RESPONSE TO THE LAW COMMISSION'S

"CRIMINAL APPEALS: ISSUES PAPER"

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This paper seeks to respond to a select number of questions asked in the comprehensive and detailed Law Commission's Issues Paper on Criminal Appeals.[1] It is submitted by, and represents the views of, three independent barristers at Doughty Street Chambers with experience of criminal appeals.[2] (*The contents do not represent the views of Doughty Street Chambers.*)

A. INTRODUCTION

1. We consider that there is an overwhelming need for reform to the criminal appeals system. There has been no holistic re-consideration of the efficacy of the system of appeals and review of criminal related matters since the Runciman Commission in 1991. The changes in technology, practise and procedure, and a vastly increased (and increasingly) case load means that the existing system is not fit for purpose and, crucially, it has failed to identify and correct an increasing number of miscarriages of justice.

2. The reality is that whatever improvements are made, the system will continue to be hampered significantly by wholly inadequate public funding – both in terms of legal representation, the Criminal Cases Review Commission [CCRC], and the very fabric of the criminal justice system [CJS] including court buildings, and the prison estate. We recognise that funding of the CJS is out with the Law Commission's remit and our responses are directed towards some of the specific issues raised in the questions posed. However, we submit that it would be artificial to ignore the profound impact of the failure to provide adequate funding on the viability of any proposed changes.

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

[2] Paul Taylor KC also contributed to the response made on behalf of the Bar Council which can be found (when published) at https://www.barcouncil.org.uk/policy-representation/consultations.html. These present submissions are made separately and in addition to those.

3. We also submit that the central features of proposals for amendments to the existing appeal system should be to seek to encourage / direct the CCRC and CACD to take a more generous approach to the consideration of appeals against conviction and sentence, and that the procedural framework should be more accommodating to applicants who are often unrepresented and unfunded.

B. THE QUESTIONS AND OUR RESPONSES

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

4. **QUESTION 1: OUR RESPONSE**

5. The purpose of the criminal appeals system is to rectify errors / omissions that occurred at first instance. This should include intervening where there has been a procedural irregularity, an unfair trial or where the CACD has a "lurking doubt". It should not be limited to intervening only where the innocence of the appellant is established.

6. **Should the jury give reasons for its decision?**

7. Whilst we recognise that juries sitting in the Coroner's Court can produce sophisticated narrative verdicts, our view is that requiring juries to give reasons for their decision in criminal trials (where, unlike Coroner's Courts, the liberty of the subject is often at stake) is fraught with difficulties, is likely to prolong proceedings, and in any event may serve no useful purpose in the majority of cases.

8. The primary need for reasons would be to enable the parties to identify potential errors in the jury's decision. However, obtaining the amount of information that would be required for this purpose may be problematic. The Judge's summing up would need to be extended to include directions as to what matters they had to include in the reasons and, in anything other than the most simple cases, the form of the reasons may need to cover the factual findings made in relation to the various witnesses, the elements of the offence, and the findings made on the steps of the route to verdict. Requiring all members of the jury to agree to the contents of such reasons may be too onerous and time consuming to be

effective. Moreover, there will be cases in which not all members of the jury are required to agree on the factual basis (see eg. *Browne* (1984) 79 Cr. App. R. 11). This would add a further unnecessary layer of complexity to the procedure.

9. **Power to make inquiries into the behaviour of jurors in the jury room.**

10. Our view is that where serious allegations of impropriety have been made, there should be limited powers to make inquiries of jurors relating to behaviour in the jury room (rather than only when related to extraneous events away from the retirement room).

11. We consider that the following safeguards should apply:
    a. This power should be restricted to the CACD (including the single judge), and the CCRC.
    b. Investigations should be conducted by a senior police officer;
    c. The report of such investigations should not disclose the identity of individual jurors without the express direction of the CACD.

Question 2.
10.2 Is there a need to reform the processes by which the decisions of magistrates' courts in criminal cases can be appealed or otherwise reviewed?
10.3 In particular:
(1) Should the ability to challenge decisions of a magistrates' court through appeal by way of case stated or judicial review, be retained, abolished or reformed (and if reformed, how?)
(2) Should a leave requirement be introduced in respect of appeals from the magistrates' court to the Crown Court? If so, should the grant of leave to appeal be followed by a re-hearing or a review of the magistrates' court's decision by the Crown Court?

QUESTION 2: OUR RESPONSE

12. We recognise that there are strong arguments to unify the routes of challenge to the decisions of magistrates. We would seek to respond to this issue at the full consultation stage. However, in relation to the existing system we make the following submissions:

13. **Judicial Review and Case Stated**

14. The public funding regime in respect of criminal judicial review and appeals by way of case stated is lamentable. The process of obtaining approval from the LAA can often take longer than the period of time afforded for submitting the appeal itself, the procedure for seeking funding is poorly understood by practitioners, and the rates of pay are derisory.

15. It is our experience that appeals by way of case stated remain relatively uncommon but are typically plagued by confusion – the legal and procedural distinctions between case stated appeals and judicial review are by and large, poorly understood. Confusion often reigns supreme at the stage when the relevant court is asked to state a case. It is not uncommon for courts to delay in responding and for magistrates to be unaware of what an appeal of this nature is. Courts often do not understand who drafts the case, or how it is supposed to be drafted. Cases have been stated where there has been and remains significant factual dispute.

16. It is submitted that, owing to the typical lack of understanding of the case stated procedure among solicitors and courts and the needlessly complicated funding route for legal aid, the 21-day time limit is, by some margin, too short and is often a reason why the procedure cannot be used at all.

17. Moreover, given that the Crown Court has discretion to extend time in respect of a case stated from it, in its appellate capacity, it makes little sense why the magistrates' court should not have the same discretion.

18. The High Court currently has no power to amend a case, it can only remit the case for amendment by the magistrates (*Ferko v. Ealing Magistrates Court* [2023] EWHC 1817 (Admin)); such a power should exist.

19. **Appeal to the Crown Court**

20. In respect of the right of appeal to the Crown Court by way of a de novo hearing, we note that this right exists in the context of the magistrates' court not being a court of record, which therefore has no record of evidence, and is presided over largely by lay magistrates. That being the essential nature of the first instance jurisdiction, there is simply no record

of the evidence nor of any of the proceedings beyond a basic court log and the notes of the legal adviser (which for obvious reasons cannot constitute a transcript of evidence).

21. Against that background, it is arguable that a de novo hearing is the only logical and fair way in which to allow the Crown Court, in its appellate capacity, to determine an appeal against conviction or sentence.

Question 6.

10.8 Is there evidence that the Court of Appeal's approach to "lurking doubt" cases (not attributable to fresh evidence or material irregularity at trial) hinders the correction of miscarriages of justice? ***Paragraph 4.145***

QUESTION 6: OUR RESPONSE

22. The role of the CACD is to rectify miscarriages of justice, and that this supervisory role has been recognised as extending beyond that of the trial judge [*Ariobeke* [1988] Crim LR 314.]. Within that context, the "lurking doubt" test has been seen as a powerful tool for the CACD that allows it to correct an injustice after an overview of all the evidence but where no one single factor can be identified as a basis to quash the conviction.[3]

23. It is therefore submitted that the CACD ought to retain a special/residual jurisdiction (however it be defined) to quash a conviction in the absence of fresh evidence/judicial misdirection/jury irregularity. In short, the Court must retain the ability to grapple with cases which cannot be brought within the paradigm 'grounds of appeal' established since the CAA 1968. Such a jurisdiction is in the interests of justice.

[3] As to the current approach, the decisions in *Heron* [2005] EWCA Crim 3245, *Pope* [2012] EWCA Crim 2241 and in *R v D* [2013] EWCA Crim 1592 mean that the CACD will only in truly exceptional circumstances (if ever) entertain lurking doubt appeals. Based on an analysis on Westlaw of the citation of the key cases of *Pope* (supra) and *Cooper* [1969] 1 QB 267, the decision in *Pope* has been cited only 16 times since it was handed down 11 years ago. The decision in *Cooper* has been cited 62 times by the CACD, COA (NI), JCPC, HoL and Courts Martial Appeal Court since 1969. The Court of Appeal (Northern Ireland) at paragraph 32 of *R v Pollock* [2004] stated, inter alia that: *4. The Court of Appeal must be persuaded that the verdict is unsafe but if, having considered the evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal.*

24. Within this context, we would invite the Law Commission to consider whether a "lurking doubt" test should be extended to allow the consideration of evidenced that may not be strictly admissible. So, where for example, there is fresh evidence that undermines the safety of the conviction or may do so, the CACD should not be prevented from taking it into account "because of a technical rule of evidence", but should "receive the evidence under Section 23(1)(c) of the Criminal Appeal Act 1968 and, having done so, to evaluate the significance of that material."[4]

25. To the extent that the CACD is hostile to the use of the term 'lurking doubt', it is hard to reconcile such deprecation with the language of the safety test. The safety test permits the Court to quash a conviction when it "thinks" that a conviction is unsafe. Whilst there are obvious reasons why the Court will not and should not interpret that test in such a manner as to usurp the function of the jury, it is equally obvious that the CACD is enjoined to subjectively consider the evidence in order to determine if a conviction is unsafe. That in exceptional circumstances, it will quash a conviction "based on a reasoned analysis of the evidence" (*Pope* at [14]) should not be seen as controversial – either at all, or by reference to what Parliament plainly intended when it enacted s.2 CAA 1968 (as amended in 1995).

[4] This was the approach taken in the case of ***Oyston*** (Owen) by both Lord Bingham CJ in the renewed leave application and then by Lord Philipps CJ in the full hearing: 96/4193/Y4 (12.6.97) (9.12.97) Lord Bingham CJ granted leave for an Appellant to rely upon a number of witness statements which would not have been admissible at the trial, but which went to the credit of the complainant prosecution witness. "If it proved such as to lead us to doubt the credibility of the complainant, we would be loth to entertain argument that the convictions should nonetheless stand because of a technical rule of evidence against the admissibility of evidence going solely to credit. Mrs. Grindrod's primary contention was that the evidence, on its face, did nothing to undermine the safety of the conviction. She was content to rely upon, what she submitted were, patent weaknesses in the evidence without seeking to cross-examine the various witnesses. In these circumstances, we decided that the convenient course was to receive the evidence under Section 23(1)(c) of the Criminal Appeal Act 1968 and, having done so, to evaluate the significance of that material" At the full hearing, Lord Philips CJ (pp. 13-14), referred to Lord Bingham and stated that they understood that the full Court in granting leave: "…ruled that we should give the new material such weight as it deserves when considering the extent to which the credit of J. might have been shaken had it been available to the defence at the time of the trial. The Court did not consider, however, that it amounted to evidence which could be placed before the jury. …It seemed to us somewhat arid to invite lengthy argument about the basis upon which we should consider the significance of the new material.

Question 18.

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

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

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

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

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

29. Our view is that in light of the CACD's literal and restrictive interpretation of s. 18, it is difficult to see what 'deficiency in a member of the jury' could be that would render a conviction unsafe if it was not raised at trial.[5] How would one (or indeed more) 'defective' jurors render a conviction unsafe? Moreover, the reference to majority verdicts is troubling.[6] If the trial proceeded on the basis of there being 12 participating jurors— and the defendant was entitled to this number— but in reality, only 11 participated, the CACD cannot know what impact the absence of the twelfth juror may have had on the discussions and verdict. [7] Against this background, such a strict reading of s. 18 appears to violate Article 6.

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

31. **Should the power to make a "loss of time" order [LOTO] be amended or removed? [4.21]**

32. Whilst we recognise that unmeritorious applications for leave require the resources in the Criminal Appeal Office, we do not think that an applicant who seeks to challenge his conviction or sentence should be penalised by a loss of time direction – particularly where public funding for a second opinion advice is almost non-existent and many applicants are unrepresented. [We note that in extradition cases there is no penalty for pursuing an unmeritorious appeal.]

[5] *Raviraj* (1987) 85 Cr App R 93, 100. ('Without attempting to formulate examples of circumstances which might give rise to such a situation, we accept the possibility of their existence.')
[6] As is the reliance in *Raviraj* (1987) 85 Cr App R 93, 100 on the fact that although a juror had been found to have been disqualified as a result of having been a police officer some years earlier, the law changed 10 months after the trial and he would have been allowed to sit: '. . . we see no reason to suppose that he would in any way have been a different person or held a different outlook'.
[7] See *Hambery* [1977] 1 QB 924, 929E; *R v Sheffield Crown Court, Ex parte Brownlow* [1980] QB 530, 541: *Goodson* [1975] 1 WLR 549, 552; *Newton Spence v The Queen* [PC Appeal No. 47 of 2000], [17]; *The People v Allen and Johnson* [Supreme Court of California] [2] .

33. We take this view for the following reasons:

a. The making of a LOTO at the single judge stage is unfair where the applicant is unrepresented and had no specific warning before the order is made. Such an applicant may be unaware of the lack of merit in their application. They may be unrepresented as a result of a lack of public funding, or because they raise grounds that criticise the original legal team and they are unable to find alternative representation.

b. The making of a LOTO is arbitrary, making it very difficult to advise a lay client on this issue. Apart from requiring a finding that the application was "meritless", there are no other guidelines, and different single judges and full Courts may take varying views as to what is meritless, which cases require a LOTO and what the duration should be.

c. A LOTO is often a disproportionate penalty for what is in effect a vexatious litigant. If made it should be proportionate to the length of the original sentence and not an apparently arbitrary figure, applied irrespective of the impact on the individual offender. The general length of the orders imposed has varied considerably[1], and can amount to around two or three months. There is no stated maximum. Such orders can amount to the imposition of a significant period of additional detention. On the basis that the period of time ordered to be "lost" has already been served in full, an equivalent sentence passed by a court at first instance would be double that period. (This is on the basis that an offender serves half the length of sentence actually imposed.) For example, a three-month loss of time order is the equivalent of an additional six-month term passed at first instance.[1] This is a relatively lengthy sentence for pursuing an unmeritorious appeal, particularly when compared to offences for which a similar sentence would be passed.

d. If the order is set without taking into account the length of the initial sentence, it is arguable that it may be arbitrary and disproportionate. This is because the impact on the individual offender will vary considerably for what is effectively the same level of culpability. For example, an additional three months may have greater impact on an offender who received an initial nine-month sentence—with a release date only weeks away—than an offender serving a 10-year sentence. This point can be demonstrated by reference to the individual penalties assessed

as a percentage of the original sentence that would be actually served by each applicant in these cases.[8]

e. Moreover, it is difficult to discern any significant variations in the level of culpability in each case.

f. There is a very limited scope for challenging the length of these orders. There is no possibility of a point being certified for the Supreme Court because there has not been an "appeal", only an unsuccessful application for leave to appeal (see the Criminal Appeal Act 1968 s.33(1)), and an application to the European Court of Human Rights is unlikely to be heard in time to make any difference to the time served unless the initial sentence was of a very significant length.

34. However, if the Law Commission is of the view that the power to make such an order should remain, we submit that it should only be in exceptional circumstances (egregious pursuance of a clearly unmeritorious claim to the full Court having been warned by the single judge.) There should be clear guidance as to when such orders will be made and the duration.

a. We submit that the approach taken by the Privy Council in *Ali v Trinidad and Tobago* [2005] UKPC 41; [2006] 1 W.L.R. 269 (see also *Young v Trinidad & Tobago* [2008] UKPC 27) should be followed:

i. Such orders should not be restricted to exceptional cases;

ii. It is wrong in principle to take into account the heinousness of the original offence or lack of remorse, these being relevant only to the original sentence;

iii. The direction for loss of time should be proportionate, that is it should impose a penalty for bringing or persisting with a frivolous application which fairly reflects the need to discourage wasting the court's time without inflicting an unfairly long extension of imprisonment upon the applicant. Whilst the length of such orders was a matter for each appellate court in each individual case, the Board would not expect them to exceed a few weeks in the large majority of cases. (Ali at [16] and [17].

[8] See commentary by Paul Taylor on *Gray and others* [2015] Crim LR 352

b. One solution to these concerns may be for the Court of Appeal to add a fixed percentage of the original sentence term, with a maximum of two weeks (equivalent to a one month sentence).

END