Inside Justice – Written evidence (FRS0004)

1. Submission on behalf of Inside Justice by Louise Shorter, CEO and Dr Ann Priston OBE, Chair of Trustees of Inside Justice, a registered charity number 1178336.

2. This paper aims to address issues around the understanding and use of forensic science, in particular as identified in bullets 1 to 3 of the Scope of the Inquiry.

3. It is unfortunately inevitable that wrongful convictions will occasionally occur, but it should NOT be inevitable that these wrongs go unidentified and uncorrected. Inside Justice is a charity which investigates possible miscarriages of justice in instances where convicted prisoners persistently maintain their innocence. To properly investigate cases Inside Justice calls on an Advisory Panel of experts from a rich range of disciplines. Members of the Panel include the former President of the Chartered Society of Forensic Sciences, a retired Circuit Judge and forensic scientists of international renown. Full details can be viewed at https://www.insidejusticeuk.com/about-inside-justice/advisory-panel.php. The panel considers selected cases put before them with a view to identifying new work and investigative strands. Such cases often deal with investigations which often took place using scientific techniques which are now outdated and have invariably been superseded by advances in both technology and interpretative understanding. It is therefore imperative there is full access to all relevant material for experts to re-evaluate. It follows that if access to material is an essential part of any investigation into a claim of wrongful conviction that proper storage of that material is also essential. The storage of material, post-conviction, is currently an opaque, unaudited landscape which is not fit for purpose. Without access to material there is NO point in storing it. Without reconsideration there is NO point in an appeal system.

4. This submission identifies five areas of concern:

5. **i. Storage of Material** Police forces have always retained material which can generally be classed as property, but the likely physical location is impossible to predict and is often reliant on unrecorded knowledge by individual officers who may retire or leave the force for some other reason. Pre-trial, evidence gathered during a criminal investigation is protected by legislation and any police officer investigating alleged crimes has a duty to record and retain material which may be relevant to the investigation. Guidelines, known as Codes of Practice, set out implementation for serving officers and police civilian staff in the execution of their duty. These Codes of Practice are not law and an officer in breach cannot face criminal proceedings. Public perception is that similar Codes of Practice, which set a framework post-conviction, will be followed: exhibits will be safely packaged and stored away. Sadly, this is not the case and research into the current adherence to guidelines has revealed a woeful picture. A recent Freedom of Information question sent to all 43 police forces of England and Wales by Inside Justice revealed only 2 forces citing the correct guidelines.
Whilst the guidelines recommend storage for 30 years, 7 years and 3 years in cases of major crime, serious crime and volume crime respectively some forces have a policy to destroy material before these time periods are met, others keep material for 100 years (incurring an unnecessary storage burden), others keep material for the length of the sentence and others decide what to keep on a case by case basis.

6. In a survey compiled by Inside Justice a former senior police officer reported “I doubt that there’s ever been a case where exhibits are kept properly”. An experienced Legal Executive who works exclusively in criminal defence work described retention post-conviction as “...very hit and miss, very haphazard and varies drastically from police force to police force”. An employee of a major force described his own expectations of finding all property safely stored within retention period guidelines as “variable”. A highly experienced solicitor described giving up on one murder case when blood-stained clothing, shoes and other material that could have been subjected to new DNA techniques could not be found and another highly experienced solicitor said: "In my experience, [storage of material is] pretty inconsistent. Overall, the pattern is that it’s just not available... sometimes the record keeping is so poor that, even if it should exist people just can’t find [exhibits]. These rather gloomy anecdotes were followed by a comment made by a scientist specialising in cold-case reviews with extensive experience of working with many forces: "I get the impression that, if cases were identified, even homicides, the exhibits aren’t kept... in sex offences, not a chance. I get the impression that they [police forces] are all doing something slightly different."

7. **ii. Retention of Material** The Criminal Procedure Investigations Act 1996 not only sets out the manner in which police officers are to record, retain and destroy material obtained in investigations but it also extends to what should happen to that material post-conviction. ‘Material’ is generally defined by professionals such as police officers and crime scene examiners as ‘exhibit’ and is used as a descriptor for all items seized. It refers to physical exhibits seized during, or created by, the police investigation which may, or may not, have been sued during the trial and includes those objects which anyone wanting to challenge an alleged wrongful conviction, through new scientific or expert work, will hope to have been retained if they are to progress their case. Exhibits include, but are not restricted to, items gathered in the search of premises, crime scene or deposition site; audio and digital recordings which may include police interviews; footage from public and private CCTV cameras; suspects’ and victims’ clothing; intimate swabs or tapings; photographs. The list is dynamic and covers any item at all collected pre-trial.

8. The National Police Chiefs’ Council (NPCC) published very helpful guidance in 2017 for police forces and forensic science providers on retention periods for material post-conviction but, as described above, only two forces appear to be aware of these useful and relevant guidelines. Because a successful appeal will require fresh evidence, which may well be found in unused trial
material, the decision on what is relevant and what should be kept, therefore, has the potential to directly affect the Court of Appeal’s ability to do its work. In a review of the first ten years of the Criminal Cases Review Commission (CCRC), one of the founding Commissioners commented: "Some of the clearest miscarriage of justice referred by the Commission have been where there has been fresh evidence to show that the jury convicted on a misleading, incomplete or simply wrong view of the relevant facts" (Elks, 2008).

9. iii. Transcripts What is not covered in the NPCC Guidance is the retention of the trial transcript which currently is a digital recording held by a privately-run company, contracted by the Ministry of Justice. The 1958 Public Records Act places a duty on the Ministry of Justice to preserve some records from a police investigation, however this does not include the audio recording of court proceedings in toto from which a transcript can be produced.

10. Whilst Government policy allows for exhibit retention for thirty years in the most serious cases, digital recordings of court proceedings from which transcripts can be produced are retained for only seven years and audio tapes for five years across all crime types; a fundamental failing which has the potential to prevent the Court of Appeal (CACD) from remedying wrongful convictions. Only terrorism and some drug cases are routinely kept for longer.

11. Printed transcripts, verbatim accounts of the recording, are not held by each court but requests can be made for the recording, or part thereof, to be transcribed. The original material belongs to the Ministry of Justice (MoJ) with copyright held by the Crown. Anyone may apply for a copy of a transcript directly to the Transcription Service, though permission may be required from the court concerned.

12. Transcription Service companies make a commercial charge for copies of any document supplied. Costs are prohibitively high. Clearly, the current situation, whereby transcripts are available at a prohibitive cost until destruction seven years later, is a matter of significant concern since any application to the CACD has little prospect of success without the ability to provide conviction context.

13. The MOJ appears to be aware of private transcription companies charging high fees but appears not to have considered the impact on the criminal justice system of allowing the record itself to be destroyed.

14. iv. Scientific Material The retention of scientific material has changed following the closure of the Forensic Science Service (FSS) and whilst the long-term viability of the Forensic Archive Ltd (the storage solution to the closure in 2012 of the FSS) is far from certain, the justification for ensuring all material retained is clear. The closure of the FSS was implemented in haste resulting in material being lost or inappropriately destroyed. Those responsible for closing the FSS also failed to formulate policy for the retention of material held by a commercial provider in the event of a
Forensic Science Provider leaving the market place. It should be of concern to the criminal justice system that policy has still not been ratified.

15. The historic practice of returning physical items to police forces (clothing, weapons etc) was expanded post-FSS to include the bulk of material created by scientists, now based at commercial Forensic Science Providers (FSPs) in line with national policy. According to NPCC guidelines FSPs should retain DNA extracts and casefiles but a lack of clarity has led to reports of inappropriate destruction of this potentially vital material. More should be done to make FSPs aware of their responsibilities. The additional burden placed on forces, to become the safeguards of forensic material in addition to property without additional funding, has created difficulties for forces.

16. **y. Access to Material** Even supposing material has been correctly retained and stored getting access to it is very much a lottery. To gain access to exhibits post-conviction, not only is permission required of the investigating force, who may not be motivated to facilitate the re-opening of a case they consider closed, but decisions are frequently made on a piecemeal basis. Historically, access to material for re-testing post-conviction has included cartridge cases, swabs, the victim’s clothing, the defendant’s clothing, knives, tapings and extracts. Sean Hodgson, who served 27 years for a murder he did not commit, would never have had his conviction quashed if it had not been for the determination of his legal team, the co-operation of the investigating force and the safe and proper storage of exhibits by the FSS.

17. However, in other instances access has been denied to **everything** including even the forensic scientist's file. In one ongoing inquiry by Inside Justice it took **four years** for the police to agree to an expert attending the police station to view the FSS files. The review established serious errors in the interpretation of the scientific evidence that was put before the jury. This is still not resolved. In another Inside Justice investigation a vital exhibit that could exonerate a prisoner serving a life sentence, who has always robustly protested his innocence, has been destroyed while other exhibits in the same case have been lost or inappropriately stored by the investigating force. This has led to potential contamination or destruction of material contrary to national guidelines. Also in this case, police refuse to release original CCTV footage necessitating legal action which is costly to the public purse, and highly significant interpretation of the scientific evidence was not referred or put to the jury in any way what so ever. All these flaws occurred in the same case and yet the CCRC dismisses criticisms made by renowned experts.

18. **Recommendations for Consideration**

19. Policy for the minimum retention of audio recordings, from which transcripts are produced, should mirror retention policy relating to physical material and scientific samples and transcripts should be provided free of charge.
20. More should be done now to promote effective dissemination to all forces of the very helpful NPCC guidance ensuring that every member of staff who may need to decide what should be retained post-conviction is appropriately informed and trained.

21. With three years left until the next review of the Forensic Archive Ltd, the Home Office has sufficient time to seek views on the proposals around storage of scientific material and make informed decisions about the future of the FAL.

22. It should be an automatic right for interested parties to view the forensic files post-conviction. The Supreme Court judgement in the case of Nunn (Trinity Term [2014] UKSC 37) provided a helpful framework for the appropriate release of exhibits post-conviction. Regrettably in our view this judgment is often mis-interpreted by police forces resulting in unnecessary Judicial Review applications. Guidance drawn up jointly by the NPCC and the Crown Prosecution Service (with input from interested parties) and issued to 43 police forces of England and Wales would provide a practical solution.

23. This submission draws on as yet unpublished research compiled by Louise Shorter for a Masters’ Degree (MA Law by Research at Queen Mary, University of London) submitted August 2018 and titled: The Post-Conviction Retention of Material and Transcripts in Criminal Investigations: Policy and Practice in England & Wales

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