
**Bar Council response to the Law Commission Consultation on criminal appeals**

This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Law Commission Consultation on criminal appeals.[1]

The Bar Council is the voice of the barrister profession in England and Wales. Our nearly 18,000 members – self-employed and employed barristers – make up a united Bar that aims to be strong, inclusive, independent and influential. As well as championing the rule of law and access to justice, we lead, represent and support the Bar in the public interest through:

- Providing advice, guidance, services, training and events for our members to support career development and help maintain the highest standards of ethics and conduct
- Inspiring and supporting the next generation of barristers from all backgrounds
- Working to enhance diversity and inclusion at the Bar
- Encouraging a positive culture where wellbeing is prioritised and people can thrive in their careers
- Drawing on our members' expertise to influence policy and legislation that relates to the justice system and the rule of law
- Sharing barristers' vital contributions to society with the public, media and policymakers
- Developing career and business opportunities for barristers at home and abroad through promoting the Bar of England and Wales
- Engaging with national Bars and international Bar associations to facilitate the exchange of knowledge and the development of legal links and legal business overseas

To ensure joined-up support, we work within the wider ecosystem of the Bar alongside the Inns, circuits and specialist Bar associations, as well as with the Institute of Barristers' Clerks and the Legal Practice Management Association.

As the General Council of the Bar, we are the approved regulator for all practising barristers in England and Wales. We delegate our statutory regulatory functions to the operationally independent Bar Standards Board (BSB) as required by the Legal Services Act 2007.

[1] Criminal appeals – Law Commission

## Overview

The Law Commission's consultation paper is typically thoroughly researched, comprehensive, and thoughtful. As will be seen below, we broadly agree with almost all the proposals made, and even where we disagree with the substance of a proposal, the observation made above remains true. The strength of the proposals made reflects favourably on the approach adopted by the Law Commission in circulating an Issues Paper in 2023, to which we and others responded[2], and which will have informed the fuller consultation paper.

While many of the proposed reforms, considered individually, may appear to represent relatively minor tweaks, the result of implementing these together would be a harmonisation of the various criminal appeals regimes that would be of a value greater than the sum of its parts. Further, some of the proposed reforms touch on questions of real substance. These include, among others: the number of routes of appeal from decisions of the Magistrates' Courts (Q11); the proper approach to appeals based on a development of the law (Q53); the test for referrals to the Court of Appeal from the CCRC (Q56); the ability of the Supreme Court to act as its own filter (rather than requiring the Court of Appeal to certify a point of law of general public importance) (Q89); and the test for compensation following a wrongful conviction (Q99). On the latter question, as with some others, we have declined to express a settled view. Where we have taken such a course, that ought not to be read as meaning that we consider that reform in these areas would not be necessary or desirable, but rather that there is a range of opinion at the bar on such matters. We would as ever welcome the opportunity to continue to liaise with the Law Commission and (in due course) the legislature in order to ensure that any reforms which are adopted are rendered practical.

## A) The Context

We invite the Law Commission to consider the Bar Council's responses to the consultation paper within the following context:

a. The project arises from a number of concerns regarding the efficacy and fairness of the existing system. The majority of the responses to the Issues paper is that there is a need for change in several central areas to remedy perceived defects in the current legislation and a restrictive judicial approach to criminal appeals.

b. The changes required are seen as being necessary to ensure, amongst other matters, fair access to the appeals process and a more generous approach to the consideration and determination of appeals by the Criminal Cases Review Commission and the judiciary.

[2] Bar Council Response to the Law Commission's Issues Paper on Criminal Appeals

c. Whilst we note that the Law Commission has not considered "the costs regime or public funding for bringing appeals" [para 1.6 (4)], it is clear that many of the profound concerns raised 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 Law Commission has been tasked to report upon.

**Consultation Question 1.**

**We invite consultees' views as to the appropriate route for appeals in summary proceedings, including whether appeals on a point of law in summary proceedings should go to the Court of Appeal Criminal Division after, or instead of, the High Court, or whether the current parallel arrangements should be maintained.**

1. –

**Consultation Question 2.**

**We invite consultees' views on the current structure of the appellate courts in respect of criminal proceedings in England and Wales.**

2. Where we have observations in this regard, they feature in response to individual questions below.

**Consultation Question 3.**

**In considering whether reform to the law relating to criminal appeals is necessary, we provisionally propose that the relevant principles are:**
**(1) the acquittal of the innocent;**
**(2) the conviction of the guilty;**
**(3) fairness;**
**(4) recognising the role of the jury in trials on indictment;**
**(5) upholding the integrity of the criminal justice system;**
**(6) ensuring access to justice (incorporating the "no greater penalty" principle and consideration of the needs of particular groups); and**
**(7) finality.**

**We provisionally propose as an overriding principle that the convictions of those who are innocent or did not receive a fair trial should not stand. Do consultees agree?**

3. We agree. We would add to this list the welfare principle when determining appeals relating to children, in particular appeals against sentence in such cases.

**Consultation Question 4.**

**We provisionally propose that in principle a person should not be at risk of having their sentence increased as a result of seeking to appeal their conviction or sentence. Do consultees agree?**

4. We agree, for the reasons given in the consultation paper.

**Consultation 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?**

5. Yes, the fact that magistrates receive more training than they once did does not fundamentally change the fact that summary justice is an efficient but imperfect process. The right to an appeal by rehearing is a fundamental and important safeguard which should not be dispensed with lightly.

6. The statistics offered in the consultation paper reflect the fact that only a very small proportion of cases dealt with by the magistrates' court proceed to a rehearing in the Crown Court and there is no sense that the appellate workload that the Crown Court currently carries is having any significant impact on the backlog of jury trials. Appeals against conviction are generally heard at the end of the week, often while juries are in deliberation, and occupy a very small proportion of court time.

7. Given that the vast majority of magistrates' court decisions are accepted rather than challenged, there is simply no pragmatic justification for increasing the burden on the magistrates' court by taking the steps that would be required to enable a process of appeal by review rather than rehearing. The current system is not only fairest to defendants but also quite probably the most efficient appeal mechanism available.

**Consultation 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.**

8. The arguments in relation to the two identified categories are somewhat different. In relation to regulatory offences, the suggestion is that there is a degree of specialist expertise

in certain magistrates' courts that is not reflected in the Crown Court when those cases are appealed. This does not require such a drastic response as to create an entirely different system of appeal for those cases, particularly given that appeal by review would require the implementation of different processes during the course of those cases (e.g. recording the proceedings and requiring detailed reasons in all such cases).

9. One example given is the fact that Cardiff Magistrates' Court deals with all prosecutions brought by Companies House. The inevitable conclusion of this must be that Cardiff Crown Court will deal with all appeals in those cases, and so it is not unreasonable to assume that the particular expertise developed in the magistrates' court can be reflected in the Crown Court.

10. In relation to regulatory offences that are generally listed across the country before District Judges with specialist expertise, again the answer is surely to ensure that a sufficient number of Circuit Judges are provided with the necessary training to mirror this expertise.

11. Alongside this, there is no reason why the District Judges with specialist expertise should not be sitting on appeals in the Crown Court. Many District Judges are also Recorders, and District Judges are now empowered to sit in the Crown Court in any event. If certain District Judges are considered to have specialist expertise, then they could be specifically trained to sit in the Crown Court. There would simply need to be diligence in ensuring that appeals are not listed before District Judges who dealt with the case at first instance.

12. There are already specific rules in relation to the composition of the court in appeals from the Youth Court, in terms of the lay magistrates having to come from the Youth Court bench, and so a degree of precedent already exists.

13. As regards domestic violence cases, while concern has been expressed there does not appear to be any actual evidence that perpetrators of domestic violence bringing attritional appeals is a significant problem that requires resolution. If it were regarded to be such an issue as to require a bespoke remedy, then a far simpler solution would be to enable the recording of evidence given by domestic violence complainants in summary trials so that this could be replayed as their evidence, if the case were appealed to the Crown Court.

14. The use of recorded evidence could be a discretionary power used either presumptively subject to there being any compelling reason why the complainant should need to attend again (e.g. if it were clear that their evidence had not been properly challenged by way of cross-examination), or as a fall-back position akin to the use of the hearsay provisions if a complainant did not attend for the re-hearing. The fact that the non-attendance of a complainant would no longer be fatal to the prosecution's case would in either scenario be sufficient to deter appeals being brought simply to test the complainant's resolve.

15. Whether or not such solutions are adopted, the overarching point is that there are simpler ways to remedy the issues raised than by adopting a wholly different appeal process.

**Consultation 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?**

16. Yes, the difference in time limits is a confusing anomaly that should be rectified.

**Consultation 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?**

17. As the consultation paper notes, where a defendant is re-tried and convicted in the Crown Court following a successful appeal to the Court of Appeal, the Crown Court cannot impose a sentence of greater severity than was passed on the original conviction (Schedule 2, Criminal Appeal Act 1968). This means that even if the facts that emerge on a re-trial are less favourable to the defendant and might otherwise have resulted in a longer sentence, they are nonetheless protected from suffering worse consequences as a result of having brought an appeal.

18. There is no principled reason why appellants to the Crown Court from the magistrates' court should not be afforded the same protection. The only plausible argument in favour of retaining the status quo is that the fear of an increased sentence serves as a disincentive to appeal. For the reasons given in the consultation paper this is not a legitimate justification, not least because there is evidence that it has a particularly significant effect on children.

19. Practitioners are familiar with the scenario where a magistrates' court convicts on questionable evidence, but counterbalances by exercising leniency on sentence. A prospective appellant to the Crown Court effectively, even if not intentionally, has their silence bought with a lenient sentence that they do not want to risk.

20. Fairness dictates that a defendant should be able to challenge their conviction without being impeded by fear of, for example, receiving a sentence of immediate custody that they had hitherto avoided.

21. The possibility of the imposition of costs for unsuccessful appeals also exists to disincentivise unmeritorious appellants and so there appears to be little need for the double disincentive that currently applies.

**Consultation 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.**

22. –

**Consultation 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?**

23. Yes, there is no principled basis for these anomalies.

**Consultation 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?**

24. Yes. We remain of the view quoted at paragraph 5.162 of the consultation paper.

25. Furthermore, we support the Commission's view at paragraph 5.183 that it would be possible for the court whose decision is being challenged to take part in judicial review proceedings by providing a statement which laid out the facts that it found, as it would in a case stated appeal. We agree that this would retain the single cited advantage of case stated appeals within proceedings for judicial review.

26. Given that not all applications for judicial review would require such a statement (i.e. those that would not hitherto have been suitable for an appeal by way of case stated), the provision of a statement should be triggered by a request on behalf of the applicant (reflecting the current process of asking the court to state a case) or an order of the High Court (in circumstances where the applicant has failed to make an appropriate request or it has not been complied with). This is because in some circumstances, e.g. a complaint of procedural unfairness by the court, a statement would be akin to the court defending the proceedings and so should not be obtained as a matter of course.

**Consultation 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?**

27. Yes, for the reasons identified in the consultation. The decision in *Cuciurean v CPS* [2024] 1 WLR 4070 was correctly decided and corrected an injustice. The underlying principles would be equally applicable in a judicial review scenario and there is no good reason why a defendant who has not brought an appeal should be denied an appellate remedy following conviction – to do so would be a breach of their Article 6 rights.

**Consultation 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.**

28. Yes. The argument for reform is perhaps strongest for children, whilst applying to all defendants. In the event that it were not wholly adopted, it should certainly be adopted for appeals from the Youth Court.

29. This is not simply because a guilty plea entered by a child is more likely to be susceptible to other pressures, but also because the Youth Court deals with indictable only offences and has much greater sentencing powers than the adult magistrate's court.

30. Furthermore, the Sentencing Council's guideline encourages the Youth Court to initially retain jurisdiction even in cases that might eventually be beyond its sentencing powers, which results in the plea being entered in the Youth Court rather than the Crown Court.

31. There is therefore an even more compelling argument for parity with the right of appeal an adult defendant would have following a guilty plea in the Crown Court.

**Consultation 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?**

32. Yes. Sentences passed in the Youth Court are passed by District Judges or magistrates of the Youth Court bench who have received specific training and are arguably better equipped for the task than a Circuit Judge chairing an appeal to the Crown Court. There will also usually have been a very detailed pre-sentence report from the Youth Offending Team. They should therefore be accorded a far higher level of deference than would be given to a sentence passed in the adult magistrates' court.

33. The notion of there being a pragmatic deterrent to appeals being brought is also even more troubling when applied to children.

**Consultation 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.**

34. Yes, the fact that an appeal is brought should not ordinarily have the consequence of costing a young person their anonymity, and to do so is an unacceptable deterrent to bring a potentially meritorious appeal. This would be particularly so in circumstances where the appeal is allowed but the case is reported, but applies irrespective of the outcome.

35. This could be achieved through a simple amendment of s49 CYPA 1933 to state that any person who had the benefit of anonymity in their original criminal proceedings will presumptively retain it in the course of any appeal unless the Court otherwise directs.

**Consultation 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. For the reasons set out by the Law Commission we agree with this proposal.

37. For these same reasons, and in particular the need to prioritise achieving access to justice as against procedural finality and not to deter meritorious appeals, we are of the view that the Criminal Procedure Rules and guidance given to potential applicants and their legal advisors should make clear that:

a. The ultimate test applied by the CACD in deciding whether to grant an extension of time will be the "interests of justice" and that this includes the merits of the grounds of appeal; and
b. The increase to 56 days ought not to mean that the "interests of justice" test will be applied more restrictively; the previous approach to this test should continue to apply.

**Consultation 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?**

38. 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) must be treated as such. To this end we think that guidance should be given emphasising this fact, whether in the form of guidance from the CACD or in the Criminal Procedure Rules.

39. However, we do not agree that the considerations in subsection (2) should remain unaltered.

40. Specifically, we think that the consideration relating to "reasonable explanation" should be removed from the subsection on the basis that:

a. This absence of a reasonable explanation in itself cannot be determinative of the merits of an appeal.
b. Whilst it may be relevant to other matters such as whether evidence is "capable of belief" it should not be set out as a consideration of equal importance to the other matters in subsection (2).
c. As the Law Commission points out at para 6.87, when referring to Lundy and Bain, "where the new evidence presents a direct and plausible challenge to one of the central elements of the prosecution case", the one trial principle "ceases to be of such importance". Or as Moses LJ (as he then was) stated in *Walker* [2011] EWCA Crim 2326, [13] "If evidence not called at trial has a significant impact upon the safety of the verdict, it is hardly conducive to justice to say: it might have been called at trial."

**Consultation 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.**

41. We do not consider that the CACD should have a power to appoint its own experts because the current system accommodates the adversarial nature of the appeal proceedings, whilst at the same time makes clear that the expert's overriding duty is to the court and not the party instructing the expert.

**Consultation 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?**

42. There are a range of opinions on this matter. All however agree that if the power to make a loss of time order is to be retained by the CACD, it should be limited to a specific maximum, and the circumstances in which the power is likely to be invoked should be clearly articulated in order that defendants can consider whether to pursue any appeal on an informed basis.

**Consultation 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?**

43. For the reasons set out, we agree with this proposal, save that we think that such orders should be made only in the most extreme cases (such as an egregious pursuance of a clearly unmeritorious claim to the full Court having been warned by the single judge.)

**Consultation Question 21.**

**We invite consultees' views on whether the CACD should no longer be able to make loss of time directions.**

44. We do not suggest that the CACD should no longer be able to make loss of time directions. The proposal in Question 20, with which we agree, is sufficient to alleviate the concerns raised.

**Consultation 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?**

45. For the reasons set out, 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.

**Consultation Question 23.**

**We provisionally propose no change to the current arrangements for defence appeals against sentence in the Court of Appeal Criminal Division ("CACD"). Do consultees agree?**

46. We agree, in common with most consultees - see paragraph 1.34 of the consultation paper.

**We invite consultees' views on the tests applied by the CACD in appeals against sentences, specifically whether a sentence was "manifestly excessive", and on whether the tests could and should be codified.**

47. "manifestly" should be removed. It leads to inconsistent outcomes and to some meritorious appeals being dismissed because of imposition of too strict a test.

**Consultation 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 imposed at trial. Do consultees agree?**

48. We agree for the reasons given.

**Consultation 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?**

49. We agree for the reasons given.

**Consultation 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.**

50. (1) & (2) We agree. This will remove an anomaly. There is no other obvious offence to be added.

**Consultation 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.**

51. We agree with both for the reasons given. Whether an appeal is arguable is the standard test and should be adopted for unduly lenient sentences.

**Consultation 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?**

52. We agree for the reasons given. A level of independence from the prosecutor (usually, but not inevitably the DPP) is desirable.

**Consultation 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?**

53. We disagree. 28 days is adequate to keep the convicted person (and the prison authorities) uncertain as to whether the A-G will make an application to appeal. The A-G can expect the prosecutor to provide a sufficient assessment within that time. To allow extra time for third parties to refer the case to the A-G is not justified.

**Consultation Question 30.**

**We invite consultees' views as to whether some types of sentence appeals and references by the Attorney General to the Court of Appeal Criminal Division could be dealt with by a single judge rather than by the full court**

54. We agree generally for the reasons given. This is appropriate where the appeal is based on the imposition of an unlawful sentence which must be quashed, but not otherwise.

**Consultation Question 31.**

**We provisionally propose that children serving a sentence of detention for life should have the same right to a review of the minimum term as is available to a child sentenced to Detention at His Majesty's Pleasure ("DHMP"). We provisionally propose that this right should extend to young adults sentenced to DHMP or life imprisonment for offences committed as a child. Do consultees agree?**

55. We agree for the reasons given. This will remove an unjustifiable anomaly.

**We invite consultees' views on how far into adulthood this right should extend. Should it be:**
**(1) 21 years old (the age at which a person leaves a young offender institution);**
**(2) 25 years old (the age at which most people will be neurologically mature); or**
**(3) some other age?**

56. We consider the age should be extended to 25 years to accord with current expert opinion. Any age will be arbitrary, but any change based on an individual maturity will require expert assessment in each case, which would be unduly time-consuming and could lead to further inconsistencies in practice.

**Consultation Question 32.**

**We provisionally propose that reviews of minimum terms for children and young people on indeterminate sentences should be heard by the Court of Appeal Criminal Division. Do consultees agree?**

57. We agree for the reasons given. The alternative would be the High Court. Although that would involve some of the same judges who sit in the Court of Appeal Criminal Division, this process should be confined to the latter court to avoid the development of inconsistent practice and outcomes.

**Consultation Question 33**.

**We invite consultees' views on whether the current powers afforded to the Court of Appeal Criminal Division in relation to sentence appeals are sufficient to deal with a change of circumstance post-sentence? This includes a change in law (for example, the repeal of a type of sentence) or a change in the personal circumstances of the defendant.**

**We invite consultees' views specifically on whether those currently serving sentences of imprisonment for public protection ("IPP") should be entitled to challenge their IPP on an individual basis on appeal and, if so, what the test for quashing an IPP should be.**

58. There are a range of opinions on how the position of those currently serving IPP sentences may be resolved. We do not consider it to be possible within the scope of this consultation paper to express a settled view on the matter. However, all agree that the situation requires a bespoke resolution.

59. We note the recent report published by the Howard League for Penal Reform on "Ending the detention of people on IPP sentences"[3], in which a working group headed by Lord Thomas of Cwmgiedd, the former Lord Chief Justice, articulates constructive proposals for reform in this area, including in respect of appeals. This appears to represent the most comprehensive, fair and humane attempt that has yet been made to provide a route to cleansing the acknowledged stain on the criminal justice system that the IPP regime represents. The report achieves that in part by providing clearly reasoned methods of managing released individuals "in the safest way possible for the public". Among the six recommendations made is an "enhanced approach to criminal appeals", which would involve a proactive review by the CCRC of all IPP sentences in light of a number of recent successful appeals in this area. We commend that approach.

[3] https://howardleague.org/wp-content/uploads/2025/06/Ending-the-detention-of-people-on-IPP-sentences.pdf

**Consultation 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?**

60. We agree with the Law Commission's provisional proposal for the reasons set out, save in one respect. As set out in the Bar Council's response to the Issues paper, in addition to the two circumstances proposed by the Law Commission we also think that the following further circumstance should be included:

> (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;*

61. Whilst we note that the Law Commission refers to the safety test as encompassing this approach [e.g. 11.156] we think that this additional circumstance should be specifically set out in legislation. This is because it is an essential part of the threefold test that we previously proposed in our response to the Issues paper. As we stated then:

"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.

[*The additional circumstance above]* Category (i) above might comprise cases in which the concept of "lurking doubt" fed into the question of the materiality of any error.

62. The additional circumstance also reflects existing CACD practice [8.47] as encapsulated in the comments of Lord Bingham cited by the Law Commission at para 8.6:.

…Cases however arise in which unsafety is much less obvious: cases in which the court, although by no means persuaded of an appellant's innocence, is subject to some lurking doubt or uneasiness whether an injustice has been done. If, on consideration of all the facts and circumstances of the case before it, the court entertains real doubts whether the appellant was guilty of the offence of which he has been convicted, the court will consider the conviction unsafe.

63. We do not think that there can be any circumstance in which the CACD could conclude that a conviction might be unsafe but still decide to uphold the conviction.

64. Moreover, the inclusion of this additional circumstance is consistent with the proposals to (i) keep the lurking doubt test [see Q36] and (ii) the consequence of fresh evidence [Q17] and retrial, the proposed CCRC test [Q56].

**Consultation 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?**

65. We agree with the Law Commission'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.

66. In addition to where the Court thinks that the fresh evidence "could have led the jury to acquit" 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 we 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 Bar Council's response to the Issues paper.]

**Consultation 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?**

67. We agree with the Law Commission's proposal for the reasons set out.

**Consultation Question 37.**

**We provisionally propose that the Court of Appeal Criminal Division's ability to make a declaration of nullity and to issue a writ of venire de novo should be retained. Do consultees agree?**

**We invite consultees' views on how greater clarity might be achieved as to which procedural errors should render a trial or conviction a nullity.**

68. For the reasons set out, we agree with this proposal.

69. We consider the formulation of words in paragraph 8.172 to be an appropriate expression of which procedural errors should render a trial or conviction a nullity: "where there has been a defect so fundamental that no trial took place", this being illustrated by the situation where necessary consent to prosecute was not obtained.

70. We also note (with reference to paragraph 8.168(3)) that pursuant to the Supreme Court's recent decision in *R v Layden* [2025] UKSC 12 a failure to comply with the procedural requirements in s8(1) does not deprive the Crown Court of jurisdiction to retry a defendant.

**Consultation Question 38.**

**We invite consultees' views on the provisions requiring the Court of Appeal to quash a person's conviction on an appeal under:**

**(1) section 7 of the Terrorism Act 2000;**
**(2) schedule 3 to the Terrorism Prevention and Investigation Measures Act 2011;**
**(3) schedule 4 to the Counter-Terrorism and Security Act 2015; and**
**(4) schedule 9 to the National Security Act 2023.**

71. We agree that these provisions reflect anomalies in the law. It may even be that the provisions in 2011, 2015 and 2023 simply echoed that in 2000 without any significant legislative intention. We also understand that these provisions are scarcely used (hence the absence of authorities).

**Consultation 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?**

72. For the reasons set out, we agree with this proposal.

**Consultation 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?**

73. For the reasons set out, we agree with this proposal.

**Consultation Question 41.**

**We provisionally propose that where the Court of Appeal Criminal Division quashes a conviction, it should have a power to substitute a conviction for any offence of which the jury could have convicted the appellant if it is satisfied that the jury must have been sure of facts:**
**(1) which are not affected by the Court's findings in relation to the safety of the conviction which it has quashed; and**
**(2) which would prove the appellant to have been guilty of that offence.**
**Do consultees agree?**

74. Yes, for the reasons given in the consultation paper.

**Consultation Question 42.**

**We provisionally propose that, where a conviction is quashed by the Court of Appeal Criminal Division following a guilty plea, the test for substitution should be whether the trial judge must have been satisfied of facts (i) which are not affected by the Court's findings in relation to the safety of the conviction and (ii) which prove that the appellant was guilty of the alternative offence. Do consultees agree?**

75. No. Where there has been no trial the matter should be remitted to the PTPH stage. The trial judge will not likely have addressed their mind to the question of D's guilt and in any event, there is no reason why a decision to plead guilty on an incorrect premise which is later quashed should vitiate the defendant's right to a trial.

**Consultation Question 43.**

**We invite consultees' views as to whether the Court of Appeal Criminal Division should have a power to order a retrial on a broader range of offences than those of which the jury could have convicted the appellant "on the indictment", and how such a provision might be framed.**

76. No. This would potentially give rise to too much range for speculation (not least because the defence case may have been advanced differently if different offences had been charged) and difficulty in defining the scope of any such provision. There remains an importance in framing indictments to accurately reflect the allegations made by the state against defendants. That responsibility properly vests in the CPS or other prosecutor.

**Consultation Question 44.**

**We provisionally propose where the Court of Appeal Criminal Division quashes a conviction, and the jury had, as a result of that conviction, delivered a not guilty verdict on a lesser alternative charge, the Court should have a power to quash that acquittal:**
**(1) in order to enable that alternative charge to be available to a jury in a retrial on the conviction which has been quashed; or**
**(2) so that it might direct a retrial on the alternative charge.**
**Do consultees agree?**

77. No. A more straightforward solution would be to remove the power of the jury to acquit on a less serious charge when they convict on the more serious one. The lesser count could simply be left to lie on the file subject to further order of the trial court or the CACD. That (combined with our answer to the previous question) would meet any issues in this area.

**Consultation Question 45.**

**We invite consultees' views on whether, where it has ordered a retrial, the Court of Appeal Criminal Division should have the power to give leave to arraign out of time where it remains in the interests of justice for there to be a retrial, despite any failure by the prosecution to act with all due expedition.**

**If the Court were to have such a power, we provisionally propose that any failure by the prosecution to act with all due expedition should be a factor for the Court to consider when deciding whether to grant leave to arraign out of time. Do consultees agree?**

78. Yes, for the reasons given in the consultation paper.

**Consultation Question 46.**

**We invite consultees' views on amending the law so that where the Court of Appeal Criminal Division ("CACD") orders a retrial, a failure to arraign within two months without obtaining an extension from the CACD would not render a retrial a nullity.**

**We invite consultees' views as to whether such a change should have retrospective effect, so that existing convictions could not be challenged purely on the basis that leave to arraign out of time was not obtained.**

79. Yes (this is also considered in Q79, and see also the recent Supreme Court decision of *R v Layden* [2025] UKSC 12, referenced elsewhere in this response.

80. However, such a change should not in our view be made retrospective. By the time this proposal (if adopted) becomes law there will have been ample time to consider time limits. Any further delay is unlikely to result in unfairness to the prosecution.

**Consultation Question 47.**

**We invite consultees' views as to whether the maximum sentence available to a court at a retrial following a successful appeal against conviction should be limited to that imposed at the first trial, when the sentence at the original trial reflected the defendant's guilty plea.**

81. There should be no such limitation, and that should be made plain in statute.

**Consultation Question 48.**

**We provisionally propose that where the Court of Appeal Criminal Division quashes a finding of not guilty by reason of insanity, it should have a power to substitute a finding of not guilty of an alternative offence by reason of insanity. Do consultees agree?**

82. Yes, for reasons given in the consultation paper.

**Consultation Question 49.**

**We provisionally propose that where the Court of Appeal Criminal Division quashes a finding that an appellant who was unfit to plead did the act or made the omission charged, it should have a power to substitute a finding that the appellant did the act or made the omission amounting to an alternative offence. Do consultees agree?**

83. Yes.

**Consultation Question 50.**

**We provisionally propose that the Court of Appeal Criminal Division be given a power to order a further "trial of the facts" where the appellant is unfit to stand trial, but the findings of the jury are unsafe. Do consultees agree?**

84. Yes.

**Consultation Question 51.**

**We provisionally propose that the Court of Appeal Criminal Division should be given a power to order an appellant to stand trial where it finds that the findings of the jury in a "trial of the facts" are unsafe and the appellant is now fit to stand trial. Do consultees agree?**

85. Yes.

**Consultation Question 52.**

**We provisionally propose that where the Court of Appeal Criminal Division quashes a verdict of not guilty by reason of insanity, it should have the power to order a retrial. Do consultees agree?**

86. Yes.

**Consultation 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.**

87. We agree with the conclusions the Law Commission has reached on this issue, in particular that an informal practice has become a test, which in turn has become a high threshold, and that this is now an obstacle to the correction of miscarriages of justice.

88. Our primary position, as was set out in our response to the Commission's issues paper in 2023, is that appeals brought following a development in the law should not be treated any differently to any other appeal and that there should be no additional test or hurdle. A miscarriage of justice is a miscarriage of justice.

89. If it were considered that some additional requirement is justified in such cases, we would make the following proposals.

90. In relation to the ambiguity of the phrase "development in law" within s16C, we do not suggest that a statutory definition is necessary. The practical measure of whether an appeal is brought on such a basis would appear to be whether the ground of appeal is fundamentally reliant on an authority subsequent to the conviction. If the conviction is argued to be unsafe based upon a misapplication of the law as it then stood, notwithstanding that subsequent authority may further illustrate or strengthen the argument, then it is not an appeal that relies upon a development in law. If, however, the conviction would have been regarded as safe at the time based upon the law as it was understood but is now to be regarded

as unsafe due to a subsequent development in the common law that changed the principle in question in favour of the appellant (e.g. the abolition of parasitic accessory liability in *Jogee*), then that would be an appeal based upon a development in law. While the phrase is not defined in the statute, its application in practice does not appear to be the problem that requires reform.

91. The real issue is the test of "substantial injustice" both in terms of the inconsistency in its application and the high threshold justified by an exaggerated risk of "opening the floodgates". The test undoubtedly needs to be reformed and clarified (if not abolished completely).

92. We propose that a statutory test should apply only in the "forward-looking" sense, as routinely applied in trafficking/immigration cases, as to whether the appellant will suffer ongoing injustice if their conviction is not quashed. This would include circumstances where the conviction is a bar to obtaining citizenship or employment, and of course cases in which the appellant is still serving any aspect of their sentence (even if only in the form of notification requirements following a sexual offence or risk of recall under license). Cases that would be excluded would include spent convictions of no real significance to the appellant (e.g. if they would not otherwise be of good character), and cases in which there is another comparatively serious offence for which a conviction could be justly substituted with no significant reduction in sentence, thereby negating any sense of ongoing injustice. We propose that the test should be significant rather than substantial injustice – i.e. an extension of time should be granted as long as the ongoing injustice is not insignificant.

93. In relation to the "backward-looking" nature of the current test in terms of whether a substantial injustice *had* been done, there should be no higher burden than the safety test that applies in any appeal. There should be no room for refusing an extension of time that would otherwise be in the interests of justice simply because the ground of appeal relies upon a development in the law – this is where miscarriages of justice are allowed to continue in deference to the overstated floodgates argument.

94. The forward-looking significant injustice test should also apply in relation to extension of time to appeal to the Crown Court against summary convictions.

95. We do not propose the repeal of s16C CAA 1968. It would be expected that the CCRC would take account of the statutory test when making any referral, but that the Court of Appeal would retain the power to disagree with the CCRC's conclusion that the test is met. In relation to summary matters, the Crown Court would be obliged to hear an appeal referred by the CCRC in the usual way, the test simply being part of the CCRC's consideration of whether to refer.

**Consultation 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?**

96. We agree with the Law Commission's proposal for the reasons set out.

**Consultation 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?**

97. We agree with the Law Commission's proposal and the Law Commission's conclusion that the referral test is hindering the correction of miscarriages of justice [11.127], and the replacement with a non-predictive test.

**Consultation 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.**

98. In order to reflect the proposed new safety test, we propose 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.

**Consultation Question 57.**

99. –

**Consultation 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?**

100. We agree with the Law Commission's proposal for the reasons set out.

**Consultation 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?**

101. We agree with the Law Commission's proposal for the reasons set out.

**Consultation 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?**

102. We agree with the Law Commission's proposal for the reasons set out.

**Consultation Question 61.**

103. -

**Consultation 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?**

104. We agree with the Law Commission's proposal for the reasons set out.

**Consultation Questions 63.**

105. -

**Consultation Question 64.**

106. -

**Consultation 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?**

107. We agree with the Law Commission's proposal for the reasons set out.

**Consultation Questions 66.**

108. -

**Consultation Questions 67.**

109. –

**Consultation Questions 68.**

110. -

**Consultation 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?**

111. We do not agree with this proposal 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 here 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. It is submitted that neither approach is correct. The statutory role of the CACD in a conviction appeal in s.2 CAA 1968 is that they "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.

**Consultation Question 70**

112. –

**Consultation 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?**

113. Yes. The necessary balance between the accuracy principle, procedural practicality and fairness as between prosecution and defence has been fully and carefully considered in the Consultation. The acquittal guarantee and duty of the prosecuting authority to act in the public interest, as opposed to partisan self-interest, has ensured that appeals against terminating rulings are sparingly pursued. They remain however a necessary safeguard against judicial error.

**Consultation Question 72.**

**We invite consultees' views on whether a third party should have the right to appeal against decisions or rulings made in the course of a trial where unless they were to appeal forthwith, they would have no other adequate remedy in respect of the decision or ruling; and the decision or ruling is one:**
**(1) which affects the liberty of the third party; or**
**(2) which would amount to a contravention of their rights under the European Convention on Human Rights.**

114. We do not support the proposed extension of the right of appeal for third parties.

115. As a matter of principle, no third party should be deprived of their liberty as part of the trial process without the ability to challenge the court order. However, the scope for remanding third parties into custody is effectively limited to witnesses who refuse to co-operate once the trial has started (as in *R. (H) v Crown Court at Wood Green* [2007] 1 WLR 1670) or non-participants in the trial process who seek to disrupt the proceedings (and are dealt

with by way of contempt). An individual who is remanded following the issue of a bench warrant for failure to comply with a witness summons has the right to apply for bail, and to challenge their detention by way of *habeas corpus*. Accordingly, there is no need for any further right of appeal against decisions concerning the liberty of third parties within criminal proceedings.

116. As to appeals arising out of an interference with Convention rights, we would observe that anecdotally, the authority of *TB v Combined Court at Stafford* is not widely used (and may not be widely known). Whilst that case concerned Art 8 privacy rights, there would seem to be no reason in principle why it could not extend to the protection of a third party's other Convention rights. Currently neither the prosecution nor the defence have the right to appeal a disclosure decision relating, for example, to the decision to disclose, or not, a complainant's medical records. However, there is provision within the CrimPR for objecting to or applying to set aside a witness summons. Such applications may be made by third parties (typically the witness in question). Civil legal aid is available to a witness who applies to set aside a witness summons.

117. In those circumstances, we do not consider there to be a pressing need for a third party to have a right of appeal, particularly where other participants in the trial do not. Further, in practice, disclosure rulings under section 8 CPIA 1996 are often made shortly before, or at the outset of, the trial. In a multi-complainant case, a decision by one complainant to appeal a disclosure decision could have the result of aborting the trial and so impacting on the interests of the other non-appealing complainants.

118. Finally, a general right of any third party to appeal a decision which arguably breaches any of their Convention rights is too broad and could have unforeseen consequences. For example, Art 8 rights of relatives of the defendant could be asserted under this proposed provision. The consultation paper rightly recognises that delay and the impact on limited resources is a significant factor in limiting the scope of interlocutory appeals.

**Consultation 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?**

119. Yes, for the reasons given. The individuals most in need of reporting restrictions – complainants of sexual offences – receive automatic life-long anonymity and so there is no risk of judicial error.

**Consultation Question 74.**

**We invite consultees' views on the law relating to appeals concerning bail decisions. We invite views particularly on whether the time limit for detaining a person pending a prosecution appeal against a grant of bail should be reduced.**

120. We recognise the anomaly of bail being denied on the decision of a prosecutor, pending an appeal hearing, being longer than that which can be ordered by a court pre-charge. As recognised in the consultation paper this may be more of a theoretical problem rather than one encountered in practice. However, since there does not appear to be any principled reason for the contrary position, we do not oppose the proposed reduction.

**Consultation Question 75.**

**We provisionally propose that the list of prosecuting bodies able to appeal against a decision to grant bail should be reviewed and updated, and that the Post Office should no longer be included. Do consultees agree?**

121. Yes, noting in particular that the Post Office does not presently bring prosecutions (and nor does HMRC). We would also observe that it is likely to be appropriate for any review of the powers of the Post Office to await the report of Sir Wyn Williams and Parliament's response to it.

**Consultation Question 76.**

**We provisionally propose that the prosecution's ability to challenge an acquittal by a magistrates' court by way of judicial review be retained. Do consultees agree?**

122. Yes.

**Consultation Question 77.**

**We provisionally propose that the prosecution should retain the ability to seek to have an acquittal quashed where there is new and compelling evidence of the commission by the acquitted person of one of a limited number of serious offences (as currently provided for in the double jeopardy provisions in part 10 of the Criminal Justice Act 2003). Do consultees agree?**

123. Yes. The existing test sets the bar at an appropriately high level.

**Consultation Question 78.**

**We provisionally propose that the list of offences covered by the double jeopardy provisions in part 10 of the Criminal Justice Act 2003 should be extended to include the following:**
**(1) oral and anal rape, where not currently covered by the provisions;**
**(2) other penetrative sexual assaults under legislation predating the Sexual Offences Act 2003; and**
**(3) non-penetrative sexual assaults on children.**
**Do consultees agree?**

**We invite consultees' views on whether the list of offences covered by the double jeopardy provisions should be extended to include non-penetrative sexual assaults on adults and/or any other offences.**

124. This is effectively a question of policy for Parliament to determine. We do not have a view either way.

**Consultation Question 79.**

**We invite consultees' views on whether, where it has ordered a retrial under the double jeopardy provisions in part 10 of the Criminal Justice Act 2003, the Court of Appeal Criminal Division ("CACD") should have the power to give leave to arraign out of time where it remains in the interests of justice for there to be a retrial, despite any failure by the prosecution to act with all due expedition. If the CACD were to have such a power, we provisionally propose that any failure by the prosecution to act with all due expedition should be a factor for the CACD to consider when deciding whether to grant leave to arraign out of time. Do consultees agree?**

**We invite consultees' views on amending the law so that where the CACD orders a retrial under the double jeopardy provisions, a failure to arraign within two months without obtaining an extension from the CACD would no longer render a retrial a nullity.**

125. We agree that the broader interests of justice will be served by (i) giving the CACD power to give leave for arraignment out of time and (ii) removing the rule that a failure to arraign within two months without obtaining an extension from the CACD renders a retrial a nullity. As to (i), this proposal is consistent with the general direction of authority from the judicial committee of the House of Lords to prevent the breach of what are essentially arbitrary but mandatory procedural requirements causing manifest injustice as a result of what could be perceived as procedural pedantry (described as a "sea change" in approach by Fulford J in *R v Ashton* [2007] 1 WLR 181 at [77] applying *R v Soneji* [2006] 1 AC 340 (timetabling requirement under the Proceeds of Crime Act 2002) and *R v Clarke; R v McDaid* [2008] UKHL 8 (*obiter*, strong opinion that, absent statutory authority to the contrary, an

unsigned indictment should not render a conviction following a trial invalid). Any change to the law must of course be designed so as to avoid prosecutorial complacency and an expectation that any lack of due diligence will readily be excused. As to (ii), there is no justification for an absolute rule where otherwise the CACD has already determined that there should be a retrial.

126. See also the observations made in response to Q37 above as to the decision of the Supreme Court in *R v Layden* [2025] UKSC 12.

**Consultation Question 80.**

**We invite consultees' views on whether the existing law permitting the quashing of an acquittal and an order for retrial under part VII of the Criminal Procedure and Investigations Act 1996 works satisfactorily where at that retrial the defendant would be liable to be convicted of an alternative offence for which they already stand convicted.**

127. The circumstances in *Ivashikin aka Hounsome* are not often replicated, but there is no reason why they should not be in the scenarios identified in the Consultation. However on different facts, for example an acquittal of murder following the unaccepted offer of a plea of manslaughter on the grounds of loss of control, not only would a second conviction for manslaughter be in technical breach of *autrefois convict*, but alternatively, because the manslaughter conviction would be rendered a nullity, there would remain a risk of a complete acquittal by the second jury of both murder and manslaughter. That latter circumstance would not be in the interests of justice, since there is no question but that the original conviction for manslaughter was a properly reached verdict, no doubt on the direct admission in evidence by the defendant. A change in the law could both allow for an exception to *autrefois convict* and could consider the removal of the current necessary consequence that the conviction for the alternative offence was a nullity.

**Consultation Question 81.**

**We provisionally propose that appeals to quash a tainted acquittal under part VII of the Criminal Procedure and Investigations Act 1996 should be transferred from the High Court to the Court of Appeal Criminal Division ("CACD"). Do consultees agree?**

128. Yes.

**We invite consultees' views as to whether the CACD should be able to quash an acquittal where it is satisfied, to the criminal standard, that a criminal offence has been committed that involves interference with the course of justice, and it is likely that, but for the interference or intimidation, the acquitted person would not have been acquitted.**

129. We do not see the pressing need for reform in this area. The CPS can only identify one case since 2010. If there is to be reform, the proposed test would seem appropriate.

**Consultation Question 82.**

**We invite consultees' views as to how far the tainted acquittal provisions in part VII of the Criminal Procedure and Investigations Act 1996 and the double jeopardy provisions in part 10 of the Criminal Justice Act 2003 might be consolidated.**

130. –

**Consultation Question 83.**

**We provisionally propose that the right to refer a point of law to the Court of Appeal Criminal Division following an acquittal should remain with the Attorney General. Do consultees agree?**

131. Yes.

**Consultation 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?**

132. Yes. Though we note that the Government has proposed amendments to the time limit for a ULS referral in the CACD, in the Victims and Courts Bill.

**Consultation Question 85.**

**We provisionally propose that the Attorney General and the acquitted person should have the same rights to appeal against the Court of Appeal Criminal Division's judgment following a reference on a point of law as the prosecution and defendant would have on an appeal against conviction. Do consultees agree?**

133. Yes.

**Consultation Question 86.**

**We provisionally propose that the prosecution should not have a right to appeal against a defendant's acquittal in the Crown Court on a point of law. Do consultees agree?**

134. Yes, for the reasons given. In addition to the terminating ruling procedure, the prosecution in prescribed cases can appeal against a ruling of law in a preparatory hearing. In the most significant and serious cases such rulings are commonly made in advance of trial, precisely so that the trial can later proceed on a clear and correct legal basis. If there is need for reform, we suggest that the appropriate course would be to enhance the category of offences for which a preparatory hearing can be held.

**Consultation 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?**

135. We agree with the Law Commission's proposal for the reasons set out.

**Consultation Question 88.**

**We provisionally propose that the Supreme Court should be given a power to remit a case back to the Court of Appeal Criminal Division or the High Court so that the Supreme Court's answer to the question of law can be applied to the facts of the case, and so that the lower court can address any outstanding grounds of appeal. Do consultees agree?**

136. Yes, save time and costs. See Coutts.

**Consultation 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?**

137. We agree with the Law Commission's proposal for the reasons set out.

138. 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)?

**Consultation 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?**

139. Yes. The evidence rehearsed in the consultation paper is compelling.

**We invite consultees' views on whether retention periods should be extended further, and for how long.**

140. Realistically, the principled options are retention for the full term of the sentence or retention for life in every case. Any other period would be arbitrary and inevitably there will be meritorious cases which fall just the wrong side of the cut-off period. There may very well be practical opposition to life-long retention of electronic data (as identified by the SFO) and real evidence – for example clothing and other items which may contain DNA. Other stakeholders are better equipped to provide evidence-based submissions.

**Consultation Question 91.**

**We provisionally propose that the retention period for children should be extended to at least the end of their sentence or at least six years after they turn 18 years old, whichever is longest. Do consultees agree?**

141. Yes.

**Consultation Question 92.**

**We provisionally propose that unauthorised destruction, disposal or concealment of retained evidence should be a specific criminal offence. Do consultees agree?**

**We invite consultees' views on the scope of such an offence.**

142. We submit that the existing offences of perverting the course of justice and misconduct in a public office sufficiently reflect the level of culpability necessary in order to criminalise the actions of police officers or others in respect of the unauthorised destruction, disposal or concealment of retained evidence. There may be sound public policy reasons for criminalising

the simple reckless destruction of property; we do not express a view but would hope that they would be identified and thoroughly analysed before enacting the proposed reform. For example, would criminalisation act as a deterrent where none currently exists? Such a justification would surely be needed before concluding that a new offence will serve to protect the rights of those falsely accused of crime. The experience of trial lawyers is that evidence can be lost at a number of different stages in the investigation and trial process, including at court during a trial. While that is plainly undesirable, it is not clear to us that the risk of this happening is likely to be reduced by the introduction of a criminal sanction, particularly in the absence of a requirement of malign intent.

**Consultation Question 93.**

**We invite consultees' views on whether responsibility for long-term storage of forensic evidence should be transferred to a national Forensic Archive Service**.

143. Other stakeholders will be better placed to comment. Any revised process to ensure the safe retention of material would be welcome.

**Consultation 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?**

144. We agree that post-conviction disclosure should be provided with a statutory framework.

145. However, in respect of (1) there is no reason to depart from the established disclosure process that the decision whether to provide material to the defence pursuant to CPIA 1996 is made by the prosecutor (rather than the police). The handing over of material pursuant to that decision may be made via the agency of the police. It is not clear why the case of *Nunn* is being misapplied by both the police and, by virtue of its Disclosure Manual, by the CPS. The cited evidence indicates that the practice is widespread and that only by imposing clear duties will the correct procedure be followed. It is agreed that the new duties should be incorporated into CPIA 1996 rather than the Code of Practice.

146. In (1) and (2) should there be a test of reasonableness as to whether there is an arguable ground? It is not clear why the test as drafted requires an 'arguable' ground in respect of an appeal against conviction but not sentence. In one sense this is semantic, since any ground of appeal is only arguable until the appeal court finds in its favour. No-one would suggest the contrary, namely that an unarguable ground of appeal should trigger disclosure. The police certainly need clarity in this regard. We suggest a test of: *"might reasonably give rise to a ground"*.

147. As to (3), we can foresee a difficulty in mandating dissemination of material subject to PII to the CCRC. This material may relate to highly confidential/classified information which, if revealed, would present an immediate risk to national security and/or the safety of individuals. The CCRC can speak to their own internal processes, but before any reform as drafted in put in place, there should surely be at the very least a system of training and accreditation for the administrative staff who receive and store such material. Rather, we suggest that where there is such material in the possession of the investigating/prosecuting authorities, then, as the current procedure dictates pursuant to CPA 1996, if the material passes the new post-conviction disclosure test, it should be placed before a court for determination as to its use, applying the well-established principles in *H and C* (as revised as necessary). The are obviously procedural and resource implications, but the risks of unauthorised disclosure are too great – hence the current regime.

**Consultation 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?**

148. Yes, in theory and subject to our suggestion as to an alternative trigger test (with reference to reasonableness) as set out in the response to Question 94. Is the absence of the qualification of 'arguable' to the ground of appeal deliberate? Also, the requirement to provide access to material for testing should make clear that the assessment as to whether the material 'might afford grounds' (or a revised test as we suggest) is an assessment to be made by the police not the convicted person. That is, it is not sufficient for the convicted person simply to assert that they have a ground of appeal. (That may be another justification for the introduction of a reasonableness test into this stage of the process.)

**Consultation Question 96.**

**We invite consultees' views on whether provision could and should be made to enable disclosure of material for the purposes of responsible journalism to reveal a possible miscarriage of justice.**

149. There is no easy answer. Whilst on the one hand 'responsible' journalism can and should form an important and influential role in revealing genuine miscarriages of justice, on the other, identifying 'responsible' journalism in advance is difficult and cannot easily be reduced to statutory definition. It may be that applications will need to be made to the court on a case-by-case basis rather than enacting a blanket exception. That is not ideal but is better than there being no exception. It is noted that the exception is not required to permit investigative journalism into miscarriages of justice in the first place, as is evident from the cited examples in the Consultation. The most important aspect of this procedure is that the material is disclosed to the convicted person's legal team. A blanket exception for further disclosure for journalistic purposes (however defined) is unlikely to identify a miscarriage of justice which otherwise will remain hidden. Others may however be better placed to comment on this.

**Consultation Question 97.**

**We provisionally propose that where a person is sentenced to a term of imprisonment, audio recordings and transcripts of their trial should be retained for at least the duration of the sentence (including the time where the person is liable to be recalled to prison). Where**

**a person is sentenced to life imprisonment, audio recording and transcripts of their trial should be retained for the remainder of their life. Do consultees agree?**

150. Yes.

**Consultation 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?**

151. Yes. Since the only restriction on the obtaining of transcripts by legal advisers seems to be cost-based, there can be no reason not to give access to the audio recordings. Often convicted persons engage a new legal team to investigate the possibility of an appeal, and this can present difficulties in understanding what detailed evidence was given on a particular point. The client's recollection will necessarily be imperfect and partial.

**Consultation Question 99.**

**We provisionally propose that the test for compensation following a wrongful conviction should not require an exonerated person to show beyond reasonable doubt that they are factually innocent but should require them to show on the balance of probabilities that they are factually innocent. Do consultees agree?**

**We invite consultees' views on who should decide on compensation.**

152. The proposal has the attraction that it mirrors (in some respects) a civil damages claim.

153. However, as the consultation paper identifies, there will be many instances when individuals deserving compensation cannot prove their innocence even to a civil standard, for example where: (a) evidence amounting to such proof has been lost or destroyed, or (b) the circumstances of the alleged offending militate against any such proof of innocence.

154. It may be that, rather than automatically excluding these applicants, the better course would be to revoke subsection 1ZA and replacing it with a provision allowing the Secretary of State to refuse to pay compensation where to do so would not be in the interests of justice - for example where, notwithstanding a wrongful conviction, the individual is or may have been guilty of a related offence – subject to review on public law grounds.

155. However, there are a range of views on this matter, and we are not therefore able to express a settled opinion.

**Consultation Question 100.**

**We invite consultees' views on whether compensation for a miscarriage of justice should be available to those whose conviction was quashed on an in-time appeal.**

156. Given the need to prove innocence by the production of new evidence there is no readily discernible reason why an earlier appeal should mean a person is not entitled to compensation. It may also lead to the perverse situation that individuals are incentivised to wait – or at least not incentivised to act swiftly – in bringing appeals. While delay may risk the appeal itself not being heard, if this is an appeal in circumstances of compelling evidence capable of proving innocence, *ceteris paribus*, its merits are likely to result in it being heard even out of time.

**Consultation Question 101.**

**We provisionally propose that where a person's conviction is quashed, and they can demonstrate to the requisite standard that they did not commit the offence, they should be eligible for compensation whether or not this was the reason for the Court of Appeal Criminal Division quashing their conviction. Do consultees agree?**

157. We agree.

**Consultation Question 102.**

**We provisionally propose that victims of miscarriages of justice should be entitled to support in addition to financial compensation. Do consultees agree?**

158. We agree.

**Consultation Question 103.**

**We provisionally propose that when a conviction is quashed, HM Courts and Tribunals Service should liaise with the relevant police service to ensure that the Police National Computer is updated to remove the relevant conviction. Do consultees agree?**

159. We agree with these proposals for the reasons given in Chapter 16.

**Consultation Question 104.**

**We provisionally propose that where there is evidence of a widespread problem calling into question the safety of a number of convictions, a review of convictions should**

**normally fall to the Criminal Cases Review Commission, if necessary using its powers to require other public bodies to appoint an investigator. Do consultees agree?**

160. We agree for the reasons given in Chapter 17.

**We invite consultees' views on any other measures which might be put in place to enable the correction of multiple miscarriages of justice when a systemic issue is identified.**

161. We do not propose any further measures.

**Consultation Question 105.**

**We provisionally propose there should be greater use of inquiries following a proven miscarriage of justice. Do consultees agree?**

162. There are a range of opinions on this matter, and we are unable to express a settled view here.

**Consultation 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.**

163. Again, there are a range of opinions on this matter, and we cannot express a settled view here.

**Consultation Question 107.**

**We invite consultees' views if they believe or have evidence or data to suggest that any of our provisional proposals or open questions could result in advantages or disadvantages to certain groups, whether or not those groups are protected under the Equality Act 2010 (age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation), and which those consultees have not already raised in relation to other consultation questions.**

164. -

**Consultation 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.**

165. -

**Bar Council**

**June 2025**

For further information please contact:

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