Written evidence from the Ministry of Justice (CCR 11)

Foreword

Since 31 March 1997 there has been a Criminal Cases Review Commission (the Commission) with authority to review and investigate alleged miscarriages of justice in England and Wales and Northern Ireland, and power to refer convictions and sentences to the relevant appeal court for an appeal. It replaced functions previously carried out by Home Secretary. Parliament established the Commission specifically to be a body independent of the Executive and the courts.

The first triennial review of the Commission, undertaken in accordance with the triennial review programme overseen by the Cabinet Office, was completed in June 2013. That review specifically considered some of the issues that this short inquiry by the Committee is covering, following on from the oral evidence session held in January 2014\(^1\). The triennial review and the oral evidence session reviewed the statutory functions carried out by the Commission and the powers available to it to fulfil them.

The triennial review firmly concluded that all of the functions of the Commission should be retained unchanged, and also that those functions should be carried out independently through it continuing as a Non Departmental Public Body.

\(^1\) Justice Committee Oral Evidence: The work of the Criminal Cases Review Commission, HC971 published 14 January 2014
Executive Summary

1. The Ministry of Justice is pleased to respond to the Justice Select Committee’s invitation for written submissions and request for observations on the following issues:

   i) Whether the CCRC has fulfilled the expectations and remit which accompanied it at its establishment following the 1993 report of the Royal Commission on Criminal Justice.

   ii) Whether the CCRC has in general appropriate and sufficient (i) statutory powers and (ii) resources to carry out its functions effectively, both in terms of investigating cases and in the wider role of promoting confidence in the criminal justice system.

   iii) Whether the “real possibility” test for reference of a case to the Court of Appeal under section 13(1) of the Criminal Appeal Act 1995 is appropriate and has been applied appropriately by the CCRC.

   iv) Whether any changes to the role, work and remit of the CCRC are needed and, if so, what those changes should be.

2. This memorandum has been prepared by the Ministry of Justice (MoJ) and provides an assessment of the work and the effectiveness of the Commission.

Whether the CCRC has fulfilled the expectations and remit which accompanied it at its establishment following the 1993 report of the Royal Commission on Criminal Justice.

3. In the wake of high profile miscarriages of justice including the Birmingham Six and the Guildford Four which shook confidence in the criminal justice system, the Criminal Cases Review Commission (the Commission) was set up following the 1993 report of the Royal Commission on Criminal Justice. The Commission is independent of the Executive and the courts and has a wider remit and powers under the Criminal Appeal Act 1995 than were available under section 17 of the Criminal Appeal Act 1968 to the Home Secretary who previously held responsibility for considering alleged miscarriages of justice.

4. The Commission opened in 1997 with the authority to review convictions and/or sentences in cases dealt with on indictment or summarily in England and Wales and Northern Ireland. It was given powers to obtain documents or other material from public bodies regardless of issues of confidentiality or secrecy, and to appoint officers to investigate matters as appropriate. In addition, the Court of Appeal has the right to require the Commission to investigate a case and report to the court. The Armed Forces Act 2006 extended the jurisdiction and powers of the Commission to cases dealt with by the Court Martial and Service Civilian Court, and the Court Martial Appeal Court may direct the Commission to investigate matters.
5. The latest figures published by the Commission to 31/10/2014\(^2\) show that the Commission has received a total of 18,513 applications (inclusive of 279 transferred from the Home Office when the Commission was set up in 1997) of which 16,990 have been completed. 565 referrals have been made to the Court of Appeal in the Commission’s 17 year history. It is clear from information provided by the Commission to the triennial review that the vast majority of applications concern cases heard in the Crown Court\(^3\).

6. From the perspective of the MoJ as sponsoring Department of the Commission, we consider that the Commission is fulfilling the expectations and purpose that it was established for. However, it has been the subject of criticism both as to the way that it carries out its functions, and increasingly for the time that it takes to deal with individual cases. These messages where highlighted during the triennial review and are reflected in correspondence that the Ministry responds to about the Commission and delays in individual cases.

7. The Royal Commission in 1993 did not make any recommendations on time limits and effectiveness. Instead it said that the Authority (i.e. the Commission) should devise its own rules and procedures for selecting cases for investigation, subject to it’s being able to conclude in each case so selected that there is, or may be on investigation, something to justify referring the case to the Court of Appeal.

8. The Commission has introduced initiatives to support its core aim of conducting effective, high quality case reviews, and also to improve access to its services. The introduction of an Easy Read application form and work carried out to draw attention to convictions affected by the Refugee Convention, the Immigration and Asylum Act 1999 and or the Asylum & Immigration Act (Treatment of Claimants) Act 2004 led to a significant increase in the number of applications to the Commission which it had to react to.

9. The Commission has previously responded to the Justice Select Committee on the issue of its processes\(^4\) acknowledging that criticisms have been made of the Commission for being too slow.

10. The Commission’s casework performance is monitored by using a set of key performance indicators (KPIs) which show the average time taken for an application to be allocated so that a case review can begin. The Commission prioritises applications from people in custody over those who are at liberty. During 2013/14 72.5% of applications were from people in custody and 27.5% from people at liberty. The KPI target is to allocate custody cases in an average of less than 26 weeks from receipt of application. Where the applicant is at liberty the KPI is for less than 52 weeks. In 2013/14 the actual average time for custody cases was 35 weeks and for liberty cases 45 weeks.

\(^2\) www.justice.gov.uk/about/criminal-cases-review-commission

\(^3\) Criminal Cases Review Commission Combined report on stages one and two published 6 June 2013, www.justice.gov.uk/downloads/about/criminal-cases-review-commission

\(^4\) Justice Committee Oral Evidence: The work of the Criminal Cases Review Commission, HC971 published 14 January 2014
11. The Commission’s 2013/14 Annual Report and Accounts\(^5\) refers to the steps that it has taken to improve performance. This includes a change from June 2013 in relation to screening of all first time applications where there had been no prior appeal. This work is now carried out by Group Leaders rather than Commissioners. The Commission reports that this has led to Commissioners having more time for matters reserved for them, and enabled the Commission to simplify several aspects of the caseworking process which has eliminated duplication and reduced administrative work.

12. In addition to tackling efficiency in terms of its processes, the Commission has sought to help applicants better understand the appeal process, and in particular the issues that need to be addressed in No Appeal Applications. These are applications where there has not been a previous appeal or an unsuccessful application for leave to appeal; applications to the Commission cannot be used as a way for applicants to by-pass conventional appeal processes. In No Appeal cases, the Commission can only refer the case for appeal if, in addition to the test that applies to every case, they consider that there are exceptional circumstances for doing so. Where no exceptional circumstances are suggested by the applicant, and where none are apparent to the Commission, the applicant is advised to seek an appeal in the conventional way. In 2012/13 around half of applicants made no attempt to address the question of “exceptional circumstances” in their applications. This leads to delay as additional information has to be sought in order for the Commission to determine whether the application can proceed. There has been a noticeable improvement as in 2013/14 three quarters of No Appeal applicants included exceptional circumstances which might apply in their case.

13. The Commission has also introduced a system by which it can refer cases in digital format to the Court of Appeal and has plans to extend this provision to the Crown Court in due course. It has also introduced a new electronic case management system to improve casework management. The software package is programmed to be delivered by the end of March 2015 and is on target to achieve this date.

14. The Ministry is supportive of the Commission in its efforts to reduce delays and improve efficiency. We know that the Commission is not complacent about performance and is continually looking at ways to make improvements whilst maintaining quality. However, we have noted that it takes a long time for the Commission to consider and implement change. The triennial review highlighted that the size, structure and way of operating of the Commission’s Board did not appear to represent the most effective and efficient model for the Commission. Many matters were reserved to the Board for decision and were reviewed quarterly, and sub-committees that met more frequently could not make key decisions. The Commission was slow to respond to the recommendations of the triennial review to restructure the membership of the Board, however it is now testing a new model. We have conveyed to the Commission the need for the operation of the new Board and

\(^{5}\) Criminal Cases Review Commission – Annual Report and Accounts – 2013/14
the impact and effectiveness of it, particularly with regard to its ability to make timely decisions and take decisive action, to be properly tested and measured.

15. In addition to the Commission (located in Birmingham) the only other two Commissions carrying out the specialist functions in relation to potential miscarriages of justice are located in Scotland and Norway. We understand that the Commission has done some work with its counterpart in Scotland and hopes to continue to do so in the future. We consider that it would be worthwhile for the Commission to examine the governance and workings of the other two Commissions to evaluate their processes and effectiveness of their decision-making and customer service and consider whether lessons and good practice could be learnt.

**Whether the CCRC has in general appropriate and sufficient (i) statutory powers and (ii) resources to carry out its functions effectively, both in terms of investigating cases and in the wider role of promoting confidence in the criminal justice system.**

(i) Statutory powers

16. The issue of whether the Commission has appropriate and sufficient statutory powers was raised and considered in both the triennial review which reported in June 2013 and the Justice Select Committee’s Oral Hearing in January 2014. The focus was the absence of a power enabling the Commission to obtain disclosure of material from non-public bodies. When the Commission was established it was given powers, under section 17 of the Criminal Appeal Act 1995, to request, where it is reasonable to do so, documents or other material from public bodies which may assist in carrying out any of its functions. However these powers do not extend to private bodies or individuals – the Commission has for some time been lobbying for this to change.

17. The Scottish Commission has had wider powers of investigation since it was established under the Criminal Procedure (Scotland) Act 1995. These include a power to apply for a court order to require any person or public body to provide any document or other material within their possession or control which might assist the Scottish Commission in carrying out its functions. The term “any person” includes partnerships and private companies as well as private individuals. However, to date this power has only rarely been used in relation to private bodies and individuals. The Scottish Commission can also apply for a court order to require any person to attend for precognition on oath where it appears to the Commission that the person in question may have information which it requires for the purposes of carrying out its functions, and the person refuses to make a statement to the Commission.

18. The Commission reported that the lack of a power to obtain disclosure of material from non-public bodies had caused some difficulties and that these were likely to be further exacerbated by an expected increase in the number of former

---

6 *Precognition* in *Scots* law is the practice of taking a factual statement from witnesses.
public bodies which the Commission has now to interact with in the course of its duties. The Commission reports that this was often to the disadvantage of applicants as well as limiting the Commission’s actions and causing delays in reviews.

19. While the absence of a power to obtain disclosure from private organisations and individuals is not preventing the Commission from carrying out its functions, the Ministry appreciates that securing voluntary disclosure of material can be a protracted process and delay progress in some cases. Following the conclusions made in the report of the triennial review the Ministry has been actively pursuing legislative options to extend the Commission’s statutory powers to obtain disclosure from private organisations and individuals. In developing the policy and draft legislation we have assessed that the need for use of the enhanced powers would be very limited - we estimate a maximum of up to ten cases per year where the Commission would seek a court order, with three of those cases progressing to a contested court hearing. We have sought to introduce primary legislation to implement these changes by amendment of section 17 of the 1995 Act but have been unable to secure inclusion in a suitable legislative vehicle thus far.

20. We have also sought to use the alternative route of a Private Members Bill in the current parliamentary session. The power for the Commission was picked up by John Hemming MP and included in his Transparency and Accountancy Bill which had its first reading on 2 July 2014. The Bill was read a second time on 17 October but was talked out and there is no current indication when or if the Bill will progress further.

21. The Ministry will continue to support the introduction of legislation to strengthen the powers of the Commission to obtain disclosure and will continue to work towards that end in the next parliamentary session after the general election.

(ii) Resources

22. The Commission is entirely funded in the form of a Grant in Aid from the Ministry of Justice. The main source of risk and uncertainty faced by the Commission relates to its level of funding. Government austerity measures and consequential Departmental budgetary pressures have coincided with a significant and sustained growth in the number of applications received by the Commission. The Commission has reported in its Annual Reports that it has found the past few years particularly difficult as the majority of its budget is spent on staff.

23. The financial pressures of recent years have resulted in changes and reductions in staffing at the Commission, which coincided with a sustained increase in the number of applications being made to the Commission. However, in the last two financial years the Commission has successfully bid for a budget uplift to tackle the queues that have built up due to the increase in applications, which it has used to recruit additional casework staff on fixed-term contracts and pay overtime to tackle specific queues.

24. The Commission has also had to manage changes to the Commissioner resource, with new Commissioners being recruited to replace outgoing long-serving
Commissioners, and adopting more flexible work patterns for them. These changes have presented a risk to the Commission in relation to the quality and timeliness of casework and decisions which it has mitigated by introducing new programmes of induction, mentoring and training.

25. The financial constraints that all ALB’s and Government Departments have been under are likely to continue for the foreseeable future. The Ministry will continue to work with and support the Commission as it manages the financial challenges. The testing of a new Board model is an opportunity for the Commission to focus on improving efficiency through reviewing its processes and looking at ways to make best use of staff and Commissioners resources, making decisions and changes in a timely way. The Ministry has also been discussing with the Commission the potential benefits of reviewing the KPI framework. Some process steps and overall timescales (such as that from decision in principle to close of case) do not appear to be measured but could be valuable in looking for ways to improve efficiency. There may also be scope for further use of comparative information about decision-makers, which could be helpful both in terms of improving performance and developing staff and Commissioners.

26. One of the most fundamental issues for the Commission is the statutory test in section 13, under which the Commission will refer a case to the Court of Appeal only if it considers “that there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made”. Once the decision is taken to refer the case, it is for the Court to determine whether to uphold or quash a conviction or change a sentence.

27. The triennial review of the Commission asked whether the ‘real possibility’ test was the right test for the Commission to apply and if not, what would be better. Thirty seven per cent of respondents expressed a view on this question, of whom fifty four per cent believed it to be the right test. There were a number of respondents who were critical of the Commission believing it to have the right powers but interpreting them too narrowly. Others were critical of the Court of Appeal itself which they said discourages the referral by the Commission of cases where there is a lurking doubt about a person’s guilt but no new evidence or argument to be raised.

28. While it is appreciated that some respondents to the triennial review were critical of the test and way the Commission applies it, the Ministry was not satisfied that there was sufficient evidence to justify a change to the current legislation.

29. In his oral response to the Justice Committee on 14 January 2014 the Commission’s Chair, Richard Foster explained his view was that it was the best test...
and that he had never heard of an alternative suggestion which would work better. He strongly argued against a form of ‘innocence test’.

30. We remain of the firm view that the ‘real possibility test’ as defined under section 13 of the Act is appropriate, and there is nothing to suggest that it is not being applied appropriately by the Commission or that it stands in the way of the Commission fulfilling its functions. If an outcome of the Committee’s inquiry is that a change to this test should be considered, the Government would explore options and carefully assess the potential impacts and costs for the Commission, the appeal courts and the criminal justice system as a whole.

**Whether any changes to the role, work and remit of the CCRC are needed and, if so, what those changes should be.**

31. The overriding consideration of the Ministry in its sponsoring of the Commission as an Arms Length Body (ALB) is its efficiency and effectiveness. The Commission, as with all public service bodies, is required to ensure it maintains its quality and range of delivery in difficult financial times. ALBs play a vital role in delivering the Ministry’s priorities and statutory responsibilities. We work with our ALBs (including the Commission) to maximise both ALB and Departmental efficiency, effectiveness and value for money as well as providing the appropriate assurance to Ministers and the Principal Accounting Officer. We do this through developing trusting and supportive relationships which provide proportionate and risk based sponsorship. Our approach draws on an ALB’s intrinsic and dynamic risks to determine the required level of sponsorship, the appropriate control environment and the holding to account arrangements that are required.

32. The Ministry has developed a strong and constructive sponsorship relationship with the Commission and this helped to ensure that the first triennial review progressed efficiently. The review demonstrated that the Commission is a well-managed organisation which on the whole complies very well with the Cabinet Office code for governance and control. Working together the Ministry and Commission have addressed the importance of increasing the diversity of the Commissioners which the triennial review highlighted. The legislation requires at least one third of Commissioners should be legally qualified, but the balance between lay and legal members was considered in the recruitment campaigns in 2012 and 2013. The campaigns also focused on attracting applications from a diverse group by offering flexible working patterns. We will continue to have close regard for these issues in the future recruitment exercises.

33. With regards to the Commission’s role, which was examined through the triennial review, 83% of respondents answered the question of whether it’s role in reviewing cases for possible miscarriages of justice continued to be necessary, and 98% said ‘yes’. The overarching message gathered from the evidence supplied during that review was that the functions of the Commission are still required. We agree with this conclusion, and it is clear that whilst there have been, and continue to
be, major improvements to the criminal justice system the underlying reasons for setting up the Commission and the need for it remain.

34. The review made important recommendations to improve corporate governance of the Commission by making changes in relation to the role of the Chair and to the size and membership of the Commission’s Board with the aim of aligning it to Cabinet Office Guidance\(^7\) and to good practice and value for money principles.

35. In relation to the Chair, the Peer Reviewer noted that a more defined leadership role would benefit the Commission by enabling the postholder to make improvements in governance, reduce unnecessary bureaucracy and feel fully accountable for the performance of the organisation. The Chair’s role was re-defined to take account of this aspiration for the open recruitment competition in 2013.

36. As regards the Commission’s Board, the review noted that it is large due to the fact that all Commissioners are members, along with the Chair (who is also a Commissioner), the Executive team and at the time, two Non-Executive Directors. The review concluded that this composition, the timing of the meetings and the standing committees along with the extensive ‘Matters Reserved for the Board’ may not be the most efficient or cost effective model of governance. There are costs of involving all Commissioners in corporate governance both in terms of actual cost and opportunity cost. Reducing the number of Commissioners on the Board would free up resource for the consideration of cases and in the current environment of limited resources, rising workloads, and lengthening delays this is an important consideration.

37. The current Board has the power\(^8\) and ability to make changes to benefit the Commission and is testing a smaller and differently composed Board until the end of this financial year. As noted in paragraph 14 above, the Commission’s response to the recommendations of the review has been slower than we would have ideally liked, however we are pleased that this is now being progressed and look forward to working with the Commission to evaluate the results before any new long-term arrangements are implemented.

December 2014

\(^7\) Public bodies, National and official statistics and Government efficiency, transparency and accountability – updated 10 November 2014

\(^8\) Schedule 1, paragraph 6(1) of the Criminal Appeal Act 1995 ‘the arrangements for the procedure of the Commission (including the quorum for meetings) shall be such as the Commission may determine’.