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Submitted to Law Commission: 14th Programme of Law Reform
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About you

What is your name?

Name:
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Email:
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What is your telephone number?

Telephone number:
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Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Response on behalf of organisation

If other, please state: :

If you are responding in a personal capacity, please tick the boxes that best describe you:

If you work in a third sector/business organisation, please state the nature of the organisation: :
A charity and law practice that fights miscarriages of justice and demands reform of the criminal justice system.

If you a practising lawyer, please state your specialist area::

If you are an academic, please describe your specialist area::

If you are a member of the judiciary, please state your court or tribunal::

If you are a government official, please state your department::

If other, please state: :

If you are responding on behalf of your organisation, please state the name of your organisation

Enter the name of your organisation:

APPEAL (working name of the Centre for Criminal Appeals)

Your idea for reform

Consultation Question 1

Please share your views below: :

Disclosure of evidence in Crown Court trials and at the post-conviction stage

Trial disclosure:

1. The current disclosure regime provided by the Criminal Procedure and Investigations Act 1996 ('CPIA 1996') gives rise to an unacceptably high risk of defendants in Crown Court trials being deprived of exculpatory evidence and consequently wrongly convicted.

2. Fundamentally, this is because the regime requires police officers and prosecutors to make assessments about the sensitivity, relevance, and exculpatory value of material which they are ill-suited to make. In an adversarial system where law enforcement seeks the conviction of an individual, it is

misguided to rely on police officers to determine what material the prosecution sees, and on the prosecution to decide what material the defence sees.

3. In the more than two decades the CPIA 1996 disclosure regime has been in force, there have been plentiful examples of collapsed trials and miscarriages of justice resulting from disclosure failures. There have also been several reviews and inquiries into the operation of the disclosure process, all of which have identified serious shortcomings. Repeated recommendations of improved training and culture change have proved ineffective because the regime is fundamentally flawed.

Post-conviction disclosure:

4. The law on post-conviction disclosure as set out in R (Nunn) v Chief Constable of Suffolk Constabulary [2014] UKSC 37 and section 138 of the Attorney General's Guidelines on Disclosure 2020 leaves wrongly convicted defendants without an effective means of accessing any evidence held by law enforcement that undermines the safety of their conviction. Essentially, this is because it places those seeking post-conviction disclosure in a Catch-22. To make a successful request, the law requires a requestor to pinpoint the existence of specific exculpatory material held by law enforcement – yet the only means of discovering that such material exists will almost always be through having access to law enforcement material and proactively searching for it.

5. Further, the current law makes police forces and the Crown Prosecution Service ('CPS'), who have little incentive to open their past actions to scrutiny, the gatekeepers to evidence.

6. The existence of the Criminal Cases Review Commission ('CCRC'), which has statutory access to law enforcement material, does not remedy the inadequacies of the current post-conviction disclosure regime. This is because
a. the CCRC is effectively inaccessible to those who have not already sought to appeal their convictions (which they may not be able to do without access to post-conviction disclosure that affords a ground of appeal); and
b. the CCRC uses its investigatory powers conservatively, sometimes even applying the narrow Nunn rationale in deciding whether to obtain and review material.

Consultation Question 2

Please share your views below: :

Trial disclosure:

7. To give an anonymised example from an APPEAL case: our client served almost two decades in prison based largely on the evidence of two witness presented to the jury as "honest". His trial defence representatives specifically requested disclosure of all prosecution witnesses' previous convictions. However, many years after his trial we discovered these two witnesses' criminal histories, which greatly diminish their credibility, had been withheld. It appears that the police failed to notify the CPS of the existence of this plainly exculpatory evidence.

Post-conviction disclosure:

8. APPEAL client Roger Khan, a vulnerable man with dyslexia who maintains his innocence, was convicted of attempted murder in 2011 after representing himself at trial. After taking on his case, APPEAL discovered that an investigating officer in the case had an undisclosed personal relationship with an alternative suspect - a man whose alibi the jury specifically asked for and whose DNA cannot be eliminated from items linked to the crime scene. The officer was in charge of coordinating phone enquiries in the case and, troublingly, the alternative suspect's phone records appear to have escaped scrutiny.

9. In such a case, the CCRC should have reviewed the full police file in the case to examine how this undisclosed relationship may have contaminated the police investigation and prevented evidence implicating the alternative suspect, rather than Mr Khan, from coming to light. Instead, it approached the police force in question for its views and left satisfied that "appropriate safeguards" were put in place, without disclosing to us what those safeguards were.

10. We therefore submitted a post-conviction disclosure request to the police force ourselves. The police refused it. Our attempt to challenge this decision via judicial review was dismissed, with the judge ruling that the Nunn disclosure threshold was not met. The unrealistically high bar set by the current law is preventing Mr Khan achieving access to justice.

Consultation Question 3

Criminal law

If other, please state: :

Consultation Question 4

Please share your views below::

11. Trial disclosure:
a. Hannah Quirk, 'The Significance of Culture in Criminal Procedure Reform: Why the Revised Disclosure Scheme Cannot Work' (2006) 10 E. & p. 42;
b. Tony Shaw QC, 'The inherent difficulties of the current CPIA regime' (2019). Contact the author for text;
c. Marika Henneberg, 'Disclosure failures in England and Wales: Causes, controversies and challenges'. International Journal of Law, Crime and Justice, December 2019.

12. Post-conviction disclosure:

a. Dennis Eady and Holly Greenwood, 'Re-evaluating post-conviction disclosure: A case for 'better late than never'', International Journal of Law, Crime and Justice, December 2019;
b. Carole McCartney and Louise Shorter 'Exacerbating injustice: Post-conviction disclosure in England and Wales' International Journal of Law, Crime and Justice, December 2019.

Consultation Question 5

Please share your views below: :

Post-conviction disclosure

13. In Louisiana in the United States, the State's public records law allows those investigating potential miscarriages of justice to access the full files held by police and prosecutors on a case once a conviction is final. This approach, dismissed by some in England as 'keys to the warehouse', allows appeal lawyers to identify exculpatory material that was withheld at trial. According to Innocence Project New Orleans: "Of the 48 people in Louisiana who have been exonerated since 1990, at least 43 exonerations were based on public records" (https://www.nola.com/news/courts/article_b3c72bf3-c652-55a0-9470-5a511d398cd8.html.).

Consultation Question 6

Please share your views below: :

14. As a law practice, we only deal with cases arising out of the courts of England and Wales. However, it is clear that miscarriages of justice resulting from evidence disclosure failings also occur in Scotland and Northern Ireland.

Consultation Question 7

Please share your views below: :

Trial disclosure:

15. The function of deciding what material is disclosed to the defence needs to be taken away from police disclosure officers and prosecutors. Instead, a new independent statutory body should be created to fulfil this role, an Independent Disclosure Agency ('IDA'). The IDA should consist of trained, security-vetted staff with no vested interest in the outcome of a prosecution who are given full access to all material generated by the police investigation in a case via access to the HOLMES2 computer database. IDA staff should identify and remove any genuinely sensitive information and disclose all remaining material to both prosecution and defence.

16. This approach reduces to a minimum the risk of exculpatory material being misclassified as sensitive or otherwise wrongly withheld from the defence. Further, it allows the defence to decide what material undermines the Crown's case and advances their defence case – rather than having police and prosecutors, who may have conflicts of interest in doing so, make that decision for them.

Post-conviction disclosure:

17. The current law on post-conviction disclosure should be replaced by a statutory right of access that gives appeal representatives and unrepresented appellants a right of controlled access to all non-sensitive material held by the police and prosecution on a case.

18. As Louisiana demonstrates, such a broad right of access is the only reliable way to ensure that withheld exculpatory evidence comes to light and can be used to exonerate the wrongly convicted.

Consultation Question 8

Please share your views below::

Trial disclosure

19. Disclosure failures are widespread and routine. The evidence for this assessment is overwhelming and includes, but is not limited to:
a. The wrongful convictions of individuals such as Danny Kay (http://www.bbc.co.uk/news/uk-england-derbyshire-42576716);
b. Collapsed trials, such as that of Liam Allan, where wrongful conviction was only narrowly avoided (http://www.dailymail.co.uk/news/article-5207249/Female-barrister-cleared-student-rape-slams- police.html);
c. A 2017 inspection (https://www.justiceinspectorates.gov.uk/cjji/wp-content/uploads/sites/2/2017/07/CJJI_DSC_thm_July17_rpt.pdf) finding that in a random sample of Crown Court cases:
i. Police failed to fully comply with their disclosure obligations on non-sensitive unused material schedules in 81.1% of cases (p. 42);
ii. Police failed to fully comply with their disclosure obligations on the sensitive unused material schedule in 40% of cases (p. 43);
iii. Police failed to fully meet its obligations to identify potentially exculpatory material to an adequate standard in 53.3% of cases (p. 44);
d. The Justice Committee's 2018 finding that there are "larger, systemic issues which... have allowed disclosure failures to prevail for too long" and that "disclosure errors have led to miscarriages of justice" (https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/859/859.pdf, p. 3).

Post-conviction disclosure

20. The problems with the current post-conviction disclosure regime have been subject to far less detailed examination. However, in APPEAL's experience using the current regime to access post-conviction disclosure is in practice extremely difficult. Our experiences are echoed by those at Inside Justice and

the Cardiff Law School Innocence Project.

Consultation Question 9

Please share your views below::

21. Benefits of the trial disclosure reform proposed include:
a. Improving the fairness of Crown Court trial proceedings;
b. Prevention of miscarriages of justice and collapsed trials;
c. More police time and resources freed up for the prevention, detection and investigation of crime and ensuring public safety;
d. Reduced inefficiency, by diverting police and prosecutors away from tasks which they are ill-suited to perform;
e. Improved transparency within the criminal justice process;
f. Improving public confidence in the criminal justice process;
g. Successive governments have acknowledged that there are serious problems with the disclosure process and have demonstrated a willingness to address it; it is just that there has been a failure to recognise that the current regime is inherently flawed.

22. Benefits of the post-conviction disclosure reform proposed include:
a. Facilitating the correction of miscarriages of justice and, in some cases, the detection of the real perpetrator of crimes;
b. Improved access to justice for the wrongly convicted;
c. Improved transparency around the criminal justice system and its mistakes;
d. Allowing for the swifter correction of miscarriages of justice, so human and financial costs of wrongful imprisonment are reduced;
e. Improving public confidence in the criminal justice system because it would be better able to identify and remedy its failings.

Consultation Question 10

Please share your views below: :

23. Costs of the trial disclosure reform proposed include:
a. The cost of establishing an Independent Disclosure Agency (though this would be offset by savings in police and prosecution resources currently spent inefficiently on disclosure); and
b. The cost of providing trial defence representatives with the resources to properly review a greater amount of unused material.

24. Costs of the post-conviction disclosure process:
a. The cost of facilitating access to non-sensitive material to appeal representatives and unrepresented appellants in a way that is secure.

Consultation Question 11

Please share your views below::

25. None identified.

Consultation Question 12

Please share your views below: :

26. Disclosure is a complex area of law. Government departments and parliamentary committees have failed to get to grips with the root cause of persistent problems with disclosure.

Consultation Question 13

Please share your views below: :

27. We have made submissions to the Attorney General's Office and Justice Committee; no substantive responses were received.

Consultation Question 14

Please share your views below: :

n/a

Consultation Question 15

Yes

Your idea for reform: second idea

Consultation Question 1

Please share your views below::

Retention of trial audio recordings and court documents; access to trial transcripts

1. Digital trial audio recordings and court documents are being prematurely destroyed under the current Crown Court Record Retention and Disposition Schedule ('RRDS') devised by HM Courts and Tribunals Service ('HMCTS'). This greatly diminishes access to justice for the wrongly convicted and hinders the work of appeal lawyers, the CCRC and Court of Appeal Criminal Division. The RRDS specifies that digital trial audio recordings are retained for just 7 years (pre-digital trial audio recordings were retained for just 5 years).

2. Even where trial audio recordings have been retained, transcripts can be prohibitively expensive for appeal lawyers and unrepresented appellants to obtain. Potential efficiencies offered by deployment of automated speech-to-text technology are not being applied to make transcripts accessible to those who need them.

3. The problem of the unavailability of trial transcripts and other court records has recently been acknowledged by the Vice-President of the Court of Appeal Criminal Division, the Westminster Commission on Miscarriages of Justice and the CCRC.

Consultation Question 2

Please share your views below::

4. At APPEAL, we are frequently prevented from finding out exactly what individual witnesses said at our clients' trials because trial audio recordings have been destroyed. This can hinder our ability to challenge an unsafe conviction. For example, in one case we established that two crucial prosecution witnesses had undisclosed criminal histories. However, because the audio recordings of those two witnesses' trial evidence had been destroyed, it has not been possible to conduct a detailed analysis of exactly how those criminal histories could have been deployed to undermine their credibility.

5. In a thesis by barrister Malcolm Birdling, he describes an example where the CCRC were unable to review a potential miscarriage of justice case because no sufficient record of the applicant's trial existed:

"In cases where the CCRC is minded to obtain transcripts, the frequency with which they are nonetheless unavailable (due to loss or destruction in accordance with data retention policies) is lamentable. This can have fatal consequences for an investigation – as was made plain in a decision letter to an applicant in the following terms:

I am afraid I have to tell you quite bluntly that there is no possibility that the Commission will be able to refer your convictions… Your trial took place over seventeen years ago, and there is no chance at all that sufficient legal documentation will have survived for the Commission to obtain any evidence robust enough to form the basis of a referral."

6. Lord Justice Fulford described the unsafe Shrewsbury 24 convictions as "the clearest example as to why injustice might result when a routine date is set for the deletion and destruction of the papers that founded criminal proceedings (the statements, exhibits, transcripts, grounds of appeal etc.)". He explained that "the absence of relevant court records can make the task of this court markedly difficult when assessing – which is not an uncommon event – whether a historical conviction is safe."

7. In relation to the cost of obtaining transcripts, APPEAL's experience is that:
a. The quotations given by the transcription firms contracted with Crown Courts can amount to thousands of pounds for a transcript of the judge's summing up and tens of thousands of pounds for a full trial transcript;
b. If a client is eligible for legal aid, the Legal Aid Agency will only usually approve funding for a transcript of the judge's summing up – which can only ever offer a subjective summary of the trial evidence; and
c. Unrepresented convicted individuals applying for a transcript of all or part of their trial to be produced at public expense using HMCTS's EX105 form rarely, if ever, have their application granted.

Consultation Question 3

Criminal law

If other, please state: :

Consultation Question 4

Please share your views below: :

8. We would direct the Law Commission to the following:
a. Lord Justice Fulford's comments in his post-script to the Shrewsbury 24 judgment (R v Warren and others [2021] EWCA Crim 413, paras. 101-3);
b. The Westminster Commission on Miscarriages of Justice in its report, In the Interest of Justice: An inquiry into the Criminal Cases Review Commission (5 March 2021) at pp. 51-52 and 71;
c. The CCRC's official response to recommendation 17 of the Westminster Commission's report, available here: https://ccrc.gov.uk/ccrc-releases-official-response-to-the-westminster-commission-report/; and
d. The section entitled 'Availability of Trial Transcripts and Forensic Material' in barrister Malcolm Birdling's 2012 thesis (pp. 197-201), available here: https://ora.ox.ac.uk/objects/uuid:2dae4513-4fd2-40cd-bb6a-dbba696d6d7f.

Consultation Question 5

Please share your views below: :

9. In the United States, a criminal defendant has a right to a complete transcript of the trial proceedings, particularly where counsel on appeal was not counsel at trial. Indeed, the unavailability of a trial transcript forms the basis for reversing a conviction. See U.S. v. Atilus, 425 F.2d 816 (5 Cir.1970) and Hardy v. U.S., 375 U.S. 277, 84 S.Ct. 424, 11 L.Ed.2d 331 (1964).

10. Malcolm Birdling reports on page 93 of his thesis that: "Full trial transcripts are produced as a matter of course in New Zealand courts, and considerable use is made of the trial record in responding to petitions."

Consultation Question 6

Please share your views below: :

11. This is not within our direct knowledge because we only deal with cases arising out of the courts of England and Wales.

Consultation Question 7

Please share your views below: :

12. As Lord Justice Fulford has called for, the RRDS must be reconsidered. We agree with the Westminster Commission on Miscarriages of Justice's recommendation, supported by the CCRC, that it be amended so that trial audio recordings are held for at least as long as a convicted person is in custody.

13. Further, the way that trial transcripts are produced should be modernised through use of speech-to-text technology. This would increase efficiency and lower the cost of transcripts.

14. Where an individual seeking to challenge their conviction cannot afford a transcript of their trial, a statutory right to be furnished with a full transcript at the public's expense should be introduced.

Consultation Question 8

Please share your views below: :

15. Significant. In 2019/20, the CCRC received 1,334 applications and around 90% of applicants were unrepresented (and thus unable to access legal aid for trial transcripts). In 2019/20, the Court of Appeal Criminal Division received 2,510 applications for leave to appeal against conviction. There is no way of knowing how many individuals were unable to launch appeal or CCRC applications because of not having a transcript of their trial, these figures make clear that thousands of people seek to challenge their convictions each year and are thus potentially affected.

16. When screening new requests for legal assistance, APPEAL is frequently hindered by the lack of availability of any trial transcripts.

Consultation Question 9

Please share your views below: :

17. Positive impacts of the reforms proposed include:
a. Addressing a problem identified by the Vice-President of the Court of Appeal Criminal Division, Westminster Commission on Miscarriages of Justice and CCRC;
b. Making markedly easier and more efficient the work of appeal lawyers, appeal judges and the CCRC;
c. Increasing access to justice for the wrongly convicted;
d. Modernising the criminal justice system to bring it in line with jurisdictions such as New Zealand, where transcripts are produced as a matter of course;
e. Improving transparency in relation to Crown Court proceedings; and
f. Savings on the costs of producing transcripts through improved use of speech-to-text technology.

Consultation Question 10

Please share your views below: :

18. The costs of the reforms proposed would be:
a. Increased digital data storage costs by lengthening retention periods;
b. The financial cost of furnishing trial transcripts on indigent appellants at the public's expense. However, if this was implemented alongside the introduction of speech-to-text technology in producing the transcripts then costs can be kept to a minimum and continue to fall as the technology becomes even more powerful and accurate.

Consultation Question 11

Please share your views below: :

19. None identified.

Consultation Question 12

Please share your views below: :

20. The importance of full trial transcripts for appellate work is something that the Law Commission is well-placed to analyse and elucidate. It is also well placed to conduct a cross-jurisdictional comparison and, for example, study the US Supreme Court's markedly different approach to the issue of the availability of trial transcripts.

Consultation Question 13

Please share your views below: :

21. We were first in touch with HMCTS several years ago. We had one meeting with Ministry of Justice officials, but no action followed.

22. Our more recent correspondence to HMCTS following Lord Justice Fulford's comments this March has recently been replied to by the Ministry of Justice Information Services Division, stating they are "carefully considering the implications of the judgment in R v Warren & others (Shrewsbury 24) [2021] EWCA Crim 413 for our retention policies. These considerations will take some time to work through, as any changes to policies have wide-ranging implications for HMCTS and for other organisations". We have been invited to meet with them in August.

Consultation Question 14

Please share your views below: :

JUST Transcription (https://www.just-access.org/about) are a social enterprise, who think technology has the power to change the justice sector for the better, but are concerned that the rate of change means that litigants from under-served communities are being left out of the process. Their aim is to improve how transcripts and judgments are disseminated to legal practitioners and the public.

Consultation Question 15

Yes

Your idea for reform: third idea

Consultation Question 1

Please share your views below: :

The tests applied by the Court of Appeal (Criminal Division) and Criminal Cases Review Commission

Safety test (s.2 Criminal Appeal Act 1995) and grounds of appeal

1. The single test of 'safety' applied by the Court of Appeal (Criminal Division) ('CACD' or 'the Court') when considering appeals against conviction prevents the reliable correction of miscarriages of justice.

2. Since its creation by Parliament in 1968, there has been no consideration of whether the test is appropriate for situations far removed from those contemplated at that time. It predated both the Police and Criminal Evidence Act 1984 (PACE) and the infamous miscarriage of justice cases which led to the creation of the Criminal Cases Review Commission (CCRC).

3. Specific grounds of appeal have been developed incrementally through the common law, but never revisited by legislation. While of course the safety test is flexible and broad in theory, it was designed without foresight of modern issues such as complex disclosure failures and the mistakes that arise inevitably in a trial system under immense pressure. It is used to encompass misdirections, defects in summings-up, fresh evidence, jury misconduct, inadequate representation, and everything else besides.

4. The overarching 'safety' test has meant that the jurisprudence of the CACD can be highly inconsistent, with different constitutions of the Court approaching issues very differently. Putting the grounds of appeal onto a statutory footing, with some incremental development, would allow specificity. Specificity would be more conducive to transparency, clarity and consistency.

5. There are cases where there is no fresh evidence or identifiable irregularity with the trial process, but the jury's verdict nonetheless appears perverse. In such circumstances, so-called 'lurking doubt' cases, the Court is slow to intervene and has become progressively more deferent to the jury's verdict and the principle of finality. Although this ground was often used in the past, in recent years different constitutions of the Court have narrowed its own jurisprudence. Since R v Pope [2012] EWCA Crim 2241, this ground is limited to situations where reasoned analysis of the evidence or the trial process, or both, lead to the inexorable conclusion that the conviction was unsafe. No convictions have since been quashed on this ground. As such, a ground of appeal that could and should form a vital safeguard in our criminal justice system has all but fallen into extinction.

6. While there is nothing inherently wrong with heavy reliance on the common law, this common law basis has allowed the grounds of appeal to narrow over time without any accountability or attention by the legislature. Given the restrictive access to the Supreme Court from the CACD, there has been no real consideration of whether the grounds are sound, or how they ought to be amended.

Real possibility test

7. The current statutory test applied by the CCRC in making referrals (s.13 Criminal Appeal Act 1995) hinders decision-making and investigation at the miscarriage of justice review body, impairing some wrongfully convicted people from accessing the Court of Appeal.

8. The real possibility test anchors the CCRC's decision making to that of the Court of Appeal, denying it the chance to submit to the court cases where it

considers a miscarriage of justice may have occurred, if the Court has made its disagreement clear. Joint enterprise, or parasitic accessorial liability cases, are a leading example.

9. If a reviewer at the CCRC predicts a line of enquiry will not give rise to fresh evidence that will persuade the CACD, relevant and potentially investigation will not be pursued and it will be shut prematurely. Under the test, the CCRC is required to second-guess what the Court will decide. Due to the inconsistency in the Court's jurisprudence mentioned above, this is not a straightforward exercise. The CCRC is not, and should not be required to engage in the exercise of predicting how things will play out in front of the Court. Cases which the CCRC deems may be a miscarriage of justice need to go before the tribunal for them to be decided, rather than rejected prematurely.

10. Moreover, the CCRC is not a judicial body and will not necessarily have legally qualified staff or Commissioners on every case. The current test requires it to act in a way where it filters out cases the Court may consider quashing the appeal. The success rate of referrals on appeal – around 70% - would seem to support that this filtering is severe.

11. Under the predictive test, the CCRC has little power if the Court of Appeal has made its disagreement clear. Conversely, even under the previous system of references made by the Home Secretary, cases could be referred repeatedly: indeed, the Birmingham Six case itself was only quashed on its third trip to the Court of Appeal. The CCRC has struggled to 're-refer' cases back to the Court of Appeal, there being only two known 're-referrals' to date across its 25 years of operation.

12. The Westminster Commission on Miscarriages of Justice has recently concluded that changing the 'problematic' test might create a different and more independent mindset.

Consultation Question 2

Please share your views below: :

Safety

13. A case of ours before the Court of Appeal involved a conspiracy to import class A drugs. While the Court recognised that a key disclosure failure of shipping radar data 'should not have happened', it considered the conviction safe, declining to consider its impact on the jury. Although the material would have fallen to be disclosed to the defence at trial – and, as such, could have been deployed as such on the jury to counter what appeared to be powerful prosecution evidence as to the course taken by the applicants' vessel – its impact on the jury was therefore not considered. The case also bore embellished testimony of police officers, with falsified logs.

14. There is no reliable means of determining what would have happened in the absence of this serious prosecution failing, except to order a retrial. Given the weight attached to the primacy of the jury verdict and deference to 'finality' when a jury has convicted a defendant, it is troubling that the question of the effect of fresh evidence on the jury – the undoubted question at trial for admissible evidence - is routinely ignored behind the safety framework, particularly where it is combined with other issues.

15. This is one example of how the test applied by the Court of Appeal conflicts with the process by which a person is convicted: the decision of the jury. The House of Lords judgment in R v Pendleton [2000] UKHL 66 sets out a 'jury impact' test is to be followed. However, this has been undermined by subsequent Court of Appeal judgments.

16. There are many different views on what approach ought to be taken to fresh evidence. We would argue that fresh evidence that might have materially assisted the defence and/or might have led the jury not to convict should see a conviction quashed and, if necessary, a retrial. Others may prefer a higher or lower standard. However, whichever approach is taken to that question, the approach ought to be consistent. The test ought to be clear.

Real possibility

17. Relying on the real possibility test, the CCRC predicted that their enquiries on a case we were involved in would not identify a new suspect and declined to initiate a full forensic review (an application having been submitted before our involvement). Later, we were able to commission new DNA testing ourselves, which has detected the DNA of an unknown male in multiple crime-specific areas. This case shows the narrow mentality fostered by the predictive test.

18. Under its requirement to predict the CACD's behaviour, the Court has been unable to refer pre-Jogee convictions involving joint enterprise, despite the fact that they may well be unsafe, juries having been directed on what is now known to be bad law.

Consultation Question 3

Criminal law

If other, please state: :

Consultation Question 4

Please share your views below: :

a. Michael Zander, 'The Justice Select Committee's report on the CCRC - where do we go from here?' [2015] Crim LR 473.
b. The Westminster Commission on Miscarriages of Justice in its report, In the Interest of Justice: An inquiry into the Criminal Cases Review Commission (5 March 2021), chapter 4.

c. The CCRC's official response to recommendation 5 of the Westminster Commission's report, available here: https://ccrc.gov.uk/ccrc-releases-official-response-to-the-westminster-commission-report/; and
d. Carolyn Hoyle and Mai Sato, Reasons to Doubt (OUP 2019), esp 14-17 and 330-338.
e. Criminal Appeal Act 1968 and Criminal Appeal Act 1995

Consultation Question 5

Please share your views below: :

Safety

19. It is difficult to compare directly given that most other jurisdictions involving trial by jury have a constitutional rights and different levels of appeals. For instance, in the United States, there are up to eight separate appeal processes across three different stages. However, it is clear that in the US there is more willingness to retry appellants and less deference to the need for finality and primacy of the jury verdict. This arguably allows for potential miscarriages of justice to be overturned more reliably.

Real possibility

20. There are few criminal cases review commissions worldwide, the English, Welsh and Northern Irish CCRC having been the first. The Scottish and Norwegian counterparts mirror the language of the tests used by their respective appeal courts and are less overtly predictive.

21. However, New Zealand's recently-established CCRC may refer a conviction or sentence to the appeal court if the Commission, after reviewing the conviction or sentence, considers that it is in the interests of justice to do so. It must have regard to several factors, which include the prospects of its appeal court allowing the appeal, but is able to make its own assessment of merits of a referral in all circumstances. In our submission this test is to be preferred.

Consultation Question 6

Please share your views below: :

Statutory tests for the Court of Appeal and CCRC

22. Scotland's separate criminal justice system and distinct Scottish CCRC put it outside of these statutory tests. Although Northern Ireland has a separate Court of Appeal, it applies the same safety test, following the same structure (s.2 Criminal Appeal (Northern Ireland) Act 1980.

Consultation Question 7

Please share your views below: :

Safety

23. The safety test should be supplemented with standalone statutory grounds. The safety test should be a fallback provision where specific grounds of appeal are not made out but there is still some reason the conviction should not stand, as to avoid any wrongly convicted person falling through the cracks.

24. Grounds should include where:

a) The trial judge has misdirected the jury on the law;

b) The trial judge has made material error on the facts in summing-up;

c) The trial judge as made an incorrect ruling;

d) Defence representatives have committed material errors in the conduct of the defence case;

e) Jury impropriety has emerged;

f) The Court has real doubt about the correctness of the jury's verdict;

g) New evidence has emerged that might reasonably have affected the jury's decision to convict;

h) Where material failed to be disclosed at trial which might reasonably be considered capable of undermining the case for the prosecution or of assisting the case for the appellant, such that there is a real prospect the appellant's defence was materially disadvantaged;

i) There has been failure to retain evidence, exhibits or a record of trial proceedings such that the appellant cannot effectively exercise their right of appeal;

j) Where for any other reason, the conviction is unsafe or the interests of justice otherwise require that it is quashed.

25. In our view, the sole safety test obscures the reasoning of the Court, inhibits applicants from making their best cases on the law, and risks wrongful

convictions going uncorrected.

Real possibility test

26. The real possibility test should be replaced with an alternative test which uncouples the decision making of the CCRC from that of the Court of Appeal, prevents lines of enquiry being closed prematurely, and provides explicitly the ability to refer when it considers a case ought to be litigated before, and considered by, the Court of Appeal. The CCRC is the specialist body for investigating miscarriages of justice and ought to have a test that allows it to exercise its independent judgement.

27. It is noteworthy that New Zealand, legislating for its own CCRC in 2019, opted for a flexible test for referral exclusively where it is in the interests of justice. In deciding if it is in the interests of justice to refer, it must have regard to factors often relevant to the CCRC's enquiries. However, the prospects of the court allowing the appeal is only one of a number of factors to be considered.

28. It seems to us that this is a preferable approach. We would support the language of the test recently suggested by the Westminster Commission on Miscarriages of Justice, for the CCRC to refer a case where it determines that the conviction may be unsafe, the sentence may be manifestly excessive or wrong in law or where it concludes that it is in the interests of justice to make a referral. By definition this would include all cases where it finds that a miscarriage of justice may have occurred, including 'lurking doubt' cases.

Consultation Question 8

Please share your views below: :

29. Roughly between 1,000 and 1,500 applicants per year have sought to appeal their convictions to the Court of Appeal since 2014 (steadily decreasing in recent years), with another 1,500 per year applying to the CCRC. The importance for those involved is considerable.

30. The problem however affects all those convicted in Crown Court following trial.

Consultation Question 9

Please share your views below: :

31. Positive impacts of the reforms proposed to the statutory tests for the Court of Appeal and CCRC include:
f. Fairness to the wrongly convicted;
g. Increasing accuracy and consistency in the criminal justice system;
h. Putting the grounds on a statutory footing would streamline pleadings before the Court of Appeal (Criminal Division) for both counsel and the large proportion of unrepresented litigants attempting to appeal their convictions and sentences;
i. Allowing investigations to be reopened and perpetrators to be identified in cases where the wrong person has been convicted, increasing public safety;
j. Financial benefits from reduction in prison population;
k. Increased public confidence that the criminal justice system is able to reliably correct its mistakes;
l. Increased understanding of the factors leading to wrongful convictions able to inform future trial practice.

Consultation Question 10

Please share your views below: :

32. The costs of the reforms proposed would be:
a. Increased costs upon the Ministry of Justice to fund an increase in of retrials arising from quashed convictions;
b. An increased caseload in the Court of Appeal (Criminal Division) (though given that wrongful convictions ought to be quashed, we would argue that this is unavoidable);
c. The CCRC may need more resources to conduct investigations arising from lines of enquiry which it would otherwise have dismissed.

Consultation Question 11

Please share your views below: :

33. None identified.

Consultation Question 12

Please share your views below: :

34. The grounds for allowing appeals under the safety test have developed in a piecemeal way, attempting to cover numerous areas not anticipated at the time of its drafting. It needs thorough, detailed consideration, legal knowledge and non-partisan commitment which the Law Commission could provide. This may be a reason for which the independent Justice Committee (in 2015) and Westminster Commission on Miscarriages of Justice (in 2021) have each recommended that the Law Commission undertake such a project.

35. The Law Commission is the body best placed to consider the full impact of overhauling the safety test and grounds for appeal, able to conduct comparative research with other jurisdictions' approaches to the test(s) to be applied on criminal appeal, and suited to a project which is part consolidation and clarification, and part development.

Consultation Question 13

Please share your views below: :

36. No, though responding to the Justice Committee's 2015 recommendation, the then-Lord Chancellor rejected the need for any Law Commission review of grounds for appeal.

Consultation Question 14

Please share your views below: :

37. The cross-party Westminster Commission on Miscarriages of Justice recently considered the real possibility test, considering that it ought to be amended, but considered any change to grounds to appeal would be of effect such that a Law Commission review would be required. The Justice Committee made a similar recommendation in 2015.

Consultation Question 15

Yes

Your idea for reform: fourth idea

Consultation Question 1

Please share your views below: :

The Single Justice Procedure

1. APPEAL's Women's Justice Initiative (WJI) uses strategic litigation to appeal sentences and convictions for women experiencing severe disadvantage in the criminal justice system; women who are victims of domestic abuse, whose mental health has been ill considered, and who are given damaging short sentences. We empower women to become advocates for reform and use casework to campaign for changes to the law.

2. Amongst other things, the Women's Justice Initiative represents women criminalised for minor, non-violent offences when alternative sanctions might have been more appropriate. It is as part of this work that APPEAL has been investigating the Single Justice Procedure (SJP) and concluded that it is in urgent need of reform.

3. The SJP is a process under which certain summary-only non-imprisonable offences are 'heard on the papers' by one magistrate sitting in private with a legal adviser. Offences can include common assault and battery, truancy, non-payment of TV licenses and some offences under Coronavirus legislation. Lauded as improving efficiency, this is at the expense of fairness and access to justice.

4. We've identified the following serious concerns with SJP prosecutions:

a. A significant proportion of people are unaware that they are being prosecuted and are convicted without their knowledge or participation.
b. The no-plea rate for SJP prosecutions is staggeringly high, around 71% (See PQ 143756, https://questions-statements.parliament.uk/written-questions/detail/2021-01-26/143756), so defendant participation in the criminal process is negligible. This is of particular concern for vulnerable defendants who may be unable to engage with a post and digital based prosecution process without support.
c. Most SJP prosecutions are not conducted by the CPS but by 'state sponsored' prosecutors, such as TV licensing, who are not subject to the same oversight or scrutiny as the CPS. While these are not strictly private prosecutions, the prosecutor is also the victim in these cases, and as has been pointed out in Post Office scandal cases and private prosecutions inquiry, this is inappropriate and likely to lead to miscarriages of justice.

5. APPEAL believes that in its current form, the SJP is not fit for purpose and that safeguards must be urgently implemented to rectify the problems.

Consultation Question 2

Please share your views below: :

6. APPEAL carried out five months of Magistrates Court observations of TVL SJP hearings, and conversations with women facing prosecution. Two of their stories are provided here as case studies to illustrate what happens in practice (names have been changed to protect anonymity). Our other observations come as a result of successfully acting on a pro bono basis on behalf of many women facing TV licensing prosecution.

Pressure to plead guilty

7. Amy, one woman we met, was determined she was innocent and would plead not guilty. Yet after a meeting with the prosecutor, who highlighted the costs implications, Amy decided it was not worth the risk and she would admit to a crime that she did not believe she had committed.

Unlawful prosecution - of which the defendant was unaware

8. Jessica was convicted under the Single Justice Procedure and only found out about it after an attachment order was put on her earnings. She did not watch TV for which a licence is required. She had tried to contact TV Licensing to sort it out but was told that she had to show up to court to fix it. She had been in and out of different Magistrates' courts over a number of weeks, having to make a statutory declaration that she did not receive the original notice, and then was sent to the incorrect court for her hearing. She tried to tell people at each stage that she did not need a TV licence, but she was always passed along by TV Licensing or the courthouse she was in that day. Her case was eventually dropped by the prosecutor, after she had to take time off work to come to Stratford Magistrates' Court for 9:30am and was only seen after 2pm.

9. From attending TV Licensing prosecution hearings in Stratford Magistrates Court over five months, we have seen the same problems come up for the many women with whom we have spoken. Of the 20 women we spoke to, 7 women disclosed that they had been convicted under the Single Justice Procedure without their knowledge.

10. In the majority of cases we observed, defendants were not present at their hearing and evidence suggests that many do not even know they are being prosecuted. 71% of people don't respond to the charge letter notifying them that they are being prosecuted. Similarly, government statistics show that 88% of prosecutions under Coronavirus Regulations resulted in no plea.

11. We do not know the reason for the low response rate. It is possible that people are not receiving the letters (either at all, or within the 21-day time limit in which they are required to respond) or that there are vulnerabilities at play which means that they are unable to respond within the time limit.

Whatever the reason, this cohort are tried in their absence and automatically assumed to be guilty. They are also assumed to be able to afford the standard fine and costs, which can amount to hundreds of pounds. If someone is unaware they have been found guilty, they may be unaware of the requirement to pay a fine, putting them at risk of imprisonment for non-payment.

12. Even where a defendant does actively engage in the SJP process, being outside the scope of the criminal legal aid system, the vast majority do not receive independent legal advice. They cannot therefore effectively scrutinise the case against them. APPEAL has further concerns that by virtue of strong incentives given to defendants (including a 33% reduction in the fine) some, like Amy, are being encouraged to plead guilty even in cases where they do not believe they are.

Both victim and prosecutor

13. Although not technically private prosecutions, in certain types of SJP prosecutions, the prosecutor is also the victim. This is true, for example, in cases bought by TVL and Transport for London. A Justice Select Committee inquiry into private prosecutions from September 2020 (https://committees.parliament.uk/work/401/private-prosecutions-safeguards/) concluded that due to concerns about independence and objectivity, the prosecutor should not be victim in these cases, the risks of which have been underlined by the recent miscarriages of justice in the Post Office scandal cases.

Unlawful prosecutions

14. Over a thousand prosecutions made under the Health Protection (Restrictions, Coronavirus) Regulations have been made under the SJP (https://questions-statements.parliament.uk/written-questions/detail/2021-01-26/143756).

15. Official data (https://www.cps.gov.uk/cps/news/cps-announces-review-findings-first-200-cases-under-coronavirus-laws) shows that there has been a high rate of unlawful prosecutions made under Coronavirus legislation (https://www.independent.co.uk/news/uk/home-news/coronavirus-act-prosecutions-wrongful-cps-review-b1847194.html). Although prosecutions brought under the SJP are not included in this data, it would be reasonable to conclude that a similar proportion of these have been unlawful, having been made under the same notoriously complex Regulations. Indeed, we know of at least two SJP charges that were made under Schedule 22 of the Coronavirus Act 2020 – a schedule which has never been activated in England.

16. Approximately 9% of SJP prosecutions from January to September 2020 were taken in relation to the offence of the non-payment of TV licences (see PQ 143756)

17. 100% of the TV licensing ('TVL') cases that we have acted in on a pro bono basis have been dropped following representations made on the defendant's behalf that the prosecutions were not in the public interest. The vast majority of people do not of course have the benefit of pro bono legal representation. It is impossible to know how many of these are vulnerable defendants are being prosecuted unfairly but official statistics show that in the case of TVL prosecutions, 75% are women (https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2020). In our experience, many are also living in poverty and suffering from mental health problems.

18. At APPPEAL we have repeatedly been denied access to documents requested under the Freedom of Information Act relating to TVL investigations involving vulnerable defendants. TVL's functions are largely contracted out to private company Capita, which is immune from such requests.

Consultation Question 3

Criminal law

If other, please state: :

Consultation Question 4

Please share your views below: :

19. The single justice procedure was introduced on 13 April 2015 when the Criminal Justice and Courts Act 2015 (CJCA 2015) enacted amendments to the relevant part of the Magistrates Courts Act 1980 (MCA 1980) and Criminal Justice Act 2003 (CJA 2003), respectively. The Criminal Procedure Rules 2020 (CrimPR), SI 2020/759 provide the procedural requirements.

20. Gibbs, Penelope, (2021), Does it matter if those accused of crime plead guilty or not guilty, Transform Justice: https://www.transformjustice.org.uk/does-it-matter-if-those-accused-of-crime-plead-guilty-or-not-guilty/

21. Gibbs, Penelope, (2019),The right to know you are accused of a crime, Transform Justice: https://www.transformjustice.org.uk/the-right-to-know-you-are-accused-of-a-crime/

22. Fair Trials, (2021), Single Justice Procedure: unlawful Coronavirus prosecutions and convictions behind closed doors, https://www.fairtrials.org/news/single-justice-procedure-unlawful-coronavirus-prosecutions-and-convictions-behind-closed-doors

Consultation Question 5

Please share your views below: :

23. We do not have knowledge of this.

Consultation Question 6

Please share your views below: :

24. England and Wales only

Consultation Question 7

Please share your views below: :

25. A moratorium should be placed on the SJP process until necessary reforms have been made to create a fairer and more transparent system.

26. Specifically, we recommend the following reforms:

a. Legal aid to be extended to these offences so that everyone prosecuted under the process is given the advice and representation to adequately defend themselves.
b. A legal duty should be placed on prosecutors to ensure that letters are delivered and received by recipient. This is to avoid prosecutions being carried out without prior knowledge of the defendant.
c. In order to provide an adequate inspectorate and oversight of SJP prosecutions, the remit of the Crown Prosecution Service Inspectorate should be expanded to include all "state sponsored" prosecutors, including those bought under the SJP.
d. Means forms should continue to be sent along with the SJP notice so Magistrates can assess the fine amount with reference to a person's finances. Further, SJP notices should include an explicit question about any vulnerabilities a defendant has that may make it not in the public interest to proceed with prosecution. The notice should also be made available in multiple different languages.
e. To provide greater transparency about the process, there should be open access to blank online and postal forms.
f. For reasons of transparency, there should be regularly published statistics on how many people are being prosecuted under the SJP, for which offences, including the number that have pleaded guilty, not guilty or entered no plea. Currently this information is obtained piecemeal via Parliamentary Questions.

Consultation Question 8

Please share your views below: :

27. Significant. The latest available statistics state that in the nine months up to September 2020 there were 400,000 SJP prosecutions bought. In 2019, the total number of SJP prosecutions was 2019 was 784,277 (https://questions-statements.parliament.uk/written-questions/detail/2021-07-15/33849). If you compare this to the latest official statistics on the total number of criminal prosecutions in one year (in 2019 it was 1.37 million) this is the equivalent of approximately 57.24% of all criminal prosecutions. Consequently, SJP prosecutions are capable of causing widescale miscarriages of justice.

Consultation Question 9

Please share your views below: :

28. By implementing safeguards to the SJP, fairness and transparency in the criminal justice system will be vastly improved, affecting over half of criminal prosecutions. It would ensure more people are able to engage in the process and provide a defence where appropriate (improving access to justice). It will also ensure people are given a penalty that is proportionate to their financial means.

29. A more transparent system is one that can be scrutinised to ensure ongoing improvements where necessary. Reform will also support the rule of law by mitigating the risk of unlawful prosecutions.

Consultation Question 10

Please share your views below: :

30. The SJP is widely lauded as being a cost-efficient form of justice, however we grow increasingly concerned at the extent to which the due process rights of defendants are being eroded by the practice. The reforms suggested would inevitably increase administrative costs (by, for example, requiring SJP notices to be sent via signed for post requiring ID, and expanding the right the Legal Aid for non-imprisonable offences) but APPEAL is of the view the costs would be proportionate to the huge benefits made in fairness and accountability.

Consultation Question 11

Please share your views below: :

31. As stated above, TV licensing prosecutions conducted through the SJP disproportionately affect women so a fairer system would improve gender equality across England and Wales.

32. Beyond gender, it is hard to assess the equalities impacts of the SJP since data is not kept centrally about ethnicity, disability, poverty, vulnerability or other protected characteristics as it relates to the SJP. In our experience, this problem disproportionately affects those on low income.

33. From attending TV Licensing prosecution hearings in Stratford Magistrates Court over five months, we have seen the same problems come up for the many women with whom we have spoken. Of the 20 women we had spoken to:

a. 8 women disclosed that they were on Universal Credit,
b. 2 women disclosed that they had disabilities and had not been asked about them during their interview with an Enquiry Officer,
c. 9 women disclosed that they had caring responsibilities, either for children or older people,
d. 6 women disclosed they had other debt issues

Consultation Question 12

Please share your views below: :

34. The Ministry of Justice has so far failed to respond to calls for reform, including following the Joint Committee on Human Rights report. APPEAL believes that SJP reform requires an independent eye to fairly assess the landscape.

Consultation Question 13

Please share your views below: :

35. APPEAL is part of a coalition of organisations working to reform the SJP including Transform Justice, Commons, Fair Trials, Big Brother Watch and the Howard League for Penal Reform. A co-signed letter was sent to the Justice Secretary Robert Buckland on 1 June 2021 and can be found here: https://bigbrotherwatch.org.uk/wp-content/uploads/2021/06/Single-Justice-Procedure-Joint-letter-June-20212127.pdf.

36. We received a response on 28th July 2021 from the Home Office, stating, "The use of the SJP contributes to our effort to reducing the backlog of criminal trials by allowing guilty pleas and uncontested offences under the Regulations to be dealt with in a streamlined manner. There are also public health benefits in reducing the number of people who need to physically attend proceedings at court. As a further safeguard, the NPCC and HMCTS undertake multi-agency dip reviews of SJP cases to identify common themes relating to any errors. CPS also feedback as part of that process. Learning is then fed back to forces to establish best practise. To change the process now would create further confusion."

37. Fair Trials were able to get a meeting with Alex Cunningham MP, the Shadow Minister of Justice, who is supportive of the issues we raised in our letter. At justice oral questions on Tuesday 29th June, Alex Cunningham MP asked what the government is doing about the various issues we have collectively raised around the SJP (Hansard extract here: https://hansard.parliament.uk/commons/2021-06-29/debates/A08EB40C-6A02-4010-A05A-970FF1A3023B/OralAnswersToQuestions). He got a meaningless answer from the Government. Mr Cunningham MP is going to write to Robert Buckland about the SJP, mentioning our joint letter and raising the key issues.

Consultation Question 14

Please share your views below: :

38. The issue was addressed by the 'Joint Committee on Human Rights in their Fourteenth Report of Session 2019–21, The Government response to covid-19: fixed penalty notices'. The Committee was looking at the procedure only in relation to prosecuting Coronavirus offences – a particularly complex area of the law. The Committee remarked:

"We are concerned that the single justice procedure is an inadequate tool to provide the necessary fair trial protections for people accused of offences that are so poorly understood and lacking in clarity and where so many mistakes have been made by enforcement authorities."

39. This view has been supported by Gregor McGill, CPS Director of Legal Services and Martin Hewitt, Chair of the National Police Chief's Council.

40. The coalition has also been working with Alex Cunningham MP, the Shadow Minister of Justice, who supports reform of the SJP.

Consultation Question 15

No