Criminal Appeal Lawyers' Association response to the Law Commission's Issues Paper on Criminal Appeals

1. INTRODUCTION

1.1 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 an active member of the Court of Appeal (Criminal Division) User Group;
- organises conferences at which there are a range of speakers representative of various aspects of appeal work – including legal practitioners, senior members of the judiciary, academics, representatives from the CCRC and journalists;
- has discussed with the Legal Aid Agency issues concerning funding appeal work;
- intervened, along with JUSTICE and the Innocence Network UK, in the Supreme Court in *R (Nunn) v Chief Constable of Suffolk Police* (post-conviction disclosure);
- contributes to consultations about proposed legislation affecting criminal appeals;
- provided submissions to the Westminster Commission on Miscarriages of Justice.

1.2 In these submissions, we respond to a number of the questions posed in the Law Commission's Criminal Appeals Issues paper. We also append our previous submission to the Law Commission on this topic, submitted in Spring 2023.

2. PRINCIPLES

Q1: What principles should govern the system for appealing decisions, convictions and sentences in criminal proceedings?

2.1 We believe that any system of criminal appeals should ensure that there is a fair and effective system for righting wrongs in the criminal process. This should include correcting convictions that are unjust, trials that are unfair, and sentences that are wrong in principle or manifestly excessive.

2.2 We also consider that the system of appeals should be accessible to everyone, not least including individuals with protected characteristics as defined by the Equality Act 2020. It should be properly funded through legal aid for those who are eligible at every stage.

2.3 The criminal appeals system should work and operate by means that ensure people are not disadvantaged due to their gender ethnicity or any other protected characteristic.

3. APPEALS FROM THE MAGISTRATES' COURT

Q2: Is there a need to reform the processes by which decisions of magistrates' courts in criminal cases can be appealed or otherwise reviewed?

3.1 The starting-point must be an acknowledgment that, if the appeal processes from Magistrates' Courts' decisions were reformed, it would fundamentally change how Magistrates' Courts operate. In particular, if a leave requirement were to be introduced, the Magistrates' Court would have to become a court of record and magistrates would be expected to give detailed reasons for their decisions. The effect of this, as indeed has been identified by magistrates, is that their work rate would significantly slow down. However, requiring Magistrates' Courts to give detailed reasons is not necessarily a bad thing. What should not happen and, we submit, what the Law Commission should be alive to and guard against, is that Magistrates' Courts continue to operate as they are ***and*** a leave requirement is introduced to appealing from their decisions. This would be fundamentally unfair.

3.2 We also note that the vast majority of cases concerning child defendants are hearings in the Youth Court and that any changes to appeals from Magistrates' Courts will therefore need to consider the impact on children. We refer to and adopt the submissions of the National Association of Youth Justice and the Youth Pracititioners' Association in this regard.

Appeals following Guilty pleas

3.3 One area in which reform is needed is in respect of appealing to the Crown Court following a guilty plea in the Magistrates' Court. At present s.108 of the Magistates' Courts Act 1980 provides a bar to appeals following a guilty plea. Unless a defendant can persuade the Crown Court to vacate the plea, for example, because it was equivocal, and so persuade the Crown Court to remit the matter to the Magistrates' Court for trial, there is no remedy in the Crown Court following a guilty plea. Another difficulty is

that the scope of the Crown Court's powers to vacate a guilty plea from the Magistrates' Court is not clear, which was recently reiterated in the case of *R. (CPS)* v. *Preston Crown Court* [2023] 2 Cr.App.R. 18. What can be said is that the Crown Court's power to vacate a plea is narrowly circumscribed.

3.4 However, experience has shown that pleas of guilty are frequently entered when they ought not to have been. This is a particular problem in the case of children and young people or the unrepresented. We submit that s.108 of the 1980 Act should be amended to allow appeals to the Crown Court following a guilty plea in the Magistrates' Court. This would correct an injustice without requiring the applicant to proceed via the CCRC – which is the only recourse open if one cannot persuade the Crown Court that the plea was equivocal.

3.5 If it is considered that appeals from guilty pleas should be distinct from appeals after conviction and should not, for example, automatically give rise to a re-hearing, the Law Commission should give consideration to setting out the circumstances in which an appeal might lie from a guilty plea. We submit that such circumstances should be wider than the plea was equivocal and could include misunderstanding of the law or facts; duress; ignorance of a defence and bad advice. We note that young and vulnerable defendants may be particularly affected by these isssues and their particular needs should be factored into any reform.

In particular:

(1) Should the ability to challenge decisions of a magistrates' court through appeal by way of case stated or judicial review, be retained, abolished or reformed (and if reformed, how)?

3.5 We do not believe that both avenues of challenge should be abolished. One route of challenge to the High Court should be retained, as rulings by the High Court on questions of law set a precedent whereas those by a Crown Court judge do not. This serves a function of creating clarity in the law. Consideration would have to be given to how such legal questions would be clarified and precedents set without the High Court's jurisdiction, particularly in summary only offences (of which there are very many) if that avenue of challenge were to be removed.

3.6 Consideration should be given to why the Case Stated regime seemingly requires reform. It offers a unique procedure for challenging questions of law without challenging the findings of fact. The procedure limits the High Court's jurisdiction to questions of law and requires the Magistrates' Court to set out the findings of fact that they made. This strikes the right balance between the Magistrates' Court retaining the power over findings of fact (unless in excess of jurisdiction) but allowing the High Court to exercise a supervisory jurisdiction to ensure uniformity and clarity in the operation of the law.

3.7 Another point to note is that resort to the Case Stated regime is not limited to the parties but includes "a person aggrieved". If the Case Stated procedure were abolished consideration must be given to wider standing than simply the parties.

3.8 As to whether both Judicial Review and Case Stated jurisdictions and procedures should be retained, at present a Case Stated is generally the preferred choice in challenging decisions of magistrates and has the advantage in identifying the findings of fact made by the magistrates. However, a claim in judicial review fills the gap where an error is not apparent from the case, for example where it is a procedural error or a breach of natural justice. A claim in judicial review allows pursuing an appeal on interlocutory matters whereas a Case Stated does not. A further advantage of a claim in judicial review over a Case Stated is that a claim in judicial review does not prevent an appeal to the Crown Court.

3.9 If it is considered that it is unnecessarily complicated to have both judicial review and Case Stated jurisdictions and procedures (and deciding which one to use does create difficulty and is not always clear) it may be that the Case Stated procedure should be expanded, so that it incorporates those aspects of challenge that it does not currently meet which resort to judicial review does. That would be relatively easy to do by amending s.111 of the 1980 Act. Currently a decision can be challenged by way of Case Stated on the ground that it is wrong in law or is in excess of jurisdiction. The grounds of challenge by way of a claim in judicial review are much wider.

3.10 As well as enhancing the grounds of challenge, thought should be given to allowing challenges by way of Case Stated to interlocutory rulings, which is not currently permitted.

3.11 Consideration should also be given to the following changes:

3.12 Allowing an extension of time for the initial application to state a case. At present if application is not made within 21 days there is no provision for an extension of that time at all even if there is a good reason for the delay;

3.13 The procedure for stating a case from the Magistrates' Court and from the Crown Court differs in that in the Magistrates' Court the court officer drafts the case whereas in the Crown Court the applicant is required to draft the case and the respondent can also produce a version with the judge deciding which version to approve. This seems unnecessarily complicated. As with the Magistrates' Court, it should be the Court that drafts the case allowing representations following the initial draft. This would have the further benefit of assisting unrepresented persons;

3.14 The magistrates can refuse to state a case if the application is "frivolous" – see s.111(5) of the 1980 Act. That has become a term of art. Again, to assist unrepresented persons, the term should be changed so that it reflects the case law as to the meaning of frivolous but is straightforward and readily understandable, for example "unarguable", "misconceived", "hopeless". As well as assisting defendants, this would serve to focus the mind of a court officer as to the high bar required before there can be a refusal to state a case.

(2) Should a leave requirement be introduced in respect of appeals from the magistrates' court to the Crown Court? If so, should the grant of leave to appeal be followed by a rehearing or a review of the magistrates' court's decision by the Crown Court?

3.15 Our view is that a leave requirement should not be introduced in respect of appeals from the Magistrates' court to the Crown Court. We submit that the power of the Crown Court sitting in its appellate jurisdiction to (i) re-sentence and to re-sentence more severely, even if the appeal is only against conviction, and (ii) order costs to be paid by the appellant if he loses, offers sufficient disincentives to unmeritorious appeals.

3.16 We agree that the right to a full rehearing is a necessary consequence of the fact that summary proceedings do not enjoy the same level of protections for defendants (including publicly funded representation) as in indictable cases.

3.17 As set out earlier, a leave requirement would require the Magistrates' Court to become a court of record and would require the introduction of DARTS across the estate. This would require a massive amount of resources and, it is submitted, is likely to cost more than it saves in reducing the amount of appeals. An added difficulty would be the authorisation of and cost of transcripts and the question of who would bear the costs of transcripts.

3.18 A leave requirement would cause unrepresented defendants a particular difficulty. Unrepresented defendants are far more commonplace in the Magistrates' Court than they are in the Crown Court and a leave requirement would mean such defendants having to analyse decisions to assess whether they pass a particular legal test.

3.19 A leave requirement would also introduce another layer of work for Crown Court judges. We agree with the submissions on this question made on behalf of the LCCSA and would endorse those submissions.

4. THE SATEFY TEST

Q3: Does the single test of "safety" adequately reflect the range of grounds that should justify the quashing of a conviction? In particular, under what circumstances, if any, should a conviction be quashed because of serious impropriety which does not cast doubt on the guilt of the appellant?

4.1 The current safety test was introduced in the Criminal Appeal Act 1995 and replaced the test in the Act of 1968. It was intended to provide an overarching test through which the court would apply the common law in determining whether a conviction should be quashed. The question, therefore, is whether a statutory amendment would assist in clarifying the basis on which the court conducts the exercise of determining whether an appeal should be allowed.

4.2 We consider there is merit in the Bar Council's submissions at their paragraphs 23 to 33. By way of refinement of the proposed amendment to the test we would offer the following suggestion:

The Court of Appeal shall allow an appeal against conviction if they think that the verdict of the jury may be unsafe on the grounds that:

i. There was a material error of law at trial;

ii. The evidence called at trial was insufficient to prove the prosecution case;

iii. Since the appellant's conviction relevant new evidence has become available;

iv. The appellant did not receive a fair trial;

v. The indictment should be stayed as an abuse of the process of the court.

4.3 As submitted by the Bar Council, the merit in particularising the statutory basis for determining appeals against conviction is that it assists in structuring the court's reasoning and aiding public understanding.

5. FRESH EVIDENCE

Q4: Is there evidence that the Court of Appeal's approach to the admission of fresh evidence hinders the correction of miscarriages of justice?

5.1 The short answer is 'yes'. 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. Indeed in *Dial and Dottin v State of Trinidad and Tobago* [2005] 1 WLR 1660, a decision of the Privy Council, Lord

Bingham agreed with Lord Brown's majority judgment that in a fresh evidence case the test was whether the evidence raised a reasonable doubt about the guilt of the accused and that the primary question was for the court itself and not what effect it would have on the minds of the jury. This formulation is arguably inconsistent with the requirement that the appellate court must decide whether the conviction is unsafe, not whether the appellant is guilty. Lord Steyn and Lord Hutton, in dissenting judgments, preferred to adopt the jury impact test.

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

5.3 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. The result is that there is significant uncertainty about the circumstances in which the Court of Appeal should apply the jury impact test.

5.4 Further, the consideration in S.23 (2)(a) CAA 1968, that the evidence is 'capable of belief' imports a recognition that it is not ultimately for the court to decide whether it believes or accepts the evidence, but whether the fact finding tribunal (i.e. the jury) may believe or accept it. This statutory consideration therefore embodies the jury impact test.

5.5 In terms of the significance of the jury impact test, the celebrated miscarriage of justice case of the Luton post office murders provides a good example. In *Cooper and McMahon* [2003] EWCA Crim 2257 the Court of Appeal, which was hearing the case for the fifth time, quashed the convictions in express reliance on the decision in *Pendleton*.

5.6 We therefore submit 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 in the exercise of its power under S.23 (1)(c), it shall conclude that any conviction to which the new evidence relates is unsafe if it decides that the jury may reasonably have acquitted had it heard the new evidence.'*

5.7 Further, we have concerns about the application of the threshold consideration for the admission of fresh evidence that there is a reasonable explanation for the failure to adduce the evidence at the time of trial or sentence. This frequently requires the Court of Appeal to embark upon an analysis of the difficult issue of whether there were failures by the defence lawyers at trial. We recognise that the court will be concerned to deter convicted defendants from having a second bite at the cherry on appeal in circumstances where the evidence was available and could have been deployed at trial, but ultimately, because S.23 is subject to an overarching interests of justice test, the reasonable failure to adduce criterion should not be deployed to defeat a meritorious appeal. Consideration should, therefore, be given to removing or amending this criterion.

5.8 Finally, on a related point, the Court of Appeal has decided that, where leave to appeal has been granted or the case is referred by the CCRC, the court may consider new evidence of the appellant's guilt. In *Craven* [2001] 2 Cr.App.R. 21 and *Hanratty* [2002] 2 Cr.App.R. 30 the court relied on post conviction DNA evidence in dismissing the appeals. In *Maxwell* [2011] 2 Cr.App.R. 31the Court of Appeal quashed a conviction because of prosecutorial misconduct but ordered a retrial on the ground that since

conviction the appellant Maxwell had confessed[1]. The Supreme Court upheld that decision. *Hanratty* was a much publicised case of an alleged miscarriage of justice in which the appellant had been executed. There was, therefore, a public interest in considering the factual basis relevant to the appellant's guilt and the court concluded that the DNA evidence was conclusive. Even so, the receipt of completely new fresh evidence probative of guilt, be it DNA or confession evidence, usurps the role of the jury. Indeed in *Hanratty* at [105] Lord Woolf C.J. stated that, if the appellant was able to show that the trial was fatally flawed because of lack of disclosure or flaws in the summing-up, then the DNA evidence would not rescue the conviction. The Law Commission may, therefore, wish to consider whether the law concerning the circumstances in which fresh prosecution evidence probative of guilt may be received in order to defeat an appeal, as opposed to providing a basis for ordering a retrial, should be clarified.

Q5: Is there evidence that the Court of Appeal's approach to assessing the safety of a conviction following the admission of fresh evidence or the identification of legal error hinders the correction of miscarriages of justice?

5.9 Please see our response to Qs 3 and 4 above.

6. LURKING DOUBT

Q6: Is there evidence that the Court of Appeal's approach to "lurking doubt" cases (not attributable to fresh evidence or material irregularity at trial) hinders the correction of miscarriages of justice?

7.1 The issue of "lurking doubt" raises a fundamental question about the role of the Court of Appeal. In *McIlkenny* [1991] 93 Cr.App.R. 97, the successful appeal of the Birmingham 6, it was held that "whereas the Civil Division of the Court of Appeal has appellate jurisdiction in the full sense, the Criminal Division is perhaps more accurately

[1] Note that his coappellant and brother Danny Mansell had not confessed and so no question of a retrial arose.

described as a court of review." In *Pendleton* Lord Bingham stated: "The Court of Appeal is entrusted with a power of review but it is a power to be exercised with caution mindful that the Court of Appeal is not privy to the jury's deliberations and must not intrude into territory which properly belongs to the jury."

7.2 The principle that a conviction may be quashed if the Court of Appeal has a subjective "lurking doubt" about the safety of a conviction was established in *Cooper* [1969] 53 Cr.App.R. 82. This was, in the words of Lord Widgery C.J. giving the court's judgment, "a difficult identity case" at a time when there was growing recognition of the dangers of identification evidence, culminating in the landmark decision of *Turnbull*. Lord Widgery stated that the basis for finding that the Court of Appeal had jurisdiction to apply its own subjective view of whether the appeal should be allowed flowed from the new test established in the 1966 Criminal Appeal Act and then consolidated in the 1968 Act to the effect that an appeal should be allowed if the appellate court thought that the conviction was unsafe or unsatisfactory. This is curious because under s.4 (1) of the Criminal Appeal Act 1907 the grounds on which an appeal may be allowed were expressed in broader terms:

> *The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal.*

7.3 In his analysis of the development of the Court of Appeal's jurisdiction in *Pendelton* Lord Bingham said: *'Although the 1907 Act has been repeatedly amended, the scheme of the Act has not been fundamentally altered'*.

7.4 Since *Cooper*, "lurking doubt" has rarely been deployed as a basis for quashing a conviction and its death knell was seemingly sounded in *Pope* [2013] 1 Cr.App.R. 14 where Lord Judge C.J. stated in terms that, where there is a case to answer and there

has been no legal error at trial, it was not open to the Court of Appeal to quash a conviction on the basis of some subjective, collective judicial hunch that the verdict is or may be unsafe.

7.5 The current position, therefore, is that the Court of Appeal has no power to quash a conviction absent procedural error at trial or the receipt of credible fresh evidence. This is consistent with the role of the Court as a court of review. The issue for the Law Commission to consider is whether the Court of Appeal should be specifically invested with the power to quash a conviction on *Cooper* lurking doubt grounds. Ironically this could arguably be achieved by reinstating the broad grounds in the 1907 Act, which included the power to quash a conviction if the court were of the opinion that the conviction was "unreasonable" or "on any ground there was a miscarriage of justice".

7.6 However, if it is accepted that the role of the Court of Appeal is limited to procedural review, our submission is that procedural safeguards at trial should be strengthened. In particular, consideration should be given to reviewing the basis on which a trial judge may decide that there is no case to answer. The *Galbraith* [1981] 73 Cr.App.R. 124 criteria for allowing no case submissions mean that the trial judge is not permitted to stop a case on the basis that he/she considers the prosecution evidence to be unreliable. It is only where the evidence is so "tenuous" that a jury properly directed could not convict on it that a no case submission will succeed. The principal exception to *Galbraith* is provided by *Turnbull* in respect of visual identification cases. This provides an example of recognition that a category of evidence requires particular caution and so the trial judge is enjoined to withdraw a case on the basis of his/her own assessment of the strengths and weaknesses of the evidence. The Court of Appeal is then able to consider the correctness of that decision. Consideration should therefore be given to whether there are other categories in which there is a lurking doubt about the reliability of the evidence. Examples may be: historic allegations of sexual abuse, the evidence of young children, evidence relevant to human trafficking where the defendant may be too afraid to give evidence about his/her predicament. We appreciate that there will be particular sensitivities in extending the role of the trial judge to intervene into what would otherwise be the jury's territory. However there should be no limitation on measures which assist in the prevention of miscarriages of justice. Far better that this should be achieved at trial rather than having to await the judgment of the Court of

Appeal, constrained as it is by a procedural review of the trial process. It would also provide a principled basis on which the Court of Appeal could quash a conviction by reference to the trial judge's reasoned decision on a no case to answer submission, rather than having to fall back on the concept of "lurking doubt".

7. REMEDIIES

Q7: Are the options and remedies available following the quashing of a conviction by the Court of Appeal adequate and appropriate?

7.1 If this question is directed at the remedies available to the Court of Appeal, we accept that the power to order a retrial is appropriate and can think of no other orders available to the Court which may fall to be considered. However, we question whether the interests of justice test for ordering a retrial is being too narrowly construed. In our experience, it is increasingly rare for the court to decline to order a retrial, even where a substantial portion of a successful appellant's sentence has been served. The Law Commission may therefore wish to consider whether S.7 Criminal Appeal Act would benefit from amendment by particularisation of the basis on which the interests of justice test is exercised.

7.2 If this question embraces the vexed issue of the availability of compensation for victims of a miscarriage of justice, we advocate for wholesale reform of the current regime. This has been a controversial issue for some time but has recently penetrated public consciousness through the publicity given to Andrew Malkinson's case. The dramatic reduction in awards of compensation came with the abolition in 2006 of the *ex gratia* scheme. The result was that compensation was only payable on the narrow grounds provided in s.133 of the Criminal Justice Act 1988. These were reduced even further by amendment in 2014 so that compensation is now limited to cases in which a newly discovered fact shows beyond reasonable doubt that the person did not commit the offence. The linked cases of Sam Hallam and Victor Nealon are currently being considered by the European Court of Human Rights following the dismissal of their appeal by the Supreme Court. The issue is whether the criterion in the amended s.133 of the Criminal Justice Act 2003 violates the presumption of innocence in article 6 of the European Convention on Human Rights.

7.3 Even if the Hallam and Nealon appeals succeed there is danger that the law may revert to the pre-2014 amendment, which was construed in the case of *Adams* [2012] 1 A.C. 48 to the effect that compensation was payable in two categories of case: (i) where fresh evidence clearly showed that the defendant was innocent (i.e. the current criterion in the amended section); (ii) where the fresh evidence was such that, had it been available at trial, no reasonable jury could properly have convicted. Even this formulation is subject to the conditions precedent that the defendant's conviction was quashed on an out of time appeal and on the basis of a newly discovered fact. As Professor John Spencer argued in an excoriating article published in 2010 (so prior to the decision in *Adams*), the statutory scheme for compensation excludes a whole raft of deserving applicants including those who had spent time in custody but whose case had been decided in their favour at trial [see *Criminal Law Review* 2010 vol 11 pp 803-822].

7.4 The problem with the *ex gratia* scheme was said to be its lack of transparency. It did, however, have the advantage of providing the executive with a wide discretion. In advance of the decision in the Hallam and Nealon cases it would be unhelpful to submit a proposal for statutory amendment at present. However, we submit that the current statutory conditions are having the effect denying compensation to a number of deserving applicants. If the Law Commission considers it to be within its remit to make recommendations in respect of this then we would wish to make further submissions in due course.

8. POWERS ON SENTENCE APPEALS

Q8: **Are the powers of the Court of Appeal in respect of appeals against sentence adequate and appropriate?**

8.1 Our view is that – broadly – the powers of the Court of Appeal in respect of appeals against sentence are adequate and appropriate. The categories of wrong in principle and manifestly excessive are broad enough that they allow the correction of a wide variety of difficulties that arise in sentence cases.

8.2 One area where the powers of the Court of Appeal have not been adequate is the Court's powers to deal with particular classes of case. The Court generally deals with each individual case that comes before it. On occasion, if a wider matter of principle arises, the Registrar will gather a number of cases together for them to be heard together. However, only those case that are already in the system will be brought together in this way.

8.3 But the Court's powers do not allow it to be proactive in correcting unlawful sentences or correcting sentences when a principle has fundamentally changed. An example is IPP cases. The difficulties with IPP sentences have been well documented. The Law Commission will be aware of the work of the Justice Select Committee on these sentences and on the recommendations made[2] (though not adopted by Government[3]). The sentences have been described as "cruel, inhuman and degrading" for many prisoners by a United Nations' expert on torture.[4] Whilst many who continue to serve these sentences have unsuccessfully appealed against the sentences, a significant number of prisoners serving IPPs have never appealed against their sentences either because they remain unaware of the mechanisms for doing so, because they believe they cannot so many years out of time, because they fear a loss of time order, or because they struggle to access assistance, given the low numbers of practitioners undertaking this work. At present, the Court of Appeal has no power to consider any sentence where an application has not been made by the offender themselves.

8.4 Consideration should be given to the Court of Appeal of its own volition reviewing particular classes of sentence in particular circumstances. In the case of IPP sentences, if the Court of Appeal were permitted to be proactive it could ask to consider all cases where IPP sentences had been imposed allowing those affected to make application.

8.5 IPPS are one example of this but there are others. A recent example is the approach to sentencing for offences (often serious sexual offences) committed when the offender was a child but sentenced when they were an adult. At [4.173] of the Law

[2] IPP sentences (parliament.uk)
[3] IPP sentences: Government and Parole Board Responses to the Committee's Third Report - Justice Committee (parliament.uk)
[4] https://news.un.org/en/story/2023/08/114023

Commission's *Issues* paper, the Law Commission refers to the case of *Ahmed and others* [2023] EWCA Crim 281, which is an example of this. The Court of Appeal fundamentally changed the approach to sentencing in such cases but again, only those whose cases already happened to be in the system felt the immediate benefit of the change.

8.6 The Commission is asked to give consideration to powers being given to the Court of Appeal which would allow the Court itself to consider a particular principle or category of case, to publicise the fact that it was considering a particular principle or category of case, allowing those potentially affected by that consideration to make application to the Court so that if appropriate their case could be joined. This would mean that the Court could consider similar cases in an efficient manner rather than waiting for the new principle to make its way down to those affected resulting in a series of future appeals.

9. APPEALS TO THE SUPREME COURT

Q9*: *Does the law satisfactorily enable appropriate criminal cases to be considered by the Supreme Court?

9.1 Our view is that the answer to this question is very firmly "no". The problem is the Court of Appeal's ability to prevent a case from ever reaching the Supreme Court because of the requirement that it must first certify a point of law of general public importance. This provides the Court with the opportunity to prevent any of its decisions being reviewed by the Supreme Court. We note that the same requirement does not exist in the Court of Appeal Civil Division. In *VCL* [2017] 1 Cr.App.R. 33, a case concerning the prosecution of minors who were victims of trafficking, the Court declined to certify a point of general public importance after it refused the appeal. The case ultimately was heard by the ECtHR (*VCL* v. *UK* (2021) 73 E.H.R.R. 9) where it was held that there had been breaches of Article 4 and Article 6. This provides a paradigm example of a case that should have been but was not heard by the Supreme Court because the Court of Appeal, acting as gatekeeper to any challenge to its decision, refused to allow it.

9.2 Our view is that the requirement that the Court of Appeal certify a point of law of general public importance as a condition for permitting an appeal to proceed to the Supreme Court should be removed.

10. CCRC TEST

Q10*: *Is there evidence that the referral test (a "real possibility" that the conviction, verdict, finding or sentence would not be upheld) used by the Criminal Cases Review Commission when considering whether to refer an appeal hinders the correction of miscarriages of justice? If so, are there any alternative tests that would better enable the correction of miscarriages of justice?

10.1 The consistently low rate of referrals year on year by the CCRC suggests that the statutory test for referral is a hindrance to the correction of miscarriages of justice.

10.2 The test for referral is higher than the test applied by the Court of Appeal which, although not defined by statute, requires it to grant leave when there is an arguable or reasonably arguable ground. We consider that there is no good reason for the CCRC test to be stricter.

10.3 The predictive test that the CCRC applies gives far too much discretion for refusing to refer cases where there are genuine arguments that might succeed on appeal. Removing the requirement that the CCRC must form its own judgment as to whether there is a real possibility that the argument *would* succeed, rather than considering whether it *might* succeed, would ensure that more cases are referred and more miscarriages of justice are corrected.

10.4 The predictive test also makes the ability successfully to challenge a CCRC refusal decision by judicial review nigh-on impossible, given the wide discretion that the test allows the CCRC to exercise. In cases involving convictions from the crown court, we suggest that the test for referral be amended to cases where:

i) There is an arguable ground of appeal; or
ii) The conviction may be unsafe; or

iii) It is in the interests of justice to do so

10.5 Separately, as things stand, the only route to challenging the CCRC's decision to refuse to refer is by judicial review. Even if a change were made to the referral test, there would still be no other way of challenging their decision. Consideration ought to be given to the setting up of a system of independent review of refusal decisions so that there is some accountability and check on the CCRC's decision making.

11. POST TRIAL RETENTION AND DISCLOSURE OF EVIDENCE

Q16*: *Is the law governing post-trial retention and disclosure of evidence, whether used at trial or not, satisfactory?

11.1 In our experience, difficulties accessing evidence post-conviction – whether because it has not been retained or because access is refused – are a leading hindrance to the identification and remedying of miscarriages of justice.

11.2 The law as set out in *R (Nunn) v Chief Constable of Suffolk Constabulary* and the Attorney General's Guidelines on Disclosure 2022 (para. 140) leaves wrongfully convicted defendants without an effective means of accessing any potentially exculpatory evidence held by law enforcement agencies. There is no incentive for law enforcement agencies to comply with a post-conviction request for access to potentially exculpatory material, and no viable mechanism to challenge a refusal.

11.3 *Nunn* imposes a duty on the police or prosecution to disclose material which comes into their possession and might afford an arguable ground for contending the conviction is unsafe, and to conduct further enquiry where it might reveal something affecting the safety of the conviction. A defendant or a defendant's representative can make a request to the police or prosecution for such material or enquiries. But in the vast majority of cases, though a defendant knows they have been wrongfully convicted, they will be unable specifically to pinpoint non-disclosed exculpatory material when they have no right to possess or review case files beforehand. There is no way in which a defendant in this position will be able to make effective representations as to how that unknown material could undermine the safety of their conviction, and the relevant agency will

refuse the request. An individual in this position is trapped in a "Catch 22" – without seeing the material and knowing what it contains they cannot articulate the relevance of the material to their case.

11.4 If an individual makes a broad or general request for material under *Nunn* it will likely be refused by the relevant agency as a fishing expedition. Further, in our experience, police forces are often ignorant of the current post-conviction disclosure framework and will incorrectly treat requests under *Nunn* as Subject Access Requests or Freedom of Information Act Requests, and then use exemptions to refuse disclosure. Even where an individual is able to make a specific request for material, the relevant agencies show little comprehension of their common law duties and regularly refuse wholly to disclose any material or conduct further enquiries. In our cases, this includes refusal of requests for unreviewed CCTV footage from around the crime scene, requests for police identity parade documentation when procedures can already be shown to have been violated, and requests for details of other unfounded allegations made by a complainant in a case.

11.5 Just as at trial, at the post-conviction stage the police and prosecution are gatekeepers to the evidence. Again, there is no incentive for the relevant agencies to conduct post-conviction enquiries or disclose material that might undermine a conviction for which they were responsible, particularly where that material has been in their possession from the outset. If anything, they may be incentivised to bury potentially exculpatory non-disclosed material. Any subsequent successful appeal proceedings are likely to shine a light on their initial handling of the case and potentially open them up to future criticism and litigation. They have a vested interest in a conviction being final, which translates into an interest in preventing convicted individuals who maintain their innocence from having access to material.

11.6 Where a request under *Nunn* is refused the only method of challenge is by judicial review, which is not a viable option for the majority of individuals due to the cost, complexity and risk involved. In any judicial review proceedings, the individual seeking the disclosure will in effect yet again be attempting to put forward an argument about the potential exculpatory value of the unseen material without possession of it. This places them at a considerable disadvantage, made worse by the judicial belief that the CCRC in most cases provides an effective alternative remedy for the requestor.

11.7 To ensure that wrongfully convicted individuals do not remain convicted because they are unable to access the material which would support their claim of innocence, a complete overhaul of post-conviction disclosure is needed. Specifically, the restrictive test endorsed by the Supreme Court in *Nunn* should be replaced with a new statutory right of access that elevates concerns for righting miscarriages of justice over concerns for finality and does not fetter this right of access through reference to an ineffective and underfunded public body.

11.8 The new statutory right of access should enable those claiming innocence and their representatives sufficient access to carry out the comprehensive investigation needed to uncover any exculpatory evidence that might be present with police and prosecution files. In our view, this can only be done through provision of controlled access to police and prosecution case material, including unused material, save any which can be justifiably withheld on the basis of genuine sensitivity (that is, disclosure would give rise to a real risk of serious prejudice to an important public interest). Where material is withheld on this basis, an individual claiming their innocence should have the right to instruct special counsel to review the material to establish whether any exculpatory material is present therein.

11.9 Further thought also needs to be given to a mechanism to challenge refusals of access given that the current remedy of judicial review is woefully inadequate. We acknowledge that such a mechanism would come with resource implications – but we submit these are a proportionate measure given the known prevalence of disclosure failures and their contribution to miscarriages of justice.

11.10 We adopt the submissions of APPEAL regarding the proposal that the media should have a right of access to disclosed material for the purpose of fair and accurate reporting, where a miscarriage of justice is being alleged. In England and Wales, the media has historically played an important role in identifying and correcting miscarriages of justice.

11.11 The current regime governing the retention of case materials held by police and prosecutors is failing to prevent the premature and unlawful loss and destruction of vital evidence, including documents and physical exhibits. This is hampering the correction of miscarriages of justice in the process because, for example, evidence loss can mean

that exhibits are not available for testing where there have been improvements in scientific techniques or understanding – potentially shutting off a wrongly convicted person's opportunity to prove their innocence.

11.12 Under the CPIA and its accompanying Code of Practice, police are legally required to retain all documents and exhibits relating to an investigation for at least as long as a convicted person remains in custody (Part 5.9). If a convicted person has a pending appeal against conviction or CCRC application at the time of their release, material must be retained until the appeal or referral decision is determined (5.10).

11.13 The fundamental problem with this legal framework is that there is no mechanism to compel the police to comply with their retention duties. In our experience, the premature loss or destruction of evidence is a problem which regularly arises in appeal cases. Without any repercussions for breaches of the legal duty to retain material, police forces have little incentive to follow the CPIA Code. Compounding this problem, police forces are often ill-informed about their retention duties and there can be a lack of consistency across police forces in their handling of evidence post-trial.

11.14 We propose an amendment to the CPIA Code of Practice to extend and simplify the retention period for documents and physical exhibits. Police forces and other agencies should be obliged retain all material relevant to a case for at least a fixed period of 50 years, rather than only until the convicted person is released from custody. It cannot be assumed that every convicted individual with an intention to appeal their conviction will have a pending appeal or application before the CCRC at the time of their release from prison.

11.15 Further, we propose introducing a more rigorous protocol for the handling and disposal of documents and physical exhibits by police so that the process can be subject to scrutiny. This should include police forces having to notify convicted individuals or their representatives of any planned destruction of material, so representations in favour of retention can be made. A named officer should have to sign off on the disposal of an exhibit, and it must be formally recorded precisely what is being disposed of and why.

11.16 There additionally needs to be a clear line of accountability for officers who have unlawfully destroyed evidence. We suggest that the Law Commission consider the

introduction of a criminal offence to hold accountable officers who knowingly or recklessly destroy such materials.

11.17 Alternatively, consideration could be given to establishing a national or regional centralised storage facility, akin to the Forensic Archive Limited, where all case material would be transferred following the conclusion of proceedings. Police forces would no longer need to be concerned with having sufficient space or resources to comply with their retention duties. The centralised facility could ensure that all material is stored safely for the required period (which, as we have said, should be at least 50 years) and facilitate access to exhibits for further testing, or to documents for review, when requested by the convicted individual or their representatives. The facility would be independent and have no procedural history with the case, meaning there would exist no incentive for the deliberate destruction or loss of evidence.

12. RETENTION OF AND ACCESS TO RECORDS OF PROCEEDINGS

Q17: Is the law governing retention of, and access to, records of proceedings following a trial satisfactory?

12.1 Absolutely not. The procedure for obtaining transcripts/access to audio recordings of hearings in the Crown Court is in desperate need of change. At present, no transcript can be obtained unless a crown court judge gives approval. When approval is granted the transcription company provide a quote and payment must be made.

12.2 Approval from a crown court judge never was necessary until the requirement for such a judge to give permission was introduced. We understand that this permission requirement was introduced to make sure that transcription companies did not release transcripts from hearings that were not held in public.

12.3 However, there is no published (nor, we understand, unpublished) criteria for when judicial approval should be given or on what basis it could ever be refused. There is no consistent approach applied by different crown courts or judges. Sometimes the decision is made by the resident judge, sometimes by the individual trial judge.

12.4 We are regularly made aware of examples where the crown court either simply does not respond to individuals' requests or where judges refuse requests for no reason or no good reason (examples include: a failure to identify an arguable ground of appeal, or a condition introduced such as that the cost of obtaining a transcript is paid for privately and not from public funds). We are aware that applications made by lawyers seem to be regarded more favourably than those made by defendants or members of the public.

12.5 The provision of transcripts is a vital part of an individual's right to have new lawyers consider the safety of their convictions. Obstructions to obtaining these transcripts represents a barrier to access to justice.

12.6 We submit that any request for a transcript should be processed within five (5) working days and that the request should be granted in every case (regardless of who made the application) unless the request relates to a hearing that was not held in public.

12.7 The fact that transcripts can only be obtained if they are paid for provides another potential barrier to access to justice. While legal aid might be available for this, it is only in cases where a solicitor can be found who is prepared to undertake this sort of work and, due to the derisory fees paid, there are a dwindling number of firms who will take instructions in this type of work. This leaves those who may have been victims of miscarriages of justice unable to access transcripts or having to pay privately – which is beyond the means of most.

12.8 We have been made aware of a number of cases where transcripts have been applied for only for it to transpire that the DARTS system was not recording at the relevant time or the sound quality is inaudible. We know of one example where the whole trial was not recorded. There must be a fail-safe system in place to ensure that a trial cannot proceed unless it is being recorded.

13. FURTHER COMMENTS AND PROPOSALS FOR REFORM

Q18: Do consultees have any further comments or proposals for reform not dealt with in answers to previous questions?

Extensions of time in which to apply for leave to appeal

13.1 At present, the Court of Appeal will not grant an extension of time unless there is a good reason for the delay and the application is meritorious. As with the position as regards fresh evidence, this allows the Court of Appeal to refuse to grant an extension of time in cases where there are meritorious grounds of appeal. This necessarily means the Court has the power to refuse to hear cases where there may be manifest unfairness because it is not satisfied that the application was brought quickly enough. We consider that this is not in the interests of justice. Those lawyers who work in the area of advising convicted defendants as to the merits of out-of-time appeals know that there are many practical difficulties in advising and putting together applications quickly.

13.2 Defendants may not have acted immediately to seek second opinion advice, either through a lack of knowledge of their right to do so, or trauma from being convicted, or the difficulty of finding a lawyer to look at their case due to the acute lack of public funding for this sort of work. There may be cases where pressure of work has meant that the case was not progressed as quickly as it could have been – but none of this should mean the applicant's case should not be considered if it is meritorious.

13.3 While more often than not the Court will consider the merits of a case first, we note that the Court of Appeal has made observations in recent months that suggest that the failure of the applicant or the applicant's lawyer to act expeditiously will likely cause the Court not to grant the extension and a move towards a higher test on the merits ('compelling') than would have been the case if the application had been made in time. This is already the case when additional grounds are added post the Single Judge decision, where the Court of Appeal (*James* [2018] 1 Cr. App. R. 33) has stated that in such cases those arguments must be *"particularly cogent*".

13.4 We are concerned that the Court of Appeal's apparent anxiety at its increasing workload and the delays that these bring about is causing it to approach cases that are out of time

less favourably by applying a higher test on the merits in circumstances where that can only act against the interests of justice.

13.5 We submit that the test for the consideration of out of time applications for leave to appeal should be simply whether there are arguable grounds of appeal that the conviction is unsafe.

The substantial injustice test for an appeal out of time

13.6 We submit 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.

13.7 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 implicit 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.

13.8 We submit 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.

Loss of Time Orders

13.9 We submit that the power to impose 'loss of time' orders under section 29 of the Criminal Appeal Act 1968 should be revoked. Although relatively rare in practice, in our experience loss of time orders are imposed in an unjust and arbitrary fashion, including where the loss of time box has not been ticked at the Single Judge stage.

13.10 Loss of time orders disproportionately impact upon applicants who are unrepresented, and therefore lack additional assistance in presenting their case and / or submitting that a loss of time order should not be imposed in the event it is considered, as well as access to relevant advice regarding renewal and loss of time orders. This is a particularly important consideration given the current limitations on funding for advice and assistance on appeal, and the lack of any funding at all in respect of renewal.

13.11 Those who rely on advice to renew are also not necessarily protected from loss of time orders. In these circumstances, it would be unfair to punish applicants.

13.12 The loss of time regime risks deterring those with arguable grounds of appeal at all stages, including preventing potential applicants from seeking advice. The impact is again exacerbated by the lack of access to advice and assistance.

13.13 This is particularly so for those serving shorter sentences – including women and children - whom the loss of time regime disproportionately affects, as the impact of potentially serving additional time is more pronounced.

13.14 The risks the loss of time regime presents in preventing potential meritorious applications and its disproportionate effects are of such concern that we submit consideration should be given to abolishing loss of time orders.

Funding

13.15 At present, legal aid funding for criminal appeal work is desultory and the eligibility thresholds for clients to qualify are ridiculously low, although set to be increased following the means test review. Where an applicant is refused permission and wishes to renew orally, there is no legal aid funding available at all. Our concerns about funding are set out in our submission to the Independent Criminal Legal Aid Review. The resulting report appeared to take on board our submissions and recommended a modest 15% increase in rates, interim payments and funding to be considered for oral renewals. The Government response to the review failed to address the last point at all, but did agree to the modest increase in rates and to consider a revised fee structure and staged billing. As yet, no proposals have been put forward. We believe it is essential that a reformed criminal appeals system is properly funded to ensure it is effective.

Children

13.16 We submit that any reforms should take account of the distinct needs of children. We adopt the submissions of the National Association of Youth Justice and the Youth Practitioners' Association.

14. CONCLUSION

14.1 We hope this submission is of assistance. We would be happy to discuss its contents further with the Commission if that would be helpful.

CALA

13 December 2023