Triennial Review of the Criminal Cases Review Commission 2012 Survey Questions

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Introduction

This survey is designed for an audience that already has a good understanding of the functions, form and purpose of the Criminal Cases Review Commission (CCRC). It is primarily aimed at key stakeholders such as legal and representative bodies. We would invite these bodies to share the survey wider with their members.

The survey is not designed to be exhaustive and does not seek to replace the general invitation to respond via the terms of reference and call for evidence published on the Justice website.

The survey is divided into 3 parts: CCRC functions; CCRC powers; CCRC form. These align with the stage 1 remit for Triennial Reviews, mandated by Cabinet Office.

1. Please state whether or not there is a continuing need for the following functions of the Commission:

(a) review of conviction and/or sentence in cases dealt with on indictment in England and Wales;

Yes to conviction. However, as a body that was established in response to notorious miscarriages of justice cases involving the conviction of individuals believed to be factually innocent (e.g. the Birmingham Six, Guildford Four, Maguire Seven etc.), I do not think that the CCRC should be using its scarce and diminishing resources on dealing with sentences.

In particular, the CCRC's limited resources are not well spent when they only result in minor variations in the appellant's sentence. For instance, in 2009, the Court of Appeal (Criminal Division) (CACD) heard the sentence appeal of Stephen McCurry[1] who was sentenced to 10 years imprisonment in 2004 for supplying 5,600 ecstasy tablets. McCurry's sentence was referred back to the CACD by the CCRC when new analysis showed that the purity of the tablets was around 40 to 50 per cent lower than what was posited at trial. The CACD held that whilst the sentence received by McCurry might have been a little shorter had the correct purity of the drugs been known, it would not result in a significant reduction due to other factors, such as the fact that McCurry was a wholesaler dealing with substantial quantities of drugs and that he had a previous conviction for dealing with lorry loads of cannabis.[2] The CCRC's referral of McCurry's sentence, therefore, resulted in only a one year deduction from the 10-year sentence he was originally given.

[1] R v McCurry [2009] EWCA Crim 227.
[2] ibid, paragraph 5.

In a similar case in 2008, the CACD heard the sentence appeal of Darren Cullen[3] who was convicted in 2004 of the murder a young, epileptic man. The murder was described by the CACD as 'prolonged and severe'.[4] The victim died as a result of serious head injuries after he was hit, stamped on and attacked using a snooker cue and a cricket bat. In view of the level of violence, Cullen was originally sentenced to life with a minimum term of 16 years. The CCRC referred the minimum sentence received by Cullen to the CACD on grounds of new psychiatric evidence which suggested that he might have suffered from a type of depressive illness at the time of the murder. Taking the new psychiatric evidence into account, the CACD deducted one year off Cullen's minimum sentence, amending his tariff from 16 to 15 years.

At present, most of the CCRC's sentence referral relates to sentence miscalculations. Whilst it is acknowledged that such miscalculations should be rectified, it is questionable whether this should be part of the role of the CCRC.

At present, the Attorney General deals with sentences thought to be too lenient. In 2011-12, the Attorney General referred 98 potentially unduly lenient sentences pursuant to section 36 of the Criminal Justice Act 1988 (compared with 102 cases in 2010/11). Of those cases dealt with by the full Court, 73 resulted in an increase in sentence.

A possible idea to remove sentences appeals from the remit of the CCRC would be to amalgamate all sentence appeals, whether on the basis that they are argued to be too lenient or too harsh, within the overall portfolio of the Attorney General's authorities.

(b) review of conviction and/or sentence in cases dealt with on indictment in Northern Ireland;

Same as (a).

(c) review of conviction and/or sentence in cases dealt with summarily in England and Wales;

Yes to conviction but no to sentence. In addition, less priority should be given to summary convictions, with applications involving convictions for serious offences where the applicant is serving long term custodial sentences being prioritised. The CCRC's assists with summary offences, such as parking tickets, and convictions under the Dangerous Dogs Act, such as Dino the German Shepherd dog, whilst the cases of alleged innocent victims of wrongful conviction languish in prison. This, arguably, can be seen by alleged victims of wrongful convictions and the public, alike, as discrediting the ??? CCRC.

(d) review of conviction and/or sentence in cases dealt with summarily in Northern Ireland;

Same as (c).

(e) investigation and reporting on matters on direction of the Court of Appeal;

Yes.

[3] R v Cullen [2008] EWCA Crim 2274.
[4] ibid, paragraph 4.

(f) investigation and reporting on matters on direction of the Court Martial Appeal Court;

No. Military offences should be dealt with by a separate body.

(g) review of conviction and/or sentence in cases dealt with by the Court Martial;

Same as (f).

(h) review of conviction and/or sentence in cases dealt with by the Service Civilian Court;

Same as (f).

(i) require the appointment of an investigating officer to carry out inquiries on behalf of the CCRC;

Yes. This function is particularly important in serious alleged miscarriages of justice involving allegations of police misconduct.

(j) provision of assistance to the Secretary of State on matters concerning recommendations for exercise of Her Majesty's prerogative of mercy.

Yes. In addition, under s.16 of the Criminal Appeal Act 1995, the CCRC also has the power to refer a conviction to the Secretary of State to consider exercising the Royal Prerogative of Mercy. This power, however, has never been used. I would recommend that the CCRC should consider utilising this power more often than it presently does, especially in cases where the Court of Appeal refuses to overturn the conviction of a clearly innocent applicant for procedural as opposed to evidential reasons.

2. Does the Commission have the right powers to fulfil its functions?

The statutory test the Commission is required to apply when deciding whether or not to refer a particular case for appeal is the "real possibility test" (set out in section 13 of the Criminal Appeal Act 1995).

(a) Is this the right test for the Commission to apply? If not, what would be better?

The "real possibility test" has drastically shaped the function of the CCRC. It has rendered the CCRC a gatekeeper of the Court of Appeal, where its decision making process is underpinned by the question of whether the Court of Appeal will overturn the verdict. A consequence of this is that the CCRC may be unable to refer convictions of those who might be innocent if it is felt to be unlikely that the Court of Appeal will quash them. This occurs, for instance, when the evidence that supports an applicant's innocence was or could have been available at the time of the original trial and, hence, does not constitute the sort of new evidence that the Court of Appeal requires to overturn a conviction. In the last 15 years, there have been a growing number of such 'cases for concern', which were deemed by the CCRC to not fulfil the real possibility test. In March 2012, INUK published a Dossier of Cases, containing 44 cases where the applicant has been refused a

referral at least once by the CCRC, primarily because evidence support their innocence is not new. (Available on: http://www.innocencenetwork.org.uk/ccrcreform) (Also contained in the INUK Report on the Symposium on the Reform of the CCRC attached and sent in Hard Copy).

This fails to take into account how juries could make mistakes in their decisions and lawyers could fail to adduce supporting evidence due to tactical errors or pure oversight, problems that were identified by the Royal Commission on Criminal Justice and were supposed to be dealt with by the new body – the CCRC.

At the same time, under the present referral criteria, the CCRC will refer the convictions of the clearly guilty if it thinks that the Court of Appeal might quash it on a technicality. In the joint-appeals of *R v Clarke* and *R v McDaid*, for instance, the CCRC referred their convictions for GBH back to the CACD solely on the ground that the bill of indictment was not signed by a proper officer of the court. There was no dispute as to the reliability of the evidence that underpinned their convictions.The attack on Mr Jacobs was violent and clearly pre-meditated. Clarke, McDaid, along with a group of unidentified men, attacked him with knifes and machetes. Both of his hands were almost severed as a result of the attack. Their appeals were initially dismissed by the CACD[5] but subsequently allowed by the House of Lords on the basis that the absence of a signature on their indictment invalidated their trial and hence their convictions.[6]

Other forms of non-innocence referrals also include 'change of law' cases where convictions are referred on grounds of new developments in case law or legislation that calls for an examination of whether the relevant criminal law had been correctly applied. In the case of Joseph Fletcher,[7] the appellant was convicted of 6 counts of indecent assault against under-age girls and an additional count of indecent assault based on a full act of sexual intercourse. At trial, over two years after the original charges were made, the additional count of indecent assault was added to the indictment as an alternative to a count of rape. The CCRC referred Fletcher's conviction solely for the additional count back to the CACD in light of the House of Lord's decision in the separate appeal of *R v J*,[8] which held that the prosecution of defendants based exclusively on an act of intercourse should be prohibited when the 12-month time limit has past. The CACD quashed Fletcher's conviction for the additional count, holding that the 12-month time limit in *R v J* would apply in instances where the count of indecent assault was added to the indictment as an alternative to the charge of rape.

Overall, the 'real possibility' test under s.13 of the Criminal Appeal Act 1995 needs to be replaced with a different test that allows the CCRC more independence from the Court of Appeal. This independence from the Court of Appeal should apply both in its review of alleged miscarriages of justice, and, in its consideration on whether to refer a case back to the Court of Appeal.

I would suggest a new test along of lines of that recently implemented by the South Australian Parliament, where convictions should be referred if there is "compelling evidence in relation to the offence which may cast reasonable doubt on the guilt of the convicted person."[9]

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[5] R v Clarke and McDaid [2006] EWCA Crim 1196.

[6] R v Clarke and R v McDaid [2008] UKHL 8.

[7] Fletcher's appeal was heard jointly with Steven Cottrell. However, Cottrell's appeal was not heard by way of referral by the CCRC but as an application for leave to appeal out of time. See R v Cottrell and Fletcher [2007] EWCA Crim 2016.

[8] R v J [2004] UKHL 42.

[9] On the 18th July 2012 the South Australian Legislative Review Committee on the CCRC Bill Reported that it would not be recommending that a CCRC-style body be established in South Australia. Instead, of the seven recommendations, Recommendation 3 was for a new statutory right for certain qualifying offences to provide that a person may be allowed at any time to appeal against a conviction for serious offences if the court is satisfied that: (i) the conviction is tainted; (ii) where there is fresh and compelling evidence in relation to the offence which may cast reasonable doubt on the guilt of the convicted person. See Parliament of South Australia (2012) 'Report of the Legislative Committee on its inquiry into the Criminal Cases Review Commission Bill 2010': LC GP 119-B: the Hon Ann Bressington MLC.

Evidence would be considered ***compelling*** if—
(i) it is reliable; and
(ii) it is substantial; and
(iii) it is highly probative in the context of the issues in dispute at the trial of the offence.[10]

The CCRC should also be looser in its interpretation of what constitutes new evidence. New evidence should be widened to include all evidence not heard by the jury and less regard should be given to the reasons why the evidence was not adduced.

I also believe that there should also be an additional 'interest of justice' test, which the Scottish CCRC currently applies. For example, the CCRC should have the discretion under the 'interest of justice' test to not refer cases back to the Court of Appeal where the applicant is clearly guilty but may have grounds of appeal due to some unintentional breach of process. Similarly, this will also give the CCRC the discretion to not refer cases where the applicant has, subsequent to the conviction that s/he is disputing, has convicted further serious offences.

(b) Do the current powers of the Commission need to be extended?

Currently, Section 17 of the Criminal Appeal Act 1995 empowers the CCRC to obtain documents or other material from a public body which may assist the Commission in the exercise of any of their functions. However, the Act does not empower the CCRC to obtain such material from a private company or an individual[11]. This power is available to the Scottish CCRC.

The CCRC's powers under s.17 need to be extended to both private company and individuals. This is particularly important in the review of convictions for historical abuse cases, where private bodies such as schools and charities may hold crucial information and records.

In addition, the CCRC should utilise its existing powers to undertake more fieldwork investigations, such as crime scene visits and re-interviewing of witnesses, particularly in complex, serious cases. Whilst it is accepted that this would require an increase in the CCRC's resources, the resource implications could be addressed by refining the CCRC's intake (such as taking the review of sentences out of its remit as outlined in section 1) to sharpen its focus. For instance, cases based on points of law or legal technicalities that have no bearing on the applicant's possible innocence could be excluded from the CCRC's remit altogether. Such a refinement can contribute to more rigorous investigations on potentially genuine innocence cases.

3. What should be the future structure of the Commission?

You may wish to consider the following questions which are in line with Cabinet Office guidance on Triennial Reviews:

(a) Should it be moved out of central Government?

(b) Does it need to be an Arms Length Body?

(c) Could the function be delivered as part of a Government Department?

(d) Could the function be delivered by a new Executive Agency and what would be the benefits of creating a new Agency?

(e) Is there any scope to merge the functions with any other body?

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[10] Ibid at p.18.
[11] This limits the ability of the CCRC to obtain information from private sector bodies and can cause delay in the CCRC's reviews. This has become more difficult as previously public bodies, such as the Forensic Science Service, are privatised.

(f) If it should remain an Arms Length Body, should there be changes to the structure and membership of the Commission?

The CCRC should remain an Arms Length Body that is independent from Government. This is crucial especially in light of the historical context that led to the establishment of the CCRC i.e. concerns that the Home Secretary was not referring meritorious cases back to the Court of Appeal for political as opposed to legal reasons. The Royal Commission on Criminal Justice thought it vital that the new body, the CCRC, should be independent of government and of the courts.

In addition to retaining its independence from Government, it is crucial that the CCRC also functions independently from the Court of Appeal by changing the existing 'real possibility test'. Its investigations and decision making process need to be focused on whether or not an applicant may be innocent, as opposed to second-guessing whether the Court of Appeal will quash the conviction. This will help to ensure that only convictions of potentially genuine innocent applicants will be referred and reduce the instances of applicants who are clearly guilty receiving a referral.

In addition, although the Criminal Appeal Act 1995 specified that only a third of staff at the CCRC need to be lawyers, most Commissioners and Case Review Managers were former practising lawyers. I feel that this has an impact on the nature of CCRC reviews, which are overtly legalistic as opposed to a factual investigation of whether an applicant may be innocent. There is a need for more diversity in terms of the composition of Commissioners and Case Review Managers. Specifically, it should consider recruiting former forensic scientists, investigative journalists and academics as Commissioners and Case Review Managers, which could help to promote a more factual investigative culture.

Finally, the CCRC is presently housed in the same building as the Crown Prosecution Service. Its present Chair, Mr Richard Foster, also used to be the Chief Executive of the Crown Prosecution Service. Whilst I am not claiming that this has influenced the CCRC's impartiality in any way, it is highly important that the CCRC's public image of independence and impartiality is preserved and its present location and Chair may cause this to be compromised.

4. Do you have any further comment on the functions or form of the Criminal Cases Review Commission?

On 30 March 2012, INUK organised a Symposium on the Reform of the CCRC, which was hosted by Norton Rose LLP and funded by the Joseph Rowntree Charitable Trust. The Symposium consisted of papers presented by CCRC applicants, criminal appeal lawyers, academics, investigative journalists, former CCRC Commissioners and representatives from grassroots organisations that provide support to alleged wrongful conviction victims.

There is an overwhelming consensus in the Symposium Report that major reforms to the CCRC are required, in particular, the need to repeal the 'real possibility test' under s.13 of the Criminal Appeal Act 1995 so that the CCRC is not slavishly tied to the Court of Appeal.

I have attached a pdf of the Report from the Symposium and have sent a hard copy in the post, which I hope will be considered by Ministry of Justice along with this Survey.