BIRMINGHAM LAW SOCIETY

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Response to the Law Commission Consultation Paper on Criminal Appeals 27 February 2025 (268).

May 2025

Response of the Birmingham Law Society's Criminal Law Committee to the Law Commission Consultation Paper on Criminal Appeals 27 February 2025 (268)

The following response to the Law Commission Consultation Paper 268 on Criminal Appeals ('the Consultation') is provided by the Criminal Law Committee of Birmingham Law Society.

The Criminal Law Committee consists of members drawn from throughout Birmingham and surrounding areas. Its co-opted members include representatives of the judiciary and the Legal Aid Agency, as well as HMCTS staff, probation officers, prosecutors and others.

The Committee liaises with prisons, police and the courts about issues affecting all of our members. It also responds to consultations, and lobbies on behalf of both members and clients.

Birmingham Law Society is the largest provincial law Society in England and Wales with about 9,000 members. Those consist of solicitors, barristers, paralegals and academics.

This response to the Consultation seeks to address appeals from magistrates' and youth courts only but including bail appeals from those courts. The overwhelming majority of criminal cases (90 – 95%) are heard in the magistrates' courts.

We note in passing that chapter 17 (wider criminal appeals issues) does not mention legal aid. We appreciate that this is not a consultation about legal aid in the criminal courts and we note the comment in paragraph 1.6(4) of the Consultation. Nevertheless, availability and ease in obtaining legal aid for an appeal is an issue which cannot simply be ignored. The same can be argued for the recovery of costs regime for successful appellants who are not legally aided.

We also note that the Consultation does not refer to appeals in criminal proceedings of civil orders made in those proceedings. It also does not deal with appeals against bind overs, whether made at common law or by statute.

Glossary

magistrates' court: A *court*, usually composed of two or three magistrates (otherwise known as justices of the peace), or a District Judge (Magistrates' Court) or a Deputy District Judge (Magistrates' Court), where *summary* trials occur.

You do get this correct in paragraphs 2.9, 5.1 and elsewhere.

3.31 Question 1

We invite consultees' views as to the appropriate route for appeals in summary proceedings, including whether appeals on a point of law in summary proceedings should go to the Court of Appeal Criminal Division after, or instead of, the High Court, or whether the current parallel arrangements should be maintained.

1. Rogue decisions (whether on conviction, on sentence or in relation to civil orders made on conviction) are more common in magistrates' and youth courts than in Crown Courts. A simple, cheap, appeal process to the Crown Court by way of rehearing, as at present, is a quick way to resolve these cases. We would recommend retaining this right of appeal.

2. Although not mentioned in the Consultation, an appeal to the Crown Court puts almost everything at large, because it is a rehearing. Therefore, an appeal on a point of law is inappropriate to the Crown Court.

3. Case Stated and Judicial Review address different errors in the magistrates' and youth courts, although Judicial Review has expanded in scope over the last few decades to overlap Case Stated on errors of law. Nevertheless, the Case Stated procedure is another simple process with very narrowly defined procedure which is simple and relatively quick.

4. Case Stated appeals are by either the prosecution or the defence. Frequently the issue of law decided is not fact specific to the case being appealed but of wider applicability. The decision of the High Court on Case Stated clarifies the law in other cases. We see no need to abolish Case Stated. We would add that in Case Stated appeals, the issue of legal aid is dealt with by the High Court which is a much faster and user-friendly environment than the process of applying for or amending civil legal aid in Judicial Review proceedings.

5. Judicial Review can address issues of law more widely and other procedural issues. Again, frequently the issue of law decided is not fact specific to the case being appealed but of wider applicability. The decision of the High Court on Judicial Review clarifies the law in other cases. We see no need to abolish Judicial Review.

6. As the Consultation notes, appeals by Case Stated and Judicial Review in criminal proceedings are heard by a Divisional Court consisting of two High Court judges of whom at least one is a Lord Justice. Both are usually judges who sit in the Court of Appeal Criminal Division ('CACD'). On the face of it there seems no reason why these appeals could not be to the CACD rather than to the High Court.

7. However, if Case Stated and Judicial Review appeals were to the CACD, then the present process of appealing from the High Court to the Supreme Court should be retained. If this were to be the case, then is there any point in changing the name of the body being appealed to? We suggest not.

8. Also, the Administrative Court office works hard in having Case Stated and Judicial Review appeals heard in the District Registries where the cases being appealed were heard. This is much less common in the CACD.

9. We recommend retaining the maintenance of the current parallel arrangements.

3.38 Question 2

We invite consultees' views on the current structure of the appellate courts in respect of criminal proceedings in England and Wales.

This is a CACD question which this response is not addressing.

4.141 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. Do consultees agree?

1. We agree with the principle that In considering whether reform to the law relating to criminal appeals is necessary, 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)

2. For the reasons discussed in the Consultation, the principle of finality is much more difficult. This is particularly the case when dealing with appeals from magistrates' courts where, in those courts, defendants may have been unrepresented. For example, it is not unusual for an unrepresented defendant to be made the subject of an inappropriately worded civil order (for example a criminal behaviour order ['CBO']). This only comes to the attention of an advising lawyer when the defendant is prosecuted for breaching that order. Whilst the crime of breaching the inappropriately drafted order is still a crime, flexibility is required to appeal that order long after it was made.

3. Whilst the seven principles are not stated to be in any order of priority, the issue of finality in particular needs to be subject to the other principles. We agree with the proposal of an overriding principle that the convictions of those who are innocent or did not receive a fair trial should not stand.

4.144 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?

We agree with the proposal 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 for the reasons given in the Consultation

5.86 Question 5

We provisionally propose that the right to an appeal against conviction and/or sentence by way of rehearing following conviction in summary proceedings should be retained. Do consultees agree?

We agree that that the right to an appeal against conviction and/or sentence by way of rehearing following conviction in summary proceedings should be retained for the reasons given in the Consultation.

However, we see no reason to retain the requirement that an appeal by an adult needs to be heard by more than a Crown Judge or recorder sitting alone. In appeals by youths, we see merit in the appeal being heard by a Crown Court judge or recorder sitting with at least one magistrate who is a member of the Youth Panel because of the extra training they will have received.

5.97 Question 6

We invite consultees' views as to whether there are any particular categories of offence heard in summary proceedings where it would be appropriate to replace the right to an appeal by way of rehearing with an appeal by way of review.

The overwhelming majority of appeals against conviction from the magistrates' court are by a defendant who disputes the findings of fact or credibility in the magistrates' court trial. Their sense of grievance at those findings are such as to make them willing to go through all the stresses involved in appeal. This necessitates a rehearing. A review would not replicate the assessment of witnesses that is involved in a trial.

In order to get close to this on a review (and we would argue not close enough) the magistrates' court trial would need to be video recorded. There are not sufficient resources to facilitate this and there are not going to be in the foreseeable future.

The Consultation does not indicate the number or percentage of magistrates' court trial appeals to the Crown Court in domestic abuse cases. Anecdotally it is tiny. Anecdotally most domestic abuse magistrates' court trials result in guilty pleas if the complainant attends or in no evidence being offered if they do not.

5.98 Question 6(i)

We would invite views particularly on whether this might be appropriate in relation to

(i) certain regulatory offences and

If appeals to the Crown Court were heard by a judge or recorder alone (as we suggest above in answer to question 5) then appeals could be allocated to a judge that was ticketed to hear regulatory appeals (or regulatory offences including appeals). We remain unconvinced of the merit of review appeals.

5.98 Question 6(ii)

(ii) specialist domestic violence or domestic abuse courts.

For the reasons we give in answer to question 6 (above) we are not in favour of review only appeals to the Crown Court in domestic abuse cases. (N.B. Domestic abuse includes domestic violence but is much wider.)

5.109 Question 7

We provisionally propose that the time limit for appeals from magistrates' courts to the Crown Court should be the same as the time limit for appeals from the Crown Court to the Court of Appeal Criminal Division. Do consultees agree?

We agree with the proposal to make the time limits to appeal from the magistrates' court to the Crown Court the same as those for appealing from the Crown Court to the CACD.

We agree with the proposal of making that time limit 56 days with an escape clause if it is in the interests of justice to exceed the time limit. As described above, this is because many defendants are

unrepresented in the magistrates' court and the inappropriate order to be appealed may not come to the knowledge of a lawyer to advise the defendant until long after the prescribed time limit has expired. Also, defendants and their legal representatives are under enormous pressure to make progress and enter their pleas at the first hearing. Further evidence or more considered legal advice may not come to light until a time limit has expired.

The Consultation does not appear to discuss whether the clock begins to run for an appeal against conviction on that conviction and a separate clock begins to run for an appeal against sentence on that sentence (as is currently the case in the Crown Court) or whether the clock does not begin to run until sentence or deferred sentence (against both conviction and sentence) (as is the case in the magistrates' court). We recommend the same procedure in both courts.

There is merit in the clock not starting at all until sentence. Anecdotally, ally, some defendants decide not to appeal against conviction once they are sentenced. It is impossible to say whether this is because of the sentence they receive or because by the time sentence occurs, they have had time to reflect on their conviction.

5.116 Question 8

We provisionally propose, in order that appellants are not discouraged from bringing meritorious appeals by the possibility of an increased sentence, that the Crown Court and High Court should not be able to impose a more severe sentence as a result of an appeal against conviction or sentence by the convicted person. Do consultees agree?

We agree with the proposal that that the Crown Court and High Court should not be able to impose a more severe sentence as a result of an appeal against conviction or sentence by the convicted person for the reason given in the Consultation, namely that the current risk of an increased sentence on appeal discourages those convicted from bringing meritorious appeals.

5.133 Question 9

We invite consultees' views as to the circumstances in which there should be a right to appeal against conviction following a guilty plea in a magistrates' court.

We consider that a right of appeal, from the magistrates' court to the Crown Court should lie at the very least on the same grounds as lie from the Crown Court to the CACD. We refer above (question 7) to the pressure on defendants and their lawyers to make progress and enter pleas at the first hearing in the magistrates' court. It is not simply a matter of, 'the defendant knows whether or not s/he did it'. The Consultation provides examples of where defendants did the act but still have legitimate defences. Another example is *R. v. Hodgson & another* [1982] in which two unrepresented defendants pleaded guilty to theft of some wood they had taken out of a skip (opposite a Birmingham police station) believing it to have been abandoned. They did not realise that they had a defence.

In addition to the grounds in which the CACD can allow an appeal against a guilty plea in the Crown Court, we would add a fourth ground, that of being in the interests of justice. It is submitted that in developing the law in relation to allowing appeals against guilty pleas, this is the unwritten test that the courts have been working towards.

5.137 Question 10

We provisionally propose that prosecution rights of appeal to the Crown Court by way of rehearing in revenue and customs and animal health cases should be abolished. Do consultees agree?

We agree with the proposal to repeal the prosecution rights to appeal to the Crown Court in revenue and customs proceedings and proceedings under the Animal Health Act 1981 for the reasons given in the Consultation.

5.145 We agree with the Consultation that a form of review on a point of law to the High Court (or possibly to the Court of Appeal) should be retained for the reasons given therein.

5.189 Question 11

We provisionally propose that appeal to the High Court by way of case stated should be abolished. Judicial review would be retained and would be available in respect of decisions which must currently be challenged by way of case stated. Do consultees agree?

1. Earlier in the Consultation it refers to the small number of appeals to the High Court from the magistrates' court. Paragraph 5.186 refers to the, 'analysis suggest[ing] that the existence of two separate routes of appeal to the High Court is capable of causing difficulties'. No examples are provided of any party to High Court proceedings being prejudiced by the party proceeding with the wrong one. Reference is made to the discretion of the High Court to proceed as though alternative proceedings had been issued. It seems to us that this is an answer looking for a problem where there is no evidence that such a problem exists.

2. The Consultation acknowledges that Case Stated proceedings are much simpler, quicker and less costly than Judicial Review proceedings. In magistrates' court proceedings which are supposed to be generally summary, swift and simple, Case Stated continues that theme. It also locks in the facts on which the case is stated.

3. Something that the Consultation does not touch on is that Judicial Review is not only more complicated proceedings but is civil proceedings (governed *inter alia* by the Civil Procedure Rules). Over the last 40 years, solicitors have become massively more specialised. This is particularly the case with criminal law solicitors who know nothing about civil proceedings and would not know how to issue them or how to progress them. Being civil proceedings, they are not governed by the Criminal Procedure Rules, in contrast to Case Stated which is. If Case Stated disappeared from the magistrates' court, this would inhibit appeals to the High Court.

4. The Consultation touches on the issue of funding (at paragraph 5.175(2). In Case Stated appeals, a fresh criminal legal aid application is lodged with the Administrative Court Office. The staff there are friendly and helpful. The form is well known and the information required known to criminal law solicitors. It is a hard copy of the criminal legal aid application which is normally completed online through the criminal legal aid eForms application.

Funding for Judicial Review requires the completion of an online civil legal aid application through what is known as the CCMS application. Both the eForms and CCMS applications are part of the Legal Aid Agency ('LAA') portal. However, the LAA do not routinely add the CCMS application to solicitors who have a criminal legal aid franchise. They need to apply to the LAA to add CCMS. Once that is done, both the eligibility and financial eligibility criteria are completely different and the documentation required to support a civil legal aid application are different too. These may be very difficult to obtain, especially if a client has been sent to prison.

Contrary to what outsiders might perceive, the judiciary and court staff work hard to try to get cases processed as fast as practicable and in the interests of justice. Experience of the Administrative Court processing legal aid applications is that it is fast and effective. The costs limitation comes at the conclusion of the case, when bills are assessed. The LAA processing of civil legal aid applications is

slower because it is a much more complicated online form. Invariably, when civil legal aid applications are granted they are only granted limited funding to obtaining an advice on the merits from external counsel or solicitor. Obtaining that causes delay. There is delay in instructing counsel or a solicitor. There is delay in such a person preparing that advice. There is further delay in submitting that advice to the LAA and them considering it.

When civil legal aid is granted by the LAA it normally comes with a very tight costs limitation. This requires counsel, counsel's clerk to maintain very close contact on counsel's fees and solicitors' costs and disbursements (expenses such as court fees), both incurred and to be incurred. Every time a costs limitation is approached, an application is required to the LAA explaining in detail what work, fees and disbursements have been incurred and what is expected. All this takes time. The funding issues involved in Judicial Review are cumbersome when compared with those involved in Case Stated.

5. The Consultation does not refer to the Magistrates' Courts Act 1980, section 113(1). Although the sentencing powers are normally limited to 12 months, the overwhelming majority of custodial sentences are vastly shorter. In Judicial Review appeals, firstly funding needs to be arranged, then the relevant forms completed, served, lodged and the appropriate fee paid. As part of that lodging process, an application for bail can be made to the Administrative Court, all of which takes time to arrange. It is not unusual for defendants to have served the custodial part of their sentence before a bail application is heard. In Case Stated appeals (and in appeals to the Crown Court) once the application to State a Case has been lodged with the magistrates' court, an application for bail pending the determination by the High Court may be made to the magistrates' court.. Thus, a defendant is not prejudiced pending the determination of the Case Stated appeal.

6. As the Consultation acknowledges, Case Stated and Judicial Review appeals overlap in certain respects but not in others. In a Case Stated, the findings of fact are frozen, as is the question of law to be reviewed by the High Court. Judicial Review is a much wider jurisdiction, covers Wednesbury unreasonableness, is cumbersome, slow and expensive, with all the related problems associated with that, both contained in the Consultation and here. Given the tiny proportion of appeals that are by Case Stated or Judicial Review, we reject the proposal that appeal to the High Court by way of Case Stated should be abolished. It should be retained. We agree with the proposal that Judicial Review would be retained. In our submission, there are various circumstances, outlined here, in which defendants would be prejudiced if Case Stated were abolished.

5.203 Question 12

We provisionally propose that a person convicted in a magistrates' court should retain a right to appeal by way of rehearing where the conviction has been substituted or directed by the High Court in judicial review proceedings (or, if retained, on an appeal by way of case stated) brought by the prosecution, and that the Crown Court should remain empowered to acquit the defendant on the facts. Do consultees agree?

We agree with the proposal that a person convicted in a magistrates' court should retain a right to appeal by way of rehearing where the conviction has been substituted or directed by the High Court in judicial review proceedings (or, if retained, on an appeal by way of case stated) brought by the prosecution, and that the Crown Court should remain empowered to acquit the defendant on the facts for the reasons given in the Consultation.

5.220 Question 13

We invite consultees' views on whether the route of appeal following a guilty plea by a child should be reformed, even if the route of appeal following a guilty plea in magistrates' courts is not.

The pressures on defendants and their advocates to, make progress', at first hearings, i.e. to enter a plea, is even greater in youth courts than it is in magistrates' courts. This pressure is increased by the availability of referral orders (when a defendant has no previous convictions). There is very little encouragement to deal with cognitive, psychiatric or psychological issues pre – plea. This is not helped by the amount of time it frequently takes to obtain expert reports, including funding issues.

We do not consider it to be necessary or proportionate to create an entirely new route of appeal from a youth court. We consider that the issues raised in the Consultation, can be properly addressed by providing a new ground of appeal following a guilty plea by a child We suggest the same solution as we did in answer to Question 9, namely an interests of justice ground.

This would not be to the High Court. But should it be to the Crown Court? It is submitted that is part of a much wider debate about whether children (as defined by either the Children and Young Persons Act 1933 or the UN Convention on the Rights of the Child) should be dealt with in criminal courts at all. We suggest that debate is outside the scope of this Consultation and it would be inappropriate to discuss the possibility of appealing to another body unless it was part of that debate.

Whilst we indicated above that appeals from magistrates' courts to Crown Courts should be dealt with by a judge alone, we do not suggest the same for youth appeals to the Crown Court. This is because Crown Court judges (and recorders) do not have the same degree of judicial training in relation to children/youths as magistrate members of Youth Panels do. Although it is not mentioned in the Consultation, currently youth court appeals to the Crown Court must be presided over by a Crown Court judge/recorder and at least one magistrate who is a member of the Youth Panel. We would continue that system.

The Consultation mentions (at paragraph 5.213) the suggestion from Just For Kids Law that advice from non – specialised youth court advocates, 'may lead to incorrect legal advice'. There is no evidence of such and we oppose any implied suggestion that there should be a requirement for advocates in the youth court to have an additional qualification to do so.

5.222 The maximum sentence in the magistrates' court is now 12 months but this does not detract from the disparity with the youth court'

5.226 Question 14

We provisionally propose that, even if the Crown Court remains able to impose a more severe penalty on appeal from a magistrates' court, the Crown Court should not be able to impose a more severe penalty on appeal from a youth court. Do consultees agree?

We have already made the point above that the Crown Court should lose the ability to increase sentence on a defendant's appeal from the magistrates' court. We agree with the proposal that, even if the Crown Court remains able to impose a more severe penalty on appeal from a magistrates' court, the Crown Court should not be able to impose a more severe penalty on appeal from a youth court.

5.241 Question 15

We provisionally propose that where a person has been convicted as a child and their anonymity has not been lost as a result of an excepting direction or their being publicly named after turning 18, that person should retain their anonymity during appellate proceedings. Do consultees agree?

For the reasons given in the Consultation, we agree with the proposal that where a person has been convicted as a child and their anonymity has not been lost as a result of an excepting direction or their being publicly named after turning 18, that person should retain their anonymity during appellate proceedings.

5.242 Question 15

We invite consultees' views on how maintaining the anonymity of a person convicted as a child could best be achieved.

Most of us do stupid things as children. Mostly, those stupid things are not criminal. However, sometimes the line between the two is very fine.

Although it is not referred to in the Consultation, the majority of offending by children is dealt with by criminal justice agencies outside the court system. Children dealt with in this way effectively have lifelong anonymity. For the reasons given in the Consultation, the same is not the case in relation to children brought before the criminal courts. We submit that all children defendants in criminal proceedings should enjoy lifelong anonymity in respect of those proceedings, subject to the power of a full time Crown Court or High Court judge to lift that anonymity where certain criteria are met. Those criteria should be the product of discussions between the senior judiciary, youth justice and other child-focussed agencies and the Government.

Birmingham Law Society Criminal Law Committee

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