Tailored review of the Criminal Cases Review Commission

We are grateful for having the opportunity to respond to your Department’s call for evidence relating to its tailored review of the Criminal Cases Review Commission (CCRC). Your Department has indicated that it is willing to consider a late response from us, provided this addresses specific questions set out in the call for evidence document. The questions considered below (identified by the numbering in that document) are those where we believe we are in the best position to respond, partly drawing on the work of our predecessor Committee.

1 Have you had contact with CCRC?

The previous Justice Committee conducted an inquiry into the Criminal Cases Review Commission (CCRC). During the course of this inquiry, the Committee heard oral evidence from the Chair of the CCRC, Richard Foster; and its Chief Executive, Karen Kellner; the transcript of this session can be found here. In addition the Committee received two written submissions from the CCRC, in December 2014 and in January 2015, together with 45 other written submissions. The report on this inquiry [Twelfth Report of Session 2014-15] was published in March 2015.

2 Are any of the six functions of CCRC as outlined in the Criminal Appeal Act 1995 no longer required? If so, which one(s)?

We do not believe that any of the CCRC’s functions are no longer required. We note that the previous Committee concluded that the CCRC was performing its statutory functions reasonably well, although it recommended that the organisation should be granted additional funding in order to reduce the backlog in applications.

The recent concerns about non-disclosure of prosecution material has thrown into sharp focus the importance of the CCRC’s statutory role in such cases, as illustrated
by several case histories in the organisation’s 2016/17 annual report. The report also notes that non-disclosure – at or before trial – of material which could have been of assistance to the defence continues to be a major cause of miscarriages of justice. We commend the CCRC for its involvement, as part of a small reference group, in the inspection of disclosure issues conducted jointly by Her Majesty’s Inspectorate of Constabulary and Her Majesty’s Inspectorate of the Crown Prosecution Service. We agree with the CCRC that urgent action is needed to resolve the concerns about disclosure; this is the focus of an inquiry that we have recently announced.

The previous Committee received submissions arguing that the CCRC’s resource constraints could be eased by restricting its remit, to allow it to focus on more serious cases; for example, it was suggested that the CCRC might be given discretion as to whether to review magistrates’ court cases which it considered to be trivial. The Committee concluded that the effect of overturning a miscarriage of justice in more serious cases is much greater and that the CCRC was originally envisaged as an organisation to deal with those cases. In the light of significant funding constraints facing the organisation, the Committee recommended that the statutory remit of the CCRC should be changed to allow it to refuse to investigate summary convictions, if it was deemed not to be in the public interest to do so; and that it should be given discretion to refuse to investigate cases relating to sentence only; taken together, these cases accounted for a quarter of all applications and so giving discretion to the CCRC would allow it to focus its resources where they would have the greatest effect, giving it greater control over its caseload.

We note that the CCRC’s annual report for 2015/16 records that 11% of its application intake for the year related to convictions for summary offences (although there is no comparable statistic in the 2016/17 annual report). We suggest that the tailored review may wish to consider whether it would be appropriate to give discretion to the CCRC along the lines proposed by our predecessor Committee.

3a Should the statutory functions of CCRC as outlined in the Criminal Appeal Act 1995 be carried out by a public body?

The CCRC was established following the 1993 recommendation of the Royal Commission on Criminal Justice that a new body should be set up, independent of both the Government and the courts, to take over the task of investigating alleged miscarriages of justice and, if appropriate, referring them to the Court of Appeal. The CCRC was established under the Criminal Appeal Act 1995 as a Non-Departmental Public Body, funded by the Ministry of Justice but independent of both the Government and the courts.
One of the terms of reference of the previous Committee’s inquiry was to consider whether the CCRC had fulfilled the expectations and remit which accompanied it at its establishment. Consideration of the extent of the CCRC’s independence was a theme running through this inquiry. Although the Committee concluded that changes should be made to enable the CCRC to function properly – including an increase in funding – it did not indicate any disquiet about the important functions of the CCRC being carried out by a public body. Our own analysis leads us to conclude that it is wholly appropriate for these functions to be carried out by a public body, operating with the benefit of a statutory remit and with recourse to enforcement powers should they be needed. In addition, we note that, as a public body, the CCRC is amenable to judicial review – an important check on the discharge of its functions.

4a How effectively does CCRC perform its statutory functions? (on a scale of 1 to 5, where 1=very poorly and 5=very well)

4b How could the delivery of any of the functions performed by CCRC be improved?

Although we have not conducted any analysis of the CCRC’s recent performance, we would like to draw attention to some of the conclusions and recommendations of the previous Committee in this area which we consider to be relevant to the current review.

- The Committee considered in some detail the CCRC’s application of the ‘real possibility’ test, the threshold by which it must decide whether to refer a case to the appeal courts; that is, whether there is a real possibility that the conviction or sentences would not be upheld, were a reference to be made. The Committee accepted that the application of the test was a difficult task, and by no means a precise science. While finding no conclusive evidence that the test was being applied incorrectly, the Committee considered that the CCRC should err on the side of making a referral, reducing the targeted success rate in its KPIs accordingly. It went on to observe:

  The Commission should definitely never fear disagreeing with, or being rebuked by, the Court of Appeal. If a bolder approach leads to more failed appeals but one additional miscarriage being corrected, then that is of clear benefit. (Paragraph 20)

- Under section 17 of the Criminal Appeal Act 1995, the CCRC can obtain any material that it considers to be relevant from a public body. However, the provision has a limitation in that there is no statutory penalty for non-compliance, other than the threat of a judicial review against the public body
concerned. The previous Committee concluded that this provision should be supplemented by enforcement measures or sanctions for failure to comply in an appropriate amount of time, and recommended that the Government bring forward legislation to add a time limit for public bodies to comply with a section 17 request, unless there are extenuating circumstances, and an appropriate sanction in the event of non-compliance.

We are aware that the limitations of section 17 have not yet been addressed, a matter that is raised by the CCRC in its most recent annual report, and we suggest that the review consider how these concerns might be addressed.

7a Do you consider that CCRC provides a good service to applicants?

We are unable provide any observations on the current quality of the CCRC’s service to applicants. However, we would draw attention to certain evidence to our predecessor Committee’s inquiry suggesting that the investigations carried out by the CCRC were sometimes of a poor quality – although this assessment was contested by several other witnesses, including some from academic sources. The Committee was concerned about a variation between Case Review Managers, both in approach and in terms of expertise and it concluded: “While this does not suggest that there are serious systemic shortcomings in the CCRC’s investigative work, there remains room for improvement even within its resource constraints.” (paragraph 50)

10b Do you consider that CCRC is making the best use of social media to promote their services?

We suggest that the CCRC may wish to consider the need for wider publicity on the implications of the Supreme Court’s decision in R v Jogee and others ([2016] UKSC 8) and the Court of Appeal’s judgment in R v Johnson and others ([2016] EWCA Crim 1613 on the doctrine of joint enterprise.

Our predecessor Committee raised concerns (Fourth Report of Session 2014–15) about the application of the joint enterprise doctrine, noting the high proportion of Black and mixed race young men with joint enterprise convictions, the link between joint enterprise cases and gang membership, and the possibility that joint enterprise was being used as a social policy tool as a means of deterring young people from gang activity. In a similar vein, the final report of David Lammy’s Independent Review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System (September 2017) commented on the disproportionate impact of joint enterprise prosecutions on BAME communities, especially those who are associated with gangs. The report notes that thousands of people are estimated to have been prosecuted under the joint enterprise doctrine.
over the last decade, and that a survey of prisoners suggested that up to half of those convicted under joint enterprise identify as members of BAME groups. The report also cites concerns that prejudicial evidence is still put to juries about defendants’ associations rather than evidence of their actions.

The CCRC’s annual report for 2016/17 records that 67 applications concerning joint enterprise were received during that year and that, in addition, work on certain cases already under review had to be expanded. However, given the tight legal framework for joint enterprise cases established by the Supreme Court and Court of Appeal, at the time of writing the CCRC had not yet identified an application where the ‘real possibility’ threshold for an out-of-time appeal was considered to be met.

We appreciate the legal difficulties in reopening these cases, and we accept that the CCRC has endeavoured to publicise its interest in joint enterprise convictions to a legal audience, for example through an article by two Commissioners in the Law Society Gazette (April 2016). However, we suggest the CCRC should do more to target publicity directly towards those who have been convicted under the joint enterprise doctrine and/or their families, while avoiding raising unrealistic expectations about the prospects of meeting the legal criteria that have been set by recent appellate decisions. Publicity should include using social media where appropriate.

I hope that this response is helpful.

Bob Neill MP
Chairman
Justice Committee