Written evidence from Paul May (CCR 03)

Personal Background

Between 1985 and 1991, I chaired the London-based campaign for the Birmingham Six. I subsequently led public campaigns for Judith Ward, the Bridgewater Four and Danny McNamee (the first CCRC referral). I also organised campaigns on behalf of less-publicised miscarriage of justice victims including the East Ham Two. I represented Sam Hallam in his application to the Commission and led his support group from 2006 until his 2012 exoneration. I am a law graduate and presently chair support groups for Colin Norris and Eddie Gilfoyle whose cases are currently under CCRC investigation.

Summary

- The CCRC largely fulfils the expectations and remit envisaged by the 1993 Royal Commission on Criminal Justice (paras 1-7).

- The CCRC should exercise its power to order Section 19 police inquiries more frequently (paras 9-11).

- The CCRC should be more willing to subject case exhibits to forensic testing and re-testing (para 12-13).

- CCRC staff should meet with applicants more frequently (para 14)

- Further measures should be explored to minimise delays in reaching referral decisions (para 15)

- The Commission should adopt a more collaborative approach towards investigations in partnership with applicants’ lawyers and other representatives. (para 16)

- Successive budgetary cuts to the CCRC should be reversed. (para 17)

- Section 17 disclosure duties should be extended to private companies and individuals (para 18-20)

- Sanctions should be introduced for failure to comply with s17 directions (para 21)

- The s13 ‘real possibility’ test should remain but the CCRC should adopt a bolder approach towards referral decisions (paras 22-26)
Has the CCRC fulfilled the Royal Commission’s expectations?

1. For almost 30 years, I’ve worked (mostly successfully) on public campaigns seeking to overturn wrongful convictions. These campaigns have culminated (to date) in the exoneration of 15 wrongly convicted persons. As a consequence, I’ve had extensive engagement with the Criminal Cases Review Commission and its predecessor, the Home Office’s C3 Division.

2. Some claim the CCRC falls short of the role envisaged in the 1993 report of the Royal Commission on Criminal Justice (the Runciman Commission). Subject to reservations outlined below, I believe the CCRC has largely fulfilled – and in some respects exceeded – the Runciman Commission’s expectations. The Commission was established on the day the Birmingham Six were exonerated against a backdrop of widespread public disquiet about many aspects of the criminal justice system. Among these concerns were manifest deficiencies in the system for investigating alleged miscarriages of justice.

3. The performance of C3 in examining claims of wrongful conviction was woeful. The division was poorly staffed comprising around 20 civil servants (none of them legally qualified). C3 adopted a purely reactive approach and saw its primary role as rebutting evidence submitted by prisoners, lawyers and others. Virtually no proactive investigation was carried out within the division. In a few cases, outside police forces were appointed to conduct inquiries. Officers conducting such inquiries were left to their own devices with no supervision by C3. The standard of police inquiries varied considerably ranging in my experience from abysmal (Merseyside Police and the Bridgewater Four) to lacklustre (Devon and Cornwall Police and the Birmingham Six) to outstanding (Essex Police and the East Ham Two). Lawyers representing applicants were routinely denied access to the reports of police inquiries. Correspondence went unanswered for months. Eventual
replies often contained flagrant factual errors. Cursory reasons for rejecting applications frequently included erroneous information.

4. The notion of a new investigative body to replace C3 was mooted for decades. In 1977, Lord Devlin proposed an ‘independent review tribunal’¹ to investigate alleged wrongful convictions. In 1982, the then Home Secretary, Rt. Hon. Leon Brittan MP rejected a similar call from the Home Affairs Select Committee. The Runciman Commission recommended the ‘Home Secretary’s power to refer cases to the Court of Appeal ... should be removed and a new body ... set up’². The role of the new body would be to ‘be to consider allegations put to it that a miscarriage of justice may have occurred, to ensure that any further investigation called for is launched...’³.

5. It’s sometimes claimed that a more confrontational, campaigning role was envisaged for the CCRC. This is untrue. I was present in Parliament in 1995 when the clauses in the Criminal Justice Bill which created the CCRC were debated in the House of Commons. Several amendments were put forward – principally concerning the CCRC’s investigative capability – but none proposed any other functions for the new body than those outlined by the Runciman Commission.

6. Some allege CCRC employees only conduct passive ‘paper’ investigations into submissions rarely leaving their offices or initiating their own inquiries. This has not been my experience. In Sam Hallam’s case, the Commission’s investigation went well beyond the issues which I’d initially submitted on Mr Hallam’s behalf. CCRC staff visited the murder scene and initiated several meetings with me and Mr Hallam’s mother. The Case Review Manager and Investigation Advisor were proactive in inviting suggestions as to potential lines of inquiry and we had

¹ Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases Cm 338 HMSO 1977 at 6.22

² Report of the Royal Commission on Criminal Justice Cm 2263 HMSO 1993 Ch 12 at para. 331

³ ibid at para 332
numerous telephone conversations about the case. The Commission eventually concluded that the case required an outside police inquiry about which I was kept fully informed as Mr Hallam’s representative. I currently represent\(^4\) in his application to the Commission, former nurse Colin Norris convicted (wrongly in my view) of four counts of murder and one of attempted murder. While the Commission’s investigation is ongoing, I’m satisfied that both the Case Review Manager and the Commissioner overseeing the application understand the (complex) issues in the case and are open to proposals for additional lines of inquiry.

7. I can only draw firm conclusions from those cases in which I’ve been personally involved but the assertion that CCRC staff *habitually* engage in passive, desk-based reviews is erroneous.

8. Every case is different and the Commission must necessarily enjoy a wide discretion how and to what extent applications which have passed Stage One screening will be examined. I have several reservations about the Commission’s current approach.

**Police Inquiries**

9. Under s19 of the Criminal Appeal Act 1995, the Commission ‘may require the appointment of an investigating officer’ to carry out inquiries on its behalf. The CCRC has been much less inclined than its predecessor to order police investigations. When a s19 inquiry was commenced in 2010 in Sam Hallam’s case, I was surprised to learn that this was only the 40\(^{th}\) such inquiry out of (then) more than 13,000 applications since the Commission was established. I’ve been told (but am unable to verify) that no s19 inquiries are currently in progress.

10. There are a significant number of cases where the Commission does not have enough staff to conduct a proper investigation. In Sam Hallam’s case, up to 20

\(^4\) Pending appointment of a solicitor
officers of Thames Valley Police (TVP) were engaged for 15 months examining specific aspects of his conviction. The Commission deserves praise for going against the Runciman Commission’s expectation that reports from police inquiries ‘would not be sent either to the parties or to the court’\(^5\). TVP’s excellent detailed report on Sam Hallam’s conviction was disclosed to me as Mr Hallam’s representative and to the solicitor\(^6\) who took over representation two months before the case was referred to the Court of Appeal. The TVP report proved invaluable to his legal team in preparing his successful 2012 appeal.

11. Notwithstanding concerns about ‘the police investigating the police’ (which can be minimised by appropriate supervision) the CCRC should exercise its s19 powers more frequently.

‘Speculative’ testing

12. In March 2014, I accompanied relatives of Kevin Nunn currently serving life imprisonment for murder to the Supreme Court for an appeal hearing against a refusal by Suffolk Police to release case exhibits for testing and re-testing in light of improved scientific techniques. I was also present in June 2014 when the Court delivered its judgment.\(^7\) It was perhaps unsurprising that the Court held that no general right to post-conviction disclosure exists. Whatever the wisdom of Mr Nunn’s previous lawyers launching judicial review proceedings, \textit{Nunn} has had a negative impact on persons claiming innocence. Those police forces which were hitherto agreeable to post-conviction disclosure now refuse to release such material.

13. The CCRC has long maintained it will not engage in ‘speculative’ testing of case exhibits – an assessment which necessarily includes a subjective element. As the recent case of \textit{Nealon}\(^8\) showed, the CCRC does not always get it right when determining whether testing would be ‘speculative’. There are, moreover, cases such as Mr Nunn’s where police failed to test potentially crucial exhibits during their

\(^{5}\) \textit{Royal Commission on Criminal Justice} op. cit. at Ch. 11 para 31

\(^{6}\) Matt Foot of Birnberg, Peirce and partners.

\(^{7}\) \textit{Nunn v Chief Constable of Suffolk Constabulary} [2014] UKSC 37

\(^{8}\) \textit{R v Nealon} [2014] EWCA Crim 574
original investigation. The CCRC should be more willing to commission such testing where it might reveal useful evidence.

Meeting applicants

14. The Runciman Commission observed ‘many people who believe that they are the victims of miscarriage of justice feel that they have a right to be heard and are frustrated by the fact that they have been unable to put their case in person’. Many CCRC staff are reluctant to visit applicants in prison. This causes significant dissatisfaction. While such visits would have resource implications for an already hard-pressed body, arranging face to face meetings – subject to necessary restrictions – would enhance confidence in the CCRC and (in the significant number of instances where applicants are unable to express themselves fully in writing) assist the investigative process.

Delay

15. The inadequate resources available to the CCRC and the complex nature of some cases render lengthy delays in reaching decisions inevitable. In some instances, however, the Commission seems to regard extensive delay as an inescapable norm with no institutional need to adopt any sense of urgency. I appreciate that the Select Committee cannot examine individual cases but the application submitted by Eddie Gilfoyle (whose support group I chair) provides a cogent example. Fresh evidence in his case was submitted to the Commission by his lawyer in July 2010. The most recent submission of further fresh evidence was made in June 2012. In May 2013, the Commission’s Chair assured Mr Gilfoyle’s former constituency MP Lord Hunt of Wirral that the CCRC understood the need to ‘reach a final conclusion as soon as possible’. In August 2014, the CCRC led Mr Gilfoyle’s solicitor to believe that a decision in the case would be forthcoming by Christmas 2014. As matters stand, Mr

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9 Royal Commission on Criminal Justice op. cit. at Ch. 11 para 25
10 Matt Foot
Gilfoyle still has no idea when a decision will be made in his case some 4½ years since his application was submitted.

**Collaboration**

16. The Commission traditionally adopted a solipsistic approach to investigating cases engaging as little as possible with applicants, lawyers and others. While some applicants’ representatives maintain a partisan and antagonistic stance towards the Commission, the majority are as concerned to establish the truth as the CCRC. There are welcome signs that the Commission may be espousing a more open attitude. If a more collaborative approach were taken in which investigations were conducted in partnership with solicitors and others representing applicants, this would help mitigate the severe resource constraints under which the CCRC is obliged to operate.

**Powers and resources**

17. Notwithstanding a recent modest increase in funding, the CCRC has been subject to successive budget cuts which mean that it now has only half the funding per case than a decade ago. These reductions cause acute delays. In 2002-03, the Commission employed 50 Case Review Managers to consider 955 applications annually. By 2013-14, the full-time equivalent number of CRMs was 34 dealing with 1625 applications per year. Most observers predict that drastic reductions in legal aid provision will prompt a major increase in miscarriages of justice. The CCRC should be allocated sufficient resources to perform its functions properly and to reduce the lengthy waiting times suffered by applicants.

**Section 17**

18. The duty under s17 of the Criminal Appeal Act 1995 for public bodies to produce such documents and other material as the CCRC may reasonably require must be

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11 The CCRC has a published protocol for dealing (and, if necessary, refusing to deal) with such representatives
extended to private organisations and individuals as soon as possible. There has been wholesale privatisation of forensic science facilities since the Act was passed. Such companies mostly co-operate with CCRC requests but situations where a company might resist can easily be imagined e.g. if the company’s competence or probity was being called into question.

19. The government has expressed support for the above change but has repeatedly failed to act despite numerous legislative opportunities to do so. The Select Committee is asked to add its voice to calls for s17 to be extended to private companies and individuals.

20. The CCRC’s powers under s17(2) to direct that material ‘must not be destroyed, damaged or altered’ should also cover private bodies and individuals.

21. There’s an additional lacuna affecting the duty under s17. If a body ‘refuses to hand over documents or seeks to destroy them after a s17 direction has been given, the CAA 95 does not provide for any punitive measures’¹². I’m aware of a current case where a public body repeatedly refused to comply with a s17 direction from the CCRC over a two year period¹³. Unless some sanction can be applied to such bodies, the CCRC’s important powers to require disclosure lack force. The legislation should be amended to allow for sanctions to be applied to those breaching s17 directions.

The ‘Real Possibility’ test

22. The Commission may only refer convictions if ‘there is a real possibility that the conviction...would not be upheld’. If the Commission were to refer convictions with scant hope of success, this would raise false hopes among applicants, cause significant delays and create a futile conflict between the Commission and the Court of Appeal.

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¹² Taylor on Criminal Appeals (2nd edition) OUP 2012 at 12.70

¹³ I understand this impasse may recently have been resolved.
23. Some claim an ‘innocence test’ should be applied to referral decisions. Such proposals are simplistic and naïve. An ‘innocence test’ would result in a minuscule number of convictions being referred. In every case of wrongful conviction, there existed enough evidence to convince a jury beyond reasonable doubt of the defendants’ guilt. Fresh evidence which negates the safety of a conviction rarely establishes conclusively that it’s impossible the person committed the offence.

24. The CCRC’s first referral in July 1997 was in the case of Danny McNamee wrongly convicted in connection with the 1982 Hyde Park bombing. In McNamee, the Court of Appeal made clear its own view of an innocence test when it said that in quashing the conviction ‘it does not at all follow that this Appellant is innocent’. There can be little doubt that the Court of Appeal would have upheld the conviction if an ‘innocence test’ had applied in 1998. As Chair of Mr McNamee’s campaign, it was my firm belief that he hadn’t committed the offence. Nevertheless, the nature of the evidence (and of the alleged conspiracy offence) rendered it virtually impossible that any new material would conclusively prove his innocence. Had the CCRC been required to ask itself whether Mr McNamee was innocent it’s questionable whether his conviction would have been referred at all.

25. The ‘real possibility’ test could be replaced by some other statutory criterion such as that placed on the Scottish CCRC to refer convictions if they believe ‘a miscarriage of justice may have occurred’. There’s no evidence the Scottish CCRC’s actual practice differs from its English counterpart when making referral decisions.

26. The need to ‘second guess’ the Court of Appeal has, however, encouraged the Commission towards an excessively cautious approach. The Court of Appeal’s jurisprudence is often confused and/or inconsistent e.g. the fluctuating extent to which the Court subjects fresh evidence to the ‘jury impact test’ set out in Pendleton.

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14 R v McNamee 1998 WL 1751094

15 S194C(1)(a) Criminal Procedure (Scotland) Act 1995
There’s considerable scope for the Commission to adopt a bolder interpretation of ‘real possibility’. The test does not require the CCRC to believe it probable the conviction would be overturned but only that there’s a credible prospect of such an outcome. In such cases, the Commission’s inclination should be towards the option of referral.

**Conclusion**

27. Much of the criticism levelled at the CCRC would in my view be better directed at the Court of Appeal which remains capable on occasions of quite breath-taking obduracy towards appellants claiming wrongful conviction. Like every public body, the CCRC is fallible but it should be acknowledged that five times the number of convictions have been referred back to the courts since the Commission was established. More than two thirds of referrals have resulted in quashed convictions. The CCRC is far from perfect but it represents a major improvement over its lamentable predecessor.

November 2014

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16 R v Pendleton [2001] UKHL 66