Law Commission Criminal Appeals Consultation

JUSTICE: Submission

27 June 2025

Introduction

1. JUSTICE is a cross-party law reform and human rights organisation working to strengthen the justice system – criminal, civil and administrative – in the United Kingdom. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.

2. Issues relating to miscarriages of justice and how they should be remedied have formed a key part of our work for more than 40 years. Our reports in this sphere have included *Compensation for Wrongful Imprisonment* (1982), *Miscarriage of Justice* (1989), *Remedying Miscarriages of Justice* (1994), *Righting Miscarriages of Justice? Ten years of the Criminal Cases Review Commission* (2008) and *Supporting Exonerees: ensuring accessible, continuing and consistent support* (2018).[1] In *Miscarriage of Justice* and *Remedying Miscarriages of Justice*, we recommended the establishment of an independent body to review and investigate cases in which there had been a potential miscarriage of justice. These recommendations, together with those made by the Royal Commission on Criminal Justice (the Runciman Report),[2] were broadly implemented through the creation of the Criminal Cases Review Commission ("**CCRC**").

3. JUSTICE intervened in the case of *R (on the application of Nunn) v Chief Constable of Suffolk Constabulary*,[3] the leading authority on post-conviction duties of disclosure. We have also intervened in several landmark cases concerning the availability of compensation for victims of miscarriages of justice, namely *R (on the application of Adams) v Secretary of State for Justice*[4], *R (on the application of Hallam)*

[1] JUSTICE, *Supporting Exonerees: ensuring accessible, continuing and consistent support* (2018)

[2] Report of the Royal Commission on Criminal Justice (1993)

[3] [2014] UKSC 37

[4] [2011] UKSC 18

v Secretary of State for Justice[5] and *Nealon and Hallam v United Kingdom*[6]. Most recently, we intervened in *R v Oni and Ors*.[7], in which we made submissions which addressed issues of racial stereotyping (including 'gang' narratives and the dangers of using drill music as prosecution evidence) and the adultification of Black and racialised defendants.[8]

4. This submission sets out our response to a number of the consulation questions posed by the consultation paper.[9]

Chapter 4 - Principles in criminal appeals

Consultation Question 3

In considering whether reform to the law relating to criminal appeals is necessary, we provisionally propose that the relevant principles are:

(1) ***the acquittal of the innocent;***

(2) ***the conviction of the guilty;***

(3) ***fairness;***

(4) ***recognising the role of the jury in trials on indictment;***

(5) ***upholding the integrity of the criminal justice system;***

(6) ***ensuring access to justice (incorporating the "no greater penalty" principle and consideration of the needs of particular groups; and***

(7) ***finality.***

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

[5] [2019] UKSC 2

[6] Application nos. 32483/19 and 35049/19, 11 June 2024

[7] [2025] EWCA Crim 12

[8] JUSTICE's full submissions are available here

[9] Law Commission, Criminal Appeals – A consultation paper

5. JUSTICE agrees that the above principles ought to frame the law relating to criminal appeals. We would, however, propose two amendments to the formulation set out above.

6. First, we propose amending principle (5) to read as follows:

> ***(5) Upholding the integrity of the criminal justice system (including guarding against miscarriages of justice and providing adequate recourse to victims of miscarriages of justice)***

7. In our view, the need to prevent miscarriages of justice – and to respond appropriately where they do occur – is a particularly crucial aspect of upholding the integrity of the criminal justice system. Whilst principles (1) and (2) are of course directed towards this objective, we consider it to merit explicit mention. The ability of the criminal justice system to recognise and rectify mistakes which occur within it is perhaps the clearest sign that it is a system in which the pursuit of justice supersedes institutional defensiveness or deference. A failure to do so is likely to undermine public trust and confidence in the criminal justice system. In a December 2024 survey conducted by Opinium, for example, 2,000 UK adults were asked their views on the provision of compensation for those who are wrongly convicted. The survey found as follows:

> *"There are high levels of support for compensating those who are wrongfully convicted. Seven in ten (71%) believe that someone who has been wrongfully convicted must receive fair and swift compensation for being unlawfully imprisoned, whereas only a tenth (10%) believe they needn't. Additionally, two thirds (65%) think the government should do more to ensure that someone who has been wrongfully convicted receives fair and swift compensation for being unlawfully imprisoned, compared to one in seven (13%) who think they do not"*[10]

8. Second, we propose amending principle (7) to read as follows:

> ***(7) Finality, unless compelling reasons indicate a verdict is unsafe***

9. Whilst we acknowledge the importance of the principle of finality and agree that it should be included as a core principle, we also agree with the overriding principle proposed by the Law Commission. In other words, the convictions of those who are innocent or did not receive a fair trial should never be allowed to stand in the interests of finality. The appeal process at present promotes finality by means of limiting the extent to which unsuccessful or unmeritorious appeals can be pursued repeatedly. The judgments of

[10] APPEAL (private poll, on file with authors), December 2024; The Mirror, 'Brit jailed for seven years over crime he didn't commit hasn't received any compensation', (4 January 2025).

the Court of Appeal Criminal Division ("**CACD**") also constitute continually refined guidance for the lower courts on how trials and investigations ought to be conducted so as to minimise the risk of future miscarriages of justice. We agree with the observation made by the Law Commission at paragraph 4.59 of the consultation paper that: *"where there are compelling reasons to indicate that a verdict is not safe, adherence to finality risks undermining the public's confidence in the criminal justice system".*

10. Recent evidence suggests that levels of public confidence in the justice system constitute a pressing concern. In a June 2025 YouGov poll in which participants were asked how much confidence they had in the courts and judicial system in Britain, over 50% answered either 'not very much confidence' (36%) or 'no confidence at all' (17%).[11] The figures also show that public confidence has declined in recent years (as of October 2019, for example, 29% of participants answered 'not very much confidence' and 10% answered 'no confidence at all').[12]

Consultation Question 4

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

11. JUSTICE agrees with the "no greater penalty" principle: exercising the right to appeal against conviction or sentence should not carry the risk of further time spent in prison. We are particularly concerned at the risk that the Law Commission identifies at paragraph 4.78 of its consultation paper, namely: "*The possibility of an increased sentence upon appeal may act as a practical constraint on the right to appeal if potential appellants are dissuaded from bringing meritorious appeals by the prospect of additional punishment if unsuccessful.*"

12. In our view, the "no greater penalty" principle ought to be applied consistently throughout the criminal justice system. This includes appeals against sentence from the magistrates' court to the Crown Court. We also consider (for the reasons set out at paragraphs 6.128-154 of the consultation paper) that the CACD's power to make a loss of time direction should be removed or, alternatively, limited to exceptional cases with a strictly limited time-period. We note that while a person serving an indeterminate sentence, an extended determinate sentence or a sentence for certain other specified offences continues to challenge their conviction, they are unlikely to be able to progress towards an earlier release from prison. This power therefore creates an additional and unnecessary punitive element.

[11] YouGov, *Confidence in the British judicial system*, June 2025

[12] *Ibid*.

Chapter 7 - Sentence Appeals in the Court of Appeal Criminal Division and sentence reviews

Consultation Question 33

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

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

13. JUSTICE is in favour of a resentencing exercise for **all** IPP sentenced individuals, and concurs with the following recommendation, made by the House of Commons Justice Committee:

> *"Our primary recommendation is that the Government brings forward legislation to enable a resentencing exercise in relation to all IPP sentenced individuals (except for those who have successfully had their licence terminated). This is the only way to address the unique injustice caused by the IPP sentence and its subsequent administration, and to restore proportionality to the original sentences that were given."*[13]

14. The IPP sentence was assessed by the Justice Committee to be *"irredeemably flawed".*[14] It has been described as *"a punishment that is inhumane and often amounts to psychological torture"* by the UN Special Rapporteur on torture Alice Edwards[15] and *"the single greatest stain on our justice system"* by Lord Brown[16]. Accordingly, JUSTICE is of the view that no individual should remain subject to an IPP sentence and that resentencing is necessary to bring an end to what has rightly been termed the "IPP scandal".[17]

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[13] House of Commons Justice Committee, *IPP Sentences*, Third Report of Session 2022-23, p. 52

[14] *Ibid.*, p. 51

[15] Alice Edwards, *Prisoners serving sentences with no clear end is a stain on British justice – it also amounts to torture*, The Guardian, 2024

[16] Prison Reform Trust, *No life, no freedom, no future: The experiences of prisoners recalled under the sentence of Imprisonment for Public Protection*, 2020, p. i

[17] The Guardian, The IPP scandal

15. Steps towards carrying out a resentencing exercise must be taken urgently. As of 31 March 2025, there were 1,012 individuals serving IPP sentences in custody who had never been released and a further 1,532 who had been recalled.[18] Over two-thirds of unreleased individuals who have served their minimum tariff period have been held for at least ten years beyond the end of their tariff.[19]

Chapter 11 – The Criminal Cases Review Commission

Consultation Question 55

We provisionally propose that the predictive "real possibility" test applied by the Criminal Cases Review Commission for referring a conviction should be replaced with a non-predictive test

Do consultees agree?

16. JUSTICE agrees with this proposal. In our view, the test for referring a conviction should direct the focus of the CCRC onto whether or not there has or may have been a miscarriage of justice rather than the exercise of predicting what the CACD may decide.

17. We acknowledge that, particularly where a referral may be made on the basis of fresh argument, it will be difficult to assess a conviction's safety without reference to any relevant CACD authorities. In this regard, we agree with the following observation made by Lord Justice Holroyde, responding to the Law Commission on behalf of the CACD as Vice-President: *"the predictive exercise required of the CCRC is in essence the same as is required of counsel advising as to whether arguable grounds exist for an appeal..."*[20]. However, his Lordship also noted that: *"the "real possibility test performs a similar function to the requirement of leave in relation to the statutory right of appeal."*[21] That being the case, we note that leave to appeal to the CACD where the application discloses an 'arguable' ground of appeal, or in other words as a 'reasonable or real' prospect of success:[11]a reasonable or real *prospect* of success[22] is significantly easier to establish than a real possibility that the conviction, sentence, verdict or finding *would* not be upheld. The threshold created by the referral test ought to be lowered to align with the threshold for granting leave to appeal.

[18] Offender management statistics quarterly: October to December 2024, published April 2025

[19] *Ibid*.

[20] Law Commission, Criminal Appeals – A consultation paper, paragraph 11.68

[21] *Ibid*.

[22] *R v Gohil* [2018] EWCA Crim 140, [2018] 1 WLR 3697 at [125]

18. In other cases, such as those where a referral may be made on the basis of fresh evidence, we reiterate that the test should be concerned more with identifying possible miscarriages of justice than with predicting potential CACD outcomes.

19. JUSTICE further notes that the CCRC has a discretion rather than a duty to refer cases to the CACD, even when cases do meet the threshold for referral.[23] Whilst we acknowledge that, as the Law Commission has observed[24], the CCRC only rarely expects to exercise its discretion not to refer a case and must exercise its discretion in accordance with public law principles, we are nonetheless concerned that this position creates a risk that the independence of the CCRC will be compromised. We would also query the utility of this discretion, which may place a further, unnecessary barrier to referral: indeed it is difficult to see why a referral would not be made in circumstances where the threshold is met. We are therefore in favour of removing the discretion to refer and replacing it with a duty.

Consultation Question 60

We provisionally propose that the replacement for the "real possibility" test applied to the Criminal Cases Review Commission for referring a conviction should not be subject to a requirement for fresh evidence or argument.

Do consultees agree?

20. JUSTICE agrees with this proposal for the reasons set out by the Law Commission at paragraphs 11.219-20 of the consultation paper namely:

> "11.219 There will be some cases where, despite the absence of fresh evidence or argument, the CCRC concludes that a miscarriage of justice may have occurred. One example may be where the jury was presented with a wholly circumstantial case at trial. The CCRC may be concerned that other possible suspects or scenarios were not investigated properly in line with the requirement to pursue all reasonable lines of enquiry and that, had they been, the evidence available at trial might have been very different. However, it might not now be possible to

[23] *R (Ashley Charles)* [2017] EWHC 1219 (Admin), at [47]

[24] Law Commission, Criminal Appeals – A consultation paper, paragraph 11.34

conduct those enquiries so as to establish fresh evidence, and a failure to pursue alternative lines of enquiry would not in itself be a ground of appeal.

11.220 If, in such circumstances, the CCRC concludes that a conviction may be unsafe, we consider that it should be able to refer the case to the CACD."

Consultation Question 66

We invite consultees' views on whether changes are needed to the legislation governing the qualifications and terms of appointment of Commissioners of the Criminal Cases Review Commission.

21. We consider that changes are needed to the legislation governing the qualifications and terms of appointment of Commissioners of the CCRC.

22. The current framework raises concerns about the Commission's independence. Since 2017, the term of appointment has been limited to three years, with the possibility of a further three-year extension. This change was introduced by the Secretary of State without clear justification and removed the previous practice of reappointments being made on the recommendation of the Chair. This shift places the power of extension solely in the hands of the Minister, which may create a perception that Commissioners are expected to align with government preferences.

23. In addition, the terms of appointment have become less conducive to developing the necessary expertise. Commissioners are now appointed on a fee-paid basis with a minimum of 52 working days per year. According to the former Chair of the Board in 2016, it takes approximately a year of working three to three-and-a-half days per week to become fully proficient in the role.[25] The demands on the CCRC and its Commissioners have only increased, through the dual pressures of an ever growing caseload due to the number of miscarriages of justice being revealed, alongside budgetary pressures. Under the current arrangement, a Commissioner may not have sufficient time to gain the experience required before their term ends.

24. The financial terms of the role have also changed significantly. From 1997 to 2012, the role included a salary with holiday pay, sick pay, and pension. Between 2012 and 2017, the pension was removed. Since 2017, the role has been fee-paid with no holiday pay, sick pay, salary, or pension. These changes may

[25] L. Welsh, 'Disclosure failures are the inevitable consequence of an underfunded and overworked system', Justice Gap, 19 February 2018.

discourage well-qualified individuals from applying and could affect the Commission's ability to attract and retain experienced professionals.

25. For these reasons, we believe legislative reform is necessary to ensure that the CCRC remains independent, effective, and capable of fulfilling its statutory responsibilities.

Chapter 15 - Retention and disclosure of evidence

Consultation Question 90

We provisionally propose that retention periods should be extended to cover at least the full term of a convicted person's sentence (meaning, for a person sentenced to life imprisonment, the remainder of their life). Do consultees agree?

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

26. As set out by the Law Commission,[26] minimum retention periods in respect of material gathered during the course of a criminal investigation are contained in the Code of Practice issued under section 23(1) of the Criminal Procedure and Investigations Act 1996 (the "**CPIA**"). The Code of Practice provides that all material which may be relevant must be retained until at least the point at which, where applicable, an individual is released from a custodial sentence or discharged from a hospital order or otherwise six months from the date of conviction.

27. JUSTICE agrees that an extension of retention periods is necessary. Numerous convictions have been found to be unsafe as a result of new examination or testing of retained evidence. Examples include the cases of Andrew Malkinson[27] (in which new DNA testing was conducted on retained fragments of the victim's clothes), Sam Hallam[28] (in which a mobile telephone retained by the police was finally examined several years after his conviction) and Peter Sullivan (in which DNA testing made possible by new scientific developments was conducted on retained samples)[29].

28. As to retention periods, JUSTICE agrees that these should cover **at least** the full term of a convicted person's sentence (in other words when both the custodial term and licence period have concluded). However, we note that an individual's interest in having a wrongful conviction overturned is not solely

[26] Law Commission, Criminal Appeals – a consultation paper, paragraph 15.3

[27] *R v Malkinson* [2006] EWCA Crim 1891

[28] *R v Hallam* [2007] EWCA Crim 966

[29] The Guardian, *Peter Sullivan has murder conviction quashed after 38 years in jail*, 2015

limited to the period of time for which they are subject to a sentence. This is acknowledged at paragraph 15.112 of the consultation paper which states that: *"We would question whether limiting retention to the period for which a person is incarcerated or liable to be recalled is sufficient. As the Post Office Horizon scandal and the Derek Ridgewell cases demonstrate, there remains an interest in correcting miscarriages of justice, notwithstanding that any sentence has long been served".*

29. We note further that a conviction may well continue to have consequences after a sentence is served: it can, for example, impede an individual's access to employment, housing or education and may impact an individual's social, family and community ties as well as their mental health. JUSTICE's 2018 report *Supporting Exonerees: Ensuring accessible, consistent and continuing support*[30] highlighted some of the mental health difficulties faced by those who have been wrongly convicted even after leaving custody, including trauma resulting from the feeling of injustice regarding what has happened to them (miscarriage of justice victims are likely to experience Post-Traumatic Stress Disorder (PTSD) akin to that experienced by victims of torture and war)[31] and difficulties in maintaining relationships with family and friends and in forming new connections[32] (see further: Chapter 16, below). Whilst our report focussed on exonerees, these difficulties in particular also pertain to those whose wrongful convictions have not been overturned.

30. Some convictions may result in an individual being placed under notification requirements for a period outlasting the sentence;[33] failure to comply with such requirements without reasonable excuse constitutes a separate imprisonable offence.[34] They may also form the basis for the imposition of an ancillary order on conviction such as a criminal behaviour order (CBO)[35] or sexual harm prevention order (SHPO)[36] which can significantly restrict an individual's liberty in a range of ways. Again, such orders can be imposed for a period outlasting the sentence and may give rise to criminal liability if breached.

31. JUSTICE therefore **recommends** that retention periods should be extended for as long as is feasible. In our view **at the very least** no retention period should end before:

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[30] JUSTICE, *Supporting Exonerees: ensuring accessible, continuing and consistent support* (2018)

[31] *Ibid.*, p. 9

[32] *Ibid.*, p. 10

[33] See, e.g., Counter-Terrorism Act 2008, sections 41-53; Sexual Offences Act 2003, sections 80 – 88 and Schedule 3

[34] See, e.g., Sexual Offences Act 2003, section 91; Counter-Terrorism Act 2008, section 54

[35] Sentencing Act 2020, Part 11, Chapter 1

[36] Sentencing Act 2020, Part 11, Chapter 2

(a) Any custodial term has expired and (in the case of individuals serving extended determinate sentences) any extended licence period has expired;

(b) The conviction has been 'spent'; and

(c) Any ancillary orders on conviction or notification requirements have expired.

32. We also **recommend** the appropriate use of technology so that, insofar as is possible, evidence that can be digitised is kept indefinitely. Where it is feasible to retain evidence indefinitely, this ought to be done.

Consultation Question 91

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

33. JUSTICE would also echo the points made by Just for Kids Law regarding the particular impact of retention periods on those who are sentenced as children, which are summarised at paragraph 15.114 of the consultation paper.

34. We again **recommend** that retention periods should be extended for as long as is feasible. In our view **at the very least** no retention period should end before:

(a) Any custodial term has expired and (in the case of individuals serving extended determinate sentences) any extended licence period has expired;

(b) The conviction has been 'spent'; and

(c) Any ancillary orders on conviction or notification requirements have expired.

Chapter 16 - Compensation and support for the wrongly convicted

Consultation Question 99.

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

Do consultees agree?

We invite consultees' views on who should decide on compensation

The test for compensation

35. JUSTICE welcomes the Law Commission's conclusion that the need for reform of the current compensation scheme for wrongful convictions ought to be considered. As detailed by our 2018 report, *Supporting Exonerees: Ensuring accessible, consistent and continuing support*,[37] victims of miscarriages of justice face enormous challenges and trauma and the provision of adequate compensation is vital (see further: Consultation Question 102). However, the current test gives rise to real injustice and makes it extremely difficult for victims of miscarriages of justice to obtain compensation. Judges Ravarani, Bošnjak, Chanturia, Felici and Yüksel rightly recognised, in their Joint Dissenting Opinion in the case of *Nealon and Hallam v. the United Kingdom,* that the current test *"represents a hurdle which is virtually insurmountable."*[38] We agree with the Law Commission's view that: *"imposing the criminal standard of proof on an applicant is indefensible and inconsistent with the fundamental principles that underlie our criminal justice system."*[39]

36. JUSTICE proposes that any test governing the availability of compensation for victims of miscarriages of justice should do the following:

Ensure meaningful compliance with the obligation to compensate victims of miscarriages of justice

37. The United Kingdom has ratified the International Covenant on Civil and Political Rights (the "**ICCPR**") which places States under an obligation to offer compensation to victims of miscarriages of justice if particular conditions are met. Article 14(6) provides:

> When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

38. However, the current regime places the threshold for receiving compensation so high that many victims of miscarriages of justice have been denied it. Lord Kerr observed in his dissenting judgment in *Hallam and Nealon* that: *"there will be many who are charged with or tried on criminal offences who are truly*

[37] JUSTICE, *Supporting Exonerees: ensuring accessible, continuing and consistent support* (2018)

[38] *Nealon and Hallam v United Kingdom* (cited above), Joint dissenting Opinion, para. 8

[39] Law Commission, Criminal appeals – a consultation paper, para. 16.75

innocent but are unable to establish their innocence as a positive fact... establishing innocence as a positive fact can be an impossible task."[40] In a number of cases in which highly significant and compelling new evidence has been found, no compensation has been awarded. In *Hallam* itself, the evidence relied upon by the prosecution at trial consisted of (1) identification evidence and (2) evidence from the alibi provided by Mr Hallam that he was not with Mr Hallam on the day of the offence or the days surrounding it, used to suggest that Mr Hallam had concocted a false alibi.[41] As noted by the Supreme Court in *Hallam and Nealon*, the weaknesses in the identification evidence were such that the evidence as to false alibi was essential to the prosecution case.[42] Mr Hallam's conviction was quashed after evidence newly discovered on his mobile phone showed that he was with his stated alibi the day after the offence, leading the Court of Appeal to conclude that the evidence as to false alibi had been *"significantly undermined"*[43] with the result that *"the proper support for the Crown's case [had] fallen away."*[44]

39. Statistics on the proportion of successful applications for compensation starkly illustrate the restrictiveness of the current test. In the five-year period between the 2016/17 and 2020/21 financial years, for example, just 10 out of the 320 decided compensation applications were successful, amounting to a success rate of 3.13%.[45] This position is unjust and suggests that the United Kingdom is failing to meet its obligation under the ICCPR to provide compensation to significant numbers of victims of miscarriages of justice.

40. JUSTICE also notes the concerns expressed by the UN Human Rights Committee (the "**Committee**") in its concluding observations on the seventh periodic review of the UK's compliance with the ICCPR. The Committee considered the definition of "miscarriage of justice" contained in section 133(ZA) of the Criminal Justice Act 1998 (the "**CJA**"). It concluded that the new test *"may not be in compliance with article 14(6) of the Covenant"* and called on the UK to *"review the new test for miscarriage of justice with a view to ensuring its compatibility with article 14(6) of the Covenant."*[46]

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[40] *Hallam and Nealon* (cited above), paras. 202 - 3

[41] *Ibid*., para. 2

[42] *Ibid*.

[43] *R v Hallam* (cited above) para. 75

[44] *Ibid*., para. 78

[45] Law Commission, Criminal Appeals – A consultation paper, paragraph 16.18

[46] Human Rights Committee, *Concluding observations on the seventh periodic report of the United Kingdom of Great Britan and Northern Ireland* (2015). There is no further expansion on why the Committee raised this concern. However, in light of the decision in *Michel Dumont v Canada*, and given the nature of the amendment, the Committee must have been concerned by the additional requirement of proof of innocence.

Reflect the nature of the wrong that has been done to victims of miscarriages of justice

41. In JUSTICE's view, the definition of the term '*miscarriage of justice*' contained in section 133(ZA) of the CJA inadequately captures the wrong which has been inflicted on victims, namely that they have been punished by the state when the state had no proper basis for doing so. JUSTICE agrees with Lady Hale's observation in *R (on the application of Adams) v Secretary of State for Justice*[47] (*"**Adams**"*) that: *"A person is only guilty if the state can prove his guilt beyond reasonable doubt… Only then is the state entitled to punish him. Otherwise, he is not guilty, irrespective of whether he is in fact innocent. If it can be conclusively shown that the state was not entitled to punish a person, it seems to me that he should be entitled to compensation for having been punished."*[48] Compensation should be awarded to reflect the fact that a person has been punished as a result of a conviction which was later found to be unsafe.

42. JUSTICE also agrees with Lord Kerr's suggestion that the question of whether a conviction is unsafe and the question of whether there has been a miscarriage of justice should be treated as equivalent. In a 2013 lecture given at the JUSTICE Scotland International Human Rights Day, his Lordship said as follows: *"...if justice miscarries, an unsafe verdict will be the consequence and if a verdict is unsafe, how could it be said that that is other than a miscarriage of justice?"*[49]

43. We note that section 133 CJA applies unamended in Scotland. Guidance for claimants states that: "*compensation may be payable when a person has been convicted of a criminal offence and subsequently had his/her conviction reversed or where they have been pardoned on the ground that a new or newly discovered fact showed beyond reasonable doubt that there has been a miscarriage of justice*" and further the scheme is "*not applicable to cases which have simply been successful on appeal in the ordinary course of the criminal justice process as this reflects the due process of law*"[50]

44. As such, it is clear that a 'miscarriage of justice' is accepted to occur in Scotland solely by there being fresh evidence (the new or newly discovered fact) in an out of time appeal that leads to the quashing of a conviction or a pardon. No further elaboration is required.

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[47] Cited above

[48] *Ibid.*, para. 116

[49] Lord Kerr, JUSTICE Scotland International Human Rights Day Lecture 2013, p. 4

[50] Scottish Government, Miscarriage of justice: compensation claim form (2016), pp. 3-4

Respect the presumption of innocence

45. Any test for compensation must be compatible with the presumption of innocence, protected by article 6(2) of the European Convention on Human Rights (the "**ECHR**") including that compensation proceedings should not undermine an individual's acquittal.[51]

46. JUSTICE acknowledges the findings made by the Supreme Court in *Hallam and Nealon* and subsequently by the European Court of Human Rights (the "**ECtHR**") in *Hallam and Nealon v. the United Kingdom* that the compensation test does not place the United Kingdom in breach of its article 6(2) ECHR (although we intervened to the contrary and remain of the view that there are fundamental problems with the test as amended in 2014). However, we would note the following observation made by Lord Hughes when the case was before the Supreme Court: *"The objective of not undermining an acquittal... can and should be properly maintained but it means that the acquitted accused must be recognised as unconvicted,* ***immune from punishment by the state*** *and from characterisation as a criminal, but not that he escapes all consequences of the ordinary application of his country's rules as to evidence and the standard of proof outside criminal trials"*[52] (emphasis added).

47. Again, whilst we recognise that Lord Hughes agreed with the majority in *Hallam and Nealon*, we suggest that it follows from his conception of the presumption of innocence, set out above, that any criminal punishment served by a person whose conviction is subsequently quashed ought not to have been imposed. We consider that the quashing of a conviction on appeal not only means that an individual is immune from future punishment but that they should not have been punished previously. Accordingly, an individual should receive compensation for punishment imposed before their conviction was quashed.

Maintain the integrity of the criminal justice system

48. JUSTICE notes that under the *ex-gratia* scheme, which ran alongside the statutory scheme until it was removed in 2008, compensation could be awarded where a wrongful conviction was due to a serious default from the police or another public authority. No analogous ground for awarding compensation currently exists under the CJA. However, in our view, the availability of compensation for serious fault on

[51] See e.g. *Hallam and Nealon* (cited above), Lord Mance

[52] *Hallam and Nealon* (cited above), para. 120

the part of the police or other public authority (or, alternatively, where something had gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of somebody who should not have been convicted i.e. a 'category (4)' case for the purposes of *Adams* is an important means of maintaining the integrity of the criminal justice system in that it recognises that, regardless of factual innocence or guilt, the state is not entitled to imprison or otherwise punish individuals other than in accordance with law and due process.

49. In this regard, we note that Scotland has an additional *ex gratia* scheme for cases in which there has been a serious error by the police or another public authority without meeting the statutory conditions, or other exceptional circumstances.

50. A similar purpose would be served by the availability of compensation in cases such as *Allen v United Kingdom*[53] ("***Allen***") where the fresh evidence renders the conviction unsafe because had it been available at the time of the trial a reasonable jury might or might not have convicted (in other words a 'category (3)' case in terms of the categories set out in *Adams*). In such a case, a retrial is likely to take place unless it is held not to be in the public interest because, for example, the appellant has already served their sentence (as in *Allen*) or the prosecution decide not to proceed. As noted by the Law Commission[54] it is this situation which section 133(5A) of the CJA was intended to cover, however given the extremely high threshold imposed in subsections (1) and (1ZA) the retrial provisions are now redundant.[55] JUSTICE considers that - as envisaged by section 133(5A) - the test should make it possible that compensation will be awarded in a category (3) case where no retrial proceeds or they are acquitted at retrial. Compensating those who have been convicted and punished in the absence of evidence which may have led to their acquittal (and in light of which their conviction has been held to be unsafe) aligns with the need to maintain the integrity of the criminal justice system.

51. We acknowledge that there may be a small number of cases in which a person who is in fact guilty receives compensation. However, this must be weighed against the grave injustice and harm which results when those who are in fact innocent are denied it. In our view, ensuring that compensation is paid to those convicted and punished for a crime they did not commit ought to take priority over ensuring that compensation is never paid to a person who was convicted and punished for a crime that they did commit: it is the latter which should be the "subsidiary object" to use the language of Lord Phillips in

[53] (2013) 63 EHRR 10 (App No 25424/09)

[54] Law Commission, Criminal Appeals – a consultation paper, paras. 16.68-71

[55] *Ibid*., para. 16.71

Adams.[56] Analogously to Blackstone's ratio that it is better that ten guilty people are acquitted than one innocent person is convicted, we consider the need to address the harm caused by the current test to outweigh the risk of awarding compensation to individuals who are guilty in a few cases, particularly given that this also furthers the aim of maintaining the integrity of the criminal justice system.

Remove the burden of proof from those applying for compensation

52. JUSTICE considers it unjust that victims of miscarriages of justice are required to bear the burden of proof in making a compensation application. In our view, once a conviction has been quashed, it is the state which should bear the burden of proof should it seek to escape liability for payment of compensation.[57] Being required to navigate a further complex legal process having had their conviction quashed can significantly add to the trauma suffered by victims of miscarriages of justice. Seema Misra OBE, a former sub-postmistress wrongly convicted of theft and sentenced to 15 months in prison has said that: *"Compensation schemes are torture. We've been through torture, mental trauma and then we have to go and explain it, which is not right mentally... it should be simple, straightforward and it shouldn't be delayed."*[58]

Who should decide on compensation?

53. JUSTICE considers that decisions on whether to award compensation should be made by a body or tribunal which is independent of the Government (in particular the Ministry of Justice, from whose budget payments for compensation are made).

54. We also agree with the Law Commission's provisional conclusion that it should not be for the CACD to decide compensation.[59] Appellate courts are concerned with narrower issues than those which may be relevant to the issue of compensation.[60]

[56] *Ibid.*, para. 16.67

[57] JUSTICE notes that care should be taken so that the standard of proof and the substance of what the state must prove in order to resist a compensation claim should not require it to suggest that the criminal proceedings should have been decided differently, thereby placing it in breach of article 6(2) of the ECHR: see, e.g. Lord Mance's judgment in *Hallam and Nealon* (cited above)

[58] *APPEAL and JUSTICE call for compensation reform*, available here

[59] Law Commission, Criminal Appeals – a consultation paper, para. 16.85

[60] JUSTICE, *Supporting Exonerees: ensuring accessible, continuing and consistent support*, para. 80

Consultation Question 100

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

55. JUSTICE acknowledges the rationale underpinning the rule that compensation is available only to those whose convictions were quashed on an out-of-time appeal or following a CCRC reference. The Law Commission sets this out at paragraph 16.89 of the consultation paper as follows: *"[this] is intended to reflect the notion that a successful appeal on an "ordinary" in-time appeal represents the proper functioning of the criminal justice system, rather than a failure of it."*

56. Equally, however, those who have spent time in custody as punishment following an unsafe conviction ought to receive compensation whether or not they have exhausted the safeguards against wrongful convictions available within the criminal justice system. JUSTICE is therefore in favour of abolishing the in-time appeal exclusion. We also rely on a number of further reasons identified by the Law Commission,[61] namely:

    (a) Current waiting times for hearing appeals against conviction are such that individuals may now be held in custody for months if not over a year from the date they were convicted. The most recent statistics show that the average waiting time for a conviction grant/referral was 13.8 months as of September 2024; for a conviction renewal the figure is 12.1 months.[62]

    (b) The in-time appeal exclusion can give rise to arbitrariness with respect to the length of time spent in custody by those who are eligible for compensation. `As the Law Commission observes: *"It seems inherently unfair that two individuals could spend an equal number of years in prison awaiting an appeal and yet one may be excluded from compensation on the ground that they lodged their appeal in time."*[63] This difference in position could be as a result of one individual lodging their appeal just a single day after the deadline; such circumstances do not, in our view, constitute sufficient grounds for differential treatment in terms of eligibility for compensation.

    (c) The length of time an individual has spent in custody is likely to be one factor taken into account in determining the *amount* of compensation awarded rather than *eligibility* for compensation.

[61] Law Commission, Criminal Appeals – a consultation paper, paras. 16.89-94

[62] Judiciary of England and Wales, *A Review of the Year in the Court of Appeal, Criminal Division* (January 2025), p.40

[63] Law Commission, Criminal Appeals – a consultation paper, para. 16.92

Consultation Question 101

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

Do consultees agree?

57. As set out above (see: Consultation Question 99) we are of the view that a miscarriage of justice can be said to have occurred in all cases where there is an unsafe conviction. However, JUSTICE agrees with this proposal in circumstances where the definition of 'miscarriage of justice' entails something over and above a conviction which has been found to be unsafe.

58. It should be noted that in *Hallam and Nealon*, Lord Mance held (at [17]) as follows:

> "Section 133(1) restricts compensation to cases where a person's conviction has been reversed (or he has been pardoned...) "on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice". Convictions are not quashed in England and Wales on the ground that there has been a miscarriage of justice, but on the ground that they are unsafe... It was said in *Adams*, para 36, that the words "on the ground that" must, if they are to make sense, be read as "in circumstances where", and that the Secretary of State must therefore determine whether a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice. In deciding that question, the Secretary of State would have regard to the judgment of the CACD, but ultimately had to form his own opinion".[64]

59. The example of the case of Barri White, referred to by the Law Commission,[65] suggests that in practice the requirement for the new or newly discovered fact to be the basis for the quashing of the conviction is not applied literally. However, in our view, the position set out by Lord Mance should be placed on explicit statutory footing. A requirement that the CACD must have quashed the conviction on the basis of a new or newly discovered fact would unjustly exclude from compensation individuals who are able to demonstrate their innocence (or that they have been the victim of a miscarriage of justice, however defined) but whose conviction was not quashed on this basis.

[64] See also Hallam and Nealon (cited above), at [20] and [25-34]

[65] Law Commission, Criminal Appeals – a consultation paper, para. 16.97-8

Consultation Question 102

We provisionally propose that victims of miscarriages of justice should be entitled to support in addition to financial compensation.

Do consultees agree?

60. JUSTICE strongly agrees with this proposal. Our 2018 report, *Supporting Exonerees: Ensuring accessible, consistent and continuing support*[66] detailed the issues faced by victims of miscarriages of justice, which serve to underscore why adequate compensation is so crucial. In particular:

(a) **Trauma**: The trauma of being wrongly imprisoned can lead to unique issues on release. The feeling of injustice carried by victims of miscarriages of justice can lead to PTSD akin to that experienced by victims of torture and war as well as mental health problems such as depression and anxiety.[67]

(b) **The transition to everyday life**: On release, many victims of miscarriage of justice struggle to adjust to the modern world, adapt to technologies that did not exist when they entered custody, maintain relationships and secure housing and employment.[68]

(c) **Lack of support on release:** Those who have their conviction quashed are released without any state-given support, other than a small one-off sum of money ('subsistence payment') and a travel voucher ('travel warrant').[69] There is no automatic assistance in finding accommodation or work. This stands in contrast to the support that is offered to individuals who are released having served their sentence. Victims of miscarriages of justice are an anomaly in the criminal justice system, and no government department is responsible for them upon their release. This is compounded by the fact that if convicted people maintain their innocence in prison, they are not eligible to join pre-release prison programmes that assist with the practical issues of life upon release.[70] As a result, they may face lengthier sentences or face additional barriers in applying

[66] Cited above

[67] *Ibid.*, paras. 13-19

[68] *Ibid.*, paras. 12, 20-31

[69] *Ibid.*, p. 8 (See also: His Majesty's Prison and Probation Service, HYPERLINK "https://assets.publishing.service.gov.uk/media/67483b3e6f60e77679723929/2024_11_04_PSI-72-2011-discharge_PPP-PF_revisions.pdf"*Prison Discharge Policy: PSI 72/2011* (Revised) (2024))

[70] *Ibid.*, p. 8

to the Parole Board to direct their release on the basis that they have not shown sufficient remorse or insight into their 'offending'.

61. JUSTICE therefore reiterates the recommendations for support for exonerees made in our 2018 report, including:

(a) Specialist psychiatric help should be readily available to exonerees immediately prior to release and following release for as long as they need it.

(b) To better manage the transition from incarceration to release cases that are likely to be overturned should be identified early and the individual should be provided the same pre-release support as other individuals in custody.

(c) Support upon release needs to be readily accessible, consistent and continuing.

(d) Support should be provided through a centrally located residential and daytime exoneree-specific support centre. This would provide practical support with: obtaining accommodation and social security assistance, readjusting to everyday life, therapy and counselling.

(e) The exoneree's status should give rise to priority services and automatic eligibility for housing and benefits.

(f) Following a residential stay, day-to-day support should be available, if required, by local caseworkers. Until a residential centre is established, all the services we recommend should facilitated by local caseworkers.

(g) A volunteer network of exonerees across the country should be established to enable exonerees to talk informally with others who have shared their experience.

(h) The centre should be staffed by specially trained support workers, who may be former exonerees, volunteers and specialist psychological and counselling practitioners who are familiar with this unique form of trauma.

(i) Services must be consistent across the country, and subject to annual assessment by an independent inspectorate, which should also have an oversight role.

(j) Existing support services should refer exonerees to specialist lawyers who undertake compensation cases. Legal aid should be available.

Consultation Question 103

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

Do consultees agree?

62. JUSTICE agrees with this proposal. Our 2018 report highlighted that, even where exonerees are fit enough to work, it is difficult to secure work quickly. Criminal record checks may not detail whether convictions have been overturned. Many people do not know what 'quashed' means, meaning that employees are often reluctant to hire exonerees even where their record does indicate that a conviction has been quashed.[71] The removal of the conviction altogether is therefore necessary.

Chapter 17 – Wider Criminal Appeals Issues

Consultation Question 105

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

63. JUSTICE agrees that, particularly in complex cases, a quashed conviction should trigger an inquiry.[72] As recognised in the consultation document, where a person is wrongly convicted there will often have been multiple points of failure. There is a clear value in conducting a robust and independent investigation to identify these failures, be they individual or systemic, and to recommend necessary improvements to ensure what has happened is not repeated.[73] Ensuring that lessons are learnt is crucially important both for victims and their families and for reducing the risk of wrongful convictions going forward.

64. In our 2018 report, we advocated for the establishment of an independent body to undertake these reviews.[74] This body should be empowered to order disclosure, compel witnesses, and make

[71] *Ibid.*, para 23

[72] JUSTICE, *Supporting Exonerees: ensuring accessible, continuing and consistent support* (2018), paras. 122-3

[73] *Ibid.*, para. 110

[74] *Ibid.*, paras. 122-3

recommendations. Those involved in these reviews should be subject to a duty of candour: that is a duty to assist the review, openly and honestly at the earliest possible opportunity.[75]

65. In addition, robust mechanisms should be put in place to monitor the implementation of recommendations arising out of these reviews. This is vital for holding those responsible to account for failure to take on board inquiry recommendations. Independent reviews can be costly and traumatic for victims and their families.[76] There is little point in increasing their use, if the recommendations arising from them are simply kicked into the long grass as is so often the case following an inquiry.[77]

Consultation Question 108

We invite consultees' views on any reforms which might reduce the opportunities for a miscarriage of justice to occur, and, particularly... on whether any particular categories of evidence contribute to the occurrence of miscarriages of justice, and how these problems might be addressed.

Identification and recognition evidence

66. JUSTICE considers identification evidence to be particularly likely to lead to miscarriages of justice. Identification evidence is notoriously difficult to rely upon – even when PACE Code D is followed – and mistaken identifications have led or contributed to numerous wrongful convictions.[78] This tenuousness of this evidence has been acknowledged by the Court of Appeal[79] and juries must now be warned in cases which depend on such evidence that:

(a) there is a need for caution to avoid the risk of injustice;

(b) a witness who is honest and convinced in their own mind may be wrong;

(c) a witness who is convincing may be wrong;

[75] See JUSTICE, *When Thing Go Wrong: The response of the justice system* (2020), paras 4.32-4.49. Note that the government has committed to introducing a statutory duty of candour. It is envisaged that this would apply to all official investigations.

[76] JUSTICE, *When Thing Go Wrong: The response of the justice system* (2020), paras 6.8 – 6.20.

[77] House of Lords Statutory Inquiries Committee, Report of the Session 2024-25, Public Inquiries: Enhancing public trust (2024) HL Paper 9, para. 82; INQUEST, No More Deaths: Learning, action, and accountability: the case for a National Oversight Mechanism (2023).

[78] See, for example, *R v Turnbull* [1977] QB 224; *R v Malkinson* [2023] EWCA Crim 954; *R v Oni and Ors*[2025] EWCA Crim 12

[79] *R v Turnbull* [1977] QB 224

(d) more than one witness may be wrong.[80]

67. Similar concerns apply in relation to recognition evidence. In cases which rely on it, juries must be given the additional warning that a witness who is able to recognise the defendant, even when the witness knows the defendant very well, may be wrong.[81]

68. In light of the difficulties in relying on identification or recognition evidence, JUSTICE considers that in the vast majority of cases, it is impossible to be confident that convictions which are based wholly or mainly on it are safe. We therefore **recommend** that where a prosecution case:

(a) depends solely on identification or recognition evidence; or

(b) would, but for identification or recognition evidence, not be based on sufficient evidence for a person charged to be properly convicted

the case should not, in the absence of highly exceptional circumstances, be deemed to be based on sufficient evidence for that person to be properly convicted for the purposes of section 2(2) of the Crime and Disorder Act 1998.

69. Highly exceptional circumstances may include, for example, where the person charged possesses an extremely rare or unusual characteristic which matches the original description of the suspect given by the eye-witness who made the identification or was one of the features that triggered the recognition for the purposes of PACE Code D, paragraph 3.36(k)(ii).

Racial bias and the criminal appeals system

70. The existence of institutional racism throughout the criminal justice system is well documented and established. A series of reports have detailed the manner in which racial bias and disproportionate outcomes exist across all stages and sectors of the criminal justice system, from policing practices to the trial process, including, most recently: the 2017 Lammy Review (an independent review into the treatment of, and outcomes for Black, Asian and Minority Ethnic individuals in the criminal justice system)[82], the 2023 Baroness Casey Review (a review into the standards of behaviour and internal culture

[80] Crown Court Compendium Part I – July 2024 (April 2025 update), p. 15-2, 15-3

[81] *Ibid*.

[82] D Lammy, *The Lammy Review*, 2017

of the Metropolitan Police Service)[83] and *Joint Enterprise on Trial: A wide net cast on weak grounds*[84], a 2025 report published by APPEAL exploring the disproportionate use of the joint enterprise doctrine in relation to young Black men and the reliance on racialised stereotypes and narratives as part of the prosecution case.

71. APPEAL's *Joint Enterprise on Trial* report highlights deeply concerning findings in relation to the conduct of joint enterprise prosecutions. Researchers observed 17 murder and attempted murder trials at the Central Criminal Court and analysed the prosecution practices employed.[85]Individuals from racially minoritised backgrounds were disproportionality represented amongst the defendants in the trials studied: 79% of defendants were from a racially minoritised background and 60% were Black. The report notes that: *"The prosecution's narrative tactics were entangled with racialised constructions of crime, including stereotypes about gangs, drugs, knife crime and association"*[86] and concludes that the *"racialised language observed in [the] study was at times unnecessary, excessive, and transparently aimed at reinforcing stereotypes and myths"*[87].

72. APPEAL's work adds to previous research by Dr Patrick Williams and Becky Clarke who, in their report *Dangerous associations: Joint enterprise, gangs and racism*,[88] found that 'gang' narratives in particular were overwhelmingly utilised in prosecutions of non-white individuals. Of those individuals convicted under the doctrine of joint enterprise surveyed for the report, 79% of those from Black and ethnic minority backgrounds reported 'gang membership' being relied upon by the prosecution at trial, compared to less than 39% of white individuals.[89]

73. Racial stereotyping can play a role in producing this disparity. This was recognised by the CPS in its analysis of the findings of its 2023 Joint Enterprise pilot, which monitored and collected data on Joint Enterprise homicide/ attempted homicide cases. The CPS noted that: "*Using the term "gang"*

[83] Baroness Casey of Blackstock DBE CB, *Baroness Casey Review Final Report: March 2023*, 2023

[84] Dr N Waller and T Sultan, *Joint Enterprise on Trial: A wide net cast on weak grounds*, 2025

[85] *Ibid*., p. I

[86] *Ibid*., p. 21

[87] *Ibid*., p. 29

[88] P Williams and B Clarke, *Dangerous associations: Joint enterprise, gangs and racism* (Centre for Crime and Justice Studies), 2016, p. 7

[89] *Ibid*., p. 14

inappropriately risks casting the net of liability beyond that which can be established. It also disproportionality affects minority ethnic people".[90]

74. Where racially biased prosecution narratives have formed part of the basis for the prosecution case, the trial will inevitably have been unfair and it is difficult to see how any resulting conviction could be deemed safe. Such circumstances ought therefore to give rise to an independent ground of appeal which must be thoroughly engaged with and scrutinised by the CACD.

Legal aid provision

75. A poor defence is a primary reason for miscarriages of justice. It is imperative that adequate legal aid funding is available to allow the defence case to be prepared to the highest possible standard and ensure a fair trial. Defence teams require sufficient time and resources to enable them to challenge the prosecution case. This preparation includes checking and analysing the facts relied upon by the prosecution, formulating disclosure requests, instructing defence experts and securing defence witnesses.

76. Yet despite the importance of legal aid provision, levels of funding remain insufficient. Whilst recent increases to legal aid rates for criminal solicitors[91] are to be welcomed, further increases are needed. There is already highly concerning evidence that individuals are struggling to obtain representation as solicitors' firms are likely to make a loss if they take on cases on the case on a legal aid basis.[92] As pointed out by Richard Atkinson, president of the Law Society, not having a solicitor increases the risk of miscarriages of justice, whether this is at the police station or at the magistrates' court (where approximately 50% of individuals are representing themselves).[93]

Criminal causes or matters on appeal from the High Court

77. In our view, a review of appeal powers should include consideration of a discrete type of case that has fallen into a lacuna: cases on appeal from the High Court which are "criminal cause[s] or matter[s]".[94] The Court of Appeal has no jurisdiction in these cases[95] (neither Criminal nor Civil Division), resulting in

[90] *Crown Prosecution Service Joint Enterprise Pilot 2023: Data Analysis*. 2023

[91] The Law Society, Criminal legal aid, 2025

[92] The Guardian, *Lawyers refusing to represent people charged with certain crimes amid pay crisis*, 2024

[93] *Ibid*.

[94] Within the meaning of section 1 Administration of Justice Act 1960 ("AJA 1960").

[95] Section 18 Senior Courts Act 1981 ("SCA 1981").

unusually restrictive access to appeal for claimants for whom the High Court is the court of first instance on judicial review.[96] These cases have only one appeal avenue with a high threshold – they can appeal to the Supreme Court if they are certified as raising a point of law of general public importance.[97] However, the Supreme Court cannot certify them as such; only the High Court which heard the case can do so.[98] This means that for these "criminal" judicial reviews, the first instance judge(s)[99] in the High Court are the only ones to hear the case *and* the only ones to consider whether the case can be appealed. This is more restrictive than any other access to appeal of a first instance decision of which JUSTICE is aware.

78. In February 2020, the Supreme Court recognised the problem, adopting a very narrow interpretation of the phrase "a criminal cause or matter" (which in that case meant a judicial review of a parole decision was deemed *not* to be a criminal matter, disapproving the contrary interpretation in case law), and observing:

> "… an overly expansive interpretation […] would have the effect of reducing to an unacceptable degree parties' access to justice at appellate level, leaving pockets of unchallengeable, potentially erroneous first instance decisions".[100]

79. JUSTICE would invite the Law Commission to consider these "pockets of unchallengeable, potentially erroneous first instance decisions" and the ongoing legitimacy of this unusually restrictive route of appeal for a small number of cases.[101] JUSTICE is concerned that, through an absence of Parliamentary scrutiny[102]

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[96] For example, a judicial review of a decision of the DPP not to prosecute, brought by a complainant. See *R (Monica) v Director of Public Prosecutions* [2018] EWHC 3508 (QB).

[97] s.1 AJA 1960.

[98] *Ibid*., see subsection 2

[99] Two judges may, and often do, hear the case sitting as a Divisional Court.

[100] *In the matter of an application by Deborah McGuinness for Judicial Review (Northern Ireland) In the matter of an application by Deborah McGuinness for Judicial Review (No 2) (Northern Ireland)* [2020] UKSC 6, para 68. The litigation concerns the use of the phrase "criminal cause or matter" in s.18 SCA 1981, and its use in section 41(1) of the Judicature (Northern Ireland) Act 1978, the parallel provision to s.1 AJA 1961 for Northern Ireland.

[101] Through the combined effect of s.1 AJA 1960 and s.18 SCA 1981.

[102] JUSTICE notes that the different appeal route for High Court matters which were "a criminal cause or matter" was initially created in 1873, and there has been little change to the wording of the legislation since then, despite significant changes in the judicial review function of the High Court and the development of victims' rights of review. Tellingly, s.1 AJA 1960 refers only to the parties within such cases as being the defendant or prosecutor, indicating that victim standing in such cases was not envisioned by the legislators.

and a "tangled" history of interpretation,[103] unequal access to appeal has emerged which cannot be justified. Whilst the Supreme Court in *McGuinness* restricted the test to its narrowest iteration in case law,[104] it still leaves some first instance judicial reviews unchallengeable.

80. As the law currently stands, a claimant judicially reviewing a decision of the DPP not to prosecute and a claimant judicially reviewing a decision of Parole Board are in extremely different positions. Whilst both seek to hold public bodies within the criminal justice system to account, and neither is more insulated from judicial error than the other, the latter can appeal to the Court of Appeal and the former cannot. JUSTICE is not only concerned by this disparity, but further observes that it leads to discriminatory treatment of those in the former group, i.e. complainants who wish to challenge the DPP's failure to prosecute, particularly in relation to systematically under-prosecuted crimes.[105]

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JUSTICE | 27 June 2025

[103] *R (Guardian News and Media Ltd.) v City of Westminster Magistrates Court* [2011] 1 WLR 3253.

[104] Do the underlying proceedings place an individual in jeopardy of criminal proceedings or punishment? See *McGuinness* (paras 43-49 and 93).

[105] For a fuller articulation of the discrimination point under Article 14 ECHR, see JUSTICE's submissions to the Supreme Court in relation to an application for permission to appeal to the Supreme Court in R(Monica) v DPP (21 February 2020).