation on States to offer compensation in certain circumstances. Article 14(6) provides:

> When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

(A similar provision is found in article 3 of Protocol No 7 of the European Convention on Human Rights ("ECHR"). However, the UK has not ratified Protocol 7.)

16.6 Following the ratification of the ICCPR, there were procedural changes to the *ex gratia* payment scheme. In announcing the changes, the then Home Secretary, Rt Hon Roy Jenkins MP, stated that the principles that governed compensation for wrongful convictions were similar to the principles governing damages for civil wrongs.[9] He emphasised that the payment was not because of some legal liability that the state had assumed. Rather it was a recognition of the hardship that had been caused and the Assessor could take into consideration other costs incurred by the claimant.[10] In 1985, further clarification was provided in a ministerial statement by the then Home Secretary, Rt Hon Douglas Hurd MP.[11] This set out the criteria for the *ex gratia* scheme: a payment could be made when an individual, who had spent a period in custody, made an application to the Home Secretary and one of the following requirements were met:

(1) they had received a free pardon, or their conviction had been quashed by the Court of Appeal Criminal Division ("CACD") or the House of Lords following a

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6 *ex gratia* roughly translates to "as an act of grace". It denotes a favour or payment to show good intentions.

7 One of the earliest known payments made was to William Habron in 1879. Mr Habron had been wrongfully convicted of the murder of a policeman and was sentenced to death. He was later found to be innocent and given £1,000 compensation by the Treasury. See Written Answer, *Hansard* (HC), 21 March 1879, vol 244, col 1035 and Written Answer, *Hansard* (HC), 3 April 1879, vol 245, col 274.

8 *R (Niazi) v Secretary of State for the Home Department* [2007] EWHC 1495 (Admin), [2007] ACD 75 at [6], by May LJ.

9 Written Answer, *Hansard* (HC), 29 July 1976, vol 916, cols 328-329.

10 Above.

11 Written Answer, *Hansard* (HC), 29 November 1985, vol 87, cols 689-690.

reference by the Home Secretary under section 17 of the Criminal Appeal Act 1968[12] or an out-of-time appeal;

(2) the period in custody arose from a wrongful conviction or charge due to a serious default from the police or another public authority; or

(3) there were exceptional circumstances in the case such as where facts subsequently emerged in the trial or on appeal which completely exonerated them.

16.7 The Home Secretary stated that where the requirements were satisfied, "I shall be prepared to pay compensation to all such persons where this is required by our international obligations".[13]

16.8 Despite the existence of the *ex gratia* scheme, there was international pressure to provide compensation in line with the obligations under the ICCPR.[14] In 1988, Parliament enacted the Criminal Justice Act 1988. Section 133 of this Act provided a parallel avenue for claimants to apply for compensation. In its original form, the provision largely mirrored the ICCPR, including providing compensation where the conviction had been reversed or the individual had been pardoned on the ground of some new or newly discovered fact. It provided:

(1) Subject to subsection (2) below, when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction or, if he is dead, to his personal representatives, unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted.

(2) No payment of compensation under this section shall be made unless an application for such compensation has been made to the Secretary of State.

(3) The question whether there is a right to compensation under this section shall be determined by the Secretary of State.

(4) If the Secretary of State determines that there is a right to such compensation, the amount of the compensation shall be assessed by an assessor appointed by the Secretary of State.

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12 Section 17 has since been repealed and replaced with provisions enabling the Criminal Cases Review Commission to refer a case: Criminal Appeal Act 1995.

13 Written Answer, *Hansard* (HC), 29 November 1985, vol 87, col 689.

14 *R (Mullen) v Secretary of State for the Home Department* [2004] UKHL 18, [2005] 1 AC 1 at [28], by Lord Steyn.

16.9 The Act defined "reversed" in (1), above, as "referring to a conviction having been quashed" on an appeal out of time or, on a reference by the Secretary of State in England and Wales, Scotland or Northern Ireland.[15]

16.10 There were, however, two key differences from the ICCPR. Rather than requiring that it be shown "conclusively" that there had been a miscarriage of justice, the 1988 Act required that it be shown "beyond reasonable doubt" that there had been a miscarriage of justice. Furthermore, the Act provided for compensation to be paid to the individual's personal representatives in the event that they were now deceased, something going beyond the requirements of the ICCPR.

16.11 Compensation could only be awarded where an application had been made to the Secretary of State who, if the application was successful, would appoint an assessor to determine the amount.[16] Compensation, therefore, was not automatically awarded following the quashing of the conviction and required an application demonstrating that the necessary standard had been met.

16.12 In 1995, subsection 133(4A) was added to the 1988 Act, requiring the assessor to take into account "the seriousness of the offence of which the person was convicted and the severity of the punishment resulting from the conviction; the conduct of the investigation and prosecution of the offence; and any other convictions of the person and any punishment resulting from them".[17] Although this reflected the existing practice of the assessor, it was put into statute following outrage over the compensation payment to Winston Silcott after his conviction for the murder of PC Keith Blakelock in the Broadwater Farm riot of 1985 was quashed.[18]

16.13 In 2006, the then Home Secretary Rt Hon Charles Clarke MP announced a number of reforms to compensation for miscarriages of justice.[19] This included the removal of the *ex gratia* scheme on the grounds that it was "confusing and anomalous", and went beyond the UK's international obligations. Other reforms in the ministerial statement included the use of time limits for all applications, and taking greater account of the applicant's criminal convictions as well as their conduct which may have contributed to the miscarriage of justice in determining the amount they ought to be paid.

16.14 In announcing the change, the Home Secretary compared compensation payments for miscarriages of justice with payments received by victims of crime under the Criminal Injuries Compensation Scheme, noting that "no legal costs are payable under the scheme for victims of crime,[20] and the average amount received by each victim is less than one fiftieth of what is paid to those eligible under the miscarriages of justice

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15 Criminal Justice Act 1988, s 133(5) as enacted.

16 Above, s 133(2) and (4) as enacted.

17 Above, s 133(4A), as amended by the Criminal Appeal Act 1995, s 28. This provision was replaced by the more extensive provisions in s 133A in 2008.

18 See Appendix 1.

19 Written Ministerial Statement, *Hansard* (HC), 19 April 2006, vol 445, col 15WS.

20 This presumably reflects the fact that unlike victims of miscarriages of justice, victims of crime are not required to defend themselves in court or to successfully take a case to the CACD before they can apply for compensation.

scheme".[21] He criticised a "massive industry for the legal profession that has been giving away large amounts of money to individuals who do not deserve it".[22] Mr Clarke was also critical of legal aid barristers who he considered were unacceptably pursuing compensation claims.[23] He claimed that the dual scheme meant that the Government was now paying compensation above that which it was required by its international obligations.

16.15 We do not think is it appropriate to draw a comparison between the compensation that is payable by the state to victims of crime under the Criminal Injuries Compensation Scheme ("CICS") and compensation for miscarriages of justice. The former scheme is "a universal scheme that exists to support all eligible victims of violent crime who have suffered the most serious injuries, and that compensation is an important and public recognition of their suffering".[24]

16.16 When a person is a victim of a miscarriage of justice, it is the state itself which has inflicted the harm on the victim. In many cases, for instance where a person has been convicted as a result of deliberate misconduct or negligence by the police or prosecuting authorities, the state's action is culpable. Additionally, in a many cases, the victim in a miscarriage of justice case will have had their liberty curtailed very significantly by having been imprisoned, sometimes for very long periods of time. Further, in cases where no such crime has occurred, the victim of the miscarriage of justice may also be the victim of ancillary crimes such as perverting the course of justice, misconduct in public office or perjury. The comparison is, therefore, inappropriate and somewhat artificial.

16.17 In our view, compensation for a miscarriage of justice has less in common with compensation for a criminal injury and more in common with compensation for a harm arising from the actions of an organ of the state – such as where a person suffers an injury as a result of clinical negligence in an NHS setting.[25]

16.18 The decision to remove the *ex gratia* scheme was made without consultation or notice and was subsequently challenged by way of judicial review. It was held that the Home Secretary had not acted unfairly.[26] The impact of the removal of the *ex gratia* scheme was significant. As the Supreme Court noted in *Adams*, there was a "very substantial

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21 Written Ministerial Statement, *Hansard* (HC), 19 April 2006, vol 445, col 15WS. The relatively low average payment to victims of crime probably reflected the fact that at that time, the majority of CICS awards (57%) were made in respect for minor injuries "such as fractured fingers and sprained ankles" for which the compensation payable was £2000 or less. Indeed, at the time, the Home Office was in the process of removing compensation for these injuries from the compensation scheme. (HM Government, "Rebuilding lives: supporting victims of crime" (December 2005) pp 15-16.)

22 A Travis, "Clarke targets compensation as 'massive industry for lawyers'", *Guardian* (20 April 2006).

23 Above.

24 Ministry of Justice, *Criminal Injuries Compensation Scheme Review 2020* (July 2020) CP 277, p 3.

25 To put the compensation figures into imperfect perspective, in the year 2023/24, for negligence claims NHS England paid £2,106.9 million damages and £545.3 million claimant legal costs in clinical claims and £26.2 million damages and £16.6 million claimant legal costs in non-clinical claims: NHS Resolution, *Annual report and accounts 2023/24*, HC 73 (2024) p 54.

26 *R (Niazi) v Secretary of State for the Home Department* [2007] EWHC 1495 (Admin), [2007] ACD 75, affirmed in [2008] EWCA Civ 755, (2008) 152(19) SJLB 29.

drop in the number of applications approved since the abolition of the *ex gratia* scheme in 2006".[27] Figures provided by the Ministry of Justice in 2023 show a sharp drop-off in the number of successful decisions from 2007 to 2008 when the discretionary scheme was no longer available.[28]

Financial Year	Number of claimants in the financial year	No of successful decisions in the financial year	Amount of compensation for successful applicants
1999/2000	n/k [not known]	32	£7,461,573.37
2000/2001	n/k	56	£14,400,929.51
2001/2002	n/k	41	£10,297,352.81
2002/2003	95	34	£8,241,042.26
2003/2004	89	36	£10,919,984.48
2004/2005	86	48	£7,769,144.21
2005/2006	90	31	£14,682,776.36
2006/2007	79	29	£7,206,847.83
2007/2008	41	9	£2,439,725.74
2008/2009	38	7	£1,664,795.00
2009/2010	38	1	£981,864.00
2010/2011	61	1	£2,189,151.00
2011/2012	38	3	£1,284,725.00
2012/2013	36	1	£50,480.00
2013/2014	45	7	£239,140.36
2014/2015	43	2	£261,705.82
2015/2016	29	2	£12,492.60
2016/2017	51	1	£93,000.00
2017/18	36	0	£0.00
2018/19	59	0	£0.00
2019/20	98	5	£713,500.00
2020/21	80[29]	4	£480,400.00
2021/22	73	4 / 1	£231,600.00 / Amount still to be determined by Independent Assessor
2022/23 (to 24/02/2023)	95[30] *Not all 95 cases have received a decision	12	Amounts still to be determined by Independent Assessor

16.19 Once an applicant had convinced the Home Secretary that compensation should be paid, the Home Office routinely issued a "Note for Successful Applicants" to the

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27 *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, [2012] 1 AC 48 at [75], by Lord Hope of Craighead DPSC.

28 Written Answer, *Hansard* (HC), 10 March 2023, UIN 150389.

29 Four cases had been placed on hold so had not received a decision when this information was provided.

30 Not all 95 cases had received a decision when this information was provided.

applicant, which provided guidance on the statutory scheme.[31] Under the legislation and the guidance, the Independent Assessor was provided with substantial discretion, and would "apply principles analogous to those governing the assessment of damages for civil wrongs".[32]

16.20 In 2001, Lord Brennan QC became the Independent Assessor.[33] In a controversial case, Lord Brennan QC reduced the compensation payable to three victims of miscarriages of justice by 25%, to account for the monies that they would have spent on "feeding, clothing and accommodating themselves" if they had not been in prison.[34] The three applicants challenged this decision on the basis that it was "unfair, unjust, unreasonable and contrary to public policy to reduce earnings lost as a result of wrongful imprisonment to reflect the free board, clothing and accommodation afforded to the prisoner".[35] They emphasised that there had been no benefit to themselves; rather imprisonment was the very detriment on which the compensation claim depended. The Assessor justified his deduction on the basis that it recognised the actual loss of the appellants and ensured that they received what they had notionally lost and no more. The House of Lords upheld the Assessor's decision by a four to one majority, holding that the Assessor's job was to put the appellant in the position that they would have been had they not gone to prison and, therefore, ensure the compensation equated to their actual loss. This decision was widely and critically reported as the "board and lodging" payment deduction.[36]

Amendments since 2006

16.21 Since the removal of the *ex gratia* scheme, applications for compensation are now only made under section 133 of the Criminal Justice Act 1988. Further amendments were made to section 133 in 2008.[37] This included a limitation period for applications, which must now be made within two years from the date on which the conviction was reversed, or the individual was pardoned. However, the Secretary of State may nevertheless direct an application be considered outside of this period in exceptional circumstances.[38] Further, the changes in 2008 also introduced a requirement that where a person's conviction has been quashed out of time and they are subject to a retrial their conviction will not be treated as "reversed" unless, and until, they have

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31 *R (O'Brien) v Independent Assessor* [2007] UKHL 10, [2007] 2 AC 312 at [9], by Lord Bingham of Cornhill.

32 Above, at [56], by Lord Rodger of Earlsferry.

33 *Hansard* (HC), 29 June 2011, vol 530, col 52WS.

34 *R (O'Brien) v Independent Assessor* [2007] UKHL 10, [2007] 2 AC 312. This case involved compensation awarded to Vincent and Michael Hickey who, along with two other alleged co-defendants had been wrongly convicted for the murder of Carl Bridgewater (sometimes referred to as part of the 'Bridgewater Four'). Their convictions had been quashed on the basis of serious irregularities in the investigation and trial. They had spent between around 12 years and nearly 14 years in prison. The Secretary of State promptly announced they should be awarded compensation. For the purposes of the appeal their case was joined with that of Michael O'Brien, one of the 'Cardiff Newsagent Three' (see Appendix 2).

35 *R (O'Brien) v Independent Assessor* [2007] UKHL 10, [2007] 2 AC 312 at [13], by Lord Bingham of Cornhill.

36 See, for example, S Morris, "Victims of miscarriage made to pay for stay in jail", *Guardian* (12 March 2003).

37 Criminal Justice and Immigration Act 2008, s 61.

38 Criminal Justice Act 1988, s 133(2A).

been acquitted at trial or the prosecution decide not to pursue a retrial.[39] Sections 133A and 133B were also inserted in 2008, imposing a cap on the amount of compensation that may be payable. Under these provisions, the maximum amount of compensation for someone who has been detained for at least 10 years is £1 million and the maximum in any other case is £500,000.[40] In calculating compensation for loss of earnings, the total amount for any year may not exceed 1.5 times the Office for National Statistics' figure for median annual gross earnings.[41]

16.22 The section was also amended to reflect the fact that references to the CACD are now made by the Criminal Cases Review Commission ("CCRC") rather than the Home Secretary. A conviction is also considered "reversed" if it was quashed on an appeal from certain provisions in national security or terrorism legislation.[42]

16.23 On 6 August 2023, after significant media scrutiny in the wake of Andrew Malkinson's case, the then Lord Chancellor Rt Hon Alex Chalk KC MP removed the possibility of the "board and lodgings" deduction as discussed at paragraph 16.20. In doing so, the guidance was amended with immediate effect to ensure such deductions from compensation could not be made in future. The Lord Chancellor stated that "fairness is a core pillar of our justice system and it is not right that victims of devastating miscarriages of justice can have deductions made for saved living expenses".[43]

Case law

16.24 Section 133 has proven to be controversial in its application and has generated significant judicial attention. Much of the case law has focused on what is meant by the expression "miscarriage of justice", which neither the ICCPR nor domestic legislation define.

16.25 In *Mullen v Home Secretary*, the House of Lords were unable to agree on what would constitute a miscarriage of justice.[44] Lord Steyn opined that the words were limited to "clear cases of miscarriage of justice, in the sense that there would be an acknowledgement that the person concerned was wholly innocent…".[45] Lord Bingham, who was the only other Law Lord to offer a definition, considered the phrase as being wider and held that in addition to Lord Steyn's definition, the term "miscarriage of justice", like the term "wrongful conviction", "can be and has been used to describe cases in which defendants, guilty or not, certainly should not have been convicted".[46] In any event, the appellant was unsuccessful given his convictions had been quashed due to an abuse of process, not because of a question as to his guilt or

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39 Criminal Justice Act 1988, s 133(5A).

40 Above, s 133A(5).

41 Above, s 133A(6).

42 Above, s 133(5).

43 Ministry of Justice, "Wrongly convicted no longer face being 'charged' for saved living expenses" (6 August 2023).

44 *R (Mullen) v Secretary of State for the Home Department* [2004] UKHL 18, [2005] 1 AC 1.

45 Above, at [56], by Lord Steyn.

46 Above, at [9], by Lord Bingham of Cornhill.

some trial deficiency.[47] Therefore, on either interpretation he would not have been eligible for compensation and a definitive test for a miscarriage of justice was not necessary to resolve the appeal.

16.26 The subsequent line of case law stemming from *Mullen* did not clarify matters. The Supreme Court considered the matter in *Adams v Justice Secretary,* noting that the phrase "miscarriage of justice" was "capable of having a number of different meanings".[48] The Court considered previous decisions including *Mullen*, but concluded that the decision and the cases which followed required a fresh approach.[49] In determining the circumstances where a conviction may be quashed due to fresh evidence, four categories were adopted which had previously been developed by Lord Justice Dyson when the case had been heard by the Court of Appeal Civil Division.[50] These categories are:

(1) Where the fresh evidence clearly shows the defendant was innocent.

(2) Where the fresh evidence was such that, had it been available at the time of the trial, no reasonable jury could properly have convicted.

(3) Where the fresh evidence rendered the conviction unsafe because, had it been available at the time of the trial, a reasonable jury might or might not have convicted.

(4) Where something had gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of somebody who should not have been convicted.[51]

16.27 Categories (3) and (4) were not considered to be within the remit of section 133 and, therefore, cases which fell into these categories would not qualify for compensation under the legislation.[52] The Court unanimously held that Category (1) plainly fell within the scope of section 133, however, it was considered too narrow to provide a complete definition of "miscarriage of justice".[53] In assessing Category (2), Lord Phillips of Worth Matravers, then a Justice of the Supreme Court, thought that the test

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47 Mr Mullen had been deported from Zimbabwe to the UK where he was convicted of conspiracy to cause explosions likely to endanger life or cause serious injury to property. He was sentenced to 30 years' imprisonment and, having served 10 years, the CACD quashed the convictions on the grounds that his deportation was a "blatant and extremely serious failure to adhere to the rule of law". Mr Mullen applied for compensation under the legislation and under the *ex gratia* scheme, both of which applications were declined. See *R (Mullen) v Secretary of State for the Home Department* [2002] EWCA Civ 1882, [2003] QB 993 at [4], by Schiemann LJ.

48 *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, [2012] 1 AC 48 at [9], by Lord Phillips of Worth Matravers PSC.

49 Above, at [35].

50 *R (Adams) v Secretary of State for Justice* [2009] EWCA Civ 1291, [2010] QB 460.

51 This was in reference to *R (Mullen) v Secretary of State for the Home Department* [2004] UKHL 18 [2005] 1 AC 1 at [4], by Lord Bingham of Cornhill.

52 *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, [2012] 1 AC 48 at [38] and [40], by Lord Phillips of Worth Matravers PSC.

53 Above, at [188], by Lord Clarke of Stone-cum-Ebony JSC.

was insufficiently robust and he argued that "[a] new fact will show that a miscarriage of justice has occurred when it so undermines the evidence against the defendant that no conviction could possibly be based upon it".[54] By a majority of five to four, the Court held that cases which fell into Categories (1) and (2) could be eligible for compensation under section 133. This meant that only those cases where fresh evidence clearly showed that the applicant was innocent and, where the fresh evidence undermined the evidence against the applicant to such a degree that no such conviction could be based upon it, would qualify for compensation. This approach widened the test for compensation, given that it was no longer limited to cases demonstrating clear innocence as had been the approach of Lord Steyn in *Mullen*.

16.28 The Supreme Court went on to consider article 6(2) of the ECHR. Article 6 provides for the right to a fair trial, and article 6(2) states: "Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law". The European Court of Human Rights ("ECtHR") had previously held that one of the functions of article 6(2) was to ensure that an acquitted person was protected from statements or acts which may appear to undermine the acquittal.[55] The appellant in *Adams* had argued that a narrow interpretation of article 14(6) of the ICCPR (set out above at paragraph 16.5) would conflict with article 6(2) of the ECHR. However, the Supreme Court disagreed on the basis that while article 6(2) applied to compensation proceedings, it did not apply to section 133. Lord Phillips went on to state:[56]

> The issue in the individual case will be whether [innocence] was conclusively demonstrated by the new fact. The issue will not be whether or not the claimant was in fact innocent. The presumption of innocence will not be infringed.

16.29 The ECtHR considered the UK legislation shortly after *Adams* was decided, in *Allen v United Kingdom*.[57] In this case the applicant, Mrs Allen, had been convicted of the manslaughter of her four-month-old baby. It had been alleged that the baby had died of "shaken baby syndrome" also known as "non-accidental head injury".[58] Mrs Allen made an out-of-time appeal which succeeded on the basis that the fresh evidence adduced on appeal, which brought into question the cause of death and the amount of force that would have been required, might reasonably have affected the decision of the jury.[59] Mrs Allen, who had been released from prison after serving 16 months of her three year sentence of imprisonment, applied for compensation under section 133. This was rejected by the Secretary of State on the ground that the medical evidence that was used to quash the conviction did not disclose a new fact rather, it showed

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54 *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, [2012] 1 AC 48, at [55], by Lord Phillips of Worth Matravers PSC.

55 *Taliadorou and Stylianou v Cyprus* App Nos 39627/05 and 39631/05 (unreported) 16 October 2008 at [26].

56 *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, [2012] 1 AC 48 at [58], by Lord Phillips of Worth Matravers PSC.

57 *Allen v UK* (2016) 63 EHRR 10 (App No 25424/09).

58 As we allude to in the first section of Chapter 17 and discuss in Appendix 3, in 2003 there was a review of convictions related to sudden infant deaths and as a result, a number of "shaken baby" cases were reviewed due to the growing medical controversy about how the injuries had been identified and if they were in fact the result of deliberate violent shaking.

59 *R v Harris* [2005] EWCA Crim 1980, [2006] 1 Cr App R 5 at [153], by Gage LJ.

"the changing medical opinion about the degree of force needed to cause a triad[60] and is properly categorised as new evidence of facts known all along rather than new facts".[61] Mrs Allen sought judicial review of the decision, which was dismissed by the High Court although the Judge accepted that the Secretary of State's categorisation of a new or newly discovered fact was an "excessively narrow view".[62] Nonetheless, the High Court found that Mrs Allen had fallen "well short of demonstrating beyond reasonable doubt that there had been a miscarriage of justice".[63]

16.30 Mrs Allen subsequently appealed against this decision to the Court of Appeal Civil Division.[64] The Court determined that Lord Steyn's interpretation of section 133, which limited the definition of "miscarriage of justice" to clear cases where there was an acknowledgement that the applicant was wholly innocent, was correct. The Court decided therefore that as Mrs Allen could not demonstrate such an acknowledgment her claim ought to fail.[65] Even if Lord Bingham's interpretation of section 133 was to be favoured, the Court concluded that the claim would nevertheless fail as there had been no flawed trial and, instead, the appeal had succeeded on the basis that the expert medical opinions needed to be resolved by a jury. The fact that the applicant was not retried was largely due to the fact that she had already served her sentence and been released, rendering a retrial pointless and not in the public interest.[66] Mrs Allen sought leave to appeal to the House of Lords, which was refused.[67]

16.31 The applicant then applied to the ECtHR on the grounds that the refusal to provide compensation was in violation of article 6(2) of the Convention as it violated her right to the presumption of innocence.[68] She had accepted that the refusal to provide compensation itself did not imply doubts about her innocence, rather she argued that the judgments in the High Court and Court of Appeal were based upon reasoning which brought into question her innocence.[69]

16.32 The ECtHR considered that in cases alleging a violation of article 6(2) that do not arise in the context of ongoing criminal proceedings, there must be a link between the concluded proceedings and the subsequent proceedings.[70] The task for the Court was, therefore, to determine if there was a link between the concluded criminal proceedings resulting in Mrs Allen's acquittal and the current compensation proceedings. Given the compensation proceedings could only be triggered at the

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60 At para 17.22, we explain the "growing medical controversy about identification of the relevant injuries, in particular the so-called 'triad' of subdural haematoma, retinal haemorrhage, and hypoxaemic encephalopathy, and whether they were diagnostic of deliberate violent shaking".

61 *Allen v UK* (2016) 63 EHRR 10 (App No 25424/09) at [23].

62 *R (Harris) v Secretary of State for the Home Department* [2007] EWHC 3218 (Admin) at [36], by Mitting J.

63 Above, at [45].

64 *R (Harris) v Secretary of State for the Home Department* [2008] EWCA Civ 808, [2009] 2 All ER 1.

65 Above, at [41], by Hughes LJ.

66 Above, at [18].

67 *Allen v UK* (2016) 63 EHRR 10 (App No 25424/09) at [42].

68 Above.

69 Above, at [110].

70 Above, at [104].

conclusion of the criminal proceedings and, because of the need to have regard to the CACD's judgment, the ECtHR was satisfied there was such a link.[71] Nevertheless, it held that there was no violation of article 6(2).[72] The Court stated that "what is important above all is that the judgments of the High Court and the Court of Appeal did not require the applicant to satisfy Lord Steyn's test of demonstrating her innocence".[73] The Court considered that the presumption of innocence had not been infringed and the domestic courts had directed themselves according to section 133, as they were required to do.[74]

16.33 The ECtHR revisited the compliance of section 133 with the ECHR shortly after *Allen* was decided in *ALF v United Kingdom*.[75] In this case the applicant, whose convictions had previously been quashed following a CCRC reference,[76] made an application pursuant to section 133 for compensation which was declined by the Secretary of State. He applied to the ECtHR on the ground that the refusal to grant compensation to him was based on doubts of his innocence and, therefore, violated article 6(2) of the Convention. In following *Allen*, the Court concluded that while article 6(2) did apply, section 133 was not incompatible with it, given there was no assessment of the applicant's criminal guilt. The Court, however, considered the reference to "innocence" by the Secretary of State in his letter to the applicant "both unfortunate and unnecessary in light of the test".[77] The Court stated that "it would be more prudent to avoid such language altogether in future decisions made under this section".[78]

The 2014 reforms

16.34 Following the decisions in *Allen* and *ALF*, in 2014 Parliament legislated to reverse *Adams* in favour of a narrower definition of "miscarriage of justice". This was achieved through the introduction of section 133(1ZA), which provides:[79]

> For the purposes of subsection (1), there has been a miscarriage of justice in relation to a person convicted of a criminal offence in England and Wales or, in a case where subsection (6H) applies, Northern Ireland, if and only if the new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence (and references in the rest of this Part to a miscarriage of justice are to be construed accordingly).

16.35 The implication of this provision is that a claimant must now prove their innocence (albeit that the word "innocence" is avoided) to the criminal standard of beyond reasonable doubt, in order to be successful in making a claim for compensation. This limits compensation to Category (1) cases only. This is somewhat anomalous in the

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71 *Allen v UK* (2016) 63 EHRR 10 (App No 25424/09), at [107].

72 Above, at [136].

73 Above, at [133].

74 Above, at [134].

75 *ALF v UK* App No 5908/12.

76 *R v F* [2009] EWCA Crim 2909.

77 *ALF v UK* App No 5908/12 at [24].

78 Above.

79 This was inserted by the Anti-social Behaviour, Crime and Policing Act 2014.

criminal justice system, given it is typically for the prosecution to prove the charge against the defendant beyond reasonable doubt. At no point other than compensation proceedings does a defendant need to prove their innocence, let alone do so to the high standard of beyond reasonable doubt. Baroness Hale of Richmond, then Justice of the Supreme Court, who agreed with the majority in *Adams* that compensation should not be limited to those demonstrating clear innocence, observed:[80]

> Innocence as such is not a concept known to our criminal justice system. We distinguish between the guilty and the not guilty. A person is only guilty if the state can prove his guilt beyond reasonable doubt. This is, as Viscount Sankey LC so famously put it in *Woolmington v Director of Public Prosecutions* [1935] AC 462, at p 481, the "golden thread" which is always to be seen "throughout the web of the English criminal law". Only then is the state entitled to punish him. Otherwise he is not guilty, irrespective of whether he is in fact innocent. If it can be conclusively shown that the state was not entitled to punish a person, it seems to me that he should be entitled to compensation for having been punished. He does not have to prove his innocence at his trial, and it seems wrong in principle that he should be required to prove his innocence now.

16.36 Plainly the threshold for compensation is now very high. In summary, a claimant must have been convicted, not simply held on remand. Their conviction must have been quashed through an out-of-time appeal or a CCRC reference on the basis of a new or newly discovered fact. Further, the new or newly discovered fact must show beyond reasonable doubt not only that the conviction was unsafe, the test applied in the CACD, but that the individual was innocent beyond reasonable doubt. The claim for compensation must be brought within two years of the conviction being quashed. This excludes a number of claimants, including those who brought an appeal within time, who have had their convictions quashed where there was an error in the trial or evidence has subsequently been lost or destroyed and they are, therefore, unable to prove their innocence. Such claimants would be unable to satisfy the requirements irrespective of their true innocence. It would also exclude someone whose conviction was quashed on the basis of fresh evidence which did not prove beyond reasonable doubt that they had not committed the offence, but where subsequent evidence did demonstrate this – for instance, where another person was later convicted at trial of having done so.

16.37 According to the Government's Impact Assessment provided prior to the Act coming into force, the rationale for section 133(1ZA) was to provide greater clarity about eligibility for state compensation.[81] It was intended that compensation would be limited only to those who could show that they were clearly innocent. By providing clear legislation, the Government thought that it would make meritorious claims easier to make, decisions would become more transparent, particularly given the disagreement in the Courts, and fewer legal challenges to the Secretary of State's decisions would arise.[82] The Government anticipated an average annual saving of £100,000 because

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80 *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, [2012] 1 AC 48 at [116], by Baroness Hale of Richmond JSC.

81 Home Office, "Anti-social Behaviour, Crime and Policing Bill Impact Assessment" (8 October 2013), p 42.

82 Above.

fewer judicial review proceedings would need to be defended.[83] No estimate was made as to how much would be saved by virtue of a higher threshold for compensation which would necessarily exclude a larger number of possible claimants.[84] It is therefore not clear that the Government – and by extension Parliament – appreciated the enormous impact that the change would have on eligibility for compensation.

16.38 As can be seen in the figures provided at paragraph 16.18 and, irrespective of Parliament's intention, few claimants have been successful in making compensation claims, with no monies being paid out for the period 2017 to 2019. The restriction on those who may now be eligible for compensation would likely exclude a number of notable miscarriages of justice, including the "Birmingham Six", given that the CACD refused to state whether the appellants were innocent.[85] It is of note that this case and the public outrage that followed was one of the key catalysts for the establishment of the CCRC, which is tasked with investigating potential miscarriages of justice.[86]

16.39 One of the difficulties with the test in section 133(1ZA) is the reliance on the CACD's judgment. However, as is well accepted in the case law including more recently in the Supreme Court, the question for the CACD is not whether the appellant is innocent but whether their conviction is unsafe.[87] Indeed, cases where the CACD does express the view that the appellant is innocent have been described as "very rare".[88] This may be further complicated where the CACD has not considered all of the grounds in the appeal after concluding that the conviction was unsafe (as was the case in *Hallam* discussed further below and in Appendix 2). As observed by Lord Kerr, Justice of the Supreme Court, in his dissent in *Hallam and Nealon*, "establishing innocence as a positive fact can be an impossible task".[89]

16.40 It is also of note that the Government has enacted separate legislation to provide compensation to former sub postmasters and mistresses. Under the Post Office (Horizon System) Compensation Act 2024, claimants who have had their convictions quashed by the courts or under the Post Office (Horizon System) Offences Act 2024, will be able to receive redress in the form of £600,000 if they sign a legal statement affirming that they did not commit the offence of which they had been convicted.[90] Despite the Horizon scandal being described as "one of the greatest miscarriages of

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83 Ministry of Justice, "Clarifying the circumstances under which compensation is payable for miscarriages of justice (England and Wales) Impact Assessment" (9 May 2013) p 4.

84 Home Office, "Anti-social Behaviour, Crime and Policing Bill Impact Assessment" (8 October 2013), p 42.

85 See J R Spencer, "Compensation for wrongful imprisonment" [2010] *Criminal Law Review* 803, 813.

86 See para 2.37 and following above.

87 *R (Nealon) v Secretary of State for Justice*; *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2, [2020] AC 279 at [27], by Lord Mance.

88 Above, at [34].

89 Above, at [203], by Lord Kerr of Tonaghmore JSC.

90 Prime Minister's Office, "Wrongful Post Office convictions to be quashed through landmark legislation" (13 March 2024).

justice"[91] it is likely that the vast majority, if not all, of these victims would be unable to meet the high standard required under section 133 to prove their innocence beyond reasonable doubt due to the lapse of time and nature of the operation of the Horizon computer system, including its numerous defects. Furthermore, these individuals would not receive £600,000 under the ordinary compensation scheme, given the amount payable is capped at £500,000 for sentences of imprisonment that are less than 10 years (those who were jailed as a result of Horizon prosecutions, a minority of those convicted, received much shorter sentences than this). The Government itself has also acknowledged the legislation may in fact quash convictions of people who were genuinely guilty of the crimes and who would then receive compensation.[92]

Hallam and Nealon

16.41 The CACD quashed the 2005 convictions of Sam Hallam of murder, conspiracy to commit grievous bodily harm and violent disorder in 2012[93] and the 1997 conviction of Victor Nealon in 2014.[94] Their cases are discussed in more detail in Appendix 2. Having spent seven years and seven months and 17 years in prison respectively, they each applied for compensation. The Secretary of State refused their separate applications, essentially because they failed to prove their innocence to the CACD (in that the CACD did not say so).

16.42 Consequently, Mr Nealon and Mr Hallam sought declarations from the High Court that section 133(1ZA) was incompatible with the ECHR (Mr Nealon also sought judicial review of the Secretary of State's decision). The Court dismissed the claims on the basis that it was bound by the Supreme Court's ruling in *Adams* which had held that article 6(2) of the ECHR had no bearing on compensation proceedings under section 133, despite the ruling by the ECtHR in *Allen* that it did.[95]

16.43 Mr Nealon and Mr Hallam's appeals against these decisions to the Court of Appeal Civil Division were dismissed.[96] They then appealed to the Supreme Court on the basis that, as with *Allen*, the requirement that they prove beyond reasonable doubt

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91 Then-Prime Minister Rt Hon Rishi Sunak MP stated that "This is one of the greatest miscarriages of justice in this country's history, with hundreds of people having their lives ruined and reputations dragged through mud": Ministry of Justice, "Government to quash wrongful Post Office convictions" (10 January 2024).

92 Above.

93 *R v Hallam* [2012] EWCA Crim 1158.

94 *R v Nealon* [2014] EWCA Crim 574. Mr Nealon's case has striking similarities with the case of Andrew Malkinson, discussed at various points in this chapter and Appendix 2. The Government has accepted that the CACD's judgment in Mr Malkinson's case exonerated him. Ministry of Justice, "Government orders independent inquiry into handling of Andrew Malkinson case" (24 August 2023). While the Court allowed Mr Malkinson's appeal on two grounds in addition to the new DNA evidence, these grounds only affected the safety of the conviction; unlike the DNA, they were not evidence of innocence. The only apparent difference between the cases of Mr Nealon and Mr Malkinson in terms of establishing their innocence is that whereas the DNA in Mr Malkinson's case was linked to a person whose DNA was on the national DNA database, the DNA in Mr Nealon's case was not.

95 *R (Nealon) v Secretary of State for Justice*; *R (Hallam) v Secretary of State for Justice* [2015] EWHC 1565 (Admin).

96 *R (Hallam) v Secretary of State for Justice*; *R (Nealon) v Secretary of State for Justice* [2016] EWCA Civ 355, [2017] QB 571.

that they did not commit their offences under section 133(1ZA) was not compatible with the presumption of innocence protected by article 6(2).[97]

16.44 The Supreme Court heard their appeals in 2019 and dismissed them by a five to two majority. Mr Hallam and Mr Nealon then appealed to the ECtHR.[98] The Court considered its reasoning in *Allen* as to the applicability of article 6(2) to ancillary proceedings that are linked to concluded criminal proceedings.[99] The Court saw no basis for departing from that judgment and held that article 6(2) continued to apply to compensation proceedings.[100]

16.45 In assessing whether there had been a violation of the presumption of innocence, the Court held that the question it had to decide was whether the refusal to grant compensation imputed criminal liability to the applicant.[101] The Court found:[102]

> it could not be said that the refusal of compensation by the Justice Secretary imputed criminal guilt to the applicant by reflecting the opinion that he or she was guilty to the criminal standard of committing the criminal offence, thereby suggesting that the criminal proceedings should have been determined differently. To find in the negative that it could not be shown to the very high standard of proof of beyond reasonable doubt that an applicant did not commit an offence – by reference to a new or newly discovered fact to otherwise – is not tantamount to a positive finding that he or she did commit the offence.

16.46 By 12 votes to five, the Court concluded that the refusal to accept the compensation applications was not in breach of the presumption of innocence, which it noted protected "innocence in the eyes of the law" and not "factual innocence".[103]

Compensation schemes in other jurisdictions

16.47 In Scotland, there are two compensation schemes.

(1) A statutory scheme under section 133 of the CJA 1988, and

(2) The *ex gratia* scheme which continues to operate (in contrast to England and Wales where it was removed in 2006).[104] A person may apply if they have spent time in custody due to a wrongful charge or conviction and the police or some

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97 *R (Hallam) v Secretary of State for Justice*; *R (Nealon) v Secretary of State for Justice* [2019] UKSC 2, [2020] AC 279.

98 *Nealon v UK* (2024) 79 EHRR 22 (App Nos 32483/19 and 35049/19). Whilst the alleged breach of the ECHR was the same, the case differed from *Allen* which was brought prior to the enactment of s 133(1ZA). Further, Mr Nealon and Mr Hallam argued that the provision itself and the exercise the Justice Secretary had to undertake was incompatible with the ECHR; Mrs Allen by contrast had argued that the reasoning in the domestic courts violated the presumption of innocence as it gave rise to doubts about her innocence.

99 Above, at [127].

100 Above, at [129].

101 Above, at [178].

102 Above, at [180].

103 Above, at [181].

104 Scottish Government, "Miscarriage of justice: apply for compensation: Eligibility" (1 May 2019).

other public authority did something "seriously wrong" which resulted in the charge or the conviction or there are other exceptional circumstances which justify the payment.[105] Under the guidance published by the Scottish Government, examples of an authority doing something "seriously wrong" include making up evidence, holding back or not sharing evidence or not carrying out a proper investigation.[106]

16.48 New Zealand is a party to the ICCPR but has maintained a reservation to article 14(6), which governs the right to compensation.[107] It has not legislated for the provision of compensation following a wrongful conviction. Like the UK's position pre-1988, it instead operates a discretionary scheme.[108] Under the scheme, an individual may apply where they have been pardoned or had their conviction quashed and they have served all or part of their sentence of imprisonment or detention.[109] Compensation can only be awarded where a sentence of imprisonment or home detention has been imposed.[110] The decision is made by Government and compensation is only awarded where Cabinet is satisfied that the applicant is innocent on the balance of probabilities, they have suffered a loss of the type that may be compensated, and to award such compensation would be in the interests of justice.[111]

16.49 Most Australian states and territories do not have a statutory or common law right to compensation; instead, compensation may be awarded at the state's discretion by way of an *ex gratia* payment.[112] The one exception to this is the Australian Capital Territory ("ACT") which, under section 23 of the Human Rights Act 2004 (ACT), provides for compensation. This provision largely mirrors the ICCPR and states that a person has the right to be compensated if:

(a) [the person] is convicted by a final decision of a criminal offence; and

(b) the person suffers punishment because of the conviction; and

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105 Scottish Government, "Miscarriage of justice: apply for compensation: Eligibility" (1 May 2019).

106 Above.

107 New Zealand Government, "International Covenant on Civil & Political Rights" (24 April 2024).

108 New Zealand Government, "Compensation Guidelines for Wrongful Conviction and Detention" (28 February 2023).

109 If an eligible applicant dies whilst their claim is being determined, the Minister may approve a payment to the applicant's estate if they consider it reasonable to do so: above, p 4.

110 Home detention was added in 2020: above.

111 Above. In New Zealand dollars, the amounts of compensation include $150,000/annum for every year spent in prison or $75,000/annum in cases of home detention, up to $100,000/annum for loss of livelihood, up to $75,000 for time spent on restrictive bail or parole, for costs associated with challenging a conviction and applying for compensation and other adjustment payments, as well as further increases or reductions in compensation to account for aggravating or mitigating factors. The Government may also make a public apology or statement of innocence: pp 5-8. In January 2025 the exchange rate was approximately 2.2 NZ$ for 1 GB£.

112 A Hoel, "Compensation for wrongful conviction" (May 2008) 356 *Trends and Issues in crime and criminal justice* 2.

(c) the conviction is reversed, or they are pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice.[113]

However, if it is proved that the non-disclosure of the fact was "completely or partly the person's own doing", then the provision does not apply.[114]

16.50 Like New Zealand, Canada has ratified the ICCPR, but does not have specific legislation for compensation for wrongful conviction.[115] An *ex gratia* scheme is similarly in place with guidelines, which were adopted in 1988 by federal and provincial prosecutors and justice ministries, specifying the prerequisites that must be met before compensation will be given.[116] The Guidelines make clear that compensation should only be granted to those who "did not commit the crime for which they were convicted". This has been specifically distinguished from persons who have been found not guilty. A further criterion is that a statement that the individual did not commit the offence is made following a pardon or, if it is a reference, a statement from the Minister of Justice that the person did not commit the crime.[117] Where the claim for compensation is successful, the amount will be decided by either a judicial or administrative inquiry appointed by either the Provincial or Federal Minister Responsible for Criminal Justice.[118]

16.51 The Canadian approach is, therefore, most similar to the present scheme in England and Wales. In *Michel Dumont v Canada*, the United Nations Human Rights Committee considered the Canadian model for compensating a miscarriage of justice.[119] Mr Dumont began a civil action against the Attorney General of Québec seeking financial compensation for the harm done to his family and himself for his wrongful conviction.[120] He also wrote a number of letters to various authorities in which he sought compensation for the miscarriage of justice, which were all rejected.[121]

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113 Human Rights Act 2004 (ACT), s 23(1)-(2).

114 Above, s 23(3).

115 Hon H LaForme and Hon J Westmoreland-Traoré, *A Miscarriages of Justice Commission* (November 2021) p 186.

116 Above, p 187.

117 Department of the Attorney-General, "Guidelines: Compensation for Wrongfully Convicted and Imprisoned Persons" (1988) p 1.

118 Above, p 2. Compensation can be for up to $100,000 (in January 2025 there were around 1.8 CA$ for every 1GB£) of non-pecuniary losses, for any amount of pecuniary losses (accounting for blameworthy conduct by the applicant and their due diligence in pursuing remedies), and for costs in obtaining a pardon or verdict of acquittal.

119 *Michel Dumont v Canada* [2006] Comm No 1467/2006. Mr Dumont was convicted of rape and sentenced to 52 months' imprisonment in 1991. His first appeal was refused; despite the victim signing a formal attestation that she was mistaken in her identification, the attestation was not mentioned in the appeal proceedings. Mr Dumont was released on parole after serving 34 months. The Canadian Government then commissioned a board of inquiry which concluded that, in light of the attestation, there was reasonable doubt as to Mr Dumont's guilt. Mr Dumont's conviction was subsequently quashed in 2001.

120 *Michel Dumont v Canada* [2006] Comm No 1467/2006 at [2.2].

121 Above, at [2.2].

16.52 Mr Dumont then brought a claim to the Human Rights Committee in which he alleged that Canada was not honouring its commitments under the ICCPR.[122] In response, Canada reiterated that, in order to meet the Guidelines, an applicant must show "proof of factual innocence".[123] It was argued that the acquittal was a result of the victim's uncertainty as to the identification of her assailant, but it did not prove factual innocence.[124] The Committee held that because Canada had no process for launching a new investigation to try and identify the real perpetrator following the acquittal, Mr Dumont had been deprived of an effective remedy that would enable him to demonstrate his innocence as required.[125] The Committee considered that Canada was under an obligation to provide an effective remedy through providing adequate compensation and that this obligation had been violated.[126]

Discussion

The burden and standard of proof are contrary to ordinary principles of criminal justice

16.53 Irrespective of the decision in *Nealon and Hallam*, we are nonetheless persuaded that we should consider the need for reform of the current compensation scheme for wrongful convictions. All of the consultees who raised compensation with us thought that the current scheme was unfair.

16.54 As the ECtHR emphasised in *Nealon and Hallam v United Kingdom*, the issue before the Court was whether section 133(1ZA) violated the presumption of innocence. It was not whether the UK was fulfilling its obligation to provide for an enforceable right to compensation following an unlawful arrest or detention as required under the ICCPR. The Court made clear it was not considering the right to compensation:

> Article 6 § 2 of the Convention does not guarantee a person whose criminal conviction has been quashed a right to compensation or a miscarriage of justice... Article 3 of Protocol No.7 to the Convention provides a right to compensation where certain conditions are satisfied, but, as the Explanatory Report to Protocol No.7 explained, it is not intended to give a right of compensation where those preconditions are not satisfied ... In any event the United Kingdom has neither signed nor acceded to protocol No.7.

16.55 Given the decision of the UN Human Rights Committee in *Michel Dumont v Canada*,[127] it is arguable that the requirement to prove factual innocence in England and Wales is in violation of the ICCPR. This is particularly so as there is no

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122 *Michel Dumont v Canada* [2006] Comm No 1467/2006 at [2.2].

123 Above, at [14.7].

124 Above, at [14.9].

125 Above, at [23.6].

126 Above, at [25]. In a report outlining possible options for a potential Miscarriage of Justice Commission in Canada, Michel Dumont submitted that 11 years after this decision he had still not received any compensation and Canada had not enacted a procedure to implement its obligations required under article 14(6) of the ICCPR. The retired Judges who authored the report described this as "a shame that we urge the minister to address". See Hon H LaForme and Hon J Westmoreland-Traoré, *A Miscarriages of Justice Commission* (November 2021) p 187.

127 *Michel Dumont v Canada* [2006] Comm No 1467/2006.

mechanism for an applicant to instigate an investigation to find the actual perpetrator (if there is one) and, therefore, any effective remedy is denied.

16.56 Requiring an applicant to demonstrate their innocence beyond reasonable doubt does not align either with the standard of proof that is normally applied in civil claims for compensation (the balance of probabilities) nor with the standard applied in criminal cases (proof *of guilt* beyond reasonable doubt). Where, in criminal proceedings, a defendant is required to prove a matter (bears a "persuasive burden of proof"), it is on the balance of probabilities.

16.57 One of the arguments that has frequently arisen in the case law on compensation is whether the proceedings are criminal or civil in nature. For example, in *Nealon and Hallam v United Kingdom*, the Government argued that the proceedings were civil and, therefore, the presumption of innocence did not apply. This argument was rejected by the ECtHR, but even if it were to be accepted, that would make the imposition of the criminal standard of proof even less sustainable.[128] Further, in other proceedings which arise ancillary to criminal proceedings, such as most confiscation proceedings, the burden of proof on the prosecution is the balance of probabilities.[129]

16.58 The test applied under section 133 therefore runs contrary to fundamental principles of both civil and criminal law.

16.59 Further, in some of the cases cited above much of the discussion centred on the fact that there had been no retrial. For example, in *Allen v United Kingdom*, the ECtHR discussed the proceedings in the domestic courts and noted that they had not commented on Mrs Allen's guilt or innocence but had "consistently repeated that it would have been for a jury to assess the new evidence had a retrial been ordered".[130] As Mrs Allen had served her sentence and been released, the Court had decided that a retrial was not in the public interest. Given whether a retrial is ordered is a matter largely outside the appellant's control, it seems inherently unfair that the lack of a retrial is seemingly then used as a ground on which to decline compensation. Moreover, as Lady Hale explained (see 16.35 above), the question for a jury is whether someone is guilty or not guilty, not guilty or innocent, and relying upon the fact that it would be for a jury to assess the new evidence a retrial does not address the important fact that innocence is not established by a not guilty verdict.

16.60 The majority of the consultees who raised compensation with us considered the threshold too high and the test unduly restrictive. For example, Mark Newby, the solicitor who represented Victor Nealon, submitted that even in some of the most notorious cases including Malkinson and the Post Office Horizon cases the Court did not declare the individuals concerned "innocent". Given that the Secretary of State will often make use of the CACD's reasoning when explaining a decision to decline

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128 For example, in *Nealon and Hallam* the Government argued that the compensation proceedings were not part of the criminal process rather it was a "civil and administrative task". *Nealon v UK* (2024) 79 EHRR 22 (App Nos 32483/19 and 35049/19) at [110].

129 See Proceeds of Crime Act 2002, s 6(7).

130 *Allen v UK* (2016) 63 EHRR 10 (App No 25424/09) at [134].

compensation, Mr Newby noted that this will inevitably have an impact on an individual's ability to obtain compensation.

16.61 The Law Society further highlighted that because of the nature of the safety test, the CACD does not go as far as pronouncing an appellant's innocence. It reiterated that the test in the CACD is about the safety of a conviction and not innocence.

16.62 Dr Felicity Gerry KC also noted the link between the test in the CACD and the ability successfully to claim compensation. She argued that in relation to joint enterprise cases:

> It means that the Court of Appeal is highly unlikely to ever pronounce on innocence which in turn affects compensation claims. Such policy approaches linked to placing the burden on those wrongly convicted mean the state purse strings are at least perceived as more important than justice. Any miscarriage of justice should give rise to compensation, especially if it is caused by an error of law by the courts.

16.63 In our view the requirement in section 133(1) to show "beyond reasonable doubt" that there has been a miscarriage of justice is a higher bar than the ICCPR requires. It is not clear why "beyond reasonable doubt" was substituted for "conclusively" – the language of the Convention – when the 1988 Act was introduced (other terms in the Convention were transposed verbatim).[131] It is strongly arguable that a person who can show, on the balance of probabilities, that they did not commit an offence, has "conclusively" demonstrated that there has been a miscarriage of justice.

16.64 When the ICCPR was being drafted, it was suggested that the standard could be "beyond reasonable doubt", however, this was rejected by the majority of the delegates.[132] Instead, the French proposal which referred to showing "conclusively" that a miscarriage of justice had occurred was adopted.[133] In the French text of the ICCPR, the word "prouve" ("proves") is used for "shows conclusively". This suggests that the word "conclusively" was not intended to require some higher level of proof.

16.65 It may be that when what the applicant was required to prove beyond reasonable doubt was that "there had been a miscarriage of justice", the *standard* of proof was largely immaterial. The court had quashed the conviction on some or other basis and what that basis was would be readily discernible from its judgment (even if the position as to the applicant's guilt or innocence was not).

16.66 Lord Phillips of Worth Matravers, President, giving the lead judgment for the Supreme Court in *Adams*, said:[134]

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131 The measure was introduced by way of an amendment to the Criminal Justice Bill before Parliament in 1987, in response to pressure from peers. Peers had tabled an amendment to the Bill which reflected the ICCPR – including the word "conclusively".

132 J Mujuzi, "The Right Compensation for Wrongful Conviction/Miscarriage of Justice in International Law" (2019) 8 *International Human Rights Law Review* 218.

133 Above, 219.

134 *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, [2012] 1 AC 48 at [37].

> I think that the primary object of section 133, as of article 14(6), is clear. It is to provide entitlement to compensation to a person who has been convicted and punished for a crime that he did not commit. But there is a subsidiary object of the section. This is that compensation should not be paid to a person who has been convicted and punished for a crime that he did commit.

16.67 The definition of miscarriage of justice in section 133(1ZA) appears to reverse the statutory priorities identified by Lord Phillips. It works primarily to ensure that compensation is never paid to a person who was convicted and punished for a crime that they did commit. Compensating a person who was convicted and punished for a crime that they did not commit has become the "subsidiary object". In doing so, domestic law has prioritised something that the UK is not required to do under our international law obligations (ensuring the guilty are not compensated) over something that the UK is required to do (provide an enforceable right to compensation for those who are wrongly convicted). In light of the claim brought by Michel Dumont against Canada, we question whether this approach is compatible with the obligation in the ICCPR. Even if it is compatible with the letter of the obligation, we do not think it is compatible with its spirit.

The legislation is now incoherent

16.68 Section 133 has developed piecemeal. One effect of that is that some aspects of the law are now incoherent.

16.69 Subsections (1) and (1ZA) mean that compensation is only payable if the conviction is quashed by the court on the basis that a new or newly-discovered fact shows beyond reasonable doubt that the person did not commit the offence.

16.70 Subsection (5A) then makes provision for the situation where a person's conviction is quashed but the court makes an order for retrial (this provides that the compensation will only be paid if they are acquitted, or the retrial does not proceed). This subsection is intended to deal with circumstances where a conviction might be quashed even though factual innocence had not yet been proven, and the person might be found guilty at a retrial. This provision made sense while a broad interpretation of "miscarriage of justice" was applied. The court might find a miscarriage of justice warranting quashing a conviction yet hold that there was a sufficient case to answer to warrant a retrial.

16.71 However, it is inconceivable that an appellate court would ever order a retrial where it had been shown beyond reasonable doubt that the person did not commit the offence. The retrial provisions in subsection (5A) are now redundant in light of the extremely high threshold imposed in subsections (1) and (1ZA).

Compensation limits

16.72 Compensation where a person has been imprisoned is capped at £1 million where the person has served 10 or more years' imprisonment or £500,000 in all other cases (this can include time spent on remand in some circumstances). These limits were

introduced in 2008, and have not been increased in line with inflation, effectively reducing the value of the maximum compensation payable by a third.[135]

16.73 Some consultees considered the limit on compensation as being unfair. For example, APPEAL were critical of £1 million cap which it noted had not been updated for inflation.

16.74 Mark Alexander, a current serving prisoner who maintains his innocence, argued that it was notable that the Post Office Horizon victims had been offered settlements which were in excess of the maximum compensation currently available under the legislation for other victims of miscarriages of justice.

Conclusion

16.75 We concluded in Chapter 4 that the principal aim of the criminal justice system is to acquit the innocent and convict the guilty – with the former taking priority. However, the current compensation scheme seemingly prioritises minimising the risk of the guilty receiving compensation at the expense of the innocent receiving compensation. Some people who are provably innocent – on the balance of probabilities, which would ordinarily apply in civil compensation proceedings – are denied compensation. The stringent requirements of the current compensation scheme seem to be in tension with the overall objective of the criminal justice system. As noted by Lord Phillips, requiring a wrongfully convicted person to prove their innocence beyond reasonable doubt is a "heavy price to pay" to ensure that no guilty person receives compensation.[136] We consider that imposing the criminal standard of proof on an applicant is indefensible and inconsistent with the fundamental principles that underlie our criminal justice system. We are also concerned that the current imposition of a beyond reasonable doubt standard fails to meet the UK's obligations under the ICCPR, particularly in light of the findings in *Michel Dumont v Canada* discussed above at paragraphs 16.51 to 16.52.

16.76 When announcing the Post Office (Horizon System) Offences Act 2024, the Government readily acknowledged the risk that the legislation would not only allow guilty individuals to obtain state-funded compensation but would also quash their convictions.[137] The Government was willing to take that risk to ensure that those who were innocent of the crimes of which they were convicted received proper redress.[138] A requirement that individuals sign a legal statement vowing they did not commit the crime of which they had been convicted was considered an appropriate safeguard.[139] The Government's clear priority is to provide compensation to those who have

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135 The value £1 million in 2008 equates to over £1.5 million in 2024; https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator.

136 *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, [2012] 1 AC 48 at [50], by Lord Phillips of Worth Matravers PSC.

137 Prime Minister's Office, "Wrongful Post Office convictions to be quashed through landmark legislation" (13 March 2024).

138 Above.

139 Above.

suffered the trauma of a wrongful conviction. This is in stark contrast to the statutory scheme under section 133 of the 1988 Act.

Options for reform

16.77 Having concluded that the current compensation scheme is unfair and fails to meet the UK's obligations under the ICCPR, we turn now to consider options for its reform.

16.78 Professor John Spencer proposed the reactivation of the *ex gratia* scheme which had previously operated in conjunction with section 133; this would return England and Wales to the position before the 2006 changes and would also be in line with the position in Scotland.[140] Such a change would create scope for wider consideration of compensation applications as the Secretary of State would have additional discretion to award compensation.

16.79 However, there are problems with this proposal. The *ex gratia* scheme was removed because the parallel avenues to compensation were considered confusing. To reinstate it would risk reintroducing that unnecessary complication. Furthermore, in other jurisdictions where there is only an *ex gratia* scheme in operation, criticisms as to the arbitrariness and lack of transparency in compensation awards have been made.[141] In its response to our Issues Paper, the Criminal Appeals Lawyers Association ("CALA") observed that whilst the *ex gratia* scheme afforded the Secretary of State a wide discretion in awarding compensation, one of the problems with the scheme was its lack of transparency. Given the lack of transparency, we are not in favour of reinstating the *ex gratia* scheme.

16.80 A second option proposed by some stakeholders, including APPEAL, would be to make compensation automatic upon a conviction being quashed. This is similar to the scheme recently enacted for the victims of the Post Office Horizon scandal.[142] However, as noted by other stakeholders (including the Law Society and Mark Newby), it is unlikely that this would be a practically or financially viable option. As was discussed above at paragraph 16.40 above, there is a risk under the Post Office (Horizon System) Offences Act 2024 that people who are genuinely guilty will have their convictions quashed and may benefit from compensation. A similar or greater risk would exist with this option. Automatic compensation for someone who had their conviction quashed on what many might see as "a technicality" could undermine public confidence in the administration of justice.

16.81 A less radical alternative would be to repeal section 133(1ZA). This would remove the requirement that claimants prove their innocence beyond reasonable doubt, restoring the pre-2014 status quo. As discussed above, this is a burden that is not imposed on a defendant at any other part of the criminal justice process. Mark Newby supported this approach, advocating a return to the scheme before the 2014 change, which relied on the categories set out in *Adams*[143] (outlined above at paragraph 16.26). This

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140 J R Spencer, "Compensation for wrongful imprisonment" [2010] *Criminal Law Review* 803, 813.

141 A Hoel, "Compensation for wrongful conviction" (May 2008) 356 *Trends and Issues in crime and criminal justice* at 6.

142 Post Office (Horizon System) Compensation Act 2024.

143 *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, [2012] 1 AC 48.

would include category (1), where there is evidence that shows clear innocence, and (2), where the fresh evidence was such that if known, no reasonable jury could have convicted.

16.82 However, a limitation of this option is that by restoring the previous position it would also restore the accompanying lack of clarity about what constitutes a "miscarriage of justice". The case law on this subject was somewhat confused even after the Supreme Court ruling in *Adams*, and part of the rationale behind the enactment of section 133(1ZA) was to provide clarification. It might be possible to improve the clarity of the scheme by bringing the *Adams* categories into legislation.

16.83 Another option would be for the test for compensation to require applicants to prove their innocence on the balance of probabilities, the civil standard. This is similar to the approach in other jurisdictions, including New Zealand. There is some coherence to this argument, particularly if it is argued, as the Government did in *Nealon and Hallam*, that compensation is a civil procedure, not criminal. Furthermore, the balance of probabilities is the standard of proof imposed on the defendant when they bear the burden of proof in other proceedings that are ancillary to criminal ones, for example confiscation proceedings.[144] We note that in such proceedings, the order is to the detriment of the defendant which arguably makes the higher standard of proof in proceedings which benefit the defendant even more unfair. As we discussed at paragraph 16.56, the use of "beyond reasonable doubt" when the burden of proof is on the defendant is foreign to our justice system and offends against the principle of fairness (once the conviction has been quashed). If the standard were lowered to the balance of probabilities, in line with the evidentiary threshold required of a defendant (when raising some defences) in criminal proceedings and the burden on parties in civil proceedings, it would still require some evidence of the appellant's innocence. This would, therefore, ensure that a genuinely guilty individual who nevertheless has their conviction quashed would be precluded from accessing compensation.

16.84 We provisionally conclude that the requirement that applicants for compensation must show beyond reasonable doubt that they did not commit the offence amounts to an unjustified and often insurmountable legal burden which conflicts with fundamental principles of civil and criminal law. We provisionally believe that lowering the standard of proof to the lower standard of the balance of probabilities is the best way to ensure that victims of miscarriages of justice can access compensation for their wrongful conviction and imprisonment: a person who can show on the balance of probabilities that they were innocent should be entitled to compensation.

16.85 Additionally, we acknowledge that, as with concerns as to the separation of powers with the Home Secretary's previous power to refer cases to the CACD, issues may be seen to arise with the Secretary of State deciding on issues of relative innocence and guilt. We provisionally conclude that it should not be for the CACD to decide compensation, because it is not regularly familiar with the considerations associated with making compensation awards and their amount. However, we are interested in hearing views about whether a body independent from the Secretary of State, perhaps analogous to the CCRC, Criminal Injuries Compensation Authority or the Canadian

144 Proceeds of Crime Act 2002, ss 6(7) and 92(9).

system, should be the entity decide whether a person whose conviction was quashed was factually innocent on the balance of probabilities.

Consultation Question 99.

16.86 We provisionally propose that the test for compensation following a wrongful conviction should not require an exonerated person to show beyond reasonable doubt that they are factually innocent, but should require them to show on the balance of probabilities that they are factually innocent.

Do consultees agree?

16.87 We invite consultees' views on who should decide on compensation.

Other requirements

16.88 Whilst most consultees primarily focused on the requirement to prove innocence beyond reasonable doubt, one consultee, CALA, raised further concerns with the other preconditions for compensation. CALA argued that using the pre-2014 test, as it was interpreted in *Adams*, "is subject to the conditions precedent that the defendant's conviction was quashed on an out of time appeal and on the basis of a newly discovered fact". Relying on Professor John Spencer's "excoriating" article,[145] CALA submitted that "the statutory scheme for compensation excludes a whole raft of deserving applicants including those who had spent time in custody but whose case had been decided in their favour at trial".

The requirement that the conviction was quashed on an out-of-time appeal or a CCRC reference

16.89 The requirement that the successful appeal was brought out of time or following a reference by the Secretary of State (now by the CCRC)[146] is intended to reflect the notion that a successful appeal on an "ordinary" in-time appeal represents the proper functioning of the criminal justice system, rather than a failure of it. This provision may have caused little detriment to those acquitted on an in-time appeal, rather than at trial, at the time that the UK signed up to the ICCPR, when in-time appeals might be heard within a few weeks of conviction. However, appeals against conviction, especially where these are complex, might now not be heard for months, or over a year after the person was convicted (and imprisoned).[147]

16.90 This provision would now act to exclude a number of notorious historical injustices from compensation if applications were made today, including the convictions of Annette Hewins and the "Cardiff Three" (see Appendix 2).

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145 See J R Spencer, "Compensation for wrongful imprisonment" [2010] *Criminal Law Review* 803, 813.

146 Criminal Justice Act 1988, s 133(5).

147 According to the most recent statistics released by the CACD, the average waiting time for a conviction renewal is 13.8 months. See Judiciary of England and Wales, *A Review of the Year in the Court of Appeal, Criminal Division* (January 2025) p 40. The statistics appear to misplace renewals and grants/referrals.

16.91 In the case of the Cardiff Three, despite clear evidence proving the appellants' innocence, they would be unable to claim compensation because their appeals were made in time. Nonetheless, they still spent between two and just over four years in prison awaiting trial and, upon conviction, pending the hearing of their appeal.

16.92 Previously, this defect was remedied by the *ex gratia* scheme which could act to fill the gaps in the legislation. Indeed, that is how the Cardiff Three were compensated. Since the *ex gratia* scheme was removed, there is no longer a mechanism to provide compensation in such circumstances. It seems inherently unfair that two individuals could spend an equal number of years in prison awaiting an appeal and yet one may be excluded from compensation on the ground that they lodged their appeal in time. It may be that more individuals will spend longer periods in prison pending an in-time appeal on account of the current backlog within the criminal justice system. Given this, we consider the out-of-time requirement unduly limits eligibility for compensation and prevents genuine victims of a miscarriage of justice from being fairly compensated.

16.93 This rule could be replaced with a requirement for a minimum time to be served post-conviction or by allowing those whose conviction is quashed on an in-time appeal to apply for compensation "in exceptional circumstances".[148]

16.94 However, we acknowledge that the former possibility could operate arbitrarily, and the latter could be too narrowly interpreted given how frequently in-time appeals are now heard months or even years after the conviction. We therefore seek views on the abolition of the in-time appeal exclusion.

Consultation Question 100.

16.95 We invite consultees' views on whether compensation for a miscarriage of justice should be available to those whose conviction was quashed on an in-time appeal.

The requirement that the conviction was quashed on the basis of a new or newly-discovered fact

16.96 In relation to the new or newly-discovered fact condition, we note that the legal test is based on the ICCPR, which requires that the conviction is quashed because the new or newly-discovered fact proves that there had been a miscarriage of justice. However, international treaty obligations need to be given effect in a way which works with the law of the state party. The CACD does not rule on whether a new or newly-discovered fact shows conclusively that there has been a miscarriage of justice; it rules on whether the conviction is unsafe. Taken literally, the ICCPR rule would only require compensation in circumstances which would never transpire; it therefore needs to be applied contextually.

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148 For instance, the Cardiff Three might argue that the circumstances of their detention were exceptional: their first trial – at the time one of the longest in English history – ended as the trial judge died overnight before completing his summing up. They had served two and a half years on remand by the time they were convicted at the retrial, and four years before their convictions were quashed.

16.97 Applying the requirement literally would also appear likely to deny compensation even to some of the few exonerated who could show beyond reasonable doubt that they were innocent. For instance, in the Issues Paper, we explored the case of Barri White (see Appendix 2), whose conviction for the murder of his girlfriend Rachel Manning was quashed in 2007 after scientific evidence adduced at trial was shown to be unreliable. He was acquitted at a retrial ordered by the CACD. He did not qualify for compensation at that time because neither the quashing nor the subsequent acquittal showed that he was innocent.[149]

16.98 However, in 2013, Mr White reapplied for compensation after Shahidul Ahmed was convicted of the murder of Ms Manning on the basis of DNA evidence linking him to the murder weapon. Since Shahidul Ahmed had been found guilty beyond reasonable doubt, this effectively demonstrated Mr White's innocence to that standard. Mr White was accordingly awarded compensation.[150] Under a literal interpretation of the current test in the Criminal Justice Act 1988, he would no longer be eligible, because the conviction was not quashed because of a newly-discovered fact which demonstrated his innocence; it was quashed because it was unsafe, and later a newly-discovered fact conclusively demonstrated his innocence.

16.99 Whilst we accept that the test for compensation should require a new or newly-discovered fact, we do not consider that cases where the defendant's innocence is proven after their appeal (such as in Mr White's case) should be excluded from compensation. We, therefore, do not think that the new or newly-discovered fact as being the reason for the quashing for the conviction should be given a literal interpretation in awarding compensation.

Consultation Question 101.

16.100 We provisionally propose that where a person's conviction is quashed, and they can demonstrate to the requisite standard that they did not commit the offence, they should be eligible for compensation whether or not this was the reason for the Court of Appeal Criminal Division quashing their conviction.

Do consultees agree?

SUPPORT POST-APPEAL

Introduction

16.101 Compensation is only one type of support needed by those who have had their convictions quashed after their subsequent release from prison.

16.102 In Chapter 4 we discussed the wider integrity of the criminal justice system. Where an individual has been wrongly convicted and has lost their liberty, a system which

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149 Law Commission, Criminal Appeals: Issues Paper (July 2023) p 70. BBC, "Murder Without a Trace", *Rough Justice* (24 March 2005); "A Drunken Argument", *UK True Crime Podcast*, episode 279 (22 March 2022).

150 L Devlin, "Rachel Manning: Barri White and Keith Hyatt compensation 'approved'", *BBC News* (26 September 2013).

maintains its integrity arguably ought to provide relief to the victim of that miscarriage of justice and, of equal importance, should also assist with integrating that individual back into wider society. Where a miscarriage of justice has occurred, it highlights a failure of the system to have operated as it should. This may result in a loss of confidence which can be ameliorated by State accountability and steps taken not only to remedy the defect in the system, but to support the individual who has suffered injustice.

16.103 We did not discuss this issue in the Issues Paper. However, concerns about the adequacy of support were raised with us throughout the consultation period both in written responses and in meetings we had with legal practitioners, organisations and victims of miscarriages of justice. We, therefore, focus the rest of this chapter on this issue.

Current support

16.104 It became apparent to us that victims of miscarriages of justice do not fall within the direct responsibility of a particular government department.[151] Given that they are no longer convicted or serving any sentence, they are not under the supervision of probation as other former prisoners are. At present, there is only one organisation which provides dedicated support to an individual wrongly convicted in England and Wales, the Miscarriage of Justice Support Service ("MJSS").[152]

16.105 The MJSS is funded by the Ministry of Justice but is run independently by Citizens Advice. At its inception it was funded by the Home Office, however, in 2008 it shifted to the National Offender Management Service, now His Majesty's Prison and Probation Service ("HMPPS"), within the Ministry of Justice.[153] The service is based in the Royal Courts of Justice, where the CACD sits in London. However, it provides an outreach service and has case workers who are based at local Citizens Advice centres throughout England and Wales. The MJSS provides support to those whose convictions have been quashed by the CACD following an out-of-time appeal or a reference from the CCRC.[154] The remit of the organisation is set through tender documents which are renewable. The purpose of the MJSS, according to these tender documents, is to provide advice and support in relation to practical issues such as housing, social security benefits and healthcare. The documents do not mention resettlement or reintegration.[155]

16.106 The MJSS offers a range of life-long services. This may include support prior to release and making prison visits to ascertain what help clients may require if they are

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151 Although we note that this may be because victims of miscarriages of justice may not want assistance from the state on the basis that they blame the state for their wrongful conviction and imprisonment.

152 In Scotland, the Miscarriages of Justice Organisation ("MOJO") which was set up by Paddy Hill, one of the "Birmingham Six", receives funding from the Scottish Government to provide support for those wrongly convicted.

153 C Hoyle and L Tilt, "The Benefits of Social Capital for the Wrongfully Convicted: Considering the Promise of a Resettlement Model" (2018) 57 *The Howard Journal of Crime and Justice* 495, 501.

154 We note this would exclude victims of miscarriages where the appeal was made in time despite them having been wrongfully convicted and imprisoned.

155 C Hoyle and L Tilt, "The Benefits of Social Capital for the Wrongfully Convicted: Considering the Promise of a Resettlement Model" (2018) 57 *The Howard Journal of Crime and Justice* 495, 501.

released. An advisor will also attend the appeal hearing and help the client through the discharge process.

16.107 Post-release support that is within the MJSS's remit includes finding accommodation, establishing income and training, applying for National Insurance credits, registering with a general practitioner and assessing any healthcare or counselling needs. MJSS also assists with opening a bank account, budgeting, finding a solicitor where compensation is sought and providing more general support with family or relationship issues. Where necessary, the service may also provide more practical assistance such as writing letters, filling in forms, booking appointments, and accompanying clients to various bookings. It may also act as a bridge between clients and other services that can provide assistance.

Immediate problems post release

16.108 As discussed earlier on in this chapter, the statutory compensation scheme sets a very high threshold for success. It is clear from the available statistics, cited above at paragraph 16.18, that very few individuals are able to claim successfully. Moreover, the average waiting time from an application being made and any payment is between 62 and 216 weeks.[156] The result of this is that a large number of those who leave prison following their convictions being quashed will have little support or time to prepare for life outside of prison due to the unpredictable nature of the appeals process.

16.109 For example, Victor Nealon, whose case was discussed above at paragraphs 16.41 to 16.46 and in Appendix 2, was released from prison with £46, a train ticket, and little time to prepare for life outside.[157] Andrew Malkinson (see Appendix 2) has, at the time of writing, only just received some payment of compensation.[158] This is despite his case resulting in an apology from the Chief Constable of Greater Manchester Police and (later) the Chair of the CCRC, as well as his case being described by the then Lord Chancellor as "an atrocious miscarriage of justice".[159] He was released from prison homeless, in need of mental health support and in receipt of universal credit.[160] Each of these two men spent 17 years in prison, which far exceeded their minimum terms, as is common for prisoners who maintain their innocence.[161]

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156 Ministry of Justice, "Miscarriage of Justice application service (MOJAS) claims Management Information" (25 April 2024).

157 J Rayner, "Compensation fight over Victor Nealon's wrongful conviction", *Law Society Gazette* (11 December 2024). The £46 is what is known as the subsistence payment or discharge grant and is given to all those leaving prison. This was recently increased to £82.39.

158 E Gawne, "Wrongly jailed Andrew Malkinson gets first payout", *BBC News* (12 February 2025).

159 Ministry of Justice, "Judge appointed to chair independent Malkinson Inquiry" (26 October 2023).

160 A Malkinson, "I was wrongly imprisoned for 17 years. Then the state released me into a legal maze", *Guardian* (11 May 2024).

161 E Burtt, "Progression and parole: The perceived institutional consequences of maintaining innocence in prison in England and Wales" (2024) 24(1) *Criminology and Criminal Justice* 249. This study found that whilst maintaining innocence should not preclude a prisoner from progressing through the prison categories and eventually being granted parole, the Parole Board will consider, among other matters, whether the prisoner has made attempts to address their behavioural problems that led to the index offending. However,

16.110 In their consultation response, APPEAL emphasised that that there was no immediate provision for those who were exiting prison; even if the individual could meet the high threshold for compensation, this may take a significant period of time. APPEAL further noted that a similar delay exists in civil remedies and spelled out the implications for legal aid eligibility of interim payments:

> If the application [for compensation] is accepted and an interim payment made, under the current rules, the applicant will become ineligible for the legal aid they might need to pursue any civil remedies against the state agents responsible for their wrongful conviction. Further, under the current guidance, civil remedies must be exhausted before any payment from the statutory scheme can be received – and civil proceedings such as an action against the police can take years to conclude.

16.111 The issue raised by APPEAL and demonstrated by Mr Nealon and Mr Malkinson echo the report published in 2018 by JUSTICE, a law reform and human rights charity, *Supporting Exonerees: Ensuring accessible, consistent and continuing support,* which was also cited in APPEAL's consultation response.[162] This report draws on the experiences of exonerees post-release and the difficulties they faced with integrating back into society. JUSTICE highlighted that exonerees (unlike offenders) have no ministerial department which is responsible for them upon their release. It observed that these individuals are often released at short notice and with very little time to prepare for the transition into society. Further, many of those wrongfully convicted faced problems returning to the community where the crime occurred (or was alleged to have occurred) given people in the community may react adversely irrespective of the conviction being quashed.

16.112 The immediate concerns for someone wrongfully convicted have also been confirmed by a further report produced by Commonweal Housing in partnership with the MJSS.[163] This report found that the first challenge for someone who has been wrongly convicted is finding somewhere to go after the quashing of their conviction as, if they are in custody, they will be released immediately after the judgment is delivered.[164] There may be a number of challenges for someone in this position, including breakdowns in family relationships whilst they were in prison, meaning they do not have anywhere to go, or their home may be far away from where they are released, making it difficult to get there. Furthermore, their bank accounts may have been closed and, beyond the discharge grant, they may have no access to money.

Long-term consequences

16.113 Not only do victims of miscarriages of justice face significant challenges immediately after release, but there have been a number of victims who have faced ongoing and long-term devastating consequences. (It should be noted that it is inherently difficult to establish that a miscarriage of justice caused negative long-term consequences, but

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in reality for many prisoners who maintain their innocence, they are unable to demonstrate a reduction in the risk they are considered to pose meaning it is difficult to progress and eventually obtain parole.

162 JUSTICE, *Supporting Exonerees: Ensuring accessible, consistent and continuing support* (2018).

163 Commonweal Housing, *Justice after release: Housing options for Miscarriage of Justice victims, a call to action* (2015). Commonweal Housing is an action learning charity set up to explore social injustices in housing policies and seek to provide research and models to address these injustices.

164 Above, p 5.

there is evidence of correlation which we think is nonetheless worthy of consideration.)

16.114 This includes Sally Clark who was convicted of the murder of her two baby sons, which we discuss in Appendix 3. Mrs Clark, a former solicitor, who had been imprisoned for three years, was found dead four years after her convictions were quashed in what was ruled by a coroner as accidental acute alcohol intoxication.[165] Her family made a statement following her death to the effect that she had been unable to recover following her wrongful conviction and that she had subsequently been diagnosed with a number of psychiatric problems including "enduring personality change after catastrophic experience and acute alcohol dependency".[166]

16.115 Annette Hewins, who was wrongly convicted of arson with intent to endanger life (see Appendix 2), died at the age of 51, around 18 years after she was released from prison. Like Sally Clark, she had suffered sustained mental health challenges after her release.[167] Mrs Hewins spent two years and eight months in custody before her conviction was quashed. Following an inquest, the cause of death was listed as:[168]

> … a consequence of a fatal arrhythmia against a background of undiagnosed, asymptomatic hearth disease. It is likely that this occurred as a consequence of the psychological and physiological stresses necessarily impose[d] upon her by her acute psychosis, opiate withdrawal and admission to hospital.

16.116 According to her daughter, Nicole Jacobs, Mrs Hewins turned to heroin inside prison to cope with the difficulties of being wrongly convicted and the separation from her family.[169] This was compounded by the fact that when she entered prison on remand prior to her trial, she was pregnant with her fourth child, but was denied bail.[170] Mrs Hewins had to decide between having her baby removed from her or being transferred to another more remote prison with a mother and baby unit – which would prevent her remaining three young children from visiting. Ultimately, Mrs Hewins had her baby removed hours after birth. She stated that this separation saw further decline in her mental health from which she never recovered.[171]

16.117 Stefan Kiszko, whose wrongful conviction for the murder of Lesley Molseed is discussed in Appendix 1, developed schizophrenia while incarcerated, and began to experience paranoid delusions. Shortly before the Home Secretary referred his conviction to the Court of Appeal, Mr Kiszko was transferred to Ashworth Hospital, a high security psychiatric hospital. Although his immediate release from custody was

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165 S Gaines and D Pallister, "Sally Clark's death accidental, coroner rules", *Guardian* (7 November 2007).

166 Above.

167 Annette Hewins' case is described in Appendix 2.

168 G Hughes, Acting Senior Coroner for South Wales Central, "Regulation 2: Report to Prevent Future Deaths (1)" (24 September 2019) p 3.

169 Nicole Jacobs presented the 2024 BBC Radio Wales podcast "Wrongly Accused: The Annette Hewins Story" detailing her mother's case as well as her journey in prison and upon release.

170 Annette was forced to give birth in an ambulance on the way from prison to the hospital.

171 "New BBC Sounds series highlights woman's traumatic birth while on remand in prison", *Birth Companions* (28 March 2024).

ordered when his conviction was quashed, he initially remained within a mental health facility. He died following a heart attack at the age of 41, the year after his release.[172]

16.118 These cases highlight the traumatic and potentially life-shortening consequences of a wrongful conviction. From the available literature, it is clear that victims of miscarriages of justice, such as Mrs Clark, Mrs Hewins and Mr Kiszco, have compounding and unique psychological impacts as a result of wrongful conviction and imprisonment, beyond the practical problems immediately after release.

16.119 Dr Adrian Grounds, a forensic psychiatrist at the University of Cambridge, has carried out psychiatric assessments of a number of individuals who are victims of miscarriages of justice, including some of the "Birmingham Six" and "Guildford Four".[173] He found that, in the majority of cases, the individuals had undergone significant personality changes with many displaying severe post-traumatic stress disorder ("PTSD") symptoms. Common features were evidence of depressive disorders and other mood changes that were attributed to the wrongful arrests, convictions and imprisonment. Dr Grounds noted the way in which the individuals had been released had caused significant difficulties. This had been sudden, without preparation or supervision that is ordinarily provided to prisoners. Many had struggled with day-to-day tasks after their release and with integrating back into their families and society. Dr Grounds concluded that a number of these outcomes could be attributed to the wrongful conviction, as well as the general adjustment problems that result from a long period of detention.

16.120 Dr Laura Tilt has also conducted research engaging with the wrongly convicted, their family and friends, professionals and organisations that provide assistance to victims of miscarriages of justice.[174] Many of the findings of her research echo those of Dr Grounds, including the deep trauma, personality changes and mental health difficulties such as PTSD and depression. Dr Tilt emphasised the need for specific and tailored support for this group who present with a unique range of difficulties and highlighted that these did not disappear when the conviction was quashed.[175]

16.121 A systematic review of the literature on psychological impacts for those wrongfully convicted has also been conducted by academics Dr Samantha Brooks and Professor Neil Greenberg.[176] They found eight key themes emerged from the existing studies. This included changes to individuals' self-identities and personalities, stigma faced by the individuals including damage to their reputations, and self-stigma as well as psychological and physical health difficulties including depression, anxiety, PTSD and sleep difficulties. They also highlighted changes in relationships with others including isolation, relationship breakdown and close family members experiencing their own

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172 See Evidence Based Justice Lab, "Stefan Kiszko".

173 A Grounds, "Psychological consequences of wrongful conviction and imprisonment" (2004) 46 *Canadian Journal of Criminology and Criminal Justice* 165.

174 L Tilt, *The Aftermath of Wrongful Convictions: Addressing the Needs of the Wrongfully Convicted in England and Wales* (2018). Dr Tilt was a former Research Assistant at the Law Commission of England and Wales but was not involved in this project.

175 Above, p 181.

176 S Brooks and N Greenberg, "Psychological impact of being wrongfully accused of criminal offences: A systematic literature review" (2021) 61 *Medicine, Science and the Law* 44.

difficulties. Other themes identified in their research were disillusionment with the justice system including a loss of trust in the police, significant financial and employment burdens, traumatic experiences in custody as well as ongoing adjustment difficulties post release.

16.122 The JUSTICE report cited above also reiterates the long-term ramifications of wrongful conviction and imprisonment. It noted that many exonerees carried strong feelings of injustice and suffered trauma-related responses. JUSTICE concluded that it was incorrect to assume that simply releasing an individual who has been wrongly convicted would vindicate them.[177]

Comparison to those rightfully convicted

16.123 We recognise that there are enormous challenges that any individual may face upon their release from prison, irrespective of whether they are guilty or innocent. This includes many of the issues discussed above, such as finding housing and employment, as well as reintegrating into families and wider society. Given this, there are a number of steps taken in prison to alleviate some of these challenges that that individual may face in the community. For example, in the last 12 weeks of their sentence, a prisoner will be provided with support and advice about finding somewhere to live, looking after money and getting a job. Moreover, if the prisoner has abused substances, was a sex worker or the victim of domestic violence, extra support will be given.[178] A prisoner may also be able to leave prison for short periods when nearing the end of their sentence. This includes "resettlement day release" during which the prisoner can do things to help assist their release such as attend work placement or a training course, attend school or college or maintain their family connections.[179] There may also be a "resettlement overnight release" where the prisoner can stay overnight at the address at which they will live after they have been released.[180] Further, the prisoner may be released to spend time with their child if they will be the primary carer of their child upon release.[181]

16.124 In 2021, the Government announced a plan to provide greater assistance in the rehabilitation and reintegration of prisoners.[182] As part of this strategy, the Government planned to facilitate more employment opportunities for prisoners through permitting release on temporary licence to allow prisoners to begin work before leaving prison. Further support included providing treatment in the community for drug and alcohol abuse and ensuring all prison leavers are registered with a GP before they are released, to address mental health concerns. It further anticipated that there would be greater access to mental health services in the community through the Community Mental Health Transformation Programme facilitated by the NHS. A new wraparound service to provide treatment and support for those considered high-risk offenders with complex needs was to be implemented by 2025. The National

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177 JUSTICE, *Supporting Exonerees: Ensuring accessible, consistent and continuing support* (2018) p 11.

178 Ministry of Justice, "Before someone leaves prison".

179 Ministry of Justice, "Release on Temporary Licence (ROTL) Policy Framework" (3 October 2022) pp 26-29.

180 Above, p 29.

181 Above, p 30.

182 Prisons Strategy White Paper (December 2021) CP 581.

Partnership Agreement for Health and Social Care for England was also extended to include offenders out in the community on probation.[183]

16.125 As part of this plan, the Government also wanted to reduce the number of prisoners who were leaving prison without basic foundational tools. The Government stated it would ensure that everyone leaving would have an ID which demonstrates their right to work, announced further investment in the Prisoner Banking Programme (which ensures that all prisoners have a basic bank account to use upon release) and committed to look at ways to support prisoners in writing their CVs. The Government further pledged support for prison leavers upon their release in arranging jobcentre appointments as well as probation appointments.

16.126 In September 2024, the new Government also committed to "reducing reoffending" and providing "education and [assistance with] employment" for prisoners.[184] In February 2025, the Lord Chancellor, Rt Hon Shabana Mahmood MP, announced various reforms intended to improve the Probation Service's supervision of released offenders.[185]

16.127 Not only do those who have been wrongly convicted not benefit from much of the previously mentioned support, but some will have been in higher category prisons at the time of their release.[186] This means they will not have had the more relaxed security afforded in lower category prisons as well as the greater availability of courses and opportunities for phased reintegration into society such as the resettlement days or overnight releases noted above. Whilst maintaining innocence should not prevent a prisoner from progressing or engaging in certain rehabilitation programmes, it can be difficult to demonstrate a low risk of reoffending where the individual is considered to be in denial of the index offending.[187]

16.128 In consultation we spoke to Progressing Prisoners Maintaining Innocence, an organisation that supports prisoners, ex-prisoners and those on probation who continue to maintain their innocence. We also spoke to a number of individuals who had been in prison or had family members in prison and maintained their innocence. Those we spoke to emphasised to us that maintaining innocence makes it very difficult to progress through the prison categories.

16.129 The fact that victims of miscarriages of justice will be released from higher category prisons may mean the shock of being released back into society is greater than for a

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183 This is an agreement between the Department of Health and Social Care, His Majesty's Prison and Probation Service, the Ministry of Justice, the National Health Service and the United Kingdom Health Security Agency. The focus is to support healthcare in prisons and those on probation including with substance misuse as well as secondary mental health services.

184 *Hansard* (HC), 10 September 2024, vol 753, col 678 (Sir Nicholas Dakin, Parliamentary Under-Secretary of State for Justice).

185 Ministry of Justice, "Lord Chancellor sets out her vision for the probation service" (12 February 2025).

186 In England and Wales, prisons are categorised from A (highest security) to D (lowest security). Prisoners are given corollary categories based on three factors: their risk of escape; the harm to the public if they were to escape; and the threat they pose to the control and stability of a prison. The risk the prisoner poses will be periodically reassessed depending on the length of their sentence. See HM Prison & Probation Service, "HM Prison Service".

187 Prison Reform Trust, "Information sheet for people Maintaining Innocence" (July 2021).

prisoner who has been in open conditions and is used to the flexibility and freedom afforded to them. Furthermore, maintaining innocence could also result in the individual spending more time in prison as they are unable to progress with their sentence plan and, therefore cannot be released without first accepting guilt.[188] The difficulties faced in prison compounded with the lack of progress and continued denial of guilt may exacerbate the feelings of injustice adding to the devastation caused.[189]

16.130 Plainly, the ordinary steps outlined above that are taken for convicted prisoners both before and after release indicate recognition from the state that support is required in order to integrate an individual back into the community. A number of these steps are to provide for rehabilitation, a key penological aim, and to address the underlying causes of the offending in order to reduce future risk. Such concerns are plainly not relevant to someone who has been wrongly convicted, nevertheless, they will have experienced a number of the same issues due to the prolonged periods of isolation.

Problems with the current support

16.131 The role of the MJSS and the service it provides has recently been explored by Professor Carolyn Hoyle and Dr Laura Tilt.[190] The researchers carried out an empirical study looking at the client files held by the MJSS, primarily focusing on those clients who had engaged with the MJSS.[191] They found that the majority of clients had been convicted of serious criminal offences including murder and drug importation. Most had been sentenced to life imprisonment and had served a significant period in prison, with the average term being seven years.

16.132 The researchers drew a number of findings from their study as to some of the difficulties which those who have been wrongly convicted can face. This included financial harm as a result of their imprisonment, not only because of the inability to earn whilst in prison, but also the costs associated with defending their innocence. Many were now in receipt of benefits and were unable to work for a range of reasons, including the mental trauma that they had suffered, the inability to upskill in prison and the general reluctance of employers to recruit those who had been in prison, even following a wrongful conviction. There were a number of mental health harms resulting from wrongful convictions which had had a negative impact on their relationships, including with their partners, children and friends. The wrongful conviction had also had a negative impact on their abilities to form new relationships. In attempting to secure housing, this group also faced challenges, as being wrongly convicted does

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188 This was raised in consultation at an event hosted by APPEAL. Prisoners will have a sentence plan which will identify activities that they ought to complete in prison and on licence. Progressing with a sentence plan is crucial for applications to move down a prison category as well as for release on a temporary licence. See JUSTICE, *A Parole System fit for Purpose* (January 2022) p 107.

189 For example, Andrew Malkinson has spoken about the difficulties he faced being in group therapy in prison and being asked to explain "what he did". See summary at "Andrew Malkinson: 'The world finally knows the truth'", *BBC News* (27 July 2023).

190 C Hoyle and L Tilt, "The Benefits of Social Capital for the Wrongfully Convicted: Considering the Promise of a Resettlement Model" (2018) 57 *The Howard Journal of Crime and Justice*, 495.

191 The MJSS held 305 clients' files. This included both current and archive files since it was established in 2003. Of these files, 93 were "within remit" clients: those who had been convicted and had their convictions quashed either through an out-of-time appeal (10% of clients) or from a CCRC reference (90% of clients). Of these 93 clients, 61 had engaged with the MJSS. The findings and analysis drew from these 61 files.

not automatically mean they reach the "priority need" status for finding accommodation.[192] Rather, the MJSS had to provide reasons as to why they may be particularly vulnerable and, therefore, require greater assistance in finding accommodation.

16.133 The implications of these findings were that this group had particular needs that were not being addressed within the community with an overall lack of support. The MJSS was operating under a limited remit and despite its best efforts, there remains a gap in the system to assist with the reintegration of those wrongly convicted. This included a lack of specialised psychiatric or emotional support to address the challenges faced by the wrongly convicted.

16.134 JUSTICE also evaluated the role of the MJSS in providing support to those wrongfully convicted.[193] Like the researchers above, JUSTICE concluded that whilst MJSS provided some of the assistance that is required, it was not able to meet this group's needs.[194] The MJSS was very successful at securing social security benefits and accommodation, but it found it difficult to find appropriate mental health services that such individuals require. Moreover, the remit of the MJSS was further limited by the fact that funding was provided through a renewable yearly contract.[195] This means that long-term planning is difficult for the organisation.

Conclusions

16.135 It is counterintuitive that someone who has been wrongly convicted and deprived of their liberty is given less support than someone who has in fact committed an offence. Despite a popular misconception that a victim of a miscarriage of justice, such as Andrew Malkinson, would be immediately awarded millions of pounds, a large number of those wrongly convicted are released with only the discharge grant and with no time to prepare for release. As we explained above, even when compensation is paid, it can take a great length of time for the person actually to receive it.

16.136 Given the tightening of the compensation scheme, we consider that support for this group is arguably more needed than ever. Even if the rules were amended for compensation as we provisionally proposed, there will still be a lengthy period before an individual is likely to receive any money. As suggested by consultee Mark Alexander, a serving prisoner who maintains his innocence, the period immediately after release is likely a time when such a victim would require the greatest support.

16.137 Evidently, the MJSS provides an invaluable service to a group that is, by and large, neglected by the rest of the criminal justice system. However, given the limitations to their remit as well as the relatively short-term nature of the tender and the funding, greater wraparound support post release is required to address the complex needs of

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192 If an individual has a priority need, their council must provide greater assistance in finding housing if they are homeless or facing homelessness. This may include providing emergency housing. Some examples of priority need include those who are pregnant or have children, are homeless as a result of domestic abuse, are between 18 and 20 and have been in care, or are vulnerable due to illness or disability. See "Priority need", *Shelter* (17 July 2024).

193 JUSTICE, *Supporting Exonerees: Ensuring accessible, consistent and continuing support* (2018).

194 Above, p 17.

195 Above, p 18.

those who have been wrongly convicted. Moreover, whilst the organisation has been vital for providing practical support such as securing accommodation and opening a bank account, the tender under which it operates does not require the provision of the emotional or psychological assistance that is necessary. From the literature addressed above, it is clear that victims of a miscarriage of justice require both short-term and ongoing long-term support due to the trauma they have invariably faced which is currently not being provided. As a result, we provisionally conclude that at present victims of miscarriages of justice are not provided with adequate support and greater support both before and after release should be available to this cohort.

Suggestions for reform

Rehabilitation House

16.138 Some of the literature and consultees identified above have suggested that a rehabilitation home, similar to a "halfway house" should be established which would be exclusively for those wrongly convicted.[196] This idea has also been supported by Paddy Hill, who set up the Miscarriages of Justice Organisation ("MOJO"), and John Kamara (whose case is discussed in Appendix 1).[197]

16.139 The Sunny Centre is an example of this sort of institution. This was established by Sunny Jacobs and Peter Pringle, each of whom were sentenced to death for crimes they did not commit and served 17 and 15 years on death row respectively.[198] They met some years after their respective releases, are now married and established a non-profit organisation which helps individuals who have been wrongfully convicted and provides support once they have been released. The Sunny Healing Retreat Center was established in Ireland in 2014 and the Sunny Living Center was opened in 2018 in Florida.

16.140 JUSTICE has similarly advocated for greater comprehensive support through a central residential and daytime support centre.[199] This would enable the provision of psychological support and provide practical assistance, for example, with identifying potential employment opportunities. Upon the quashing of their convictions, individuals would be able to go to the centre directly where they would be provided with necessities such as clothing and a mobile phone. JUSTICE suggested that caseworkers would be assigned to an individual and there should be ongoing and free mental health screenings.

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196 This was raised by an MJSS caseworker in Dr Laura Tilt's research (see L Tilt, *The Aftermath of Wrongful Convictions: Addressing the Needs of the Wrongfully Convicted in England and Wales* (2018) p 219). It was also suggested in JUSTICE, *Supporting Exonerees: Ensuring accessible, consistent and continuing support* (2018) p 21.

197 MOJO has attempted to set up a similar refuge but has been unable to obtain the funding.

198 Sunny was convicted in 1976 in Florida and Peter was convicted in 1980 in Ireland, each for the murders of two police officers.

199 JUSTICE, *Supporting Exonerees: Ensuring accessible, consistent and continuing support* (2018) p 24. The service described by JUSTICE aligned with their consultees' views, including Professor Turnbull, Professor Grounds and victims of miscarriages of justice, namely John Kamara, Robert Brown and Sonia Jacobs.

Other suggestions

16.141 JUSTICE also recommended greater support to address the specific and unique psychological difficulties of someone wrongfully convicted. JUSTICE argued that such support should be available immediately both leading up to the individual's appeal and following their release. In order to provide support prior to release, JUSTICE recommended that cases that are considered as "likely to be overturned should be identified early" and such individuals should be given similar pre-release support to other prisoners.[200] JUSTICE further advocated for better management of the transition from prison to society and the availability of specialist psychiatric help immediately prior to release as well as post release for as long as the individual requires it.[201]

16.142 APPEAL suggested that a victim of a miscarriage of justice should receive an immediate interim package that includes financial support which is exempted from civil legal aid eligibility assessments. APPEAL also argued for the provision of immediate and specialised psychological support and therapeutic care upon release.

16.143 The MJSS provided a list of recommendations based on its unique experience in assisting those who have been wrongfully convicted. This included addressing compensation as well as providing the following support services:

(1) Enhanced support services: The MJSS stated that their funding has been static which has led to reduced staffing impacting the clients and the scope of the service.

(2) A mechanism to have criminal convictions immediately removed from the Police National Computer.

(3) A mechanism with HMRC to fast track the reinstatement of National Insurance Credits.

(4) "An apology from the Minister of Justice".

(5) Greater transition care: MJSS noted the wrongfully imprisoned do not always have support and, for those with friends and family there can be enormous pressure on them to assist. It recommended that accommodation should be provided for three months with a daily caseworker to assist with welfare benefits, registering with a GP and obtaining housing as well as necessary items such as a mobile phone.

(6) Release Grant: MJSS argued that every wrongfully convicted individual should receive a minimum £2,000 given many are released homeless and welfare benefits take at least four weeks to start. This sum would assist with obtaining basic essentials as well as rental deposits and transport costs.

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200 JUSTICE, *Supporting Exonerees: Ensuring accessible, consistent and continuing support* (2018), p 15, para 31. We note that this is similar to the role that the MJSS currently undertakes where a caseworker will become involved whilst the appellant is in prison and may attend the appeal hearing.

201 Above, p 12.

(7) Psychological Therapy Fund/Entitlement: MJSS advocated an entitlement to specialist mental health support for all those who have had their convictions quashed. This should be provided for at least a year with the timeframe being determined by the psychiatrist.

16.144 We consider that there is merit in a support package that encompasses many of the recommendations suggested by the MJSS including greater access to housing, greater transitional care as well as long term social services including mental health support. However, we would welcome consultees' views on what other support measures may be necessary.

Consultation Question 102.

16.145 We provisionally propose that victims of miscarriages of justice should be entitled to support in addition to financial compensation.

Do consultees agree?

Removing a quashed conviction from a criminal record

16.146 Both the MJSS and victims of miscarriages of justice have raised with us the difficulties exonerees have had in removing their quashed convictions from their criminal records. For those who have wrongly been convicted of sexual offences there may be additional barriers given certain job opportunities or careers will be unavailable to them with sexual offence convictions on their records. Even where the employer does not require a detailed criminal record check, there may be a significant gap in their employment history requiring explanation and proof of a wrongful conviction.

16.147 In consultation, two victims of miscarriages of justice, Michael Devine and Michael O'Brien, told us that their convictions had remained on their records and were not automatically removed when their convictions were quashed. These individuals had to request the convictions be removed either themselves or through a lawyer.

16.148 The current process where a conviction is quashed in the CACD is for the Court's decision to act as an instruction to the convicting court to quash the conviction. This is then to be updated in the Police National Computer ("PNC") database which is used by the police and law enforcement. The Disclosure and Barring Service ("DBS") is the body responsible for providing information on someone's criminal record; it draws its information from the PNC.[202] Therefore, if the PNC has not been updated, the individual's quashed convictions will still appear on a record check.

16.149 Under the Post Office (Horizon System) Offences Act 2024, a specific provision has been enacted to ensure that the convictions which fall within the remit of the statute

[202] The DBS may issue four different types of certificates pertaining to an individual with varying degrees of specificity depending on the level of clearance that has been requested.

are removed from the relevant databases.[203] Under the Act, the appropriate authority (which is the Secretary of State, or Department of Justice for Northern Ireland convictions) "must take all reasonable steps to identify the convictions quashed".[204] Once the authority has identified the convictions, it must notify the convicting court. The convicting court must then enter a record that the conviction has been quashed by the Act "as soon as is reasonably practicable after receiving notification".[205] It is then for the appropriate authority to notify the person or, if they have died, their personal representatives that the conviction has been quashed. A similar provision has been enacted for cautions for offences under the Act in England and Wales where the Secretary of State must direct the appropriate chief officer of police to delete details of the caution from the UK criminal records database.[206] The appropriate chief officer of police must delete the details of the caution "as soon as is reasonably practicable after receiving notification".[207]

16.150 In its 2018 report, JUSTICE recommended:[208]

> To assist with job applications, Her Majesty's Courts and Tribunals Service should liaise with the Disclosure and Barring Service to automatically amend criminal records and remove quashed convictions.

16.151 The DBS told us that it does not and cannot update the PNC; only law enforcement agencies can do that. Therefore, we provisionally propose that HMCTS should liaise with the relevant police service to ensure quashed convictions are removed from the PNC in a timely manner. This would be similar to the approach adopted in the Post Office (Horizon System) Offences Act 2024 in relation to police cautions. When a conviction is quashed, it should be completely expunged. This is important for multiple reasons. First, so that victims of miscarriages of justice who feel able to seek employment can do so without having to surmount this particular obstacle, given the importance of work for the individual's economic and psychological wellbeing and in assisting with their reintegration into society. Secondly, criminal convictions may affect other aspects of the exonerated person's life, such as access to housing and the ability to travel internationally. Finally, but importantly, clearing their criminal record has symbolic significance for the exonerated person.

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203 Post Office (Horizon System) Offences Act 2024, s 4.

204 Above, s 4(1).

205 Above, s 4(3).

206 Above, s 5.

207 Above, s 5(2).

208 JUSTICE, *Supporting Exonerees: Ensuring accessible, consistent and continuing support* (2018) p 13.

Consultation Question 103.

16.152 We provisionally propose that when a conviction is quashed, HM Courts and Tribunals Service should liaise with the relevant police service to ensure that the Police National Computer is updated to remove the relevant conviction.

Do consultees agree?

Chapter 17: Wider criminal appeals issues

17.1 We observed in the introduction to this consultation paper (Chapter 1) and when discussing the principles of criminal appeals (Chapter 4) that criminal appeals serve primarily a corrective function. Where mistakes have been made or injustices occur, the appeals system, and other systems such as that providing for compensation,[1] exist to remedy or rectify the situation so far as possible. However, as explained in those chapters, the criminal appeals system does not operate in isolation and is part of the wider criminal justice system. It arguably should be capable of responding to systemic problems causing miscarriages of justice. It also serves an indirect role in stopping miscarriages of justice occurring in future (or, at the very least, not indirectly permitting their continued occurrence). Finally, as has been highlighted in specific parts of this paper, particular groups are impacted by features of the criminal appeals system differently or may face obstacles not faced by others (in relation to specific issues or more generally), just as in other areas of the criminal justice system.

17.2 As such, beyond specific stages or subject areas, we cover three topics in this chapter that address wider issues or concerns relevant to the criminal appeals system.

(1) Dealing with systemic miscarriages of justice.

(2) Preventing miscarriages of justice.

(3) Impacts on particular groups.

DEALING WITH SYSTEMIC MISCARRIAGES OF JUSTICE

17.3 Sometimes the exposure of one or more miscarriages of justice may bring into question the safety of a much larger number of convictions. This could occur as a result of individual or institutional misconduct or error. Alternatively, it may occur when scientific understanding develops to expose previous prevailing opinion as unreliable.

17.4 In this section and Appendix 3, we examine groups of cases where the disclosure of misconduct, error or wrongful convictions has led to concerns that there might be a significant number of previous cases which ought to be reviewed, and examine the approaches which were adopted to identifying and addressing those cases. We do not deal with the situation in which a change in the law brings previous convictions into question, which is dealt with in Chapter 10 on the "substantial injustice" test.

17.5 In this section, we explore systemic miscarriages of justice in four contexts:

(1) police misconduct;

(2) infant deaths;

[1] See Chapter 16.

(3) the Post Office Horizon scandal; and

(4) railway convictions under the single justice procedure.

17.6 In Appendix 3, we cover in more detail cases of or the background to the first three of these contexts, and in addition discuss cases involving unreliable expert evidence.

17.7 At the end of this section, we provisionally propose that the Criminal Cases Review Commission ("CCRC") should normally be the body to review systemic miscarriages of justice and invite consultees' views on other measures to deal with them.

Police misconduct

17.8 Cases of institutionalised police misconduct, in particular in the West Midlands and East London, culminated in the exposure of a series of wrongful convictions in the late 1980s and early 1990s. These were the subject of investigations by the Police Complaints Authority, a predecessor to the Independent Office for Police Conduct.

17.9 The cases contributed to a development of the law of evidence in criminal proceedings in two respects:

(1) the extent to which trial and appellate courts could take account of police misconduct by individual police witnesses, prior to, during, and after the time of an alleged offence; and

(2) the extent to which misconduct within a policing unit could be relevant to the credibility of police witnesses where the conduct of those officers personally had not been impugned.

The law relating to institutionalised police misconduct

17.10 In *Edwards*,[2] the Lord Chief Justice, Lord Lane, laid down principles for dealing with evidence of police misconduct in trials. Where a police officer has been found guilty of disciplinary charges, cross-examination would be permitted.

17.11 Evidence could also be admitted where there had been acquittal of another defendant "by virtue of which [the officer's] evidence is demonstrated to have been disbelieved" by the jury.[3]

17.12 In the later case of *Edwards (Maxine)*, Lord Justice Beldam said:[4]

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2 [1991] 1 WLR 207, CA. Edwards was convicted of involvement in an armed robbery where the main prosecution evidence was alleged confessions to members of the discredited West Midlands Serious Crime Squad.

3 Above, 217D-E, by Lord Lane CJ.

4 [1996] 2 Cr App R 345, CA, 350F, by Beldam LJ. Maxine Edwards had been arrested on suspicion of possession of crack cocaine with intent to supply. The officers said that they had found crack cocaine in a car next to which she was standing and that she had made an oral admission in the police car on the way to the police station. The CACD found that she was one of a number of persons who had been convicted on very similar evidence from officers of the Stoke Newington Drugs Squad and who had complained that the evidence against them had been fabricated. In November 1991 an investigation into the drugs squad had

> Once the suspicion of perjury starts to infect the evidence and permeate cases in which the witnesses have been involved, and which are closely similar, the evidence on which such convictions are based becomes as questionable as it was in the cases in which the appeals have already been allowed.

17.13 However, under the earlier *Edwards*,[5] cross-examination would not be permitted on unresolved criminal charges or complaints; equally, where the officer had been acquitted or a complaint dismissed, cross-examination would not be permitted.

17.14 In *Clancy*,[6] following *Edwards*, the CACD ruled that evidence was not admissible "to demonstrate the dishonest investigating and evidence gathering practices at that time routinely employed, it is alleged, by this particular squad" (the West Midlands Serious Crime Squad).

17.15 In *Guney*,[7] Lord Justice Judge (as he then was) suggested that the underlying rationale was twofold: to guard against "guilt by association" and to avoid a "bandwagon" effect based on a multiplicity of complaints. He noted:[8]

> Juries are entitled to use their own knowledge of the real world to take full account of the fact that police officers do sometimes behave discreditably, and that there are considerable pressures against breaking ranks and requiring misplaced loyalty.

17.16 He went on to qualify the rule in *Edwards* relating to the extent to which unsuccessful prosecutions could be used to impugn the credibility of a police witness, suggesting:[9]

> the quashing of a conviction by this Court should be less likely to found a proper basis for cross-examination than an acquittal by the jury, not least because the

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begun. The two officers who had given evidence against the appellant were amongst those whose conduct was scrutinised in the course of the investigation. One of those officers had also been involved between 1991 and 1993 in cases which had resulted in acquittals after allegations that police evidence had been fabricated, or in which prosecutions had been dropped, or in which the Crown had not contested appeals. Although no action had ultimately been taken against the officers in this case, had the jury at trial known of the suspicions about these officers, it could not be certain that they would have convicted.

5 [1991] 1 WLR 207, CA.

6 [1997] Crim LR 290, CA. The CACD allowed Clancy's appeal on the basis that there was other relevant material which could properly have been put to the police officers who took Clancy's confession to question their integrity.

7 [1998] 2 Cr App R 242, CA. Guney was appealing a conviction for possession of a class A drug with intent to supply and possession of a firearm without a certificate. Guney had claimed that the search of his property was a "set up". Three of the officers who had conducted the search were former members of the discredited Stoke Newington Drugs Squad, though none of them had been personally prosecuted or disciplined. The CACD held that the safety of Guney's conviction was therefore not undermined.

In a subsequent development, the CCRC later referred Guney's conviction to the CACD on the basis of inquiries which cast substantial doubt on the integrity of former police officers who had played an important part in gathering intelligence that led to the raid. The details were included in a confidential annexe which the CACD and the prosecution saw, but Mr Guney and his counsel could not. The CACD quashed the conviction: *R v Guney* [2003] EWCA Crim 1502.

8 [1998] 2 Cr App R 242, CA, 261A, by Judge LJ.

9 Above, 262C. Conversely, it might be argued that where a conviction is quashed on the basis of express findings by three senior judges as to a police officer's credibility then there is a stronger case for evidence of this being adduced before a jury, than where the conclusion that a police officer has been disbelieved is inferred from a jury's acquittal of a defendant, where the reasons for acquittal will not be stated.

witness whose conduct is impugned has not normally had any opportunity to give evidence.

17.17 He observed that the fact that the prosecution had elected not to proceed with a prosecution on the basis that an officer could not be put forward as a witness of truth. However he suggested that that judgement might just have reflected "clouds overshadowing the witness" which might subsequently have lifted, or the need to take a decision to continue or discontinue which could not wait until the outcome of an enquiry into the officer.[10]

Infant death cases

17.18 A review of infant death convictions was initiated in December 2003 after concerns about a series of cases in which (usually) mothers had been prosecuted and in some cases convicted after allegedly killing their babies – generally based on the fact that more than one child had died in their care. In Appendix 3, we discuss the cases of Sally Clark, Trupti Patel (who was acquitted) and Angela Cannings.

17.19 Following judgment in the Angela Cannings appeal, the Attorney General immediately announced that he and his office had already begun work to identify all convictions potentially involving sudden infant deaths; 258 convictions over the past decade had been identified involving murder, manslaughter or infanticide of a child under two by a parent. These would be examined to see if they "[bore] the hallmarks [of] a conviction which the Court of Appeal judgment yesterday indicated may be unsafe".[11] The convicted person would then be informed so that an application to the CCRC or for leave to appeal out-of-time could be made. The 54 cases where the convicted person was still serving a term of imprisonment would be prioritised. The Crown Prosecution Service ("CPS") were also asked to review 15 ongoing cases involving similar deaths.

17.20 In December 2004, the Attorney General announced that 297 cases had been examined. The terms of reference of the project had been extended to cover cases where a carer of the child, rather than a parent, had been convicted, and three cases were considered which strictly fell outside the timeframe of the review.[12]

17.21 Only three cases were identified that were precisely analogous to the Cannings case. There were 25 additional cases where detailed consideration gave rise to concerns about the medical evidence at trial.

17.22 Most of the remaining cases did not give rise to concern. However, the review identified 97 cases which were separately categorised as "shaken baby" cases. These differed from the sudden infant death syndrome cases,[13] because there was physical evidence of a cause of death. However, the Attorney identified a growing medical controversy about identification of the relevant injuries, in particular the so-called

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10 [1998] 2 Cr App R 242, CA, 262C-D.

11 *Hansard* (HL), 20 January 2004, vol 657, col 908.

12 *Hansard* (HL), 21 December 2004, vol 667, col 1657-1659.

13 That is, cases in which there was no identified cause of death.

"triad" of subdural haematoma, retinal haemorrhage, and hypoxaemic encephalopathy, and whether they were diagnostic of deliberate violent shaking.[14]

17.23 In April 2005, the CACD heard the first case to be referred by the CCRC, that of Donna Anthony. She was convicted in November 1998 of killing her daughter Jordan, aged 11 months, in 1996, and her son Michael, aged four months, in 1997. An appeal against conviction had been rejected in 2000. Her convictions were quashed at this second appeal.

17.24 In July 2005, the CACD heard the conjoined appeals of *Harris, Rock, Cherry and Faulder*.[15] One was the mother of the child who had died, one the father, and two were the partners of the child's mother. The primary issue in these cases was what could be inferred from the presence of the "triad" of injuries as evidence of non-accidental head injury ("NAHI"). The Court held that while the triad was a "strong pointer" to NAHI, it did not find that it must automatically lead to a diagnosis of NAHI.[16] The CACD quashed the convictions of Harris and Rock. Cherry's conviction was upheld. The Court quashed Faulder's conviction, not accepting his account but noting that the Crown's account at trial was that the child's death was caused by shaking, whereas it was now alleging it was caused by repeated blows to the head. Finding that "the turnaround in the Crown's case in *Faulder* could hardly be more substantial … coupled with the introduction of potentially credible alternative explanations presented by the defence experts", it concluded that the conviction was unsafe.[17]

17.25 In February 2006, the Attorney General provided a final update on the review, relating to the 88 "shaken baby" cases. The review had been carried out by "a senior CPS lawyer and independent Counsel" who had been involved with the initial review.[18]

17.26 He said that there were only three cases of questionable convictions: one was a male defendant convicted of murder and then in prison; one a male defendant convicted of manslaughter and sentenced to three years' imprisonment, who was no longer in prison; and a female defendant convicted of manslaughter and sentenced to seven years' imprisonment, who was no longer in prison and could not be traced. It was reported that in one of these cases the convicted person's lawyers had still advised against an appeal, while in another (assumed to be the female defendant) lawyers were still trying to locate their client.[19]

17.27 The review had found that in all but these three cases there was additional evidence to support a finding of "shaken baby" syndrome.[20]

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14 *Hansard* (HL), 21 December 2004, vol 667, col 1657-1659.

15 [2005] EWCA Crim 1980, [2006] 1 Cr App R 5.

16 Above, at [70], by Gage LJ.

17 Above, at [266].

18 *Hansard* (HL), 14 February 2006, vol 678 col 1080.

19 *Hansard* (HL), 14 February 2006, vol 678, cols 1079-1080.

20 Above.

17.28 In 2012, David Jessel[21] told a symposium on the CCRC:[22]

> Cases referred by the CCRC were helping to nudge the Court of Appeal towards engaging with the problem that the finest scientific experts say that science has yet to establish the cause of death in these cases. The Court of Appeal recently decided that such cases were too difficult to adjudicate and upheld a conviction, thus demonstrating that there is no 'real possibility' and therefore no real point in the CCRC sending such cases back to the Court of Appeal.

17.29 We think this is a reference to *Arshad*, whose conviction for manslaughter was upheld by the CACD in January 2012.[23] There were no external signs of injury, but the "triad" was present (although the subdural haemorrhaging was described as "low volume") and there was no evidence of a natural disease which might have caused the injuries.

17.30 The main ground of appeal was that the judge had not directed the jury that in an area of developing medical science it had to consider the realistic possibility of an unknown cause and that special caution was needed where expert opinion in a developing science was fundamental to the prosecution. The CACD agreed that this was a case where the expert evidence was fundamental and that, in the current state of medical science, there was an acknowledged uncertainty as to aspects of causation and the significance of findings.

17.31 However, the Court held that the jury cannot have been left in any doubt by the clear nature of the summing-up as to the uncertain state of medical science, and knew that they could only convict if they were sure on the evidence that the death had been caused in the manner alleged by the Crown.

17.32 David Jessel's concern appears to have been borne out. A review of appeals since *Arshad* suggests that there have only been four appeals against conviction in "shaken baby" cases: all were brought as first appeals (and one was on the basis of procedural irregularity, two jurors having expressed concern about intimidation).[24] The CCRC does not appear to have referred a case involving the death of an infant since the conviction in *Arshad* was upheld.

The Post Office Horizon scandal

17.33 The Post Office Horizon scandal is arguably the most widespread miscarriage of justice in British legal history. In 1999, the Post Office introduced a new computer accounting system, "Horizon", provided by the IT firm Fujitsu. Almost immediately, sub-postmasters began to report irregularities. The Post Office refused to acknowledge these discrepancies. Between 2000 and 2014, Post Office Limited ("POL") prosecuted at least 736 sub-postmasters based on data from Horizon. Other cases in England and Wales were prosecuted by the CPS and the Department for Work and Pensions. Some sub-postmasters were persuaded to plead guilty to false

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21 A CCRC Commissioner from 2000-2010.

22 M Naughton and G Tan, *Innocence Network UK (INUK) Symposium on the Reform of the Criminal Cases Review Commission (CCRC): Report* (2012) p 28.

23 [2012] EWCA Crim 18, (2012) 124 BMLR 135.

24 *R v Hopkinson* [2013] EWCA Crim 795, [2014] 1 Cr App R 3; *R v Scholey* [2016] EWCA Crim 499; *R v Miah* [2019] EWCA Crim 366; and *R v Peace* [2022] EWCA Crim 879.

accounting charges in order to avoid prosecution for theft. A fuller discussion of the history of the Post Office Horizon scandal is in Appendix 3. This section concentrates on the responses aimed at identifying and addressing the wrongful convictions.

The Post Office's review of convictions

17.34 By summer 2013, the Post Office was well aware of problems with Horizon and previous prosecutions which had relied on it. In June 2013, an internal Post Office report (the "Rose Report") established that it was possible for changes to be made to Horizon data which would falsely appear to have been made by a sub-postmaster.

17.35 In July 2013, a report for the Post Office by outside consultants Second Sight had found that there had been two incidents, affecting 76 branches, where defects had led to incorrect balances or transactions. Additionally, in August 2013, Simon Clarke, a barrister working on prosecutions for the Post Office, wrote a memo (the "Clarke advice") in which he warned that an expert working for Fujitsu, who had provided many expert statements in support of Post Office prosecutions, had failed to disclose knowledge of bugs in Horizon, and had thereby failed to comply with his duties to the court, and concluded that he should not be used again.[25] Clarke also noted that there were now a number of convicted defendants to whom the existence of those bugs should have been disclosed and was not.[26] He correctly noted that they remained entitled to have that disclosure notwithstanding their convicted status (in accordance with the *Nunn* duties of post-trial disclosure).[27]

17.36 In July 2013 the CCRC had also written to Paula Vennells, the Chief Executive of POL, enquiring about the number of convictions that might be affected by the issues with Horizon that had emerged.[28]

17.37 POL therefore started a review of prosecutions by Cartwright King ("CK"), the law firm who had acted for POL in many of those prosecutions. The review was limited to prosecutions where the supposed shortfalls had occurred after 1 January 2010. The rationale for this cut-off seems to have been that in any earlier cases, the person convicted would have served any sentence of imprisonment or unpaid work requirement, or paid any fine imposed.[29]

17.38 In the later "Altman Review", Brian Altman QC stated:

> in reviewing the case and the issue of non-disclosure, counsel has been asking the question whether the conviction is arguably not unsafe (sic) in light of all the other facts of the case, as informing their likely stance to any future appeal process; in other words "whether there is a real possibility that the jury would have arrived at a different verdict had the necessary disclosure been made" …

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25 *Hamilton v Post Office* [2021] EWCA Crim 577, [2021] Crim LR 684 at [82]-[86], by Holroyde LJ.

26 Above, at [86].

27 *R (Nunn) v Chief Constable of Suffolk Constabulary* [2014] UKSC 37, [2015] AC 225; see Chapter 15.

28 Brian Altman QC, "General Review", at para 157; D Boffey, "Paula Vennells ruled out Post Office review that 'would be front-page news'", *Guardian* (23 May 2024).

29 See R Moorhead, "Altman Review III: Relying on the unreliable?", *Substack* (18 March 2023).

> Although [CK] points out that it is unconcerned with the question of the safety of convictions, there is an inexorable link between the disclosure decisions it makes and the view it might take towards possible appeals, based on its view of the strength overall of the other evidence in the case. It is right to observe that even where there has been non-disclosure in a given case that does not mean that any appeal based on it is likely to succeed.

17.39 It would appear that CK advised that disclosure should be made in only 26 cases.[30] It is not clear whether the 26 people identified by CK were ever informed or the relevant disclosures made.

17.40 In October 2013, Brian Altman QC advised POL that "there may have to come a time, if the CCRC maintains its interest, when POL through CK feels bound to share CK's review with the CCRC and cooperate with it".[31] POL sent a partial summary of the Altman Review to the CCRC in June 2014. A full copy of the review does not appear to have been sent to the CCRC until the CCRC requested it in January 2015.

17.41 It has since emerged that POL saw their internal reviews as a way of resisting scrutiny by the CCRC. An internal message, disclosed for the Horizon Inquiry, shows that a solicitor advising POL advised that "[t]he [Altman] report gives [POL] good grounds to resist any formal external review of its historic prosecutions (i.e. by the [CCRC])".[32]

17.42 POL did not inform the CCRC of the Clarke advice until the latter requested it in 2020.

The *Bates* litigation

17.43 In 2019, in civil group litigation in the High Court brought by sub-postmasters who had been forced to repay money identified as shortfalls by POL, Mr Justice Fraser[33] (as he then was) found that it was possible for defects in the software to cause apparent or alleged discrepancies or shortfalls, and that this had happened on numerous occasions.[34] He also found that Fujitsu had the ability to amend data in branch accounts without the knowledge or consent of the sub-postmasters, and that this would look as though the sub-postmaster had made the changes. Mr Justice Fraser found that POL were aware of issues with Horizon. POL agreed to settle with 555 claimants. The convictions of those in criminal proceedings were not affected by the judgments in that civil litigation or by POL settling the group litigation.

The CCRC references

17.44 A number of sub-postmasters had already applied to the CCRC for their convictions to be referred to the CACD prior to the commencement of the group litigation. The CCRC agreed to delay making decisions on those applications until after resolution of

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30 R Moorhead, K Nokes and R Helm, *Working Paper 3: the conduct of Horizon prosecutions and appeals* (2021) p 33.

31 Brian Altman QC, "General Review", para 164

32 Email from Belinda Crowe to Andrew Parsons, Andy Holt and Angela Van-Den-Bogerd re Sparrow.

33 Fraser J became Chair of the Law Commission from 1 December 2023, and was appointed a Lord Justice of Appeal from 15 December 2023. See para 1.17 above.

34 *Bates v Post Office Ltd* [2019] EWHC 3408 (QB) (Judgment (No 6) "Horizon Issues"). The sub-postmasters had different causes of action against POL, including having been forced to repay money.

the group litigation. Once that had occurred in December 2019, in 25 March 2020, the CCRC referred an initial 39 Horizon cases for appeal – 35 to the CACD and 4 to the Crown Court. The appeals in the small number of Horizon cases that had been dealt with at magistrates' courts were all dealt with by the Crown Court at Southwark.

17.45 The first cases were heard at Southwark Crown Court in December 2020. Because the appeals in the Crown Court were by way of rehearing, the way that the appeals proceeded was that POL offered no evidence.

17.46 The first 42 cases heard by the CACD were dealt with in *Hamilton v Post Office Ltd*.[35] In 39 cases (those conceded by PO) the Court found the convictions unsafe on the basis of fresh evidence about Horizon's unreliability and on the basis that the prosecutions should have been stayed as abuses of process because the defendants could not receive a fair trial ("category 1" abuse of process; see paragraph 4.2 and its footnote). POL also conceded that in four cases it had been an affront to the public conscience to prosecute ("category 2" abuse of process). However, the Court found that in all 39 cases, the failures of investigation and disclosure were so egregious as to make the prosecution an affront to the conscience of the Court.[36]

17.47 After the judgment in *Hamilton*, and having identified 700 convictions in cases it prosecuted between 1999 and 2015 in which Horizon data might have featured, POL began to contact those affected, explaining how to appeal or (where the person had pleaded guilty in a magistrates' court or had already had an appeal rejected) to apply to the CCRC. It was only unable to trace 25 people affected. POL contracted with Citizens Advice to provide independent support and advice to those affected. Later, in 2022, the CCRC contacted those who had failed to respond to POL, using its powers under section 17 of the Criminal Appeal Act 1995 to obtain their names from POL.

17.48 Identical or similar constitutions of the CACD to that which heard *Hamilton* heard *Ambrose and others*[37] (12 appellants), *Allen and others*[38] (nine appellants), *White and Cameron*,[39] *Hawkes and others* (five appellants),[40] *Coultas and Ingham*,[41] *Reynolds*

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35 [2021] EWCA Crim 577, [2021] Crim LR 684.

36 Above, at [59].

37 [2021] EWCA Crim 1443.

38 [2021] EWCA Crim 1874.

39 [2022] EWCA Crim 435, [2022] Crim LR 685. Cameron had been prosecuted on the basis that after facilitating cash withdrawals for four elderly customers, he had immediately made a second withdrawal of the same amount, pocketing the cash. Although Horizon data was in evidence, the main evidence was four complainants' testimony. Had these second withdrawals been artefacts of Horizon, there would have been surplus cash at the branch, whereas a small shortfall had been found. The Court noted that if there had been a bug, it would have been remarkable that it only happened to elderly customers when Mr Cameron was behind the counter.

40 [2022] EWCA Crim 1197.

41 [2023] EWCA Crim 606.

and others[42] (three appellants); *Crane*;[43] *O'Donnell (deceased)*,[44] and *Falcon*.[45] In *Falcon*, the Lady Chief Justice, Baroness Carr of Walton-on-the-Hill, stated:[46]

> The court has been, and remains, committed to the efficient and swift dispatch of Horizon appeals. [So far in 2024, to 13 February] six applications have been received, the most recent of which has arrived this week. Four that were unopposed have already been quashed – two within 14 days of Notice of Appeal being received by the Court of Appeal Office, and two within seven days.
>
> These matters have proceeded under [a] fast track approach ...

17.49 As of April 2024, the CCRC had referred 76 cases to the CACD or Crown Court. The Post Office (Horizon System) Offences Act 2024 quashed almost all the remaining Horizon convictions. Following this, it remains to be seen what occurs in terms of any further referrals.[47] A public inquiry under Sir Wynn Williams, a retired High Court judge, is expected to report in 2025.

The legislative response

17.50 In December 2023, the Horizon Compensation Advisory Board ("HCAB")[48] wrote to the Lord Chancellor noting that despite 900 Horizon-related convictions, there had only been 93 successful appeals.[49] This, it attributed to:

(1) much of the evidence having been lost or destroyed by the Post Office;

(2) individuals' unwillingness to appeal given their understandable deep distrust of authority; and

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42 [2024] EWCA Crim 317.

43 [2024] EWCA Crim 312.

44 [2023] EWCA Crim 979. The appeal was unsuccessful. The Court found that the case was not one in which Horizon material was central. The main allegation was that pension and allowances payments had been recorded as being made against books which had been reported as lost in transit or not received by the customer and therefore cancelled. The Court held that this allegation had been proved by reference to the dockets returned the Department of Work and Pensions and the circumstantial evidence that the pattern of books corresponded to the various branches where she worked was very strong.

45 [2024] EWCA Crim 311. *Falcon* was unusual in that the prosecution was brought by the CPS rather than the Post Office. As a result, the Court did not make a finding of "category 2" abuse of process – the prosecution was not aware of Horizon's deficiencies. However, the conviction was quashed on the basis of fresh evidence rendering the conviction unsafe and "category 1" abuse of process.

46 Above at [28]-[29].

47 It would be open to refer if for some reason a Horizon-related conviction did not meet the conditions in the Act. For instance, a conviction may already have been considered and an appeal dismissed by the CACD, or the particular offence charged might conceivably be one not covered by the Act.

48 The HCAB is an independent advisory board whose role is to advise ministers about the "Group Litigation Order" compensation scheme, set up to provide further compensation to the *Bates* litigants. Its remit was subsequently extended to cover other Horizon-related compensation schemes. Its membership comprises two legal academics and two parliamentarians who were previously involved in investigating the scandal.

49 HCAB, "Letter to Lord Chancellor Alex Chalk from the Horizon Compensation Advisory Board ref Post Office convictions" (14 December 2023).

(3) the CACD's rules limiting the Post Office's ability to concede cases.[50]

17.51 The HCAB concluded:[51]

> For these reasons we believe the only viable approach is to overturn all 900+ Post Office-driven convictions from the Horizon period. A small minority of these people were doubtless genuinely guilty of something. However, we believe it would be worth acquitting a few guilty people (who have already been punished) in order to deliver justice to the majority – which would not otherwise happen.

17.52 A few weeks later, ITV broadcast the drama series *Mr Bates v The Post Office*, which portrayed the experiences of several of those who had been wrongly accused of theft by the Post Office, including some (notably Josephine Hamilton) who had been convicted in criminal proceedings. The series was broadcast on four consecutive evenings from 1 to 4 January 2024; the series attracted an audience of 13.5 million within the first 28 days after broadcast.[52]

17.53 On 10 January 2024, the Parliamentary Under-Secretary for Business and Trade announced "unprecedented action by Parliament to overturn specific verdicts of the courts".[53] The Post Office (Horizon System) Offences Bill was introduced in Parliament on 13 March 2024, and received Royal Assent on 24 May 2024.

17.54 Once the Act came into force on the date it received Royal Assent, any conviction was immediately and automatically quashed if it met five conditions:

(1) The offence was alleged to have been committed between 23 September 1996 and 31 December 2018 or at any time during a period that falls wholly or partly in that period.

(2) The offence was one of false accounting, fraud, handling stolen goods, money laundering, theft or an offence ancillary to one of these (that is, attempting or conspiring, aiding, abetting, counselling or procuring, encouraging or assisting, or inciting the commission of such an offence).

(3) At the time of the offence, the convicted person was carrying on a Post Office business, or was working in a post office (whether under a contract of employment or otherwise).

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50 The HCAB wrote to the then Lord Chancellor stating:

> POL considers that it may be in contempt if it fails to take a stance of opposing or arguing a case in the Court of Appeal, in accordance with the adversarial principle on which the proceed[ing]s are based. We have been told by POL that if it were to concede a wider range of appeals, there is no guarantee that the Court of Appeal would agree to quash the convictions concerned, and apprehend that they would be subject to significant criticism from the bench for excessive leniency.

HCAB, "Horizon Compensation Advisory Board Concerns on the Systems for Criminal Prosecutions and Overturning Convictions" (30 October 2023).

51 Above.

52 H Fallon, "Mr Bates vs Post Office hits whopping 13.5m", *Broadcast* (2 February 2024).

53 *Hansard* (HC), 10 January 2024, vol 743, col 302.

(4) The person was alleged to have committed the offence in connection with the carrying on, or working for the purpose of, the Post Office business.

(5) The Horizon system was being used for the purposes of the Post Office business for the whole or part of the period when the offence was alleged to have been committed.

17.55 However, a conviction was not quashed as a result of the Act where the CACD had (i) dismissed an appeal against conviction, (ii) refused to give leave to appeal, or (iii) where the single judge had refused leave to appeal and the CACD had not subsequently given leave.

17.56 The Act requires the Secretary of State to take all reasonable steps to identify the convictions which have been quashed by the Act, and to notify the convicting court so that it can record that the conviction has been quashed. It also requires the Secretary of State to take all reasonable steps to notify the previously-convicted person or their personal representative if they have died.[54]

17.57 Further provisions require the Secretary of State, where a person appears to have been cautioned for a relevant offence, to direct the relevant chief police officer to remove details of that caution from the Police National Computer.[55]

17.58 A conviction quashed by the Act is treated as a conviction quashed on an appeal out of time for the purposes of compensation for miscarriages of justice under section 133 of the Criminal Justice Act 1988.[56] However, a separate, more generous compensation scheme is being introduced which will not require the person to demonstrate that they were factually innocent of the offence for which they were convicted, as they would be required under section 133.[57]

Criticism of the Horizon legislation

17.59 There has been some criticism of using legislation to quash convictions in this way. Dr Hannah Quirk, for instance, has written:[58]

> This is an unprecedented measure. The separation of powers requires the executive, legislature and the judiciary to be independent of each other in order to guard against corruption and to ensure good government through a system of checks and balances.
>
> Ministers have asserted that this case is exceptional and should have no bearing on the future operation of the law, but that is not how precedents work … The sub-

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54 Post Office (Horizon System) Offences Act 2024, s 4.

55 Above, s 5.

56 Above, s 7(3). This scheme is discussed in Chapter 16.

57 The Horizon Convictions Redress Scheme, announced by the Secretary of State for the Department for Business and Trade, HC Statement made on 30 July 2024, Statement UIN HCWS42.

58 H Quirk "The Post Office scandal and the separation of powers (Editorial)" [2024] *Criminal Law Review* 91, 92.

postmasters should have had their cases reviewed individually and been able to hear their convictions declared unsafe by the appropriate court.

17.60 Barrister and writer David Allen Green has also contended that such legislation is both "unnecessary" and "wrong in principle".[59]

17.61 However, Dr Robert Craig has argued that because the Horizon prosecutions were an affront to justice, the legislation was justified even if as a result the convictions of some guilty people were quashed.[60] Nonetheless, Dr Craig identified problems with the way that the legislation was drafted, noting that if a case had been referred to the Court by the CCRC and rejected, the conviction would stand; but if the Commission had thought the case too weak to refer, it would be quashed.

Railway convictions under the Single Justice Procedure

17.62 The Single Justice Procedure ("SJP") was introduced by the Criminal Justice and Courts Act 2015. A single magistrate can try certain summary only non-imprisonable offences "on the papers" without a court hearing, where the defendant has either pleaded guilty or failed to enter a plea.

17.63 The SJP can only be used in proceedings brought by a "relevant prosecutor". Under the Criminal Justice Act 2003 (New Method of Instituting Proceedings) (Specification of Relevant Prosecutors) Order 2016, railway companies were made a "relevant prosecutor" in respect of various railway offences. However, the offence of "failure to produce a ticket for inspection"[61] was not included in the order.

17.64 Between 2016 and 2024, seven railway companies prosecuted this offence using the SJP. They also used the SJP to prosecute more serious offences which require proof of intent, and which are punishable by up to three months' imprisonment.[62] In neither case was the SJP available. Around 74,000 prosecutions for these offences were brought using the SJP.

17.65 In August 2024, the Chief Magistrate ruled that every prosecution for these offences using the SJP was a nullity.[63] Following the ruling, HM Courts and Tribunals Service ("HMCTS"), the Ministry of Justice, and the Department for Transport announced that working with the railway companies concerned, HMCTS would draw up a list of the relevant cases, and contact those affected, so that the cases could be put before a court for the necessary declaration of nullity to be made.[64]

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59 D A T Green, "Why legislating to acquit Horizon victims may be unnecessary in practice and wrong in principle", *Prospect* (18 January 2024).

60 J Rozenberg, "Post Office bill – messy but quick" *Law Society Gazette* (22 April 2024).

61 Regulation of Railways Act 1889, s 5(1).

62 Above, s 5(3).

63 *Northern Trains Ltd v Ballington, Wylie and Cooke* [2024] EW Misc 23 (MagC).

64 HM Courts & Tribunals Service, Ministry of Justice and Department for Transport, "Train company prosecutions" (15 August 2024).

Discussion

17.66 In this section and Appendix 3, we have sought to demonstrate that there has been no single way of reviewing convictions where systemic miscarriages of justice are identified. Although, ultimately, convictions must usually be processed through the CCRC and CACD (where the person was convicted on indictment), in many cases other organisations – such as the Attorney General's Office ("AGO", in the case of infant deaths) or eventually the Post Office (initially, in the case of the Horizon convictions) – initiated investigations to identify those affected.

17.67 It is usually prosecuting authorities who will be in the best position to collate details of cases likely to have been affected, but this causes difficulties when it is they who are to blame, or alleged to be to blame, for the miscarriages of justice.

17.68 For example, the Post Office went on to contest both civil and criminal litigation in relation to its dismissals and prosecutions of sub-postmasters following its own review, which seems to us to have had the effect of preventing, or at the very least delaying, scrutiny by the CCRC. Further, in the infant death cases, it might be asked whether a larger number of references would have been made by the CCRC than were actually made by the AGO, presumably relying on the CPS to assess the cases. It is not clear, for instance, what test the AGO used when deciding whether to refer a case, and in particular whether it was different to the "real possibility" test which the CCRC would have applied.

17.69 Though the CCRC has the power to require a public body to appoint an investigator, it is unclear whether it considered using this power to require the Post Office to appoint an investigator when it became alert to the possibility that a number of criminal convictions might have been impacted by Horizon failures in July 2013.

17.70 We are provisionally of the view that when evidence of widespread or systemic problems with the safety of groups of convictions comes to light, it should be for the CCRC, as the body created by Parliament to refer possibly unsafe convictions, to review and investigate them. It should use, as fully as appropriate, its powers to require other public bodies to appoint investigators, as well as adopting a systematic approach to systemic cases in addition to its duties in relation to individual convictions.

17.71 Nonetheless, in some systemic cases circumstances may make investigation by the CCRC (alone) inappropriate, be it because of the extent of systemic failures, the imperative to address them swiftly or criticisms of the CCRC's own historic conduct in handling the cases in question. Therefore, we invite views on other measures that could enable the correction of miscarriages of justice in systemic cases.

Consultation Question 104.

17.72 We provisionally propose that where there is evidence of a widespread problem calling into question the safety of a number of convictions, a review of convictions should normally fall to the Criminal Cases Review Commission, if necessary using its powers to require other public bodies to appoint an investigator.

Do consultees agree?

17.73 We invite consultees' views on any other measures which might be put in place to enable the correction of multiple miscarriages of justice when a systemic issue is identified.

PREVENTING MISCARRIAGES OF JUSTICE

17.74 We are conscious that although this project is concerned with criminal appeals, and with the appeals process as a mechanism for correcting miscarriages of justice, from a wider perspective, it might be considered at least as important to prevent those miscarriages of justice from occurring in the first place.

17.75 We recognise that many potential reforms to prevent miscarriages of justice would not fall within the terms of reference of this project, and as such much of our discussion of them is confined to Appendix 4, which should be read in conjunction with the following section. In this section, we consider miscarriage of justice inquiries, then outline and seek views on some perceived trial issues dealt with in Appendix 4.

Miscarriage of justice inquiries

17.76 In England and Wales, little use has been made of miscarriage of justice inquiries; that is, inquiries to establish how an acknowledged miscarriage of justice occurred (rather than to assess the safety of conviction). Currently, two public inquiries are going on into miscarriages of justice: Judge Sarah Munro's inquiry into the conviction of Andrew Malkinson and the failure to refer his conviction to the Court of Appeal Criminal Division ("CACD") earlier;[65] and Sir Wyn Williams' Post Office Horizon Inquiry.[66]

17.77 These appear to be the first major public inquiries into miscarriages of justice in England and Wales since Sir John May's inquiry into the convictions of the Guildford Four and the Maguire family in 1989-94. In 2017, the Independent Police Complaints Commission, predecessor to the Independent Office for Police Conduct, launched an investigation into the original murder inquiry which resulted in the wrongful conviction

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65 See *The Andrew Malkinson Inquiry*.

66 See *Post Office Horizon IT Inquiry*. The terms of reference are much broader than the criminal prosecutions, including the civil litigation and how claims for compensation were dealt with. They are, however, focused on the actions of the Post Office, and not whether the actions of other agencies were unsatisfactory in failing to address the unfolding scandal. It is not, for instance, examining the CCRC's actions once it became aware in July 2013 of the possibility that people had been wrongfully convicted as a result of Horizon errors.

of Noel Jones for the murder of Janet Cummins (see Appendix 1), but this was limited to investigating the possibility of police misconduct.

17.78 However, as we discussed in Chapter 4, many features of the criminal justice system are intended to minimise the risk of wrongful convictions and, therefore, where a person is wrongly convicted there will often have been multiple points of failure. Even where clear misconduct by an agency can be shown, there can be value in trying to establish why aspects of the system which are intended to guard against wrongful convictions failed to achieve this aim.

17.79 In its report *Supporting Exonerees*,[67] JUSTICE notes that in certain contexts, inquiries automatically take place, including:

(1) deaths and serious incidents in police custody;

(2) serious patient safety incidents; and

(3) care and treatment of children.

17.80 It notes, however, that there is rarely a review or inquiry process when a wrongful conviction is discovered. It says:[68]

> Public inquiries are not only put in place to assure victims or their families that what has happened is taken seriously but to identify failures and necessary improvement to procedures in order to make sure that what has happened does not take place again, either through systemic changes or identifying individuals responsible for the actions under scrutiny.

17.81 JUSTICE recognises that where the evidence is clear as to fault, an inquiry will not be necessary. However, it says:[69]

> In more complex cases, we recommend that a quashed conviction should trigger an inquiry to ascertain what went wrong and to make recommendations as to how to avoid it in the future.
>
> An independent public body should be established to undertake these inquiries, which will include a permanent panel of relevant experts. The panel should have the power to call witnesses and make recommendations for the improvement of criminal justice processes.

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67 JUSTICE, *Supporting Exonerees: Ensuring accessible, consistent and continuing support* (2018).

68 Above, p 38, para 110.

69 Above, p 40, paras 122-123.

Previous miscarriage of justice inquiries in England and Wales

The Devlin Committee

17.82 In February 1974, the Home Secretary announced his decision to recommend a free pardon in the case of Laszlo Virag.[70] Announcing the pardon, the Home Secretary also referred to the recent case of Luke Dougherty, whose convictions for shoplifting had been quashed by the CACD.[71]

17.83 In response to the two cases, the Home Secretary set up an independent committee to look into the law and procedures relating to identification evidence, to be chaired by Lord Devlin, a retired Law Lord. The terms of reference required the committee to:

> review, in the light of the wrongful convictions of Mr Luke Dougherty and Mr Laszlo Virag, and of other relevant cases, all aspects of the law and procedure relating to evidence of identification in criminal cases; and to make recommendations.

17.84 Thus, the review looked in detail at Virag and Dougherty's cases individually, including the police investigations, preparation for trial, the trial itself and, in Dougherty's case, the conduct of the appeal. However, it also considered more generally evidence and procedure at trial in relation to identification evidence, and police procedures in relation to photographs and identification parades. That review concluded:[72]

> identification ought to be specially regarded by the law simply because it is evidence of a special character in that its reliability is exceptionally difficult to assess … Witnesses who are themselves convinced of the truth of their identification and who are able to impart to a jury their own sense of conviction have not infrequently been found to have been mistaken … The testimony of a second eye-witness does not offer much additional protection … There seems to be a tendency for them, when there is a mistake, to make the same mistake.

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70 *Hansard* (HC), 8 April 1974, vol 872, col 45-47. Virag had been convicted in 1969 of several offences in Liverpool and Bristol of theft of parking meter boxes, using a firearm to resist arrest, and wounding a police officer with intent. He was sentenced to 10 years' imprisonment. An application to appeal was refused in 1970. He had been picked out on properly conducted identification parades by three officers from Gloucestershire Police, two officers from Liverpool police, and three civilians.

In September 1971, however, the Office of the Director of Public Prosecutions wrote to the Home Office saying that similar offences committed by a man in London suggested that he might have been responsible for the Liverpool and Bristol offences. Only in 1973 did the Home Office request that Gloucestershire and Liverpool police forces should arrange for a re-examination of the convictions by another force. As a result of that investigation, the Home Secretary concluded that Mr Virag was innocent.

71 Dougherty had been convicted of stealing some curtains from British Home Stores in Sunderland. The prosecution relied on a courtroom identification of Dougherty by two members of the shop's staff, both of whom had previously been shown a photograph of him, and had also already seen Dougherty in the dock through the glass doors to the courtroom.

Around 50 people would have been able to confirm that Dougherty had been on a coach trip to Whitley Bay with his partner and her four children which had departed shortly after (if not before) the theft. As one of only two men on the trip, Dougherty would have stood out. No one suggested that Dougherty could have committed the theft and joined the coach trip.

72 Rt Hon Lord Devlin, *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases* (1976) p 76, para 4.25.

17.85 The review made several recommendations, principally requiring judges to warn jurors of the special need for caution in convicting on the basis of eyewitness identification and the possibilities that a mistaken witness can be convincing, and that a number of witnesses might be mistaken. Although there was no immediate legislative response, the judgment in *Turnbull*[73] effectively put into effect the proposals from the Committee.

The Fisher Inquiry

17.86 In 1975, an inquiry was commissioned after the CACD quashed the convictions of Colin Lattimore, Ronnie Leighton and Ahmet Salih for the murder of Maxwell, also known as Michelle, Confait in Lewisham, South East London (see Appendix 1). The inquiry examined both the particular circumstances of the case and went on to consider the law and procedure relating to the treatment of suspects.

17.87 The Inquiry Chair, Sir Henry Fisher, found, contrary to the CACD, that Leighton and Salih (but not Lattimore) had carried out the murder. He concluded that all three had committed arson – and that Lattimore's confession to the arson was true, but he had been persuaded to confess falsely to the murder by Leighton and Salih. (The Attorney General later announced on the basis of fresh information received by the DPP, Confait had died twelve hours earlier than suggested at trial, and at least six hours earlier than the Fisher inquiry had concluded he had died, and that had the new evidence been available, Fisher would not have concluded that any of the three young men was responsible for Confait's death.)[74]

17.88 However, the wider impact of the inquiry was substantial. Though Fisher made several recommendations, such as the tape recording of police interviews, he reasoned that:[75]

> An inquiry such as mine into a particular case is not a sufficient foundation for fundamental changes in the law relating to police investigation and criminal prosecution … If such changes are to be contemplated, then something like a Royal Commission, which could go into all aspects of any proposed changes (including the cost) would be required.

17.89 Thus, the Fisher Inquiry led to the Royal Commission on Criminal Procedure, chaired by Sir Cyril Phillips, which reported in 1981. This, in turn, led to the Police and Criminal Evidence Act 1984 and the Prosecution of Offences Act 1985.

The May Inquiry

17.90 In 1989, following the quashing of the convictions of the Guildford Four (see Appendix 1), Sir John May, a retired Court of Appeal judge, was appointed to lead an inquiry into those convictions, and the Maguire family's convictions. In 1990, he issued his first report. He concluded that the Maguires' convictions were unsafe and should be referred to the CACD.[76] In December 1992, after the quashing of the Maguire

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73 [1977] QB 224, CA.

74 *Hansard* (HC), 4 Aug 1980, vol 990, col 23W.

75 Report of an Inquiry by the Hon. Sir Henry Fisher into the circumstances leading to the trial of three persons on charges arising out of the death of Maxwell Confait and the fire at 27 Doggett Road, London SE 6 (1977) para 1.8.

76 Interim Report on the Maguire Case (12 July 1990) HC 556.

convictions, he published a second report examining the decision to prosecute and the handling by the Home Office of their representations following their convictions.[77]

17.91 His final report, dealing with the Guildford Four, was not published until 1994 because of criminal proceedings against three of the police officers involved (they were acquitted in May 1993).[78]

17.92 A key area of concern for his inquiry was the "potentially harmful influence of unquestioning acceptance of a confession upon the assessment by the police, lawyers or the courts of apparently independent evidence". Sir John was critical of the way in which the CACD had, in 1977, rejected an appeal by one of the Guildford Four, Carole Richardson, without having "made or relied upon any detailed analysis of the evidence". Instead, they relied solely on a statement she had made which, the CACD held, "bears all the hallmarks of a voluntary confession".[79] In fact, Richardson had had an alibi. However, Sir John found that when her alibi witness came forward, Surrey Police arrested him under the Prevention of Terrorism (Temporary Provisions) Act 1974 in order to "destroy her alibi rather than investigate it".[80]

17.93 While his review into the Guildford Four was ongoing, Sir John was appointed to be a member of the Royal Commission on Criminal Justice ("the Runciman Commission"), which was to look more broadly at the criminal justice system.[81]

Miscarriage of justice inquiries overseas

Canada

17.94 In the report mentioned at paragraph 17.79 above, JUSTICE note that in Canada, full public inquiries are often held after high-profile cases of wrongful conviction, including:

(1) the 1986 Royal Commission into the wrongful conviction of Donald Marshall Jr for murder in 1971;[82]

(2) the 1996 Kaufman Commission into the wrongful conviction of Guy Paul Morin for the murder of a nine-year-old girl in 1984;[83]

(3) the 2004 Commission of Inquiry into the Wrongful Conviction of David Milgaard;[84]

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77 Second report on the convictions on 4th March 1976 of the Maguire family and others for offences under section 4 of the Explosive Substances Act 1883 (3 December 1992) HC 295.

78 Report of the inquiry into the circumstances surrounding the convictions arising out of the bomb attacks in Guildford and Woolwich in 1974: Final report (30 June 1994) HC 449.

79 Above, paras 17.40-17.50.

80 Above, paras 10.53-10.54.

81 See the Report of the Royal Commission on Criminal Justice (1993) Cm 2263.

82 *Royal Commission on the Donald Marshall, Jr., Prosecution* (December 1989).

83 Ministry of Attorney General, *Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin* (1989).

84 Hon E P MacCallum, *Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard: Volume 1* (September 2008).

(4) the 2004 Sophonow Inquiry[85] and the 2005 Driskell Inquiry[86], both of which concerned the practices of the former Manitoba Crown Attorney;

(5) the 2008 Goudge Inquiry into Pediatric Forensic Pathology in Ontario, which followed a series of wrongful convictions based on expert evidence from a paediatric pathologist in Toronto.[87]

17.95 These inquiries have resulted in a number of important recommendations which have led to fundamental changes in the criminal justice system. Many of them also called for an independent review mechanism.[88] For instance, the Marshall Inquiry highlighted problems of racial bias, particularly for black and indigenous peoples (Marshall was Mi'kmaq[89]). The Inquiry made 82 recommendations and saw changes to improve racism within the criminal justice system including the establishment of the Race Relations Division within the Nova Scotia Human Rights Commission in 1991.

17.96 Both the Marshall and Morin inquiries highlighted issues of "tunnel vision" among police officers and prosecutors. This saw recommendations on Crown disclosure obligations and encouraged greater training of police and counsel around the identification of tunnel vision and how to avoid it.

17.97 The David Milgaard Inquiry specifically examined the role of youth vulnerability and identified a number of concerns with the tactics adopted by police and prosecution when dealing with vulnerable young people. It also considered compensation following a wrongful conviction and criticised the requirement of a finding that the applicant "did not commit the offence". The Inquiry recommended that compensation should be more widely available, including where people are not factually innocent but there have been obvious breaches of standards by the courts, prosecution or police.

17.98 The Sophonow and Driskell inquiries concerned the behaviour of then Manitoba Crown Attorney George Dangerfield, including his flawed practices in using jailhouse informants. The inquiries highlighted the risks of using "jailhouse informants".[90] The Sophonow report proposed that as a general rule they should be prohibited from testifying and stated that "[u]sually, their presence as witnesses signals the end of any hope of providing a fair trial".[91] In the wake of this inquiry several provinces subsequently restricted the use of such informants.

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85 Manitoba Department of Justice, *The Inquiry Regarding Thomas Sophonow* (November 2001).

86 Hon P Le Sage QC, *Report of the Commission of Inquiry into certain aspects of the trial and conviction of James Driskell* (January 2007).

87 Hon S T Goudge, *Inquiry into Pediatric Forensic Pathology in Ontario* (October 2008).

88 In December 2024, the Miscarriage of Justice Review Commission Act (David and Joyce Milgaard's Law) received Royal Assent. The Act was named in memory of David Milgaard who was wrongfully convicted of murder and his mother, Joyce Milgaard who both called for the establishment of an independent commission to examine claimed miscarriages of justice.

89 The Mi'kmaq are Indigenous peoples and some of the earliest inhabitants of the Atlantic Provinces of Canada.

90 Mr Sophonow's case had involved 11 jailhouse informants who had volunteered to provide testimony against him. Defence counsel was not told of concerns about their credibility.

91 Manitoba Department of Justice, *The Inquiry Regarding Thomas Sophonow* (November 2001) p 101.

17.99 The Goudge Inquiry examined the expert evidence provided by Dr Charles Smith, a paediatric pathologist, who despite having had no formal forensic pathology training was recognised as a leading expert and was involved in over 40 autopsies of children whose deaths were treated as suspicious. His errors as a witness lead to a number of wrongful accusations and convictions. The Inquiry highlighted the importance in expert witnesses understanding the role and to ensure impartiality in their evidence. It has led to significant changes in forensic pathology in Ontario.[92]

New Zealand

17.100 New Zealand's Criminal Cases Review Commission Te Kāhui Tātari Ture also has the power to launch thematic inquiries:[93]

> Section 12 of the CCRC Act provides that Te Kāhui Tātari Ture has the power to initiate and conduct inquiries into general matters identified in the course of performing our primary role that may be related to cases involving a miscarriage of justice, or that may have the potential to give rise to such cases.

17.101 In 2024, the organisation launched its first systemic investigation, into eyewitness identification. At time of writing, the Commission has referred four cases to appellate courts, two of which turned on identification evidence. The Commission stated that:[94]

> [d]uring our first three years of operation, Te Kāhui has identified a range of systemic issues which we consider have the potential to contribute to miscarriages of justice in Aotearoa New Zealand. In particular, issues relating to eyewitness identification evidence (otherwise known as visual identification evidence) have been raised in several applications to Te Kāhui and were a key feature of our recent referrals to appellate courts in December 2023 and January 2024.

Discussion

17.102 We think there will often be value in an inquiry following a miscarriage of justice. As the Canadian inquiries have shown, important improvements and safeguards can be adopted as a result of findings and recommendations to prevent future miscarriages of justice. Whilst an effective appeals system is necessary, the criminal justice system must also be robust enough to prevent miscarriages from occurring in the first place, and this requires a willingness to learn when things have gone wrong. We consider that a greater use of inquiries can help prevent future miscarriages of justice.

17.103 It is worth noting, however, that judicial inquiries into miscarriages of justice in the UK have attracted criticism. In Appendix 1, we discuss the Brabin report which concluded – surprisingly – that although Timothy Evans had not killed his daughter (for whose murder he had been hanged), and that she had instead been killed by serial killer John Christie, Evans had killed his wife Beryl (whose murder Christie had admitted).

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92 R Mason, "Wrongful Convictions in Canada" (23 September 2020).

93 Te Kāhui Tātari Ture, "Systemic Inquiries" https://ccrc.nz/news/systemic-inquiries/.

94 Te Kāhui Tātari Ture, "Commission commences inquiry into eyewitness identification evidence in Aotearoa" (13 March 2024).

17.104 In his submission to Sir John May's inquiry, Chris Mullin wrote:[95]

> You will be aware that the history of judicial inquiries into miscarriages of justice is not a happy one. Previous inquiries have tended to concentrate on reconvicting the defendants rather than addressing what caused them to wrongfully convict in the first place. This, you will recall, is what happened with the Brabin inquiry into the Timothy Evans case, with Sir Henry Fisher's inquiry into the Confait case and with Lord Hunter's into the conviction of Patrick Meehan.[96]

17.105 We recognised earlier the advantages of the CCRC having the power to conduct systemic inquiries, as in New Zealand. This includes the independence afforded to the CCRC rather than the CPS or AGO, which may be criticised for having perceived bias or a lack of independence.[97] In particular, a victim of a miscarriage of justice may not feel vindicated if the body that prosecuted them is tasked with investigating other potential miscarriages. Further, by its work in reviewing potential miscarriages, the CCRC may be able to identify types of evidence, such as eyewitness identification, which may contribute to miscarriages of justice. Also, inquiries may benefit from the CCRC's powers under section 17 of the Criminal Appeal Act 1995, such as requiring public bodies to provide documents and other materials in conducting its reviews.

17.106 However, in many cases where a miscarriage of justice is eventually established, there will have been unsuccessful applications to the CCRC, and any inquiry may well need to consider the conduct of the CCRC, and whether it delayed the correction of a miscarriage of justice. Accordingly, it would often be inappropriate for the CCRC to be the body charged with investigating what went wrong.

17.107 We also think that it is important that in appropriate cases the inquiry is able to look at the conduct of the trial, including decisions and directions of the judge, and potentially of previous appeals. If criticisms are to be made of judicial decisions, it might be considered appropriate to have a judicial inquiry.

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95 C Mullin, "Evidence to Sir John May's Inquiry into the Guildford and Woolwich bombings – 1989", *Chris Mullin*.

96 Patrick Meehan was convicted of the murder of Rachael Ross during a robbery at her house in Ayr in 1969. Mrs Ross's husband, who survived the robbery, said that their attackers had addressed each other as "Mick" and "Pat". Patrick Meehan was in the area earlier on the day of the murders with an accomplice, James Griffiths. When police attempted to arrest Griffiths, he shot at them, and subsequently several members of the public, before being shot dead by police.

At trial, Meehan claimed that another man, Ian Waddell, had been involved, and following Meehan's conviction, Waddell confessed to the attack. In addition, Meehan's lawyer knew that another man, William McGuiness, had committed the murder, as McGuiness had confessed to him, but McGuiness was his client, and the confession was covered by legal privilege. In 1976, McGuinness was killed, and Meehan's lawyer disclosed his confession. Meehan was pardoned later that year. Waddell was subsequently tried for the murder, but acquitted.

Lord Hunter concluded that Meehan's guilt was not disproven. Although he concluded that Meehan and Griffiths were not directly involved in the attack, he speculated that they might have been taken along as a back-up team.

97 See the discussion of inquiries by the CPS and AGO above at paras 17.66-17.73 and in Appendix 3.

Consultation Question 105.

17.108 We provisionally propose there should be greater use of inquiries following a proven miscarriage of justice.

Do consultees agree?

Procedural and evidential issues at trial

17.109 In the Issues Paper we noted that although this project is concerned with criminal appeals, and with the appeals process as a mechanism for correcting miscarriages of justice, from a wider perspective, it might be considered at least as important to prevent miscarriages of justice.[98] Accordingly, we invited views on reform which consultees had not dealt with in answer to the other questions we had asked.

17.110 In Appendix 4, we discuss several issues which were raised by consultees as potentially relevant to miscarriages of justice. These include:

(1) the tension between the "safety" test applied by the CACD and the *Galbraith*[99] test on a submission of no case to answer in relation to the prosecution's case at trial, under which the judge must leave the case to the jury if a reasonable jury could "properly" convict on the evidence (and not, as some previous authorities had suggested, "safely" convict). The tension arises due to *Galbraith* suggesting a distinction between "properly" and "safely", but, in the absence of fresh evidence or the identification of a legal error, the CACD is highly unlikely to find a conviction unsafe if the jury could properly convict on the evidence;[100]

(2) the absence of reasoned verdicts by juries in England and Wales, and in particular the possibility that in some cases it may not be clear from the verdict the basis on which the jury came to its decision;

(3) issues relating to certain types of evidence, in particular problems with the reliability of eyewitness identification evidence, cell confessions and retracted confessions in cases which are revealed to be miscarriages of justice, and perceived problems with the expert evidence regime; and

(4) failures in practice in relation to pre-trial prosecution disclosure of evidence, which has been a recurring issue in miscarriages of justice.

17.111 We recognise that these issues are largely outside the terms of reference for this project (although the first issue concerns a test which, prior to the ruling in *Galbraith*, was related to the test which the CACD would apply in an appeal against conviction).

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98 Law Commission, Criminal Appeals: Issues Paper (July 2023).

99 *R v Galbraith* [1981] 1 WLR 1039, CA.

100 See the discussion on "lurking doubt" at para 8.128 and following above.

17.112 However, as we indicated in relation to miscarriage of justice inquiries, we consider that there is value in seeking to learn from wrongful convictions with a view to preventing miscarriages of justice in the future. Although we have identified certain areas on which we would welcome the views of consultees, we would also welcome views on any issues not covered within this paper that give rise to particular risks of wrongful conviction, and what measures might be taken to reduce those risks.

Consultation Question 106.

17.113 We invite consultees' views on any reforms which might reduce the opportunities for a miscarriage of justice to occur, and, particularly:

(1) on the relationship between the test applied on a submission of no case to answer and the test of safety applied by the Court of Appeal Criminal Division; and

(2) on whether any particular categories of evidence contribute to the occurrence of miscarriages of justice, and how these problems might be addressed.

IMPACTS ON PARTICULAR GROUPS

17.114 In Chapter 4, we discussed the principles which underpin and inform the criminal justice system, including the idea of fair treatment for all those who come within it irrespective of their personal characteristics. We noted that certain groups may be more vulnerable and might be disproportionately affected by certain aspects of the appeals system. We further observed that the principles we identified, and the appeals system itself, would be rendered hollow if individuals cannot effectively access it. It is therefore important that we consider whether there are barriers which disproportionately impede certain groups' access to the appeals system.

17.115 In consultation, a number of consultees argued that in order for the criminal justice system to be considered fair, there must be a wider appreciation that for potential appellants with certain protected characteristics it may be more difficult to bring an appeal. For example, the Law Society submitted that it is:

> essential that any reform of the appeals system considers the need to pay special attention to young and vulnerable individuals and guard against the risk that those with protected characteristics will be disadvantaged.

17.116 Other consultees agreed that the appeals system's impact on those who have certain protected characteristics requires special attention, and that reform should aim to remove or diminish barriers which may disproportionately affect those already disadvantaged.

17.117 Three key characteristics were raised as warranting special consideration: sex (specifically women and girls), race (specifically young black men and boys), and age

(specifically children[101]). Throughout this consultation paper, we have considered how these characteristics and others figure in our discussions of particular issues, such as:

(1) paragraphs 6.22 to 6.24 on time limits, 6.97, 6.105 and 6.111 to 6.112 on fresh evidence and 6.147 on loss of time orders in relation to women;

(2) paragraphs 10.112 to 10.115 and 10.138 on "substantial injustice" in relation to young black men and boys; and

(3) paragraphs 5.204-5.242 on appeals from youth courts and on turning 18 and the loss of anonymity, 6.148 on loss of time orders and 15.79 to 15.83 and 15.114 to 15.120 on retention of evidence in relation to children and young people.

17.118 In addition, we acknowledge the intersectional nature of defendants' characteristics, by which we mean the "phenomenon of combined forms of discrimination and disadvantage, and the unique dynamic this creates".[102]

17.119 In the following three subsections on sex, race, and age, we briefly outline considerations in relation to the particular groups that may cause disproportionate impacts in the criminal appeals context.

Women and the criminal appeals system

17.120 We held two separate consultation events to gain further understanding of disproportionate impacts on women in the appeals system and met with the Centre for Women's Justice, the charity APPEAL, and academics including Naima Sakande, a solicitor and freelance researcher who has conducted recent quantitative and qualitative research in this area.[103]

17.121 Men and women's differential treatment in the criminal justice system has long been recognised such as in Baroness Corston's 2008 Report, which referred to a need "to ensure that their needs are properly recognised and met".[104] The vast majority of those arrested, prosecuted, convicted and imprisoned are male.[105] It follows that the majority of those who exercise appeal rights will be male, and that therefore the system is thus heavily focused on male defendants' experiences.

17.122 It appears that women are less likely to pursue appeals than men.[106] A range of reasons have been put forward to explain this, including women overall being

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101 As noted in Chapter 5 (footnote 159), for the purposes of this project, we use the term "child" (and "boys", "girls", etc) to refer to anyone under 18.

102 Hate crime laws (2020) Law Commission Consultation Paper No 250, paras 5.43 and 16.108.

103 N Sakande, *Righting Wrongs: What are the barriers faced by women seeking to overturn unsafe convictions or unfair sentences in the Court of Appeal (Criminal Division)?* (2020 Griffin Society) p 4. The research involved interviewing women in custody as well as legal professionals, barristers and solicitors with relevant experience.

104 Home Office, *The Corston Report* (2007) p 2.

105 See Ministry of Justice, "Women and the Criminal Justice System 2021" (2022) fig 1.01.

106 N Sakande and N Padfield, "Time to appeal – an argument for extending time limits" [2020] *Criminal Law Review* 935.

sentenced to shorter sentences than men,[107] against which there may be less of an incentive to appeal.[108]

17.123 In contrast, the CCRC estimate that although women make up only 5% of the prison population, they make up 8% of applications to the CCRC.[109] Work on outreach to women with criminal convictions undertaken by the CCRC found:[110]

> women with criminal convictions had particular needs and vulnerabilities, and it was important to understand these. Women with convictions were less likely than men to seek help if they felt that they were wrongly convicted or wrongly sentenced due to differing priorities and concerns. These include worries about children and family members, as women were more likely to be primary carers, which was why women may feel less inclined to appeal or to ask for help.

17.124 Naima Sakande has identified emotional and psychological factors which may be putting women off from making an appeal. She notes the idea that in breaking the law women "had also transgressed against societal stereotypes of women as mothers, carers and nurturers"[111] and that this may engender particular feelings of shame. This, coupled with the desire to avoid placing greater strain on their children – many women are the primary caregiver for their children – may help to explain why some women do not want to pursue an appeal.[112] Naima Sakande also found that women had a general lack of knowledge about the appeals system, felt ignored by their legal representatives or had received poor legal advice.[113]

17.125 In paragraphs 6.97 and 6.104-6.116, we discuss the challenges that the rules relating to fresh evidence can pose for victims of domestic abuse, when they seek to appeal relying on evidence which is in turn based on their own accounts of abuse which only

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107 See Ministry of Justice, "Statistics on Women and the Criminal Justice System 2021" (24 November 2021): 14% of female defendants prosecuted in 2021 were prosecuted for indictable offences compared to 23% of male defendants. The average custodial sentence length for female offenders was 14.5 months compared to 22.7 months for male offenders. A report by the National Health Service ("NHS") and His Majesty's Prison and Probation Service ("HMPPS"), *A review of health and social care in women's prisons* (November 2023) noted at p 28 that "[i]n 1993, one third of custodial sentences given to women were for less than six months; in 2022 it [was] more than half (53%)".

108 See M Zander, "Legal Advice and Criminal Appeals: A Survey of Prisoners, Prisons and Lawyers" [1972] *Criminal Law Review* 132 and K Malleson, "Miscarriages of Justice and the Accessibility of the Court of Appeal" [1991] *Criminal Law Review* 323.

109 This could be due to the unavailability of loss of time orders (see Chapter 6) for CCRC references, the lack of a separate leave (permission) stage for references and the CCRC contacting prospective applicants.

110 CCRC Board minutes, 24 Nov 2024.

111 N Sakande, *Righting Wrongs: What are the barriers faced by women seeking to overturn unsafe convictions or unfair sentences in the Court of Appeal (Criminal Division)?* (2020, Griffin Society) p 46.

112 In a survey conducted by the NHS and HMPPS which received 2,250 responses from women with lived experience of prison, "[a]lmost half (48%) of women expressed concern about their children, for whom they are predominately the primary carers …, and described the anguish of separation". NHS and HMPPS, *A review of health and social care in women's prisons* (November 2023) p 25.

113 N Sakande, *Righting Wrongs: What are the barriers faced by women seeking to overturn unsafe convictions or unfair sentences in the Court of Appeal (Criminal Division)?* (2020, Griffin Society) pp 45-47.

emerge after their conviction. This is a phenomenon which disproportionately affects women.

Race and the criminal appeals system

17.126 The disproportionate over-representation of certain ethnic groups in the criminal justice system, and in particular the youth justice system, has been well researched and documented. This includes the Scarman Report[114] following an inquiry into the 1981 Brixton riots, the Stephen Lawrence Inquiry[115] which followed the murder of Stephen Lawrence in 1993 and the Young Review[116] in 2013 which sought to identify improvements in negative outcomes faced by Black and Muslim male offenders between 18 and 24 years old. More recently, in 2017, David Lammy MP conducted a review of the outcome for Black, Asian and Minority Ethnic ("BAME") individuals within the criminal justice system.[117] The review noted that despite the overall rate of youth offending decreasing over the previous decade, the proportion of offending and reoffending by BAME young people rose.[118]

17.127 In the most recent statistics published in March 2024,[119] black adults accounted for approximately 4% of the general population but 12% of the prison population. Asian adults accounted for 9% of the general population and made up 8% of the prison population. White adults accounted for 84% of the general population and 73% of the prison population. Black children, who were approximately 7% of the general child population, accounted for 30% of the prison population. Asian children, who made up 12% of the general population, accounted for 5% of the prison population; white children who made up 73% of the general population accounted for 49% of the prison population. Children of mixed ethnicity were 7% of the general population but 13% of the prison population.

17.128 As we discuss at paragraph 17.117 above, the principal impact of race in relation to the criminal appeals system raised with us by consultees related to the "substantial injustice" test's disproportionate impact on black young men and boys. For example, APPEAL said that the "substantial injustice" requirement was "hindering the correction of miscarriages of justice" arising from joint enterprise prosecutions, which, it noted by reference to CPS data,[120] demonstrated significant racial disparities.

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114 Rt Hon Lord Scarman, *The Brixton Disorders, April 10 -12, 1981*: Inquiry Report (1981).

115 W Macpherson, *The Stephen Lawrence Inquiry* (1999) Cm 4262 -1.

116 L Young, *The Young Review* (2013).

117 According to their website (https://www.ethnicity-facts-figures.service.gov.uk/style-guide/writing-about-ethnicity/) the UK Government no longer uses the acronyms BAME (black, Asian and minority ethnic) or BME (black and minority ethnic), following a recommendation from the Commission on Race and Ethnic Disparities. The Commission said, "Use of the term BAME, which is frequently used to group all ethnic minorities together, is no longer helpful. It is demeaning to be categorised in relation to what we are not, rather than what we are: British Indian, British Caribbean and so on. The BAME acronym also disguises huge differences in outcomes between ethnic groups"; Commission on Race and Ethnic Disparities (March 2021), p 32. We have used this term in this section when referring to material or data which itself used it.

118 D Lammy, *The Lammy Review* (September 2017) p 4..

119 Ministry of Justice, *Statistics on Ethnicity and the Criminal Justice System 2022* (19 March 2024). The population statistics are from the 2021 Census and the prison population statistics are from 30 June 2023.

120 CPS, "Crown Prosecution Service Joint Enterprise Pilot 2023: Data Analysis", *CPS* (29 September 2023).

17.129 The Lammy Review found that "many BAME defendants [do not] believe they will receive a fair hearing from magistrates" so elect for a jury trial at the Crown Court.[121] Since this decision will affect the defendant's appeal rights, this points to an additional way in which the law on appeals may disproportionately affect some racial groups.

Children and young people and the criminal appeals system

17.130 Children are subject to specific youth justice principles and legislation which directly affects their appeal rights. As we discuss at the end of Chapter 5, where a child is convicted in a youth court (a type of magistrates' court), the routes of appeal include the right of rehearing in the Crown Court and case stated or challenge by judicial review to the High Court.[122] Children may also be tried in the Crown Court in certain circumstances, including where they are tried alongside an adult defendant, and where they are tried for certain "grave crimes" (such as murder).

17.131 In common with many other jurisdictions, the criminal justice system in England and Wales has long treated children in a different manner to adults. This distinction takes into account the different needs of children when compared to their adult counterparts. Further, it recognises that children often lack the maturity, emotional development, and comprehension we expect of adults. As noted by the CACD, this may diminish their culpability, warranting differential treatment.[123]

17.132 The distinction for different standards in youth justice further reflects the UK's international obligations found in a number of international instruments that have been ratified or adopted. This includes the United Nations Convention on the Rights of the child ("UNCRC") which requires that:[124]

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

17.133 In this consultation paper, we have also noted several ways in which the right to bring an appeal may be affected by turning 18, including the fact that the appellant's identity can be publicly reported if they have turned 18, even though at the first instance trial their identity would have been subject to reporting restrictions (something which, we were told, may deter meritorious appeals).[125] Under reforms made by the Police, Crime, Sentencing and Courts Act 2022 (which have been held incompatible with the

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121 *The Lammy Review* (September 2017) p 27.

122 At Consultation Question 11 in Chapter 5 we provisionally propose that appeals to the High Court by way of case stated should be abolished. This would leave judicial review as the only mechanism for challenging decisions taken in a magistrates' court in the High Court. However, at Consultation Question 5, we provisionally propose to retain the automatic right of rehearing in the Crown Court so there would still be two routes of appeal from the youth court.

123 See for example, *R v Ahmed* [2023] EWCA Crim 281, [2023] 1 WLR 1858 at [21] (by Lord Burnett of Maldon CJ) where the Court stated that children and young people are treated differently from adults because they are generally "less culpable, and less morally responsible for their acts than adults".

124 Article 3(1).

125 See para 5.227 and following generally and 5.236 specifically above.

ECHR),[126] turning 18 also means that a person Detained at His Majesty's Pleasure loses their right to seek a review of their minimum term.

Conclusion

17.134 In addition to the potential impacts on particular groups across the criminal justice system we have identified in this section and throughout the consultation paper, we are aware that there will be impacts on particular groups that we have not covered or been alerted to in preparing this paper and seek consultees' views on examples of or themes in relation to impacts on particular groups, or on intersectional impacts.

17.135 The Equality Act 2010 sets out nine "protected characteristics": age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.[127] We invite consultees' views on any group or characteristic, whether protected by the 2010 Act or not.

Consultation Question 107.

17.136 We invite consultees' views if they believe or have evidence or data to suggest that any of our provisional proposals or open questions could result in advantages or disadvantages to certain groups, whether or not those groups are protected under the Equality Act 2010 (age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation), and which those consultees have not already raised in relation to other consultation questions.

Consultation Question 108.

17.137 We invite consultees' views in relation to any issues relevant to the criminal appeals project that they have not dealt with in answer to previous consultation questions.

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126 *R (Quaye) v Secretary of State for Justice* [2024] EWHC 211 (Admin), [2024] 1 WLR 3303.

127 Equality Act 2010, s 4.

Chapter 18: Consultation Questions

Consultation Question 1.

18.1 We invite consultees' views as to the appropriate route for appeals in summary proceedings, including whether appeals on a point of law in summary proceedings should go to the Court of Appeal Criminal Division after, or instead of, the High Court, or whether the current parallel arrangements should be maintained.

Paragraph 3.31

Consultation Question 2.

18.2 We invite consultees' views on the current structure of the appellate courts in respect of criminal proceedings in England and Wales.

Paragraph 3.38

Consultation Question 3.

18.3 In considering whether reform to the law relating to criminal appeals is necessary, we provisionally propose that the relevant principles are:

(1) the acquittal of the innocent;

(2) the conviction of the guilty;

(3) fairness;

(4) recognising the role of the jury in trials on indictment;

(5) upholding the integrity of the criminal justice system;

(6) ensuring access to justice (incorporating the "no greater penalty" principle and consideration of the needs of particular groups); and

(7) finality.

We provisionally propose as an overriding principle that the convictions of those who are innocent or did not receive a fair trial should not stand.

Do consultees agree?

Paragraph 4.141

Consultation Question 4.

18.4 We provisionally propose that in principle a person should not be at risk of having their sentence increased as a result of seeking to appeal their conviction or sentence.

Do consultees agree?

Paragraph 4.144

Consultation Question 5.

18.5 We provisionally propose that the right to an appeal against conviction and/or sentence by way of rehearing following conviction in summary proceedings should be retained.

Do consultees agree?

Paragraph 5.86

Consultation Question 6.

18.6 We invite consultees' views as to whether there are any particular categories of offence heard in summary proceedings where it would be appropriate to replace the right to an appeal by way of rehearing with an appeal by way of review.

We would invite views particularly on whether this might be appropriate in relation to (i) certain regulatory offences and (ii) specialist domestic violence or domestic abuse courts.

Paragraph 5.97

Consultation Question 7.

18.7 We provisionally propose that the time limit for appeals from magistrates' courts to the Crown Court should be the same as the time limit for appeals from the Crown Court to the Court of Appeal Criminal Division.

Do consultees agree?

Paragraph 5.109

Consultation Question 8.

18.8 We provisionally propose, in order that appellants are not discouraged from bringing meritorious appeals by the possibility of an increased sentence, that the Crown Court and High Court should not be able to impose a more severe sentence as a result of an appeal against conviction or sentence by the convicted person.

Do consultees agree?

Paragraph 5.116

Consultation Question 9.

18.9 We invite consultees' views as to the circumstances in which there should be a right to appeal against conviction following a guilty plea in a magistrates' court.

Paragraph 5.133

Consultation Question 10.

18.10 We provisionally propose that prosecution rights of appeal to the Crown Court by way of rehearing in revenue and customs and animal health cases should be abolished.

Do consultees agree?

Paragraph 5.137

Consultation Question 11.

18.11 We provisionally propose that appeal to the High Court by way of case stated should be abolished. Judicial review would be retained and would be available in respect of decisions which must currently be challenged by way of case stated.

Do consultees agree?

Paragraph 5.189

Consultation Question 12.

18.12 We provisionally propose that a person convicted in a magistrates' court should retain a right to appeal by way of rehearing where the conviction has been substituted or directed by the High Court in judicial review proceedings (or, if retained, on an appeal by way of case stated) brought by the prosecution, and that the Crown Court should remain empowered to acquit the defendant on the facts.

Do consultees agree?

Paragraph 5.203

Consultation Question 13.

18.13 We invite consultees' views on whether the route of appeal following a guilty plea by a child should be reformed, even if the route of appeal following a guilty plea in magistrates' courts is not.

Paragraph 5.220

Consultation Question 14.

18.14 We provisionally propose that, even if the Crown Court remains able to impose a more severe penalty on appeal from a magistrates' court, the Crown Court should not be able to impose a more severe penalty on appeal from a youth court.

Do consultees agree?

Paragraph 5.226

Consultation Question 15.

18.15 We provisionally propose that where a person has been convicted as a child and their anonymity has not been lost as a result of an excepting direction or their being publicly named after turning 18, that person should retain their anonymity during appellate proceedings.

Do consultees agree?

We invite consultees' views on how maintaining the anonymity of a person convicted as a child could best be achieved.

Paragraph 5.241

Consultation Question 16.

18.16 We provisionally propose that the time limit for bringing an appeal against conviction or sentence to the Court of Appeal Criminal Division should be increased to 56 days from the date of sentence.

Do consultees agree?

Paragraph 6.33

Consultation Question 17.

18.17 We provisionally propose that the test for admitting fresh evidence in section 23 of the Criminal Appeal Act 1968 should remain "in the interests of justice", provided that the considerations in subsection (2) are treated as such rather than as criteria which must be met before fresh evidence can be admitted.

Do consultees agree?

Paragraph 6.116

Consultation Question 18.

18.18 We invite consultees' views on whether the Court of Appeal Criminal Division should have a power to appoint its own experts in order to assist it in determining appeals, what the nature of such a power might be and what constraints (if any) there should be on the exercise of such a power.

Paragraph 6.127

Consultation Question 19.

18.19 We provisionally propose that the power of the Court of Appeal Criminal Division to make a loss of time direction, ordering that time counted between the making of an application for leave to appeal and its determination not be counted as part of an applicant's sentence, should be limited to a period of up to 56 days of that time.

Do consultees agree?

Paragraph 6.155

Consultation Question 20.

18.20 We provisionally propose that the CACD should only be able to make a loss of time direction where:

(1) the application for leave to appeal has been refused by the single judge as wholly without merit;

(2) the applicant has been warned that, if they renew their application before the full court, they are at risk of a loss of time order; and

(3) the application is renewed to the full court and rejected as wholly without merit.

Do consultees agree?

Paragraph 6.156

Consultation Question 21.

18.21 We invite consultees' views on whether the CACD should no longer be able to make loss of time directions.

Paragraph 6.157

Consultation Question 22.

18.22 We provisionally propose that the Court of Appeal Criminal Division should have the power to correct an accidental slip or omission in a judgment or order, within 56 days of that judgment being handed down or the order made.

Do consultees agree?

We invite consultees' views on which members of the Court should be able to exercise this power. For instance, should it be:

(1) all of the same judges who made the judgment or order;

(2) the most senior judge (the presider) who made the judgment or order;

(3) any one of the judges who made the judgment or order; or

(4) any judge who is either an ordinary judge of the Court or is a judge of the Court by virtue of the office that they hold?

Paragraph 6.172

Consultation Question 23.

18.23 We provisionally propose no change to the current arrangements for defence appeals against sentence in the Court of Appeal Criminal Division ("CACD").

Do consultees agree?

We invite consultees' views on the tests applied by the CACD in appeals against sentences, specifically whether a sentence was "manifestly excessive", and on whether the tests could and should be codified.

Paragraph 7.77

Consultation Question 24.

18.24 We provisionally propose that the Court of Appeal Criminal Division should have the discretion not to quash an unlawful order where to substitute the correct order would breach the rule against imposing a more severe sentence than was imposed at trial.

Do consultees agree?

Paragraph 7.89

Consultation Question 25.

18.25 We provisionally propose including a failure to impose a mandatory minimum sentence as a ground for referring a sentence as unduly lenient to the Court of Appeal Criminal Division.

Do consultees agree?

Paragraph 7.97

Consultation Question 26.

18.26 We invite consultees' views on whether the following offences should be included within the unduly lenient sentence scheme:

(1) offences involving a fatality which are not currently covered, such as causing death by careless driving; and/or

(2) animal cruelty offences.

We invite consultees' views on whether there are any additional offences that should be included within the unduly lenient sentence scheme.

Paragraph 7.106

Consultation Question 27.

18.27 We provisionally propose that there should be a statutory leave test for unduly lenient sentence references.

Do consultees agree?

If there is to be a test, we invite consultees' views on whether it should be whether it is arguable that the sentence was unduly lenient.

Paragraph 7.113

Consultation Question 28.

18.28 We provisionally propose that the right to refer sentences to the Court of Appeal Criminal Division as unduly lenient should remain with the Attorney General.

Do consultees agree?

Paragraph 7.124

Consultation Question 29.

18.29 We invite consultees' views as to whether the Attorney General should have the ability to refer a sentence to the Court of Appeal Criminal Division as unduly lenient outside of the 28-day limit. If so, under what circumstances might this be permissible, and should there be a maximum period of extension?

Paragraph 7.136

Consultation Question 30.

18.30 We invite consultees' views as to whether some types of sentence appeals and references by the Attorney General to the Court of Appeal Criminal Division could be dealt with by a single judge rather than by the full court.

Paragraph 7.142

Consultation Question 31.

18.31 We provisionally propose that children serving a sentence of detention for life should have the same right to a review of the minimum term as is available to a child sentenced to Detention at His Majesty's Pleasure ("DHMP").

We provisionally propose that this right should extend to young adults sentenced to DHMP or life imprisonment for offences committed as a child.

Do consultees agree?

We invite consultees' views on how far into adulthood this right should extend. Should it be:

(1) 21 years old (the age at which a person leaves a young offender institution);

(2) 25 years old (the age at which most people will be neurologically mature); or

(3) some other age?

Paragraph 7.173

Consultation Question 32.

18.32 We provisionally propose that reviews of minimum terms for children and young people on indeterminate sentences should be heard by the Court of Appeal Criminal Division.

Do consultees agree?

Paragraph 7.177

Consultation Question 33.

18.33 We invite consultees' views on whether the current powers afforded to the Court of Appeal Criminal Division in relation to sentence appeals are sufficient to deal with a change of circumstance post-sentence? This includes a change in law (for example, the repeal of a type of sentence) or a change in the personal circumstances of the defendant.

We invite consultees' views specifically on whether those currently serving sentences of imprisonment for public protection ("IPP") should be entitled to challenge their IPP on an individual basis on appeal and, if so, what the test for quashing an IPP should be.

Paragraph 7.188

Consultation Question 34.

18.34 We provisionally propose that the single ground that a conviction is unsafe should continue to be the test for quashing a conviction, but that the circumstances in which a conviction will be unsafe should be set out non-exhaustively in legislation.

We provisionally propose that these circumstances should include the following, which we consider represent the current practice of the Court of Appeal Criminal Division:

(1) where the Court considers that the appellant's trial, as a whole, was unfair; or

(2) where the Court considers that the conviction of the appellant involved abuse of process amounting to an affront to justice.

Do consultees agree?

Paragraph 8.89

Consultation Question 35.

18.35 We provisionally propose that where, in an appeal against conviction, the Court of Appeal Criminal Division admits fresh evidence that could have led the jury to acquit, then the Court should order a retrial unless a retrial is impossible or impractical.

Do consultees agree?

Paragraph 8.127

Consultation Question 36.

18.36 We provisionally propose that the Court of Appeal Criminal Division should continue to be able to find a conviction unsafe if it thinks that the evidence, taken as a whole, was insufficient for a reasonable jury to be sure of a defendant's guilt.

Do consultees agree?

Paragraph 8.167

Consultation Question 37.

18.37 We provisionally propose that the Court of Appeal Criminal Division's ability to make a declaration of nullity and to issue a writ of venire de novo should be retained.

Do consultees agree?

We invite consultees' views on how greater clarity might be achieved as to which procedural errors should render a trial or conviction a nullity.

Paragraph 8.174

Consultation Question 38.

18.38 We invite consultees' views on the provisions requiring the Court of Appeal to quash a person's conviction on an appeal under:

(1) section 7 of the Terrorism Act 2000;

(2) schedule 3 to the Terrorism Prevention and Investigation Measures Act 2011;

(3) schedule 4 to the Counter-Terrorism and Security Act 2015; and

(4) schedule 9 to the National Security Act 2023.

Paragraph 8.204

Consultation Question 39.

18.39 We provisionally propose that the law be amended to enable the Court of Appeal Criminal Division to admit evidence of juror deliberations where the evidence may afford any ground for allowing the appeal (which includes the defendant not having received a fair trial before an impartial tribunal).

Do consultees agree?

Paragraph 8.246

Consultation Question 40.

18.40 We provisionally propose that the Criminal Cases Review Commission should be added to the list of persons in section 20F(2) of the Juries Act 1974 to whom a person may lawfully make a disclosure of the content of a jury's deliberations.

Do consultees agree?

Paragraph 8.256

Consultation Question 41.

18.41 We provisionally propose that where the Court of Appeal Criminal Division quashes a conviction, it should have a power to substitute a conviction for any offence of which the jury could have convicted the appellant if it is satisfied that the jury must have been sure of facts:

(1) which are not affected by the Court's findings in relation to the safety of the conviction which it has quashed; and

(2) which would prove the appellant to have been guilty of that offence.

Do consultees agree?

Paragraph 9.68

Consultation Question 42.

18.42 We provisionally propose that, where a conviction is quashed by the Court of Appeal Criminal Division following a guilty plea, the test for substitution should be whether the trial judge must have been satisfied of facts (i) which are not affected by the Court's findings in relation to the safety of the conviction and (ii) which prove that the appellant was guilty of the alternative offence.

Do consultees agree?

Paragraph 9.76

Consultation Question 43.

18.43 We invite consultees' views as to whether the Court of Appeal Criminal Division should have a power to order a retrial on a broader range of offences than those of which the jury could have convicted the appellant "on the indictment", and how such a provision might be framed.

Paragraph 9.95

Consultation Question 44.

18.44 We provisionally propose where the Court of Appeal Criminal Division quashes a conviction, and the jury had, as a result of that conviction, delivered a not guilty verdict on a lesser alternative charge, the Court should have a power to quash that acquittal:

(1) in order to enable that alternative charge to be available to a jury in a retrial on the conviction which has been quashed; or

(2) so that it might direct a retrial on the alternative charge.

Do consultees agree?

Paragraph 9.96

Consultation Question 45.

18.45 We invite consultees' views on whether, where it has ordered a retrial, the Court of Appeal Criminal Division should have the power to give leave to arraign out of time where it remains in the interests of justice for there to be a retrial, despite any failure by the prosecution to act with all due expedition.

If the Court were to have such a power, we provisionally propose that any failure by the prosecution to act with all due expedition should be a factor for the Court to consider when deciding whether to grant leave to arraign out of time.

Do consultees agree?

Paragraph 9.105

Consultation Question 46.

18.46 We invite consultees' views on amending the law so that where the Court of Appeal Criminal Division ("CACD") orders a retrial, a failure to arraign within two months without obtaining an extension from the CACD would not render a retrial a nullity.

We invite consultees' views as to whether such a change should have retrospective effect, so that existing convictions could not be challenged purely on the basis that leave to arraign out of time was not obtained.

Paragraph 9.123

Consultation Question 47.

18.47 We invite consultees' views as to whether the maximum sentence available to a court at a retrial following a successful appeal against conviction should be limited to that imposed at the first trial, when the sentence at the original trial reflected the defendant's guilty plea.

Paragraph 9.135

Consultation Question 48.

18.48 We provisionally propose that where the Court of Appeal Criminal Division quashes a finding of not guilty by reason of insanity, it should have a power to substitute a finding of not guilty of an alternative offence by reason of insanity.

Do consultees agree?

Paragraph 9.147

Consultation Question 49.

18.49 We provisionally propose that where the Court of Appeal Criminal Division quashes a finding that an appellant who was unfit to plead did the act or made the omission charged, it should have a power to substitute a finding that the appellant did the act or made the omission amounting to an alternative offence.

Do consultees agree?

Paragraph 9.148

Consultation Question 50.

18.50 We provisionally propose that the Court of Appeal Criminal Division be given a power to order a further "trial of the facts" where the appellant is unfit to stand trial, but the findings of the jury are unsafe.

Do consultees agree?

Paragraph 9.155

Consultation Question 51.

18.51 We provisionally propose that the Court of Appeal Criminal Division should be given a power to order an appellant to stand trial where it finds that the findings of the jury in a "trial of the facts" are unsafe and the appellant is now fit to stand trial.

Do consultees agree?

Paragraph 9.156

Consultation Question 52.

18.52 We provisionally propose that where the Court of Appeal Criminal Division quashes a verdict of not guilty by reason of insanity, it should have the power to order a retrial.

Do consultees agree?

Paragraph 9.158

Consultation Question 53.

18.53 We invite consultees' views on how the law governing appeals based on a development of the law might be reformed, in particular to enable appeals where a person may not have been convicted of the offence (or of a comparable offence) had the corrected law been applied at their trial.

Paragraph 10.148

Consultation Question 54.

18.54 We provisionally propose that, in cases of magistrates' court convictions, the Crown Court should be able to hear an appeal upon a reference by the Criminal Cases Review Commission when the convicted person has died.

Do consultees agree?

Paragraph 11.33

Consultation Question 55.

18.55 We provisionally propose that the predictive "real possibility" test applied by the Criminal Cases Review Commission for referring a conviction should be replaced with a non-predictive test.

Do consultees agree?

Paragraph 11.133

Consultation Question 56.

18.56 We provisionally propose that the Criminal Cases Review Commission should refer a case to the appellate court when it considers that a conviction may be unsafe.

Do consultees agree?

We invite consultees' views on any alternative non-predictive referral tests.

Paragraph 11.169

Consultation Question 57.

18.57 We provisionally propose that the current test applied by the Criminal Cases Review Commission for referring a sentence – that there is a real possibility that the appellate court will not uphold the sentence – should be retained.

Do consultees agree?

Paragraph 11.181

Consultation Question 58.

18.58 In order to reflect the independence of the Criminal Cases Review Commission ("CCRC"), we provisionally propose that the power of the Court of Appeal Criminal Division ("CACD") to direct the CCRC to undertake an investigation on its behalf should be replaced with a power to request an investigation.

We provisionally propose that the conditions for the CACD to refer a matter to the CCRC for investigation should be relaxed so that the CACD can make use of this power in a wider range of circumstances.

We provisionally propose that the power to request the CCRC to undertake an investigation on its behalf should be exercisable by a single judge.

Do consultees agree?

Paragraph 11.201

Consultation Question 59.

18.59 We provisionally propose that the requirement that there must have been a first appeal or an unsuccessful application for leave to appeal before the Criminal Cases Review Commission can refer a case should not apply to appeals against conviction in trials on indictment.

Do consultees agree?

Paragraph 11.208

Consultation Question 60.

18.60 We provisionally propose that the replacement for the "real possibility" test applied by the Criminal Cases Review Commission for referring a conviction should not be subject to a requirement for fresh evidence or argument.

Do consultees agree?

Paragraph 11.223

Consultation Question 61.

18.61 We provisionally propose that the Criminal Cases Review Commission should retain the discretion not to refer a case.

Do consultees agree?

Paragraph 11.230

Consultation Question 62.

18.62 We provisionally propose that the Criminal Cases Review Commission's powers to seek an order for disclosure and retention of material under section 18A of the Criminal Appeal Act 1995 should be extended to cover public bodies.

Do consultees agree?

Paragraph 11.248

Consultation Question 63.

18.63 We invite consultees' views as to whether the restriction on the Criminal Cases Review Commission's power to obtain material held in relation to the Home Secretary's former power to refer a case to the Court of Appeal Criminal Division should be revoked.

Paragraph 11.254

Consultation Question 64.

18.64 We invite consultees' views as to whether the law should be reformed to enable the Criminal Cases Review Commission to explain publicly a decision not to refer a case.

Paragraph 11.263

Consultation Question 65.

18.65 We provisionally propose that the requirement for the Criminal Cases Review Commission ("CCRC") to follow the practice of the Court of Appeal Criminal Division should be replaced with provision that in exercising its discretion to refer a case, the CCRC may have regard to any practice of the relevant appellate court.

Do consultees agree?

Paragraph 11.307

Consultation Question 66.

18.66 We invite consultees' views on whether changes are needed to the legislation governing the qualifications and terms of appointment of Commissioners of the Criminal Cases Review Commission.

Paragraph 11.340

Consultation Question 67.

18.67 We provisionally propose that the Criminal Cases Review Commission should be subject to inspection by one of the criminal justice inspectorates. We think there is a strong case for HM Crown Prosecution Service Inspectorate, which inspects the Crown Prosecution Service and the Serious Fraud Office, to take on this role.

Do consultees agree?

Paragraph 11.350

Consultation Question 68.

18.68 We invite consultees' views on whether applicants to the Criminal Cases Review Commission ("CCRC") should be able to challenge decisions of the CCRC in the First-tier Tribunal.

We provisionally propose that any mechanism to challenge decisions of the CCRC relating to the investigation or reference of a case should be limited to judicial review grounds.

Do consultees agree?

Paragraph 11.358

Consultation Question 69.

18.69 We provisionally propose that leave of the Court of Appeal Criminal Division should continue to be required for an appellant to argue any grounds of appeal not related to the reasons given by the Criminal Cases Review Commission for referring a case.

Do consultees agree?

Paragraph 11.369

Consultation Question 70.

18.70 We provisionally propose that it should be possible for an appeal to be heard upon a reference by the Criminal Cases Review Commission ("CCRC") without an appellant, where there does not appear to be any person with a sufficient interest in the outcome to take forward the appeal, and:

(1) the convicted person cannot be located;

(2) the convicted person has died; or

(3) there is some other reason why the convicted person cannot take forward the appeal.

We provisionally propose that the CCRC should only be empowered to refer a case in such circumstances where it considers that there is a compelling public interest in the appeal being heard.

We provisionally propose that in such cases, the Registrar of Criminal Appeals should have the power to appoint legal representation to represent the convicted person's interests for the purposes of the appeal.

Do consultees agree?

Paragraph 11.377

Consultation Question 71.

18.71 We provisionally propose that the provisions for appeals against so-called "terminating rulings" should be retained but that the uncommenced provisions in sections 62 to 66 of the Criminal Justice Act 2003, which provide for prosecution appeals against evidentiary rulings, should not be brought into effect and should instead be repealed.

Do consultees agree?

Paragraph 12.92

Consultation Question 72.

18.72 We invite consultees' views on whether a third party should have the right to appeal against decisions or rulings made in the course of a trial where unless they were to appeal forthwith, they would have no other adequate remedy in respect of the decision or ruling; and the decision or ruling is one:

(1) which affects the liberty of the third party; or

(2) which would amount to a contravention of their rights under the European Convention on Human Rights.

Paragraph 12.120

Consultation Question 73.

18.73 We provisionally propose that there should be no right to appeal against:

(1) a refusal to impose reporting restrictions; or

(2) a decision to lift reporting restrictions.

Do consultees agree?

Paragraph 12.133

Consultation Question 74.

18.74 We invite consultees' views on the law relating to appeals concerning bail decisions. We invite views particularly on whether the time limit for detaining a person pending a prosecution appeal against a grant of bail should be reduced.

Paragraph 12.159

Consultation Question 75.

18.75 We provisionally propose that the list of prosecuting bodies able to appeal against a decision to grant bail should be reviewed and updated, and that the Post Office should no longer be included.

Do consultees agree?

Paragraph 12.160

Consultation Question 76.

18.76 We provisionally propose that the prosecution's ability to challenge an acquittal by a magistrates' court by way of judicial review be retained.

Do consultees agree?

Paragraph 13.27

Consultation Question 77.

18.77 We provisionally propose that the prosecution should retain the ability to seek to have an acquittal quashed where there is new and compelling evidence of the commission by the acquitted person of one of a limited number of serious offences (as currently provided for in the double jeopardy provisions in part 10 of the Criminal Justice Act 2003).

Do consultees agree?

Paragraph 13.43

Consultation Question 78.

18.78 We provisionally propose that the list of offences covered by the double jeopardy provisions in part 10 of the Criminal Justice Act 2003 should be extended to include the following:

(1) oral and anal rape, where not currently covered by the provisions;

(2) other penetrative sexual assaults under legislation predating the Sexual Offences Act 2003; and

(3) non-penetrative sexual assaults on children.

Do consultees agree?

We invite consultees' views on whether the list of offences covered by the double jeopardy provisions should be extended to include non-penetrative sexual assaults on adults and/or any other offences.

Paragraph 13.65

Consultation Question 79.

18.79 We invite consultees' views on whether, where it has ordered a retrial under the double jeopardy provisions in part 10 of the Criminal Justice Act 2003, the Court of Appeal Criminal Division ("CACD") should have the power to give leave to arraign out of time where it remains in the interests of justice for there to be a retrial, despite any failure by the prosecution to act with all due expedition.

If the CACD were to have such a power, we provisionally propose that any failure by the prosecution to act with all due expedition should be a factor for the CACD to consider when deciding whether to grant leave to arraign out of time.

Do consultees agree?

We invite consultees' views on amending the law so that where the CACD orders a retrial under the double jeopardy provisions, a failure to arraign within two months without obtaining an extension from the CACD would no longer render a retrial a nullity.

Paragraph 13.70

Consultation Question 80.

18.80 We invite consultees' views on whether the existing law permitting the quashing of an acquittal and an order for retrial under part VII of the Criminal Procedure and Investigations Act 1996 works satisfactorily where at that retrial the defendant would be liable to be convicted of an alternative offence for which they already stand convicted.

Paragraph 13.86

Consultation Question 81.

18.81 We provisionally propose that appeals to quash a tainted acquittal under part VII of the Criminal Procedure and Investigations Act 1996 should be transferred from the High Court to the Court of Appeal Criminal Division ("CACD").

Do consultees agree?

We invite consultees' views as to whether the CACD should be able to quash an acquittal where it is satisfied, to the criminal standard, that a criminal offence has been committed that involves interference with the course of justice, and it is likely that, but for the interference or intimidation, the acquitted person would not have been acquitted.

Paragraph 13.129

Consultation Question 82.

18.82 We invite consultees' views as to how far the tainted acquittal provisions in part VII of the Criminal Procedure and Investigations Act 1996 and the double jeopardy provisions in part 10 of the Criminal Justice Act 2003 might be consolidated.

Paragraph 13.137

Consultation Question 83.

18.83 We provisionally propose that the right to refer a point of law to the Court of Appeal Criminal Division following an acquittal should remain with the Attorney General.

Do consultees agree?

Paragraph 13.161

Consultation Question 84.

18.84 We provisionally propose that a reference on a point of law following acquittal should be subject to a time limit of 28 days, subject to a right to apply for leave to make a reference out of time where it is in the interests of justice.

Do consultees agree?

Paragraph 13.166

Consultation Question 85.

18.85 We provisionally propose that the Attorney General and the acquitted person should have the same rights to appeal against the Court of Appeal Criminal Division's judgment following a reference on a point of law as the prosecution and defendant would have on an appeal against conviction.

Do consultees agree?

Paragraph 13.170

Consultation Question 86.

18.86 We provisionally propose that the prosecution should not have a right to appeal against a defendant's acquittal in the Crown Court on a point of law.

Do consultees agree?

Paragraph 13.188

Consultation Question 87.

18.87 We provisionally propose that appeals to the Supreme Court should continue to be limited to those which raise an arguable point of law of general public importance which ought to be considered by the Supreme Court.

Do consultees agree?

Paragraph 14.88

Consultation Question 88.

18.88 We provisionally propose that the Supreme Court should be given a power to remit a case back to the Court of Appeal Criminal Division or the High Court so that the Supreme Court's answer to the question of law can be applied to the facts of the case, and so that the lower court can address any outstanding grounds of appeal.

Do consultees agree?

Paragraph 14.89

Consultation Question 89.

18.89 We provisionally propose that the Supreme Court should be able to grant leave to appeal where the Court of Appeal Criminal Division or High Court has not certified a point of law of general public importance.

Do consultees agree?

Paragraph 14.96

Consultation Question 90.

18.90 We provisionally propose that retention periods should be extended to cover at least the full term of a convicted person's sentence (meaning, for a person sentenced to life imprisonment, the remainder of their life).

Do consultees agree?

We invite consultees' views on whether retention periods should be extended further, and for how long.

Paragraph 15.118

Consultation Question 91.

18.91 We provisionally propose that the retention period for children should be extended to at least the end of their sentence or at least six years after they turn 18 years old, whichever is longest.

Do consultees agree?

Paragraph 15.120

Consultation Question 92.

18.92 We provisionally propose that unauthorised destruction, disposal or concealment of retained evidence should be a specific criminal offence.

Do consultees agree?

We invite consultees' views on the scope of such an offence.

Paragraph 15.134

Consultation Question 93.

18.93 We invite consultees' views on whether responsibility for long-term storage of forensic evidence should be transferred to a national Forensic Archive Service.

Paragraph 15.147

Consultation Question 94.

18.94 We provisionally propose that a statutory regime governing the post-trial disclosure duty should encompass the following principles.

(1) A police officer must disclose to the convicted person or to a Crown prosecutor any material which comes into their possession which might afford arguable grounds for contending that a conviction is unsafe or which might afford grounds for an appeal against sentence.

(2) A prosecutor must disclose to the convicted person any material which comes into their possession which might afford arguable grounds for contending that a conviction is unsafe or which might afford grounds for an appeal against sentence, unless there is a compelling reason of public interest.

(3) Where there is a compelling reason not to make disclosure to the convicted person or their legal representatives under (2), the prosecutor must disclose the material to the Criminal Cases Review Commission and notify the convicted person that they have made a disclosure to the Commission of material which is relevant to their conviction.

(4) A compelling reason would include material subject to Public Interest Immunity or where disclosure is prevented by any obligation of secrecy or other limitation on disclosure.

(5) Where a police officer or prosecutor considers that there is a real prospect that further inquiries will reveal material which might afford grounds for contending that a conviction is unsafe or grounds for an appeal against sentence, then there is a duty to make reasonable inquiries or to ensure that reasonable inquiries are made.

Do consultees agree?

Paragraph 15.171

Consultation Question 95.

18.95 Where a request is made for material which might afford grounds for an appeal against conviction or sentence, we provisionally propose that the following principles should apply:

(1) Where it is possible to undertake non-destructive tests on material, the convicted person should be entitled to access to the material for the purposes of testing.

(2) Where tests are proposed which are destructive of the material, but where testing would not substantially reduce the amount of material available for future testing, the convicted person should be entitled to access to some material for the purposes of testing.

(3) The police should have the right to restrict access to material to the convicted person's legal representatives or to accredited testing facilities.

Do consultees agree?

Paragraph 15.184

Consultation Question 96.

18.96 We invite consultees' views on whether provision could and should be made to enable disclosure of material for the purposes of responsible journalism to reveal a possible miscarriage of justice.

Paragraph 15.197

Consultation Question 97.

18.97 We provisionally propose that where a person is sentenced to a term of imprisonment, audio recordings and transcripts of their trial should be retained for at least the duration of the sentence (including the time where the person is liable to be recalled to prison). Where a person is sentenced to life imprisonment, audio recording and transcripts of their trial should be retained for the remainder of their life.

Do consultees agree?

Paragraph 15.250

Consultation Question 98.

18.98 We provisionally propose that legal advisers should be able to access audio recordings of the defendant's trial in order to obtain a non-admissible transcript for the purposes of investigating whether a case is suitable for appeal.

Do consultees agree?

Paragraph 15.270

Consultation Question 99.

18.99 We provisionally propose that the test for compensation following a wrongful conviction should not require an exonerated person to show beyond reasonable doubt that they are factually innocent, but should require them to show on the balance of probabilities that they are factually innocent.

Do consultees agree?

We invite consultees' views on who should decide on compensation.

Paragraph 16.86

Consultation Question 100.

18.100 We invite consultees' views on whether compensation for a miscarriage of justice should be available to those whose conviction was quashed on an in-time appeal.

Paragraph 16.95

Consultation Question 101.

18.101 We provisionally propose that where a person's conviction is quashed, and they can demonstrate to the requisite standard that they did not commit the offence, they should be eligible for compensation whether or not this was the reason for the Court of Appeal Criminal Division quashing their conviction.

Do consultees agree?

Paragraph 16.100

Consultation Question 102.

18.102 We provisionally propose that victims of miscarriages of justice should be entitled to support in addition to financial compensation.

Do consultees agree?

Paragraph 16.145

Consultation Question 103.

18.103 We provisionally propose that when a conviction is quashed, HM Courts and Tribunals Service should liaise with the relevant police service to ensure that the Police National Computer is updated to remove the relevant conviction.

Do consultees agree?

Paragraph 16.152

Consultation Question 104.

18.104 We provisionally propose that where there is evidence of a widespread problem calling into question the safety of a number of convictions, a review of convictions should normally fall to the Criminal Cases Review Commission, if necessary using its powers to require other public bodies to appoint an investigator.

Do consultees agree?

We invite consultees' views on any other measures which might be put in place to enable the correction of multiple miscarriages of justice when a systemic issue is identified.

Paragraph 17.72

Consultation Question 105.

18.105 We provisionally propose there should be greater use of inquiries following a proven miscarriage of justice.

Do consultees agree?

Paragraph 17.108

Consultation Question 106.

18.106 We invite consultees' views on any reforms which might reduce the opportunities for a miscarriage of justice to occur, and, particularly:

(1) on the relationship between the test applied on a submission of no case to answer and the test of safety applied by the Court of Appeal Criminal Division; and

(2) on whether any particular categories of evidence contribute to the occurrence of miscarriages of justice, and how these problems might be addressed.

Paragraph 17.113

Consultation Question 107.

18.107 We invite consultees' views if they believe or have evidence or data to suggest that any of our provisional proposals or open questions could result in advantages or disadvantages to certain groups, whether or not those groups are protected under the Equality Act 2010 (age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation), and which those consultees have not already raised in relation to other consultation questions.

Paragraph 17.136

Consultation Question 108.

18.108 We invite consultees' views in relation to any issues relevant to the criminal appeals project that they have not dealt with in answer to previous consultation questions.

Paragraph 17.137

Appendix 1: Case studies, pre-PACE

1.1 In the 1980s, significant changes were introduced to police procedures and legislation relating to prosecutions. These were enacted following the Royal Commission on Criminal Procedure, which in turn followed the inquiry by Sir Henry Fisher into the quashed convictions of three young people for the murder of Maxwell Confait (see paragraphs 29 to 37 below).

(1) The Police and Criminal Evidence Act 1984 ("PACE") among other things set up the Police Complaints Authority (now the Independent Office for Police Conduct); reformed the law on admissibility to make confession evidence presumptively inadmissible unless it could be proven not to have been obtained by oppression or in circumstances likely to render any confession unreliable; gave arrested people at a police station a right to obtain legal advice at any time, and introduced a requirement for audio recording of certain interviews of suspects taking place at police stations.[1]

(2) Code of Practice C issued under PACE ("PACE Code C") imposed requirements for the detention, treatment and questioning of persons by police officers.

(3) In 1988, Pace Code E imposed requirements for the recording of interviews in police custody.[2]

(4) The Prosecution of Offences Act 1985 set up the Crown Prosecution Service ("CPS"), removing responsibility for the prosecution of most offences from the police to the CPS.

1.2 The following cases concern wrongful convictions predating the main implementation of PACE in 1985-86, and associated reforms.

TIMOTHY EVANS (CONVICTED 1950)[3]

1.3 The conviction and execution of Timothy Evans is now generally recognised as one of the most notorious single miscarriages of justice in British legal history. Evans was convicted of the murder of his daughter Geraldine in January 1950. An appeal to the Court of Criminal Appeal was unsuccessful and he was executed in March 1950.

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1 PACE 1984, s 60(1). This provision required the Home Secretary to "to make an order requiring the tape-recording of interviews of persons suspected of the commission of criminal offences, or of such descriptions of criminal offences as may be specified in the order".

2 The Code issued in 1988 regulating the manner in which interviews were to be recorded did not become mandatory until 1 January 1992 (Police and Criminal Evidence Act 1984 (Tape-recording of Interviews) (No. 1) Order 1991).

3 Section informed by The Case of Timothy John Evans (1966) Cmnd 3101; *R (Westlake) v Criminal Cases Review Commission* [2004] EWHC 2779 (Admin); L Kennedy, *Thirty-Six Murders and Two Immoral Earnings* (2002), pp 21-40.

1.4 In November 1949, Evans had told police that he had accidentally killed his wife Beryl by giving her a drink intended to induce an abortion, and that he had disposed of her body in a sewer outside their home in 10 Rillington Place, Notting Hill, West London. When police examined the drain, they found no body.

1.5 When re-questioned, Evans explained that he had given this account to protect his neighbour, John Christie. Christie, he said, had offered to perform an abortion on Beryl. He said that he and Beryl had agreed to accept Christie's offer, but that, upon returning home, Christie informed him that she had died as a result of the procedure. Christie had told Evans that he would dispose of her body and arrange for a couple to look after Geraldine.

1.6 Police searched 10 Rillington Place and discovered the bodies of Beryl and Geraldine in an outhouse. Evans subsequently confessed to strangling both. In accordance with a practice that only one prosecution for a capital offence would be brought at a time, Evans was prosecuted for Geraldine's murder, on the basis that the same person had killed both Beryl and Geraldine. At trial, Evans withdrew his confessions and the defence sought to show that Christie was the murderer.

1.7 Three years after Evans' execution in 1950, a new tenant who had moved into Christie's flat found the bodies of three women hidden in his kitchen. Further searching found the body of Christie's wife under floorboards, and the bodies of two women buried in the garden. Christie admitted to murdering all six. Two of the women had been murdered years before Beryl and Geraldine Evans; four after Evans' execution. Christie also admitted to murdering Beryl – though not Geraldine.

1.8 After Christie's conviction and execution Home Secretary Sir David Maxwell-Fyfe commissioned an inquiry by John Scott Henderson, the Recorder of Portsmouth. Henderson concluded that Christie's confessions were unreliable because they were made to support his defence of insanity. Evans, he held, was properly convicted of Geraldine's murder and had also murdered Beryl.

1.9 After the publication of Ludovic Kennedy's *10 Rillington Place* in 1961, Home Secretary Frank Soskice commissioned a further inquiry, by Sir Daniel Brabin in 1965. This concluded that Christie had killed Geraldine (which he had denied) but had not killed Beryl (which he had admitted).[4] Evans, therefore, although guilty of Beryl's murder, had been wrongly convicted of murdering Geraldine.

1.10 Sir Julian Knowles has described Brabin's findings as "nothing short of bizarre", saying "it appeared that a lawyer just could not contemplate that an innocent man had been executed".[5]

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4 The Case of Timothy John Evans (1966) Cmnd 3101, pp 149-157.

5 J Knowles, *The Abolition of the Death Penalty in the United Kingdom: How it Happened and Why it Matters* (2015) p 37.

1.11 On the basis that Brabin's report exonerated Evans of the murder of which he had been convicted, however, the Home Secretary, Rt Hon Roy Jenkins MP granted him a full pardon in October 1966.[6]

1.12 In 2003, the Home Office awarded Evans' sisters Mary Westlake and Eileen Ashby compensation for the miscarriage of justice under the *ex gratia* scheme then in operation (see Chapter 16).[7] The independent assessor concluded that there was no evidence to implicate Evans in the murder of his wife and she was probably murdered by Christie.

1.13 This was acknowledged by the High Court in *R (Westlake) v Criminal Cases Review Commission*, which upheld the Criminal Cases Review Commission's ("CCRC") decision not to refer the conviction to the Court of Appeal Criminal Division ("CACD") on the basis that Evans had received a free pardon and had therefore been exonerated and, taking into account the time and cost of an appeal, it would not be a reasonable decision to refer.

1.14 The High Court did, however, state:[8]

> The conviction of Timothy Evans is now recognised to have been one of the most notorious, if not the most notorious, miscarriages of justice...
>
> Timothy Evans has been exonerated of the murders of his wife and child. It is recognised that he committed neither murder.

DEREK BENTLEY (CONVICTED 1952)[9]

1.15 Nineteen-year-old Derek Bentley was executed in 1953 for the murder of PC Sidney Miles. PC Miles was shot by Bentley's co-accused Christopher Craig (who was only 16, and therefore avoided the death penalty). Bentley, who had already been detained, was said to have shouted the ambiguous phrase "Let him have it" to Craig before the shooting, although Bentley denied this. On convicting him, the jury recommended mercy, but Home Secretary Sir David Maxwell-Fyfe refused to commute the then mandatory sentence of death.

1.16 In 1991, a film about the murder and Bentley's trial and execution, *Let Him Have It*, was released. In 1992, the Home Secretary, Rt Hon Kenneth Clarke, refused to recommend a pardon for Bentley. He concluded that:

> Nothing has emerged from my review of this case which establishes Derek Bentley's innocence … It has been the long established policy of successive Home Secretaries that a Free Pardon in relation to a conviction for an indictable offence should be granted only if the moral as well as technical innocence of the convicted

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6 *Hansard* (HC), 18 October 1966, vol 734, col 38.

7 *R (Westlake) v Criminal Cases Review Commission* [2004] EWHC 2779 (Admin), at [13], by Stanley Burnton J.

8 Above, at [4] and [35].

9 Section informed by *R v Secretary of State for the Home Department, ex p Bentley* [1994] QB 349, DC (especially 355G-356A, by Watkins LJ); and *R v Bentley (dec'd)* [2001] 1 Cr App R 21, CA.

person can be established. I do not believe that is the case on either point in relation to Derek Bentley.

1.17 This was the subject of an application for judicial review brought by Bentley's sister. The High Court held that although the decision not to recommend a full pardon was justified, the Home Secretary – who had stated that he considered that Bentley should not have been hanged – had failed to consider whether he could alter the sentence. He had been wrong to conclude that he could not substitute his own judgment for that of the Home Secretary at the time. The matter was remitted to the new Home Secretary, Michael Howard, who recommended a pardon limited to sentence.

1.18 The CCRC received an application for a review of the conviction upon its creation in April 1997, and duly referred it to the CACD. In 1998, the Court quashed the conviction on the basis that the jury had been misdirected in two respects – the judge had failed to direct the jury that they needed to be sure that Bentley knew Craig had the weapon, and on the issue of whether Bentley had withdrawn from the joint enterprise at the time. In addition, the judge had placed the jury under undue pressure to convict. Consequently, Bentley had not received a fair trial.

1.19 The CACD concluded:

> The killing of PC Miles had, very understandably, aroused widespread public sympathy for the victim and his family and a strong sense of public outrage at the circumstances of his death. This background made it more, not less, important that the jury should approach the issues in a dispassionate spirit if the defendants were to receive a fair trial, as the trial judge began by reminding them. In our judgment, however, far from encouraging the jury to approach the case in a calm frame of mind, the trial judge's summing up had exactly the opposite effect. We cannot read these passages as other than a highly rhetorical and strongly-worded denunciation of both defendants and of their defences.
>
> The language used was not that of a judge but of an advocate (and it contrasted strongly with the appropriately restrained language of prosecuting counsel). Such a direction by such a judge must in our view have driven the jury to conclude that they had little choice but to convict. …
>
> The effect was to deprive him of the protection which jury trial should have afforded. It is with genuine diffidence that the members of this court direct criticism towards a trial judge widely recognised as one of the outstanding criminal judges of this century. But we cannot escape the duty of decision. In our judgment the summing up in this case was such as to deny the appellant that fair trial which is the birthright of every citizen.

1.20 The Bentley judgment established that when considering whether a conviction is unsafe on the basis that the appellant did not receive a fair trial, fairness is to be judged by modern standards.

DAVID COOPER AND MICHAEL MCMAHON (CONVICTED 1970)[10]

1.21 Michael McMahon, David Cooper and Patrick Murphy were convicted in March 1970 of the murder of Luton sub-postmaster Reginald Stevens during a botched robbery in September 1969. They were convicted on the testimony of Alfred Matthews, whose car had been involved in the robbery, who had a previous conviction for robbing a Post Office, and who was identified by witnesses as driving the getaway vehicle. Matthews was given immunity in return for his testimony, on the basis that he only acted as a lookout at the Post Office – some distance from where the murder was carried out – and was not party to the robbery or murder.

1.22 McMahon, Cooper and Murphy unsuccessfully appealed against their convictions in 1971, the CACD rejecting evidence not disclosed at trial that two witnesses had identified Matthews, not Murphy, as driving the gang away from the site of the murder. It did so on the basis that the jury must have believed that Matthews was more involved than he admitted, and therefore must have accepted his inculpation of McMahon, Cooper and Murphy as true, while rejecting his account of his limited involvement.

1.23 In 1972, the Home Secretary referred Murphy's conviction back to the CACD after the BBC disclosed extensive alibi evidence that he was in London at the time of the murder. The CACD, having heard evidence from one of these witnesses, found the witness to be a "man of good character" and therefore "abandon[ed] our somewhat cynical original view of this story", and quashed Murphy's conviction in November 1973.

1.24 In 1974, the Home Secretary referred the convictions of Cooper and McMahon in the light of Murphy's acquittal. The prosecution were forced to disclose evidence showing that Matthews had received £2,000 reward money. However, Cooper and McMahon's appeal was rejected in 1975, on the basis (i) that the jury must have believed that Matthews was more involved than he had admitted and (ii) that Matthews' identification of Murphy may have been mistaken rather than lying. (As Woffinden points out, these are mutually incompatible: if Matthews was fully involved, he knew whether or not Matthews was his accomplice.)

1.25 In 1976 the Home Secretary referred the case for a third time. The officer in charge of the case had now been charged with corruption and a new alibi witness had come forward for Cooper. The CACD heard evidence from Matthews. The judges concluded that "on the vital part of the story he was clearly telling the truth" and upheld the convictions again in July 1976.

1.26 In 1980 Ludovic Kennedy published *Wicked Beyond Belief*, a book about the case. Within three weeks, Home Secretary William Whitelaw announced that because of continued unease about the case, he had ordered the immediate release of Cooper and McMahon under the Royal Prerogative of Mercy.

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10 Section informed by L Kennedy, *Thirty-Six Murders and Two Immoral Earnings* (2002), pp 157-171; B Woffinden, *Miscarriages of Justice* (1987) (especially pp 138 and 141); *R v Cooper* (1975) 61 Cr App R 215, CA; *R v McMahon* (22 July 1976) CA (unreported), [1976] Lexis Citation 63; and *R v Cooper* [2003] EWCA Crim 2257 (especially at [26] and [28], by Kennedy LJ).

1.27 When the CCRC was set up in 1997, it inherited an application for review of Cooper and McMahon's convictions, although Cooper had died in 1995. McMahon died in 1999 while the CCRC was considering the application. In 2001, the CCRC referred their case to the CACD.

1.28 In 2003, the CACD quashed Cooper and McMahon's convictions. First, police had not disclosed that a witness who had admitted owning the gun used in the murder, (i) was a police informant, (ii) had given evidence to the police within 24 hours of the murder, suggesting close involvement, and (iii) had named a number of people, but not Cooper, McMahon or Murphy. Second, the Court "respectfully disagree[d] with the Court of Appeal's assessment in 1975" that the evidence exculpating Murphy did not affect his reliability in respect of Cooper and McMahon. In addition, by giving Matthews the opportunity to argue "mistaken identity" in 1976, that Court "came very near to putting the Court in 1976 in the position of the primary decision maker in relation to a different case" to that at trial. Third, undisclosed evidence showed that a witness statement given by Matthews' wife ahead of trial, consistent with her testimony at trial where she supported his account of limited involvement, differed from two previous statements. Fourth, the jury had no opportunity to evaluate the evidence from two eyewitnesses who would have placed Matthews at the scene. Fifth, the subsequent conviction for corruption of the officer in charge of the investigation added to the sense of unease given the relationship between that officer and Matthews – he had recommended that Matthews receive the largest share of the reward money, and on some accounts had taken a "cut" of Matthews', and possibly others', rewards.

COLIN LATTIMORE, RONNIE LEIGHTON AND AHMET SALIH (CONVICTED 1972)[11]

1.29 In 1972, Maxwell, or Michelle, Confait was murdered in Lewisham, South East London. Confait's body was discovered following a house fire. However, the cause of death was strangulation. The timing of the murder, and how long before the fire it took place, became key issues because new evidence would undermine the police's understandable assumption that the fire was started immediately after the murder, and by the person or persons involved.

1.30 Two days after the murder, there were a series of fires in the locality. Police arrested an 18-year-old man, Colin Lattimore, who admitted starting one of these fires with his friends Ronnie Leighton, who was 15, and Ahmet Salih, who was 14. Lattimore had severe learning difficulties. The three were interviewed without any other adult being present and in the course of these interrogations, Leighton and Lattimore admitted to the murder of Confait.

1.31 At trial in November 1972, all three alleged that they had been assaulted by a police officer. Lattimore was found guilty of manslaughter by reason of diminished responsibility and ordered to be detained indefinitely under the Mental Health Act 1959. Leighton was found guilty of murder and sentenced to detention at Her

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11 Section informed by Report of an inquiry by the Hon Sir Henry Fisher into the circumstances leading to the trial of three persons on charges arising out of the death of Maxwell Confait and the fire at 27 Doggett Road, London SE6 (1977-78) HC 90; *R v Lattimore* (1976) 62 Cr App R 53, CA (especially 62, by Scarman LJ); Royal Commission on Criminal Procedure (1981) Cmnd 8092; and *Hansard* (HC), 4 August 1980, vol 990, col 23.

Majesty's pleasure. Salih was found guilty of burglary and arson and sentenced to four years' detention. An appeal was rejected in 1973.

1.32 A documentary about the case was broadcast by ITV in November 1974. The Home Secretary referred the case back to the CACD in June 1975. In October 1975, the CACD quashed the convictions, and declared all three appellants "innocent". The next month the Home Secretary Rt Hon Roy Jenkins MP announced an inquiry by Sir Henry Fisher, a retired judge.

1.33 Sir Henry found that the murder must have taken place several hours before the fire, and at a time for which Lattimore had a strong alibi. He therefore concluded that Lattimore – who had confessed to the murder – could not have taken part in it, but that Lattimore's confession to the arson was true. He concluded that Lattimore had been persuaded to confess falsely to the murder by Leighton and Salih. He rejected the allegation that the boys had been assaulted by the police officer.

1.34 In 1980, Attorney General Sir Michael Havers QC made a statement in which he said that in January 1980 new information had come into the possession of the Director of Public Prosecutions ("DPP"), who ordered further investigations and subsequently instructed counsel to advise. This report identified another suspect, who had been in prison with Confait; the two had had a relationship. The evidence came from someone who said he had been with this suspect when he killed Confait. Shortly after being interviewed by the investigators, the suspect took his own life.

1.35 Investigation had also revealed that Confait had been killed not, as Sir Henry Fisher had concluded, in the evening before the fire, but before midday.

1.36 The Attorney General said that he was "satisfied that if the evidence now available had been before Sir Henry Fisher he would not have come to the conclusion that any of the three young men was responsible for the death of Confait or the arson".

1.37 The Confait inquiry led to the establishment of the Royal Commission on Criminal Procedure. This recommended a variety of reforms, including the establishment of an independent prosecution service (which was established by the Prosecution of Offences Act 1985); reforms to police procedures (enacted in and under PACE); and the creation of a Police Complaints Authority.

THE "SHREWSBURY 24" (CONVICTED 1973-74)[12]

1.38 In 2021, the CACD quashed the convictions of fourteen pickets who had been convicted of public order offences in relation to a construction workers' strike in 1972. The men had been convicted in three separate trials. Only the first of these had been the subject of an appeal following conviction (three of the men, Des Warren, Ricky Tomlinson and John McKinsie Jones, had convictions for affray quashed, but their convictions for unlawful assembly were upheld).

1.39 In the proceedings, handwritten witness statements had been replaced with substituted statements (and the originals destroyed). A note revealed that the substitute statements had been taken once the police were able to show press

[12] Section informed by *R v Warren* [2021] EWCA Crim 413.

photographs to the witnesses and once officers responsible for taking the statements knew what prosecutors were seeking to prove. The defence were not alerted to this fact, and consequently were unable to challenge witnesses on any discrepancies between their initial account and that given at trial. There was also evidence that additional allegations had been added to witnesses' statements without their knowledge or permission.

1.40 A second ground of appeal, relating to potential prejudice caused by a television programme broadcast during the first trial, which discussed the strike, and contained footage of four of the men on trial, was not upheld.

THE "BIRMINGHAM SIX" (CONVICTED 1975)[13]

1.41 On 21 November 1974, bombs exploded in two pubs in the centre of Birmingham. Twenty-one people were killed and 182 were injured.

1.42 Hugh Callaghan, Patrick Joseph Hill, Gerard Hunter, Richard McIlkenny, William Power and John Walker were arrested in Heynsham, where they were about to board a ferry to Belfast. The men had boarded a train from Birmingham before the bombs had detonated and were travelling to Belfast for the funeral of James McDade. McDade had been killed when a bomb he was planting in Coventry prematurely exploded. He was a member of the Provisional IRA. The six men all knew McDade or his family but denied knowing of his involvement in paramilitary activity.

1.43 Photographs taken following their arrests showed signs of injuries, and at trial all six gave evidence that they had been subjected to physical violence by the police (and prison officers).

1.44 As well as confessions made by the men while in custody, the prosecution used evidence from Dr Frank Skuse (see Appendix 3 at paragraphs 37 to 38) that the hands of the men had tested positive for nitroglycerine.

1.45 The Six were convicted in 1975. A seventh man was convicted of conspiracy to cause explosions. The convictions were upheld by the CACD in 1976.

1.46 In 1977, following their first unsuccessful appeal, they attempted to bring a civil claim for damages against West Midlands Police. The claim was struck out in January 1980 by the Court of Appeal Civil Division (see Chapter 2, paragraph 2.42).

1.47 As discussed at Chapter 2, paragraph 2.40, a second 1988 appeal was unsuccessful. The Lord Chief Justice commented that the "longer the hearing has gone on, the more convinced this court has become that the verdict of the jury was correct".[14]

1.48 In 1990, as a result of further revelations, the Home Secretary referred the case to the CACD for a third time. In 1991, the Crown indicated that it would not defend the

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13 Section informed by *Hunter v Chief Constable of the West Midlands* [1980] QB 283, CA, affirmed in [1982] AC 529; *R v Callaghan* (1989) 88 Cr App R 40, CA; and *R v McIlkenny* [1992] 2 All ER 417, CA.

14 This sentence is paraphrased in the only law report of the judgment (*R v Callaghan* (1989) 88 Cr App R 40, CA) and there are minor variations in subsequent reporting of the words used in court. This wording cited above is taken from Lord Acker, *Hansard* (HL) 14 March 1991, vol 187, col 316.

appeals, and their convictions were quashed. The CACD found that evidence of police misconduct and new scientific evidence both independently rendered the convictions unsafe.

STEFAN KISZKO (CONVICTED 1976)[15]

1.49 In May 1991, the Home Secretary referred the conviction of Stefan Kiszko for the sexually-motivated murder of 11-year-old Lesley Molseed in 1975. Kiszko, a man with intellectual disabilities associated with Klinefelter Syndrome, confessed to the murder after prolonged questioning. Kiszko's first appeal against conviction was dismissed in 1978.

1.50 Following sustained campaigning by Kiszko's mother, in February 1991, the Home Secretary ordered West Yorkshire Police to reinvestigate the case. That review found that Kiszko was infertile and could not have left the semen found on the victim's clothes, which contained live sperm. In fact, West Yorkshire Police had had a sample of Kiszko's semen at the time of trial which could have proved his innocence. Three women who, as children, had alleged that Kiszko had exposed himself to them, which had led to his arrest, admitted that the allegation was false.

1.51 In May 1991, Home Secretary, Rt Hon Kenneth Baker referred Kiszko's conviction to the CACD, and it was quashed in 1992. He died in 1993, two years after his release (he had been bailed pending appeal in 1991).

1.52 In 1994, a detective and a retired forensic scientist, both of whom had worked on the case, were charged with perverting the course of justice. However, the case was stayed by the judge on the basis that the passage of time meant that the men could not have a fair trial.

1.53 In 1999, scientists from the Forensic Science Service extracted DNA from the sperm heads in the retained samples, and were able to obtain a full DNA profile. The profile did not match any profile stored in the National DNA database.

1.54 However, in 2005, Ronald Castree, who had lived near to where Lesley Molseed was abducted, was arrested and his DNA was taken. It matched the sample taken from Lesley Molseed. Castree was convicted of the murder in 2007.

THE "GUILDFORD FOUR" AND THE "MAGUIRE SEVEN" (CONVICTED 1975-77)[16]

1.55 In October 1974, the Provisional IRA detonated bombs at two pubs in Guildford frequented by Army personnel stationed at Pirbright Barracks. The first killed four soldiers and a civilian. The second bomb injured eight people.

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15 Section informed by *R v Kiszko* (1979) 68 Cr App R 62, CA.

16 Section informed by *R v Richardson*, *The Times* 20 October 1989, CA; Return to an address of the Honourable the House of Commons dated 30 June 1994 for a report into the circumstances surrounding the convictions arising out of the bomb attacks in Guildford and Woolwich in 1974 (1994) HC 449; and "In quotes: Blair's apology", *BBC News* (9 February 2005).

1.56 The following month, a bomb was thrown into a pub in Woolwich, South East London. Two people, one a soldier and the other a civilian, were killed.

1.57 The Guildford Four – Paul Hill, Gerry Conlon, Paddy Armstrong and Carole Richardson – came to the attention of the police after an army intelligence officer noticed a likeness between Hill and a woman of whom a photofit image was published in the *Sun* newspaper as a suspect in the Guildford attack. The officer thought that Hill, who had long hair, could have been mistaken for a woman. In fact, the women pictured were not suspects, but victims of the bombing.

1.58 Hill and his friend Conlon were from Belfast but had recently moved to London and were living and working together at the time of the attacks. Patrick Armstrong was also from Belfast and in October and November 1974, he was living in various squats in London with Carole Richardson.

1.59 Under questioning, all four confessed to having participated in the bombings. The Four were convicted of murder in relation to the Guildford bombings. Hill and Armstrong were also convicted of the Woolwich bombing, and Hill of the murder of British soldier Brian Shaw.

1.60 In 1975, four IRA members were involved in a siege in Balcombe Street, Marylebone, in London, following a gun attack on a restaurant in Mayfair. They had bombed the restaurant a few weeks earlier, killing one man and injuring 15 people. The siege lasted six days, and the group became known as the Balcombe Street Gang. The four were found guilty at a trial in 1977 of seven murders, conspiracy to cause explosions, and the false imprisonment of the two people whose flat they had occupied during the siege. Although they had admitted to the Guildford and Woolwich bombings, they were not prosecuted for these. During their trial, the four had instructed their lawyers to draw attention to the fact that four totally innocent people were serving sentences for those attacks. An appeal by the Guildford Four in 1977 was unsuccessful.

1.61 While a further appeal was underway (and adjourned to January 1990), a review of the case by Avon and Somerset Constabulary found evidence of widespread police misconduct in relation to their detention and evidence, following which the Crown stated that it did not wish to defend the convictions. The convictions were quashed in October 1989. In 1994, Hill's conviction for the murder of Shaw was quashed by the Court of Appeal in Belfast. The Court held that the Crown had not been able to disprove beyond reasonable doubt an allegation by Hill that a gun had been pointed into his cell while he was in the custody of Surrey police, and that his confession to Shaw's murder would therefore have been inadmissible.

1.62 The "Maguire Seven" were mostly members of Gerry Conlon's family: his father, Patrick "Guiseppe" Conlon; his aunt, Anne Maguire; her husband, Patrick Maguire; Anne and Patrick's sons Vincent, aged 17, and Patrick Jr, aged 14; Anne's brother Sean Smyth; and family friend Patrick O'Neill. The seven were convicted of handling explosives on the basis of flawed tests identifying the presence of nitro-glycerine on their hands. Guiseppe Conlon died in prison in 1980.

1.63 In 1990, Sir John May, who had been commissioned to undertake an inquiry into the convictions of the Guildford Four, published an interim report on the Maguire

convictions. The Home Secretary, Rt Hon David Waddington MP, referred the convictions of the Maguires back to the CACD, which found the convictions unsafe.

1.64 In 1994, Sir John published his report into the convictions of the Guildford Four, which had been delayed due to legal proceedings against police officers involved. Although the report dismissed claims of a conspiracy, he found that:

(1) Surrey police had arrested Carole Richardson's alibi witness without any investigation to establish whether the alibi was true, and continued to seek to "destroy" the alibi, even when they knew that the underlying basis of it was true.

(2) The police failed to disclose details or the statement of a witness whose statement, if true, provided Gerry Conlon with a "complete" alibi.

(3) There was a failure to disclose evidence from a forensic scientist linking the Woolwich bombing to other attacks in which bombs were thrown into buildings.

(4) Statements relating to attacks by the Balcombe Street gang were amended to exclude references to the Woolwich and Guildford attacks, although this was not an attempt by the Crown to suppress evidence.

(5) The CACD dismissed evidence showing weaknesses in the case against Carole Richardson without considering it objectively because they were satisfied that her confession was voluntary.

1.65 In 2005, Prime Minister Rt Hon Tony Blair MP publicly apologised to Guildford Four and Maguire Seven, saying "they deserve to be completely and publicly exonerated".

JUDITH WARD (CONVICTED 1974)[17]

1.66 In February 1974, nine soldiers were killed, along with the wife and two sons of one of them, when a bomb exploded on a coach taking them to army bases in North-East England. Judith Ward was convicted of their murder and other offences in November 1974.

1.67 Ward suffered from a personality disorder and made a series of false statements suggesting she was involved with the IRA. She had initially been arrested for planting the bomb on the coach. However, on investigation it was found she was 150 miles away. She was therefore instead charged on the basis that she had planned and organised the bombing. Her subsequent appeal found that it was "to the credit of some of those in Northern Ireland who heard what she said that they did not believe her and therefore took no action against her". The case also relied on the same discredited tests used in the Maguire case. However, Ms Ward did not challenge her conviction until 1991.

1.68 It later emerged that the Home Office had independently commissioned reviews of her conviction in 1985, 1987 and 1989, each of which had concluded that there was something wrong with the conviction.

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[17] Section informed by *R v Ward* [1993] 1 WLR 619, CA (especially 691G, by Glidewell, Nolan and Steyn LJJ).

NOEL JONES (CONVICTED 1976)[18]

1.69 Janet Cummins was sexually assaulted, strangled and killed in January 1975 in Mold, North Wales. Noel Jones, an 18-year-old living on a local travellers' site was arrested, questioned and eventually confessed to killing her. Under further questioning, where it was put to him that he could not have pushed Janet's body over a fence, as he had stated, if he were acting alone, he named another man, Michael Orford, as having been involved. On the third day of his trial for murder, Jones changed his plea to guilty of manslaughter, which was accepted, and he was sentenced to 12 years' imprisonment. He did not appeal against his conviction, fearing that his sentence would be increased. There was insufficient evidence to proceed against Orford.

1.70 In 2006, police opened a "cold case" investigation; the intention seems to have been to find evidence against Orford. The investigation did not initially lead to a suspect. However, in 2016, Stephen Hough was arrested for a sexual offence on a 15-year-old girl. When his DNA was taken, it matched samples from the scene of Janet Cummins' death. Hough had been 16 and living locally when Janet was killed. He had been interviewed in 1975 and said that at the time of Janet's disappearance he had been stealing petrol from cars. He was charged with theft and fined by magistrates.

1.71 At Hough's trial, Jones was called as a prosecution witness. He gave evidence that he was not responsible and only confessed due to the pressure he felt at the time. The jury was instructed that they could only convict Hough if they were sure that Jones was not Janet's killer. Hough was convicted of manslaughter, rape and buggery.

1.72 On this basis, Jones appealed against his conviction. The Crown did not oppose the appeal and his conviction was quashed, saying that Jones was "wholly exonerated".

1.73 Following Hough's conviction, the Independent Office for Police Conduct ("IOPC") launched an investigation into the conduct of police officers involved in the conviction. This concluded that there was insufficient evidence that police officers had breached the Judges' Rules that applied before PACE.

THE "BRIDGEWATER FOUR" (CONVICTED 1979)[19]

1.74 In September 1978, 13-year-old newspaper boy Carl Bridgewater was shot at a farmhouse in Stourbridge. Police believed that Carl Bridgewater had been shot after stumbling upon a burglary.

1.75 Cousins Michael and Vincent Hickey, along with Patrick Molloy and James Robinson, were later arrested over a series of armed robberies. During Molloy's questioning, he was presented with a fabricated confession from Vincent Hickey. Faced with this, Molloy confessed that he was present but had been upstairs when Carl Bridgewater was shot. Robinson and Michael and Vincent Hickey were convicted of murder, but Molloy was convicted of manslaughter.

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18 Section informed by Independent Office for Police Conduct, *Operation Willow: An investigation into the conduct of officers from North Wales Police and other forces during a 1976 murder investigation* (2018); *R v Jones* [2019] EWCA Crim 1059 (especially at [26], by Sir Brian Leveson PQBD).

19 Section informed by *R v Hickey* (30 July 1997) CA (unreported), [1997] 7 WLUK 912.

1.76 In 1981, Molloy died in prison. An application for leave to appeal by the Hickeys and Robinson was refused by the CACD. An appeal in 1989, following a reference by the Home Secretary, was also unsuccessful.

1.77 In 1996, the Home Secretary again referred the convictions to the CACD on the basis of fresh evidence showing that Carl Bridgewater's bike contained fingerprints which could not be matched to either Carl or any of the convicted men, and that there had been breaches of the "Judges' rules" in relation to Molloy's questioning. Subsequently, document examiners suggested that the statement purporting to have been made by Vincent Hickey was in the handwriting of one of the investigating officers, and that a signature of Vincent Hickey's was a forgery. The prosecution conceded that there was no explanation other than that Molloy had been telling the truth. The CACD quashed the convictions.

JOHN KAMARA (CONVICTED 1981)[20]

1.78 John Kamara was convicted of the murder of Liverpool bookmaker John Suffield. He was tried jointly with Ray Gilbert, who had changed his plea to guilty during the trial. His original 1983 appeal against conviction was dismissed.

1.79 Upon his arrest Gilbert had confessed and named Kamara as his accomplice. Gilbert subsequently resiled from this confession and pleaded not guilty, but midway through the trial he changed his plea to guilty. During the trial, Gilbert's girlfriend gave evidence that around the time of the murder she had admitted to Gilbert that she had had sex with Kamara, potentially giving Gilbert a reason to implicate Kamara.

1.80 After the trial, Gilbert made a statement to Kamara's solicitor in which he said that his (Gilbert's) cousin was his accomplice.

1.81 In 1988, a man twice told police officers that he was Gilbert's accomplice. An episode of Channel 4's *Trial and Error* in 1997 showed that this man – unlike Kamara – bore a striking resemblance to a photofit image of the accomplice which had been produced with an eyewitness at the time.

1.82 The CCRC referred his case to the CACD on three grounds:

(1) the potential unfairness of the identification evidence;

(2) the failure of the police to disclose over two hundred witness statements, some of which involved possible sightings of suspects; and

(3) the failure to direct the jury as to the special need for caution in respect of admissions that Kamara supposedly made to fellow prisoners while on remand.

1.83 The CACD rejected complaints about the identification procedures, specifically that Kamara "stuck out like a sore thumb", as he was dressed in prison issue clothing and was unkempt and dishevelled while the others on the parade were smartly dressed and well-groomed. Despite evidence from other participants on the parade who

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[20] Section informed by *R v Kamara* (9 May 2000) CA (unreported), [2000] 5 WLUK 171 (especially at pp 1, 6-7, 25 and 28); and "Trial and Error", 17 July 1997, *Channel 4*.

confirmed this – including someone who was now Assistant Director of Social Services at Liverpool City Council – the Court was satisfied that they were mistaken, as it was sure that Kamara's lawyers would have raised this at the trial.

1.84 It did, however, express concern that in his warning about identification evidence, the judge did not explain why there is a particular need for caution, contrary to the instructions laid down in *Turnbull*.[21] It was also concerned that the witness who identified Kamara had previously visited her brother at the same remand centre and therefore might have identified that Kamara was the suspect from his prison-issue clothing. The Court also expressed an "abiding sense of unease" about the consequences of Gilbert's mid-trial change of plea. It found that "by virtue of the accumulation or aggregation of the doubts we have expressed and reasons for them we have come to the firm conclusion that the verdicts of guilty of murder and robbery can no longer be considered safe".

SEAN HODGSON (CONVICTED 1982)[22]

1.85 In December 1979, Theresa De Simone was murdered outside the pub in Southampton where she worked. There was evidence that she had been raped, including a semen sample.

1.86 Sean Hodgson was arrested in relation to an unrelated matter two days later. He had numerous previous arrests, including one for unlawful sexual intercourse, although none for "offences of violence". He was also a pathological liar. While in custody, he named another man as being responsible for Theresa's murder – but that man could be quickly eliminated as his blood group did not match the blood type found in the semen sample.

1.87 In 1980 Hodgson was sentenced to three years' imprisonment for theft, admitting to a large number of minor offences: he could not have committed them all, as some occurred while he was in custody.

1.88 In December 1980, Hodgson told a prison chaplain that he was having visions of a woman he had killed in Southampton a year earlier. The next day he gave an account of killing Theresa to a prison officer. Shortly afterwards he confessed to two other murders in London; police inquiries established that neither had happened. Hodgson was charged with Theresa's murder. He pleaded not guilty. He did not give evidence, but made an unsworn statement explaining that he could not go into the witness box as "I am a pathological liar … every time I have been nicked by the police, which is on many occasions, I have made false confessions to crimes I have not committed".

1.89 He was found guilty and sentenced to life imprisonment with a minimum term of 17 years. He applied for leave to appeal in 1983, but this was refused.

1.90 In 1998, Hodgson's solicitors made enquiries of the Forensic Science Service, who said that none of the evidence had been retained. That was incorrect.

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21 *R v Turnbull* [1977] QB 224, CA.

22 Section informed by *R v Hodgson* [2009] EWCA Crim 490 (especially at [38], by Lord Judge CJ).

1.91 In 2008, with the assistance of Hampshire Police and the DPP, the evidence was located. DNA testing confirmed that the semen could not have come from Hodgson. Hodgson applied to the CCRC, and the CPS informed the CCRC that if the case were referred to the CACD, it would not contest the appeal. The reference was made within weeks, and Hodgson's conviction was quashed two weeks later on 18 March 2009. He had by this point served 27 years in prison.

1.92 The semen was subsequently matched to a man called David Lace, who had taken his own life in 1988. Lace had confessed to Theresa's murder to police in 1983. The police had dismissed this as a false confession and did not inform Hodgson's legal team.

DONALD PENDLETON (CONVICTED 1986)[23]

1.93 Donald Pendleton was arrested in June 1971 for the murder of a newspaper seller a few weeks earlier, but he was eliminated as a suspect. In March 1985, he was arrested again. He was interviewed over three days without a solicitor. After initially denying the offence, he subsequently said he was present when another man, Thorpe, committed the murder, but did not take part in any violence. He was tried with Thorpe. He told his legal advisers that he had not been present, had "been prepared to say anything to 'get the police off [his] back'" and "he had tried to recite what the police had said, although it was a complete pack of lies". However, the view was taken that the jury would not believe this, so instead reliance was placed on his statements that, although present, he had not inflicted violence. Thorpe, however, gave evidence asserting that it was Pendleton, not he, who had murdered the victim. Both were convicted. Pendleton's application for leave to appeal against conviction was refused in 1987. In 1999, the CCRC referred Pendleton's conviction to the CACD.

1.94 Evidence showed that Pendleton was highly suggestible to giving in to leading questions and interrogative pressure, with "a strong tendency to answer questions in the affirmative irrespective of content".

1.95 However, the CACD rejected his appeal, finding that "the reliability of the appellant's admissions in interview are, in the present context, sufficient to ensure the safety of the verdict against him". The House of Lords, however, concluded that had the evidence of suggestibility been available, he might have been called to give evidence explaining his disavowal; there would have been more searching investigation of his mental state during the interviews; and much more detailed inquiry into what happened which was not recorded. The Lords quashed the conviction, holding that:

> Had the jury been trying a different case on substantially different evidence the outcome must be in doubt. In holding otherwise the Court of Appeal strayed beyond its true function of review and made findings which were not open to it in all the circumstances. Indeed, it came perilously close to considering whether the appellant, in its judgment, was guilty.

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23 Section informed by *R v Pendleton* (22 June 2000) CA (unreported), [2000] 6 WLUK 602 (especially pp 6, 17 and 25 by Pill LJ); and *R v Pendleton* [2001] UKHL 66, [2002] 1 WLR 72 (especially at [28], by Lord Bingham of Cornhill).

THE "TOTTENHAM THREE" (CONVICTED 1987)[24]

1.96 On 6 October 1985, Metropolitan Police constable Keith Blakelock was violently killed by rioters during the Broadwater Farm riot in Tottenham, (This followed the death of Cynthia Jarrett, an Afro-Caribbean woman, by heart failure during a police search of her home, the 28 September Brixton riot and deteriorating relations between the Metropolitan Police and London's black community.) In the weeks following PC Blakelock's death, police arrested more than 300 people and charged many following untaped signed confessions.

1.97 Three children and three adults – Winston Silcott, Engin Raghip and Mark Braithwaite – were charged with Blakelock's murder, and tried in 1987. The cases against the three children were dismissed following submissions of no case to answer, leaving the three adults. The case had been built on signed interviews implicating 40 individuals by name, including the six, but the evidence against Silcott ended up resting entirely on notes of an interview of 13 October 1985 made by DCI Melvin, the officer in charge of the case, where Silcott appeared to challenge the police to find people to give evidence against him. Silcott did not give evidence at trial, but his defence made a submission of no case to answer, which was refused by the trial judge. The three were convicted of murder and riot in March 1987.

1.98 Their original applications for leave to appeal were dismissed in December 1988. The Home Secretary referred Raghip's conviction to the CACD in December 1990 and Silcott and Braithwaite's in September 1991. Earlier in 1991, Silcott's solicitors had requested that the notes of his interview be inspected by an expert in handwriting. Using electrostatic deposition analysis ("ESDA"), the expert, inspecting indentations, found that, effectively, an earlier less remarkable page 5 had been replaced by the one used at trial, in which Silcott appeared to threaten witnesses; he also thought that it was possible that two further pages had been replaced. Another expert endorsed these conclusions. The Crown did not oppose the appeals. In November 1991, the CACD held that the new evidence "clearly destroys the basis of the Crown case" against Silcott and allowed his appeal. Further, the Court held that if the judge had known about DCI Melvin's conduct he would have withdrawn the cases against Raghip and Braithwaite, and that evidence of Raghip's learning difficulties and suggestibility should have been admitted. It therefore allowed Raghip and Braitwaite's appeals as well, and apologised to the three.

1.99 Braithwaite and Raghip were released; Silcott remained imprisoned for a murder committed in 1984, but was released on licence in 2003. In 1992 (by then) DCS Melvin was charged with perjury and conspiracy to pervert the course of justice with DI Dingle, charged with conspiracy. The detectives were acquitted in July 1994.

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[24] Section informed by *R v Raghip*, *The Times* 9 December 1991, CA; D Rose, "'They created Winston Silcott, the beast of Broadwater Farm. And they won't let this creation lie down and die'", *Observer* (18 January 2004); and *R v Silcott* [1987] Crim LR 765, Central Criminal Court.

The Police and Criminal Evidence Act 1984 came into force on 1 January 1986; the arrest of Mark Braithwaite on 4 February 1986 therefore technically post-dated the Act's coming into force.

Appendix 2: Case studies, post-PACE

THE "CARDIFF NEWSAGENT THREE" (CONVICTED 1987)[1]

2.1 In October 1987, newsagent Philip Saunders was killed outside his home in Cardiff. Lying near him was a spade, believed to be the murder weapon. As it was his practice to collect the takings from one of his kiosks every night, and only £11 was found near him, and nothing on him, police believed his death to have resulted from a robbery.

2.2 South Wales Police arrested 42 suspects, including Michael O'Brien, Elias Sherwood and Darren Hall. Under questioning, Hall said that he had been involved in the attack on Mr Saunders. However, Hall also made several other admissions, some of which the Court of Appeal Criminal Division ("CACD") later found to have been "patently untrue and indeed bizarre". The CACD concluded that the police clearly doubted his admissions at that stage.

2.3 O'Brien and Sherwood denied having anything to do with the murder, although they admitted that they had been out together intending to steal a car.

2.4 At trial, the prosecution also relied on a statement from a man, Robert Bradley, who said that when visiting someone at Cardiff prison, he had spoken with Sherwood, who was in the adjoining cubicle being visited by his sister. He claimed that Sherwood had told his sister that "Mike done it".

2.5 The prosecution also relied on a statement from a man called Ricky Forde who had been on remand at Cardiff at the same time as Sherwood. Forde told Sherwood that he had heard that Sherwood's mother had found a bloodstained t-shirt under Sherwood's bed. He claimed to have told Sherwood that he should have got rid of the t-shirt and he would have got away with murder; Sherwood's supposed reply that this was "partly true and partly untrue" was presented as an admission.

2.6 DI Lewis of South Wales Police also gave evidence that he had heard an incriminating conversation between O'Brien and Sherwood when they were held in adjoining cells in the police station.

2.7 An unusual feature of the case was that, having confessed, Hall was pleading guilty to manslaughter, while O'Brien and Sherwood were saying that he was fully innocent.

2.8 Hall continued to stick to his account for several years after conviction. On one occasion he gave an account of the attack to the Senior Medical Officer at Dartmoor, saying that he had apologised to Mr Saunders' son, who had accepted his apology but had said that Hall would have to live with the death on his conscience. Mr Saunders did not have a son.

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1 Section informed by *R v O'Brien* [2000] Crim LR 676, [2000] 1 WLUK 529, CA (especially pp 6, 23 and 25 by Roch LJ).

2.9 Later, when at HMP Grendon, Hall completely changed his story and claimed that he had killed Mr Saunders after being raped by two men in Mr Saunders' presence and possibly at his instigation. (HMP Grendon is a specialist prison for the treatment of sex offenders and violent offenders, unique among prisons in England and Wales in using "therapeutic community" principles). Hall said that he had taken the shovel that was used to kill Mr Saunders with him; it had in fact been in the garden before the murder.

2.10 In 1996, however, asked by his father whether he had committed the murder, Hall stated that he had nothing to do with it, and neither had Sherwood and O'Brien.

2.11 In January 2000, the CACD quashed O'Brien's conviction, along with those of his co-accused Darren Hall and Ellis Sherwood. Hall was found to be someone with "traits in his personality of the kind associated with those who make false confessions". The Court held that there were fundamental breaches of PACE against O'Brien, "the gravest of which" included handcuffing him to a radiator; his interview evidence would now be inadmissible.

2.12 DI Lewis, it was discovered, had been note-taker in a case in 1983 which two men were acquitted of charges relating to a bombing campaign by Welsh nationalists. Because of the seriousness of the case, South Wales Police had called in the West Midlands Serious Crime Squad ("WMSCS"; see Chapter 17 and Appendix 3) to investigate on their behalf. The men were acquitted after it was shown that incriminating material in transcripts of their interrogations was not in the contemporary notes. Although the CACD accepted that the improper copying was attributable to the WMSCS, it could not see how this could have happened without DI Lewis's knowledge.

2.13 The Court accepted that had a jury known of the unacceptable practices of officers at that station, it would have taken a different view on the reliability of Hall's confession.

2.14 On the evidence of Bradley, who claimed to have overheard a confession while visiting someone else in the same prison, the Court was suspicious of this supposed development, saying "we find it remarkable that Sherwood's sister should wait until the end of December before asking her brother if he had been involved in the murder of Mr Saunders, and that she should ask that question in the presence of Bradley".

2.15 In 2010, two people were arrested for perjury and perverting the course of justice in relation to the investigation of the murder of Mr Saunders.

THE "CARDIFF THREE" (CONVICTED 1990)[2]

2.16 In 1988, Lynette White was murdered in her flat in Cardiff, South Wales. The events that followed were described by an official inquiry as:

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[2] Section informed by *R v Paris* (1993) 97 Cr App R 99, CA (especially 103, by Lord Taylor of Gosforth CJ); "A Killing in Tiger Bay", *BBC Television* (2021); R Horwell. *Mouncher Investigation Report* (July 2017) HC 292 (especially pp 4-5 and 7); A Hirsch and S Sekar, "Jailing of Cardiff Three witnesses raises questions over law on duress", *Guardian* (22 December 2008); *Mouncher v Chief Constable of South Wales* [2016] EWHC 1367 (QB); and C Gogarty, "Lynette White: The blood sealed behind a skirting board that solved a notorious murder", *WalesOnline* (30 Oct 2021).

> one of the worst miscarriages of justice in the history of our criminal justice system [which] should be required reading for those who either support capital punishment or are complacent about the quality and standing of our criminal justice system.

2.17 Although police had issued a photofit image of a white male who had been seen in the vicinity, with blood on his clothing, five black or mixed-race men were prosecuted for the murder. The case relied on perjured evidence of three local women, two of whom were vulnerable to pressure (one was a drug addict and a sex worker; one was intellectually disabled, with an IQ of 55) and a false confession from White's boyfriend Stephen Miller, obtained after prolonged, oppressive questioning. In November 1990, three of the men – Tony Paris, Yusef Abdullahi and Stephen Miller – were convicted of murder.

2.18 The trial was held in Swansea, not Cardiff, upon an application by the prosecution. (Swansea's population in 1991 was 98.4% white, compared to 93% in Cardiff.) The jury at the trial was all-white, and the murder was portrayed as a ritual sacrifice.

2.19 The jury's verdict suggested that it had relied on Miller's confession: two cousins, John and Ronnie Actie were acquitted. The witnesses had falsely claimed that the Actie cousins were physically involved in the killing, but Miller had said in his confession that the Acties were outside the room.

2.20 In December 1992 the convictions of all three were quashed on the basis that the questioning of Mr Miller was so oppressive that the confession should have been excluded. The Lord Chief Justice, Lord Taylor, said that "short of physical violence, it is hard to conceive of a more hostile and intimidating approach by officers to a suspect".

2.21 The three prosecution witnesses were convicted of perjury in 2008. The prosecution at their trial said that it was clear that all three had been "harassed into lying".

2.22 In 2011, 12 serving and former police officers and one member of police staff were charged with conspiracy to pervert the course of justice. Two other witnesses who had given evidence against the five were also charged with perjury. One was a prisoner who had claimed that Paris had confessed to him in prison.

2.23 In November 2011, this trial collapsed when the police said that files which should have been disclosed to the officers had been destroyed. The "destroyed" files turned up a few weeks later at the local police headquarters.

2.24 The Mouncher Inquiry was set up under Richard Horwell QC following concerns that the trial had been deliberately sabotaged. He found that such suspicion was "entirely understandable but has not been supported by the evidence". He found that the collapse of the trial against the police defendants was down to "a rather chaotic trail of poor management by police officers and the prosecution lawyers, particularly the CPS" rather than bad faith. He concluded that "the prosecution was then in much worse shape than had ever been anticipated and that if the full facts had been known, there is no doubt that by the vulnerable stage the trial had then reached, it would still have collapsed".

2.25 Claims by some of the acquitted officers against South Wales Police for misfeasance in public office and malicious prosecution were rejected by Wyn Williams J (as he then was) in June 2016. He found that the police had reasonable grounds to suspect that the officers had committed one or more of the offences for which they were arrested.

2.26 In 2002, DNA found at the murder scene was matched to Jeffrey Gafoor, who subsequently pleaded guilty to the murder of Lynette White. Unlike the three black men initially convicted, he bears a striking similarity to the white man in the photofit.

2.27 Yusef Abdullahi was diagnosed with post-traumatic stress disorder after his acquittal, and spent several months in a psychiatric hospital. He died of a perforated ulcer at the age of 49. Ronnie Actie, who was acquitted at the trial, became a recluse, living in a shed in his garden. He died of deep vein thrombosis at the age of 49.

JONATHAN JONES (CONVICTED 1995)[3]

2.28 Jonathan Jones was convicted of the murders of his girlfriend's elderly parents who had been shot at their farmhouse in South Wales. At the time, Jones was living in Kent. The prosecution alleged that he had travelled from Kent to South Wales, shot the couple, and returned to Kent. That evening, when his girlfriend could not make contact with her parents, he drove back to South Wales to check on them, but when he arrived, police were already there.

2.29 He was convicted on the basis of six pieces of evidence.

(1) Several eyewitnesses identified Jones as a man seen near the farmhouse a month before (although other eyewitnesses stated that he was not the person seen). Jones acknowledged that he had been at the farm to assist with agricultural work, but denied being the man in question and owning a coat like that worn by this man.

(2) Jones's alibi could not be corroborated by the workmen he said he had spoken to.

(3) The evening journey took longer than might have been expected. The prosecution speculated that he could have been disposing of incriminating items.

(4) It was believed that the killer must have known the victims as they had put out their best crockery.

(5) Some police officers felt that his responses when told of the murder by police were suspicious (although other officers did not).

(6) Finally, a print of his left thumb was found on a saucer in the house of the victims (his girlfriends' parents).

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[3] Section informed by *R v Jones* [1998] 2 Cr App R 53, CA (especially 54C by Rose LJ VPCACD); and D Eady (2009), "Miscarriages of Justice: The Uncertainty Principle", ch 5.

2.30 The CACD found that the prosecution case was "circumstantial": the prosecutor concentrated on the thumbprint, while acknowledging that Jones could have touched the saucer after arriving at the farm or at a funeral two years earlier (it was part of the prosecution case that this crockery was rarely used). The CACD held that the judge should not have admitted evidence that Jones might have been able to steal a shotgun from the farmhouse the previous year, since there was no evidence that the stolen gun was the murder weapon. The CACD also noted that while Jones could not prove his movements on the day, the only aspect where there was strong evidence against him related to whether he had owned a coat similar to the one worn by the man in the area of the murder a month before. It held that the judge should have given a much stronger *Turnbull* warning in respect of the evidence of a witness identifying Jones as the man in the coat: no identification parade was held; and there was evidence of contamination of this identification.

2.31 The Court also held that the judge was wrong not to warn the jury that the failure of an alibi, or even a false alibi, did not mean that the defendant was guilty; instead, he had directed the jury that a lie for no reason could be "very telling evidence of guilt".[4]

2.32 The CACD rejected, however, an argument that the judge should have acceded to a submission of no case to answer. However, it held that the conviction was rendered unsafe due to the combined effects of wrongly admitted evidence, misdirections given to the jury, and new evidence that provided support for his initial alibi.[5]

VICTOR NEALON (CONVICTED 1996)[6]

2.33 In 1997, Victor Nealon was convicted of attempted rape and sentenced to life imprisonment with a minimum term of 7 years' imprisonment. The attempted rape was said to have occurred outside a nightclub. The victim said that the attacker mauled her, tried to kiss her and touched her bra underneath her blouse. There was no DNA or forensic evidence implicating Mr Nealon. For his part, Mr Nealon denied being anywhere near the crime scene and stated that he had been at home with his partner and her children, which was confirmed by both his partner and her daughter. He offered a DNA sample when he was arrested and later offered to give a sample of blood and hair. The only evidence against Mr Nealon came from three eyewitnesses who picked him out at an identification parade. However, two of them said they were uncertain, with one only selecting Mr Nealon after observing him with his solicitor (and therefore knowing that he was the suspect). Only one witness had said with certainty that they had seen Mr Nealon. Mr Nealon had a distinctive pockmarked face and a large number of prosecution witnesses had referred to the alleged perpetrator as having a lump on his forehead, something which Mr Nealon said meant that it could not have been him.

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4 This does not appear in the law report cited above, but is in the original judgment of the Court in *R v Jones* (10 May 1996) CA (unreported), available at http://www.homepage-link.to/justice/Jones/index.htm.

5 *R v Jones* [1998] 2 Cr App R 53, CA, 55, by Rose LJ VPCACD.

6 Section informed by *R v Nealon* [2014] EWCA Crim 574 (especially at [24], by Fulford LJ); *R (Nealon) v Secretary of State for Justice* [2015] EWHC 1565 (Admin); *R (Nealon) v Secretary of State for Justice* [2016] EWCA Civ 355, [2017] QB 571; *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2, [2020] AC 279; and *Nealon v UK* (2024) 79 EHRR 22 (App No 32483/19).

2.34 Mr Nealon appealed against his conviction in 1998 on the basis that the identification evidence had been poor and that there was evidence to demonstrate he did not have a conspicuous lump on his forehead at the time. It was also emphasised there was no forensic evidence. The CACD rejected this appeal, holding that the case should not have been withdrawn: the number of the witnesses who had identified him meant that there was "abundant evidence" for the jury to convict on.

2.35 Mr Nealon then applied to the Criminal Cases Review Commission ("CCRC"). The CCRC twice rejected his applications, refusing to do additional forensic testing of samples taken from the victim's clothing that had been requested by his solicitors on the basis that the CCRC did not undertake speculative tests. In 2010, the samples were released to the defence team who conducted relevant tests. These tests included a probable saliva swab taken from the victim's blouse which was found to have come from an unidentifiable male who was not Mr Nealon. Other males who might have come into contact with the blouse such as the victim's boyfriend were also excluded and the victim stated that she had bought the blouse either the day before or day of the attack. The results led to a further application to the CCRC, who then referred the case to the CACD in July 2012.

2.36 The CACD accepted that there were credible arguments as to whether there was sufficient evidence before the jury to be satisfied Mr Nealon was guilty to the criminal standard. It noted that the prosecution was not "overwhelming" and only one witness had made an unequivocal identification of Mr Nealon. The Court further concluded that the DNA results had a substantial effect on the safety of the conviction, particularly in addition to the weak identification evidence. Mr Nealon was acquitted after spending around 17 years in prison.

2.37 The CCRC apologised to Mr Nealon in 2014 for their failure to investigate his case properly. It led to an internal Report in 2013 which suggested that the CCRC should do a trawl for similar cases.

2.38 As discussed in Chapter 16, Mr Nealon was never compensated for his wrongful conviction. The Secretary of State determined that whilst the DNA swab came from an unidentified male, it did not undoubtedly belong to the person who attacked the victim.

ANNETTE HEWINS AND DONNA CLARKE (CONVICTED 1997)[7]

2.39 In 1995, Diane Jones and her two children were killed in a fire at their home in South Wales. It was found that someone had torn part of the front door, poured petrol into the flat and deliberately stated a fire.

2.40 It was initially believed that the arson attack was linked to the local drugs trade: Jones's partner, who was a drug dealer and lived at the property, was due to be released from prison shortly after the attack. However, the police later came to believe

[7] Section informed by *R v Clarke* (15 February 1999) CA (unreported), [1999] Lexis Citation 2712; *R v Clarke and Hewins* [1999] EWCA Crim 386, [1999] Lexis Citation 2712; *Wrongly Accused: the Annette Hewins Story* (2024) BBC Sounds podcast; and Graeme Hughes, Acting Senior Coroner for South Wales Central, "Annex A, Regulation 28: Report to Prevent Future Deaths (1)".

that it was connected with a relationship that he had previously had with Donna Clarke, who lived on the same estate.

2.41 Donna Clarke and her aunt Annette Hewins were charged jointly with three counts of murder, along with their friend Denise Sullivan. The prosecution case against Hewins was that she had taken Clarke to a petrol station to buy the petrol, which was syphoned into a Lucozade bottle. There was no evidence that this syphoning had taken place, but the prosecution speculated that it could have happened during six minutes when the car was parked in an area of the petrol station that was not covered by CCTV.

2.42 The three were also charged with arson with intent to endanger the life and with arson being reckless to endangering life. Both Ms Clarke and Mrs Hewins were acquitted of murder and manslaughter but convicted of arson with intent to endanger life. Ms Sullivan was convicted of a separate offence of perverting the course of justice. Mrs Hewins was sentenced to 13 years' imprisonment for her role and Ms Clarke was sentenced to 20 years' imprisonment.

2.43 In 1999, Ms Clarke and Mrs Hewins' convictions were quashed. In the case of Hewins, the CACD found that "in reality there was no sufficient evidence to prove the case against her …". There was no evidence that the petrol that they had put in the car had been used to start the fire. The CACD said "grounds for suspicion and lies cannot alone constitute a positive case of arson with intent to endanger life".

2.44 The Court also found that prosecution counsel had repeatedly used material from interviews with their co-defendant Sullivan which was inadmissible against Hewins and Clarke, finding that "for the most part the object, and certainly the effect, can only have been to cause the jury to take into account inadmissible material".

2.45 A retrial for Ms Clarke was ordered although it was subsequently stayed on the grounds of double jeopardy: the judge accepted a submission that conviction on the charge of arson would call into question her acquittal for murder and manslaughter.

2.46 Mrs Hewins had been pregnant with her fourth child when she went into custody, she was denied bail pending trial. She gave birth in an ambulance on the way to a hospital from prison. She then had to decide between having her newborn baby removed from her or being transferred to another prison – which would prevent her remaining three young children from visiting. Ultimately, she had her baby removed hours after birth. Mrs Hewins became addicted to heroin while in prison and developed psychosis. On 7 February 2017 she was detained under section 2 of the Mental Health Act and admitted to a psychiatric unit. She died the following day. The Coroner found that:

> [she] likely died as a consequence of a fatal arrhythmia against a background of undiagnosed, asymptomatic heart disease. It is likely that this occurred as a consequence of the psychological and physiological stresses necessarily imposed upon her by her acute psychosis, opiate withdrawal and admission to hospital.

NAZEEM KHAN AND CAMERON BASHIR (CONVICTED 1999)[8]

2.47 In 1999, Nazeem Khan and Cameron Bashir were convicted of conspiracy to obtain property by deception. Khan was also convicted of two counts of dishonestly obtaining a communication service and two of possession of a thing intended to avoid payment or service. Bashir was sentenced to nine months' imprisonment and Khan to 12 months' imprisonment.

2.48 The allegation was that Khan and Bashir used cloned credit cards to obtain goods including designer sunglasses, car parts and two Tag Heuer watches.

2.49 The defence case was that the pair had been "set up" by Khan's former girlfriend Joanne Fletcher in an act of revenge. She had convictions for fraud, theft and other dishonesty offences, and had been convicted of assault occasioning actual bodily harm on Khan's wife. The defendants claimed that the officer in charge of the case, DS Chris Spackman, had planted incriminating evidence and suppressed other evidence. Spackman denied all these allegations.

2.50 It later emerged that there was a long, close and subsisting relationship between Ms Fletcher and Spackman. In 2002, now an Inspector, Spackman was arrested on a charge relating to the theft of £160,000 from Hertfordshire Police. The money, in the form of foreign currency, had been seized in a previous case Spackman was involved with. Spackman conspired with Fletcher and another man to obtain this currency by falsifying identity documents to enable the money to be released to Fletcher.

2.51 Upon his arrest in 2002, Spackman was found to be wearing one of the watches supposed to have been bought by Bashir in 1998. (The CCRC had previously sought to obtain this watch for the purposes of an investigation and had been told by Hertfordshire Police that it had been destroyed.) Spackman was subsequently jailed for four years for conspiracy to steal, theft and misconduct in public office.

2.52 The CCRC referred Khan and Bashir's case to the CACD. The CPS did not seek to uphold the conviction. It accepted that Spackman's misconduct was "substantially more serious than that dealt with in previous authorities and displays an ability to conduct complicated deceptions within a police environment" and that it was impossible to rule out that Spackman was dishonest in all aspects of the investigation.

2.53 The CACD quashed Khan and Bashir's convictions in 2005, holding that the fresh evidence "lent support to what may have appeared at trial to have been fairly wild, slightly misplaced allegations of impropriety against a police officer".

WARREN BLACKWELL (CONVICTED 1999)[9]

2.54 A woman alleged that she was sexually assaulted by a man on 1 January 1999. After the alleged assault, she identified Warren Blackwell, whom she had met earlier that

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8 Section informed by *R v Khan and Bashir* [2005] EWCA Crim 3100 (especially at [14] and [16], by Sir Igor Judge PQBD); and *R v Lane* [2015] EWCA Crim 1226.

9 Section informed by *R v Blackwell* [2006] EWCA Crim 2185 (especially at [5], [25] and [27], by Tugendhat J); *Attorney General's Reference (No 83 of 1999)* [2001] EWCA Crim 819, [2001] 2 Cr App R (S) 117; and "Victim of false rape claim must pay £12,500 for bed and board in jail", *Evening Standard* (12 April 2012).

evening, by his voice. The case was one of identification, with the defence not disputing that the woman had been sexually assaulted. Blackwell was convicted of indecently assaulting the woman on 7 October 1999. In 2001, the CACD refused Blackwell leave to appeal against conviction and increased his sentence from three to five years' imprisonment, following a reference by the Attorney General.

2.55 Following Blackwell's conviction, the woman made further allegations of sexual assault, said later by the CACD to be "strikingly similar to those made" in his case.

2.56 The CACD heard the appeal in September 2006. It heard that the woman had made multiple allegations from 1998-2001, being observed on many occasions to have bruises and cuts. In one instance, a police surgeon concluded that her account of an incident was false and consistent with self-harm: she alleged that her attacker had cut the word "HATE" into her chest, but the writing was backwards, consistent with her having cut the word while looking in a mirror. The CCRC used witness evidence of the woman's former husband, mother, daughter and two former boyfriends, including her fiancé at the time of the alleged January 1999 assault, to claim that she had a propensity and ability to lie. Evidence of the woman's medical and psychiatric evidence contained in a confidential annex was held by the CACD to be "consistent with the other evidence" referred to above.

2.57 The CACD quashed Blackwell's conviction. He applied for and received compensation for his wrongful conviction, but £12,500 was deducted for "board and lodging" during his imprisonment.[10]

BARRI WHITE AND KEITH HYATT (CONVICTED 2002)[11]

2.58 In 2002, 19-year-old Rachel Manning was murdered, and her body left on a golf course near Milton Keynes. Her face had been severely beaten with a steering lock from a car, which was found near her body. Her boyfriend, Barri White, was charged with her murder, alongside his friend Keith Hyatt.

2.59 The case against Mr White was wholly circumstantial. He had been seen on CCTV involved in an altercation with a man and arguing with Ms Manning immediately prior to her disappearance. Shortly afterwards, a telephone call was made from a nearby phone box to Mr Hyatt's house. Mr White and Mr Hyatt were seen on CCTV driving around the local area in the hours that followed. The following day, Mr Hyatt had turned up at a police roadblock where Ms Manning's body had been found.

2.60 The prosecution claimed that either Mr White and Mr Hyatt had killed Ms Manning, or White had killed her and Hyatt helped him dispose of Ms Manning's body. The prosecution adduced evidence from a forensic scientist who said that particles found on Ms Manning's body matched those found on the passenger seat of Mr Hyatt's van.

2.61 Mr White's explanation was that following the argument he had gone to Mr Hyatt's house. He claimed that the telephone calls to Mr Hyatt's house were made by Manning calling him asking to be picked up, but that when they arrived at the

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10 Compensation for wrongful conviction is discussed in Chapter 16.

11 Section informed by *Re White (Setting of Minimum Term)* [2006] EWHC 3245 (QB); and Monster Films, "Barri White", *Wrongly Accused*, Episode 1 (2023).

telephone box to pick her up she was not there, so they drove around trying to find her.

2.62 Mr White was found guilty of murder and sentenced to life imprisonment, while Mr Hyatt was found guilty of perverting the course of justice and received a sentence of 30 months' imprisonment.

2.63 In 2005, the case featured on the BBC TV programme *Rough Justice*. Experts identified by *Rough Justice* showed that the particles in question were not, as the prosecution expert claimed, unique, but were given off by any disposable lighter (Ms Manning was a smoker). The programme also identified a hair on the steering lock which did not match Ms Manning, Mr White or Mr Hyatt.

2.64 Mr White and Mr Hyatt successfully appealed against their convictions on the basis that the fresh evidence showed that the particle evidence was unreliable. The CACD, however, concluded that there was sufficient circumstantial evidence against White and ordered that he should face a retrial. He was cleared by the jury at his retrial in 2008. Both were refused compensation as they could not prove that they were innocent of the offence.

2.65 In 2010, Shahidul Ahmed was arrested for a sexual assault on a student who had got into his car thinking he was a taxi driver. When his DNA was taken, it matched the DNA found on the steering lock with which Ms Manning had been attacked. Ahmed was convicted of her murder in September 2013. The circumstances of the incident with the student strongly suggested that Ahmed had abducted Ms Manning while she was waiting to be picked up by Mr White and Mr Hyatt as they had claimed.

2.66 Because Mr Ahmed's conviction proved conclusively that Mr White and Mr Hyatt were not guilty, they were awarded compensation for their wrongful conviction.

ANDREW MALKINSON (CONVICTED 2004)[12]

2.67 In 2003, a woman in Bolton was violently attacked. She reported that she was strangled until she became unconscious and that she believed she had been raped vaginally and anally. The police treated this as a case of both rape and attempted murder.

2.68 Andrew Malkinson was arrested the next month. He immediately denied committing the offence, telling detectives that they had the wrong man. He had no convictions for any violent or any sexual offence. Although he matched some aspects of the victim's description of her attacker, there were also significant differences. The victim said that the attacker had a smooth chest and spoke with a local accent (neither of which Mr Malkinson had), and although she said the attacker was shirtless, she had made no mention of tattoos (Mr Malkinson had prominent tattoos on his arms). Crucially, the

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12 Section informed by *R v Malkinson* [2006] EWCA Crim 1891, (2006) 150 SJLB 1288 (especially at [41], by Gage LJ); *R v Malkinson* [2023] EWCA Crim 954; *Independent review by Chris Henley KC of the CCRC's handling of the Andrew Malkinson case: Report & CCRC Response* (2024); Ministry of Justice, "Government orders independent inquiry into handling of Andrew Malkinson case", (24 August 2023); https://andrewmalkinson.independent-inquiry.uk/; and Two Step Films, "The Wrong Man: 17 Years Behind Bars" (2024); The Times podcast, *Seventeen Years – The Andrew Malkinson story* (2021-2023).

victim claimed to have scratched her attacker's face with her left hand. Malkinson had been seen by police officers the following day, and his face was not scratched.

2.69 Nonetheless, he was identified by the victim in an identification parade. Two eyewitnesses also identified him as someone they had seen in the vicinity shortly after the attack.

2.70 There was no DNA evidence linking Mr Malkinson to the offence. Police concluded that this demonstrated that he was "forensically aware". There was forensic evidence that the attacker had used a condom.

2.71 At trial, the judge instructed the jury that it could only convict Mr Malkinson if it was sure that the victim was correct in her identification but mistaken in saying she had scratched her attacker. The jury convicted Mr Malkinson of two counts of rape, and one count of attempting to choke in order to commit rape. He was acquitted of a charge of attempted murder. He received a life sentence with a minimum term of over six years.

2.72 The trial judge granted leave to appeal to the CACD after the forensic scientist disclosed that swabs used to take vaginal and anal samples from the victim had been contaminated with silicone oil which could be misinterpreted as lubricant from a condom.[13]

2.73 The CACD rejected the appeal. First, swabs of the victim's underwear, which had not been contaminated, had also confirmed the presence of lubricant. More importantly, there was the identification evidence of the victim. The Court heard evidence from her and found her "a convincing witness … truthful and accurate". It concluded that even if the jury had had the fresh evidence, it would have convicted.

2.74 Mr Malkinson continued to deny that he was the person responsible. As a result, he was effectively unable to take part in rehabilitation programmes in order to demonstrate that he could be safely released. While in prison, he twice applied to the CCRC. It rejected both applications.

2.75 In 2006, the Forensic Science Service ("FSS") had undertaken a review of DNA testing on samples which had previously produced no result, known as Operation Cube.[14] Some evidence from the Malkinson case had been sent to the FSS for testing as part of Operation Cube. Nothing of significance was found.

2.76 In 2009, following a further application to the CCRC, the CCRC refused to undertake further testing.

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13 The trial judge would not now be able to grant leave in this way. Under a change introduced in the Criminal Justice and Immigration Act 2008, s 153, the trial judge can only certify that a case is fit for appeal within 28 days of the conviction (Criminal Appeal Act 1968, s 1).

14 Operation Cube was undertaken after a change in the FSS's practice to address a problem, known as "inhibition", whereby contaminants would lead to a DNA test producing no profile. Re-analysis of samples processed before the change might therefore yield positive results and could "potentially detect unsolved crimes or exonerate the innocent". Association of Chief Police Officers, "Operation Cube: Final Report to the Home Office Minister" (December 2008).

2.77 In 2019, however, APPEAL obtained agreement from Greater Manchester Police ("GMP") to allow further tests. Evidence held by GMP had been destroyed (in apparent breach of retention policy) but the material which had been transferred to the FSS for Operation Cube had been retained in the Forensic Archive following the closure of the FSS. Testing carried out on behalf of APPEAL showed the presence of DNA from a male who was neither Malkinson nor the victim's partner.

2.78 The CCRC then agreed to commission their own tests on this material, which confirmed the presence of DNA from an unknown male in a "crime specific" area. When tested against the National DNA Database, the DNA matched to an individual ("Mr B") whose DNA had been retained.

2.79 Despite receiving a minimum term of just over six years, Mr Malkinson served 17 years before the Parole Board judged he was safe to release. He was released on life licence in December 2020, subject to stringent restrictions and liable to recall to prison.

2.80 In July 2022, the CACD quashed Mr Malkinson's conviction on three distinct grounds.

2.81 First, the Court held that the DNA made the conviction unsafe. This was a basis of the CCRC's reference and was accepted by the prosecution.

2.82 Second, the Court found that an undisclosed photograph, showing possible damage to a fingernail on the victim's left hand, and no damage to any on her right, would have shown a medical report indicating damage to a fingernail on her right hand to have been mistaken. This in turn would have suggested that the victim's claim to have scratched her attacker with her left hand was not mistaken. The judge had specifically told the jury that it could only convict Mr Malkinson if it concluded that the victim was mistaken about scratching her attacker (since Mr Malkinson was known not to have been scratched).

2.83 Third, "with some hesitation", the Court accepted that taken with the second ground, the failure to disclose previous convictions of the two supposed eyewitnesses rendered the conviction unsafe. Had these been disclosed, the defence would not have conceded that the pair were giving evidence honestly. The jury would have known that one of them had been cautioned for possession of heroin and amphetamine during the proceedings.

2.84 The CPS did not seek to uphold the conviction as safe, conceding that it was unsafe on the basis of the fresh DNA evidence. However, it contested the second and third grounds.

The Henley Review

2.85 The CCRC commissioned a review by Chris Henley KC which was announced on 21 August 2023. A redacted version of this review along with the CCRC's response to it was published on 29 May 2024.

2.86 The Review was to consider how the CCRC had conducted their reviews of Mr Malkinson's three applications that he made in 2009,2018 and the final application in 2021 which was referred. The Review had a relatively wide scope and was to make findings and future recommendations for the CCRC.

2.87 The review was published in 2024. It criticised the failure of the CPS to obtain the police file on the case in 2009 and 2018-20. It found that the CCRC failed to appreciate the significance of the new DNA evidence in 2009 and opportunities to obtain fuller DNA testing were missed. Once a new DNA profile was obtained, the CCRC had wrongly refused to refer the case because the person could not be identified, when this was not necessary to show that the conviction was unsafe.

2.88 The review also found that the CCRC's initial reasoning in response to Mr Malkinson's third application in 2021 nearly repeated the same errors. It also stated that the CCRC was wrong to take full credit for the retesting that was eventually done in 2021, finding that all the crucial tests and the work done which resulted in the discovery of undisclosed photographs of the victim's hands and the previous convictions of the "eyewitnesses" was the result of APPEAL's efforts.

The Andrew Malkinson Inquiry

2.89 On 24 August 2023 the Justice Secretary Alex Chalk KC and the Attorney General, Victoria Prentis KC, announced a public inquiry chaired by HH Judge Sarah Munro. The inquiry is ongoing.

SAM HALLAM (CONVICTED 2005)[15]

2.90 In 2004, Essayas Kassahun was murdered during a street fight. The fight, which was prearranged, was said to have been attended by between 40 and 50 young people, some who were intent on violence and others who gathered to watch. Given the number of people in attendance at the incident, which took place at night and was both short-lived and fast-moving, witnesses at the scene gave a variety of accounts.

2.91 Nine males were charged with murder under the doctrine of joint enterprise. The charge against one was severed from the others (and the prosecution later offered no evidence against him), so eight were tried together on charges of murder, conspiracy to commit grievous bodily harm and violent disorder. The judge subsequently ruled that there was no case to answer on any charges against one of the defendants, and that there was no case to answer on the charge of murder against three of the others, who had said that they were merely spectators and not involved in any violence (they were acquitted on the remaining charges by the jury). Another defendant argued that the sole witness to his involvement was unreliable and he was acquitted on all counts. Thus, of the nine defendants initially charged with murder, by the end of the trial there was only a case to answer against two defendants – Bullabek Ringbiong and Sam Hallam. They were both convicted of murder.

2.92 The case against Mr Hallam was largely based on eyewitness identification. There was no forensic evidence, CCTV footage or cell site data to place Hallam at, or near the scene of the crime. None of the seven other co-accused implicated Hallam or suggested that he was present. Hallam was the sole accused to stand trial who denied involvement or being present at the scene. Hallam had sought to rely on an

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15 Section informed by *R v Hallam* [2007] EWCA Crim 966, (2007) 151 SJLB 433; *R v Hallam* [2012] EWCA Crim 1158; *R (Nealon) v Secretary of State for Justice* [2015] EWHC 1565 (Admin); *R (Nealon) v Secretary of State for Justice* [2016] EWCA Civ 355, [2017] QB 571; *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2, [2020] AC 279; and *Nealon v UK* (2024) 79 EHRR 22 (App No 32483/19).

alibi of a friend with whom he claimed to have been playing football. However, the friend denied having seen Mr Hallam that week and, therefore, the prosecution led evidence that Hallam had concocted a false alibi. This was used to support the eyewitness identification.

2.93 Mr Hallam's first appeal, in 2007, was brought on the basis that the Judge had been wrong not to accept the submission of no case to answer that was made on his behalf. The CACD dismissed the appeal on the basis that combined with evidence of a false alibi, the eyewitness identification was sufficient as it had come from two witnesses.

2.94 Mr Hallam then applied to the CCRC who referred his case to the CACD primarily on the basis of fresh evidence which included photographs on Hallam's mobile phone which showed him with the individual he sought to use as his alibi the day before the incident. Whilst this did not then provide Hallam with a positive alibi, it showed that his friend's claim that he had not seen Hallam all week was false, and therefore suggested that Hallam had made a genuine mistake rather than having concocted a false alibi.

2.95 Further fresh evidence included material that had not been disclosed to defence about the eyewitnesses and discussions that were taking place within the local community about who may be responsible. The CCRC was also concerned that no other witnesses placed the appellant at the scene of the crime, that there was no other evidence that implicated Hallam and the fact that some of the eyewitnesses' accounts could have been unreliable. During the appeal hearings, the prosecution revised their position and decided not to oppose Hallam's appeal. The CACD determined that the cumulative effect of the factors and the unsatisfactory nature of the identification evidence which was the primary evidence against Hallam in light of the fresh evidence meant that the safety of the convictions was undermined.

2.96 Mr Hallam spent seven years and seven months in prison which began when he was 17 years old. His father took his own life while Mr Hallam was in prison. Mr Hallam has never received any compensation for his wrongful conviction because the Secretary of State determined that the new evidence did not show beyond a reasonable doubt that he did not commit the offence as it did not positively establish that Hallam had not been at the scene. Most recently, Mr Hallam along (along with Victor Nealon) unsuccessfully challenged the compensation scheme as being incompatible with the ECHR due to it violating the presumption of innocence at the ECtHR. This was rejected by the Court.[16]

PATRYK PACHECKA AND GRZEGORZ SZAL (CONVICTED 2016)[17]

2.97 In August 2016, Grzegorz Pietrycki was murdered in Wood Green, North London. He had been in the company of Patryck Pachecka, Grzegorz Szal and a third man ("Mr G"). Mr Pietrycki was stabbed in the bedroom of his flat. Pachecka, Szal and Mr G

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16 See paras 16.41-16.46 above.

17 Section informed by *R v Szal and Pacheka* [2021] EWCA Crim 37 (especially at [78]-[79], by Holroyde LJ); J Ritchie, "The Criminal Court of Appeal's Stale Approach to Fresh Evidence" (2023) 87(1) *Journal of Criminal Law* 53; and Tortoise Media podcast, *Wronged: a murder and a miscarriage of justice* (2023).

were prosecuted for murder on the basis that they were parties to a joint enterprise to attack the victim.

2.98 The fatal strike was a stab wound to the victim's neck. Following the attack in the bedroom, the victim had climbed out of his window, leapt across a gap to a stairway to the raised ground floor entrance, and made his way eastwards up the street, before collapsing a short distance from his home. Pachecka and Szal, were observed together running away from the scene by a camera west of the building. Mr G was observed on CCTV following the same route as the victim after the attack.

2.99 At trial, Mr G, unlike Mr Pachecka and Mr Szal, was presented as being of good character. Pachecka and Szal were convicted of murder, whereas the jury could not agree a verdict on Mr G. At a subsequent retrial, another jury failed to agree on a verdict against Mr G.

2.100 Mr Pachecka and Mr Szal appealed against their convictions on three grounds, including the good character evidence relating to Mr G; the use of hearsay evidence; and fresh evidence suggesting that the fatal attack had not taken place in the bedroom but after Mr Pietrycki had run eastward away from the flat. Significant blood spatter evidence was found in a location up that street, consistent with the fatal wound being inflicted there. Thus, it was also possible that Pechacka and Szal were not running away from the scene of a crime they had committed, but away from an attack in progress.

2.101 The CACD refused to admit the fresh forensic evidence. It held that there was no reasonable explanation for the failure to adduce that evidence at trial. Although the evidence would have been admissible at trial, the evidence related to points which were identified during the trial and which there was an opportunity to address; to admit it at appeal would "subvert the trial process" and it was therefore not in the interests of justice to admit it.

2.102 However, the CACD quashed the convictions on the basis of the fresh evidence relating to Mr G's character. The fact that he had been acquitted while Pachecka and Szal were convicted suggested that this was important evidence for the jury. The CACD ordered a retrial of both men.

2.103 At the retrial, the defence were able to present the new blood spatter evidence which the CACD had refused to admit at the appeal. They were also able to present evidence that had Mr Pietrycki suffered the fatal wound inside the flat, he would not have been able to escape through the window and leap across to the staircase. Both men were unanimously acquitted.

Appendix 3: Systemic miscarriages of justice: specific cases and background

3.1 This appendix complements the first section of Chapter 17 and should be read with it. In that section, we covered, generally, miscarriages of justice in relation to police misconduct, infant deaths, the Post Office Horizon scandal and railway convictions under the single justice procedure, and how they were dealt with.

3.2 Provisionally concluding that there were issues with how systemic miscarriages of justice were dealt with, we provisionally proposed at Consultation Question 104 that it should be for the Criminal Cases Review Commission ("CCRC") to review convictions where there is evidence of a widespread problem calling into question their safety, if necessary using its powers to require other public bodies to appoint an investigator. We also acknowledged that there may be instances where it is inappropriate for the CCRC to perform such a role, and so invited views on any other measures that might be put in place to enable the correction of miscarriages of justice in systemic cases.

3.3 This appendix serves to provide both the background to and case studies in relation to three groups of miscarriages of justice raised in Chapter 17, and an additional one:

(1) police misconduct (namely, the West Midlands Serious Crime Squad, Rigg Approach Flying Squad and DS Derek Ridgewell);

(2) unreliable expert evidence and testing failures (not raised in Chapter 17; namely, concerning Drs Clift and Skuse and the Greater Manchester drink driving cases);

(3) infant deaths (including the wrongful convictions of Sally Clark and Angela Cannings); and

(4) the Post Office Horizon scandal (namely, the background to the system, early appeals and the Post Office's internal review of convictions).

POLICE MISCONDUCT CASES

West Midlands Serious Crime Squad

3.4 The West Midlands Serious Crime Squad ("WMSCS") was a unit of the West Midlands Police from 1974-89. It has been implicated in a large number of miscarriages of justice, including the case of the Birmingham Six, discussed in Chapter 2 at paragraphs 2.37 to 2.49. At least 60 convictions obtained through misconduct by the officers of the unit have been quashed.

3.5 In 1989, the Squad was disbanded. The Chief Constable asked West Yorkshire Police to undertake an investigation of the Squad's activities since 1986 ("when complaints

about the squad started to emerge", according to then Home Secretary Douglas Hurd).[1]

3.6 Although the conduct of WMSCS officers was the principal object of concern, other units dealing with serious crime in the force were also subject to criticism, including the conduct of officers of the West Midlands Drugs Squad and the Regional Crime Squad.[2]

3.7 In addition to the inquiry commissioned by the Chief Constable, the Civil Liberties Trust provided funding for an independent inquiry by Professor Tim Kaye of Birmingham University.[3]

3.8 The independent report was published in December 1990. Its conclusions included the following.

(1) Regular pairings of interviewing officers seemed to have led to collaboration in falsifying evidence.

(2) The Squad often relied on confession evidence to the exclusion of other types of evidence, despite its unreliability.

(3) Signed confessions were shown through ESDA[4] analysis to have been tampered with.

(4) Linguistic analysis suggested that confessions were fabricated: the language was generally similar, lacking differences in phrasing, and not reflecting the backgrounds of the suspects (except for the additional use of the word "man" where the suspect was Afro-Caribbean).

(5) Purported transcriptions of detailed confessions were implausibly fast.

(6) Access to solicitors was delayed: the tactic seems to have been to secure a "confession" before allowing access to a solicitor.

(7) Suspects were beaten up.

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1 *Hansard* (HL), 26 October 1989, vol 158, col 1036.

2 The Regional Crime Squad was responsible for the investigation of the murder of newspaper boy Carl Bridgewater in 1978 (see Appendix 1).

3 T Kaye, *Unsafe and Unsatisfactory?: Report of the Independent Inquiry into the Working Practices of the West Midlands Police Serious Crime Squad* (1990).

4 Electrostatic Detection Apparatus analysis is a means of recovering impressions on documents from writing one or more pages above. It can be used to show that pages of a document have been interposed, removed or substituted. For instance, where impressions from page one are found on page three, but not on page two, and impressions from page two are not found on page three, the implication is that pages one and three were written together and page two was interposed. If there are unidentified impressions on page three, these may represent the text on the original page two which has been replaced.

3.9 The official report published in 1994 confirmed that there had been physical abuse of suspects, fabrication of admissions, planting of evidence and mishandling of informants.[5]

3.10 Beginning in 1990, there were a succession of appeals in which the Court of Appeal Criminal Division ("CACD") quashed convictions on the basis of misconduct by members of the WMSCS. In 1990, in *Khan*, the CACD quashed a conviction for armed robbery, holding:[6]

> there were too many incongruities for the confession evidence to be treated as reliable. The fact that notes were written by torchlight in a moving car but showed no difference to notes made at the police station, that K had only signed one page of a statement and that no independent officer had read his confession to him, all brought that evidence under suspicion.

3.11 The convictions of the Birmingham Six were quashed in March 1991.[7] In 1992, the conviction of George Glen Lewis for burglary was quashed on the basis that, given what is now known about the WMSCS, his protestations at the time of his trial that his confession had been fabricated were plausible. The officers who had carried out the interview had subsequently been found to have falsified evidence in another case.[8]

3.12 In 1994, the High Court heard a claim for damages initially begun in 1985 by John Treadaway against the Chief Constable of West Midlands Police. He had been arrested for robbery in 1982 and claimed that following his arrest he was assaulted by police officers, who repeatedly placed a plastic bag over his head so that he was asphyxiated, until he confessed to the robbery. He had been examined by a police doctor, to whom he had reported these assaults, and the doctor had found injuries consistent with his account. The court accepted Treadaway's account of his treatment and awarded him damages of £50,000. Treadaway then appealed against his conviction. Although the prosecution sought to have the conviction upheld on the basis of evidence from two "supergrasses", the CACD held that their evidence was manifestly tainted, while Treadaway's own confession had been obtained by oppression and was unreliable.

3.13 In 1996, the CACD quashed the conviction of Roy Meads for armed robbery, finding that six of the 11 officers could now have been challenged as to their credibility, while expert evidence showed that the speed at which the notes of an interview were supposed to have been made was not credible ("certain interviews having been apparently read back almost at the speed of a horse racing commentary").[9] In November 1996, the conviction of Thomas Clancy for armed robbery was quashed on

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5 H Carter, "'Double' miscarriage of justice victim Martin Foran speaks", *BBC News* (15 August 2013).

6 *R v Khan*, *Guardian* 2 March 1990, CA, [1990] 2 WLUK 337.

7 *R v McIlkenny, Hill, Power, Walker, Huner and Callaghan* [1992] 2 All ER 417, CA.

8 *R v Lewis*, *Independent* 1 May 1992, *Guardian* 9 April 1992, CA, [1992] 4 WLUK 22.

9 *R v Meads* [1996] Crim LR 519, CA.

the basis that alleged confessions made in interview were not reliable as the officers involved could now be challenged as to their integrity.[10]

3.14 This meant that by the time the CCRC was set up in 1997, several WMSCS officers had been found to have been unreliable. The CCRC then referred a series of cases, including *Brown*; *Campbell*; *Cummiskey*; *Irvine*; *Brown, Brown, Dunne and Gaughan*; *Hagans and Wilson*; *Murphy and O'Toole*; and *Twitchell*.[11] All of these convictions were quashed.

Rigg Approach Flying Squad[12]

3.15 In 1998 the Metropolitan Police launched Operation Ethiopia, an investigation into the activities of members of the "Flying Squad"[13] based at Rigg Approach, East London. In 1998, two Flying Squad officers pleaded guilty to offences including burglary, conspiracy to rob and perverting the course of justice. The two agreed to give evidence of corruption against other officers. Sixteen officers were suspended and two were later jailed, as was a retired detective inspector. It was found that the jailed officers had been parties to the theft of more than £200,000 recovered from a security van robbery.

3.16 By the end of 1998, the Crown Prosecution Service ("CPS") had identified at least 25 officers from Rigg Approach who could no longer be advanced as witnesses of truth.

3.17 One of the key findings of the investigations into Rigg Approach was the existence of a bag (referred to as the "First Aid Kit") at the station containing an imitation firearm and balaclavas which could be planted by officers either to enhance a case against a suspect or to protect the position of an officer who had shot an unarmed suspect. It became clear that as well as the officers ("A officers") who had been personally implicated in misconduct, a much wider group of officers ("B officers") were aware of the squad's corrupt approach to evidence and made no attempt to prevent it.

3.18 The CCRC referred several cases to the CACD on the basis that the convictions rested largely on the evidence of A or B officers, including *Christian*; *Findlay*; *Martin, Taylor and Brown*; *Michael Thomas*; and *Willis*.[14] All these convictions were quashed.

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10 *R v Clancy* [1997] Crim LR 290, CA.

11 Respectively [2006] EWCA Crim 141; (14 October 1999) CA (unreported); [2003] EWCA Crim 3933; [2002] EWCA Crim 29; [2001] EWCA Crim 169; [2003] EWCA Crim 3358; [2006] EWCA Crim 951; and [2000] 1 Cr App R 373, CA.

12 Section informed by the cases cited in para 14 in this Appendix (3).

13 The Flying Squad is a specialist branch of the Metropolitan Police, which was set up in 1919 as a mobile unit which could operate across geographical divisional boundaries. It was originally set up to address robbery and pickpocketing but would later specialise in armed robberies.

14 Respectively [2003] EWCA Crim 686; [2003] EWCA Crim 3480; (12 July 2000) CA (unreported); [2003] EWCA Crim 1555; and [2006] EWCA Crim 809.

Derek Ridgewell[15]

3.19 Derek Ridgewell was a detective with the British Transport Police. In 1972, Ridgewell was responsible for a squad of officers specialising in muggings on the London Underground. He was later moved to a unit specialising in thefts from mail in transit at a Royal Mail depot in South London.

3.20 In February 1972, the "Stockwell Six" – Paul Green, Courtney Harriot, Cleveland Davidson, Texo Johnson, Ronald De'Souza and Everet Mullins – were arrested on charges that they had attempted to rob Ridgewell on a London Underground carriage. All six pleaded not guilty, claiming that the alleged incident had never happened. Five were convicted.

3.21 The "Oval Four" – Winston Trew, Sterling Christie, George Griffiths, and Constantine Boucher – were arrested at Oval underground station in March 1972 and convicted of assaults on officers and attempted theft of passengers' handbags. A defence witness who had seen the police initiate the attacks on the four was also charged with assault.

3.22 Concerns over Ridgewell first emerged publicly in 1973, when he arrested two black men at Tottenham Court Road underground station. The men turned out to be Jesuit scholars from the University of Oxford. The charge was dismissed by the judge who said, "I find it terrible that here in London people using public transport should be pounced upon by police officers without a word".[16] The BBC's current affairs programme *Nationwide* also raised concerns about the safety of the Stockwell Six convictions.

3.23 Although the "mugging squad" was closed down, Ridgewell was moved to a squad charged with investigating mail theft. In fact, he was committing mail thefts. In 1980, he was convicted of conspiracy to rob and jailed for seven years. He had stolen over £1million (approximately £4m in current prices). He died in prison in 1982, aged 37.

3.24 It subsequently emerged that Ridgewell had a practice of framing innocent people for crimes which he was himself committing. In June 1975, Stephen Simmons and two other men were stopped and questioned by Ridgewell about stolen mail bags. They were prosecuted and convicted. Their defence was that they had never been in the goods yard and that this was a "fit up" and that their supposed confessions were fabricated. In 2013, Simmons discovered Ridgewell's history and made an application to the CCRC. His conviction was quashed by the CACD in January 2018. The Court considered accounts of the Stockwell Six and Oval Four cases (even though these had not been successfully appealed against), the judge's decision to stop the trial of two men in 1973, and another case in 1972 where magistrates at Southwark Juvenile Court had acquitted four children, despite the prosecution presenting signed confessions. The Court noted that the magistrates "were so disturbed by the

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15 Section informed by *R v Peterkin* [2024] EWCA Crim 309; *R v Johnson* [2021] EWCA Crim 1837; *R v Green* [2021] EWCA Crim 1026; *R v Boucher* [2020] EWCA Crim 629; *R v Christie* [2019] EWCA Crim 2474; *R v Simmons* [2018] EWCA Crim 114; and M Foot, "Corrupt Cops", *London Review of Books* (8 February 2024).

16 D Campbell, "'Oval Four' men jailed in 1972 cleared by court of appeal in London", *Guardian* (5 December 2019).

implications of what they had heard, including allegations of police violence, that they said that there should be an investigation".

3.25 The CCRC launched an ongoing investigation into convictions in which Ridgewell was involved. It had contacted Winston Trew as part of the inquiry into the Simmons conviction. In October 2019, the Commission referred Winston Trew's conviction, along with that of Sterling Christie, to the CACD. The CACD quashed both convictions on 5 December 2019. In November 2019, the CCRC successfully referred the conviction of George Griffiths. In January 2020, it successfully referred the conviction of Omar Boucher, meaning that all of the "Oval Four" had been exonerated.

3.26 The CCRC also set about trying to contact the members of the Stockwell Six. In December 2020, it referred the convictions of Courtney Harriot and Paul Green. In March 2021 it referred the conviction of Cleveland Davidson. In July 2021, it announced that it had located Texo Johnson, who was living overseas. His conviction was quashed in November 2021. The Commission recently referred the case of Ronald De Souza, the last convicted member of the Stockwell Six, to the CACD.[17]

3.27 The Commission also located the families of Saliah Mehmet and Basil Peterkin, two British Rail workers who were in 1977 convicted of conspiracy to steal parcels from a railway yard on Ridgewell's testimony. Both had died (Peterkin in 1991 and Mehmet in 2021). Their convictions were referred to the CACD, which quashed them posthumously in 2024.

3.28 In 2020, British Transport Police commissioned a review of the service history of Ridgewell, and identified seven other officers who were "associated with" Ridgewell in addition to the two who had been convicted alongside him.

3.29 The CCRC's ongoing review into the Ridgewell cases has involved using ancestry and property websites, coroners' records, and physical records from the National Archives to locate those convicted or surviving family members on the basis of Ridgewell's testimony.

UNRELIABLE EXPERT EVIDENCE

Dr Alan Clift[18]

3.30 In 1972, Helen Will was found murdered on the English side of the border between England and Scotland. Her murder was investigated by English police officers, using Home Office scientists, but because it emerged that the murder may have taken place in Scotland, a prosecution was eventually launched in Scotland. John Preece, a lorry driver, was convicted of her murder in 1973. At trial there was eyewitness evidence placing Preece and the victim together in Aberdeen on the last day she was seen, but this was shown to be demonstrably false. The High Court of Justiciary later accepted that the only reliable evidence in the case was (i) that the victim was last seen at a roundabout in central Scotland, and that Preece would also have passed that

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17 E Dugan, "Case of last wrongly convicted Stockwell Six member referred to court of appeal", *Guardian* (31 January 2025).

18 Section informed by *Preece v HM Advocate* (19 June 1981), 2013 SCL 523, High Court of Justiciary (especially at [14], by Lord Justice General Emslie).

roundabout on his way to Kirkcaldy at around this time; (ii) his lorry had been in a car park in Kirkcaldy that evening; (iii) one witness saw Preece in Kirkcaldy the following morning, claiming that he had scratch marks on his face; and (iv) Preece would have had time to have driven over 200 miles to the English border and back between the last sighting of his lorry in Kirkcaldy that night, and the first sighting the following morning. In addition, Preece had initially given a false account of where he had spent that night.

3.31 Crucially, however, Dr Alan Clift, Chief Biologist at the Home Office North Western Science Laboratory, gave evidence that there were two grass seeds in the cab of the lorry which were similar to a seed found in Helen Will's tights; that fibres found in dust in the cab were similar to fibres from Helen Will's coat; that a hair on Helen Will's body was similar to Preece's hair, and that there was semen staining on Helen Will's body and clothes from a Group A secretor.[19] John Preece was a Group A secretor.

3.32 Dr Clift did not point out that Helen Will was herself a Group A secretor and that as the staining contained a mix of semen and vaginal secretions, this alone could account for the test on the staining reacting as it did.

3.33 In 1977, Dr Clift was suspended over the quality of his work. A review by Margaret Pereira, director of a Home Office forensic laboratory, concluded:

> He does not seem to have turned his mind to the possibility of his evidence incriminating people – trusting that the police were always right in their initial suspicions …[20]

> In many ways Dr Clift's attitudes reflect those of the very early forensic scientists who saw their function as one of 'helping the police' and not … (a) to assist the police in their investigations and (b) to assist in the cause of justice in the courts.[21]

3.34 Following Dr Clift's suspension, three convicted prisoners petitioned the Home Secretary to refer their cases to the CACD. Two of the cases were referred. The Court quashed the conviction of one of the two prisoners along with those of two other men convicted with him of robbery and burglary mainly on the evidence given by Dr Clift.[22]

3.35 In 1981, Preece's case was referred to the High Court of Justiciary by the Secretary of State for Scotland, and the High Court quashed his conviction. It found that Dr Clift had known that Helen Will was a Group A secretor and had failed to mention this in his evidence, holding that:

> consciously or unconsciously, Dr Clift expressed his confident opinion that the donor of the semen was an A secretor in a wholly misleading way [and] deprived the defence and the court of the means whereby it could have been called to question.

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19 A "secretor" is someone who secretes blood-group antigens in bodily fluids.

20 J H Philips and J K Bowen, *Forensic Science and the Expert Witness* (1985).

21 M Hamer, "How a forensic scientist fell foul of the law", *New Scientist* (3 September 1981) pp 575-6.

22 *Hansard* (HC), 15 Nov 1984, vol 67, col 888.

3.36 Dr Clift was subsequently required to retire by the Home Secretary. The Home Secretary then undertook a review of cases in which Dr Clift had been involved. Eleven cases were referred to the CACD, although in three cases, the convicted person abandoned his appeal. The CACD quashed the convictions in three cases, but dismissed the appeals in five cases. In two of the cases where the Court upheld the convictions, retesting of material by fresh Home Office scientists had been possible.[23]

Dr Frank Skuse

3.37 In January 1983, another Home Office scientist, Dr Frank Skuse was "removed from reporting cases to court" due to a "pattern of deteriorating performance".[24] He was later suspended from duty, and in 1985 he retired early from the Civil Service. The director of the forensic laboratory in which Dr Skuse worked undertook a review of all the cases he had worked on since 1966 – around 350 cases. That review concluded that it "had not brought to light any case where Dr Skuse had misreported facts, had been biased in his reports, or had been negligent in his work", and that there were no "grounds for suspecting that Dr Skuse's work had led to any miscarriage of justice".[25]

3.38 It is clear that that review failed to identify the issues with Dr Skuse's work that formed part of the grounds for quashing the convictions of the Birmingham Six and Judith Ward (see Appendix 1) which were not referred to the CACD as a result. The cases were successfully appealed against later; in both cases, the CACD found problems with the evidence of Dr Skuse: in *Ward*,[26] the CACD described his conclusions as "wrong, and demonstrably wrong, judged even by the state of forensic science in 1974".

Dr Michael Heath

3.39 In 2006, pathologist Dr Michael Heath was subject to disciplinary proceedings before the Home Office Policy Advisory Board for Forensic Pathology over reports that he had made in two cases, *Puaca*,[27] and *Fraser*.[28] The complaints had been made by other forensic pathologists involved in the cases. After the complaints had been lodged, but before they were determined, Puaca's conviction for the murder of his partner, Jacqueline Tindsley, was quashed.[29] Dr Heath had given evidence that Miss Tindsley had been smothered on her bed, rather than that she had died of a drug overdose. The CACD held that his conclusions were not founded in a way that they

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23 *Hansard* (HC), 15 November 1984, vol 67, col 303.

24 *Hansard* (HC), 17 March 1988, vol 129, col 1209.

25 *Hansard* (HC), 16 Feb 1988, vol 127, col 955.

26 [1993] 1 WLR 619, CA, 677. The CACD also referred to "an impressive body of expert opinion to the effect that Dr Skuse's tests, notwithstanding his confident assertions at the trial, were of no value in establishing contact between the appellant and the explosives", and described his evidence as "valueless".

27 [2005] EWCA Crim 3001, [2006] Crim LR 341.

28 Fraser was acquitted by a jury in 2002 of killing his partner, Mary Anne Moore. Dr Heath had given evidence that she had been beaten. The other pathologists said that her injuries were indicative of having fallen, or being pushed, down stairs.

29 *R v Puaca* [2005] EWCA Crim 3001, [2006] Crim LR 341.

could be safely relied upon, and his evidence was presented in a way which may have caused the jury to give inappropriate weight to it.

3.40 The CACD subsequently considered several appeals which had turned on contested pathology evidence of Dr Heath. Two, *O'Leary*[30] and *Laverick*,[31] were heard after leave to appeal out of time was granted by the single judge.

3.41 The case of *Boreman and others*[32] was referred by the CCRC in June 2006, and the convictions of three men for murder were quashed and substituted with convictions for causing grievous bodily harm with intent. Following this, the CCRC began a review of cases involving Dr Heath that it had previously closed without a reference. At least nine cases where he was involved were identified, and at least five cases gave rise to concern requiring investigation.[33] However, the review concluded that none of these should be referred to the CACD and in most cases the evidence of Dr Heath had been uncontentious.[34]

3.42 The Attorney General refused to undertake a wider review of convictions involving Dr Heath, saying that "the normal appeal procedures, and where appropriate the involvement of the CCRC, should be sufficient".[35]

TESTING FAILURES

Greater Manchester drink driving cases

3.43 In November 1998, a testing facility in Chorley used by Greater Manchester Police identified an anomaly when testing a blood sample taken in relation to a drink driving charge. There was a significant discrepancy between the level of alcohol found in the blood test and that expected as a result of the roadside breathalyser test. An inquiry was begun. It established that in February 1987, in response to complaints that swabs used to clean an area of skin before blood was drawn were drying out, the force had replaced all the swabs with towelettes. The new towelettes, however, were ethanol based, meaning that they could contaminate any alcohol test. As the Divisional Court

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30 [2006] EWCA Crim 3222. The CACD quashed the conviction and ordered a retrial on the basis that Dr Heath had drawn the unjustified conclusion that the fatal blow could not have been struck in self-defence. O'Leary was subsequently found not guilty of murder, but guilty of manslaughter. He was sentenced to six years' imprisonment, but immediately released on account of the time that he had already served.

31 [2007] EWCA Crim 1750. Dr Heath had given evidence that the fatal blow with a knife must have been deliberate and powerful rather than a moderate impact consistent with an accident. The conviction was quashed but Laverick was convicted at a retrial.

32 [2006] EWCA Crim 2265. Dr Heath had given evidence that the deceased had suffered injuries from a physical assault which had rendered him unconscious and thus unable to escape a fire in his property, and that had he not died from smoke inhalation, he would have died of his injuries within an hour. The Court held that there was no evidence that the fire was started deliberately; there was no support for the proposition that the injuries would have rendered the victim unconscious, or that they would have been fatal. Thus, there was no evidence that the injuries had directly or indirectly caused the death. The Court substituted convictions of causing grievous bodily harm with intent.

33 S Laville, "Murder cases review after expert criticised", *Guardian* (1 Nov 2006).

34 L Elks, *Righting Miscarriages of Justice* (2008), p 104.

35 S Laville, "Murder cases review after expert criticised", *Guardian* (1 Nov 2006).

noted, there "could hardly be a more potent contaminating agent in the circumstances".[36]

3.44 Over 2,000 samples had been taken by police doctors using the towelettes before the problem was noticed. The CPS conducted a review and referred 1,427 cases to the Home Secretary for consideration for a free pardon. However, the Home Secretary refused these, citing a previous statement that before recommending a pardon he needed to be satisfied that the defendant did not in fact commit an offence.

3.45 At least 52 applicants then sought judicial review of their convictions. In *ex parte Scally*,[37] the Divisional Court held that, albeit unintentionally, the prosecutor (meaning the police) had corrupted the process in a way which gave the defendant no proper opportunity to decide whether to plead guilty or not guilty.

3.46 Among the cases were two people who had attempted suicide after being convicted; a man who was jailed for three months; and a man whose garage business closed down after he was banned from driving.

3.47 Greater Manchester Police denied liability, saying that the towelettes had been supplied by the Home Office. The Home Office set up a scheme to compensate those wrongly convicted. Around 60-70 convicted motorists were awarded compensation.[38]

Randox blood tests

3.48 In 2017, Randox Testing Services ("RTS") reported alleged manipulation of data at one of its laboratories to the Police, the Forensic Science Regulator and the UK Accreditation Service ("UKAS"). In March 2017, UKAS suspended accreditation of drug testing at the laboratory after a second form of manipulation was identified. Randox voluntarily suspended testing at a second laboratory.

3.49 Around 50 pending cases had to be dropped. The National Police Chiefs' Council ("NPCC") announced in December 2018 that it had identified more than 10,500 cases across 42 police areas which might have been affected.

3.50 The NPCC coordinated a programme of retesting, funded by RTS. The CPS contacted those whose convictions were considered not to be reliable. In many cases they had pleaded guilty in the face of seemingly incontrovertible scientific evidence.

3.51 Most of these cases would have been dealt with by magistrates' courts. However, in at least two cases people had been convicted of causing death by careless driving while unfit through drugs or over the prescribed limit. In *Bravander*,[39] the defendant had pleaded guilty, but successfully appealed against sentence on the basis that retesting

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36 *R v Bolton Magistrates' Court, ex p Scally* [1991] 1 QB 537, DC, 543C, by Watkins LJ.

37 [1991] 1 QB 537, DC.

38 "Motorists win drink-drive claim", *BBC News* (25 June 1998).

39 [2018] EWCA Crim 723.

suggested that the level of impairment was in the lowest category. In *Ward*,[40] the appeal against conviction was rejected as retesting confirmed the previous findings.

3.52 However, in some cases the appellant had been dealt with by the Crown Court. In *Senior*,[41] in addition to drug driving, the appellant had also been charged with possession of a Class B drug with intent to supply. He had pleaded guilty to both offences after blood tests showed the presence of THC of 5.1 µg/l, above the legal limit of 2.1µg/l. Retesting showed that the level of THC in his blood was consistent with use of cannabis, but below the legal limit. In consequence, there was no reliable evidence of the level of cannabis in the appellant's blood at the time of the driving.

3.53 The Court found the conviction in *Senior* unsafe, contrary to the prosecution's argument that there was ample evidence to support the admission of guilt, holding:[42]

> It is plain that this appellant had used cannabis and had cannabis in his bloodstream when he was stopped by the police. That much is accepted and is demonstrated by means of reliable evidence. But this offence is only committed if the quantity of THC in the bloodstream exceeds 2 micrograms per litre of blood. Once the Randox reports are put to one side there is no scientific evidence to show that the appellant had THC in excess of that limit in his blood.
>
> We are unable to infer from the other evidence relied upon by the prosecution that THC in excess of that limit was present. That other evidence establishes what is already known and is not disputed, namely that the appellant was a regular user of cannabis and had used cannabis in the recent past before he was stopped. But that is not enough.

INFANT DEATH CASES

Sally Clark

3.54 In April 2003, the CACD quashed the conviction of Sally Clark, a solicitor, for the murder of her baby sons Christopher and Harry in 1996 and 1998 respectively.[43] Although the death of Christopher had been attributed to natural causes, after Harry's death she was arrested and charged with murdering both boys. During the trial, Professor Sir Roy Meadow testified that the chance of two children from a family like the Clarks – affluent, non-smokers – dying from cot death was 1 in 73 million. Home Office pathologist Dr Alan Williams also gave evidence. The jury had asked if there were "blood" tests in respect of Harry. Dr Williams failed to disclose that samples of

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40 [2018] EWCA Crim 872.

41 [2018] EWCA Crim 837.

42 Above, at [22]-[23], by Whipple J. As a post-script, the Court sitting simultaneously as the CACD and the High Court subsequently held that as Senior's case had been sent to the Crown Court by magistrates under s 51(3) of the Crime and Disorder Act 1998, it was not a conviction on indictment, and therefore the CACD had no power to quash it. The correct route of challenge was by way of judicial review. The Court chose not to reopen the quashing of the conviction on the basis that it would have been open to the CACD to quash the conviction by reconstituting itself as a Divisional Court, and its order was "for all material purposes the same as granting an order in the High Court" (*R v Wilson* [2019] EWCA Crim 2410, [2020] RTR 20 at [34], by Fulford LJ VPCACD).

43 [2003] EWCA Crim 1020, [2003] 2 FCR 447.

cerebrospinal fluid had been taken, which had shown the presence of the bacterium staphylococcus aureus. This had also been found in his stomach tissue and fluid, lungs, bronchus, and throat.

3.55 The case had been unsuccessfully appealed against in 1999, despite the CACD expressing concern over Professor Meadow's statistical evidence.[44] However, it was satisfied that the jury had been directed that "we do not convict people in these courts on statistics". The argument that Professor Meadow had strayed beyond his expertise was rejected as "[n]o-one would know better than Professor Meadow that this important evidence as to whether these deaths were unnatural … certainly did not lie in the statistics".[45] The CACD had concluded that there was "some substance" in the criticism that the jury might have focused on the 1 in 73 million figure,[46] but satisfied themselves that there was an "overwhelming case" against Clark.[47]

3.56 However, public concern continued over the convictions. The Royal Statistical Society wrote to the Lord Chancellor expressing concern about the misuse of statistics by Meadow, while the Solicitors' Disciplinary Tribunal suspended Clark but did not strike her off the roll of solicitors. Given that the tribunal was compelled to treat her conviction as established for the purposes of the fitness to practise proceedings, this was generally seen as representing an expression of concern about the safety of the conviction.

3.57 Following a reference by the CCRC, Clark's conviction was quashed on the basis of fresh evidence of significant non-disclosure by Dr Williams. The Court concluded that Dr Williams had known of the findings, but having satisfied himself that Harry and Christopher had not died of natural causes, did not feel that he needed to disclose them to others. If Harry's death may have been from natural causes, then no safe conclusion could be reached in respect of Christopher's death – since it was only Harry's later death which raised any question over Christopher's earlier death.[48]

3.58 In addition to the non-disclosure, however, the Court expressed concern over statistical evidence presented at trial. Implicitly rejecting the findings of the CACD at the first appeal, it held that had this ground been argued, it would in all probability have considered that it provided a distinct basis for quashing the conviction.

3.59 It also questioned the way that the case had been put to the jury. The prosecution had argued that the jury could infer from similarities between the deaths that both had been killed by their mother. The CACD held that four of the supposed similarities were inconsequential (and one was arguably not a similarity at all).

Trupti Patel

3.60 In June 2003, Trupti Patel was acquitted by a jury of murdering her three children, Amar, Jamie and Mia. All three had died when a few weeks old. Evidence had been

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44 *R v Clark* (2 October 2000) CA (unreported), [2000] 10 WLUK 1.

45 Above, at [160], by Henry LJ.

46 Above, at [184].

47 Above, at [272].

48 [2003] EWCA Crim 1020, [2003] 2 FCR 447.

given by Professor Meadow. The defence successfully adduced evidence from a geneticist that several cot deaths in one family could be attributable to an unknown genetic defect. Two key witnesses who had disputed claims that rib fractures sustained by Mia could have been caused during attempts at resuscitation said that they could no longer be sure of this.

Angela Cannings

3.61 In January 2004, the CACD quashed the conviction of Angela Cannings.[49] Three of Cannings' children had died in infancy (and a fourth had suffered an "apparent life threatening event"). She had initially been charged with killing all three, but the prosecution only proceeded in respect of two.

3.62 Allowing the appeal and quashing the convictions, The Lord Chief Justice, Lord Judge, said:[50]

> The unavoidable reality is that some infant deaths remain "unexplained" or "unascertained" … Treating the problem as a syndrome tends to obscure the fact that sudden unexplained infant deaths occur in different circumstances, and some may be multi-factorial, the result of a coincidence of processes which, taken in isolation, would not necessarily cause death. No underlying condition for every death categorised as [Sudden Infant Death Syndrome ("SIDS")] has been identified. The critical point of each such death is that it is indeed unexplained, and that its cause or causes, although natural, is or are as yet unknown. SIDS does not apply to deaths, or if already attributed to SIDS, ceases to apply to deaths which are clinically explicable or consequent on demonstrable trauma. In each SIDS case the mechanism of death is the same, apnoea, loss of breath or cessation of breathing. In the true SIDS case we do not know why the particular infant's breathing stopped. All we know is that for some unexplained reason it did. One obvious reason for loss of breath is smothering or some deliberate interference with the infant's normal breathing process. However the same process, with the same result, also occurs naturally.

3.63 He went on:[51]

> There could be no denying that the death of three apparently healthy babies in infancy while in the sole care of their mother was, and remains, very rare, rightly giving rise to suspicion and concern and requiring the most exigent investigation. Given the overwhelming consensus of medical evidence, it would indeed have been an affront to common sense to treat the deaths of the three children and the [Apparent Life Threatening Events ("ALTEs")] as isolated incidents, entirely compartmentalised from each other. All the available relevant evidence had to be examined as a whole. Nevertheless, a degree of caution was necessary to avoid what might otherwise have been the hidden trap of taking the wrong starting point… If, after full investigation, the deaths, or ALTEs, continued to be unexplained, and

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49 [2004] EWCA Crim 1, [2004] 1 WLR 2607.

50 Above, at [8]-[9], by Judge LJ.

51 Above, at [12]-[14]. For instance, after Angela Cannings' conviction it emerged that she had a previously unknown half-sister, whose daughter had suffered a similar ALTE when aged four weeks.

there was nothing to demonstrate that one or other incident had resulted from the deliberate infliction of harm, so far as the criminal process was concerned, the deaths continued properly to be regarded as SIDS, or more accurately, could not properly be treated as resulting from unlawful violence…

As we have already emphasised, the question in this case was whether there were any crimes at all, and whether there were, in the legal sense, any victims of crime. As we shall see, there was no direct evidence and very little indirect evidence to suggest that they were, and there was further evidence which tended to suggest that they were not.

THE POST OFFICE HORIZON SCANDAL

3.64 In 1999, the Post Office introduced a new computer accounting system, "Horizon", provided by the IT firm Fujitsu. Almost immediately, sub-postmasters began to report irregularities. The Post Office refused to acknowledge these discrepancies.

3.65 Between 2000 and 2014, Post Office Limited ("POL") prosecuted at least 736 sub-postmasters based on data from Horizon. Other cases in England and Wales were prosecuted by the CPS and the Department for Work and Pensions. Some sub-postmasters were persuaded to plead guilty to false accounting charges in order to avoid prosecution for theft.

The initial appeals: *Brennan* and *Butoy*

3.66 None of these cases were successfully appealed against at the time. Only two appeals were heard by the CACD: those of Harjinder Butoy[52] and Lisa Brennan.[53] (Many of the convictions were in magistrates' courts and therefore any appeal would have been to the Crown Court.)

3.67 Lisa Brennan had been charged with 32 separate counts of theft, relating to payments of cash against vouchers for pensions and benefits. She was convicted of 27 and acquitted of 5. The discrepancies took the form of amounts being paid out greater than the amount on the voucher. Each count alleged theft in a particular sum, that sum attributed to discrepancies relating to one – or more – vouchers.

3.68 Her appeal, in 2004, did not allege problems with Horizon (which were then not so widely known). Instead, her counsel argued that it was perverse that the jury acquitted on five counts but convicted on 27 when the common issue was dishonesty. Counsel for the prosecution therefore tried to rationalise why the jury might have acquitted on the five counts. The CACD effectively accepted the explanation given by the prosecution.[54]

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52 [2018] EWCA Crim 2535.

53 [2004] EWCA Crim 1329.

54 In two cases, the sums "paid out" were the same digits as the sums which were supposed to have been paid out transposed (£174.45 rather than £147.45, and £62.30 rather than £26.30), perhaps indicating she had made a genuine mistake and passed the amount to the customer, rather than – as alleged – retaining the excess. In two of the other counts on which she was acquitted the amounts said to have been overclaimed

3.69 Harjinder Butoy was convicted of 10 counts of theft in 2008 (he was acquitted of an 11th charge). He was sentenced to 39 months' imprisonment and made subject to a confiscation order of approximately £61,000. The Post Office alleged that Mr Butoy had stolen cash, and then altered computer records to show that the cash had been paid out against cheques presented for payment. The Post Office claimed that those cheques were never received.

3.70 The Post Office challenged Mr Butoy's application to appeal against his conviction out of time: first, they argued that "whilst, as with any computer system, errors from time to time may crop up, Horizon is considered to be largely reliable"; second, that "what lay at the heart of the thefts were the missing cheques and the applicant's inability to explain why it was when the paperwork was otherwise in order that these cheques should have gone missing". The Court upheld the conviction on the basis that Horizon was not at the heart of the evidence, but rather the missing cheques.

3.71 The CACD has now accepted that both of these cases were in fact "Horizon cases", in which Horizon data was central to the prosecution.[55] In Mr Butoy's case, the CACD concluded that "[a]lthough POL emphasises the paper trail, proof that money had been stolen depended upon the Horizon evidence".[56]

3.72 The CCRC started to receive applications from a "large number" of affected persons as problems with Horizon began to become known.[57] However, no cases were referred until after the 2019 "Horizon issues" judgment in *Bates v Post Office Limited*.[58]

The Post Office's review of convictions

3.73 By summer 2013, the Post Office was well aware of problems with Horizon and previous prosecutions which had relied on it. As we discuss in Chapter 17, in July 2013, the CCRC had written to Paula Vennells, the Chief Executive of POL, enquiring about the number of convictions that might be affected by the issues with Horizon that had emerged.

3.74 The Post Office started a review of prosecutions by Cartwright King, the law firm who had acted for Post Office in many of those prosecutions. The review seems to have been limited to those cases in which Cartwright King had undertaken the prosecution on behalf of the Post Office. Some Cartwright King solicitors were involved in reviewing cases which they had personally prosecuted.

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were small (£20 and £10) which the jury might have concluded was small enough to be a genuine mistake. The fifth charge was a discrepancy of £110, but made up of two alleged overpayments, one being just £10. Again, the jury may have considered that it was small enough that they could not be sure that the overpayment was dishonest.

55 *R v Hamilton* [2021] EWCA Crim 577, [2021] Crim LR 684 at [333]-[340] (*Butoy*) and [286]-[290] (*Brennan*), by Holroyde LJ.

56 Above, at [339].

57 CCRC, "The CCRC and Post Office/ Horizon cases" (3 January 2024)

58 *Bates v Post Office Ltd* [2019] EWHC 3408 (QB) (Judgment (No 6) "Horizon Issues"); the group litigation against the Post Office never reached final judgment, as the Post Office settled the case after this 16 December 2019 judgment. There were five other judgments in the *Bates* litigation dealing with other matters.

3.75 The review was also limited to prosecutions where the supposed shortfalls had occurred after 1 January 2010. This excluded many cases in which Gareth Jenkins had given evidence, including the only case – that of Seema Misra[59] – in which he had given oral evidence.

3.76 As we also discuss in Chapter 17, it has since emerged that the Post Office saw their internal reviews as a way of resisting scrutiny by the CCRC. In the event, the CCRC did not make any references to the Crown Court or the CACD until after the ruling in the *Bates* litigation had established that that it was possible for defects in the software to cause apparent or alleged discrepancies or shortfalls, that this had happened on numerous occasions,[60] that Fujitsu had the ability to amend data in branch accounts without the knowledge or consent of the sub-postmasters, and that this would look as though the sub-postmaster had made the changes.

3.77 Actions taken after the *Bates* litigation to refer convictions to appellate courts, and subsequently to quash convictions legislatively, are discussed in Chapter 17.

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59 Seema Misra pleaded guilty to six counts of false accounting in 2009. However, she consistently denied having stolen any money and claimed that errors with Horizon were responsible. She was convicted of theft in November 2010, and sentenced to 15 months' imprisonment (concurrently with six months' imprisonment on each false accounting count). Mrs Misra, who was pregnant, served four and a half months before being released on Home Detention Curfew; she gave birth while wearing an electronic tag. Disclosure of material relating to Horizon reliability had been requested before the trial, and wrongly refused by POL. Mrs Misra's convictions were quashed in 2021. *R v Hamilton* [2021] EWCA Crim 577, [2021] Crim LR 684 at [91], by Holroyde LJ.

60 *Bates v Post Office Ltd* [2019] EWHC 3408 (QB) (Judgment No 6, "Horizon Issues").

Appendix 4: Procedural and evidential issues at trial

4.1 The terms of reference for this project are limited to matters relating to criminal appeals (plus retention and disclosure of evidence; retention and access to records; and compensation for miscarriages of justice). Matters relating to the investigation of offences and first-instance trials are not within the scope of the project. However, we recognise that very often miscarriages of justice will occur as a consequence of failures of investigation or disclosure, or the handling of submissions at trial.

4.2 In the Issues Paper,[1] we asked a final question whether consultees had any comments or proposals for reform not dealt with in their answers to previous questions. Several respondents made comments on matters which do not fall strictly within the terms of reference of this project.

4.3 One matter which we raised in the Issues Paper, and which was raised by some respondents, was the test to be employed by a trial judge upon a submission of no case to answer. Historically, this test related closely to the test employed by the Court of Appeal Criminal Division ("CACD"), because until the judgment in *Galbraith*,[2] the test had come to align with the "unsafe or unsatisfactory" test applied in the Court of Criminal Appeal, and later the "unsafe" test applied in the CACD.

4.4 In this appendix, we discuss various trial issues which some have suggested risk creating or fail in preventing or remedying miscarriages of justice.

4.5 In light of these issues, Consultation Question 106 in Chapter 17 invites views on particular reforms which might reduce the risk of a miscarriage of justice occurring.

TRIAL PROCEDURES

Reform of the *Galbraith* test

4.6 In the Issues Paper, we noted that a trial judge is obliged to leave a case to the jury if it could properly convict, even if the judge believes that a conviction would be unsafe.

4.7 Until 1981, the test that a court would apply on a submission of no case to answer was linked to the test that the CACD would apply in deciding whether a conviction would be quashed. In *Mansfield*, the CACD ruled that:[3]

> In 1968 … the basis for allowing an appeal in a criminal case was changed. The [appellate] Court was no longer to be concerned with the problem whether there was evidence upon which a reasonable jury could convict but with the question whether the verdict was unsafe or unsatisfactory ... That change now finds its place in section 2 of the Criminal Appeal Act 1968.

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1 Law Commission, Criminal Appeals: Issues Paper (July 2023).

2 [1981] 1 WLR 1039, CA.

3 [1977] 1 WLR 1102, CA, 1106D-F, by Lawton LJ.

> [Prosecution counsel]'s recollection is that about the time when the change came into existence, namely 1966, the practice began at the Bar of inviting the judge at the end of the prosecution's case, to say that on the prosecution's evidence it would be unsafe for the jury to convict and accordingly the judge ought to withdraw the case from the jury. [Defence counsel] submitted that that is now a well-established practice. That accords with the trial experience of the three members of this court.

4.8 However, the Court expressed its concern that "there has, it seems, been a tendency for some judges to take the view that if they think that the main witnesses for the prosecution are not telling the truth then that by itself justifies them in withdrawing the case from the jury".[4] The Court quoted the earlier *Barker*, where it was stressed that "It is not the judge's job to weigh the evidence, decide who is telling the truth, and to stop the case merely because he thinks the witness is lying. To do that is to usurp the function of the jury".[5]

4.9 In *Galbraith*, however, the CACD overruled *Mansfield*. The Lord Chief Justice, Lord Lane, noted:[6]

> There are two schools of thought: (1) that the judge should stop the case if, in his view, it would be unsafe (alternatively unsafe or unsatisfactory) for the jury to convict; (2) that he should do so only if there is no evidence upon which a jury properly directed could properly convict. Although in many cases the question is one of semantics, and though in many cases each test would produce the same result, this is not necessarily so.

4.10 Lord Lane concluded that applying a test of safety on a submission of no case to answer risked the trial judge engaging in the sort of assessment of witnesses that was prohibited in *Mansfield*:[7]

> If a judge is obliged to consider whether a conviction would be "unsafe" or "unsatisfactory," he can scarcely be blamed if he applies his views as to the weight to be given to the prosecution evidence and as to the truthfulness of their witnesses and so on …
>
> … the word "unsafe"; by its very nature it invites the judge to evaluate the weight and reliability of the evidence in the way in which [*R v*] *Barker* forbids and leads to the sort of confusion which now apparently exists. …

4.11 Accordingly, the Court held that when considering whether to accede to a submission of no case to answer, the test in a trial on indictment is whether the prosecution evidence, "taken at its highest", would allow a properly directed jury to convict.[8]

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4 [1977] 1 WLR 1102, CA, 1106F-G.

5 *R v Barker* (1977) 65 Cr App R 287, CA, 288, by Lord Widgery CJ.

6 *R v Galbraith* [1981] 1 WLR 1039, CA, 1040F-G, by Lord Lane CJ.

7 Above, 1041B and 1041H.

8 Above, 1042B-D.

4.12 In *Shippey*,[9] the Court held that although the trial judge is required to consider the prosecution evidence "taken at its highest", this does not involve "picking out all the plums and leaving the duff behind".

4.13 In *Broadhead*,[10] the CACD said that this phrase,

> overused it may be … embod[ies] a valid and important point… The judge's task in considering such a submission at the end of the prosecution's case is to assess the prosecution's evidence as a whole … the weaknesses of the evidence as well as such strengths as there are.

4.14 The flip side of this is that the judge cannot concentrate on the "duff" while ignoring the "plums".[11]

4.15 It has been suggested that this approach is "sound" because "if there is a conviction the CACD will decide whether the conviction can stand".[12] However, in practice, where it was open to the jury to convict on the evidence, the CACD has been increasingly unwilling to find a conviction unsafe on the basis of its own feeling that the conviction is unsafe. As we discuss at paragraph 8.165 above, after *Pope*, it is questionable how far "lurking doubt" remains available as a basis of appeal at all.

4.16 In *Jones*,[13] where the trial judge had expressed surprise at the jury's verdict, the CACD made clear that if there was a case sufficient to be put to the jury, the judge's own view of the evidence was "of no more relevance or materiality than that of an intelligent bystander in the public gallery".

4.17 The Runciman Commission recommended that the CACD's decision in *Galbraith* should be "reversed so that a judge may stop any case if he or she takes the view that the prosecution evidence is demonstrably unsafe or unsatisfactory or too weak to be allowed to go to the jury".[14]

4.18 Such a rule already applies in the case of hearsay evidence.[15] For such evidence, if:

(1) the case for the prosecution is based wholly or partly on a statement not made in oral evidence, and

(2) the evidence is "so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe",

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9 [1988] Crim LR 767, CA.

10 [2006] EWCA Crim 1705 at [17], by Keene LJ.

11 *R v ALD* [2023] EWCA Crim 967 at [15], by Macur LJ.

12 A Samuels, "No case to answer: the judge must stop the case" [1996] 9 *Archbold News* 6.

13 [1998] 2 Cr App R 53, CA, 55F, by Rose LJ VPCACD. The case is discussed in detail in Appendix 2.

14 Report of the Royal Commission on Criminal Justice (1993) Cm 2263, p 59, para 42. Under the second limb of *Galbraith*, the trial judge would be entitled to stop the case if it were "too weak" to go to the jury; the point, perhaps, is that "too weak" means no more than that no jury could properly convict on the prosecution evidence "taken at its highest".

15 Criminal Justice Act 2003, s 125.

the judge must direct the jury to acquit, or discharge the jury so that there may be a retrial.

4.19 A similar rule applies whereby if bad character evidence against a defendant is admitted[16] (other than by or with the agreement of the defendant) and the evidence is "contaminated", such that conviction of the defendant would be unsafe, the judge must direct the jury to acquit or discharge the jury. Evidence is "contaminated" if it is false or misleading as a result of collusion or of the witness being aware of something alleged by another witness.

4.20 Several consultees mentioned *Galbraith* in their responses. For example, APPEAL said:

> We agree that it would assist to amend the *Galbraith* 'no case to answer' test by permitting a trial judge to stop a case where there are manifest weaknesses in the prosecution case... This would then provide a principled basis on which the Court of Appeal could intervene by reviewing the trial judge's decision.

4.21 Cardiff University Law School Innocence Project said

> In [*Galbraith*], the Court of Appeal has effectively communicated that trial judges should give supremacy to the jury in allowing cases to proceed where they think the defendant could be convicted on the evidence, notwithstanding that judges would have concerns about the safety of that conviction. This has made judges reluctant to stop cases with a weak evidential basis from proceeding at trial. The danger of wrongful conviction here is further entrenched by the Court of Appeal's own reluctance to quash jury verdicts on appeal. We agree with the recommendation made by the [Runciman Commission] that the ruling in Galbraith should be overturned. If judges were prepared to stop weak cases from progressing, then many miscarriages of justice could be prevented.

4.22 JENGbA suggested that amending the test "would be of particular importance in [a] joint enterprise case where the evidence of participation and or/mens rea on the part of secondary parties is weak but adjudged sufficient to amount to a case to answer".

4.23 As acknowledged by the Court in *Galbraith*, in most circumstances, the difference between stopping a trial because no jury could properly convict and stopping it because no jury could safely convict would be purely semantic. However, *Galbraith* itself suggests that there may be circumstances in which there is sufficient evidence upon which a properly directed jury could *properly* convict, but where it would be *unsafe* for a jury to do so. We would point to the example of Jonathan Jones (see Appendix 2) as a possible example of a case where the evidence at trial was such that although there was evidence upon which the jury could convict, a conviction on that evidence would be unsafe. In that case the CACD held that the trial judge was correct to reject a submission of no case to answer but acknowledged that the prosecution case was "far from strong", and that at appeal the prosecution tried to defend the conviction as safe on the basis of a single thumbprint which they accepted could have been left innocently before or after the murder. Another example would be *Brown*

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16 Criminal Justice Act 2003, s 107.

(Jamie)[17] where the identification evidence was demonstrably weak, but there was a degree of corroboration if the jury rejected the evidence of the defendant's alibi witnesses. Given that rejection of an alibi is capable of corroborating a weak identification, it would appear that the judge could not have withdrawn the case from the jury under the tests in *Galbraith* and *Turnbull*; if the test was one of safety, the judge might have been free to do so.

4.24 *Galbraith* reflects the principle that in a criminal trial, it is the jury, not the judge, which is the primary finder of fact. However, trials have a variety of protections – including rules on the admissibility of evidence – which constrain how the jury may arrive at its decision, reflecting the overriding principle of acquitting the innocent and convicting the guilty. Indeed, several rules, including *Turnbull*, require a case to be withdrawn where, even though there is evidence, it would not be safe for the jury to convict on it. Reform of the test in *Galbraith*, to restore the link with the safety test, might therefore represent only a modest change.

Reasoned verdicts

4.25 In this jurisdiction, juries do not provide reasons for their verdict. In the Issues Paper, we noted that the compatibility of unreasoned jury verdicts with the right to a fair trial has been considered by the European Court of Human Rights ("ECtHR").[18] As we discussed in Chapter 8 in relation to the admissibility on appeal of evidence of juror deliberations, in *Saric v Denmark*,[19] the ECtHR held that article 6(2) does not prevent a defendant being tried before a jury which gives unreasoned verdicts. However, for the requirements of a fair trial to be satisfied, the defendant must be able to understand the reasons for the jury's verdict.

4.26 Directions from the judge, coupled with a presumption that the jury has followed them, will often be sufficient for the convicted person to know the basis on which they have been convicted. However, a potential complication here may arise from the fact that in some circumstances it may be legitimate to convict the accused on more than one basis, and therefore even if the jury follows the judge's route to verdict properly, it may be difficult for a convicted person to know the basis on which the jury convicted. This affects the convicted person's ability to pursue an appeal, and is particularly problematic where fresh evidence or identification of a legal ruling vitiates one of the routes by which the jury could have convicted, but not the other.

4.27 There have been proposals in recent years for juries to give a fuller explanation of their verdicts, whether by giving reasoned decisions, or giving answers to questions from the trial judge that show how they have come to their verdict.

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17 *R v Brown* [1998] Crim LR 196, CA. Brown was convicted of a robbery, in which a woman was attacked from behind. She had described her attacker as "5 feet 8 inches to 5 feet 10 inches tall", between 15 and 18, with dark brown hair. She said she had got a "good look at the left hand side of his face". Brown was 19, 6 foot 3 inches tall, and had black hair, and a prominent tattoo on the left hand side of his face. He also had three alibi witnesses. After the trial, the judge had written to the Registrar of Criminal Appeals to express concern about the safety of the conviction. The CACD held that the judge had failed to direct the jury in accordance with *Turnbull*, including the need for care when they have rejected an alibi, and found the conviction unsafe.

18 Law Commission, Criminal Appeals: Issues Paper (July 2023) para 2.51-2.58.

19 App No 31913/96.

4.28 Dr Mark Coen and Professor Jonathan Doak suggest that reasoned verdicts "would assist both prosecution and defence in assessing the available appeal options".[20]

4.29 Professor John Spencer has argued that:[21]

> A reasoned decision, surely, is indeed a vital safeguard, in particular for innocent defendants ... In the first place, there is no means of telling whether the jury have understood what the judge in his direction told them: a serious matter, since a substantial body of research suggests that juries frequently do not. And secondly, there is no guarantee that, assuming they did understand it, they followed it.

4.30 In their consultation response, Paul Taylor KC, Edward Fitzgerald KC and Kate O'Raghallaigh, were sceptical as to whether juries could be expected to provide fully reasoned explanations of their verdicts:

> Whilst we recognise that juries sitting in the Coroner's Court can produce sophisticated narrative verdicts, our view is that requiring juries to give reasons for their decision in criminal trials (where, unlike Coroner's Courts, the liberty of the subject is often at stake) is fraught with difficulties, is likely to prolong proceedings, and in any event may serve no useful purpose in the majority of cases.

4.31 A possible variant of asking the jury to provide a narrative of its reasoning would be the approach suggested by Lord Justice Auld in his review of criminal courts. He recommended that:

> the judge should devise and put to the jury a series of written factual questions, the answers to which could logically lead only to a verdict of guilty or not guilty [and] where he considers it appropriate, should be permitted to require a jury to answer publicly each of his questions and to declare a verdict in accordance with those answers.[22]

4.32 Juries are now routinely provided with a written route to verdict. If they were required, in appropriate cases, to answer the questions in the route to verdict, this might not only provide a protection against perverse or illogical verdicts. It might also enable the CACD, on an appeal, to understand how the jury had arrived at its verdict and therefore whether fresh evidence of the correction of some legal error would have made a difference.

EVIDENTIAL ISSUES

4.33 It will be seen from the cases cited in this consultation paper and its appendices that there are certain types of evidence which arise repeatedly in relation to miscarriages of justice.

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20 M Coen and J Doak, "Embedding Explained Jury Verdicts in the English Criminal Trial" (2017) 37 *Legal Studies* 786, 794.

21 J R Spencer, "Strasbourg and defendants' rights in criminal procedure" (2011) 70 *Cambridge Law Journal* 14, 16.

22 Rt Hon Lord Justice Auld, *A Review of the Criminal Courts of England and Wales* (2001) p 538, para 55.

Eyewitness identification evidence

4.34 One of these is eyewitness identification. Following the Devlin Report, the ruling in *Turnbull*[23] made special provision for eyewitness identification. Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused – which the defence alleges to be mistaken – the judge must warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification(s). The judge should tell the jury that caution is required to avoid the risk of injustice; that a witness who is honest may be wrong even if they are convinced they are right; that a witness who is convincing may still be wrong; that more than one witness may be wrong; and that a witness who recognises the defendant, even when the witness knows the defendant very well, may be wrong.[24]

4.35 The judge should direct the jury to examine the circumstances in which the identification by each witness can be made, including the length of time the accused was observed by the witness; the distance the witness was from the accused; the state of the light; and the length of time between the observation and the subsequent identification to the police. If, in the judgement of the trial judge, the quality of the identifying evidence is poor, the judge should withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification.

4.36 However, *Turnbull* is now almost 50 years old. The nature of identification procedures has changed: a video identification is generally preferred to an in-person identity parade. In addition, identification evidence will often turn on identification of a person on (often poor-quality) CCTV footage. In *Clare and Peach*,[25] the CACD ruled that a police officer who has conducted lengthy and studious research viewing and analysing photographic images from the scene can be treated as an *ad hoc* expert witness, and is entitled to assist the jury with identification evidence.

4.37 Moreover, there is now a much greater understanding of the psychology of memory,[26] and the risks associated with eyewitness identification.[27] Allied to this is the emerging use of experts to identify suspects based on their height or gait.[28]

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23 [1977] QB 224, CA.

24 Judicial College, *Crown Court Compendium* (July 2024) pp 15-2 to 15-4.

25 [1995] 2 Cr App R 333, CA.

26 See, for instance, Popplewell LJ, "Judging Truth from Memory: The Science", Speech to COMBAR, 16 Nov 2023; CR Brewin and B Andrews, "Memory accused: research on memory error and its relevance for the courtroom" [2019] *Criminal Law Review* 748.

27 See, for instance, J T Wixted and G Wells, "The Relationship Between Eyewitness Confidence and dentification Accuracy: A New Synthesis" (2017) 18 *Psychological Science in the Public Interest* 10; G Pike and C Clark, "Identification Evidence" in A Griffiths and R Milne (eds), *The Psychology of Criminal Investigation: From Theory to Practice* (2018), pp 133–153.

28 See, for instance, *R v Ferdinand* [2014] EWCA Crim 1243, [2014] 2 Cr App R 23 at [53]-[78], by Pitchford LJ; *R v Otway* [2011] EWCA Crim 3; I Birch, M Birch, L Rutler, S Brown, L Rodriguez Burgos, B Otten and M Wiedemeijer, "The repeatability and reproducibility of the Sheffield Features of Gait Tool" (2019) 59 *Science and Justice* 544; M Nirenberg, W Vernon, and I Birch, "A review of the historical use and criticisms of gait analysis evidence" (2018) 58 *Science and Justice* 292.

4.38 Following the exoneration of Andrew Malkinson, Professor Andrew Ashworth and Professor David Ormerod suggested that the case:[29]

> provides a timely and important opportunity for the review and revision of English law's safeguards against wrongful conviction on the basis of erroneous eyewitness identification. We should be asking the question: are they fit for purpose? For any reform to be effective, it must engage fully with the scientific knowledge concerning the risk of error and how it might be minimised.

Cell confessions

4.39 A recurring feature in proven and claimed miscarriages of justice is supposed confessions to a fellow prisoner while the defendant is held on remand (see, for instance, the case of John Kamara in Appendix 1 and the "Cardiff Newsagent Three" in Appendix 2). As we noted at paragraph 17.98 above, reliance on "jailhouse informants" was strongly criticised in the Sophonow inquiry, and as a result several Canadian provinces restricted the use of such evidence.

4.40 In *Corah*,[30] the CACD quashed a conviction for murder which relied on a transcript of a prisoner's evidence of a supposed confession. The prisoner had given evidence at the first trial (where the jury had been discharged because of illness) but had absconded by the time of the retrial. The CACD held that although the transcript was admissible, the need for caution when dealing with cell confessions meant that that the jury should have had the opportunity to see the witness in person, including her demeanour and the manner in which she gave evidence.

4.41 In *Stone*,[31] the appellant's conviction for the murder of Dr Lin Russell and her daughter Megan Russell, and the attempted murder of her other daughter Josie, was quashed. Crucial to the conviction was a confession which Stone had supposedly made to a fellow prisoner called Daley by means of a heating pipe which ran between their cells.[32] Daley's evidence was supported by the testimony of two other prisoners. One of these prisoners had claimed that he had been threatened by Stone; he subsequently told newspapers that Stone had made no such threats, and that he had only testified that he had because of pressure from the police. The Crown accepted that this person was unreliable and that his evidence may have influenced the jury's decision to accept Daley's account of a supposed confession. Another prisoner who gave evidence was subsequently revealed to have accepted payments from newspapers which were contingent upon a conviction. Stone's conviction was quashed but he was convicted at a retrial in which the evidence of Daley (but not the other informants) was admitted.

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29 A Ashworth and D Ormerod, "Improving identification procedures: time for Devlin 2.0?" [2024] *Criminal Law Review* 325, 335.

30 *R v Lockley* [1995] 2 Cr App R 554, CA.

31 [2001] EWCA Crim 297, [2001] Crim LR 465. Stone was reconvicted at a retrial, the prosecution again relying on the alleged confession to fellow prisoner, Daley. An appeal against that conviction, on the basis that Daley could be shown to have lied to the second jury about his use of drugs, was rejected on the basis that "it must have been obvious to the jury that Daley was deeply flawed … [and] lied when it suited him": [2005] EWCA Crim 105, [2005] Crim LR 569 at [39] and [11], by Rose LJ VPCACD.

32 "Damning confessions from fellow inmate", *BBC News* (4 October 2001).

4.42 In *Allan*,[33] the CACD quashed a conviction for murder and conspiracy to rob. The police had placed a paid informant into the defendant's police cell. The trial court was told that this was coincidental, but it was deliberate. The Court held that the informant had been used by the police to circumvent the protections afforded to a suspect under the Police and Criminal Evidence Act 1984 ("PACE"). The Court also found that the prosecution should have disclosed that the informant had been told at an early stage that there was a reward of £30,000; at trial, the judge had warned the jury that the informant saw an advantage in terms of obtaining bail and/or a reduction in sentence, but no mention was made of payment.

4.43 The potential for prisoners to be induced into giving evidence can also be seen in *Maxwell*[34] (although here the evidence related to discussions that the defendant and informer had before the offence in question rather than any subsequent confession). The defendants' convictions for murder and robbery were quashed after the CCRC discovered evidence of serious police misconduct in relation to a witness. At trial, senior police officers had given evidence that the witness had not been expecting a financial reward and that, having already received credit in his reduced sentence, had nothing to gain by giving evidence against the defendants. In fact, he expected a substantial payment, and he received £10,000 after the defendants were convicted.

4.44 In addition, the witness was taken out of prison, ostensibly to be interviewed, but was also allowed to smoke cannabis, supplied with alcohol, allowed unsupervised home visits and taken to pubs, to police officers' homes and to a brothel. In total, over £6,000 was spent on him. (The CACD in *Joof* – see Appendix 2 – noted parallels with the indulgence of the informant in that case with that in the case of *Maxwell*.)

4.45 We see force in Dr Dennis Eady's criticism that in some cases, dubious cell confessions are used to bolster a weak case.[35] In the case of Jonathan Jones (see paragraph 16 above and Appendix 2), which the CACD acknowledged was "far from strong", the prosecution had intended to adduce evidence from two prisoners who would claim that Jones had confessed to them. However, according to Dr Eady:[36]

> In the end the witnesses were not used in court when it was discovered that both their statements quoted details word for word including factual and spelling errors from the Western Mail newspaper.

Retracted confessions

4.46 A number of miscarriages of justice have been associated with confessions which have been subsequently retracted. While in many historic cases these were confessions which were obtained through violence (as in the cases of the Birmingham Six and the Guildford Four) or other oppressive practices (as in the case of Stefan Kiszko, the Cardiff Three, and the Cardiff Newsagent Three), this is not always the case. For instance, in *Fell*, the appellant made a false confession to murdering a

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33 [2004] EWCA Crim 2236, [2005] Crim LR 716.

34 [2009] EWCA Crim 2552.

35 D Eady, *Miscarriages of Justice: The Uncertainty Principle* (2009), thesis submitted for degree of Doctor of Philosophy at Cardiff University, p 344.

36 Above, p 216.

couple who were walking their dogs on Army land in Aldershot because he wanted "to be someone".[37] Sean Hodgson (see Appendix 1) confessed to the murder of Teresa de Simone in 1980 because he was a compulsive liar; he also confessed to two murders in London, neither of which actually happened.

4.47 There is evidence that jurors do not disregard false confessions because they believe (quite possibly wrongly) that they themselves would never confess to something which they did not do.[38] Although the trial judge will invariably direct the jury on how to approach evidence of a withdrawn confession, there is no requirement that the judge should explain to the jury that although it may appear counter-intuitive or unlikely, that it is the experience of courts that people do confess to crimes that they have not committed, and that this need not be the result of threats, violence or oppression.

Expert evidence

4.48 Several miscarriages of justice have been attributable to the admission of unreliable expert evidence. In Appendix 3, we cite several cases in which individual experts have been shown to have been serially unreliable; in the Post Office Horizon scandal, expert evidence as to the reliability of the Horizon computer system has been shown to have been unreliable. However, there have also been cases where new or untested categories of evidence have been admitted on the basis of the expertise of individuals giving evidence.

4.49 In *Dallagher*,[39] the CACD quashed the conviction of a man who had been convicted of murder on the basis of ear print evidence. (Evidence was also admitted of supposed confessions to a cellmate.) The CACD received fresh evidence suggesting that there was an insufficient body of research data to support the hypothesis that every human ear leaves a unique print and that the identity of an offender could confidently be determined solely on the basis of an ear-print comparison. At his subsequent retrial, the judge directed the jury to acquit after the defence presented DNA evidence from the site of the ear print which matched to another suspect.

4.50 In *Kempster*,[40] however, after hearing evidence, the CACD concluded that ear print evidence was capable of providing information which could identify the person who left

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37 [2001] EWCA Crim 696; "Fantasy that became 17 year nightmare", *Guardian* (6 Mar 2001). Although the trial judge found that the confession was voluntary (he made the initial confessions in telephone calls to the police), the CACD described it as "reprehensible" that police had repeatedly ignored Fell's requests for a solicitor. The CACD concluded, at [117], by Waller LJ:

> the longer we listened to the medical evidence, and the longer we reviewed the interviews, the clearer we became that the appellant was entitled to more than a conclusion simply that this verdict is unsafe. There are strange features of the case, not least his failure to support his own alibi, but the alibi exists from an independent source. But more important, since our reading of the interviews and the evidence we have heard leads us to the conclusion that the confession was a false one, that can only mean that we believe that he was innocent of these terrible murders...

38 S Kassin and H Sukel, "Coerced confessions and the Jury: an experimental test of the "harmless error" rule" (1997) 21 *Law and Human Behavior* 27; L A Henkel, K A J Coffman and E M Dailey, "A survey of people's attitudes and beliefs about false confessions" (2008) 26 *Behavioral Sciences and the Law* 555.

39 [2002] EWCA Crim 1903, [2003] 1 Cr App R 12.

40 [2008] EWCA Crim 975, [2008] 2 Cr App R 19 at [27]-[28], by Latham LJ VPCACD.

it "where minutiae can be identified and matched" but that "gross features" could only do so "where the gross features truly provide a precise match".

4.51 In *Pluck*,[41] expert evidence had been adduced at trial that related to the supposedly distinctive way in which two co-defendants extinguished their cigarettes. It was, the CACD later accepted, "a significant part of the prosecution's presentation of the case".[42] Pluck was said to let his cigarettes burn down to the filter. His co-accused Bierton stubbed his out. A scientist from Rothmans, which produced the cigarettes in question, gave evidence that "although smokers do not necessarily always put out their cigarettes in exactly the same way, there is a remarkable consistency in the way in which they extinguish their cigarettes".[43] Thus, the cigarettes found at the murder scene, which had been smoked down to the filter, were said to show that Pluck was present. Following the pair's conviction, the cigarettes were tested further, and one of those supposedly extinguished in Pluck's characteristic manner was found to have Bierton's, not Pluck's, DNA. (Despite the apparent importance of the cigarette evidence to the prosecution case against Pluck, the CACD held that "[l]eaving aside the evidence about the cigarette ends, in our judgment the jury could not reasonably have been left in doubt that the appellant and Bierton" were guilty.)

4.52 In 2009 to 2011, we reviewed the law relating to expert evidence, in response to fears expressed by the House of Commons Science and Technology Committee that expert evidence was being admitted too readily. We shared these fears, pointing to the cases of Dallagher and Sally Clark, Angela Cannings and Donna Clark (see Appendix 3).

4.53 In our 2011 report on Expert Evidence in Criminal Proceedings,[44] we recommended, among other things:

(1) a statutory provision in primary legislation which would provide that expert opinion evidence is admissible only if it is sufficiently reliable to be admitted;

(2) a provision which would provide our core test that expert opinion evidence is sufficiently reliable to be admitted if –

(a) the opinion is soundly based, and

(b) the strength of the opinion is warranted having regard to the grounds on which it is based;

(3) a provision which would set out the following examples of reasons why an expert's opinion evidence is not sufficiently reliable to be admitted:

(a) the opinion is based on a hypothesis which has not been subjected to sufficient scrutiny (including, where appropriate, experimental or other testing), or which has failed to stand up to scrutiny;

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41 [2010] EWCA Crim 2936.

42 Above, at [29], by Toulson LJ.

43 Above, at [31].

44 Expert Evidence in Criminal Proceedings in England and Wales (2011) Law Com No 325.

(b) the opinion is based on an unjustifiable assumption;

(c) the opinion is based on flawed data;

(d) the opinion relies on an examination, technique, method or process which was not properly carried out or applied, or was not appropriate for use in the particular case;

(e) the opinion relies on an inference or conclusion which has not been properly reached.

4.54 The Ministry of Justice responded on 21 November 2013. It indicated that it did not intend to act on the majority of our recommendations at that time. However, Criminal Practice Direction 7.1.3 now requires the court, when considering whether expert evidence is sufficiently reliable to be admitted, to consider factors (3)(a)-(e) above.

4.55 Nonetheless, expert evidence continues to cause concern in relation to both proven miscarriages of justice (such as the expert evidence given in the Post Office prosecutions as to reliability of the Horizon system by employees of the firm which developed and maintained the system) and other claimed miscarriages of justice.

DISCLOSURE

4.56 As we noted at paragraph 17.111 the law relating to pre-trial disclosure of evidence is outside the terms of reference of this project. Nonetheless, many miscarriages of justice (from *Evans* and the "Irish cases"[45] to Andrew Malkinson and the Post Office Horizon convictions) involve serious failures of disclosure by the prosecution. The Westminster Commission observed in 2021 that "non-disclosure or destruction of exculpatory material has been a factor in a number of miscarriages of justice".[46]

4.57 The current test in the Criminal Procedure and Investigations Act 1996, was in some ways a reaction to the broad common law test promulgated in *Ward*,[47] and was intended by the Runciman Commission and the Government to limit the burden on the prosecution. Nonetheless, as Lord Justice Gross noted in his review of disclosure in criminal proceedings:[48]

> the context in which the [Criminal Procedure and Investigations Act 1996 ("CPIA")] came into force was the anxiety to prevent a recurrence of the miscarriages of justice which were a legacy of an earlier and troubled period in the criminal justice system; indeed the CPIA was the legislative response to such miscarriages and other concerns.

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45 That is, the Birmingham Six, Guildford Four, Maguire family and Judith Ward (see Appendix 1).

46 Westminster Commission on Miscarriages of Justice, *In the Interests of Justice: An inquiry into the Criminal Cases Review Commission* (2021) p 51.

47 [1993] 1 WLR 619, CA.

48 Rt Hon Lord Justice Gross, *Review of Disclosure in Criminal Proceedings* (2011) para 19.

4.58 In June 2018, the House of Commons Justice Committee concluded:[49]

> Problems with the practice of disclosure have persisted for far too long, in clear sight of people working within the system. Disclosure of unused material sits at the centre of every criminal justice case that goes through the courts and as such it is not an issue which can be isolated, ring fenced, or quickly resolved. These problems necessitate a concerted, system wide and ongoing effort by those involved, with clear leadership from the very top …
>
> When police and prosecutors do not undertake their disclosure duties correctly cases may be delayed, may collapse or a miscarriage of justice may occur.

4.59 An independent review of disclosure and fraud offences was recently undertaken by Jonathan Fisher KC, but has not yet been published. In April 2024, Mr Fisher published preliminary findings. He said:[50]

> The proliferation of digital material and the progressively complex nature of offending in both volume and serious crime means that disclosure is an increasingly time and resource intensive process for all parties, which has the impact of slowing down case progression in the criminal courts. This is acutely felt in the prosecution of 'disclosure heavy' crime types such as fraud and also rape and serious sexual offences cases (RASSO) where digital evidence is frequently found. The volume of material generated and gathered in criminal cases continues to rise…
>
> However, problems encountered when dealing with unused material are not confined to [Serious Fraud Office ("SFO")] or RASSO cases. Although the scale is smaller, the handling of unused material in other criminal cases, whether tried in the Crown Court or Magistrates' Court, presents similar challenges which need to be met.

4.60 He indicated that there "seems to be a consensus that the structure and architecture of [the] CPIA is sound, and the problems occur largely in its practical application".[51]

CONCLUSION

4.61 As we indicated in relation to miscarriage of justice inquiries, we consider that there is value in seeking to learn from wrongful convictions with a view to preventing miscarriages of justice from occurring in the future. Although we have identified certain areas on which we would welcome the views of consultees, we would also welcome views on any issues not covered within this paper that give rise to particular risks of wrongful conviction, and what measures might be taken to reduce those risks.

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49 House of Commons Justice Committee, *Disclosure of evidence in criminal cases* (20 July 2018) para 26.

50 J Fisher, "Preliminary findings and direction of travel (accessible)" (24 April 2024), paras 6 and 8.

51 Above, para 15.