Criminalising Dissent

Key Words: dissent, criminal law, Court of Appeal, Senior Courts Act 1981, judicial independence, certainty

Rory Kelly*

* UCL Faculty of Laws. My thanks to Professor Andrew Ashworth, Professor David Ormerod, Karl Laird, Professor Lucia Zedner, the Editor, and the anonymous reviewer for their comments on an earlier draft. My thanks also to my colleagues at UCL for their thoughtful feedback both at and after the corresponding Faculty Research Seminar.

Criminalising Dissent

There are no dissents in the Court of Appeal Criminal Division (CACD).[1] The absence is unusual amongst common law appellate courts where the value of dissenting judgments has been widely recognised.[2] Lord Neuberger MR, in a 2012 speech, made the following observation on the phenomenon:

> "At least on the civil side, I would defend to the last the right of a judge to give a reasoned judgment in the terms which he or she wants. But tell that to the CACD, where single judgments are *de rigueur*. So, if you disagree with your colleagues on an appeal, you still have to subscribe to the judgment of the court – sometimes, I am told, a judge even has to give a judgment with which he or she does not agree."[3]

Perhaps there was an element of playing to the gallery in this remark – the speech was made to the Chancery Bar Association. Nonetheless, it brings three important questions into focus. First, can a judge in the CACD dissent when they disagree with their colleagues? Secondly, should a judge dissent in such circumstances? Thirdly, are there any alternatives to dissent in the CACD? Despite the wider literature on dissent and important research on the working practices of appellate courts, these questions have not received appropriate attention to date.

The article proceeds over five sections. Section one provides context by sketching the role of the CACD. Section two engages with the doctrinal question of whether judges in the CACD can dissent when they disagree. The question must be taken seriously as a trio of senior judges have recently indicated that dissent is not possible on the Court.[4] Nonetheless, I argue section 59 of the Senior Courts Act 1981 does allow for dissent in the CACD in certain

[1] An unusual exception is discussed in section 2.

[2] M. Kirby, "Law at Century's End - A Millennial View from the High Court of Australia" (2001) 1 Maquarie L. J. 1 at 12; C. L'Heureux-Dube, "The Dissenting Opinion: Voice of the Future" (2000) 38(3) Osgoode Hall L.J. 495 at 501-502; A. Paterson, *Final Judgment: the Last Law Lords and the Supreme Court* (Oxford: Hart Publishing, 2013), at p.115.

[3] Lord Neuberger MR, "Developing Equity – A View from the Court of Appeal" (Chancery Bar Association Conference 2012) at para.20. See also, T. Bingham, *The Rule of Law* (London: Penguin, 2011), at p.44.

[4] J. Beatson, L. Henderson and K. Lindblom, "Collective Judging in the Court of Appeal of England and Wales" in B. Häcker and W. Ernst (eds.), *Collective Judging in Comparative Perspective: Counting Votes and Weighing Opinions* (Cambridge: Intesentia, 2020), at p.44.

circumstances. The argument relies on the language of the provision and its history. The section then examines the circumstances in which a judge on the CACD may dissent.

The fact that dissent is possible does not mean it is a good thing. In section three, I draw five reasons for dissent from wider literature and reflect on their applicability in an intermediate criminal appeal court: judicial independence; setting a direction for future decisions; clearer judgments and clearer law; the benefit of draft dissents; and the increased value of unanimity. I conclude there are good reasons in favour of dissents in the Criminal Division. I then turn to possible reasons for the absence of dissent in the CACD which fall broadly into three categories: criminal law as a subject matter, practical alternatives to dissent and the general administration of the court. Though a number of these reasons speak against the normalisation of dissent, they are insufficient to legitimise the absence of dissent in the CACD. The case for dissent where there is disagreement on a "strong" bench is particularly compelling. Finally, in section five, I suggest steps that could be taken to promote appropriate dissent in the CACD.

1. The Court of Appeal Criminal Division

Before examining dissent in the CACD, some context on the role of the Court is needed.[5] The CACD has jurisdiction to hear appeals against conviction on indictment.[6] An appeal against conviction may be heard where the trial judge grants a certificate that the case is fit for appeal or the CACD gives leave.[7] In 2019/20, 510 applications for leave to appeal against conviction were considered.[8] Leave is usually considered by a single High Court judge on the papers.[9] Again in 2019/20, 413 applications were refused on the papers and 44 were granted. The Registrar also referred 53 cases directly to the full Court. In turn the full Court allowed 67 appeals against conviction and dismissed 104. As the numbers indicate, the High Court judge

[5] This section can only offer an overview. See generally, D. Ormerod and D. Perry, *Blackstone's Criminal Practice 2022*, 32nd edn (Oxford: Oxford University Press, 2021), Ch.D26-D28; R. Pattenden, *English Criminal Appeals,1844-1994: Appeals against Conviction and Sentence in England and Wales* (Oxford: Oxford University Press, 1996).

[6] Criminal Appeal Act 1968 ss.1-2.

[7] Criminal Appeal Act 1968 s.1.

[8] The statistics here originate from the *Court of Appeal (Criminal Division) Annual Report 2019-20,* (London: Judicial Office, 2021), at pp.43-53.

[9] Beatson, Henderson and Lindblom, "Collective Judging" (2020), at p.44. The relevant power is contained in the Criminal Appeal Act 1968 s. 31(2)(a).

has an important filtering function.[10] Where the single judge refuses leave, the applicant is entitled to then have their application determined by a bench of two or more.[11]

An appeal against conviction will be heard by an uneven number of judges of three or more.[12] As a norm, the bench will be made up of an L.J. and two first instance judges (either two High Court judges or a High Court judge and a Circuit judge).[13] A larger bench of five or more judges is exceptional and tends to be convened for cases raising important points of law.[14]

The Court will allow an appeal where the conviction is unsafe.[15] Where an appeal is successful the CACD will quash the conviction.[16] The Court may order a retrial if it appears in the interests of justice to do so.[17] In general, the offender has a single right of appeal to the CACD.[18] The following are common grounds of appeal against conviction: wrongful admission or exclusion of evidence; erroneous exercise of discretion; conduct of lawyers; rejection of submission of no case to answer; defects in the indictment; inconsistent verdicts and jury irregularities; and the conduct of the trial judge.[19] An important point which may be discerned from these categories is that not every case heard by the CACD will be on a pure question of law. The Court has an important, and indeed more usual, role in correcting error where the law is clear, but misapplied.[20]

The Court may also hear appeals against sentence from those sentenced on indictment in the Crown Court.[21] In fact, most applications received and allowed by the CACD are sentencing appeals. In 2019/20 the Court received 2,510 applications for leave to appeal against

[10] See also R. Auld, *Review of the Criminal Courts of England and Wales* (London: HMSO, 2001), at p.639.

[11] Criminal Appeal Act 1968 s.31(3).

[12] Senior Courts Act 1981 s.55.

[13] Beatson, Henderson and Lindblom, "Collective Judging" (2020), at p.45. Only certain Circuit judges are ticketed to sit in the CACD.

[14] *Court of Appeal (Criminal Division) Annual Report 2019-20*, at p.8; Pattenden, *English Criminal Appeals,1844-1994* (1996), at p.40.

[15] Criminal Appeal Act 1968 s.2

[16] Criminal Appeal Act 1968 s.2

[17] Criminal Appeal Act 1968 s.7. On substituting verdicts, see s.3.

[18] Criminal Procedure Rules 2015/1490 rule.36.15.

[19] Ormerod and Perry, *Blackstone's Criminal Practice* (2021), at paras D26.21-D26.29.

[20] Pattenden, *English Criminal Appeals, 1844-1994* (1996), at pp.57-61.

[21] Criminal Appeal Act 1968 s. 9.

sentence, allowed 672 appeals and dismissed 344.[22] When hearing a sentencing appeal, the Court may sit as two judges be it as an L.J. and a High Court judge or Circuit judge; two High Court judges; or a High Court judge and a Circuit judge.[23] Where an even bench is divided, the case must be reargued before an uneven number of judges of not less than three.[24]

When the CACD considers the appellant should be sentenced differently, it may quash their sentence and pass such a sentence as it thinks appropriate subject to two restrictions.[25] First, the court from which the appeal came must have had the power to impose the sentence. Secondly, the appellant must not be dealt with more severely than they were by the court below. Grounds of appeal against sentence include that the sentence is wrong in law or manifestly excessive.[26] The Attorney General may also refer a sentence, for certain offences, imposed in the Crown Court to the CACD if it appears unduly lenient.[27] Such references are rarer: in 2017 the Attorney General sought leave to refer 173 sentences as compared to 3,798 applications for leave to appeal against sentence by the offender.[28]

The CACD is de jure an intermediate appellate court, but the vast majority of the cases that it decides are not later heard by the Supreme Court.[29] In 2020-21 the Supreme Court published 54 judgments and only four of these concerned criminal law.[30] This was an increase from three criminal law judgments in 2019-20.[31] As will be clear from the above, these figures pale in comparison to the number of cases dealt with by the Criminal Division. Additionally, the

[22] *Court of Appeal (Criminal Division) Annual Report 2019-20,* at pp.48-49. (As compared to receiving 813 applications against conviction.)

[23] Beatson, Henderson and Lindblom, "Collective Judging" (2020), at p.45.

[24] Senior Courts Act 1981 s.55(5).

[25] Criminal Appeal Act 1968 s.11(3).

[26] See generally, Ormerod and Perry, *Blackstone's Criminal Practice* (2021), at paras D26.50-D26.53.

[27] Criminal Justice Act 1988 s.36.

[28] L. Harris, "Evaluating 30 years of the Unduly Lenient Sentence Scheme: Attorney General's References 1988-2017" [2019] (5) Crim.L.R. 370 at 376. For the outcomes of recent sentences examined by the Attorney General, see <www.gov.uk/government/statistical-data-sets/outcome-of-unduly-lenient-sentence-referrals> accessed 29 October 2021.

[29] See similarly, on the Civil Division, G. Drewry, L. Blom-Cooper and C. Blake, *The Court of Appeal* (Oxford: Hart, 2007), at pp.143-144.

[30] *The Supreme Court Annual Report and Accounts 2020–2021* (HC 310, 2021), at p.81.

[31] *The Supreme Court Annual Report and Accounts 2019–2020* (HC 721, 2020), at p.62.

CACD has control over which cases are given leave because, amongst other requirements, it must certify the decision involves "a point of law of general public importance".[32] C.J.S. Knight notes, this means the CACD could "effectively remove the appellate function of the Supreme Court."[33] More practically, it is clear the CACD has an important gate-keeping function. The CACD is a de facto final court of appeal for criminal law matters.[34] This makes it all the more important to address whether judges sitting on the Court can and should dissent.

This brief overview is sufficient to draw out four important points that will feature in the analysis in later sections. First, the CACD is remarkably busy: it deals with thousands of applications for leave and hundreds of full appeals a year. Secondly, most appeals relate to sentencing. Both points will be picked up when we examine the workload of the CACD in section 4(vi). Thirdly, the Court sits with varying numbers of judges and judges of different seniority. In section 4(vii), we will consider whether varied seniority speaks against dissent. Fourthly, the vast majority of appeals will not require detailed consideration of an important point of law.[35] The Court fulfils a range of functions to include addressing errors in first instance cases (such as misdirection on the law) and providing analysis of contentious points of doctrine that arise.[36] It is a court of multiple purposes. This point will underlie the argument for limited dissent in later sections. Before that, we must first examine whether dissent is lawful in the CACD.

2. Is it lawful for judges in the CACD to dissent?

The view that judges of the Court cannot dissent has received support in practice and the academy. Jack Beatson, Launcelot Henderson L.J. and Keith Lindblom L.J. write, "Unlike in civil appeals, it [the Criminal Division] always gives a judgment of the Court. There is no

[32] Criminal Appeal Act 1968 s.33(2). The full criteria are set out in section 4(v) below.

[33] C.J.S. Knight, "Second Criminal Appeals and the Requirement of Certification" (2011) 127(Apr) L.Q.R. 188 at 189. To this it can be added that the Court could effectively drown the Supreme Court with criminal law work.

[34] See also Auld, *Review of the Criminal Courts of England and Wales* (2001), at p.644.

[35] Pattenden, *English Criminal Appeals,1844-1994* (1996), at p.58.

[36] J.R. Spencer, "Does our Present Criminal Appeal System Make Sense?" [2006] (8) Crim. L.R. 677 at 683-684; Pattenden, *English Criminal Appeals,1844-1994* (1996), at pp.57-82; Drewry, Blom-Cooper and Blake, *The Court of Appeal (2007)*, at pp.145-148. These functions are not wholly separate because the Court decides matters of law raised by first instance cases, not in the abstract. For discussion see Pattenden at, pp.63-64.

provision for separate judgments, although there is provision for the presiding judge to certify a point of law."[37] We will return to certifying points of law in section 4(v). For now, there is a clear significance in a retired L.J. and two current L.J.s stating there is no provision for dissent in the CACD. Indeed, their lordships are not alone in this view. Thomas Roe QC, with reference to section 59 of the Senior Courts Act 1981, has said that the CACD "is bound by statute to deliver a single judgment".[38] Roderick Munday has likewise referenced the section and stated that "A member of the court [the CACD] may not deliver a dissenting speech."[39]

It is worth setting out section 59 in full:

> "Any judgment of a court of the criminal division of the Court of Appeal on any question shall, except where the judge presiding over the court states that in his opinion the question is one of law on which it is convenient that separate judgments should be pronounced by the members of the court, be pronounced by the judge presiding over the court or by such other member of the court as he directs and, except as aforesaid, no judgment shall be separately pronounced on any question by any member of the court."

On an initial reading, the section appears to quite clearly allow for "separate judgments", and thus dissents, in certain circumstances.[40] Returning then to the views of the commentators above, they can perhaps best be read as recognising the practical impediments to dissent and the CACD's long history of unanimity. Munday's argument quickly becomes one of the *practice* of the CACD: "I am unaware of any case in modern times where the presiding judge in the Criminal Division has actually authorised the delivery of multiple judgments or where one of the wing judges sought the privilege of delivering a concurring judgment." This leads Munday to conclude: "the exception allowed in section 59 is, to all intents, a dead letter."[41]

---

[37] Beatson, Henderson and Lindblom, "Collective Judging" (2020), at p.45.

[38] T. Roe, "Dissenting Judgments" (2015, 3HareCourt.com), at p.6.

[39] R. Munday, "'All for One and One for All': The Rise to Prominence of the Composite Judgment within the Civil Division of the Court of Appeal" (2002) 61(2) C.L.J. 321 at 340-341.

[40] Practitioner texts also share the view that dissent is allowed: Ormerod and Perry, *Blackstone's Criminal Practice* (2021), at para.D26.6; S. Holdham and A. Beldam, *Court of Appeal Criminal Division: A Practitioners' Guide* 2nd edn (London: Sweet & Maxwell 2018), at para.2-008.

[41] Munday, "The Composite Judgment" (2002), at 340-341.

Munday was, of course, right on the practice of the Criminal Division, but the focus of this section is to establish whether dissent is lawful, not whether it is practised.[42]

The Senior Courts Act 1981 was consolidating legislation. Both parliamentary debate on and cases under the preceding legislation reaffirm that judges in the CACD may dissent in certain circumstances. Section 1(5) of the Criminal Appeal Act 1907 was to the same effect as section 59 of the 1981 Act: the Court of Criminal Appeal would give a single judgment unless the Court directed it was convenient to have separate judgments. This exception was the result of a parliamentary amendment proposed by Sir John Walton, the then Attorney General.[43] Before amendment, clause 1(4) had prohibited dissent: "no judgment with respect to the determination of any question shall be separately pronounced by any other member of the court."[44] We will examine the Government's reasons for seeking to limit dissent in section 4(ii) below. For now, it is sufficient to note section 1(5) of the Act was designed to allow for dissent.

Dissenting judgments, though rare, were given under section 1(5). In *Kerr*, the dissent concerned whether there was sufficient evidence to leave a charge of conspiracy to commit murder to the jury.[45] In *Norman*, the Lord Chief Justice, with seven justices concurring, held it is always a question for the jury whether a person was a habitual offender regardless of whether they had previously been found to be so or not.[46] Avory J., with three other justices, dissented, reasoning that once a person had previously been classed as a habitual offender this was conclusive.[47]

The Court of Criminal Appeal was replaced by the CACD through the Criminal Appeal Acts of 1966 and 1968.[48] Section 2(4) of the 1966 Act was to the same effect as section 1(5) of the

[42] Cf. D.S. Davies, "The Court of Criminal Appeal: The First Forty Years" (1951) 1(6) J.Soc'y.Pub.Tchrs.L. 425 at 440.

[43] HC Deb 9 July 1907, vol 178, cols 1061-1062.

[44] Criminal Appeal Bill HC Bill (1907) [264], as amended by Standing Committee B, vol.1. pp.575-576.

[45] (1921) 15 Cr.App.R 165. s.1(5) is unmentioned in *Kerr*. In the later case of *Norman*, Avory J. confirmed both dissents were given under the section: (1925) 18 Cr.App.R. 81, at 99. Avory J. sat in both cases.

[46] *Norman* (1925) 18 Cr.App.R. 81, at 96.

[47] *Norman* (1925) 18 Cr.App.R. 81, at 97. See also the multiple judgments in *Head* [1958] 1 Q.B. 132; [1957] 3 All E.R. 426 (CCA) and the dissent of Thesiger J concerning the admissibility of oral statements in *Customs and Excise Commissioners v Harz* [1967] 1 A.C. 760; [1967] 1 All E.R. 177 (CA).

[48] See generally, Pattenden, *English Criminal Appeals, 1844-1994* (1996), at pp.34-42.

1907 Act. In turn, the 1966 Act was repealed by the Senior Courts Act 1981[49] and the present section 59 replaced the old section 2(4). The clause corresponding to section 59 did not draw comment in the Memorandum to the Bill nor was it contentious in the relevant Standing Committee.[50] Section 59 was not intended to prohibit dissent. To the contrary, it was designed to retain the status quo. The 1981 Act itself and its history point in the same direction: a judge in the Criminal Division may, under certain circumstances, dissent.[51]

But what are these circumstances? The presiding judge must state: 1. there is a question of law and 2. it is convenient for separate judgments to be pronounced on it. With regard to the first criterion, in a trial on indictment, questions of fact tend to be for a jury such as whether they are satisfied to the relevant standard that the matter at issue occurred.[52] Questions of law are for the judge such as on the substantive law governing the charges; the burden and standard of proof; submissions of no case to answer and leave to appeal. The focus here is on dissents on questions of law. It is thus beyond the scope of the article to examine whether dissents on question of fact ought to be allowed. Though it is worth noting that the divide may reflect the general deference of appellate courts on findings of fact. Reasons suggested for this deference include protecting the constitutional role of the jury, the advantageous position of the initial fact finder, the need for finality and resource concerns.[53]

To allow for dissent on a question of law, the presiding judge must state that separate judgments are convenient. When then will separate judgments be convenient? In Parliamentary debate on the 1907 Bill, the Attorney General stated that occasionally separate judgments may show a need for further legislation.[54] Presumably the minority judgment would indicate the need for reform by detailing issues of clarity or fairness raised by the

[49] S.152(4) and sch.7. (Then named the Supreme Courts Act 1981).

[50] *Explanatory and Financial memorandum to the Supreme Court Bill*, at pp.i-iii; SC Deb (B), 17 June 1981, col 372.

[51] Section 59 is thus not a complete prohibition on dissent. The constitutionality of such a prohibition has been considered in the US by R.K. Little, "Reading Justice Brennan: Is There a 'Right' to Dissent?" (1999) 50 Hastings L.J. 683. For commentary on the position in Australia, see A. Lynch, "Is Judicial Dissent Constitutionally Protected? (2004) 4 Macquarie L.J. 81.

[52] Ormerod and Perry, *Blackstone's Criminal Practice* (2021), at paras F1.37-43. A full analysis of the fact / law divide is beyond the scope of this article. See generally, T. Endicott, "Questions of Law" 114(Apr) L.Q.R. 292.

[53] R. Pattenden, "The Standards of Review for Mistake of Fact in the Court of Appeal, Criminal Division" [2009] (1) Crim. L.R. 15 at 26-29.

[54] HC Deb 9 July 1907, vol 178, col 1061.

majority's reading of the relevant law. Regardless, the resulting amendment introduced the broad language of "convenience" that on its face extends beyond dissent aimed to stimulate legislative reform.

The convenience standard is underexamined in practice but that case law which does exist indicates it is not particularly high. The test for separate judgments was not addressed in *Norman* but only acknowledged in a footnote.[55] In *Commissioners of Customs and Excise v Harz*, the Court of Criminal Appeal did not go beyond stating the test, and thus the convenience standard, was satisfied.[56] In *Kerr*, Darling J. writes, "One member of this Court does not agree with my opinion. That being so the members will at my request express their separate opinions, as the difference is purely on a point of law."[57] This may be read to suggest disagreement per se is sufficient to satisfy the convenience standard. By comparison, in *Head*, Lord Goddard C.J. indicated something more was required: "This case is one of such importance that the court deems it convenient that they should exercise their powers under section 1(5) of the Criminal Appeal Act, 1907, and two judgments will be delivered."[58] The better view appears to be that something more than mere disagreement is required. Otherwise, the convenience standard would be stripped of meaning. Yet this does not necessitate the standard is hard to satisfy. R.E. Megarry reports an example where the Court of Criminal Appeal gave multiple judgments in the belief it was the Divisional Court, which led Lord Goddard C.J. to later remark "the Court better say in the present case that they considered it convenient to do so."[59]

At this point *CPS v Eastenders Cash and Carry Plc* should be noted.[60] The CACD examined who ought to pay the costs and expenses of a receiver who had been appointed under an order that was later quashed. There were three possibilities: the companies, the CPS or the receiver.

---

[55] *Norman* (1925) 18 Cr.App.R. 81 at 99.

[56] [1967] 1 A.C. 760, at 765-766 (CCA). See also, *Attorney-General for Northern Ireland's Reference (No 1 of 1975)* [1976] NI 169 at 173 (NI CCA).

[57] *Kerr* (1921) 15 Cr.App.R 165 at 168 (CCA).

[58] [1958] 1 Q.B. 132 at 137 (CCA). Pattenden suggests the convenience standard was met due to the "disturbing facts" of the case: Pattenden, *English Criminal Appeals,1844-1994* (1996), at p.123.

[59] R. Megarry, *A New Miscellany-at-Law: Yet Another Diversion for Lawyers and Others* (Oxford: Hart, 2005), at p.76. The case is also discussed in R.E. Megarry, "Dissenting Reasons in the Judicial Committee" (1998) 114(Oct) L.Q.R. 574 at 577-578.

[60] [2012] EWCA Crim 2436; [2013] 1 W.L.R. 1494.

At first instance, Underhill J. had held that it would be a breach of the companies' right to the peaceful enjoyment of their property to impose an order allowing the receiver to take payment from their assets but that it would be to replace one injustice with another to deny the receiver renumeration. Underhill J. proceeded to find that the Proceeds of Crime Act 2002 may be read, relying on the Human Rights Act 1998, so as to impose liability for the receiver's costs and expenses onto the CPS.[61] The Court of Appeal unanimously held that the Proceeds of Crime Act could not be read in this manner.[62] Mitting J. and Edwards Stuart J. held that the companies' right to peaceful enjoyment of their property would be breached by an order allowing the receiver's costs and expenses to be taken from their assets.[63] By comparison, Laws L.J. maintained an order allowing the receiver's costs and expenses to be recovered from the companies would not breach their rights.[64]

For present purposes, the importance of *Eastenders* is not in its substance but in the fact that it contains a dissent in the CACD. The case though must be treated with some caution. Yes, it does provide support for the argument that judges in the CACD may dissent but there are a couple of unusual features of the case. First, in substance, *Eastenders* concerned property rights and fair renumeration. The case was later resolved in the Supreme Court with reliance on the principles of unjust enrichment.[65] Secondly, neither the judgment nor the dissent engage with the criteria in section 59 of the Senior Courts Act 1981. Indeed, neither speech cites the section. The Court did not indicate that it appreciated the extraordinariness of dissenting in the CACD. *Eastenders* supports the conclusion that judges may dissent in the CACD, but this conclusion is better built on section 59 and its history.

Under section 59 of the 1981 Act, the starting point is that there will not be a dissent in the CACD. Where there is a certain level of disagreement on a question of law dissent is possible.[66] This level is hard to pin down, but more than minor disagreement seems to be

[61] Discussed in the CACD at [2012] EWCA Crim 2436 at [23]-[27].

[62] [2012] EWCA Crim 2436 at [69]-[71] (Laws L.J.) and [84] (Mitting J. and Edwards-Stuart J.).

[63] [2012] EWCA Crim 2436 at [75]-[84] (Mitting J. and Edwards-Stuart J.).

[64] [2012] EWCA Crim 2436 at [56]-[67] (Laws L.J.).

[65] *Barnes v Eastenders Cash & Carry Plc* [2014] UKSC 26; [2015] A.C. 1 at [97]-[116].

[66] In Canada, the Supreme Court has stated the convenience threshold limits separate judgments to those cases where a dissent would be in the interest of justice: *Davis v the King* [1924] SCR 522 at 527; 1924 Carswell Que 72 at [11] (Supreme Court of Canada). In South Australia, a similar provision has been suggested to be a presumption against dissent, which required "something more than mere disagreement; it demanded some

required. Some types of disagreement that are likely to meet the standard are disagreement that indicates the need for legislation, disagreement on a core criminal law concept, disagreement informed by conflict in prior case law, and disagreement where the answer would have a substantial impact for a large number of defendants. As will be seen this means the statutory requirements for separate judgments do not form an obstacle to the overarching argument developed in later sections: where there is important disagreement on a question of law on a strong bench of the CACD the minority ought to dissent.

3. The value of dissent

Dissent is lawful in the CACD in certain circumstances, but would it be of value in practice? This section draws reasons in favour of dissent from academic writing and judicial commentary.[67] It also assesses the relevance of these reasons for the Criminal Division. The reasons given speak strongly to the value dissent would have in the CACD.

i. Judicial independence

Judicial independence not only entails the institutional independence of the judicial branch; it also requires that individual judges are free to reach a decision in accordance with their view of the law.[68] If a judge who disagrees with their colleagues must acquiesce and share in a unanimous judgment, can they be described as independent?[69] In Australia, Chief Justice Kiefel has recently averred that "the common law ideal of independence of thought is still strongly felt...There is no sense of obligation felt to achieve a collective decision in every

---

particular intensity in the divergence of views." J. McIntyre, "In Defence of Judicial Dissent" (2016) 37 Adelaide L.R. 431 at 446-447.

[67] For a useful appraisal of various benefits of dissent, see McIntyre, "In Defence of Judicial Dissent" (2016) at 438-441. For consideration of dissent and deliberative democracy, see K.M. Stack, "The Practice of Dissent in the Supreme Court" (1996) 105 Y.L.J. 2235.

[68] M. Arden, "Judicial Independence and Parliaments" in K. Ziegler, D. Baranger and A.W. Bradley (eds), *Constitutionalism and the Role of Parliaments* (Oxford: Hart, 2006), at pp.391-393; R. Brody (ed), *The Independence of Judges and Lawyers: A Compilation of International Standards* (Centre For the Independence of Judges And Lawyers, Bulletin N. 25-26, 1990), at p.60; M. Elliott and R. Thomas, *Public Law* 4th edn (Oxford: Oxford University Press 2020), at pp.292 and 297-298.

[69] Cf. R. Munday, "Judicial Configurations: Permutations of the Court and Properties of Judgment" (2002) 61(3) C.L.J. 612 at 636: "The common-law judge's capacity to speak his mind attains possibly its strongest form in the right to dissent."

case."[70] Indeed, Kiefel C.J. suggests the obligation is in the other direction: "Generally speaking if an appellate judge cannot agree with the view of the majority, it is his or her duty to dissent."[71] More challengingly, Justice Heydon has described any step to conceal judicial disagreement as "the most insidious of threats to judicial independence" and judges who take such steps as "the enemy within".[72] Where an individual judge cannot dissent, the threat to independence is twofold: they are prohibited from expressing their view on how the law applies; and, perhaps more troublingly, they must represent a view that they do not hold as their own.[73]

There is something stirring in the above quotations and in the image of a judge standing alone calling the law as they see it. However, another image can also be drawn. Sometimes judges may have marginally different views, but for all intents and purposes agree on an outcome. In such circumstances, the image may change from that of a strong independent judge, to a self-indulgent judge risking both clarity in law and professional tension.[74] A right to dissent grounded in judicial independence may risk misuse on occasion. But this does not sink the argument from independence. First, judges should not be assumed to be unaware of practical considerations when writing judgments.[75] Secondly, it would be an overcorrection to prohibit dissent because of the possibility of occasional misuse.

The argument for dissent from judicial independence has a clear presumptive relevance in the CACD: there, as elsewhere, judges may disagree on the law or its application. A total

[70] S. Kiefel, "An Australian Perspective on Collective Judging" in Häcker and Ernst, *Collective Judging* (2020), at p.56. See also, R.B. Ginsburg, "The Role of Dissenting Opinions" (2010) 95(1) Minnesota L.R. 1, at 3; A. Scalia, "Dissents" [1998] (Fall) OAH Magazine of History 18, at 19; L'Heureux-Dube, "The Dissenting Opinion" (2000) at 513.

[71] Kiefel, "An Australian Perspective on Collective Judging" (2020), at p.54. See also M. Kirby, "Judicial Dissent – Common Law and Civil Law Traditions" (2007) 123(Jul) L.Q.R. 379 at 396-397.

[72] J.D. Heydon, "Threats to Judicial Independence: The Enemy Within" (2013) 129(Apr) L.Q.R. 205, at 221-222. On the context of the article and the judicial debate to which it gave rise, see McIntyre, "In Defence of Judicial Dissent" (2016) at 434-438.

[73] The conception of judicial independence relied on here is rooted in the common law tradition. For subtle discussion of dissent and independence in the common and civil law traditions, see N. Duxbury, *The Intricacies of Dicta and Dissent* (Cambridge: Cambridge University Press, 2021), at pp.143-152.

[74] Cf. J. Lee, "A Defence of Concurring Speeches" [2009] (Apr) P.L. 305.

[75] R.A. Posner, *How Judges Think* (Cambridge, Mass, HUP 2008) pp.30-33.

prohibition on dissent would undermine judicial independence.[76] Too ingrained a culture against dissent may also pose a significant threat. Several context specific points do, however, require particular attention to include the differing seniority and experiences of judges in the CACD. We will return to such points in section 4.

ii. Setting a direction for future decisions

In the context of apex courts, a dissent can function as an appeal to a future lawmaker by exposing weaknesses in legal reasoning.[77] This point has more weight in the context of an intermediate appellate court. The dissent is not as speculative an endeavour contingent on changing judicial attitudes or the whims of a legislator. Instead, the dissent may offer a plausible alternative to the apex court. Justice Kirby writes:

> "The expression of minority legal views at the trial, or in an intermediate appellate court are immensely useful to final courts of appeal. They identify and sharpen issues of legal doctrine that may require attention higher in the judicial hierarchy. Indeed, they can assist in opening the door to further consideration, which the suppression of dissent and of heterodox views serves to mask and keep from further attention."[78]

The absence of dissent in the CACD may then deny opportunity and insight to the Supreme Court. But could the CACD secure the benefit of setting a future direction without issuing separate judgments? The Court could write that there was considerable merit in view A, but on balance view B was preferred. Such judgments could become difficult to draft if there were multiple points of difference in the judges' views. For instance, in the Civil Division in *Ivey*, concerning whether a gambler had cheated, Arden L.J. and Tomlinson L.J. gave

[76] This view is predicated on the assumption that there would be judges who held different views from those they sat with. For judicial remarks that suggests this is the case on the CACD, see P. Darbyshire, *Sitting in Judgment: The Working Lives of Judges* (Oxford: Hart 2011), at p.339; Lord Neuberger MR, "Developing Equity" (2012) at para 20*; Bingham, The Rule of Law* (2011), at p.44.

[77] L'Heureux-Dube, "The Dissenting Opinion" (2000); Alder, "Dissents in Courts of Last Resort" (2000), at 241; W.J. Brennan Jr., In Defense of Dissents (1986) 37 Hastings L.J. 427, at 438; Duxbury, *Dicta and Dissent* (2021), at pp.172-175. As an example, see, Lord Aitken's dissent in *Liversidge v Anderson* [1942] A.C. 206 at 225-247; [1941] 3 All E.R. 338 at 349-363 and its later acceptance in *Inland Revenue Commissioners v Rossminster Ltd* [1980] A.C. 952 at 1011; [1980] 1 All E.R. 80 at 93.

[78] Kirby, "Judicial Dissent" (2007) at 396.

different reasons for dismissing the appeal, and Sharp L.J. would have allowed the appeal.[79] In addition, any such judgment containing disagreement may not have quite the same capacity to signal that a case should be heard by the Supreme Court.

iii. Clearer judgments? Clearer law?

The capacity to dissent may make judgments clearer because there is no need for ambiguity to achieve compromise.[80] Additionally, a dissent may be of wider value as an alternative to deciding the case on a more fact specific point to avoid, or hide, an important disagreement.[81] Dissent may also be a threat to clarity in law because it leaves open the possibility of future challenge.[82] In a mid-level court this could result in uncertainty in the case at hand (will there be an appeal?)[83] and beyond (does a two-one split leave lingering uncertainty in the law?). Matthew Dyson conveys this dual character of dissent well:

> "If judges pull in different directions, having a single judgment as a harness might give a single direction; though none of them might be happy with that aggregate direction. It is also possible that a single statement which commands respect might be too vague or fail to resolve the underlying tension and leave too few clues for the future."[84]

Dissent may allow for clarity but may also risk unclarity. How then are we to know when a particular dissent would be beneficial? It can be hard to say in the abstract. As Lord Reed puts it:

---

[79] *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)* [2016] EWCA Civ 1093; [2017] 1 W.L.R. 679.

[80] For an example of a compromise in the House of Lords that was later accepted to have caused uncertainty, see *Kay v Lambeth L.B.C.* [2006] UKHL 10; [2006] 2 A.C. 465 and the discussion in Paterson, *Final Judgment* (2013), at p.137.

[81] Or to "go small": R. Reed, "Collective Judging in the UK Supreme Court" in Häcker and Ernst, *Collective Judging* (2020), at p.32.

[82] The command paper that preceded the creation of the CACD was more swayed by the clarity of a single judgment though its approach is largely declarative: Lord Chancellor's Office and Home Office, *Report of the Interdepartmental Committee on the Court of Criminal Appeal* (HMSO 1965, Cmnd. 2755), at paras 246-251.

[83] Though this point is less compelling in the particular context of the CACD given the Court's important role in determining which cases receive leave to appeal to the Supreme Court. The test for leave is appraised in section 4(v).

[84] M. Dyson, "Beyond Anecdote and Synecdoche" in Häcker and Ernst, *Collective Judging* (2020), at p.337.

> "It is a question of judgement whether the best solution in a particular case is to acknowledge the division on the court by issuing majority and concurring or dissenting judgments, or to issue a judgment which is more vaguely expressed and leaves the contested issue open for further argument in another case."[85]

Yet dissent must be an option for such judgements to be made. Without the practicable option to dissent we risk unruly compromise where separating the voices of judges would promote clarity.

Fagan, a Divisional Court case, is a useful example of how dissent can promote clarity in the case at hand and the law in general.[86] Fagan inadvertently drove onto a police officer's foot and intentionally delayed driving off it. Had Fagan assaulted the officer? The majority held an assault cannot be committed by an omission (the failure to drive off the foot), but that Fagan had undertaken a "continuing act" by staying on the officer's foot. In consequence, Fagan satisfied the actus reus and mens rea of the offence contemporaneously and his conviction was upheld. Dissenting, Bridge J agreed an assault could not be committed by an omission, but, despite his deplorable behaviour, Fagan had not undertaken an act by remaining on the officer's foot; he thus did not satisfy the requirement of contemporaneity of actus reus and mens rea. This was a substantial disagreement, but the availability of dissent meant the judgment, and the disagreement itself, are quite clear.

The dissent in *Fagan* also proved of value in the later Court of Appeal and House of Lords judgments in *Miller*. Miller fell asleep with a lit cigarette; awoke to see the mattress he was on smouldering; but then went to sleep in another room. The question was whether a link could be made between the unintentional act of setting the mattress on fire and the failure to act having later realised the situation. May L.J. paid close attention to *Fagan* in his judgment. His Lordship agreed with the result of the majority, but accepted a failure to move the car was an omission stating, "it is unreal to describe it as any more than that."[87] This led to a suggested alternative approach of whether D could be said to have "adopted" what he had

[85] Reed, "Collective Judging" (2020), at p.32. See also, L. Blom-Cooper and G. Drewry, *Final Appeal: A Study of the House of Lords in its Judicial Capacity* (Oxford: Clarendon Press, 1972), at p.87.

[86] [1969] 1 Q.B. 439; [1968] 3 All E.R. 442 (DC).

[87] *Miller* [1982] Q.B. 532 at 540; [1982] 2 All E.R. 386 at 392 (CA). The Court also placed weight on Glanville William's criticism of *Fagan in* G. Williams, *Textbook of Criminal Law* (London: Stevens & Sons, 1978), at pp.143–144.

done earlier through his later actions.[88] Adoption was said to be a less "artificial" means to achieve the result the majority had reached in the Divisional Court.[89] The development of this approach, so reliant on the judgment and dissent in *Fagan*, led to Miller's appeal being dismissed. The House of Lords also engaged with *Fagan* when it dismissed Miller's appeal. Lord Diplock made clear his preference for an account that turned on the responsibility of D to act as opposed to one based on a continuous act.[90] Read together, *Fagan* and *Miller* show an approach to issues of contemporaneity of actus reus and mens rea that becomes more refined. The dissent in *Fagan* had an important role in signalling the need for such refinement. More generally then, the cases demonstrate dissent can bring clarity in the case at hand and be of wider value in drawing attention to an issue of law that requires further attention.

Fagan was a judgment of the Divisional Court and was thus a mid-level appeal on a point of criminal law.[91] It indicates the CACD too could use dissent to bring clarity to the case at hand and the law. A counterargument would be that a judgment of the CACD could achieve clarity without dissent. As per the above section, it is of course possible two alternative positions could be set out and the Court could say which it preferred, though this may be harder when the judges hold fundamentally different perspectives or when there are multiple points of disagreement. There would also be something jarring in a unanimous judgment in *Fagan* that 1. accepted there is good reason to be sceptical of the continuous act approach and 2. upheld Fagan's conviction in reliance on this approach. It is here important to reaffirm that the point is not that dissents will always promote clarity. More conservatively, if dissent is unavailable, it may leave the reasoning in the case at hand harder to discern and veil important complexities in law.

Draft dissents

Permitting dissent could also allow for draft dissents that offer a number of advantages. First, such drafts may be written to convince those initially of another perspective to move from the

[88] *Miller* [1982] Q.B. 532 at 540-541 (CA).

[89] *Miller* [1982] Q.B. 532 at 540 (CA).

[90] *Miller* [1983] 2 A.C. 161 at 178-179; [1983] 1 All E.R. 978 at 983 (HL).

[91] On the confusing structure of criminal appeals, see Spencer "Does our Present Criminal Appeal System Make Sense?" [2006].

provisional majority.[92] On the UK Supreme Court the norm is for dissenters to wait until a draft judgment has been circulated before they circulate their draft, but "a dissenter will sometimes issue a judgment very quickly, hoping to persuade the other members of the court."[93] On the US Supreme Court, it has been estimated that up to four times a term a draft dissent would be so persuasive so as to become the opinion of the Court.[94] Draft dissents then can bring out important points of principle,[95] or a different perspective that was underappreciated or uncrystallized in any earlier exchanges.

Secondly, where a draft dissent does not become a majority judgment, it may still strengthen the judgment of the court.[96] Lord Neuberger gives *R (Miller) v Secretary of State for Exiting the European Union* as an example.[97] His Lordship states that the draft dissents "inevitably contained expressed or implied criticisms of the majority judgment. Some of those criticisms were then accepted and others were then answered in a revised version of the majority judgment, which, whether you agree with it or not, was definitely an improvement on the first draft."[98]

The benefits of draft dissents would seem to transfer readily to the CACD. If dissents were accepted, a draft dissent could replace a provisional majority judgment or could improve the argument therein.[99] The benefits should not, however, be overstated. First, as will be discussed in section 4(vi), the majority of CACD judgments are handed down ex tempore. Secondly, even where a judgment is reserved, the choice is not between draft dissents and no interaction during judgment writing. Judges do meet to discuss provisional views on cases

[92] See also Dyson, "Beyond Anecdote and Synecdoche" (2020), at pp.335-336.

[93] Reed, "Collective Judging" (2020), at p.31.

[94] Ginsburg "Dissenting Opinions" (2010) at 4.

[95] Posner, *How Judges Think* (2008), at p.31.

[96] See also L'Heureux-Dube, "The Dissenting Opinion" (2000) at 515. Note "may" is important here; the majority will not necessarily engage effectively with a dissent: R. George, 'In Defence of Dissent: *R (McDonald) v Royal Borough of Kensington and Chelsea*' [2011] (Oct) Fam.L. 1097.

[97] [2017] UKSC 5; [2018] A.C. 61.

[98] D. Neuberger, "Twenty Years a Judge: Reflections and Refractions" (Neil Lecture 2017) paras 44-46. See also Ginsburg "Dissenting Opinions" (2010) at 3.

[99] Darbyshire's important empirical work on the practices of CACD judges does not suggest they produce draft dissents: Darbyshire, *Sitting in Judgment* (2011), ch.14. Neither is this suggestion made in the recent commentary of Beatson, Henderson and Lindblom, "Collective Judging" (2020). More is said on the working practices of the Court in section 4(vi)-(vii) below.

and drafts are emailed between the bench.[100] Discussion of a case or correspondence as a draft develops may work to increase the quality of a judgment and tease out different perspectives. A draft dissent is best seen as additional to any preliminary engagement when judgment is reserved. Sometimes an argument must be drafted fully for its strengths and weaknesses to be appreciated. Again, to quote Lord Neuberger:

> "There is, I think, no better way to test and improve a judgment one has written than to read a colleague's judgment which not merely supports the opposite conclusion, but answers the points made in one's own judgment."[101]

It thus appears the CACD has deprived itself of a valuable means to evaluate and enhance the quality of its judgments.

iv. Dissent and unanimity

The possibility of dissent increases the value of unanimous judgments. Judges who were free to reach a different outcome did not. This unanimity can be used to provide a strong statement of what the current law is or its application on particular facts.[102] On the Civil Division, Beatson, Henderson L.J. and Lindblom L.J. write, "Although, as a matter of precedent, a judgment of the Court carries no extra authority, it is in practice likely to carry more weight, or at least be perceived to do so, in cases of unusual sensitivity or public significance."[103] By comparison, where there is no practice of dissent, claims of unanimity have greatly reduced value.[104] The choir cannot be a powerful contrast to the soloist when there are no solos. If the CACD was to take on a practice of dissent, unanimity would have real value.[105]

4. Impediments to dissent

[100] Beatson, Henderson and Lindblom, "Collective Judging" (2020), at p.45.

[101] Neuberger "Twenty Years a Judge" (2017) at para.44. See also the remarks of an anonymous Law Lord in, Paterson, *Final Judgment* (2013), at p.98.

[102] A recent criminal law example is *Jogee* [2016] UKSC 8; [2017] A.C. 387.

[103] Beatson, Henderson and Lindblom, "Collective Judging" (2020), at p.42. see also Munday, "The Composite Judgment" (2002), at 331-333.

[104] J. Lee, "Collegiality and Collectivity in Common Law Courts" in Häcker and Ernst, *Collective Judging* (2020), at pp.310-311.

[105] On the, limited, role of judgments of the Court in the Criminal Division, see Munday, "The Composite Judgment" (2002) at 342-345.

In certain circumstances dissents are lawful in the CACD and important benefits of dissents would be applicable in the Court. Yet these considerations alone are insufficient to conclude judges should dissent in the Criminal Division. There may well be reasons which explain the absence of dissent.[106] I first examine the rationale for limiting dissent put forward during parliamentary debate of the 1907 Bill. Having found it questionable and dated, I turn to six other possible factors. The first two relate to the law considered by the CACD: the substance of the criminal law and certainty in criminal law. The next two are plausible alternatives to dissent: the Court's rules on stare decisis, and the ability to relist or certify a point of law. The last two relate to the administration of the Court: the workload of the CACD and the make-up of benches. Though a number of these factors speak, and speak strongly, against the overuse of dissent, they are insufficient to rationalise the lack of dissent in the CACD particularly when a "strong court" is convened.

Given the importance of the concept of a "strong court" to the argument, it is worth commenting briefly on its meaning. The term has been used by the CACD and its predecessors;[107] by the Supreme Court and House of Lords;[108] and widely in academic commentary.[109] It is a relative concept. A strong court is distinguished from a standard court by the number of judges who sit, the expertise of those judges and/or their experience. So, if a "standard" bench of the CACD consists of three judges one of whom is an L.J., a strong court may contain five judges; The L.C.J. and two L.J.s; or three criminal law experts.

---

[106] The reasons against dissent should not be presumed to be universal. On the absence of dissent in the CJEU, for instance, see A.S. Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: OUP, 2000), at p.145; T. von Danwitz, "Collective Judging in the Court of Justice of The European Union" in Häcker and Ernst, *Collective Judging* (2020), at pp.264-265.

[107] *Barber* [2009] EWCA Crim 774 at [11]; *Draper* [2008] EWCA Crim 3206 at [5]; *Boyle* [1914] 3 K.B. 339 at 343; (1914) 10 Cr.App.R. 180 at 190 (CCA); *Brown (1889)* 24 Q.B.D. 357 at 359 (CCR).

[108] *Jogee* [2016] UKSC 8 at [34] and [72]; *Hinks* [2001] 2 A.C. 241 at 247; [2000] 4 All E.R. 833 at 838 (HL); *Preston* [1994] 2 A.C. 130 at 169; [1993] 4 All E.R. 638 at 669 (HL); *Moloney* [1985] A.C. 905 at 921; [1985] 1 All E.R. 1025 at 1033 (HL).

[109] M. Dsouza, "Intoxication, Psychoses, and Self-defence: Evaluating Taj" [2018] (9) Arch. Rev. 6 at 7; A. Ashworth, "The Evolution of English Sentencing Guidance in 2016" [2017] (7) Crim. L.R. 507 at 516-517; R. Buxton, "Jogee: Upheaval in Secondary Liability for Murder" [2016] (5) Crim. L.R. 324 at 325; D. Thomas, "Sentencing: Confiscation Order – Money Laundering and Related Offences - Extent of Benefit" [2009] (5) Crim. L.R. 363 at 368; D. Ormerod, "Custody Time Limits" [2004] (10) Crim. L.R. 839 at 840; P. Roberts, "Towards the Principled Reception of Expert Evidence of Witness Credibility in Criminal Trials" (2004) 8(4), International Journal of Evidence & Proof 215 at 224.

i. The 1907 Bill debate

The Government's reason for a general restriction on dissent in the Court of Criminal Appeal was reported by the Attorney General as follows: "the executive, in the execution of a sentence, should have the full support of the tribunal."[110] This reasoning requires scrutiny. First, it approaches circularity by offering the need for full support in execution of a criminal sanction as the reason for no dissent in criminal matters. Secondly, it has troubling ramifications for judicial independence indicating a judge ought to support the coercive actions of the state even where they think these actions are without lawful basis. Thirdly, the reasoning is too narrow. What if D successfully appeals against conviction but one judge would have dismissed the appeal? What if the Attorney-General refers a point of law following an acquittal on indictment?[111] In either case there would not be a sentence to uphold. Fourthly, in reaching its position, the Government drew on the then practice of the Privy Council not to dissent. Yet the historic reason for a single judgment of the Privy Council was that its judgments were advice to the Monarch.[112] This was not the case with the Court of Criminal Appeal. In addition, dissent in the Privy Council has been possible since 1966.[113] The reasoning of the Government in 1907 was questionable and has since become dated. We can now turn to examine six other factors which may explain the absence of dissent in the CACD.

ii. The substance of the criminal law

James Lee has remarked that "the inherent controversiality of law is such that reasonable people, whether judges, lawyers or academics can sensibly disagree. 'Enforced unanimity' denies this innate quality of the law."[114] Is the criminal law any different? In other words, is there something in the substance of the criminal law which makes it less contentious? This argument ought to be given short shrift. Should factual consent to having your ear removed in

[110] HC Deb 9 July 1907, vol 178, col 1061. It is worth emphasising that at the time the sentence itself could be one of execution. The death penalty was later abolished: Murder (Abolition of the Death Penalty) Act 1965.

[111] As has since become possible under Criminal Justice Act 1972 s.36. Such an appeal cannot affect acquittal.

[112] Blom-Cooper and G. Drewry, *Final Appeal* (1972), at pp.110-111.

[113] Judicial Committee (Dissenting Opinions) Order 1966. On which see Megarry, "Dissenting Reasons in the Judicial Committee" (1998).

[114] Lee, "Concurring Speeches" [2009] at 327.

a tattoo parlour preclude liability for an offence against the person?[115] Should the CPS prosecute whistle-blowers?[116] Should a whole life order ever be imposed on those who commit an offence other than murder?[117] The criminal law is at least as controversial as other areas of law, and perhaps more so. Indeed, on the same day two benches of the CACD have handed down alternative judgments on the mens rea requirement of assault occasioning actual bodily harm.[118] If further evidence is needed, dissents have occurred on criminal law matters in the House of Lords,[119] the Supreme Court,[120] and the Divisional Court.[121] If there is a particular reason to disallow dissent in the CACD, it is not to be found in the substance of the criminal law.

iii. Criminal law and certainty

The criminal law then is contentious, but there may still be a justification for the absence of dissent related to its substance. Criminal law should be maximally certain.[122] Several reasons can be put forward for this proposition. First, respect for people as autonomous decision-makers requires that they can discern what the law is otherwise there is a risk they will fall into criminal liability as opposed to stepping into it.[123] Secondly, and relatedly, criminal law may have serious consequences for the defendant in terms of liberty and state censure.[124]

---

[115] *BM* [2018] EWCA Crim 560; [2019] Q.B. 1.

[116] Crown Prosecution Service, *Prosecuting Cases Where Public Servants Have Disclosed Confidential Information to Journalists* (Legal Guidance, 2019).

[117] *McCann (Attorney General's Reference No 688 of 2019)* [2020] EWCA Crim 1676; [2021] 4 W.L.R. 3.

[118] A. Ashworth and K. Campbell, "Recklessness in Assault - and in General?" (1991) 107(Apr) L.Q.R. 187 at 189. The issue was resolved by the House of Lords in *Savage* [1992] 1 A.C. 699; [1991] 4 All E.R. 698.

[119] *Brown* [1994] 1 A.C. 212 at 256-275 (Lord Mustill) and 275-283 (Lord Slynn); [1993] 2 All E.R. 75 at 100-117 (Lord Mustill) and 117-123 (Lord Slynn) (HL).

[120] *R (Stott) v Secretary of State for* Justice [2018] UKSC 59; [2020] A.C. 51 at [205]-[222] (Baroness Hale P.S.C.) and [223]-[248] (Lord Mance).

[121] *Fagan v Commissioner of Metropolitan Police* [1969] 1 Q.B. 439 at 446 (Bridge J.).

[122] See, for instance, *C v DPP* [1996] A.C. 1 at 28; [1995] 2 All E.R. 43 at 52 (HL); *Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234 (HL). On maximum certainty as opposed to total certainty, see J. Horder, *Ashworth's Principles of Criminal Law*, 9th edn (Oxford: OUP, 2019), at pp.81-84; W.O. Douglas, "The Dissent: A Safeguard of Democracy" (1948) 32 J. American Judicature Society 104 at 104.

[123] Horder, *Ashworth's Principles* (2019), at pp.81-84.

[124] A. von Hirsch, *Censure and Sanctions* (Oxford: OUP, 1993).

Thirdly, vague offences may empower state agents to apply the criminal law where it was not meant to apply.[125]

Would dissent in the CACD threaten certainty in criminal law? In the context of the Supreme Court, Lord Reed has said there are "strong reasons" for giving single judgments in criminal appeals rooted in the need to give "lower courts clear and unequivocal guidance".[126] His Lordship continues to write that this may lead to compromise, avoiding disagreement where possible, and, somewhat ironically, "greater indeterminacy".[127] Single judgments then can be both prioritised as a means for unequivocal guidance and a source of indeterminacy. This is not wholly surprising given much the same was concluded on dissents in section 3.

It is here important to draw out how dissent may pose a subtly different challenge to certainty in criminal law than agreed but vague rules. Judges may both disagree over a rule and be able to specify it quite clearly. Take, for instance, *BM* in which the CACD held factual consent to body modification, such as removing an ear or splitting a tongue, did not preclude liability for causing serious harm.[128] A dissenter could have challenged this conclusion on autonomy grounds and found body modification an exceptional category where factual consent to serious harm is relevant such as in surgery and boxing.[129] This would not leave the applicability of offences against the person unclear. Instead, such a dissent may have an important signalling function. Having argued respect for autonomy requires maximally certain criminal law, Jeremy Horder writes the criminal law may also achieve respect by aligning to moral distinctions understandable to lay people.[130] Yet sometimes criminal law cannot draw such distinctions because the status of an activity is contentious. Dissent in the

[125] W. Stuntz, "The Pathological Politics of Criminal Law" (2001) 100 Michigan L.R. 505. On article 7 of the European Convention on Human Rights and certainty in criminal offences, See A. Ashworth and M. Strange, "Criminal Law and Human Rights" [2004] (2) E.H.R.L.R. 121 at 124-125.

[126] Reed, "Collective Judging" (2020), at p.32.

[127] Reed, "Collective Judging" (2020), at p.32. See also, Munday, 'The Composite Judgment' (2002) at 341-342.

[128] [2018] EWCA Crim 560.

[129] The question would be one of law: does consent to body modification preclude liability for more serious offences against the person? A separate judgment may satisfy the convenience standard because it concerns the liberty of the defendant and others who have or may want to undertake similar body modification; it may indicate the need for legislative reform of offences against the person; and it concerns the core criminal law concept of consent.

[130] Horder, *Ashworth's Principles* (2019), p.151.

CACD may flag to the Supreme Court or Parliament the social contentiousness of, and the need for serious consideration of, a practice.

Further, we must not conflate the valuable end of certainty in criminal law with the costly means of hiding judicial disagreement. As a hypothetical, assume one of the judges in *BM* was of the view consent to body modification could preclude liability for more serious offences against the person. If they were unable to express this view, it would hide disagreement in a manner hard to reconcile with judicial independence. This hypothetical should not be ruled out as farfetched. A High Court judge has said of their experience on the CACD that "Internally you can be two-to-one but that's not revealed to the outside world".[131] The President of the Supreme Court has also candidly remarked: "[C]ompromise can result in greater indeterminacy, but where the court is divided on an important aspect of doctrine, that is not necessarily a bad thing."[132] Unreported disagreements happen and this can, in fact, affect certainty in law.

The above point bears emphasising. Hiding disagreement through a shared, and perhaps vaguer, judgment is not a costless means to promote certainty in law and it may also risk certainty by leaving important issues unresolved. Agreement through acquiescence and indeterminacy would be particularly troubling if one judge would have found for the defendant, or where vague agreement functioned to safeguard a problematic precedent drifting ever further from acceptability. To complete the *BM* hypothetical, perhaps a dissent could have led to a Supreme Court case which saw the defendant allowed to run a consent argument or even to reconsideration of the House of Lords' much-criticised judgment in *Brown*.[133]

Dissent does not have to leave a rule uncertain. Dissent may signal that an issue is contentious, and a Supreme Court judgment is needed. A unanimous judgment may hide important disagreement and risk uncertainty as opposed to promoting certainty. To these points it should be added that dissent on criminal law matters is also accepted in other courts.

[131] Darbyshire, *Sitting in Judgment* (2011), at p.339.

[132] Reed, "Collective Judging" (2020), at p.32.

[133] *Brown* [1994] 1 A.C. 212 (HL). Dissent would not obligate the CACD to grant leave. The test for leave is detailed in section 4(v) below. Yet if the CACD could agree on a question of law and the presiding judge had found dissent convenient, it would at least suggest a real possibility of leave being granted.

The case against dissent in the CACD founded on legal certainty then is not as compelling as it may initially appear.

iv. Stare decisis

It may be argued that prohibiting dissent is acceptable because of – or is mitigated by – the looser rules on stare decisis in the Criminal Division. As detailed in *Young v Bristol Aeroplane Company, Limited*, the Civil Division is bound to follow its previous decisions unless one of three exceptions applies.[134] By comparison, in the Criminal Division the rules on precedent are looser.[135] The rationale for this difference was given by Lord Goddard C.J. in *Taylor*:

> The Court of Appeal in civil matters usually considers itself bound by its own decisions… This court [the Court of Criminal Appeal], however, has to deal with questions involving the liberty of the subject, and if it finds, on reconsideration, that, in the opinion of a full court assembled for that purpose, the law has been either misapplied or misunderstood in a decision which it has previously given, and that, on the strength of that decision, an accused person has been sentenced and imprisoned it is the bounden duty of the court to reconsider the earlier decision with a view to seeing whether that person had been properly convicted. The exceptions which apply in civil cases ought not to be the only ones applied in such a case as the present…[136]

Yet the approach to stare decisis in the Criminal Division and its rationales are not an alternative to dissent. The rules on precedent may allow the Court to address historic errors, but that does not undercut the benefits of dissent such as additional clarity, signalling areas of law for development, and affirming judicial independence. In fact, it appears somewhat grating to have a norm against dissent on the current bench whilst allowing a future bench to depart.

v. Relisting case and certifying appeals

[134] [1944] K.B. 718 at 725-730; [1944] 2 All E.R. 293 at 298-300 (CA).

[135] *Taylor* [1950] 2 K.B. 368; [1950] 2 All E.R. 170 (CCA); *Gould* [1968] 2 Q.B. 65; [1968] 1 All E.R. 849 (CA); *Barton* [2020] EWCA Crim 575; [2020] 3 W.L.R. 1333; R. Cross and J.W. Harris, *Precedent in English Law* (Oxford: OUP 1991), at pp.154-156.

[136] *Taylor* [1950] 2 K.B. 368, at 371 (CCA). See also Cross and Harris, *Precedent in English Law* (1991), at pp.117 and 155-156.

We can now turn to two other plausible alternatives to dissent in the CACD: relisting cases to be heard by a different bench and certifying a point of law for an appeal to the Supreme Court. What these alternatives share is shifting the point of contention to another decision-maker, be it a different bench or a different court.

As per section 1, relisting is the statutory solution to disagreement on a two-judge sentencing appeal.[137] In *Shama*, Lloyd L.J. explained an appeal may also be relisted for another bench when a three-judge bench disagrees:

> "This case was called on before us on 20 July 1989. We heard full argument on that occasion on all points raised in the appeal. The court was not however unanimous. So on 31 July we directed that the appeal should be relisted for further argument. Our intention was that it should be re-argued de novo before another division of this court. There was a well established practice under which this used to be done, although there was never any statutory backing for the practice."[138]

The practice of relisting the case to be reargued before a "fuller court" was also acknowledged in the Donavon Report on the Court of Criminal Appeal.[139] A fuller court was said to usually be a five-judge court to include either three 3 L.J.s, or the L.C.J. and two L.J.s.

A situation may arise where an important point of law is raised on appeal, which the judges agree would be better dealt with by a strong court. In such, likely very rare, circumstances relisting seems appropriate regardless of whether the provisional view of the original bench was to agree or disagree on the substantive point.[140] This does not mean relisting is a plausible alternative to dissent in all cases. It will be argued below that the most appropriate bench from which to have a dissent is a strong one. Relisting would not be a solution where a strong court was formed to resolve an important point. What other bench could step in if

[137] Senior Courts Act 1981 s.55(5).

[138] [1990] 1 W.L.R. 661 at 663; [1990] 2 All ER 602 at 603 (CA). See also, *Healey* (1956) 40 Cr.App.R. 40 at 42 (CCA). Interestingly, *Shama* itself was reargued before the same bench: Munday, 'The Composite Judgment' (2002), at p.341.

[139] Lord Chancellor's Office and Home Office, *Report of the Interdepartmental Committee on the Court of Criminal Appeal* (1965), at paras 19 and 88. See also D.S. Davis "The Court of Criminal Appeal" (1951) at p.439.

[140] Emphasis should be place on how rare such relisting would be. In 1996, Pattenden described the process of relisting to resolve disagreement as "obsolete": Pattenden, *English Criminal Appeals,1844-1994* (1996), at p.40.

senior members of the Court of Appeal disagreed? In addition, where there to be such disagreement after argument before a senior bench, concern for judicial independence would indicate a dissent ought to be written.

An appeal to the Supreme Court from the CACD lies when three requirements are met:

> 1. The CACD or the Supreme Court gives leave;
>
> 2. The CACD certifies the decision involves a point of law of general public importance; and
>
> 3.The CACD or the Supreme Court (as the case may be) maintains the point ought to be considered by the Supreme Court.[141]

As with dissent, certifying can indicate uncertainty in law. Certifying would also allow for argument that could have been made in a dissent to be presented by the appellants in the Supreme Court. Yet the capacity to certify a point is not an adequate replacement for dissent. A judge with a different view on an important point that was destined for the Supreme Court should be free to dissent and not have to feign that their view was that of the majority. To hold otherwise would appear particularly hard to reconcile with judicial independence. The CACD would have accepted uncertainty in the law and through its own actions have precluded finality in the case at hand. Why then cover any important differences of view? Additionally, the Supreme Court would likely be in a stronger position to address the issue if a dissent was given because the possibility of a more indeterminate Court of Appeal judgment could be avoided. Dissent would also mean the Supreme Court would not incorrectly presume there had been agreement in the CACD. This is important because the balance of opinion in the courts below affects both which cases are given permission to appeal by the Supreme Court and the final outcome of the cases it does hear.[142] Neither the possibility of relisting a case nor certifying a point of law can explain or justify the absence of dissent in the CACD.

vi. Workload

[141] Criminal Appeal Act 1968 s.33(2).

[142] C. Hanretty, *A Court of Specialists: Judicial Behavior on the UK Supreme Court* (New York: OUP, 2020), at pp.74-75 and 255-257.

A significant impediment to dissent, in practice, may be the CACD's workload.[143] We must dispel the unreal image of the CACD preparing meticulously for an appeal, hearing from counsel for days, and then taking time to reflect, test ideas and draft a judgment. The argument for dissent would be easier in such a context, but that is not reality. The CACD, in the words of Robin Auld L.J., is "plainly overloaded."[144] The typical case load has been given as seven or eight appeals a day with brief morning discussion of the daily lists, judgments prepared before the hearing (occasionally with two alternative conclusions ready before meeting), and the majority of judgments then being handed down ex tempore.[145]

This reflects the earlier findings of an important study into the working lives of judges by Penny Darbyshire.[146] The study entailed shadowing and observing four L.J.s and interviews with four further L.J.s. Darbyshire found judges were working substantial hours with work over weekends and vacations the norm.[147] Judges routinely had twelve or more sentencing appeals in a single day, or eight sentencing appeals along with a case which raised a point of law. One L.J. interviewed by Darbyshire reported they had a record of having heard 16 sentencing appeals in a day.[148] In their 20-minute meetings before sitting, judges would share their provisional views on the cases on their daily list.[149] This is worth reiterating: views were shared on eight or more appeals in the space of 20 minutes. It is little wonder that the majority of appeals were dealt with ex tempore and reserving judgment was dreaded.[150]

This sketch of the working practices of the CACD may offer some explanation of why there have not been dissents previously and insight into a major impediment to future dissent. The judges do not have time. In a system with little time for discussion, which is based largely on ex tempore delivery of a substantial number of judgments, where would dissents fit in?

---

[143] Workload is not a new concern: Pattenden, *English Criminal Appeals, 1844-1994* (1996), at pp.56 and 124. For suggestions on how to ease this burden, see Spencer, "Does our Present Criminal Appeal System Make Sense?" [2006] at 692-694.

[144] Auld, *Review of the Criminal Courts of England and Wales* (2001), at p.644.

[145] Beatson, Henderson and Lindblom, "Collective Judging" (2020), at pp.44-45.

[146] Darbyshire, *Sitting in Judgment* (2011).

[147] Darbyshire, *Sitting in Judgment* (2011), at pp.327-330. See likewise Auld, *Review of the Criminal Courts of England and Wales* (2001), at pp.639 and 642-643.

[148] See also Auld, *Review of the Criminal Courts of England and Wales* (2001), at p.639.

[149] Darbyshire, *Sitting in Judgment* (2011), at p.336. Auld L.J. puts the length at about 15 minutes: Auld, *Review of the Criminal Courts of England and Wales* (2001), at pp.643-644.

[150] Darbyshire, *Sitting in Judgment* (2011), at pp.338-339 and 355.

Workload appears to speak strongly against dissent in the CACD. I offer two points in response: the first contextual and the second narrow.[151]

First, between 2014 and 2018 the Law Commission developed a Sentencing Code for England and Wales. Sentencing procedure had become near impenetrable due to the law being distributed across dozens of Acts, the frequency of substantial reform and the inconsistency of the method of reform. A central argument in favour of the Code was that it would reduce the risk of error in applying the law and therefore lower the numbers of appeals.[152] The Commission maintained that the Code would lead to a reduction in the number of sentencing appeals heard in the CACD.[153] It estimated around 30% of pre-Code appeals were the result of unlawfully imposed sentences and its best estimate was that this would be reduced to 10% after the Code came into force. The Commission also estimated a corresponding reduction in applications to appeal. In 2018-19, Hallett VP said the Code will "hopefully alleviate some of the pressures" on the CACD and suggested it will have an "undoubted positive effect".[154] Given the workload of the CACD and the proportion of its work that is sentencing appeals, any reduction that results from the recent enactment of the Code will be of real value.[155] For present purposes, the reform is important because to the extent one of the major obstacles to dissent is that the Court is too busy, its workload will hopefully soon decrease. Fewer appeals may leave more room for dissent. Though it should be recognised that any additional time may also become filled by other CACD work or sitting in other courts. Of more importance then may be the narrower response to the workload argument.

Secondly, it would be to overclaim to suggest that every case heard by the CACD is dealt with at manic pace. Some cases do require a full day or longer in argument and are heard by a strong bench.[156] The Registrar of Criminal Appeals looks out for "cases raising novel or

[151] See also the interesting effects of workload on dissent in the Supreme Court: Hanretty, *A Court of Specialists* (2020), at p.184. Individual workload had almost no effect on the likelihood of dissenting and a greater panel workload was associated with a *higher* likelihood of dissent.

[152] Law Commission, *The Sentencing Code Volume I: Report* (2018, HC 1724, Law Com No 382), at paras 1.33-1.34.

[153] Law Commission, *Sentencing Code: Impact Assessment* (2018), at pp.18-19.

[154] *Court of Appeal (Criminal Division) Annual Report 2018-19* (London: Judicial Office, 2020), at p.3.

[155] The Code was enacted as the Sentencing Act 2020.

[156] Beatson, Henderson and Lindblom, "Collective Judging" (2020), at p.45.

important points of law or procedure for inclusion in special or guidance courts" and such cases may be heard before a constitution of five judges.[157] Take for example *Barton*, in which the CACD had to consider the meaning of "dishonesty" in light of obiter comments in a Supreme Court judgment.[158] The bench was made up of the Lord Chief Justice, the President of the Queen's Bench Division, the Vice-President of CACD, and two High Court judges. As another example, the Lord Chief Justice, the President, and the Vice President again sat with two High Court judges in *McCann (Attorney General's Reference No 688 of 2019)*, which considered, amongst other things, the suitability of whole life orders in cases of serious sexual offending.[159] A whole life order has never been given for an offence other than murder. What if a member of the relevant bench did disagree on the meaning of dishonesty or was of the view that a whole life order should have been imposed?

There are practical considerations that stand against dissent in the vast majority of CACD judgments. Yet faced with an important question of law – the answer to which has significant ramifications for and beyond the parties to proceedings – a judge on the CACD should dissent where they cannot reach agreement with their colleagues. The general busyness of the Court does not preclude judges acting independently when an important point of law is raised. Cases which raise an important point may not be the mainstream of CACD's work, but they are also not limited to five judge benches. Take, for example, the infamous judgment of the Court in *Blackshaw* on the sentencing of those who had committed offences during the 2011 London Riots.[160] The bench was the then Lord Chief Justice, President, and Chairman of the Sentencing Council. Its strength lay in the judges who sat as opposed to their number. With the advantage of full argument, and time to consider their positions, there is a particularly compelling case for dissent on strong courts.

To promote occasional dissents on strong courts would not be to open the floodgates to dissents throughout the work of the CACD. Judges are pragmatic.[161] It is close to

[157] *Court of Appeal (Criminal Division) Annual Report 2019-20*, at p.8.

[158] *Barton* [2020] EWCA Crim 575 considering *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)* [2017] UKSC 67; [2018] A.C. 391.

[159] [2020] EWCA Crim 1676.

[160] *Blackshaw* [2011] EWCA Crim 2312; [2012] 1 W.L.R. 1126. More recently, *Chin-Charles* [2019] EWCA Crim 1140; [2019] 1 W.L.R. 5921.

[161] Posner, *How Judges Think* (2008), at pp.30-33; C. Sunstein, *Why Societies Need Dissent* (Cambridge, Mass: HUP, 2003), at p.182; Brennan, "In Defense of Dissents" (1986) at 435.

inconceivable that in practice an occasional dissent in a particularly important case could lead to the normalisation of dissents in the Court's regular ex tempore work. A freedom to dissent in an appropriate case is quite distinct from a norm of dissenting based on minor disagreement.

The workload of the CACD is an important structural impediment to the normalisation of dissent. There is insufficient time in the majority of appeals to write one judgment let alone a dissent. Yet when the Court does consider an important point of law it works in a different fashion. In such cases, the argument for dissent is stronger. It is to be hoped that the enactment of the Sentencing Code will also reduce the workload of the Court so as to alleviate some of the pressure on the CACD in general and, more relevantly, to set the stage for dissents in appropriate cases.

vii. Uneven benches

In the CACD, an L.J. may sit with a High Court judge and a Circuit judge. Could this difference in seniority provide a reason against dissent? As an example, what would be done if a presiding judge, who had less experience of the criminal law, disagreed with their more experienced junior colleagues? In a system that allowed dissent in practice, both the junior members of the bench and the senior non-specialist could make their positions and reasoning clear. By comparison, in our current system what would hold sway – seniority, majority, or expertise?[162] The point may become still more difficult if a senior and specialist L.J. disagreed with more junior colleagues. If more junior judges are trusted to agree with the presiding judge, they must also be trusted to disagree.[163] Yet this leaves us with another unappealing prospect: a senior and expert judge may have to join in a judgment when they disagree with the reasoning and the result.

In her study, Darbyshire did not find deference from High Court judges to L.J.s. In fact, the four L.J.s shadowed had extensive civil backgrounds and relied on High Court judges for

[162] Cf. Criminal Appeal Act 1907 s.1(4) which explicitly stated determination was by majority on the Court of Criminal Appeal. Though this was not always strictly construed: Lord Chancellor's Office and Home Office, *Report of the Interdepartmental Committee on the Court of Criminal Appeal* (1965), at paras 19 and 88. On the risks posed by uneven expertise in the Civil Division, see Drewry, Blom-Cooper and Blake, *The Court of Appeal* (2007), at pp.128-129.

[163] See the outlier case of *CPS v Eastenders Cash and Carry Plc* [2012] EWCA Crim 2436 discussed above. For a troubling suggestion to the contrary, see Brennan "In Defense of Dissents" (1986) at 429.

their knowledge of criminal law and procedure, and their trial experience.[164] In the ordinary run of matters then, it may be that the Court is best understood as stronger than the sum of its parts with each judge able to feed in different points of specialism; be it extensive experience of criminal trials or of appellate argument. Given the possibility of differing expertise on the Court, there is some force to the conception of crafting CACD judgments as a shared endeavour. This is not to rule out dissent, but to accept there are structural impediments to dissent in most cases. These impediments are less onerous where a strong court is convened. In such circumstances a panel of senior judges would sit to hear a point of law.[165] In such cases, the CACD could also adopt a process of judges reporting their views to each other in reverse seniority. This practice is already used in the Supreme Court and on occasion in the CACD.[166] As with the above section on workload, we are left with good reason against dissent in most CACD cases, but not where there is disagreement on a specially convened strong court.

5. The future of dissent

Judges sitting in the CACD may dissent on questions of law when the presiding judge states it is convenient to do so. There are also good reasons to dissent to include promoting judicial independence, producing clearer judgments, and setting a direction for law reform. This article is not a call for Criminal Division judges to take on a dissenting spirit every time they sit. There are also good reasons to limit dissent in the Court. Not least amongst these is the formidable workload of the CACD. The thought of dissent may be distant when a judge is in a twenty-minute meeting with their colleagues to set out their views on the eight cases on their daily list. Who has the time to write a judgment let alone a dissent? Yet the CACD also, on occasion, sits as a strong court to consider a particularly complicated or sensitive point of law. On such occasions, it is appropriate that, in the case of important disagreement, dissent should be allowed.

[164] Darbyshire, *Sitting in Judgment* (2011), at pp.337-338.

[165] In the Supreme Court, less senior justices may be more likely to dissent: Hanretty, *A Court of Specialists* (2020) at p.184.

[166] On the Supreme Court, see Reed, "Collective Judging" (2020), at p.53; Paterson, *Final Judgment* (2013), at pp.84-91. On the CACD, see Darbyshire, *Sitting in Judgment* (2011), at p.337.

Justice Kirby has written that "no special courage" would have been needed for the first judge of the common law tradition to dissent in the House of Lords.[167] By comparison, it may take special courage for a judge sitting in the CACD to dissent under section 59 without further action. The culture against dissent appears so engrained that steps may need to be taken within the judiciary to make the possibility of dissent in appropriate cases practicable. What could these steps be? Judges who sit in the CACD need to know of the possibility of dissent along with its legitimacy and dangers. To this end, the Lord Chief Justice could usefully write an open letter to those judges who sit in the Criminal Division that recognises the important norms of ex tempore and unanimous judgments, but also reaffirms that dissent is a viable option in certain cases.[168] Such a letter could also specify that a dissent would weigh in favour of certifying a point to be heard in the Supreme Court. The Judicial College could build on the letter by engaging with CACD judges on their decision-making processes; the value of drawing on the collective knowledge and experiences of the bench; and, when appropriate, how to dissent. What would then be needed is a spirit of independence when a senior judge in a future criminal appeal sees an important case differently than their colleagues. Of course, if any readers – judicial or academic – were to reach a different conclusion on this topic, I would be glad for them to express their dissent.

[167] Kirby, "Judicial Dissent" (2007) at 386.

[168] Cf. Munday, 'The Composite Judgment' (2002) at 330 on the role of the senior judiciary in legitimating composite judgments in the Civil Division.