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Criminal Cases Review Commission

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Summary

The Criminal Cases Review Commission (CCRC) is the criminal justice system's safety net. Independent of the courts, prosecution and defence, the CCRC investigates possible miscarriages of justice in the criminal courts of England and Wales and Northern Ireland. A separate Scottish Criminal Cases Review Commission reviews possible wrongful convictions in Scottish courts.

In addition to the cases of applicants who have exhausted their appeal rights, it investigates cases on its own initiative and those referred to it by the Court of Appeal. Where it finds new evidence that raises a real possibility that a conviction or sentence would not be upheld on appeal, it has the power to refer the case to the appellate courts for a fresh appeal.

The CCRC was a key recommendation of the Runciman Commission established in 1991 following the quashing of the convictions of the Guildford Four, the Maguire Seven and the Birmingham Six. Introducing the subsequent *Criminal Appeal Act 1995* at its Second Reading in the House of Commons, then Home Secretary Michael Howard spoke of the 'common interest' in ensuring the criminal justice system has 'the best machinery for investigating possible miscarriages of justice'.

However the CCRC has been accused of timidity in its dealings with the Court of Appeal and of being so cautious in its approach that it has failed to refer a sufficient number of cases to the appeal courts, including 'obvious' miscarriages of justice. Critics say its test for referrals - whether there is a real possibility that the appeal court would not uphold the conviction or sentence - both leaves the CCRC subordinate to the Court of Appeal and leads it to adopt a highly restrictive review of cases, looking not for miscarriages of justice but instead weighing up a case's chance in court. Whilst campaigners argue this allows wrongful convictions to go uncorrected, the current arrangement between the CCRC and Court of Appeal is defended by Lord Runciman and the former Lord Chief Justice Lord Judge, who point out the CCRC is not a court and its commissioners not judges.

Richard Foster, chair of the CCRC, also rejected these criticisms, asserting the commission's independence and defending the current test. A more pressing concern for the CCRC is the drop in its funding; according to Mr Foster 'austerity came early to us'. He told MPs 'for every £10 that my predecessor had to spend on a case a decade ago, I have £4 today'. At the same time as the CCRC has struggled with financial constraints it has seen a sharp increase in the number of applications. The Government has resisted the House of Commons Justice Committee's call for an additional £1 million of annual funding until the CCRC's backlog is reduced, preferring to allow changes aimed at improving efficiency in CCRC procedures to bed-in.

1. What is it?

The CCRC is the world's first statutory, publicly-funded body charged with the task of reviewing alleged miscarriages of justice. It is the 'safety net'[1] in the criminal justice system should there be any possibility of a wrongful conviction.

The CCRC's case reviewers look into the cases of those convicted of crimes and whose appeals against conviction were unsuccessful. They also consider whether mistakes were made in the sentencing process. Whilst a convicted person has usually only one opportunity to appeal, the CCRC can refer a case back to the appeal courts for a fresh appeal.

In an otherwise adversarial criminal justice system the CCRC plays a unique inquisitorial role. It is independent of the courts, the prosecution and the convicted people whose cases it investigates. Whilst it may refer a case to an appellate court it does not represent the convicted person or instruct counsel to do so.

It deals only with cases from the criminal courts of England, Wales and Northern Ireland. The separate Scottish Criminal Cases Review Commission investigates potential miscarriages of justice in the Scottish criminal courts.

1 *R (on the application of Nunn) v Chief Constable of Suffolk Constabulary and another* [2014] UKSC 37 at para 39

2. Applying to the CCRC

Anyone convicted of a criminal offence in England, Wales or Northern Ireland can apply to the CCRC.

Those who have not yet appealed against their conviction via the normal route through the courts should do this before approaching the CCRC. The CCRC is very unlikely to look into a conviction that was not challenged on appeal.[2] The CCRC will rather encourage such applicants to lodge an appeal, even if the deadline for appealing has long passed.[3] Only where there are 'exceptional circumstances' will the CCRC investigate a case not previously the subject of an appeal.

Applicants do not need to instruct a lawyer before applying to the CCRC. The CCRC has sought to make the application process as easy as possible and encourages applicants to use its easy read form.[4] Whilst it asks for as much information as possible it stresses that the form is not a test.

It does not cost anything to apply to the CCRC.

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2 CCRC Formal Memorandum, *Exceptional Circumstances*, July 2015, para 9. Despite this, 46% of all new applications received by the CCRC in 2014-15 related to cases where there has been no previous appeal and no previous application for leave to appeal.

3 The *Justice* guide to the criminal appeal system, '*How to appeal*', provides simple and accessible information for prisoners on the appeal system and its procedures

4 The form can be found on the CCRC webpages on how to apply.

3. How it works

3.1 Priority ranking of cases

Due to the sharp increase in its workload and the resultant backlog of cases to consider[5] the CCRC has to give some cases a higher priority than others. The CCRC has three levels of priority, set out in its formal memorandum: *Priority ranking and ordering of cases*.

The cases treated as having the highest priority include those where the Court of Appeal has asked the CCRC to investigate the safety of a conviction[6], those in which the applicant applied for a review of sentence only and has less than two years to serve in prison, and those where exceptional circumstances justify a prioritised review (these may include the old age or ill health of the applicant; the youth of an applicant whose conviction has an exceptionally adverse effect on their welfare or educational or career prospects; or where there is a risk of being unable to secure relevant evidence).

Cases are allocated to case reviewers in order of the date of their receipt unless they have been identified as priority cases.

3.2 The investigation

CCRC case reviewers analyse cases to see whether or not there may be new evidence or new legal arguments, not identified at the time of the trial or the subject of a previous appeal, upon which a new appeal could be considered by the courts.

It has been stressed that the CCRC's finite budget and resources do not allow it to be a '*criminal cases re-investigation commission'*.[7] All applications are reviewed at a basic level and only those which reveal something new are the subject of a more in-depth review or re-investigation.

Investigatory powers

Section 17 of the *Criminal Appeal Act 1995* provides the CCRC with a wide ranging power to obtain documents from public bodies as part of its investigations. If the CCRC believes that a public body has any material which may assist it in an investigation, it may require the material to be produced, may take it away or may direct it be preserved without alteration.

There is no corresponding power in relation to documents and other material held by private bodies. The Government accepts this

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5 Justice Committee, *Criminal Cases Review Commission*, 25 March 2015, HC 850, 2014–15, para 30

6 Under section 15 of the *Criminal Appeal Act 1995*. Whilst the majority of the CCRC caseload is of cases previously dismissed by the Courts of Appeal of England and Wales and of Northern Ireland, the Courts can themselves refer a case to the CCRC.

7 Stephen Heaton, 'The CCRC—is it fit for purpose?', *Archbold Review*, Issue 5, 15 June 2015

represents a 'legislative anomaly'[8] and thus supports the *Criminal Cases Review Commission (Information) Bill*,[9] a Private Members Bill that would extend the powers of the CCRC to require the production of material held by private bodies. In contrast to the CCRC, the Scottish Criminal Cases Review Commission has enjoyed such a power since its inception.

The CCRC can require the appointment of investigating officers to carry out inquiries it considers necessary to assist it in the exercise of its functions.[10]

The CCRC may take what steps it considers appropriate to assist it in exercising its functions, including undertaking inquiries and obtaining statements, opinions and reports.[11]

3.3 The test for referral

Section 13

The test applied by the CCRC when deciding whether or not to refer a conviction or sentence to the appropriate appellate court is set out in section 13 of the *Criminal Appeal Act 1995*.

The CCRC must consider there to be a real possibility that the conviction or sentence would not be upheld.

There must always be a new argument on a point of law or new evidence not previously considered before a conviction, verdict or finding can be referred by the CCRC to an appellate court.

Similarly, before a sentence can be referred, a new legal argument or information not previously raised must be identified.

Exceptional circumstances

These requirements may be by-passed if it appears to the CCRC that there are exceptional circumstances justifying a referral.[12] This is a high test and the CCRC will scrutinise and assess the facts of each case before it comes to a decision as to whether the circumstances are so exceptional as to justify a reference.

As explained above, in all cases an appeal should have been determined, or leave to appeal refused, before the CCRC refers a case. This is so the CCRC is not used as a means of usurping the conventional appeals process. Applicants whose cases disclose no exceptional circumstances but in which the CCRC finds a real possibility that a referral would result in a conviction being held to be unsafe are advised to seek legal advice or to apply to the Court of Appeal for leave to appeal out of time.

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8 Government response to the Justice Select Committee's Twelfth Report of Session 2014-15, para 14

9 The Bill, introduced by William Wragg, had its Second Reading on 4 December 2015 and was committed to a Public Bill Committee.

10 *Criminal Appeal Act 1995*, section 19 (1)

11 *Criminal Appeal Act 1995*, section 21

12 *Criminal Appeal Act 1995*, section 13 (2)

3.4 Powers of referral

The CCRC can refer a case to the appropriate appellate court on its own initiative and without an application having been made.

Unlike the various appellate courts, the Commission does not act within statutory time limits. Its power of referral can be exercised at any time.

3.5 CCRC contact with victims

The CCRC is subject to the *Code of Practice for Victims of Crime*, introduced under section 32 of the *Domestic Violence, Crimes and Victims Act 2004,* and therefore has responsibilities to victims.[13]

Whenever a case is allocated for review the CCRC will consider whether or not to inform the victim of its involvement in the case. The CCRC considers the following factors:[14]

- The likelihood of media attention
- The likelihood of the victim becoming aware of the review as a result of the Commission's investigation
- Whether the case is likely to be referred to an appellate court
- Whether any approach from the CCRC would cause a victim distress

If it decides to contact a victim, the CCRC will provide him or her with information about Victim Support and its own leaflet, *The Way We Work*.

The CCRC strives to ensure that the victim of an offence is informed at the same time as the applicant of a decision to refer a case. Victims will be given a brief explanation for the CCRC decision to refer the case.

3.6 Post-decision activity

The CCRC will close a case once it has made a final decision on referral and issued its statement of reasons. The CCRC will read and consider further correspondence but may inform an applicant that unless the letter identifies new information or evidence it will not reply.

In the event that new information or evidence does come to light, the CCRC will consider accepting the case as a fresh application.

3.7 Prerogative of Mercy

Section 16 (2) of the *Criminal Appeal Act 1995* gives the CCRC power to refer a case to the Secretary of State to consider exercising the Royal Prerogative of Mercy. Whilst the historic prerogative is today exercised sparingly, it was described by the High Court in the following terms:

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13 The obligations of the CCRC to victims of crime are found in section 6 of the Code.

14 CCRC Formal Memorandum, *Victims of crime - CCRC contact with victims*, October 2013, para 4

> The prerogative of mercy [can no longer be regarded as] no more than an arbitrary monarchical right of grace and favour. It is now a constitutional safeguard against mistakes.[15]

The modern statement of the doctrine is that of Watkins LJ in the Court of Appeal case of *Bentley*:

> We understand the strength of the argument that, despite the fact that a free pardon does not eliminate the conviction, a grant of a free pardon should be reserved for cases where it can be established that the convicted person was morally and technically innocent.[16]

Professor Zander has described the section 16 power as an 'open, unqualified, invitation' to the CCRC, and suggested it was available for use 'if all else fails'.[17]

The House of Commons Library has published a briefing paper on the Royal Prerogative.

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15 *R v Secretary of State for the Home Department Ex p Bentley* [1994] QB 349 at 365

16 [1994] QB 349 at 364E

17 The Justice Gap, 'Zander on the CCRC', April 2012

4. Historical background

4.1 Applications to the Home Secretary

Before the creation of the CCRC the only avenue left open to a convicted person whose appeal against conviction had been rejected by the Court of Appeal was an application to the Home Secretary. Section 17 of the *Criminal Appeal Act 1968* gave the Home Secretary the power to refer a case to the Court of Appeal. This power was limited to cases tried on indictment.[18]

Whilst the wording of section 17 appeared to give the Home Secretary an unfettered discretion to refer cases to the Court of Appeal ("if he thinks fit"), in practice Home Office ministers and the officials advising them adopted strict, self-imposed limits on the use they made of this discretion. According to the CCRC, only four to five cases were referred each year out of around 700 applications. The overriding principle that governed Home Secretaries' use of the power is described in the Home Office Memorandum to the Royal Commission on Criminal Justice as follows:

> 4.5 Successive governments have taken the view that it is fundamental to our system of justice that questions of guilt or innocence are matters for the courts to decide, free from interference from Ministers. Juries are the arbiters of fact and it is not for the Home Secretary to seek to set aside a verdict simply because he or others who have interested themselves in a case have drawn a different conclusion about a convicted person's guilt based on their own assessment of the evidence which was before the court. Similarly, questions of law are a matter for the judges, not the Secretary of State; it is not for him to substitute his view on such questions.[19]

These considerations meant that the Home Secretary normally only intervened in a case if new evidence which was not previously been considered by the courts was brought to his attention.

Whilst not criticising the Home Office, Sir John May, in his *Second Report on the Maguire Case*, noted:

> However there is no doubt that the criterion so defined was and is a limiting one and has resulted in the responsible officials within the Home Office taking a substantially restricted view of cases to which their attention has been drawn, as it was in the case of the Maguires. The very nature and terms of the self imposed limits on the Home Secretary's power to refer cases have led the Home Office only to respond to the representations which have been made to it in relation to particular convictions rather than to carry out its own investigations into the circumstances of a particular case or the evidence given at trial. As it was expressed to me on a number of occasions in the course of the evidence the approach of the

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18 Ie those cases tried by judge and jury in the Crown Court. Those convicted in the magistrates' courts of summary offences could not apply to the Home Secretary.

19 Home Office, *Memoranda*, 1991, para 4.5

> Home Office was throughout reactive, it was never thought proper for the Department to become proactive.[20]

4.2 The Royal Commission on Criminal Justice

On March 14th 1991, following the quashing by the Court of Appeal of the convictions for murder of the 'Birmingham Six', the then Home Secretary, Kenneth Baker, announced the establishment of the Royal Commission on Criminal Justice.[21]

The Commission was tasked with examining the effectiveness of the criminal justice system in England and Wales in securing the conviction of the guilty and the acquittal of the innocent. It considered whether changes were needed in a number of aspects of the criminal process, including the arrangements for considering and investigating allegations of miscarriages of justice when appeal rights have been exhausted.

The Report of the Royal Commission was published in July 1993. The Commission recommended the removal of the Home Secretary's power under section 17 of the *Criminal Appeal Act 1968* and the creation of

> a new independent body to consider allegations of miscarriage of justice, to arrange for their investigation where appropriate, and where that investigation reveals matters that ought to be considered further by the courts, to refer the cases concerned to the Court of Appeal.[22]

4.3 The *Criminal Appeal Act 1995*

At the Second Reading of the *Criminal Appeal Bill* the then Home Secretary, Michael Howard, recognised the need for a "new investigative body that is constitutionally separate from, and visibly independent of, both Government and the courts."[23] The Bill enjoyed cross-party support.

The *Criminal Appeal Act 1995* created the CCRC as the world's first statutory publicly-funded body charged with the task of reviewing alleged miscarriages of justice.

Departing from the limited section 17 power of the Home Secretary the Act gave the new body a wider remit. This included the cases of people convicted of offences by the magistrates' courts as well as those convicted on indictment. It operates both in England and Wales and Northern Ireland and its jurisdiction was extended by the *Armed Forces Act 2006* to cover the Court Martial and the Service Civilian Court.

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20 Sir John May, *Second Report on the Maguire Case*, 3 December 1992, HC 295, para 10.7
21 HC Deb 14 March 1991 vol 187 c1109
22 The Royal Commission on Criminal Justice, *Report*, Cm 2263, 2 June 1993, chapter 11, para 1
23 HC Deb 6 March 1995 Vol 256 c23

5. Criticisms and proposals for reform

5.1 Adequacy of funding

The CCRC is funded by a grant-in-aid from the Ministry of Justice. In 2014-15 this was £5.67 million.[24]

Over the past decade the CCRC has faced a 30% budget reduction alongside a 70% increase in workload.

In his evidence to the House of Commons Justice Committee the chair of the CCRC, Richard Foster, said 'austerity came to us rather early.'[25] Between 2009/10 and 2014/15 funding to the CCRC fell from £6.511 million to £5.250 million.[26] Adjusted for inflation this amounts to a 30 per cent cut. The Justice Committee found this cut resulted in a drop in case reviewers, from 42 at full time equivalent at the end of 2004-5 to 34 as of the end of the 2013-14 financial year.[27]

Whilst absorbing the impact of these cuts the CCRC has seen a sharp increase in its workload caused by the introduction of an Easy Read application form in 2012 and other work to improve access to its services. Between 2010-11 and 2012-13 there was a 74 per cent increase in the number of applications to the CCRC. Mr Foster told the Committee these competing pressures meant that 'for every £10 that my predecessor had to spend on a case a decade ago, I have £4 today'.[28]

The Committee found the CCRC is struggling to cope with the increase in its workload at post-austerity resource levels. It recommended, as a matter of urgency, the CCRC be granted an additional £1 million of annual funding until its backlog is reduced.[29]

In its response the Government argued that the CCRC budget was increased between 2012/13 and 2013/14, and has been maintained at the same level for the last three financial years (13/14, 14/15 and 15/16). It welcomed operational changes made by the CCRC to make its processes more efficient and said the changes should be allowed to bed down before any further funding allocation is considered.[30]

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24 Criminal Cases Review Commission, Annual Report and Accounts 2014/15, page 30

25 Justice Committee, *Criminal Cases Review Commission*, 25 March 2015, HC 850, Q1

26 Justice Committee, *Criminal Cases Review Commission*, 25 March 2015, HC 850, supplementary evidence of the Criminal Cases Review Commission (CCR0055)

27 Justice Committee, *Criminal Cases Review Commission*, 25 March 2015, HC 850, para 31

28 Justice Committee, *Criminal Cases Review Commission*, 25 March 2015, HC 850, Q108

29 Justice Committee, *Criminal Cases Review Commission*, 25 March 2015, HC 850, para 35

30 Government response to the Justice Select Committee's Twelfth Report of Session 2014-15, July 2015

5.2 The 'real possibility' test

Critics argue the CCRC is constrained by the language of section 13 of the *Criminal Appeal Act 1995* which renders it subservient to the Court of Appeal. Much of the evidence received by the Justice Committee suggested the CCRC approaches a case looking at whether or not there is a 'real possibility' the Court of Appeal would not uphold the conviction, rather than investigating whether there was actually a miscarriage of justice. The director of Innocence Network UK, Dr Michael Naughton, told the Committee the 'real possibility' test 'means 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'.[31] Another witness told the Committee the cautious approach of the Court of Appeal 'percolates down' to case reviewers who then look at applications 'from a very narrow perspective'.[32]

The CCRC dispute this and favours the current test for referrals. The Royal Commission's chair, Lord Runciman, rejected the assertion that the 'real possibility' test is contrary to what the Commission envisaged. Professor Michael Zander, who also served on the Commission, told the Justice Committee that had the Commission discussed grounds for referral it would have come up with something identical or broadly similar.[33]

The Justice Committee found no conclusive evidence that the CCRC fails to apply the 'real possibility' test correctly in the majority of cases, but recommended that the CCRC never fear being rebuked by the Court of Appeal and to be less cautious in its approach to the test.[34]

5.3 Relationship with the Court of Appeal

Following his oral evidence to the Justice Committee Professor Zander argued for a 'long-desired paradigm shift' in the CCRC relationship with the Court of Appeal to address those cases where there are serious doubts about the jury's decision on the evidence.[35] Proposing a relationship more akin to a 'partnership', he called for the CCRC to be given the power to refer a case to the Court of Appeal where it considers that the conviction is against the weight of the evidence heard by the jury.

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31 Justice Committee, *Criminal Cases Review Commission*, 25 March 2015, HC 850, Written evidence of Dr Michael Naughton (CCR 02), paras 8 and 22

32 Justice Committee, *Criminal Cases Review Commission*, 25 March 2015, HC 850, Q33

33 Justice Committee, *Criminal Cases Review Commission*, 25 March 2015, HC 850, para 15

34 Justice Committee, *Criminal Cases Review Commission*, 25 March 2015, HC 850, para 20

35 Michael Zander QC, 'The CCRC and the Court of Appeal: A Better Way Forward', *The Justice Gap*, January 2015

Lord Judge, the former Lord Chief Justice, responded to Professor Zander's suggestion in written evidence to the Justice Committee.[36] He did not accept the Court of Appeal had been derelict in its duty to examine potentially unsafe convictions. He remains against the CCRC having the power to state publically that it entertained serious doubts about a conviction, arguing that public confidence in a jury's verdict would be fatally undermined if the two public bodies with responsibility for considering the safety of a conviction issued contrasting public statements on a case. Lord Judge suggested that the effect of upsetting the current constitutional arrangement between the CCRC and the Court of Appeal would be the involvement of the Home Secretary to adjudicate between the two bodies, and thus the unsatisfactory and improper blurring of the separation of powers.

[36] Justice Committee, *Criminal Cases Review Commission*, 25 March 2015, HC 850, supplementary written evidence of Lord Judge (CCR 57)

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