

SUBMISSION TO: Westminster Commission inquiry on the ability of the Criminal Cases Review Commission (CCRC) to deal effectively with miscarriages of justice.

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ABOUT ME: I am an academic who has extensively researched and written about the limits and outright failings of the CCRC in assisting alleged factually innocent applicants. I established Innocence Network UK (INUK) (Director, 2004-2015) and the University of Bristol Innocence Project (Director, 2005-2015) because of the failures of the CCRC to assist innocent applicants. And, I also have a wealth of first-hand experience of the CCRC in terms of submissions, applications and meetings with the various CCRC Commissioners, Case Review Managers (CRMs) and other members of staff on behalf of alleged innocent victims of wrongful conviction and imprisonment under the auspices of the University of Bristol Innocence Project and Innocence Network UK (INUK). This submission is supported by the following publications in books, official reports and academic articles in peer-reviewed journals, which centre on the ability of the CCRC to assist alleged innocent victims of wrongful convictions: Naughton, M. (Ed.) (2009) *The Criminal Cases Review Commission: Hope for the Innocent*. Palgrave Macmillan (The book is the first critical review of the operations of the CCRC from the perspective of alleged innocent applicants. It is comprised of 16 chapters by lawyers, journalists, academics and third-sector organisations. In addition to conceiving and editing the book I contributed Chapters 1, 2 and 16); Huff, C. R., and Naughton, M. (2017) 'Wrongful conviction reforms in the U.S. and UK: Taking Stock' in Plywaczewski, E. and Guzik-Makaruk, E. (2017) (Editors) *Current Problems of the Penal Law and Criminology*. 7th Edition. Warsaw, Poland: Wolters Kluwer Publishing; Naughton, M. (2013) 'The Criminal Cases Review Commission' in Naughton, M. (2013) *The Innocent and the Criminal Justice System*. Palgrave Macmillan; Naughton, M. and Tan, G. (2010) *Claims of Innocence: An introduction to wrongful convictions and how they might be challenged* (University of Bristol); Naughton, M. (2012) 'The Criminal Cases Review Commission: Innocence versus Safety and the Integrity of the Criminal Justice System', *Criminal Law Quarterly*, Vol. 58: 207-244; Naughton, M. and Tan, G. (2012) 'INUK on the Reform of the Criminal Cases Review Commission – Report'. LexisNexis; Naughton, M and Tan, G. (2010) 'The Right to Access DNA Testing by Alleged Victims of Wrongful Convictions in the United Kingdom'. *International Journal of Evidence & Proof*, 14: 326-345; Naughton, M. (2006) 'Wrongful Convictions and Innocence Projects in the UK: Help, Hope and Education', *Web Journal of Current Legal Issues*. 3. These articles and many others which centre on issues relating to miscarriages of justice and wrongful conviction and imprisonment can be accessed on my website at: <http://michaeljnaughton.com> Copies can also be supplied on request.

EXECUTIVE SUMMARY:

The following legislative and policy reforms are recommended, which are aimed at firstly, at enhancing the CCRC's independence by unshackling it from the Court of Appeal; and, secondly, improving the thoroughness and quality of its case review process so that it is better placed to assist applicants who are or may be innocent.

1. The existing relationship between the CCRC and the Court of Appeal is unsatisfactory.
2. In particular, the 'real possibility' test under s.13 of the Criminal Appeal Act 1995 enshrines a relationship of deference to the Court of Appeal. It prevents the CCRC from referring potentially genuine miscarriages of justice of applicants who may be innocent if it is thought that the Court of Appeal may conclude that the case lacks legal merit.

3. This severely compromises the CCRC's claim to independence and hinders its ability to assist applicants who may be innocent.
4. Most crucially, the 'real possibility' test under s.13 of the Criminal Appeal Act 1995 needs to be urgently repealed to be replaced with a test that allows the CCRC to refer a conviction back to the Court of Appeal if it thinks that the applicant is or might be innocent.
5. CCRC reviews cannot continue to be restricted to the mere pursuit of fresh evidence that was not available at the time of the original trial or the first appeal but must consider all the evidence.
6. The wording of the fresh evidence criteria under s.23 of the Criminal Appeal Act 1968, which defines fresh evidence as evidence not adduced at trial, is generally unproblematic.
7. However, both the CCRC and the Court of Appeal tend to adopt an overtly strict interpretation of the test.
8. In particular, evidence that was, or could have been, available at the time of the trial is generally not considered as fresh evidence.
9. A fairer interpretation of the fresh evidence criteria needs to be adopted so that victims of miscarriages of justice are not procedurally barred from having their convictions overturned.
10. The CCRC's case review approach is generally limited to a desktop review of the case papers.
11. It needs to undertake more fieldwork investigations, such as crime scene visits and (re)interviewing of witnesses, particularly in complex, serious cases.
12. Whilst it is accepted that this would require a significant increase in the CCRC's resources, the resource implications could be addressed by refining the CCRC's intake 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. Such a refinement can contribute to more rigorous investigations on potentially genuine innocence cases.

SUBMISSION

1. This submission pertains only to convictions given in the Crown Court and to the failures of the CCRC to assist applicants who are or might be innocent to have their cases referred to the Court of Appeal.

2. Example 1: I worked on a case with the University of Bristol Innocence Project for almost 10 years. When we took on the case the applicant had made two previous failed applications to the CCRC. We submitted a third application in 2013 and waited two years for the CCRC to tell us that it was not going to refer his conviction to the CACD without conducting any investigations at all. This was despite the application being supported by a letter from a fellow prisoner who claimed that he was present when our 'client' was alleged to have admitted to the murder to a prison informant who gave evidence against him and he did not hear such an admission being made. We requested that that prisoner be interviewed. The application was also supported by reports from three leading and respected independent forensic scientists (fingerprints, mycology and DNA), which requested that further investigations be conducted to determine whether the applicant was indeed innocent as s/he claimed. Yet no inquiries or investigations were carried out by the CCRC CRM at all. Instead, the Statement of Reasons for why the conviction was not going to be referred was restricted to an attempt to justify why no further investigations should be undertaken as the CRM did not believe that if inquiries were made or forensic tests conducted that they would satisfy the 'real possibility test'. For the CRM, what we were asking to be done could have or should have been done at the time of the original trial. On that basis, he was not prepared to do anything at all. The applicant who was convicted of murder in 1998 is still in prison in 2019 and is currently almost 9 years past tariff.

3. Example 2: In another case that I worked on with the University of Bristol Innocence Project, a request for DNA testing to be conducted on a murder weapon that was claimed to have been used by our 'client' was also refused on the basis that the CRM did not see how it could be relevant to the 'real possibility test' as the testing could have been done at the time of the original trial. We pointed out that if our 'client' was innocent then the conviction must surely be unsafe but even that did not persuade the CRM to carry out the test.

4. The CCRC claims that it is an independent public body at arm's length from the executive and the judiciary; the government and the courts.

5. Yet, the CCRC as it currently functions is not independent of the appeal courts due the restrictive nature of s.13 of the Criminal Appeal Act 1995, which determines the nature and depth of its reviews.

6. More specifically, s. 13(1)(a) of the Criminal Appeal Act 1995 mandates that it can only refer a case back to the appeal courts if there is a 'real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made'.

7. This 'real possibility test' that is required by its governing statute fatally compromises the CCRC's claim of 'independence' and with it its ability to assist factually innocent victims of wrongful conviction. It shackles the CCRC to the criteria of the Court of Appeal for quashing convictions.

8. It means that the CCRC is always in the business of second-guessing how the Court of Appeal might decide any applications that it refers.

9. It means that the CCRC does not attempt to determine the truth of alleged wrongful convictions but, rather, seeks to determine whether convictions might be considered 'unsafe' by the Court of Appeal when dealing with convictions in the Crown Court, for instance.

10. The knock-on effect of these limitations is that the CCRC's reviews are mere safety checks on the lawfulness or otherwise of criminal convictions, as opposed to in-depth inquisitorial investigations that seek the truth of claims of innocence by alleged innocent victims of wrongful convictions.

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

12. Therein lies the most crucial structural problem with the CCRC.

13. It means that the CCRC as currently constituted is not looking for evidence or innocence; it is not concerned with whether the applicant did or did not do the alleged crime that they were convicted of but, rather, with whether the case will be accepted by the appeal courts, which is contrary to the interests of justice and to why the CCRC was set up in the first place.

14. This places a requirement on applicants to the CCRC to provide evidence or argument thought to be fresh that was not available at the time of the trial. This requirement follows the Court of Appeal's provisions on the admissibility of evidence under s.23 of the Criminal Appeal Act 1968.

15. This requirement restricts the CCRC's ability to assist the innocent if the evidence of their innocence was deemed to have been available at the time of the original trial or previous appeal.

16. If evidence supporting the applicants claim of innocence was available but was not produced at trial either by reason of omission, or, some presumed tactical decision by trial counsel, such evidence will not, generally, constitute the kind of fresh evidence or argument required by the CCRC.

17. Overall, the current operations of the CCRC presupposes that jury decisions are always correct which prevents the CCRC from rectifying errors that were known at trial or first appeal.

18. It means that the CCRC often cannot rectify errors of judgment or omissions made by defence counsels/solicitors, notwithstanding the reality that defendants often have little knowledge of the criminal trial process and rely entirely on the judgment and expertise of their legal representatives.

19. The 'real possibility test' and the requirement for fresh evidence not only impact on the CCRC's consideration on whether or not to refer a case back to the appeal courts, but also its case review process.

20. As a review (as opposed to investigatory) body, the CCRC generally does not undertake re-investigation of cases. Its case review methodology can be characterised as a 'desktop review', often limited to an appraisal of the arguments or evidence presented to it by applicants – first, to assess whether the evidence is 'fresh' and second, to consider if the application meets the 'real possibility test'.

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

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

23. On the other hand, a dossier of 44 cases of potentially innocent alleged victims of wrongful convictions were made public by the Innocence Network UK (INUK) in March 2012. Dossier of Cases available at: <http://www.innocencenetwork.org.uk/wp-content/uploads/2012/05/INUK-Dossier-ofCases.pdf>

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

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

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

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

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

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

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

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

32. The CCRC ought to demonstrate its (claimed) independence and refer cases where it believes a miscarriage of justice may have occurred even in the face of a clash with s.13 – the “real possibility test”, i.e. where the evidence that led to conviction has been undermined or that evidence of innocence exists that may have been available at the time of the original trial or previous appeal, that

33. In not referring such cases, the CCRC works contra the conditions for its establishment and it undermines other possible impacts that sending such cases back to the appeal courts might have, even if they were not to be overturned under the existing arrangements.

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

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

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

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

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