Written evidence from the Criminal Case Review Commission (CCR 41)

Justice Select Committee Inquiry 2014/15

Executive summary

- The Criminal Cases Review Commission is the statutory body created in 1997 to investigate alleged miscarriages of justice and refer appropriate cases for appeal.

- Up to the end of November 2014, it had reviewed 17,183 cases and referred 568 for appeal including 31 referrals in 2013/14 and 18 in the first eight months of 2014/15.

- Improvements in accessibility to the Commission have driven large increases in the number of applications received. This has happened against a backdrop of significant budgetary pressure.

- As a result of the increased workload and decreasing funds, and in spite of our best efforts, waiting times for applicants have grown to unacceptable levels.

- We have started to reduce waiting times by focussing on efficiency and introducing changes to the way we work. Our plan to eradicate them altogether in the next three years is dependent on the level of funding we receive.

- We have for some years been pressing for an extension of our powers to enable us to require disclosure from the private as well as the public sector. Progress has been painfully slow while our concern grows as more functions transfer from public into private hands.

- We have continued to build constructive relationships with stakeholders and to find ways in which we can feed our knowledge and experience of miscarriages of justice back into the criminal justice system.

- The “real possibility” test applied by the Commission has been the subject of some debate. The Commission is open minded on the matter, but yet to be persuaded that a better test has been articulated. We would welcome, and be happy to take part in, a review of the test.

- We think several factors in the wider criminal justice system are likely to increase pressure on the CCRC.
An independent body

1. The Royal Commission on Criminal Justice argued for the creation of a body independent of the Government and the courts which would investigate alleged miscarriages of justice and refer appropriate cases for appeal. As a direct result, the Criminal Cases Review Commission (CCRC) was established on 1 January 1997 by the Criminal Appeal Act 1995 (the Act). It was the first organisation of its kind in the world; there are now two other Commissions, in Scotland and in Norway.

2. The Act enshrined the Commission’s independence in keeping with the intentions of Parliament and of the Royal Commission. As a publicly funded body, it is clearly appropriate that the Commission should be accountable for how we spend public money, but we would never tolerate any attempt to influence or interfere with our casework or decision-making.

3. The Royal Commission was particularly concerned that the CCRC should be independent of the courts. One criticism sometimes levelled at the Commission is that it must second-guess the Court of Appeal. While it is true that our role is a predictive one, this does not mean we are subservient to the Court of Appeal. The Act sets out the “real possibility” test that the Commission is required to apply. The test necessarily dovetails with the Court’s test of safety; to have the Commission and the Court of Appeal applying substantially different tests would make no sense.

Investigations

4. We are fundamentally an investigative body, but we are sometimes criticised for being too paper based in our approach. That criticism is unfair, not least because the only rational starting point for the investigation of an alleged miscarriage of justice is a critical analysis of the papers generated by the justice process that is alleged to have miscarried.

5. In almost all cases, we use our powers under section 17 of the Act to obtain material from public bodies such as the police, the courts and social services. We start with the papers to establish what has gone before and form a view about what else may need to be done. We then conduct whatever investigations we think necessary from talking to applicants, witnesses and trial advocates to interviewing jurors and obtaining fresh expert evidence.

6. Many of our staff are skilled investigators; they can also call upon the expertise and experience of our specialist investigations advisers. We can also, under section 19 of the Act, instruct the police to act on our behalf if we think there may be an advantage in using police powers.

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1 The Commission routinely begins its consideration of applications by obtaining documents such as the files of the Court of Appeal, the trial court, the judge’s summing-up and so on.
(such as interviewing under caution) or where an investigation is simply too large for a body of our size.

7. One particular issue we face as an investigative body is the absence of statutory powers by which we can obtain material in private hands. This is discussed below.

Referrals
8. The Commission’s principal aim is to identify and refer potential miscarriages of justice to the appeal courts; staff and Commissioners are focussed on that aim. We have so far reviewed 17,183 cases and referred 568 for appeal. Approximately 70% of those referrals resulted in a conviction being quashed or sentence amended.

9. In 2013/14 we completed 1,131 cases and referred 31 (2.7%) for appeal. Between the start of April and end of November 2014, we completed 1,064 cases and referred 18 (1.7%). That compares with 1.6% in the whole of 2012/13, 3.5% in 2011/12 and 2.3% in 2010/11.

Performance
10. We believe it is a fundamental part of our role to provide access to justice and we therefore seek to raise awareness of the Commission among those who may need us. There is, however, a tension between promoting access and keeping queues and waiting times to acceptable levels.

11. In January 2012 we launched our Easy Read application form which uses simple words and pictures to assist people with comprehension and literacy difficulties. The introduction of the new form has driven an increase in the number of applications to levels never seen or anticipated.

12. In the last full year before the new form was introduced, we received 933 applications; in the first full year afterwards, we received 1,625. This is a 74% increase in case intake. During the same period (2010/11 to 2012/13) our Grant in Aid funding fell by 4.7%. We are forecasting case intake for 2014/15 at around 1,600.

13. Our current waiting times are unacceptably long, but they are intrinsically linked to funding. For the year ending March 2014, the average time taken to start the substantive review in a custody case was eight months; for a liberty case it was just under ten-and-a-half months. For the period between the start of April and end of

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2 Section 19 investigations, such as in the case of Sam Hallam, can require the police to set up incident rooms and detail numerous staff to mount substantial operations on our behalf.
3 Figures current at 30 November 2014.
4 The Grant in Aid figure for 2013/14 has been adjusted to reflect £621,000 of accommodation costs now paid directly by the MOJ.
5 As a matter of course the Commission prioritises the applications of people who are in custody over those from people who are at liberty.
November 2014, those averages were eight months for custody cases and 13½ months for liberty cases.

14. Waiting times are even longer if we remove from the calculation cases that received special priority. Without those, the average waiting times for 2013/14 were 12 months for custody and two-and-a-half years for liberty cases.

15. We have started to make in-roads into the custody waiting times in particular and expect that, by the end of November 2014, the maximum waiting time for custody applicants will be down to eight months.

16. While this represents an improvement, we still consider such waits to be unacceptable. We have committed ourselves to eradicating the wait between the arrival of a custody case and the start of a review. We aim to achieve this within three years. In order to do so without jeopardising the quality of our work, we have introduced some new ways of working and expect to introduce further changes in future.

**Investigations for the Court of Appeal**

17. The Court of Appeal can, under section 23A of the Criminal Appeal Act 1968, ask the CCRC to investigate and report on matters relating to an ongoing appeal or application for leave. We conducted eight such investigations in 2011/12 and nine in 2012/13. In 2013/14, there were two; so far this year there has been only one.

18. The majority of these investigations relate to allegations of jury impropriety. In November 2012, the Court of Appeal issued a protocol for dealing with suspected jury irregularities. It seems likely that the protocol has contributed to the reduction in the number of times when the Court has needed to seek assistance from the Commission.

**Statutory powers**

19. Section 17 of the Act provides the Commission with the power to secure material it needs from any public body. This key investigative tool gives us access to material regardless of its sensitivity or security level; it is fundamental to our ability to examine the safety of convictions.

20. The absence of a corresponding power in relation to material in private hands is an obstacle to our work. Currently, if we believe we need privately held material we might, at best, face protracted negotiations which can cause significant delay. At worst it means we may never obtain potentially important information; this could mean that questions remain unanswered and miscarriages of justice unresolved.

21. The problem is becoming more acute as functions which were once the preserve of public bodies are transferred into private hands. For instance, various types of health care and social services are often provided by private companies or charities on behalf of the NHS or...
local authorities. The forthcoming privatisation of the Probation Service may also present us with significant difficulties.

22. We have long argued that our section 17 powers must be extended to cover the private sector. The Scottish CCRC has enjoyed such a power since it was established. A 2006 inter-departmental working party concluded that we too should, with judicial oversight, be able to require disclosure by private bodies and individuals. Although action has been backed in principle by Ministers, and in spite of the frequent passage of criminal justice bills, we are told that no appropriate statutory vehicle has been available.

23. During 2014, a draft bill consisting of two clauses was prepared by the Ministry of Justice to extend our powers. It was prepared as a Handout Bill but was not picked up. The clauses have been added to the Transparency & Accountability Bill, but the Bill was not moved for debate and the order to read the Bill a second time lapsed. It is highly unlikely that the Bill will progress any further. This effectively puts us back to square one. The absence of this power makes it difficult for us to assure the Committee that we are fully meeting our statutory duties. While we can point to a number of cases each year where such a power would have been of real use (or where its absence was a real hindrance), it is harder to estimate how often we could make effective use of a power that we currently do not have and therefore do not factor into our casework considerations.

24. We are encouraged that the Department of Justice for Northern Ireland has recently begun consulting on a proposal to extend our powers within that jurisdiction.

Resources

25. Like most public bodies, the Commission has been the subject of substantial budgetary pressures in recent times. In the period between 2009/10 and 2013/14, our Grant in Aid fell from £6.511m to £5.908m. This has required us to ruthlessly pursue efficiency savings in order to focus resources on casework.

26. These pressures have overlapped with the 74% increase in applications discussed above. The increased caseload was, in terms of funding, recognised by the Ministry of Justice which, during 2013/14 and 2014/15, sought to insulate the Commission from cuts of the kind seen elsewhere.

27. We have risen to the challenge of delivering more with less by maximising the number of casework staff and reviewing and amending our casework processes. As a result we have become significantly more efficient.

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6 See footnote 4.
28. The impact on efficiency of those changes is shown in detail in Appendix One on page 11. The final graph shows significant reductions in average cost per case closed. Crucially, we are satisfied we have achieved these efficiency improvements without compromising the quality of our casework.

29. Despite improved efficiency, the increased caseload and the need to invest time and effort in training new staff and newly-arrived Commissioners, has meant queues and waiting times continued to grow for a time. Our investment in training and mentoring is starting to pay off and we are beginning to make real in-roads into waiting times.

**Stakeholders**

30. The Commission is fundamentally a caseworking organisation and must strike an appropriate balance between focussing resources on casework and meeting other legitimate demands in areas such as its relationships with stakeholders and wider role within the criminal justice system.

31. We continue to develop appropriate and cost effective ways to engage stakeholders such as our successful stakeholders’ conference in November 2014. The event, hosted in facilities provided free of charge by University College London, was well received by delegates who heard from several noteworthy speakers and took part in discussions about miscarriages of justice and related issues. In 2015 we will begin providing stakeholders with regular email updates.

32. We have in recent years stepped-up engagement with *pro bono* groups involved in miscarriages of justice and particularly with university-based groups. Following the recent demise of INUK, which acted as an umbrella organisation for many “innocence projects”, we continued to engage with active groups and have offered to provide regional training workshops and to continue operating a *pro bono* advice line.

33. There continues to be significant interest in the Commission from overseas jurisdictions. We recently took part in a successful fact-finding visit by senior members of the Chinese Judiciary and provided training for an official from Mauritius where a CCRC-type function has lately been established.

34. We have created a research committee involving independent academics to conceive, direct and monitor academic research based on appropriate access to Commission material. The aim is to build upon the growing body of independent qualitative and quantitative research about the CCRC and its work. We have also joined an advisory board to the Criminal Justice Research Centre of the University of Nottingham.

35. Following the success of our Easy Read application from, we extended the Easy Read principle to other documents including a complaints
form and the cover letters sent with CCRC decision documents. The Criminal Procedure Rule Committee has asked the Commission to design an Easy Read version of the Crown Court Appeal Notice for people appealing in relation to magistrates’ court convictions. We have also assisted the Ministry of Justice to develop Easy Read literature.

36. During our appearance before the Committee in January 2014, members expressed some interest in the situation regarding the Commission’s website. We are pleased to report that, after a lengthy struggle, we obtained agreement from the Ministry of Justice and Cabinet Office that we should reinstate an independent CCRC website rather than be required, against our will and better judgment, to have our web presence restricted to pages on the government website GOV.UK. As a result, we expect to launch a new independent website early in 2015. The costs of creating the new site will be close to nil because we were able to re-use professional web design work commissioned before the 2010 General Election but which we were subsequently unable to use.

**Promoting public confidence**

37. The Commission responds carefully to relevant criminal justice consultations and evidence gathering exercises which, in recent months, have included this Committee’s own Joint Enterprise Enquiry. We also feed our knowledge and experience directly into the criminal justice system in various ways. We are involved in the Ellison Review and Operation Herne, both of which relate to possible miscarriages of justice arising from undercover policing practices. We have been working with the Solicitors Regulation Authority in relation to questions about the quality of legal advice provided by solicitors and barristers in relation of certain types of offence.

38. In 2014/15 we have devoted considerable time and effort to visiting and presenting to ACPO and to several police forces. In a new initiative we have, through the College of Policing’s Professionalising Investigation Programme, been providing training to strategic and senior level investigating officers to increase awareness of issues of concern including non-disclosure, police misconduct and abuse of process. We are soon to embark on providing training for officers running investigations day-to-day.

39. In the last few years the Commission has visited dozens of prisons to raise informed awareness of our work among prisoners and staff. From these experiences, and other interactions with prisoners, we have formed the view that circumstances in prisons have worsened significantly in recent times and that this may be contributing to increased pressure on the Commission. The deterioration of conditions, facilities and of morale within the prisons system in general is well publicised⁷. We know from what prisoners and prison staff tell us

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that basic information and facilities to assist with appeals are scarce and even rudimentary resources such as writing paper can be hard to obtain. In light of these and other factors, we think it likely that some prisoners may be applying to the Commission out of desperation rather than because of any genuinely held belief that they have been wrongly convicted.

The Real Possibility Test
40. The real possibility test that the Commission applies when deciding whether it can refer a case for appeal was set out by Parliament in section 13 of the Criminal Appeal Act 1995. It is sometimes argued that the test is too restrictive and that, as a result, the Commission is unable to refer cases that it should send for appeal. Anyone who argues thus should be able to respond convincingly to the question: “What useful purpose would be served by the CCRC being entitled to refer cases where there is no real possibility that an appeal would succeed?”

41. If we referred cases with no real possibility of success, we would be referring cases that were bound to fail. This would clearly involve the expenditure of significant resources by the Commission, the courts, CPS, the defence and so on. There would also be a real human cost, not only in terms of the appellant in whom false hopes may be raised, but also in terms of the impact on the victim or victims of the original offence.

42. Some have argued that the existing test should be replaced altogether; an “innocence test” is one suggestion. The Commission is open-minded on the issue but has yet to hear a viable alternative articulated. The Scottish CCRC can refer cases when it “believes that a miscarriage of justice may have occurred and that it is in the interests of justice to refer”. Some consider this to be a more generous test than real possibility. Although the tests applied here and in Scotland are prima facie different, SCCRC’s interpretation of the matter (with which we agree) is essentially that their test is no more or less liberal than ours and that the Sutherland Committee (the Scottish equivalent of the Runciman Commission) designed the test to dovetail with the one applied in appeals heard by Scotland’s High Court. In any event, the overall 'success' rates of referrals from the CCRC and the SCCRC have remained broadly similar at around 70%.

43. In 1998, the Home Affairs Select Committee recommended that the real possibility test be reviewed after five years. No such review has ever taken place. While the Commission remains to be persuaded of the need to change the current test, we would welcome and be happy to take part in any review of the test.

Triennial review
44. The findings of the Government’s Triennial Review of the Commission were overwhelmingly positive. The review concluded that the Commission should continue fulfilling its role as it is doing and that no legislation is necessary or desirable save only in respect of a power to obtain material from the private sector.

45. The Triennial Review findings commented on the Commission’s governance and we have risen to the challenge and modernised our arrangements by overlaying a smaller, more agile Board onto the commission model. We are currently testing these arrangements and will review them at the end of the business year.

Less serious cases

46. The making of a referral when the real possibility test is met, is not mandatory; the Act provides the Commission with discretion to refer. It is rare that we exercise our discretion not to refer, although we may do so, where, for example, there would be no tangible benefit to the applicant or to the wider criminal justice system.

47. We do not believe we can exercise similar discretion to decline to review cases which fall within our statutory remit; the Act seems to require us to consider all eligible applications. It seems, from looking at Hansard, that those debating the establishment of the CCRC did not think the Commission would review what many consider to be less serious offences. One prominent member of the Runciman Commission, Professor Michael Zander, has said publicly that he does not believe the members of the Commission had in mind that the Commission would look at summary offences or sentence only cases.

48. The Commission has questioned whether it should continue to review less serious offences. The matter seems particularly pressing when our resources are so stretched. Our view has so far been that the legislation requires it, but we also recognise there are inherent difficulties in deciding what “less serious” means. It could be argued, for example, that we should not review magistrates’ court convictions. It is worth noting that this would mean we would have been unable to deal with (and refer) many of the immigration and human trafficking cases we have seen in recent years. These are cases where, typically, people were wrongly advised to plead guilty, improperly convicted and imprisoned. Their guilty pleas in magistrates’ courts also meant they had no ordinary right of appeal. If we had been unable to deal with such cases, many of these wrongful convictions would be unresolved and we would not have been able to take the steps we have taken to prevent further similar wrongful convictions from arising.

49. We note the recent comments of the Master of the Rolls, Lord Dyson, in relation to the impact of legal aid cuts in the civil cases leading to miscarriages of justice. While it is too early to expect to see any impact

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8 See: [http://www.lawgazette.co.uk/law/dyson-miscarriages-of-justice-likely-since-laspo/5045450.article](http://www.lawgazette.co.uk/law/dyson-miscarriages-of-justice-likely-since-laspo/5045450.article)
of legal aid changes on the Commission’s work, it is not unreasonable to suppose that those changes may contribute to an increase in miscarriages of justice including in relation to “less serious” magistrates’ court cases. We have already raised our concerns about the possible impact of changes to the criminal legal aid regime in a Government consultation on the issue. We also have more generalised concerns that current budgetary pressures on the criminal justice system may increase the likelihood of errors occurring in key areas such as the making of decisions on disclosure. In light of that, we question whether now is the time to consider reducing the scope of the arrangements which exist to deal with alleged miscarriages of justice.

December 2014
Appendix one

The graph above show the Commission's operational performance between 2005/6 and 2014/15

The graph above shows the efficiency gains per Case Review Manager (FTE) between 2005/6 and 2014/15

The graph above show the decrease in the average cost per case closed between 2005/6 and 2014/15