Law Commission Consultation

'Criminal Appeals'

RESPONSE OF THE CRIMINAL BAR ASSOCIATION

June 2025

OVERVIEW OF RESPONSE

1. The Criminal Bar Association (CBA) welcomes the broad scope of the consultation published by the Law Commission on Criminal Appeals (and the ambition it clearly exudes). The CBA exists to represent the views and interests of specialist criminal barristers in England & Wales but in practice is an organisation run by those barristers in their spare time. The response of the CBA is – it is hoped – representative of views of the Bar but is inevitably drafted by only a few of those barristers. Whilst significant endeavours have been made to give fulsome answers to as many of the consultation questions as the CBA feels it appropriate to comment on, the Law Commission may still wish to engage more directly with the Bar and Judiciary in considering its proposed reforms (including outside the formal consultation period).

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

2. The CBA support the retention of a parallel route of appeal in summary proceedings, both to the Crown Court and to either a Divisional Court or the Court of Appeal (Criminal Division) ('CACD'). They serve different functions in the administration of justice. It is

important to retain a direct route of appeal to the higher courts on a point of law in order to obtain certainty in the application of the law and its development.

3. As to whether appeals on a point of law should be considered by the High Court or by the CACD, in practice, the substantive hearing of such cases will be listed before a Divisional Court, comprising a Lord Justice of Appeal and a High Court Judge. There is no practical difference between the seniority and experience of two Judges sitting in a Divisional Court and three Judges sitting in the CACD. The judgments which they produce are authoritative and binding on the lower courts.

4. The statistics quoted show that the volume of appeals brought by this route is low. Although there is no requirement for permission, frivolous cases are filtered out by the lower Court's right to refuse to state a case.

5. The principal benefit of changing the current system would be to achieve symmetry with other forms of appeal from the Crown Court. We query whether this is a sufficient reason to change a system which is currently working extremely well.

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

6. The CBA agrees that the question of a constitutionally separate Court of Appeal in Wales should be regarded as contingent on the devolution of the lower courts as well.

7. A separate issue is the merits of greater regionalisation of the CACD itself. It remains a single, centralised administration. The greater regionalisation of divisions of the High Court, such as the Administrative Court, has been a significant success. There is no reason why the CACD and CAO could not operate within a regional court structure, even if limited to a small number of centres.

8. Both the CACD and the Circuits would benefit from the creation of regular regional lists of sittings of the CACD. The current practice occasional sittings on Circuit are welcomed, but they are extremely limited in extent.

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

9. The CBA agrees with this proposal. Points (1) to (7) are perhaps best described as the *overriding objectives* of the criminal appeal system.

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

10. The CBA agrees that making an application for permission to appeal should not place a person at risk of an increased sentence or penalty. However, as discussed below, where permission has been refused by the Court, it is still appropriate in certain cases for the Court to impose a limited and proportion sanction, in order to discourage appeals which are totally without merit.

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

11. The CBA strongly agrees with this proposal, for the reasons given. Please see our comments in response to Questions 6 and 11 below.

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

12. The CBA strongly disagrees with this proposal. The reasons for retaining an unrestricted right of appeal in summary cases are fully explained within the Law Commission report. In particular, even when sitting with a District Judge it remains a summary jurisdiction. It is not a Court of Record, with the result that the availability of a record of evidence is limited. The reasons given are normally relatively brief in nature, and in their current form would often not stand up to an 'adequacy of reasons' challenge. It would place a considerable burden on the Magistrates Court if District Judges and/or lay justices were required to provide a formal Judgment of the kind which would allow a proper appeal by way of review. They are markedly different from the level of detail seen in judgments given in Civil Proceedings or decisions of the First Tier Tribunal.

13. The requirements for justice to be done in criminal proceedings are no different according to the subject matter. For example, 'regulatory offences' are serious matters which can result in sentences of immediate imprisonment and/or very large fines. Magistrates Courts have the power in such cases to impose fines which are unlimited in amount. Adverse findings in regulatory proceedings can also have other significant consequences, such as triggering a referral to the Crown Court for confiscation or loss of a vital licence or permit.

14. There is no reasoned basis for treating regulatory offences different from any other kind. In fact, regulatory bodies such as the HSE and the EA have available to them a range of sanctions and other enforcement options for less serious cases. In cases where they elect to bring a criminal prosecution, the defendant is entitled to be treated in exactly the same manner as any other defendant facing criminal proceedings.

15. As to a different approach in respect of appeals from specialist domestic violence or domestic abuse courts, the CBA recognises the potential burden on victims who may have to give evidence on more than one occasion. However, any limitation on the right of appeal would have to be contingent on changes to the first instance procedure, namely the recording of evidence and the provision of detailed judgments.

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

16. The CBA agrees with this proposal. The current time limit (15 business days) is excessively restrictive. It is particularly difficult where defendants are in custody and instructions need to be taken. An extension either to 28 or 56 days would not cause significant delays or increased uncertainty and would enable greater time to consider and advise on appeal as well as for clients to consider their instructions on appeal. This is particularly important if there is a risk of the Crown Court increasing any sentence imposed on the defendant upon appeal.

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

17. The CBA does not support a complete prohibition on the imposition of a higher sentence by the Crown Court. A threshold of 'exceptional circumstances' (or a "material change of circumstances") could be considered.

18. As the Report acknowledges, on an appeal by way of rehearing the evidence may change. Additional witnesses may be called. Additional facts may emerge. Greater harm may now have become apparent. This would obviously arise on an appeal against conviction, but could also sometimes arise on an appeal against sentence. The duty of the sentencing court is to pass a sentence which is commensurate with the seriousness of the offence. There would be a strong sense of injustice if the Court deciding such an appeal was required to disregard the evidence which it had just heard.

19. The risk of a higher sentence is also relevant to concerns about appeals which may be abusive in nature (i.e. designed to intimidate or further traumatise a vulnerable witness). Although the power might be sparingly exercised and only in egregious cases, the power to Court's power to take such matters into account may be an important safeguard.

20. In our experience, the Court's power to make an adverse costs order is rarely a sufficient deterrent against unmeritorious appeals.

21. We accept that in theory the High Court has the power to set aside a sentence which is so unduly lenient that it is irrational or otherwise unlawful. However, that is unheard of in practice. In any event, it does not answer the concern that the Crown Court might be forced to pass a sentence which does not reflect the seriousness of the offence according to the evidence which it has heard on the appeal. If primary legislation prohibited the Crown Court from increasing the sentence which the Magistrates Court had passed, the sentence would ipso facto be lawful and could not be challenged by way of Judicial Review, even it was plainly unjust on the evidence heard on the appeal.

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

22. The CBA's view is that appeals against conviction following a guilty plea in the Magistrates' Court should be decided on the same legal basis as an application to vacate a plea in the Crown Court before sentence, or on appeals from the Crown Court to the CACD.

23. The current system gives rise to a risk of injustice. The circumstances in which a conviction following guilty plea may be appealed to the Crown Court are arguably even tighter than identified at paragraph 5.118 given the *obiter* comment in *R. (CPS) v Crown Court at Preston* [2023] EWHC 1957 (Admin).

24. Where the issue is raised before sentence, we cannot identify any reason of principle why the approach should be different to an application to vacate a plea before the Crown Court.

25. Where the defendant has been sentenced, we cannot identify any reason of principle why there should be a different approach on an appeal to the Crown Court as opposed to in the CACD.

26. A right to appeal following a guilty plea should not be an unrestricted right of appeal (i.e. by way of an automatic re-hearing). An unrestricted right could give rise to abuse. In some cases, there is a risk of witnesses having since disengaged.

27. This could be achieved by an amendment to Section 108 of the Magistrates' Courts Act 1980 to allow for appeals against conviction to the Crown Court following a guilty plea, and to provide that in such cases the Crown Court shall have the power to hear the appeal by way of rehearing if it thinks that the conviction is unsafe notwithstanding the guilty plea.

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

28. Yes. The CBA supports this proposal.

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

29. The CBA supports the retention of a direct route of appeal to the High Court on grounds of legal error in summary proceedings.

30. The CBA's position is that the proposal to replace appeals by way of case stated with Judicial Review should be approached with caution, for the following reasons:

31. It is highly desirable that the High Court should be presented with a definitive record by the lower court. The case stated procedure allows for this, but Judicial Review does not.

32. Substantive appeals in criminal cases do not directly fit within the 'standard' Judicial Review procedure. If such cases were to be heard by way of Judicial Review, it would be necessary to amend Part 54 of the Civil Procedure Rules and/or to provide a separate Practice Direction to ensure an appropriate procedure.

33. The proposed reform does not entirely abolish appeal by way of case stated, because it would remain for summary civil and regulatory cases.

34. The fact that there are only limited numbers of appeals to the High Court does not undermine the legal and constitutional importance of the procedure. Cases involving significant points of law are often determined by this process. A recent example is Pwr v DPP [2022] UKSC 2 on the right to protest.

35. As the Report discusses, one of the limitations of Magistrates' Court trials is that it is not a court of record. There is no definitive record of the evidence which has been given, or of the arguments advanced on behalf of the prosecution and defence. The reasons which are given for decisions are summary in nature. They are not as detailed as a judgment in a civil trial or the detailed reasons given by First Tier Tribunals such as the Immigration Appeals Tribunal or HESC. Nor are they as detailed as the reasons typically seen from other administrative bodies who may have taken a decision based on a written procedure, such as the decisions of a Local Planning Authority or the Secretary of State's decision in an immigration case.

36. In our professional experience, the Auld Review was optimistic to state that "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."

37. None of this is a criticism of the quality of work of District Judges and lay Justices. There is nothing wrong with the provision of summary reasons for a decision, as is the case with the reasons given for the refusal of permission to appeal by the single judge, or for refusals of permission in Judicial Review. However, summary reasons are not the same as a full judgment which is capable of being tested by way of review. Also, it is important to remember that in criminal proceedings the process is essentially oral in nature, in contrast with civil and Tribunal cases where evidence and submissions are normally in writing.

38. The advantage of an appeal by way of case stated is that it requires the Court to provide, at an early stage, a definitive record of the evidence which was heard, the arguments which were advanced and the reasons for the decision. Before it is submitted to the High Court, the parties have the opportunity to correct the record based on their own notes of the hearing. Without that, the High Court would not have a full decision to review, and there would be the scope for disputes between the parties as to what took place before the lower court.

39. In Judicial Review, the lower court would only provide a record of the proceedings if a specific direction was made for the service of a Witness Statement. That would be an exceptional step. Also, unless an application was made for interim relief, that would only be considered at the permission stage which might be 6 months or more after the trial.

40. On a Judicial Review, the claim is issued by the appellant supported by a statement of facts of their own making. Conventionally, the Court is named as the Defendant but it does not play any active part in the proceedings. It falls to the Interested Party (prosecution or defence) to seek to file Grounds of Defence.

41. The time limits for Judicial Review are different to criminal appeal. Under Part 54 a claim must be issued promptly and in any event within 3 months of the decision. An Acknowledgement of Service and any Summary Grounds of Defence must be served within 21 days thereafter, and a Claimant may file a response within 7 days. Thereafter, the case will be referred to a single judge to decide whether to grant permission.

42. The consequence of the above is that in normal circumstances it typically takes 6 months or more before a decision on permission is granted. It would only be at that stage that the

single judge would decide whether to request a statement from the lower court. Such delay would cause difficulties in the provision of a statement, especially in cases where the appeal is from a bench including several lay justices.

43. If appeals by way of case stated in summary criminal proceedings were to be subsumed into Judicial Review, it would be appropriate to make special provision within Part 54 CPR. There are several existing examples of this. Shorter time limits are set down for challenges to planning decisions and the award of public contracts (Rule 54.5) and for appeals from the Upper Tribunal (Rule 54.7A). There are separate procedural provisions for Planning Appeals (Rule 54.21 to 54.24 and PD 54D) and for Environmental Review (Rule 54.25 to 54.35). Special provision could be made for criminal cases requiring the provision of a statement of facts or even Grounds of Defence by the lower court.

44. In conclusion, although it may be archaic in its origins, the system of appeals by way of case stated does work. It ensures that the High Court has a definitive record of what took place before the lower court, which is almost invariably agreed by the parties. Similar provision would have to be made if such cases were to be subsumed into the broader system of Judicial Review. If that was to happen, the objective of simplifying routes of appeal is lost. The CBA is not actively opposed to the proposal but respectfully say that it would have to be accompanied by changes to Part 54 CPR

45. The proposed reform would not abolish appeals by way of case stated in any event, as they would remain for appeals in civil and regulatory cases.

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

46. The CBA agrees with this proposal. There is no justification for treating a person convicted in these circumstances any differently from any other person who may have been convicted in summary proceedings.

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

47. The CBA do not agree that the route of appeal for a child should be any different from other offenders. As set out above, the basis for appeals following a guilty plea should be the same as for cases in the Crown Court.

48. The only reason in principle to distinguish between children and other groups is the potential for children to not understand their decisions, or to be pressured into making a decision. Other vulnerable groups, such as those with mental disorders, developmental disorders or neurological conditions may well have similar, if not more profound, issues with the same.

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

49. The CBA disagree with a complete prohibition, but it may be appropriate to recognise that exceptional circumstances are required. The reasons are the same as those which were set out in respect of appeals to the Crown Court generally. There is no principled reason why children should be treated differently.

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

50. The CBA agrees with this proposal.

51. There are understandable concerns about the lifting of reporting restrictions where child defendants turn 18. The CBA understand it is outside the scope of this project to engage with those concerns except in the process of appeals. However, the CBA agrees that where a child's proceedings have concluded whilst a child (and whilst still subject to reporting restrictions) they should enjoy the benefits of those restrictions in relation to any such appeal. To do otherwise would not only provide a disincentive to a proper appeal, but also potentially have a negative effect on rehabilitation.

52. A reporting restriction should continue to apply, unless a Court makes an exception direction.

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

53. The CBA strongly agrees with this proposal.

54. Our experience is that it has become increasingly common for appeals to the Court of Appeal to be lodged out of time, accompanied by a statement which explains the difficulties which were experienced on gathering information or taking instructions. Given the routine delays in Crown Court cases, the lack of counsel, the difficulties with getting

conferences with those serving sentences of imprisonment, and the fact that the Crown Court slip rule period is 56 days (and so in relation to sentence the need for appeal may not yet have even finalised within 28 days), we agree. We agree that there are particular reasons of finality justifying an earlier (and non-extendable) deadline for prosecution challenges to sentence.

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

55. The CBA agrees with this proposal.

56. A broad 'interests of justice' test is necessary and appropriate. The wording of Section 23(2) makes it clear that it is setting out factors which the Court of Appeal should consider, not a closed list of pre-conditions. The criticisms which have been made relate to the application of Section 23(2), not to its wording.

57. It would be effectively impossible to create a defined list of the circumstances in which it would be in the interests of justice to admit fresh evidence and so a discretionary test is the only test appropriate. We do not consider this requires legislative reform.

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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

58. The CBA does not consider a specific power to be necessary.

59. There are a number of fundamental principles which would point away from the use of court appointed experts. Criminal proceedings in England and Wales are adversarial in nature, but the prosecutor is under a duty to act as a *'minister of justice assisting the administration of justice'* (R v Banks [1916] 2 KB 621). Likewise, all expert witnesses are under a duty to the court to provide objective and unbiased evidence (Rule 19.2 CrimPR).

60. Section 31B of the Criminal Appeal Act 1968 already gives the Court of Appeal the power to make directions, which may include directions concerning the evidence to be heard on a substantive appeal. If the Court is concerned that additional evidence is required in order to determine an issue on the appeal, directions can be given. Both prosecution and defence can then consider whether they wish to instruct an expert to meet the Court's requirement, and as a minister of justice it is highly likely that the prosecution would do so.

61. The use of court-appointed experts risks the development of an inquisitorial process of appeal, which is contrary to the fundamental basis on which our courts operate. It is difficult to envisage the exceptional circumstances in which it might be necessary to do so given the wide power the Court of Appeal already has to make directions.

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

62. The CBA agrees that it is appropriate to limit loss of time directions to 56 days.

63. It may also be appropriate to make clear that the order should be proportionate to the sentence appealed, by stating: "Any loss of time order should take into account the length of sentence appealed, and in any event should not exceed 56 days."

64. The justification for the use of loss of time directions is that they are necessary to discourage unmeritorious appeals. A maximum sanction of 56 days additional detention is appropriate to achieve this objective.

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

65. The CBA suggests that the only necessary condition is (3), namely that "the CACD should only be able to make a loss of time direction where the application is renewed to the full court and rejected as wholly without merit".

66. The use of loss of time directions was recently considered by the Court of Appeal in R v Tamiz [2024] EWCA Crim 200. In that case the single judge had not "ticked the box" but had provided detailed reasons for refusing permission to appeal. Although the court did not make a loss of time direction, it was critical of the appellants' decision to persist with their appeal in the knowledge that there was already a reasoned decision showing that their appeal was wholly without merit.

67. As to proposed condition (1), the CBA considers that the current approach of the Court of Appeal, referred to in Tamiz, is appropriate, namely that whilst whether the single judge did tick the relevant box is a material factor it should not necessarily be decisive. The reasons given for refusal may of themselves be a sufficient indication to an appellant that they should accept that their grounds of appeal are without merit.

68. Proposed condition (2) is (or should be) superfluous. The risk of a loss of time order is set out in writing in the notice refusing permission.

69. Proposed condition (3) is appropriate. It is sufficient to meet the objective that defendants should not in ordinary circumstances be deterred from exercising a right of appeal.

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

70. The CBA does not support the total abolition of loss of time directions. It is appropriate that there should be a residual power to make a direction in cases which are totally without merit.

71. The CBA agrees with the principle that defendants should not be deterred from exercising their right of appeal. However, it would be wrong to undermine the importance of the permission stage. A decision of the single judge refusing permission involves a review of the lower court's decision and is determined on the relatively low threshold of arguability. Reasons are given for the decision. It is a fair and appropriate judicial consideration of the merits of the appeal. As the Court of Appeal observed in Tamiz, it would be wrong to proceed thereafter as if the single judge's decision had not occurred.

72. If permission to appeal has been refused on the merits, it is appropriate that there should be some potential consequence if the defendant elects to renew a hopeless application before the full court. The resources involved both for the Court of Appeal and the Respondent in responding to a renewed application can be very significant, with consequences for participants in other cases. It is appropriate to retain a residual power to deter abusive or repetitious appeals in limited circumstances.

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

73. The CBA agrees with this proposal.

74. The CBA submits that the decision to make the correction should be the decision of all of the same judges who made the judgment or order (option (1) above).

75. The power to make a correction is all the more important in the Court of Appeal, as it is not dealing solely with a single defendant's case. It is providing authority that must be applied in all lower instance courts. There is therefore a greater interest in ensuring non-controversial legal errors are corrected in a judgment (even if that does not result in an amendment to the outcome).

76. It seems to us that there can be no objection to any amendment provided that at least a majority of the judges who made the judgment or order agree with the amendment, and that the parties have an opportunity to make representations (in a similar manner to rule 28.4 of the Crim PR 2020).

77. Any corrections can be handed down remotely (a practice the court is already familiar with).

78. Whilst the exceptionality test in *Yasain* [2015] EWCA Crim 1277; [2015] 2 Cr. App. R. 28 understandably should continue to apply to challenges to substantive parts of a ruling

there can be no objection to correction of minor errors or omissions, particularly where they do not impact the result.

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

79. The CBA agrees with this proposal.

80. The CBA considers that it would be almost impossible to properly codify the existing case law. The broad test of 'manifestly excessive' is appropriate and attempting to provide exhaustive definitions risks excluding potentially meritorious appeals and restricting the ability of the law to develop. We see no pressing need for reform.

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

81. Please see above in relation to the rule against imposing more severe sentences generally.

82. The particular issue identified in *R. v Eaton* [2012] EWCA Crim 1456 (in which a SOPO was imposed for a period shorter than the statutory minimum) is likely to arise very rarely (not least because most behaviour order provisions no longer have a minimum period), but we agree that given the public protection considerations present (and the approach to orders such as custodial sentences and surcharges) the court should have a discretion to decline to quash such a sentence.

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

83. The CBA agrees with this proposal.

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

84. The CBA submits that the limits of the unduly lenient sentence scheme should be reviewed holistically, as opposed to being amended piecemeal to reflect public concerns about sentences imposed in specific circumstances.

85. JR Spencer identified seven arguments in favour of a prosecution appeal against unduly lenient sentences in 1987[1] - that ULS blunt the value of deterrence; outrage victims, cause lost faith in the system; demoralise the police; cause injustice to those who were appropriately sentenced; undermine public confidence in the administration of justice and the authority of the courts; expose the public to danger; and hinder rational sentencing policy.

86. The purpose of the scheme is not merely to correct manifest error in a single case but more broadly to correct error while developing rational sentencing policy by creating clear authority on errors of law and ensuring consistency between cases. Without it the Court of

[1] JR Spencer, 'Do we need a prosecution appeal against sentences?' (1987) Criminal Law Review 724.

Appeal hears only appeals against sentences which defendants feel are too severe, where law is misapplied to the benefit of defendants – as a court might quite rightly feel is appropriate when there is a lack of clarity – there is no other mechanism by which the prosecution may bring a case in front of the Court of Appeal and have it publicly rectified.

87. Pragmatic limits on the scope of the scheme to ensure that the resource expenditure on the number of sentences referred, and the number of decisions that need to be reviewed remains reasonable are not inherently objectionable.

88. However, if large groups of sentences do not fall within the remit of the scheme the Court of Appeal cannot provide any relevant authority, and the ability of the ULS scheme to correct error – and fulfil its purpose – is blunted.

89. The way the ULS scheme has been extended since 1994 has been piecemeal and arbitrary. It leads to incongruous results. Alisdair Gillespie recognised this as far back as 2005 noting that while the offence of the importation of indecent images of children[2] fell within the remit of the scheme the far more common charge of making indecent photographs of children did not.[3] A more principled approach to the matter would clearly be desirable.

90. It is suggested that simply adding further piecemeal offences is not a useful or necessary reform.

91. There a number of ways in which this issue could be approached that are worth consideration: ensuring that all offences attracting a certain level of punishment are within the scheme, so that consistency can be ensured in all decisions in relation to offences that Parliament considers the most serious; approaching the matter by reference to broader criminal justice concerns about public protection and the safeguarding of vulnerable groups so that all offences where those concerns are present fall within the scheme; or extending the scheme to all offences triable either way so that consistency and error can be assured and monitored in all Crown Court cases.

92. While the last of these options is likely to cause the most alarm with those concerned that the AG's power to refer ULS has already simply become a general power of appeal,[4] it is at least *prima facie* the most principled and preferable approach to the matter provided the

[2] Customs & Excise Management Act 1979, s 170.
[3] Alisdair A Gillespie, 'Reviewing unduly lenient sentences' (2005) 10 Archbold News 5, 6.
[4] Lydia Wane, 'Bad ref! Are the numbers of Attorney-General's references undermining their purpose? (2011) News@one <http://www.onepaper.co.uk/Attorney-General_%20References.pdf> accessed 21 December 2016.

AG's office adopts an appropriately reserved position to references in light of this expanded scope.

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

93. The CBA agrees with this proposal.

94. The general approach to granting leave in the Court of Appeal is that leave should be granted where the grounds were arguable. It is desirable for the AGO (and for statistics) to have a clear and consistent approach to the application of this threshold test.

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

95. The CBA agrees that in practice there is no issue with the power remaining with the Attorney General. We do not therefore object to the power remaining with the Law Officers. We raise, however, that the power to refer sentences to the Court of Appeal remains with the Attorney General and Solicitor General personally is a historical oddity. It requires both to personally consider a great number of applications to refer sentences – thereby taking up a significant amount of their time.

96. Both the Attorney General and Solicitor General are by their nature legally qualified persons. However, they are not necessarily persons who have practiced recently, nor are they necessarily persons who have any real experience or understanding of criminal law. They are of course competently advised by members of staff at the Attorney General's Office (many of whom are seconded from the Crown Prosecution Service) and by Treasury

Counsel, but there is no clear reason why casework decisions of this nature need to be undertaken by either.

97. As identified in the consultation paper there is always a risk that their referrals are seen as political, and indeed there is a risk that referrals are seen as such by the Court of Appeal: see, for example, *Attorney General's Reference (R. v Long, Bowers and Cole)* [2020] EWCA Crim 1729 in which the Attorney General appeared personally to outline the public concern about the sentence.

98. It is fair to say in practice that the arrangements do seem to work reasonably well and so the CBA supports the decision not to reallocate them, but it is certainly arguable that the practice could work better if perhaps allocated to Chief Crown Prosecutors (or similar) (and free up the Law Officer's resources).

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

99. The CBA agrees there should be a power to refer sentences outside the 28 day limit but that any such power should be limited (see below) – and along with any further conditions should not be beyond 56 days.

100. We can see the argument for an extension to the 28 day limit, and it is understandable that the practice of making defensive references raises questions. We agree there is a need for certainty for defendants in relation to the sentences imposed upon them. Similarly, a system that does not allow for egregious legal errors to be corrected runs a risk of being called into disrepute. However, there does need to be a balance. Any extension power would need to have strict conditions. It would inevitably result in arbitrary limits (as does any test). If there is to be one we suggest it should be limited to cases in which a mandatory sentence (whether minimum sentence or a dangerousness type sentence should have been imposed and was not). These are cases in which the interests in finality should not outweigh the fact that the legal framework was clearly incorrectly applied. These are likely to be the cases in which slip rule applications are going to be made. Even in such cases, however, it is submitted there should be a time limit of 56 days in total.

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

101. The CBA does not support this proposal.

102. It is desirable that an appeal from a single judge sitting in the Crown Court should ordinarily be reviewed by a 3 judge panel reaching a collective decision. This is also consistent with the Court of Appeal's role in setting binding precedent.

103. We cannot see the practical advantage in time saving of these matters being dealt with by a single judge. In practice we expect that a single judge deals with the short judgment (5 to 10 paragraphs in many cases) and the second/third judges simply approve the matter when dealing with another hearing in the list. There does not seem a sufficient resource need to amend the Court of Appeal's procedure in this respect.

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

104. As the consultation paper explores, the historic procedure in respect of children sentenced to DHMP is a relative oddity. It does not reflect the approach to sentencing children

generally and is arguably the result of historical circumstance only. It is an aberration that acts in favour of children, but still it is an aberration.

105. As a matter of principle given the minimum term is meant to be for the purposes of punishment it is odd to see how an offender's positive progress is strictly relevant to that assessment. If the scheme is justified it is principally justified by reference to the mandatory nature of DHMP as distinguished from other cases where discretionary life sentences are imposed.

106. Any extension probably requires more careful consideration of how and why the scheme is justified. Any extension will inevitably result in an arbitrary limit of sorts. It may be that any change to this scheme is best considered in the context of sentence reform generally (as opposed to through the backdoor of a project on appeals).

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

107. Yes, this procedure is better dealt with by the Court of Appeal Criminal Division.

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

108. The Court of Appeal's powers in relation to the abolition of sentences and changes in law are suitable. The task of the Court of Appeal is to determine whether a sentence is

manifestly excessive or unduly lenient applying the law as it stood at sentence (including as it should now be understood following clarification by that court). The pace of change in sentencing legislation is such that specific types of sentence are often amended or repealed. That should not render those sentences nugatory or require the Court of Appeal to intervene in them.

109. The particular issue with indeterminate sentences of public protection is not that the sentences were incorrectly legally imposed. It is that the policy of imposing IPP's was a poor one. Parliament legislated such that IPPs were mandatory when they should not have been. This is not an issue for the Court of Appeal to resolve of its own volition (and it has rightfully refused to do so). The issue is the way in which that sentence was repealed did not resolve the unfairness of the pre-existing regime. As explored recently by Rory Kelly and Lyndon Harris[5] in their recent article the difficulty with the way in which the IPP regime operated is that whilst there are many prisoners subject to IPPs who should have been released many years ago, some would instead have been made subject to life sentences if the IPP did not exist. Given the public protection concerns the likely best option is a specific legislative regime for re-sentencing. Bad cases make bad law, and the issue of IPPs should not lead to wholesale reform of the Court of Appeal's powers.

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

110. The CBA agrees with this proposal.

[5] Rory Kelly and Lyndon Harris, "Resentencing IPP prisoners" Arch. Rev. 2024, 10, 8-11.

111. The CBA agrees that the overriding test should remain the broad test of the safety of the conviction. Any attempt to codify the law risks excluding meritorious appeals.

112. The CBA agrees that it may be appropriate to clarify the law by the inclusion of the non-exhaustive list of circumstances in which a conviction may be considered to be unsafe. In particular, point (2) – the conviction of the appellant involved an abuse of process amounting to an affront to justice – provides a welcome clarification and simplification of the law. The risk, of course, is that a more far-reaching attempt to clarify the law could be seen as effecting material legislative change and lead to further challenges or unintended legal developments.

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

113. With qualifications, the CBA agrees with the broad thrust of this proposal.

114. We see no reason why this should not be incorporated within the non-exhaustive list of circumstances considered in Question 34.

115. However, the wording set out in Question 35 appears to place emphasis on the decision to admit the fresh evidence. As discussed elsewhere, that is a procedural question which sometimes involves some circularity of argument. In our experience, the approach of the court to the decision to admit evidence can vary. The real issue is whether the Court thinks that the fresh evidence is sufficient to show that the conviction is unsafe.

116. Also, the wording of Question 35 is not entirely consistent with the wording of Section 23(1)(c) of the Criminal Appeals Act 1968.

117. As to the provision "unless a retrial is impossible or impractical", we respectfully suggest that the provision should instead include a wider 'interests of justice' test. For example, the "impossible or impractical" formula excludes cases where a conviction has been quashed after the defendant has already served their sentence, or where the offence was

very minor in nature. An 'interests of justice' test would allow the Court to take a broader view of whether a re-trial is appropriate.

118. Taking those points together we would respectfully suggest that an appropriate provision would be: "where, in an appeal against conviction, the Court of Appeal has received evidence which was not adduced at trial and which the Court considers could have led the jury to acquit, then the Court should order a retrial unless a retrial is impossible, impracticable or otherwise contrary to the interests of justice".

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

119. With slight modification to the wording, the CBA supports this proposal.

120. The CBA agrees that in exceptional circumstances it may be appropriate for an appeal to be allowed in such circumstances. The general principle that the Court of Appeal should respect the verdict of a jury who has heard the evidence at first instance is well recognised, and is not undermined by the existence of a residual power.

121. This residual power is similar the Crown Court's power of dismissal pursuant to Sch 3 Para 2(2) of the Crime and Disorder Act 1998, which states:

> "(2) The judge shall dismiss a charge (and accordingly quash any count relating to it in any indictment preferred against the applicant) which is the subject of any such application if it appears to him that the evidence against the applicant would not be sufficient for him to be properly convicted."

122. We respectfully suggest that the test for appeals should be consistent with the test on an application to dismiss. An appropriate wording would therefore be: *"the Court of Appeal may find a conviction unsafe if it is satisfied that the evidence, taken as a whole, was not sufficient for him to be properly convicted by the jury".*

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

123. The CBA supports the retention of the power to declare a conviction a nullity.

124. The power should be reserved to cases where an essential precondition either to the lawful commencement of proceedings or to the lawful commencement of a trial was not complied with.

125. Appeals in all other cases should fall to be determined according to the overarching test of the safety of the conviction. Where there is a successful appeal against conviction following a guilty plea, the Court of Appeal should have a general power to remit the case to the Crown Court for the proceedings to continue subject to such directions as the Court may consider appropriate.

126. There is a range of circumstances in which a guilty plea might have been entered. It may be a plea entered on first arraignment, or a change of plea during a trial, or anywhere between. It is not appropriate to consider the entire proceedings to be a nullity as there may already have been rulings given or even video recorded testimony pursuant to Section 28 of the Youth Justice and Criminal Evidence Act 1999. An open discretion to make relevant directions is therefore appropriate.

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

127. The CBA agrees that these provisions are anomalous.

128. There seems no basis in legal principle for treating cases under these provisions outside the general provisions of the criminal and administrative law.

129. As a matter of law it is difficult to see why the fact that a pending deproscription or challenge to an order was in progress should mean that a breach of that proscription or order should not be a criminal offence. It runs directly contrary to the ordinary position that legal obligations must be complied with unless set aside and therefore discourages compliance. It risks providing an acquittal to persons who properly committed criminal offences and did so in a culpable manner requiring punishment.

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

130. The CBA supports a modest and focussed reform to allow the CACD to receive evidence of juror deliberations where the evidence may show that one or more jurors failed to act with impartiality.

131. We agree with the conclusions of the Law Commission report at 8.236 to 8.245. We strongly believe that it important to maintain the confidentiality of legitimate jury deliberations. It is essential to the effective functioning of the jury system that members of the jury feel that they can speak frankly. A reform which allowed the examination of jury deliberations without clear boundaries would encourage litigation over a wide range of matters, including challenges to the adequacy of the jurors' reasons for their decision.

132. We recognise the concern that there currently is no mechanism to address an allegation of bias, such as arose in *Remli v France* [1996] 22 EHRR 253 and *Gregory v UK* [1998] 25 EHRR 577, if the allegation only comes to light post-conviction. In *Gregory*, [at para 44] the ECtHR recognised that:

> "the secrecy of jury deliberations is a crucial and legitimate feature of English trial law which serves to reinforce the jury's role as the ultimate arbiter of fact and to guarantee open and frank deliberations among jurors on the evidence which they have heard".

Relying on *Remli*, the Court held [at para 45] that it is necessary nonetheless to consider whether:

> "there were sufficient guarantees to exclude any objectively justified or legitimate doubts as to the impartiality of the jury."

133. Clear focus is important if investigators are to ask questions of members of a jury. In our experience, where post-conviction allegations of juror misconduct arise, the Registrar will often request that the relevant local police force conduct the necessary investigations, although such inquiries can also be referred to the CCRC. It should be clear to the officers undertaking that sensitive task that the questions which they are permitted to ask of a juror are strictly confined.

134. We agree that, as the decision of the House of Lords in *R v Mirza, Connor and Rollock* [2004] UKHL 2 already recognises two exceptions to the absolute prohibition on secrecy of deliberations, a modest and focussed reform would not have a chilling effect. However, we respectfully say that any provision should be tightly worded to make it clear that its purpose is to address issues of impartiality.

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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

135. The CBA agrees with this proposal.

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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

136. The CBA agrees with this proposal.

137. Although the purpose of this reform is clear from the Report, when read in isolation the wording proposed above might give rise to ambiguity. It might still be suggested that an *"offence of which the jury could have convicted"* would have to be an offence which had been included on the indictment (or an available alternative).

138. The drafting might therefore be clearer if it expressly included words to the effect: "*whether or not it had been included on the indictment"*.

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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

139. The CBA agrees with this proposal.

140. For the avoidance of doubt, we suggest that this provision should be in addition to the existing provision in Section 3A(1)(c) CAA 1968, not in substitution for it. In practice, cases affected by this proposed amendment will be extremely rare. Far more cases will fall within the existing provision for cases where *"the plea of guilty indicates an admission by the appellant of facts which prove him guilty of the other offence"*.

141. We also repeat the points made in respect of Consultation Question 41 above. The power of substitution should encompass "any offence of which the defendant could have pleaded guilty, or found guilty, in the original proceedings (whether or not it had been included in the indictment)".

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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

142. The CBA strongly opposes this proposal.

143. We believe that any extension to the current provisions risks seriously undermining the principle of double jeopardy. A fundamental tenet of our system of criminal justice is that it is the prosecution who decides who to charge and what offences to charge them with. The evidence within the proceedings may disclose a wide range of alleged offences. One

of the core tasks of the prosecution is to review the evidence and decided which charges to advance at trial.

144. A further principle is that a defendant is entitled to know the case which they are required to answer. The prosecution sets out its case in the indictment and in its opening to the jury. The defendant responds to that case.

145. The danger of this proposal is that it allows the prosecution *"a second bite at the cherry"*. It would apply only in cases in which the CACD had decided that retrial on the charges which the prosecution had elected to proceed upon is impossible. It would allow the prosecution to review its tactical decisions and then re-present its case in a different form.

146. This is fundamentally different from the proposals in Questions 41 and 42, both of which are predicated on the basis that an offence which is to be substituted were conclusively established in the original trial.

147. We recognise that there have been a small number of cases, referred to in the Report, where the CACD may have wished to remit a case for retrial on an alternative charge but was unable to do so. However, we do not consider that a sufficient justification for creating such an obvious route to *"second bite"* prosecutions.

148. We have considered whether this risk could be obviated by the drafting of a provision, but cannot see how that might be achieved. We also recognise that the CACD would only order a retrial if it was in the interests of justice to do so. However, if primary legislation expressly allowed the prosecution to re-draft the indictment and proceed on entirely different charges, the CACD would no doubt consider a retrial in those circumstances to be consistent with the intention of the legislation.

149. In the circumstances, we strongly oppose this suggestion notwithstanding the issues raised in cases such as Lawrence..

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

150. The CBA agrees with this proposal.

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

151. The CBA agrees with this proposal.

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

152. The CBA agrees with this proposal.

153. The CBA agrees that this should have retrospective effect..

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

154. The CBA's response is 'no'. Where the defendant pleaded guilty in the original proceedings, but pleads not guilty following an order for re-trial, the prohibition on passing a sentence of greater severity should not apply.

155. This is not simply a question of the reduction for the guilty plea which may have been applied in the original proceedings. A defendant who has pleaded guilty may have done so on a limited factual basis which also reduced the starting point for the sentence. If they plead not guilty following an order for a retrial, the sentencing judge will then have to reach his or her own conclusion about the factual basis for sentence having heard the evidence on the retrial. Put simply, if a defendant pleads not guilty on their retrial and is convicted, sentence should be at large.

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

156. The CBA agrees with this proposal.

157. Questions 48 to 52 all deal with anomalies relating to appeals in cases of insanity or defendants who were unfit to plead. We agree that all of these changes are required to ensure that the CACD can make the appropriate order in all such cases.

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

158. The CBA agrees with this proposal.

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

159. The CBA agrees with this proposal.

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

160. The CBA agrees with this proposal.

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

161. The CBA agrees with this proposal.

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

162. The CBA's position is that an enhanced filter test is legitimate and necessary for out-of-time appeals of this nature. This approach is consistent with the core principles (i.e. overriding objectives) identified in Question 3 above.

163. The main criticisms of the existing 'substantial injustice' test relate to the way in it has been applied by the CACD rather than to the principle of having an enhanced filter test. In particular, there is a strong argument that those who have been convicted of murder in circumstances where the proper verdict was manslaughter have suffered a substantial injustice. However, that does not mean that every time a rule of substantive criminal law

is reinterpreted, or a rule of the admissibility of evidence is revisited, that all defendants convicted under the 'old' law should be able to appeal on the grounds that it might have affected the jury's approach to their case.

164. The practical consequences of removing an enhanced filter altogether should be considered. If the threshold test is set too low, it is not difficult to envisage circumstances where hundreds if not thousands of appeals could be advanced as a result of a so-called 'change of law'. The CACD could be overwhelmed by the additional caseload. Also, it could result in large numbers of cases being sent to retrial in Crown Courts which are already overwhelmed by the volume of cases awaiting trial. The appellate courts should not be deterred from revisiting significant points of law for fear that any restatement might open the floodgates to historic appeals.

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

165. The CBA supports this proposal.

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

166. The CBA agrees that reform of the test is required, but we consider that a predictive element should remain. Our reasons are as follows.

167. The CBA notes the low number of referrals made by the CCRC. 3% of applications to the CCRC result in a referral to the Court of Appeal, and 70% of cases referred are successful. By comparison, 18% of applications to the CACD for leave to appeal are granted by the single judge, and 45% of the conviction appeals heard by the full court are successful.

[Source: Review of the Year In the Court of Appeal, Criminal Division 2023 – 2024 at p. 38]. This suggests the CCRC is far more cautious about referring cases for full hearing than the judges themselves. However, that does not mean that the root cause is the *formulation* of the threshold test in Section 13(1) of the Criminal Appeal Act 1995. We respectfully suggest that this is more likely due to an overly-conservative *application* of the test by the CCRC.

168. We recognise that the CCRC is independent of the CACD, and that its decisions should not simply be deferential to the approach or decisions of the Court. Section 13(2) CAA 1995 already permits the CCRC to refer a case in exceptional circumstances even if the "real possibility" test has not been met. That would allow for a case to be referred on a point of law of importance even if there was existing authority against it.

169. However, in ordinary circumstances a filter for appeal cases which contains a predictive element is entirely appropriate. It is not simply a question of the efficient use of judicial resources. In the context of criminal cases, there would be harm to both victims and defendants themselves if cases were referred without any realistic hope that the appeal will succeed.

170. In civil cases, permission to appeal is required (subject to limited exceptions). The threshold test is set out in Rule 52.6 CPR, which provides:

> "(1) ... permission to appeal may be given only where—
>
> > (a) the court considers that the appeal would have a real prospect of success; or
> >
> > (b) there is some other compelling reason for the appeal to be heard."

The language of this provision is not greatly different from Section 13 CAA 1995. However, the Court of Appeal has held:

> "the use of the word "real" means that the prospect of success must be realistic rather than fanciful"

[*Tanfern Ltd v Cameron-McDonald* [2000] 1 WLR 1311, per Brooke LJ at para 21]. We respectfully suggest that the CCRC has (in practice) wrongly interpreted *"real possibility"* as being a higher threshold.

171. "Arguability" and "real prospect of success" are not necessarily the same. This point was discussed by Underhill LJ, in the context of applications for permission to claim Judicial Review, in *R (Wasif) v SSHD* [2016] EWCA Civ 82, [2016] 1 WLR 2793 at paras 13 to 16. Part 54 CPR does not define the criteria by which the decision to grant permission should be made, but "*it is now generally accepted that the touchstone is whether the application is 'arguable' or has 'a realistic prospect of success'*". Underhill LJ said:

> "There are indeed cases in which the judge considering an application for permission to apply for judicial review can see no rational basis on which the claim could succeed .... In such cases permission is of course refused. But there are also cases in which the claimant ... has identified a rational argument in support of his claim but where the judge is confident that, even taking the case at its highest, it is wrong. In such a case also it is in our view right to refuse permission; and in our experience this is the approach that most judges take. On this approach, even though the claim might be said to be "arguable" in one sense of the word, it ceases to be so, and the prospect of it succeeding ceases to be "realistic", if the judge feels able confidently to reject the claimant's arguments...."

172. The commissioners of the CCRC are not themselves acting in a judicial capacity, and therefore Underhill LJ's decision does not directly translate to the CCRC's unique role. However, it helps to highlight the distinction between the identification of a rational argument in support of an appeal and the identification of cases where the prospective appellant has a genuine chance of succeeding.

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

173. The CBA's position is that the test should retain a predictive element. Again, the criticisms relate to the application of the test, not the formulation. Under the existing provisions, a reference can already be made either (a) where the real possibility test is satisfied or (b)

where it is justified by exceptional circumstances. Accordingly, the CCRC already have power to refer a case where the predictive test is not met, but there has to be a justification.

174. The purpose of the CCRC is to ensure that cases in which the Court of Appeal may properly interfere should be heard by that court. The CCRC provides a route to the Court of Appeal that would not otherwise be available. There is no merit in referring cases in which it is inconceivable that the Court of Appeal would interfere.

175. Many of the proposed tests do not in fact materially differ from the question of whether a conviction may held to be unsafe (i.e. the proposal that there is an arguable ground of appeal that a conviction may be unsafe; or that there has been a miscarriage of justice (what is a miscarriage of justice except an unsafe conviction)).

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

176. The CBA agrees.

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

177. The CBA considers that in practice there is unlikely to be any different between the two. It is inconceivable that if the Court of Appeal has sufficient concern about the potential unsafety of a conviction to order (or request) an investigation that the CCRC would not then undertake an investigation (even if a brief one).

178. If the power was to request an investigation the CCRC would have a public law duty to give reasons for declining to do so, and in practice this is unlikely to be anything more than at least a preliminary investigation. If a direction is thought to be improper then it is conceivably subject to judicial review. Independent parties are often made the subject of court orders and directions; and independent counsel are often instructed by the Criminal Appeal Office.

179. The CBA is not in a position to comment on a relaxation of the conditions to use these powers without there being proposed conditions.

180. The CBA agrees that there is no issue in principle with this power being exercisable by a single judge. There are, however, significant cost implications to any decision to institute an investigation and so this may be a matter that would need to be kept under review (and we are sceptical that the power would be used frequently).

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

181. The CBA disagrees. In the absence of a first appeal, an application can be made to the CACD for permission to appeal out of time in any event.

182. This would impose a more significant administrative burden on the CCRC than presently exists. The existing threshold ensures there is an opportunity for cases to be resolved without recourse to the CCRC and there are sensible reasons why this should be the case.

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

183. The CBA continues to support a test that has a predictive element. There is little merit in referring a matter that the Court of Appeal would consider unarguable.

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

184. The CBA agrees.

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

185. The CBA agrees it is appropriate to extend this power.

186. The history of s.18A as a Private Member's Bill perhaps explains why a separate power was created and there was no amendment to s.17 at the time. The power under s.18A arguably provides greater safeguards in that it requires a Crown Court judge to approve the CCRC's application.

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

187. The CBA's view is that if the only ground for repeal of the power is that it has largely become redundant then it is unclear why any reform is required. Moreover, the consultation paper notes that the power may still be relevant in contexts outside the scope of this project: a factor suggesting reform should be avoided.

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

188. The CBA agrees the CCRC should have this power; the grant of such a power would improve transparency and trust and confidence in the justice system. A small minority of cases considered by the CCRC generate significant media and public interest. In circumstances where there is no referral there is evident benefit in knowing why that is so.

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

189. As noted above, the CBA continues to support an element of a predictive test. The CBA's view is that even if the CCRC is not required to follow the practice of the Court of Appeal, it must (as opposed to merely may) have regard to that practice. There is no merit in CCRC

decisions that are made entirely absent of a consideration of the likely legal tests that the appellate court will apply.

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

190. The CBA considers that it is not the perception at the Criminal Bar that CCRC Commissioners have a status equivalent to that of a High Court judge. There is of course no requirement for Commissioners to be legally qualified, albeit the CBA does not suggest such a requirement should be introduced: those with significant experience in criminal justice investigations clearly provide value to the CCRC. There is significant advantage to the CCRC of having suitably qualified persons be available part-time, including potentially making the CCRC more attractive to those who have otherwise partially retired.

191. The role of a Commissioner is though significantly underfunded compared to any part-time judicial role. A recruitment advert in April 2024 indicated that fees were £460 per day. The equivalent daily fee for a Deputy District Judge in the magistrates' court was £623.74 and for a First Tier Tribunal judge was £609.58. This disparity is aggravated by a lack of comparable pension arrangements to any other judicial post; and a lack of any defined professional progression. The result is that these posts are far less attractive to practitioners. The CCRC also seems to have failed to have successfully recruited former full time judicial office holders (a practice that the Parole Board has been successful at).

192. The CBA's view is that it is remuneration and career progression that make the role of a CCRC Commissioner unattractive and that these are the issues that need reform as opposed to the qualifications and terms of appointment.

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

193. The CBA agrees that HMCPSI would be a suitable inspectorate of the CCRC and that there would be benefit to inspection, but – as the Commission identifies – there would also be a need for appropriate funding for this.

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

194. The CBA agrees.

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

195. The CBA agrees.

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

196. Yes.

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

197. This may well be a sensible consideration but would need to be considered alongside the powers of third parties to intervene in proceedings generally. It would be undesirable for a third party to have the power to challenge an order only on appeal but not to appear or make representations in the substantive proceedings themselves. Similarly, it would not be desirable for third parties to have a right to appeal that essentially amounts to seeking a re-hearing of a decision without any change of information.

198. The CBA also notes that as currently drafted this would extend to interference with a persons rights under Article 1 of Protocol 1 to the European Convention on Human Rights (the right to property) and so would encompass a potentially very broad group.

199. In the CBA's view it is likely that the power of a third party to appeal against an order will need to be considered by reference to the specific order, the power of that third party to appear in the first instance proceedings, the extent to which the order impacts the third party, and the power of the third party to seek a variation of the order in the first instance court, or indeed to challenge the effect of the order via another avenue (such as the civil courts).

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

200. The CBA agrees.

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

201. Generally the appeal powers relating to bail appear to work. There has been a relatively large amount of technical litigation in relation to the prosecution power to appeal against a granting of bail in the magistrates' court. The court's attempt in *Hammond v Governor of HMP Winchester* [2024] EWHC 91 (Admin) to slightly relax those strict limits is understandable (in the context of the public safety decisions being reviewed). These matters are generally listed promptly and we do not consider there to be a particular need for reform of any time limits.

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

202. The CBA agrees.

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

203. Yes, amongst other things it provides a valuable opportunity for the correction of legal error.

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

204. Yes.

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

205. Yes. The Law Commission should also consider whether this should be extended to serious terrorist offences (such as those listed in Schedule 17A to the Sentencing Act 2020), an offence under section 134 of the Criminal Justice Act 1988 (torture), and offences contrary to ss.1 and 2 of the Modern Slavery Act 2015.

206. In respect of non-penetrative sexual assaults on children the interests of justice test will continue to assist in ensuring the exceptional nature of the jurisdiction

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

207. The consultation paper has in this respect been perhaps overtaken by the decision of the Supreme Court in *R. v Layden* [2025] UKSC 12. There is a similar power in s.84(4) of the Criminal Justice Act 2003 to apply to set aside the order to the power considered in *Layden*. There is therefore unlikely to be a need to amend the law now *Layden* has been considered.

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

208. The court's view in *Ivashikin* [2024] EWCA Crim 41 that by operation of law the defendant's acquittal for murder and conviction for manslaughter occurred at the same time is difficult to understand on the facts of the case (albeit it is noted the judgment does not appear to be publicly available). The conviction of the defendant occurred at the time he entered his guilty plea. His acquittal at the subsequent time at which the crown offered no evidence and entered a not guilty plea. They may have happened on the same day but it is not obvious they happened contemporaneously and therefore his plea was rendered a

nullity. Similarly, even if a defendant was facing a murder charge and a jury verdict was returned as follows "Not guilty, but guilty of manslaughter" it is not immediately apparent why the quashing of the acquittal also quashes the conviction of an alternative. Would it in fact quash convictions on other counts on the indictment?

209. Taking the summary in the consultation paper at face value there is, however, clearly an issue where a defendant's conviction is quashed on the acquittal. There is no reason why this should follow and it is not satisfactory.

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

210. Yes, we agree this jurisdiction more naturally sits with the Court of Appeal Criminal Division.

211. We agree, although note there appears to be a difference between the wording suggested in paragraph 13.130 and that in paragraph 13.125. In relation to the standard of proof, the proof of the prior criminal offence will generally have been provided by the underlying conviction, and any sentencing remarks/certification by the court below. That can then be challenged by the acquitted person (who will not necessarily have been part of those proceedings).

212. In relation to the relevance of the court who tried a person for an underlying administration of justice offence it appears to us there is merit in that court having a power to certify that in its opinion the statutory test is met factually. That court may well have heard extensive evidence and likely will be in a better position to have factually assessed that evidence. Whilst there may be grounds on which any such finding could be challenged in the Court of Appeal, the Court of Appeal ought to be able to have due regard to any such findings

by the tribunal of fact. This will not remove the need of the Court of Appeal to consider the issue of the interests of justice and the exercise of its discretion to permit a retrial.

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

213. As the CPS notes these provisions are in practice very rarely used but they are addressed at different issues and so any consolidation would need to be carefully considered. There is practically a question of how much merit there is in attempting a consolidation given the difficulties in potentially creating unintended legal change during that process. It does not appear to be causing any problems.

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

214. As detailed above it is arguable that this role could be better done by others, but in practice it is agreed that the system works (albeit there was a long abeyance in its use).

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

215. No, the purpose of a reference on a point of law is to enable the correction of a legal issue that would not have justified an appeal against a terminatory ruling (because the prosecution would not be willing to give the acquittal undertaking if unsuccessful), but for which there is a clear public interest in establishing the correct legal position.

216. The immediate case is merely the vehicle by which the issue of law is to come before the Court of Appeal. That a defendant's case is the subject of a reference on a point of law has no adverse effect on their liberty nor can it lead to a conviction.

217. The public interest is in correcting legal error, and that is best done if these references do not have to be rushed. They will almost always merit careful consideration and consideration of the public interest in a reference. There is no reason to apply a strict time limit to them; if the case is so sold that it is not in the public interest to make a reference then no reference will be made.

218. If there are to be time limits there is certainly no justification for making that time limit 28 days in the context of a consultation paper which proposes 56 day time limits for ordinary appeals.

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

219. Yes.

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

220. We agree. The prosecution's powers to appeal rulings in relation to which it is willing to give the acquittal guarantee, and to refer points of law post acquittal appropriately balance the need for an adequate redress to significant legal errors with the need for finality in criminal proceedings.

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

221. The CBA agrees with this proposal.

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

222. The CBA agrees with this proposal, but perhaps qualified by the words "where necessary". This is consistent with the Supreme Court's role in addressing points of law of general public importance. It also allows for greater flexibility to justice to both sides on the merits of the instant case.

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

223. Yes. It is an anomaly that the existing law allows the CACD itself to control whether its decisions are susceptible to appeal. It is unlikely that this will lead to a significantly increased number of applications for leave (thereby causing an undue administrative burden) given the relatively low numbers of such applications a year.

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

224. The CBA can see the argument for extended retention periods but is not fully informed as to the scale of the practical costs this would entail. The retention of large quantities of physical or digital evidence for considerable periods of time would have significant financial implications. We can acknowledge the balance the existing law attempts to provide by providing that material must be retained until release from custody. Given for many sentences prisoners are now released having served 40% of their custodial term, the effect of the proposed change would be to increase the time that material needs to be retained by 150%. Where non-custodial disposals have been imposed it could increase the period of retention by an even greater percentage (i.e. three years from sentence for a community order as opposed to six months from conviction). It must be acknowledged that these decisions have financial implications in an over-stretched and under-funded system.

225. If retention periods are to be altered it may be that an element of offence seriousness needs to be considered when considering the retention period; there is clearly a greater scope for a substantial miscarriage of justice where an offender is serving a sentence for murder than, for example, a driving disqualification order as a result of speeding.

226. There may also be grounds for differentiating between types of evidence. Forensic evidence may well merit longer periods of retention than, for example, real exhibits or BWF of a search or seizure. Any such reform will be difficult to draft, however, given the difficulty with identifying what is "key" evidence when considering a potential miscarriage of justice (which may raise issues entirely different from those pursued at the original trial).

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

227. Please see above.

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

228. The CBA supports this proposal, but subject to an appropriate mental element to the offence. We do not believe that it would be appropriate to have a pure strict liability offence.

229. The intentional destruction, disposal or concealment of evidence to prejudice criminal proceedings would amount to perverting the course of justice under the existing law. The lacuna which any new offence should address should encompass:

a. Reckless behaviour that has that potential effect; or

b. Negligence.

230. Evidence is unfortunately and sadly routinely destroyed or disposed of in criminal cases for entirely accidental reasons. Bodyworn footage is not saved. A storage unit floods. An exhibit is mislabelled and cannot be found. Seized cash is not photographed and is instead put into a police bank account and notes cannot now be recovered. We do not consider it appropriate to impose criminal sanctions on a strict liability basis to cover non-culpable errors.

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

231. The practical arrangements for such storage are a matter for the relevant authorities to feed in on bearing in mind the costs of doing so.

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

232. As the consultation paper states, the wider disclosure regime is outside the remit and scope of this project. Disclosure generally needs to be considered holistically. It is not desirable it is reformed piecemeal.

233. However, we agree generally that the *Nunn* principles are appropriate, and are capable of codification. We also agree broadly with the suggested proposals.

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

234. Yes.

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

235. In relation to cases in which convicted persons are alive there is a real question of invasion of privacy where journalists are seeking material entirely independent of the convicted person that they would not otherwise be entitled too. The law already allows journalists access to any material used in open court proceedings.

236. We also agree that there would be significant difficulties in drawing a line between "approved" journalists and "citizen journalists", particularly in an era in which "true crime journalism" is rife.

237. It seems that the underlying complaint is that investigative journalists are able to find new evidence and create public awareness about convictions. If those journalists become part of the defendant's legal team then they will be able to have sight of that information, even

if they are subject to the limits on further disclosure. They will also be able to write articles about the issues with the cases even if they do not make reference to disclosed material that was not used during the trial. If their involvement leads to a further appeal, then once that appeal is heard then they will be able to write about the material used in that appeal proceedings.

238. In those circumstances it is unclear what specific need there is for a separate ability for journalists to get access to unused material, particularly where that is independent of defendants.

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

239. The CBA agrees with this proposal. However, as above, the practical processes for doing this are a matter for the relevant authorities to feed in on bearing in mind the costs of doing so.

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

240. Yes, in theory this would assist significantly, although again we expect that even the digital provision of this material carries with it attendant costs. The difficulty of checking the record presently often requires advocates to attend court, the court be closed, and the Xhibit recording played in open court whilst advocates sit and listen. It would be much more

desirable generally if those involved in legally representing a defendant could have access to those recordings more freely.

241. The practical concern of course is whether this power would be too open to abuse. It would be much easier to copy and disseminate portions of those recordings (in breach of the criminal law and as a contempt of court). It is for this reason that the Civil Practice Direction: Access to Audio Recordings of Proceedings provides that "permission will only be granted in exceptional circumstances, for example where there is cogent evidence that the official transcript may have been wrongly transcribed."

242. This is a particular concern in criminal cases, where the dissemination of the recordings could have a chilling effect on witnesses' desire to engage with proceedings and in an individual case could lead to recriminations (or indeed identification where the witness has been subject to an anonymity order).

243. In our view these practical concerns are real and not theoretical and there would need to be careful consideration as to how these recordings are to be provided, for what period of time, what paper trail would exist as to who accessed them and when, and if there are circumstances in which audio recordings should not routinely be provided.

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

244. The CBA agrees that the balance of probabilities is the appropriate test. This would bring matters into line with the ordinary civil standard of proof for tortious claims.

245. It is not appropriate for decisions to be made by the MoJ or Home Office. An independent body is clearly required . That body will need to have powers to receive evidence (including orally if it wishes) and to invite representations from third parties. An appropriate mechanism would be to determine cases within the Tribunal system, as with Criminal Injuries Compensation. A compensation body could be established as a First Tier

Tribunal (probably within the Social Entitlement Chamber), with appeals to the Upper Tribunal under the existing framework of the Tribunals, Courts and Enforcement Act 2007. The alternative would be to create a freestanding body equivalent to, say, the Parole Board, but that would be more complex to enact.

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

246. The CBA does not support such a reform.

247. The fact that a conviction is quashed by the Court of Appeal on an in-time appeal should not be sufficient grounds for compensation, and we do not read the Law Commission's recommendation as suggesting that. That would be too wide. It is justified by the principle that such cases arise from the proper functioning of the criminal justice system. A miscarriage of justice deserving compensation by the state requires more.

248. We recognise that it is hard to see why such a person should receive compensation but not a defendant who has waited a significant period of time for their trial. A defendant who is in custody awaiting trial may end up spending a significant period of time there where other defendants are added to his case, or there is a need for a retrial.

249. Ultimately, the financial realities of the criminal justice system (and indeed the burden and standard of proof that is applicable) require us to draw a line somewhere, and this does not seem to be an inappropriate place to do so.

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

250. The CBA supports this proposal, with qualification.

251. There is a clear lacuna, as identified by the case of Barri White. Although that will rarely arise, we agree that this reform is necessary to prevent the risk of injustice. However, we remain of the view that the *existence* of a new or newly discovered fact should be a condition for an award of compensation even if that was not the ground on which the appeal had succeeded. A potential formula might be a condition that: *"The applicant's factual innocence is proven (wholly or in part) by a new or newly discovered fact (or facts)."*

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

252. The CBA strong agrees with this proposal. Post-release support for prisoners generally in this jurisdiction is concerningly poor. It requires improvement at all levels. Those who are victims of miscarriages of justice are a statistically very small group who likely have a wide range of potential issues stemming from their status as victims of miscarriage of justice and who will live in a disparate area across the jurisdiction. As a matter of practicality setting up or funding a body to provide them support would seem to be potentially cost-inefficient. We query whether the probation service may be best to deal with those who are directly released as a result of their status as a victim of miscarriage of justice.

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

253. Yes, although this should continue to be reflected on the PNC as it presently is; namely, that it appears as a conviction that has subsequently been quashed. Given the purpose of the PNC a person's engagement with the criminal justice system in that way may well be

relevant and pertinent to future matters and the simple deletion of it entirely may be inappropriate. It should not, however, feature as a conviction on a subsequent DBS check (albeit again in an enhanced DBS check it may be pertinent).

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

254. The CBA agrees that in general the CCRC is the best organisation to initiate a widespread investigation into inter-related miscarriages of justice and to consider the merits of individual cases.

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

255. The CBA agrees that in suitable cases inquiries can provide substantial public benefits in understanding how and why miscarriages of justice occurred, and ensuring that measures are put into place to attempt to avoid their repeat. Such inquiries do, however, have substantial costs and it may be that a CCRC investigation or CACD judgment provides sufficient information. There certainly cannot be any assumption that there will be a public inquiry (there being no analogous assumption in any other area of public life).

256. The Law Commission also does not appear to be suggesting any change of law here, but simply identifying a potential change in practice.

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

257. Part (1) of this question raises a fundamental proposal for reform which would arguably be outside the remit of the present consultation.

258. The scope of the Galbraith test is well established in case law, and widely understood both by Judges and practitioners. The test fairly reflects the distinction between the roles of judge and jury.

259. We note the suggestion that it is anomalous that the Crown Court applies the 'could properly convict' test whereas the Court of Appeal applies the 'safety of conviction' test. If the criminal law was to be codified from scratch, there might be an argument for using the same language to describe the tests to be applied at first instance and on appeal. However, altering the formulation of such a core first instance test gives rise to the risks of uncertainty, proliferation of litigation and potential anomalous results.

260. A Judge at first instance dealing with a 'no case' submission, usually at half time, is answering a fundamentally different question to the CACD on appeal, which is looking retrospectively at the trial process as a whole. The meaning of the 'safety' test is well understood in the context of appeals, but what would it mean at first instance when a Judge is assessing prospectively what the jury might make of the evidence?

261. We respectfully suggest that a strong case would have to be shown to justify a wholesale statutory reformulation. Three questions should be answered: (a) What is the problem which the proposed reform is intended to solve? (b) Is this the minimum

reform necessary to solve that problem? (c) Is the proposed solution likely to cause more harm than good?

262. What is the problem which this reform is intended to solve? The report identifies residual concerns about a limited number of case types, such as cases of disputed visual identification. The reality of practice in the 21st century, when CCTV evidence, DNA evidence and mobile phone evidence predominate, is that cases which are decided solely or largely on disputed identification evidence are very rare compared to 30 or 40 years ago. Judges now are alert to the weaknesses of visual identification evidence and a no case submission is liable to succeed if the Judge decides that no rational jury would be able to accept the evidence. If there remains a specific, residual concern about such cases, it could be addressed by a provision along the lines of Section 125(1) CJA 2003 applicable to visual identification evidence.

263. A wholesale reform would open up the question of the trial Judge's approach to the credibility of witnesses. Cases of rape and other serious sexual offences often turn on the credibility of a complainant's evidence, and/or the credibility of a defendant's own account. Without more, a test of 'safety' would open up the issue of whether the case should be left to a jury where a Judge's personal view is that they are not sure that the witness' account is truthful and/or accurate. Should a Judge direct a jury to acquit if the Judge's personal view is that they do not believe the Complainant's evidence? Should a Judge in a circumstantial evidence case direct the jury to acquire if their personal view is that they are not sure that the necessary inferences should be drawn? Either of those would undermine the exclusive role of the jury as judges of the facts. If that is not the intention, what then is the problem the reform is intended to solve?

264. In respect of Part (2) of the question, we raise two matters.

a. Expert evidence remains an area of concern. We regret the fact that the Ministry of Justice rejected the majority of the Law Commission's recommendations in the 2011 report 'Expert evidence in criminal proceedings'. Although the Criminal Procedure Rules set a clear framework for the format of expert reports and the declarations which experts must make, it has stopped short of a filter test of sufficient reliability.

b. The Post Office Horizon cases have called into question the approach to the reliability of computer-generated digital material. The abolition of the threshold test for admissibility in Section 69 of PACE has had the perhaps unintended effect of placing two great a burden on defendants to identify grounds for objection, and too lax approach by the prosecution to the investigation and disclosure of undermining evidence. There is a persuasive case that complex computer systems are capable of error and the real issue is the nature and extent of known or foreseeable errors. We would not expect the Law Commission to be able to address these concerns in the context of the present review. Sir Wyn Williams' Inquiry will no doubt bring forward relevant recommendations..

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

265. We have nothing to add.

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

266. We wish to make the observation that the consultation paper is 725 pages long and contains 108 consultation questions. The CBA observes that there does come a point where the length and size of any consultation in fact discourages responses.

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