

## Comments on the work of the Criminal Cases Review Commission

1. Firstly, I would like to express my thanks to the Justice Committee for the invitation to comment on the evidence session on the work of the Criminal Cases Review Commission (CCRC), House of Commons, 14 January 2014.

2. As the world's first statutory publicly-funded body charged with the task of reviewing alleged "miscarriages of justice", it is of vital importance that the CCRC scrutinised by Parliament to determine whether it operates in a way that was envisaged by Parliament (on behalf of the public) when it was established.

3. If it is found that the CCRC is not performing the public function that was envisaged or intended then it is just as vital that it is reformed at Parliament's earliest opportunity so that it can address miscarriages of justice that befall innocent victims of wrongful convictions as was the original intention and fulfil its public mandate.

4. In what follows, my comments will relate mainly to the questions and answers that bear on the ability or otherwise of the CCRC to assist alleged innocent victims of wrongful convictions to overturn their convictions for serious criminal offences that were given by the Crown Court, which was, after all, the reason for its establishment and the work that it was envisaged to undertake.

5. My comments are supported by the following academic books and articles in academic peer-reviewed journals which centre of the limitations of the CCRC to assist alleged innocent victims of wrongful convictions: Naughton, M. (2013) "The Criminal Cases Review Commission" in Naughton, M. (2013) *The Innocent and the Criminal Justice System* (Palgrave Macmillan, Chapter 7); Naughton, M. (Ed.) (2009) *The Criminal Cases Review Commission: Hope for the Innocent* (Palgrave Macmillan: Chapters 1, 2 and 16); Naughton, M. and Tan, G. (2010) *Claims of Innocence: An introduction to wrongful convictions and how they might be challenged* (University of Bristol); Naughton, M. (2012) "The Criminal Cases Review Commission: Innocence versus Safety and the Integrity of the Criminal Justice System" *Criminal Law Quarterly*, Vol. 58: 207-244; Naughton, M. and Tan, G. (2012)

“INUK Symposium on the Reform of the Criminal Cases Review Commission – Report”; Naughton, M and Tan, G. (2010) “The Right to Access DNA Testing by Alleged Victims of Wrongful Convictions in the United Kingdom”. *International Journal of Evidence & Proof*, 14: 326-345; Naughton, M. (2006) “Wrongful Convictions and Innocence Projects in the UK: Help, Hope and Education”, 3 *Web Journal of Current Legal Issues* (Copies can be supplied on request).

6. Overall, I was surprised by the general vagueness of some of the answers given by the Chair and Chief Executive (CE) of the CCRC to such an important evidence session. There was an apparent lack of preparation to provide facts and hard evidence for several of the answers that were given in favour of what are, effectively, unsupported assertions (see, for instance, answers to Q1; Q2; Q20; Q23; Q25; Q26 which give answers based on what the respondents "think").

7. It was also apparent that crucial questions about whether the CCRC is independent and/or undertakes its work in the way that was envisaged by Parliament were evaded or answered in a way that contradicted with answers given to other similar questions.

8. An example is Mr Foster's assertion that the CCRC is independent in response to Q1 which was contradicted by his answer to Q23 in his acceptance that the CCRC must work under the terms of the statutory test laid out in s.13(1) of the Criminal Appeal Act 1995, the "real possibility test", which means that the CCRC are always in the realm of second-guessing what the Court of Appeal may think about cases that are received following a referral by the CCRC.

9. Moreover, and most crucially, Mr Foster's answer to Q1 avoided meaningful engagement with the question and instead gave a rather flippant “independence and clout yes”, ignoring the parts of the related parts of the question about whether the CCRC carries out the work envisaged at the time to address miscarriages of justice. Instead, he avoided the question and talked solely about shortage of money, volume of work, etc, which was not part of the question asked.

10. To answer the question about whether the CCRC carries out the work that was envisaged we need to go back to why it was established and what was expected at the time.

11. The CCRC followed a recommendation by the Royal Commission on Criminal Justice (RCCJ) that was prompted by the public crisis of confidence in the entire criminal justice system that was caused by the cases of the Guildford Four and the Birmingham Six and a string of other notable miscarriage of justice cases at the time.

12. It is significant that the RCCJ was announced on the day that the Birmingham Six overturned their convictions in the Court of Appeal on the 14th March 1991.

13. In particular, it was found that successive Home Secretaries were failing to refer potential miscarriages of justice back to the CACD for political, as opposed to legal, reasons and that individuals believed to be innocent were unable to overturn their convictions within the existing criminal appeals system.

14. Whilst the RCCJ felt that the Court of Appeal ought to be able to quash the convictions of the innocent, it recognised that it operates within a realm of legal rules and procedures that mean it is neither “the most suitable or the best qualified body to supervise investigations of this kind” (RCCJ Report, page 183).

15. This indicates, clearly, that the CCRC was envisaged by the RCCJ to assist innocent victims of wrongful convictions to overturn their convictions that the normal criminal appeals system could not do.

16. In addition, prior to the setting up of the CCRC, JUSTICE, the all-party human rights organisation, was the main organisation for assisting alleged miscarriages of justice victims who claimed to be innocent to overturn their convictions.

17. However, when the CCRC was established JUSTICE ceased its casework on alleged miscarriages of justice precisely on the basis that the CCRC was set up to do the work that it had been doing since the late 1950s and that it was no longer necessary for it to do such work.

18. The Report by JUSTICE in 1994, *Remedying Miscarriages of Justice*, is widely held to be the blueprint for the CCRC.

19. It proposed that the new body would “undertake comprehensive investigations in criminal cases where miscarriages of justice may have occurred” and to “examine the totality of the case to seek to assess whether there is prima facie evidence of a miscarriage of justice”, with all references to miscarriages of justice to be read as meaning the possible wrongful conviction of an innocent individual (see *Remedying Miscarriages of Justice*, 1994, pages 21-22).

20. This is further evidence that the CCRC was envisaged as a body to assist innocent victims of wrongful convictions to overturn their convictions if and when they occurred.

21. Mr Foster and Ms Kneller’s answers to the Justice Committee, then, are better understood as relating more to the terms of the Criminal Appeal Act 1995 and to how the CCRC works strictly to its dictates rather than as answers to specific questions about what the CCRC was envisaged to do.

22. That the CCRC works under the terms of s.13(1) of the Criminal Appeal Act 1995 - "real possibility test" - is entirely contrary to what the RCCJ envisaged and directly against its recommendation that it be “independent of both the Government and the courts” (RCCJ Report, page 183).

23. There is no doubt that "real possibility test" subordinates the CCRC to the appeals criteria of the Court of Appeal, meaning that it is not independent from the Court of Appeal in the way that was envisaged.

24. It means that the CCRC strives to predict how referrals may be viewed by the Court of Appeal, referring only those cases that are subjectively deemed to meet the strict terms of s.23 of the Criminal Appeals Act 1968, for example, which governs the requirements for appeals at the Court of Appeal.

25. The following quote from the CCRC website illustrates that the CCRC is not independent from the Court of Appeal but, rather, acts as a filter or gatekeeper for the Court of Appeal: "If you are asking us to review your conviction, we will not be looking again at the facts of your case in the way that the jury did to decide if you are guilty or innocent. Our concern will only be with the question which the Court of Appeal would ask, which is whether your conviction is unsafe."

26. Rather than provide confidence in the criminal justice system the CCRC's lack of independence from the Court of Appeal may actually undermine confidence when it emulates the Court of Appeal in assisting factually guilty offenders to overturn their convictions on points of law and fails to refer the convictions of potentially innocent victims of miscarriages of justice if it is not felt that the case fulfils the terms of the "real possibility test" and the prevailing procedures of the Court of Appeal.

27. For instance, there was no doubt that Clarke and McDaid were guilty as charged and the Court of Appeal upheld their convictions for GBH at their first appeal. Despite this, the CCRC referred their convictions back to the Court of Appeal solely on the ground that the bill of indictment was not signed. At the second time of asking the Court of Appeal again upheld their convictions. However, their convictions were subsequently quashed by the House of Lords on the basis that the absence of a signature on their indictment invalidated their trial and, hence, their convictions could not stand (see *R v Clarke and R v McDaid* [2008] UKHL 8).

28. On the other hand, a dossier of forty four cases of potentially innocent alleged victims of wrongful convictions were made public by the Innocence Network UK (INUK) in March 2012. Dossier of Cases available at: <http://www.innocencenetwork.org.uk/wp-content/uploads/2012/05/INUK-Dossier-of-Cases.pdf>

29. They were part of its campaign for the reform of the CCRC so that it might be better placed to assist innocent applicants in the way that was envisaged when it was set up.

30. All of the cases have been refused a referral back to the Court of Appeal at least once by the CCRC on the basis that they do not meet the "real possibility test" despite continuing doubts about the evidence that led to their convictions.

31. The cases included in the INUK Dossier of Cases was comprised mainly of prisoners who are serving life or long-term sentences for serious offences, ranging from gangland murders, armed robbery, rape and other sexual offences.

32. In all of the cases the alleged victims continue to maintain that they had no involvement at all in the offences they were convicted of. They assert that they were wrongly convicted due to reasons including fabricated confessions, eyewitness misidentification, police misconduct and flawed expert evidence.

33. Because the evidence suggesting innocence in these cases is not fresh or a jury has decided to convict despite hearing conflicting evidence, the CCRC says that it is unable to refer these cases back to the Court of Appeal.

34. The crimes that the men and women were convicted of in the INUK Dossier of Cases are appalling but in every single case there are questions, conflicts and problems in the evidence that led to their conviction.

35. If they are genuinely innocent, it means that the dangerous criminals who committed these crimes remain at liberty with the potential to commit further serious crimes.

36. This is a public safety issue that cannot be overstated and should be taken most seriously.

37. Mr Foster's remark to the effect that there is no point in sending cases to the Court of Appeal that they will "simply bin" (Q23) is very telling and further evidence of the CCRC's lack of independence from the Court of Appeal and potentially irresponsible in light of the previous point about public safety.

38. It overlooks the conditions for the establishment of the CCRC and it undermines other possible impacts that sending such cases back to the appeal courts might have, even if they were not to be overturned under the existing arrangements.

39. Such cases could, for instance, raise public awareness of the inability or unwillingness of the Court of Appeal to overturn cases of appellants thought (even by the CCRC after its impartial and "independent" investigations) to be victims of miscarriages of justice.

40. Historically, such public awareness of the failings of the criminal justice system in the face of cases that give evidence to those deficiencies have led to changes to protect the public against wrongful convictions or the introduction of new remedies.

41. The CCRC was itself established in response to cases such as the Guildford Four and Birmingham Six to assist in overturning such miscarriages of justice when they occur when the failings of the existing appeals system at the time were revealed.

42. The answers by Mr Foster to Qs 16-18 about the comparison between the number of referrals under the Home Office system (C3 Division) and the CCRC were incorrect and misleading as they were not on a pro rata basis and did not acknowledge that the CCRC and C3 have/had quite different remits.

43. To 31 May 2012, the CCRC had received 14,778 applications, including the 279 cases that were transferred from the Home Office when the CCRC was set up, approximately a thousand each year.

44. Of these, it had completed its reviews of 14,133 cases, of which it had referred 503 to the relevant appeal court.

45. This equates to an average referral rate over the period of 3.6%.

46. Of the total number of cases referred, 461 appeals had been heard and 324 were reported to have been 'quashed' and 137 were reported to have been upheld.

47. On a straightforward reading this suggests a 'success' rate of approximately 20 cases a year that have been 'quashed' following a referral by the CCRC, or around 65% of the applications that it has so far referred.

48. On face value, this certainly appears to be an increase on the previous system under C3, which contributed to an annual average of 5 convictions being quashed upon referral between 1980 and 1992, for instance.

49. Such a crude statistical comparison between the CCRC and C3, however, is methodologically problematic as the CCRC and C3 are not directly comparable as they did different things and with different resources at their disposal.

50. The CCRC has six times more staff than C3 had, and the budget of the CCRC is nine times greater than that of C3, so more referrals might well be expected.

51. Also, C3 dealt only with alleged miscarriages of justice for serious criminal offences given in the Crown Court. It did not deal with appeals against length of sentence and it did not deal with appeals against convictions and/or sentences in magistrates' courts in the way that the CCRC does.

52. This further reveals how the CCRC is not fulfilling its expected public function, namely that it was set up to help innocent victims of serious wrongful convictions to overturn their convictions.

53. Mr Foster's answers to Qs 15-19 re the statistics on 'quashed' cases needs to be clarified as the CCRC data on 'quashed' cases is not to be read as synonymous with C3 quashed convictions.

54. First, by 'quashed', the CCRC includes conviction referrals that are quashed by the CACD that are sent for retrial and in which the appellants are, subsequently, reconvicted.

55. Second, it also includes sentences that are 'quashed' and replaced with lower sentences and the appellant remains in prison.

56. Third, the CCRC also counts as successes those cases where alternative convictions are substituted, for instance manslaughter for murder.

57. Fourth, the CCRC engages in multiple counting, rating its 'success' not in terms of individual cases but numbers of convictions, e.g. the case of the Bridgewater Four would be recorded as four successful cases and the case of the M25 Three as three, making a total of seven 'successes' for two cases.

58. Finally, the CCRC statistics include cases in magistrates' courts for such things as road traffic offences, parking tickets and the notorious cases such as Dino the German shepherd dog. The CCRC helped to reprieve Dino from 'Death Row' after he was put under a destruction order, imposed under the Dangerous Dogs Act 1991. Dino had bitten Elizabeth Coull who tried to intervene in a fight between him and her pet terrier, Ralph. The legal battle over Dino's case passed from Northampton Magistrates' Court to Northampton Crown Court, to the High Court, the House of Lords, the European Court of Human Rights and, finally, the CCRC. The CCRC looked into the case and referred it back to Northampton Crown Court, whereupon the destruction order was rescinded.

59. The forgoing is not meant as advocating for the return of C3, which clearly presented a constitutional problem, which was correctly resolved with the separation of post-appeal investigations of alleged wrongful conviction from politics.

60. Rather, it is to make clear that comparing the work of the CCRC and that of C3 is akin comparing apples and oranges: they each have/had different premises on what actually constitutes a miscarriage of justice, which determined that they deal/dealt with alleged miscarriages of justice in different ways and they had different referral powers at their disposal.

61. Indeed, the aim here is to outline some of the key characteristics of the CCRC and introduce the idea that the replacement of C3 with the CCRC is not the final

solution to the overturning of the convictions of genuine miscarriages of justice of innocent victims of wrongful convictions for serious criminal offences that was hoped for and many believe it is or want us to believe it is.

62. Moreover, when assessed in the context of the forgoing analysis, the CCRC's performance in serious wrongful conviction cases does not look so favourable when compared with that of C3.

63. In fact, C3's average of 5 cases a year with six times less staff and nine times less resources stands up well against the CCRC's average of 1.4 cases a year between 2005 and 2010 on the basis of multiple counting.

64. In the final analysis, it seems that we have shifted from a problem with the political sphere failing to refer the cases of potentially innocent individuals convicted of serious criminal offences in the Crown Court back to the Court of Appeal if those cases were thought to conflict with political interests to a problem with the CCRC failing to refer and overturn cases of the potentially innocent if they are believed to conflict with the dictates of the legal system.

65. The reality is that CCRC is not independent and is in need of urgent reform so that it can truly carry out the work that was envisaged and assist innocent victims of miscarriages of justice and deliver the kind of confidence in the criminal justice system that was intended.

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