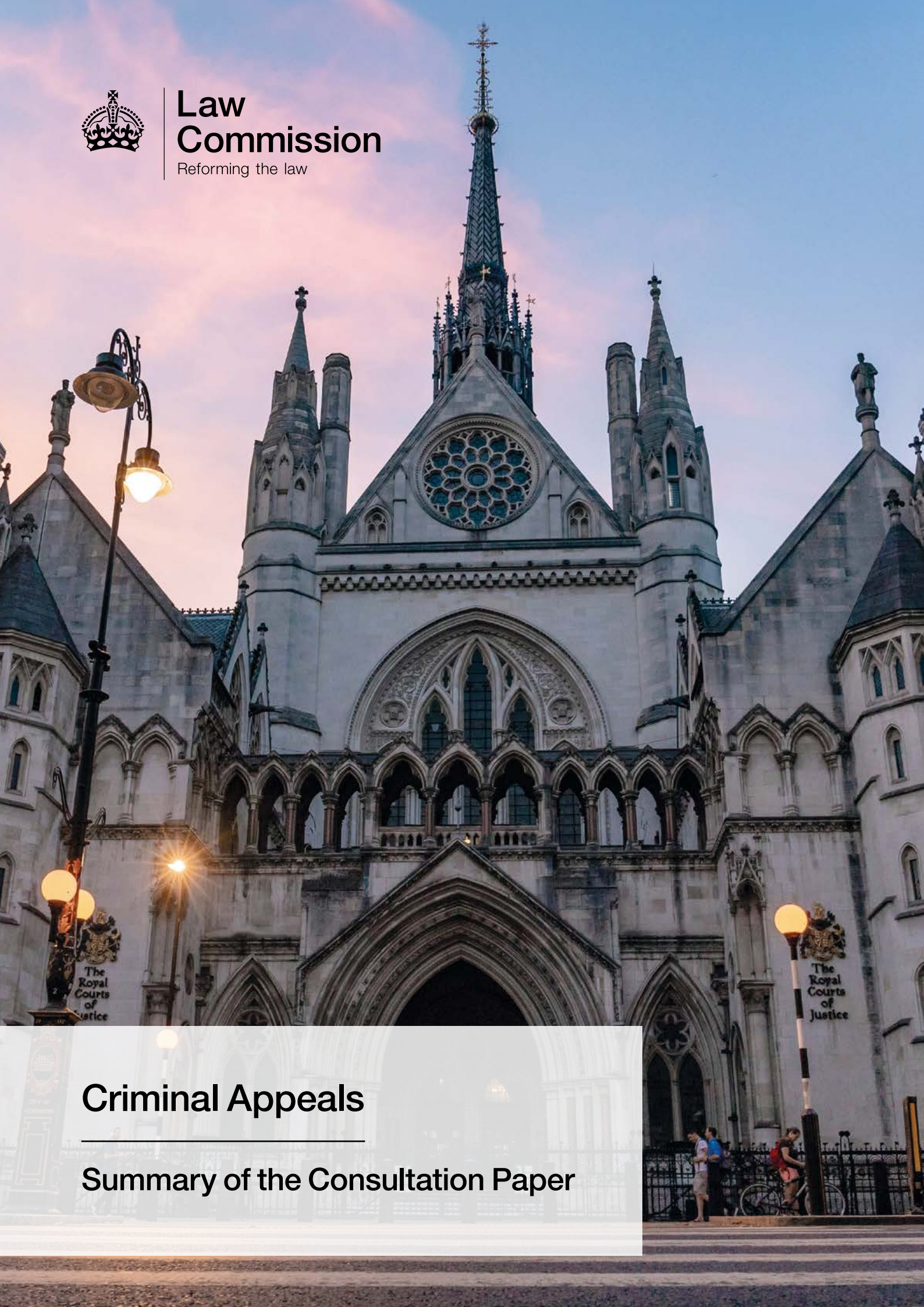


Criminal Appeals

Summary of the Consultation Paper

This summary

This summary is intended to provide an overview of the key issues that we discuss in our Criminal Appeals consultation paper. It explains what the project is about and the issues that we address.

In the consultation paper, we set out a number of consultation questions to which we are seeking responses. We refer to these consultation questions throughout this summary when we ask 29 "summary consultation questions". Some set out provisional proposals for law reform and ask whether or not you agree. Others are open questions in which we ask for your views. We will only reach our final conclusions and make recommendations for reform once we have received and considered all responses to the full and summary consultation papers.

Our aim is that anyone should be able to read this summary and engage with the key issues we address. This may be particularly useful for members of the public who may be less interested in engaging with the more detailed matters in the full consultation paper.

Where individuals or organisations have particular interest or expertise in any or all of the areas we examine, then we would encourage them to read the full consultation paper. It has a more detailed discussion of the issues.

Who we are 	The Law Commission of England and Wales is an independent body established by statute to make recommendations to Government to reform the law in England and Wales.
What is it about? 	The Law Commission is conducting a review of the law governing appeals in criminal cases and considering the need for reform with a view to ensuring that the courts have powers that enable the effective, efficient and appropriate resolution of appeals. The review is particularly concerned with inconsistencies, uncertainties and gaps in the law.
Why are we consulting? 	We are seeking views on whether and how the law needs to be reformed. Consultation is a crucial pillar of our work. We want any recommendations we ultimately make to have as strong an evidence base as possible.
Who do we want to hear from? 	We would like to hear from as many stakeholders with experience of the criminal appeals process as possible, including legal professionals, judges, academics and researchers, and organisations offering support to people who are, or claim to be, victims of a miscarriage of justice. We are also keen to receive responses from people who have tried to appeal, or are currently appealing, against their conviction or sentence. However, we are unable to become involved in individual cases or appeals.
Where can I read the consultation paper? 	The full consultation paper is available on our website, as are Welsh, easy-read and audio forms of the summary: www.lawcom.gov.uk/project/criminal-appeals/

What is the deadline?

The deadline for responses is 27 June 2025.

How to respond

If you are responding to the full-length consultation paper, we would appreciate responses using the online response form available at:

https://consult.justice.gov.uk/law-commission/criminalappeals

If you are responding to the questions in this summary, we would appreciate responses using the online response form available at:

https://consult.justice.gov.uk/law-commission/criminalappealssummary/

Otherwise, you can respond:

by email to criminal.appeals@lawcommission.gov.uk

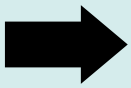
by post to:

Criminal Appeals Team, Law Commission,
1st Floor, 52 Queen Anne's Gate, London, SW1H 9AG

(If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically.)

We are happy to provide a printed form on which written responses to the questions in this summary can be submitted for those who are unable to respond electronically. Please request an "appeals response form" using the address or email address above.

What happens next?



After analysing all the responses, we will make recommendations for reform, which we will publish in a report. It will be for Government to decide whether to implement the recommendations.

For further information about how the Law Commission conducts its consultations, and our policy on the confidentiality and anonymity of consultees' responses, please see the consultation paper.

Introduction

A person who has been convicted of a criminal offence can seek to challenge their conviction or sentence (or both) by way of an appeal.

Appeals serve an important function for individuals, whether this is to correct a miscarriage of justice, such as the conviction of someone who is innocent, or to correct a legal error, such as imposing a harsher sentence than is legally allowed.

However, they also serve important public functions, in ensuring that the criminal law is interpreted and applied consistently and predictably, and in the development of the common law.

In July 2022, the Law Commission was asked by the Government to conduct a review of the law relating to criminal appeals. The terms of reference for this project require us to consider the need for reform of the law, with a view to ensuring that courts have powers that enable the effective, efficient and appropriate resolution of appeals. This includes considering whether there is evidence that the legal tests employed in the Court of Appeal and by the Criminal Cases Review Commission (CCRC) hinder the correction of miscarriages of justice, and whether the current arrangements for appeals from the magistrates' court are an efficient and effective use of court resources and judicial time. In late 2024, the Law Commission and the Government agreed that we would also consider the law governing compensation for victims of a miscarriage of justice.

In July 2023, we published a 167-page Issues Paper, in which we asked 18 questions to scope out areas for potential reform in criminal appeals and respondents' provisional views on them. We received over 150 responses to the paper, including from serving prisoners, state bodies such as the Crown Prosecution Service (CPS), individual lawyers, academics and campaigners, professional bodies such as the Law Society, Bar Council and the Criminal Appeals Lawyers Association and charities and groups such as APPEAL, the Centre for Women's Justice and JENGbA (Joint Enterprise Not Guilty by Association). These responses have fed directly into the formulation of our consultation paper.

Background

Two distinctions are key to understanding the modern criminal appeals system.

First, the procedures for appeals reflect the split between "summary" proceedings, for less serious or less complex cases, tried by magistrates or district judges, and trial "on indictment" before a judge and jury in the Crown Court. Criminal offences may be "summary only", "indictable only", or "either-way". Either-way offences may be prosecuted in either summary proceedings or on indictment, but the defendant has the right to choose to be tried by a jury in the Crown Court.

Secondly, the appeals system has historically preferred appeals on points of law to appeals on points of fact (in other words, arguments that the law was wrongly applied or did not make the conduct in question criminal versus arguments that a witness was wrong or evidence misunderstood). This is due to the principle that the trial process is the best mechanism for establishing facts, and that appeals are primarily for reviewing, rather than rehearing, a case.

In the year ending June 2024, 1,096,074 people were convicted in magistrates' courts and 53,537 in the Crown Court.[1] Only a small minority of convictions and the sentences that follow them will end up being challenged or appealed against.

Appeals can be brought against convictions, sentences or both. Successful conviction appeals lead to a conviction being "quashed" (that is, the appellant, the person who brought the appeal, is acquitted of the offence). In some circumstances, the court can order a retrial or substitute a conviction for a lesser offence. Successful sentence appeals can lead to the court altering a sentence based on errors in the original sentencing or factors that have subsequently come to light.

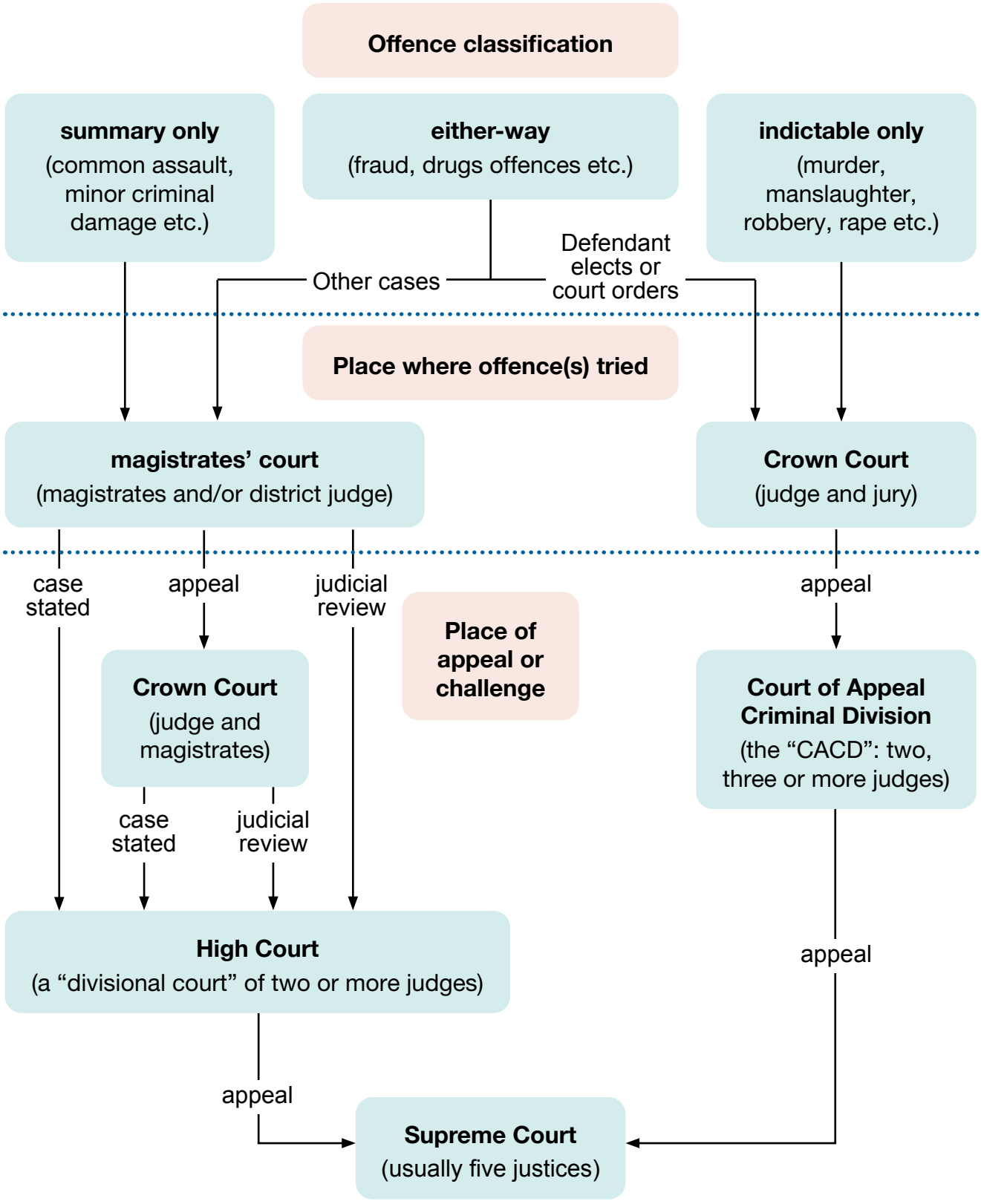
Magistrates' court cases can generally be appealed to the Crown Court or (on a point of law) to the High Court, and Crown Court cases to the Court of Appeal Criminal Division (CACD). Appeals to the High Court and CACD can be appealed further to the Supreme Court on a point of law of general public importance. There are strict time limits for bringing appeals, but extensions can be granted, and all appeals except in-time appeals to the Crown Court require leave (permission) before the appeal court can consider the appeal.

The main statutes governing criminal appeals are the Magistrates' Courts Act 1980 (for appeals from magistrates' courts), the Criminal Appeal Acts 1968 and 1995 (for appeals to the CACD), and the Senior Courts Act 1981 (for both).

*** The following diagram is not exhaustive and does not mention requirements for leave (permission) or extensions of time. Additionally some summary only offences can be tried with indictable ones in the Crown Court, but appeals against these offences will be to the CACD. Separately, if a person is convicted in a magistrates' court, they can be committed (sent) for sentencing by a judge in the Crown Court; in those circumstances, an appeal against conviction will be to the Crown Court but an appeal against sentence will be to the CACD.**

1 Ministry of Justice, Criminal Justice statistics quarterly: Year ending June 2024.

Appeal routes: defendant appeals against conviction or sentence



Historically, the main driver of criminal appeals reform has been concern about miscarriages of justice and the perceived inability of the criminal justice system to adequately avoid or address them. The Royal Commission on Criminal Justice followed the outrage at the decades it took to overturn the wrongful convictions of the Guildford Four, Birmingham Six and others, and led to the Criminal Appeal Act 1995, which created the CCRC, a body mainly set up to reexamine and refer cases that have been unsuccessfully appealed against back to the relevant appeal court.

The CCRC and the appeals system generally have come under criticism in recent years, through reports of the House of Commons Justice Committee in 2015 and the All-Party Parliamentary Group on Miscarriages of Justice in 2021. Public concern has also been expressed following the wrongful convictions of sub-postmasters prosecuted by the Post Office, and the failures by public authorities relating to the case of Andrew Malkinson, who served 17 years in prison following his wrongful conviction for rape.

The Post Office Horizon Scandal

Between 1999 and 2015, hundreds of Post Office sub-postmasters and other employees were prosecuted for theft, fraud, false accounting and other dishonesty offences, based on shortfalls discovered by the Horizon accounting software.

In 2009, *Computer Weekly* magazine reported "on claims that the Post Office has failed to recognise a potential IT problem". Following this, Alan Bates, who was not prosecuted due to Horizon shortfalls but had his contract terminated in November 2003 in the context of them, founded the Justice for Subpostmasters Alliance.

555 sub-postmasters sued the Post Office in *Bates v Post Office Ltd*. It was ruled that the Post Office's contracts with the sub-postmasters had been unfair and that Horizon contained bugs, errors and defects.

The Government set up the Post Office Horizon IT Inquiry in 2020 to investigate the implementation and failings of the Horizon IT system.

In the meantime, sub-postmasters (or their families, for those who had died) challenged their convictions through the CCRC and regular appeals, starting with the 39 of 42 appellants in *Hamilton v Post Office Ltd* who had their convictions quashed by the CACD in 2021.

However, widespread public outrage led to Parliament passing the Post Office (Horizon System) Offences Act 2024 on 24 May 2024, which, almost unprecedentedly, quashed the convictions of hundreds more sub-postmasters which fulfilled certain criteria.

Principles

Several core principles, some common to the whole criminal justice system, others unique to appeals, inform criminal appeals, reform and our consultation paper. Almost every decision and rule of law relating to appeals will involve the balancing of different principles, which often do not point in the same direction.

The acquittal of the innocent and the conviction of the guilty are principal aims of the criminal justice system. While the wrongful conviction of the innocent is recognised as amounting to a miscarriage of justice, it can also be a miscarriage of justice if people who commit crimes go unpunished and victims unprotected. Many aspects of criminal procedure reflect the generally accepted principle that it is better to acquit the guilty than to risk convicting an innocent person.

These principles can conflict with the need for finality in legal proceedings: victims, the public and convicted persons themselves should have a degree of certainty that particular criminal proceedings are concluded and will not be revisited. Nevertheless, it is widely acknowledged that it is of greater importance that an innocent person should not remain convicted of a crime they did not commit, even if the grounds for the wrongfulness of the conviction only come to light months, years or decades following the conviction.

Under article 6 of the European Convention on Human Rights (ECHR), everyone has the right to a fair trial, while under the International Covenant on Civil and Political Rights (ICCPR), every convicted person has the right to the review of their conviction and/or sentence by a higher body. These rights complement principles of fairness and the legal system's integrity (among other things, in being able to right its wrongs) at common law. In Crown Court trials, the primacy of the jury and the courts' respect for its verdicts are also long-established at common law.

Some parts of the criminal appeals system reflect the principle that a person should not be at risk of a greater penalty as a result of their bringing an appeal (the "no greater penalty" principle). This principle is observed in some parts of the criminal appeals system, but not others. Where it is not, the prospect of an increased sentence has the potential to discourage meritorious appeals and impede access to justice.

Summary Consultation Question 1:

Do you agree that the relevant principles of the criminal appeals system are:

1. the acquittal of the innocent;
2. the conviction of the guilty;
3. fairness;
4. recognising the role of the jury in trials on indictment;
5. upholding the integrity of the criminal justice system;
6. ensuring access to justice (including the "no greater penalty" principle, and consideration of the needs of particular groups); and
7. finality?

Summary Consultation Question 2:

Do you agree that, in principle, a person should not be at risk of having their sentence increased as a result of their seeking to appeal against their conviction or sentence?

The wrongful conviction of Andrew Malkinson

On 19 July 2003, a woman was strangled to the point of unconsciousness, grievously harmed and raped in Salford.

Andrew Malkinson was arrested by Greater Manchester Police (GMP) on 2 August 2003 due to a supposed resemblance between him and a description of the attacker. The victim selected him at an identification parade.

Charged with attempted murder, rape and attempted choking, the case against Mr Malkinson relied heavily on the identification evidence of not only the victim, but also two witnesses who placed him nearby at the time of the offence (both of whom had convictions for dishonesty). The defence case was one of mistaken identity. Mr Malkinson was convicted of attempted choking and two counts of rape on 10 February 2004 and sentenced to life imprisonment with a minimum term of six years and 125 days on 30 March 2004.

Mr Malkinson appealed against his convictions, but his appeal was dismissed in 2006. In 2007, a DNA test of the victim's top found DNA in a "crime-specific location", which did not come from Mr Malkinson or the victim's boyfriend. Mr Malkinson applied to the CCRC to refer his case in 2009. It rejected his application in 2012, and a second application in 2020.

Mr Malkinson was not released from prison until December 2020, after 17 years in custody. Following a third application, the CCRC referred Mr Malkinson's convictions to the CACD, which quashed them on 23 July 2023. In addition to the DNA evidence, the Court held that the convictions were unsafe on the basis of the failure to disclose a photo which undermined the victim's identification of Mr Malkinson and the previous convictions of the supposed eyewitnesses.

The CCRC commissioned a review of its handling of the case by Chris Henley KC, which was heavily critical of the CCRC's repeated failure to identify the relevance of the new DNA evidence. An inquiry ordered by the Government, by HHJ Sarah Munro, which is examining the actions of the CCRC, GMP and the prosecution, is ongoing.

Mr Malkinson's acquittal also drew public attention to the restrictions on compensation for a person who is a victim of a miscarriage of justice.

Convicted persons' appeals to the Court of Appeal Criminal Division

A person convicted or sentenced in the Crown Court must apply for leave (permission) to appeal against their conviction and/or sentence to the CACD before the appeal is determined. (The trial or sentencing judge can certify that a case is fit for appeal, but this is rarely done.) Applications for leave are normally decided by a single judge of the CACD (usually a High Court judge): the test is whether the appeal is "arguable". If leave is granted, the appeal is sent for determination by the "full court" (see below).

If they do not apply for leave within 28 days of the decision they want to challenge, a convicted person must apply for an extension of time from the CACD. This means that to apply for leave to appeal against a conviction, a convicted person must apply within 28 days to avoid needing an extension of time, even if they are not yet sentenced. Most applications for extensions of time are dealt with by a single judge.

The single judge or the Registrar of Criminal Appeals can also refer an application to the full court to make a decision on an extension and/or leave, which is sometimes done when a large extension of time is sought, someone is challenging a short prison sentence and therefore might need a faster decision or in complex cases.

The final decision on whether to allow the appeal is always for the full court. A person who is refused an extension of time and/or leave by the single judge can renew their application(s) to the full court, which will need to decide whether to grant an extension and then whether to grant leave before deciding the appeal.

The "full court" in any conviction application or appeal is at least three judges, and at least two in any sentence application or appeal. Appeals usually do not involve the rehearing of evidence or resentencing of offenders. However, the full court can admit evidence (for example, a witness statement or expert evidence) which was not admitted in the original proceedings if it thinks that it is "necessary or expedient in the interests of justice".

If "fresh" evidence is admitted, the full court might ask what impact it might or would have had on the jury if it had heard it. On sentence appeals, fresh evidence might lead the court to depart from its normal practice of considering only whether the sentence was right at the time it was made.

The full court must allow an appeal against conviction if it thinks that the conviction is "unsafe". Partly because the court is considering "safety" and not guilt or innocence, it can order a retrial on any offences of which the jury could have convicted the appellant on the indictment. In some circumstances, the court can substitute a conviction for another offence in place of the offence of which the appellant was convicted. If a person was sentenced on two or more counts and the court only quashes some of them, it can resentence on any remaining counts.

The full court will allow a sentence appeal if it thinks that a sentence is "not justified by law", "manifestly excessive" or "wrong in principle". If it thinks that a person should be sentenced differently, it may quash any such sentence and substitute it with one which the original court had the power to make, so long as the person, taking their case as a whole, is not more severely dealt with on appeal than by the court below.

A decided appeal (but not an application for leave) can be further appealed by either the appellant or the prosecution to the Supreme Court on the basis of a point of law of general public importance.

It is only possible to bring a single appeal against a conviction or sentence. However, the CCRC can refer a conviction or sentence which has already been appealed to the CACD (and, exceptionally, when no appeal has been brought). That reference becomes a full appeal, and neither an extension of time nor leave is required.

Time limits

Organisations expressed concerns to us that 28 days is not long enough for an applicant to secure legal funding, representation or a "second opinion" on the merits of an appeal, or to collate fresh evidence, and that unrepresented, vulnerable or female applicants or those convicted of 'gang'-related crimes face particular difficulties. We are persuaded that some applicants may not know they can apply for leave out of time or only realise that they have reasons to appeal after 28 days, which can be relatively soon after incarceration.

Summary Consultation Question 3:

Do you agree that the time limit for bringing an appeal against a conviction or sentence to the CACD should increase to 56 days from the date of sentence?

"Loss of time" orders

Normally, the time a person spends in prison waiting for their application to appeal to be determined counts towards their sentence. Exceptionally, if the CACD thinks that an application or appeal is totally without merit, it can make a "loss of time" order, meaning that some of the time between lodging the application for leave to appeal and its determination does not count as having been served. Effectively, the time is added to the time that the person will spend in prison. Orders are usually for 14, 28 or (rarely) 56 days. Single judges have the power to make these orders, but none have done so since October 2007. The full court will almost always only make an order if the single judge has explicitly warned the applicant of the risk of an order by initialling a box on the form they send to applicants when refusing leave to appeal.

Loss of time orders are one of the only means the CACD has to discourage unmeritorious appeals from taking up precious court time. However, we have received evidence that the availability of a power which some describe as draconian discourages meritorious, genuine and arguable appeals. We were told that this "chilling effect" is particularly strong because although in practice the court only imposes loss of time orders where an unsuccessful applicant renews their application before the full court, and for a fixed period, a lawyer would be correct to warn them of the theoretical possibility of

receiving a loss of time order even when they have not yet been explicitly warned by the CACD, and that the order could be for the whole period between lodging the application and it being determined.

We see a case for abolishing the orders altogether, but appreciate that they allow the CACD to have some control over applications and are almost always used only when an applicant persists with a hopeless application having been warned of the possibility of an order should they renew it.

Summary Consultation Question 4:

Do you agree that loss of time orders should have an upper limit of 56 days and should only be available when:

1. leave to appeal has been refused by the single judge as totally without merit,
2. the applicant is warned that, in the event of renewing their application, they will be at risk of a loss of time order; AND
3. the applicant renews their application before the full court and the full court rejects it as totally without merit?

A "slip rule" for the CACD

The CACD currently has no power to correct errors made in its judgments or orders. To varying extents, other courts have powers to do anything from correcting grammatical slips to rehearing decided cases. Relevantly, the Crown Court can vary or cancel a sentence imposed within 56 days of it being imposed, but this must be done by the same judge as originally imposed it.

We think that the lack of an equivalent rule for the CACD is an anomaly. Though the CACD has an exceptional power to reopen decisions, the lack of a "slip rule" means that uncontroversial errors made by the CACD (either in a substituted sentence it imposes or in relying on something in error when it allows or dismisses an appeal) cannot easily be corrected. Such slips frequently do not raise points of law of general public importance, which means that such cases are unlikely to be given leave to appeal to the Supreme Court.

Summary Consultation Question 5:

Do you agree that the CACD should have the power to correct an accidental slip or omission in a judgment or order within 56 days of it being handed down or made? If so, who do you think should be able to exercise this power? For instance, should it be:

1. all of the same judges who made the judgment or order;
2. the most senior (presiding) judge who made the judgment or order;
3. any one of the judges who made the judgment or order; or
4. any judge who can sit in the CACD?

Fresh evidence

As discussed above, the test for admission of fresh evidence is whether it is "in the interests of justice". The CACD must, in deciding this, have regard to whether:

a. the evidence appears capable of belief,
b. the evidence may afford any ground for allowing the appeal,
c. the evidence would have been admissible in the original proceedings, and
d. there is a reasonable explanation for failing to admit the evidence in the original proceedings.

We are concerned that sometimes these four considerations are treated as mandatory criteria to be satisfied in order to admit fresh evidence. As long as the considerations are not treated as criteria, we think the "interests of justice" test is the right test.

Summary Consultation Question 6:

Do you agree that the CACD should continue to admit fresh evidence when it is in the interests of justice, informed by the existing four considerations?

We think there are issues when convicted people want to argue that their conviction is unsafe due to (mis)conduct by jurors.

Keeping jurors' deliberations secret allows jurors to speak freely within the jury room. Following recommendations we made in 2013, the Criminal Justice and Courts Act 2015 created exceptions to the general rule that disclosing jury deliberations is illegal, allowing for disclosure to the police or the courts of information that may provide grounds for appeal.

However, case law which predates this change means that courts are unable to consider deliberations unless the jury has completely abandoned their oath to try a case according to the evidence (for example, by tossing a coin) or if external material, which was not adduced at trial, is introduced to deliberations.

Juror Secrecy and the ECHR

Under article 6 of the ECHR everyone has the right to a fair trial before an independent and impartial tribunal.

In *Gregory v UK*,[2] the European Court of Human Rights acknowledged that juror secrecy is a crucial safeguard to allow open discussions between jurors. It said that the defendant in that case had not been deprived of the right to a fair trial where allegations of racism on the part of jurors were made, because the trial judge had investigated the claims and reminded the jury of their duty to try the case on the evidence.

In *Remli v France*,[3] however, the Court found that racist remarks by a juror were not investigated by the trial judge, and the defendant was unable to appeal against their conviction to a higher court on this point. It held that the defendant's right to a fair trial had been denied.

2 (1998) 25 EHRR 577 (App No 22299/93).
3 (1996) 22 EHRR 253 (App No 16839/90).

We do not think that juror secrecy should prevent the CACD from considering evidence suggesting that a defendant did not receive a fair trial before an independent and impartial jury. We think jurors' secrecy could be adequately protected by maintaining their anonymity in any proceedings. Given that jurors can already make disclosures in limited circumstances, we do not think this change would affect jurors' willingness to talk freely in the jury room. We also think that the CCRC should be added to the list of bodies to which jurors can lawfully make a disclosure of misconduct.

Summary Consultation Question 7:

Do you agree that the law should be changed to allow the CACD to admit evidence of juror deliberations when the evidence may provide grounds for appeal, such as that a person did not receive a fair trial before an impartial jury?

The safety test for conviction appeals

The test for allowing an appeal against conviction has changed many times since 1907, but the current test asking whether the conviction "is unsafe" has been in place since 1995.

A person's appeal will be allowed when they are proved to be, or possibly be, factually innocent – that is, that they did not commit the crime at all, or an act forming a crucial part of it.

However, the law of England and Wales has long recognised the importance of a fair trial and justice being done justly, and article 6 of the ECHR ensures the right to a fair trial. Because of this, an appeal will almost always be allowed when the CACD concludes that a person's trial was, taken as a whole (in other words, ignoring more technical procedural errors), unfair or when prosecuting a person involved such abuse of process to amount to an "affront to justice". A key issue we identified is that it has occasionally been suggested that the fact that the accused did not receive a fair trial can be outweighed by the strength of the prosecution's evidence.

We understand unease about clearly guilty individuals having their convictions quashed "on a technicality", but the option of a retrial will often be available and showing that a trial was unfair as a whole or that the prosecution was an affront to justice are both very high bars to surmount. This provisionally convinces us that convictions in these circumstances can never be safe and we want to clarify this.

Summary Consultation Question 8:

Do you agree that the single ground that a conviction "is unsafe" should continue to be the test in appeals against conviction? Do you agree that legislation should confirm the existing practice of the CACD that "unsafe" extends to situations where it considers that (1) the appellant's trial, taken as a whole, was unfair or (2) the conviction involved abuse of process amounting to an affront to justice?

Retrials

When allowing an appeal against conviction, the CACD may order a retrial if "it appears to the Court that the interests of justice so require". Some consultees expressed the view that even when fresh evidence is adduced or a legal error identified that might have led the jury to acquit, the CACD too often finds convictions to be safe. Where fresh evidence could have led a jury to acquit, we think that, unless it is impossible or impractical to order a retrial, a conviction should be quashed and (if it is in the interests of justice) a retrial ordered so that a jury can make a determination in light of the fresh evidence.

Summary Consultation Question 9:

Do you agree that, in conviction appeals, where the CACD admits fresh evidence that could have led the jury to acquit, then it should order a retrial unless one is impossible or impracticable?

The "substantial injustice" test

If a convicted person thinks that their conviction is unsafe due to a changed judicial interpretation of the law after their conviction, but they need an extension of time in order to appeal, they must demonstrate "substantial injustice". The fact that the law has changed (or that there has been a development in the law) is not itself sufficient.

This means that such applicants face a higher bar than others needing extensions of time. The reason goes to the heart of our legal system of precedent and applying the (statutory and judge-made) law in force at the relevant time; it is closely related to the principle of finality. But if the Supreme Court decides that courts have been applying or interpreting the law incorrectly, and a convicted person thinks that they would not be convicted under the new "corrected" law, they have a good case to challenge their conviction.

This tension came into sharp relief following the Supreme Court's 2016 decision in *Jogee*,[4] which addressed the criminal liability of people when they aid, join in with or agree to carry out a criminal offence, where one of those involved commits a more serious offence ("parasitic accessory liability").

4 *R v Jogee* [2016] UKSC 8 and *Ruddock v The Queen* [2016] UKPC 7, [2017] AC 387.

Joint enterprise and the Supreme Court case of *Jogee*

When two or more parties commit a crime together, they are all liable to be convicted of the offence. This includes those who encouraged or assisted commission of the offence. For instance, three people rob a bank together: one threatens the staff with a gun; the second bags up the money; the third acts as a lookout and drives the getaway vehicle. All three are guilty of robbery on the basis of joint enterprise.

Under the doctrine of "parasitic accessory liability", if one party to a joint criminal enterprise foresaw that the other party might commit some other offence as part of that enterprise, both could be convicted of the other offence. For instance, if two people agreed to commit a burglary together, and during the burglary, one of the parties stabbed a householder, the other burglar could be convicted if they had foreseen that this might happen. If the burglar who carried out the stabbing intended to cause serious harm, the other burglar could then be convicted of murder.

In *Jogee*, the Supreme Court held that this was wrong. To be convicted of the more serious offence, the party to the joint enterprise had to intend, not just foresee, that the other party to the joint enterprise would commit it. That intent might be conditional – for instance, if they intended that, if necessary, the householder should be stabbed. Foresight was something from which a jury might (but need not) infer the necessary (conditional) intent.

The Supreme Court's ruling in *Jogee* implies that, in theory, it was "wrong" that anyone was convicted of committing a more serious offence than agreed to based on foresight alone. The two immediate difficulties are (1) that this could lead to an unmanageable number of appeals, especially as joint enterprise murder prosecutions normally involve several defendants, and (2) that few prosecutions were actually argued on the basis of foresight alone – although the judge might have included foresight in the instructions to the jury. Therefore, it will rarely be clear whether the jury convicted on the basis of foresight, or was in fact satisfied that the person intended for the victim to be seriously or fatally injured.

The "substantial injustice" test requires a person convicted under the "old" law in *Jogee*-style cases to prove that their conviction under the old law led them to suffer "substantial injustice" in order for their appeal to be heard.

The Supreme Court in *Jogee* explicitly acknowledged the "substantial injustice" test, but many have argued that the CACD applies it too strictly, especially when it can not only order a retrial but substitute a murder conviction with one for manslaughter (which does not carry a mandatory life sentence). Only two *Jogee*-style appeals have been allowed since 2016.

The test also applies in other situations. For instance, some asylum seekers who were prosecuted for having false documents were held not to be able to use their status as a defence if they had travelled through a "safe" country before arriving in the UK. The law now recognises that this does not prevent a person from using the defence. In *Ordu*,[5] the CACD ruled that it was not enough to show that the person would not have been convicted had the law been correctly applied; they had to show that the conviction was causing them some ongoing injustice.

5 *R v Ordu* [2017] EWCA Crim 4, [2017] 1 Cr App R 21.

We found that there was some uncertainty about the meaning of "substantial injustice", and whether it is assessed looking back to the date of conviction, asking whether it was a substantial injustice that the defendant was convicted, or looking forward from the application, and asking if there would be a substantial injustice if the appeal were not heard or allowed.

Some consultees have argued that the doctrine of joint enterprise has a disproportionate effect on minority groups and especially young black men, and therefore these groups may be particularly affected by the requirement to demonstrate "substantial injustice".

We think that it is strongly arguable that the development of "substantial injustice" as a practice or test has become a real obstacle to the correction of miscarriages of justice, and that the law should be reformed to allow a person to appeal against their conviction by arguing that, had the "corrected" law been applied in their case, they may not have been convicted of the offence they were (or a comparable offence).

Summary Consultation Question 10:

Do you think that the "substantial injustice" test hinders the correction of miscarriages of justice? What test should be applied where a person seeks to appeal against their conviction on the basis that there has been a development in the law?

Appeals against sentence: change of circumstances and imprisonment for public protection (IPP)

Sentencing appeals usually review the sentencing judge's process and decision in reaching a sentence, giving a large degree of respect to their conclusions on, and weighing of, facts. As part of that, they focus on the situation at the date of the sentence and not the (possibly changed) situation when the appeal is heard. The tests the CACD applies, specifically whether a sentence is "manifestly excessive", have been criticised, in part because they are not set out in legislation, but we do not think that there is a strong enough case for changing them.

Summary Consultation Question 11:

Do you agree that there should be no change to the test(s) for allowing CACD sentence appeals? Do you think that the test(s) should be set out in legislation?

We identified a tension in the CACD's practice, in that while it largely does not consider changes of circumstances between a sentence and its appeal, it may do so when pregnancy or a serious health issue is discovered after sentencing, or when quashing a sentence and resentencing an offender.

Separately, several consultees raised with us the issue of the sentence of imprisonment for public protection (IPP).

Sentences of imprisonment for public protection (IPPs)

IPP sentences were introduced in 2005 and abolished in 2012. Introduced to deal with dangerous offenders, including some whose offences were not eligible for a discretionary life sentence, 8,711 were imposed. IPPs, like life sentences, were "indeterminate", meaning that they allowed an offender to be kept in prison for their whole life, and came with a minimum term which they had to serve in prison before they could apply for parole. Initially, courts were required to impose IPPs in certain circumstances if a life sentence was not imposed, and there was a presumption that an offender was dangerous if they had previously been convicted of certain violent or sexual offences. These rules were relaxed in 2008, giving judges greater discretion not to impose an IPP.

In 2012, the European Court of Human Rights ruled that the presumption of dangerousness, and the restrictions on judicial discretion, coupled with limited opportunities for prisoners to undertake rehabilitation work, meant that the operation of the IPP regime amounted to arbitrary detention, contrary to article 5 of the ECHR.

The sentence was abolished in 2012. However, this did not affect those already sentenced to IPP. Legislation has since changed the rules governing post-release conditions to enable released IPP prisoners to have their licence terminated more easily. However, a provision allowing ministers to relax the parole test that applies before an IPP prisoner can be released has not been used.

As far as this project is concerned, the issue is that while appeals are brought on the grounds that an IPP should not have been imposed under the law as it stood, more often the complaint is that the law governing IPPs itself gave rise to injustice. There is evidence that IPP prisoners are more likely to self-harm, and released IPP offenders can be brought back to prison for relatively minor breaches of their licence. On the other hand, IPP offenders were found at trial to be "dangerous" and, if their sentences were quashed altogether, potentially dangerous people could be immediately released into the community; resentencing all such offenders could also overwhelm the court system. So, we would be interested to hear your views on whether those sentenced to IPPs should have a unique right to appeal or be resentenced, and whether there should be a bespoke test for quashing an IPP.

Summary Consultation Question 12:

Do you think that the current powers of the CACD are sufficient to deal with changes of circumstances post-sentence, whether to personal circumstances or changes of law such as the abolition of sentences of imprisonment for public protection (IPPs)?

Prosecution appeals to the Court of Appeal Criminal Division

Normally, the prosecution cannot challenge acquittals or sentences in serious cases. However, the Attorney General (AG) and their deputy, the Solicitor General, can "refer" a sentence to the CACD on the ground that it is "unduly lenient". The AG can also refer a case to the CACD for clarification on the law involved where a person has been acquitted.

Exceptionally, in relation to certain very serious offences, the Director of Public Prosecutions (DPP) can allow an application to the CACD for an order quashing an acquittal and ordering a retrial where there is compelling new evidence.

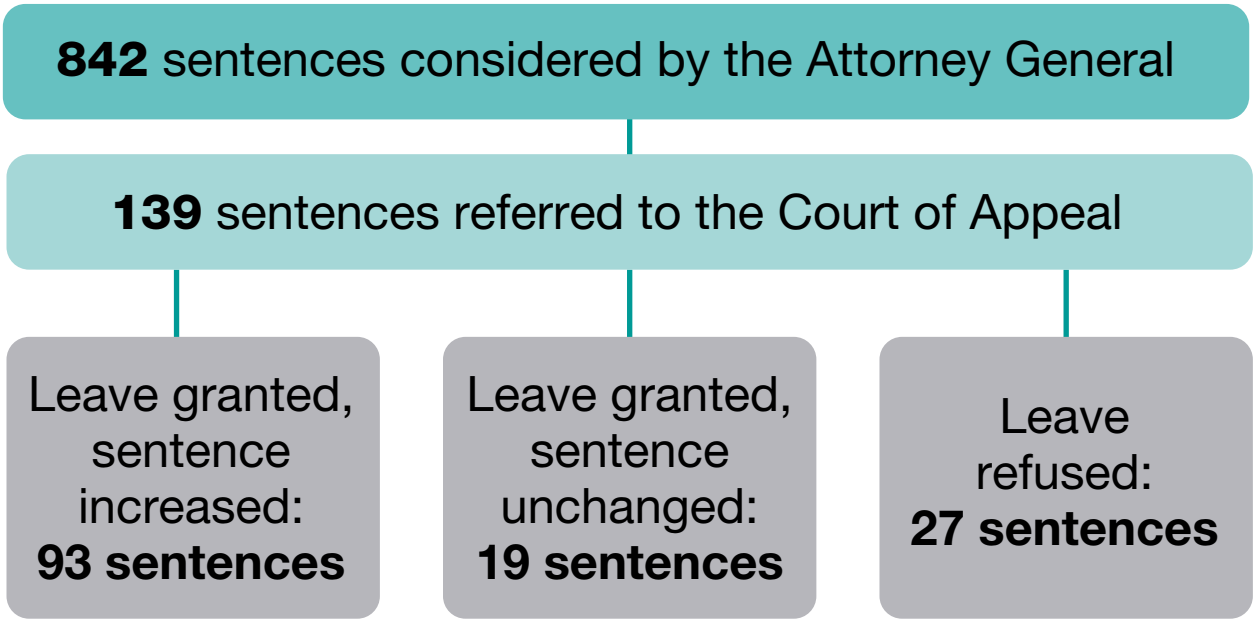
Prosecution appeals engage the principle of avoiding "double jeopardy" (that is, being subjected to criminal proceedings—including sentencing—for the same alleged offending more than once). The absolute rule against being tried twice for the same alleged offence was abolished in 2005 and, in other contexts, the broader principle has weakened in recent years.

Unduly lenient sentence references

The AG can make references on "unduly lenient" sentences for offences triable only on indictment (for example, rape or murder) and some other offences set out in an Order of 2006 (for example, many either-way sexual offences). The reference must be made within 28 days of the sentence; this time limit is absolute. An "unduly lenient" sentence is one which falls outside the range of sentences which the judge, applying their mind to all the relevant factors and in relation only to facts found or admitted at trial, could have reasonably considered appropriate. As with convicted persons' appeals, the CACD must first grant leave (permission) to the AG.

Even if the CACD finds a sentence "unduly lenient", it can decide not to increase it or effectively apply a discount to any increase.

Unduly lenient sentence references, 2023



We heard little concern about the current law governing "unduly lenient" sentence references, but some have advocated to us, and there has been occasional public outrage, about the inability to refer certain offences (not being indictable only or within the 2006 Order). Principal among these are causing death by careless driving and animal cruelty offences.

Summary Consultation Question 13:

Do you think that (1) offences involving a fatality which are not currently covered, such as causing death by careless driving, and/or (2) animal cruelty offences should be included in the "unduly lenient" sentence reference scheme? Are there any other offences not currently included that you think should be?

Challenging acquittals

In summary proceedings, the prosecution can appeal against an acquittal on a point of law by way of "case stated" or judicial review of an acquittal.

Also, in some cases, if a person interferes with criminal proceedings, is convicted of an "administration of justice" offence in relation to them and there is a real possibility that an acquittal in those proceedings resulted from the interference, the High Court can quash the acquittal, allowing a new trial (see "Tainted acquittals" below).

Since 2005, it has been possible for the prosecution to apply to the CACD to quash an acquittal for certain serious offences where there is new and compelling evidence and a retrial would not be contrary to the interests of justice. The applying prosecutor needs the consent of the DPP and no more than one application can be made in relation to an acquittal. The power has enabled the eventual retrial and conviction of several infamous offenders previously acquitted, following decades of campaigning by victims and their families.

Those who responded to the prosecution appeals questions in our Issues Paper were generally satisfied with the current system, but, as with the "unduly lenient" sentence scheme, there were concerns about the exclusion of certain serious offences from the list of serious offences to which the procedure applies, which has not been changed since the power was introduced. The current list includes murder, manslaughter, rape, genocide and some serious drugs and terrorism offences.

There are some anomalies. For instance, manslaughter and corporate manslaughter are included, even though the latter can only be punished with a fine. However, causing or allowing the death of a child, which carries a possible life sentence, is not covered. Rape and penetrative sexual assaults are included, but not some older forms of certain sexual offences which have since been replaced. For instance, anal rape committed prior to 1994, and oral rape committed prior to 2005 are not included (as these did not legally constitute rape at the time, but "indecent assault"). In addition, sexual assaults, including sexual assaults on children, are not covered if they do not involve penetration.

We are provisionally persuaded that it is an anomaly not to include such conduct, which is at the serious end of already highly serious offending.

Summary Consultation Question 14:

Do you agree that (1) oral and anal rape, (2) other penetrative sexual assaults charged under historic legislation and (3) non-penetrative sexual assaults on children should be included in the list of offences for which acquittals can be quashed by the CACD where there is compelling new evidence?

Do you think that non-penetrative sexual assaults against adults and/or any other offences should be included in that list?

"Tainted acquittals"

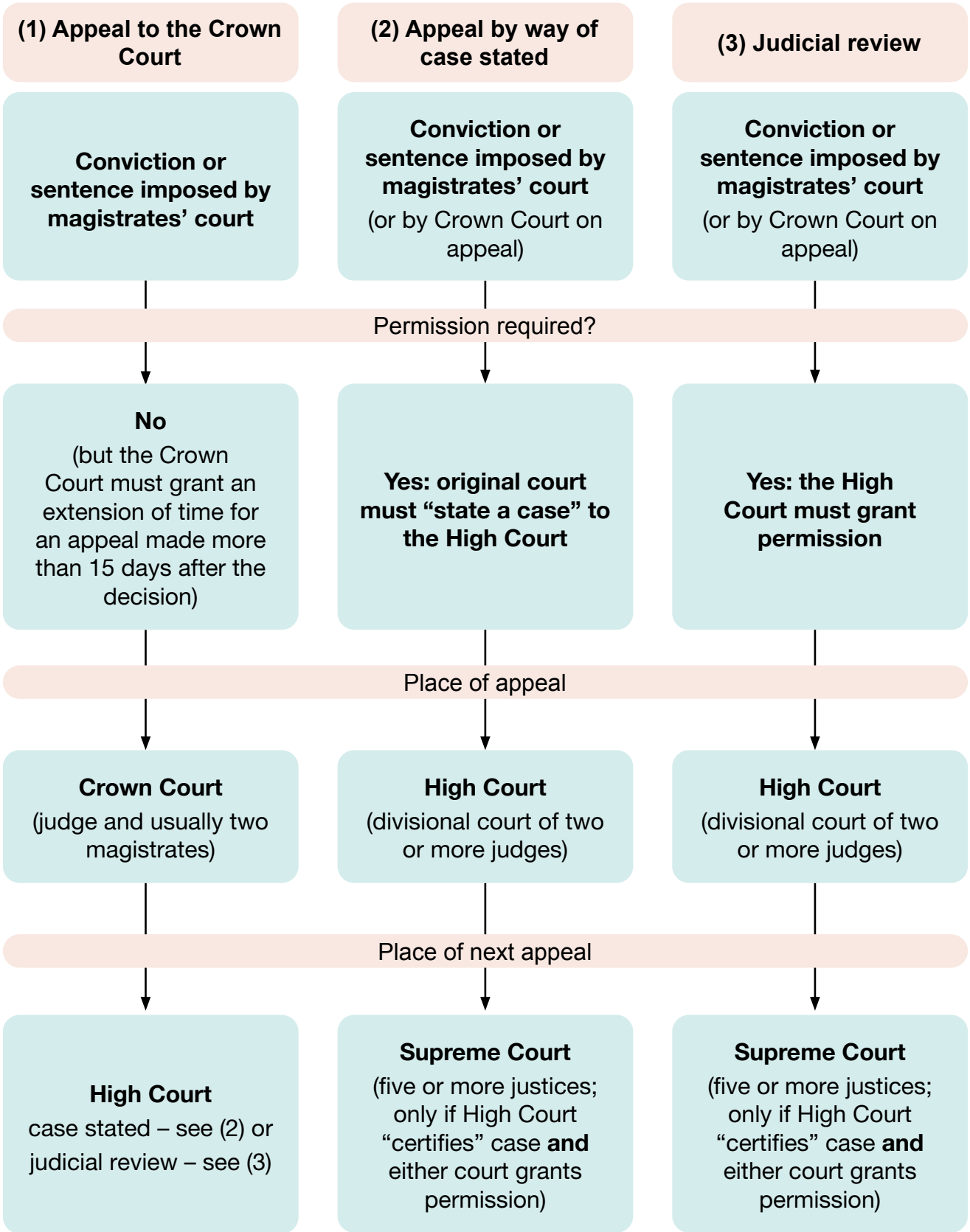
The law allows an acquittal to be quashed by the High Court where it is "tainted" by an unlawful interference with the course of justice.

The "tainted acquittal" provisions have barely ever been used. This may be down to the legal requirements to quash an acquittal as tainted. It is necessary that someone is prosecuted for, and convicted of, interfering with the course of justice, and that both the court at which that person is convicted and the High Court find that the interference could have affected the outcome of the earlier trial. We think that these requirements, which are more onerous than those involved in cases where the defendant was properly acquitted but there is new and compelling evidence of guilt, reflect the fact that these provisions were an early, and controversial, interference with the principle of double jeopardy, and could be preventing some cases from being retried where an acquittal was secured through improper interference with the course of justice. You can read more about this issue in Chapter 13 of our full consultation paper.

Attorney General's references on a point of law

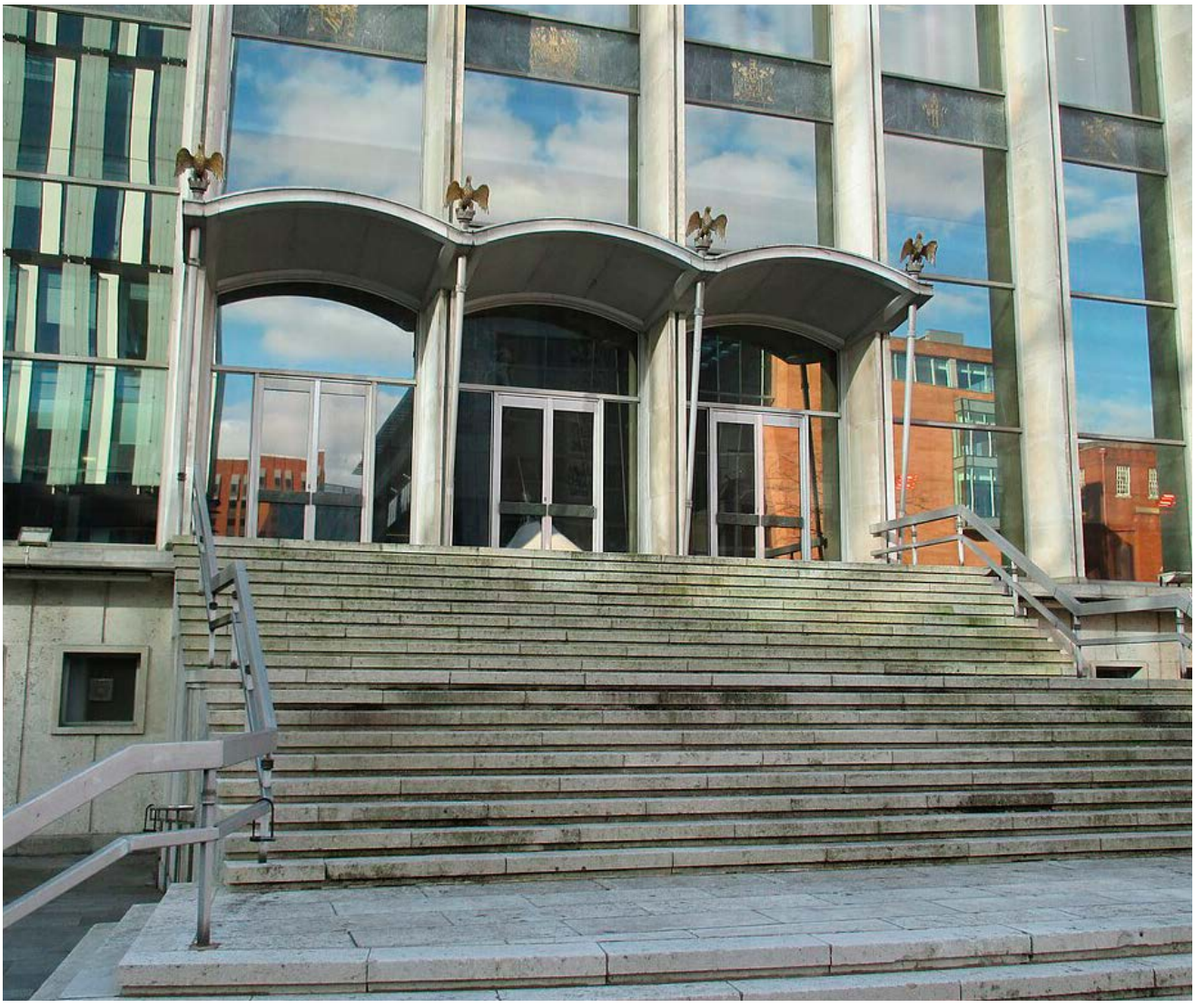
Where a person is acquitted in a trial on indictment, the Attorney General can refer their case to the CACD to clarify a point of law. The reference does not affect the acquittal. You can read more about our provisional proposals in Chapter 13 of our full consultation paper. In short, among other things, we think that the power to make such references should remain and be subject to a 28-day time limit (with the right to apply to make a reference out of time where it is in the interests of justice).

Appeals to the Crown Court and the High Court in summary cases



When offences are tried in a magistrates' court (whether it is a summary only or either-way offence), these are called summary proceedings. (The vast majority of child defendants are tried in youth courts, a type of magistrates' court.)

There are currently three ways to challenge a conviction or sentence in summary proceedings: (1) an appeal to the Crown Court, (2) an appeal to the High Court by way of "case stated" and (3) an application to the High Court for judicial review.



Appeal to the Crown Court

In 2023, out of well over a million magistrates' courts cases, 5,968 appeals were made to the Crown Court.[6] Appeals to the Crown Court make up the vast majority of appeals against summary proceedings and there are a similar number of conviction and sentencing appeals.

Convicted persons do not need permission to appeal against their conviction (unless they pleaded guilty) and/or sentence as long as their appeal is made within 15 business days of their sentence. After that point they must apply for and be given an extension of time before appealing.

6 Criminal court statistics quarterly: October to December 2023

We heard similar concerns about the 15-day limit as with the 28-day limit for appeals to the CACD. We think that the time limit should be the same for appeals to the Crown Court as to the CACD. This would mean 28 days currently or 56 days under our proposed change (see Summary Consultation Question 3, above).

Summary Consultation Question 15:

Do you agree that the time limit for making appeals to the Crown Court should be 56 days, the same as we propose for the CACD?

Unlike in the CACD, a Crown Court appeal is a rehearing, not a review, by a judge and (usually) two magistrates. Permission is not needed to introduce fresh or unused evidence. The Crown Court can confirm or vary a magistrates' court decision, or send it back to the magistrates with its opinion. Crucially, the "no greater penalty" principle does not apply and the Crown Court can increase a sentence on appeal.

Some consultees argued that a permission requirement should be introduced for appeals to the Crown Court and that such appeals should be by way of a review of the hearing in the magistrates' court rather a rehearing, perhaps as part of a broader reform to make magistrates retain a full record of hearings.

However, many argued against these suggestions. We received persuasive evidence that if magistrates' decisions were to be susceptible to review in this way, there could be a detrimental effect on the work of these courts by requiring large changes in practice (such as the production of official records) in all cases, when only a very small number of cases are the subject of an appeal.

Nonetheless, some said that appeal by way of review might be appropriate in certain cases, such as for certain specialist regulatory offences which are usually prosecuted in a small number of magistrates' courts which have developed an expertise in the technical issues involved. It was also suggested that replacing appeal by way of rehearing with review might be appropriate for domestic abuse cases, where there is a particular risk that a person might appeal against their conviction in the hope that the alleged victim will be unwilling to give evidence for a second time.

We are provisionally satisfied that the right to rehearing and lack of a permission requirement should remain. Less than 1% of magistrates' court convictions are appealed against, despite there being no permission requirement. To the extent that there may be merit in making magistrates' courts officially record their proceedings, we think that this needs to be considered on its own terms, rather than as part of our review of criminal appeals.

Summary Consultation Question 16:

Do you agree that the right to an appeal by way of rehearing following conviction in summary proceedings should be retained? Do you think there should be a permission requirement and/or a review-only appeal for certain offences?

Appeal to the High Court

Convicted persons, the prosecution and any sufficiently concerned person can appeal by way of "case stated" or make a claim for judicial review to the High Court in respect of a magistrates' court decision. Decisions of the Crown Court sitting as an appeal court from a magistrates' court can be similarly challenged.

Case-stated appeals must be made within 21 days of the decision appealed against. Case-stated appeals are technically applications to the magistrates' court (or Crown Court) to "state a case" to the High Court – that is, to give a summary of its findings and submit one or more legal questions to the High Court.

Judicial review must be claimed for "promptly" and within three months of the relevant decision, but the High Court can consider out-of-time applications. The High Court must first give permission for the claim, and will do so if it is "arguable". In a claim for judicial review, the decision is challenged on "public law" grounds (among other things, that it was illegal, irrational or procedurally bad).

Decisions of the High Court in case-stated appeals or judicial reviews can be appealed on to the Supreme Court.

We heard that there could be difficulties establishing whether a case should be brought by way of case stated or judicial review. We also heard that it was important to have an avenue of challenge purely on a point of law – especially for prosecutors, who do not normally have a right of appeal to the Crown Court. We think there would be benefits in simplifying the law in this area, and we think that it is preferable to retain judicial review and abolish the case stated procedure. We think that challenges that are currently made by way of case stated could be dealt with by way of judicial review if case stated were abolished.

Summary Consultation Question 17:

Do you agree that appeal to the High Court by way of case stated should be abolished, but that judicial review should be retained and made available for decisions which must currently be challenged by way of case stated?

Interlocutory and other appeals

The vast majority of appeal rights relate to concluded trials and are by defendants or the prosecution. A minority relate to other trial decisions and/or appeals by third parties.

Interlocutory appeals

Both the defence and prosecution can appeal against decisions made in preliminary "preparatory hearings" and bail decisions. Interim or "interlocutory" appeals are generally not possible, primarily for reasons of practicality: proceedings have to be paused and usually the jury will have to be discharged, leading to the collapse of a trial.

The prosecution can appeal against so-called "terminating rulings". This includes rulings which literally or effectively halt a prosecution, such as a ruling of no case to answer or a stay on the grounds of abuse of process. It also includes other rulings where the prosecution agrees that if an appeal is unsuccessful, it will drop the prosecution.

We discuss this issue more fully in Chapter 12 of the full consultation paper. We consider that allowing the prosecution to appeal against "terminating rulings" is fair because the prosecution's right to challenge a "terminating ruling" is broadly equivalent to a defendant's right to appeal against a conviction. However, we do not think it would be fair to allow the prosecution, but not the defence, to appeal against non-"terminating rulings"; and we do not think it would be practical to allow both prosecution and defence the right to appeal against such rulings. In that chapter, we also discuss the prosecution's ability to appeal against bail decisions and concerns that have been expressed about the process and seek your views on these topics.

Appeals against a failure to impose reporting restrictions

One of the few circumstances where a third party can appeal against a ruling in a criminal case is where a person – normally a representative of the media – appeals against a decision to impose reporting restrictions. An issue we identified is that while it is possible to appeal against reporting restrictions while a trial is in progress, it is not possible to appeal against a decision not to impose restrictions.

However, we received persuasive evidence that such a right would be open to abuse by those seeking to suppress reporting of court proceedings. Temporary restrictions would have to be left in place until the appeal was heard, which could deter the media from covering the case, even if the restrictions were subsequently lifted.

Summary Consultation Question 18:

Do you agree that there should be no right to appeal against (1) a refusal to impose reporting restrictions; or (2) a decision to lift reporting restrictions?

The Criminal Cases Review Commission

The CCRC was set up by the Criminal Appeal Act 1995, following several notorious miscarriages of justice which had been the subject of repeated legal challenges. It is an independent body that investigates claimed miscarriages of justice and refers convictions and sentences back to the CACD or Crown Court.

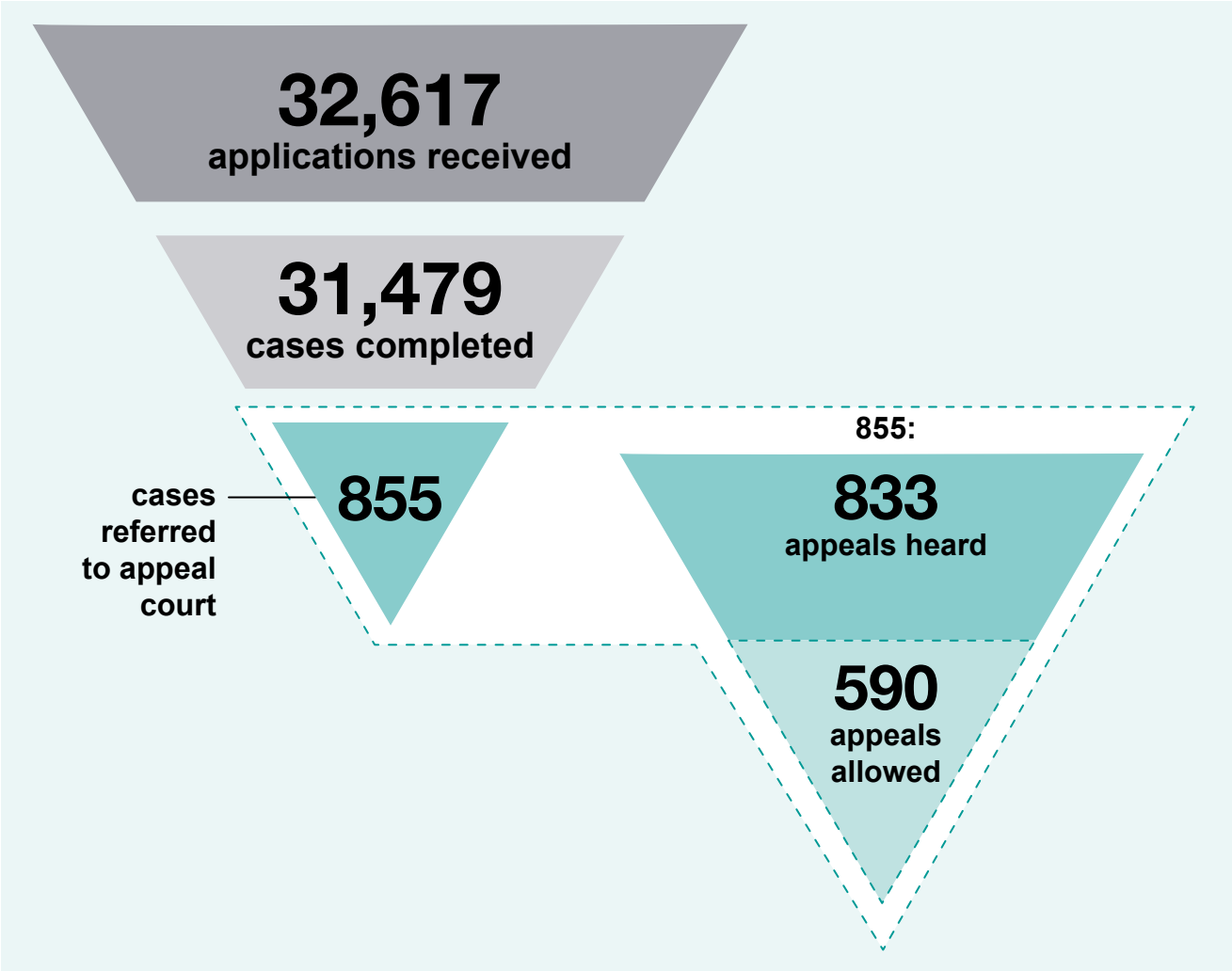
The CCRC also has powers to conduct enquiries, compel bodies to provide it with evidence, and refer questions to the CACD.

The CCRC will not refer a conviction, sentence or other decision unless:

1. "there is a real possibility" that the referred decision "would not be upheld" due to a new argument or evidence not raised in the original or appeal proceedings, and
2. an appeal or application for leave has been determined (though, in exceptional circumstances, the CCRC can make a reference even when a person has not exhausted their appeal rights).

Appeal courts have allowed almost three-fifths of the over 850 challenges made through its references. Some consultees interpreted this as suggesting that the CCRC was requiring something more than a "real possibility" before it would refer a case.

Outcome of CCRC applications, to March 2024



We have taken into account criticisms of the CCRC's practice and use of its powers, but as a law reform body our focus is on the legal framework governing the CCRC.

Concerns were strongly expressed to us, and earlier to the House of Commons Justice Committee and the Westminster Commission on Miscarriages of Justice, about the "predictive" nature of the "real possibility" test. The perceived problem is that the CCRC is assessing the possibility of the appeal court upholding the decision, rather than assessing the possibility that the decision is right, wrong, safe or unsafe. 34 of 35 respondents to our Issues Paper question on the "real possibility" test believed it hindered the correction of miscarriages of justice.

The review by Chris Henley KC of the CCRC's handling of Andrew Malkinson's applications found that the CCRC had unduly focused on the reasons why the CACD had previously rejected his appeal (when there was no DNA evidence before the CACD) and failed to appreciate the significance of fresh DNA evidence for the safety of his conviction.

We are provisionally persuaded that the current test should be replaced with a non-predictive one. Alternative tests, some based on tests in other countries, have been suggested, such as whether: a miscarriage of justice may have occurred; it would be in the interests of justice to make a reference; there are arguable grounds of appeal; or a decision is or may be unsafe.

Summary Consultation Question 19:

Do you agree that the "real possibility" test applied by the CCRC for referring convictions should be replaced with a non-predictive test? Do you have suggestions or arguments for alternative non-predictive tests?

Systemic miscarriages of justice

The Post Office Horizon and Ridgewell cases are just two examples of widespread miscarriages of justice. In the full consultation paper we consider several other cases where systemic issues have been uncovered, including other instances of institutionalised police misconduct, as well as testing laboratory failure, and "shaken baby syndrome" cases. We found that the processes which were adopted for reviewing prosecutions to identify potential miscarriages of justice were ad hoc and inconsistent.

The 2024 Act quashing Post Office Horizon convictions was exceptional, but a significant reason for introducing it was to speed up a long and expensive process of reviewing convictions. There was a fear that the CCRC's current practice, which relies on the convicted person or their representatives taking forward an appeal once the case is referred, was inadequate when some of those wrongly convicted would be unable or unwilling to engage with the process.

We consider that there is a strong case, when problems like these arise, for the CCRC, as part of its investigatory function, to conduct or oversee investigation of these miscarriages of justice systemically, as investigations, evaluative techniques and data gathered will likely be transferable across cases.

Summary Consultation Question 20:

Do you agree that where there is evidence of a widespread problem calling into question the safety of convictions, a review of them should normally fall to the CCRC, using as necessary its investigatory powers? Do you have views on other measures that could enable the efficient correction of multiple miscarriages of justice where systemic issues are investigated?

DS Derek Ridgewell

Derek Ridgewell, a British Transport Police officer in the 1970s, and members of his squad, framed innocent men, many from ethnic minorities, for crimes of robbery, theft and related crimes and conspiracies. These included four black men arrested at Oval underground station (the Oval Four) and six black men arrested when Ridgewell claimed that he himself was a victim of an assault with intent to rob at Stockwell station (the Stockwell Six) both in 1972.

In 1973, Ridgewell arrested two black men at Tottenham Court Road station. Their trial collapsed when it emerged that they were Jesuit students on their way to a training course at Oxford University.

Ridgewell was moved to a new team investigating mail theft. In fact, he orchestrated thefts, framing innocent people for the crimes. In 1980, he and two other officers were jailed for stealing goods worth approximately £364,000. He was sentenced to seven years' imprisonment, but died having served two years.

Despite the conviction of Ridgewell, the convictions of the many victims of his conspiracies were not referred by the authorities or quashed until the CCRC referred the 1975 conviction of Stephen Simmons for mail theft in 2018. Mr Simmons had learned about Ridgewell's history by chance in 2013. He applied to the CCRC, which referred his conviction to the CACD. This led to the CCRC referring the convictions of the Stockwell Six and the Oval Four. In 2023, it posthumously referred the convictions of Basil Peterkin and Saliah Mehmet, two rail workers who had been convicted of mail thefts. All of the convictions were quashed.

Appeals to the Supreme Court

Both the defence and prosecution can seek to appeal against a case after the High Court or CACD, as the case may be, has determined an appeal.

As with appeals in civil cases, appeals from the High Court or CACD in criminal cases require permission from the High Court or CACD, or from the Supreme Court itself. However, unlike for civil appeals, permission cannot be granted unless the High Court or CACD has certified that a point of law of general public importance is involved in the decision.

Some have questioned the Supreme Court for lacking specialist criminal experience, especially compared to the CACD. The President of the Supreme Court has strongly disputed this, and noted that, as well as appeals from the CACD and the High Court, the Supreme Court frequently deals with criminal law issues when it considers civil cases or when Supreme Court justices sit as members of the Judicial Committee of the Privy Council.

Appeals to the Supreme Court serve the important purposes of developing the common law, correcting perceived errors made by courts below and reconciling conflicts between criminal and civil law. Most of those who responded to our Issues Paper believed that the current certification requirements unduly restrict cases reaching the Supreme Court. Similar jurisdictions to our own do not require certification by a lower court for their supreme courts to hear criminal appeals, and we consider that the separate requirement to obtain leave to appeal to the Supreme Court would prevent the number of Supreme Court appeals from being overwhelming. As such, we think that the Supreme Court should have the final say on which cases it hears.

Summary Consultation Question 21:

Do you agree that the Supreme Court should be able to grant leave for an appeal from CACD or High Court criminal proceedings where it is satisfied that the appeal involves a question of law of general public importance?

Post-trial retention and disclosure of evidence

Unused and/or undisclosed evidence may be central to an appeal, not least if its usefulness or relevance only becomes apparent years later as a result of scientific developments, evidentiary techniques or other new information. Equally, when such evidence is concealed or destroyed, it may be impossible to prove that an innocent person's conviction is unsafe. Our research found that the current law governing post-trial retention and disclosure of evidence is haphazard, misunderstood and misapplied, potentially hindering the correction of miscarriages of justice. For instance, exhibits in Andrew Malkinson's case were lost or destroyed by the police, and it was only good fortune that forensic samples taken from those exhibits had been retained after they had been tested by the Forensic Science Service as part of an earlier review (which did not yield usable results at the time).

Currently, material that may be relevant to the investigation of a convicted person's offending should be kept until they are released from custody (or for six months from conviction if no custody is imposed). One issue is that this period is almost always shorter than the person's sentence: they might be released on licence at the 40%, halfway or two-thirds point of their sentence, or after the expiry of their "minimum term" for life sentences, but subsequently recalled to prison for a breach of the terms of their licence.

The length of the retention period has also been questioned in a digital age or in the particular context of child offenders, who may not see the urgency or importance of appealing against their conviction before experiencing its consequences in adulthood. We have been provisionally persuaded by these criticisms, but recognise the potentially overwhelming burden of permanent retention of any or most evidence.

You can read more about this issue in Chapter 15 of the full consultation paper, including our provisional proposal that audio recordings and transcripts of trials should be retained for at least the full term of a person's sentence when they are sentenced to imprisonment.

Summary Consultation Question 22:

Do you agree that retention periods for evidence should be extended to cover at least the full term of a person's sentence? Do you have views on whether retention periods should be extended further?

Concerns have been expressed about intentional or reckless premature destruction of evidence. Though an official deliberately destroying or concealing evidence could be punished under the offences of perverting the course of justice or misconduct in public office, destruction of evidence due to serious negligence or recklessness is not specifically criminalised.

Summary Consultation Question 23:

Do you agree that the unauthorised destruction, disposal or concealment of retained evidence should be a specific criminal offence? Do you have views on the scope of such an offence?

Some consultees also argued that it would be preferable if responsibility for long-term retention of evidence was transferred from the police to a specialist independent facility.

Summary Consultation Question 24:

Do you think that responsibility for long-term storage of forensic evidence should be transferred to a national Forensic Archive Service and do you have views on its affordability and practicability?

Post-trial disclosure of and access to evidence

The Supreme Court, in the leading case *Nunn*,[7] held that the principle of fairness does not require the same level of disclosure after conviction as before and during trial.

Some consultees have criticised the scope of the duties in *Nunn*. A broader concern is that *Nunn* is misapplied by public bodies. Consultees told us that *Nunn* was being relied on to deny disclosure and misinterpreted as providing a minimal right for post-conviction disclosure.

Others questioned the assumption in *Nunn* that the CCRC is an effective "fallback" option if the police or CPS refuse disclosure. They argue for a legal right of access and enquiry into police and prosecution files and a duty to preserve evidence and give defendants notice of and ability to challenge destruction of files. Readers can see the full discussion of these issues in Chapter 15 of our full consultation paper.

In this summary, we ask about journalists' access to evidence that may lead to correcting miscarriages of justice. The importance of investigative journalism in exposing miscarriages of justice is well-demonstrated. The programmes *Rough Justice* (BBC, 1982-2007) and *Trial and Error* (Channel 4, 1992-2000) helped overturn the convictions of many wrongly-convicted people. Similarly, long-term or subject-specific journalism, such as that of *Computer Weekly* in uncovering the errors in the Post Office Horizon system, can sustain public pressure or interest in claimed miscarriages of justice. Journalists' ability to access evidence which is not publicly available has played a crucial role in their work in uncovering miscarriages of justice.

However, in the modern age the line between mainstream journalism and other forms of communication is much less clear. There are obvious difficulties in allowing disclosure of material (for instance, which is subject to reporting restrictions or contains confidential information) to "citizen journalists", such as bloggers, who are not subject to professional training or accountability, and who may not understand or observe legal restrictions on its use.

Summary Consultation Question 25:

Do you think that provision could and should be made to enable disclosure of material for the purposes of responsible journalism to reveal possible miscarriages of justice?

7 *R (Nunn) v Chief Constable of Suffolk* [2014] UKSC 37, [2015] AC 225.

Compensation and support for victims of miscarriages of justice

Where an innocent person has been wrongly convicted, there is a strong case for some form of redress to compensate them. A conviction can cause significant harm, particularly where there has been a loss of liberty, including reputational damage and financial loss. As a party to the ICCPR, the UK is obliged to provide compensation to victims of miscarriages of justice in certain circumstances.

However, the current compensation scheme following a wrongful conviction imposes a very high threshold. Under section 133 of the Criminal Justice Act 1988, an individual must have had their conviction reversed or pardoned due to a new or newly discovered fact which shows beyond a reasonable doubt there has been a miscarriage of justice.

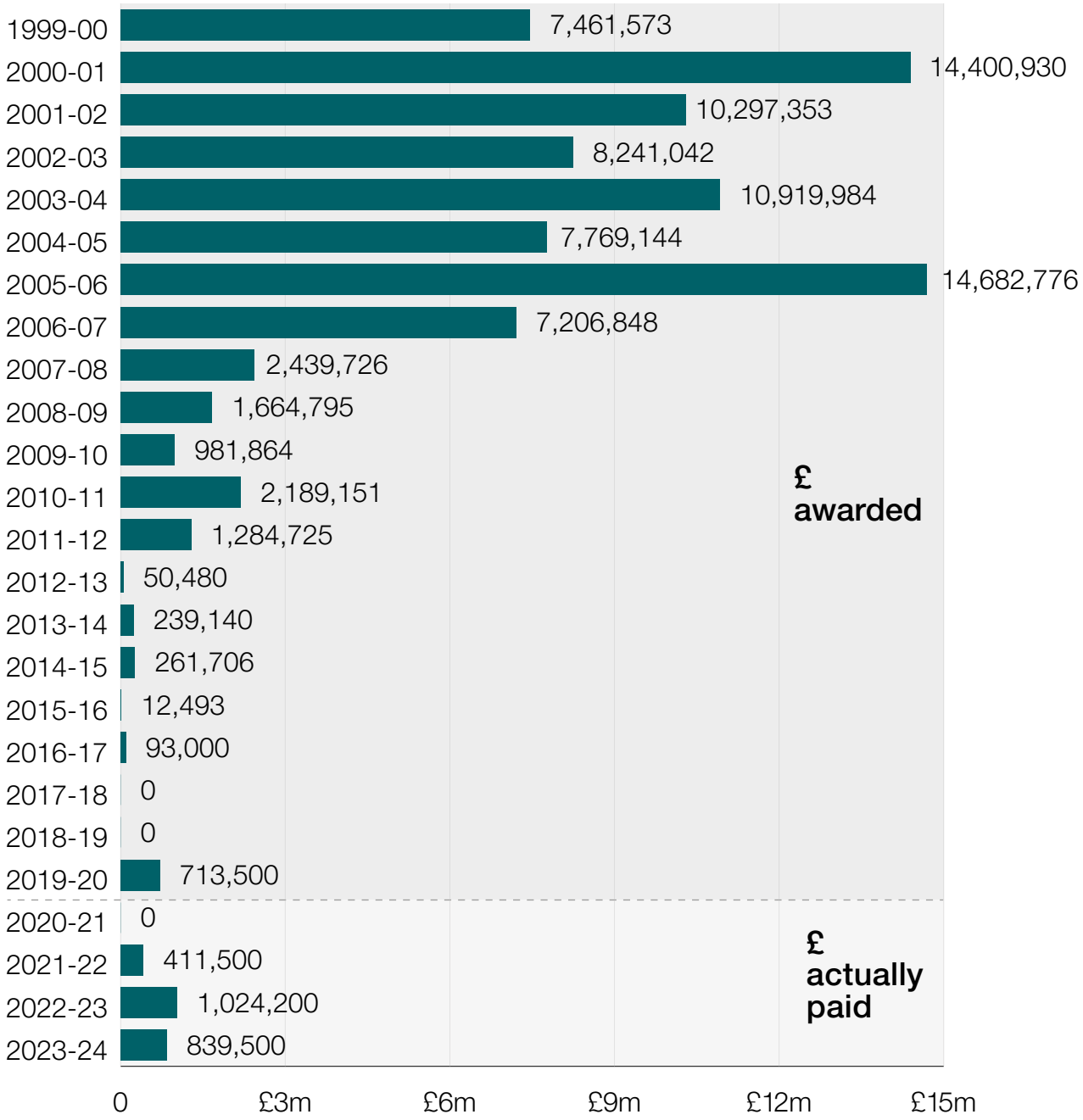
In 2014, the scheme was further restricted so that compensation will only be awarded "if and only if the new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence". There is also a cap on compensation that is payable: the maximum amount of compensation for someone who has been detained for at least 10 years is £1 million and the maximum in any other case is £500,000.

We consider that the requirement to prove innocence beyond reasonable doubt conflicts with fundamental principles of civil and criminal law. In criminal cases, it is for the prosecution to prove guilt to the criminal standard (so that the jury is "sure", or "beyond reasonable doubt"); where the burden is on the defendant to prove some matter, the standard is never higher than the balance of probabilities. In civil cases (such as most claims for compensation), where a party bears the burden of proving something, the standard of proof is the balance of probabilities. We think that the law may now fail to meet the UK's obligations under the ICCPR.

Summary Consultation Question 26:

Do you agree that the test for compensation following a wrongful conviction should not require an exonerated person to show beyond reasonable doubt that they are factually innocent? Do you agree that compensation should be payable where the person can show on the balance of probabilities that they are factually innocent? Do you think that a different test would be more appropriate?

Compensation awarded or actually paid in £ by year[8]



8 Figures from 1999/2000 to 2019/2020 represent the amount of compensation awarded to successful applicants in that year: Jon Robbins, "MoJ has paid out less than £1.5m in compensation to victims of miscarriages of justice in three years", *The 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/. Figures from 2020/2021 to 2023/24 represent the payments actually made in that year: Ministry of Justice, "Miscarriage of Justice Application Service (MOJAS) Claims, England and Wales, April 2016/17 to March 2023/24" (25 April 2024), https://assets.publishing.service.gov.uk/media/66292a41b0ace32985a7e7c9/MOJAS_tables.ods.

Appeals by children and young people

The criminal justice system treats children[9] differently to adults. This recognises the different needs of children, as well as their diminished culpability on account of their lack of maturity and emotional development. The majority of children who come within the criminal justice system are dealt with in youth courts, which are a type of magistrates' court. The route of appeal for children is, therefore, the same as those from magistrates' courts and includes a right of rehearing in the Crown Court, case stated to the High Court or challenge by way of judicial review to the High Court.

There are significant consequences when a child attains the age of 18 and is largely considered and treated as an adult. However, the courts also recognise that young people continue to mature after reaching the age of 18.

Turning 18 has an impact on the anonymity afforded to the defendant. Under the Children and Young Persons Act 1933, there are automatic reporting restrictions on proceedings which involve children unless the Court dispenses with these restrictions where it is considered to be in the public interest to do so. We have received evidence that some young people are dissuaded from appealing against their sentence or conviction where they have turned, or are about to turn, 18 and, although their case had been subject to reporting restrictions, the appeal would not be. We accept that this may discourage meritorious appeals. However, we also recognise that where anonymity has already been lost (for instance, where the trial judge has allowed the offender to be named) restricting reporting of an appeal would not be justified.

Summary Consultation Question 27:

Do you agree that where a person has been convicted as a child and their anonymity has not been lost for another reason, that person should retain their anonymity during their appeal?

Retention of evidence

We consider that the current retention periods are inadequate for children. This is because children may not fully understand the criminal justice process, or the long-term consequences of conviction. We also received evidence that children may come under pressure from parents or others to plead guilty. In turn this may mean children may be more likely to bring appeals later in life but are then unduly hindered by the loss or destruction of evidence. We have, therefore, concluded that retention periods for children in particular should be extended.

Summary Consultation Question 28:

Do you agree that, for children, the retention period for evidence should be extended to the end of their sentence or six years after they turn 18, whichever is longer?

9 While different terms may be used in legislation, here we refer to all those under the age of 18 as 'children'. This is in line with the UN Convention on the Rights of the Child, which states that everyone under 18 is a child, unless national law provides for a lower age of majority (in England and Wales, the age of majority is 18).

Impacts on particular groups

In addition to the potential impacts we have identified earlier in this summary (principally, on young people, young black men and women), we are aware that there will be particular groups or particularised impacts that we have not covered or been alerted to in preparing our consultation paper, and want to hear of examples or themes in relation to impacts on particular groups or intersectional impacts (impacts resulting from more than one characteristic). You can read more about wider impacts in Chapter 17 of the full consultation paper.

Though we want to hear about impacts on any group or characteristic, the Equality Act 2010 sets out nine "protected characteristics": age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.

Summary Consultation Question 29:

Please tell us if you believe or have evidence or data to suggest that our provisional proposals and open questions could result in advantages or disadvantages to certain groups or based on certain characteristics (with particular attention to age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation).