5KBW'S RESPONSE TO

THE LAW COMMISSION'S "CRIMINAL APPEALS: CONSULTATION PAPER"

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5 KBW is a set of barristers' chambers specialising in criminal law. Many of our tenants both defend and prosecute; we have senior and junior Treasury Counsel, and our joint head of chambers, Mark Heywood KC, is a former First Senior Treasury Counsel at the Central Criminal Court. Our Criminal Appeals Unit is headed by Paul Taylor KC, the general editor of *Taylor on Criminal Appeals.*

This paper responds to a selection of the questions asked in the Law Commission's Consultation Paper on Criminal Appeals. It is submitted by, and represents the views of, six independent barristers at 5 KBW Chambers.[1] (*The contents do not necessarily represent the views of 5KBW.*)

A. THE CONTEXT

1. It is difficult to overstate the importance and potential impact of the Law Commission's Criminal Appeal Project. The decisions in *Andrew Malkinson*, the *Horizon appeals* and *Peter Sullivan* are just the most recent in a long list of miscarriages of justice that demonstrate the desperate need for substantial change to the criminal appeal system. As Chris Henley KC wrote "Miscarriages of justice disfigure the lives of all connected to the case and make the public generally less safe."[2]

[1] Paul Taylor KC also contributed to the Bar Council response to the Consultation Paper. The 5KBW submissions are made separately from those.
[2] Page 113, Henley report

2. We invite the LC to consider 5KBW's responses to the consultation paper within the following context:

   a. Our view is that there is a pressing need for change both within the statutory and procedural framework, and the approach of the appellate courts to the determination of perceived miscarriages of justice.

   b. We note that the LC has not considered "the costs regime or public funding for bringing appeals" [para 1.6 (4)], and that this is outside of its remit. However, many of the concerns with the current system are caused by lack of appropriate funding (in particular in relation to legal representation for a second opinion on the merits of an appeal, and the CCRC) and that this failing permeates many of the matters that the LC has been tasked to report upon. We hope that this issue is addressed by the appropriate entity as a matter of urgency.

B. OUR RESPONSES

Question 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?

1. Yes, the right to an appeal against conviction and/or sentence by way of rehearing following conviction in summary proceedings should be retained. There are multiple issues with summary proceedings.

2. The vast majority of magistrates' court cases are decided by a bench of lay magistrates who are not legally trained and are therefore likely more susceptible to misinterpreting or misapplying the law. The risk of the law or procedure being misapplied is amplified by the fact that many lawyers who practise in the magistrates' court are often more junior and inexperienced.

3. Conviction rates tend to be higher in the magistrates' court than in the Crown Court and there is a public perception that proceedings in the magistrates' court can be biased towards the prosecution. Prosecutors in the magistrates' court tend to be resident over one or two courts and they get to know the tribunals in a way that defence advocates covering a vast area, are not able to do. This further compounds the potential for bias.

4. Proceedings in the magistrates' court are much faster paced than in the Crown Court. As a result, the proceedings can be less thorough both in relation to the testing of evidence and also in relation to compliance with disclosure and in the presentation of a case.

5. The magistrates' court is not a court of record. The main written record is derived from the notes taken by the legal adviser. The length and quality of these notes will vary from adviser to adviser and cannot always be fully relied upon to identify the salient issues that may lead to an appeal. Therefore, a right to a full rehearing is necessary and should be retained.

6. In light of the above, a rehearing on appeal provides a crucial safeguard against any errors or misjudgements that may have occurred in the magistrates' court proceedings.

Question 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.

7. No, there are not 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.

8. This is because neither regulatory hearings nor hearings involving domestic abuse are dealt with differently to other magistrates' court proceedings. Indeed, each of the concerns detailed above (paragraphs 1 to 6, Q5) apply equally to regulatory and crimes involving domestic violence.

9. In fact, given the sensitive and serious nature of crimes involving domestic violence and abuse, the right to an appeal by rehearing becomes even more crucial. Domestic abuse cases often involve more complex legal principles than other crimes. For example, victimless prosecutions are common and legal arguments in relation to res gestae often arise. The risk that lay magistrates or inexperienced advocates may misapply the law in relation to res-gestae is therefore greater. The safeguard of a full rehearing in the Crown Court is therefore even more important.

10. The only caveat to this answer is that in the case of domestic violence cases, there is the potential for a defendant to utilise the rehearing to put the complainant through the ordeal of giving evidence again. That may increase the risk that a complainant would be more inclined to disengage or withdraw support prior to the rehearing, leaving some circumstances where the defendant is successful at appeal simply because the complainant withdraws their support. However, at present this risk does not in our view outweigh the importance of an appeal being by way of rehearing.

Question 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?

11. Yes, 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.

12. The same time limit for both appeals procedures would reduce confusion and scope for error. This would likely reduce the number of out-of-time appeals and make it easier for legal practitioners to submit appeals from the magistrates' court to the Crown Court.

13. Importantly, having the same time limit for both procedures will make it easier for litigants in person to understand and comply with the appeals procedure.

Question 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?

14. In our view, the Crown Court should be able to impose a more severe sentence as a result of an appeal against conviction or sentence by the convicted person.

15. Unlike an appeal from the Crown Court to the Court of Appeal, where grounds of appeal are required, the right of appeal from the magistrates' court to the Crown Court is automatic. If the risk of a more severe sentence on appeal was removed, this would potentially open the floodgates to wholly unmeritorious appeals being made to the Crown Court.

16. An appeal from the magistrates' court to the Crown Court is by way of rehearing, rather than review. The appeal takes place before a Crown Court Judge (in addition to lay justices) and the appellant is afforded the benefit of a tribunal better placed to rule on matters of law, disclosure and evidence. In addition, evidence may feature in the appeal that was not heard in the lower court, including factors which may aggravate the offence. Therefore, in our view, the Crown Court should be permitted to sentence on the basis of the evidence heard and not be bound by the sentence imposed by the lower court.

17. In relation to the High Court, we agree with the principle that no greater penalty should be imposed on appeal by a convicted person. Appeals to the High Court require grounds and this significantly mitigates the risk of opening the floodgates to unmeritorious appeals. In addition, the High Court does not hear fresh evidence which could change the factual basis for sentencing. The case will only be remitted to the magistrates' court for retrial in the event that the appeal is successful. In those circumstances, the convicted person should not find themselves in a worse position because they sought to rectify an error made in first instance.

Question 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.

18. We do not think that there should be a right to appeal against conviction following a guilty plea in the magistrates' court. The process should remain as it is. If a defendant wishes to change their plea, they should apply to vacate that guilty plea in the ordinary manner before any sentence is passed. The test for vacating a guilty plea is stringent and the court will only exercise its power to vacate a guilty plea sparingly.

19. Allowing a right to appeal against conviction following a guilty plea, would create a two tier system, allowing an automatic right from the magistrates' court, where the equivalent right does not exist in the Crown Court system. Further, the stringent test is justified as, in the vast number of such cases, a defendant will have entered a guilty plea following sound advice and an acceptance of guilt on their part. Attempts to circumvent the test, in circumstances where a defendant is unhappy with the outcome, ought not to be encouraged.

Question 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?

20. Yes. We see no reason why there should be these niche rights of appeal to the Crown Court. The right is scarcely exercised and does not appropriately reflect the existing system of appeals for other matters. Further, there seems to be no concrete policy reasons as to why appeals in this manner have been retained.

Question 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?

21. Yes. The Consultation Paper sets out valid concerns regarding confusion caused by having two routes of appeal to the High Court. Our view is that there appears to be no obvious benefit to retaining both case stated appeals and judicial review. Abolishing one would inevitably simplify the process for all parties.

22. In terms of favouring one route, we agree that the advantage of the judicial review system is that it is available in respect of interlocutory matters and the possibility of an appeal to the Crown Court is not barred.

23. We wish to highlight that the primary advantage of case stated appeals, which does not currently apply to judicial review, is that the appellate court is provided with a statement of the trial court's findings. The suggestion at paragraph 5.183 of the Consultation Paper appears to be a sensible one; that in judicial review cases the magistrates' court could be asked to provide an explanation of how it had reached its decision and then take no further part in the proceedings. However, enforcing the use of transcripts and making the lower court a court of record would eliminate this issue entirely.

Question 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?

24. Yes. The Consultation Paper at paragraph 5.201 rightly reaffirms that *"…appeal to the High Court…is an appeal as to the law, not the facts. It is important that the defendant retains the right to appeal against magistrates' courts' findings of fact. To that extent, where the Crown Court comes to a different verdict to that directed or substituted by the High Court it is not challenging the High Court's findings in substance, but those of a magistrates' court".*

25. It is our experience that appeals to the Crown Court are often successful - for good reason on the facts**.** The Crown Court provides a vital safety net. We agree it is very important that the defendant retains the right to appeal against magistrates' courts' findings of fact.

Question 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.

26. Whilst it may seem attractive that the route of appeal be the same for both children and adults who plead guilty, there are a number of issues which arise in practice, reflected in the Consultation Paper, that give rise to a strong argument against maintaining the current requirement to apply to the CCRC.

27. The lack of specialist expertise in dealing with children and young people can lead to incorrect advice being given and available defences not being properly understood or explored. This is particularly important in light of the fact that children and young people often appear in the magistrates' court charged with very serious offences which would ordinarily be dealt with in the Crown Court. The lower courts may not be equipped to deal with serious cases involving, for example, complex psychiatric or medical evidence applicable in particular to youths.

28. Dr. Helm highlights the fact that children have immature cognitive, social, and neurobiological systems that influence their decision making and that their guilty pleas may not always be true admissions of guilt. In addition, the effect of a

conviction and the length of time taken by the CCRC to consider a reference can also be particularly detrimental to a child at a crucial stage of their lives. In our view, children should be given some heightened protection through a specific channel with expediency at its forefront.

Question 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?

29. Yes. We agree that the Crown Court should not be able to impose a more severe penalty on appeal from the youth court. In our experience, children and young adults can be disengaged from the court process. They often do not understand the gravity of a conviction upon their future and having to attend court is seen to be an inconvenience, and something they would rather not have to repeat. Adding further disincentive by telling youths that an appeal may lead to a more severe sentence would only add an additional deterrence to engage in the appellate process.

30. Disincentivising possible meritorious appeals is counter intuitive. Moreover, the majority of youth sentences rightly involve community based rehabilitative work and youth justice engagement. It is our view that there is no proper justification for increasing sentences for children and young persons on appeal from the Youth Court. The proportion of appeals from the youth court involving DTOs, the most severe punishment, would likely be very small, and even then, with the maximum DTO available of 24 months, any increase is likely to be marginal and therefore more likely to be unjustifiable.

31. Finally, there is the fact that the sentencing court in the youth court often includes a panel of designated youth service members, sometimes social workers and other carers who are vital to the sentencing process and the court's understanding of the defendant. A re-sentencing exercise in the Crown Court often does not have those

same people present, and there is a risk the sentencing panel would not have all of the material or information available to make a proper and fair re-determination.

Question 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.

32. Yes. Anonymity for youths is a vital component of our justice system. Losing that anonymity, with all the consequences and safeguards that flow from that, appears disproportionate. There appear to be no public interest principles that mean the sudden change in age due to extended proceedings should thrust a young person into the spotlight. Again, it may act as another deterrent.

33. Our view is that, so long as a defendant was a youth at the age of conviction in the lower court, their anonymity should be retained throughout their appellate proceedings, regardless of the outcome. This would of course be subject to the usual exceptions where applicable.

34. The length it takes to conclude appellate proceedings from the youth court can vary depending on a number of factors including court location, time of year, complexity of the case and input from various legal teams. There is currently no fast-track system for youths. This means that in the case of two youths who commence separate appellate proceedings at exactly the same time, both may be successful but one (through no fault of the defendant) may take twice as long, meaning that one may lose anonymity whilst the other maintains it. As highlighted by the Consultation Paper, Covid-19 has only made things worse in this regard.

35. We would only add that consideration could also be given to a fast-tracking system for those defendants who are youths, but even priority to be given to those who

are reaching an age threshold. This would have the added benefit of ensuring that a youth's appellate proceedings are concluded in good time, noting the additional vulnerabilities of young defendants.

Question 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?

36. Yes. We also think that it should be made clear to potential applicants and their legal advisers that the "interests of justice" test, based ultimately on the merits of the appeal, will remain the determinative factor when the Court considers an application for an extension of time. Moreover, although increasing the time limit to 56 days will alleviate some of the difficulties faced by potential applicants, it will not remove them completely. Accordingly, we think that new guidance should also made it clear that the increase will not result in the "interests of justice" test being applied more restrictively than it has up until now.

Question 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?

37. Yes, subject to the next paragraph. We agree that the test for admitting fresh evidence in section 23 of the Criminal Appeal Act 1968 should remain "in the interests of justice", and that the considerations in subsection (2) should be treated as such. We think that this should be emphasised in the Criminal Procedure Rules.

38. We think that the consideration relating to "reasonable explanation" should be removed from the subsection on the basis that:

    a. It cannot (and should not) be determinative of the merits of an appeal,

b. It may detract from and undermine consideration of the central question in an appeal based on fresh evidence, namely the potential impact on the safety of the conviction.

Question 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.

39. We do not consider that the CACD should have a power to appoint its own experts because the current system reflects the adversarial nature of the appeal proceedings. Moreover, the Criminal Procedure Rules emphasise that the expert's overriding duty is to the court.

Question 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?

40. We do not agree with the LC's proposal. We are of the view that, whilst the power to make a loss of time direction [LOTD] should be retained, it should be limited to a maximum of 14 days. Such a limit will ensure that a LOTD will not amount to a disproportionate penalty for being a vexatious litigant. On the basis that the period of time ordered to be "lost" has already been served in full, an equivalent sentence passed by a court at first instance would be double that period because an offender would normally serve half the length of such a sentence actually imposed. Consequently, a maximum 14 day LOTD would be the equivalent of an additional 28 days passed at first instance, which is a relatively lengthy sentence for pursuing an unmeritorious appeal.

Question 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?

41. Yes, save that we think that the guidance and Criminal Procedure Rules should make clear that such orders should be limited to the most extreme cases (such as an egregious insistence on pursuing an obviously unmeritorious claim to the full Court, notwithstanding a clear warning from the single judge.)

Question 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?

42. We agree with this proposal. The power should be exercisable by the presider of the constitution of the court who made the judgment or order, or another judge within that constitution if the presider is not available.

Question 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 originally imposed at trial.

Do consultees agree?

43. Yes. We agree for the reasons given by the LC.

Question 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?

44. Yes. We agree. We question however whether, given the effect of the time limit provisions, there is any pressing need for this recommendation, since an application under the "slip rule" is the appropriate mechanism, the use of which ought to be encouraged.

Question 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.

45. (1) Yes, offences involving a fatality not currently covered should be included in the scheme;

(2) No, offences of animal cruelty should not.

46. The purpose of the power to refer a sentence for review has always been the avoidance of gross error, the allaying of widespread public concern at what appears to be an unduly lenient sentence and the preservation of public confidence in cases where a judge appears to have departed to a substantial extent from the

norms of sentencing generally applied: see *Attorney General's Reference (No. 132 of 2001)(R. v. Johnson)* [2003] 1 Cr. App. R. (S.) 41). For good reason, the scheme has been limited to those offences whose seriousness merits attention in this way. As a matter of general principle, its ambit ought not to be expanded.

47. There is however, some merit in extending the scheme to cover offences involving a fatality since such offences are most likely to give rise to widespread public attention and concern.

Question 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.

48. Yes, there should be a statutory leave test for unduly lenient sentences. It should be whether it is arguable that the sentence was unduly lenient.

49. Such a test would bring welcome improved rigour to the decision-making process on referral and to the leave stage before the CACD. It might also reduce the present high level of refusals of leave, which ought not to be the general experience.

Question 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?

50. Yes. We agree because, although there is some anecdotal evidence that decisions to refer for review are influenced by public pressure, such decisions should be given a high degree of scrutiny at an appropriate level, in order to maintain public confidence and to restrict the scheme to its proper application.

Question 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?

51. Yes, we consider that the Attorney General should, exceptionally, have the ability to refer a sentence to the CACD outside of the 28 day time limit, but only (1) with the leave of the CACD to extend time (2) for good reason on an interests of justice test and (3) where, in any event no extension should exceed a further 28 days, making 56 days in all.

52. The occasional need for a power of extension arises because of the multiplicity of steps that are required before a reference occurs. The ULS system is in a state of constant pressure. There is good reason for the present time limit: an offender and others interested are entitled to know the sentence at the earliest opportunity and finality matters. The pressure on the system means that on occasion a reasoned decision to refer requires further time, which a power to extend would address. A requirement for leave to extend is the appropriate safeguard to deter unnecessary delay and an overall time limit is in keeping with the need for swift action to refer.

Question 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?

53. We agree with the LC's provisional proposal, but would add the following:

(1) *where the Court considers that the conviction is, <u>or may be, unsafe</u>;*

We think that this would reflect existing practice and clarify the approach of the Court.

Question 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?

54. We agree with the LC's proposal for the reasons set out, save for one matter relating to the circumstances in which the CACD should order a retrial where it is possible to do so. We agree with the Bar Council response that:

> In addition to where the Court thinks that the fresh evidence "could have led the jury to convict" we propose "*or significantly affected the way in which the defence and/or prosecution cases were advanced at trial?*" This two fold test would reflect the provisional suggestion that the BC raised in response to the Issues paper in which we stated that:
>
> > "Such a formulation would capture (a) cases in which the prosecution case was obviously and fundamentally weakened, albeit in a way that would not have affected the presentation of the case. Such cases would plainly be susceptible to a finding that the conviction was or may be unsafe. The above formulation would also capture (b) cases in which the changed evidential picture may well have affected the way in which the trial as a whole was conducted. In the latter instance, there is likely to be no reliable guide to what would have happened in such a circumstance, and it would therefore arguably be inappropriate for the CACD to speculate as to what an imaginary jury, trying what was in effect a completely different trial, may have made of matters." [This approach would meet the concerns raised by the CACD's approach in cases such as Pomfrett and Dorling, referred to in the BC response to the Issues paper.]

Question 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?

55. Yes. We agree with the LC's proposal for the reasons set out.

Question 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?

56. Yes. We agree with this proposal for the reasons set out.

Question 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?

57. Yes. We agree with this proposal for the reasons set out.

Question 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.

58. We agree with the LC's provisional view that the 'substantial injustice' test risks hindering the correction of miscarriages of justice.

59. On the basis that an unsafe conviction resulting from a change in the law is as much a miscarriage of justice as other unsafe convictions, we do not think that there is any principled basis to justify a different, more stringent test for change in law

appeals. It appears to us that the application of the test is arbitrary and disproportionate, and conflicts with the approach taken by the CACD to applications for leave to appeal that are not based on a "development of the law."

60. Our view is that the test should be abolished and the one statutory test of "safety" should be applicable to all applications for leave to appeal against conviction without distinction. There should also be uniformity in the test applied by the CACD to all out of time applications, namely, whether it is in the interests of justice to allow the appeal to be brought out of time.

61. To this end we also propose that s.16C should be repealed.

62. We invite the LC to consider our response to this question in the context of our response to Question 56 regarding the replacement of the "real possibility" test.

Question 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?

63. Yes. We agree with the LC's proposal for the reasons set out.

Question 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?

64. Yes. We agree with the LC's proposal.

Question 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.

65. Yes. We agree with the LC's provisional proposal.

66. In order to reflect the proposed new safety test, we support the Bar Council response that that the alternative non-predictive referral test should be:

> A reference of a conviction, verdict, finding or sentence shall not be made unless the Commission considers that it is in the interests of justice that the Court of Appeal should have the opportunity to consider whether the conviction is or may be unsafe.

Question 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?

67. Yes. We agree with the LC's proposal for the reasons set out.

Question 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?

68. Yes. We agree with the LC's proposal for the reasons set out.

Question 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?

69. Yes. We agree with the LC's proposal for the reasons set out.

Question 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?

70. Yes. We agree with the LC's proposal for the reasons set out.

Question 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?

71. Yes. We agree with the LC's proposal for the reasons set out.

Question 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?

72. No. We do not agree with this proposal. We support the stance taken by the Bar Council and propose that the need for an appellant to seek leave to argue grounds not related to the reasons given for referral should be removed for the following reasons:

a. The role of the CACD in an appeal against conviction is to determine whether the conviction is unsafe. Determination of this issue will require the CACD to consider all the grounds before it, individually and cumulatively.

b. Both the NICA and the CACD have sought to impermissibly restrict the approach taken to the leave requirement in s.14(4A) and (4B) CAA 1995.

   i. In *Smith* [2023 NICA 86 [19], the NICA stated:

   "The effect of these provisions is that the Court of Appeal *may* grant leave to appeal on grounds unrelated to any reason given by the Commission for making a reference. The exercise of this discretion is not precluded even if the grounds for making the reference prove unsuccessful. The range of factors that the court can take into account in exercising this discretion are not spelt out. Plainly, the interests of justice will be at the forefront and in considering whether to grant leave in respect of unrelated grounds the court would at a minimum require to be satisfied that the additional grounds are arguable and may undermine the safety of the convictions. **There is no explicit requirement to extend time as in a conventional appeal. This could lead to is the probably unintended consequence that an applicant may piggyback grounds of appeal long out of time which would not necessarily survive the rigorous tests for an out of time appeal summarised in *R v Brownlee* [2015] NICA 39. However, we see no reason why this court would not have regard to the *Brownlee* principles."**

   ii. In *Hayes and others* [2024] EWCA Crim 304, [123]

   "…We agree that the proposed unrelated grounds must as a minimum be arguable grounds which may undermine the safety of the conviction. **But in addition it must not undermine the purpose of the prohibition in s. 14(4A) designed to ensure that a reference is not used an opportunity to argue points which were available at a previous appeal but were not taken.** This ground was available at Mr Hayes' and Mr Palombo's appeals, and the dismissal of those appeals should have been the end of the matter. It would be contrary

to the purpose of s. 14(4A) to allow them to piggyback these unrelated appeals upon the reference concerned with *Connolly and Black*…"

c. In these two cases, the Courts inferred an additional requirement to the need for leave to argue grounds under s.14(4A) that are unrelated to the reasons for referral. In *Smith* that additional requirement was the need to explain why the grounds were brought "out of time" and, in *Hayes,* the CACD appears to be stating that even if the additional ground is arguable and may undermine the safety of the conviction, leave will not be given if it was available – but not argued – at the original appeal. Our view is that neither approach is correct. The statutory role of the CACD in a conviction appeal pursuant to s.2 CAA 1968 is that the CACD "shall allow an appeal against conviction if they think that the conviction is unsafe", and s.14(4A) CAA 1995 gives the CACD power to grant leave to a ground unrelated to the CCRC referral reason. No restrictions on this discretion are set out.

d. There is no basis for requiring justification for arguing the grounds "out of time", or for stating that "the purpose of the prohibition in s.14(4A) designed to ensure that a reference is not used an opportunity to argue points which were available at a previous appeal but were not taken." If this was correct, the statute could state this specifically. It does not.

Question 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?

73. Yes. We agree because we consider that the "terminating ruling" provisions and the manner of their application by the CACD are working well but that there is no unmet need to warrant the bringing into force of the evidentiary ruling provisions in the way provided for in sections 62-66 of the Criminal Justice Act 2003.

Question 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?

74. No. We consider that there may be some very limited situations in which a very limited or circumscribed right to appeal against such decisions should be available to the prosecution, for example in a national security case or one related to other highly sensitive material. It is conceivable that a refusal to impose or decision to lift could affect the viability of a prosecution in such circumstances. It seems anomalous that there is no right of appeal at all.

75. We accept that any such right would have to be clearly circumscribed and subject to the permission of the CACD. Suitable provision could be made but we would advocate against using a mechanism such as that provided for in "terminating ruling" appeals by a prosecutor. In the very limited kind of cases identified above, the risk of an unmeritorious acquittal is highly likely to have such a chilling effect on any appeal as to render the mechanism unworkable. In such cases, where the appeal is likely to be based on well-founded security considerations, there ought to be no need for more than a standard leave test.

Question 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?

76. Yes. We think that it is essential to provide a right to apply out of time where it is in the interests of justice to do so because the aim of these references is to seek clarification of the law and to prevent erroneous rulings becoming accepted amongst the judiciary. [*Att.- Gen.'s Res. No. 1 of 1975* (1975) 61 Cr App R 118.]

Question 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?

77. Yes. We agree with the LC's proposal for the reasons set out

Question 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?

78. Yes. We agree with the LC's proposal for the reasons set out.

79. We support the stance taken by the Bar Council in response to this question, namely that the need for this proposed change is evidenced by two recent examples of judgments handed down by the NICA (both murder appeals based on CCRC references) in which the Court declined to certify points of general public importance.

    a. In *Smith*, [2023] NICA the Court declined to certify questions relating to joint enterprise, the standard of proof where circumstantial evidence is relied upon, and the correct approach to the status of an appeal based on a CCRC reference. The question relating to circumstantial evidence raised the need for clarification of the apparent conflict between the Court's decision in the Appellant's case and the Supreme Court's decision in *R v Mitchell* [2017] AC 571, and the specimen directions in relation to lies, DNA, adverse inferences and alleged confessions.

    b. In *Kirkpatrick* [2024] NICA the Court declined to certify the following question: In a criminal appeal in which neither the Crown nor Appellant apply to adduce specific post-trial material…, can the Court adduce such evidence of its own volition without first considering and applying the statutory requirements in section 25 CAA (NI)?

Question 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.

80. Yes. We agree that retention periods should be extended, for the reasons given by the LC.

81. Given that modern records are digitally held or can be converted, there is no practical reason why longer retention should not occur. A minimum further period of 6 years has significant merit, in our view.

Question 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?

82. Yes. We agree with the LC that the common law duties under *Nunn* are giving rise to misunderstanding and are being inconsistently and inadequately applied at times.

83. Post conviction disclosure is a fundamental and important element of the overall fairness of the trial and appellate process. Without an effective and consistently applied system of post-conviction disclosure it is possible that miscarriages of justice might remain uncorrected. A statutory scheme would both clarify and mandate an improved process.

Question 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?

84. Yes. We agree for the reasons given by the LC.

Question 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?

85. Yes. The ability of a new legal adviser to obtain this material is often a crucial part of assessing whether there has been a potential miscarriage of justice and a basis for an appeal.

Question 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.

86. **Amendment of the Galbraith test:**

87. We have considered whether to propose that the "no case to answer" test should be reformulated to include unsafety. We would favour such a change and consider that the following matters identified by LC provide significant support for such an amendment:

a. Such an approach already applies in respect of the admissibility of unconvincing hearsay evidence, contaminated bad character evidence, and poor and unsupported identification evidence. This undermines the objection based on the violation of the paramountcy of the jury;

b. Defendants could appeal on the basis that a submission of no case to answer based on "unsafety" should have been accepted;

c. Such a ruling by the trial judge would qualify as a "terminating ruling" and the prosecution would have the ability to challenge such a decision on appeal

d. There would be less need to bring cases to the CACD because some unsafe cases would be weeded out before conviction.

e. The judge who has sat through the evidence alongside the jury would be better placed to assess whether a conviction would be unsafe than an appeal court looking at the matter retrospectively without having observed the evidence and cross-examination of witnesses (and conscious that the jury had convicted).

Question 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.

88. **Revocation / amendment of s.18 Juries Act 1974**

89. This is not a specific matter identified by the Law Commission. However, we consider that the current section 18 Juries Act 1974 should be amended or revoked as it involves an unnecessary and disproportionate restriction on the investigation of irregularities relating to the jury, and has been interpreted in such a way as to violate article 6 ECHR.

90. The section governs the extent to which errors and irregularities in the way jurors or the jury panel was summoned, selected, or empanelled may give rise to a ground of appeal against conviction. However, it prevents lack of qualification or unfitness on the part of an individual juror being a ground of appeal (other than on the ground of personation) unless the irregularity complained of was raised but not remedied at trial. Our view is that this can cause miscarriages of justice. For example in *Chapman* (1976) 63 Cr App R 75 it was discovered after the trial that one of the jurors had been hard of hearing, had not heard half the evidence and did not hear all that the judge was saying. Despite this, the CACD held that s. 18 provided 'a complete answer' and dismissed the appeal. The Court stated that:

> "there may be circumstances in which it could be argued that despite the provisions of section 18. . " the verdict was unsafe or unsatisfactory because of some deficiency in a member of the jury or for some other reason, but on the facts of this particular case, where there is only one juror involved, where that juror could well have been discharged had the facts of his deafness become known, and the trial proceeded; having regard to the fact that majority verdicts are possible in circumstances these days, and there being no evidence whatsoever of miscarriage of justice by reason of the verdicts, it is not possible to say that verdicts in the case of each of these appellants were either unsafe or unsatisfactory.

91. Our view is that, in light of the CACD's literal and restrictive interpretation of s. 18, it is difficult to see what 'deficiency in a member of the jury' could be that would render a conviction unsafe if it was not raised at trial.[3] How would one (or indeed more) 'defective' jurors render a conviction unsafe? Moreover, the reference to

[3] *Ravira j* (1987) 85 Cr App R 93, 100. ('Without attempting to formulate examples of circumstances which might give rise to such a situation, we accept the possibility of their existence.')

majority verdicts is troubling.[4] If the trial proceeded on the basis of there being 12 participating jurors— and the defendant was entitled to this number— but in reality, only 11 participated, the CACD cannot know what impact the absence of the twelfth juror may have had on the discussions and verdict. [5] Against this background, such a strict reading of s. 18 appears to violate Article 6.

92. In light of the above we consider that the current section 18 of The Juries Act 1974 should be amended (to allow the complaint to be raised for the first time post trial) or revoked as it involves an unnecessary and disproportionate restriction on the investigation of irregularities relating to the jury.

END

[4] As is the reliance in *Raviraj* (1987) 85 Cr App R 93, 100 on the fact that although a juror had been found to have been disqualified as a result of having been a police officer some years earlier, the law changed 10 months after the trial and he would have been allowed to sit: ' . . . we see no reason to suppose that he would in any way have been a different person or held a different outlook'.

[5] See *Hambery* [1977] 1 QB 924, 929E; *R v Sheffield Crown Court, Ex parte Brownlow* [1980] QB 530, 541: *Goodson* [1975] 1 WLR 549, 552; *Newton Spence v The Queen* [PC Appeal No. 47 of 2000], [17]; *The People v Allen and Johnson* [Supreme Court of California] [2] .