

# Wrongly accused:

who is responsible for investigating miscarriages of justice?



Edited by Jon Robins

**THE**  
**JUSTICE**  
**GAP**

**SOLICITORS JOURNAL**  
**Justice Gap** series



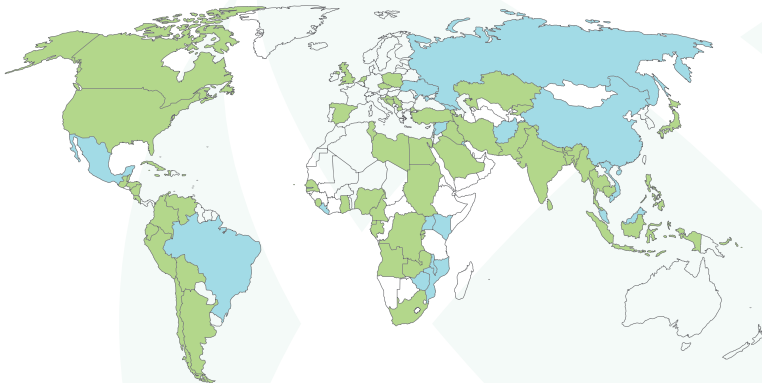
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# Contents

Foreword by <b>Mr Justice Sweeney</b>	2
Introduction	4
Contributors	6
No going back, <b>Michael Mansfield QC</b>	8
Unrealistic expectations, <b>Alastair MacGregor QC</b>	11
Time to reconnect, <b>David Jessel</b>	17
No champion of justice, <b>Michael Naughton</b>	20
Out of step, <b>Campbell Malone</b>	23
Time to tackle injustice, <b>Vera Baird QC, Glyn Maddocks and Emily Bolton</b>	27
Governing in prose, <b>Hannah Quirk</b>	30
Up to the job, <b>Ralph Barrington</b>	34
Get me out of here, <b>Louise Shorter</b>	40
Remember the roots, <b>Dr Eamonn O'Neill</b>	43
Calling for renewed media interest, <b>Sam Poyser</b>	46
Poor defence, <b>Maslen Merchant</b>	51
Righting wrongs, <b>Alex Bailin QC</b>	55
Constructive dialogue, <b>John Cooper QC</b>	58
The dilemma of maintaining innocence, <b>Matt Evans</b>	61
Child appeals, <b>Laura Janes</b>	65
Evolution not revolution, <b>Dr Angus Nurse</b>	69

**THE JUSTICE [ ] GAP**  
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# Foreword

## Mr Justice Sweeney

Our system of criminal justice is not perfect. Despite all its safeguards and the strivings of the vast majority of those of us who are involved in its conduct, a risk of miscarriages remains. Even in the current state of the public finances, we must continue to recognise and confront that risk. Miscarriages that have taken place, perhaps many years ago, must be identified and put right; the risk of miscarriages in the future must be yet further minimised.

Since it began its work in 1997, the Criminal Cases Review Commission has been responsible for examining claims that a miscarriage has occurred, and for referring to the Court of Appeal cases in which it believes that there is a real possibility that the resultant appeal will be allowed. Aspects of its work have been the subject of criticism. Some have suggested that it should be replaced. Yet over the years since 1997 the involvement of both the media and voluntary organisations in the investigation, exposure and future minimisation of miscarriages has diminished.

Nevertheless, as the deputy chair of the commission acknowledges in this publication, journalists, pressure groups, academics and others still have vital roles to play in uncovering miscarriages of justice, in ensuring that miscarriages remain matters of real public concern and in keeping up to the mark those who

are charged with investigating and/or remedying them. Against that background, we can all agree that further improvements are possible, but what should they be? This is thus a question that is ripe for consideration in the *Justice Gap* series. The result is an excellent and thought-provoking collection of essays by distinguished authors from across the spectrum of involvement and interest.

It examines, among other things: the events that resulted in the creation of the commission; what is or should be regarded as a miscarriage of justice; the way in which miscarriages may arise; the effect on the victims of miscarriages who continue to protest their innocence (particularly while serving a long sentence of imprisonment); the way in which the commission has carried out its work from both a day-to-day and an overall perspective; its relationship with the Court of Appeal; frustrations with and criticisms of the commission; arguments in support of the work of the commission; and suggestions for the way ahead.

In reading the essays I was particularly struck by the different referral test applied by the commission in Scotland, and by the way in which the Canadian criminal justice system learns lessons for the future when a miscarriage has taken place. Even for the experienced lawyer, the content provides a salutary reminder that anything less than the highest standard

of professionalism increases the risk of miscarriages. On the other hand, and although the perceived reasons for it are troubling, it is encouraging to read of the creation of the Centre for Criminal Appeals which will be a not-for-profit multi-disciplinary specialist legal organisation.

The essays make a valuable contribution to what is a necessary, vital and current debate. I commend them to you.

**Nigel Sweeney** was called to the Bar (Middle Temple) in 1976, and was a member of Chambers at 6 King's Bench Walk for more than 30 years. He was appointed a Junior Treasury Counsel in 1987, Senior Treasury Counsel in 1992, and First Senior Treasury Counsel in 1997. He took Silk in 2000.

He was involved in the miscarriage appeals of the Guildford 4, Derek Bentley and James Hanratty, as well as in nearly 50 terrorist cases – such as the Brighton Bombing, the Clapham bomb factory, the Al Qaeda ricin conspiracy, and the 21/7 London bombers; official secrets cases including David Shayler (MI5) and David Tomlinson (MI6); and murder cases such as Michael Stone, Stephen Lawrence, and Damilola Taylor.

A Recorder of the Crown Court for many years, he was appointed to the Queen's Bench Division of the High Court in October 2008.



# Introduction

This collection of essays was commissioned last year shortly after the 20th anniversary of the release of the Birmingham Six. On 14 March 1991, Paddy Hill, Hugh Callaghan, Richard McKelney, Gerry Hunter, Billy Power and Johnny Walker with Chris Mullin MP stood outside the Old Bailey free after 16 years, having had their convictions overturned for the murder of 21 people in two pubs in Birmingham.

That most notorious miscarriage of justice came hard on the heels of other judicial scandals and set in motion a series of events. Such was the level of public and political concern that a Royal Commission was established and, ultimately, the collapse of public confidence led to the creation of the Criminal Cases Review Commission 13 years ago as the independent body to investigate miscarriages.

This idea behind this publication was to explore the various issues to do with the investigation of miscarriages of justice. We invited contributions from leading thinkers in the criminal appeals field, not just lawyers but campaigners, journalists and academics.

The brief that we sent out to prospective contributors was to explore “the responsibility not just on government but on all involved (lawyers, journalists, academics and campaigners...) to assist the victims of miscarriages of justice”.

It said: “There is a recognition that the victims of alleged miscarriages need help beyond the role of CCRC and so the essays would address those reasons why the wrongfully

accused are being failed by the criminal justice system and what role should the various groups play in promoting the interests of the wrongly accused."

Since the creation of the CCRC concern over miscarriages of justice appears to have slipped from the radar of public consciousness. The topic has been consigned to some distant 'Life on Mars' past. The media, which did so much of the spadework exposing the notorious miscarriages through the 1970s and 1980s through, for example, the BBC's *Rough Justice*, has long given up. The broadcaster pulled the plug on *Rough Justice* after 25 years in 2007; Michael Jackson, chief executive of Channel 4, dismissed *Trial and Error*, which also investigated miscarriages, and its subject matter as a 'bit 1980s'.

Of course, the issue doesn't go away.

Contributors to this collection come from all different sides of the debate. All recognise the need for a debate. No one is complacent.

The CCRC receives some 1,000 new applications every year mainly from prisoners claiming to be serving time for crimes they didn't commit. The commission described by one contributor as "a remarkable innovation" in the criminal justice landscape (an independent public body established to investigate wrongful convictions and the appropriateness of sentences) struggles with year-on-year cuts. It faces strong criticism from some commentators who argue that it is failing to do what it was set up to but also support from others. Both views are reflected in this publication.

The idea behind this collection of essays was not a critique of the failings perceived or otherwise of the CCRC nor of the Court of Appeal.

This is the fourth publication in the *Justice Gap* series which aims to shine light on different aspects of 'access to justice'.

In particular, the series aims:

- to make a positive and different contribution to the debate to improve 'access to justice' for ordinary people;
- to challenge received wisdoms;
- to be thought-provoking; and
- to raise the profile of the issues.

### Thank you

We are grateful to all the contributors. Thanks for your time, effort and patience.

Thanks also to Michael Mansfield QC for his continued support to the *Justice Gap* series; Kim Evans, commissioning editor on [www.thejusticegap.com](http://www.thejusticegap.com); and all those who have contributed to and otherwise supported it. Thanks also to Gus Sellitto and Richard Elsen, co-directors of the specialist research company Jures which supports the series, and *Solicitors Journal* for publishing our work.

We hope you enjoy the collection. We hope it is a positive contribution to an important debate.

**Jon Robins**

[www.thejusticegap.com](http://www.thejusticegap.com)

March 2012

# Contributors



## Alex Bailin QC

Alex Bailin is a barrister at Matrix Chambers. He was lead counsel for JUSTICE in the *Adams* case in the UK Supreme Court, which considered the correct meaning of 'miscarriage of justice'. He has been instructed in more than 20 cases before the Supreme Court, House of Lords, Privy Council and European Court of Human Rights.



## Matt Evans

Matt Evans is managing solicitor of the Prisoners' Advice Service, the only UK charity with a specific remit to provide free prison law advice. Matt studied law at the London School of Economics and has worked at a number of leading legal aid firms including TV Edwards and Hickman & Rose.



## Vera Baird QC

Vera Baird is a practising Queen's Counsel specialising in criminal work. She is co-director of Astraea Research and a lecturer and writer. She was MP for Redcar between 2001 and 2010, a minister in the Labour government in 2006, and former Solicitor General.



## Laura Janes

Laura Janes is a solicitor with six years' experience of representing children and young people in detention. Before joining SCOMO last year, she was a solicitor at the Howard League for Penal Reform. Her practice covers prison law, criminal appeals and public law. Laura specialises in representing children serving life sentences before the Parole Board.



## Ralph Barrington

Ralph Barrington joined Essex Police in 1964, aged 20. He became a detective constable in January 1967 and became head of Essex CID in February 1987 on his promotion to detective chief superintendent. He remained as the senior detective in the force until June 1997 when he retired to take up the post of investigations adviser to the Criminal Cases Review Commission until March 2011.



## David Jessel

David Jessel is a broadcaster, investigative journalist (*Rough Justice* and *Trial and Error*), campaigner and former commissioner at the Criminal Cases Review Commission.



## Emily Bolton

Emily Bolton is a solicitor with a long-term interest in cases of wrongful conviction. She set up the Innocence Project New Orleans and is an associate with Reprive, focusing on death penalty casework. She is working on the establishment of a non-profit centre for criminal appeals.



## Glyn Maddocks

Glyn Maddocks is a solicitor and consultant with Gabb & Co. He specialises in civil litigation, particularly personal injury and clinical negligence, and in public law including judicial review.



## John Cooper QC

John Cooper practises from 25 Bedford Row. He specialises in serious crime including murder, serious violence, drug trafficking, terrorism, fraud, human rights and media.



## Campbell Malone

Campbell Malone is the chair of the Criminal Appeal Lawyers Association (CALA) a body he helped to set up. He has enjoyed a 40-year career as a criminal lawyer, earning a national reputation as one of the country's leading miscarriages of justice campaigners. The Legal 500 refers to him as "undoubtedly 'the elder statesman' of criminal appeals".





### Michael Mansfield QC

Michael Mansfield was called to the Bar in 1967, established Took's Court Chambers in 1984 and took silk in 1989. He has written extensively in all major broadsheets and law journals and he has appeared in several documentaries. He is the president of Amicus, Haldane Society of Socialist Lawyers and National Civil Rights Movement.



### Dr Eamonn O'Neill

Eamonn O'Neill is a lecturer in journalism and course director of the MSc in investigative journalism at the University of Strathclyde, Glasgow. Over a career spanning 22 years, he has been honoured for his investigative journalism in both broadcast and print with awards in the UK and USA.



### Alastair R MacGregor QC

Alastair R MacGregor QC was called to the English Bar in 1974 and became a QC in 1994. He joined the Criminal Cases Review Commission in 2004 and has been its deputy chairman since 2006.



### Sam Poyser

Sam Poyser is a senior lecturer in applied criminology at Canterbury Christchurch University, Kent. She has been researching in the area of miscarriages of justice for the past six years and specialises in the media's involvement in miscarriages of justice.



### Maslen Merchant

Maslen Merchant is a legal executive with Hadkiss Hughes and Beale Solicitors in Birmingham with more than 20 years' experience in criminal law. He specialises in miscarriages of justice work. He is also an accredited police station representative.



### Dr Hannah Quirk

Hannah Quirk is a lecturer in criminal law and justice at the University of Manchester. She worked for four years as a case review manager at the Criminal Cases Review Commission, including six months on a research sabbatical at the Innocence Project New Orleans. Before that she was senior researcher at the Legal Services Research Centre (the research unit of the Legal Services Commission).



### Dr Michael Naughton

Michael Naughton is a senior lecturer in the School of Law and School of Sociology, Politics and International Studies (SPAIS), University of Bristol. He is the founder and director of the Innocence Network UK (INUK), an organisation that facilitates casework and communications in the area of wrongful convictions and has actively supported the creation of more than 30 Innocence projects in UK universities.



### Jon Robins

Jon Robins is a freelance journalist who runs [www.thejusticetag.com](http://www.thejusticetag.com). He is also a director of the specialist legal research company Jures. His work has appeared regularly in *The Times*, *The Observer*, *The Guardian* and the *Financial Times*. He has written several books including *The Justice Gap: Whatever happened to legal aid?* He edits *The Justice Gap series*.



### Dr Angus Nurse

Angus Nurse is lecturer in criminology at Birmingham City University where he teaches and researches criminology and criminal justice. He was research fellow at the University of Lincoln's Law School from 2008 to 2011, researching civil justice systems and criminal justice and teaching in constitutional law and human rights. Before this, he was an investigator for the Local Government Ombudsman.



### Louise Shorter

Louise Shorter is a freelance television producer, director and writer with 15 years' experience of criminal justice issues. She was a producer on the BBC's *Rough Justice* programme for ten years before it was axed. In 2010 she set up *Inside Justice*, a not-for-profit miscarriages of justice investigative unit funded by the Esmée Fairbairn Foundation, the Michael Newsom Charitable Trust and *Inside Time*.

# No going back

## Michael Mansfield QC

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**“The force that shook the long-standing and entrenched bastions of the law was the power of investigative journalism”**

There was a time when the sight of an envelope addressed to me in green ink, as though written studiously along a ruler’s edge, with each letter truncated in line, signified one thing – a plea from prison. It was another inmate aggrieved by an unfair system and a wrongful conviction.

In those days (the 1970s and ‘80s) there was a limited number of ways to mount an effective challenge to a conviction, especially once the Appeal Court had rejected any approach on traditional grounds concerned with points of law and decisions by the trial judge. Uncovering fresh evidence, either evidence that was available at the time but was unknown, or evidence that has arisen since the trial, was a bridge too far in the normal run of cases.

A possible opening lay with the Home Office C3 Department. This took forever and was mostly unsuccessful. Another was via the good offices of sympathetic lawyers – solicitors and barristers. At one time I was receiving a dozen requests per week. As a one man band it was impossible to take on the enormity of the task, which to be done properly would require prison visits, retrieval of trial papers, fresh research and analysis, and tracing witnesses old and new – all to be undertaken without funding.

There were one or two organisations that attempted to fill the gap, notably ‘Justice’ under the energetic and relentless investigative spirit of Tom Sargent. His case load was unimaginable

and insurmountable. He was, however, the lone forerunner and trailblazer of those who came later to pick up the baton marked ‘miscarriages of justice’.

I believe the force that shook the long-standing and entrenched bastions of the law was the power of investigative journalism. It had both resources and courage. Successive members of the higher judiciary took umbrage from Denning to Lords Lane and Taylor. They considered the television programmes to be an affront to the systems of justice undermining public confidence. Grotesque attempts were made to besmirch the journalists’ efforts by alleging underhand methods and unprofessional practice. These were the desperate last-ditch ploys to deflect from the central malaise, which was an uncritical acceptance and belief in the rectitude of a system that had for too long permitted a form of noble cause corruption. It took initiatives like *Rough Justice* with Peter Hill, *Trial and Error* with David Jessel (later a CCRC commissioner) and Yorkshire Television’s *World in Action* to unravel notorious miscarriages encased in layers of misplaced assumption and malpractice. Prime among them was the Birmingham Six and the discovery that playing cards could give rise to spurious positive results for explosive traces. It was blind justice itself which had undermined public confidence, not the inquisitive journalist.

As a result the Runciman Commission was set up and after its report the CCRC was

established in Birmingham, as was a separate one for Scotland. For the first time since the criminal Courts of Appeal were established in both jurisdictions at the start of the 20th century on the back of miscarriages brought about by serious misidentification, there was to be a permanent body whose function it was to investigate potential wrongful convictions.

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**“It was blind justice itself which had undermined public confidence, not the inquisitive journalist”**

The commission is empowered to do this either on its own motion or upon application, and to refer such cases back to the Court of Appeal if it concludes there is a ‘real possibility’ the conviction would be overturned. Even if the preconditions for referral are not satisfied they may still do so in ‘exceptional circumstances’.

### **Stretched to the limit**

The commissioners combined with caseworkers have provided a formidable advance on what has happened before and the significance of this should not be undervalued. Nevertheless, as it has grown so have a number of problems.

Evidential unreliability has shifted from identification and confession evidence to

the complexity and speed of forensic science developments. This is an expensive and time-consuming area that requires intimate and up-to-the-minute expertise.

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**“The commission has had the difficult, if not impossible, task of trying to second guess the Court of Appeal and the likelihood of success in order to cross the threshold for referral”**

The size of the case load itself has not eased and once more resources are stretched to their limit. This has revealed a weakness in the system that has echoes in the past. The commission has to sort out the deserving from the undeserving among a plethora of applications. As ever, presentation and focus are consummate aids to this exercise. It requires considerable skill and the help of legal advisers to assemble and submit a dossier at a stage where there is once again little or no funding. The result is a situation redolent of pre-CCRC days where sympathetic lawyers and a few voluntary organisations have stepped into the breach. For example, Paddy Hill (ex-Birmingham Six) and Mojo, and Michael Naughton with his network of ‘Innocence project’ based at UK universities. Despite their excellent efforts they by no means meet the need.

Above all the commission has had the difficult, if not impossible, task of trying to second

guess the Court of Appeal and the likelihood of success in order to cross the threshold for referral. To begin with the commission’s work was welcomed but then judicial criticism began to surface particularly where cases were old. Over the last decade, however, it has been possible to detect a worrying trend towards a more robust and less flexible approach to fresh evidence. While the statute which governs the Court of Appeal makes it clear that it is their decision alone and that it is for them to determine whether they ‘think’ a conviction is safe they have increasingly adopted the stance of a trial court rather than a court of review.

As Lord Devlin repeatedly pointed out this is dangerous in a system that has entrusted the jury in serious cases with the primary task of adjudicating upon the facts. The Court of Appeal will never be able to reconstruct the effect of much of the trial evidence, which will only be available on paper.

The ‘jury impact’ test, as it has been termed, by which the Court of Appeal, which assesses whether a reasonable jury properly directed might have reached a different verdict, is being marginalised and relegated to the status of a potentially useful but not an essential tool. This is occurring both at the admission and the substantive stages of a hearing.

The CCRC needs to be supported and expanded. There can be no return of the iniquities of pre-history. There is a strong reactionary lobby that should not be underestimated, which embrace the doctrine ‘prison works’ and regards prisoners as almost sub-human meriting few facilities and heaven forbid the right to vote. It is this lobby that no doubt would prefer to see the demise of the CCRC. This must be resisted.

# Unrealistic expectations

**Alastair R MacGregor QC** is deputy chairman of the Criminal Cases Review Commission

**N**o reasonable commentator would deny that the current system sometimes fails victims of miscarriages of justice. Nor would they deny that it is the duty of all concerned with miscarriages to press for improvements to that system. But the mere fact that improvements can and should be made to the existing arrangements and to the commission's role within them cannot sensibly lead to the conclusion that some wholly new approach is necessary.

In its 14 years of operations the commission has dealt with almost 13,500 applications. Each has been considered and decided by a commissioner who has explained his or her reasoning to the applicant; none has been rejected without the applicant being given an opportunity to make further representations. More than 480 convictions or sentences have been referred to appeal courts and of the 455 appeals decided, 320 have succeeded.

Though mainly involving serious crimes, the cases referred have ranged from murder to traffic offences, and from those that have attracted widespread support to those that have generated little interest or sympathy. The only constants are that all have been alleged miscarriages of justice, that all have been important

to the applicants concerned, and that all have been addressed by the commission with objectivity, thoroughness and care. Furthermore, after six years of cuts in its budget and personnel, the commission's waiting lists, while still as unacceptable to it as they are to others, are as short now as they have ever been.

The commission makes no claim to perfection. It does, however, suggest that those who express concerns about its role and performance should first acknowledge its considerable achievements.

Any institution that rejects criticisms of its performance or calls for its reform is likely to be accused of excessive defensiveness and/or of Panglossian complacency. Both charges have been levelled at the commission and there may sometimes have been some force in the first of them. Any charge of complacency is, however, unjustified.

Throughout its existence the commission has been engaged in an almost constant process of self-analysis, self-improvement and reform. None of its critics is more committed to remedying miscarriages of justice or to optimising the process for doing so.

What then of the criticisms that have been made of the commission and of its role?

**“Nothing is more likely to lead to a commission referral than compelling new evidence of factual innocence. The commission looks for such evidence whenever and wherever it is sensible and practical to do so”**

### **The commission doesn't care about factual innocence**

Of course the commission cares about factual innocence. Nothing is more likely to lead to a commission referral than compelling new evidence of factual innocence. The commission looks for such evidence whenever and wherever it is sensible and practical to do so. Evidence of that type is, however, rarely discoverable and in its absence the commission has no greater gift than others for identifying those of its applicants who are factually innocent.

Though campaign groups and journalists understandably focus on the convictions of those they believe to be factually innocent, the commission has a wider remit. It works to overturn not only the wrongful convictions of those who others believe to be innocent, but also the wrongful convictions of those who only might be innocent (though others doubt it) and even, indeed, of those who, whatever the evidence of their guilt, have been convicted only after substantial systemic error or wrongdoing.

Few victims of miscarriages can hope to prove their factual innocence and many will lack supporters who believe in them. Their 'victimhood' is not diminished by that fact and it cannot be assumed that their applications are in consequence less meritorious. The commission makes no apology for concerning itself not only with the convictions of those who others believe to be innocent, but with all wrongful convictions and with the need to keep the system 'clean' and, by doing so, to reduce the risk of future injustices.

### **The 'real possibility' test is too restrictive**

The 'real possibility' test was not devised by the commission: it is the test established by Parliament. Those who disapprove of it

must provide a convincing response to the question: 'What useful purpose would be served by the commission being entitled to refer convictions to appeal courts where there is no real possibility that those convictions will be quashed?'

Only two responses to that question appear to be at all compelling. The first is that miscarriages of justice are such an evil that, where one is suspected, even a mere 'outside chance' of a successful appeal should be sufficient for a referral. Whatever the force of that argument, however, it takes little account of political or economic realities or of the fact that, as discussed below, unsuccessful referrals are not a 'cost-free' option.

A second and more compelling argument against the 'real possibility' test is that it makes life too comfortable for the Court of Appeal. At least on occasion, so it could be contended, the commission should have the power to make a 'contrarian' referral which obliges the court publicly to confront and address the concerns that exist in relation to a case and/or to look again at some issue or principle on which it has already expressed a concluded view.

On the face of things, such a power would institutionalise the scope for conflict between the court and the commission and, on any view, it is one that could properly be exercised only in the most unusual of circumstances. It is, moreover, by no means easy to find examples of past cases where the commission might appropriately have exercised such a power. Even so, a sensible case could be made for extending the commission's powers by allowing it "in exceptional circumstances and where it considers it to be in the interests of justice to do so" to refer a conviction even when it cannot persuade itself that there is a real possibility that the court will quash it.

### **The commission is overcautious**

Given that the commission has power to refer a conviction to the Court of Appeal only if it is satisfied there is a real possibility that that court will quash it, the criticisms that are made of the commission in respect of non-referrals are often criticisms that ought more sensibly to be directed at the court.

Equally, however, there have presumably been occasions when the commission has been overcautious when applying the 'real possibility' test and when it has, as a result, failed to refer convictions that, if referred, might well have been overturned.

Recognising the seriousness of the consequences that may flow from an overcautious application of the 'real possibility' test, commissioners are of course sometimes tempted to refer convictions that seem to have only an outside chance of being quashed. They resist that temptation both because it would be improper for them to do otherwise and because they also recognise – as others sometimes fail to – that the referral of cases that are doomed to failure can cause real damage.

Such referrals may cause unnecessary and serious distress to victims of crime who have long since tried to put behind them the trauma of the relevant events. Pain of that sort must not be belittled or underestimated. They may also cause real distress to applicants and their families by raising hopes that are then disappointed.

One of the more outspoken passages of adverse criticism that the Court of Appeal has directed at the commission was in the case of *Gore* [2007] EWCA Crim 2789 where, on the application of her parents, the commission referred a conviction for infanticide of a young woman who had later died. The court said: "We are surprised that the commission should

**“Given that cases that are referred by the commission are often of real weight and complexity, the resulting burden on appeal courts and its consequences for other appellants can be very substantial. In those circumstances it takes little imagination to see why the Court of Appeal might be quick to take exception to speculative or unrealistic commission referrals”**

have seen fit to refer this case to us. This was not a case where the system failed a distressed defendant. On the contrary, it was a case where a young woman was treated with considerable compassion and sensitivity. She never wanted to resurrect this matter and it is unfortunate that, given there can be no benefit whatsoever to her, her parents’ expectations have been raised only to be dashed. They should have been left to grieve for their daughter, not forced to relive the tragic circumstances of the death of their grandchild.”

In the particular circumstances of that case, this was not in the Commission’s view a fair criticism. The thrust of the underlying reasoning could, however, undoubtedly have been compelling in other circumstances.

Other factors that militate against making referrals that stand no real possibility of success arise out of the fact that, when a referral is made, the court is obliged to treat it “for all purposes” as an appeal in the normal way (see e.g. section 9(2) of the 1995 Act). That aspect of the legislation is as remarkable as it is central to the commission’s ability to assist in the remedying of miscarriages of justice.

Whether or not an appeal court wishes to do so – and no matter what other pressures there may be on its time – it must deal with a commission referral as a substantive appeal. Given that cases that are referred by the commission are often of real weight and complexity, the resulting burden on appeal courts and its consequences for other appellants can be very substantial. In those circumstances it takes little imagination to see why the Court of Appeal might be quick to take exception to speculative or unrealistic commission referrals. Nor is it difficult to imagine how the court might react if it came to the view that there was a real risk that referrals of that nature might



undermine its ability properly to discharge its duties to other appellants.

In the infanticide case referred to above, the court also observed that “the Commission might have been well advised to heed the wise words of Kay LJ in the appeal of *Ruth Ellis* [2003] EWCA Crim 3556”. Those words included: “If we had not been obliged to consider [this] case we would perhaps in the time available have dealt with eight to 12 other cases, the majority of which would have involved people who were said to be wrongly in custody. The Court of Appeal’s workload is an ever increasing one and recent legislation will add substantially to that load. Parliament may wish to consider whether going back many years into history to re examine a case of this kind is a use that ought to be made of the limited resources that are available.”

Both *Gore* and *Ellis* were to some extent ‘historic’ cases and that factor no doubt contributed to the court’s displeasure. The commission is perhaps less inclined than is the court to the view that wrongs should be left unrighted merely because time has passed. It seems unlikely, however, that the court would be any more enthusiastic if the commission were to refer significant numbers of more recent cases that stood no sensible prospect of success.

In 2006 and 2007 the Court of Appeal expressed concerns about referrals that had been made to it by the commission on so-called ‘change of law’ grounds. By May 2008 – and after “members of the senior judiciary brought the matter to the attention of the government” – legislation had been introduced, which in effect provided that commission referrals on such grounds need no longer be treated “for all purposes” as appeals in the normal way.

If more general legislation were introduced

to the effect that commission referrals need no longer be dealt with as substantive appeals but merely as applications for permission to appeal, the consequences for the wrongfully convicted could be serious indeed.

To recognise that there can be downsides in the making of over-ambitious referrals is neither to run scared of ambition nor to be excessively in thrall to the Court of Appeal. It is simply to recognise the realities of the situation and, in particular:

- that under the existing system it is only the Court of Appeal – and not the commission – that can actually remedy miscarriages of justice;
- that, as every advocate knows, one’s ability to influence a court is largely dependent upon the extent to which that court respects and trusts one’s good faith and judgement;
- that the commission’s power to require the Court of Appeal to consider a case as a normal appeal must be coupled with a responsibility to exercise that power sensibly, in good faith and with proper concern for the interests of others who have a right to call on the court’s time; and
- that if that important power is abused, there is good reason to fear that it may be lost altogether.

### **The commission doesn’t make sufficient use of its investigatory powers**

The commission cannot sensibly reinvestigate every aspect of every case which comes before it. It does, however, make extensive use of its investigatory powers and will in virtually every case obtain relevant material from public bodies. Although there have no doubt been occasions when the commission could and should have made further investigations than those it has in fact conducted, the most pressing

investigatory problems relate not so much to the commission's use of the powers it already possesses but rather to the investigatory powers that it still lacks.

For years the commission has been pressing for the power - which is already enjoyed by the Scottish CCRC - to obtain material from private as well as public bodies and for an (appropriately qualified) right to require witnesses to answer its questions.

The need for such powers has grown as functions have been transferred from the public to the private and/or charitable sectors, and as legislation about data protection has led to increased concerns about confidentiality. The desirability of transnational investigatory powers has also become ever more apparent as the years have passed.

There must always be a much greater chance that a wrongful conviction will be overturned by even the most conservative and recalcitrant of appeal courts if the commission can present compelling new evidence of 'unsafety'. The commission would welcome any alteration to the present arrangements that would make it easier for it to find such evidence.

### **Different roles**

Journalists, pressure groups, academics and others have vital roles to play in uncovering miscarriages of justice, in drawing them to public attention and in keeping up to the mark those who are charged with investigating and/or remedying them. The commission has a different role to perform. It is a public body expending public funds that must review each application as a potential miscarriage. It does not have the luxury of choosing the cases with which it engages or of ignoring those that do not evoke its sympathy.

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**"There must always be a much greater chance that a wrongful conviction will be overturned by even the most conservative and recalcitrant appeal courts"**

Convictions will be overturned only if the Court of Appeal can be persuaded that, on a proper analysis of the available evidence and the law, they are unsafe. In those circumstances it is both proper and inevitable that the body charged with investigating alleged miscarriages will focus on the evidence and the law, and that it will give little weight to emotional declarations or campaigning fervour. Equally, however, it will not hesitate to make challenging referrals when it can properly do so.

The commission is one of only three bodies of its type in the world. In it we have the most powerful apparatus anywhere for identifying and dealing with miscarriages of justice. Its considerable powers allow it to make a real and important contribution to the remedying of such miscarriages.

Wider powers and more generous resources would undoubtedly enable it to make an even greater contribution. But those who argue that the commission or its model is fundamentally flawed and that there is need for a wholly different approach to miscarriages of justice should be watchful that, in an inevitably imperfect world, they do not undermine the good in their illusive search for the best - and in consequence end up with neither.

# Time to reconnect

**David Jessel** is an investigative journalist and a former commissioner at the CCRC

**T**he CCRC is not the body we campaigned for. It never was. Most of us who, in the eighties, were concerned with miscarriages of justice had a vision of an independent court of last resort, which could cut through the intransigence shown by the Court of Appeal in cases such as the Birmingham Six and the murder of Carl Bridgewater.

That didn't happen. Parliament, instead, came up with a formula whereby the CCRC had the power to send a conviction back to the Court of Appeal, while the court alone had the power to quash it. The linkage lay in the 1995 statute's provision that the CCRC could refer only when there was a 'real possibility' that the court would quash the conviction.

'Real possibility' was the wicked fairy at the christening of the CCRC, and the more sensible critics of the commission usually end up identifying this baptismal curse as its principal problem, rather than any institutional cowardice, sloth or mutton-headedness. It was a political compromise with a judiciary jealous of their own rights and suspicious of a bunch of amateurs in Birmingham set up to mark their homework.

It would be quixotic – and no service to the CCRC's applicants – to send up cases where there was no real possibility of a successful outcome. It would be idle, too, to base appeals on a mere belief in innocence, based on the same 'evidence of innocence' that a trial jury found implausible – the route apparently favoured by some Innocence projects. But the CCRC's obligation to second guess the Court of Appeal in-

evitably puts its judgments at an extra remove from justice and truth, and holds its applicants hostage to the vagaries of a court whose very failings were largely responsible for the crisis that brought forth the CCRC.

The issue of shaken baby syndrome is a case in point. A recent shoulder-shrugging Appeal Court judgment ducked the issue, making it harder for the CCRC to refer such cases in the future. But campaigners know that only constant pressure and sustained challenge forces the court to adapt. The present formula conspires against the need to keep hammering on the door of the Court of Appeal in cases such as Anthony Stock or Eddie Gilfoyle, where the whole landscape of the original prosecution has changed beyond recognition.

## Playing the villain

The CCRC as a creature of statute presents another problem for campaigners. Concern with miscarriages of justice is an obsessive pursuit. Ludovic Kennedy, Paul Foot, Peter Hill, Tom Sargent, Bob Woffinden and both the Duncan Campbells – these are people whose passion, commitment and anger I recognise. I hope I used to have some of it myself. The creation of the CCRC, however, was seen as the nationalisation of zeal, the taking of fervour into public ownership. There are passionate and committed people at the commission, but, right from the start, the CCRC made it clear that it was not a campaigning organisation. It was a system, a mechanism – and it's hard to detect the heartbeat in a machine.

That's perhaps why the CCRC is widely – and unfairly – seen as the institutional villain of the piece, just as in our day we identified the police and the judges as the 'forces of evil'. Campaigners need a bit of hate. The CCRC didn't help itself by maintaining on its website that it was not concerned with guilt or innocence but with the safety of convictions, mistakenly assuming that it would be obvious to anyone with an IQ greater than that of a coral sponge that the conviction of an innocent person is by definition unsafe.

The CCRC's role as the central clearing house of miscarriages further alienates it from more familiar champions of justice. Most campaigns are based on individual cases – Susan May's, for instance, or Jeremy Bamber's. As campaigners we didn't always agree on the merits of each other's cases – but everyone can cheerfully unite to excoriate the CCRC when it knocks both cases back.

The CCRC rejects 96 per cent of its cases. Just as Dickens' optimistic Mr Micawber would "just wait for something to turn up", the CCRC was always doomed to be caricatured as a grim institution just waiting for someone to turn down. Internally, too, there's the danger of miscarriage fatigue when the umpteenth no-hoper of the month thuds onto your desk. Sometimes it can feel as if you began with a concern for asylum seekers, and ended up as an immigration officer. It always struck me as strange, coming from the trebles-all-round world of the telly, that successful referrals were not celebrated in any corporate sense at the CCRC; the management view is that to do so would undervalue the efforts of those whose work tirelessly in producing non-referrals.

Against a background of year-on-year cuts the pressure for more efficient case closure will intensify. Already, an early exercise in forensic triage rejects roughly half of the intake at an ear-

ly stage. There's a perfectly respectable utilitarian justification for heroically scything through what appear to be unpromising applications – it clears the decks for the more deserving cases. But judgement and productivity – Solomon and Stakhanov – do not make easy bedfellows. These early rejects can't be described as having had the benefit of a thorough review. Often the applicant's letter alone forms the basis for rejection, on the grounds that he hasn't appealed, or that he has furnished no plausible grounds to justify a review. But the innocent applicant often doesn't know what grounds he can plead – he won't know that his accuser is a serial liar, for instance – or has obediently followed his barrister's advice that there's no prospect of a successful appeal. We know that this can be an inconsistent process, because the occasional reject has reapplied, and has had his case successfully referred.

### **Passion killer**

Managing the mountain of applications can lead to a preoccupation with process, targets and performance indicators. But following the trail of a possible miscarriage of justice is an innately inefficient exercise, wandering down unpromising forensic avenues and refusing to take no for an answer. When case closure is one of the criteria in assessing staff performance, where's the incentive to go the extra mile? Do the very processes necessity has forced on the commission dampen, dissipate and diminish the passion to identify the wrongly convicted?

A candid reappraisal of what the commission can and cannot do is overdue – before the CCRC's enemies seize their opportunity furnished by economics and ideology.

For example, can the CCRC continue to be the universal safety net of criminal justice? Should access to the commission be restricted

to those cases that meet strict public interest criteria, set by parliament, rather than the commission? These might include the exclusion of people who are no longer alive, cases that involve minor or even non-custodial sentences, or applicants appealing on the grounds that their five previous offences have no bearing on their sixth. I could argue against all or any of these exclusions, but I'd rather the CCRC concentrated its resources on a nurse wrongly accused of attempted murder, or an elderly music teacher maliciously charged with sexually abusing a pupil, than in seeking to identify irregularities in the latest conviction of a serial drug dealer, or taking up the cause of a prisoner who has never shown any inclination to take it up himself.

The CCRC could abandon its ambition drastically to shorten its waiting lists. We all know about justice delayed being justice denied, but the backlog is the result of matters outside the commission's control – its applicants and its funded resources. If the price of thoroughness is delay, the commission should not have to choose between doing its job right or doing it quickly.

The cab-rank principle should also be reassessed; high-profile cases (Sally Clark, Barry George) don't achieve that status by accident. Cases where positive and credible new work has been achieved by students, journalists, campaigners or other interested parties should be prioritised – a huge and quick win to re-involve the CCRC with the constituency of campaigning concern.

Priority should also be given to cases where the application is based on quickly verifiable grounds, such as the revelation of previous dishonesty by the police, witnesses or complainants, or developments in forensic science.

Applications based on points of law should be hived off to a separate specialist secretariat; the

CCRC was not put on earth to pick over deficient judicial directions over inferences from the accused's silence at interview. Resources should be channelled more to knocking on doors, less to anatomising precedents.

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**“The CCRC is an inherently good thing, and better than anything else on offer. But it will need help”**

### Rescue mission

These modest proposals would go some way to rescue the commission from the burdens that stifle its true mission, impart an honest transparency to its workings, and help it to reconnect with, and maybe refresh, public concerns with miscarriages of justice. It would mean that the CCRC spends more of its time on investigating troubling cases, and less in processing the cases of those who have been safely convicted. And why not scrap the 'real possibility' formula and take a lesson from the Scottish Commission, which refers on the basis of a belief that a miscarriage of justice has occurred, and that it is in the public interest to send it back to the court? In the name of independence and accountability, a body set up to identify miscarriages of justice should do what it says on the tin – refer cases where it thinks justice has miscarried.

The CCRC could, of course, go on as it is. But it runs the risk of becoming a shadow of what it was set up to be. The CCRC is an inherently good thing, and better than anything else on offer. But it will need help – and the candid advice of campaigners – to survive, and to justify its survival.

# No champion of justice

**Michael Naughton** is a senior lecturer at the University of Bristol and founder and director of the Innocence Network UK (INUK)

When the Criminal Cases Review Commission (CCRC) was announced, following a recommendation of the Royal Commission on Criminal Justice (RCCJ), prominent organisations such as JUSTICE and Liberty gave up providing case-work assistance to alleged innocent victims of wrongful conviction on a belief that voluntary efforts were no longer necessary. In fact, the 'blueprint' offered by JUSTICE for the CCRC was seen as the reform solution to the problem of the wrongful conviction of the innocent that it had long fought for.

The CCRC also resulted in a decrease in media and political interest amid widespread celebration that we now had a state-funded and supposedly independent public body to deal with miscarriages of justice should they arise and that efforts could be applied to more pressing areas of social justice need.

However, the CCRC is not the panacea to the problem of wrongful convictions that was widely believed as it is shackled to the criteria of the appeal courts – which stifles its claimed independence. As such, rather than assisting the innocent to overturn their convictions, it can be argued that it has set the cause against wrongful convictions back by raising the threshold for alleged innocent victims of wrongful convictions, which many of them will never be able to reach. What follows evaluates how the CCRC operates as a post-appeal remedy against miscarriages of justice. It shows that

further reforms are urgently required to assist innocent victims to achieve justice.

## The CCRC's notion of safety

Public statements by senior personnel at the CCRC repeatedly claim that it cannot concern itself with whether applicants against convictions are innocent or guilty, but, rather, applies a test that seeks to determine whether alleged miscarriages of justice are likely to be unsafe along the lines of the requirements for quashing convictions in the appeal courts. This approach determines how the CCRC reviews alleged miscarriages of justice, seeking to show that the evidence (fibres, fingerprints, hairs and so on) that led to a conviction is unreliable and, therefore, that a conviction may be unsafe before it considers whether to refer a case back to the relevant appeal court. However, the CCRC is quick to remind us that that doesn't prove that an alleged innocent victim of the wrongful conviction is, in fact, innocent. Yet, the story continues that fewer innocent people would be freed if the legal criterion that they worked to was provable innocence rather than unsafety of conviction.

Taken on face value this seems to make logical sense. Without a crystal ball, in most alleged wrongful convictions, save those rare cases where DNA proves factual innocence, it is just not possible to know if the alleged victim is innocent or guilty. But, the CCRC's notion of safety needs unpacking to demonstrate how it

fails to assist alleged victims of miscarriages of justice who may be innocent.

First, it might be thought that the CCRC's notion of safety of convictions would relate to the factual reliability or otherwise of the evidence that underpinned the conviction. However, the standard of safety applied by the CCRC is not an objective one. Rather, section 13(1)(a) of the Criminal Appeal Act 1995 requires the CCRC to only refer cases back to the relevant appeal court if there is a 'real possibility' that the conviction will not be upheld – i.e. that it will be quashed. As such, the CCRC is not independent as claimed. Instead, it is best viewed as a gatekeeper for the appeal courts. It is always in the realm of trying to second-guess how the appeal courts may deal with any cases that are referred back. And all decisions made need to be understood within this context.

Further, section 13(1)(b) of the Criminal Appeal Act 1995 restricts the CCRC to consider, except in exceptional circumstances, only evidence or argument not raised in the proceedings that led to the conviction or on any previous appeal or leave to appeal. This means that even in cases where there is a credible claim of innocence the CCRC is unlikely to refer the conviction if the evidence of innocence is not fresh and it, therefore, does not think that the conviction will be overturned.

A key consequence of the requirement that the CCRC restrict itself to fresh evidence is that it is often helpless when confronted with applications in which applicants argue that they are innocent and the evidence against them at trial was unreliable. For instance, a judge may decide at trial that a potentially unreliable form of evidence is admissible, such as an eye-witness identification that was obtained in breach of PACE that was known before trial. If a jury, having heard all of the arguments and given a

Turnbull direction, still decided to convict the CCRC would not be able to go behind the jury's verdict even though the conviction might be factually unsafe and the applicant may, in fact, be innocent.

Similarly, in cases involving expert evidence, if an applicant is able to find additional experts post-appeal that support the defence case at trial, the CCRC will tend not to see the case as having a real possibility in the appeal courts as the arguments are not new, even though the applicant might be innocent and there is sound scientific evidence to substantiate the applicant's claim.

This is all the more problematic in light of the legislative changes outlined above as inherently unreliable forms of evidence are increasingly seen as admissible in criminal trials. Crucially, if wrongful convictions are obtained in accordance with due process and without any procedural irregularity, despite the unreliability of the evidence, the CCRC's lack of independence from the judiciary means that it is unlikely to be able to rectify them.

This reveals how the CCRC undertakes its reviews of alleged miscarriages of justice. It does not tend to undertake thorough inquiries to investigate whether the evidence that led to the conviction is reliable or to seek out new scientific techniques that may positively prove whether an applicant is innocent. Rather, 'desktop reviews' are, generally, undertaken to identify those very rare cases (in a statistical sense based on the number of applications that it receives and refers) that may contain fresh evidence and may be overturned by the appeal courts.

### **Reforms needed**

In addition to dealing with alleged wrongful convictions, the CCRC also deals with a range of

other issues such as sentence matters, technical miscarriages of justice such as cases where murder convictions should be quashed on the grounds of diminished responsibility, and cases that might be deemed more trivial such as road traffic offences and destruction orders under the Dangerous Dogs Act 1991.

However, alleged wrongful convictions by those who claim to be factually innocent were the driving force behind the establishment of the CCRC. Infamous cases such as the Guildford Four and the Birmingham Six induced a public crisis of confidence in the entire criminal justice system, prompting the RCCJ, which recommended the establishment of the CCRC, to allay concerns that innocent people were unable to overturn their convictions.

Yet, the foregoing critique of the CCRC's operations is intended to illustrate just how far it is detached from its public mandate to assist those who may be genuinely innocent victims of wrongful conviction. And, although it can be legitimately argued that this is not the fault of the CCRC, which is required by statute to perform the functions that were remitted by parliament, it remains equally true that the CCRC remit and mode of operation are in need of reform if it is to be a truly independent body to assist innocent victims of wrongful conviction.

First, the CCRC needs to be independent from the appeal courts. The 'real possibility' test has to be removed and the CCRC should be able to refer any cases in which it believes that a wrongful conviction of an innocent person might have occurred, referred to as actual innocence claims in the United States.

Second, this would have a knock-on effect in terms of the CCRC's remit of how it reviews alleged wrongful convictions, which should not be restricted to fresh evidence. Akin to public enquiries, this would entail thorough

reinvestigations, as opposed to paper reviews, of the credibility of evidence, whether in the form of witness testimonies or scientific evidence, to get to the bottom of whether claims of innocence are valid.

Third, the CCRC must be permitted to acknowledge that forms of evidence, even if deemed to be admissible by trial judges, are potentially unreliable and that juries make mistakes.

These points were made in the reports by the RCCJ and JUSTICE (*Remedying Miscarriages of Justice*) almost 20 years ago but are yet to be put into effect.

Fourth, all referrals by the CCRC should be deemed to be first appeals; that is, they should be afforded the same status as the powers of the home secretary's under section 17 of the Criminal Appeal Act 1968 under the previous system for reviewing alleged miscarriages of justice. This would free the CCRC from the current fresh evidence criteria and further enable it to operate independently and to refer cases of applicants thought to be innocent in the wider interests of justice.

From past experience, successive CCRC chairs and commissioners have not been receptive to critiques of its limitations in assisting the innocent. Rather than openly acknowledging its statutory straightjacket it has promulgated the idea, both in the UK and around the world, that it is a state-sponsored innocence project and a champion of justice.

This guise is increasingly unsustainable as more alleged victims of wrongful conviction who have been let down by the CCRC despite having plausible claims of innocence come to the fore and expose its inherent defects.

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Many thanks to **Gabe Tan** for her assistance with this essay



# Out of step

**Campbell Malone** is chair of the Criminal Appeal Lawyers Association

**I**n March 2010 I was invited by the Criminal Cases Review Commission to address their stakeholders' conference on the issue of the effectiveness of the commission from a practitioner's prospective, and this piece largely follows the concerns I raised at that meeting.

I do so with some hesitation because from my experience the CCRC is a well-intentioned body comprised of a large number of individuals working collectively with a commitment to correcting injustice. Nevertheless, the commission has attracted criticism from a variety of sources and there is little doubt that it is operating in a very different climate from the one that saw its creation.

It arose out of the Royal Commission set up in 1995 following a series of high-profile miscarriages of justice that had rocked public confidence in the administration of criminal justice.

By the time it started work in 1997, things were starting to change and, under Tony Blair, New Labour set about addressing what they saw as a lack of balance in the criminal justice system. Bizarrely they seemed to find it necessary that to protect the victims of crime those affected by a miscarriage of justice could safely be disregarded.

Progressively over a number of years the CCRC has found itself under pressure from the relevant government departments and in recent

years its budgets have been slashed. The result is a body that is currently demoralised, and it is significant that it has not sought to replace the two commissioners who most recently retired.

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**“Bizarrely they seemed to find it necessary that to protect the victims of crime those affected by a miscarriage of justice could safely be disregarded”**

It has been unjustly criticised by those who complain that it is not interested in the innocence or otherwise of the applicants and applies the wrong test in determining whether or not to refer a case back to the Court of Appeal. It is clear that it can only apply the test imposed upon them by the legislation and that it would in any event be pointless to refer cases back to the Court of Appeal where there is absolutely no prospect of the case being successfully appealed. In my experience the commission has always been ready to use forensic evidence if it could realistically lead to the exclusion of an applicant as being the perpetrator, but, after all, it is only in a small percentage of cases that such an outcome might be feasible.

As a result I am worried that in the current climate it may be seen as an easy way to save money to get rid of the commission in the face of the complaint that it is not discharging its function and return it to the fold of the Ministry of Justice. Those of us who remember having to deal with C3 within the Home Office and the concern about political interference in the decisions as to whether or not a case should be referred view such a possibility with horror.

Nevertheless the legitimate concerns about the commission need to be ventilated. The commission has always been prepared to listen to criticism. The extent to which it might be affected by that criticism remains an open question.

I raised a number of issues with the commission arising out of my dealings with them on behalf of my clients at the stakeholders' conference. For example, I found it surprising that, when dealing with an application based on fresh evidence, the commission should regard negative comments from prosecution experts as being conclusive grounds for rejecting the application. Even more startling were the occasions when the commission instructed an expert who agreed with the opinion of the applicants' new expert evidence only for the commission to decline to refer on the grounds that the issues raised were not new. Why then incur the expense?

### **Not enough cases?**

Practical concerns raised included a variable approach to communicating with applicants ourselves and to disclosure of material unearthed during their investigation, but the concern really boils down to the number of cases referred. It is perhaps unremarkable that a practitioner will complain that the commission does not refer enough cases. The Court of

Appeal probably feels that the commission refers too many cases and the commission probably believes that they get it just about right. None of that may be surprising but the fact remains that historically the commission has only referred about four per cent of the cases submitted to them and have had a success rate of something like 65 to 70 per cent, which they regard as a vindication.

Many practitioners believe that they do not refer enough cases and that they do not always refer the right cases. Some of the cases that are referred and are unsuccessful are unsuccessful because the nature of the case develops during the period that the case is waiting to be heard. More evidence comes to light that enables the Court of Appeal to safely dispatch it. That is not something for which the commission can be held responsible. Those cases that should not be referred are dispatched with even greater swiftness by the court and the court would usually make it known to the commission what they considered about its merits. That has obvious value to the commission in that it serves as an audit for their decision-making process.

### **Misunderstanding the court**

The problem is with those cases that are not referred by the commission, and I have been particularly concerned with decisions taken by the commission not to refer a case where fresh evidence, particularly expert evidence, is involved based on its view of the court's powers under section 23 of the Criminal Appeal Act 1968. This section gives the court the discretion to admit evidence before it, if it is in the interests of justice to do so. In exercising that discretion the court would normally have regard to the four criteria set out in the section, in essence that the evidence should: (a) address

the issue of the safety of the conviction; (b) be credible; (c) be admissible; and (d) within reason, not have been available at the time of trial. I believe that the commission has often misunderstood how the court would be likely to interpret and apply those powers.

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**“The commission sometimes makes decisions that are not irrational or unlawful but just plain wrong, having come down on the wrong side of the fence when it comes to the decision-making process as to the realistic likelihood of the Court of Appeal quashing the conviction”**

In its statement of reasons explaining its decision not to refer, the commission often mentions a couple of judgments of the Court of Appeal to argue that the court would not receive the evidence proposed (*R v Steven Jones* [1997] 1 Cr App 86 and *R v Kai-Whitewind* [2005] EWCA Crim 1092).

One case rarely mentioned by the commission is *R v Cairns* [2000] Crim LR 473, where the Court of Appeal was prepared to admit fresh expert evidence despite the absence of any reasonable explanation for the failure to call such evidence at trial. The court adopted an approach that, as the fresh evidence indicated that the conviction was unsafe, the interests of justice required that it admit it. That approach was consistent with the wording of

section 23 of the 1968 Act, which makes it clear that the interests of justice are the overriding consideration.

### **Common sense and discretion**

The truth is that in the appropriate cases the Court of Appeal has shown itself ready to exercise its discretion and admit evidence even though all of the criteria of section 23 are not met (for example, *Henretti* [2002] CR App PR419 and *Richardson*, 9 May 1991).

The judgment in *R v CCRC ex p Pearson* [1999] 3 ALL ER 498 is almost certainly quoted in probably every statement of reasons issued by the CCRC because, in it, Bingham LJ spelt out the power of the commission to refer and its obligation to make a judgement on the case’s prospects of success including, to be fair, the likelihood or otherwise of the Court of Appeal receiving “fresh evidence”.

Rarely quoted, however, is that part of the judgment where Lord Bingham quoted *Richardson* and said: “It seems clear that by 1991 the court had come to recognise, even in an extreme case of this kind, the paramount need to ensure that a conviction was safe,” or where he restated the principle that: “The overriding discretion conferred on the court enables it to ensure that, in the last resort, defendants are sentenced for the crimes they have committed and not for the psychological failings to which he may be subject.”

No one is saying other than the criteria of section 23 set out the guidelines which normally would be applied by the Court of Appeal but what these cases demonstrate is that the court will apply common sense when considering an application and above all will be guided by their sense of justice and will not prevent a wrongful conviction from being overturned simply on the basis that the evidence that

undermines the safety of that conviction could have conceivably been called at an earlier stage.

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**“The commission has often misunderstood how the court would be likely to interpret and apply those powers”**

### **Overly cautious**

It is for that reason that I believe the commission has so far often been out of step with the approach taken by the Court of Appeal and have been overly cautious in their approach to fresh evidence cases, particularly those involving expert witnesses. I should add that the criticism is not limited to cases involving expert evidence and applies, for example, to cases where critical new evidence points to an alternative suspect.

I suspect the commission will disagree and will point to its track record in relation to judicial review, the only challenge available to an unhappy applicant whose case has not been referred by the commission. The case of *Pearson* made it clear that the power in determining whether or not a case should be referred lies exclusively with the commission and the commission would point to the fact that it was only in the one case where they were successfully judicially reviewed. While true it ignores the fact that a number of judicial review applications are lodged and in many of those cases the commission itself will review its decision and will seek to compromise the matter by taking further appropriate steps.

It is perhaps significant that in the one case successfully reviewed the basis of the criticism of the commission was that it had

fundamentally misunderstood the approach the Court of Appeal would be likely to take.

### **Avoiding bad decisions**

So we have a system in place via the court itself when they refer incorrectly. The commission would acknowledge that inevitably it makes mistakes and commissioners in the past have accepted that they felt the commission is too conservative.

Obviously there also needs to be finality and the decision-making process of the commission allows further submissions to be made once an initial decision not to refer it has been made, but I am concerned that there is no inbuilt review system to pick up those cases where the commission has decided not to refer and the decision is not susceptible to challenge in the Administrative Court. The commission sometimes makes decisions that are not irrational or unlawful but just plain wrong, having come down on the wrong side of the fence when it comes to the decision-making process as to the realistic likelihood of the Court of Appeal quashing the conviction.

I believe therefore that it would be a useful process (useful for the commission as well) for there to be a random sample audit of a small number of cases that have been considered by a panel of three commission members but not referred. My understanding of the procedure of the commission is that decisions to refer on borderline cases are taken by such a panel.

If negative decisions by such a panel were subject to a random review carried out by independent leading counsel or a retired judge then weaknesses of the kind that I have tried to highlight might be exposed, inconsistencies might be eliminated and those bad decisions that leave miscarriages of justice unresolved averted.

# Time to tackle injustice

**Vera Baird QC** is former Solicitor General, **Glyn Maddocks** is a solicitor at Gabb & Co and **Emily Bolton** is an associate with Reprieve

**A**t about 10.30pm on Sunday 22 July 1990, two young black men shot dead the owner of the GNH stores at 155 Lower Clapton Road, Hackney, in course of an attempted robbery. Four months later, 20-year-old Oliver Campbell was arrested because the gunman had worn a distinctive 'British Knights' cap, which had once belonged to Oliver and which was found near the GNH stores in a side street. He was put on an identification parade. Three witnesses including the murdered man's son failed to pick him out but the son then changed his mind after a conversation with a policeman. There was also a weak identification by a passer by. But the key evidence was the confession that Oliver made in his police interview.

Oliver has severe learning difficulties. His intelligence is 'borderline defective' with an impaired capacity to process or remember more than the simplest verbal information. Despite this, there was no lawyer present in the police station and his answers were suggested by leading questions, some of which were at odds with the known facts and some of which were absurd. When he had legal assistance Oliver withdrew his confession and was adamant that he was not guilty, but he was convicted of murder at the Old Bailey in December 1991.

All of the forensic evidence, far from linking him to the crime, exculpated him. The fingerprints found on the counter, the shop door and on a beer can carried by the gunman were

not his and neither were two hairs found in the British Knights baseball cap. Furthermore, Eric Samuels, his co-accused, admitted taking part in the robbery and told the police from the start that Oliver was not there and was not, as the police alleged, the gunman.

Oliver got nowhere in the Court of Appeal, and he served 11 years of a life sentence and was released on licence in 2002.

After that his case attracted the attention of the BBC's *Rough Justice* programme, who paid for extra medical reports and further investigations and who covertly taped Eric Samuels once again confessing to the crime and confirming that Oliver was not involved. Oliver has a team of experienced lawyers, including a leading criminal QC, who has worked pro bono for many years, spearheading cogent and detailed submissions to the CCRC and then seeking a judicial review when they refused to refer the case back to the Court of Appeal. Even with such help Oliver's conviction has not been quashed. His supporters are currently attempting to obtain more fresh evidence to launch yet another application to the CCRC.

## Familiar story

This case is neither unusual nor surprising. It is an all too familiar story to criminal law practitioners. While the facts of each case vary, the errors that produce outcomes like this are very common.

In the 12 years since the CCRC launched,

criminal lawyers have become involved in putting together coherent legal cases for some CCRC applicants to get a better chance of serious attention from the CCRC. Rarely can a prisoner afford good-quality legal representation, and publicly funded legal help is poorly paid and is restricted in scope and quantity. The London rate of £49.70 per hour has not changed since 2001 and payment is not made until the end of the case, which, as Oliver Campbell's case makes clear, is often not for many years. There remain a few practitioners around the country who are still sufficiently committed or financially reckless enough to take on the often thankless task of trying to overturn false convictions, but the number is dwindling, and given the current economic climate there can be little confidence about how much longer public funding for this sort of work will survive.

Members of the public not involved with the workings of the UK criminal justice system find it hard to believe that people are still wrongly convicted. The received view is that there are inbuilt safeguards to avoid errors; that guilt is always established beyond reasonable doubt following a full and fair trial in which all of the evidence that could possibly influence the outcome has been painstakingly examined and that if there is any doubt the Court of Appeal is there to rectify injustice or error.

### **Limited resources and expertise**

The CCRC potentially has the power to undertake a fresh investigation and is tasked with looking at whether anything was missing or mismanaged in the original trial and/or if something fresh has come to light since. However, its resources are becoming more and more limited, and, with more than 1,000 cases a year to progress, it faces an almost impossible task in undertaking the depth and level of investigation

that is required in all but a very few of them.

The fact that the CCRC is an independent body may sound desirable to a convicted prisoner cynical about courts and state institutions. However, the CCRC is also independent of the prisoner and so not subject to the same duty to him as his own lawyer. Further, a study by Warwick University, referred to later, identified a lack of defence expertise at the CCRC, where many of the personnel come from a law enforcement background and, as a result, are not attuned to defence issues and defence investigation methodology. We have an adversarial system and the Crown continues to be partisan, interested in upholding convictions. It is vital therefore to have a lawyer working for the applicant, on whom the burden of rectifying the miscarriage of justice can be extremely high.

The University of Warwick carried out a research project in 2008, examining the extent and impact of legal representation on applicants to the CCRC and ensuing outcomes in the Court of Appeal

It found that only one third of applicants to the CCRC are legally represented and applications where lawyers were involved were almost twice as likely to contain successful submissions. The study also discovered that an unrepresented applicant is significantly disadvantaged when challenging a CCRC decision not to refer a case to the Court of Appeal. Given that the CCRC only refers just over three per cent of the cases it reviews, this represents the vast majority of CCRC applicants.

The implication from the Warwick research is that at least some of the 600 or so unrepresented people of the 1,000 who apply to the CCRC each year should have a lawyer if they are to have a better chance of successfully overturning their conviction. That is also the experience of practitioners. Most typically the CCRC needs fresh

evidence to refer a case. Interviewing potential witnesses and reinvestigating crime scenes require the work of experienced legal professionals and investigators.

Such investigative and legal work is complex and requires insight into both trial and appellate processes. They have to start with very little and work out what steps are necessary, first to ascertain whether there may be a case to pursue.

Those few victims who are lucky enough to find quality representation have an enormous advantage over the vast majority who attempt to overturn their convictions by themselves. It is probably right to say that anything less than this quality of representation will be insufficient. Working one's way back to the essence of a case after it has had a number of hearings, many lawyers, and it has gone in many directions, is a highly skilled task. Anyone without very substantial experience of criminal appeals will just add another layer and will do more harm than good.

### Action stations

To fill this very real justice gap a number of programmes have begun. University-based Innocence projects, the Innocence network and a few private law firms and media-based initiatives such as the miscarriage of justice unit at Inside Times are doing what they can. However, there is nothing that brings together the level of expertise necessary. In response to this a number of specialist lawyers already involved in criminal appeals are developing a new way of engaging with the problem. The intention is to create a not-for-profit, multi-disciplinary specialist legal centre – the Centre for Criminal Appeals (CCA) ([www.criminalappeals.org.uk](http://www.criminalappeals.org.uk)) to support such cases and to try to engage in data collection research and analysis to pinpoint the principal ways in which these cases indicate that our jus-

tice system is failing some accused people.

The CCA's case work will focus on obtaining new facts rather than considering simply the legal issues. The CCA will also review cases with mixed issues of facts and law and utilise advice from specialist counsel with appellate experience to guide and direct the investigations. There will be a dedicated team of investigators, with forensic and other specialist scientists to take the work forward. With a centralised operational headquarters, but with specialised consultant lawyers located regionally, the CCA intends to be positioned to provide high standards of investigation and legal representation to those who may have been victims of unsafe convictions.

The initial intention is to establish a two-year pilot to proof the proposal. The aim is to demonstrate to public and private funders that a specialised, not-for-profit legal centre, with a case investigation focus, can provide a cost-effective solution to the shortage of quality legal representation in this field. The pilot project will use public funding where available, but its data collection, analysis and consequent potential to inform future criminal justice policy on the most frequent systemic failings will be underwritten by grant funding from the private sector. By the end of the two years a sustainable and appropriately combined public/private funding model should be achieved.

Those of us involved in this project have been very encouraged at the positive response received from all sections of the legal profession and the wider community to this proposal, and we are very keen to hear from and receive further support (practical or otherwise) from individuals, organisations or anyone else who can assist us in fulfilling our ambition of enabling everyone who has suffered an injustice to have the benefit of the highest quality representation.

# Governing in prose

Hannah Quirk is a lecturer in criminal law and justice at the University of Manchester

**“You campaign in poetry. You govern in prose.” (Mario Cuomo, governor of New York)**

After long political conflicts or revolutions are over, those who fought on the winning side often find the mundanity of ordinary government business unfulfilling when compared to the certainties and moral purpose of their previous struggles. So it has proved with those campaigning against miscarriages of justice after the establishment of the Criminal Cases Review Commission (CCRC), the first state-funded organisation in the world to investigate wrongful convictions. The criminal justice system has changed radically in the last 25 years, mostly for the better; suspects have more rights since the Police and Criminal Evidence Act 1984 and police practice has improved enormously. Appeals now tend to be based on lack of certainty in the guilty verdict rather than an assertion of innocence.

There are dangers of complacency or of forgetting the damage miscarriages of justice do both to the individuals concerned and to public confidence in the system. The political debate has moved from concerns about convicting the innocent to fears that ‘rebalancing the system’ has tipped too far in favour of ‘criminals’. Fundamental principles such as the right of silence have been eroded and successive governments

have sought to restrict the legal aid budget. Such changes are more insidious and are less likely to galvanise opposition than dramatic decisions at the Court of Appeal, nevertheless resisting them is essential if the system is to operate to the highest standards.

In order to be effective, campaigners against miscarriages of justice must change their approach, recognise the gains that have been made, and not allow these to be eroded while they are busy preparing to fight the last war. The CCRC sought and received little attention in the early years. Now in its adolescence, it is experiencing budget cuts and increased public scrutiny. This essay explores why the CCRC was such a remarkable innovation, assesses some of the criticisms it faces and offers options for further reform.

The CCRC was one of the few widely praised recommendations of the Royal Commission on Criminal Justice 1993. It was established on the day the Birmingham Six had their convictions quashed of the IRA bombing of two pubs in 1975. After their appeals were rejected in 1976, the only way the Court of Appeal could reconsider their case was if the home secretary referred it. In 1988 the Court of Appeal dismissed their second appeal in robust terms. Following further enquiries, it was referred again and their convictions were overturned on 14 March 1991.

There was a sense among reformers that the



criminal justice system was at a critical point, with a series of miscarriages of justice being overturned in short order (including the Maguire Seven and Tottenham Three in 1991; Stefan Kiszko and Judith Ward in 1992, the Taylor Sisters in 1993). By the time the Royal Commission reported, the prevailing political climate had changed in favour of the Michael Howard-Tony Blair competition to be 'toughest on crime'. Nevertheless, it was recognised that the existing system for correcting mistakes was inadequate and inappropriate. The Home Office unit charged with investigating these cases had limited resources and expertise. Political involvement in individual cases contravenes the separation of powers between the judiciary and executive. The home secretary faced potential conflicts of interest as he had ministerial responsibility for the police, who may have been criticised in appeals. Such decisions are also difficult for an elected politician as these cases often arouse strong public opinion. The decision to pass such cases to an independent body received widespread approval.

### Remarkable innovation

The CCRC was established by the Criminal Appeal Act 1995 and began work in 1997. The CCRC was a remarkable innovation; an independent public body established to investigate wrongful convictions and the appropriateness of sentences. It currently has a staff of around 80, an annual budget of almost £7m, and the authority to refer cases directly to the appropriate court. It can require access to relevant material held by any public body; it also has power to direct the police to carry out investigations on its behalf. Legal aid is available to applicants seeking judicial review of the commission's work, and applicants are free to reapply if their cases are turned down. Other jurisdictions have ad-

mired the work of the CCRC and commissions have been established in Scotland and Norway.

The CCRC receives around 1,000 applications a year. It refers just under four per cent of applications; of these around 70 per cent have the conviction quashed or varied, or the sentence altered. The CCRC has discretion in referring cases and it is important that it exercises its judgment robustly. Some have criticised the CCRC for not referring 'enough' cases. Such criticisms have tended to be non-specific and

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**“Campaigners against miscarriages of justice must change their approach, recognise the gains that have been made, and not allow these to be eroded while they are busy preparing to fight the last war”**

this is an impossible assessment to make without detailed knowledge of each case. Referrals are made by a committee of at least three commissioners but cases can be turned down by a single decision maker. Publication of the statements of reasons (the decision-making document completed for each case) might go some way towards addressing these concerns. Publication could offer a useful resource to researchers interested in the area, make the process more transparent and allow for trends in its decision making to be observed. Names could be redacted in sensitive cases, as happens in Court of Appeal judgments.

The criticism of some commentators that the CCRC does not care about the 'innocent' is spe-

cious. The CCRC does not look at ‘innocence’ but considers only if there is a ‘real possibility’ that the Court of Appeal will find a conviction unsafe; that is its statutory remit. The Court of Appeal listens to the new evidence or argument offered by the appellant and considers whether, if the jury had heard this, it would still have been certain to have convicted. If the court is not certain that the jury would have convicted – even if it thinks the jury probably would have done so – then the conviction should be declared unsafe. The presumption of innocence means that, if a conviction is quashed, the individual is legally innocent even if, in cases such as that of the M25 Three, the Court of Appeal has stated that the conviction is being quashed solely because of irregularities in the prosecution case.

Some have argued that this focus on legal technicalities means that the CCRC might not refer a case of somebody factually innocent but no examples have been given of such a case. (The CCRC can refer a case in ‘exceptional circumstances’ in the absence of new evidence or argument, but it has not yet done so.) Those wrongly convicted who are ‘factually innocent’ may find this technocratic remedy unsatisfactory but the test of unsafety is more widely protective than a test of innocence. In the absence of DNA evidence or a video recording, it is almost impossible to establish innocence.

### Missing the point

After the CCRC was established, organisations such as JUSTICE announced an end to their casework on miscarriages of justice, and television companies lost interest in *Rough Justice* and *Trial and Error* type programmes. The CCRC has been criticised for causing the demise of grassroots campaigns against miscarriages of justice; yet this seems to miss the point. These

groups had been a response to the inadequacies of the system, which have now been remedied. The CCRC took over the casework function of these groups, but it has a different role. It does not act for applicants; if it refers a case, it takes no part in the appeal, applicants must instruct their own representatives. Campaign groups and journalists had some notable triumphs but could work on the cases of only a tiny proportion of those claiming to have been wrongly convicted. Some equally deserving cases never got the oxygen of publicity.

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**“The CCRC has become more open in recent years, allowing academic research, engaging with campaign groups, running conferences and recently allowing journalists to observe committee meetings”**

Anybody can have their case considered by the CCRC regardless of their wealth, connections or campaigning abilities. Access to justice should not depend on these factors. Investigations into historic sex abuse cases, for instance, are potentially a great source of injustice but are complicated cases where the truth is often unknowable and will not make good television. At a time when state functions are being delegated to the Big Society, this is one responsibility that is too important to be left to volunteers. (It should also be remembered that society can be one of the causes of wrongful convictions when the police are under public pressure to ‘solve’ high-profile crimes quickly.)

If the state imprisons individuals, it has a duty to investigate where doubts are raised about a conviction. As a solicitor once remarked to me: "This work is too important to be left to a bunch of meddling kids and a Great Dane!"

The CCRC is supposed to act to improve public confidence in the criminal justice system. This is one area in which it has not done enough. It has tended to focus on individual cases rather than using its unique perspective to draw conclusions at a systematic level. In the early days, it said that its case sample was too small, atypical and covered too great a time period for any useful analysis to be undertaken. It might equally be argued that these are the only cases subject to such an in-depth post-conviction review and could offer lessons for individual police officers, lawyers, or expert witnesses if they are still serving. The CCRC has become more open in recent years, allowing academic research, engaging with campaign groups, running conferences and recently allowing journalists to observe committee meetings.

### **Delicate position**

While groups such as Liberty and JUSTICE speak out about potential causes of miscarriages of justice, such as extended periods of detention without charge in terrorism cases, or cuts to police station legal advice, the CCRC is in a delicate position. It is a non-departmental public body, but it relies on the Ministry of Justice for its funding. It also has an awkward relationship with the Court of Appeal, which has the ultimate say in determining the outcomes of cases. The CCRC could speak with authority about the risk factors for miscarriages of justice, but there are dangers if it appears partisan when one of its strengths is its neutrality. If it is seen by the police and prosecution as pro-applicant, this may damage working relation-

ships and its ability to investigate cases. It is vital, however, to maintain public confidence in its independence from others in the criminal justice system. While it should remain disinterested in its investigations, it should never be uninterested in the causes of wrongful convictions. By making more of its material publicly available and producing thematic reports, either in house or via academics, its experience could inform these debates.

There should be some responsibility within the criminal justice system for alerting potential applicants. The CCRC has not been proactive in seeking applications. This could be an onerous duty where, for instance, an expert witness or technique is discredited, or the pending decision regarding those interrogated without legal representation in Northern Ireland. In the sudden infant death syndrome cases, the Solicitor General's Office screened all the possible cases before passing them onto the CCRC. This seemed to be an ad hoc decision, but one which would seem a more appropriate role for the CCRC.

Since the safeguards introduced by the PACE, there have been few clear-cut miscarriages of justice. It would be wrong to suggest that serious mistakes no longer occur but these seem more likely to arise from mistakes rather than misfeasance. Emerging from the campaigns around cases such as the Birmingham Six, the CCRC finds itself engaged mostly in routine, worthy but essential work.

The creation of the CCRC marked a new stage in criminal justice and new measures are necessary to mark its achievements and to hold it to account. "Governing in prose" may lack the excitement and certitudes of previous campaigns, but, when recalling what happened in those cases, we should be grateful not to live in "interesting times".

# Up to the job

**Ralph Barrington** is a former CCRC investigator

Critics of the commission say that it is not really up to doing its job. It is suggested that the wrongfully convicted are being failed by the criminal justice system and a new approach is required. I don't understand these arguments. The commission cannot respond to public criticism about its decisions in individual cases and it is not easy for it to deal with general comments suggesting that it has become ineffective and ought to be replaced. My recent retirement has allowed me to say something about life at the commission and how it approaches its work. I hope that I can make a useful contribution to the debate by shedding some light on the realities of dealing with alleged miscarriages of injustice.

The Criminal Appeal Act 1995 set up the commission, sets out its functions and gives it the powers to do its job. The Act provides the statutory test for referrals of convictions to the Court of Appeal – generally there must be new evidence or new argument which in the commission's view raises the real possibility that, if referred, the conviction would not be upheld. A significant number of applicants are ineligible or are judged to have no reviewable grounds.

Cases accepted for review are allocated to a case review manager (CRM) who will carry out the necessary work. The first thing to do is to identify the issues raised and if possible agree them with the applicant (and legal representative). This is often a relatively straightforward process, but in some cases applicants make voluminous submissions which can be poorly writ-

ten and which can take a great deal of time to distil down to a workable list of issues to address.

In the majority of cases the CRM finds no basis upon which a referral could be considered and a single commissioner makes the decision. The CRM prepares a draft provisional statement of reasons (PSOR) for the single commissioner to consider. The draft PSOR will list the issues raised by the applicant and explain what the commission has actually done during the course of the review. It then responds to each issue explaining why in its provisional view a referral cannot be made.

Once the single commissioner concludes that the review has been satisfactorily completed and a non-referral is the right decision, the PSOR is sent to the applicant (and legal representative). The applicant is given an opportunity to make further representations. If none are made the case will be closed. Many applicants do make further representations and these are carefully considered before a final decision is made.

Where the CRM finds that there is a basis on which a referral could be considered the case goes before a committee of three commissioners. A single commissioner will also ask for a committee to consider a case if not entirely satisfied that a non-referral is the right decision. Many cases are far from straightforward and committees will often ask for further enquiries to be carried out before a final decision is made.

## Developments in forensic science

My job at the commission was to advise on in-

vestigation work. It always helps if the truth can be established, but opportunities to do so are quite rare. Rapid strides have been made in the development of forensic science and especially with DNA. Where an applicant says he is innocent and forensic science could potentially assist his case the commission will arrange for further testing. There have been a few spectacular successes but somewhat surprisingly there has also been the odd case where an applicant has asked for a test to be conducted that has only served to confirm his guilt.

In murders and other serious crimes there may be a number of unidentified finger marks found at the crime scene. It is only in relatively recent times that it has been possible to run a computer check nationally to try to identify these marks. Where the Crown's case was strong, new evidence to show that at some time someone with a criminal record was in the particular premises or vehicle is not likely to help very much. If, though, the Crown's case was circumstantial with no direct evidence of guilt, then it is theoretically possible that a finger mark, unidentified at the time of the original investigation, could now be shown to belong to someone with a propensity to commit the very crime for which the applicant has been convicted. Where this theoretical possibility exists national checks are made, but I can only recall one case where the identification of a previously unidentified crime scene finger mark threw up a potential new suspect.

### **Child sex abuse cases**

Child sex abuse represents a significant proportion of the commission's cases. These are difficult cases. Offences committed by strangers are normally reported at the time, but those committed within a family or in a care home are sometimes not reported for years. There is rarely any independent evidence and so at trial it comes down

to the victim's word against that of the alleged offender. Victims often come from very troubled backgrounds and some children are good at telling lies. The words of denial from the guilty defendant when claiming to be innocent are the same words used by the truly innocent defendant facing a false allegation. The jury has to decide who is telling the truth and who is not and they are bound to get it wrong sometimes.

Full disclosure by the prosecution is crucial in child sex abuse cases. If the victim's background is fully disclosed and any relevant matters have been raised by the defence the jury will know all that it should know about the victim when deciding whether to accept his or her evidence. The commission is in the unique position of being able to use its powers under the Act to check to see if all relevant information has, in fact, been disclosed. Social services files are routinely checked. Sometimes undisclosed material is found, which in the commission's view would have assisted the defendant's case at trial and ought therefore to have been disclosed.

The question of social services files on children is a difficult one. Social services departments rightly regard their files as highly confidential. Judges, it seems, will not allow the defence to go on so-called 'fishing expeditions' and yet that is exactly what the commission does. The non-disclosure of relevant material is rarely, if ever, deliberate, but busy social workers and police officers do not always see the relevance of some material. The commission, by inspecting the social services files relating to the victim, does something the defence cannot do and this will occasionally lead to a referral. It seems a little odd that the commission has the power to find material post trial, which if disclosed at trial might have led to a different verdict and possibly to no prosecution at all. I doubt that there is an easy answer to this, but it must be better to avoid

an unfair conviction than put it right some years later.

Some of the checks that the commission routinely makes in child sex abuse cases are also carried out in sex cases with adult victims. The commission will routinely check the files of the Criminal Injuries Compensation Authority (CICA). There have been one or two cases referred, where, in the application to CICA, the victim has exaggerated what actually occurred to such an extent that, in the commission's view, had the jury known this it might not necessarily have accepted the victim's evidence. Victims of sexual offences are also checked through a national police system designed to make information held by one police force available to all police forces. This system was apparently introduced to address the failings identified by the enquiry into the Soham murders. In a case where the applicant has been convicted of, for example, 'date rape', it is now possible for the commission to check whether the victim has made any other allegations of this kind. Before the introduction of this system it was possible for a man to be convicted of rape without anyone knowing that his victim had previously made what was accepted to have been a false allegation of rape in another part of the country.

### **Drug trafficking**

Persons convicted of drug trafficking receive very long sentences and also represent a significant proportion of commission cases. In many cases the applicant will not have been found in possession of drugs or large amounts of cash. The Crown's case will often be based on observed meetings and records of telephone contact between the key players. Each applicant will raise his or her own particular issues and, where investigation is possible, and appropriate, enquires are made.

Applicants in these cases often claim that there has been some form of undisclosed skulduggery on the part of the investigators, which, if true, would render their conviction unsafe. They will, for example, allege that an unauthorised participating informant has been used. The commission is usually able to establish how the operation against the applicant and his co-defendants began and how it developed right through to the trial. The commission can look into the deepest secrets of the investigators to check that all is as it should be. While the commission is never in a position to vouch for the honesty of the covert side of a policing operation, its enquires will take it to a position where it can say that it is satisfied that there is no evidence of wrong doing and, just as importantly, no reason to believe wrong doing has occurred.

In its early days the commission dealt with a series of cases where lack of adequate disclosure to the court about the role played by participating informants involved in the importation of heroin led to a number of referrals and successful appeals. These cases apart, referrals in serious drug trafficking cases have been rare.

### **Section 19 investigations**

Section 19 of the Act gives the commission the power to require a chief officer of police to appoint an investigating officer to make enquiries to assist the commission. This power, which is exercised by a committee of three commissioners, has only been used on 43 occasions in 14 years. Some commission reviews require the investigation of matters that might involve the commission of offences such as perjury and/or perverting the course of justice. The police have the responsibility and powers to investigate possible criminal offences. Individuals, in a variety of circumstances, have been interviewed as suspects by the police as part of a commission

review. Commission employees are not responsible for the investigation of suspected offences and therefore cannot administer a Police and Criminal Evidence Act (PACE) caution.

Some of the section 19 investigations instigated by the commission have been very large, have lasted a long time and have cost the force concerned a great deal of money. Others have been much shorter. The low number of section 19 investigations suggests that this is a route the commission takes only when considered absolutely necessary. While this is probably true, the need for police involvement to get the necessary enquiries made is always the deciding factor. In the commission's early days some high-profile referrals followed a section 19 investigation, and at one stage in the commission's history 50 per cent of section 19 cases had led to a referral. Although referrals from section 19 cases still occur, the referral rate has dropped in recent years. I am satisfied though that the lower referral rate is not in any way related to the quality of police investigations, but is simply due to the nature of the individual case themselves.

### Retracting witnesses

In a relatively small number of cases the application involves a suggestion that a prosecution witness has made or is prepared to make a retraction of their trial evidence. Most, but by no means all, retraction cases relate to child sex abuse within a family. Retracting witnesses have to be interviewed in an effort to determine which of the two versions given is true. The need to interview a retracting witness presents the commission with something of a problem. The commission has no responsibility for the investigation of criminal offences, but does this mean that it can simply interview an unrepresented witness knowing that the witness might admit perjury? One view is that the commission's business is in-

vestigating possible miscarriages of justice and it needs to find out exactly what the retracting witness has to say. It should not have to worry about any form of warning against self-incrimination. The opposing view is that the commission is a responsible public body that should not be interviewing unrepresented witnesses without, at the very least, suggesting that legal advice be sought.

The commission basically has three options: it could choose to interview a retracting witness without worrying about the implications of an admission of perjury, it could instigate a section 19 police investigation, or it could make an approach to the Crown Prosecution Service to see if it would be prepared to give an undertaking not to use anything said to the commission by a retracting witness in a prosecution for perjury.

The commission has normally been prepared to interview the, now often much older, victims of child sex abuse without worrying about the question of perjury. The Court of Appeal is only likely to accept new evidence of a retraction if there is some supporting independent evidence, or at the least some very good reason to believe that it is true. It is important, therefore, that the retracting witness is carefully interviewed in order to find, if it exists, the supporting evidence or reason to believe the new account. Sometimes it is clear that there is nothing to support the new account and no credible explanation for making the retraction or the timing of it. Child sex abuse victims who later retract are not very likely to be prosecuted for perjury and the commission has not been criticised for conducting this type of interview.

Witnesses who wish to retract evidence given as an adult are a different matter in the sense that if there was evidence to show that an adult witness has deliberately given false evidence it is usually in the public interest to prosecute. The commission has not normally been prepared to

interview adult retractors without regard to the question of perjury. A section 19 police investigation might seem the obvious way forward, but the retracting witness may be interviewed under caution and the legal advice is likely to lead to a 'no comment' interview.

There have been a handful of cases where the retracting witness has indicated a willingness to tell the truth so long as there is no risk of prosecution. On odd occasions the Crown Prosecution Service has, somewhat reluctantly, given an undertaking not to use answers given to the commission's questions in any prosecution for perjury. This is not an immunity from prosecution, and, in theory at least, a retracting witness with such an undertaking could still be prosecuted for perjury if there was sufficient other evidence.

The manner in which retracting witness interviews are conducted is decided on a case-by-case basis. There is an obvious conflict between the interests of the applicant and the interests of the witness who in retracting their trial evidence is admitting perjury. It would be difficult to resolve this conflict without seeming to encourage the retraction of evidence given on oath at trial.

### **Competent and dedicated**

The commission has been subjected to a good deal of criticism for most of its life. The first dozen or so referrals it made all led to the quashing of convictions. I recall it being said that the commission was only referring 'dead certs' so that it looked good and was failing to apply the 'real possibility' test laid down by the Act. The fact that the record now shows that in more than 30 per cent of its referrals the appellant has been unsuccessful seems to have done nothing to satisfy those who suggest the commission is too cautious.

I have attended many decision-making committee meetings and I have never once felt that

the commission as an organisation is setting the hurdle too high. I have never had the slightest reason to feel that a committee decision has been made other than on the commissioners' view of the merits of the case. I have never seen the slightest reluctance to refer a case if the real possibility exists. No defendant in a contested case likes to be found guilty and no appellant likes to lose an appeal. It is perfectly understandable that applicants are unhappy with commission decisions not to refer their case. Since the vast majority of applicants do not get their case referred the commission is never going to be popular, but how does this translate to the commission not being up to the job? I thought its job was to turn down cases that did not meet the statutory test.

The commission has a very competent and dedicated workforce, but I would not suggest that things are never missed. In a number of referrals the key point has not been raised at all by the applicant or his legal representative, but has been spotted by the commission itself.

Applications to the commission have remained at a fairly high level. Many of the cases have little or no merit. Cases are screened by commissioners and those who simply have no grounds that could be reviewed are rejected, but not without an opportunity for the applicant (and legal representative) to make further representations. Screening commissioners must be careful though to ensure that there is no potential for the commission to find something capable of undermining the safety of the conviction in material to which only the commission can gain access. Again I do not suggest that things helpful to an applicant are never missed, but the commission as an organisation does its best to prevent this.

Some of the loudest critics of the commission are those involved in campaigns to support in-



dividuals who claim to be innocent. It must be very frustrating for your efforts to be seemingly blocked by the commission, but the reality is that it is not blocking anything; the problem is the absence of anything that is going to get the conviction overturned. If an applicant, legal representative or campaign group feels that a commission decision is unreasonable then a judicial review is one option. Another is to publish the commission's final statement of reasons for its decision not to refer the case to the Court of Appeal. This would expose the commission to a wave of bad publicity that it would richly deserve if it was, in fact, making unreasonable and irrational decisions not to refer. To the best of my knowledge no campaign group has ever published a commission's final decision not to refer and one is entitled to ask why. In any event, I do not believe it makes any sense to judge the commission's performance in general on the basis of its decision in any particular case.

The commission's critics also cite a lower rate of referrals to the Court of Appeal as evidence that it is not the organisation it once was. It is true that referrals in recent years have been fewer, but surely this was only to be expected. In the 1980s and 1990s there were a number of high-profile cases of alleged miscarriage of justice. The concern about our system of justice led to the Runciman Commission and in turn to the Criminal Appeal Act 1995 setting up the commission. The commission, when it started work in 1997, inherited 279 alleged miscarriage cases from the Home Office including many of the high-profile cases that were yet to be resolved. In the commission's first year it received 1,103 new cases, many dating back to the 1980s, 1970s and some even earlier. This number of applications in a single year has never been exceeded.

Applying modern standards of fairness to old cases is likely to lead to some referrals and most

of the commission's more notable referrals relate to convictions in the last century. We are now more than a decade into the 21st century and things have changed for the better. The disclosure regime set out by the Criminal Procedure and Investigations Act 1996 has now been operational for 14 years. While the regime has its critics the responsibilities for proper disclosure of relevant material are clearly defined. The Regulation of Investigatory Powers Act 2000 also introduced important changes that regulate all aspects of covert policing. It would be naïve to ignore the effect of 14 years of commission activity. It has exposed serious failings on occasions, which must have had some effect on the organisations and individuals responsible.

I am sure that I am not alone in thinking that our system of criminal justice is better regulated and fairer than it was in the past. I don't think it is right to judge the commission's performance by the number of referrals alone, especially since most of its best work ends with a non-referral. The commission can only deal with the applications it receives. If improvements in our system of justice have led to fewer miscarriages of justice and consequently fewer referrals then that is something we should rejoice rather than try to undermine the organisation that has played its part in bringing about those improvements.

So, is it time for a new approach? Well it depends on where you start from. I have left others to debate wider questions about the approach taken by the Court of Appeal or whether the 'safety of the conviction' is the right basis for determining appeals against conviction. If, though, the starting point is that a new approach is required because the commission is a failing organisation that is no longer up to doing its job, then my response is unequivocal – there is no evidence at all to support this assertion and a new approach is quite unnecessary.

# Get me out of here

**Louise Shorter** was a journalist on *Rough Justice* and runs Inside Justice

In the same week that the BBC announced it was to axe *Rough Justice*, three Court of Appeal judges quashed the murder conviction of a young man, whose wrongful conviction had been exposed by the programme. Barri White was in no doubt about the part *Rough Justice* had played in securing his freedom when he told reporters on his release: "Without *Rough Justice* I would not be here today." Today he is a happily married man and a father. Unusually for miscarriage cases, the local police force re-opened their files and recently charged a new man in relation to the murder. He will stand trial later this year.

The BBC's 2007 decision to quietly ditch its 27-year-old household-name strand, genuine public sector broadcasting, was in part financial: factual output at the corporation was being slashed, a period *The Guardian* described as "swingeing budget cuts". But chief executive Michael Jackson's description of his Channel 4 show *Trial and Error* as "a bit 1980s" revealed far more about the reasons media execs fell out of love with miscarriage of justice stories, in a climate of reality razzmatazz and celebrity schmoozing.

A little over one hundred years after England had its collective appetite whetted with the original whodunit, the Road Hill House murder case (recently documented in the hugely successful book and TV adaptation *The Suspicions of Mr Whicher*), the media latched onto a new twist on an old theme: miscarriages

of justice. In 1860 the death of the middle-class child in a house locked from the inside caught the imagination of the public turning them into amateur detectives wanting to solve the horrific mystery of who had cut the throat of the toddler before forcing him headfirst into the cesspit below the outside privy. In 1961 murder once again grasped the imagination of a public hungry for details of an illicit couple, forced at gunpoint from a cornfield in Buckinghamshire to drive through the night. First Michael Gregsten was fatally shot, then his mistress Valerie Storie was raped and shot, though she survived. A BBC *Panorama* programme in 1966 examined the case in detail and questioned whether James Hanratty, hanged four years earlier for the crimes, had been guilty at all. It is a question that endures 50 years on.

It was in the 1980s that miscarriage of justice cases became staple teatime fodder for the Great British public. Peter Hill, inspired by the work of Ludovic Kennedy and Tom Sargent at Justice, devised the BBC programme *Rough Justice*. In 1992 he told *The Guardian*: "At that time there were equally important programmes being made by John Willis at Yorkshire Television and Ray Fitzwater at Granada. We were all investigating mistakes made before a case came to trial. That was the problem in the early eighties – the legacy of police misconduct from the seventies." In 1985 *World in Action*, a strand seen worldwide, which in its heyday drew audiences of 23 million in Britain alone,

highlighted the case of the Birmingham Six, which of course ultimately ended in 1991 with those iconic shots of the six triumphant men, arms aloft, their names finally cleared.

### **Rough and ready**

I joined the BBC production team at *Rough Justice* in 1998 at a time when the programme still had a dedicated team of half a dozen or so members at any one time, working on a range of cases. Usually two programmes were made every year, one less than in the heydays of the 80s but similar in terms of the level of detailed investigative work done and comparable in results for the prisoners. When I joined, the team was made up of a couple of former barristers working as interns looking for a route away from the Bar teamed with journalists and researchers. It is hard to underestimate how difficult the job of raking over a murder case is once the conviction is in. The training opportunities programmes like *Rough Justice* and *Trial and Error* provided were hugely important in keeping the spectre of shoddy police work and dubious expert evidence under the public spotlight, and, of course, in helping innocent prisoners and their families desperate for help. In the ten years I worked on the programme I was constantly amazed by the level of support and assistance given by solicitors and barristers working pro bono for a cause, and an individual, they believed in.

From 2003 *Rough Justice* saw its operation scaled back, but it still continued to make critically acclaimed programmes about injustices. The nature of television commissioning meant that *Rough Justice*, with its brief to deliver one or two programmes every year, allowed in-house, immediate commissioning of programmes which were difficult, controversial and risky.

In 2003 I made a programme that came out of the *Rough Justice* stable called *Life after Life*. It was about John Kamara, a man who'd spent 20 years in prison for a crime he did not commit, whose case had first been highlighted by Channel 4's *Trial and Error*. The programme showed the injustice done to wrongly convicted people who won their appeals and had their convictions quashed. These men were set free at the Court of Appeal without the safety net of parole, probation and a supported return to freedom in place for guilty people. John Kamara was released with the clothes he stood up in, two sacks of legal papers he'd carried with him throughout his time in jail, and a £46 travel warrant. He had no home, had lost contact with virtually all of his family, and, without a national insurance number, had no identity. It wasn't long before he wished he was back inside. One reviewer said of the programme: "In 50 minutes, BBC1 last night redeemed itself for almost all of its recent lapses with *Life after Life* – a compelling and important documentary in the very best traditions of campaigning television." The programme would not have been made without *Rough Justice*. In 2006 a miscarriage of justice advisory service was launched at the Appeal Court to help people like John Kamara.

In 2004 a *Rough Justice* programme showed CCTV footage of a former soldier called Christopher Alder who died while lying handcuffed as police officers looked on, wondering whether he was faking it. After more than ten minutes on the station floor, he choked to death on his own blood and vomit. Following transmission of the programme, the then home secretary David Blunkett ordered the IPCC to conduct a full review, which resulted in a scathing report declaring four police officers guilty of the "most serious neglect of duty."

*Rough Justice* is still a rare beast of a programme

which the public remembers instantly despite it being off-air for five years. Today I run a not-for-profit organisation called Inside Justice, which is funded through charitable donations to investigate alleged miscarriages of justice. Any mention of my training ground on *Rough Justice* to lawyers or experts, witnesses or police, results in immediate recognition of the series and universal respect, tinged with a healthy element of trepidation from some quarters. Television controllers keen on instant gratification for commissions within their tenure may have fallen out of love with the genre, but it's not a view reflected by audiences. *Life after Life* had the highest audience figure for its timeslot for the entire year. Sean Hodgson's release in 2009, after spending 27 years in prison for a murder he did not commit, received wall-to-wall media coverage and the man was so hounded by the press his location on release was kept secret. A Google search about the case gets more than half a million hits worldwide.

The problem we all face in bringing these stories into the public arena is one of risk and investment compared to today's standards of quick turnaround telly fixated with celebrity. Simon Ford who ran the *Rough Justice* unit says "the tragedy of losing *Rough Justice* is not just that television audiences are not being regularly informed of miscarriages. It is that a dedicated unit, tasked explicitly to do new journalism and fresh investigation has been disbanded. Newspapers will no longer afford dedicated investigative teams and it seems neither will public service broadcasters."

### Going public

Inside Justice was set up with charitable funding, primarily from the Esmee Fairbairn Foundation, to do the legwork required to come up with new evidence to get innocent

prisoners out of jail, and their stories into the public domain. The case of former nurse Colin Norris, convicted of murdering elderly patients in his care with insulin injections, was investigated by Inside Justice. Once convinced of his innocence we took the case to the BBC and then, in collaboration with them made a 30 minute TV documentary about his plight. His application for a referral to the Court of Appeal is now being considered by the Criminal Cases Review Commission.

We are not an alternative to a firm of solicitors, we work closely with existing legal representatives or can find a good solicitor if one is not already in place, but our expert advisory panel and extensive contacts can bring the opportunities for new forensic work to be done, which the prisoner could neither afford personally, nor qualify for legal aid to pursue. We re-examine case papers and trawl over unused material: vital work that won't, in today's climate, be covered by legal aid. We can knock on doors and track down witnesses, and shine that all-important spotlight on an increasingly ignored area of the criminal justice system. We try to work closely with Innocence projects and are forging links with universities and laboratories, hoping that our combined efforts will bring justice for individuals who have been forgotten and are lost in the system.

It is important that these stories be heard to inspire future generations of lawyers, experts and investigative journalists to work in this difficult field, so they in turn can help future generations of innocent people, who will undoubtedly be wrongfully convicted. Miscarriages of justice weren't invented in the 1970s and '80s, television just discovered the notion then and started digging. They didn't go away either at the turn of this century, and nor did the public's interest.

# Remember the roots

**Dr Eamonn O’Neill** is a lecturer in journalism at the University of Strathclyde and programme director of the MSc in investigative journalism

**T**he involvement of journalists carrying out investigations into alleged miscarriage of justice cases and influencing the criminal justice system in the UK has a long provenance.

Think of Sir Arthur Conan Doyle, for example, using his skills and public authority to investigate and publicise the George Eldaji case (which led to the creation of the Court of Criminal Appeal in 1907) and the Oscar Slater case in 1908 after the German-Jew was convicted of the murder of 83-year-old Marion Gilchrist in Glasgow in May of that year and sentenced to death. A huge public outcry followed and a campaign organised by supporters was soon established, featuring lawyers, judges, policemen and Conan Doyle. But it was to take another 20 years before the verdict was finally overturned (on the grounds of poor direction from the judge) and Slater was awarded £6,000 compensation. The publication of his little book *The Case of Oscar Slater* in 1912 harnessed his investigative skills and mastery of the short story to astonishing affect.

Later in the 20th century, the public’s imagination was caught in similar fashion by the cases taken on by the likes of Ludovic Kennedy. His list of investigations and campaigning reads like a grim roll-call of modern-age miscarriage of justice cases that shamed the British

criminal justice system: Timothy Evans, Derek Bentley, Stephen Ward, the Guildford Four and the Birmingham Six.

The University of Strathclyde is now home to the Patrick Meehan collection, an archive donated to us by Kennedy himself in 1986, and comprises several boxes of files, papers, correspondence, books and campaigning material relating to the notorious July 1969 robbery of a Mr and Mrs Archibald in their west-coast home, which later cost the latter her life (see [www.strath.ac.uk/archives](http://www.strath.ac.uk/archives) under *Our Collections, Other Archival Collections*). Patrick Meehan, a known robber, was later arrested but his co-accused, James Griffiths, was killed while resisting arrest. The archives reveal how Kennedy, then a well-known broadcaster and author, was approached by Meehan and his family, seeking his journalistic skills to reinvestigate the case. He wrote letters to the press, influential colleagues, placed articles in newspapers and organised several, unsuccessful, appeals to the secretary of state for Scotland. Another suspect widely held to be culpable of the crime, was tried (albeit unsuccessfully) but it was the posthumous public release of a confession by another accomplice, William ‘Tank’ McGuinness, to the crime which finally led to Meehan’s release.

The archive includes Kennedy’s brilliant

book on the case *A Presumption of Innocence* published after Meehan was released in 1973 and had received a controversial pardon (Meehan told me in 1994 shortly before his death: “How can I be pardoned for a crime I didn’t do?”). The implicit role of himself as a ‘custodian of conscience’ was taken for granted by Kennedy and he clearly felt that he had to take the case on as a long-term project once he had convinced himself he was dealing with a wrongfully convicted man (see *Custodians of Conscience: Investigative Journalism and Public Virtue*, Ettema and Glasser, Columbia University Press, 1998).

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**“While the legal system finally did the right thing and overturned the wrongful conviction in November 2002, the CCRC would not have acted as it did without press pressure and it was left to me and other journalism colleagues to ask the awkward questions”**

The tradition established by Conan Doyle, Kennedy, and later Robert Kee, Paul Foot, Chris Mullin and others, led directly to the BBC’s superb *Rough Justice* series and later (involving some of the same team) *Trial and Error* at Channel 4. The successes racked up by them, and also the conspicuously brave campaign to free the Birmingham Six by Granada TV’s *World in Action* series, had a direct impact on the decision to form the Criminal Cases Review Commission (CCRC) in 1997 (see, for example, Chris

Mullin’s submission to the Royal Commission on Criminal Justice, established after the release of the Birmingham Six, at [www.chrismullinexp.com](http://www.chrismullinexp.com)).

### **Vital investigation**

However, that long and hard-won tradition came grinding to a semi-voluntary halt when the CCRC was established since it was assumed the requirement for investigative journalists to be involved in cases had more or less ended. Alas, that was precisely when I found myself in the longest and most challenging investigative project of my career.

In the 11 years I investigated the Robert Brown case for Scottish TV, BBC and numerous broadsheet newspapers, I dealt with both the old C3 department of the Home Office, and later the freshly-minted CCRC. The 19 year-old unemployed Scotsman had been imprisoned in 1977 for a violent murder of a 56 year-old single woman named Annie Walsh in Hulme, Manchester. In both my long dealings with C3 and the CCRC I found that any actual ‘on-the-ground’ investigative techniques were conspicuous only by their absence. In Brown’s case this was particularly unfortunate since breakthroughs were gained by me using precisely this approach (e.g. finding alibi witnesses; discovering witnesses changing testimonies; location fresh witnesses testifying to police brutality; obtaining independent forensic testimony from scientists at the University of Strathclyde; receiving official secret papers from Home Office sources supporting Brown’s claims of violence during interrogation; and, finally, strong evidence from senior police sources that the main detective leading the murder hunt was himself criminally corrupt at the time of the Brown case).

Uncovering such compelling evidence in the

tradition of earlier historical cases and then publishing it took the case out of the shadows and threw light on mucky goings on down the years. While the legal system finally did the right thing and overturned the wrongful conviction in November 2002, and freed Brown after almost 26 years behind bars, I remain convinced the CCRC would not have acted as it did without press pressure and it was left to me and other journalism colleagues to ask the awkward questions about why a secret Greater Manchester Police report (The topping report) identifying police corruption at the heart of the case as far back as 1979 was buried for more than 22 years and only surfaced at the 11th hour when the case was sent to the Appeal Court? I am still waiting on an answer and I am still banned from discussing the contents of the report since it is still protected by a public interest immunity certificate.

### Necessary criticism

Some have criticised the recent wave of negative comment on the CCRC from academic, press and campaigning quarters. I understand this touchiness and resentment but I also reject it. The CCRC is a publicly-funded body, unique internationally, and therefore holds a special but still publicly-accountable position. No more than anyone should have stayed silent about the plodding nature of C3 back in the bad-old days, should anyone now feel it's wrong to critically engage with the work its successors at the CCRC are doing.

The key criticism I hear time and again, however, is that the 'desktop review' approach of the CCRC reflects an institutional unwillingness to properly 'investigate' cases. I don't believe that is true. What I do believe however, is that the CCRC's lack of early-stage investigation into cases reflects staff inexperience (from

top to bottom) in understanding how some door-knocking, witness-chasing and fieldwork can save time, money and effort and sometimes yield astonishing results. Now, a kneejerk solution to that would be to bring in some old cop-pers – like MI5 employs so-called, 're-treads' (retired employees hired on a 'consultancy basis') for its vetting process – and send them out to ask questions. But that would be a massive mistake, since experience shows that the last thing those involved in alleged wrongful convictions want to see is an old detective.

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**“The key criticism I hear time and again, however, is that the ‘desktop review’ approach of the CCRC reflects an institutional unwillingness to properly ‘investigate’ cases”**

Instead, the CCRC should look at its roots and understand how it would not exist had it not been for investigative journalists and their unique work. Moreover, it was the fruits of their techniques, practices and investigative models that led to the overturning of high-profile cases that shook the foundations of the British legal system and forced the CCRC into becoming a reality. The cases involving input and leadership from investigative journalists stretch back over a century and have touched every jurisdiction with the UK. The CCRC has been in existence for less than a decade and a half and is very much a work in progress, but evidence indicates this body needs to radically change its approach to the former, in order to achieve more of the latter.

# Calling for renewed media interest

Sam Poyser is a senior lecturer in applied criminology and policing



In 2003, campaigner Dennis Eady noted that “investigative journalism has for many years been virtually the only way that new evidence to overturn a conviction could be found. Despite the advent of the CCRC, this is... still the case to a large extent today.” I conducted empirical research that examined the role of the media in revealing and remedying miscarriages of justice. The results of interviews with more than 60 individuals involved in miscarriage cases (including victims, lawyers, campaigners, experts, police officers, politicians and members of the media) support the assertion that, despite the existence of the CCRC, journalistic involvement in this area is still required, but has also declined over the past 20 years or so.

The importance of journalists in this area has been recognised from the top echelons of the judiciary: “Many miscarriages... have been identified... only through painstaking investigations by journalists” (Lord Steyn in *Walker and Wood*, 1999); to miscarriages campaigners: “...every single righting of injustice has involved journalists” (Morrell, 1999). The media have been investigating miscarriages in the UK for more than 100 years (see Lloyd, 2002). Their investigations and stories have caught public, government, and judicial attention, and contributed not just to the overturning of convictions (Marr, 2004) but ultimately to calls for reform of the justice system itself and the



establishment of bodies such as the Court of Appeal and CCRC (Sanders and Young, 2010). Some print journalists have undertaken one-off investigations into cases single-handedly; whereas some television programmes such as *Rough Justice* have devoted teams to investigating a succession of individual cases, thereby developing some expertise in the area.

Such investigations have been possible due to the commitment of time and financial resources, the journalist's powers of persuasion and a 'dog with a bone' level of determination to see the job through (Jessel, 2004). With no special investigative powers, journalists have relied on solicitors' goodwill and used good, old-fashioned detective skills, such as knocking on doors, re-interviewing old, and finding new, witnesses and re-examining timings and 'place' in a case, to reveal injustice. Such work is very difficult, financially and legally risky, emotionally draining and sometimes downright dangerous. Journalists investigating miscarriages have suffered abuse and threats, obstruction, denial, suppression from the authorities and lack of support from superiors. Despite this, many have offered long-term personal commitment to cases, often continuing after a conviction has been quashed, in terms of fighting for compensation.

Aside from investigations into miscarriages, journalists have also provided victims with essential links to networks of contacts (such as lawyers) built up through their profession (Morrell, 1999). Through the "oxygen of publicity", journalists have also brought a case to the attention of the public and those whose support has further strengthened it (Eady, 2003). Publicity, however, is dependant upon the newsworthiness of a victim's case (Chibnall, 1977). Victims of miscarriages associated with rape and child abuse are far less likely to be-

come 'news', as their stories are often considered ambiguous, or 'untouchable' by the media (Webster, 1999) and miscarriages arising from magistrates' courts rarely interest them from a commercial perspective. Thus, generally only a narrow range of cases fit the media's brief, with journalists 'cherry picking' prisoners with 'marketable' stories (Jessel, 1994).

Despite the media's importance to this area, this research confirms that over the last two decades their involvement has diminished,

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**“Intensified ownership and increased competition in newspapers resulted in diminished resources, and a move away from expensive, dry investigative stories, to the production of cheaper, lighter stories, presented in populist formats”**

after peaking in the period 1989-93. The wrongful conviction of the Guildford Four was revealed in 1989. From then on, media investigations into, and revelations of, a succession of miscarriages greatly heightened their newsworthiness (Belloni and Hodgson, 2000) and set in train a 'snowball effect'. Now journalists were very keen to unearth miscarriages, their stories reaching front pages/popular broadcasting slots (Rose, 1996) tied to a broader media narrative of 'justice in crisis' (Nobles and Schiff, 2001).

Such heightened coverage of miscarriages is eventually said to have had a major impact

upon public confidence in the justice system (Woffinden, 1990) – although whether public confidence did lessen at this time, or whether it was solely a media construct is hotly disputed (Nobles and Schiff, 2001). Nevertheless, the very perception of a loss of public confidence, arguably acted as a major impetus for reform. The system had to be ‘seen to be doing’ something about miscarriages. This ‘something’ came in the shape of the Runcimann Commission (RCCJ), which reported in 1993 and recommended the establishment of an independent body to investigate miscarriages. Many journalists had campaigned for this, arguing that the investigation of miscarriages should not be left to them: “An informal system based on the funds of commercial interests” (Hill, Young and Sargent, 1985).

### Diminished media involvement

The RCCJ signalled the end of the media ‘narrative of crisis’ and the beginning of a gradual decline in the newsworthiness of miscarriages (Nobles and Schiff, 2000). In addition, the subsequent establishment of the CCRC, some believe, caused journalists to deem their investigations superfluous (Naughton, 2009). The CCRC may have given media executives an excuse to abandon such difficult work (Jessel, 2004); however, many other factors contributed to diminished media involvement in this area, including, from the 1990s onwards, changes within journalism and to the political climate within which journalists worked.

Changes within journalism included increased regulation and intervention into journalistic practice by lawyers and managers, meaning less journalistic freedom. The impact of new technologies, which gradually altered public reading and viewing habits, also led media executives to believe that people were

gradually becoming less interested in lengthy, complex stories (Snoddy, 1996). Intensified ownership and increased competition in newspapers resulted in diminished resources, and a move away from expensive, dry investigative stories, to the production of cheaper, lighter stories, presented in populist formats.

In television, the Broadcasting Acts of 1990 and 1996 increased competition and affected resource availability and programme priorities. Broadcasters now prioritised low-budget, guaranteed ‘audience pullers’ over expensive investigative work which could not promise such high ratings. Some broadcasters also had their obligations to produce public purpose programmes relaxed (Curran and Seaton, 2003).

This all meant a change in the priorities of people in charge of some TV companies, as highlighted by Carlton TV’s Paul Jackson: “If *World in Action* was to uncover three more serious miscarriages... delivering an audience of... five million, I would cut it. It isn’t part of the ITV system to get people out of prison” (Barnett and Curry, 1994). Indeed, as one journalist interviewed remarked to me: “Investigating miscarriages used to... have kudos attached to it... Now... the heady purposes of journalism... have diminished.”

Another remarked that journalistic ‘duty’ had also changed to revealing a different type of miscarriage, through the ‘What scumbag have you let out of prison or not even sent to prison?’ story. Some journalists now began to devote investigative resources to securing evidence against criminals ‘getting away with it’. This reflects the major change in political debate on criminal justice, which began during the mid 1990s – one that moved from a focus on suspects’ rights towards victims’ needs because of a general perception of rising crime.

By the late 1990s, wrongful convictions no

longer commanded mainstream political debate, and this, together with the factors previously mentioned, resulted in most miscarriages programmes being axed and print journalists finding it increasingly difficult to convince editors that miscarriages were worthy of space (Jessel, 2004). Some 'lone wolves' continued to investigate miscarriages (Sekar, 1998; Hale, 2002), as did *Rough Justice* (until its demise in 2007) and today others, such as print journalist Duncan Campbell (with his revived 'Justice on Trial' unit at *The Guardian*), and TV journalists such as John Sweeney, remain fully engaged with the area. In addition, academic journalist Eamonn O'Neil has achieved some success by involving his media students in investigating miscarriages. However, journalistic involvement in this area is much reduced. This is perhaps a problem in the light of growing concerns regarding the performance of the CCRC.

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**“More recent criminal justice cut backs have also resulted in an increasingly under-resourced, under-staffed body”**

### **Doomed from the start?**

Since it began work in 1997, the CCRC has received some praise for a more receptive and transparent attitude to cases than occurred with its predecessor C3 (Walker, 2002b). Comparing the CCRC's work to that of investigative journalists in this area, it has produced a steady stream of referrals for less high-profile cases than most journalists would ever have bothered to investigate. However, more recently the body has been accused of not being fit for pur-

pose. Arguments centre around its 70 per cent success rate (Quirk, 2007), which consists, in large part, of 'successes' in varying sentences, substituting alternative convictions, and overturning minor convictions, cases which were not the spur for its creation (Woffinden, 2010). More recent criminal justice cut backs have also resulted in an increasingly under-resourced, under-staffed body, creating, some fear, a slower, more superficial 'paperwork approach' to cases, rather than one that utilises its extensive investigative powers.

The CCRC is also alleged to be increasingly inconsistent, cautious and overly deferential to the Court of Appeal in deciding not to refer some cases with merit (Naughton, 2009). However, criticism goes deeper than this, to arguments that the CCRC has not undertaken the role that it was commonly believed it would undertake, namely to investigate the convictions of those claiming to be innocent (Naughton, 2009). The CCRC is bound by legal rules allowing it to only consider new evidence/argument that casts doubt on the safety of convictions and to only refer a case to appeal when it believes there is a real possibility that the conviction will be quashed (Walker, 2002). Indeed, only around four per cent of applications result in a referral (CCRC, n.d). As the remaining 96 per cent of applicants are surely not all dishonest, many innocents remain imprisoned. The CCRC (2002) agrees: "...where alternative explanations... are advanced... but [new] evidential support... cannot be established... the miscarriage cannot be exposed".

It could be argued then that the CCRC, having been introduced into the appeals process as a 'middle-man', who, from the start, had his hands tied by the system under which he operated, was always doomed to be ineffective in resolving the problem of the wrongly convicted

innocent. This is arguably because, in creating the CCRC, the legal system found a 'solution' to the problem of miscarriages within the confines of its own structures (structures that created the problem initially) (Nobles and Schiff, 2000). This is not the first time this has occurred. Over the past 100 years or so, there has been a cycle of occasional crises of confidence in the justice system, allied to miscarriages, and led by the media, which have been addressed by the establishment of reforms that have, in turn, failed to 'live up' to expectations of them. This is because such reforms actually serve to enhance, rather than fundamentally change, the nature of the legal system (ibid). The CCRC, then, amounts to little more than a 'bureaucratic tinkering' of the system (Walker, 1999). Growing realisation of this has led to claims that the media are still very much needed in this area (Poyser, 2011).

### **Different versions of truth**

The CCRC itself welcomes help from those outside the system, arguing that cases most likely to succeed are those that arrive fully researched and investigated with new evidence compellingly presented (Hill, 1999). This is something that investigative journalists have proved themselves very able to do. Interestingly, in this respect, investigative journalists note that their version of 'truth' is different from that of the CCRC. As mentioned, legal restrictions mean that the CCRC is often unable to conduct the kind of investigations that can get to the truth of claims of innocence. However, the investigative journalist, free from such restrictions, uses common sense, not legal rules, to determine the truth. Indeed, arguably they have the best chance of determining the 'truth' as they can consider all available (and if necessary, seek more) data (Hill, 1999).

The current appellate system requires a major overhaul in order to provide a system that prioritises pursuit of truth, one that can receive compelling evidence of innocence even if available at trial. Until that time, journalism must continue to challenge the judicial system (Jessel, 2004), by demonstrating that 'legal' and 'common sense' truth are different and through highlighting the growing number of cases, which, through lack of remedy, reveal the flaws in the system. Interestingly, the growing debate around the CCRC's effectiveness may in itself spur renewed media interest in miscarriages as the issue provides an essential 'hook' for journalists to hang their miscarriages stories upon. Ultimately this may set another 'miscarriages snowball' rolling within the media, one that may eventually cause elites to feel that they must once again be seen to be doing something. This time, we must ensure that what they do actually makes a difference to wrongly convicted innocents.

So, while we must all act as 'watchdogs on the wrongly convicted', the journalists interviewed for my research argue that the media retain an inbuilt duty, or responsibility, to do so, because of the massive amount of power that they possess. It is more difficult today for journalists to 'do' miscarriages. However, investigations involving working collaboratively and creatively with Innocence projects and telling miscarriages stories via populist formats that emphasise the 'whodunit' element of their work (stories that continue to fascinate the public) are just a few ideas for consideration.

Certainly, bearing in mind the current problems with the CCRC, an absence of journalistic involvement in this area will mean that many more innocents will remain in prison, and the public will remain ignorant of the system's failings.

# Poor defence

**Maslen Merchant** is a legal executive at Hadgkiss Hughes and Beale Solicitors

**A**s controversial and unexpected as it may be to read, in my experience a very high proportion of wrongful convictions are the fault of poor defence work by the trial lawyers.

The most famous of the many high-profile miscarriage cases of the last 20 years received such huge publicity because of the police corruption that was endemic within them. The discredited experts whose opinions and theories have been debunked and disproved have also hit the headlines for the very reason that these people were 'experts' – professionals employed to express an opinion based on a wealth of experience and knowledge in their field. These were people upon whom you should have been able to rely, without doubt or hesitation. The very idea that the opinion of a forensic scientist, pathologist or doctor may not actually be worth a damn is shocking. If you go to see your GP or consultant you expect to receive appropriate treatment; you expect the expert you see to actually have the appropriate degree of expertise.

However, it seems to be very difficult for the Court of Appeal and the CCRC to accept that some lawyers themselves who conduct trials are responsible for wrongful convictions; to put it simply, they are not up to the job. The

criminal justice system assumes that criminal lawyers who practise are competent. It assumes that it does not matter who represents you, or what the charge is, whether it is speeding or murder the end result will be the same.

That assumption is wrong. As is the case with any other profession, there are good and bad lawyers. There are those, perhaps mercifully few, who are downright incompetent. Some are well intentioned and hard working but lack experience. In my view, of increasing concern is the growing number of solicitors' practices which, sometimes out of a perceived necessity to survive in the current financial climate, but often simply out of greed, believe that 'big is best' and that 'economy of scale' is the key to a successful practice.

## **Profit first**

The financial pressures on solicitors' practices nowadays are so great that turnover and profit rank far higher than actually doing a good job for the client and ethics come nowhere.

Legal aid fees in the Crown Court are, basically, calculated taking into account the seriousness of the case, the page count of prosecution evidence and whether it is a guilty plea or how long the trial lasts. You get paid the same amount at the end of the case if you do

ten hours work or a hundred hours work. It follows, therefore, that the less work you do the higher your profit margin. The less work you do for your money the more cases you can do at any one time. There exists a positive financial disincentive to do the job properly, which is scandalous. It undermines the whole ethic of someone being rewarded for a job well done.

Such is the desire to increase profit margins that some solicitors now do little more than read the prosecution evidence, have a cursory appointment with the client and nothing else. The concept of fighting your client's corner and of the lawyer actually doing what is necessary to defend the client is anathema to many modern criminal lawyers.

So, how does this specifically lead to miscarriages of justice? Before the legal aid system changed a number of years ago and when you actually got paid (or at least could claim) for the work you did on an hourly basis I was shocked at the number of lawyers I came across who simply did not do the work that they should do to prepare a case properly. All lawyers seem capable of following the checklist type of approach to preparation. If its murder you instruct a pathologist; if its child rape you need a paediatrician; if its arson get a psychiatric report.

What concerns me is when lawyers have to actually think about a case; when something or someone out of the ordinary arises; when they actually have to earn their money and do what they are paid to do. Unfortunately it is very often the most vulnerable of defendants who suffer. It seems to be something of an inconvenience to the modern criminal lawyer to get a medical report addressing mental health issues, for instance. The question of whether a defendant is fit to plead seems to be ignored by many unless it is screamingly obvious because

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**“The financial pressures on solicitors’ practices nowadays are so great that turnover and profit rank far higher than actually doing a good job for the client and ethics come nowhere”**

of mental illness, by which time the client has very often already been diagnosed, sectioned under the Mental Health Act and is in hospital.

About 18 months ago a man came to see me one afternoon with his friend. That morning he had pleaded guilty at a Crown Court to a serious sexual offence against a child. He told me that he was not guilty but had been bullied into pleading guilty by his solicitor and barrister. They told him if he was convicted after a trial he could get a life sentence. When he told them he didn't understand, the barrister told him, “the same sentence you get for murder”. Petrified at this, the man had succumbed to a plea bargain that had been offered on the morning of the trial. He instructed me that he was not guilty and that he wanted to change his plea and have a trial.

It took about five minutes for me to have serious concerns that this man may have a learning disability. His difficulty with speech was a clue. The fact that his friend told me that he had an appropriate adult with him in the police interview was a strong indicator but the fact that it took him three attempts to sign his own name was the real clincher.

When the judge read the reports from the psychologist and psychiatrist that we

instructed and learned that the man concerned had an IQ that placed him in the bottom 0.3 per cent of the population, and that he was highly suggestible and suffered from a learning disability, he had no hesitation in vacating the guilty plea and allowing the client to have his trial. He was acquitted of the charge to which he had pleaded guilty.

What on earth were the former lawyers playing at? How could you not see that this man was so vulnerable? What were they doing placing him under such pressure and why even mention murder? Why had they not taken the extra care and time that was so obviously needed to help the client who was totally reliant upon them for advice? Was this incompetence? Was it lack of experience? I fear that the true answer is simply that obtaining medical reports on the defendant and putting in the extra work in the case, which was so obviously necessary, would prove to be such an inconvenience that it was simply not cost effective. This was an obvious business decision. What if that man had been sentenced and sent to prison? That would have been a gross miscarriage of justice.

### Failing clients

Sadly, there are many examples. A senior duty solicitor (now a district judge) and barrister (now QC) defended a young man charged with murder on the basis that he was labouring under diminished responsibility (an abnormality of mind which gave rise to a defence to murder serving to reduce the charge to one of manslaughter). They did not instruct a psychiatrist to assess his state of mind at the time of the offence. The solicitor's file showed absolutely no sign of the instruction of an appropriate mental health expert ever having been raised, let alone being given serious consideration. The psychiatrist that I instructed was unequivocal in stat-

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**“The concept of fighting your client’s corner and of the lawyer actually doing what is necessary to defend the client is anathema to many modern criminal lawyers”**

ing that the defendant was indeed labouring from diminished responsibility due to the horrific physical abuse he had suffered as a child. The Crown's expert agreed.

I once spoke to a solicitor outside court before a hearing on a manslaughter case. I said that we were looking to get an order for disclosure of certain material we knew the Crown had but were not disclosing to us voluntarily. She commented: “I don't know why you're bothering with the unused material, there's never anything in it.” Really? Tell the Guildford Four that; tell Judith Ward, the Maguire Seven, the M25 Three and the Bridgewater Four. It was astonishing to hear.

Perhaps the worst example is that of a client of mine convicted of the armed robbery of a post office. He was serving 12 years. I went to see him after he was convicted and he earnestly told me that his solicitors had only seen him twice during the ten months he spent on remand before trial, and that although he had begged, pleaded and shouted for his solicitors to request unused material they had requested precisely nothing. I was sceptical; this was an armed robber, a serious offence. Surely he was exaggerating. The solicitors' file confirmed that his instructions were entirely accurate. He had had two one-hour appointments with his

solicitors' agent (a former police officer) and there were precisely no letters to the Crown Prosecution Service asking for any of the material that is generated during a major police investigation that so obviously might have assisted his defence case.

It took 12 months of letters to the local CPS branch, to their Chief Crown Prosecutor and ultimately the Director of Public Prosecutions before we even got a response to our requests.

In the end the police handed over so much material that had not been disclosed before the trial that I had to make two trips to the police station to get it. It filled the car twice over.

The police were perfectly happy to hand the material over and confirmed that they would have disclosed it before the trial had they been asked to. One sergeant went to great pains to make sure that we had received every last item that I had requested. We sat down together and painstakingly ticked off one document after another; hundreds of pages of witness statements, descriptions of the offenders, crime reports and investigation logs. We checked that the many compact discs containing the recorded witness interviews were in order and made sure that the tapes containing the many CCTV angles of the robbery were all in a viewable format.

The flaw in the trial process was defence incompetence; the failings were entirely those of the trial lawyers. None of this material had ever been requested by the trial lawyers.

### **Bleak future**

Twenty years ago while waiting at court or at the local prison you would hear lawyers discussing the cases they were dealing with and the charges their clients faced. The interest was obviously in the job itself; how you could find that elusive legal argument to derail the

whole prosecution or what unused material may be hidden in the back of a police filing cabinet. Nowadays, all one hears are lawyers discussing page counts and how to challenge the latest Legal Services Commission decision to reduce their fees.

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**“The flaw in the trial process was defence incompetence; the failings were entirely those of the trial lawyers”**

High-profile miscarriage cases attract publicity because of corrupt police or dishonest or incompetent experts; however, compare those relatively few cases to the number of cases that become miscarriages because of poor defence work. This is happening in every court every day to some degree. As cuts increase and the criminal legal aid budget is tightened it will only get worse.

Conscientious, ethical, altruistic lawyers are now few and far between and the number of miscarriage cases rises proportionately. Today's criminal lawyer is a businessman first and foremost; actually practising law seems to be sandwiched somewhere in between accountancy, practice management and marketing.

Access to justice for a defendant in criminal proceedings is entirely dependant on the trial process being fair. This extends not only to the judiciary and the prosecuting authorities but also the defence lawyers.

There are far too many defence lawyers who fail in their duty to their clients at very basic levels and who, therefore, undermine the fairness of the proceedings as a whole.



# Righting wrongs

Alex Bailin QC practises from Matrix Chambers

To its credit, our criminal justice system now accepts its own fallibility. The establishment of a criminal Court of Appeal at the beginning of the 20th century and the creation of the CCRC towards the end of it both recognise this. Providing compensation for a miscarriage of justice is one important aspect of attempting to provide redress for a wrongful conviction.

In 2006 the then home secretary, Charles Clarke, decided, without any prior consultation, to abolish the broad and flexible *ex gratia* scheme, under which the government compensates those who have suffered wrongful convictions. From 2006, compensation for miscarriages was payable only under section 133 of the Criminal Justice Act 1988 – giving effect to the United Kingdom’s international obligations. Section 133 only permits compensation where a person has his conviction reversed on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice. The scheme is concerned with failures in the criminal justice system and therefore contains certain filters that exclude many successful fresh evidence appeals. For example, the reversal must not occur at an in-time appeal, since that is the criminal justice system working correctly. And the non-disclosure of the new fact must not

be attributable to the convicted person, since that would not be demonstrative of a failure in the system itself. But what constitutes a ‘miscarriage of justice’? It is a phrase that has now entered everyday parlance and yet its meaning is elusive and it may mean different things to different people.

Most people would agree that a miscarriage of justice includes the conviction of an innocent person. But how is innocence to be established? Does the presumption of innocence mean that anyone whose conviction is quashed or who is acquitted at a retrial is innocent? And does the notion of a miscarriage of justice include a wider category of cases, such as those where the defendant should, would or might not have been convicted if the new evidence in question had been before the trial court?

The United Kingdom Supreme Court recently had to grapple with these difficult questions in *R (Andrew Adams) v Secretary of State for Justice* [2011] UKSC 18. The case was joined with the Northern Irish appeals of Eamonn MacDermott and Raymond McCartney. Adams’ conviction had been quashed, after he had spent ten years in prison, following the discovery that information that would have greatly assisted his cross-examination of crucial witnesses had been overlooked by his defence team.

By a majority of 5-4 the court held that

compensation for miscarriages of justice is not limited to those persons who can establish their innocence but also extends to those cases where a new or newly discovered fact “so undermines the evidence against the defendant that no conviction could possibly be based upon it”. At the heart of the problem that divided the court was the fact that, as Lady Hale explained: “Innocence as such is not a concept known to our criminal justice system. We distinguish between the guilty and the not guilty... A defendant does not have to prove his innocence at his trial and it seems wrong in principle that he should be required to prove his innocence now.”

Ultimately, what persuaded the court not to confine compensation to the provably innocent was that to do so would have resulted in some people who are in fact innocent receiving no compensation. In cases in which there is no traceable DNA, for example, it may be very difficult for the defendant to establish factual innocence. But the majority of the court felt that it was preferable that a few people who are in fact guilty might receive compensation, rather than to exclude some of those who were innocent. The division in the court’s reasoning was sharp, with Lord Brown, in the minority, evincing a “palpable sense of outrage”.

The debate had been polarised somewhat by a previous decision with extreme facts. In *R (Mullen) v Secretary of State for the Home Department* [2004] UKHL 18, the House of Lords had decided that a “quarter master for an active IRA unit” was not entitled to compensation under section 133 or the *ex gratia* scheme even though the British authorities had procured his deportation to the UK by unlawful means, “in breach of public international law”.

His prosecution was held to be “unlawful” and therefore he should not have been charged,

let alone prosecuted. But the House of Lords considered that there was no defect in the trial process that warranted compensation. Although Mullen’s conviction was quashed as an abuse of process, he had not actively contested his guilt on appeal.

Although Mullen’s case might be decided differently today, given that there was ostensibly a failure to make disclosure at trial of material relevant to an abuse of process argument, the Supreme Court was virtually unanimous in not wanting to extend section 133 to include *Mullen*-type cases.

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## **“According to the Supreme Court, a miscarriage of justice includes but is not confined to those who are innocent. But who should determine innocence?”**

It was Lord Steyn in *Mullen* who had sought to confine section 133 to innocence only, whereas Lord Bingham had gone wider and included those “whether guilty or not, should clearly not have been convicted”. Ever since *Mullen*, the courts have had to grapple with whether Lord Bingham or Lord Steyn was correct, and the Supreme Court has now steered a fresh, middle course.

### **Determining innocence**

According to the Supreme Court, a miscarriage of justice includes but is not confined to those who are innocent. But who should determine innocence? The Supreme Court was divided on whether the Court of Appeal has the power to pronounce someone innocent – “a point of

great constitutional importance". Lord Phillips, the president, thought it did not: relying on the Court of Appeal's view in the Birmingham Six appeal that it was not "obliged nor entitled" to state that an appellant was innocent. Lord Judge, the Lord Chief Justice, disagreed. According to the Supreme Court, the secretary of state must decide if an applicant for compensation is innocent – which is a somewhat strange state of affairs given that the CCRC was established partly because the home secretary was manifestly ill-suited to that task.

The Supreme Court was also split on what constituted a "new or newly discovered fact". Was there a reasonable explanation for the non-discovery of the fact? Did the defendant himself have to be ignorant of the new fact at the time of his trial, and did his lawyers also have to be unaware of it? Lord Phillips followed the generous interpretation used in Ireland where a qualifying fact is one "the significance of which was not appreciated by the convicted person or his advisers during the trial or appeal proceedings".

The position regarding retrials is also interesting: a person acquitted at a retrial following an out-of-time appeal may qualify for compensation under section 133. But the category of eligible cases may be very slender: the defence case must be strong enough that "no conviction could possibly be based upon it" and yet if the Court of Appeal orders a retrial that ordinarily suggests that the case has only met the conventional "unsafe conviction" threshold.

The Supreme Court envisaged a class of cases in which the Court of Appeal orders a retrial on the basis of new evidence whose significance only becomes clear at the retrial. How workable this is in practice is unclear.

The court was unanimous in rejecting all

the arguments based on the presumption of innocence: it considered that there was not a sufficient link between the compensation proceedings and the reasons for the acquittal – reasoning, for example, that victims can sue acquitted defendants without violating the presumption. But whether that analogy is a complete answer remains to be seen: if, as is often to be the case, the secretary of state points to the Court of Appeal's judgment in which it quashes a conviction but does not pronounce the appellant innocent as being dispositive of the question of compensation, then the link between the two sets of proceedings would seem to be very close indeed. There are pending cases before the European Court of Human Rights on the issue.

### Refocusing the debate

The Supreme Court judgment is interesting on many levels. A test based solely on factual innocence would have been very restrictive given that defendants are not required to prove their innocence at trial or on appeal. In none of the most notorious British miscarriage of justice cases (Birmingham Six, Cardiff Three, Judith Ward, Maguire Seven and Guilford Four) did the Court of Appeal declare the successful appellants innocent.

By anxiously scrutinising what constitutes a 'miscarriage of justice', the Supreme Court's judgment is a welcome reminder that our criminal justice system still makes serious errors that require rectification and compensation. That ought to help refocus the debate as to whether the CCRC is indeed continuing to fulfil its vital purpose in helping to right wrongful convictions.

**Alex Bailin QC represented JUSTICE in the Adams appeal before the UK Supreme Court.**

# Constructive dialogue

John Cooper QC practises from 25 Bedford Row

The overriding consideration for the Criminal Cases Review Commission is the safety of a conviction. Put more strictly, and here lies the root of much controversy, whether the Court of Appeal would find it unsafe. This severely curtails the approach that the commission takes. During the parliamentary debates which established the CCRC, the requirement that the commission consider factual innocence was dropped. The work of the CCRC is seen through the telescope of whether the Court of Appeal will be prepared to receive it. In practice the issue of safety will hinge on fresh evidence or new legal argument. Many references fail because they raise no new matters. There is a residual power invested within the commission to refer cases even in the absence of new evidence if it considers that there are exceptional circumstances, but this power is used only exceptionally.

The problem with this narrow definition of the parameters of both the CCRC and the Court of Appeal is that they are concerned with safety, not instead whether the accused is guilty of any conviction. This is graphically demonstrated in the case of *R v Stock (Anthony)* [2008] EWCA Crim 1862 - the first and only case that the CCRC referred to the Court of Appeal on two separate occasions. The facts reveal a clear case of a miscarriage of justice that was not upheld by the Court of Appeal. The appellant was convicted

of robbery in July 1970 and was sentenced to ten years' imprisonment.

## Safety first

In dismissing the appeal, the court observed that its jurisdiction and duty was to consider the safety of the conviction and not whether the accused was guilty. The Criminal Appeal Act 1995, section 13(1), gave the commission power to make a reference if it considered that there was a real possibility that the court would not uphold a conviction in the event of a reference because of a new argument or evidence. Section 13(2) empowered it, in exceptional circumstances, to make such reference even where there was no new evidence or argument.

The Court of Appeal in *Stock* also referred to *Thomas* [2002] EWCA Crim 941, which made it clear that the power provided by section 13(2) of the 1995 Act permitting the commission to refer a case in exceptional circumstances (cases where there is 'a lurking doubt') would rarely result in a successful appeal.

The judgment in *Stock* presented a clear reversal from *Pendleton* [2001] UKHL 60 and represents a difficulty encountered by a number of CCRC cases where it may be difficult to find admissible evidence that affects the view of original verdict to the extent that it may be unsafe, and cases that are affected by the passage of time. Furthermore, *Stock* is not assisted by the general reluctance of the Court of Appeal as expressed in *Thomas* to consider exceptional circumstances.

## Impact of expert evidence on juries

The development of authorities since *Pendleton* is instructive when considering the limits of the safety test. That case emphasised the role of the jury as 'fact finder'. The majority opinion in the Court of Appeal was that in a case of difficulty they should "test their own provisional view by

asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict. If it might, the conviction must be thought to be unsafe". In other words, the Court of Appeal is suggesting that it should stand back and consider what doubts the jury might have had. *Pendleton* was set back by *Hakala* [2002] EWCA Crim 730, which proposed a jury impact test. Here it was held that it was integral to the process, but, if fresh evidence is disputed, the court must decide whether and to what extent it should be accepted and, if it is to be accepted, to evaluate its importance. Particular concern around this case centred upon the Court of Appeal apparently seeking to usurp the jury's function.

An analysis of referrals indicated that the commission is unduly deferential to the Court of Appeal in cases involving expert evidence. A number of commentators have suggested that the commission should become more proactive in seeking fresh evidence in cases of expertise.

In the authority of *Kai Whitewind* [2005] EWCA Crim 1092, the court made it clear that the fact that the defence expert did not give his evidence as well as it was hoped that he would, or that parts of his evidence were exposed as untenable thereby undermining confidence in his evidence, does not begin to justify the calling of further evidence. Where expert evidence has been given and apparently rejected by the jury, it could only be in rare circumstances, the Court of Appeal opined, that the court would permit repatriation or near repatriation of the evidence by some other expert to provide the basis for a successful appeal. The court went on to observe that if it were otherwise the trial process would represent little more than 'a dry run' for experts.

Despite this guidance the Court of Appeal will, in exceptional circumstances, depart from its own structure for typically pragmatic rea-

sons. It has been suggested that the CCRC takes a *de novo* role in examining expert evidence. The crux of the suggestion is that the commission departs from *Pendleton* and examines disputed expert evidence that was presented to the jury. This suggestion is in step with recent recommendations by the Law Commission in relation to expert evidence. If the commission were to extend its role into examining fresh expert evidence in this manner it would depart from *Pendleton* and potentially be susceptible to an accusation that the role of the jury is being undermined.

### More significant role

As a result of challenges facing the CCRC – not least poor funding that has caused difficulty at the commission 'leaving staff frustrated... and dispirited' – the role of organisations such as the Innocence projects has become increasingly significant over the last decade. At the end of 2010 there were at least 100 murder convictions being analysed by justice groups throughout the country. Primary among these organisations are the Innocence projects which draw on US experience. Significantly, the US government allotted \$1.3bn to facilitate post-conviction DNA testing under the Innocence Protection Act.

Compare this to the UK, where legal aid is being squeezed to breaking point, and where it is rare for DNA to be successful in overturning a conviction. Take the case of Sean Hodgson, convicted in 1979 for the murder of a 22 year old. He had his conviction overturned in 2009 after 27 years. Six months after his successful appeal, Hodgson was exonerated when DNA evidence testing on the exhumed body of a suspect resulted in a complete match from the crime scene. Such was the disillusionment with the CCRC that his lawyers went straight to the police and prosecution who discovered that DNA on the deceased's body was not Hodgson's.

### Delving deeper

This is symptomatic of the driving force behind the Innocence projects to delve deeper than the CCRC is either inclined or able to do. The whole focus of Innocence projects is entirely different to that of the commission. Innocence projects primarily focus on ‘factual innocence’ compared to the commission, which will consider ‘wrongful convictions’. For the Innocence projects, innocence is defined in lay rather than legal terms. A person is innocent if they did not commit the crime compared to legal innocence or procedural or legal errors that will establish wrongful conviction rather than innocence.

The terms ‘factual innocence’ or ‘actual innocence’ are used to describe those cases where the defendant was wrongfully convicted because no crime was in fact committed or that there was a crime but it was committed by someone else.

In an article for the Oxford Journal of Legal Studies 2009, Stephanie Roberts and Lynn Weathered observed that “it is necessary to outline the reasons why the CCRC was created, understand the differing emphasis in case reviews undertaken by the CCRC and by Innocence projects, and look at the wider role Innocence projects can play regarding law reform and legal education”.

Despite the Innocence projects’ focus on ‘factual innocence’ they, of course, accept the need for appeals on the basis of wrongful convictions and irregularities. In reality ‘factual innocence’ is hard to prove and irregularities present a more tangible chance of achievement. Whatever the approach of Innocence projects, the Court of Appeal remains steadfast in its pragmatic attitude, maintaining a restrictive approach.

There is presently a difference of opinion between Innocence projects. Dr Naughton argues that the CCRC has not fulfilled its remit. He argues it lacks focus on ‘factual innocence’ and

makes the case for a specific body that is not bound to the Appeal Courts, is sufficiently resourced and not dependent on government.

These arguments are refuted by others who emphasise that the commission refers the majority of its cases on fresh evidence arguments rather than procedural or legal errors.

There is no point having a body such as the commission referring cases without regard to the powers and procedure of the Court of Appeal. Perhaps it is better to consider reforming the Court of Appeal to make it more receptive to factual innocence claims that would then have a knock-on effect for referral to the commission.

Any power of pardon would not rectify miscarriages of justice because it does not remove the conviction. This could result in the Court of Appeal rectifying procedural and legal error and a minister of justice dealing with cases of factual innocence. This will also remove these cases from the jurisprudence of the Court of Appeal and they would not be able to contribute to the development of the law, thereby depriving other appellants of the benefit of favourable changes in the law, and, in turn, those applying for a pardon would not be able to use favourable appeal judgments to argue their case. Indeed, to suggest that the commission has no interest in factual innocence may be doing a disservice to it. It is concerned with unsafe convictions and it could be said nothing is more unsafe than someone who is factually innocent. The practicable problem for Innocence projects is that they are grossly underfunded. There should be further constructive dialogue between stakeholders including the CPS, the commission, the Ministry of Justice, lawyers and campaign groups.

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This article is based on the lecture John Cooper gave at the annual Ewan Davies law lecture at Cardiff University

# The dilemma of maintaining innocence

**Matt Evans** is managing solicitor of the Prisoners' Advice Service

**I**t is 20 years since the Birmingham six were released as innocent men, but the stark reality is that if their appeals had not been successful they would in all likelihood either have died in prison or still been incarcerated because of their absolute insistence of innocence and wrongful conviction.

The Parole Board and Prison Service will say that there is no rule or policy that automatically prevents a lifer who denies guilt from progressing through the lifer system, or from being released. This may be technically correct but it is a highly mendacious line of argument because clearly denial of guilt does affect the timing of release, and, despite the ongoing debate around prisoners maintaining innocence in the last few years, neither the Prison Service nor the Parole Board have made any real progress to resolve the issue. My understanding is that only two mandatory life prisoners have ever been released by the Parole Board on tariff (i.e. their earliest date of release) while maintaining complete denial of the crimes for which they were convicted. Susan May, who has always maintained her innocence (and is still seeking to overturn her conviction) of the murder of her aunt was released in 2005, and most recently John Taft in April 2011.

Indeterminate sentenced prisoners who maintain their innocence are especially af-

ected. It is they who have to jump through a series of hoops, relying on the Prison Service lottery to provide them with courses to 'show a reduction in risk' and so as to ultimately satisfy the Parole Board that they are ready for release. And it is they who continue to be confronted with the same problem: either admit guilt and comply with their sentence plans, or face the prospect of serving many years over their minimum tariffs and possibly never achieving parole.

It is currently for the courts and the independent Criminal Cases Review Commission to review alleged miscarriages of justice in England, Wales and Northern Ireland. The effectiveness or otherwise of these institutions is referred to elsewhere in this publication, but prisoners whose appeals have failed for whatever reason, or whose cases are ongoing, are left to satisfy the key consideration to granting release on parole or life licence; namely is their current risk to the public manageable? And when looking at this the Prison Service and Parole Board will always assume that the prisoner was rightly convicted.

## **Risk assessment**

Innocence-maintaining prisoners present many problems for the risk assessment process, problems that will only intensify with the

exponential growth in the number of IPP, high risk, determinate and recalled prisoners needing risk assessment, coupled with the acute shortage of appropriate offending behaviour programmes and prison psychologists working on an individual basis with such prisoners.

The starting point, one would have thought, is that if someone is innocent they are not a risk to society. The credibility of such claims could be looked at, through, for example, the steps taken by a particular prisoner to clear their name, their behaviour in prison and their attempts to undertake work whether related to their index offence or not. However, neither the Prison Service nor Parole Board seems currently able, or indeed willing, to look at this as a part of their assessment processes.

On the specific issues of the validity of denial as a measure of risk, this is based purely on clinical wisdom rather than any scientifically founded measure of risk (*Hood, R, Shute, S, Feilzer, M, and Wilcox, A* (2002). *Reconviction rates of serious sex offenders and assessments of their risk. Findings 164*. London:HomeOffice). On a more general level, risk can be calculated only to a limited extent anyway. However, while the Parole Board is aware that a maintaining of innocence is not an automatic bar to release and that it is unlawful for the board to refuse to consider the question of release solely on the ground that the prisoner continues to deny guilt (*R v Secretary of State for the Home Department ex p Oysten* [2000] Independent 17 April, CA) increasing and unhelpful political pressures on the Prison Service and Parole Board has meant a risk averse culture permeates across these assessments (see the comments of Sir David Latham around the pressures brought to bear by John Reid and David Blunkett in [www.guardian.co.uk/uk/2010/Mar/31/parole-chief-warns-overreaction](http://www.guardian.co.uk/uk/2010/Mar/31/parole-chief-warns-overreaction)).

Factors such as denial of guilt, attitudes to treatment and absence of risk reduction work are all therefore added into the mix of risk assessment despite their neither being reliable or valid.

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**“Programmes such as controlling anger and learning to manage it, and the cognitive self-change programme, depend on an offender admitting to and discussing their offences and are not open to individuals who deny their offences”**

Another related issue is that both the Prison Service and Parole Board have formed a view that the assessment and minimisation of risk is premised through the successful completion of behaviour modification programmes, which require an acknowledgement of guilt and a preparedness to discuss self-critically the salient features of the offence. This presents an obvious problem to prisoners who continue to maintain their innocence, as they are unable to cooperate over something they have not done. Programmes such as the sex offender treatment programme (SOTP), controlling anger and learning to manage it (CALM) and the cognitive self-change programme (CSCP) depend on an offender admitting to and discussing their offences, either during the initial assessment stage, or during the programme itself, and so are not open to individuals who deny their offences.



### Managing 'deniers' in prison

In my experience it is a fallacy to suggest that it is common for prisoners to deny the offences for which they have been convicted. It is true that some do and this may be for all sorts of reasons. They may not be able to accept what they have done, may be trying to protect others, or may not want people close to them to know the truth, or in more complex cases believe themselves legally guilty but factually innocent (mercy killings or joint enterprise being obvious examples). Finally, of course, they may be entirely innocent.

PSO 4700 sought to address the issues of 'deniers' (as they are referred) by at least acknowledging that they form part of the prison population and their stance on guilt or innocence should be recorded. However, the real difficulty is that it fails to offer any sensible approach to those who might have a genuine case of miscarriage of justice. Such individuals are simply left in limbo. Even if they undertake courses, they are unable to give a full and frank account of their offence for the purposes of analysis for obvious reasons, given their claim that they did not commit it; simply looking at previous and often minor offences is not going to demonstrate a reduced risk in, for example, the case of murder.

The incentive and earned privileges scheme (IEPS) highlights another difficulty. Since the introduction of the IEPS there have been a number of challenges brought by prisoners who, because they have maintained their innocence and therefore have not fully participated in their sentence planning, were denied access to the enhanced regime despite impeccable behaviour. However, these arguments – including the fact prisoners denying their offence are discriminated against in their access to the right to family life under

article 8 of the ECHR, as prisoners on standard regime receive less or shorter visits than those on enhanced (*R v Secretary of State for the Home Department ex p Potter and others* [2001] EWHC 1041 (Admin)) – have consistently been rejected by the courts (*R (Green) v Governor of HMP Risley and Secretary of State for the Home Department* [2004] EWHC 596 (Admin)).

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### **“The impact of PSI 33/2009 is most keenly felt by those maintaining innocence and have not been able or willing to undertake offending behaviour programmes”**

An added complication is that PSI 33/2009, which came into force on 1 January 2010, has introduced pre-tariff sift reviews. The effect of this is that all lifer cases are now subject to a prison service assessment, as to their suitability for a Parole Board review two years before their tariff date expires. The test applied is whether there is a reasonable prospect or 'is there a case for consideration' for open conditions by the Parole Board? PSI 33/2009 impacts on all prisoners but its impact is most keenly felt by those maintaining innocence and who for that reason have not been able or willing to undertake offending behaviour programmes.

It is also part of a move away from full judicialisation of the parole and release decision pertaining to lifers and those who maintain their innocence, along with things such as the removal (by the Parole Board (Amendments) Rules 2009) of the right to an oral hearing. Oral hearings are essential for those maintaining

their innocence. Given that their paper dossiers are unlikely to reflect favourably on them if they are not engaging with courses etc, prisoners maintaining innocence rely on oral hearings to put forward their case and their side of the story to the Parole Board.

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**“The nature and extent of, and reasons for, any assertion of a prisoner’s innocence would be explored and challenged in much greater detail than at present, using perhaps archived material that may not be readily available in prison files or on the parole dossier”**

### Explore and challengee

The Parole Board has been given only one power by parliament, which is to decide whether or not to release a prisoner. There is no mechanism to allow the board to look behind the court’s verdict and this is not going to change. Therefore, those advising innocent prisoners (and those whose decision making affects such prisoners) need to try to operate within this framework and look at how the crucial question of risk assessment in particular is dealt with.

There is a need for the risk assessment process to take greater account of all forms of innocence assertion. In particular, the nature and extent of, and reasons for, any assertion of a prisoner’s innocence should be explored

and challenged in much greater detail than at present, using perhaps archived material that may not be readily available in prison files or the parole dossier.

The key issue affecting a lifer’s progress should not be weighted to, as it seems currently, what offending behaviour work has been undertaken, but whether or not the risk he or she poses to the public is acceptably low. This can be measured (as it used to be) through their interaction with prison and probation staff and importantly how they conduct themselves with other prisoners.

Prison lawyers can also do their bit by obtaining (within the restrictions of current legal aid funding) expert reports to challenge often intransigent prison and probation risk analysis.

The Prison Service itself also needs to accept that its general presumption that the conviction was correct does not meet the case of the person who is genuinely innocent, but who has exhausted all avenues of appeal without success. Suitable sexual and violent risk reduction work should be devised for those maintaining innocence.

Furthermore, one-to-one motivational work should be more readily available for such prisoners, particularly when their stance is holding back their sentence progression. Reports and assessments, including the OASys form, should be adapted to allow for details to be provided about the maintenance of innocence and the reasons for that position.

Finally, prison and probation report writers, when commenting on offending behaviour programme work, should distinguish between cases of non-cooperation or refusal to participate by the prisoner and cases where the prisoner is excluded from courses on account of their denial.

# Uphill struggle

**Laura Janes** is a consultant solicitor at SCOMO

**I**n stark contrast to the now almost universal acceptance of the need to adopt a distinct and child-centred approach when dealing with children in a legal context, navigating the appellate system continues to be a very tricky, and grown up, process.

There are more children locked up in England and Wales than any other western European country. Even though the child prison population has reduced significantly in recent years, the number of children sentenced to long sentences has steadily increased, largely due to the introduction of sentences for public protection. A representation order at first instance should cover the completion of an advice on appeal. But it is not unusual to find children serving life sentences without the benefit of a fully considered advice on appeal. The same is true of children sentenced to shorter, determinate sentences. This may include patently problematic cases such as pregnant girls breached for crimes committed earlier in their childhood.

The numbers of children serving sentences for public protection under the provisions of the Criminal Justice Act 2003 increased rapidly following their implementation in April 2005. Following the amendments made to these sentences by the Criminal Justice Act

2008 in July 2008, there was an immediate decrease in the number of children serving public protection sentences. However, there has been a corresponding increase of the use of long-term determinate sentences in the same period. Since April 2008, there has been a continuous increase in the number of children in custody serving long-term sentences as a percentage of the total population. The number of children serving long-term sentences as of the end of March 2010 was 454 out of a total of 2,145 children in detention. This represented almost one quarter of all children in prison. This represents an increase from February 2007, when just under a fifth of children (514 out of 2,809 children) in detention were serving long sentences (the latest data from the Ministry of Justice shows a dip in the number of children serving long-term sentences but this is largely due to severe bed shortages in the youth estate resulting in the immediate or even premature transfer of long-term child detainees to the adult secure estate). A high proportion of all children in the secure estate are serving sentences for breaching orders or breach of licence.

### **Least likely to have injustice remedied**

The Legal Services Centre for Research and Youth Access (2007) found that, compared with other age groups, young people are more likely to suffer from clusters of severe problems but less likely to seek or obtain advice successfully. The study found that only 20 per cent of young respondents with welfare benefit problems, 27 per cent with debt problems and 44 per cent with homelessness problems managed to obtain advice. This is true also in the criminal justice system, where a combination of poor advice and lack of understanding by young people appears to inhibit them from appealing.

This means that young people are less likely to have injustice remedied. It is also the case that there are specific issues that may apply to young people that practitioners should be alive to and which may mean that young people are more likely to suffer from errors and injustice in the first place. This may stem from judges and representatives simply getting the law wrong because of the large number of technical differences that apply to children in

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**“A judge’s perception that a child will be unable to change in a fixed period of time may be incorrect due to the absence of adequate information. This is especially important if such a conclusion has led to the imposition of an indeterminate sentence”**

the sentencing process, and sentences based on inadequate information resulting from difficulties that young people may face in explaining their case.

Grounds of appeal may be based on specific issues that apply to children and young people in light of the recognition that they change and develop in a shorter time than adults (see the decision in *R v Lang* [2005] EWCA Crim 2864). This may mean that a judge’s perception that a child will be unable to change in a fixed period of time may be incorrect because of the absence of adequate information. This is especially important if such a conclusion has led to the imposition of an indeterminate sentence.

Frequently the sentencing court places insufficient weight on the welfare principle and the unique factors that apply when imposing custody on young people underlined by the Sentencing Guidelines Council (2009). Often psychiatric reports have not been obtained where a young person suffers mental health problems or reports that have been obtained are incomplete. In relation to a proposed appeal all of these issues require careful consideration, investigation and appropriate decision making. Young people are often very anxious about appealing and it is usually necessary to visit them to explain the grounds and the process in person to both the young person and their carers.

### **Primitive and unsophisticated approach**

While the Court of Appeal appears to be predisposed to hearing arguments concerning a young person's capacity to change, there is a great deal of resistance to welfare-based arguments. The welfare principle set out in section 44(1) of the Children and Young Persons Act 1933 requires every court dealing with a child to have regard to his or her welfare. However, arguments based on the welfare principle tend to be greeted with short shrift by the Court of Appeal. It appears that the judiciary has historically taken a hard line approach to children.

As the late Tom Bingham commented in his article on the use of the pardon (*At the White House's Whim*): "The more primitive and unsophisticated a society's criminal law and practice, the greater the need for an extrajudicial power to alleviate the injustices that will inevitably arise." Drawing on examples from our own early history, Bingham cites examples quoted in the books of pardons granted to child killers (*London Review of Books*, 2009).

### **Capacity to change**

In the case of *R v S* [2010] EWCA Crim 1462, the Court of Appeal quashed a discretionary life sentence imposed on a child aged 12 at the time of the offence, replacing it with a very long extended sentence. In reaching its conclusion, the court specifically rejected the proposition that life sentences imposed on children should be the subject of periodic review or that progress of a child will be sufficient to

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**"It is often necessary to do quite a lot of work to obtain the relevant document from the original solicitors and what actually happened at first instance because children are often unable to explain what's happened"**

demonstrate that a sentence was wrongly imposed. The court was of the view that the judge had not considered the possibility of a long, fixed sentence and that this was in fact the appropriate sentence, presumably in light of the capacity of a child to change. The court noted: "We reach that conclusion particularly in view of the extreme youth of the child being sentenced and the need for all criminal courts to ensure that sentences upon children of that age are tailored not only to the need for public safety but also to the circumstances of the child."

Baroness Hale has closely examined the development of the welfare principle

within judicial decision making in a series of impressive civil judgments culminating in the recent judgment in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4. Agreeing with Baroness Hale, Lord Kerr observed that the best interests of a child “must rank higher than any other” consideration.

In *R v Secretary of State, Ex p Maria Smith* [2005] UKHL 51, Baroness Hale explained that the welfare principle stems from the fact that an important aim of sentencing children is to “promote the process of maturation, the development of a sense of responsibility, and the growth of a healthy adult personality and identity”. This is reflected in the SGC guidelines, which state that “the intention [of sentencing] is to establish responsibility and, at the same time, to promote re-integration rather than to impose retribution”.

However, the Court of Appeal Criminal Division remains reluctant to adopt this approach.

### Difficulties in representing children

It is often necessary to do quite a lot of work to obtain the relevant documents from the original solicitors and to investigate what actually happened at first instance. This is because children are often unable to explain what has happened. Many young people appear to have been wrongly advised that they should not appeal as they could get a longer sentence.

### Reporting restrictions

Many young people are especially anxious about their cases being reported and it is often necessary to make applications for reporting restrictions and take a statement explaining why this is necessary. There is no statutory provision that explicitly confers a power on

the Court of Appeal in relation to reporting restrictions, although it is likely that, where section 39 restrictions are in place, they continue and that there is an inherent jurisdiction for the court to grant similar restrictions. Practitioners should always ask the listing office to ensure the case is listed with an initial only to preserve the position before determination by the court.

### No special measures

While the Venables and Thompson directions have been incorporated into the Criminal Procedure Rules, they appear to only relate to matters in the Crown Court and below. They do not explicitly apply to the Court of Appeal. It is therefore necessary to make special arrangements to ensure that children are not overly intimidated when they are produced for appeal hearings.

Given the imposing nature of the Royal Courts of Justice, this can be a particular problem for young people who are keen to be present during their appeal hearings.

### Ways forward

Children undoubtedly suffer from lack of access to justice in this area of law. Even when they are advised on appeal, lack of specialist knowledge combined with the rigidity of an essentially adult appellate system means that children may struggle to achieve justice.

As a minimum, professional bodies should provide training on working with child appellants; the Court of Appeal should ensure that the practice direction concerning children is applied to itself and offer some coherent guidance on reporting restrictions for children at appellate level; and funding should be available as a matter of right for both solicitor and counsel representing children before the Court of Appeal.

# Evolution not revolution

**Dr Angus Nurse** is lecturer in criminology at Birmingham City University

Critics of the Criminal Cases Review Commission (CCRC) point to various factors in determining that the organisation has ‘failed’. In November 2010, Bob Woffinden, writing in *The Guardian*, described it as little more than a fig leaf and with a dubious record of success; others argue that it does little to help the innocent who are wrongly convicted. While it may be true that the CCRC has met with little success in quashing major convictions, its very existence (acknowledged by Woffinden and others to be unique) should be celebrated.

Few jurisdictions have a body that routinely examines the cases of those who feel they have been wrongly convicted or unfairly sentenced and which provides free access to aggrieved citizens without the need to involve lawyers.

But critics may legitimately consider whether the original role of the CCRC goes far enough. This essay sets out the case for development of the CCRC arguing that there is scope to extend its functions in line with other quasi-judicial bodies and models that exist elsewhere so that its role goes beyond its investigatory function to incorporate scrutiny of miscarriages of justice issues.

First, the CCRC’s role is not to establish the innocence of those making applications to it. Instead its role is to investigate with a

view to establishing the safety or otherwise of convictions in the cases brought before it. This is not to say that the commission is not concerned with innocence.

Indeed, in December 2009, outgoing commissioner David Jessel argued that “to consider the safety of a conviction provides a sterner test for the system and a more useful one for the innocent individual than any test for factual innocence alone ever could”. It also involves independent review of procedural and evidential faults that cause the innocent to be convicted, on a case-by-case basis.

But the specifics of the CCRC’s jurisdiction under the Criminal Appeal Act 1995 means that in practical terms the CCRC is not seeking to establish innocence even though this may be a by-product of its actions. The Criminal Appeal Act requires that only cases with the ‘real possibility’ of the conviction being overturned should be referred to the Court of Appeal.

The CCRC will naturally be selective in those cases that it refers to the Court of Appeal, but in this regard it is no different from any other investigative or quasi-judicial body, all of whom reach judgements on what cases they will and will not pursue and the criteria by which matters within their jurisdiction will be determined. The CPS does not prosecute all cases brought before it but instead makes

decisions based on guidance contained within the Code for Crown Prosecutors, nor do investigators for the Public Sector Ombudsmen investigate and decide all cases brought to their attention.

One principle of quasi-judicial bodies like the CCRC is that they are generally granted discretion over how they exercise their judgment, and as long as they do so in a logical manner and provide reasons for their decisions there is no reason why they should not do so.

Criticisms over the way the CCRC decides which cases to refer are thus criticisms of the decision itself not the actual function, and, while there will inevitably be those who disagree with specific decisions, it is the role of the CCRC, once entrusted with the discretion, to decide how to exercise it.

The courts have upheld this independence in a range of decisions concerning such quasi-judicial bodies.

### Working within its role

In *Re Fletcher's Application* [1970] 2 All ER 527, the courts refused to grant an order requiring the parliamentary commissioner to investigate an allegation of neglect of duty against the official receiver. The House of Lords concluded that the courts had no jurisdiction to order the commissioner to carry out an investigation.

Quasi-judicial commissions and commissioners must be free to exercise their functions as they see fit, and, in *R v The Criminal Cases Review Commission, ex parte Pearson* [1999] EWHC (Admin) 452, Lord Bingham made clear that the decision on whether or not to refer a case to the Court of Appeal “lay fairly and squarely within the area of judgment entrusted to the commission” and concluded that if the court were to assess the merits of the CCRC’s

judgment “it would be exceeding its role”. In *Morris v the Criminal Cases Review Commission* [2011] EHC 117, the High Court reiterated this view that as the CCRC “is vested with the power and duty to assess which cases cross the threshold for a reference to the Court of Appeal and which do not”. It is not for the courts to scrutinise cases where an individual, however aggrieved they may be, wishes to challenge the CCRC’s ‘evaluative’ judgments.

Critics also challenge the CCRC’s ‘official’ figure of 315 quashed convictions arguing that it does not stand up to scrutiny as cases where sentences are varied or where alternative convictions are substituted are counted as quashed. However, while the terminology may be misleading and such technical changes may make little difference to the convicted prisoner who remains incarcerated, it is important to bear in mind that such cases do constitute an effective review of a case.

The focus on the safety of the conviction is an integral part of the CCRC’s jurisdiction. It requires examination of cases specifically to consider whether there might have been error that new evidence could correct or which might provide grounds for a review. It has never been the CCRC’s role to decide the innocence of an individual or to establish the case for reform of the criminal justice system.

Innocence commissions are an entirely different thing, sometimes established to provide remedies for factually innocent victims of wrongful convictions (the error-correction model) or sometimes charged with providing advice about how to reform the criminal justice system to prevent future occurrences of wrongful conviction (the systematic reform model). The North Carolina Innocence Inquiry Commission, for example, has as its remit determination of claims of factual innocence



from living persons, while the public inquiry commission model employed by Canadian provincial governments is generally appointed after a conviction has been quashed and conduct investigations into the causes of the wrongful convictions.

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**“Theoretically at least there is no reason why the CCRC cannot function as both an error-correction and systematic reform commission - although this does require amendment to its jurisdiction”**

But these Canadian commissions can also make specific recommendations for changes to the criminal justice system arising from their investigations. For example, the Commission on Proceedings Involving Guy Paul Morin, an Ontario public inquiry into a wrongful murder conviction, made specific recommendations on the use of forensic science evidence, including: the requirement for forensic opinion to be acted upon only when in writing; the establishing of a written policy and guidelines on report writing for forensic reports; the creation of an advisory board and a full quality assurance unit; and the monitoring of courtroom evidence and the training of staff.

Other Canadian wrongful conviction commissions have recommended: mandatory sharing of investigation reports between all police forces assisting in major cases; recording of all young person's statements in both audio and video formats; referring all complaints to police which call into question the safety of convic-

tions to the Director of Public Prosecutions; and guidance to trial judges on how juries should be directed to consider and weigh identification evidence. Such recommendations seek to identify the causes of wrongful convictions and to aid in the development of practices to prevent their recurrence.

Theoretically, at least, there is no reason why the CCRC cannot function as both an error-correction and systematic reform commission – although this does require amendment to its jurisdiction. At present the CCRC rarely expresses views on legislative reform except in respect of legislation that directly affects its functions. However, there is scope to amend the Criminal Appeal Act 1995 to give the CCRC the power to make recommendations or provide guidance on the causes of miscarriages of justice. Other quasi-judicial bodies such as the Information Commissioner and the Commission for Local Administration in England (the Local Government Ombudsman) combine their investigative functions with a duty to promote good practice. The ombudsmen interpret their powers under the Local Government Act 1974 as providing a duty to provide guidance and disseminate information on what constitutes good (and bad) administration. By investigating individual complaints the ombudsmen may identify “more generalised weaknesses in practices, rules and attitudes” and from investigative findings identify a need for changes to administrative practices that will benefit other citizens. They disseminate this information in the form of guidance notes on good administrative practice and special reports on areas where common administrative mistakes occur. The Information Commissioner also publishes codes of practice and compliance and legal guidance. While these bodies admittedly have

different jurisdictions to that of the CCRC the provisions of their respective legislation allows them to develop and publish guidance on areas of systematic fault identified through their casework, and guidance on the requirements of good practice based on the failures that they uncover through their investigative work and their developing body of case law arising from this work.

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**“Miscarriages of justice ruin lives... it is not enough that the state reviews only the safety of convictions, no matter how well the CCRC does it”**

The CCRC is uniquely placed to do the same for miscarriages of justice given its casework experience, and to play an advisory role in the development of the criminal justice system such that a repeat of miscarriages of justice can be addressed.

Admittedly such a move would not be cheap; in 2010, Kent Roach, Prichard and Wilson Chair in Law and Public Policy at the University of Toronto indicated that Canadian inquiries typically have multimillion dollar budgets and these are temporary institutions with a mandate that is completed with the issue of their public report.

But these resulting reports are among the most comprehensive analyses of wrongful convictions within western criminal justice systems and the CCRC, in contrast to the Canadian model which considers individual wrongful convictions, has access to an ongoing

resource of miscarriages of justice evidence, providing for analysis of what goes wrong within our criminal justice system and the lessons that need to be learned to prevent a recurrence.

There are signs that the government has accepted the need for systematic casework review as a tool to improve aspects of the criminal justice system. In April 2011 the home secretary announced that, where someone has been killed by their current or former partner, a review will take place so that lessons can be learned to prevent future tragedies.

The principle of domestic homicide reviews is to be applauded but action is also required to address other tragedies within the justice system.

### **Time for action**

Miscarriages of justice ruin lives and undermine confidence in the criminal justice system and it is not enough that the state reviews only the safety of convictions no matter how well the CCRC does this (and despite its critics, let us acknowledge its uniqueness in doing so). While the CCRC already does good work in providing for extra-judicial review of cases that have reached the end of the road, it has the potential to contribute further by not only resolving miscarriages of justice when they occur but also helping policy makers and professionals understand the causes of miscarriages and how to prevent them.

For us to achieve this, the commission should be reformed so that rather than being a body within the justice system it becomes a body truly independent of it providing for extra-judicial scrutiny, the provision of evidence-based advice and guidance on how the criminal justice system can learn lessons from its ongoing failings to prevent miscarriages of justice.



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