

Consultation on Quashing Convictions

The consultation paper 'Quashing Convictions: Report of a review by the Home Secretary, Lord Chancellor and Attorney General' has been issued by the Home Secretary for public consultation. It relates to the test applied by the Court of Appeal in England and Wales when considering applications to quash criminal convictions.

Similar issues arise in respect of applications to the Court of Appeal in Northern Ireland, and the relevant legislation extends to both England and Wales and Northern Ireland jurisdictions.

There is a difference between the jurisdictions in relation to convictions handed down in Diplock courts. Diplock cases tend to involve a reconsideration of the evidence in the Court of Appeal. In addition, an appellant against a conviction made by a Diplock court can of right appeal to the Court of Appeal, whereas non-Diplock cases can only be heard with leave of the Court of Appeal.

However, these differences do not have any impact on the changes proposed in this consultation, and the Government is already consulting on proposals to replace Diplock courts in Northern Ireland.

The Secretary of State therefore intends that any proposed legislative changes should be extended to Northern Ireland also, and he invites comments on the paper.

Comments on the proposals as they might affect Northern Ireland can be submitted in writing by post, fax or e-mail to:-

Criminal Law Branch
Northern Ireland Office
Massey House
Stoney Road
BELFAST
BT4 3SX
Tel: 028 9052 7522

Fax: 028 9052 7507

E-Mail: cjpb@nio.x.gsi.gov.uk

These should be submitted to arrive no later than 18 December 2006.

In brief, views are invited on how best to amend the existing law –the Criminal Appeal (Northern Ireland) Act 1980, as amended by the Criminal Appeal Act 1995 – to ensure that where the Court of Appeal in Northern Ireland is satisfied the appellant committed the offence, the conviction cannot be quashed.

An equality screening exercise of the proposed policy has been conducted in line with the Equality Commission's guide to the Statutory Duties under Section 75 of the Northern Ireland Act 1998 and no adverse impact has been identified.

Your attention is drawn to the information on pages 20-21 of the paper under the heading "responses and disclaimer"; this applies equally to any responses received in Northern Ireland.

Please contact Criminal Law Branch if you require a copy of the paper in any other format.

A summary of the responses to the consultation in Northern Ireland will be published on the Northern Ireland Office website at www.nio.gov.uk.

If you have any concerns about the consultation process in Northern Ireland you should contact the Northern Ireland Office's consultation co-ordinator Donna Knowles. She may be contacted at:

Central Management Unit
Northern Ireland Office
Stormont House
BELFAST
BT4 3SH
E-mail donna.knowles@nio.x.gsi.gov.uk .
Telephone: 028 9052 7015

Quashing Convictions

Report of a review by the
Home Secretary,
Lord Chancellor and
Attorney General

September 2006



Office for Criminal Justice Reform

QUASHING CONVICTIONS – REPORT OF A REVIEW BY THE HOME SECRETARY, LORD CHANCELLOR AND ATTORNEY GENERAL

A Consultation Paper

September 2006

A consultation paper produced by the Office for Criminal Justice Reform. This information is also available on the Home Office website (www.homeoffice.gov.uk) and the Criminal Justice System website (www.cjonline.gov.uk).

Contents

	Page
Foreword by the Home Secretary	3
What are we consulting on?	4
Responses to this paper	4
	Paragraphs
Introduction	1 - 4
'Unsafe': the central concept	5 -11
Development of case law	12 -18
The legal issue of fairness	19 – 24
Integrity of the system	25 – 26
Retrials	27 – 30
Options	31 – 39
Partial Regulatory Impact Assessment	40 – 46
Contact points	47
List of persons and bodies consulted	48
	Page
The consultation criteria	20
Responses and disclaimer	20 - 21
Alternative format	21
Post-consultation information	21



Foreword by the Home Secretary

This Government is committed to rebalancing the Criminal Justice System in favour of the victim and the law-abiding majority. I was pleased to announce on 20 July our plans for doing just that, and they included a promise to change the law about appeals against conviction.¹

We must, of course, ensure that we have an effective and robust appeals system so that those who are innocent have their convictions quashed. Equally, however, we must have a system that punishes the guilty and delivers justice for victims.

It may come as a surprise to some that the existing law empowers the Court of Appeal to quash a conviction on purely procedural grounds even where the judges of that Court have no doubt the appellant is guilty. Such outcomes are damaging to public confidence in the criminal justice system. They may also put the public at further risk of crime.

The Lord Chancellor, Attorney General and I have conducted a review of this matter. We have set out the issues and our aims in this document and would welcome your views on how best to achieve those aims. However, whilst the Government is open to suggestions about how we achieve the aims, we are not consulting on the aims themselves or therefore on whether the law should be changed. It is our firm view that the present system risks outcomes which are unacceptable to the law-abiding majority.

A handwritten signature in black ink, appearing to read 'John Reid'.

John Reid
Home Secretary

¹ COI: Ref: 275921 'Rebalancing the criminal justice system in favour of the law-abiding majority' page 16.

What are we consulting on?

Under the current law, a convicted person can have his or her conviction quashed even where the Court of Appeal have formed the view that he or she was indeed guilty of the offence. The conviction is overturned in such cases because the Court are dissatisfied with some aspect of the trial or pre-trial process.

The Government wants to ensure that, where the Court of Appeal are of the view that a conviction is, in the normal sense of the word, 'safe', it should not be possible to quash it.

The Government acknowledges that the Court of Appeal are not in the same position as the jury and may not always be able to form a view on whether the appellant committed the offence. However, where they have formed such a view, the Government believes that they should not be empowered to allow the appeal.

The purpose of this consultation paper is to consider how best to achieve that outcome.

The background and legal considerations surrounding these issues are discussed in detail in the main paper.

Responses to this paper

Responses should be sent to:

Liton Miah
Better Trials Unit
Office for Criminal Justice Reform
Ground Floor/ Fry Building
2 Marsham Street
London
SW1P 4DF

Tel: 020 7035 8471 Fax: 020 7035 8601 Email: liton.miah@cjs.gsi.gov.uk

The final date for receipt of responses is by **18 December 2006**.

Introduction

1. An appeal against conviction on questions of law or fact was introduced by statute in 1907, when the Court of Criminal Appeal was established. The grounds for appeal were restated in a simplified form by the Criminal Appeal Act 1968. Since 1966 criminal appeals in cases tried on indictment have been heard by the Criminal Division of the Court of Appeal.
2. The 1907 and 1968 legislation both included a ‘proviso’ that, even if the point raised at the appeal might be decided in favour of the appellant, the appeal could be dismissed if the Court considered that “no miscarriage of justice has actually occurred” (“no substantial miscarriage of justice” was the wording used in the 1907 legislation).
3. The grounds for appeal in the 1968 Act were amended by the Criminal Appeal Act 1995 and now read:

“2.-(1) Subject to the provisions of this Act, the Court of Appeal -
(a) shall allow an appeal against conviction if they think that the conviction is unsafe; and
(b) shall dismiss such an appeal in any other case.”

4. In his Review of the Criminal Courts of England and Wales², Lord Justice Auld recommended that "consideration should be given to amendment of the present statutory test to make clear whether and to what extent it is to apply to convictions that would be regarded as safe in the ordinary sense of the word but follow want of due process before or during trial". The impact of the change to the Court of Appeal test in 1995 is considered below. However, it is worth noting that over the years the Court of Appeal have appeared more ready to grant leave and quash convictions than they used to be³.

² HMSO, London, ‘Review of the Criminal Courts’, ISBN 0 11 702547 X

³ c.f. Professor J R Spencer in Criminal Law Review, August 2006: ‘In 1954 leave to appeal was given in only 11% of cases and of those who attempted to appeal only some 7% eventually achieved a degree of success. In 2004, leave was given in some 35% of cases and 20% of those who instituted appeals ‘got something out of it’.

'Unsafe': the central concept

5. There are many grounds for appeal, such as misdirection by the trial judge or the wrongful admission or exclusion of evidence, but the central question is always whether the error rendered the conviction unsafe. In the case of *Renda*⁴, for instance, Sir Igor Judge, President of the Queen's Bench, said that even if it were "positively established" that there had been an incorrect ruling or misdirection by the trial judge, the "court is required to analyse its impact (if any) on the safety of any subsequent conviction. It does not follow from any proved error that the conviction will be quashed".
6. The approach to be taken by the Court of Appeal under section 2(1) was considered by the House of Lords in the case of *Pendleton*⁵, concerning the impact of new evidence. Lord Bingham of Cornhill said the Court of Appeal "is not and should never become the primary decision-maker", and because "it has an imperfect and incomplete understanding of the full processes which led the jury to convict... it will usually be wise for the Court of Appeal, in a case of any difficulty, to test their own provisional view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict. If it might, the conviction must be thought to be unsafe." Similarly, the Court will test the possible effect on the jury of misdirection or other error. For this reason, the Court's judgment in allowing an appeal does not normally express their view of the appellant's innocence.
7. The difficult cases are those in which the fresh evidence is not clear-cut, as would be DNA evidence showing the appellant could not have committed the offence, but nevertheless reveals some factor which the Court of Appeal think might have created a sufficient doubt in the mind of the jury for them to have acquitted the defendant (or might well have led to there being no prosecution in the first place).
8. In the recent case of *Gee*⁶, the appellant's conviction for rape was posthumously quashed following a psychiatrist's report on the complainant, commissioned by the Criminal Cases Review Commission, which cast grave doubt on her mental state, and another man who was the subject of a similar complaint from her had previously had his conviction quashed.

⁴ [2005] EWCA Crim 2826

⁵ [2001] UKHL 66

⁶ Times report 22 April 2006

9. On occasion, however, appeals may be allowed where the flaw in the trial or pre-trial process has little bearing on the substance of the guilt or innocence of the accused. For instance, it might subsequently become clear that the Crown had relied upon evidence from a participating informant, something that should have been disclosed by the prosecution to the defence. Ignorance of this fact, it might then be contended, affected the accused's decision to plead guilty at trial. The Court might then conclude that the conviction was 'unsafe', because on a "not guilty" plea the jury might have acquitted the accused.
10. This general issue was considered by the 1985 Royal Commission on Criminal Justice⁷ and was subsequently the subject of divergent views in the Court of Appeal. In essence, the question is whether, either under the 'unsafety' principle or in the exercise of some more general inherent power, the Court should quash a conviction in the face of even the clearest evidence of guilt, where there has been some serious flaw in the process leading up to conviction.
11. The majority of the 1985 Royal Commission agreed that in such cases the public interest was not served by quashing the conviction. Professor Zander (joined by another member of the Commission) offered a dissenting view.

Development of case law

12. These paragraphs consider the development of the Court of Appeal case law in some detail so that a clear picture can be developed of how the current interpretation of the law has been reached. Non-legal readers might want to go directly to the section on 'Integrity of the system' at paragraph 25.
13. In one of the early cases following the 1995 Act, *Chalkley*⁸ (which concerned a prosecution intention to rely in evidence on unlawfully obtained tape recordings), the Court of Appeal adopted a narrow interpretation of the current law on determining appeals. Lord Justice Auld said, "The Court has no power under the substituted Section 2(1) to allow an appeal if it does not think the conviction unsafe but is dissatisfied in some way with what went on at the trial"⁹. Although the Court of Appeal went on to find that the trial judge was correct in allowing the unlawfully

⁷ 'The Royal Commission on Criminal Justice' Cm 2263 Chapter 10, Paragraphs 27 to 63.

⁸ [1997] EWCA Crim 3416

⁹ Lord Justice Auld noted that his judgment was subject to what the courts would later make of the European Convention on Human Rights following the passing of the Human Rights Act 1998.

obtained tape recordings to be admitted, Lord Justice Auld said, "... a conviction would be unsafe where the effect of an incorrect ruling of law on admitted facts was to leave an accused with no legal escape from a verdict of guilty on those facts. But a conviction would not normally be unsafe where an accused is influenced to change his plea to guilty because he recognises that, as a result of a ruling to admit strong evidence against him, his case on the facts is hopeless. A change of plea to guilty in such circumstances would normally be regarded as an acknowledgment of the truth of the facts constituting the offence charged. We qualify the above propositions with the word 'normally', because there remains the basic rule that the Court should quash as unsafe a conviction where the plea was mistaken or without intention to admit the truth of the offence charged." In the circumstances of the *Chalkley* case, the appellants had "by their pleas of guilty, ... intended to admit and have admitted their guilt, and ... their convictions are, therefore, safe." The approach in the *Chalkley* case was followed by the Court of Appeal in subsequent cases, including *Rajcoomar*¹⁰ and *Thomas*¹¹.

14. However, in the *Mullen*¹² case (which concerned the unlawful rendition of the accused from Zimbabwe to the UK), the Court of Appeal adopted a different approach. It stated that the *Chalkley* case should not be regarded as having concluded the matter of the interpretation of section 2(1) and they took the view that the intention of the new section 2(1) was to restate the then existing practice of the Court of Appeal, which prior to 1995 had established that abuse could be a ground for quashing a conviction. The Court added, "Furthermore, in our judgment, for a conviction to be safe, it must be lawful; and if it results from a trial which should never have taken place, it can hardly be regarded as safe. ... But, for the reasons which we have given, we agree with his 1995 conclusion that "unsafe" bears a broad meaning and one which is apt to embrace abuse of process ... It follows that, in the highly unusual circumstances of this case, notwithstanding that there is no criticism of the trial judge or jury, and no challenge to the propriety of the outcome of the trial itself, this appeal must be allowed and the appellant's conviction quashed." [*emphasis added*].

¹⁰ [1999] EWCA Crim 447

¹¹ [1999] EWCA Crim 1266 (in which the Court distinguished the circumstances of this case from the circumstances in *Mullen*)

¹² [1999] EWCA Crim 278

15. In the case of *Smith*¹³ (which concerned the wrongful rejection of a submission of no case to answer), the Court of Appeal said, “Now that the test for allowing an appeal is simply the safety or otherwise of the conviction, is it competent for the Court to consider evidence entertained after the wrongful rejection of a submission of no case to answer. ... What if a submission is wrongly rejected but the defendant is cross-examined into admitting his guilt? Should the conviction be said to be unsafe? We think it should. The defendant was entitled to be acquitted after the evidence against him had been heard. To allow the trial to continue beyond the end of the prosecution case would be an abuse of process and fundamentally unfair. So even in the extreme case, the conviction should be regarded as unsafe....”
16. In the case of *Togher*¹⁴, which, like the *Chalkley* case mentioned earlier, concerned unlawfully obtained tape recordings (in this instance to be used in rebuttal of defence evidence) the Court of Appeal followed the *Mullen* approach. The Court commented that the meaning of section 2(1) “was broad enough to permit the quashing of the conviction on the ground that it was unsafe because of abuse of process prior to trial. In particular, a conviction could be unsafe even if there was no doubt that the defendant had committed the offence of which he had been found guilty.” [*emphasis added*]. The Court noted, “The broad approach laid down in *Mullen* has since been adopted in other cases. However, so has the approach in *Chalkley* ...” They went on, “As a matter of first principles, we do not consider that either the use of the word ‘unsafe’ in the legislation or the previous cases compel an approach which does not correspond with that of the ECHR. The requirement of fairness in the criminal process has always been a common law tenet of the greatest importance. ... If a defendant has not had a fair trial and as a result of that injustice has occurred, it would be extremely unsatisfactory if the powers of this Court were not wide enough to rectify that injustice. ... Applying the broader approach identified by Rose L J [in *Mullen*], we consider that if a defendant has been denied a fair trial it will almost be inevitable that the conviction will be regarded as unsafe. For this reason we endorse the approach of Rose LJ in *Mullen* and prefer the broader approach to the narrower approach supported by Auld LJ [in *Chalkley*]”.
17. It appears from later cases (see further below) that the approach in the *Chalkley* case is now regarded as superseded. It seems also to be clear that the approach founded

¹³ [1999] 2 Cr App R 238

¹⁴ [2001] Cr App R 457

upon the *Mullen* case has led to appeals being upheld even where the Court are satisfied as to the appellant's guilt.

18. However, while the judicial approach may now be settled, the issue of principle over which the 1985 Royal Commission was divided has not been resolved to the satisfaction of all legal commentators.

The legal issue of fairness

19. Both English common law and the European Convention on Human Rights require a criminal trial to be fair. It should be noted that fairness does not require jury trial. And the European Court of Human Rights has recognised that defects occurring at a trial may be remedied by a subsequent procedure before a court of appeal. What matters is the fairness of the proceedings as a whole (explained, for example, in the cases of *Edwards*¹⁵ and *Condron*¹⁶). How does 'fairness' relate to 'safety' for the purposes of quashing appeals? In the case of *Davis, Rowe and Johnson*¹⁷, the Court of Appeal said:

"We are satisfied that the two questions [i.e. fairness and safety] must be kept separate and apart. The ECHR is charged with inquiring into whether there has been a breach of a convention right. The court is concerned with the safety of the conviction. That the first question may intrude upon the second is obvious. To what extent it does so will depend upon the circumstances of the particular case. We reject, therefore, the contention that a finding of a breach of Article 6.1 of the ECHR leads inexorably to the quashing of the conviction. Nor do we think it helpful to deal in presumptions. The effect of any unfairness upon the safety of the conviction will vary according to its nature and degree."

20. However, there are also cases where 'unfairness' leads to a conviction being quashed, despite clear acknowledgement by the Court of the strength of the case against the appellant. Thus in the *Randall*¹⁸ case, Lord Bingham said, "... it is not every departure from good practice which renders a trial unfair. ... But the right of a defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a

¹⁵ UK 5 EHRR 417

¹⁶ UK (2000) 31 EHRR 1

¹⁷ [2001] 1 Cr App R 8, CA

conviction as unsafe, however strong the grounds for believing the defendant to be guilty.” [emphasis added].

21. Appeals to the Court of Appeal against conviction increasingly raise the issue of the fairness of the appellant's conviction, sometimes expressly referring to Article 6 of the ECHR. For instance, in the case of *O'Hare*¹⁹, where the appellant had absented himself from trial, the Court of Appeal said the appellant had nevertheless had a fair trial and “in this court we have given him a full opportunity to explain his absence. We are, therefore, sure that the conviction was safe and the proceedings, taken as a whole, entirely fair and in compliance with Article 6”. In the *Russell*²⁰ case, where the appellant had leapt up from the dock and physically attacked the judge in the course of his summing-up, the Court of Appeal said the decision to continue with his trial was not unfair, and the conviction was not unsafe.
22. In the *Abdroikov*²¹ case, the Court said there was no need to distinguish between the position under Article 6 and the common law requirement of fair trial, disregard of which would render a conviction unsafe. But, and as the Strasbourg Court has often said, Article 6 requires only that the proceedings overall should be fair.
23. There seems little evidence that reference to Article 6 of the ECHR is resulting in more convictions being quashed than was previously the case. While the right to a fair trial is absolute, the question always remains, whether the trial in the particular case was unfair. There may be cases where there is little or no doubt as to the guilt of the appellant, but where the trial was nevertheless so flawed that the Court believe themselves bound to quash the conviction. But that could happen prior to the Human Rights Act. An example, under the original wording of section 2(1) of the Criminal Appeal Act 1968, is the case of *Llewellyn*²², where the Court said that while the conviction was not unsafe, there had been a kind of plea-bargaining that had left the appellant with a “burning sense of grievance” that he had been induced to plead guilty. The consequence was that while the conviction could not be said to be 'unsafe', the evidence being strong, it was 'unsatisfactory'. In such a case the proviso was not sufficient to prevent the conviction from being quashed.

¹⁸ [2002] 1WLR 2237

¹⁹ [2006] EWCA Crim 471

²⁰ [2006] EWCA Crim 470

²¹ [2005] EWCA 1986

²² 67 Cr App R 149

24. Perhaps more typical are two recent unsuccessful appeals, *Davis* and *Ellis and Others*²³, where the Court upheld the decision by the trial judge to allow certain witnesses to give evidence anonymously. After a thorough discussion of English and ECHR decisions on the point, the Court explained their role in an appeal against conviction where the ruling of the trial judge was challenged. If the ruling “had the effect of producing what in all the circumstances was an unfair trial”, then the conviction would be unsafe and it would be quashed. There was nothing mechanical or unduly favourable to the defence in the judgment of the Court, which considered carefully whether, even though it was due to a climate of fear created by the defendants, the procedure adopted at trial had prejudiced their right to a fair trial.

'Integrity of the system'

25. The Court will also quash a conviction where there has in their view been a serious failure to respect the integrity of the criminal justice system. However, this may have little or no bearing on the safety of the conviction in the ordinary sense of that expression. Thus, in the *Mullen*²⁴ case, the Court of Appeal “condemned the abuse of executive power which had led to his apprehension and abduction [from Zimbabwe] in the only way it effectively could”, even though it “identified no failure in the trial process” (judgment by Lord Bingham of Cornhill). Before 1995 it would have been open to the Court to hold Mullen's conviction 'unsatisfactory' by reason of the events preceding trial; Rose LJ said the 1995 Act embodied the earlier practice of the Court, and that Mullen's conviction could be quashed as 'unsafe'. However, the majority view of the 1985 Royal Commission appears to have been that an appeal should not be allowed in such circumstances, if guilt was clear.

26. On this view to quash a conviction where there is strong evidence of guilt, without ordering a retrial, will bring the criminal justice system into disrepute, rather than protect its integrity. According to that argument it is wrong to punish the public and deny justice for the victim in this way: if the system or those who operate it are at fault it is they and not the public who should be punished or required to learn lessons, if appropriate. There is some analogy here with the treatment of improperly obtained evidence, where in most situations the question for the Court is whether the admission of unlawfully obtained evidence would have such an adverse effect on the fairness of the proceedings that they ought not to admit it. There is no automatic bar

²³ [2006] EWCA Crim 1155

²⁴ [2004] UKHL 18

on admitting the evidence so as to ensure the breach of the rules is punished: why should the approach be different for criminal appeals?

Retrials

27. In quashing a conviction the Court can, of course, order a retrial.

28. Section 7 of the Criminal Appeal Act 1968 allows the Court of Appeal to order a retrial where they allow an appeal against conviction and where it appears to the Court that “the interests of justice so require”. In the past five years retrials have been ordered in around a third of cases where convictions have been quashed by the Court of Appeal. It is not clear, however, that this proportion is unduly low, having regard to the “interests of justice” test that is currently applied.

29. In *Graham, Kansal, Ali and Marsh*²⁵, the Court of Appeal explained the factors relevant to the interests of justice:

“It is apparent that the conditions which permit the court to order a retrial are twofold: the court must allow the appeal and consider that the interests of justice require a retrial. The first condition is either satisfied or it is not. The second requires an exercise of judgment, and will involve consideration of the public interest and the legitimate interests of the defendant. The public interest is generally served by the prosecution of those reasonably suspected on available evidence of serious crime, if such prosecutions can be conducted without unfairness to or oppression of the defendant. The legitimate interests of the defendant will often call for consideration of the time which has passed since the alleged offence, and any penalty which the defendant may already have paid before the quashing of the conviction. The offences for which a defendant may be ordered by the Court to be retried are, however, strictly limited by section 7(2) [i.e. the offence of which he was convicted, or could have been convicted at the original trial].”

30. Clearly, therefore, factors other than guilt or innocence weigh heavily on the Court’s mind in deciding whether or not to order a retrial. It might well, for example, be impracticable or impossible to secure attendance of the relevant witnesses after a

²⁵ [1996] EWCA Crim 1211

long passage of time, or memories may have faded to a point where reasonable doubt is more likely than not. Even where these factors are not relevant, a retrial may well be stressful and burdensome to victims, their families and witnesses.

Options

31. The dominant and settled legal interpretation of the statutory test in the Criminal Appeal Act 1968 (as amended) appears to mean that the Court of Appeal may quash a conviction if they are dissatisfied with some aspect of procedure at the original trial, even if the person pleaded guilty or the Court are in no doubt that he committed the offence for which he was convicted. The Government believes that the law should not allow people to go free where they were convicted and the Court are satisfied they committed the offence.
32. The Government believes that legislation is now needed to change the position because the approach of the Court of Appeal appears now to be settled. Moreover, it is right that Parliament should debate the desired effect of the test which it has itself provided (and amended).
33. It is for consideration what form such amending legislation should take. Three options can be identified:
 - A re-instate a proviso similar to that which was part of the original statutory test (see paragraph 2 above) so as to provide that the appeal should not be allowed, even if there is a procedural irregularity, if the Court consider no miscarriage of justice actually occurred;
 - B replace the proviso with another formulation, designed to achieve the same end, and perhaps addressing more directly the Court's view (where they have reached one) of the guilt of the appellant;
 - C recast the test and the task of the Court of Appeal so as to require a substantial re-examination of the evidence (akin to the task of the jury).
34. The Government does not rule out Option A, but considers it suffers from a number of disadvantages. In particular, it appears from the experience of the proviso that the concept of "miscarriage of justice" itself requires considerable interpretation and that this legal process may overlay and obscure the essential matter of the guilt of the appellant. It should also be borne in mind that by the time Parliament deleted the

proviso in what was to become the Criminal Appeal Act 1995, most commentators considered that the proviso, as then worded, added nothing of significant value to the test itself.

35. Option B would, effectively, seek to legislate along the lines of the approach taken by Lord Justice Auld in the *Chalkley*²⁶ case. This would mean that appeals would not be allowed where:

“The Court ... does not think the conviction unsafe but is dissatisfied in some way with what went on at the trial.”²⁷

36. But the principle would be equally applicable, in the Government’s view, to pre-trial impropriety, and comment on this aspect of the proposed reform would be particularly welcome.

37. A change to the Court of Appeal test along these lines would make no difference where the Court, for whatever reason, are unable to reach their own view on the guilt or otherwise of the appellant. The change would address those cases where the Court of Appeal form the view that the appellant is guilty of the offence. And it would be only in those cases that there would be no power to quash the conviction, despite the impact that the new evidence or other basis for appeal might have had upon the trial jury. In short, where the Court believe that the appellant committed the offence there would exist a ‘safety valve’, preventing a further miscarriage of justice on purely procedural grounds.

38. As regards Option C, the Government wishes to make it clear that it considers that a retrial by a judge sitting with a jury remains the appropriate outcome where the Court of Appeal consider an appeal should be allowed and have, for whatever reason, not felt able to form a clear view as to the appellant’s guilt. Whilst it would be possible to vary the functions of the Court of Appeal, for example by placing a duty upon them to determine the issue of guilt directly, the Government sees little merit in effectively reconstituting the Court as if it were akin to a court of first instance or the ‘primary decision maker’, summoning and hearing all the witnesses and supplanting the jury as a tribunal of fact. Where a retrial is impossible then the appeal would have to be allowed.

²⁶ Op cit

²⁷ Op cit

39. If there are any other proposals not referred to in this paper which could achieve the aim set out at the end of paragraph 31 above in a proportionate and just manner, we would be interested to hear them.

Partial Regulatory Impact Assessment

Title

40. The title of the proposal is ‘Quashing Convictions – Report of a review by the Home Secretary, Lord Chancellor and Attorney General.’

Purpose and effect

41. To consider the current test used by the Court of Appeal for quashing convictions and decide what amendments are required to section 2(1) of the Criminal Appeal Act 1968 (as amended).

42. The proposal for change is to amend section 2 (1) of the Criminal Appeal Act (as amended by the Criminal Appeal Act 1995) to change the test the Court of Appeal use in deciding whether to quash a conviction.

Benefits

43. It would ensure that the plainly guilty would not have convictions quashed because of a procedural irregularity, where the Court of Appeal were satisfied that the appellant committed the offence.

Costs

44. Change should mean that fewer people are released from prison and this could have an impact on the prison population. However, the potential number will be very small, probably fewer than 20 each year under any of the proposed options. In addition, some whose convictions would not be quashed under the new proposals will have served all or most of their sentence so will serve no or very little additional time in prison. Additionally, there may be some small off-setting saving because fewer convictions would be quashed there would, potentially, be fewer retrials.

Other assessments

45. A draft Race Equality Impact Assessment (REIA) confirms, in line with the criminal justice system generally, that proportionately more appellants to the Court of Appeal are from minority ethnic communities, although the numbers likely to be affected by the proposed change is proportionately very small. A full REIA is, therefore, being carried out and will be informed by this consultation process. It will be available shortly.

Monitoring and evaluation

46. Should there be legislation the effect of the proposals will be monitored.

Contact points

47. The following officials can answer questions about the proposals or the Partial Regulatory Impact Assessment:

Paul Jackson, Better Trials Unit, Office for Criminal Justice Reform, Ground Floor/Fry Building, 2 Marsham Street, London, SW1P 4DF

Tel: 020 7035 8465 Fax: 020 7035 8601 Email: Paul.Jackson18@cjs.gsi.gov.uk

Laurie Little, Better Trials Unit, Office for Criminal Justice Reform, Ground Floor/Fry Building, 2 Marsham Street, London, SW1P 4DF

Tel: 020 7035 8466 Fax: 020 7035 8601 Email: Laurie.Little@cjs.gsi.gov.uk

Nick Matthews, Better Trials Unit, Office for Criminal Justice Reform, Ground Floor/Fry Building, 2 Marsham Street, London, SW1P 4DF

Tel: 020 7035 8468 Fax: 020 7035 8601 Email: Nick.Matthews@cjs.gsi.gov.uk

48. List of persons and bodies consulted

- Lord Chief Justice of England and Wales
- Sir Igor Judge, President of the Queen’s Bench
- ACPO
- Amnesty International
- Council of Her Majesty’s Circuit Judges
- Criminal Bar Association
- Criminal Cases Review Commission
- Crown Prosecution Service
- General Council of the Bar
- Institute of Legal Executives
- Law Society of England and Wales
- Society of Black Lawyers
- Victim Support
- Whitehall Prosecutors’ Group
- Liberty
- Justice
- Miscarriages of Justice Organisation
- Lawyers with whom OCJR communicate in relation to miscarriage of justice compensation applications

September 2006

OCJR

The consultation criteria

The Code of Practice on Written Consultation issued by the Cabinet Office recommends the following criteria:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
3. Be sure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

In order to facilitate the consultation, steps have been taken to try to identify those with an interest in the proposals, to ensure that they receive a personal copy of the consultation document.

The full Code of Practice is available at:

<http://www.cabinet-office.gov.uk/regulation/consultation/introduction.htm>

Responses and disclaimer

The information you send in may be sent to colleagues within the Office for Criminal Justice Reform, the Government or related agencies. Furthermore, information provided in responses to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals with, among other things, obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided

as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances.

An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department. Please ensure that your response is marked clearly if you wish your response and name to be kept confidential. Confidential responses will be included in any statistical summary of numbers of comments received and views expressed. The Department will process your personal data in accordance with the Data Protection Act – in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Alternative format

Please contact the Better Trials Unit if you require a copy of this consultation paper in any other format.

Post-consultation information

A summary of the responses to this consultation will be published and made available on the Home Office website (www.homeoffice.gov.uk) and the Criminal Justice System website (www.cjsonline.gov.uk).

Consultation coordinator

If you have any complaints or comments **about the consultation process only**, you should contact the Home Office's consultation coordinator, Chris Brain, by email at:

christopher.brain2@homeoffice.gsi.gov.uk

Or you may wish to write to:

Chris Brain
Consultation Coordinator
Performance and Delivery Unit
3rd Floor/Seacole Building
Home Office
2 Marsham Street
London
SW1P 4DF