Consultation Paper No. 268

LAW COMMISSION CONSULTATION ON CRIMINAL APPEALS

RESPONSE ON BEHALF OF THE MEDIA LAWYERS ASSOCIATION

INTRODUCTION

1. The Media Lawyers Association ("**MLA**") is an association of in-house media lawyers with broad membership from newspapers, magazines, broadcasters, news agencies and book publishers. Its members include national, regional and local news media organisations across the UK, including the major publishers and broadcasters, reaching the vast majority of the viewing and reading public in the UK at national and local level. Its members include all national UK newspaper publishers and broadcasters, news agencies (The Press Association and Thomson Reuters PLC), representative organisations for thousands of regional, local and specialist publications, the publishers of a wide range of national and international magazines and non-fiction book publishers. (A list of the MLA's corporate members may be found at Appendix 1.)

2. Many of the MLA's members have extensive experience of the issues being considered by the Consultation Paper as it affects the media. They work with crime and court reporters covering cases of local, national and international public interest and heard in a range of courts and tribunals. They have also been involved with many major developments aimed at facilitating open justice.

3. This Response seeks to address the questions posed by the Law Commission ("**LC**") by reference to first-hand knowledge and examples of how reporting of the criminal courts and appeal processes operate in practice.

4. This Response does not cover all the questions posed in the Consultation Paper; rather the MLA has focused on those areas that are most relevant to the media and particularly those highlighted in the round table meeting that took place on 17 April 2025.

5. Should the LC require any further information about any of the issues raised in this Response, the MLA would be very happy to assist.

6. Some members organisations of the MLA will also be providing individual responses to this Consultation Paper.

Consultation Question 15

- ***5.241 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?***

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

7. Any extension of the current provisions on anonymity to grant anonymity to individuals who are no longer children would necessarily constitute a significant restriction on open justice. While the MLA has sympathy for the concerns that have been laid out in the consultation paper, it is opposed to the suggestion that defendants who are over 18 should retain their anonymity for the duration of appellate proceedings.

8. As the LC has set out in the consultation paper, there are two separate mechanisms by which a child defendant involved in criminal proceedings could be entitled to anonymity.

9. If the case is being heard by a Youth Court, then they would be entitled to automatic anonymity under s.49 of the Children and Young Persons Act 1933, as set out in paragraph 5.229 of the consultation paper. The s.49 anonymity automatically expires when the defendant reaches the age of 18.

10. However, in the case of prosecutions that are dealt with in the Crown Court, reporting restrictions are not automatic and would need to be granted by the Court under s.45 of the Youth Justice and Criminal Evidence Act 1999. Section 45 orders provide anonymity until the age of 18 in the same way as s.49 CYPA in the Youth Court system, but are at the discretion of the court which means

that, before making any order, the court must consider the impact upon open justice and apply the usual threshold of the order being both necessary and proportionate.

11. As the LC has acknowledged, the High Court has, in rare cases, extended anonymity of defendants beyond the age of 18 in the form of an injunction based upon the provisions of the European Convention of Human Rights (the Venables jurisdiction), however, given the significant interference with open justice that such an order would entail, the threshold is exceptionally high and any order would only be made after a careful assessment of the facts in each case. (See the Court of Appeal's decision in the case of *R v Aziz [2019] EWCA Crim 1568*.)

12. We believe that the number of cases where the media are interested in reporting on appeal proceedings where they have not considered the proceedings at first instance will be very rare. In any exceptional cases the appellant would be entitled to pro-actively apply for a restriction under the jurisdiction in Venables.

13. There are also practical concerns should such an approach be adopted. From the consultation paper, it appears that the proposal is that anonymity would only be extended in cases where a defendant maintains their anonymity at the time they lodge an appeal, and that it would only apply to first appeals.

14. In relation to the limitation of any such restrictions to circumstances where a defendant maintains their anonymity at the time they lodge the appeal, we would be grateful for clarity as to whether this means they would have to lodge an appeal before they turn 18, or whether the proposed change would be intended to encompass individuals who have already turned 18 but who have not been named publicly up until that point in time. If it is the latter, then we would invite the LC to consider how that would be determined. It is possible that, while an individual might not have been named in the national or local press, they may have been named within their local community or on social media pages online. We believe it would be incompatible with open justice to impose restrictions on reporting in such circumstances.

15. An additional concern held by the MLA members is that, while the defendant's date of birth (and therefore the date upon which any s.49/s.45 restrictions would lapse) may be available via the indictment or other court documents, there isn't a public record of appeals that have been lodged or their status. If the proposal is to introduce new automatic provisions, it would be practically difficult for a journalist to establish whether or not a defendant's anonymity continued by virtue of an appeal having been lodged. (There would also be a separate matter, once aware of the appeal, of establishing whether or not those appeal proceedings had concluded.)

16. In the event that the LC is persuaded such a change is necessary, the MLA would advocate for an explicit mechanism by which anonymity is extended e.g. a requirement for a separate order of the court extending anonymity pending the outcome of the appeal proceedings, potentially by way of an extension of the Venables jurisdiction. Any such order should explicitly state who is covered and for what period (i.e. until the appeal is determined) as well as explicitly providing that if the appellant is charged with a different offence, they can be identified in connection with that offence. Exceptions should also be included to allow the appellant to waive anonymity. As with all other reporting restrictions applications, copies of orders as made should be circulated to the media.

17. The MLA would also advocate for a database via which journalists could check the status and outcome of the appeal proceedings themselves, and whether or not reporting restrictions are in force. This is another matter where the availability of accurate and timely information on the court file will be integral to the feasibility and effectiveness of any change. The MLA has previously raised the argument in favour of a centralised database for reporting restriction orders, including in its response to the LC's Contempt of Court consultation submitted in December 2024. (See paragraph 62 of that response.)

18. Finally, the MLA would also be grateful for clarification as to whether the LC's proposal is that any extension of anonymity would automatically lapse in the event that a defendant's appeal is unsuccessful.

Consultation Question 64

- ***11.263 We invite consultees' views as to whether the law should be reformed to enable the Criminal Cases Review Commission to explain publicly a decision not to refer a case.***

19. We strongly support this proposal. The open justice principle should apply to the work of the Criminal Cases Review Commission (CCRC) as it does during the trial and appeal process.

20. The current restrictions imposed on the Criminal Cases Review Commission (CCRC) preventing the disclosure of information creates a system entirely lacking in transparency.

21. The open justice principle was described by Toulson LJ in R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court [2012] EWCA Civ 420, [2013] QB 618 as follows:

"1. Open justice. The words express a principle at the heart of our system of justice and vital to the rule of law. The rule of law is a fine concept but fine words butter no parsnips. How is the rule of law itself to be policed? It is an age old question. Quis custodiet ipsos custodes - who will guard the guards themselves? In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse. Jeremy Bentham said in a well known passage quoted by Lord Shaw of Dunfermline in Scott v Scott [1913] AC 407, 477: "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.""

22. In an imperfect legal system - which is to say all legal systems - where mistakes can and do occur, the function of CCRC is an integral part of the justice process. The investigation and resolution of potential miscarriages of justice is a paradigmatic example of information which should be scrutinised and understood by the public.

23. An example of where the existing restrictions have hampered accurate contemporaneous reporting is in the case of Peter Sullivan. This is a case where an individual who had served 38 years for murder had his conviction quashed following an application to the CCRC based upon the availability of new DNA methods and evidence. This appeal had similarities to the case of Andrew Malkinson, to the extent that fresh DNA evidence formed the basis for the conviction being quashed. Reporters wished to establish whether the two cases demonstrated a systemic failing with the operation of the appeals process and specifically the work of the CCRC and to do so asked the CCRC for clarification about the nature of the DNA testing method used in the Sullivan case. The CCRC could not answer these questions due to the constraints imposed upon it. The information needed to answer the question was only gathered in the course of the substantive appeal proceedings when journalists had access to the court papers and it was revealed that the DNA testing used in the two cases was of a different type. This is information that could have been quite simply provided by the CCRC had it been permitted to do so. https://www.bbc.co.uk/news/articles/c8rej5jv626o

24. The LC sets out in the consultation paper that the current rationale for restricting the disclosure of information centres around concerns about what could be disclosed given the CCRC's powers to obtain disclosure of information.

25. We would suggest this reasoning does not take into account the existing causes of action which regulate the publication of material by the media. Cases can be already brought in privacy and data protection to protect the rights of an individual. Furthermore, in instances where the integrity of active criminal proceedings that are subject to ongoing judicial process require protection, the law of strict liability contempt would apply.

26. We welcome the suggestion by the LC that the CCRC should be enabled to provide information to the public about its decision making. Further to this, consideration should be given to the value of *requiring* the CCRC to publicly explain the reasoning for its decisions whether those are to entertain or reject an application. Greater transparency would have the benefit of enabling the public to better understand and scrutinise the decisions of the CCRC.

Consultation Question 73

- ***12.133 We provisionally propose that there should be no right to appeal against: (1) a refusal to impose reporting restrictions; or (2) a decision to lift reporting restrictions. Do consultees agree?***

27. We strongly support this proposal. As has been noted by the LC, all restrictions upon reporting are an interference with the principle of open justice and the media, and the public's Article 10 rights.

28. At present an unsuccessful applicant can appeal a judge's decision not to impose reporting restrictions or to lift reporting restrictions by way of an application to the High Court for judicial review. In such cases, interim reporting restrictions can be put in place having the effect described by the LC at paragraph 12.131.

29. An example of where a decision to lift reporting restrictions was challenged was in the case of *R (on the application of Javad Marandi) v Westminster Magistrates Court & Ors [2023] EWHC 587*. In that case an anonymity order was granted by Westminster Magistrates Court in October 2021; following an application by the media the same court ruled that the anonymity order should be lifted in May 2022, however an interim order was put in place allowing the applicant time to appeal. An application was made for judicial review; the case was heard by the Divisional court in March 2023; a further appeal was made to the Court of Appeal and the matter finally concluded in May 2023 at which point the applicant's application was rejected by the Court of Appeal and the media was permitted to report the individual (Mr Marandi's) connection with the proceedings. This was 12 months after the Magistrates Court originally ruled the restriction should be lifted. This case demonstrates the potential chilling effect and significant delays to reporting which are already in play for media organisations who seek to challenge such restrictions. (Another case which followed a similar course and caused significant delays regarding reporting is *R (Rai) -v- Winchester Crown Court [2021] EWHC 339 (Admin)*.)

30. The MLA also agrees with the arguments at 12.131 that any additional right of appeal could easily be abused to postpone the reporting of important details in a case, which would have the effect of diminishing contemporary reporting of

proceedings and potentially also force media organisations to incur significant legal costs in making their own submissions to oppose any appeals.

Consultation Question 96

- ***15.197 We invite consultees' views on whether provision could and should be made to enable disclosure of material for the purposes of responsible journalism to reveal a possible miscarriage of justice.***

31. As the LC acknowledges in the consultation paper, disclosure of unused prosecution material to journalists can be "*an important way of securing an appeal or obtaining the fresh evidence necessary for a successful appeal*" (15.186). There are multiple examples of occasions where, but for the role of the media the most profound miscarriages of justice possible in our country (people imprisoned for decades for crimes they did not commit) would have persisted.

32. We are pleased to see acknowledgement of these investigations, including the recent work of journalists around uncovering the Post Office scandal and the work of television series such as Rough Justice, in the consultation paper. We would add to this list the work of investigative journalists in the cases of Yusef Abdullahi, Stephen Miller and Tony Paris (The Cardiff Three), Paddy Hill (one of the Birmingham Six) and John Kamara.

33. This role of the media in such cases has been recognised by the courts, particularly in the case of *R(Simms) v Secretary of State for the Home Department* [2000] 2 AC 155 as cited in the consultation. Additionally, in *Re B (A Child) (Disclosure)* [2004] 2 FLR 142, Munby J observed "*We must be vigilant to guard against the risks. And we must have the humility to recognise — and to acknowledge — that public debate, and the jealous vigilance of an informed media, have an important role to play in exposing past miscarriages of justice and in preventing possible future miscarriages of justice ... Open and public debate in the media is essential*.'' [§101 and §103].

34. At present, under s17 and 18 of the Criminal Procedure and Investigations Act 1996 (CPIA), it is a contempt of court for a person to knowingly use or disclose

unused prosecution material, save for use in connection with the proceedings in question or for the purposes of appeal proceedings. This applies to material that was disclosed under the CPIA (and therefore post 1 April 1997) in the course of the proceedings and continues to apply to that material post trial. (A similar restriction applies under common law where material is disclosed outside of the CPIA see *Taylor v Serious Fraud Office [1999] 2 AC 177*.)

35. While we are not aware of any reported cases in which a media organisation or investigative journalist has been prosecuted under these sections of the CPIA, it is implausible to suggest that the chilling effect of these legislative provisions on the work of journalists seeking to investigate and report on alleged miscarriages of justice is anything less than significant. We agree that it may be possible to argue that onward disclosure of unused material for the purposes of exposing a miscarriage of justice may not represent a "wholly collateral purpose" (para 15.188 of the consultation paper) however clarification of the law would be helpful and would mitigate against the deterrent that uncertainty provides.

36. We support APPEAL's proposal to introduce an exception to s17 which would allow disclosure of unused material to journalists and, by extension, for journalists to be permitted to use and publish that material for the purpose of fair and accurate reporting. We also agree the existing process of making a formal application to court under s.17(4) in each individual case under s17 is onerous, costly and impractical.

37. At paragraph 15.193 of the consultation paper, the LC raises the point that "where the prosecution are satisfied that a conviction is safe, it is questionable whether they would wish to allow disclosure." This is the very issue that would be remedied if the law were changed to permit disclosure to be made directly to journalists investigating that same question. As Lord Hughes stated in *Nunn v Chief Constable of Sussex [2015] AC 225* at para36; ". . .the public interest is in such miscarriages, if they occur, being corrected. There is no doubt that there have been conspicuous examples of apparently secure convictions which have been demonstrated to be erroneous through the efforts of investigative

journalists, or of solicitors acting on behalf of convicted persons or, sometimes, of other concerned persons."

38. The LC queries at 15.194 whether, if APPEAL's proposals were to be adopted, there would be a need to define "who is a journalist" and "what is journalism". We suggest that further definitions of these terms is both unnecessary and inadvisable.

39. The self-evident nature of the words journalist and journalism is illustrated by their inclusion in existing legislation without definition. For example, in the Police and Criminal Evidence Act 1984, "journalistic material" is defined as "*material acquired or created for the purposes of journalism*" [s13]. They are ordinary English words which carry a clear meaning. Similarly the Data Protection Act contains an exemption for material that is processed for "the purposes of journalism" (Data Protection Act 2018 paragraph 26) and the terms "for the purposes of journalism" is a phrase used again in Part V Schedule I of the Freedom of Information Act 2000 (in relation to the extent to which the BBC is to be considered a public authority under that Act). The question of "what is journalism" has been considered by the courts and we would argue that the scope of the practice of journalism is therefore already clearly defined. (See in particular the decision of the Supreme Court in *Sugar (Deceased) (Represented by Fiona Paveley) (Appellant) v British Broadcasting Corporation (Respondent) [2012] UKSC 4).)*

40. Each of these statutes focusses upon the *purpose* for which the material is used rather than the person to whom it is disclosed. We would argue that the same approach could be applied here to ensure legislative consistency and that any amendment to the CPIA could focus on an exemption for material that is disclosed "for the purpose of journalism."

41. At 15.195 the LC asks whether disclosure could be limited to "recognised news publishers" adopting the wording in the Online Safety Act 2023. While the membership of the MLA constitutes such organisations, we would caution against the adoption of this definition when it comes to the work of investigative journalists because, as the LC recognises, many of them work in a freelance

capacity and may well conduct the initial stages of any investigation before being commissioned/contracted by a news organisation with a view to publication.

Consultation Question 97

- ***15.250 We provisionally propose that where a person is sentenced to a term of imprisonment, audio recordings and transcripts of their trial should be retained for at least the duration of the sentence (including the time where the person is liable to be recalled to prison). Where a person is sentenced to life imprisonment, audio recording and transcripts of their trial should be retained for the remainder of their life. Do consultees agree?***

42. The retention and availability of transcripts has a direct and significant impact upon open justice and the media's ability to accurately reflect the outcomes of cases. While this is clearly of benefit to contemporaneous news reporting and the production of current affairs and documentary programmes about both ongoing and historic cases, it also has a wider impact, for example in relation to the depiction of historic cases in factual drama programmes where they form an important historic record. Transcripts from a trial enable programme makers to ensure that the proceedings are both accurately and fairly reflected. Recent examples where transcripts proved a valuable resource in the case of both factual drama and documentaries include series such as *The Sixth Commandment* (BBC) (depicting the trial of Ben Field and Martyn Smith), *The Trial of Christine Keeler* (BBC), *The Jury: Murder Trial* (C4)*, Deceit* (C4)*, Killed by a Rich Kid* (C4) *and The Fall: Skydive Murder Plot* (C4).

43. In some cases, copies of transcripts will have been retained by the participants in the proceedings, or their legal advisers, and journalists and programme makers are provided with access by that route, however this is a very unreliable system and depends very much on the parties and their lawyers both retaining transcripts and being willing to provide them.

44. We agree that the current law governing retention of and access to recordings of proceedings is not satisfactory. Now that records can be stored electronically, we see no reason why recordings of proceedings held in open court should not

be held in accordance with the retention periods for physical papers with access being made available to anyone who would have been entitled to attend the proceedings. We would also argue that, where possible, they should be stored in an accessible, digitised format and, where necessary, the format they are stored in should be updated in line with technological developments.

45. We support the retention periods proposed in consultation question 97.

46. We also note that the costs of obtaining a transcript can often be prohibitively expensive. Where transcripts are already in existence, media parties should only be charged a de minimis administrative charge (if any charge at all) for obtaining a copy. We also note that the application of rapidly developing AI technologies may provide a means by which accurate transcripts may be created from an audio recording at minimal cost. Alternately the LC may wish to consider whether simply providing audio recordings themselves would be a more cost-efficient solution.

47. We also support the observations made by the LC at 15.254-15.258 regarding the application of the principle of open justice to requests by the media for transcripts and the suggestion that the Criminal Procedure Rules Committee should consider reviewing the rules to ensure that transcripts are generally available, especially to the media, unless there is a compelling reason to restrict access. (We believe that this aligns with the ongoing work of the Transparency and Open Justice Board under the direction of Nicklin J.)

Sarah McColl & George Yates
27 June 2025

For further information please contact:
Sarah McColl **sarah.mccoll@bbc.co.uk**

Appendix 1: List of current MLA members

Associated Newspapers
Bloomberg LP
BBC
British Sky Broadcasting
Channel 4
Channel 5
Conde Nast
The Economist
Financial Times
Guardian News and Media Limited
Harper Collins
Hearst Magazines UK
ITN Ltd
ITV Plc
Independent Digital News and Media Limited
NBC News Group
News Media Association
News UK
Press Association
REACH plc
Reuters News & Media Limited
Telegraph Ltd
Which?