Bar Council response to the Law Commission's Issues Paper on Criminal Appeals

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Law Commission's Issues Paper on Criminal Appeals.[1]

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Introduction

4. A holistic reconsideration of the system of criminal appeals and related matters is welcomed, and arguably long overdue. As the Law Commission, in its typically thorough and careful Issues Paper, has noted, the last substantial changes to the system of criminal appeals resulted from the recommendations of the Runciman Commission, and date back some thirty years.

[1] Available here: https://lawcom.gov.uk/document/appeals-issues-paper/

5. We are mindful that what has been published by the Law Commission at this stage is properly described as an "Issues Paper", rather than a formal consultation. In the words of the Introduction, the Law Commission is "seeking evidence on whether reform is or might be necessary." [1.10] [2] With that in mind, our contribution at this early stage of the process is deliberately couched in open terms. As such, the purpose of this document is twofold. It is, first, to identify, among the topics covered in the issues paper, those where we feel the need for reform, or consideration of whether reform is required, may be most acute. And second, where we consider it appropriate, to suggest further areas that might meaningfully be explored during the consultation process.

6. We have not provided answers to every question asked. It does not follow that we may not have more to contribute on such topics as the consultation process progresses, but we have tried to focus our efforts on the areas which we consider to be the most significant.

Question 1.
10.1 What principles should govern the system for appealing decisions, convictions and sentences in criminal proceedings? Paragraph 2.65

7. Key principles relevant to the system of criminal appeals include:

(i) that there should be a broad scope for rectifying errors that have occurred at first instance, in order to minimise the possibility that wrongful convictions are sustained;

(ii) that, therefore, the supervisory jurisdiction of the Court of Appeal (Criminal Division),[3] in particular, is wide enough to encompass failings in procedure which do not themselves bear upon the guilt of the appellant;

(iii) that the primacy of the jury as the finders of fact in relation to convictions on indictment should be observed;

[2] References in square brackets are to paragraphs of the Issues Paper, unless otherwise stated.
[3] Hereafter "CACD".

(iv) that the principle of finality should not lightly be invoked to defeat the principle of justice. As noted by the Law Commission, there can at times be a tension between these principles. The favouring of the principle of justice is however an inevitable feature of the appellate system, and rightly so.

8. Specific manifestations of those principles are touched upon below, in the responses to discrete questions.

Question 2.
10.2 Is there a need to reform the processes by which decisions of magistrates' courts in criminal cases can be appealed or otherwise reviewed?
10.3 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)?
(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?
Paragraphs 3.59 and 3.60

Routes of appeal

9. We consider that there may well be scope to consolidate the various routes of appeal from a conviction in the Magistrates' Court. In particular, thought might be given to whether there is a need for two separate routes of challenge to matters of law, by way of case stated and judicial review. Change would, however, not be desirable if it had the effect of limiting a defendant's ability to challenge legally flawed decisions.

10. We also consider that the prosecution should retain its ability to challenge errors of law at first instance by way of an appeal to the High Court. The routes of challenge to legal errors made in the Magistrates' Court should be mirrored, so far as possible, between prosecution and defence.

11. We consider that there should remain an ability to request and be granted a re-hearing by way of appeal against conviction to the Crown Court, as of right, as a fair corollary to the compromises inherent in delivering summary justice. A powerful

reason to retain this right of appeal is that often defendants are unrepresented at this stage, and that a significant number of appeals are allowed.

Recording of proceedings

12. Separately, we are of the view that recording proceedings in the Magistrates' Court would have a number of advantages and should be considered. Most obviously:

(a) Where a decision is challenged by way of rehearing in the Crown Court, the consistency or otherwise of witnesses who have previously given evidence is likely to be relevant. At present there is no reliable record of what was said in the court below.

(b) Similarly, where a decision is challenged through a stated case or judicial review, clarity as to the basis for the decision would plainly assist. That may at present be difficult to achieve if a request to state a case comes some time after the initial decision.

(c) A transcript / recording of evidence in the Magistrates' Court could potentially be used in lieu of live evidence at a re-hearing at the Crown Court if a witness was unable to attend (perhaps with some reference to ss114(1)(d) CJA 2003), thereby reducing the incentive for a defendant to appeal simply in the hope that a key witness may not attend a re-hearing.

13. We are not at present persuaded that recording would introduce delay to the court, which was a concern raised by Sir Brian Leveson in his Review of Efficiency in Criminal Proceedings back in 2014. [2.88] But in any event, if some loss of pace were to be a consequence of more careful decision-making, that would not in our view be a disadvantage which outweighed the potential benefits of recording.

14. In support of this proposal, the Law Commission may want to consider the way the position in family proceedings.

15. Prior to the establishment of a single family court in 2014, the civil 'family' jurisdiction (below the High Court) was split between the magistrates' courts and the county courts. The former was under Part II of the MCA 1980 so those proceedings

were not recorded. If the matter was before a DJ or CJ, though, it would be in the county court and thus recorded. With the advent of the single family court, magistrates became judges of the family court, which is a court of record and which has its proceedings recorded.

16. There have been a few notable appeals in which access to a transcript (rather than only the legal advisor's notes or the combined notes, where available, of the advocates) have revealed relatively major misunderstandings of law which have caused appeals to be allowed where otherwise – where the appeal court might have been working only from the order, which can be easier to justify devoid of context – they might not have been. One example from not long after recordings came in which did the rounds was *Re C* [2015] EWCA Civ 539.

Posthumous appeals

17. A further, discrete, topic that we consider merits consideration by the Law Commission is the need to clarify whether there is an inability of the CCRC to make posthumous referrals arising from convictions in the Magistrates' Court. Whilst there is a power to refer a conviction upon indictment to the CACD when the applicant has died, it is arguable that there is no power to do the same in referrals following conviction after summary trial.

18. There would arguably be limited value in permitting summary convictions to be sent to the Crown Court posthumously, because an appeal to the Crown Court is essentially a retrial focusing on disputed questions of fact, which is not what would be required in such cases.

19. One possible avenue of reform in this area would be to provide for an exceptional power for the CCRC to refer a deceased applicant's case to the High Court rather than the Crown Court, so that consideration could be given to whether the conviction should be quashed on legal grounds.

Do CCRC referrals need to go to the Crown Court at all?

20. There may be something to be said for all CCRC referrals, whether from the Magistrates' Court or the Crown Court, proceeding to the Court of Appeal and being

dealt with in the same way as if they had been convictions on indictment. It can be difficult for the Crown Court to deal with CCRC referrals as re-hearings, because inevitably a significant period of time will have gone by, and at least part of the sense of appeals against summary conviction to the Crown Court is that they happen quickly (currently, often faster than the case would have reached a jury trial if it had been sent straight up).

21. If the Court of Appeal were to deal with CCRC referrals from summary convictions, then if the conviction was quashed the court could decide whether or not to order a re-trial in the usual way.

22. Alternatively, there could be a system where the CCRC were afforded a discretion to refer either way, so that they could send recent convictions straight to the Crown Court if they considered it appropriate, but older convictions could be sent to the Court of Appeal where a re-hearing may not do justice to the case.

Question 3.
10.4 Does the single test of "safety" adequately reflect the range of grounds that should justify the quashing of a conviction?
10.5 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? ***Paragraphs 4.92 and 4.93***

23. This is arguably the most fundamental question raised by the Issues Paper. Opinion is likely to vary widely as to whether reform of the "safety" test is needed, and if so, what form it should take. At this stage in particular we do not propose to do any more than raise points for discussion and deeper consideration around this topic.

24. The question is framed with reference to the use of language, but there is plainly a wider point under consideration here. The analysis set out in [4.41-4.91] of the Issues Paper correctly identifies that the term "unsafe" has been interpreted by the Court of Appeal as permitting (and indeed requiring) the quashing of convictions in cases beyond simply those in which the court is satisfied that the defendant is (or even may be) innocent.

25. We agree with the Law Commission [4.78] that under the current legal interpretation of the safety test:

> (1) A conviction should always be considered unsafe where the person was, or might have been, wrongly convicted.
>
> (2) A conviction may also be unsafe where the prosecution amounted to an abuse of process or the conduct of the authorities fell seriously below acceptable standards. This includes situations such as entrapment, "disguised extradition" and where the prosecution reneges on an agreement.
>
> (3) A conviction will also be unsafe where the appellant did not receive a fair trial.
>
> (4) However, not every breach of a right associated with a right to fair trial will mean that the appellant did not receive a fair trial. Such breaches can be recognised in other ways than by quashing a conviction.

26. There are therefore two related issues to consider:

(i) Is the current approach of the CACD to appeals against conviction an appropriate one, capturing all circumstances in which convictions on indictment ought to be set aside?

(ii) Does, or may, the expression "unsafe" hinder public understanding of the basis on which convictions may be quashed? And if so, how should the test be reframed?

27. There is a respectable argument that, given the court's approach to convictions obtained in breach of rights guaranteeing a fair trial, or following an abuse of process, the safety test could helpfully be reframed to reflect the exercise that the court actually performs in such cases. Such a revision was suggested by Lord Justice Auld in his Review of the Criminal Courts.[4]

[4] Issues Paper, [4.89]

28. There could, for example, be three discrete findings available to the court, each of which would lead to the quashing of a conviction:

(i) *The conviction is, or may be, unsafe (on evidential grounds, or because of a material error of law) – meaning that the defendant was, or might have been, wrongly convicted;*

(ii) *The defendant did not receive a fair trial;*

(iii) *The prosecution amounted to, or involved, an abuse of process.*

29. Such a threefold test would reflect the current bases on which the CACD may presently find a conviction to be "unsafe", but would arguably (a) assist the court in structured decision-making, by requiring its attention to be directed to the test that it is actually applying, and (b) aid public understanding of what the court has actually decided.

30. Category (i) above might comprise cases in which the concept of "lurking doubt" fed into the question of the materiality of any error. [As to which, see further below.]

31. The question of whether the test applied ought to be framed as "the conviction is unsafe" or "the conviction may be unsafe" could be seen as a semantic one, if "unsafe" were to be read as comprising the possibility of a wrongful conviction as well as those cases in which an innocent man has plainly been convicted. However, it is in our view worth considering whether the language suggested by the Runciman Commission of "is or may be unsafe" should now be adopted, largely for the reasons explained in the Issues Paper at [4.53] and onwards, but also to provide further clarity as to the court's decision.

32. Categories (ii) and (iii) above might not necessarily require a consideration of the correctness of the verdict. In cases in which the defendant had not received a fair trial, the appropriate remedy might be a retrial, if a fair trial were now to be possible. In cases in which the proceedings had amounted to an abuse of process, the appropriate remedy might be the quashing of the conviction and a stay of proceedings (as where abuse of process is found at first instance).

33. These are not presented as final thoughts on the matter, rather as areas for consideration. But it seems to us that there may well be merit in widening the wording of the "safety" test to reflect the various ways in which it is generally considered convictions may properly be overturned.

Question 4.
10.6 Is there evidence that the Court of Appeal's approach to the admission of fresh evidence hinders the correction of miscarriages of justice? ***Paragraph 4.111***

34. The Law Commission might here explore whether reframing the test as a broad one, with reference to "interests of justice", would be preferable to the present position, in which the s.23(2) considerations may seem to represent conditions precedent to the admission of fresh evidence on appeal (which of course they are not).

35. That said, in the main the s.23(2) considerations are among matters that would likely be taken into account even were the test to be reframed as a straightforward "interests of justice" test. Plainly, material that would not have been admissible at first instance is unlikely to be capable of bearing on the safety of a conviction (though it may have a role to play in an appeal, depending on the issues in play). Similarly, it serves no purpose for any court to receive evidence that was incapable of belief.

36. The "reasonable explanation" provision, on the other hand, may risk generating unfairness if it is applied as a necessary condition, and it is in any event of limited value as a factor to weigh in the balance against the wider interests of justice. Put simply, if there were to be in existence material evidence, that was plainly capable of belief, admissible on a key issue, and which might reasonably provide a ground for allowing the appeal, the just outcome would clearly be to admit that evidence before the court and properly evaluate its impact, regardless of prior failings by the defence. To punish a defendant for what may have been a poor tactical decision taken at first instance by refusing to entertain an otherwise meritorious appeal would not obviously serve the interests of justice.

37. Against that, we acknowledge the counter argument that if, in fresh evidence cases, there is no test which grapples with misguided tactical decisions at trial, there is a risk of the appeal process being exploited so as to enable defendants to 'have

another go' if their case strategy fails to work the first time round, or inadvertently encouraging defendants generally to view the trial as simply the first stage in the process. We observe that, whilst finality should not be a trump card to defeat meritorious appeals, it remains an important principle. Here, a question that needs to be grappled with is how to frame a test that pays respect to this principle, while properly protecting a defendant's ability to pursue a meritorious appeal. We will of course continue to consider this dynamic, and look forward to engaging further as the process of consultation progresses.

38. Further, to deal with one example given in the Issues Paper, there is probably no need to rely on the "no reasonable explanation" objection to refuse to admit evidence of one expert commenting favourably on a trial expert's evidence. As happened in *Kai-Whitewind*, if the fresh evidence does not in truth add anything to the evidence called at first instance then it would not likely provide a ground for allowing an appeal. [5]

39. Accordingly, whatever else is made of the fresh evidence provisions, the Law Commission might consider revisiting the extent to which "no reasonable explanation" has a proper part to play in this area.

Question 5.
10.7 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?
Paragraph 4.126

40. We recognise that appeals based on fresh evidence necessarily require the CACD to trespass into the territory of the jury. To a lesser extent, the same applies to appeals based on legal errors. The question is to what extent should the CACD be permitted to do so, and how should this task be undertaken. We respectfully note and

[5] The prosecution did not seek to resist the application to adduce fresh evidence on the basis of "no reasonable explanation": "Very fairly, Mr William Davis QC, for the Crown, does not suggest that evidence which might afford a ground for allowing the appeal should not be heard and admitted. He would not seek to resist an appeal on a wholly technical basis. We agree that points which may legitimately be taken on behalf of the appellant which serve to undermine the safety of the conviction should, in the interests of justice, be considered on its merits. In the particular circumstances of this case, we heard all the evidence tendered before us *de bene esse.*" [2005] EWCA Crim 1092, at [96]

emphasise the warnings set out by Lord Bingham in *Pendleton* [19], and we acknowledge the need for the "jury impact" test in some form.

41. Lord Bingham (giving the majority judgment) in the House of Lords in *Pendleton* set out the reasons as to why the CACD had to approach fresh evidence appeals with caution. Those reasons remain unchanged, as does the need for caution. However, there is some evidence that the CACD has adopted rather too robust an approach to the "jury impact" test.

42. To take just two examples:

(a) In *Pomfrett* [2010] 2 Cr. App. R 28 the appellant was convicted of offences in relation to VAT fraud. Following his conviction the prosecution accepted that they had wrongly failed to disclose around 30,000 pages of documentation. It was agreed that the jury impact test applied. The CACD accepted that they had "seen only a fraction of the evidence in this very long trial and, of course, that we do not know the detailed process of reasoning by which the jury reached their verdict." And "that with the additional material the landscape of the case…would have been significantly different and the appellant's defence would have been advanced in a different context." However, the CACD concluded that "Taking everything together, we cannot see a sustainable basis for concluding that the additional material might reasonably have affected the jury's decision."

(b) In *Dorling* [2015], the CACD rejected an appeal against conviction for murder, which had been referred by the CCRC. The basis for the reference and the appeal was fresh material undermining the credibility of three trial prosecution witnesses [D, C, and Mc]. The Crown accepted that it was now unable to rely on the evidence of D. The CACD found that there was now much stronger material undermining their credibility. Consequently, a significant amount of the evidence before the jury simply disappeared. The court noted that "…in the light of the fresh evidence this would have been a very different case [*at trial*] which would require a different approach." However, the court then effectively excised the impugned evidence of D, C and Mc from consideration, and decided itself that the remaining evidence would, when considered in isolation from the discredited evidence, be sufficient to support the conviction. The appeal was rejected: "We remind ourselves of our task. It is for us to consider the safety of the conviction, not for us to unravel the mysteries of the jury room."

43. We recognise that not every appeal based on fresh evidence will trigger such a test. As was set out in *Pendleton* [para 16], in a simple case, for example entirely dependent upon a police confession or one eyewitness identification, it may be possible to infer what evidence the jury accepted in convicting and draw inferences in assessing the safety of the conviction in light of any admitted fresh evidence. However, in any case other than the most straightforward, and in particular where the prosecution case was complicated by the reliance on several separate and interdependent strands, supported by the evidence of numerous witnesses, the Law Commission might consider whether the CACD should ask itself something such as:

> *Might the new material (or removal of previously available material) (a) reasonably have affected the decision of the trial jury to convict; or (b) significantly affected the way in which the defence and/or prosecution cases were advanced at trial? If either applies, the Court should quash the conviction as unsafe and consider ordering a retrial.*

44. 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.

Question 6.
10.8 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? ***Paragraph 4.145***

45. There is a range of opinion as to the role of the concept of "lurking doubt" in determining appeals against conviction.

46. On the one hand, it is perhaps of significance that the case which gave rise to the concept of "lurking doubt" - *Cooper* (1969) - was decided before both *Turnbull* (1977) and *Galbraith* (1981). It may therefore be reasonable to suppose

that, informed by the approach established by those later cases, the court in *Cooper* would have felt no need to reach for the subjective concept of "lurking doubt". (Certainly the decision in *Cooper* could have been reached on *Turnbull* / *Galbraith* grounds, had it been decided fifteen years later.) There may therefore be some support for a suggestion that a "lurking doubt" safeguard is not in fact needed, because it has been overtaken (at least in identification cases, which as the Law Commission notes is the dynamic in which it most clearly has a role to play) with a case-specific test that is applied at the close of the prosecution case.

47. Further, as recognised by the Law Commission, there is plainly a tension between the test applied on a *Galbraith* submission at the close of the prosecution case and the ability of the Court of Appeal thereafter to quash an otherwise properly obtained conviction on the grounds of a subjective "lurking doubt", while not disagreeing that there was a *Galbraith*-sufficient case to answer.

48. Importantly, that tension also risks undermining the primacy of the jury in the fact-finding exercise, and thus impacts upon the democratic engagement aspect of a jury trial. It is also difficult to justify prioritising, above the findings of the jury, following proper direction and deliberation, "a reaction which can be produced by the general feel of the case as the court experiences it", in circumstances where the court has not heard the evidence or seen the witnesses for itself. As touched upon above in relation to the "jury impact" test, it is a widely recognised principle of appellate jurisprudence that a degree of restraint should be exercised by an appeal court which has not seen or heard evidence given as it was before the first instance tribunal, as indeed the court in *Cooper* recognised: *"It has been said over and over again throughout the years that this court must recognise the advantage which a jury has in seeing and hearing the witnesses, and if all the material was before the jury and the summing-up was impeccable, this court should not lightly interfere."*

49. On the other hand, however, the view of a panel of experienced appellate judges (LJ, puisne, and Crown Court judge) that there is something not quite right about a conviction, in a case in which no single factor can be identified as a basis for quashing that conviction, should not lightly be dismissed. The function of the CACD is, so far as possible, to correct actual or possible miscarriages of justice, as well as performing a supervisory role as to the fairness of the process adopted, and the broadest possible scope should be afforded the court to ensure that it can perform

those functions effectively. The concept of "lurking doubt" may be thought to have a role to play in helping the court perform that function.

50. So for example, one way in which the concept of "lurking doubt" might be incorporated into the safety test / the reframed tests suggested above could be by identifying it as a factor to consider when deciding whether an irregularity (for example, in the admission or exclusion of evidence) was or may have been material.

51. This area is not straight-forward and plainly requires more thought. Wherever the balance settles, we consider that the concept of "lurking doubt" merits further consideration by the Law Commission.

Question 7.
10.9 Are the options and remedies available following the quashing of a conviction by the Court of Appeal adequate and appropriate?
Paragraph 4.168

Question 8.
10.10 Are the powers of the Court of Appeal in respect of appeals against sentence adequate and appropriate? ***Paragraph 4.181***

52. Our only observation in this area at this stage is that it might be clarified that, in line with the court's existing practice (at least in some cases), if the court considers that the defendant should be sentenced differently, it can take into account post-sentence material, for example psychiatric and prison reports, that was not before the sentencing judge. Consideration might need to be given as to how to prevent appeals against sentence becoming opportunities for a second attempt to procure a lower sentence, and this is an area in which time limits may have a significant part to play. But it is, we think, worthy of some further thought.

Question 9.
10.11 Does the law satisfactorily enable appropriate criminal cases to be considered by the Supreme Court? ***Paragraph 4.192***

53. Our view is that there is no justification for the CACD being the "gatekeeper" of the certification procedure to the Supreme Court. We consider that there should be an alternative / additional direct route to the Supreme Court when seeking to have a point certified. We have reached this view for the following reasons:

a. The application to certify a point from the Court of Appeal (Civil Division) is directly to the Supreme Court. There is no apparent justification for the distinction with the procedure from the CACD.

b. The Supreme Court has the task of considering, clarifying and if necessary correcting errors of law, that would otherwise become the "currency" in the lower courts. Without such intervention, this may lead to a significant number of miscarriages of justice. Consequently, failing to provide an alternative / additional direct route risks leaving such errors uncorrected.

c. At present, the only alternative methods of challenging a decision after a refusal to certify are by way of an application to the ECtHR (which involves a significant delay), or an application to the CCRC (which may be hampered by the CCRC's unwillingness to refer a case on the same or similar grounds as those already argued).

d. The right of direct access to the highest appellate court exists elsewhere – for example in the USA, Canada and Hong Kong.

e. Over the past year, only 2% of all matters filed in the Supreme Court were criminal cases, according to research from Thomson Reuters (reported in The Times on 26 October). Any increase in the number of criminal cases considered would not, therefore, be likely to meaningfully increase the court's burden.

Question 10.
10.12 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?
10.13 If so, are there any alternative tests that would better enable the correction of

*miscarriages of justice?**Paragraphs 5.70 and 5.71***

54. There are inherent problems in principle with requiring the CCRC to apply a predictive test when deciding whether to refer cases. They include:

(i) That such an approach does not allow for the development of the law through previously untested arguments which find approval under proper consideration by the CACD;

(ii) That it deprives the CCRC of a degree of autonomy (because it reduces the body to second-guessing what another tribunal will make of its arguments, rather than requiring the CCRC to evaluate their strength for itself);

(iii) That it is inconsistent with (and considerably more onerous than) the approach to granting permission to appeal through the standard post-conviction route (application to a Single Judge).

55. While it is difficult to reach a concluded view on the matter, the relatively limited number of cases referred by the CCRC may suggest that the present test acts as an impediment to referring appropriate cases. (It may perhaps also point to a lack of resources, which is perhaps beyond the scope of the Law Commission's consultation but nonetheless bears consideration if it may be behind the limited number of referrals.)

56. In any event, the Law Commission is likely to want to consider what alternative tests for referral by the CCRC may be appropriate. Among those to consider might be the following (in the alternative, or in addition to the present test):

(i) Referral should follow where the CCRC considers that the CACD ought to quash the conviction; or, perhaps

(ii) Where the CCRC considers that there are arguable grounds of appeal (that is, that it is arguable that the conviction is unsafe / resulted from an unfair trial / an abuse of process) which either (a) were not previously advanced at the permission stage, or (b) were previously advanced but are materially strengthened by the availability of fresh evidence.

57. The obvious merit in the latter suggestion is that it seeks to follow the test applied by the Single Judge, which is widely considered to be an appropriately framed test at the permission stage. (While there are arguments about the strictness with which the test is applied, it is not widely considered that the test itself requires reform.)

Question 11.
10.14 Is there evidence that the application of the "substantial injustice" test to appeals brought out of time on the basis of a change in the law is hindering the correction of miscarriages of justice? ***Paragraph 6.83***

58. In short, yes. Most obviously, despite the Supreme Court in Jogee finding that the law on parasitic accessory liability took "a wrong turn" over 30 years previously, only one historic murder conviction has been subsequently quashed as a result[6], and only four cases referred back to the CACD by the CCRC on this basis. It is submitted that these numbers alone, when considered in the context of the number of murder convictions since 1985, provides evidence that the "substantial injustice" test is hindering the correction of miscarriages of justice.[7]

59. Our view is that, 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, there is no justification for requiring an applicant in a "change of law" appeal to demonstrate that they have suffered "a substantial injustice" before leave is granted. The test should be the same for all applications for leave to appeal. Requiring a more onerous test in change of law cases is arbitrary and a disproportionate response to the "wider public interest in legal certainty and the finality of decisions made in accordance with the then clearly established law'. These factors ought not to outweigh the need for justice in individual cases[8], and the concerns can be met by applying the usual criteria for applications for leave in all cases.

[6] The other applications for leave have all been refused on the basis that no substantial injustice has been demonstrated.
[7] And this is leaving aside the obvious linguistic point here – that for the Court of Appeal to identify injustice but refuse to interfere because it is not "substantial" enough is somewhat unattractive, particularly where the unjust conviction is for murder.
[8] In the words of Lord Atkin: 'Finality is a good thing, but justice is a better.' (Ras Behari Lal v King-Emperor [1933] All ER 723, 726)

60. We think that the additional stringent criteria may properly be criticised as unfair, and risk preventing meritorious applications from succeeding for the following reasons:

a. The certainty with which an applicant is required to show the detrimental impact of the change in law on his conviction is far more onerous than in other appeals. The need to show that he 'would not' have been convicted under the new law contrasts with the usual need to show that a misdirection 'might have' made a difference to the verdict (Graham [1997] 1 Cr App R 302, 308 per Lord Bingham CJ, a conviction is unsafe if the CACD '… is left in doubt whether the Appellant was rightly convicted of that offence or not'). As Professor Ormerod QC has pointed out: 'Indeed, if the evidence is such that D 'would not' have been convicted of murder then presumably it would be inappropriate for there to be a retrial for murder?' (CALA Conference paper, November 2017, para 2.20.)

b. The higher test also brings with it a greater danger that the Court of Appeal will need to speculate improperly about the jury's reasoning and the potential impact that the 'old law' misdirection would have had (see Pendleton [2002] 1 Cr App R 34 [16-19]).

c. The requirement for the court to 'have regard to… whether the applicant was guilty of other, though less serious, criminal conduct' may cause particularly serious injustice. The fact that an applicant may be not guilty of murder but guilty of manslaughter should not be a basis for denying that she suffered a substantial injustice. As has been pointed out, there is a qualitative difference between being labelled as a murder and a 'manslaughterer' as a matter of both label and sentence (see 'Jogee – Not the End of a Legal Saga but the Start of One?': Ormerod, Laird: [2016] Crim LR 539, 551).

d. The use of the date on which the application for leave was lodged as the sole criteria for triggering the far stricter 'substantial injustice' test can lead to arbitrary results. The court in Johnson demonstrated this unfairness when it stated on the one hand that: 'It is not… in our view, material to consider the length of time that has elapsed. If there was a substantial injustice, it is irrelevant whether that injustice occurred a short time or a long time ago. It is and remains an injustice' [21], but on the other recognised that to apply the

'substantial injustice' test to applicants who had sought leave to appeal within 28 days of conviction on the non-Jogee grounds, but required an extension of time in respective of the Jogee grounds, would 'be unjust' [84].

Question 12.
10.15 Are the powers available to prosecutors to appeal decisions made during criminal proceedings adequate and appropriate? ***Paragraph 7.37***

61. We have not yet gathered a significant range of opinion on this matter, but there is not generally widespread disquiet at the scope for prosecutorial appeals.

62. It should also be noted that prosecution appeals are, because of the need to resolve them before a jury returns verdicts, highly disruptive of the trial process. This is the position even where an appeal is not ultimately pursued, because the mere existence of the possibility frequently requires delays in a trial while the prosecution consider their position following an adverse ruling. When an appeal is pursued, the "acquittal guarantee" can be of little comfort where, for instance, the ruling relates to only one count on a multiple count indictment and/or one defendant in a multi-handed case. In those circumstances even when the appeal is unsuccessful it may still have the effect of having necessitated the discharge of the jury and a subsequent re-trial. Given the current pressure on the criminal justice system in terms of court capacity, any measures that cause further disruption to the trial process would need to be considered very carefully.

Question 13.
*10.16 Are the powers of the Attorney General to refer a matter to the Court of Appeal adequate and appropriate?****Paragraph 7.53***

63. The Law Commission's observations in relation to the inconsistency of appeals being made to the High Court by the prosecution following conviction in summary proceedings, and Attorney-General's References going to the Court of Appeal following convictions on indictment, are essentially subsumed in the issues relating to appeals from the Magistrates Court. As the law presently stands, there is at least uniformity of where appeals are resolved from each Court whether brought by prosecution or defence, and it would only make sense to address this issue if there is a change in relation to defence routes of appeal in summary proceedings. To give a

practical example of why the routes of appeal need to the same, it is not unheard of for both the prosecution and defence to appeal, in which case the same court must clearly deal with both appeals.

64. As regards the identified 'anomaly' of indictable only offences dealt with in the Youth Court not being susceptible to the unduly lenient sentence scheme, again this mirrors the fact that an appeal against sentence by a defendant in the Youth Court would not go to the Court of Appeal. There is, however, precedent for the prosecution to appeal to the High Court where a sentence involves an error of law (*Haine v Walkett* [1983] RTR 512), and of course the prosecution could equally judicially review a decision of the Youth Court to accept jurisdiction in a case of the utmost seriousness thereby pre-empting the possibility of the Youth Court passing an unduly lenient sentence in the most serious cases. Again, if proposals are made in relation to a defendant's rights of appeal against sentence from the Youth Court, this would provide an opportunity to address this perceived anomaly.

Question 14.
10.17 Do you have any views on the circumstances in which an acquittal might be quashed, including the law relating to acquittals tainted by interference with the course of justice? ***Paragraph 7.60***

65. It is extremely rare for an acquittal by a jury to be quashed and there does not appear to be any compelling reason for reform in this area of the law. To the extent that there is a difference between the tests to be applied following jury interference as against fresh evidence, with the latter reflecting a lower bar than the former, this is something the Commission may wish to address in its consultation, but realistically this applies to an extremely small number of cases.

Question 15.
10.18 Do you have any views on the circumstances in which a third party might appeal a decision made in criminal proceedings?
Paragraph 7.68

66. We have recently responded to the Law Commission's Consultation on Evidence in Sexual Offence Prosecutions[9], in which this topic was covered. For reasons set out in our response to that consultation, we do not consider it appropriate (or feasible) to generally introduce third-party representation into criminal proceedings, including appellate proceedings.

Question 16.
10.19 Is the law governing post-trial retention and disclosure of evidence, whether used at trial or not, satisfactory? ***Paragraph 8.22***

67. While the test for post-conviction disclosure is now pretty well settled (as per *Nunn*, which approved the AG's guidelines requiring only disclosure of material that might cast doubt on the safety of the conviction), there may well be value in considering amendments to the forum in which arguments around post-trial disclosure can be litigated, by providing for an opportunity to apply to the CACD for disclosure pre-appeal.

68. That would avoid a judicial review (the route followed in *Nunn*) and bring the case before the court that may ultimately be required to consider the appeal. So it would transfer the such an application from one forum to another that is more appropriate. More fundamentally, it is questionable whether judicial review is the right mechanism to challenge the non-disclosure of material on appeal. What is required is the correct decision on whether disclosure should be ordered, not just a reasonable one (which would be capable of surviving judicial review).

69. There would be downsides to such a mechanism, not least in terms of court capacity. But if the only impact in that regard were to be a change of forum, that might not be consider to be a serious bar to making the change. A permission stage (single Judge, on paper, perhaps with powers to order disclosure in obvious cases, as well as to filter out plainly unarguable applications) might be worth considering.

Question 17.
10.20 Is the law governing retention of, and access to, records of proceedings following

[9] Available here: https://www.lawcom.gov.uk/project/evidence-in-sexual-offence-prosecutions/ . Our response can be found here: https://www.barcouncil.org.uk/static/84de9ba1-d9cf-4295-94bef7d091e21182/response-to-the-law-commission-consultation-on-evidence-in-sexual-offence-prosecutions.pdf

a trial satisfactory? ***Paragraph 8.27***

Question 18.
*10.21 Do consultees have any further comments or proposals for reform not dealt with in answers to previous questions?****Paragraph 9.8***

Time limits – appeals against conviction

70. These are touched upon in the Issues Paper in various places. We recognise that time limits have a place in the criminal justice system, as elsewhere, and that any period will, to a certain extent, be arbitrary. However, echoing the recommendation of the Westminster Commission,[10] in light of the difficulties with securing public funding, legal representation and "second opinions", we consider that there is merit in the Law Commission exploring further whether:

a. The present limit of 28 days for appealing against conviction on indictment is too short, and should be extended to 56 days; and

b. The merits of an application for permission to appeal should be the determinative factor in granting leave, and that an extension of time should be granted where necessary to facilitate this – even when there is no reasonable explanation for the delay. This is effectively the existing practise of the appellate courts, however the relatively short existing time frame and the need to seek an extension if this is not adhered to, (together with the threat of a loss of time direction) may dissuade some applicants from pursuing meritorious appeals. Consequently, the centrality of the merits of the appeal should be emphasised in statutory form.

Prosecution appeals – time limits

71. Primarily for the reason set out in the Issues Paper at [7.45], we consider that the Law Commission might wish to further consider whether the time limit for an AG's reference of a sentence ought to be extended to 56 days. Against that, however,

[10] Cited at [4.16] in the Issues Paper.

is the fact that until any such reference is determined by the Court of Appeal, a defendant is left without definitively knowing the sentence that they will be required to serve. At present, as we understand it, such references are commonly submitted to the Court of Appeal at the same time as applications made under the slip rule (where thought appropriate); where the slip rule application succeeds, then the reference is withdrawn. Accordingly, the need to harmonise the time limits for applications under the slip rule and applications for an AG's reference of an unduly lenient sentence may be less acute than would otherwise be the case.

Loss of time orders

72. We consider that the concept and practice of loss of time orders would benefit from serious consideration. Various concerns have been raised about their existence and operation, including that they are arbitrary (making it hard to advise a lay client as to degrees of risk associated with an appeal) and disproportionate to the fault that is sought to be punished.

Revocation / amendment of Section 59 Supreme Court Act 1981

73. This is not a specific matter identified by the Law Commission, but we consider that it may merit investigation. The general rule in the CACD is that only one judgment is given on behalf of the whole Court. The exception is where the presiding judge states that in his or her opinion the question raised by the appeal is one of law and that it is convenient for separate judgments to be pronounced by the Court. The Court has rarely exercised this discretion.

74. The Law Commission may want to consider whether s.59 should be amended to more clearly provide for, or even encourage, the giving of dissenting judgments in the CACD, where appropriate. That would bring the practice into line with that of the Caribbean Commonwealth appellate courts, and indeed with that of the Court of Appeal Civil Division. Such a reform might have the advantage that the law could be developed through consideration of factors set out in dissenting opinions, as has been the case with judgments of the Supreme Court and, historically, opinions in the House of Lords. It would also allow the CCRC and others to analyse the alternative trajectory of the law in similar cases.

Publicity and public understanding of the work of the CACD

75. A proposal was floated several years ago (we believe by Mrs. Justice Dobbs) that would assist in making Court of Appeal hearings more intelligible to members of the public. That is, that a short summary of each case to be argued should be available at the court entrance (or perhaps displayed in the main hall of the RCJ) to all who wish to better understand the matters in which the court is engaged. We consider that there would be real merit in such a practice being adopted. The current example of the Supreme Court, in producing press-friendly digests of issues and decisions, may provide a helpful template.

Court of Appeal of Wales

76. We would also flag for possible consideration the position of Wales. In the 2019 Commission on Justice in Wales report, the following recommendations were made:

(i) a Court of Appeal of Wales, with jurisdiction to hear appeals in criminal matters, is established (page 500); and

(ii) Wales should be put in a similar position to Scotland and Northern Ireland in the Supreme Court as regards appointment of judges to the Supreme Court (page 501).

77. We express no view on those proposals in this document.

Bar Council[11]
31 October 2023

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[11] Prepared by members of the Law Reform Committee, the Legal Services Committee and a practitioner external to the Bar Council.