Rapid Redress: Reforms for the swift rectification of wrongful convictions in England and Wales

APPEAL's response to the Law Commission's Criminal Appeals Issues Paper – 20 November 2023

Two decades battling for justice. Andrew Malkinson stands outside the Royal Courts of Justice, alongside his legal team at APPEAL, after the quashing of his conviction on 26 July 2023. Credit: Ben Broomfield

#APPEAL

The Law Commission's Criminal Appeals: Issues Paper
Response from APPEAL
20 November 2023

About APPEAL

1. APPEAL is a non-profit law practice dedicated to fighting miscarriages of justice and demanding reform. We provide investigation and legal advocacy for victims of unsafe convictions and unfair sentences who cannot afford to pay for a lawyer themselves. We use individual cases as leverage for system-wide criminal justice reform by educating the media, parliament, criminal justice policy makers, the legal profession, and the public about how and why miscarriages of justice occur and what needs to change to stop them.

Summary of APPEAL's response to the Issues Paper

2. APPEAL has long called for systemic reform of the criminal appeals system in England and Wales. As the Issues Paper highlights, the past fifty years have been marked by appalling miscarriages of justice - from the Guildford Four and Birmingham Six cases to *Nealon* and *Hallam*. Despite legislative action and the creation of the Criminal Cases Review Commission ('CCRC'), the system is still failing to reliably and swiftly identify and rectify miscarriages of justice. The last few years have seen a number of wrongful convictions quashed many years after they should have been rectified, including the Post Office and Shrewsbury 24 cases and, latterly, *Malkinson*. There is a need for urgent and sweeping reform of the criminal appeal system, so that wrongful convictions can be reliably and rapidly identified by the CCRC and rectified by the Court of Appeal (Criminal Division) ('the Court').

3. We have not responded to every question raised in the Issues Paper. Instead, we have sought to set out reform priorities which, based on our experience, we believe would better equip the system to identify and overturn wrongful convictions and unfair sentences.

4. In relation to the Court of Appeal, APPEAL recommends the following reforms:
    a. The single test of safety applied by the Court when deciding whether to uphold convictions ought to be supplemented with statutory grounds of appeal, including the enshrining of the jury impact test into statute. This would help reduce inconsistency in the Court's decision-making and discourage the Court from upholding a conviction based on its own subjective view of the appellant's guilt or the strength of the prosecution case.

b. Section 23 of the Criminal Appeal Act 1968 ought to be revised to tackle the Court's unduly restrictive approach to admitting fresh evidence, which is hindering its primary function of correcting miscarriages of justice.
c. The substantial injustice test applied by the Court in out of time change in law cases should be scrapped, since there is concern that it is hindering the correcting of miscarriages of justices in joint enterprise prosecutions where race of defendants is a factor.
d. The existing grounds for allowing sentencing appeals should be put on a statutory footing, along with a further ground which would see sentences overturned where it is in the interests of justice to do so, taking into account evolving standards of decency.
e. The 28-day time limit for lodging appeals ought to be abandoned, since it serves no useful purpose and fresh evidence cannot realistically be obtained in such a short period.
f. The Court's power to impose loss of time orders should be revoked, particularly due to the unfairness that can result for unrepresented applicants, the arbitrary way in which they are used, and the risk of such orders creating a "chilling effect" which puts off meritorious applicants.
g. The scope for appeals against Court of Appeal (Criminal Division) decisions to the Supreme Court must be considerably widened, including the removal of the requirement that the former certify that the case raises a point of law of general public importance.

5. In relation to the CCRC, APPEAL recommends the following reforms:
    a. The predictive real possibility test should be replaced with a new test which requires the CCRC to decide independently whether it considers that a conviction may be unsafe, or a sentence may be unlawful, manifestly excessive or wrong in principle. Additionally, the new test must mandate the CCRC to refer cases wherever there is an arguable ground of appeal or it is otherwise in the interests of justice to do so.
    b. The CCRC's chronic failure to adequately investigate cases should be addressed by introducing a statutory duty on the body to pursue all reasonable lines of enquiry when assessing whether a case ought to be referred.
    c. The CCRC should be made accountable by (i) setting up a CCRC Inspectorate to scrutinise its work and drive improvements and (ii) introducing a tribunal whereby applicants can challenge CCRC decisions on their merits, as an alternative to costly and inaccessible judicial review proceedings.
    d. The CCRC's duty to share information with applicants under *Hickey* must be made statutory and expanded to ensure that applicants are in a position to scrutinise the CCRC's case reviews and make their best case for referral.
    e. Statutory provisions should be changed to ensure that the CCRC has robust leadership with the right experience to lead a body whose focus should be on relentlessly tackling miscarriages of justice.
    f. The requirement that the CCRC can only refer cases where there has been no appeal in cases where there are "exceptional circumstances" should be scrapped.

6. Additional recommendations for criminal appeals reform advanced by APPEAL include:
    a. Scrapping of the brutal miscarriage of justice compensation test. Instead, compensation should be made automatic for those whose convictions have been quashed provided no retrial has been ordered or they have been found not guilty after retrial. Additionally, the 2006 cap on compensation should be abolished and victims of miscarriages of justice should be given a statutory right to an immediate interim package of support and therapeutic care, with any interim payments exempted from civil legal aid eligibility assessments.
    b. The common law right of access to post-conviction disclosure set out in *Nunn* should be replaced with a much broader statutory right of access to material to ensure that the wrongfully convicted can access material needed to substantiate their claims of innocence. This should grant those seeking to challenge their convictions a controlled right of access to all unused material held by public bodies, save where material is genuinely sensitive.
    c. The Criminal Procedure and Investigations Act 1996 ('CPIA 1996') Code of Practice should be amended to extend and simplify the retention period for case materials to 50 years. A separate criminal offence should be introduced to hold accountable officers who deliberately or recklessly unlawfully destroy evidence. Alternatively, police could be relieved of the responsibility for storing case materials post-conviction, with an independent storage facility being established at the national or regional level. Before destroying any case materials, convicted defendants should be contacted to confirm that they do not intend to challenge their convictions any further.
    d. The retention period for digital trial audio recordings should be raised from 7 years to 50 years, with those seeking to challenge their convictions given a statutory right of access to a transcript of their trial if they cannot afford to pay for one.
    e. Section 17 of the CPIA 1996 should be amended to allow those seeking to clear their name to share case materials with journalists, to facilitate fair and accurate reporting and investigation of potential miscarriages of justice by the media.
    f. Fundamental changes to the appointment process for judges who sit on the Court of Appeal, aimed at diversifying the backgrounds of judges and addressing deeply ingrained biases amongst the senior judiciary which hinder the correction of miscarriages of justice.

7. While not strictly falling within the scope of the Law Commission's review of Criminal Appeals, APPEAL recommends that the Law Commission suggest that the following reforms are considered further by the Government:
    a. Fundamental reform of the trial disclosure regime provided by the CPIA 1996, so that police and prosecutors are no longer entrusted to act as gatekeepers to the case material which the defence has access to – a role which they have proven themselves inherently unsuited to faithfully carrying out.
    b. Safeguarding against wrongful convictions by re-introducing the unanimity requirement for jury verdicts.

8. In full, APPEAL has provided a response to questions 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 16, 17 and 18. We have responded to the questions in the order they appear in the Issues Paper.

Q2: Is there a need to reform the processes by which decisions of magistrates' courts in criminal cases can be appealed or otherwise reviewed? In particular, 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?) Should a leave requirement be introduced in respect of appeals from the magistrates' court to the Crown Court? If so, should the grant of leave to appeal be followed by a rehearing or a review of the magistrates' court's decision by the Crown Court?

9. We submit that the ability to challenge decisions of a magistrates' court through appeal by way of case stated or judicial review should be retained. This is an important mechanism by which to challenge errors of law which have occurred in the magistrates' court.

10. Secondly, we take the view that there should not be a leave requirement in respect of appeals from the magistrates' court to the Crown Court and that prospective appellants should have the remedy of a full rehearing at the Crown Court. We adopt the Bar Council's submissions on this point as set out in paragraph 11 of the Bar Council response to the Law Commission's Issues Paper.

Q3: Does the single test of "safety" adequately reflect the range of grounds that should justify the quashing of a conviction? In particular, under what circumstances, if any, should a conviction be quashed because of serious impropriety which does not cast doubt on the guilt of the appellant?

11. Even if the single test of 'safety'[1] applied by the Court of Appeal (Criminal Division) when considering appeals against conviction, can be said to theoretically encompass the range of grounds that should justify the quashing of a conviction, it prevents the reliable correction of miscarriages of justice. This is for two reasons.

12. Firstly, because of its broad and undefined nature, the safety test gives the Court too wide a discretion to uphold convictions based on *its* subjective views of the appellant's guilt and the strength of the prosecution's case, notwithstanding the emergence of materially relevant fresh evidence, fair trial breaches, abuses of process or other material irregularities. This approach is pervasive and can be seen in *R v Park* [2020] EWCA Crim 589 (at para. 237), *R v Beere & Payne* [2021] EWCA Crim 432 (at para. 173) and *R v Gilfoyle* [2000] EWCA Crim 81 (at para. 38), to give just three examples.

13. This approach to assessing safety is usually justified with reference to the perceived fear that the 'obviously guilty' should not have their convictions quashed and out of a

[1] Section 2, Criminal Appeal Act 1968 ("CAA 1968"), as amended in 1995.

supposed deference to the jury's verdict and the desirability of finality. However, in our submission, the Court has no rightful place to make the judgement that an appellant is plainly guilty: it will not have had the benefit of hearing the trial evidence, and the Court is likely to be biased in its assessment of the evidence by the simple fact that a jury convicted. Additionally, by carrying out its own subjective appraisal of the appellant's guilt, the Court is, as Lord Devlin argued,[2] undermining the right to trial by jury: since in serious criminal cases, findings of guilt ought only to be made by a jury, not judges. In our submission, the Court has confused deference to *a given jury's verdict* – which may of course be wrong – with deference to *the principle of trial by jury*, with deleterious results for the correction of miscarriages of justice.

14. Secondly, the broadness of the safety test breeds an unacceptably high degree of inconsistency in the Court's decision-making, creating the risk that whether a miscarriage of justice is remedied may depend on which constitution of the Court happens to consider the appeal. One example of this inconsistency is the Court's approach to fresh evidence appeals, with the Court variously applying the jury impact test and declining to apply it following the decisions in *Stafford v DPP* and *R v Pendleton*.[3] Compounding the problem is that the narrow right of appeal to the Supreme Court provides little prospect of the Court's inconsistent jurisprudence being resolved.

15. It cannot be conducive to the reliable correction of miscarriages of justice that an appellant's prospects of success depend so largely on chance: that is, on a given constitution of the Court's subjective determination of guilt, or of the correct legal principles to be applied.

16. As to the question of when a conviction should be quashed because of serious impropriety which does not cast doubt on the guilt of the appellant, the answer is: always. This is because, for the reasons given above, it should not be permissible for the Court to uphold a conviction where there has been serious impropriety simply on the basis that *it* does not feel the appellant's guilt is in doubt, an assessment which is subjective, usurps trial by jury, and may be factually incorrect. The appropriate role for the Court in cases where serious impropriety comes to light is to quash the conviction and let the prosecution pursue a retrial if it remains persuaded of the appellant's guilt. If a retrial is not possible in the circumstances, that is not a good reason for upholding the conviction; that would be to unfairly punish an appellant for the impropriety of others.

Suggested reform

17. The single test of safety provided by section 2 of the Criminal Appeal Act 1968 ("CAA 1968") should be supplemented with specific statutory grounds detailing circumstances where a conviction ought to be overturned.

[2] Roberts, S. 2017. 'Reviewing the Function of Criminal Appeals in England and Wales', pp. 24-5.
[3] Roberts, S. 2017. 'Reviewing the Function of Criminal Appeals in England and Wales', pp. 26-7.

18. The test of 'safety' should remain a fallback provision, along with an interests of justice test, to ensure convictions are quashed where specific grounds of appeal are not met but there is still some other reason why the Court feels the conviction should not stand.

19. Under this revised approach, we propose that the Court should quash a conviction where:
    a. The trial judge has materially misdirected the jury on the law;
    b. The trial judge has made a material error of fact in the summing-up;
    c. The trial judge has made an incorrect ruling which materially disadvantaged the defence;
    d. The trial judge's summing up was unbalanced or otherwise materially defective;
    e. There was a material error in the defence's conduct of case;
    f. Jury impropriety has emerged;
    g. The prosecution may have amounted to an abuse of process, or the conduct of the authorities may have fallen seriously below acceptable standards;
    h. The right to a fair trial was breached;
    i. The case should not have been allowed to go to the jury because the prosecution evidence was unacceptably weak or otherwise unsatisfactory;
    j. There is evidence which was not before the jury, but which may have affected its decision to convict;
    k. Material was not 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;
    l. There has been failure to retain relevant materials, exhibits or records of trial proceedings such that the appellant cannot effectively exercise their right of appeal or to apply to the CCRC;
    m. The Court has real doubt about the correctness of the jury's verdict; or
    n. Where for any other reason, the conviction may be unsafe, or the interests of justice otherwise require that it be quashed, taking into account all the circumstances of the case.

20. In our view, such legislative change would result in the Court more effectively and reliably addressing miscarriages of justice. This is because the proposed specific grounds of appeal will guide the Court's decision-making to achieve more consistent and just outcomes. The revised test for determining conviction appeals proposed above would re-assert the principle of trial by jury. Additionally, it would send a clear message from Parliament to the Court that it considers that justice ought to take precedence over finality when there is doubt, and that it is for jurors alone to make findings of guilt.

21. As can be seen, elements of the proposed test above go to two issues which will be discussed further below, namely the Court's approach to fresh evidence appeals and 'lurking doubt' appeals.

Q4: Is there evidence that the Court of Appeal's approach to the admission of fresh evidence hinders the correction of miscarriages of justice?

Q5: Is there evidence that the Court of Appeal's approach to assessing the safety of a conviction following the admission of fresh evidence or the identification of legal error hinders the correction of miscarriages of justice?

22. Due to the similarities and overlap in questions 4 and 5 of the Issues Paper, we have provided a joint response below.

23. Similar inconsistencies exist with the Court's approach to the admission of fresh evidence as exist with its application of the safety test. Many constitutions will go through each consideration in s23(2) CAA 1968, placing varying degrees of emphasis on different s23(2) considerations, whilst in other cases the Court will only refer to the 'interests of justice' principle – which as the legislation makes clear should be the determinative consideration.

24. In relation to the Court's consideration of s23(2)(a) (whether the fresh evidence is "capable of belief"), the Court often appears to ask itself whether *it* considers the evidence in question to be believable. In our view, this is an incorrect interpretation of the statute. Regardless of what the Court ultimately thinks regarding the reliability and credibility of the fresh evidence, all that matters is that a reasonable jury acting reasonably *could* find the evidence believable. The Court should treat this as a low bar, bearing in mind that it is for juries, not judges, to ultimately decide the question.

25. Where the considerations listed in s23(2) are given a restrictive interpretation and treated as conditions, and fresh evidence is viewed in isolation by the Court of Appeal, the Court avoids seeing the greater picture that demonstrates the miscarriage of justice. While there are many examples of this, APPEAL wishes to provide the Law Commission with an example from one of our cases, *R v AWJ* [2021] EWCA Crim 1776, which demonstrates how this approach can particularly disadvantage women appealing their convictions where fresh evidence relates to delayed disclosure of domestic abuse.

Issues with fresh evidence of domestic abuse – R v AWJ

26. The s23(2) considerations which cause most issues in relation to fresh evidence of domestic abuse are s23(2)(a) and s23(2)(b) (whether there is a reasonable explanation for the failure to adduce the evidence at trial).

27. Looking first at s23(2)(a), the Court has displayed a concerning unwillingness to accept as capable of belief a victim of abuse where her evidence at trial differs from that on appeal. In *R v AWJ*, APPEAL represented a woman who was convicted of harming her child, where at trial she claimed the injury was the result of an accident. It was only after going to prison and participating in counselling and support groups for women who were in abusive relationships that she properly understood the behaviour of her partner as abusive and felt able to disclose this information to fresh

appellate representatives. She disclosed to representatives at APPEAL that, in addition to lengthy and extensive physical, sexual and emotional abuse by her partner over a number of years, on the night of the injuries to her son, her partner had punched her in the head causing her to drop him involuntarily.

28. Despite APPEAL collecting fresh expert evidence on the child's injuries, along with extensive documentary evidence of this abuse, including police records, local council reports, GP records of her injuries and evidence from a clinical psychologist who classified the abuse she suffered as torture as defined under international criminal law, the Court still found it necessary to call our client to give evidence in the Court of Appeal. She was subject to cross examination on her changing accounts by prosecution counsel, questioning why she did not leave her abusive partner in order to keep her children safe. Not only is such an experience re-traumatising for a victim of abuse, but it is also reflective of a misguided approach which views her evidence in isolation of the "ample independent evidence of domestic violence" which the Court conceded existed.

29. Rather than asking whether a reasonable person might find her evidence believable, the Court concluded that in its view she was not a "convincing witness" and therefore did not allow the appeal, criticising her "selective memory recall". While this judgment of the Court displays a worrying lack of understanding of how domestic abuse and coercive and controlling behaviour affects an individual, it also provides an example of how focusing on the "capable of belief" consideration in s23(2) in isolation from other evidence prevents the Court from taking an comprehensive view of a case and evidence, resulting in perpetuating miscarriages of justice. APPEAL submits that the fresh evidence that was presented in this case painted a very different picture of what happened. The plethora of fresh evidence from independent sources would, we argue, have been capable of having a demonstrable impact on the jury's findings.

30. Turning next to the "reasonable explanation for failure to adduce" consideration, the Court has applied this rigidly and restrictively, resulting in its failure to admit fresh evidence of abuse where there has been delayed disclosure of such abuse.

31. The Court appears to apply this consideration in an attempt to uphold the "one trial" principle and the principle of "finality", as referenced in the Issues Paper at paragraphs 2.18-2.22. While APPEAL would point to the dearth of evidence that appellants are deliberately "holding back" defences to be advanced before the Court of Appeal, we also submit that these principles, as embodied in the s23(2)(d) consideration, can indisputably result in innocent appellants struggling to have their convictions overturned.

32. The "reasonable explanation for failure to adduce" consideration can be difficult to overcome for appellants where their trial representatives did not obtain evidence that was available for them to obtain at the time of trial, such as records of abuse. In *R v AWJ*, APPEAL obtained an expert report from a clinical psychologist which offered an explanation for why our client had not initially disclosed such abuse. There was also

an application by a charity organisation that supports women who have been victims of abuse to submit a Third-Party Intervenor's Statement. This report explained in detail the extensive research into how long it takes victims of abuse to make disclosures of such abuse, and how it can be even longer for women from minority ethnic backgrounds, such as our client.

33. In relation to the Third-Party Intervenor's Statement, the Court rejected its admission at an earlier directions hearing, saying that it did not assist the Court. In relation to the expert report, the Court found that it was intended to explain the delayed disclosure point, but as it was tied into an account from our client, which the Court found to be incapable of belief, it was not admitted. The Court found our client to lack credibility due to the significant change in her account. However, the Court failed to appreciate that the history of domestic abuse and coercive control was directly linked the ability by the appellant to give a true account at trial. It was only through the prism of abuse that the Court could begin to understand and assess credibility, but by refusing to admit the fresh evidence, the Court deprived itself of that opportunity. This case is a stark example of where the interest of finality was considered superior to the interests of justice in allowing an appeal and ordering a fresh determination of the facts by a jury.

Jury Impact test

34. As already discussed above, even where the Court agrees to receive fresh evidence, it too often will uphold the conviction based on its own subjective views of the appellant's guilt or the strength of the prosecution case, rather than deciding whether it may possibly have affected the jury's decision to convict.

35. In truth, there is no reliable way of determining what would have happened if fresh evidence had been available to a jury, except to order a retrial. To ensure that miscarriages of justice are reliably corrected, this is precisely what should be done in all fresh evidence appeals where there is a real – as opposed to entirely fanciful – chance that the evidence may have affected the jury's verdict. In our submission, that will always be the case where the fresh evidence is materially relevant to the issues the jury had to consider.

36. Far from undermining the primacy of the jury, such an approach re-affirms the principle that only juries can find a defendant guilty of a serious criminal offence, following a fair trial in which the defendant has been able to prepare and present their defence, fairly and fully, with access to all the relevant evidence.

37. Whilst an increased number of retrials will come with its costs, so do miscarriages of justice which go uncorrected for years if not decades. While having just one criminal trial is of course desirable, ensuring the correct outcome has been achieved, and is seen to have been achieved, should be paramount.

Suggested reform

38. To encourage the Court to take a less restrictive approach in fresh evidence appeals, we propose that s23 CAA 1968 be amended so that:
    a. The Court *must* receive any evidence not adduced in the proceedings from which the appeal lies where it is necessary or expedient in the interests of justice to do so.
    b. The Court *may*, in considering whether to receive any fresh evidence, have regard to:
        i. whether a reasonable jury acting reasonably could possibly find the evidence believable;
        ii. whether it appears the evidence may afford any ground for allowing the appeal or may otherwise be materially relevant to the outcome of the appeal; and
        iii. whether the evidence *may reasonably have been ruled* admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal.

39. In our view, these amendments would better guide the Court into focusing primarily on the interests of justice when deciding whether to admit fresh evidence, rather than getting side-tracked into forming its own views on:
    a. the persuasiveness of the evidence (which is a matter for a jury);
    b. the admissibility of the evidence (which is a fact-specific exercise for a trial judge); or
    c. deciding whether it considers the failure to adduce the evidence at trial as reasonable (which is an irrelevant consideration when determining the effect of the fresh evidence on the safety of the conviction).

40. Additionally, we recommend that s23 be amended so that the Court can receive evidence which was adduced in the proceedings from which the appeal lies if it is necessary or expedient in the interests of justice for it to do so. This, we submit, would prove a useful power for the Court in determining appeals where the following two statutory grounds proposed above are being considered:
    a. the case should not have been allowed to go to the jury because the prosecution evidence was unacceptably weak or otherwise unsatisfactory; and
    b. the Court has real doubt about the correctness of the jury's verdict.

41. Lastly, the jury impact test should be put on a statutory footing, using the standalone ground of appeal listed above.

Q6: 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?

42. There are cases where there is no fresh evidence or identifiable irregularity with the trial process, but the jury's verdict nonetheless appears perverse or at least in serious doubt. In such circumstances, so-called "lurking doubt" cases, the Court is slow to intervene and has become progressively more deferential 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.

43. The concept of lurking doubt has a vital role to play in assessing whether a conviction is safe. This is particularly so in cases involving identification evidence such as *Malkinson* and, also in other categories of case such as those involving cell confession evidence, or where there has been misconduct by law enforcement.

Suggested reform

44. We agree that it would assist to amend the *Galbraith* 'no case to answer' test by permitting a trial judge to stop a case where there are manifest weaknesses in the prosecution case, as discussed in the Issues Paper at 4.143-4. This would then provide a principled basis on which the Court of Appeal could intervene by reviewing the trial judge's decision.

45. However, we are concerned that this change would only assist with future cases. To those who have already been subject to a miscarriage of justice, we have proposed above the following two statutory grounds of appeal be introduced:
    a. The case should not have been allowed to go to the jury because the prosecution evidence was unacceptably weak or otherwise unsatisfactory; and
    b. The Court has real doubt about the correctness of the jury's verdict.

46. On the surface, it may be thought that there is some tension between APPEAL's criticism of the Court upholding convictions based on its subjective opinion of an appellant's guilt, while simultaneously inviting the Court to quash convictions where it subjectively assesses that there is real doubt about the appellant's guilt.

47. However, this apparent contradiction is an illusion. In the former case, the Court is effectively usurping a jury's monopoly on making findings of guilt in serious criminal cases: it is making a finding of guilt to prevent a jury considering the case again (at a retrial). In the latter case, in contrast, the Court is fulfilling its function of remedying miscarriages of justice.

Q7: Are the options and remedies available following the quashing of a conviction by the Court of Appeal adequate and proportionate?

48. The compensation scheme and support offered to victims of miscarriages of justice after their convictions are quashed are wholly inadequate.

49. In 2014 the Government changed the statutory eligibility for miscarriage of justice compensation, introducing a new test providing that compensation is only available if the new or newly discovered fact that led to the conviction being quashed shows "beyond reasonable doubt" that the person did not commit the offence. This reversed the burden of proof for the innocent. As the respected lawyer, the late Jack Dromey MP said during the parliamentary debate:

> *"I stress again that the essence of our argument, and that supported by all parties and crossbenchers in the other place, is that an individual is innocent until proven guilty. We see no good reason why a victim of a miscarriage of justice should suffer a 'beyond all reasonable doubt' test."*[4]

50. Figures published in the Justice Gap confirms the shocking decline of grants of compensation, including two years (2017/18 and 2018/19) where not a single person received compensation.[5]

51. At the European Court of Human Rights hearing of the cases of Sam Hallam and Victor Nealon on 5 July 2023, the Government confirmed that in the five-year period of 2017-2022, of the 346 applications for compensation by miscarriage of justice victims only 13 applications were granted. This amounts to fewer than 4% of applicants being granted compensation.[6]

52. Back in 2006, in reaction to a few cases of well-off miscarriage of justice victims receiving considerable sums under the discretionary compensation scheme, then Home Secretary Charles Clarke brought in a statutory cap. This means the most that can be received is £1 million in cases where the applicant has been imprisoned for at least 10 years, or half a million in all other cases. This figure has not been raised since 2006; if it had tracked inflation it would stand at £1.65 million.[7] This is an insult given the devastation to the lives of victims of miscarriages of justice and does not begin to compensate them for the years they spent wrongfully imprisoned.

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[4] Hansard, 4 Feb 2014 : Column 171, Jack Dromey, (https://publications.parliament.uk/pa/cm201314/cmhansrd/cm140204/debtext/140204-0002.htm).

[5] Jon Robins, 'MOJ has paid out less than £1.5m in compensation to victims of miscarriages of justice in three years', Justice Gap, 5 September 2023. (https://www.thejusticegap.com/moj-has-paid-out-less-than-1-5m-in-compensation-to-victims-of-miscarriages-of-justice-in-seven-years/).

[6] Matt Foot 'Andrew Malkinson was right to expose these ministers. Why do they keep punishing innocent people?' The Guardian, 9 August 2023. (https://www.theguardian.com/commentisfree/2023/aug/09/andrew-malkinson-was-right-to-expose-these-ministers-why-do-they-keep-punishing-innocent-people).

[7] Calculated using https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator.

53. In April 2018, JUSTICE published a report, *Supporting Exonerees: Ensuring Accessible, Consistent and Continuing Support*,[8] adding to the call for reform. Under the 2014 statutory compensation scheme, an applicant might spend months preparing submissions to satisfy the statutory test, before the application is accepted and arguments about quantum can be made. This means there is no immediate provision for those exiting prison after being wrongfully imprisoned for years. If the application is accepted and an interim payment made, under the current rules, the applicant will become ineligible for the legal aid they might need to pursue any civil remedies against the state agents responsible for their wrongful conviction. Further, under the current guidance, civil remedies must be exhausted before any payment from the statutory scheme can be received – and civil proceedings such as an action against the police can take years to conclude.

54. As JUSTICE pointed out, while the Government-funded Miscarriage of Justice Support Service ('MJSS') can help exonerees with a number of activities, it lacks sufficient long-term funding and "does not provide the extensive service that is necessary".[9] As JUSTICE's report also highlighted, exonerees face "unique psychological difficulties", including a high prevalence of post-traumatic stress disorder – yet there is a dearth of specialist psychiatric help for exonerees.[10]

Suggested reform

55. The test provided by s.133 (1ZA) Criminal Justice Act 1988, as amended in 2014, should be abolished, as an affront to the presumption of innocence and to miscarriage of justice victims. When a conviction is quashed and no retrial is ordered, the individual should be automatically eligible for compensation. If a retrial is ordered and a defendant is found not guilty, they should be automatically eligible for compensation.

56. The arbitrary and unfair 2006 cap on compensation for miscarriage of justice victims should be abolished.

57. Victims of miscarriage of justice on release from prison should have a statutory right to receive an immediate interim package of support, including financial support, to allow them to rehabilitate in the community, which should be exempted from civil legal aid eligibility assessments.

58. Victims of miscarriage of justice should have a statutory right to immediate and specialised psychological support and therapeutic care to help deal with the long-term impact of their incarceration.

[8] Available here: https://justice.org.uk/supporting-exonerees-ensuring-accessible-continuing-and-consistent-support/.
[9] Ibid, para. 39.
[10] Ibid, paras. 16-18.

Q8: Are the powers of the Court of Appeal in respect of appeals against sentence adequate and appropriate?

59. The Issues Paper has rightly remarked that sentencing appeals have become more standardised since the introduction of sentencing guidelines. APPEAL does not take issue with the existing grounds for reducing a sentence on appeal, namely where a sentence is not justified by law, where it is wrong in principle or manifestly excessive. However, in a similar manner to the legislative interventions aimed at regularising sentencing at the trial level, APPEAL would propose that those grounds for reducing a sentence on appeal are put on a statutory footing.

60. Having said this, APPEAL would suggest that there are areas where having only these limited grounds for sentencing appeals would restrict the Court's ability to correct some unjust sentences. The main area in which this is applicable is dealing with sentence types since repealed where individuals remain on such sentences passed lawfully at the time. This is particularly relevant to the sentence of Imprisonment for the Public Protection ('IPP'), abolished in 2012.[11]

61. The IPP sentence was abolished following great criticism from across the political spectrum[12] and in a decision of the European Court of Human Rights,[13] which stated that such sentences amounted to "arbitrary detention". Yet, as of March 2023, there remain 2,916 individuals in prison on IPP sentences, 45% of whom have not yet been released despite being over their tariff.[14] Individuals who are still serving an IPP sentence in prison currently have only two options to get out of prison; via the Parole Board or via a sentencing appeal at the Court of Appeal. The Parole Board route has proven a notoriously difficult route for IPP sentenced prisoners to successfully pursue,[15] as evidenced by the extremely high proportion of those on IPPs who have never been released. APPEAL would submit that there is an opportunity to extend the Court of Appeal's sentencing appeal powers to correct these unfair sentences.

62. The Court has had to grapple with IPP sentence appeals on numerous occasions. While recognising the unique difficulties faced by those serving those sentences, it has often felt unable to interfere with sentences which were lawful at the time of imposition.[16] The Court has expressed the view that it is a matter for Parliament to rectify the injustices of IPP sentences, but it is equally possible for Parliament to legislate to give the Court greater powers to rectify these unjust sentences itself.

[11] Section 123 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).
[12] For summary of criticism, see Justice Select Committee, 'IPP Sentences - Third Report of Session 2022–23', 22 September 2022, [11]-[17].
[13] *James, Wells and Lee v United Kingdom* [2012] ECHR 1706.
[14] United Group for Reform of IPP (UNGRIPP), 'IPP by Numbers' (https://www.ungripp.com/statistics).
[15] See Justice Select Committee, 'IPP Sentences - Third Report of Session 2022–23', 22 September 2022 [83]-[129].
[16] See for example, *R v Roberts and others* [2016] EWCA Crim 71.

63. There have been some recent cases before the Court of Appeal where it has replaced indeterminate sentences with determinate sentences on appeal,[17] focusing on mistakes made by sentence judges in dealing with the legislation governing IPPs but also looking at the more subjective determination of whether an IPP sentence was needed to protect the public from harm.[18] It is not quite clear from these recent decisions which of the grounds of appeal for sentencing appeals are being relied on by the Court. It can appear that, as stated by Paul Taylor KC, judges may in fact be making decisions "merely on the grounds that it might have passed a somewhat different sentence if they had been sitting at first instance".[19] APPEAL thinks it would be helpful to place such actions by the Court on a statutory footing, alongside existing grounds of appeal for sentence.

Suggested reform

64. The existing grounds of appeal in relation to sentence should be set out in legislation, along with a further ground allowing the Court of Appeal to reduce a sentence where it is in the interests of justice to do so, taking into account evolving standards of decency. This would allow the Court to take a more active and direct approach to dealing with sentencing appeals where an individual has been given a sentence that has since been repealed and strongly criticised for its cruelty and disproportionality.

Q9: Does the law satisfactorily enable appropriate criminal cases to be considered by the Supreme Court?

65. It is far too difficult for appellants to exercise their right of appeal to the Supreme Court under s33 CAA 1968. This not only hinders the development of the common law, but also deprives the Court's decision-making from an important layer of scrutiny and challenge from above.

66. APPEAL agrees with the Runciman Commission's view that the requirement that the Court of Appeal certify that the case involves a matter of law of general public importance is unduly restrictive.

67. Additionally, the Court's inability to provide such a certification in cases where it has refused leave to appeal, as confirmed by *R v Garwood* [2017] EWCA Crim 59, narrows the right of appeal to the Supreme Court to an even more unacceptable degree.

Suggested reform

68. APPEAL supports the Runciman Commission's recommendation that any Court of Appeal (Criminal Division) decision be appealable to the Supreme Court, regardless of whether leave to appeal was granted or not, as long as the application for leave was decided by the Full Court. This right of appeal to the Supreme Court should be

[17] See *R v Hanson* [2023] EWCA Crim 203 and *R v Fellowes* [2023] EWCA Crim 819.
[18] *R v Hanson* [2023] EWCA Crim 203 [30].
[19] *Taylor on Criminal Appeals*, 10.129.

regulated only with the need to obtain leave to appeal from either the Court of Appeal or the Supreme Court.

Q10: Is there evidence that the referral test (a "real possibility" that the conviction, verdict, finding or sentence would not be upheld) used by the Criminal Cases Review Commission when considering whether to refer an appeal hinders the correction of miscarriages of justice? If so, are there any alternative tests that would better enable the correction of miscarriages of justice?

69. There is evidence that the real possibility test hinders the correction of miscarriages of justice. Replacement of the test is a necessary change, but one which on its own will be insufficient to transform the CCRC into an effective and accountable miscarriage of justice watchdog. As set out below, further law reforms are needed to ensure the CCRC investigates cases thoroughly, and that the body is transparent, accountable and well led.

The 'real possibility' test

70. We consider that the current statutory test applied by the CCRC in making referrals, provided by s13 Criminal Appeal Act 1995 ('CAA 1995'), hinders wrongfully convicted applicants from accessing the Court of Appeal. It is a predictive test which requires the CCRC to second-guess the outcome of an appeal. As a consequence, the test anchors the CCRC's decision making to that of the Court, and this is turn causes the CCRC to be far too deferential to what the CCRC speculates that the attitude of the Court will be. As stated by the Westminster Commission on Miscarriages of Justice ('WCMJ'):

> "The 'real possibility' test is problematic. First, the distinction between a 'real possibility' and a 'probability' is a very fine one, and it is very easy for one to elide into another. Second, it encourages the CCRC to be too deferential to the Court of Appeal and to seek to second-guess what the Court might decide, rather than reaching an independent judgement of whether there may have been a miscarriage of justice. A different test might create a different and more independent mindset."[20]

71. Although Lord Bingham made clear that that a real possibility "may be less than a probability",[21] the fact that from 1997 to the present over 70% of referrals resulted in a successful appeal[22] suggests that in practice the CCRC adopts a more conservative interpretation of the meaning of the term. Many others have commented on this phenomenon, urging the CCRC to interpret the test less cautiously, including the Justice Select Committee in 2015. In their extensive study of the CCRC, Professor Carolyn Hoyle and Dr Mai Sato "discerned a cultural imperative to keep in favour with

[20] Westminster Commission on Miscarriages of Justice, *In the interests of justice; an injury into the Criminal Cases Review Commission*, February 2021 ("WCMJ Report"), p. 36.
[21] *R v CCRC ex parte Pearson* 1999 WL 477999.
[22] Criminal Cases Review Commission, 'Facts and Figures' (September 2023) (https://ccrc.gov.uk/facts-figures/).

the Court of Appeal that seemed to go beyond the legal mandate of matters of efficacy."[23] One member of CCRC personnel told them: "I think we could be bolder".[24]

72. The CCRC has publicly denied that the real possibility test prevents it from referring cases it considers to be meritorious, and responding to the WCMJ report, the CCRC stated that "in any case where the decision on merits appears to be borderline, the CCRC has always erred on the side of referring the case for appeal and will give the benefit of any doubt to an applicant."[25] However, the CCRC's referral rate remains low, with it standing at less than 2% in 2022/23, while the success rate of referred cases stood at 89%.[26] This suggests that, if anything, the CCRC is presently adopting a more conservative approach to the real possibility test, and there are many examples of cases initially rejected by the CCRC and later found to be a miscarriage of justice, including *Nealon*, *Shrewsbury 24* and *Malkinson*.

73. One further striking feature of the 'real possibility' test is that it bears no similarity to the test that is applied by the Single Judge in determining whether to grant leave to appeal. There does not appear to be any logical reason why the test which is applied in order to grant leave to allow an appellant a right to challenge his or her conviction should differ from the considerations to be applied by the CCRC.

74. It is notable that New Zealand's recently established CCRC did not opt for the real possibility test. It 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 the merits of a referral in all the circumstances.

Suggested reform

75. 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 explicitly gives the CCRC the ability to refer when *it* considers a case ought to considered by the Court. 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.

76. S13 CAA 1995 should be amended so that it provides that:
    a. The CCRC should refer a conviction for appeal if it considers that:
        i. there is an arguable ground of appeal;
        ii. the conviction may be unsafe; or

[23] Hoyle, Carolyn and Mai Sato, *Reasons to Doubt: Wrongful Convictions and the Criminal Cases Review Commission* (OUP, 2019), p. 66.
[24] WCMJ Report, p. 35.
[25] Criminal Cases Review Commission, 'CCRC releases official response to the Westminster Commission report' (2 June 2021) (https://ccrc.gov.uk/news/ccrc-releases-official-response-to-the-westminster-commission-report/).
[26] CCRC Annual Report and Accounts 2022/23, p. 20.

iii. it is otherwise in the interests of justice to do so.

b. The CCRC should refer a sentence for appeal if it considers that:
   i. there is an arguable ground of appeal;
   ii. the sentence may be unlawful, manifestly excessive, wrong in principle or against the interests of justice, taking into account evolving standards of decency; or
   iii. it is otherwise in the interests of justice to do so.

CCRC investigation

77. Even if the real possibility test is replaced as proposed, the CCRC's failure to conduct thorough investigations on cases will continue to hinder the identification and correction of miscarriages of justice.

78. There is ample evidence to suggest that a close-minded, non-proactive approach to investigation is often adopted by the CCRC in its case reviews. The WCMJ "repeatedly heard evidence to the effect that the CCRC's investigations lacked thoroughness and scope".[27] A former CCRC Commissioner admitted to the WCMJ that "the over-riding question was to ask the question 'so what' instead of 'what if'."[28] Emily Bolton of APPEAL gave the WCMJ the following example from another case where the CCRC had refused to initiate DNA testing:

> "Our client was convicted of murder alongside a co-defendant. DNA recovered from a spent shotgun cartridge found next to the victim's body did not match either of the two individuals convicted of the crime. We therefore suggested the DNA be checked against the National DNA Database, since of course it could belong to the shooter. However, the CCRC refused: saying the exercise was not worth doing because even if a match was found, all it would show for certain is that the person had come into contact with the cartridge at some point. While it is of course true that a match would not necessarily prove they were the shooter, it is disingenuous to claim that such a finding would not constitute important and potentially game-changing fresh evidence."[29]

79. The CCRC's restrictive approach to investigation presents particular difficulties in cases involving material non-disclosure – acknowledged by the CCRC to be a leading cause of miscarriages of justice. A former CCRC Commissioner told the WCMJ: "I believe that the diligence in seeking out undisclosed material depended very much on the diligence of the CRM and the approach taken by the Assigned Commission Member."[30] That same ex-CCRC Commissioner wrote in a book that because the CCRC does not routinely comb through police unused material: "There is no

[27] WCMJ report, p. 44.
[28] WCMJ report, p. 45.
[29] WCMJ report, p. 45.
[30] WCMJ Report, p. 49.

certainty… that the Commission's investigations will pick up non-disclosure where it has taken place."[31]

80. As a matter of policy, the CCRC states that when considering whether to carry out an enquiry, the CCRC "will have regard to whether there is any real prospect that the investigation might produce evidence or argument capable of affecting the safety of the conviction".[32] In other words – and this is confirmed by APPEAL's experience – the CCRC will only obtain and review police material where the *Nunn* [2014] UKSC 37 test is met, i.e. where it can be shown in advance that amongst the material there is a real prospect of something emerging which may affect the safety of the conviction. This threshold is hopelessly high since non-disclosure will often be an 'unknown unknown', which can only be discovered through proactive searches. What is more, it involves a fettering of the CCRC's discretion since s17 of the CAA 1995 makes clear that the CCRC can compel disclosure of police material as long as it is "reasonable" and "may assist" the body in deciding whether to refer the case – a far less stringent standard than that in *Nunn*.

81. In response to recent criticism regarding the *Malkinson* case, the CCRC has repeatedly referred to the following statistic "In the last three reporting years (1 April 2020 to 31 March 2023), there have been 105 convictions or sentences overturned by the courts after being referred by the CCRC."[33] This might be thought to give the impression that through its own investigations, the CCRC is identifying a significant number of miscarriages of justice. However, analysis of the CCRC's reporting data demonstrates that at least 54 (51.4%) of these cases are related to the Post Office Horizon scandal.[34] In these cases, crucially, it was *not* investigative work by the CCRC which brought to light the errors and defects within the Post Office's transaction processing software which exposed the miscarriages of justice. Rather, that came to light through a group civil litigation.[35]

Suggested reform

82. For these reasons we propose that the CCRC, like the police (under s23 CPIA 1996), should be placed under a statutory duty to pursue all reasonable lines of inquiry in assessing whether a case meets the referral criteria.

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[31] Elks, Laurie, *Righting Miscarriages of Justice? Ten years of the Criminal Cases Review Commission* (JUSTICE, 2008), p. 307.

[32] CCRC CW-POL-04, para 4.4

[33] Criminal Cases Review Commission, 'Annual Reports and other publications' (https://ccrc.gov.uk/corporate-information-and-publications/).

[34] The value of 54 was reached through comparison of the CCRC's listings of commission referrals decided by appeals courts and open-source searches of press coverage regarding the Post Office cases.

[35] *Bates & Others v. Post Office Ltd* (2019) High Court of Justice, Queens Bench Division, case Nos. HQ16X01238, HQ17X02637 and HQ17X04248. Available at: https://www.judiciary.uk/wp-content/uploads/2019/12/bates-v-post-office-judgment.pdf (Accessed: 7 November 2023).

Accountability

83. Currently, the only means of challenging CCRC decisions in individual cases is via judicial review. Having heard evidence that the CCRC was "well protected" by the Administrative Court and that judicial review was a costly, lengthy process that was inaccessible to the vast majority of CCRC applicants who are unrepresented, the WCMJ concluded that judicial review did not offer a "meaningful and effective way of challenging CCRC decisions either in relation to the investigation strategy or the decision about a referral".[36]

84. The WCMJ stated that: "This lack of accountability is unhealthy and likely to have a detrimental impact on confidence in the CCRC and the quality of its investigations and decisions."[37] This was echoed by David Emanuel KC, who stated: "Knowledge that their decisions are effectively immune from challenge is bound to affect those at the CCRC who make decisions." We agree and are of the firm view that CCRC decision-making will not improve until its casework decisions can be subjected to proper scrutiny, oversight and challenge.

85. It is noteworthy that driving instructors, consultant lobbyists and estate agents all have fee-free access to the First-Tier Tribunal (General Regulatory Chamber) to challenge decisions by public bodies which affect them, yet potential miscarriage of justice victims do not.

86. There is also presently a dearth of accountability at the CCRC at the institutional level. Unlike the CPS and police, there is no inspectorate of the CCRC which scrutinises its work and drives improvements. The CCRC does have three non-executive directors, who are meant to provide scrutiny and challenge, however this appears directed at business management rather than CCRC's casework, as none of these non-executive directors predominantly have a background in criminal justice,[38] and furthermore, non-executive directors are no substitute for a body which carries out detailed inspections and publishes its findings.

Suggested reform

87. CCRC decisions - including refusals to refer cases, carry out specified investigation and disclose material – should be subject to challenge on their merits via access to a free, independent Tribunal. This Tribunal should be made up in part of lay members with knowledge and experience of the criminal justice system, including ideally experience of miscarriage of justice work.

88. A CCRC Inspectorate should be established to conduct detailed inspections of CCRC casework aimed at driving improvements in quality.

[36] WCMJ Report, pp. 53-4 and 58.
[37] WCM Report, p. 54.
[38] https://ccrc.gov.uk/who-we-are/

Leadership

89. When the CCRC was set up in 1997 there were people who worked in the leadership of the Commission who had some experience and understanding of miscarriages of justice. For example, David Jessell, a former presenter of *Rough Justice*, and the forensic psychiatrist Dr Jim MacKeith, were Commissioners. Such experience does not exist in today's CCRC. The current CCRC Chair's professional experience consists mainly of board member roles, including at United Biscuits, while her immediate predecessor Richard Foster was Chief Executive of the Crown Prosecution Service. These professional histories do not offer the kind of experience and understanding of miscarriages of justice needed to provide effective leadership of the CCRC.

Suggested reform

90. This problem could be addressed by introducing a requirement that the appointment process for CCRC Commissioners, including the Chair, include a consultation with stakeholders as well as a public confirmation hearing at the Justice Select Committee.

91. Additionally, the current statutory test governing the composition of Commissioners at the CCRC (s8(6) CAA 1995) ought to be amended to ensure there is enough knowledge and experience of miscarriage of justice work amongst the CCRC's Commissioners. We propose the following language:

> "At least two thirds of the members of the Commission shall be persons who have direct knowledge and experience of working on miscarriage of justice cases and of them at least one shall be a person who appears to have knowledge or experience of any aspect of the criminal justice system in Northern Ireland. The Chair of the Commission should have experience of the criminal justice system and direct knowledge and experience of miscarriage of justice work."

Exceptional circumstances requirement in no appeal cases

92. Under s13 CAA 1995, the CCRC cannot refer a conviction or sentence unless an appeal, or an application for leave to appeal, has already been attempted and denied, unless it finds that there are exceptional circumstances that justify making the reference.

93. As noted in the Issues Paper at 5.13, the WCMJ expressed serious concerns about the "exceptional circumstances" requirement in no appeal cases considered by the CCRC. We echo these concerns and, in a climate where post-conviction legal aid provision is so minimal, agree with Dr Dennis Eady's observation that the requirement places many potentially wrongly convicted individuals in a "Catch-22" whereby "until

you've lost your first appeal, you can't go to the CCRC … so you can't get any evidence to go for your first appeal".[39]

Suggested reform

94. The WCMJ shied away from recommending that the exceptional circumstances requirement be scrapped, citing concerns the CCRC would be overwhelmed by the resultant increased workload.

95. In our view, that is not a persuasive reason for keeping a rule which deprives prospective appellants, the vast majority of whom will likely never be able to find fresh appeal representatives, from accessing a thorough CCRC review of their case. The solution is to abandon the exceptional circumstances requirement, with the Government ensuring there is an adequate increase in CCRC funding to deal with the consequences.

Q11: Is there evidence that the application of the "substantial injustice" test to appeals brought out of time on the basis of a change in the law is hindering the correction of miscarriages of justice?

96. As the Bar Council has pointed out:

> "…despite the Supreme Court in *Jogee* finding that the law on parasitic accessory liability took "a wrong turn" over 30 years previously, only one historic murder conviction has been subsequently quashed as a result, and only four cases referred back to the CACD by the CCRC on this basis. It is submitted that these numbers alone, when considered in the context of the number of murder convictions since 1985, provides evidence that the "substantial injustice" test is hindering the correction of miscarriages of justice."[40]

97. We endorse the Bar Council's submission that:

> "…on the basis that an unsafe conviction resulting from a change in the law is as much a miscarriage of justice as other unsafe convictions, there is no justification for requiring an applicant in a "change of law" appeal to demonstrate that they have suffered "a substantial injustice" before leave is granted. The test should be the same for all applications for leave to appeal. Requiring a more onerous test in change of law cases is arbitrary and a disproportionate response to the "wider public interest in legal certainty and the finality of decisions made in accordance with the then clearly established law'."[41]

[39] WCMJ report, p. 38.
[40] Bar Council, 'Bar Council response to the Law Commission's Issues Paper on Criminal Appeals' (31 October 2023) [58].
[41] Ibid [59].

98. We would add that the "substantial injustice" requirement, which has no mandate from Parliament and thus no democratic legitimacy, is in particular hindering the correction of miscarriages of justice which, at their core, are about racism. Recently released data from the CPS, while limited in its scope, reveals significant racial disparities in 'joint enterprise' prosecutions. This data, though specific to post-*Jogee* cases, aligns with prior research findings covering both the pre- and post-Jogee *period*, consistently indicating racial disproportionality in prosecutions and convictions, most notable amongst young black men.[42]

Suggested reform

99. The simple reality is that the "substantial injustice" test is unfairly and arbitrarily perpetuating miscarriages of justice, including those caused by systemic racism. The CAA 1968 should be amended to expressly provide for its abolition. While some have expressed concerns about this resulting in an increased workload for the criminal appeals system, this is infinitely preferable to the status quo, in which justice is neither being done nor being seen to be done.

Q16: Is the law governing post-trial retention and disclosure of evidence, whether used at trial or not, satisfactory?

100. In APPEAL's experience, difficulties accessing evidence post-conviction – whether because it has not been retained or because access is refused – are a leading hindrance to the identification and remedying of miscarriages of justice.

Trial disclosure

101. Before addressing the problems post-conviction, we consider it important to address the issue of disclosure at trial.

102. Disclosure irregularities at trial are a notorious cause of cases collapsing, and where disclosure failings do not come to light in time, they constitute one of the leading causes of miscarriages of justice.

103. Under the current trial disclosure regime, crucial evidence is routinely withheld from the defence, violating the principle of equality of arms and the right to a fair trial. This is not simply down to inadequate resourcing or training; rather, it is the inherent result of the following structural flaws in the CPIA 1996 and its accompanying Code of Practice:

a. They require the police and prosecution to act in an impartial and inquisitorial manner, when in practice they act as adversaries to the defence;
b. They require police officers to make critical legal decisions regarding the sensitivity of the material, when they are not legally qualified; and
c. They require police officers and prosecutors to make decisions regarding the relevance and value of material, as well as how to describe that material and

[42] Nisha Waller, 'The racist stereotypes behind joint enterprise', The Justice Gap, 5 October 2023.

its potential relevance and value on a schedule, when in fact it is the defence who will almost always know better what will help establish their client's innocence or lesser culpability.

104. Disclosure failings at trial have been widely reported, studied, and commented upon. Though cuts to resources have certainly worsened the application of the CPIA in practice, they are not, for the reasons given above, solely to blame. Disclosure failings are not restricted to certain kinds of cases, nor certain kinds of evidence. They persist despite numerous reviews which have recommended tweaks such as better guidance and training.

105. At the core of the problem is that the current disclosure regime provides little incentive for the relevant bodies to faithfully exercise their disclosure duties. If they fail to do so, there is no criminal or disciplinary offence of non-disclosure, nor does a material disclosure failing that is uncovered automatically result in a successful appeal. So long as police and prosecution have sole possession of investigative material and are trusted to act as faithful gatekeepers to the material with which the defence is supplied, wrongful convictions will continue to occur.

106. The CCRC has acknowledged in numerous annual reports how common a factor non-disclosure is in the cases it refers back to the Court of Appeal:
    a. 2015-16: "In the past twelve months this Commission has continued to see a steady stream of miscarriages. The single most frequent cause continues to be failure to disclose to the defence information which could have assisted the accused. Sometimes the prosecution team were unaware that they possessed the material or misunderstood its significance. On other occasions it was deliberately suppressed."
    b. 2016-17: "…a major cause of miscarriages of justice continues to be non-disclosure, at or before trial, of material which could have been of assistance to the defence. Sometimes non-disclosure is deliberate… We are aware that this problem has exercised senior practitioners across the criminal justice system… and has been the subject of much comment in criminal justice inspectorate reports and elsewhere… Urgent action is needed to resolve these matters."
    c. 2019-20: "We continue to be greatly concerned about non-disclosure of material and this again was a key theme in our referrals this year."

Suggested reform

107. Though it is not strictly within the scope of this review, given how trial disclosure failings continue to pervade wrongful conviction appeals, it would be appropriate for the Law Commission to recognise the ongoing risk of miscarriages of justice occurring as a result of the present trial disclosure regime, and comment upon the need for further consultation and reform.

Post-conviction disclosure

108. The law on post-conviction disclosure leaves wrongfully convicted individuals without a coherent right of access to potentially exculpatory material. There is no incentive for law enforcement agencies to comply with a post-conviction request for access to potentially exculpatory material, and no viable mechanism to challenge a refusal.

Ineffective right of access

109. In light of the risk of disclosure failings occurring at trial, there is an urgent need for wholesale reform of the post-conviction disclosure landscape. The law as set out in *R (Nunn) v Chief Constable of Suffolk Constabulary* and the Attorney General's Guidelines on Disclosure 2022 (para. 140) leaves wrongfully convicted defendants without an effective means of accessing any potentially exculpatory evidence held by law enforcement agencies.

110. *Nunn* imposes a duty on the police or prosecution to disclose material which comes into their possession and might afford an arguable ground for contending the conviction is unsafe, and to conduct further enquiry where it might reveal something affecting the safety of the conviction. A defendant or their representatives can make a request to the police or prosecution for such material or enquiries. But in the vast majority of cases, though a defendant knows they have been wrongfully convicted, they will be unable to specifically pinpoint non-disclosed exculpatory material when they have no right to possess or review case files beforehand. There is no way in which they will be able to make effective representations as to how that unknown material could undermine the safety of their conviction, and the relevant agency will refuse the request. They are trapped in a "Catch 22" – without seeing the material and knowing what it contains they cannot articulate the relevance of the material to their case.

111. If an individual makes a broad or general request for material under *Nunn* it will likely be refused by the relevant agency as a fishing expedition. Further, in our experience, police forces are often ignorant of the current post-conviction disclosure framework and will incorrectly treat requests under *Nunn* as Subject Access Requests or Freedom of Information Act Requests, and then use exemptions to refuse disclosure. Even where an individual is able to make a specific request for material, the relevant agencies show little comprehension of their common law duties and regularly refuse wholly to disclose any material or conduct further enquiries. In our cases, this includes refusal of requests for unreviewed CCTV footage from around the crime scene, requests for police identity parade documentation when procedures can already be shown to have been violated, and requests for details of other, unfounded allegations made by a complainant in a case.

Lack of incentive to supply post-conviction disclosure

112. Just as at trial, at the post-conviction stage the police and prosecution are gatekeepers to the evidence. Again, there is no incentive for the relevant agencies to conduct post-conviction enquiries or disclose material that might undermine a conviction they were responsible for, particularly where that material has been in their possession from the outset. If anything, they may be incentivised to bury potentially exculpatory non-disclosed material. Any subsequent successful appeal proceedings are likely to shine a light on their initial handling of the case and potentially open them up to future criticism and litigation. They have a vested interest in a conviction being final, which translates into an interest in preventing convicted individuals who maintain their innocence from having access to material.

Challenging a refusal

113. Where a request under *Nunn* is refused the only method of challenge is by judicial review, which is not a viable option for the majority of individuals due to the cost, complexity and risk involved. In any judicial review proceedings, the individual seeking the disclosure will in effect yet again be attempting to put forward an argument about the potential exculpatory value of the unseen material without possession of it. This places them at a considerable disadvantage, made worse by the judicial belief that the CCRC in most cases provides an effective alternative remedy for the requestor.

"Safety net"

114. In *Nunn*, the Supreme Court referenced the CCRC's extensive investigatory powers and described the body as the "safety net" that can be trusted to obtain and review any material in possession of the police and prosecution that might be relevant to the safety of a conviction. This was a flawed stance for two reasons.

115. First, it does not account for the fact that in cases where a first appeal has not been possible, perhaps due to the need for post-conviction disclosure, individuals are not eligible for a case review by the CCRC unless there are "exceptional circumstances" (a designation which is both opaque and very rare, as discussed above).

116. Second, as already outlined above, in practice the CCRC uses its investigatory powers too conservatively to be able to consistently uncover exculpatory, *Nunn*-disclosable material. Despite acknowledging how common disclosure failings are in their referrals, in our experience the CCRC simply does not do the kind of comprehensive investigation needed to reliably identify non-disclosure. In addition to the ex-Commission's comments quoted above, we would evidence this further by pointing to:

    a. 2017 CCRC board minutes obtained by APPEAL using FOIA, which record ex-Commissioner Alexandra Marks stating, "she had recently been involved in two referral cases where material non-disclosure was the reason for referral,

but she doubted whether the enquiries that led to the discovery of that non-disclosure would be made if the applications had been made to-day."[43]

b. The case of our client Roger Khan, a vulnerable man with dyslexia who maintains his innocence and 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. 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. 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 denied Mr Khan access to justice, and the CCRC certainly did not act as a safety net.

117. In circumstances where police forces are refusing to cooperate with legal representatives in locating and providing post-conviction disclosure and instead entrusting the CCRC with this kind of review, and the CCRC are refusing to employ their investigative powers (whether due to restricted resources or an entrenched belief that the applicant is guilty), it is easy to see how material non-disclosure remains undiscovered, buried in police files that the wrongfully convicted individual has no right to access. It is imperative that convicted individuals and their legal representatives are given a greater right of access to police and prosecution files and this right should not be restricted because of the existence of an arm's length body subject to the vagaries of government funding levels.

Suggested reform

118. Comparison with a jurisdiction that permits so-called 'fishing expeditions' demonstrates the need for full access to police and prosecution files. In Louisiana, USA, 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. In 2017, Innocence Project New Orleans said the following: "Of the 48 people in Louisiana who have been exonerated since 1990, at least 43

[43] CCRC Board Meeting Minutes, 27 September 2017, p. 6, as referenced in submission by Centre for Criminal Appeals and Cardiff Innocent Project to Justice Select Committee (March 2018) (https://committees.parliament.uk/writtenevidence/88608/html/#_edn13).

exonerations were based on public records."[44] In Louisiana, then, access to full police and prosecution files is essential in order for most wrongfully convicted people to achieve justice. It is not unreasonable to suggest that the same might be true in England and Wales.

119. To ensure that wrongfully convicted individuals do not remain convicted because they are unable to access the material that would support their claim of innocence, a complete overhaul of post-conviction disclosure is needed. Specifically, the restrictive test endorsed by the Supreme Court in *Nunn* must be replaced with a new statutory right of access that elevates concerns for righting miscarriages of justice over concerns for finality and does not fetter this right of access through reference to an ineffective and underfunded public body.

120. The new statutory right of access must enable those claiming innocence and their representatives sufficient access to carry out the comprehensive investigation needed to uncover any exculpatory evidence that might be present within police and prosecution files. In our view, this can only be done through provision of controlled access to *all unused* police and prosecution case material, save any which can be justifiably withheld on the basis of genuine sensitivity (that is, disclosure would give rise to a real risk of serious prejudice to an important public interest). Where material is withheld on this basis, an individual claiming their innocence should have the right to instruct special counsel to review the material to establish whether any exculpatory material is present therein.

121. Any refusals of access should be readily and freely challengeable on their merits to an independent tribunal; perhaps to the same one being proposed to consider challenges to CCRC decisions.

122. Of course, this proposal would come with resource implications – but we submit this is a proportionate measure given the known prevalence of disclosure failings at trial and their contribution to miscarriages of justice.

123. Additionally, the proposal would create the unusual situation of a broader post-conviction right of access to disclosure than applies to defendants at trial. We submit this only reinforces the need for the trial disclosure regime to be fundamentally rethought.

Disclosure by the CCRC

124. The current rules governing disclosure of material by the CCRC to applicants are restrictive and opaque. This puts applicants at a serious disadvantage in scrutinising the CCRC's decision-making and presenting their best case for referral. The rules also discourage the CCRC from being open to scrutiny by third parties such as journalists and the public more generally.

[44] Matt Sledge, 'Innocence Project New Orleans fights for access to district attorney case files' Nola.com (2 May 2017) (https://www.nola.com/news/courts/article_b3c72bf3-c652-55a0-9470-5a511d398cd8.html).

Disclosure to applicants under Hickey

125. In *R v Secretary of State for the Home Department ex parte Hickey & Ors (No. 2)* [1995] 1 WLR 734, 746, it was determined that there should be sufficient disclosure by the CCRC to enable an applicant to properly present their best case for referral.

126. In our experience, however, the CCRC rarely agrees to disclose any material requested under *Hickey* and interprets the scope of its duty very narrowly. Apart from judicial review, there is no mechanism for reviewing or challenging a refusal to disclose. In a similar fashion to requests pursued under *Nunn*, an individual making a *Hickey* request is left largely in the dark about the potential value of the unseen material, and unable to make effective representations as to why it should be disclosed.

127. The fundamental unfairness in the CCRC's current approach to disclosure to applicants is that it should be for applicants and their representatives, not the CCRC, to determine what material will assist them in making their best case for referral.

128. Additionally, the lack of transparency undermines the CCRC's legitimacy. For instance, in one APPEAL case our application to the CCRC focused in large part on issues of law enforcement misconduct. The CCRC met on several occasions with the officers involved, yet it refused to disclose what was said at those meetings. This naturally bred concern that the officers may have misled the CCRC or at least made assertions which we were not in a position to scrutinise and challenge.

129. Yet again, lack of structural incentive is an issue. In a case that the CCRC is minded to reject, it may see little value in disclosing material and opening its decision-making up to greater scrutiny. If the CCRC does not disclose the material, it knows at present that it is very unlikely to be effectively challenged on that refusal.

130. The WCMJ recommended that "the CCRC should adopt a less conservative interpretation of its disclosure duties under *Hickey*" and further that the CAA 1995 should be amended to:

> "allow the CCRC to disclose to applicants and their legal representatives copies of material gathered or generated in the course of its review, with appropriate redactions and restrictions on onward disclosure, except where the CCRC deems disclosure of the material would give rise to a real risk of serious prejudice to an important public interest, including, for example, the privacy of complainants and the protection of law enforcement techniques".[45]

131. We endorse the WCMJ's suggested approach. In our view, there is no proper reason to restrict disclosure from the CCRC to an applicant in the way that its current

[45] WCMJ report, pp. 72-3.

narrow interpretation of *Hickey* does. A statutory right of access to the material reviewed by the CCRC should be introduced, enabling an applicant or their representatives, who will almost always have a better understanding of the individual case, to identify any material that may assist them. Inevitably there will be good reason to hold some sensitive material back, and to apply necessary redactions to some material, but beyond that, an applicant should have the right to make a value judgement on the gathered material and take independent legal advice on its impact, rather than having to trust an unaccountable and under-resourced body with that task.

132. We therefore suggest that the CAA 1995 is amended to require the CCRC to disclose to applicants and their representatives copies of material gathered and generated in the course of its review, to the extent requested by the applicant and with appropriate restrictions on onward disclosure, except where the CCRC deems disclosure of the material would give rise to a real risk of serious prejudice to an important public interest.

Ss23 and 24 CAA 1995

133. These statutory provisions make it a criminal offence for a person who is or has been a member or employee of the Commission to disclose information obtained by the Commission in the exercise of any of their functions, unless a specific exemption applies.

134. In our view, as currently drafted, this enables the CCRC to evade public scrutiny of their procedures and decision-making. Though clearly some material and information that might be gathered in the course of a case review will be genuinely sensitive (i.e. third-party medical records; intelligence records), a broad provision that prevents disclosure or publication of all information gathered in the review, as well as internal decision-making, is overly restrictive and creates a lack of transparency. Additionally, it is likely to have a chilling effect on potential whistle-blowers at the CCRC.

135. Further, in our experience, the CCRC is inappropriately relying on s23 to avoid complying with Subject Access Requests under the Data Protection Act 2018 and the UK General Data Protection Regulation (despite s23 not being listed as an enactment that creates a specific exemption to UK GDPR disclosure in Schedule 4 of the DPA 2018). On two of our cases, we have recently received fully redacted case logs in response to Subject Access Requests, preventing the individuals we represent from getting any insight whatsoever into the CCRC's approach to their case. We do not believe this was the envisaged use of s23 when it was passed by Parliament, and we suggest that a specific exemption is introduced to s24 to make it clear that s23 does not apply to Subject Access Requests made under the DPA 2018/UK GDPR and that individuals are still entitled to their personal data which is held and processed by the CCRC. This would be comparable to a provision in s35 of the New Zealand Criminal Cases Review Commission Act 2019, which provides that the prohibition on

disclosure does not affect an individual's entitlement to request information under the Privacy Act 2020.

136. In the CCRC's response to the Westminster Commission, they expressed a desire to be given greater discretion in their ability to disclose information:

> "…in terms of transparency, we're quite restricted in what we can say about casework, because of provisions within our statute. And undoubtedly that is there for very good reasons, but we are a mature organisation, and I think it would be useful, if there's any legislative opportunity to reconsider that particular section. Perhaps, rather than a blanket 'you cannot disclose', gives us a direction, perhaps an additional exemption so that we can disclose the information we thought maybe it was in the public interest."[46]

Suggested reform

137. In summary, we recommend:
   a. Replacement of the common law disclosure duty under *Hickey* with a new statutory obligation for the CCRC to disclose to applicants all material gathered and generated in the course of its review to an applicant, subject to certain exemptions, to improve transparency and the likelihood of miscarriages of justice being identified and corrected.
   b. A specific exemption should be introduced into s24 CAA 1995, providing that any prohibition on disclosure does not apply to or affect an individual's right to access their personal data held by the CCRC under the Data Protection Act 2018 and the UK General Data Protection Regulation.
   c. A specific provision should be introduced into s24 CAA 1995 to protect whistle-blowers who are responsibly sharing information in the public interest.

Disclosure to journalists

138. In England and Wales, the media has historically played an important role in identifying and correcting miscarriages of justice. In particular, the enquiries and campaigns carried out by investigative journalists such as Ludovic Kennedy, Paul Foot and Bob Woffinden, and the TV programmes *Rough Justice* and *Trial and Error*, have played a pivotal role in remedying wrongful convictions.

139. Following the creation of the CCRC in 1997, however, a sharp decline in such reporting on miscarriages of justice was observed.[47] In our view, this decline is exacerbated by the strict rules on disclosure of case materials to journalists provided by ss. 17 and 18 CPIA 1996.

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[46] WCMJ Report, p. 55.

[47] Brian Thornton, 'Media reporting on miscarriages of justice in England and Wales fundamentally changed after the creation of the Criminal Cases Review Commission resulting in a decline in coverage, a reduction in investigative journalism and a radically altered usage of the term "miscarriage of justice".' University of Winchester (18 July 2018).

140. S17 provides that material disclosed to the accused by the police and prosecution, but not aired in open court, cannot be onward disclosed except where limited exceptions apply, including the use of the material for legal proceedings and where the court makes an order. Under s18, a failure to comply with these restrictions constitutes contempt of court.

141. In APPEAL's experience, these restrictions hamper fair and accurate investigative reporting on miscarriages of justice because they restrict disclosure of case papers to journalists. In particular, they prohibit the sharing of so-called "non-sensitive unused material", in which often key information – such as investigative leads – can be found.

142. While s17 does allow those seeking to prove their innocence the right to apply for a court order to facilitate such disclosure to journalists, this is an onerous step for such an individual to take, particularly if they are unrepresented. There is also no guidance detailing the way in which the Court should exercise this power to permit disclosure by an accused person to the media.

Suggested reform

143. APPEAL recommends that an exception be added to s17 CPIA 1996 to allow for the disclosure of material to journalists for the purpose of fair and accurate reporting, where a miscarriage of justice is being alleged.

Retention of material

144. The current regime governing the retention of case materials held by police and prosecutors is failing to prevent the premature and unlawful loss and destruction of vital evidence, including documents and physical exhibits. This is hampering the correction of miscarriages of justice in the process because, for example, evidence loss can mean that exhibits are not available for testing where there have been improvements in scientific techniques or understanding – potentially shutting off a wrongly convicted person's opportunity to prove their innocence.

145. Under the CPIA and its accompanying Code of Practice, police are legally required to retain all documents and exhibits relating to an investigation for at least as long as a convicted person remains in custody (Part 5.9), and if convicted person has a pending appeal against conviction or CCRC application at the time of their release, material must be retained until the appeal or referral decision is determined (5.10).

146. The fundamental problem with this legal framework is that there is no mechanism to force the police to comply with their retention duties. In our experience, the premature loss or destruction of evidence is a problem that regularly arises in appeal cases. Without any repercussions for breaches of the legal duty to retain material, police forces have little incentive to follow the CPIA Code.

147. Compounding this problem, police forces are often ill-informed about their retention duties and there can be a lack of consistency across police forces in their handling of evidence post-trial.[48] There is also little oversight or scrutiny of their retention and destruction decisions.

Suggested reform

148. We propose an amendment to the CPIA Code of Practice to extend and simplify the retention period for documents and physical exhibits. Police forces and other agencies should be obliged retain all material relevant to a case for at least a fixed period of 50 years, rather than only until the convicted person is released from custody. It cannot be assumed that every convicted individual with an intention to appeal their conviction will have a pending appeal or application before the CCRC at the time of their release from prison.

149. Further, we propose introducing a more rigorous protocol for the handling and disposal of documents and physical exhibits by police so that the process can be subject to scrutiny. This should include police forces having to notify convicted individuals or their representatives of any planned destruction of material, so representations in favour of retention can be made. A named officer should have to sign off on the disposal of an exhibit, and it must be formally recorded precisely what is being disposed of and why.

150. To encourage compliance with the CPIA code, and to give individuals proper recourse to justice where they are unable to conduct further testing or take advantages in developments in scientific understanding, there should be a statutory ground of appeal which makes clear that the unlawful loss or destruction of potentially exculpatory evidence, including documents and physical exhibits, renders a conviction unsafe. An appellant would have to show that, if the material was still available, there is a realistic prospect that it might have given rise to evidence rendering the conviction unsafe, such that the appellant cannot effectively exercise their right of appeal or to apply to the CCRC.

151. The consequence of unlawfully destroying documents and physical exhibits would then be at the least a retrial, at which the judge would give the jury clear and precise directions as to how to approach the loss/destruction of the material in question.

152. There additionally needs to be a clear line of accountability for officers who have unlawfully destroyed evidence. We suggest that the Law Commission consider the introduction of a criminal offence to hold accountable officers who knowingly or recklessly destroy such materials.

[48] Elliot Tyler, 'Eight out of 10 police forces are unaware of guidance on evidence retention' The Justice Gap (24 November 2020) (https://www.thejusticegap.com/eight-out-of-10-police-forces-are-unaware-of-guidance-on-evidence-retention/).

153. Alternatively, police forces could be relieved of the responsibility of storing and preserving case document and physical evidence altogether. A national or regional centralised storage facility, akin to the Forensic Archive Limited, could be established, where all case material would be transferred following the conclusion of proceedings. Police forces would no longer need to be concerned with having sufficient space or resources to comply with their retention duties. The centralised facility could ensure that all material is stored safely for the required period (which, as we have said, should be at least 50 years) and facilitate access to exhibits for further testing, or to documents for review, when requested by the convicted individual or their representatives. The facility would be independent and have no procedural history with the case, meaning there would exist no incentive for the deliberate destruction or loss of evidence.

Q17: Is the law governing retention of, and access to, records of proceedings following a trial satisfactory?

154. The inadequately short retention periods for trial audio recordings and court documents, along with the exorbitant cost of trial transcripts, represent an unnecessary hindrance to the identification and rectification of miscarriages of justice.

Retention of records of proceedings

155. Under the HM Courts and Tribunal Service ('HMCTS') Crown Court Record Retention and Disposition Schedule ('RRDS'), audio recordings of trials are only required to be retained for 7 years. Similarly, in many types of cases, the RRDS specifies that case documents, evidence and data also only need be retained for this same short period.

156. This presents serious difficulties for those seeking to review potential wrongful convictions, since the starting point of any such review is to get an understanding of what happened at trial. As Lord Justice Fulford stated in *R v Warren & Others (Shrewsbury 24)* [2021] EWCA Crim 413, "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."

157. Indeed, there have been cases where a review of a potential miscarriage of justice has not been possible at all because of the absence of sufficient case records. Barrister Malcolm Birdling wrote in 2012:

> "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.’”[49]

158. Even where a case review is possible, the absence of a record of specific parts of the trial proceedings can be a real hindrance to those seeking to overturn their convictions. In one of APPEAL’s cases, we uncovered new data that undermined the contents of reports produced for trial by a prosecution expert witness. However, the audio recordings of that expert’s testimony were not available, meaning it could not be subject to line-by-line scrutiny in view of the new evidence. This hampered our ability to demonstrate the significance of the fresh evidence.

Cost of obtaining transcripts of proceedings

159. Even where the audio of proceedings is available, obtaining a useable transcript can be prohibitively expensive for those seeking to prove their innocence. Quotations given by the transcription firms contracted with Crown Courts for production of a full trial transcript can amount to thousands of pounds or even tens of thousands of pounds.

160. By way of example, APPEAL represented a man with borderline intellectual functioning who represented himself at his trial. To understand what happened at court and assess the fairness of his trial, we needed a transcript of the court proceedings, which lasted over 60 hours. At the hourly rate of £157.74 provided by a contracted transcription company, this would have cost over £10,000 including VAT. To avoid this prohibitive cost, we instead had to pay over £1,000 to get the audio recordings digitized and provided to us, then rely on volunteers to produce transcripts of the proceedings. We were fortunate to have voluntary assistance, but this would simply not be possible for most law firms or for unrepresented individuals.

161. Even where an individual is eligible for legal aid, in APPEAL’s experience the Legal Aid Agency will only usually approve funding for a transcript of the judge’s summing up – which can only ever offer a limited summary of the trial evidence.

162. Based on our anecdotal knowledge, 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. However, HMCTS does not centrally record data on the outcome of such applications.

163. In contrast to the lamentable situation in England and Wales, other jurisdictions provide much better access to records of proceedings.

[49] ‘Availability of Trial Transcripts and Forensic Material’ , Malcolm Birdling’s 2012 thesis (pp. 197-201), available here: https://ora.ox.ac.uk/objects/uuid:2dae4513-4fd2- 40cd-bb6a-dbba696d6d7f.

164. In the United States, a person convicted of a felony has a right to a complete transcript of the trial proceedings, and this has been the case since 1956. Indeed, the unavailability of a trial transcript forms the basis for reversing a conviction.[50] The Louisiana Supreme Court has said: "Without a complete record from which a transcript for appeal may be prepared, a defendant's right of appellate review is rendered meaningless."[51]

165. Malcolm Birdling reports in 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." The same is true in Western Australia where a defendant is provided with one full transcript free of charge, without needing to request it.[52]

Suggested reform

166. As Lord Justice Fulford has called for, the retention periods within the RRDS must be reconsidered. We recommend that records of the trial, including trial audio recordings, are kept for at least 50 years – with no destruction taking place without the consultation of the convicted person to establish whether they intend further efforts to challenge their conviction.

167. 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. To reduce the cost of this, speech-to-text technology should be fully utilised.

Q18: Do consultees have any further comments or proposals for reform not dealt with in answers to previous questions?

The time limit for appeals

168. The Issues Paper points out at paragraph 2.59 that the right to appeal in criminal proceedings as enshrined in the International Convention on Civil and Political Rights is not violated by the requirement to bring an appeal within a certain timeframe, so long as that timeframe is not so short as to prevent defendants being able effectively to appeal. APPEAL would argue that in many circumstances, particularly where new representatives are instructed or in fresh evidence cases, the 28-day time limit to bring an appeal does operate to prevent defendants being able to effectively appeal.

[50] 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).
[51] *State v. Ford*, 338 So. 2d 107 (La. 1976).
[52] Supreme Court of Western Australia, 'Transcripts' (https://www.supremecourt.wa.gov.au/T/transcripts.aspx).

169. The time limit for appealing will only be extended where it can be demonstrated that there is good and exceptional reasoning to do so.[53] While the Court has generally indicated that it will not deny a meritorious appeal that has been submitted out of time,[54] recent decisions of the Court have been highly critical of out-of-time applications. In *R v MT* [2023] EWCA Crim 558 at [39], the Court has stated that "there comes a time when speed is more important than the last detail".

170. Such language is discouraging and could worryingly lead to applications that have not been properly thought out or investigated for fear of criticism by the Court. In fresh evidence cases and those not exclusively based on legal errors at trial, it would be extremely difficult for an appellant to identify and collect fresh evidence within anything close to 28-days after conviction or sentence. Indeed, if new representatives are instructed on appeal, it would also be an unrealistic task to take instructions, read into the case, pursue any necessary further investigation, instruct experts, and draft meritorious grounds of appeal within this period.

171. The Westminster Commission on Miscarriages of Justice has also pointed out the need for the Law Commission to review the 28-day time limit, in recognition of the many difficulties faced by applicants, including many who are vulnerable.[55]

172. Research by Naima Sakande has also identified the gendered impact of the 28-day limit often inhibiting vulnerable women from appealing.[56] She points to the "adjustment period" many women face when first entering prison, where safeguarding their family and own mental health has to be prioritised over considering their options for appeal. Additionally, where abuse has played a role in offending and has not come up at trial, it can take months or even years before an individual feels able to disclose this to any professionals, including fresh legal representatives. Where high numbers of prisoners are vulnerable individuals with limited understanding of the appeals process, they may think that they have no hope of appealing outside of the 28-day time limit.

173. It should also be pointed out that it can be very difficult for individuals in prison to instruct new representatives. This is both due to the communication difficulties experienced by prisoners trying to research and contact legal representatives, and the shrinking number of law practices doing criminal appeals work, largely due to cuts to legal aid. Indeed, a legal representative cannot get funding from the Legal Aid Agency for a second opinion advice on the merits of an appeal if the applicant has been given advice on the same matter by another legal representative in the last six

[53] *R v Roberts* [2016] EWCA Crim 71, [2016] 1 WLR 3249 at [39].
[54] See *R v O* [2019] EWCA Crim 1389 at [45].
[55] WCMJ Report, p. 34.
[56] Naima Sakande, 'Righting Wrongs: What are the barriers faced by women seeking to overturn unsafe convictions or unfair sentences in the Court of Appeal (Criminal Division)?' (The Griffins Society, 2020), 45-46.

months.[57] This can act to prevent an applicant from instructing new lawyers for at least five months after the expiry of the 28-day time limit.[58]

Suggested reform

174. While there are policy reasons for requiring a time limit for appeals, where the Court will ultimately look at the underlying merits of a claim in determining whether to grant an extension of time, it seems little more than an administrative burden for appellant to deal with, and a deterrent to potentially meritorious applications.

175. APPEAL would propose therefore that the 28-day time limit to appeal is repealed in relation to both conviction and sentencing appeals, and it is made clear in legislation that applicants can submit an application to appeal at any point after their conviction and/or sentence.

176. In the event that the Law Commission is not minded to recommend abolition of a time limit in its entirety, we would recommend that the time limit be significantly increased, at least to twelve months. This would allow applicants a reasonable period of breathing space to consider what went wrong at trial, to adjust to life in prison (if applicable) and to find new legal representatives if needed. It would also allow for public funding for a second opinion advice on appeal. If the time limit is extended, there must still be the opportunity to bring an appeal outside of this time limit, with leave of the Court, as of course, fresh evidence can come to light many years after the offence that may not only undermine the safety of a conviction, but conclusively prove an applicant's innocence.

Loss of time orders

177. APPEAL endorses the submissions of Doughty Street Chambers ('DSC')[59] to the effect that loss of time orders are disproportionate penalties, arbitrarily imposed, and unfair to unrepresented applicants in particular. We also consider that the mere possibility of such an order being made risks having an unacceptable "chilling effect" on meritorious applicants, who may be deterred from lodging proceedings with the Court of Appeal.

178. As noted in the Issues Paper, loss of time orders appear to be rarely made. However, as DSC observe in their submissions, such orders are applied without consistency or the application of clear, standardised reasoning.

179. APPEAL agrees with DSC's highlighting of the particular unfairness of imposing loss of time orders on unrepresented applicants, who may not be able to present their application to appeal in as clear a manner or format as those with legal

[57] Ministry of Justice, *Standard Crime Contract 2022* [11.26].
[58] APPEAL also advocates for the repeal of this 'six month' rule. However, we are aware this is a matter of secondary legislation and therefore within the Ministry of Justice's remit to reform.
[59] Available here: https://insights.doughtystreet.co.uk/post/102iro8/responses-to-the-law-commission-criminal-appeals-issue-paper.

representation. This unfairness is exacerbated by the difficulties in instructing fresh appellate counsel where funding for such work has been drastically limited.

180. The Law Commission should also be mindful of the impact of loss of time orders on individuals given shorter sentences, where the addition of further time in prison could be a significantly disproportionate additional punishment. This may in particular deter many women from appealing, due to the high proportion of women receiving sentences of six months or less.[60] In Naima Sakande's survey of legal professionals, she found that many thought the loss of time order had a "chilling effect on taking proper appeals", with "the lower the sentence, the more chilling effect the risk of adding on time to deter an appeal".[61]

Suggested reform

181. APPEAL urges the Law Commission to recommend the repeal of s29 CAA 1968, thereby abolishing the loss of time order. It acts as a disproportionate and unjust deterrent to prospective applicants and presents a clear risk of discouraging victims of miscarriages of justice from submitting appeals.

Appointment process for judges sitting on the Court of Appeal

182. While APPEAL fully supports law reform aimed at improving the decision-making of the Court of Appeal, we are concerned that such efforts will be undermined by a lack of diversity of backgrounds amongst the judges who sit on the Court.

183. 2023 judiciary diversity statistics show that of the 38 Lord and Lady Justices of Appeal, at least 36 are white and just one third are women.[62] Additionally, analysis of online resources by APPEAL indicates that a staggering 78% are Oxbridge graduates.

184. Amongst High Court judges, Masters, Registrars and Cost Judges, diversity is similarly lacking. Just 28% are women and just 9% identify as being from an ethnic minority.[63]

185. What these statistics show is a stark difference in background between those who sit on the Court of Appeal versus those upon whom they sit in judgement. While a demographic breakdown of Court of Appeal applicants and appellants is not available, more than a quarter of the prison population are from a minority ethnic group.[64]

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[60] Figures from the Prison Reform Trust research show that over half (58%) of prison sentences given to women in 2022 were for less than six months (https://prisonreformtrust.org.uk/six-in-10-women-sent-to-prison-serve-sentences-of-less-than-six-months/).

[61] Sakande in 'Righting Wrongs: What are the barriers faced by women seeking to overturn unsafe convictions or unfair sentences in the Court of Appeal (Criminal Division)?', 39.

[62] Ministry of Justice, 'Diversity of the judiciary: 2023 statistics' (8 September 2023) (https://www.gov.uk/government/statistics/diversity-of-the-judiciary-2023-statistics).

[63] Ibid.

[64] Prison Reform Trust, 'Projects: Race' (https://prisonreformtrust.org.uk/project/race/).

186. When there is so little diversity amongst the senior judiciary, it is inevitable that its decisions will be affected by biases rooted in racism, sexism and classism. The Law Commission is encouraged to read the ground-breaking report, *Racial Bias and the Bench*.[65] To highlight just one extract from it:

> "Leslie Thomas KC examined appeals at the very pinnacle of the judicial system – the Supreme Court. He provided three recent examples of judicial bias relating to stop and search, immigration and a novel legal argument and asked rhetorically:
> 'Would all these cases have gone the same way if we had a genuinely diverse senior judiciary? Would they have gone the same way if we had Supreme Court justices who had lived experience of racialised stop-and-search? Or Supreme Court justices who had lived experience of the immigration system?'"[66]

Suggested reform

187. We urge the Law Commission to consider recommending fundamental changes to the appointment process for judges who sit on the Court of Appeal aimed at ensuring a diversity of backgrounds and perspectives. Such efforts are, we submit, of foundational necessity if the Court is to effectively tackle miscarriages of justice.

188. We also suggest that judicial racial bias at the Court of Appeal should be tackled through high-quality racial bias and anti-racist training for all its judges.

Majority jury verdicts

189. While not strictly within the scope of the criminal appeals review, we invite the Law Commission to urge Government to give serious consideration to scrapping majority jury verdicts.

190. In England and Wales, majority jury verdicts are a relatively recent phenomenon. They were introduced in 1967, ostensibly as a response to concerns around "jury nobbling." However, forthcoming research by Nisha Waller and Naima Sakande, due to be published next year, suggests these concerns were overblown and shows how racism and classism were both a factor in the decision to introduce non-unanimous verdicts. In essence, their findings suggest that majority verdicts were, at least in some part, introduced with racist and classist intent, intended to dilute the influence of racialised minority jurors.

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[65] K. Monteith, E. Quinn, A. Dennis, R. Joseph-Salisbury,
E. Kane, F. Addo and C. McGourlay, 'Racial Bias and the Bench: A response to the Judicial Diversity and Inclusion Strategy (2020-2025)', University of Manchester, November 2022.
[66] K. Monteith, E. Quinn, A. Dennis, R. Joseph-Salisbury,
E. Kane, F. Addo and C. McGourlay, 'Racial Bias and the Bench: A response to the Judicial Diversity and Inclusion Strategy (2020-2025)', University of Manchester, November 2022, p. 18.

191. In the United States, only two states allowed individuals to be convicted of serious crimes by majority jury verdicts – Louisiana and Oregon – and in 2020 in the case of *Ramos*, the US Supreme Court ruled the practice unconstitutional.

192. APPEAL is in the process of undertaking further research into the frequency of majority verdicts amongst wrongful conviction cases. However, it is clear already that majority verdicts played a role in several miscarriages of justice: *Malkinson* offers a recent example, but there were also majority verdicts in the cases of Judith Ward, Michael Shirley, Dr David Sellu and the Oval Four.

193. Ultimately, majority verdicts are divided verdicts. If not all the jurors who have sat through the evidence in a case are persuaded of a defendant's guilt, we submit this must provide an indication of reasonable doubt since it is entirely implausible that in every such case the dissenting jurors are acting unreasonably.

Suggested reform

194. We invite the Law Commission to urge the Government to look closely at majority verdicts and their role in miscarriage of justice cases. Our view is that the unanimity requirement, steeped in hundreds of years of legal history, acts as a basic safeguard against wrongful conviction. Whilst of course its re-introduction would lead to more hung juries and retrials, this is a price worth paying if miscarriages of justice can be prevented.

195. We also ask the Law Commission to consider whether a jury's verdict being non-unanimous ought to be a factor alongside other evidence to be considered by the Court of Appeal when assessing the safety of the conviction.

Legal Aid

196. In recent years advice deserts have been identified around the UK for different areas of legal aid advice. For those in prison who are innocent it is almost impossible to obtain a criminal legal aid solicitor for advice on appeal. At a recent meeting of the CCRC they stated that the current proportion of applications supported by a legal representative is just 3% (it used to be one third of applications). The rates of pay for this work have not increased since 1997. The Bellamy Review recommendation for an increase in rates for solicitors has not been implemented.

197. The Law Commission should urgently recommend increasing the rates paid for appeals work and widen the scope of the work which is deemed eligible, for all practitioners undertaking criminal appeal work.

198. In addition, the Law Commission should consider recommending block grant funding from the Ministry of Justice for specialist appeal lawyers working in non-profit law practices, such as APPEAL.

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