



Westminster Commission on Miscarriages of Justice

JUSTICE evidence

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Executive Summary

- We are concerned that the Criminal Cases Review Commission (the Commission) is currently unable to fulfil its remit satisfactorily for a number of reasons, including:
 - Its apparent lack of independence;
 - Its statutory test for referral; and
 - Its ability to fully review cases.

Independence

- Recent events have suggested the independence of the Commission has been undermined.
- In addition, there is no longer security of tenure for Commissioners. This leaves open the possibility of external factors influencing the decision-making of Commissioners.

The statutory test

- The current test for referral asks the Commission to consider whether the Court of Appeal Criminal Division (CACD) is likely to uphold an appeal. Moreover, the test does not require the Commission to consider whether there has been a miscarriage of justice.

Ability to fully review cases

- The Commission has faced funding cuts in recent years, making it more difficult to carry out its duties.
- Many cases the Commission's reviews appear to not be complex. Although important, there is a risk that this diverts resources from more complex cases.

Failings elsewhere in the justice system

- Reduced resources for police and CPS, reduced legal aid and mental health issues not being identified increase the risk of miscarriages of justice occurring.
- As well as the right to compensation being severely restricted, there is very little support offered to victims of miscarriage of justice, with no agency responsible for their support on release. This makes reintegration into society far more difficult.

Recommendations

- **Commissioners should have security of tenure to ensure that they are not influenced in their decision-making by the Secretary of State's view.**
- **It is vital that the Commission is sufficiently funded, both in terms of providing the right resources for thorough investigations and so that Commissioner roles can be properly remunerated.**
- **Less complex cases should be dealt with by a dedicated team within the Commission to ensure resources are not diverted from more complex cases.**
- **A duty to refer cases that meet the threshold should be implemented.**
- **A new test for referring cases to the CACD should be established.**

Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists.
2. We have published a number of reports regarding miscarriages of justice, including *Compensation for Wrongful Imprisonment* (1982), *Miscarriage of Justice* (1989), *Remedying Miscarriages of Justice* (1994), *Righting Miscarriages of Justice?: Ten years of the Criminal Cases Review Commission* (2008); and *Supporting Exonerees: ensuring accessible, continuing and consistent support*.¹ These reports outline how we believe the criminal appeals process would better function.
3. JUSTICE long campaigned for the establishment of an independent body to review and investigate cases in which there had been a potential miscarriage of justice.² This was due to deficiencies in the criminal appeals system, including:
 - The reluctance of the Home Secretary to interfere with the work of the courts and consequently ignore potential errors made during and prior to trial; and
 - Substandard re-investigation, often carried out by the same police force used in the original investigation.
4. Our report *Miscarriage of Justice* (1989), made a number of recommendations to improve the system, including:
 - That an independent review body be established that would seek to establish the truth about a complaint and advise the Secretary of State (SoS) on the matter;
 - That if the SoS did not follow the recommendation made by the body, the SoS would have to answer parliamentary questions about the matter;
 - That the body would adopt its own procedure, rather than follow formal evidential rules;
5. In 1991, the government established a Royal Commission on Criminal Justice, (the Runciman Report).³ It made a number of recommendations:
 - The establishment of a new independent, non-governmental body to handle cases of miscarriages of justice, as the discretionary power vested in the Secretary of State to refer a case to the Court of Appeal was incompatible with the separation of powers between the courts and the executive;
 - The 'Criminal Cases Review Authority' (CCRA) would replace the Secretary of State's role in considering alleged cases of miscarriages of justice;
 - The CCRA would investigate and subsequently refer cases to the Court of Appeal if it found there was convincing evidence of a miscarriage of justice;⁴

¹ Available online at https://2bqk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2018/04/0218037-BROCHURE-Justice-Pro-Bono-brochure-Supporting-Exonerees_07-standard-00000002.pdf.

² JUSTICE, *Criminal Appeals*, Stevens and Sons 1964; JUSTICE, *Home Office Reviews of Criminal Convictions*, Stevens and Sons 1968; JUSTICE, *Miscarriages of Justice*, 1989; JUSTICE, *Remedying Miscarriages of Justice*, 1994; JUSTICE, *Righting Miscarriages of Justice? Ten years of the Criminal Cases Review Commission*, 2008.

³ The Royal Commission, *Report of the Royal Commission on Criminal Justice*, 1993,

⁴ The Royal Commission, *Report of the Royal Commission on Criminal Justice*, 1993, p.180

- The CCRA should not make any determination as to whether there had been a miscarriage of justice;⁵ It should only provide a statement for the Court of Appeal detailing why the referral was made.⁶
6. JUSTICE responded to the Runciman Report with a seminar, and further report, *Remedying Miscarriages of Justice* (1994). These made a number of additional recommendations as to what a new review body should look like, including:
- That the body should have the power to review the criminal justice system as a whole;
 - That a complaint made to the body should raise a new issue in order to be eligible for referral –this need not solely be fresh evidence but could include the presentation of new lines of argument;
 - That there should be an alternative review procedure for cases turning on simple questions of verification, while more complicated cases should go to the body for investigation;
 - Applications considered by the body should have exhausted the appeal process and should be made directly to the body.;
 - The first stage of review by the body should establish eligibility. The second stage should be a merits test: whether the body accepts that there is a new issue relevant to the case, which convincingly casts doubt on the safety of the conviction, requiring further investigation.
7. It was hoped that as the body fell outside the scope of both the Judiciary and the Executive, it would avoid suspicions of bias and the ‘constitutional difficulties that arise when a departmental body carries out investigations.

The remit, composition, structure and funding of the CCRC

Establishment of the Criminal Cases Review Commission

8. The recommendations provided in the *Runciman Report* and by JUSTICE were taken on board by the government who established the CCRC (the Commission) in 1997, with its powers being outlined in the Criminal Appeal Act 1995, sections 8 to 25. The Government did not implement all of the recommendations in full. As such, upon the establishment of the Commission we, and other organisations, remained concerned about how the appeals system would operate and how effective it would be for overturning convictions.
9. The Commission was established to be constitutionally independent of government,⁷ constituted as an executive non-departmental public body sponsored by the Ministry of Justice (MOJ). The Commission is able to accept complaints from applicants who have exhausted their appeal rights. It is only able to accept cases that rely on new evidence or issues that were not available at trial. In addition, it can only refer a case to the Court of Appeal Criminal Division (CACD) if it believes there to be a ‘real possibility’ that the CACD will quash the conviction or change the sentence.⁸ This presents difficulties that will be discussed below.

⁵ The Runciman Report, p.183

⁶ Ibid.

⁷ See: MOJ, *The Tailored Review of the Criminal Cases Review Commission (TR)*, p.13.

⁸ Section 13(1)(a) Criminal Appeals Act 1995.

Independence

10. We are concerned that the Commission's independence from Government has recently been undermined. This is for two reasons:
 - a. The Secretary of State has misused their role as sponsor for the Commission; and
 - b. There is no security of tenure for Commissioners.

Sponsorship

11. Ahead of a recruitment exercise in 2017, the Secretary of State reduced the term of Commissioner appointments to three years with the possibility of extension for another three years, which raised concerns of board members at a board meeting of 27 February 2017. The Secretary of State also terminated the practice of the Minister approving re-appointments that were recommended by the Chair of the Commission, with all reappointments being at the discretion of the Minister.⁹ The reasons for doing so are unclear, and seem counter intuitive given that the Chair would have better knowledge of a Commissioner's ability to perform the role than the Secretary of State.
12. We are concerned that the possibility of extension being in the gift of the Government may place undue influence on a Commissioner to perform their duties in a way that satisfies the Secretary of State. The independence of Commissioners ensures that decisions over referrals are not influenced by outside considerations, allowing justice to be 'seen' to be done.
13. In 2019 the Ministry of Justice published a Tailored Review of the Commission (TR),¹⁰ making a number of recommendations for the Commission to implement.¹¹ The Ministerial Foreword stated that the Minister "will be taking a keen interest in their timely implementation," which places particular emphasis on the Minister's expectations that the Commission will apply the recommendations. In making this statement, the independence of the Commission has been compromised. The Criminal Appeals Act states that the Commission should determine the arrangements for its own procedure,¹² and not the Ministry of Justice. The implication of the Minister's Foreword that the Tailored Review recommendations should be followed suggests an unlawful interference by Government with the independence of the CCRC. This is particularly so since the Commission expressly resisted the proposed changes.

⁹ See: Cabinet Office, *HM Government Public Appointments: Commissioners of the Criminal Cases Review Commission (CCRC)*, available at <https://publicappointments.cabinetoffice.gov.uk/appointment/commissioners-of-the-criminal-cases-review-commission-ccrc/>

¹⁰ MoJ, *Tailored Review of the Criminal Cases Review Commission*, (2019), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777176/tailored-review-of-the-criminal-cases-review-commission.pdf Tailored Reviews provide assurance to government and the public on the continuing need for the functions delivered by public bodies, as well as assessing the potential for improved efficiency, effectiveness, governance and different delivery mechanisms (TR para 1.1).

¹¹ These include recommending the CCRC: 6(a) move responsibility for the final decision of non-referrals in Type 1 and 2 cases from Commissioners to Case Review Managers; 6(b) consider establishing a small team of CRMs to review and decide on Type 1 and 2 cases and introduce other 'specialist teams' working on cases that fall into a particular theme (as with asylum cases) to promote more efficient working; and 6(e) allocate resources more proportionately by redirecting the final decision as to whether no appeal cases raise exceptional circumstances from Commissioners to CRMs. This should be supported by guidance based on the experience of Commissioners (TR p.6).

¹² Paragraph 6 (1)-(3) of Schedule 1 to the CAA 1995.

14. We are concerned that the MOJ has made recommendations that could be perceived as directives. The Commission should determine its own arrangements, in accordance with Statute, and be accountable to Parliament, not Government.
15. We are further concerned that the Ministry of Justice is also misusing its position as sponsor to unduly interfere with Commission decision making. The recruitment pack for the most recent recruitment exercise details Commissioner appointments will be on a daily rate, rather than salaried, with the minimum number of days a year set at only 52 days.¹³
16. However, the Chair of the Board of the Commission indicated in the Commission's board meeting on 26 January 2016¹⁴ that it takes around a year for a Commissioner to fully learn the role, working at three to three-and-a-half days per week. 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. It will also prevent Commissioners from being able to develop expertise and experience in casework.
17. Moreover, changes to the system of appointment have also devalued the role financially. To illustrate this, the payment and benefits package the role attracts has declined as follows:
- 1997 – 2012: Salary, including holiday pay and sick pay, plus pension;
- 2012 – 2017: Salary, including holiday pay and sick pay, with no pension;
- 2017 - date: Fee paid, no holiday pay, no sick pay, no salary, no pension.
- The reduced financial recompense for Commission work will detract from the best and most able applying for Commissioner roles.

Investigative Process

18. The Commission has faced funding cuts in recent years, making it more difficult to carry out its duties. Richard Foster CBE, Chair of the Commission said, "for every £10 that my predecessor had to spend on a case a decade ago, I have £4 today" – this being "the biggest cut that has taken place anywhere in the criminal justice system."¹⁵
19. The funding cut may be a contributory factor as to why various critics have suggested that the Commission does not investigate as effectively as it ought to, especially in the context of initial reviews of cases.¹⁶ The lack of engagement in cases at an early stage

¹³ Supra note 9.

¹⁴ Minutes no longer available on the CCRC website.

¹⁵ L. Welsh, 'Disclosure failures are the inevitable consequence of an underfunded and overworked system', *Justice Gap*, 19 February 2018, available at: <http://www.thejusticegap.com/2018/02/disclosure-failures-are-the-inevitable-consequence-of-an-underfunded-and-overworked-system/>

¹⁶ For example, the argument has been raised that the CCRC lacks a hands-on approach. Indeed, research conducted by Professor Hoyle on the Commission with The University of Oxford found that in one-third of cases the CCRC investigated, investigations moved 'beyond the bundle'. (available at: <http://www.thejusticegap.com/2015/01/problem-lies-court-appeal-always/>). Furthermore, Dr Dennis Eady, stated that this research did not 'necessarily leave a very positive impression' about the CCRC's

has been attributed to the fact that caseworkers are often having to work quickly in order to cover a vast caseload.¹⁷ While the Commission has suggested that a substantial amount of time is dedicated to investigating individual cases, this does not negate the argument that the Commission is not looking into cases as thoroughly as it could. For instance, while it may seem as though an investigation has taken place over a long period of time, there is no actual indication of how many hours have actually been spent working on an individual case or how extensive the investigation has been.^{18,19}

20. The case of Eddie Gilfoyle illustrates why there have been criticisms the Commission's investigatory approach. It has been suggested that the Commission ought not to have concluded that the conviction was safe because they ignored clear issues with disclosure and there was new evidence concerning police misconduct, which might have impacted on the jury's decision.²⁰

21. These criticisms may be why a study found that in almost 40% of cases referred between 2005 and 2007, legal representation had a determinative effect on the review of cases. Of the cases where there was legal representation, the lawyer's role was crucial in half of those.²¹ This shows the value lawyers bring in being able to challenge decisions made by the CCRC, especially where investigations may not have been thorough as they might have been. It is a concern that the number of applicants with legal representation has dropped to a quarter.²²

Prioritisation of cases

22. While the 2017/2018 Annual Report stated that many of their referrals relate to the most serious types of offending,²³ nine of the cases that year involved cases

investigations as demonstrated by a lack of proactivity in the majority of cases. Justice Select Committee, *Twelfth Report – Criminal Cases Review Commission*, 2015, para 48, available at <https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/850/85002.htm>.

¹⁷ M. Naughton, *The Criminal Cases Review Commission: Hope for the Innocent?*, (Springer 2009), p.124.

¹⁸ Emily Bolton, Director and Founder of Centre for Criminal Appeals says the CCRC are not able to put the necessary time into the cases they review, stating "our guess is that they might average 50 hours work on a strong case, strung out over two years" – "if I was a cancer patient, I wouldn't want my consultant oncologist spread so thinly." J. Robbins, 'University innocence projects: where are they are now?' *The Guardian*, available at:

<https://www.theguardian.com/law/2016/apr/27/university-innocence-projects-where-are-they-now>

¹⁹ Michael Naughton says that "in cases that I have been involved with it is very evident that the CCRC spend more time in trying to justify not investigating the case, interviewing witnesses that are alleged to have lied, undertaking new forensic tests such as DNA testing that might exclude an applicant from a key piece of evidence that the prosecution said links them with the crime, for instance, than in actually interviewing a witness or doing the testing": M. Naughton's statement of evidence submitted to *Tailored review of the Criminal Cases Review Commission: Call for evidence* in 2018, available at: <http://michaeljnaughton.com/wp-content/uploads/2018/01/MOJ-tailored-review-of-the-CCRC-10-January-2018-my-ID-removed.pdf>

²⁰ The Gilfoyle family have spent the last two decades fighting to overturn Eddie Gilfoyle's conviction of the murder of his pregnant wife in 1992. Gilfoyle was convicted in 1993 by a jury whom found that the victim's alleged suicide letter had been falsified by the accused. Despite there being documentation indicating that the Merseyside Police had engaged in corruption and other issues with the conviction, the CCRC rejected the Gilfoyle's application to refer the case back to the Court of Appeal.

²¹ J. Hodgson and J. Horne, *The extent and impact of legal representation on applications to the Criminal Cases Review Commission (CCRC): a report for the Legal Services Commission*, (Warwick Law School), May 2008, p. 4, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1483721

²² https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1483721

²³ Page 11.

concerning incorrect documentation.²⁴ Although important, there is a risk that this diverts resources from more complex cases. Such cases should not take too much resource.

23. We understand that the Commission has a Long Running Cases Committee, which focusses on cases that have taken more than two years to review.²⁵ This is a positive initiative that we hope will bring long running cases to a speedy resolution. However, we consider that an additional specialist team that dealt with less complex cases would ensure that resources were not diverted from complex cases. This would reduce the frequency of complex cases taking more than two years to review.²⁶

Recommendations:

- **Commissioners should have security of tenure to ensure that they are not influenced in their decision-making by the Secretary of State's view.**
- **It is vital that the Commission is sufficiently funded, both in terms of providing the right resources for thorough investigations and so that Commissioner roles can be properly remunerated.**
- **Less complex cases should be dealt with by a dedicated team within the Commission to ensure resources are not diverted from more complex cases.**

Whether statutory or other changes might be needed to assist the CCRC to carry out its function

The Statutory Test

24. Our report, *Righting Miscarriages of Justice? Ten years of the Criminal Cases Review Commission*, pointed out that no reference is made to the need for there to be a 'miscarriage of justice' in the "real possibility" test or anywhere else in the CAA. As such, the 'real possibility' test is based on assumptions and predictions about the CACD's potential decision, rather than on whether there is or is not a miscarriage of justice.²⁷
25. A further concern is that the Commission has a discretion rather than a duty to refer cases to the CACD, even when cases do meet the threshold for referral.²⁸ This creates a risk of outside influences bearing on decision-making, highlighting the need for true independence.
26. This results in a predictive exercise for the Commission, leaving it vulnerable to judicial guidance and, at times, plain direction.²⁹ This has led to a restrictive approach, with the

²⁴ CCRC, *Annual Report and Accounts 2017/18*, p. 82.

²⁵ *Supra*, *Annual Report*, p. 17.

²⁶ Paragraph 5.23 of our *Miscarriages of Justice* report, we recommended that a separate body should be established for less complex cases. This was in a context where the Home Secretary retained responsibility for the more complex cases. We no longer believe that a new body would be necessary, although a separate unit within the Commission may be beneficial.

²⁷ L. Elks, JUSTICE, *Righting Miscarriages of Justice? Ten years of the Criminal Cases Review Commission*, 2008, p.15 - The report noted that this is particularly problematic given that the CACD's decisions favour the notion that the jury's verdict was implicitly credible as they had the benefit of hearing all the evidence first-hand.

²⁸ *R (Ashley Charles)* [2017] EWHC 1219, para 47.

²⁹ *Ibid* p.345.

Commission rejecting certain types of cases because the CACD would not be receptive to them, such as change of law cases.³⁰

27. This is also impacted by the fall in number of referrals made to the CACD.³¹ Indeed, the Commission's 2017/18 annual report recorded that 19 referrals were made in that year, at only 12 referrals made the year before. This is well below the average of 33 referrals made by the Commission each year.³² The fall in referrals may be due to the complicated test the Commission must apply, which requires the commission to imagine what the CACD will do rather than taking responsibility for its own decisions. Of course, it is difficult to look at referral numbers and come to a firm conclusion as to the reasons for the fall, due to the variables of the criminal justice system. However, a clearer test, with a focus on what the Commission believes, may improve numbers.

28. This is partly why has been argued that an alternative to the "real possibility" test should be established.³³ Two different options could be: (a) that the Commission should ask whether there is an 'arguable' case that a miscarriage of justice had occurred;³⁴ or that the Commission should focus on whether there is a 'real possibility' that there had been a wrongful conviction based on what they themselves would have decided if they constituted part of the jury for the original hearing.³⁵ We consider that there is merit in the focus of the Commission test being on what itself considers has occurred rather than trying to anticipate the reasoning of the Court.

29. A further solution could be that the Law Commission review the CACD's current grounds for allowing an appeal and also look into a new statutory provision that would encourage the Court of Appeal to quash convictions where there is 'serious doubt' about the jury's verdict, in spite of there being a lack of fresh new evidence or legal argument.³⁶ This should result in a less restrictive approach by the CACD, meaning the Commission may seriously consider a broader range of cases for referral.³⁷

Recommendations:

- **A duty to refer cases that meet the threshold should be implemented.**
- **A new test for referring cases to the CACD should be established.**

The extent to which the CCRC's role is hampered by failings or issues elsewhere in the criminal justice system

³⁰ See: *R v Steven Cottrell and Joseph Fletcher* [2007] EWCA Crim 2016, 2007 WL 2139991. This approach continues in appeals emanating from *R v Jogee* [2016] UKSC 8. The court has adopted a restrictive approach, with a threshold where the applicant must demonstrate 'a substantial injustice' (see *R v Johnson & others* [2016] EWCA Crim 1613), which as resulted in one successful joint enterprise appeal (P. Taylor, 'The Jogee effect', *Counsel Magazine*, September 2018, available at <https://www.counselmagazine.co.uk/articles/the-jogee-effect> and J. Robins, 'Joint enterprise exposes all that is wrong with our justice system', *The Justice Gap*, 18 February 2019, available at <https://www.thejusticegap.com/joint-enterprise-exposes-all-that-is-wrong-with-our-justice-system-2/>)

³¹ *Supra* 2016/17 CCRC Annual Report, p.6.

³² *Ibid*, p. 5.

³³ *Supra* Justice Select Committee, para 16.

³⁴ *Ibid*.

³⁵ *Ibid* para 14.

³⁶ *Supra* Justice Select Committee 2015, para 27-8 – This was to, essentially, formalise the 'lurking doubt' principle.

³⁷ *Ibid* para 28.

30. The criminal justice system has faced significant reductions in legal aid, police resource and CPS resource. As a result, innocent people may not be receiving the legal assistance they require to successfully defend their cases and overworked legal professionals and police officers may miss exculpatory evidence. Moreover, we now have an increased understanding of the negative role mental health difficulties can play both in criminality and effective participation in trials.³⁸
31. All of this points to an increased risk of miscarriage of justice, distinct to that which led to the establishment of the Royal Commission on Criminal Justice. The Royal Commission looked at false confessions, misidentification and general police misconduct, which are now rare. The current risk of miscarriage of justice lies deeper than this, in a stretched system that does not have time or resource to investigate properly, or the tools needed to understand mental illness. In this environment, vital evidence may be missed, or someone may not understand the case being presented against them. Focussing on how to reduce the risk of miscarriage of justice caused by these failures must now be a priority.
32. We are also concerned by the treatment of victims of miscarriage of justice when they are released from prison. As well as the right to compensation being severely restricted, there is very little support offered to them, with no agency responsible for their support on release. This makes reintegration into society far more difficult, which is compounded by the fact that many miscarriage of justice victims suffer from complex mental health difficulties including Post-Traumatic Stress Disorder, and require specialist treatment. Our report, *Supporting Exonerees*,³⁹ focusses on this issue and makes recommendations on how to improve support for miscarriage of justice victims. We consider it vital that the Commission investigates this issue is also addressed.

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³⁸ See: JUSTICE, *Understanding Courts*, 2019, available at <https://2bqk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2019/01/Understanding-Courts.pdf> ; JUSTICE, *Mental Health and Fair Trial*, 2017, available at <https://2bqk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2017/11/JUSTICE-Mental-Health-and-Fair-Trial-Report-2.pdf> ; and JUSTICE, *Prosecuting Sexual Offences*, 2019, available at <https://2bqk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2019/06/Prosecuting-Sexual-Offences-Report.pdf>

³⁹ *Supra*.