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of justice**



In the Interests of Justice

An inquiry into the Criminal Cases Review
Commission

by

The Westminster Commission on
Miscarriages of Justice

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Baroness Stern CBE (Co-Chair) is a crossbench member of the House of Lords.

Erwin James is the Editor-in-Chief of Inside Time, the national newspaper for people in prison.

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FOREWORD

The Criminal Cases Review Commission began its work on 31 March 1997. It was created by the Criminal Appeal Act 1995, 25 years ago. It came into being, as we explain in this report, after some appalling miscarriages of justice under the previous system of consideration by Home Office ministers. That system was clearly not working in the interests of justice nor was it transparent. The CCRC was a necessary and timely addition to our criminal justice system and it has done a great deal to right wrongs and to bring justice where there was none. But nothing stands still and everything needs to be re-evaluated in the light of changing circumstances and experience.

On 5 February 2019 the All-Party Parliamentary Group on Miscarriages of Justice, chaired by Barry Sheerman MP, decided to promote an inquiry into the work of the CCRC and that we were to be its co-chairs. A quarter of a century is a reasonable period to look back on the work of the CCRC and a good place from which to look forward. We have found, perhaps unsurprisingly, a mixed picture: things to celebrate and things we believe need changing, but with all our conclusions and recommendations we have advanced from the evidence and in a spirit of constructive criticism, admiration and goodwill.

This is our Commission's report. It is not an indictment and the CCRC is not in the dock. We hope it will assist the work of the CCRC and encourage government, parliamentarians, academics, lawyers, victims of crime and criminal defendants, in short, all those interested in justice, to see the CCRC as a much-needed public body but one that cannot stand still.

This is, above all, a report for public consumption and comment and we hope one that will encourage constructive new thinking and statutory reform. It follows on from the House of Commons Justice Select Committee's 2015 report, but this report contains the conclusions and recommendations only of its six authors. It is not a parliamentary or party-political report.

That we have taken so long is a matter of regret and frustration. We were not helped by a number of factors wholly outside our control: the prorogation of Parliament in September 2019, the general election campaign in November and December 2019 and then, because *troubles come not single spies*, the coronavirus pandemic. They led to the reduction of access to Parliament, the halting of the work of APPGs, and our being hindered by the public health requirements that prevented normal working. Covid-19 has meant that since March 2020 we, our fellow commissioners and our invaluable assistants have not been able to come into Westminster and assemble as

a commission but have had to meet, intermittently and remotely, from home. We have though had more time for reflection.

That we have now produced our report is a testament to the patience and willingness of our witnesses who many months ago took time away from their own work and daily lives to provide oral or written evidence. We are particularly grateful to Helen Pitcher and Karen Kneller, respectively the Chair and Chief Executive of the CCRC whose work is the subject of the report. Without Hannah Swirsky, formerly the Parliamentary Officer at the Centre for Criminal Appeals (now known as Appeal), Alex Kane of Appeal who succeeded Hannah as our secretary and organiser, and James Burley, also of Appeal, there would have been no report. Glyn Maddocks QC (Hon), an experienced criminal appeals solicitor, has been a constant source of advice and encouragement. We gratefully acknowledge the financial and other support we have received from those identified on pages 1 and 73-74 and those who wish to remain anonymous.

Above all, we wish to express our profound and heartfelt thanks to our fellow commissioners, Dame Anne Owers DBE, Michelle Nelson QC, Dr Philip Joseph and Erwin James for all that they have done, collectively and individually, without reward or recognition, to bring this project to its conclusion.

The Rt Hon The Lord Garnier QC

The Baroness Stern CBE

House of Lords, London SW1A 0PW

February 2021

EXECUTIVE SUMMARY

The Westminster Commission was set up to review the work of the Criminal Cases Review Commission (CCRC). The CCRC is the public body with statutory responsibility for investigating alleged miscarriages of justice in England, Wales and Northern Ireland. It was established by section 8 of the Criminal Appeal Act 1995 and started work investigating possible miscarriages of justice on 31 March 1997. The CCRC has the power to send, or refer, a case back to an appeal court if it considers that there is a *real possibility* the court will quash the conviction or reduce the sentence in that case.

Before the creation of the CCRC the only resort for a case which had already been to the Court of Appeal (or Northern Ireland Court of Appeal) was directly to the Home Secretary (or the Secretary of State for Northern Ireland), who alone had the power to order the court to hear a case again. This power was limited to cases tried on indictment. On average, only four or five cases were referred each year out of around 700 applications. The ministers only considered the issues raised by the applicant or their representatives. They could not investigate or seek new grounds for appeal.

The CCRC was established because this system was inadequate and had been unable to remedy some serious miscarriages of justice. This Commission was set up to revisit the work of the CCRC, after 25 years of operation. This report contains our conclusions and recommendations, based on the evidence, written and oral, we received. We heard from practitioners, academics and those who have experienced the criminal justice system as lawyers, witnesses and defendants, including those who felt they had been denied justice.

The report emphasises the continuing importance of the CCRC and its work, especially as the criminal justice system is increasingly under pressure. It examines the CCRC's structure, resources, statutory framework and approach, as well as the wider criminal justice context.

Structure and resources

The report examines the current structure of the CCRC, in the light of its founding legislation, and the resources that are needed for it to be effective. It considers that the diminished role of Commissioners in recent years is not in line with either the spirit or the intention of the legislation. It recommends that the role of the Chair and Commissioners should be strengthened, and the processes for their appointment should be reviewed, given the constitutional significance of the CCRC. The report also finds that the CCRC is significantly under-funded and that this problem is

exacerbated by the financial restrictions on the public provision of advice and representation for applicants, recommending that this should be remedied. The report does not, however, recommend saving money by limiting the CCRC's workload by removing certain cases from its remit, not least because all wrongful convictions or sentences have a lasting impact.

A new test

The report considers the current test for referring cases to the Court of Appeal, and the way that it is applied by the CCRC. Under the 1995 Act the CCRC is empowered to refer cases directly to the Criminal Division of the Court of Appeal if it considers that there is 'a real possibility' of success at appeal. The report considers that the predictive nature of this test has encouraged the CCRC to be too deferential to the Court of Appeal. The report therefore considers that the test acts as a brake on the CCRC's freedom of decision. It recommends that there should be a more objective test: that the CCRC is to refer a case if it considers the conviction may be unsafe, the sentence may be manifestly excessive or wrong in law, or that it is in the interests of justice to make a referral. This would encourage a different and more independent mindset. Meanwhile, until the test is amended, the report urges the CCRC to be bolder in applying the current test and to adopt a broader interpretation of its power to refer cases in exceptional circumstances where there has not been an appeal. The report additionally recommends that the Law Commission should review the test applied by the Court of Appeal under the Criminal Appeal Act 1968, to allow it to quash a conviction where it has serious doubt about the verdict, even without fresh evidence or new legal argument. The review should also address concerns about the retention and disclosure of evidence.

Investigation

The report looks at the quality and scope of the CCRC's investigations. It recognises some excellent investigative work, but it also finds that financial constraints and an increased caseload have compromised the CCRC's ability to carry out its role effectively in all cases. It points to the risk that a target-driven culture prioritises speed over thoroughness and that this can compromise effective investigation. Without increased resources the CCRC cannot examine all relevant documents, carry out enough face-to-face enquiries and take advice from external forensic experts. The report also expresses serious concerns about the non-disclosure or destruction of exculpatory material. It recommends changes to the retention of documents and that the CCRC should have additional powers to obtain information and material from public bodies in a timely manner.

Accountability and transparency

The report examines the relationship between the CCRC and those who apply to have their convictions reviewed. It found insufficient communication in relation to both the progress of and approach to cases, which undermines trust in the CCRC. Judicial review of the CCRC after the event is not an effective substitute for a thorough examination of, and a real dialogue about, an applicant's case. The report recommends that the CCRC should be more open with applicants and their representatives, disclosing actions taken, providing meaningful regular updates and fuller statements of reasons for its decisions. It also recommends that the Criminal Appeal Act 1995 should be amended to allow wider disclosure of material to applicants and to permit the CCRC, with the authority of the applicant or in anonymised form, to publish statements of reasons where this is in the public interest.

Other matters

The report considers the specific issues for juveniles, as well as cases of alleged wrongful convictions arising from joint enterprise. It commends the CCRC's efforts to reach out to juveniles. This would be enhanced if there were a specialist unit established within the CCRC specifically to deal with youth justice cases. In addition, the report recommends that the role of advocacy services in under-18 custodial establishments should be extended to include advice on and during applications to the CCRC. It also recommends that the 'substantial injustice' test in joint enterprise cases should be reviewed as a matter of urgency by the Law Commission because it poses a real risk that miscarriages of justice remain unidentified or unremedied.

1. INTRODUCTION

What is the CCRC and why does it matter?

Just before midnight on a cold Thursday in November 1974, Paddy Joe Hill was sipping on a pint of beer. He stood in the bar on board a ferry docked in Heysham, Lancashire, waiting to set off for his hometown of Belfast. He never made it. "Within a few hours I was being battered around by policemen trying to get me to confess to planting bombs for the IRA," Hill later wrote.¹

Earlier that evening, bombs had exploded at two pubs in Birmingham. 21 people were killed and 182 others injured.² Within days, Hill and five other men were charged with the murders and conspiracy to make explosives. They would come to be known as the Birmingham Six. All were innocent, but convictions were secured after the police beat "confessions" out of four of the men.³

In 1991, the Court of Appeal finally quashed the Birmingham Six's convictions, ending over sixteen years of wrongful imprisonment. The Court had twice before upheld the convictions as 'safe', but pressure from the men, their families, campaigners, journalists and lawyers resulted in the Home Office's C3 Divisionⁱ referring the case back for a second time.

In the wake of this shocking miscarriage of justice, along with those of the Guildford Four, the Maguire Seven, Judith Ward, the Tottenham Three and others, the Government in 1991 set up a Royal Commission on Criminal Justice, known as the Runciman Commission, named after its chair, Viscount Runciman. This Commission recommended the creation of an independent body to investigate alleged miscarriages of justice.⁴

In 1997, this body – the Criminal Cases Review Commission (CCRC) – began its work. It was tasked with referring cases back to court in England, Wales and Northern Ireland, normally only when previous appeals had failed and there was "fresh evidence", and only if it found there was a "real possibility" that the conviction or sentence would not be upheld.

Parliament gave the CCRC statutory powers to help it investigate cases. One of the first it referred was that of John Kamara, who spent some 20 years in prison for a murder he did not commit.⁵ The CCRC's investigation found that the prosecution had wrongly withheld 201 witness statements from Kamara's defence team at trial.⁶

ⁱ See p 16 for description of the role of C3 prior to the establishment of the CCRC.

John Kamara is only one of those able to benefit from the CCRC's work. To date the CCRC has referred 752 other cases for fresh appeals, of which 677 were heard and 456 were successful.⁷ According to two academics who wrote a book on the CCRC, it has shown that it is "a whole lot better than its predecessor, C3".⁸ Sir Brian Leveson (former President of the Queen's Bench Division and Senior Presiding Judge for England and Wales) described the CCRC as "one of the critical safeguards for our human, and thus fallible, criminal justice system".⁹ Since the CCRC's creation, similar organisations have been established in Scotland, Norway, North Carolina and New Zealand.

Why this inquiry now?

Victor Nealon walked out of prison with a train ticket and just £46 in his pocket. It was December 2013. The former postman had spent the last 17 years in prison for an attempted rape he did not commit.¹⁰

The Court of Appeal quashed Nealon's conviction following a CCRC referral, made on the basis of new DNA evidence which pointed to another man as the attacker. However, it was not the CCRC who ordered the DNA testing that exonerated Nealon, despite having the resources and authority to do so. It was left to his legal team.

This was because the CCRC had twice before – in 2001 and 2003 – rejected Nealon's case. In both applications, Nealon had asked the body to commission DNA testing. The CCRC refused, dismissing it as "speculative".¹¹

"I spent an additional 10 years in prison because they [the CCRC] accepted at face value evidence given by the police," Nealon later said.¹² The CCRC acknowledged that in its first two reviews it "could and should have identified there were forensic opportunities that had not been explored".¹³

The case of Victor Nealon raises the question of how many other cases of wrongfully convicted people have been incorrectly turned down by the CCRC. **Of over 26,000 applications, the CCRC has referred only 751: around 2.9%.**¹⁴

Wrongful convictions do not just affect the person wrongly convicted. They can also result in the victims being re-victimised if the actual offender remains at large. S was convicted of attempted rape in 1993 on the basis of a confession which was later shown to have been a "mere fantasy". While S was in prison, the perpetrator returned and attacked the victim again in a vicious assault, saying "it's me again".

The Westminster Commission on Miscarriages of Justice was established under the All-Party Parliamentary Group on Miscarriages of Justice with a remit to inquire into the CCRC and its ability to identify and correct miscarriages of justice.ⁱⁱ Although miscarriages of justice can be said to occur when the innocent are wrongly subjected to the trial process or when defendants are sentenced unduly harshly, or indeed when the guilty go free, the focus of this inquiry is on wrongful convictions.

The context for the inquiry is the low, and in recent years declining, number of cases referred to the Court of Appeal by the CCRC, criticism of its work and approach, and more broadly a criminal justice system widely considered to be under immense strain.

The wider justice landscape

There is a broad consensus in the oral and written evidence we received that the criminal justice system is struggling. Professor Carolyn Hoyle, who gave oral evidence to our inquiry, analysed its current state:

We have huge cuts in legal aid which will produce further miscarriages of justice in the future. We have police and CPS failures to disclose potentially exculpatory evidence, and we have at the same time a crisis in the forensic science service, with the abolition of the Forensic Science Service in 2010 ... And private forensic services are not coping: they're making errors; samples are being lost. We've seen all this in the newspapers. In this climate, with all of that going on, there's no way miscarriages of justice are going to decline. They're going to rise, if anything: a perfect storm of austerity cuts.¹⁵

Many others have agreed with this analysis. According to the head of the Crown Prosecution Service Inspectorate, our criminal justice system is "close to breaking point".¹⁶ The Law Society recently described the system as "on its knees".¹⁷ Meanwhile, the House of Lords' Science and Technology Select Committee found that the forensic science market was "becoming dysfunctional" and without introduction of more regulation risked "putting justice in jeopardy".¹⁸

It is hard not to conclude that in the current climate, the risk of miscarriages of justice has increased, not diminished. In the view of one witness to our inquiry, "Although media coverage [of miscarriages of justice] has dwindled, the problem is as big as ever."¹⁹

ⁱⁱ The full Terms of Reference are set out at Appendix 2.

Lack of action since 2015 Justice Committee inquiry

The Westminster Commission began this inquiry four years after the House of Commons Justice Select Committee scrutinised the CCRC's work. By then, there was already a great deal of criticism of its powers, approach and resources.

The Justice Select Committee's 2015 inquiry received 47 written submissions and held four oral evidence sessions, hearing from 16 witnesses.²⁰

The Committee recommended that²¹

- a) the CCRC should "be less cautious" in referring cases to the appellate courts;
- b) the Law Commission should review the Court of Appeal's grounds for allowing appeals;
- c) the CCRC should be granted an additional £1m of annual funding "as a matter of urgency";
- d) the CCRC should have discretion to refuse to investigate cases arising from the magistrates' courts and cases where the applicant is only seeking to challenge their sentence (as opposed to conviction);
- e) there should be legislation to add a time limit for public bodies to comply with requests for material made by the CCRC and "an appropriate sanction in case of non-compliance";
- f) there should be legislation to allow the CCRC to compel private bodies to disclose material needed for its investigations;
- g) CCRC Case Review Managers should engage more with applicants during investigations;
- h) the CCRC should develop "a formal system for regularly feeding back into all areas of the criminal justice system".

The Justice Committee's recommendations were largely unimplemented, the extension to private bodies of the CCRC's powers to obtain material being a notable exception.²²

The CCRC's referral rate

Between its creation in 1999 and the end of 2015/16, the overall proportion of cases referred to the appeal courts by the CCRC stood at 3.43%.²³ Recent annual referral rates have, however, been much lower: in the subsequent three years they stood at

0.77%, 1.24% and 0.9% respectively. In 2019/20 this rose to 1.95%,ⁱⁱⁱ still lower than the previous overall average.^{iv}

To the CCRC's critics, this is evidence that the body is failing to successfully find and remedy miscarriages of justice. The CCRC, in contrast, told us not to read too much into these three years of low referrals, as this would vary due to other factors. The Chair considered that "perhaps too little attention is paid to the other outcomes of the Commission's work, such as the considerable value we bring to the justice system in the de facto audit of the safety of convictions and correctness of sentences in each case we consider".²⁴

There has been criticism not only of the volume of cases referred, but also the types of case. An increasing proportion of referrals have been from the magistrates' courts to the Crown Court.²⁵ By definition these are less serious cases than those referred from the Crown Court to the Court of Appeal, in that they involve significantly shorter prison sentences.

The CCRC has attributed the decline in its referral rate in part to the "absence of thematically linked referrals".²⁶ Yet a significant number of cases referred in recent years have been immigration documentation cases following incorrectly-advised guilty pleas before the magistrates' courts.²⁷ This accounted for five of the cases referred in 2019/20. An additional 12 referrals in 2019/20 were of individuals convicted in one case or as a result of a single incident in the 1970s. Though the CCRC has pointed out the importance of these referrals for each individual, they rest on a single allegation, incident or point of law. The rates would be even lower without such cases.^v

Mounting criticism

ⁱⁱⁱ The number of case referrals in these years brought the running average referral rate (as it stood over the lifetime of the CCRC) to 3.3% by 2016/17, 2.9% following 2017/18, 2.75% after 2018/19, and 2.74% at the end of 2019/20. The running average has therefore been decreasing over these years.

^{iv} The initial referral rate during 2020/1 was higher, due to the referral of 47 linked Post Office cases, but it is not yet clear what the annual rate will be, or whether this represents a trend rather than an exceptional year.

^v Four applicants were convicted in a single trial, 'The Oval Four'; eight were convicted in separate trials arising from a single incident, 'The Shrewsbury 24 group' and five had been individually convicted, of asylum or immigration offences. Of the 29 referrals in 2019/20, 17 related to these cases, one followed judicial review of CCRC refusal to refer and five related to terrorism and/or murder offences.

Criticism of the CCRC appears to have grown in recent years, with a 2018 BBC Panorama documentary asking whether the body was still fit for purpose.²⁸ A submission from the charity Inside Justice, which works on alleged miscarriages of justice, made the following claim:

It is our belief that it is harder today to overturn a wrongful conviction that it was in the dark days of the 1980s and 90s which led to lasting criminal justice reform including the establishment of the CCRC.²⁹

Dr Dennis Eady, an academic with many years' experience in the field of wrongful convictions, said:

Overall, I think the criminal justice situation, and consequently the nature of miscarriages of justice and the extent of miscarriages of justice, is actually far worse than when I started out.³⁰

While accepting that the current system was an improvement on what had gone before, other witnesses nevertheless told us that they believed that the CCRC had become less ready to refer cases in recent years. Solicitor advocate Mark Newby said that "it's much more difficult to get a referral through the Commission now."³¹ Michael O'Brien, who spent 11 years in prison for a murder he did not commit as one of the Cardiff Newsagent Three, and whose case was referred by the CCRC, told us:

I wrote at the time of my release of the good work the CCRC did on my case, however in the last few years my concerns over the CCRC have grown due to the cases I have been involved in and supported not being referred to the Court of Appeal when they clearly should have been referred.³²

A prisoner-applicant told us that in his view: "The CCRC needs root and branch reform before it can offer justice to victims of miscarriages of justice."³³

These comments show that there are strong views held by some stakeholders about the CCRC's performance. That is why we have been commissioned to take a close look at the CCRC's ability to identify and remedy miscarriages of justice.

The work of this inquiry

The Commission gathered evidence through:

- Five oral evidence sessions held in Parliament, during which 12 witnesses, including the CCRC itself, gave evidence^{vi}
- Written evidence totalling 1,025 pages, including evidence from 113 former applicants following a call for evidence in the newspaper *Inside Time* and evidence from former CCRC Commissioners
- Responses to a questionnaire designed for former and current applicants on their experiences with the CCRC

A considerable number of responses were not suitable for publication in full, as they contained extensive detail of ongoing applications and/or appeals. We made it clear that the Westminster Commission would not be taking up cases on behalf of applicants, but individual accounts of dealings with the CCRC were nonetheless significant. Such submissions have been published where possible.

The next section in this report sets out how the CCRC currently operates. Subsequent sections are organised by theme, setting out concerns raised by witnesses and giving our conclusions and recommendations.

^{vi} Transcripts of the oral evidence sessions and written evidence suitable for publication can be found at <https://appgmiscarriagesofjustice.files.wordpress.com/>

2. THE CURRENT SITUATION

The CCRC's predecessor

Before describing the CCRC as it currently stands and the broader criminal appeals system in which it operates, it is worth setting out some details of the regime it replaced.

Before the CCRC commenced operations in 1997, if someone convicted by a jury in the Crown Court lost their appeal but protested their innocence, their only hope was to petition the Home Secretary. Under section 17 of the Criminal Appeal Act 1968, a Home Secretary could refer such cases to the Court of Appeal for a fresh hearing.³⁴ They could not, however, grant appeals to those wrongly convicted in magistrates' courts.

The Home Secretary's decisions about which cases to refer were informed by the work of a unit in the Home Office known as C3 Division which had "limited resources and expertise".³⁵ Staffed by thirteen civil servants, it had no formal powers to assist its investigations (such as the power to secure evidence) and "the process by which applications were considered was slow and opaque".³⁶

In Pete Weatherby QC's recollection, "applications to the Secretary of State rarely achieved justice".³⁷ On average, around 700 to 800 applications per year were made to C3 Division.³⁸ Between 1981 and 1992, the Home Secretary referred 64 cases involving 97 appellants.³⁹

In the rare cases the Home Secretary referred, the investigative work was generally performed by journalists and campaign groups. As a result, according to Dr Hannah Quirk, there tended to be a focus on cases "of factual innocence that were interesting or dramatic".⁴⁰

As it was a government minister who had the power to grant fresh appeals, political pressure could help pave the way for a wrongful conviction to be quashed. In Dr Dennis Eady's view, "the advantage of the old system was that you could pound away at the Home Secretary with massive publicity and so on until they eventually cracked."⁴¹

Equally, though, the fact that referral decisions rested in the hands of a politician left the regime open to "the accusation of political bias"⁴² and inevitably disadvantaged applicants whose cases might be 'politically difficult' to refer. As Dr Hannah Quirk describes it

The Home Secretary risked contravening the separation of powers between the judiciary and executive and faced potential conflicts of interest due to his ministerial responsibility for the work of the police, whose misdemeanours were sometimes the basis of the referral.⁴³

The replacement of the C3 Division regime with the CCRC, following the recommendations of the Royal Commission on Criminal Justice, was considered a significant achievement. Henry Blaxland QC told us it was “a very important development” and “undoubtedly an improvement on the previous system”.⁴⁴ Echoing this view, Pete Weatherby QC told us that

the institution of the CCRC was a significant moment which should not be overlooked. I strongly endorse the view that having an independent agency to review cases which have exhausted the normal appeal processes is an essential ‘backstop’ provision in a system that is always going to be fallible.⁴⁵

Criminal appeals in England, Wales and Northern Ireland

Unless there are exceptional circumstances, the CCRC’s involvement in a case only begins when a person has exhausted their first appeal.

A defendant’s usual route of appeal depends upon the type of court in which they were convicted. After a ‘summary conviction’ following trial in the magistrates’ courts or the Youth Court, a convicted person has a direct right of appeal to the Crown Court. Such an appeal takes the form of a complete rehearing, rather than a review of the Magistrates’ or Youth Court proceedings.

In contrast, a person convicted by a jury in the Crown Court does not have an automatic right of appeal to the Court of Appeal (Criminal Division). They must either ask the trial judge themselves to certify that the case is fit for appeal – a rare occurrence – or apply directly to the Court of Appeal for leave, or permission, to appeal.

A convicted defendant has 28 days to apply for leave to appeal, leaving little time for the kind of investigation that might uncover new evidence, or for issues such as police misconduct to be exposed. The Court of Appeal can grant an extension of time if it considers it in the interests of justice to do so.

Once grounds of appeal have been submitted, and often after the prosecution has had an opportunity to respond, a Single Judge of the High Court will usually consider

the application first.⁴⁶ They “may grant the application for leave, refuse it or refer it to the full Court”, usually consisting of three judges. Where considered appropriate, the Single Judge “may grant limited leave i.e. leave to argue some grounds but not others”.⁴⁷

If leave is granted, the full Court will then hear the appeal. If it is refused or any ground upon which leave is sought is refused, an application for leave can be renewed before the full Court.

In conviction appeals, the test that the Court of Appeal applies is whether it deems the conviction unsafe, whereas for sentence appeals the question is whether the sentence is manifestly excessive or wrong in principle.⁴⁸ Where the Court finds a conviction unsafe, it has the power to quash it and it can, if it deems the interests of justice require it, order a retrial.

In 2018/19, the Court of Appeal received 4,434 applications for leave to appeal.⁴⁹ Over the last five years, 6.7% of conviction appeals and 21.5% of sentence appeals were allowed.⁵⁰

Potential issues with the Court of Appeal’s legal framework and its approach to appeals more generally are considered in more depth later in this report.

The Court can sanction certain applicants still in custody whose appeals it considers to be totally without merit, using what is known as a loss of time order.⁵¹ Under these, the Court can direct that some or all of the time served whilst appealing should not count towards their sentence. The Court describes these as a means of “discouraging unmeritorious applications”.⁵² No official data are published on the frequency of loss of time orders, but they appear to be relatively rare. An analysis of judgments by criminal chambers 2 Hare Court identified just eight cases where loss of time orders were made in the 2014 calendar year.⁵³

If a victim of a miscarriage of justice, that is to say a wrongfully convicted person, has been unsuccessful before the Court of Appeal, their only hope of being granted a fresh appeal – and a chance of having their conviction quashed – rests with the CCRC.

The CCRC’s functions, powers and composition

The CCRC’s main statutory function is to review alleged miscarriages of justice arising out of the courts of England, Wales and Northern Ireland. Although it cannot overturn verdicts itself, subject to a strict legal test it can refer convictions or sentences to the relevant appellate court for consideration.

Under section 13 of the Criminal Appeal Act 1995, the CCRC can only refer a case for appeal where it considers that there is a real possibility that the appeal would succeed. In the case of convictions, the CCRC's referral must be based on "an argument, or evidence, not raised in the original proceedings" unless exceptional circumstances justify making the reference.⁵⁴ In addition, unless it finds that there are exceptional circumstances, the CCRC cannot refer a conviction or sentence unless an appeal, or an application for leave to appeal, has already been attempted and denied.⁵⁵

Anyone can apply free of charge to the CCRC to have their conviction or sentence reviewed, "regardless of the nature of their case, their wealth, connections, or campaigning abilities".⁵⁶ CCRC applicants do not need to have a lawyer, though research and evidence before this Commission demonstrates that quality legal assistance is of considerable benefit.^{vii} If the CCRC rejects a case, there is nothing to stop applicants reapplying. However, if the CCRC considers that a re-application simply restates the same points, and it cannot identify any potential new issues, it will close the case.⁵⁷

The CCRC has two other statutory functions which take up less of its time. One is to investigate and report on matters at the request of the Court of Appeal and Court Martial Appeal Court, which usually involves the CCRC investigating issues relating to jury misconduct and interference. The second is to assist the Secretary of State for Justice in exercising Her Majesty's prerogative of mercy, which allows pardons to be granted to those convicted of criminal offences.

To assist the CCRC in exercising its statutory functions, the Criminal Appeal Act 1995 gives the body legal powers to help investigate cases. Under section 17 of the Act, it has the power to obtain any material it considers relevant to a case review from public bodies (though the legislation provides no mechanism for enforcing such requests). Under section 19, the CCRC can appoint an investigating officer, usually from a police force, to help investigate a case. Finally, since the introduction of section 18A in 2016, the CCRC also has a power to apply for a court order compelling private bodies and individuals to provide it with material.

The CCRC is a non-departmental public body based in Birmingham. Its funding comes from a grant in aid from the Ministry of Justice, which amounted to £5.936m in revenue expenditure in 2019/20.⁵⁸ Like most commissions, by statute it is composed of a publicly appointed Chair and a number of publicly appointed

^{vii} The main academic research on the extent of the benefit to applicants of representation was conducted in 2008. This point is discussed further in Chapter 3.

Commissioners. Collectively, under statute, they are the 'body corporate', forming the Commission and appointing the Chief Executive. The Commissioners have an operational role, as they decide whether or not to refer cases to the Court of Appeal. Currently, there are ten Commissioners, including the Chair (who in practice does not contribute to casework decisions). More recently, a non-statutory Board has been created, responsible for 'determining and overseeing the overall strategic direction of the Commission'. It consists of the Chair, three Commissioners, three non-executive directors and three senior Commission staff.

The Commission's staff report to the Chief Executive and her senior management team (a director of casework operations and a director of finance and corporate services). As at 31 March 2020, the CCRC had 95 permanent members of staff (equivalent to 81.83 full-time posts).⁵⁹

Day-to-day casework is conducted by case review managers, whose job is to investigate cases with a view to deciding whether there are grounds on which the case can be referred for appeal. If the case review manager believes there may be such grounds, a committee consisting of at least three commissioners decides whether to refer the case. If the case review manager identifies no such grounds, the case is referred to a single commissioner who can make a decision not to refer the case, direct a case review manager to carry out further work before a decision is made, or call a committee of three or more commissioners to consider a case. In oral evidence given in July 2019, the CCRC's Chair said that there were 31 case review managers.⁶⁰

The CCRC emphasises that every case is considered by multiple members of staff, with supervision coming from senior group leaders, with legal advisors and investigations advisors providing input as needed.⁶¹

3. LEADERSHIP, INDEPENDENCE AND RESOURCES

Although the CCRC is a public body like many others, it has a unique role in the justice system, and, as the Divisional Court has held, must be constitutionally independent of government.⁶² Witnesses pointed out that this needs to be reflected in its leadership, structure and resourcing.

Leadership and structure

The public face of the CCRC, and its overall leadership, are provided by the Chair. Michael Birnbaum QC told us that in his view:

the Chair should be someone with lifelong experience of the criminal justice system rather than someone who appears to be chosen because they might be thought to be good at running things. I think you need ... a real commitment to try to discover miscarriages of justice and put them right.⁶³

Pete Weatherby QC took a similar view, arguing “the CCRC needs leadership from those with a proven track record in correcting miscarriages of justice.”⁶⁴

Professor Hoyle also urged the CCRC to “speak out more, and to be more critical of when things go wrong” in the criminal justice system.⁶⁵

Michael Birnbaum QC suggested that “a senior lawyer or police officer”⁶⁶ might be well-suited to leading the CCRC and added that “having a very senior judge as Chair would give the Commission more weight with the Court of Appeal”.⁶⁷

The Scottish CCRC’s Chief Executive, who gave evidence to this inquiry, carries out some part-time judicial work as a Sheriff (Scotland’s equivalent to a Crown Court judge).⁶⁸ This creates independence from the executive branch of government. However, a SCCRC applicant criticised this, saying it “shows their lack of independence from the courts”.⁶⁹ The Chief Executive himself recognised this potential concern in oral evidence.⁷⁰ We were told that “pretty much” half of the SCCRC’s board consists of legally qualified members and that Sir Gerald Gordon, a retired Sheriff who edited and authored influential texts on Scottish Law, was a SCCRC board member at its inception and for the succeeding ten years.⁷¹

The CCRC made clear to us its view that the suggestion it “be led by a (former) senior Judge is of concern in terms of perceived independence.”⁷² Professor Carolyn Hoyle agreed, saying: “if you have a Chair who was a judge, even if they haven't worked in the Court of Appeal, you might get ... criticisms about independence from the judiciary.”⁷³ She discouraged an overly prescriptive approach to what background a CCRC Chair should have: “I wouldn’t want to put a requirement on what the Chair should or should not be ... I think it’s about character and personality, probably, more than occupational background.”⁷⁴

The CCRC’s current Chair was appointed on a three-year term with a time commitment of up to 10 days per month.⁷⁵ A former Commissioner raised concerns that this time commitment was not enough:

I have doubts whether a one day per week chairman can maintain the oversight and give the leadership that the Commission requires ... I note that [former CCRC Chair] Sir Frederick Crawford as chairman was appointed on a three day per week basis and frequently worked a further day.⁷⁶

Independence

The CCRC needs to demonstrate its independence from government. It was set up because the previous system lacked independence. However, like all non-departmental public bodies (NDPBs), it has key relationships with government and government departments. Its Chair and Commissioners are appointed by the Queen on the advice of the Prime Minister. It is sponsored by the Ministry of Justice, which sets its budget and, through a sponsor team, provides liaison with the department and carries out regular Cabinet Office mandated ‘tailored reviews’^{viii} of effectiveness.

Many of our witnesses were critical of the way these sensitive relationships had been managed, and what they considered to be incursions by the Ministry of Justice into the CCRC’s independence. The all-party law reform organisation JUSTICE told us: “Recent events have suggested the independence of the Commission has been undermined.”⁷⁷ Dr Hannah Quirk said: “There are recent signs that the Ministry of Justice is pulling the CCRC too close. This must be resisted and reversed.”⁷⁸

^{viii} The tailored review process, set up by the Cabinet Office, is a process that scrutinises all public bodies ‘to provide assurance to government and the public on the continuing need for the public body, its functions and its form’. Sponsoring departments are required to carry out these reviews, in line with Cabinet Office guidance.

A great deal of criticism centred on the recommendations of the tailored review of the CCRC, which reported in 2019, and their implementation. A number of our witnesses said that the fine line between seeking assurance and compromising independence had been crossed both before and in the aftermath of the review, whose publication was significantly delayed.

The first point of contention was the changes to the terms of appointment of Commissioners. JUSTICE drew our attention to how the Commissioner role had been devalued financially over the years.⁷⁹ Until 2012, Commissioners were salaried and received holiday and sick pay, plus pension. Since 2017, Commissioners have been fee-paid with no holiday, no sick pay and no pension. The journalist Jon Robins pointed out that a Commissioner's daily rate of £358 was "relatively meagre" compared to, for example, that paid to a Crown Court Recorder (currently £668.04).⁸⁰ In addition, Commissioners' terms of appointment were reduced from five to three years.

The time commitment, as well as the remuneration, was also significantly reduced. Before the tailored review was published, new Commissioners were appointed to work on a part-time basis, sometimes as little as a day a week. We were told that the overall level of Commissioner resource fell from 8.8 full time equivalent posts in 2014 to 2.5 FTE by 2019.⁸¹ The most recent CCRC annual report shows a significant decrease in Commissioner days between 2018/19 and 2019/20, from a maximum of 1,239 days to a maximum of 866: a 30% drop.⁸²

CCRC Board minutes showed that these changes faced strong opposition within the CCRC.

"A new Commissioner said they would have found it impossible to do the current job working only one day per week. [A Commissioner] confirmed that all Commissioners agreed with this opinion."⁸³

"The Board agreed that retaining a 5-year term was crucial owing to the nature of the Commissioner role and if this was reduced to 3 years it would severely challenge the Commission's independence."⁸⁴

Several witnesses to our inquiry supported these criticisms, with JUSTICE pointing out:

If a Commissioner is expected to work only one day per week, three years or more will be required for that Commissioner to be fully "trained", with the result that by the time a Commissioner has learned the role sufficient to perform it adequately, his/her tenure will have

expired. If every new Commissioner is in this position, it will take an inordinate amount of time for the Commission to ensure accurate decisions are being taken, putting more pressure on its resources rather than alleviating them.⁸⁵

In written submissions, three former CCRC Commissioners told us that the changes undermined Commissioners' ability to provide scrutiny and challenge within the CCRC. One said that Commissioners would be "effectively reduced to marking the homework of staff preparing Statements of Reasons for approval",⁸⁶ while another wrote:

From personal experience of workloads at the Commission, I cannot see how one-day a week Commissioners could ever fulfil the duties for which they were appointed ... the Commissioners would find it almost impossible to be anything other than 'rubber-stamping' decisions.⁸⁷

The tailored review also made recommendations, sometimes detailed, about the CCRC's governance, scope and procedures. Noting that the Commission had "begun to move away from full-time Commissioners towards fee-paid appointments", it proposed a smaller Board, consisting of only three Commissioners, including the Chair, three non-executives and three members of the senior management team.

According to the minutes of a CCRC Board meeting, before the review report was published, Commissioners were told that if the recommendations were not implemented their appointments might be terminated or not renewed. This was later recognised to have been an error. However, the foreword to the review stated that the departmental Minister "will be taking a keen interest" in the "timely implementation" of the recommendations⁸⁸ and that "the Chair of the CCRC will be held accountable for the implementation of the recommendations and reporting on progress". In JUSTICE's view, this "suggests an unlawful interference by Government with the independence of the CCRC."⁸⁹

The CCRC's leadership disputed the claim that the Ministry of Justice's actions had undermined the body's ability to review cases independently. Helen Pitcher told us the Ministry of Justice "don't want to interfere in what we're doing day-to-day, because that would not be right".⁹⁰ In a written submission, the CCRC also denied that the Ministry of Justice control of its budget impacted on its independence:

It is important not to confuse issues surrounding dialogue with the Ministry of Justice over funding, with the independence of our casework decisions. There has never been any interference from government in CCRC casework.⁹¹

In a judicial review case brought by Gary Warner, an unsuccessful applicant, the Divisional Court considered the extent to which the CCRC's relationship with the Ministry of Justice undermined its independence.⁹² In rejecting his claim, the Court relied in part on the CCRC's rejection of some of the review's recommendations, without resistance or repercussions. However, the Court was critical of aspects of the relationship with government, saying:

The CCRC is much more than merely "operationally" independent; it is constitutionally independent from Government too, and must be seen to be so, if the public is to have confidence in its decisions.⁹³

The relationship between the CCRC and MoJ ... was very poor during this period, even dysfunctional. The poverty of this relationship undoubtedly tested the CCRC's ability to remain independent of MoJ, and to be seen to be so.⁹⁴

The Court expressed serious concern about the language used in the department's presentation of the tailored review, as well as about the decision not to reappoint one Commissioner, where, in the ministerial submission recommending not to reappoint, reference was made to their opposition to the tailored review changes.

Conclusions

In statute, the publicly appointed Commissioners are the Commission. They have both governance and operational decision-making roles, yet have no management responsibility for the staff who carry out the required work to support decision-making. This can be a cause of tension and reduced efficiency, as other Commissions have found.

The response to this, in relation to the CCRC, has undermined the spirit and purpose of the legislation, without solving the underlying problem. An extra-statutory management board has been created and Commissioners have been reduced to a very part-time fee-paid role. Most, therefore (including the Chair) combine this role with other, usually non-executive, roles, so that CCRC work is only part of a larger portfolio. This has significantly shifted the balance of power towards the executive.

The CCRC is therefore operating in a completely different way from that envisaged and provided for in its legislation, which gives Commissioners a central, not a peripheral, role. If Ministers consider that the statutory structure is not an effective mechanism, they should bring legislation before Parliament and make the case for changing the structure, rather than seeking to do this through departmental reviews or internal CCRC decisions. The Commission model was presumably chosen for a

reason: because it could provide independent leadership, regularly bringing in individuals with wider expertise and experience to mitigate the development of an institutional mindset. There are ways of strengthening this leadership and approach while providing a more effective governance structure and relationship with those responsible for management.

We conclude that the role of the Chair and Commissioners should be strengthened: looking to qualities of leadership and decision-making. Alongside that there could be a statutory board, including non-executives with relevant governance skills and experience, to provide oversight and support for the CCRC and its work.

Some witnesses argued for a full-time executive chair. This would, however, create a managerial, rather than a leadership, role. Others argued for the chair to be an ex-judge, but we agree with Professor Hoyle and others that independence from the courts is as important as independence from government. However, we believe that it is important that the role is filled by a person of some standing, demonstrably independent of government, and willing and able to speak out when the CCRC's work reveals flaws or failings in the system.

We also note the general concern, expressed to us by a number of witnesses, about the process for appointing both the Chair and Commissioners. The fact that these are Prime Ministerial decisions places them firmly within the political arena. Such appointments must follow guidance from the Public Appointments Commissioner, but the process is not transparent. Some witnesses proposed creating a quite separate selection process, outside government; others suggested that the Judicial Appointments Commission (JAC) could take on this role.

We find it difficult to argue that the CCRC is so unique it requires an entirely novel appointment process. If, as we have accepted, the Chair should not be a judge, this also rules out the JAC. However, we believe that public appointment procedures, for roles that, as the Divisional Court has said, have "constitutional importance" should be more transparent and accountable, to provide assurance of independence.

Recommendations

- The Chair of the CCRC should be appointed for a five-year term for a minimum of three days per week, and the focus of the role should be to provide strategic leadership, to ensure that the organisation's independence and mission is at the centre of its work, to liaise with government, the courts and Parliament, and to seek to ensure that the CCRC's findings influence law reform and criminal justice practice.

- The Public Appointments Commissioner should be invited to look at whether the appointments arrangements for those non-departmental public bodies (NDPBs) that need to be constitutionally independent from government are sufficient, and sufficiently transparent, to guarantee this.
- There should, as anticipated in the legislation, be a mix of full- and part-time Commissioners, on a salaried basis, for five-year terms and with a minimum of three days per week.
- We consider that a separate Management Board would be beneficial, to provide governance and additional assurance, and involving the CCRC's senior management team and some external non-executive directors, as well as some Commissioners, on the lines of the current Board. However, this should be secured in legislation.

CCRC resources

It is well known that in recent years the criminal justice system has experienced significant funding cuts. However, less well known is that the CCRC received "the biggest cut that has taken place in the criminal justice system", as its former Chair told MPs back in 2015.⁹⁵ "For every £10 that my predecessor had to spend on a case a decade ago," Richard Foster then explained to Justice Committee members, "I have £4 today."⁹⁶

In real terms, the CCRC's funding was cut by 30% between 2009/10 and 2014/15,⁹⁷ Adjusting for inflation, the CCRC's funding level in 2014/15 (£5.25m) was 43% lower than it had been in 2003/04 (£9.264m).⁹⁸ Even though funding has slightly increased more recently, to £5.936m in 2019/20, it is still significantly lower than in previous years.

Moreover, witnesses brought to our attention funding issues affecting the criminal justice system more broadly. These issues, they argued, in fact made miscarriages of justice more likely, and therefore increase the CCRC's probable workload.

Dr Lucy Welsh, an academic focusing on the impact of changes to legal aid, told us that between 2010 and 2015 the Ministry of Justice's budgets fell by 29%, the Home Office's budgets fell by 19% and the CPS's budgets were reduced by 23%.⁹⁹ A Justice Select Committee report concluded in 2018 that "under-funding of the criminal justice system in England and Wales threatens its effectiveness ... undermines the rule of law, and tarnishes the reputation of the justice system as a whole."¹⁰⁰

In Dr Welsh's view, these "systemic funding issues ... increase the possibility that a miscarriage of justice will occur".¹⁰¹ She drew our attention in particular to the 2012 dismantling of the Forensic Science Service, explaining that: "As services have been outsourced, and fees payable to expert witnesses have reduced, concern about the quality of expert evidence has increased."¹⁰²

Cardiff University Innocence Project explained how legal aid cuts also brought a heightened risk of the trial process going wrong:

Following cuts to legal aid, the defence do not have the resources to thoroughly investigate the evidence and often focus on undermining the prosecution case in court, rather than gathering independent evidence.¹⁰³

The CCRC's caseload has indeed significantly increased since 2010/11: the average number of incoming applications up by around 50% over the last five years.¹⁰⁴

Witnesses expressed the view that funding cuts, alongside this increasing workload, have diminished the CCRC's effectiveness. Pete Weatherby QC said: "It is fanciful to imagine that the CCRC can function effectively after such savage cuts."¹⁰⁵ Criminal Appeal Lawyers Association Chairman Steven Bird agreed: "I don't really see how you can expect the same sort of service to be provided when you're increasing the number of cases and decreasing the amount of money you've got to deal with them."¹⁰⁶

Journalist and author Jon Robins argued:

Ten years ago the funding crisis became so acute that it was acknowledged by the chair of the CCRC as having a detrimental impact on staff morale and, since then, the organisation's funding situation has steadily worsened and its workload has significantly increased.¹⁰⁷

The CCRC's Chair Helen Pitcher explained to us the impact of funding cuts on its most valuable resource, staff: "we need to take on more Case Review Managers to support the work we do. We currently have 31, I believe. Ideally we need 45, so there is some recruitment to do."¹⁰⁸ A 2018 Parliamentary Question response revealed that the average caseload of a Case Review Manager had climbed from 12.5 cases in 2010/11 to 27 in April-December 2017.¹⁰⁹

Helen Pitcher told us that the CCRC was struggling to recruit and retain Case Review Managers: "A number of regulatory bodies have moved into the Birmingham area, and they all have better terms and conditions than we have within the

Commission."¹¹⁰ Dr Hannah Quirk, a former Case Review Manager herself, agreed that their pay was "not particularly competitive", comparing it unfavourably to junior Crown Prosecutors, for example.¹¹¹

However, the CCRC's leadership insisted that funding cuts and the impact on staffing have not caused the quality of its investigations to suffer.¹¹²

Where witnesses and the CCRC were in agreement was that additional resources would allow case reviews to be completed more quickly, and that this would be beneficial to applicants. The charity Inside Justice said that CCRC delays "cause misery and uncertainty to the applicant", while Pete Weatherby QC pointed out simply: "Justice delayed is justice denied."¹¹³

One proposal in the tailored review of the CCRC was that the burden on its resources could be reduced by limiting the kinds of case it was obliged to consider. It recommended that the CCRC and Ministry of Justice should discuss the possibility of removing the requirement to review summary cases (i.e. those dealt with in the magistrates' courts), and those challenging only the sentence, not the conviction. This has not been acted on.

Resources for legal representation

In addition to raising concerns about the CCRC's own resourcing, witnesses also told us that funding limits on eligibility for legal aid severely restricted the ability of most CCRC applicants to access legal representation.

At present, only those with a disposable income of £99 per week or less and disposable capital of £1,000 or under are eligible for the relevant legal aid scheme.¹¹⁴ As the Criminal Appeal Lawyers Association (CALA) pointed out, this can easily render prisoners with partners or spouses ineligible: "The financial test takes into account the income and capital of a partner if the appellant was living with that person prior to incarceration and regardless of the length of the sentence unless separation proceedings are in train."¹¹⁵

Those who are eligible struggle to find law practices willing to represent them, we heard, because the legal aid rates make the work "effectively a loss leader".¹¹⁶ In fact, CALA pointed out that the rate paid to lawyers under the scheme has not just failed to increase for over two decades, but was in fact cut by 8.75% in 2014 to £45.35.¹¹⁷ This means, CALA explained, that legal aid appeal lawyers are paid less for this work than they were in 1996.¹¹⁸

Solicitor advocate Mark Newby said that, given this, "it is unsurprising that many good appeal providers have disappeared from the work over the last few years."¹¹⁹

Under the scheme, the Legal Aid Agency provides a fixed amount of £456.25 for CCRC reviews and £273.75 for Court of Appeal cases. In oral evidence, Mark Newby explained:

That's effectively 10 hours work, but everything has to come off that ... for example, we might be asked to pay from the previous solicitor to obtain the case papers. Every letter, every communication has to come out of that; the appellant will want a visit, the family will want to speak to us, they'll be telling us about fresh evidence, and they'll want us to investigate all of these different aspects. We're subject to a very rigorous process with the Legal Aid Agency ... and we've got to be able to justify all of that work under public funding and then what's happened with legal aid practitioners over the last few years is we have been subject to aggressive auditing by the Legal Aid Agency where they've then come back trying to claw back money, and a lot of practitioners were targeted. And a number of them gave up criminal appeal work as a result, and that's the overall atmosphere under which we are asked to undertake CCRC reviews.¹²⁰

Beyond the fixed amounts, applications can be made to extend funding. However, CALA Chairman Steven Bird pointed out:

you're always looking over your shoulder making sure that everything you're doing is pushing the case forward that there is sufficient benefit in the case to justify the use of public funds. It's quite a tough regime to work under.¹²¹

The increasingly restrictive nature of the legal aid regime appears to be having a noticeable impact. In 2008, approximately a third of CCRC applicants were represented.¹²² That figure is now just 10%, leaving 90% of applicants unrepresented.¹²³

Our attention was drawn to research published in 2009 by Professor Jacqueline Hodgson and Dr Juliet Horne.¹²⁴ This demonstrated that quality legal representation improved an applicant's chance of being granted a new appeal significantly: in the period studied, 8% of represented applicants had their cases referred, versus just 2.1% of unrepresented applicants.¹²⁵ Moreover, the research found that legally represented applicants were less likely to have their applications rejected at an early

stage (19.5% of represented applicants compared with 49.5% of unrepresented applicants) and thus more likely to have their case subjected to a detailed review.

Witnesses explained to us how the availability of legal assistance for CCRC applicants can also benefit the CCRC. Michael Birnbaum QC told us that lawyers “can save the CCRC a great deal of time and effort by organising the case and its presentation properly”.¹²⁶ Dr Lucy Welsh echoed this point, writing that representatives “might be able to direct the CCRC towards the most potentially fruitful lines of enquiry, enabling the CCRC to use its ever more strained resources as efficiently as possible”.¹²⁷

Conclusions

In our view, significant funding cuts alongside an increasing caseload have left the CCRC under-resourced, particularly in the context of a criminal justice system under immense strain, which is likely to result in an increase in miscarriages of justice. In particular, the CCRC’s case review managers appear to have extremely high caseloads. We address the impact of this on the quality of the CCRC’s investigations in a later section of this report. We consider that the scale of the cuts experienced will have negatively affected the CCRC’s ability to carry out its core functions effectively.

This is compounded by the financial restrictions on legal representation for applicants. Although both applicants and the CCRC are greatly assisted by access to good quality legal representation, both the eligibility limits and the rates of payment under the legal aid scheme inhibit this. Some applicants are unable to access legal aid at all; for those who can, remuneration rates for lawyers are unsustainably low, so that there are too few law practices to do the work. Fixed fees, and the need to make applications for any additional funding, also restrict practitioners’ ability to carry out the necessary work.

We do not recommend that the under-resourcing of the CCRC should be tackled by removing cases originating in the magistrates’ courts or those relating to sentences, as opposed to convictions, from its remit. In our view, a wrongful conviction in the magistrates’ courts can have a lasting and severe impact on a person’s life, while a manifestly excessive or unlawful sentence is an injustice which should be corrected.

Recommendations

The Ministry of Justice should

- provide increased funding to the CCRC so that it can recruit additional case review managers and put in place the other changes that we have recommended in the earlier part of this Chapter and in Chapter 5 (investigations);
- raise the financial eligibility criteria for advice and assistance with CCRC and Court of Appeal matters;
- increase the rates payable to solicitors for work undertaken under the legal aid scheme to allow more solicitors to undertake the work on a financially sustainable basis.

4. STATUTORY FRAMEWORK AND RELATIONSHIP WITH THE COURT OF APPEAL

It may be thought that the CCRC exists to refer cases to the appeal courts where it believes a miscarriage of justice may have occurred. In fact, its remit is more limited. It must consider that there is a 'real possibility' that the conviction, verdict or sentence would not be upheld and, unless there are exceptional circumstances, the applicant must have exhausted their appeal rights and there must be fresh evidence or argument not taken at trial.

The 'real possibility' test

A number of witnesses told us that the referral test was flawed. Pete Weatherby QC said that while there is "certainly a logic to [it], it is unnecessary and fulfils no useful purpose other than reducing the number of references."¹²⁸ David Emanuel QC described it as "predictive, vague and subjective". If the test was not changed, he considered that there needed to be a different route other than judicial review to challenge a CCRC decision not to refer.¹²⁹ We also heard that, as it was an adversarial test, it was an inappropriate one for an investigative/inquisitorial organisation to apply.¹³⁰ Cardiff University Innocence Project said the test "directly undermines the objectives of the CCRC as envisaged by the Royal Commission on Criminal Justice" which recommended its creation. Dr Michael Naughton said of the current test:

It prevents the CCRC from referring potentially genuine miscarriages of justice of applicants who may be innocent if it is thought that the Court of Appeal may conclude that the case lacks legal merit. This severely compromises the CCRC's claim to independence and hinders its ability to assist applicants who may be innocent.¹³¹

Michael Birnbaum QC, amongst others, expressed concern about the predictive nature of the CCRC's current test, writing that the real possibility test

requires [the CCRC] to second guess whether the [Court of Appeal] would find the conviction to be unsafe. This might work well if the [Court of Appeal] could be relied upon to apply its own declared criteria for assessing safety in a consistent and principled way. But in this regard the [Court of Appeal] is very unreliable.¹³²

The CCRC's Chief Executive told us that she would be "very happy for the test to be reconsidered" but said: "We don't feel it's inhibiting us ... I can't think of a case where we've sat there and thought, were it not for this test, we would be making a referral."¹³³ She also denied that the 'real possibility' test inherently undermined the CCRC's independence from the Court of Appeal, saying that "there's a difference between having a test ... which is deferential to the test of the Court of Appeal, and us being deferential to the Court of Appeal".¹³⁴

This test is different from that envisaged by the Royal Commission on Criminal Justice in 1993. It called for the new miscarriage of justice authority to refer cases for appeal "where there are reasons for supposing that a miscarriage of justice might have occurred", though it did not specifically consider the wording of the test to be applied.¹³⁵

Dr Hannah Quirk suggested there are "sound arguments for replacing the 'real possibility' test with that used by the Scottish CCRC".¹³⁶ The Scottish CCRC can refer cases to the High Court of Justiciary where it believes a miscarriage of justice may have occurred and that it is in the interests of justice to do so.¹³⁷ It is worth noting, however, that the test applied by the (Scottish) High Court when considering conviction appeals mirrors this language: it quashes convictions where it decides there has been a miscarriage of justice.

David Emanuel QC suggested that the CCRC should refer cases where there is an arguable ground of appeal.¹³⁸ JUSTICE offered two different options: that the CCRC be allowed to refer where it finds an arguable case that a miscarriage of justice had occurred, or alternatively, where it itself determines there has been a wrongful conviction "based on what [it] would have decided [had it] constituted part of the jury for the original hearing".¹³⁹

Last year, legislators in New Zealand gave its newly-created CCRC a different test to that in England, Wales and Northern Ireland, allowing it to refer cases for appeal where it "considers that it is in the interests of justice to do so".¹⁴⁰ In determining this, the New Zealand CCRC must *have regard to* whether the applicant has appealed, the extent to which the matters raised have been dealt with at trial or on appeal, the prospects of the court allowing the appeal, and any other matters it considers relevant, allowing discretion where it considers the appeal court ought to hear a particular case.¹⁴¹

Applying the test

We also heard evidence that the CCRC interprets the real possibility test too conservatively. Professor Carolyn Hoyle and Dr Mai Sato told us "the Commission

could be bolder in its referrals and be prepared to push at the boundaries of the real possibility test".¹⁴² Their research demonstrated that in distinguishing between a safe and unsafe conviction, the real possibility test can be unclear and that Commission staff faced difficulty applying the test."¹⁴³ Commission staff told them:

I think we could be bolder... my view is, there are cut-and-dried cases, and there's a grey area. And I think in the grey area, we ought to lean more towards referring.¹⁴⁴

This was echoed by Lord Judge, the former Lord Chief Justice, in written evidence to the 2015 Justice Committee inquiry. He said that "there was no reason why the CCRC should not refer a case where there is "a 'real possibility' that the verdict of the jury is against the weight of the evidence".¹⁴⁵

What exactly constitutes a real possibility is not set out by the legislation. The late Lord Bingham suggested it "is more than an outside chance or a bare possibility, but ... may be less than a probability or a likelihood or a racing certainty."¹⁴⁶ In terms of how the CCRC interprets it in practice, we note that the proportion of CCRC conviction referrals which resulted in successful appeals was 76.2% in 2018-19 and 61.1% in 2019/20,¹⁴⁷ and has averaged 68.7%^{ix} over the CCRC's lifespan.¹⁴⁸ This lends some support to SAFARI's view that:

The 'real possibility' test seems to be misunderstood by the CCRC. It appears that what they are looking for is not a 'real possibility' but a 'strong probability' that the case would succeed.¹⁴⁹

On this point, solicitor and CALA Chairman Steven Bird told us: "If your success rate on referrals is 70%, then perhaps you could be referring more cases."¹⁵⁰

We heard evidence that the predictive nature of the real possibility test encourages a deferential attitude to the Court of Appeal and that criticism or approval of CCRC decisions in the Court impacts on the independence of the Commission.¹⁵¹ Several witnesses suggested that the CCRC needed empowering to help it challenge the Court of Appeal. As Professor Carolyn Hoyle pointed out, "all institutions are fallible. All of us make mistakes. All of us misinterpret. The Court of Appeal is not an exception to that."¹⁵²

Michael Birnbaum QC said the CCRC had been "cowed by criticism" from the Court,¹⁵³ while Professor Julie Price suggested that the fact that there had only been

^{ix} These figures do encompass both conviction and sentencing referrals, which differ slightly in their respective rates of success before the courts.

two re-referrals in over twenty years would confirm suggestions that the CCRC is not comfortable challenging the Court.¹⁵⁴

The CCRC denied these allegations, saying: "The CCRC is unafraid to challenge the Court where necessary. The decision on whether to refer is for the CCRC alone, and is taken solely on the evidence in the case."¹⁵⁵

However, some ex-CCRC Commissioners did not agree. One told us "the Commission became unduly sensitive to criticisms from the CoA."¹⁵⁶ Another said:

Any criticism of referrals by the Court of Appeal was a cause for considerable concern ... and interpreted as evidence that the Commission was at risk of losing the confidence of the appeal court. In the vacuum thus created, the number of referrals began to reduce.¹⁵⁷

Both an ex-CCRC Commissioner and the Chief Executive of the Scottish CCRC pointed out that a strain in the CCRC's relationship with the Court is natural and healthy.¹⁵⁸ The latter told us:

There will always be and there should always be a tension between an appellate body and a body which is tasked with reviewing cases and referring cases back to them. Because if there isn't that tension, somebody's not doing their job.¹⁵⁹

It has been suggested that referring more cases could merely give applicants false hope. We note, however, a conversation described by Dr Dennis Eady between himself and the victim of an alleged miscarriage of justice who told him: "Well, look, in my position, false hope is better than no hope."¹⁶⁰

Conclusions

The 'real possibility' test is problematic. First, the distinction between a 'real possibility' and a 'probability' is a very fine one, and it is very easy for one to elide into the other. Lord Bingham's careful distinctions are likely to lose some subtlety when applied by many decision-makers across a large organisation. Second, it encourages the CCRC to be too deferential to the Court of Appeal and to seek to second-guess what the Court might decide, rather than reaching an independent judgement of whether there may have been a miscarriage of justice. A different test might create a different and more independent mindset.

However, even if the test remains the same, the evidence we have heard raises concerns that the CCRC has been too cautious in determining whether there is a real possibility that the Court of Appeal will overturn a conviction or sentence. This seems to be supported by the low proportion of cases it refers and the high proportion of those cases that are successful before the Court.

We note that the Justice Select Committee made a similar recommendation in 2015, but the CCRC does not appear to have responded to it.¹⁶¹

Recommendations

- the 'real possibility' test should be redrafted to expressly enable the CCRC to refer a case where it determines that the conviction may be unsafe, the sentence may be manifestly excessive or wrong in law or where it concludes that it is in the interests of justice to make a referral. By definition this would include all cases where it finds that a miscarriage of justice may have occurred including 'lurking doubt' cases.
- while 'real possibility' remains the test to be applied by the CCRC, it should be bolder in interpreting it: determining in each case whether there is more than a fanciful chance of the verdict being quashed, even if quashing is less likely than not. It should also remove any targets for success rates before the Court of Appeal.

'No appeal' cases

Where a person applying to the CCRC has not appealed against conviction or sentence, under current legislation they will only have their case reviewed fully if the CCRC considers there are "exceptional circumstances" which warrant it. The rationale behind this, according to the CCRC's published policy, is that "[i]t is vital that the CCRC does not, other than for compelling reasons, usurp the conventional appeals process."¹⁶²

Research conducted between 2010 and 2015 found "enormous variation" amongst CCRC Commissioners as to what they considered to be exceptional circumstances,¹⁶³ with the worrying implication that whether an applicant's case received a full review depended largely on luck or at least a degree of subjectivity

However, the CCRC told us that since then, "the CCRC's screening process has completely changed" and that there are now "more checks and balances to the

process".¹⁶⁴ In 2018-19, 493 of the 1,371 applications received by the CCRC were no appeal cases, and of these 21.7% were passed through to a normal case review.¹⁶⁵

We nevertheless heard evidence about the difficulties faced by CCRC applicants who do not meet the exceptional circumstances threshold. A former CCRC Commissioner told us:

One of the frustrations of working in the CCRC was refusing those cases who had not appealed either their conviction or sentence. ... We knew in refusing them that many did not have the capacity to take their own case forward without assistance or the resources to engage appropriate help.

Dr Dennis Eady agreed, pointing out that a "Catch-22" faced by some potentially wrongfully convicted individuals is that "until you've lost your first appeal, you can't go to the CCRC ... so you can't get any evidence to go for your first appeal".¹⁶⁶ Research published in 2018 found that amongst 183 'no appeal' applicants whose cases the CCRC rejected at the initial assessment stage, only 21, or 11.5%, actually went on to appeal.¹⁶⁷

Another issue raised was the 28-day time limit for lodging an appeal, outside of which any delay must be justified to the Court's satisfaction. Progressing Prisoners Maintaining Innocence explained that: "For an innocent person to be convicted is such a shock they often cannot muster engagement with the appeal process, so they are then too late to attempt application."¹⁶⁸

Conclusions

We are concerned that the bar on the CCRC considering 'no appeal' cases unless there are exceptional circumstances denies access to justice to those who may have been wrongly convicted. This is because some of those people – including those who have received negative advice on appeal from trial counsel – will not have the legal assistance or access to evidence needed to properly pursue a first appeal. As researchers have pointed out, they "are in danger of falling through the criminal justice system's safety net".¹⁶⁹

We have considered whether to recommend the abolition of the 'exceptional circumstances' test altogether. This has some attractions, especially given the current pressures on criminal legal aid and representation both at first instance and at appeal. However, if there were no filter at all, this would mean that every person convicted or sentenced in the Crown Court or magistrates' courts could go straight to the CCRC.

This could create an unsustainable workload for the CCRC and effectively undermine the criminal appeal system. Nevertheless, the CCRC exists to ensure that wrongful convictions can be overturned. We therefore consider that there should be a wider and more consistent definition of what amount to 'exceptional circumstances'.

Recommendations

- the CCRC should adopt a broader interpretation of the 'exceptional circumstances' requirement. This should include cases where applicants can show that there were reasons why they were unable to exercise an appeal right in time, including the inability to access legal advice and representation, as well as where there is new evidence or new techniques which were not available at the time. Applicants should not be required to supply documentary evidence that they have taken all reasonable steps to obtain access to material which the CCRC can acquire using its section 17 or 18A powers.
- the 28-day time limit for lodging an appeal should be extended to reflect the difficulties faced by applicants, some of whom are unrepresented and vulnerable.

Discretion not to refer

Under the current law, the CCRC can determine that there is a real possibility the Court of Appeal will quash a person's conviction, but nevertheless refuse to refer it for review.¹⁷⁰ Some witnesses, including JUSTICE and the Cardiff University Innocence Project, were concerned by the CCRC's having this residual discretion.¹⁷¹

The relevant published CCRC policy states it will "rarely be appropriate" for it to use this discretion and that if it does so, it "must be exercised in accordance with public law principles".¹⁷² The policy gives a hypothetical example of a case where it might be "an affront to justice" to refer, namely where "the applicant complains with some justification of a serious irregularity or abuse of process, but admits his guilt publicly".¹⁷³

Conclusions

We understand why in some extremely rare cases it may be considered against the interests of justice to refer a verdict that the CCRC determines has a real possibility of being overturned. Having said this, we are uncomfortable with the CCRC having such a power, because of the risk, however remote, of preventing a miscarriage of

justice case being heard by the Court of Appeal. We also note that any referrals based upon due process failures, even in such circumstances, bring attention to flaws within the criminal justice system and can thus contribute to the prevention of future miscarriages of justice.

Recommendation

- section 13 of the Criminal Appeal Act 1995 should be amended to provide that any cases which the CCRC deems meet the referral criteria should be sent to the appeal courts.

The Court of Appeal's legal framework

Much of the evidence we heard suggested that reform of the CCRC is not enough. Dr Ann Priston and Louise Shorter of Inside Justice said that "blame" for the difficulties faced by the wrongly convicted in accessing justice "does not rest squarely at the door of the CCRC",¹⁷⁴ while journalist Jon Robins told us the "whole appeals system isn't working".¹⁷⁵ Witnesses told us that tackling miscarriages of justice required that the Court of Appeal itself be subject to scrutiny and reform.

In 2018, former Lord Justice of Appeal Sir Anthony Hooper told BBC Panorama that: "It's become much more difficult for an appellant to succeed" at the Court of Appeal.¹⁷⁶ Dr Dennis Eady agreed, saying "the Court of Appeal's bar has got higher and higher and higher. And the CCRC is stuck between the rock and the hard place, there."¹⁷⁷

Some suggested there was reluctance amongst appeal judges to address miscarriages of justice. Dr Hannah Quirk wrote: "The judiciary has never reflected upon or acknowledged its role in wrongful convictions."¹⁷⁸ Henry Blaxland, an experienced appeals QC, told us "you get the impression, sometimes, that the Court of Appeal's main preoccupation is keeping down the work that they have to deal with".¹⁷⁹

A common complaint was that the Court of Appeal is too reluctant to quash convictions on the basis that the evidence being presented to it was not 'fresh'. Cardiff University Innocence Project told us:

The refusal of the [Court of Appeal] and CCRC to revisit evidence available at trial (even if not heard) is based on unfair assumptions about a defendant's ability to run a thorough defence at trial. Following cuts to legal aid, the defence do not have the resources to thoroughly

investigate the evidence and often focus on undermining the prosecution case in court, rather than gathering independent evidence.¹⁸⁰

Professor Carolyn Hoyle commented on the knock-on effect the Court's approach has on the CCRC:

I've seen, so often, Commissioners at committee meetings that I've sat in on pulling their hair out in frustration because they can't get past the fresh evidence requirement, especially when a case has been to the Court of Appeal before and they've used their best shot, and now they can't use that again, because of the requirement to present fresh evidence. And that's hugely frustrating.¹⁸¹

Dr Michael Naughton said: "A fairer interpretation of the fresh evidence criteria needs to be adopted so that victims of miscarriages of justice are not procedurally barred from having their convictions overturned."¹⁸²

Progressing Prisoners Maintaining Innocence (PPMI) point out that obtaining fresh evidence "is often very difficult in historic cases that are alleged to have happened decades ago."¹⁸³

Even when the Court of Appeal does accept that evidence is fresh, Henry Blaxland QC explained to us that a series of judgments has watered down the jury impact test recommended by the House of Lords in the 2001 case of Pendleton.¹⁸⁴ Under Pendleton, the test for determining whether new evidence renders a conviction unsafe should be "whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict."¹⁸⁵

In theory, the Court of Appeal is able to quash a conviction as unsafe, even if there is no new evidence or argument. These are known as 'lurking doubt' cases. In 2015, the former Lord Chief Justice Lord Judge assured the Justice Committee that "if having examined the evidence, the court is left in doubt about the safety of the conviction it must and will be quashed".¹⁸⁶

Professor Michael Zander, a member of the Runciman Commission, pointed out to the Justice Committee that the exceptional circumstances test (section 13(2)) was "introduced with the specific conscious and articulated objective of giving permission exceptionally for a referral even though there is nothing new where there are compelling reasons sufficient to create a real possibility of the appeal succeeding".¹⁸⁷

However, we heard that, in practice, the Court's willingness to allow lurking doubt appeals was questionable. One ex-CCRC Commissioner criticised "the way the Court effectively sought to kill off cases based on 'lurking doubt'. In the early years, the [Court of Appeal] was ready to quash convictions which were slender or unsatisfactory ... The [Court of Appeal] turned decisively against this ..." ¹⁸⁸

Hoyle and Sato state that, in consequence, the Commission "has never used" its theoretical power to refer on the basis of 'lurking doubt'. ¹⁸⁹

Dr Eady argued that the Court of Appeal needed to be more open to the possibility that jury had simply made the wrong decision when considering cases:

Juries are not infallible. It's an absurd act of doublethink we have. We all know that juries make mistakes, will get it wrong. We all know that investigations go wrong. We all know that trial processes are adversarial. The jury doesn't hear all the evidence, it hears a sort of carefully choreographed two sets of 'the truth'. So, things will go wrong, and you won't always be able to find new evidence. ¹⁹⁰

Some witnesses went even further. Cardiff University Innocence Project, False Allegations Support Organisation and SAFARI suggested the CCRC could be given the power to quash convictions itself. ¹⁹¹ Dr Eady said at present the Court of Appeal was "effectively unaccountable even for the most perverse judgments". ¹⁹² He proposed "easier access to the Supreme Court as a kind of appeal from the Court of Appeal." ¹⁹³ At present, the Supreme Court can only hear criminal appeals in which there is a point of law of general public importance". ¹⁹⁴

Conclusions

The evidence we heard suggests that the Court of Appeal's approach to cases may prevent some miscarriages of justice being corrected, and inhibit the CCRC's ability to raise alleged miscarriages of justice. This is particularly the case where there is little or no fresh evidence and argument, but where it appears that the initial verdict may nonetheless be flawed or perverse: the classic 'lurking doubt' cases.

We do not, however, believe that the CCRC should itself have the power to quash convictions. It is not, and is not intended to be, a judicial body. The aim must be to ensure that the CCRC has the resources, approach and powers it needs to carry out its function as an investigative and reviewing body, as we recommend elsewhere in this report. Nor do we believe that the Supreme Court can or should become a second-tier appellate authority. We do believe that the 1968 Criminal Appeal Act

should be reviewed to ensure that the Court of Appeal can take the widest view of the circumstances which may have resulted in a wrongful conviction.

Recommendation

The Law Commission should review the Criminal Appeal Act 1968 with a view to recommending any changes it deems appropriate in the interests of justice. Specifically, we would invite the Law Commission to consider whether any of the following statutory reforms ought to be recommended:

- a. As the Justice Committee suggested in 2015, changes to “allow and encourage the Court of Appeal to quash a conviction where it has a serious doubt about the verdict, even without fresh evidence or fresh legal argument”;¹⁹⁵
- b. Mandating and encouraging a cumulative review of issues;
- c. Introducing the premature destruction of crucial evidence which could have undermined the safety of a conviction as a standalone ground of appeal;
- d. Broadening the law on post-conviction disclosure to assist appellants in accessing evidence to make applications for leave to appeal.^x

^x Chapter 5 deals with disclosure issues in further detail.

5. INVESTIGATION

Quality of investigations

The CCRC was set up to be an investigatory body. It has unique statutory powers to obtain evidence from public and private bodies and individuals for this purpose. Without conducting adequate investigation, certain miscarriages of justice will go undiscovered and uncorrected. Yet, we repeatedly heard evidence to the effect that the CCRC's investigations lacked thoroughness and scope.

"The CCRC's case review approach is generally limited to a desktop review of the case papers," reported Dr Michael Naughton.¹⁹⁶ The support group SAFARI considered that the CCRC "more often [than not] do not go 'beyond the bundle'".¹⁹⁷ Solicitor advocate Mark Newby said the CCRC "remains reactive and not proactive",¹⁹⁸ while a prisoner-applicant complained that the CCRC is "simply not using" its statutory powers to investigate "in the vast majority of cases", adding that "it is precisely because of this inaction that they are so widely lambasted as 'unfit' for purpose."¹⁹⁹ The Criminal Appeal Lawyers' Association told us that purely paper-based reviews present "the constant danger of creeping cynicism" and that "face to face interviews with applicants can bring the case to life".²⁰⁰

The CCRC disputed this characterisation, stating it "is in no sense conservative in the use of its section 17 powers" to obtain evidence from public bodies.²⁰¹ Defending its investigations, the CCRC told us:

Firstly, the CCRC does regularly meet with witnesses, police officers, prosecutors, defence lawyers and others in the course of its reviews ... Secondly, particularly in the modern world, review work which takes place 'at your desk' can be immensely valuable ... Thirdly, a high percentage of unsafe convictions are caused by material non-disclosure of information to the trial defence. Our review of police/CPS case materials can and does uncover such non-disclosure, and has led to approximately one fifth of all CCRC referrals, so the desk-based aspect of our case reviews should be viewed as an essential part of our work.

However, the fact that it is not rare for the CCRC to use its investigatory powers does not mean that it is making adequate use of them in every case. Solicitor Matt Foot told us that in one case where he acted, the CCRC "did a very good job", while in another there was a "problem, I suspect, of basically not getting out of the office" to investigate.²⁰² Professor Carolyn Hoyle said the CCRC "has more variability in its responses to cases than I think any of us would like to see".²⁰³

Cardiff University Innocence Project said the CCRC is “unlikely to investigate unless the applicant demonstrates the potential for identifying significant fresh evidence, which is virtually impossible for applicants to achieve within a prison environment.”²⁰⁴

We were told that the CCRC’s investigations sometimes show “cognitive bias in favour of not carrying out investigation”.²⁰⁵ One prisoner-applicant wrote: “The CCRC seems to me to investigate cases with a definite view to proving there is no miscarriage, rather than to find out if there has/had been one.”²⁰⁶ A former Commissioner’s evidence suggested that the CCRC has indeed taken a closed-mind approach when investigating: “the over-riding question was to ask the question ‘so what’ instead of ‘what if’.”²⁰⁷ A comment attributed to a CCRC Case Review Manager that it is “obvious” most applicants are guilty, reported in Professor Hoyle and Dr Sato’s recent book, is further evidence of some closed-mindedness.²⁰⁸

The CCRC’s approach to commissioning new forensic testing came under particular criticism from practitioners. Mark Newby highlighted the case of his client Victor Nealon, where the CCRC twice refused to order the DNA testing which eventually exonerated him.²⁰⁹ The charity Inside Justice claimed the CCRC “does not have suitably qualified expertise” in-house to develop a forensic strategy in cases.²¹⁰ Emily Bolton gave an example where the CCRC refused to conduct DNA work:

Our client was convicted of murder alongside a co-defendant. DNA recovered from a spent shotgun cartridge found next to the victim’s body did not match either of the two individuals convicted of the crime. We therefore suggested the DNA be checked against the National DNA Database, since of course it could belong to the shooter. However, the CCRC refused: saying the exercise was not worth doing because even if a match was found, all it would show for certain is that the person had come into contact with the cartridge at some point. While it is of course true that a match would not necessarily prove they were the shooter, it is disingenuous to claim that such a finding would not constitute important and potentially game-changing fresh evidence.²¹¹

Witnesses said that funding cuts alongside an increased caseload had reduced the quality of the CCRC’s investigations, with Dr Hannah Quirk, a former Case Review Manager herself, suggesting that these were “bound to have an impact on casework”.²¹² A prisoner-applicant wrote: “What happens if the workload keeps going up and the budget stays the same? The quality of investigations cannot remain constant”.²¹³

The CCRC denied that cuts had lessened the standard of its investigations, telling us:

We would stress that we never decide against relevant lines of enquiry because of cost. If an enquiry might reasonably lead to evidence of relevance to the safety of the conviction, then we will undertake the enquiry regardless of cost.²¹⁴

However, Professor Carolyn Hoyle said:

decisions about how thoroughly, or how to investigate, cases, are made with a mind to a budget ... I've never seen in any of my scrutiny of the case records anybody make a statement that they won't do a particular investigation for financial reasons. But it's the context there. They talk about the cost, and they discuss with forensic experts, for example, the cost of expert evidence. So it's there.²¹⁵

Several individuals told us that a culture of aiming to meet internal targets also risked undermining the thoroughness of CCRC investigations. One of the CCRC's current key performance indicators is for case reviews to be completed in less than 30 weeks.²¹⁶ Dr Quirk argued:

Rather than trusting professionals to get on with their work, a 'Key Performance Indicator' culture appears to have taken hold. ... Waiting times for applicants were a concern, but requiring the elimination of queues may be counterproductive if it just means that Case Review Managers become overloaded or cases are closed prematurely.

A former CCRC Commissioner also touched on this point:

It was somewhat disturbing to me that by the time I left, a small number of Commissioners were permanently dedicated to dealing expeditiously with cases at the front ... I am personally as sure as I can be, without being sure, that some potentially meritorious cases were winnowed out prematurely.²¹⁷

The same ex-Commissioner gave an example of how targets risk encouraging CCRC Case Review Managers to take shortcuts in investigations:

I remember a CRM telling me (in a case which clearly fell within the guidelines for making these investigations) that she was not going to seek out the Social Services material because the case had been fast tracked with tighter expectations on the time taken to case closure. I

told that CRM that this was wholly wrong – I do not think all of my colleagues would have agreed.²¹⁸

A different ex-Commissioner told us that the target-based approach adopted by the CCRC to tackle delays “risked incentivising staff to resolve cases as quickly as possible rather than search for potential referable points, and action needs to be taken to redress this balance”.²¹⁹

The CCRC has previously defended its focus on completing reviews quickly, with its Chief Executive writing that “for the majority of our applicants who are unrepresented, the most important thing is the time taken to work on their case and the time we take to complete it”.²²⁰ Journalist Jon Robins took issue with this claim, telling us: “I have interviewed many applicants and spoken with their families. I can say with confidence that their biggest concern is having their convictions overturned.”²²¹

We received many suggestions about how the CCRC’s investigations could be improved. Dr Naughton called for the CCRC to adopt an “in-depth inquisitorial” approach,²²² while a prisoner-applicant said it “should be under a duty, like the police, to pursue all reasonable avenues of inquiry”.²²³ SAFARI urged: “Sufficient funding needs to be provided so that the CCRC can afford to get expert evidence, can afford to interview witnesses, can afford to get trial transcripts, and so on.”²²⁴

Inside Justice’s submission suggested that the CCRC needed to employ in-house forensic expertise,²²⁵ while Dr Kevin Felstead of the British False Memory Society called for the CCRC to “set up a specialised team comprised of psychiatrists, clinical psychologists and other mental health professionals to examine false memory-type allegations”.²²⁶

Investigating law enforcement misconduct

We heard criticism of the way the CCRC investigates alleged law enforcement misconduct. The wife of one CCRC applicant told us that the body “needs to be more cautious in their assumption that an investigating police officer has behaved with integrity and honourable intent.”²²⁷ A prisoner-applicant said: “I really thought the CCRC were meant to be neutral but it seems that a conversation with the police ... is enough to make up their mind.”²²⁸

The Cardiff University Innocence Project claimed that in some of its cases the CCRC “accepted the police account, despite unexplained anomalies within the investigation”.²²⁹ Hoyle and Sato concluded that it is “likely that the [CCRC] has been

a little too complacent ... in assuming that institutionalised corruption and misconduct by police is rare."²³⁰

Conclusions

Though the CCRC has done excellent investigative work in some cases, our evidence suggests that some of its investigations lack the scope and rigour to identify potential miscarriages of justice. The combination of budget cuts and an increased caseload is bound to impact on the organisation's ability to carry out comprehensive investigations. We understand the need to ensure the cases are progressed in a timely fashion, but an over-rigid target-driven approach risks prioritising speed over thoroughness.

While we accept that paper-based investigations can be valuable, we agree that reliance on this, rather than any face to face contact with applicants or witnesses, can lead to a one-dimensional or even cynical approach.

When there are allegations against law enforcement personnel, it is particularly important, in the public interest, that they are fully investigated and that the investigation is thorough and transparent, with interviews fully recorded and retained with a view to disclosure to the applicant and his or her legal representatives.

Some witnesses suggested that the CCRC should be given powers of compulsion to require officers to attend interviews. However, we note that, when such powers have been provided to other investigatory bodies, witnesses under compulsion commonly elect to provide no comment, relying on the protection against self-incrimination. Unless it can be shown that officers are regularly refusing even to attend interviews voluntarily, we do not consider that this power would add a great deal to the CCRC's ability to carry out effective investigations.

Recommendations

- The CCRC's budget should be increased so that
 - it can carry out more face to face inquiries with both applicants and other relevant individuals
 - it can conduct thorough inquiries into all potentially relevant material
 - it can obtain and review complete trial transcripts where relevant to the points at issue in the case
- The CCRC should review its key performance indicators, so that they are less generic and do not focus solely or mainly on timeliness. Each case should have a regularly updated individual case plan, with target activities and dates.

- The CCRC should set up an advisory panel of external forensic experts to consult on scientific and technical issues and on developing forensic strategies.
- When investigating allegations against police or other law enforcement personnel, the CCRC should always interview officers separately, and where necessary obtain primary source information to substantiate these accounts through senior officers unconnected with the initial investigation.

Investigating non-disclosure of evidence

A crucial part of ensuring that defendants receive a fair trial is the Crown's duty to hand over any material that may undermine the prosecution case or support the case for the defence. However, in 2018, the Justice Select Committee found that there had been "serious long term failures in disclosure" of evidence by police and prosecutors.²³¹ Former Director of Public Prosecutions Lord Macdonald QC said there are potentially "thousands of people" languishing in prison who have been wrongly convicted due to such disclosure failings.²³²

We were told that the CCRC's investigations are not sufficient to reliably uncover the existence of undisclosed evidence.²³³ In particular, several evidence-givers criticised the CCRC's 2017 decision to stop conducting checks for previously undisclosed evidence about the credibility of complainants in all sexual offence cases.²³⁴

The CCRC undertook an internal review of the way it approaches disclosure issues in 2018/19. The review said: "no evidence was identified to indicate that current CCRC policies and guidance regarding disclosure, witness credibility and exceptional circumstances require revision".²³⁵

However, a former Commissioner suggested that whether the CCRC was successful in uncovering undisclosed exculpatory evidence depended on the luck of which staff members were involved:

I believe that the diligence in seeking out undisclosed material depended very much on the diligence of the CRM and the approach taken by the Assigned Commission Member.²³⁶

To address these concerns, Emily Bolton argued the CCRC needed to take a different approach:

The only way for the CCRC to reliably identify evidence wrongly withheld by law enforcement is to obtain and review all law enforcement material relating to a case so that fresh leads can be identified and "unknown unknowns" discovered. This includes material that may not

be present with the main body of case files: such as Police National Computer records relating to witnesses, police officer disciplinary records, and material held by the police force's intelligence unit.²³⁷

Enforcing disclosure requests

Numerous individuals told our inquiry that the lack of an effective mechanism by which the CCRC can force public bodies to comply with its requests for disclosure of material is a problem. An ex-CCRC Commissioner explained:

There were occasionally inexcusable delays in getting responses from some police forces and from the CPS. Such delays could profoundly impact upon the outcome of a case ... Generally, speaking, there was a feeling of helplessness in trying to expedite requests.²³⁸

Hoyle and Sato cite one instance where the CCRC waited 1,000 days for a public body to comply with a disclosure request.²³⁹

Currently, the only way the CCRC can enforce compliance with a request made under section 17 of the Criminal Appeal Act 1995 is to take judicial review proceedings against the public body. This "can be time-consuming" and expensive.²⁴⁰ By contrast, the CCRC can enforce compliance with requests made to private individuals. A failure by an individual to obey a Crown Court order to disclose material made under Section 18A of the Act is enforceable as a contempt of court. The Scottish CCRC is able to apply for a court order to enforce compliance from both public bodies and individuals.²⁴¹

Inside Justice argued: "Changes are required to make more effective, and give 'teeth' to, the statutory powers the CCRC holds to obtain material from public and private bodies."²⁴² Kirsty Brimelow QC told us "there has to be a rule that somebody has to get back to them with a reply within a certain period of time".²⁴³

The CCRC agreed that "some teeth" to ensure speedy enforcement of its section 17 requests "would be helpful".²⁴⁴

Destruction of material

We heard concerns about the premature destruction of material inhibiting CCRC investigations. Police are legally required to retain all documents and exhibits relating to an investigation for at least as long as a convicted person remains in custody.²⁴⁵ However, Inside Justice reported that "the post-conviction retention landscape within

police forces is chaotic: material which could exonerate an innocent individual is routinely lost, contaminated or destroyed."²⁴⁶

A former CCRC Commissioner agreed this was a problem:

Many of our cases went back several years. Although the changes in the legislation allowed us to access records held by private as well as public bodies, such organisations were increasingly operating strict retention policies and documentation whether electronic or hard copy, where it had existed, had often been destroyed.²⁴⁷

The premature destruction of the audio recordings on which trial transcripts are based was also raised as a concern.²⁴⁸ Under HM Courts and Tribunal Service's current Crown Court Record Retention and Disposition Schedule, such recordings are destroyed after five years, while digital recordings are kept for seven years.²⁴⁹

In his 2012 thesis discussing the results of research carried out with access to CCRC files, barrister Malcolm Birdling wrote that:

In cases where the CCRC is minded to obtain transcripts, the frequency with which they are nonetheless unavailable (due to loss or destruction in accordance with data retention policies) is lamentable. This can have fatal consequences for an investigation.²⁵⁰

Conclusions

Non-disclosure or destruction of exculpatory material has been a factor in a number of miscarriages of justice. We recognise that the CCRC has undoubtedly done admirable work in finding wrongly withheld evidence; however, we are concerned that its current approach may be less rigorous. We agree that it is both proportionate and necessary that the CCRC is able, where relevant, to fully examine schedules of used and unused material.

There have clearly been delays by public bodies in providing information to the CCRC. This adds to the length of investigations and is particularly deplorable for applicants who are in prison. We agree that there should be some sanction, as there is for private individuals, to ensure speedy compliance with CCRC requests.

It is important that in righting a miscarriage of justice, all relevant material can be examined. We were concerned to hear that current retention processes

may not be being complied with, and that such material may be destroyed while someone is in custody.

Recommendations

- In cases where the withholding of relevant evidence is a concern, or has been alleged, the CCRC should obtain and review the schedules of disclosed and undisclosed material, including, where relevant to the application, credibility checks on complainants and witnesses and disciplinary checks on law enforcement personnel. Where necessary, the CCRC should have access to the documentation that is referred to within those schedules.
- There should be a statutory power requiring public bodies to comply with section 17 requests within a fixed timescale, which is appropriate and reasonable based on the nature of the request. There should be sanctions for non-compliance and where necessary the CCRC should be able to apply to the Crown Court for an order to enforce compliance as it can in relation to private bodies and individuals.
- The Home Office should contact police forces to remind them of their legal obligation to retain all material in cases resulting in conviction and to ask them what measures they have in place to ensure compliance. We suggest that HM Inspectorate of Constabulary and Fire and Rescue Services should conduct a thematic inspection into police forces' current retention practices.
- HM Courts and Tribunals Service should amend the Crown Court Retention and Disposition Schedule so that Crown Court trial audio recordings are held for as long as a convicted person is in custody, or for five or seven years (as at present), whichever is longer.

6. ACCOUNTABILITY AND TRANSPARENCY

Accountability

All public bodies should be accountable, including the CCRC. It makes decisions about alleged miscarriages of justice which have grave consequences. When the CCRC makes an incorrect decision, it can mean that an innocent person is denied justice and remains in prison for a crime they did not commit. Further, when this happens, it can inhibit the identification of the actual offenders by preventing the police investigation from being reopened.

We repeatedly heard evidence that the CCRC lacks accountability. Appeal solicitors reported to us that there is “no effective way to challenge the Commission”²⁵¹ and that “the CCRC is insufficiently accountable for its failings”,²⁵² whilst the support group SAFARI called the CCRC “virtually untouchable at present”.²⁵³ One prisoner-applicant wrote that “the CCRC is pretty much above the law”.²⁵⁴

The only mechanism for challenging CCRC decisions is via judicial review. The importance of this is clear in the CCRC’s recent referral of eight members of the Shrewsbury 24 pickets. In 2017, the CCRC decided not to refer their cases; the applicants instituted judicial review proceedings, in the course of which the CCRC decided to revisit its decision on the basis of fresh evidence and argument and made a referral in 2020.

However, this kind of challenge is not readily available to applicants. The charity Just for Kids Law described judicial review as a “costly (given the limited availability of legal aid) and lengthy process which doesn’t provide very effective oversight.”²⁵⁵ With a rising number of applicants (over 90% in 2019/20) coming to the CCRC without representation,²⁵⁶ witnesses considered judicial review inaccessible to many. Just for Kids Law made clear to us that unrepresented applicants were unlikely to be aware of the possibility of judicial review”. Likewise, lawyer Emily Bolton explained that “the prospect of an unrepresented applicant making use of the judicial review procedure is fanciful” and that the potential risk of having to pay the CCRC’s legal costs if unsuccessful “has a further chilling effect”.²⁵⁷

For a judicial review to succeed, it is not enough to show that a CCRC decision is, or may be, substantively incorrect. Applicants must show that the CCRC’s decision is unlawful, which “[i]n practice means proving [...] that a CCRC decision is so demonstrably unreasonable as to be irrational or perverse.”²⁵⁸ Even if that is established, the Court has a discretion whether to grant a remedy or not. Relief will not be granted if it appears to be highly likely that the outcome for the claimant would

not have been substantially different if the conduct complained of had not occurred. While the threat or anticipation of – or grant of permission for – judicial review has on occasion led the CCRC to revisit investigations, this is rare.²⁵⁹ The CCRC has, according to Hoyle and Sato, lost only one judicial review in its lifetime.²⁶⁰

In Mark Newby's opinion, the CCRC "is well protected" by the Administrative Court, which decides judicial review cases, because of the "high threshold it has set down" when applying this test. Just for Kids Law agreed, adding that even if an applicant succeeds, they may simply find themselves in the same position in which they started:

The case law for judicial review suggests that the High Court give[s] a wide discretion to the decisions of the CCRC, and those that are successful find themselves at the beginning of the process that means the CCRC will remake a decision, again often with a lengthy wait.²⁶¹

The CCRC does have a complaints procedure, but this is an entirely internal process and, as its Formal Memorandum on the process makes clear, does not cover "[d]issatisfaction or disagreement solely with the decision whether or not to refer a conviction and/or sentence."²⁶²

David Emanuel QC also raised concern about the impact of an absence of accountability on the quality of the CCRC's casework: "Knowledge that their decisions are effectively immune from challenge is bound to affect those at the CCRC who make decisions."²⁶³

We received more than one suggestion about how the CCRC could improve accountability. One CCRC applicant called for the broadening of the complaints process,²⁶⁴ while lawyer Emily Bolton suggested "a costs-free mechanism should be introduced by which CCRC non-referrals and other case decisions can be scrutinised and overturned on their merits by an independent party."²⁶⁵ SAFARI urged that there should be "somewhere to go, whether the applicant is rich or poor, to challenge a decision of the CCRC".²⁶⁶ Others suggested that there should be an appeal to a First Tier Tribunal, as there is for some administrative decisions.

Transparency

Transparency and accountability are linked. As Lord Justice Toulson (as he then was) put it, the principle of open justice is "at the heart of our system of justice and vital to the rule of law."²⁶⁷

However, several witnesses criticised the CCRC for being insufficiently transparent with applicants and their representatives. One appeals practitioner said that the

CCRC “is insufficiently transparent in sharing material”, citing four examples where it had refused to disclose material, including notes of CCRC meetings with law enforcement personnel accused of misconduct.²⁶⁸ A prisoner told us the CCRC “often could be more transparent in its work”.²⁶⁹

Many others expressed the view that the CCRC was opaque when communicating with applicants and their representatives about the progress of case reviews.

Subject to certain exemptions, the CCRC is prohibited from disclosing information obtained in the course of its work by section 23 of the Criminal Appeal Act 1995. This restriction is understandable: using its powers, the CCRC can obtain sensitive information ranging from complainant medical records to MI5 files.

However, the Divisional Court’s judgment in Hickey places a legal duty on the CCRC to make sufficient disclosure to applicants so that they can properly present their best case for referral.²⁷⁰ Moreover, sections 24(1)(e) and 24(1)(f) of the Criminal Appeal Act 1995 authorise disclosure by the CCRC as part of its Statements of Reasons and in connection with its case reviews.

It is possible that the CCRC may consider that making greater disclosure of material acquired in their investigations will discourage co-operation from other agencies, who may be less willing to supply it with material if there is a greater perceived risk of onward disclosure to applicants, although we note the CCRC Disclosure Policy indicates that third parties are advised of onward disclosure.²⁷¹ The CCRC was, however, given its statutory powers to compel disclosure precisely because it should not have to rely on co-operation from such agencies.

Having said this, in oral evidence CCRC Chief Executive Karen Kneller invited us to consider legislative change:

... in terms of transparency, we’re quite restricted in what we can say about casework, because of provisions within our statute. And undoubtedly that is there for very good reasons, but we are a mature organisation, and I think it would be useful, if there’s any legislative opportunity to reconsider that particular section. Perhaps, rather than a blanket ‘you cannot disclose’, gives us a discretion, perhaps an additional exemption so that we can disclose the information where we thought maybe it was in the public interest.²⁷²

Progress updates

The CCRC has made some creative efforts to make itself more accessible to potential applicants, including the development of an innovative Easy Read application form, for which it should be commended. That said, we heard complaints from prisoners, lawyers and academics that the CCRC does not communicate effectively *during* its case reviews.

One prisoner-applicant told us:

I found the whole process opaque in the extreme.

the CCRC kept us entirely in the dark during the 12 months that they were 'investigating' my case. I could only imagine what steps they were actually taking over the course of that year to uncover the truth. Having been lulled into a false sense of hope, the shock revelation at the end of this process that they had done none of the things we asked them to do made the fall all that much harder.²⁷³

Solicitor Steven Bird said: "They're very good at writing to you every couple of months to say there isn't anything to report".²⁷⁴ Kirsty Brimelow QC told us about

a current case I have pending before the CCRC, a very serious case, is one which is bogged with undue delay and I don't know why, but what I do know is I get letters, I don't have communication.²⁷⁵

Professor Carolyn Hoyle explained she had

criticised the organisation for not communicating effectively with applicants. I think they sometimes forget that although they know they're waiting on a report and they can't do anything for two months that the applicant doesn't know that. So again, I think that the applicant must think that they do nothing, or they don't care, and actually they often do things and they do care, but they're just not communicating that, or they're writing letters instead of picking up the phone, which has always frustrated me greatly.²⁷⁶

The CCRC told us that since Professor Hoyle's research, "we have reviewed our policy on updates to applicants and representatives, with a renewed emphasis on providing substantive detail of activity in the case review wherever we properly can."²⁷⁷

The wife of a prisoner who had applied to CCRC argued: "The CCRC needs to take a far less secretive approach and openly communicate with its applicants".²⁷⁸ One prisoner-applicant suggested:

CRMs should keep applicants regularly informed about the progress of their application, and what steps they are currently taking. The more an applicant knows, the more confidence they will have in the CCRC, and the more reassured they will feel that the time spent waiting for a response is being put to good use.²⁷⁹

Dialogue with applicants and representatives

In addition to criticism about the way CCRC updates applicants on the progression of case reviews, we received complaints that the CCRC was reluctant to enter into a meaningful dialogue with applicants and their lawyers. In oral evidence, Michael Birnbaum QC suggested the CCRC was unwilling to talk on the telephone with legal representatives.²⁸⁰

The CCRC rejected this allegation outright, telling us: “That is completely incorrect, staff are always willing to speak with legal representatives to discuss cases; it is absolutely routine”.²⁸¹

The experiences of some prisoners and practitioners was different. Various CCRC applicants told us:

All attempts to discuss the case with the CRM by telephone were rebuffed.²⁸²

The CCRC on the whole is uncommunicative and in my case showed a distinct reluctance to speak to me and seem to consider doing so an annoyance.²⁸³

The CCRC operates in an opaque manner. Trying to have a proper two-way conversation quickly becomes impossible because that is not the way that the Commission works.²⁸⁴

I was not given updates. Nobody from the CCRC would talk to me.²⁸⁵

The wife of an alleged miscarriage of justice victim said:

The applicant should be kept informed of what enquiries are being undertaken and allowed to ask questions and/or make suggestions about the caseworker’s approach. ... Any information gathered in the course of CCRC enquiries should be made available to the applicant or

their representative. The CCRC should be allowed to share information so that the applicant may consider its usefulness themselves.²⁸⁶

Communicating decisions

The CCRC explains its decisions about whether or not to grant a fresh appeal in documents known as Statements of Reasons. In full case reviews, the CCRC usually issues a Provisional Statement of Reasons (PSOR), to which applicants or representatives are given the opportunity to respond, before there is a Final Statement of Reasons.

According to David Emanuel QC, "the problem is that there is a feeling that minds have already been made up" by this stage.²⁸⁷ Retired barrister Nicholas Wood told us that "substantial issues" raised in response to PSORs were "barely considered".²⁸⁸ In a case sample considered by Hoyle and Sato, in only 0.7% of cases did further submissions reverse the CCRC's provisional decision not to refer.²⁸⁹ We were directed to the CCRC's Decision-Making Process Casework Policy, which suggests that even this limited possibility to respond is not guaranteed in all cases.²⁹⁰

Michael Birnbaum QC suggested to us that these decision documents were not as rigorous as they used to be: "... I think the overall quality is getting worse, and I think they're cutting corners."²⁹¹ Former barrister Nicholas Wood considered that in his experience, "no, or no sufficient, attention" was given to key issues.²⁹²

Professor Hoyle emphasised that Statements of Reasons need "to be written in a way that is accessible for most people, not for a tiny minority of skilled lawyers."²⁹³ but also that "it needs to be thorough, it needs to be detailed, it needs to be accurate."²⁹⁴

A former CCRC Commissioner's recollections explained why this is so crucial: "Many applicants had poor literary skills and, not surprisingly, did not understand the appeal process. Some did not speak English as their first language."²⁹⁵

Conclusions

In our view, the CCRC's decisions to refuse to review cases must be more susceptible to challenge given the seriousness of its work. Neither judicial review nor the CCRC's current internal complaints process offer a meaningful and effective way of challenging CCRC decisions either in relation to the investigation strategy or the decision about a referral. This lack of accountability is unhealthy and likely to have a detrimental impact on confidence in the CCRC and the quality of its investigations and decisions.

We have considered carefully whether a separate external review panel should be set up. However, we do not consider that this is practicable, nor should it be necessary if the CCRC can be provided with the resources, and take the approach, that we have recommended elsewhere in this report. It is likely that most or many unsuccessful applicants would choose this route, and the external panel would need to review all the evidence considered by the CCRC, which in many cases would be voluminous. It would not necessarily improve initial decision-making; it could simply displace responsibility for getting it right first time and result in over-reliance on the 'safety net' of the second tier.

We do, however, support greater transparency by the CCRC in relation to its decisions and a greater willingness to engage with applicants, provide them with information on the investigation and the provisional decision, and to seek their comments, as well as seeking external advice and assistance in complex and contentious matters. We also consider that it would add to public confidence in the CCRC's decision-making if it could make its Statements of Reasons public, where this was in the public interest and subject to the agreement of applicants.

We note the recommendation of the Royal Commission on Criminal Justice that the review body it had envisaged "should in general be responsible for disclosing any evidence found in the course of the investigations that is relevant to the representations about the conviction". We believe that under the current legal framework, the CCRC can, and should, supply material to applicants and their representatives, to the extent requested by them but subject to the need to protect sensitive material.²⁹⁶

Recommendations

- the CCRC should disclose the actions to be pursued and the case investigation plan to applicants and/or their legal representatives and allow them to comment, contribute or challenge decisions and actions or the failure to take actions.
- applicants should be provided with at least a quarterly update that sets out the progress against the case plan, the current activities being undertaken, reasons for any delays or lack of progress and the current case completion estimate.
- a Provisional Statement of Reasons should be issued in all cases to give an applicant and/or their legal representative the opportunity to respond.

- Statements of Reasons should be written in language that is as comprehensible as possible – especially where an applicant is unrepresented – but should also be comprehensive and contain a full and detailed analysis.
- the CCRC should appoint a small panel of experienced barristers and solicitors who will be available to provide advice and guidance, particularly in relation to contentious decisions and cases involving complex issues.
- the CCRC should adopt a less conservative interpretation of its disclosure duties under *Hickey*
- the Criminal Appeal Act 1995 should be amended to:
 - allow the CCRC to disclose to applicants and their legal representatives copies of material gathered or generated in the course of its review, with appropriate redactions and restrictions on onward disclosure, except where the CCRC deems disclosure of the material would give rise to a real risk of serious prejudice to an important public interest, including, for example, the privacy of complainants and the protection of law enforcement techniques;
 - allow the CCRC to make public its Statements of Reason or parts of them, where it believes this is in the public interest, subject to the agreement of applicants.
- the CCRC should introduce an external element into its complaints procedure; perhaps involving one of its non-executive directors to scrutinise and review complaints handling and decisions.

7. YOUTH JUSTICE AND JOINT ENTERPRISE

Youth justice

According to the latest Ministry of Justice statistics,²⁹⁷ 571 children are held in custody in England and Wales.^{xi} It is vital that our mechanisms for correcting miscarriages of justice work effectively for children and young people convicted of offences.

The CCRC has plainly made some commendable efforts to help reach young people with convictions, such as: holding a youth engagement workshop; creating a YouTube outreach video;²⁹⁸ and developing its Easy Read application form.

However, Just for Kids Law, a charity which provides legal representation and advice to young people, raised concerns about the CCRC's ability to deal effectively with youth justice cases. "We are concerned that the CCRC do not appear to have any policies about how they deal with child defendants, nor, as far as we can tell, are there any specialists in youth justice amongst their decision makers," it told us.

Children convicted after trial at the Youth Court have an automatic right of appeal to the Crown Court for a retrial. If they are convicted there, and a subsequent appeal is lost, they can ask the CCRC to refer the case back to the Court of Appeal in the usual manner. Additionally, however, the CCRC can refer the cases of children who plead guilty at the Youth Court, who have no automatic right of appeal, to the Crown Court for retrial. Some of these children may, of course, have been incorrectly advised as to how to plead, leading to a miscarriage of justice.

In both types of case, but especially the latter, Just for Kids Law said that it was vital that the length of CCRC reviews be kept to the minimum. "It is particularly difficult for everyone involved, including witnesses and the defendant, if ... retrial takes places years after the event," they explained.²⁹⁹

In all cases involving child defendants, Just for Kids Law argued that delays in CCRC reviews had a disproportionately negative impact:

during the time that the CCRC is considering the matter the child will be living with the effects of the conviction, whether that be spending time in custody, or having a criminal record that affects their future. Children who have been convicted are often at a crucial point in their

^{xi} This figure has reduced from 664 prior to the COVID-19 pandemic.

lives, they are at a point where they may be going to school or starting to apply to university or further education or for their first job. If they spend time, unnecessarily, in custody at this point or even serving a community sentence that they need not, this may have a disproportionate impact on them and their futures.³⁰⁰

They explained further:

time passes more slowly for children: a year feels like a far longer period for a child than an adult. This is likely to result in a greater sense of perceived injustice on the part of children who refer their cases to the CCRC and do not have a resolution for years.³⁰¹

Kirsty Brimelow QC suggested that the lack of specific procedures deterred children and young people from applying to the CCRC:

Whilst we haven't researched the statistics of the number of children who apply to the CCRC, from practitioner experience, the author would expect it to be low. It is a process which is not easily accessible to a child in custody due to the procedure, time that it takes, and commitment required to pursue.³⁰²

Joint enterprise

Henry Blaxland QC told us that joint enterprise is "one of the greatest sources of injustice which is still festering within the system."³⁰³ It is also one of the issues which disproportionately affects young people.

In 2016, the Supreme Court handed down its historic judgment in *R v Jogee* [2016] UKSC 8. It held that the law of joint enterprise had taken a wrong turn in 1984. Under the pre-*Jogee* interpretation of the law, individuals could be convicted of murder where the fatal blow had been inflicted by another person simply on the basis that that they had foresight that the murder might occur, even if they did not necessarily intend for it to happen.

We were told that as a result of this wrong turn, "[t]here are a significant body of, mainly young people, who have been wrongly convicted of murder because they've been convicted under the old system."³⁰⁴

Despite the change in law, Michael Birnbaum QC told us that the Court of Appeal has "put up a wall" by refusing to overturn unsafe joint enterprise convictions unless 'substantial injustice' is demonstrated.³⁰⁵ In only one post-*Jogee* joint enterprise

appeal application has the Court of Appeal agreed that to uphold the conviction would cause substantial injustice.

The CCRC made a string of referrals to the Court of Appeal on the basis of the Jogie ruling, but all were unsuccessful.³⁰⁶ Felicity Gerry QC argued to us that the Court of Appeal's imposition of the substantial injustice requirement "effectively neuters the CCRC".³⁰⁷

As the campaign group Joint Enterprise Not Guilty by Association (JENGbA) put it, "people are now left with nowhere to turn to legally".³⁰⁸ The CCRC leadership also expressed dissatisfaction with the current situation.³⁰⁹

Conclusions

We are concerned about the severe effects of wrongful imprisonment and undue delay on children and young people. Delay is exacerbated when there is a referral to the Crown Court for retrial. Those under 18 also have distinct needs and are less likely to be reached in the usual processes for publicising the CCRC's work and applying to it, despite the CCRC's best efforts.

We are also persuaded that there is a risk that wrongful convictions which resulted from the law on joint enterprise taking a wrong turn cannot be addressed by the CCRC due to the substantial injustice threshold imposed by the Court of Appeal.

Recommendations

- the CCRC should prioritise case reviews of prisoners who were under the age of 18 when sentenced
- there should be funding for a specialist unit at the CCRC to deal with youth justice cases and to proactively identify young people who may have been wrongly convicted.
- the remit of advocacy services in under-18 custodial establishments should be extended to include advice on applying to the CCRC
- the Law Commission should be directed to urgently consider statutory change to remove the 'substantial injustice' test currently applied by the Court of Appeal.

8. CONCLUSIONS AND RECOMMENDATIONS

Leadership, independence and resources

Although the CCRC is a public body like many others, it has a unique role in the justice system, and must be constitutionally independent of government. This needs to be reflected in its leadership, structure and resourcing.

In statute, the publicly appointed Commissioners are the Commission. They have both governance and operational decision-making roles, yet have no management responsibility for the staff who carry out the required work to support decision-making. This can be a cause of tension and reduced efficiency, as other Commissions have found.

The response to this has undermined the spirit and purpose of the legislation, without solving the underlying problem. An extra-statutory management board has been created and Commissioners have been reduced to a very part-time fee-paid role. Most, therefore (including the Chair) combine this role with other, usually non-executive, roles, so that CCRC work is only part of a larger portfolio. This was done administratively, through a Ministry of Justice 'tailored review' and has significantly shifted the balance of power towards the executive.

The CCRC is therefore operating in a completely different way from that envisaged and provided for in its legislation, which gives Commissioners a central, not a peripheral, role. If Ministers consider that the statutory structure is not an effective mechanism, they should bring legislation before Parliament and make the case for changing the structure, rather than seeking to do this through departmental reviews or internal CCRC decisions. The Commission model was presumably chosen for a reason: because it could provide independent leadership, regularly bringing in individuals with wider expertise and experience to mitigate the development of an institutional mindset. There are ways of strengthening this leadership and approach while providing a more effective governance structure and relationship with those responsible for management.

We conclude that the role of the Chair and Commissioners should be strengthened: looking to qualities of leadership and decision-making. Alongside that there could be a statutory board, including non-executives with relevant governance skills and experience, to provide oversight and support for the CCRC and its work.

A concern was expressed to us by a number of witnesses about the process for appointing both the Chair and Commissioners. Such appointments must follow

guidance from the Public Appointments Commissioner, but the process is not transparent. Some witnesses proposed creating a quite separate selection process, outside government; others suggested that the Judicial Appointments Commission (JAC) could take on this role.

We find it difficult to argue that the CCRC is so unique it requires an entirely novel appointment process. If, as we have accepted, the Chair should not be a judge, this also rules out the JAC. However, we believe that public appointment procedures, for roles that, have “constitutional importance” should be more transparent and accountable, to provide assurance of independence.

In our view, significant funding cuts alongside an increasing caseload have left the CCRC under-resourced, particularly in the context of a criminal justice system under immense strain, which is likely to result in an increase in miscarriages of justice. In particular, the CCRC’s case review managers appear to have extremely high caseloads. We consider that the scale of the cuts experienced will have negatively affected the CCRC’s ability to carry out its core functions effectively.

This is compounded by the financial restrictions on legal representation for applicants. Although both applicants and the CCRC are greatly assisted by access to good quality legal representation, both the eligibility limits and the rates of payment under the legal aid scheme inhibit this.

We do not believe that the under-resourcing of the CCRC should be tackled by removing cases originating in the magistrates’ courts or those relating to sentences, as opposed to convictions, from its remit. A wrongful conviction in the magistrates’ courts can have a lasting and severe impact on a person’s life, while a manifestly excessive or unlawful sentence is an injustice which should be corrected.

Recommendations

- The Chair of the CCRC should be appointed for a five-year term for a minimum of three days per week, and the focus of the role should be to provide strategic leadership, to ensure that the organisation’s independence and mission is at the centre of its work, to liaise with government, the courts and Parliament, and to seek to ensure that the CCRC’s findings influence law reform and criminal justice practice.
- The Public Appointments Commissioner should be invited to look at whether the appointments arrangements for those non-departmental public bodies (NDPBs) that need to be constitutionally independent from government are sufficient, and sufficiently transparent, to guarantee this.

- There should, as anticipated in the legislation, be a mix of full- and part-time Commissioners, on a salaried basis, for five-year terms and with a minimum of three days per week.
- We consider that a separate Management Board would be beneficial, to provide governance and additional assurance, and involving the CCRC's senior management team and some external non-executive directors, as well as some Commissioners, on the lines of the current Board. However, this should be secured in legislation.
- The Ministry of Justice should
 - provide increased funding to the CCRC so that it can recruit additional case review managers and put in place the above changes and those recommended in Chapter 5 (Investigation);
 - raise the financial eligibility criteria for advice and assistance with CCRC and Court of Appeal matters;
 - increase the rates payable to solicitors for work undertaken under the legal aid scheme to allow more solicitors to undertake the work on a financially sustainable basis.

Statutory framework and relationship with the Court of Appeal

It may be thought that the CCRC exists to refer cases to the appeal courts where it believes a miscarriage of justice may have occurred. In fact, its remit is more limited. It must consider that there is a 'real possibility' that the conviction, verdict or sentence would not be upheld and, unless there are exceptional circumstances, the applicant must have exhausted their appeal rights and there must be fresh evidence or argument not taken at trial.

The 'real possibility' test is problematic. First, the distinction between a 'real possibility' and a 'probability' is a very fine one, and it is very easy for one to elide into the other. Second, it encourages the CCRC to be too deferential to the Court of Appeal and to seek to second-guess what the Court might decide, rather than reaching an independent judgement of whether there may have been a miscarriage of justice. A different test might create a different and more independent mindset.

However, even if the test remains the same, the evidence we have heard raises concerns that the CCRC has been too cautious in determining whether there is a real possibility that the Court of Appeal will overturn a conviction or sentence. This seems to be supported by the low proportion of cases it refers and the high proportion of those cases that are successful before the Court. This is also a conclusion reached by the Justice Select Committee in 2015.

We are concerned that the bar on the CCRC considering 'no appeal' cases unless there are exceptional circumstances can deny access to justice to those who may have been wrongly convicted. This is because some of those people will not have the legal assistance or access to evidence needed to properly pursue a first appeal.

We have considered whether to recommend the abolition of the 'exceptional circumstances' test altogether. This has some attractions, especially given the current pressures on criminal legal aid and representation both at first instance and at appeal. However, if there were no filter at all, this would mean that every person convicted or sentenced in the Crown or magistrates' Courts could go straight to the CCRC. This could create an unsustainable workload for the CCRC and effectively undermine the criminal appeal system. Nevertheless, the CCRC exists to ensure that wrongful convictions can be overturned. We therefore consider that there should be a wider and more consistent definition of what amount to 'exceptional circumstances'.

Under the current law, the CCRC can determine that there is a real possibility the Court of Appeal will quash a person's conviction, but nevertheless refuse to refer it for review. We are uncomfortable with the CCRC having such a power, because of the risk, however remote, of preventing a miscarriage of justice case being heard by the Court of Appeal. We also note that any referrals based upon due process failures, even in such circumstances, bring attention to flaws within the criminal justice system and can thus contribute to the prevention of future miscarriages of justice.

The evidence we heard also suggests that the Court of Appeal's approach to cases may prevent some miscarriages of justice being corrected, and inhibit the CCRC's ability to raise alleged miscarriages of justice. This is particularly the case where there is little or no fresh evidence and argument, but where it appears that the initial verdict may nonetheless be flawed or perverse: the classic 'lurking doubt' cases.

Recommendations

- the 'real possibility' test should be redrafted to expressly enable the CCRC to refer a case where it determines that the conviction may be unsafe, the sentence may be manifestly excessive or wrong in law or where it concludes

that it is in the interests of justice to make a referral. By definition this would include all cases where it finds that a miscarriage of justice may have occurred including 'lurking doubt' cases.

- while 'real possibility' remains the test to be applied by the CCRC, it should be bolder in interpreting it: determining in each case whether there is more than a fanciful chance of the verdict being quashed, even if quashing is less likely than not. It should also remove any targets for success rates before the Court of Appeal.
- the CCRC should adopt a broader interpretation of the "exceptional circumstances" requirement. This should include cases where applicants can show that there were reasons why they were unable to exercise an appeal right in time, including the inability to access legal advice and representation, as well as where there is new evidence or new techniques which were not available at the time. Applicants should not be required to supply documentary evidence that they have taken all reasonable steps to obtain access to material which the CCRC can acquire using its section 17 or 18A powers.
- the 28-day time limit for lodging an appeal should be extended to reflect the difficulties faced by applicants, some of whom are unrepresented and vulnerable.
- section 13 of the Criminal Appeal Act 1995 should be amended to provide that any cases which the CCRC deems meet the referral criteria should be sent to the appeal courts.
- the Law Commission should review the Criminal Appeal Act 1968 with a view to recommending any changes it deems appropriate in the interests of justice. Specifically, we would invite the Law Commission to consider whether any of the following statutory reforms ought to be recommended:
 - as the Justice Committee suggested in 2015, changes to "allow and encourage the Court of Appeal to quash a conviction where it has a serious doubt about the verdict, even without fresh evidence or fresh legal argument",³¹⁰
 - mandating and encouraging a cumulative review of issues;
 - amending the 28-day time limit for lodging an appeal, to reflect the difficulties faced by applicants, some of whom are unrepresented and vulnerable;

- introducing the premature destruction of crucial evidence which could have undermined the safety of a conviction as a standalone ground of appeal
- broadening the law on post-conviction disclosure to assist appellants in accessing evidence to make applications for leave to appeal (see investigation section).

Investigation

The CCRC was set up to be an investigatory body. It has unique statutory powers to obtain evidence from public and private bodies and individuals for this purpose. Though it has done excellent investigative work in some cases, our evidence suggests that some of its investigations lack the scope and rigour to identify potential miscarriages of justice. The combination of budget cuts and an increased caseload is bound to impact on the organisation's ability to carry out comprehensive investigations. We understand the need to ensure the cases are progressed in a timely fashion, but an over-rigid target-driven approach risks prioritising speed over thoroughness.

When there are allegations against law enforcement personnel, it is particularly important, in the public interest, that they are fully investigated and that the investigation is thorough and transparent, with interviews fully recorded and retained with a view to disclosure to the applicant and his or her legal representatives.

Some witnesses suggested that the CCRC should be given powers of compulsion to require officers to attend interviews. However, we note that, when such powers have been provided to other investigatory bodies, witnesses under compulsion commonly elect to provide no comment, relying on the protection against self-incrimination. Unless it can be shown that officers are regularly refusing even to attend interviews voluntarily, we do not consider that this power would add a great deal to the CCRC's ability to carry out effective investigations.

Non-disclosure or destruction of exculpatory material has been a factor in a number of miscarriages of justice. We recognise that the CCRC has done admirable work in finding wrongly withheld evidence; however, we are concerned that its current approach may be less rigorous. It is both proportionate and necessary that the CCRC is able, where relevant, to fully examine schedules of used and unused material.

There have clearly been delays by public bodies in providing information to the CCRC. This adds to the length of investigations and is particularly deplorable for applicants

who are in prison. There should be some sanction, as there is for private individuals, to ensure speedy compliance with CCRC requests.

It is important that in righting a miscarriage of justice, all relevant material can be examined. We were concerned to hear that current retention processes may not be being complied with, and that such material may be destroyed while someone is in custody.

Recommendations

- The CCRC's budget should be increased so that
 - it can carry out more face-to-face inquiries with both applicants and other relevant individuals
 - it can conduct thorough inquiries into all potentially relevant material
 - it can obtain and review complete trial transcripts where relevant to the points at issue in the case
- The CCRC should review its key performance indicators, so that they are less generic and do not focus solely or mainly on timeliness. Each case should have a regularly updated individual case plan, with target activities and dates.
- The CCRC should set up an advisory panel of external forensic experts to consult on scientific and technical issues and on developing forensic strategies.
- When investigating allegations against police or other law enforcement personnel, the CCRC should always interview officers separately, and where necessary obtain primary source information to substantiate these accounts through senior officers unconnected with the initial investigation.
- In cases where the withholding of relevant evidence is a concern, or has been alleged, the CCRC should obtain and review the schedules of disclosed and undisclosed material, including, where relevant to the application, credibility checks on complainants and witnesses and disciplinary checks on law enforcement personnel. Where necessary, the CCRC should have access to the documentation that is referred to within those schedules.
- There should be a statutory power requiring public bodies to comply with section 17 requests within a fixed timescale, which is appropriate and reasonable based on the nature of the request. There should be sanctions for non-compliance and where necessary the CCRC should be able to apply to the Crown Court for an order to enforce compliance as it can in relation to private bodies and individuals.

- The Home Office should contact police forces to remind them of their legal obligation to retain all material in cases resulting in conviction and to ask them what measures they have in place to ensure compliance. We suggest that HM Inspectorate of Constabulary and Fire and Rescue Services should conduct a thematic inspection into police forces' current retention practices.
- HM Courts and Tribunals Service should amend the Crown Court Retention and Disposition Schedule so that Crown Court trial audio recordings are held for as long as a convicted person is in custody, or for five or seven years (as at present), whichever is longer.

Accountability and transparency

All public bodies should be accountable, including the CCRC. It makes decisions about alleged miscarriages of justice which have grave consequences. When the CCRC makes an incorrect decision, it can mean that an innocent person is denied justice and remains in prison for a crime they did not commit. Further, when this happens, it can inhibit the identification of the actual offenders by preventing the police investigation from being reopened.

In our view, the CCRC's decisions to refuse to review cases must be more susceptible to challenge given the seriousness of its work. Neither judicial review nor the CCRC's current internal complaints process offer a meaningful and effective way of challenging CCRC decisions either in relation to the investigation strategy or the decision about a referral. This lack of accountability is unhealthy and likely to have a detrimental impact on confidence in the CCRC and the quality of its investigations and decisions.

We have considered carefully whether a separate external review panel should be set up. However, we do not consider that this is practicable, nor should it be necessary if the CCRC can be provided with the resources, and take the approach, that we have recommended elsewhere in this report. It is likely that most or many unsuccessful applicants would choose this route, and the external panel would need to review all the evidence considered by the CCRC, which in many cases would be voluminous. It would not necessarily improve initial decision-making; it could simply displace responsibility for getting it right first time and result in over-reliance on the 'safety net' of the second tier.

We do, however, support greater transparency by the CCRC in relation to its decisions and a greater willingness to engage with applicants, provide them with information on the investigation and the provisional decision, and to seek their

comments, as well as seeking external advice and assistance in complex and contentious matters. We also consider that it would add to public confidence in the CCRC's decision-making if it could make its Statements of Reasons public, where this was in the public interest and subject to the agreement of applicants.

We note the recommendation of the Royal Commission on Criminal Justice that the review body it had envisaged "should in general be responsible for disclosing any evidence found in the course of the investigations that is relevant to the representations about the conviction". We believe that under the current legal framework, the CCRC can, and should, supply material to applicants and their representatives, to the extent requested by them but subject to the need to protect sensitive material.

Recommendations

- the CCRC should disclose the actions to be pursued and the case investigation plan to applicants and/or their legal representatives and allow them to comment, contribute or challenge decisions and actions or the failure to take actions.
- applicants should be provided with at least a quarterly update that sets out the progress against the case plan, the current activities being undertaken, reasons for any delays or lack of progress and the current case completion estimate.
- a Provisional Statement of Reasons should be issued in all cases to give an applicant and/or their legal representative the opportunity to respond.
- Statements of Reasons should be written in language that is as comprehensible as possible – especially where an applicant is unrepresented – but should also be comprehensive and contain a full and detailed analysis.
- the CCRC should appoint a small panel of experienced barristers and solicitors who will be available to provide advice and guidance, particularly in relation to contentious decisions and cases involving complex issues.
- the CCRC should adopt a less conservative interpretation of its disclosure duties under *Hickey*
- the Criminal Appeal Act 1995 should be amended to:

- allow the CCRC to disclose to applicants and their legal representatives copies of material gathered or generated in the course of its review, with appropriate redactions and restrictions on onward disclosure, except where the CCRC deems disclosure of the material would give rise to a real risk of serious prejudice to an important public interest, including, for example, the privacy of complainants and the protection of law enforcement techniques;
- allow the CCRC to make public its Statements of Reason or parts of them, where it believes this is in the public interest, subject to the agreement of applicants.
- the CCRC should introduce an external element into its complaints procedure; perhaps involving one of its non-executive directors to scrutinise and review complaints handling and decisions.

Youth justice and joint enterprise

We are concerned about the severe effects of wrongful imprisonment and undue delay on children and young people. Delay is exacerbated when there is a referral to the Crown Court for retrial. Those under 18 also have distinct needs and are less likely to be reached in the usual processes for publicising the CCRC's work and applying to it, despite the CCRC's best efforts.

We are also persuaded that there is a risk that wrongful convictions which resulted from the law on joint enterprise taking a wrong turn cannot be addressed by the CCRC due to the substantial injustice threshold imposed by the Court of Appeal.

Recommendations

- the CCRC should prioritise case reviews of prisoners who were under the age of 18 when sentenced.
- there should be funding for a specialist unit at the CCRC to deal with youth justice cases and to proactively identify young people who may have been wrongly convicted.
- the remit of advocacy services in under-18 custodial establishments should be extended to include advice on applying to the CCRC.
- the Law Commission should be directed to urgently consider statutory change to remove the 'substantial injustice' test currently applied by the Court of Appeal.

APPENDIX 1: GLOSSARY

The below abbreviations and terms are used throughout the text

APPG - All-Party Parliamentary Group

C3 Division – Before the creation of the Criminal Cases Review Commission, the C3 Division of the Home Office received applications from convicted people whose appeals had failed (or been denied permission) and claimed to have been wrongfully convicted. It was responsible for asking the Home Secretary to refer cases to the Court of Appeal.

CACD – Court of Appeal (Criminal Division): the main criminal appellate court in England and Wales, responsible for quashing unsafe convictions

CCRC – Criminal Cases Review Commission

Commissioner – The members of the Criminal Cases Review Commission who decide whether or not a case should be referred to the Court of Appeal, and on what grounds.

CRM – Case Review Manager: the employees of the Criminal Cases Review Commission responsible for conducting day to day casework and investigation

Crown Court - Trials by jury are held in the Crown Court. These involve more serious offences, carrying more severe sentences.

Fresh evidence - Evidence which was not adduced at trial, and generally not available at the time of trial

HMCTS – Her Majesty’s Courts and Tribunals Service

LAA – Legal Aid Agency, which is the authority responsible for overseeing the funding of legal help for those who cannot afford it

Magistrates’ Courts - Less serious offences, which carry maximum sentences of up to six months, are tried in the magistrates' courts.

MoJ – Ministry of Justice

PSOR – Provisional Statement of Reasons

Quashing - When a court quashes a conviction, it overturns that conviction

Royal Commission on Criminal Justice – Formed in 1991, the Royal Commission on Criminal Justice (or Runciman Commission) was set up to inquire into the entire criminal justice system following a series of miscarriages of justice.

SCCRC - Scottish Criminal Cases Review Commission

SOR - Statement of Reasons: the final document justifying a CCRC referral or non-referral decision

Unsafe - Only convictions which are unsafe can be quashed (overturned) by the Court of Appeal. Broadly, a conviction is considered unsafe when the Court of Appeal considers that it cannot be supported after reviewing it.

APPENDIX 2: TERMS OF REFERENCE

Given that there are serious misgivings expressed in the legal profession, and amongst commentators and academics, about the remit of the Criminal Cases Review Commission (CCRC) and its ability to deal with cases of miscarriages of justice, and given that perceptions of injustice within the criminal justice system are as damaging to public confidence as actual cases of injustice, the WCMJ will inquire into:

1. The ability of the CCRC, as currently set up, to deal effectively with alleged miscarriages of justice;
2. Whether statutory or other changes might be needed to assist the CCRC to carry out its function, including;
 - (i) The CCRC's relationship with the Court of Appeal with particular reference to the current test for referring cases to it (the 'real possibility' test);
 - (ii) The remit, composition, structure and funding of the CCRC;
3. The extent to which the CCRC's role is hampered by failings or issues elsewhere in the criminal justice system;

and make recommendations.

APPENDIX 3: LIST OF EVIDENCE RECEIVED

Oral evidence

15 July 2019

Criminal Cases Review Commission

Helen Pitcher, *Chairman, Criminal Cases Review Commission*

Karen Kneller, *Chief Executive, Criminal Cases Review Commission*

Transcript:

<https://appgmiscarriagesofjustice.files.wordpress.com/2019/07/transcript-of-evidence-session-1-criminal-cases-review-commission-15-july-2019.pdf>

24 July 2019

Scottish Criminal Cases Review Commission

Gerard Sinclair, *Chief Executive, Scottish Criminal Cases Review Commission*

Chris Reddick, *Director of Corporate Services, Scottish Criminal Cases Review Commission*

Transcript:

<https://appgmiscarriagesofjustice.files.wordpress.com/2019/08/transcript-of-evidence-session-2-scottish-crcr-24-july-2019-1.pdf>

Criminal Bar

Michael Birnbaum QC, *Foundry Chambers*

Henry Blaxland QC, *Garden Court Chambers*

Kirsty Brimelow QC, *Doughty Street Chambers*

Transcript:

<https://appgmiscarriagesofjustice.files.wordpress.com/2019/08/transcript-of-evidence-session-2-criminal-bar-24-july-2019-1.pdf>

3 September 2019

Academics

Professor Carolyn Hoyle, *Professor of Criminology, University of Oxford*

Dr Dennis Eady, *Lecturer and Cardiff University Innocence Project*

Transcript:

<https://appgmiscarriagesofjustice.files.wordpress.com/2019/10/session-3-academics-4.pdf>

9 September 2019

Solicitors

Mark Newby, *Solicitor advocate, QualityJordans*

Steven Bird, *Chair, Criminal Appeals Lawyers Association*

Matt Foot, *Solicitor, Bimberg Peirce*

Transcript:

<https://appgmiscarriagesofjustice.files.wordpress.com/2019/12/transcript-of-fourth-evidence-session-solicitors.pdf>

Written evidence

We are grateful to have received evidence in writing from the following named individuals and organisations. Wherever possible, their evidence is published at appgmiscarriagesofjustice.files.wordpress.com. Some submissions were not suitable for publication in full.

Accused.me.com,	Phil Gaisford	Jane Metcalfe	Ian Southwood
Falsely Accused	Robin Garbutt	Afzal Miah	Anthony Stadler
Letters to the	Felicity Gerry QC	Sabine McNeill	Paul-Christian
Establishments	Sandra Gibbons	Miscarriage of	Stellato
and #metoo-	Linda Gilroy	Justice Support	Angela Stubbs
falselyaccused	Robert Glasspool	Service	Supporting All
(joint submission)	Philip Green	Leanne Mould	Falsely Accused
Jason Adams	Raymond Handley	Uday Narayan	with Reference
Geoff Aldridge	Professor Carolyn	Michael Naughton	Information
Mark Alexander	Hoyle and Dr Mai	Mark Newby	(SAFARI)
Terry Allen	Sato	Delphon Nicholas	Lina Tantash
Olubode Baligun	Howard Hughes	Michael O'Brien	Des Thomas
Michael Birnbaum	Martin Hughes	Steven Oldfield	Stephen Tulles
QC	Abid Hussain	Jonathan Palmer	Steve Tulloch
Chris Bolder	Manzoor Hussain	Paul Pardon	Bruno Vece
Graham George	Joint Enterprise	Sean Parker	Kenneth Waters
Birchwood	Not Guilty by	Derek Patterson	Pete Weatherby
Alvin Black	Association	Richard	QC
Emily Bolton	Just for Kids Law	Pendlebury	Dr Lucy Welsh
John Bradshaw	JUSTICE	Philip Prescott	Mark Williams-
David Briggs	William Kean	Julie Price	Thomas
Kirsty Brimelow	Glyn Kenyon	Progressing	Mark Williams
QC	Ian Kerry	Prisoners	Daniel Wilson
British False	Maurice Kirk	Maintaining	Leonard Wilson
Memory Society	Dominik Kocher	Innocence	Ashley Wood
Edmund Bruton	David Large	Jimmy Prosper	Lewis Wood
Ian Bushby	Laurie Elks	Graham Quintana	Nicholas Wood
Liz Calderbank	Andrew Lawless	Dr Hannah Quirk	Julie Wright
Cardiff University	Ben Leapman	Jon Rayman	
Innocence Project	Leonard Leigh	Mark Repin	
Simon Clancy	Ian MacMaster	Shahab Reza	
Robert Coulson	John Macpherson	Jon Robins	
Nicola Cresswell	Danny Major	David and Fiona	
Criminal Appeals	Garry Malone	Rowntree	
Lawyers	Graham Martin	Norman Scarth	
Association	Fiona McDonald	Brian Sharp	
Farah Damji	Geoffrey	George Skelly and	
Carl Donaldson	McLaughlin	John Thrower	
David Emanuel QC	Christopher	Lyndon Smith	
Alan Evans	McMullan	Michael Smith	
Friends of Susan	Michael Meanza	Ranjit Sondhi	
May	Russell Mellford	Michael Souter	

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- ³ 'The Birmingham Six: Have we learned from our disgraceful past?', *The Guardian* (12 March 2011): <https://www.theguardian.com/theguardian/2011/mar/12/gareth-peirce-birmingham-six> accessed 20 July 2020.
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- ¹⁴ As of the end of October 2020: Criminal Cases Review Commission, 'CCRC casework statistics' (2020): <https://ccrc.gov.uk/case-statistics> [accessed 4 December 2020].
- ¹⁵ Transcript of third oral evidence session (Professor Carolyn Hoyle), p 12.
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