Criminal Appeal Lawyers' Association response to Sir Brian Leveson's Review of the Criminal Courts

INTRODUCTION

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;
    - provided submissions to the Law Commission's issues paper in respect of its review of the law relating to Criminal Appeals.

SCOPE

2. These submissions address in short form the issues identified for consideration by Sir Brian Leveson's review viz.:
    - The reclassification of offences from triable-either-way to summary only.
    - Consideration of magistrates' sentencing powers.
    - The introduction of an Intermediate Court.

- Any other structural changes to the courts or changes to mode of trial that will ensure the most proportionate use of resource.

THE CONTEXT

3. The government's review has been prompted by the current crisis in the criminal justice system which has caused completely unacceptable delays to cases in the Crown Court. It is, however, widely agreed that, although the COVID pandemic was a cause of delay to the functioning of the justice system, the root cause is long term chronic underfunding across the estate, including to the court system itself, the public funding of practitioners and HMCTS, the prison estate and the probation service.

4. The issue of underfunding has been recognsed by the Government itself on numerous occasions. In announcing this review, the Lord Chancellor and Secretary of State for Justice noted that the "scale of the Crown Court crisis inherited by this government is unprecedented" and that "justice delayed is as good as justice denied."[1]

5. It has also been addressed by a wide range of other stakeholders. It was directly addressed in Lord Bellamy's report in 2021[2] and, more recently, by the report of the Criminal Legal Aid Advisory Board delivered by HHJ Taylor.[3] It was directly addressed by the Lady Chief Justice Baroness Carr in her evidence to the Parliamentary Justice Select Committee on 22nd November 2024, in which she opened by reminding the committee that "the foundation of the rule of law is a properly funded and properly functioning justice system which delivers for our citizens."[4] In wide ranging evidence the LCJ made the following points, among many others:

    - The MOJ is the most underfunded of all government departments and its budget is a tiny fraction of that allocated to other departments;
    - The system is currently "firebrigading instead of town planning";

[1] https://www.gov.uk/government/news/courts-reform-to-see-quicker-justice-for-victims-and-keeps-streets-safe

[2] https://www.gov.uk/government/groups/independent-review-of-criminal-legal-aid
[3] https://www.gov.uk/government/publications/criminal-legal-aid-advisory-board-claab-annual-report-2024
[4] https://www.judiciary.uk/lady-chief-justice-appears-at-the-house-of-commons-justice-committee-2/

- The courts are not currently sitting to capacity because of the Treasury's failure to fund sufficient sitting days for both salaried and fee paid judges;
- The Crown Court Efficiency Group, instituted by her predecessor Lord Burnett, was making significant progress in reducing delays through effective case management and liaison with all stake holders in the criminal justice system and is now being expanded to embrace the operation of Magistrates' Courts.

6. In addition to the causes of delay identified by the LCJ, we would add:
   - The shocking number of adjournments to Crown Court trials caused by the failure to find an advocate for either the prosecution or defence, caused by a decreasing pool of available advocates due to inadequate funding of both branches of the legal profession;
   - The signficant cuts over the last 10 years to the Crown Prosecution Service leading to inevitable delays in the preparation of cases and an increasing failure to weed out evidentially weak cases;
   - The failure of the prison service and the private contractors that the Ministry of Justice commissions to deliver prisoners to court in time for hearings and to provide sufficient video-link facilities.
7. Further, as pointed out by Lord Macdonald K.C. in Counsel magazine, the inexorable rise in the length of custodial sentences introduced by successive governments as crowd pleasing political gestures has not been matched by increased funding for the prison estate, which has precipitated the entirely predicatable shortage of available prison places and the consequent reduction of the custodial element of certain sentences to 40%.
8. These are systemic issues which are capable of being dealt with by a combination of adequate funding and procedural improvements. Just as the introduction of the electronic Crown Court Digital Case System, brought about as result of Sir Brian Leveson's earlier Review of Efficiency in Criminal Proceedings, has proved transformational in the functioning of the criminal justice system, there is no reason

why a properly funded and properly functioning system could not deliver signficant reductions in delay.

THE ISSUES

9. Each of the four issues identified in the current review raises in stark terms the question of the ambit of the right to trial by jury. CALA is opposed to any reduction to the right to trial by jury as a matter of constitutional principle and questions whether the reforms under consideration would in practice achieve their objective.

10. Although originally written almost 70 years ago and revised for publication in 1966, Lord Devlin's celebrated series of Hamlyn lectures under the general title 'Trial by Jury' provides the best account of the historical development of the jury system in England and Wales. Lord Devlin characterised the jury as 'a little Parliament' and stated that trial by jury is 'more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.' In his speech in the case of *R v Wang* [2005] 2 Cr.App.R. 8, in which it was held that there are no circumstances in which a trial judge may direct a jury to convict, Lord Bingham referenced Lord Devlin's Hamlyn lectures and stated: [16]:

> 'If there were to be a significant problem no doubt the role of the jury would be subject to legislative scrutiny. As it is, however, the acquittals of such high profile defendants as Ponting, Randle and Pottle has been quite as much welcomed as resented by the public, which over many centuries has adhered tenaciously to its historic choice that decisions on the guilt of defendants charged with serious crime should rest with a jury of lay people, randomly selected, and not with professional judges.'

It follows that, as Lord Bingham stated in his speech in *R v Pendleton* [2002] 1 Cr.App.R.34, the right to trial by jury on indictment 'is an important and greatly-prized feature of our constitution.'

11. At the time that Lord Devlin was writing eligibility for jury service was subject to a property qualification. Its abolition by the Juries Act 1974 marked the final extension of the democratic legitimacy of the jury system, which underpinned Lord Devlin's analysis. Although the rationale for a jury comprising 12 jurors is unclear (the great British dozen), the introduction of majority verdicts has removed the objection that the requirement for unanimity was vulnerable to the votes of

maverick dissenters. The introduction by S.44 Criminal Justice Act 2003 of the power to order trial by judge alone in cases where there is a real and present danger of jury tampering, which cannot be addressed by sufficient safeguards, has provided protection for the integrity of the jury system.

12. In addition to the constitutional protection against overbearing professional judicial decision makers where the liberty of the subject is at stake, the procedural benefits of trial by judge and jury are that they ensure that prejudicial and inadmissible material is excluded from the deliberative process and that the unreasoned verdict of a jury can be subject to rights of appeal focussing on the procedural guarantee of a fair trial.

13. The issue with which the review must therefore grapple is the circumstances in which the constitiutional right to trial by jury should be limited, if at all. Assuming that it is accepted that the right should be available to all those charged with serious criminal offences, the question is, what amounts to a serious offence. Some 90% of criminal cases are currently disposed of in the Magistrates' Courts. The terms of the review suggest extending that to all but indictable only offences.

14. Either way offences are often deemed too serious to be tried summarily. They include the offence of violent disorder, carrying a maximum of 5 years' imprisonment and which may result in substantial custodial sentences, as seen in the sentences passed on those convicted of offences arising from the riots in the summer of 2024. They include the offence under S.78 Police, Crime and Sentencing Act 2022 of causing a public nuisance, carrying a maximum of 10 years' imprisonment on indictment. This offence is specifically targeted at disruptive protests, the sort of case eminently suitable to be tried by a jury. They also include the offence of sexual assault contrary to S.3 Sexual Offences 2003, with a maximum sentence of 10 years' imprisonment and the offence under S.8 SOA 2003 of causing or inciting a child under 13 to engage in sexual activity, which carries a maximum of 14 years on indictment.

15. Conversely, the most serious offences of sexual assault, for example rape and assault by penetration, are indictable only. It is the delays in trials for these offences, where the defendant is on bail, which have been the greatest cause for concern.

16. It follows that any proposal that all either way offences should no longer attract a right to trial by jury would fundamentally undermine the consititutional right.

17. Furthermore, it is widely accepted amongst practitioners that disclosure failures are a leading cause of miscarriages of justice. There have been regular exposures of police and prosecutors ignoring their duties to disclose potentially relevant material which could have led to serious miscarriages of justice. Following the widely reported case of *Liam Allan,* there were a series of reviews culminatinhg in a House of Commons Justice Committee inquiry.[5] This has led to well intended updates to the AG Guidelines on Disclosure which, in the experience of practitioners, are more honoured in the breach than in the observance. We have a real concern that, if the right to trial by jury in the Crown Court were to be further restricted, with a concomitant reduction in procedural safeguards, the increased burden of compliance with the CPIA disclosure duties on under-resourced CPS summary trial units, will serve to exacerbate the problems with disclosure.

18. In this context the question arises, which offences which are currently triable either way, should no longer be subject to the right to trial by jury? What should the upper limit on sentence be for Magistrates or the mooted new Intermediate Court? Should it be 5 years' imprisonment or less? The recently reinstated power of the Magistrates Court to impose a sentence of 12 months' imprisonment for a single offence is intended to reduce delays in the system by removing a tranche of cases from the Crown Court and has been welcomed by the Magistrates Association, albeit this does not remove the right of a defendant in an either way case to elect trial by jury. However, if jurisdsiction is accepted in the Magistrates' Court, and the defendant consents to summary trial, the anticipated increase in workload will also significantly increase the number of appeals to the Crown Court against both sentence and conviction. Those appeals will require a complete re-hearing in the Crown Court. To date the number of such appeals has remained modest. This probably reflects the restricted sentencing powers. Increased sentences could exponentially increase that figure.

[5] https://www.justiceinspectorates.gov.uk/cjji/inspections/making-it-fair-the-disclosure-of-unused-material-in-volume-crown-court-cases/

19. Whether or not the increase in Magistrates' Courts' powers of sentence will ease pressures on the system will also depend on whether it leads to an increase in the prison population. If it does, then it will have been counterproductive. We note that this review is being undertaken at a time when a review into sentencing practice is being undertaken by the Right Hon David Gauke. We assume that Sir Brian Leveson will, therefore, wish to have regard to the conclusions of the Gauke Review as part of an overall assessment of whether it is expedient to limit the right to trial by jury.

20. Beyond the question of the principled considerations, we question the practicality and efficacy of the creation of an Intermediate Court, which we presume would be constituted similarly to an appeal against conviction from the Magistrates' Court with Magistrates sitting alongside a Circuit Judge. We envisage that this would require a significant expansion of both the judiciary and the magistracy in order to process trials which would last considerably longer than those currently heard at first instance in the Magistrates' Court.

21. The creation of an Intermediate Court also poses the question of the appellate process from its decisions. Given the seriousness of cases tried at that level, the route to appeal would need to be to the Court of Appeal (Criminal Division) with the consequential increase in the cases with which that Court would have to deal[6].

22. We therefore suggest that the creation of an Intermediate Court would raise more questions than it would address, both in terms of the available funding and resource and in terms of its efficacy in reducing delay in the system. Where would the adjudicators come from? Where would it be located? Who would have rights of audience and how would representation before the court be funded?

CONCLUSION

23. The scope of the review focusses on structural changes to the courts or mode of trial. However, we consider that the review should also address the following features of the current system, which could both improve the quality of justice and help to free up court time:

[6] We would hope that the Law Commission will also be consulted about any proposed changes given the current consultation which it is undertaking in respect of criminal appeals, to which CALA has contributed.

- Greater use of diversion and out of court disposals; including a duty on the Crown Prosecution Service to give written reasons in response to representations not to prosecute under the Code for Crown Prosecutors;
- Modification of the *Galbraith* test for allowing a submission of no case to answer by providing the judge with the power to stop weak evidential cases;
- Greater use of restorative justice;
- The use of Drug and Alcohol Courts for criminal cases;
- Stricter application of the custody time limit conditions to reduce remand time.

24. CALA does not accept that the attachment to the right to trial by jury can be described as either sentimental or an anomaly. We read with dismay the views of the former Home Secretary and Lord Chancellor Jack Straw that the right to trial by jury for either way offences is a 'ridiculous anomaly', which allows a defendant to play the system.[7] That is a rationale for removing the right to trial by jury altogether. It is understood that such a move is not contemplated by the Government: the Courts Minister, Sarah Sackman has stated in terms that jury trials are an 'absolute cornerstone of the British criminal justice system and will remain so'.[8]

25. The current crisis in the criminal justice system has not been caused by the exercise of the right to trial by jury, which lies at the heart of the functioning of the system. The review should not allow the compromising of constitutional principle as a means of addressing system failures caused principally by under-funding. The proposals under consideration would require a wholesale revision of the criterion of seriousness for entitlement to trial by jury, which would unacceptably erode that right.

26. We doubt, in any event, that the proposals under consideration would achieve the intended results.

[7] https://www.independent.co.uk/news/uk/crime/courts-backlog-jack-straw-justice-secretary-b2677366.html
[8] https://www.independent.co.uk/news/uk/crime/wales-moj-government-england-angela-eagle-b2663186.html

27. We end with a note of caution. There is a clear lack of diversity in the Judiciary in England and Wales – in 2024 89.6% of Court Judges were white, whilst 5.3% were Asian and 1.3% were Black. The same picture can be seen in the Magistrates Court.

28. We have real concerns that the erosion of the fundamental right to by tried by one's peers will increase the risk of racial bias in decision making given the obvious lack of diversity on the Bench. Racialised communities are already over-represented in the penal system. Over a quarter of the prison population is from a minority ethnic group and these communities are known to have much poorer outcomes than their white counterparts. Research published in *Racial Bias and the Bench* found that many respondents, both prosecution and defence practioners, regarded judicial racial bias as commonplace and 56% said that they had witnessed judges acting in a racially biased way.

29. Any reduction to the right to trial by jury carries with it a significant risk of worsened outcomes for indivuduals from minority ethnic communities.

Criminal Appeal Lawyers Association Committee

30th January 2025