CRIMINAL APPEAL LAWYERS ASSOCIATION

SUBMISSION TO THE LAW COMMISSION

1. The Criminal Appeal Lawyers Association (CALA):
    - was formed in 2002 with a view to providing better representation for those people seeking to appeal their convictions and sentence.
    - is a member of the Court of Appeal (Criminal Division) User Group.
    - organises conferences at which there are a range of speakers including legal practitioners, senior members of the judiciary, academics, representatives from the CCRC and journalists.
    - has been involved in discussions with the Legal Aid Agency in relation to the funding of appeal work.
    - was permitted intervener status, along with JUSTICE and the Innocence Network UK, in the Supreme Court case of *R (Nunn) v Chief Constable of Suffolk Police* dealing with post conviction disclosure.
    - has contributed to consultations concerning proposed legislation affecting criminal appeals.
    - provided submissions to the Westminster Commission on Miscarriages of Justice.

2. These submissions are made in response to the Law Commission's invitation to provide representations for suitable projects for its 14th Programme of Law Reform. CALA supports the proposal that 'Review of Appeal Powers in the Criminal Courts' should be included in the Programme.

3. CALA's principal submission in support of the proposal comes by way of endorsement of the recommendations made by the Westminster Commission on Miscarriages of Justice (WCMJ). We consider that the careful and detailed work of the WCMJ should lead to the statutory changes, which it has advocated. Indeed without statutory change much of the work of the WCMJ will have been in vain.

4. There are two statutory changes in particular, which are recommended by the Commission, which CALA would single out and one further issue, which was

touched upon in representations to the WCMJ, but which did not feature as a recommendation in its report.

The statutory test for a CCRC reference

5. The WCMJ has recommended that the 'real possibility' test for the CCRC to refer a case to the Court of Appeal in S.13 (1)(a) Criminal Appeal Act 1995 should be replaced with a test to the effect that a case may be referred if the Commission considers that the conviction may be unsafe or the sentence may be manifestly excessive or wrong in law, or, where it concludes that it would be in the interests of justice for the case to be referred.

6. CALA supports this recommendation. The predictive assessment test has been widely criticised for its imprecision and its contribution to an over cautious approach to the referral of cases by the Commission. By requiring the Commission to consider for itself whether a conviction may be unsafe or a sentence excessive or wrong in principle, as opposed to second guessing the appeal court, the Commission would be invested with the responsibility of forming a judgement about the merits of an applicant's case based on its own assessment of the evidence and issues. This would serve to reinforce its status as an independent body.

The substantial injustice test for an appeal out of time

7. The WCMJ has recommended that the test of substantial injustice, which applies in cases where there is an application for an extension of time in which to appeal on the basis of a subsequent change in the common law, should be revised. The background is the continuing disquiet about the consequences of the application of the joint enterprise principle prior to the change in the law brought about by the judgment of the Supreme Court in *Jogee*. It had been hoped that the convictions for murder of a significant number of mainly young defendants would be referred to the Court of Appeal in the wake of that decision. However in *Johnson* [2016] EWCA Crim 1613 the Court of Appeal ruled that in change of the law cases the test of 'substantial injustice' required the appellate court to consider whether the defendant would not have been convicted of murder had the jury been directed in accordance with *Jogee*. This differs from the test in other cases of jury misdirection in which the court has to decide if the wrong direction may (not would) have led to a different verdict. In *Jordan Towers v R* [2019] EWCA 198 (Crim) at [61] the Court of Appeal expressly

stated that the substantial injustice test imported a considerably higher threshold than the safety test.

8. The substantial injustice test as originally formulated in change of the law cases related principally to the continuing consequences of conviction for the defendant. In the case of conviction for murder it has been implicitly accepted that, were the defendant to have been wrongly convicted, the failure to quash the conviction would lead to a substantial injustice due to the life-long consequences of the conviction. It is against that background that the Court of Appeal in *Johnson* formulated an enhanced version of the safety test as an almost insuperable hurdle to the quashing of convictions.

9. CALA submits that there can be no justification in principle for this extension of the substantial injustice test and that the Law Commission should consider recommending the introduction of a statutory test for the extension of time in which to appeal which does not require consideration of an altered test for the safety of the conviction.

The test in fresh evidence cases

10. Although not directly considered by the WCMJ, the question of the test to be applied by the Court of Appeal in cases dependent on the receipt of fresh evidence under S.23 Criminal Appeal Act 1968, as amended, is of fundamental importance to the outcome of a significant number of the cases which fall to be considered by the CCRC. The leading case is the decision of the House of Lords in *Pendleton* [2002] 1 WLR 72, in which Lord Bingham stated that in a fresh evidence case, although the court was not constrained by any test, in a 'case of any difficulty' the appeal court should test its own provisional view about the impact of the fresh evidence by considering whether it might have led the jury to acquit and, if it might, the conviction would be unsafe. However the House of Lords declined to overrule its decision in the case of *Stafford v DPP* [1974] 878 with the result that the Court of Appeal now frequently declines to apply the jury impact test in favour of its own assessment of the safety of the conviction.

11. CALA submits that the state of the law is deeply unsatisfactory[1]. Prior to *Stafford* the appeal court applied the jury impact test (see *Parks [1961]* 1 WLR 1484), when

[1] For a critique of the development of the law in this area see 'Sappers and Underminers: Fresh Evidence Revisited' by Henry Blaxland Q.C. C.L.R. 2017 vol 7 p.537

considering fresh evidence cases, which is consistent with the conventional test in cases involving procedural irregularity or misdirection viz., had the error not occurred might the jury, acting reasonably, have returned a different verdict. This test is consistent with the primacy of the jury in the decision making process in trial on indictment and the role of the Court of Appeal as a court of review of the jury's decision. It is also the test as applied in Scotland – see *McInnes v HM Advocate* [2010] UKSC 7.

12. It is illogical for a different test to be applied in fresh evidence cases and runs the obvious risk, as recognised by Lord Bingham in *Pendleton*, that the appeal court decides for itself whether the defendant is guilty as opposed to whether the conviction is unsafe. Currently the appeal court has to consider whether the case before it is 'a case of any difficulty' before deciding whether it is appropriate to apply the jury impact test. Although Lord Bingham appears to have contemplated that the majority of cases in which fresh evidence has been received will be cases of difficulty this has not deterred the Court of Appeal from routinely declining to apply the jury impact test.

13. CALA therefore submits that the Law Commission should consider an amendment to S.23 CAA 1968 along the following lines:

> 'Where the Court agrees to receive new evidence, it shall conclude that the conviction is unsafe if it decides that the jury may reasonably have acquitted had it heard the new evidence.'

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