



Justice Committee

Oral evidence: [Criminal Cases Review Commission](#), HC 850

Tuesday 13 January 2015

Ordered by the House of Commons to be published on 13 January 2015.

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Members present: Sir Alan Beith (Chair); Jeremy Corbyn; Mr Christopher Chope; John Howel; and John McDonnell

Questions 1-44

Witnesses: **Dr Dennis Eady**, Case Consultant, Cardiff University Law School Innocence Project, **Dr Michael Naughton**, Innocence Network UK (INUK), University of Bristol Innocence Project, **Glyn Maddocks**, solicitor, and **Mark Newby**, solicitor, gave evidence.

Q1 Chair: Good morning, gentlemen, and welcome. I am sorry our numbers are depleted. Some of our members are serving on the Serious Crime Bill Committee, which is taking place at the same time as this meeting. We have with us Dr Dennis Eady, case consultant at the Cardiff university law school innocence project, Glyn Maddocks, specialising as a solicitor in appeal cases, Dr Michael Naughton, founder and director of the University of Bristol innocence project and the innocence network, and Mark Newby, solicitor advocate specialising in criminal law, who has taken a strong interest in miscarriages of justice. We look forward to benefiting from your considerable collective and individual experience in this

field. You have all said that the CCRC should be more proactive in its investigations, although some of the research indicates that they go “beyond the bundle” in as many as a third of cases. Does anyone want to spell out why and how they should be more proactive in the way they investigate?

Mark Newby: The experience of practitioners in dealing with these cases, and some practitioners deal with a lot of these cases, is that applicants, in particular when they make their own applications, will submit a series of what they consider to be their appeal points. Many CCRC cases can be concluded simply by cross-checking those points, and we regularly find that to be the case, rather than taking a proactive stance and looking more deeply at what may be the unsafe aspects of a case that may not have occurred to an appellant. We see a body of evidence on a regular basis that, in fact, the commission can be very reactive as opposed to proactive in terms of investigations. Of course, there are cases where the commission goes above and beyond, but consistency is the real problem here, that as a body it is not delivering that consistently to all the applicants who come before it.

Q2 Chair: What should be the threshold for it ordering, for example, forensic testing or other active measures?

Mark Newby: Clearly, it should not be purely speculative. An obvious example might be if someone were involved in a consensual rape case. They might say, “I want to have all the exhibits tested.” There would be no point in having those exhibits tested. However, you have to be careful about making that decision. The obvious and very relevant example was the wrongful conviction of Victor Nealon, where the commission wrongfully, and it accepts wrongfully, had a policy not to undertake speculative tests and applied that in a wrong way and did not do tests that it should have done, which would have made a significant difference to Mr Nealon.

Q3 Chair: What went wrong with that? How did they get into a practice of interpreting their rules wrongly?

Mark Newby: When the commission first started, it had to create a number of policies, and one of those was not to undertake speculative testing, no doubt owing to a large number of applicants asking the commission to do that very thing. The difficulty was that that became an ingrained policy, and so in the Nealon case everyone lost sight of the fact that there were very good reasons to undertake that testing. There were clear hints that something had gone wrong and that exhibits had not been tested. A bad decision was made in 1999; and then in 2002, when the case went back with a different appeal lawyer, the commission built upon that, indicating it would not undertake the test because of its policy, and relied on assurances from the police officer that the test had been done, when, of course, everyone now knows from the appeal that the test had not been done. So it just built on it. Then, with respect to the commission, it was lazy in not looking further to see what had gone wrong, and that is where we are, and the commission accepts that.

Dr Naughton: I do not think it is helpful to mix entirely speculative testing with testing which might determine whether a claim of innocence is valid or not. Mark talks about our not asking the CCRC, which has finite resources, to do all testing in all cases all the time, but if the paperwork indicates that this is a claim of innocence which may be valid, I think all testing which can be done should be done to determine whether that is true. In the cases we are talking about there is nothing speculative in the true sense of that word that we are asking them to do.

Dr Eady: May I take you back to your original point? I think you said that in one third of cases they were proactive.

Chair: The evidence we had was that it involved going beyond the bundle.

Dr Eady: I think people's expectations with the CCRC, and when the CCRC go into prisons and talk to prisoners, are that the CCRC will be proactive in some sense in every case, and that they will look beyond what the person is saying and what is in the bundle, so for an organisation to be proactive in only a third of cases is not necessarily a very positive impression.

Q4 Chair: Does the CCRC not have a duty to establish that there is some potential route towards the overturning of a conviction before expending resources on it, given that the cases are in competition with each other: there is a queue of people outside who may be able to show clear indicators that further investigation would yield results?

Glyn Maddocks: I think that is correct. The CCRC carry out an initial screening where they establish whether or not a case has merit, and in those cases which they decide have merit they should undertake what I would describe as an agnostic search for the truth. If that involves them in doing some speculative testing, which again has merit and which can be justified, they should do it. What we all find over here is that they are not doing their job as effectively as they could and they are not listening to outside solicitors or campaigners or whoever making suggestions. What we are now trying to do with them is set out a template so that they can proceed along the path we are setting out for them. In cases that I have been involved with in the past I have done most of the legwork for them, so they then just have to follow that. Obviously, they have resources that I do not have, but I am suggesting experts to whom they could go, whatever discipline they are, and do what I cannot do and do not have the resources to do, but if they follow that path they will inevitably come up with what I think to be the good result.

Dr Naughton: Another question we need to know the answer to when they claim that in a third of cases they go beyond the bundle is what types of case they are. We know that the Royal Commission thought that the CCRC would be looking only at cases of people who were claiming to be victims of a miscarriage of justice. That can be interpreted very narrowly or very broadly, but they were talking about people who were convicted of serious offences and claiming factual innocence. However, they look at all these other cases we know about, and I do not need to go into that, but in that third of cases in which they go beyond the bundle they are typically not the kinds of case which we as innocence projects and Mark and Glyn are working on. We are typically working on serious sexual offences, life sentences, murder cases, and they take a lot more resources. In terms of the

cases in which they go beyond the bundle, it was interesting that, in a conference that the CCRC came and gave a presentation to for Innocence Network UK last April, they gave some examples of where they go beyond the bundle. None of them was a murder or serious assault case. They were low-hanging fruit cases. They were immigration cases, asylum cases, burglary cases, cases in which they go beyond the bundle but they do not have to go that far beyond the bundle to get “a success” so that they can record it as part of their 70% overall success rate. I believe they are obsessed with that 70% figure, which makes them look out for these easier cases and they shy away from the very cases they were set up to sort out.

Q5 Chair: Should we be worried that those who are legally represented appear to do better in the CCRC process?

Glyn Maddocks: Yes, definitely. There has been some research undertaken by Warwick university which proves very clearly that those who are represented stand a much higher chance of having their case referred, which makes perfect sense. When Parliament debated the establishment of the CCRC, I do not think that that point was considered in as much detail as it should have been, but it is certainly one which has become more and more apparent. It is a complicated process. A prisoner from his prison cell writing a letter to the CCRC saying, “I am innocent; please help me,” has almost a nil chance of success, as opposed to someone who has a solicitor or barrister or some campaigner outside, an innocence project or whatever, specifying in enormous detail with documents and arguments of considerable merit that there is something wrong with his conviction. It is a completely different ball game. Having said that, a third of those who apply to the CCRC each year are not represented.

Dr Eady: It should be fairly self-evident that, hopefully, if you have a solicitor you are going to get a better job done. That should be an expectation. What happens with a lot of cases is that the solicitors tend, naturally enough, to pick the cases they feel they can achieve something with. Maybe they will get legal aid; maybe they can see a way forward. What innocence projects and other organisations often end up with are cases which the solicitors have not taken up, and the only hope for these people is for them to go to an innocence project. That is one of the reasons why innocence projects and similar organisations have a low success rate.

If I may backtrack to the last question to give an illustration, we have put forward nine applications to the CCRC. Seven have been completed. In all of those, we requested things like a review of the police investigation, sometimes pathology, handwriting, medical issues, forensic science. In only one case has any of those things ever been investigated by the CCRC. In all the others, they have decided not to do them outside their own resources. The one case which was investigated was referred and cleared at the Court of Appeal. There are a lot of instances where possibly a more proactive approach might bring about some results.

Q6 Chair: Could the CCRC engage better with those who are representing people who are making applications to it?

Glyn Maddocks: It certainly could and should. I have written about this. I think it is very much a random situation where, if the solicitor is able to communicate effectively with the case review manager, the chances of that case making progress are much more effective and much more likely. If it does not, if the case review manager is not particularly communicative or is not very experienced, or whatever, that case does not progress in the way it should. It seems to be very random.

Mark Newby: The problem, I think, comes almost from a misunderstanding by the case review managers. They seem to approach their role in the sense that they must keep every single thing secret from an applicant until they make the decision and there is no reason for that. Of course the commission cannot disclose discreet inquiries which might involve public immunity issues or certain routes or anything which might ultimately indicate where its direction may be, but that does not mean there cannot be engagement as to what is happening. My experience is that, in large part, very little information travels out of the commission to indicate to applicants and their representatives what is happening, and the hapless applicants therefore find themselves not only fraught by the fact that they are wrongfully convicted but by sitting waiting, unfortunately, for applications which sometimes can take many years for the commission to resolve, not knowing what is happening with their application. That cannot be right.

Dr Naughton: Part of the problem is that, correctly, the case review managers were intended to have quite a heavy lay representation, so a lot of the case review managers are not legally trained. I was talking to one at a meeting one time and he had a 2:2 degree in theology from Hull university. There is nothing wrong with that, of course, but if you have a case review manager who is relatively inexperienced, there is no training programme for case review managers. They are supposed to learn their own way to investigate their own cases, and when they come up against a formidable solicitor like Mark or Glyn they are going to feel uncomfortable. The way they have interpreted their independence is as their independence from people who are making applications as well, so the default position becomes, “Do not give any information out whatsoever,” because there is less likelihood of their getting into conflict with the solicitor because they feel insecure and inexperienced compared with some of the advocates for these alleged victims of wrongful convictions because these are the hardest cases, which get the best representation.

Dr Eady: I think a major concern is the CCRC’s reluctance to meet the applicants themselves. We know of cases which have been on and off with the CCRC for over 10 years and they have never even met the applicant. What they say—that they do it when they consider it necessary—is, to be honest, a little bit arrogant. You do not know what is going to come of it when you meet the applicant. All sorts of things can arise which can take you in different directions and verify certain things, so I think they should look at that. Particularly in serious cases where there is a major review, they should be consulting with the applicant directly.

Q7 John Howell: Could the CCRC reduce its work load simply by refusing to investigate some categories of case, sentence-only cases or trivial cases? Is this a possibility? Could it

then concentrate on more deserving and significant cases?

Glyn Maddocks: I do not think they can just do that because at the moment they have a statutory responsibility to investigate what Parliament has asked them to investigate, but I think it would be a good idea if they did concentrate on the more serious cases. In fact, the courts have restricted what they feel they want to see in relation to sentencing cases anyway, so I do not think anyone here would disagree with some of the trivial stuff being taken out of their remit.

Q8 John Howell: What does it take to allow it to do that? Would it take a change in the law?

Glyn Maddocks: I suspect it would take a change in the law.

Dr Naughton: The Royal Commission on Criminal Justice was the most significant review of our criminal justice system. Twenty years on, the way the CCRC prioritises its cases, I do not think is either in the spirit or the letter or what the RCCJ was talking about. Parliament did give it all these extra things to look at, and so Glyn says, rightly, that you cannot really criticise it according to the letter of the law for what it looks at. However, what the CCRC does do is decide what kinds of case it prioritises. It has its own policies in place, and what it is prioritising are these low-hanging fruit cases rather than the more difficult murder cases. If it wanted to leave the dangerous dogs and the parking tickets till last and focus on dealing with all the murder cases first, you might not get a 70% success rate and it might take them five or six years to overturn one case. John Spencer at Cambridge once wrote about what the Court of Appeal does, and I think it is also relevant to the CCRC. It deals with those cases in which it thinks it can do something. It does this kind of triage system where it looks at the cases in a quick filter, “We can do something with that case. Let us work on it. We cannot do much with that case. It is going to take us five years, it is going to take us 10 years. Just leave it.” Those cases keep going to the bottom of the pile, so we are outside, talking about cases that Glyn has been working on for 20 years. The whole country thinks that is a miscarriage of justice, and we are still talking about the same cases. We are all getting old with these cases, and they are still at the bottom of the pile or the CCRC is still sitting on them. There needs to be a change of priority, if not a change in law.

Q9 John Howell: What is the average time between applying to the CCRC and getting a decision?

Dr Eady: We have recently put in some applications and eight months is the minimum to get a case review manager to begin to look at the case. In our experience, reviews were taking about two years in most cases, and if you are lucky enough to be referred to the Court of Appeal, you have another year to wait before you get there. The process is very lengthy.

Q10 John Howell: How can that process be speeded up?

Glyn Maddocks: I think you would have to ask the CCRC that. I do not quite know what they do sometimes. One of my cases, which Mike has just mentioned, was with the CCRC almost from the day it started, and it was referred in 2008. I am not quite sure why it took so long. Having said that, when it was referred and the conviction was not quashed, we have now gone back once more and raised a considerable number of additional points. Theoretically, if they had had 10 years to look at them in the first place, they should certainly have looked at those points, but they have not even looked at the HOLMES material in the police investigation, which seems bizarre.

Mark Newby: One of the problems is the very structure of the commission and the way in which it approaches the cases, because when it gets to a point where it thinks it is a case which requires considerable investigation and it may amount to a referral, it then falls within a committee structure where three commissioners are looking at it. As an example, there is the Nealon case and there are other cases. There is a historic case referred to in my submission of Dent, which took six years. Each time those investigations and inquiries are being done it is then going back to the committee of three to look at those and make a formalised decision. That sort of bureaucracy elongates the process, because, as you can imagine, you have to get those commissioners together, you have to get the case review manager, you have to get all the reports collated and read, and those processes take far too long. That is what is dragging the commission down, the level of bureaucracy that has developed within it, and it is not easy to fix, of course.

Q11 Chair: Is it bureaucracy or is it an excessive level of internal accountability as decisions are made?

Mark Newby: I think you are right; it is that, and I think they are understandably fixated on recording all their processes and how they record and deal with matters, but it seems to me that the process is not right. It is elongating cases unnecessarily.

Dr Naughton: It is not just that. When you put cases in and you put on the table what we believe to be new evidence from, say, four experts, the CCRC does not speak to those experts. It regards those experts as somehow partisan to the innocence project or the lawyer, and they almost see them as something they have to try to overcome, so they go and speak to other experts to ask them what they think about these expert reports, and if they find any conflict whatsoever that becomes a cause to say, "We do not think this will fulfil the 'real possibility' test." It is a very high hurdle and it does not seem to matter what you put on their table. They are trying to overcome the evidence you are putting on their table very quickly to push your case away. The CCRC was set up because the public in this country had the biggest crisis of confidence that has ever happened in the criminal justice system at the scandal of innocent people being in prison for 18 and 16 years. In some of the cases we are working on, they have been in prison for longer than that, over 20 years. These cases have been with the CCRC and some of them were with C3 division before the CCRC, and they ain't going away. So another application has just been put in for his case, and he is not going to go away because they are convinced that this person is

innocent but this person does not fulfil the “real possibility” test because they are looking for whether it is unsafe in law, not whether the person is or might be innocent.

Chair: We will come on to the test in a moment.

Q12 John Howell: We have had a lot of evidence that the CCRC should have the power to compel private bodies to disclose documents. Is that a sensible condition and how would it work?

Mark Newby: It is absolutely essential. The problem is that we are in a situation where the Scottish CCRC, which follows it, is in a position where it can do that, and it is wholly wrong that the commission is not able to do that. Let me give you an example. In a number of historic care home appeals which the commission has looked at, in those cases—and there are going to be more coming now as part of the new spate of concerns over these cases—a lot of the institutions are private bodies and therefore you can only access those records if you can persuade that private body to disclose the records, which the commission cannot because it has no power to do so. Forensic laboratories have now moved to private laboratories and those records are kept by private laboratories. The whole trend in society now is to move to private organisations, and unless the commission can access those records, it is not doing its job properly. There are a number of reviews which have been concluded where the commission has simply said in its statement not to refer, “We cannot take this point any further forward because we cannot access the records,” so this is a priority. What is disturbing is that it has been a priority for so long and yet we are still here asking for it. I know the commission itself was working on a Bill to try and get the issue dealt with, and yet again it is not dealt with. I would certainly urge that, if this Committee does nothing else, it stresses how important it is that these private records should be accessed by a change to the commission’s powers.

Q13 John Howell: If we stick with the documents for a moment and go to public bodies, have you seen public bodies not complying with a section 17 order?

Mark Newby: I have not personally, no. I cannot say that I have encountered this.

Dr Eady: What we frequently get with the CCRC is that the police, or whoever it is, cannot find the evidence, and that is the end of it. Nobody does anything about it. You get in your statement of reasons, “We could not investigate this because the evidence is now missing,” so what do you do about it? There does not seem to be any consequence to that at all. It is the major issue. Can I make the point on the timing? I am sorry to keep backtracking, but when the CCRC reviewed its procedures, and it had some management consultants, its referral rate went down. They speeded up but its referral rate went down: in 2009, 3.5%; in 2012, 1.6%. It halved the referral rate. That may be partly due to trying to speed things up, and I do not want to speak for everybody, but quite a few people have said to me, “Look: I do not care if it takes a little while. Just get it right in the end.” What destroys them is when they get a statement of reasons back where nothing has been investigated, there are bland comments, usually, “This is not new,” or, “It was available at the time of trial,” or, “It is not significant,” or, “It is not a ground for appeal.” They do not

get an investigation at the end of it, and that is the worst thing. It is not even the time it takes. It is the fact that you get this unsatisfactory statement at the end of it—not in every case, obviously, but in some cases.

Q14 John McDonnell: There are cases, are there not, where information has not been provided because of the Official Secrets Act, for example, the Shrewsbury pickets, which has been used by the CCRC as a reason? May I come on to the issue of the “real possibility” test, because it does seem to be one of the cruxes of the concerns that you have? Glyn, in your evidence I was interested in reading what you said, “The view that Parliament established the CCRC to carry out a competent agnostic search for truth, which would leave no stone unturned in its quest for justice and fairness...”. Then you go on to say, “It is in the main subservient to the CA and a little frightened of it.”

Glyn Maddocks: I do not take anything away from that; those are my feelings. That is certainly the experience I have had—that the CCRC is, in almost every serious case, trying to second-guess what the Court of Appeal is going to say. It has a difficult relationship with the Court of Appeal. It does not quite know what the Court of Appeal is going to do, so it takes a very cautious attitude. If it spends a lot of time investigating a case it feels very strongly about, it sends it back to the Court of Appeal, and the Court of Appeal basically says, “No, this is not good enough. We do not like this case.” I have cases in my portfolio, so to speak, which are very similar to that. What can the CCRC do? It cannot respond in any effective way. It has done everything it can do. It can send a case back again but it has very rarely done that. It has done it once with one of my cases. I think it has done it since, but, out of the 15,000 or so cases that it has looked at, sending only two cases back to the Court of Appeal for the second occasion is pretty rare and it probably does it with reluctance and trepidation. That is not satisfactory in my view. That is an unfair or an unequal relationship between the Court of Appeal and the CCRC. Therefore, the CCRC cannot be independent because it is frightened of the Court of Appeal.

Q15 John McDonnell: To follow on from that, and others will want to come in on this, that throws up two issues, does it not? The first question is on the issue of the “real possibility” test. The argument that is put to us is that it would be a waste of the CCRC’s resources if it simply sent up cases that had no real possibility of change, so what should the test be? The second is, what does independence from the Court of Appeal look like in terms of the CCRC? What does that mean?

Dr Naughton: It is very easy for senior representatives from the CCRC to argue against the idea that they are fearful of the Court of Appeal. I do not think we need to make this about individuals. I think it is a structural problem. It is a natural consequence of section 13(1)(a), the “real possibility” test. When the Royal Commission was looking at this matter, it said specifically that we needed something new, a new authority, a new statutory body, that could deal with these difficult cases that the Court of Appeal was not best placed to deal with. These are cases where people are believed to be or are innocent and they do not have the legal grounds to get their case overturned because it is unsafe; it is not fresh evidence. Therefore, when the CCRC sends a case, and it is cautious because it

has to comply with the “real possibility” test, if you make another application, it is looking for fresh fresh evidence, so it is even more cautious. What we do as innocence projects and lawyers is look at cases holistically. We look at every piece of evidence and we submit those kinds of application, the way the Royal Commission envisaged the body working, and the way justice used to work. It is a public inquiry into a claim of innocence, but the CCRC, if you look at its application, says, “What is fresh?” You might have five witnesses against you, and you prove that two of them were coerced by the police, but that will not throw any doubt on the other three for the CCRC. They will just say, “There are three witnesses who are still standing by what they are saying.”

Q16 John McDonnell: It does have the power, though, in legislation now to refer a case where there is no new evidence or new argument. Have you any examples of that?

Glyn Maddocks: My case of Stock: it did refer his case for the second time, the fourth time to the Court of Appeal, and it used that ground as well as all the other grounds. The Court of Appeal did not even consider the exceptional circumstances. It rejected the case in the most bizarre way, even saying, which I think was a great put-down to the CCRC, that Mr Stock had managed to persuade it to send his case back to them without any merit to it—really bizarre comments from the Court of Appeal.

Dr Naughton: Mark has already mentioned the Scottish CCRC, which was born out of the CCRC. You have the Norwegian CCRC. When it says that a case needs to be reopened, that is their terminology, and they say they are exactly modelled on the CCRC. When a case is reopened, the whole case is investigated anew, not just one piece of fresh evidence. When you look at the North Carolina innocence inquiry commission, which again is based on the CCRC, when it says a case has to be overturned, it has to be overturned. There are different ways of dealing with this perennial problem of wrongful convictions around the world, and I do not think we have hit on the correct solution yet, but I do not think this is a fatal blow to the CCRC. It was set up as an experiment, the first in the world. It is 15 years on now, roughly, and it needs to be reformed; just tweak it so that it works the way it was intended to work, because now we can see it is not working the way it was intended to work.

Glyn Maddocks: We have not got it right. The Scottish CCRC refers more cases.

Dr Naughton: Twice as many.

Glyn Maddocks: Twice as many. Their test is different. Invariably, going back to your earlier point, they go and see every applicant. I know they have fewer cases but, as an absolute priority, the CCRC should be encouraged to see virtually every applicant with merit. From my point of view, that is the first thing I always do, and it gives me the best insight as to whether or not there is any strength in the case.

Q17 Chair: I find it a slightly puzzling comment, actually. What is it that you learn from meeting the applicant that the CCRC would learn?

Glyn Maddocks: You would learn what the applicant is saying to you about the story. It is a very effective way of finding out—

Chair: You might form an instinctive and subjective view.

Glyn Maddocks: I will give you one example. I have a case of a client who was brain damaged when he was four, and he was supposed, when he was an adult, to have gone into a shop in east London with a gun—he made a holster with some string—and shot the shopkeeper. It is almost impossible for him to do that, and I would say to you that after about five minutes in his presence you would form the same view—that he could not possibly have undertaken that crime. Most right-thinking people think exactly the same. His claim of innocence is probably the strongest case I have ever dealt with. The CCRC have never seen him. They spent two and a half years with his case. They rejected it, despite the fact that there was a BBC “Rough Justice” programme about his case. The evidence is compelling. Someone else has even admitted that he did it and my client did not. Notwithstanding that, the CCRC went through the motions, as I say, for two and a half years—I not quite sure entirely what they did—but it was rejected. It was not sent to the Court of Appeal. I even think the Court of Appeal would probably be positive with that case if it got a chance to see it, but there we are.

Chair: I interrupted Mr McDonnell. I am sorry.

Dr Eady: The problem lies essentially with the Court of Appeal; it always did. That, after all, was the problem with the Guildford Four and the Birmingham Six. The Court of Appeal did not overturn their first appeal; it took two or three in most cases, and that is still the problem. That is why the test is such a disaster, because it set up the organisation—the CCRC—to fail. It effectively does the opposite of what it was intended to do. What people wanted from the CCRC was an organisation which would overcome this resistance to the Court of Appeal, what Michael has called “a statutory straitjacket”, only looking at new evidence and so on. How do we change the Court of Appeal? It is a very difficult problem. That is why we say the first step is to change the test, because at least you are beginning then to think culturally differently. I do not know how you change the Court of Appeal, but if we are still going to allow them to make the decisions—

Dr Naughton: I do not think we need to change the Court of Appeal and I do not think we need to get bogged down here discussing the Court of Appeal, because this is about the CCRC. As I have already said, and have been talking about this for 15 years, I think, the Royal Commission was clear. For the most part the Court of Appeal works. It is only on certain occasions that the Court of Appeal is unable to deal with certain types of case, so you need something else, and that something else needs to have its own authority, its own teeth. That is the problem. We need to focus on why the CCRC was set up and how it is failing in that task. I know there is a big debate about, “Is it the Court of Appeal? Is it the CCRC?”, but the point is that the CCRC, working the way it does, prevents us from being able to see that the Court of Appeal would not overturn certain cases. It is protecting the Court of Appeal.

Dr Eady: But it cannot continue to work that way. The test gives the CCRC the perfect excuse to say, “We cannot look at this because it is not new; it is not strong enough.” I think there is a case for removing the decisions from the Court of Appeal; that may be the

only solution, but certainly I believe, and I think most of my colleagues agree, that changing the test is the first step to try and create a different culture, a different view of it, a culture that, after all, the Royal Commission wanted. It is perfectly clear—we set it out in section 1 of our submission to you—that that is what is required. That is what the Royal Commission wanted, and they state that it is absolutely categorical.

Q18 John McDonnell: I can see the argument that has been put forward by Professor Zander and others about the whole nature of the process of investigation, the role of the CCRC as an investigatory body as much as anything, and also that the CCRC arguably needs the resources to do that, but it still comes down to the basics of the test that has to be applied as well. Therefore, if it is not the “real possibility” test, is it the “lurking doubt” test, or is it an innocence test?

Dr Eady: No. Incidentally, if you read Laurie Elks, he points out that in the 10 years he has studied the CCRC only one case, the Mills and Poole case, was ever referred on “lurking doubt” during that period, and, as we know, the courts have got even more difficult about it. The test is the one which was suggested by JUSTICE in 1994 and which the Royal Commission seemed to be suggesting, which is an arguable case within the scope of justice. You look at the case holistically. You do not break it up into bits, so you look at this at the trial, then you look at that at appeal and that at the CCRC, ignoring the rest. You look at the entirety of the case, as Michael suggested happens in Norway, and you make the decision looking at all the evidence and its cumulative effect—a holistic approach. That is what we believe the test should be.

Dr Naughton: But we also have to be clear, when we are talking about a miscarriage of justice, that it was people who were claiming factual innocence. The elephant in the room is that the CCRC also emulates the Court of Appeal, to the discredit of our criminal justice system, and refers cases of people who are factually guilty to have their cases overturned. When we leave innocent people in prison, it means that real criminals are at liberty to commit more crimes. There was research done in the United States in 2014 which showed that in over 50% of the innocence project cases overturned, 300-plus DNA factual innocence cases, the real perpetrator was identified, and in the time that they were at wrongful liberty, which is the new term, because the innocent person was in prison—and we all forget about that innocent person, and we think it is just about that person but it is as much about public safety—there were 30-odd more murders, 76 more rapes and serious assaults. All those crimes and harm would not be caused if we were committed to making sure we got the right person for the right crime. It is not about an innocence test. We can have a “real possibility”, is there a miscarriage of justice, meaning, is there a real possibility that this person is innocent? That is it. It is not an innocence test. You are not looking for factual innocence, but innocence has to be the lens through which we are looking. It is claims of innocence that we should be interested in, not claims of technical miscarriage of justice, of terrorists and murderers and rapists, who are overturning their convictions on technicalities. I think that is a miscarriage of justice of a different order.

Mark Newby: The problem here is that the commission’s response to this is often that, if we do that, we will somehow water down the test and the referral, but in fact that would bolster the review and make it more significant. In that way, it is not going to be a case

where the commission under a new test is going to be firing up hundreds of cases to the Court of Appeal and the Court of Appeal is going to be saying, “What on earth are you doing?” It means it is going to focus the commission on delivering what Runciman expected it to deliver, and in that way more proper miscarriages should be dealt with. It is not about weakening the test.

Dr Eady: Mark does a lot of sex abuse cases. It is almost impossible to find new evidence in those cases, though somehow he sometimes manages it, and I congratulate the Committee on its work recently on joint enterprise. There are lots of people serving 30 or 35-year sentences for perhaps having been on the periphery of something. There is no hope of overturning those cases as it stands because they are not going to find new evidence as the evidence was so thin in the first place. Sometimes, the less evidence you have, the harder it is to overturn the case. That is another crucial reason for changing the way we look at this.

Q19 John McDonnell: Can I bring you back to the Court of Appeal?

Glyn Maddocks: Please do.

John McDonnell: The reality is that, if there is to be a change of test, that will call for some reform of the Court of Appeal, will it not?

Glyn Maddocks: Yes.

Q20 John McDonnell: What shape would that reform have?

Glyn Maddocks: That is a difficult—

Dr Eady: Some of the commentators, and I think Michael Mansfield was one of them, at the time of the royal commission, suggested that perhaps the decision should be taken out of the Court of Appeal, that the CCRC itself should make the decision. That is one possibility. The Court of Appeal could then perhaps hear the appeals of people who were rejected by the CCRC. However, unless the Court of Appeal is in some way prepared to entertain the new thinking, they are always going to obstruct this. It is a problem. That is why we need a cultural change. That is why we are saying the test is the beginning of that cultural change.

Glyn Maddocks: Someone said that the Court of Appeal did not like the CCRC marking its homework, which is probably correct. It has not really had a very good relationship with the CCRC in the sense that it has often told the CCRC that it does not like it sending cases back to it. For instance, lots of the very old cases it has told the CCRC it does not want many more of, and it has reduced some of the expert evidence cases, the baby-shaking cases. It has narrowed the remit for the CCRC, which means the CCRC has a more difficult task. From my point of view, when I see clients and they say that their son or their brother or themselves have suffered a miscarriage of justice, what can they do about it, I have to be realistic. It is an extremely difficult problem that they are facing.

They are not climbing a small hill; they are going to be climbing K2-plus. It is that difficult now persuading first the CCRC that there is a real possibility and therefore they should refer it to the Court of Appeal, and then after that that the conviction is unsafe. That is a mammoth task nowadays, and I do not think that when Parliament established the CCRC back in the mid-90s parliamentarians thought it was going to be as difficult as it has proved to be to overturn a miscarriage of justice. I do not think that is what was intended. I think it was intended that it was going to be easier than it had been in the past. It is no easier. If anything, it is more difficult now.

Dr Naughton: But the Royal Commission and Parliament were also clear that what needed to stay in place was the option of going down the route of the Royal Prerogative. Prior to the CCRC being set up, they were quite regular, six or seven a year, and so where there were these cases where, looking at them holistically, all the evidence falls away where there is nothing fresh—that is not a “lurking doubt”, by the way; that is that the evidence does not sustain the conviction—there was a sense in which we needed something else for those cases. The CCRC has never sent a case down that route because the way it works means it is not looking to determine whether someone is innocent or not. I do not think it is too far out of the box to say that, if the CCRC were to prioritise serious criminal offences rather than summary offences and so on, it would not be dealing with that many cases each year. There are not thousands and thousands of people convicted of murder who are saying they are innocent in prison. It is because their remit is so wide that they get so many applications, because they have to cover so many things. If you narrowed it down to the most important cases, with their finite resources which I think they should prioritise, there would be fewer cases, and if they think that person is or might be innocent the case should be overturned. Otherwise, what is the point in setting up the CCRC to spend 10 years investigating a case, three commissioners believe that this conviction may be unsafe, and the Court of Appeal says, “We disagree”? The final point on that is that, if you look at the Court of Appeal statistics, about a third of people who apply for an appeal get an appeal, but the CCRC’s rate is 70%. They could refer more cases and get that 70% figure down to about 30% and test the Court of Appeal more.

Mark Newby: The other problem, going away slightly from the individual cases, is that the commission has a voice which is never heard in the public domain and so it is uniquely placed with all the case histories it has had and all the data it has had to be saying to the court, “This is a worrying trend of cases and these are our concerns.” It never enters the public domain. The commission, in its earlier response to the Committee, said, “We meet the Court of Appeal judges and we brief certain departments,” and so on. That is not the public domain. The public domain is saying in the public arena, “These are concerns and they ought to be addressed, and why are these issues not being addressed?” It is letting everybody down in not tackling those issues. The Chair said it should have a louder voice but there is no evidence of that.

Q21 Chair: Should they also make clear why cases have not proceeded? Should they give reasons more publicly?

Dr Naughton: Yes. It is like Innocence Network UK. We put out a dossier of 40-plus cases. We worked with Harry Fletcher on that, who was instrumental in setting up the

CCRC, and that was a strategy of NAPO at that time, to put a dossier together of cases of concern. We followed that model and we have put this dossier of cases in the public domain. The CCRC is not saying that these people are guilty; it is saying that they do not fulfil the “real possibility” test, even though all these cases have doubts, and these cases are not going to go away either so they should give reasons why they do not refer, because then you would see that it is not because he or she is not innocent; it is because they do not think they fulfil the “real possibility” test.

Chair: But in other cases the commission might want to say, “We have reviewed the evidence and we see no reason to question that it sustains the conviction.”

Dr Naughton: That is fine.

Glyn Maddocks: But if it thinks the Court of Appeal has got it wrong, it should say so. There is no reason why it should not. I think we would all feel happier if it did.

Dr Eady: Yes, because sometimes the CCRC will—

Glyn Maddocks: Frequently.

Dr Eady:—fall back on Court of Appeal decisions. If the Court of Appeal has made an outrageous decision, what you are then doing for the next 20 years is relying on an outrageous decision. If the problem is the Court of Appeal, part of the system is going wrong in some instances, and what we are tending to do with the test and all the rest of it is make all the rest of the system go wrong as well. Instead of fixing that bit, we just adjust all the others so they are wrong as well.

Q22 Jeremy Corbyn: I missed the first part of the evidence and I apologise for that. You obviously have serious complaints and concerns about the way the CCRC operates. In summary, do you think it is something that needs to be fundamentally changed to make it more effective, or is it something that needs to be much more accountable, because it feels almost like 20 years ago when we were talking about setting up the CCRC, like we are going to have a new CCRC to look at the CCRC, which obviously would not be a good thing? Do you have any shorthand suggestions for the best way forward?

Glyn Maddocks: Reforming the CCRC on its own is not going to solve the problem. Giving it more resources is not going to solve the problem.

Dr Naughton: If it had teeth, it could overturn its own cases—

Glyn Maddocks: Yes, or if it had more powers itself, or if there is a way of redressing the balance between it and the Court of Appeal. The problem, in my view, is the relationship between the Court of Appeal and the CCRC. That is the difficulty that the CCRC faces. It has constantly to be looking at what the Court of Appeal will do in relation to any cases it thinks it is going to send to it.

Jeremy Corbyn: You mean it is estimating what the Court of Appeal may or may not do.

Glyn Maddocks: Of course it is; and if it sends a case which it thinks is a good one and it gets it thrown back at it by the Court of Appeal, then it is going to be much more reluctant the next time to be confident enough to send a case back to it. Richard Foster said that when in doubt they send it to the Court of Appeal—

Q23 Jeremy Corbyn: Are you suggesting it has become a tool of the Court of Appeal?

Glyn Maddocks: It has not become a tool of it.

Dr Naughton: It has always been one, because of the statute. It is not about getting a new CCRC. What you were calling for 20 years ago and what you got do not relate to each other. You never got what you thought you were asking for.

Jeremy Corbyn: I can hear myself calling for it now.

Dr Naughton: Right, so we never got what you intended because of that statute, because of how it worked. That statute determines how it investigates or does not investigate cases, so you have never had what you wanted.

Chair: This really is the final point. There was 20 years ago, a clear tension, as people considered the matter, between producing an effective Criminal Cases Review Commission and setting up a rival court system which could in some way challenge the authority and undermine the credibility of the court system, and, certainly as I remember it, that was in the minds of people as they tried to devise a system. It may not have worked as they intended, but you have to recognise that they were both elements to the argument.

Q24 John McDonnell: We have all got form on this. I chaired the Guildford Four campaign—

Dr Naughton: Yes, I know.

John McDonnell:—and Jeremy was then involved in it as well.

Dr Naughton: Yes, and you are still here 20 years on.

John McDonnell: Exactly. Do you think, therefore, that the Guildford Four and the Birmingham Six, for example, would be treated differently now under this system?

Dr Naughton: This was a specific question that was put to a commissioner who became deputy chair, John Weedon, at a conference in Scotland, by Paddy Hill from the Birmingham Six. He said, “The way yous work would my case get referred now?” and John Weedon said, “Unlikely.” That is not us speculating; that is a senior member of the CCRC. There is no debate on that. Such cases are “unlikely”, and the case we are working on now— the case I have just put an application form in for—was I think eight months; they did all right. We did not get a case review manager on ours for 12 months, and now we have just had a letter saying they cannot start work on it for another three months, and

that will grow. Our client has been in prison for 18 years, longer than the Birmingham Six and the Guildford Four. These are the new Birmingham Six and Guildford Four cases, and the cases they are working on are 20-plus years as well. A case that Mark is working on that we are working on with him is 30 years.

Chair: We have further witnesses, who I am sure will help us in the way you have. We are very grateful for your help this morning.

Examination of Witnesses

Witnesses: **Professor Jacqueline Hodgson**, University of Warwick School of Law, **Professor Carolyn Hoyle**, Centre for Criminology, University of Oxford, and **Dr Carole McCartney**, Northumbria University School of Law, gave evidence.

Q25 Chair: Welcome, Professor Hodgson, Professor at Warwick School of Law, Professor Hoyle from the Centre for Criminology at the University of Oxford, and Dr McCartney, Reader in Law at the University of Northumbria. Perhaps I should declare an interest as I have an honorary doctorate from the University of Northumbria. From your research on the CCRC, and probably Professor Hoyle is the first person to answer on this, can you describe how the CCRC approaches a case after it has first received it and then through to screening and investigation?

Professor Hoyle: It varies. It has varied over time according to the increase in demand on resources and the relatively declining resources. First, cases are categorised by a categorisation team and then they are sent to groups, so the case review managers are now located in separate groups that have group leaders and those groups work with two or three commissioners. Those groups will decide how the case should be categorised, how it should be reviewed, whether it should be a very basic type 1 review, type 2, type 3 or type 4 review, which is a much heavier investigatory review. Then, of course, there is a difference. If somebody is at liberty, they might wait in a queue for up to three years. If they are in custody it might be up to one year, so there is a difference if people are at liberty. Then it is down to a case review manager to look at the evidence that has come in with the application and to make a decision on what kind of investigation is to take place and work alongside a commissioner, and group leaders, who to some extent supervise and manage and support the case review managers on their team.

Q26 Chair: We have evidence that in this process unrepresented applicants tend to do less well than applicants with legal representation. Could the commission do more to redress that in the way it handles the unrepresented cases?

Professor Hoyle: Jacqui could certainly give much more information on that question, because of her study. From my point of view, I cannot give categorical information on whether or not those cases do make a difference, but in the cases I have looked at in detail, just over 100 cases, it seems to be that when the applicant is well represented by a lawyer, typically, or has had work done by an innocence project on the case, what comes in is a much more powerful and persuasive application. Some of the applicants do not have any

sort of representation or support and their cases come in with a few scribbles saying, “I am innocent; I did not do it.”

Chair: That is not a surprise, is it?

Professor Hoyle: It is not a surprise at all.

Q27 Chair: And, therefore, does it not put a certain responsibility on the CCRC as to how it handles the unrepresented cases?

Professor Hoyle: I think they are more careful at screening, but it is very difficult if you have 1,500 applications a year coming through to give each of those a type 3 or type 4 review. If the application comes in with absolutely nothing and there is nothing they can find, having used their section 17 powers to get the court transcript and so on, it is very difficult to know how to go forward with that. It does not mean that every case which comes in with legal representation is a strong case or has been well represented. Some lawyers do a very thorough and good job; other lawyers not so much. Some of them are little more than a mailbox for their applicants, but when it comes in with good representation, it does make a difference because the application identifies the key areas for investigation or even provides evidence they can work with. That is certainly going to be an easier application to get through the screening process.

Q28 Chair: The CCRC has an investigator on its own team and can require the police to do further investigation. How efficiently does it use those opportunities, those resources?

Professor Hoyle: At any one time, it has one or two investigations advisers as well as legal advisers and the majority of case review managers are also legally trained. I think it uses them well but I have found some variability in the use of investigations advisers. Some case review managers use them a lot to bounce ideas off, and these are people who tend to have investigatory skills. They are often people who used to be in the police service, for example, so they are very good at looking at how a case has been constructed before it went initially to the court or came to the CCRC, and they use them well, sometimes just to bounce ideas off them, sometimes to assist with different types of investigation, but they do not all use them as much as each other.

Q29 Chair: On a different issue, why do you think the CCRC has not made applications for the Royal Prerogative of Mercy, given that there are cases which do not quite fit the Court of Appeal threshold but in which they may have very serious doubts about the safety of the conviction? Why do you think they have not done that?

Professor Hoyle: I do not know. They have not, but I do not know why they have not.

Dr McCartney: It is only an impressionistic view because we do not have anything from the CCRC that would tell us why they have not done that, but I would personally say that a

lot of it comes down to what the previous panel were saying about this fear that they seem to have interpreted their independence status as being very passive. They come across as a very placid organisation. They are not very proactive, and I think the Royal Prerogative of Mercy would perhaps require some courage on their behalf. They are going to have to stand up and defend this decision and authoritatively take a stand on a particular case. From what we have seen over the years, that is something they definitely shy away from.

Chair: I find this puzzling because it is quite clear that there must be cases where the thinking in the commission is, “There are serious doubts here but it just does not satisfy the test for the Court of Appeal. It does not have, for example, the new evidence.”

Dr McCartney: There definitely are cases. We know of cases where case review managers have resigned and publicly said, “This is a travesty,” and in cases where they go to the Court of Appeal and the Court of Appeal makes some odd decision to reject the appeal, we never seem to get from the CCRC a post mortem on that, “Why did the Court of Appeal turn this down when we thought there was a real possibility?” There have been cases where they felt certain; the three commissioners have said, “There is a real possibility”; they send it to the Court of Appeal; the Court of Appeal then refuses the appeal, and it seems to stop at that point. Why do we have no discussion or debate as to what has gone wrong here, looking at what has gone wrong with the initial trial and failure of the appeal system, but never looking at why did this case get through the CCRC, reach these high hurdles, overcome them, yet still fail at the Court of Appeal? There must be some process beyond that which looks at that. There is no feedback loop, “Why did that go wrong?”

Q30 John Howell: May I take you to the issue of the “real possibility” test and ask you how consistent you think the approach to that is, and in particular whether there is a consistency between commissioners?

Professor Hoyle: There is some variability, I think, in their approach to investigations. Given that investigations are likely to produce the evidence, or in many cases will produce the evidence they need to meet the “real possibility” test, I am not sure the extent to which that makes a difference to which cases are referred, but, across the case review managers, there are some who are doing investigations much more often than others. While that to some extent is accounted for by the types of cases they are dealing with at the time, I think that is only to some extent. I think there is some variability in inclination to do that type of investigatory work, in confidence to do it, maybe in skills: we all have different types of skills. There might be some who feel much more comfortable with the finer points of the law, while others feel more comfortable going out to meet the applicant, and so on. It is inevitable that in a large organisation that draws people from both legal and non-legal backgrounds you are going to get some variability, and we have certainly found that, albeit not in the section 17 powers. They nearly all use those in most cases.

Q31 John Howell: Do you feel that the CCRC's approach to the Court of Appeal though is too restrictive, that they are a bit too deferential?

Professor Hoyle: I think it is inevitable that it will be to some extent.

Dr McCartney: It is like the previous panel said: that is the way it has been set up, that for us to expect anything different when the way the statute is interpreted, the way the statute is written and the way the CCRC and the Court of Appeal stand at the moment, you cannot expect anything other than a deferential approach. That is how it is built.

Professor Hodgson: I think those two questions are linked. I think the CCRC is quite a maverick organisation and I think that is one of its real strengths. One of the weaknesses is that inevitably it depends to some extent on who you get. As Carolyn has said, case review managers have different inclinations sometimes in terms of how they will approach a case. Certainly, when cases get all the way through to the committee stage, we saw quite different approaches from certain commission members as well in terms of whether they are trying to second-guess the Court of Appeal, and say, "I can just see the Court of Appeal knocking this back." Wrong test: that is not the test. The "real possibility" test allows for a real breadth of interpretation and the mistake is that, once you start to keep second-guessing the Court of Appeal, you are then unnecessarily narrowing things.

Q32 John Howell: You have supported adding a "lurking doubt" test criterion to the referral test. Considering the attitude of the Court of Appeal, and its ability to restrict that, would any cases referred to it have a realistic prospect of success if that were in place?

Professor Hodgson: It would require legislative change, but I think, potentially. The Court of Appeal still clearly in some cases has an overall interests of justice type of approach. I am not wedded to "lurking doubt"; that was quite appealing that that was put forward. I think somebody in the last session talked about an arguable case. In principle, "real possibility" should be enough, but we have had the CCRC for 17 years and I think it has been a little bit too cautious, a little bit too hesitant. It values its independence from the Court of Appeal very highly, but it also wants to maintain a good relationship with it, and it feels knocked back when it is slapped down and told, "Don't be sending the likes of these cases to us." I do not think it should feel slapped down. It is not there to be friends with the Court of Appeal; it is there to be robust and authoritative and it was set up to get more cases in front of the Court of Appeal. Something that will nudge it and give it the confidence not to be in a somewhat self-imposed constrained position would be good.

Professor Hoyle: I think section 13 does include a provision for "lurking doubt", but the CCRC is very reluctant to go ahead on "lurking doubt" if it thinks the case does not meet the "real possibility" test. I think, though, that what happens during investigations if they cannot find anything in the initial review of the case but there is that sense of "lurking doubt" about the case as a whole, you get much more tenacity and much more willingness to find other routes for the investigation to pursue until they find something that ticks the box of the "real possibility" test. The "lurking doubt" informs the culture of investigation without it leading a decision to make a referral. The court perhaps does a similar thing in the sense that it gets the sense of a case but homes in on the specifics in order to quash a case.

Q33 John Howell: Do you see the Court of Appeal standing back and taking a broader look at a case as a whole, and how does that affect the work of the CCRC?

Professor Hoyle: I do not have expertise on what the Court of Appeal does. I have watched the court behave in the cases I have followed through but I have not studied the Court of Appeal, so I do not know the answer to that. Incidentally, I think Jacqui is right that the CCRC is reluctant to push cases through under the “real possibility” test that they think have no possibility, because, if the Court of Appeal is using a safety test after they refer, then they have to be careful about referring cases that will not meet that safety test because of the cost, not just to the public purse but to the applicants themselves of raised expectations and to the original victims of the offence, who have to live through the trauma again if they are putting the case forward. That is their rationale. As Jacqui says, they could be a little bit less cautious in doing that.

Professor Hodgson: It is important to remember that we talk about the Court of Appeal as if it is a single unity, that the same old people are going to turn up every day. They do not. There are 40 judges to choose from and differently constituted Courts of Appeal give rather different judgments. Of course one has to be mindful; of course there has to be a degree of symmetry; but mirroring would be a disaster. I think there is scope for pushing the boundaries. The former chair, Graham Zellick, talked about straining at the standards. Interestingly, in our research, some commissioners categorically went the other way and said, “That would be a real disaster if we did that, if we really strained at the standards the Court has set,” and yet, if we thought there was a really poor decision by the Court of Appeal, surely we would not want to follow it. One of the witnesses in the previous panel said that. You would not want to hang on to a bad decision and have it knocking around for 20 years. You would want to challenge that. It would be easy if it were something that was categorically wrong or offensive in some way; nobody would doubt that, and yet once we are with legal criteria everybody thinks we should stick with that. Generally, I should say I am very positive about the CCRC and its work, but I would really like to see it flex its muscles a little bit more, be more confident and push a bit more at the Court of Appeal.

Dr McCartney: A lot of the difficulty arises from the simplistic way that we measure the effectiveness or success of the CCRC with this idea that a 70% success rate is something we should be hanging on to and that is somehow how we are measuring it. That is very simplistic. Also, the difficulty with the Court of Appeal is that if they are taking a very cautious approach, or there is a narrow interpretation of something, that percolates down to the case review manager inasmuch as when they are investigating or looking through the bundle, as we say, they are coming at that from a very narrow perspective because they are already thinking three steps ahead: “This is going nowhere with the Court of Appeal. We know the Court of Appeal will not listen to this, so I am not going to say that in front of the commissioners because the commissioners are going to tell me I am being daft because that is going to get nowhere.” That percolates all the way down and the CCRC was supposed to be created to avoid that, so that we were not always so dependent on previous decisions of the Court of Appeal. This case is peculiar; it is odd; things have gone wrong; we cannot say for certain exactly; we do not have the silver bullet; but we know something has gone wrong here. Instead, all the way through the system, we have this very narrow focus that we are getting the lead from the Court of Appeal.

Q34 John Howell: If everything was running as it should be, what sort of referral rate could you expect to see?

Professor Hodgson: I was thinking about this the other day. When the CPS are looking at a realistic prospect of conviction, that is generally understood to be about 51% or more; so “real possibility” seems to me to be potentially less than realistic prospects. I do not think it has to be as high as 70%. It probably has to be over 50% and, if it is above 80%, that is going to be problematic.

Q35 John Howell: Do you expect to see it fluctuate over time rather than a steady state as it is at the moment?

Professor Hodgson: That is a good question. If the CCRC is working consistently, some fluctuation. It is remarkably steady; you are right.

Dr McCartney: One of the difficulties is that you are asking that question based on “Given the resources it has, what should be the referral rate?” If you could double the size of the CCRC, I would love to see the referral rate shoot up because we could investigate more cases, we could take more cases to the Court of Appeal and so forth. When I ran the innocence project at the University of Leeds I was always very critical of the referral rate, saying it was far too low, and then after six years I looked at our so-called referral rate from the innocence project and it turned out to be practically the same as the CCRC’s, so I suddenly felt, “Oh, no, I should not be criticising the CCRC because our referral rate is the same.” However, when I reflect on it I say, “My referral rate is like this because I only have 12 students; I only have a certain amount of hours a week.” We are rejecting most people who write to us because we do not have the resources to look into their cases.

Chair: We are going to come on to resources.

Q36 Jeremy Corbyn: Thanks for coming along to our Committee today. I have three questions for you. Do you have any figure on the additional funding which should be made available to the CCRC? Have you done any calculations on this?

Dr McCartney: I have not done calculations. The simple answer is more. I am a hopeless optimist, so when the CCRC was created I was dancing around the room thinking, “We have cracked miscarriages of justice because we are going to learn what the causes are. We are going to find out”—

Jeremy Corbyn: You were not alone in that.

Dr McCartney: I am not the only one dancing around the room. I thought we were going to have a feedback loop and we were going to learn what the causes of miscarriages of justice were. We were going to feed that back to the police and the CPS and we were going to stop. I was expecting the CPS application rate to be going down every year, not

up every year. Of course, some of that is the good work the CCRC is doing in advertising and making themselves accessible, which is good, although there are still some groups which are seriously under-represented. However, if we are going through all the funding cuts that this Government are insisting upon in policing, the courts, the legal profession—let us not mention legal aid before my hair stands up on my neck—all those cuts are going to result in more miscarriages of justice. Even if you said that the CCRC is operating perfectly now, it is going to need more resources because you are going to have more miscarriages of justice. Corners are cut now in investigations, prosecutions and disclosure, and lawyers are working for peanuts in the dead of night. All that will only increase when we have less money in the system.

Professor Hodgson: You cannot just throw money at it and think that will make it better. The most important part of the CCRC work is the case review managers and all the legwork that they do. I totally agree that we need to be a little bit more analytical and strategic about what is working. For example, the CCRC has done work and has been very proactive and is encouraging more applications. Has that resulted in more referrals? No, not really. It has resulted in quite a dramatic increase in the number of cases screened out at the early stage from around 54% or 51% when I did my research on legally represented applicants to around three quarters now, so more cases but more of them are being screened out earlier on.

Professor Hoyle: The CCRC budget in 2008-09 was £6.8 million. In this last financial year, it has been under £6 million. At the same time they have seen their numbers increase from just under 1,000 cases a year to 1,500 cases a year, as Jacqui mentioned, partly because of these reforms, partly because of more work done in clinics in prisons by the teams there. The queues that had been going down are starting to go up again as a knock-on effect of this. If you think about that £6 million budget, about 80% of it goes on personnel, on commissions and case review managers, so there is about 20% going on investigations. It is that part of it which needs to be increased. I do not think the commission needs any more commissioners. They may think they do and I would not complain if they had some more, but it desperately needs some more case review managers. You will have to ask them what the figure would be, but on a rough estimation it seems to me that a 20% increase would take them back to where they should be, given the cuts over the years in real terms and the increase in cases.

Professor Hodgson: They have had an initiative, have they not, in recent years, where they have had short-term case review managers, types of internships and so on, and that has been really effective, particularly because they have been legally trained, are very focused and so on. If I dare go back, because I did not say anything in answer to the initial question around legal representation of applicants, that is really important because there is an argument, and the commission would probably say, that lawyers tend to attach themselves to the strongest cases. There is some truth in that. Lawyers do a fantastic job—the commission probably does not realise this—in filtering out a lot of cases which they see as no-hopers. The value of good legal representation for an applicant and for the commission is enormous, because the ideal case for the Commission to receive is one which largely has the material set out, “These are the new arguments; these are where the bodies are buried; this is what you should be chasing up,” and off we go. When you used the word “mailbox”, the postbox/mailbox metaphor is a real CCRC classic. Lots of people will say, “The lawyer is just a mailbox. We are always writing to them and they are not

doing anything about it.” There are some lawyers like that, but there are some really great lawyers as well, who are doing really helpful work. In our own research, we saw a number of cases of, “Provisional statement of reasons not to refer. Send it back to the lawyer,” and the lawyer says, “Here are three things you should be doing.” The commission does those three things; it goes back and the conviction is overturned. There is real added value from having good legal representation and saving money in the long run.

Q37 Jeremy Corbyn: Two other quick points. What would be the effect on performance in dealing with cases if the CCRC did not consider sentence-only cases and only considered conviction cases?

Professor Hoyle: Sentence-only cases comprise about 16% of their applications. That varies across the years. This last year it was 18%. It also varies across jurisdictions. Bizarrely, in England and Wales it is 24% and in Northern Ireland it is 2%, so there is something different going on with Northern Ireland cases, and I think it is about the way people use the appeals process there.

Q38 Jeremy Corbyn: Do you have any information on the amount of variation of sentences achieved by CCRC referrals? Have you done any studies on that?

Professor Hoyle: Very little, and no, I have not, so it is impressionistic. It is not a great deal because the court is becoming increasingly reluctant to change sentences which are perceived by the CCRC to be disproportionate.

Q39 Jeremy Corbyn: When you say 16% of work, is that 16% of all cases or 16% of the volume of work they do, because clearly some cases require far more work than others?

Professor Hoyle: It is 16% of all applications at the beginning. You asked the question, “What difference would it make?” At 16% it would not make an enormous difference but it would make some difference. If those cases were taken away, it would free up some of the resources to devote to those other cases.

Jeremy Corbyn: But it would not be 16% of resources, would it?

Professor Hoyle: No, it would not, because those cases which go through to a full investigation have a full review.

Jeremy Corbyn: A sentence is much easier to deal with than a conviction.

Professor Hoyle: It tends not to require any sort of investigation beyond looking in the bundle, legal skills required. Sometimes, that is difficult legal work. I am not saying it does not take time and effort, and they have to be very careful in preparing the statement of reasons on those cases, not least because the court seems a little reluctant there, but it does not take the kind of investigative work where they have to get forensics tested, and so

on. Of course, what you do not know is, if you do not give people the opportunity to come in on a sentence-only appeal, whether some of those might decide to throw in an appeal on their conviction at the same time, so the figures could be distorted slightly if you took away that power.

Q40 Jeremy Corbyn: Moving on to section 17, what evidence do you have of non-compliance and do you think there is a case for extending section 17 powers beyond statutory authorities, which is, I believe, where it resides at the present time? That is for all of you.

Dr McCartney: I do not think you can mount an argument against it, because probationary services—

Jeremy Corbyn: There are plenty of people who may, so I would like to hear what the arguments are for it.

Dr McCartney: In a lot of the cases at the University of Leeds that we would deal with, or at the University of Northumbria, you cannot look into a case without dealing with private bodies. As a university, our student law clinic, we have no powers to force—we had a case we worked on where we wanted CCTV from a hospital car park, but the hospital car park is run by NCP, a private organisation. We cannot get the CCTV. There is not even any point our asking the CCRC to get it because they cannot get it either. We need CCTV to put our client in that hospital car park at a particular time and no one can do it.

Professor Hodgson: Given the sensitivity of the information that they can get from public bodies, particularly when they are looking at things like victim impact statements, victim compensation, health records, social service records, the idea that they could not get the NCP car park CCTV is ridiculous.

Q41 Jeremy Corbyn: I get that; I fully understand the point, and I'm glad you have put it that way, but what degree of resistance is there at the moment of cases which are impeded and never get to the Court of Appeal because of the lack of access to private information? Have you any figures on that? You may want to send us a note on that if you do not have it available with you.

Professor Hoyle: I have figures on requests and positive responses from statutory public bodies. They have a 90% success rate with section 17 applications to the court, 85% to the police and 79% from CPS. It is slightly lower from other local authorities at about 67%, but most of their section 17 requests—and they do a mean average of three in each case and in some cases up to 28 requests—are met in a reasonably timely fashion; again, it is a mean average of seven days that the cases come back.

Jeremy Corbyn: It does not sound very good for local government. That is one third of cases which are not responded to.

Professor Hoyle: That is right.

Dr McCartney: It does not even say anything to me that it is 85% from the police. What is happening in the other 15%? Why are the police not responding to the section 17?

Professor Hoyle: Because the data are missing in most of them. In almost all of them they say the data are missing.

Dr McCartney: That is a big concern when the police are now in charge of forensic exhibits.

Q42 Jeremy Corbyn: That is very helpful, but the point I am also concerned about is, do you have any estimation of the number of cases which never get referred to the Court of Appeal because of the inability of the CCRC to demand information from private sources, so the case never passes the starting point, if you like? Do you have any information?

Professor Hodgson: No. I think that would be a very useful thing to look at specifically and target, but I do not have information on it.

Jeremy Corbyn: Because if we want section 17 changed, we need to do that.

Professor Hodgson: I understand you need the evidence to show it is necessary.

Dr McCartney: Of course, it is very difficult to know how an investigation would have gone: if you had obtained the information, would it have been referred back or could they have discounted the information had you had it anyway? There are lots of examples of cases where we have documentation, we have been able to get evidence, but it still does not pass the “real possibility” tests anyway. It is very difficult to pick out one piece of evidence and say that was the crucial factor that meant we did not get over the hurdle.

Q43 Jeremy Corbyn: One last point from me on section 17. Could the CCRC itself go to court and require a private organisation such as a TV company to reveal information? Does it have that power?

Professor Hodgson: No. It is not a party to the case.

Dr McCartney: I cannot imagine how it would.

Professor Hoyle: Going back to your original point, there are two points to be made that are persuasive. One is that I know of cases where the CCRC have tried to get information from a private body and the private body has said things like, “We would love to give it to you. We can see why it is important information, but we are worried about data protection.” There are cases like that. The second point is that, if you care about the inequities in the criminal process and you have some people coming through the system later when the organisation that otherwise would have been in the public sector is in the private sector and look at what is happening with the Probation Service—

Jeremy Corbyn: It has been privatised.

Professor Hoyle: Yes. When you think about the Probation Service now, it is going to look very different in the next few years from 20 years ago, as will other organisations. If you want equity across the process, you cannot have some people whose cases just happen to have information in the private sector now but would not otherwise be compared with cases where they have remained, for other reasons, in the public sector. It seems wrong that those applications will be treated differently because of the lack of that power. It is wrong.

Chair: Is there any evidence of that having happened?

Professor Hoyle: There have been a lot of changes over the last year, and the NHS would be one obvious example of that. There are cases—I cannot give you numbers; I do not have them—where they cannot get the information because it is in a private body and because organisations are very worried about data protection now because this has become much tougher—

Chair: It is usually because of misinterpreting data protection, of course.

Professor Hoyle: Sometimes it is.

Dr McCartney: Yes, but care homes are the perfect example that Mark Newby was talking about. We have so many cases which are historical cases. Care homes which were once run by local authorities are now private bodies and they will not give out that information because it is sensitive information: who was in a care home at what date. Data protection is a catch-all. There is a real discrepancy here between—

Chair: It is not for me to be answering the question, but this Committee, of all bodies, needs to make it clear that data protection is not a catch-all and public bodies and private bodies have a duty, if in doubt, to seek advice from the Information Commissioner and apply the law correctly, not incorrectly.

Professor Hodgson: When you say, “Are there particular cases which have not been referred because of that?”, and, understandably, the focus now is on those cases which have got one or two years down the line and they are in a committee, do not forget that the vast majority of cases never get past initial screening. There are all kinds of reasons why they may be screened out, and one of them may be that the key bit of evidence is held by a private body. We are never going to get that out of them. The only possible line of investigation is one we cannot pursue. I do not know, but that could be a reason for screening it out.

Q44 John McDonnell: Before you go, on the role of the CCRC for the future, at the moment it deals with individual cases of miscarriages of justice, but it makes it uniquely placed to see how the whole system operates. It could play the role of looking at and advocating changes in the criminal justice system to avoid or minimise miscarriages of justice. Do you think that is the role it should now take up?

Professor Hodgson: I think that was a role which was envisaged for it by the Royal Commission on Criminal Justice, that it would be able to feed back and improve practice

and prevent miscarriages of justice. There is a will to do that, but they nowhere near have the resources, the time, the expertise to do that. It is a real shame because, as you say, they are uniquely placed; they have data that nobody else has. Yes, you might argue that these are individual exceptional cases; these are not representative; but we do not know that. We need to do some research to look at that. The insights are incredibly powerful and we know that there have been major changes in police practice as a result of some key cases. That is something they could do more of. Just, “There is a little bit at the back of the annual report,” is nowhere near enough. It is a waste of resource that it does not have them, but it would have to come from somewhere else. I know they are keen on engaging additionally with academia and independent researchers. They simply do not have the resource in-house for the expertise to do that at the moment.

Dr McCartney: One of the difficulties—and they are engaging with academia more—is that they are engaging with academia in a fairly navel-gazing way of, “How is the CCRC operating?” What we are talking about is how the criminal justice system is operating and why we are still getting innocent people in prison. That is a question which to me is not being addressed, because of resources, not because of lack of will perhaps, but they just cannot get round to that. That is the biggest disappointment of mine, that we are not learning about the criminal justice process. There is no feedback loop. There is no, “Hang on: in this case, these police officers broke this rule.” What happens? Absolutely nothing. Does anything happen when we find that there is a spate of cases which have all been misinterpreting? There was one recently where footwear marks were being taken illegally in a police station, and it was only through one case going to the appeal courts that they discovered that this police station had got PACE wrong. They had read it wrong. It is that feedback loop we would like. Let us learn from these cases they are dealing with and feed back to the Judicial Studies Board how bad character is leading to miscarriages of justice and so forth.

Somebody asked the earlier panel a really exciting question for academics, “What would the Court of Appeal look like if we were going to change the system?” I cannot help thinking why can’t we make the CCRC a body that is about getting innocent people out of prison and reforming the criminal justice process, and we can leave to the Court of Appeal those legal issues? For example, is the joint enterprise doctrine working? No. Let us get the Court of Appeal to look at it because that is a legal question. Is PII being used properly in cases? Very often not. Let the Court of Appeal deal with it. Are indeterminate sentences appropriate? The Court of Appeal could deal with these knotty legal issues, perhaps not on an individual case-by-case basis but on a class case basis. In this class of cases, can the Court of Appeal sort out the joint enterprise doctrine, please, and let the CCRC deal with the individuals and get the individuals out of prison? That is just me, off the top of my head, dreaming, but that is a possibility. Why could we not get the CCRC to be part of this feedback loop and get innocent people out of prison and leave the Court of Appeal with the legal issues?

Chair: Thank you very much. We are very grateful to all three of you for the help you have given us this morning.