



Justice Committee

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

Friday 6 February 2015

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Written evidence from witnesses:

- Criminal Cases Review Commission [CCR 41](#)
- Ministry of Justice [CCR 11](#)

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Members present: Sir Alan Beith (Chair); Jeremy Corbyn; John Howell; Mr Elfyn Llwyd; Andy McDonald; and John McDonnell

Questions 103-155

Witnesses: **Richard Foster**, Chair, and **Karen Kneller**, Chief Executive, Criminal Cases Review Commission, gave evidence.

Chair: Mr Foster and Miss Kneller, welcome. Since you are here so promptly, we thought we would start early and get on with it. As you know, we have been taking evidence for some weeks about the work of the commission, some of which you have probably seen. Today we are going to hear your comments, and also those of the Minister and the Department following your session. I am going to ask Mr Corbyn if he will begin.

Q103 Jeremy Corbyn: Thank you very much for coming. You are most welcome. We have been taking evidence on this matter, as you know, for some while. One thing that has come across to us is that, when people make an application to the commission, they have an expectation that the commission will do a lot of the investigative legwork for it. Then they find that there is a problem, and this simply does not happen and they have to do a great deal themselves. Is this your general feeling and is this a policy, or is this just because of your lack of resources?

Richard Foster: We have certainly got a very significant lack of resources, and I would like, subsequently if I could, to talk about that.

Jeremy Corbyn: I am sure you will get questions on that.

Chair: We will ask some questions about that.

Richard Foster: On investigations, perhaps I might start by just referring to some work

done by Professor Carolyn Hoyle, who is the professor of criminology and the head of the Centre for Criminology at Oxford, who I know has given evidence to this Committee. Last year, because this criticism has been made on several occasions, I asked Professor Hoyle and her assistant, Dr Sato, if they would run a specific review of our investigative work, and she did that last year. It involved interviews with our staff and commissioners, an anonymous survey of our staff on the investigations they have undertaken and a very detailed look at some 4,000 cases. If I quote from her written findings, which are in the evidence to you, she said: “The CCRC undertakes further investigations in an overwhelming majority of cases.” She also said: “There is no evidence that the CCRC typically fails to conduct thorough investigations.” That is talking about all of the cases that it is appropriate for us to review—that is to say, cases which come within our scope and not cases that are convictions in another jurisdiction, cases which are not criminal convictions or cases where, because the individual has not appealed and there are no exceptional circumstances, it is not proper for us to look at them. Those were her findings.

Q104 Jeremy Corbyn: What sort of training do your officers get in investigative work?

Richard Foster: We have 52 staff and commissioners who deal with casework. Of those 52 staff, 30 are legally qualified. When I say “legally qualified”, they do not just have law degrees but they have worked as lawyers—barristers or solicitors—some of them sit as judges, and so on. In addition to those 30, all of our case review managers are professionally qualified in one way or another—so we have former forensic scientists, forensic psychologists, former police officers, and so on and so forth.

Q105 Jeremy Corbyn: Can officers call on somebody else?

Richard Foster: Yes, they can.

Jeremy Corbyn: So if somebody has a psychiatric ability, they can be called in.

Richard Foster: Yes, exactly so. As regards training, nobody who joins the commission, whether they are a commissioner or a member of the staff, will be allowed anywhere near a case on their own until they have been fully trained in the specifics of our work. That will include mentoring and a process of appraisal. In the case of commissioners, that process is undertaken by myself. You don’t get let loose, even though you may have worked on criminal work, in the commission until you have been through that induction training, which is quite intensive. On top of that, we routinely train all of our staff and commissioners. In the last two years, we delivered a thousand hours of training covering 57 separate sessions of training.

Q106 Jeremy Corbyn: Could the Court of Appeal make better and more frequent use of its powers to direct investigations, do you think?

Richard Foster: We have been asked by the Court of Appeal to investigate on their behalf on 70 occasions since the power was introduced, which was relatively recently. Most of those are into matters such as allegations that the jury have been got at or allegations that jurors have accessed the internet and got alternative sources of information—things of that kind. One or two of those investigations have turned into major exercises. For example, in the case of Diouf, in the end, we had to appoint a chief constable, Mick Creedon, to investigate that. It involves about 30 police officers and cost over a million pounds. That

led to the quashing of a number of murder convictions and to a subsequent IPCC inquiry, elements of which are still ongoing.

Q107 Chair: We have been told that you have only directed the use of a police investigation 40 times since your creation. That was obviously one case where you did so at the highest level. How do you decide whether to use the police?

Richard Foster: Yes. The exact figure is 50 or 51 times. We would have about three or four such investigations running a year. We have three running at the moment. We tend to use the police where we either feel that we are going to need to use police powers—that is to say, arrest or interview under caution—but we typically use them where, in the course of an investigation, we think that there may be some other form of criminality involved and therefore there may need to be a separate criminal investigation and a separate prosecution.

Why don't we use them more than we do? We are an investigative body ourselves. I have seen the evidence, I have heard one or two of the comments made and people have suggested that we are not investigators. I assure you we are.

Q108 John Howell: When you were last before the Committee, you said that £1 million of additional funding would enable you to clear the backlog. The latest MOJ annual report indicates that you will have a budget cut of just over a million. First, do you recognise those figures? Secondly, in relation to the consultation that took place with you about those figures, did it take place, and what effect will that have on your organisation?

Richard Foster: We have been given, on a temporary basis, for the year we are currently in and the year before, an extra £500,000 by the Ministry of Justice. We are extremely grateful to them. It is the first increase in money that we have had in a decade. Nevertheless, it is nothing like sufficient. In real terms, our current budget is £5.2 million. We have had no increase for inflation for the last 10 years, so in real terms our budget 10 years ago was £8.1 million compared with £5.2 million today. That is the budget. At the same time, our business volumes have exploded. For the last two years, we have had 60% more applications than we had in the previous decade. If I put those two things together, for every £10 that my predecessor had to spend on a case a decade ago, I have £4 today. I am quite certain that that is the biggest cut that has taken place anywhere in the criminal justice system. We have managed, more or less, to maintain productivity, despite those cuts, but we are struggling with queues at the moment. I am quite certain that if the rest of the public sector had been able to absorb cuts of that kind, austerity would be a thing of the past and we would no longer be worrying about the deficit.

Q109 John Howell: What discussions did you have with the Ministry about that?

Richard Foster: We had quite extensive discussions about it. They gave us the extra £500,000. It was a something-for-something deal. They asked us to make changes to our practices and ways of doing things, which we have done, and we got the money in return.

John Howell: I am not sure that you answered the question about how overall that will affect the operational capability of your organisation.

Richard Foster: At the moment, if you are in custody and you come to us, you will have

to wait for just under eight months on average before we can start your review. If you are at liberty, you will have to wait on average 13 months before we can start your review. That is an average figure. The people who are just joining the queue will have to wait a lot longer. The review itself will take about eight months on average. If we do not continue with our funding at our current levels, not only will those queues get longer but we will hit a tipping point.

Q110 John Howell: When you appeared before us last, you spoke of the difficulties created by uncertainty in the budgeting process, making it very difficult for you to plan ahead. There seems to have been some adjustment to that, but how would you describe the overall situation in relation to that?

Richard Foster: It is extraordinarily difficult, given the nature of the staff that we employ. If I want to take on an investigator or a case review manager, I have, first, to look across the civil service to see if there is a suitable candidate. Only after that can I go to a public advertisement and recruitment. Those two things together will take three or four months. Once we have got a suitable candidate, we cannot offer them a job until they have security clearance, given the nature of our work. That will take a minimum of another three months. So the fastest I can possibly do it, from the moment I have been given the money to having the body through the door, is six to seven months. As I previously explained to Mr Corbyn, we will not then let anybody loose on a case until they have been fully trained, with mentoring support and all the rest of it, and that will take about six months. So it takes about 12 months from getting the money to having somebody fully effective. If I am operating on an annual budget and not knowing from one year to the next, you can see that no sooner are they through the door than they will be out again. At the moment, we have three or four staff on one-year contracts, all of them exceptionally good staff, who will have to go in March if we don't get an extension. Since we are now in February, as you can well imagine, they are not exactly sitting waiting for that to happen. They are looking at the sits vac columns.

Karen Kneller: We have about half-a-dozen.

Richard Foster: It's half-a-dozen, is it?

Karen Kneller: It's the lack of certainty of funding from year to year which is the real problem because you simply can't plan, and it means that the core staff are looking to move on—and who can blame them for that?—because we can't give them any certainty. I suspect we won't be able to give them any certainty for some time yet, as we are still waiting for the budget settlement.

Q111 Chair: Are you saying that the public spending projections themselves are uncertain or that these staff are employed out of the extra £500,000, and it is through the renewal of that—

Richard Foster: Exactly. The latter, yes.

Karen Kneller: Yes.

John McDonnell: It is the extension that you got.

Karen Kneller: Yes.

Q112 John Howell: Can I take you on to a question that relates partly to the powers of the CCRC? What number of cases have been thwarted or substantially hindered by your lack of power to require disclosure from private bodies?

Richard Foster: It is a significant and growing problem. It is a problem partly because an increasing number of bodies that were in the public sector are now in the private. It is also a problem because of concerns by private sector organisations about data protection legislation, which makes them increasingly reluctant to provide us with data. It is also extraordinarily anomalous. Let me just give you a couple of examples. For those of you who bank with Lloyds, I have the power, on behalf of the commission, to insist that Lloyds provides me with your banking details if I need that in the conduct of an investigation. If, on the other hand, you bank with Barclays, I can't. If you go to your local authority car park and they operate a CCTV system, I can obtain that footage. If they have sub-contracted that to, say, G4S, then I can't. It is not just that it frustrates our investigations, but it is also an absurdity. It is very hard to say exactly how many investigations have been completely thwarted. Because we don't get the information, we don't know what we don't know. What I can tell you, just looking at it statistically, is that you can be confident that there are miscarriages of justice that have gone unremedied because of the lack of that power. They have the power in Scotland, of course.

Karen Kneller: We do know that points have not been resolved because we can't get material, so in some cases there are unanswered questions.

Q113 John Howell: So that is the situation with private bodies. What about the public bodies? What problems do you have with non-compliance to section 17 orders with public bodies?

Richard Foster: People usually comply in the end. We don't have a sanction and we don't have a time limit. If there were legislation looking at this issue in general, I would greatly like both of those things to be incorporated. Could I just add this on the private sector? As to the really worst cases or at least the most ludicrous cases that I could point you to of people not complying, we have had law firms, which acted for the applicant in the original trial, which have resisted providing us with their case papers from their original acting. We have even had one of the campaigning organisations operating on behalf of an applicant which has not been prepared to provide us with material that they have had when we have been going to a referral. It is quite ludicrous.

Q114 Chair: If the Government, and I am sure you must have discussed this with them, were willing to insert the power to deal with private bodies in the current legislative programme, in Bills, presumably you would not want to delay that by opening up the wider issues which you have just mentioned, important though they are.

Richard Foster: If I had to choose, I would like to get the private sector power. We have been in consultation with the Ministry of Justice about it, they have been very helpful, they have drafted legislation, and we sought to introduce by way of a private Member's Bill, but that did not work. The safeguard would be as in Scotland: that is to say, if we were exercising this power, it would be by way of application to the court.

Q115 Mr Llwyd: Good afternoon. The courts have interpreted the real possibility test to mean that a case has "more than an outside chance or a bare possibility, but which may be

less than a probability or a likelihood or a racing certainty”. Less than a probability or a likelihood suggests that even cases with a chance of success below 50% can be referred. The current success rate of cases referred is about 70%, as you know, so by definition aren’t you being a little too cautious and, possibly, incorrectly applying that test?

Richard Foster: I don’t think we are being too cautious. Again, if I might just refer to independent academic work, we have had both Dr Heaton, who has given evidence here, and Professor Hoyle, looking in intense detail at our casework. Certainly Dr Heaton has said, in terms, that he agrees with the decisions that we have been making. With Professor Hoyle, the work is still ongoing, but she has not raised any concerns with me yet. It is very difficult to know—I had exactly the same issue when I was in the Crown Prosecution Service—what the right percentage figure would be. If it were higher than 70%—if, say, 90% of our applications resulted in the conviction being quashed—I would be quite confident that we were being too cautious. If it was 50%, I am pretty certain that people would be saying, “You are running far too many cases that are simply too problematic.” It is very difficult to look at anything that would give you an independent sightline on what the percentage ought to be.

Could I also say that this is in no way a target with us? It is not something that we aim at. The way we look at cases is to say, “Do we think that there is a basis for referring this to the Court of Appeal: yes or no?” When we start looking at a case, we don’t start looking at it from the point of view of there being a test called the real possibility test and whether this case might pass it or not. We start, when we look at a case, in the way that anybody ought to start looking at the case—by saying, “Here’s the case. Is there anything here that concerns us? If there is, let’s investigate it.” If we find that we have a concern, then we will find a way of referring it. I can give you particular examples where we have come at a case, time and time again, until we have found a ground on which we can get through the gateway, which is known as the “real possibility test”.

Karen Kneller: The 70% figure on appeal is not to say that we are looking for a 70% hurdle that we need to get across in each case, because you may have a case which has a limited chance of success, you could say, objectively, and others which, perhaps, are much closer to a dead cert, say with the development in scientific evidence. It goes back to looking at each case individually, but it just is the case that, on appeal, around 70% of convictions are overturned.

Q116 Mr Llwyd: So you are not concerned about the real possibility test as currently applied.

Richard Foster: Do you mean in the sense of “Are we applying it consistently?” or in the sense of “Is it the right test?”?

Mr Llwyd: Yes.

Richard Foster: In the sense of “Are we applying it consistently?” and “Are we being sufficiently bold in applying it?”, no, I am not concerned. My clear steer, and I think the view of anybody in the commission, would be, “If there’s a basis for referring this case, we will refer it.”

Q117 Mr Llwyd: To what extent do you face issues with the Court of Appeal being reluctant to quash convictions or interfere with jury verdicts?

Richard Foster: This is the issue of lurking doubt and is the Court prepared to go behind the jury. If you asked different commissioners at the commission, you would get differing answers to this question, because among commissioners who are selected for their independence of mind, as with lawyers more generally, there are very differing views on this. Most lawyers who are defence minded will tell you that the Court of Appeal is too cautious. Most lawyers who are prosecution minded will tell you the reverse. It is difficult for me to give you a considered commission answer because we don't have a collective view on that issue. What I can tell you is this: we will always refer a case if we think there is a basis for doing so. On those occasions where we have had concerns about the trial court's decision, we have been prepared to re-refer the case. The question for anybody who is concerned about the Court of Appeal allegedly being too cautious is that if it were you—if you were faced with having a case referred to you for reconsideration where you had nothing at all that was new by way of new evidence or new argument, and the proposition was simply that the jury got it wrong—most people, in those circumstances, would be pretty cautious in being prepared to overturn the jury verdict.

Q118 Mr Llwyd: Interesting. In an article in the *Criminal Law and Justice Weekly*, Professor Zander—I must be very careful how I put this today and more careful than usual—has proposed adding an alternative ground for referral to the commission if there were a serious doubt about the correctness of the verdict. On such a referral, the Court of Appeal would then have to allow the appeal if this serious doubt did occur. What are your thoughts on this?

Richard Foster: It is a very interesting suggestion. It would be worth further discussion and further consideration. There was another suggestion put by Dr Heaton, which is a different way of coming at broadly the same issue, which was expressed as either, in those circumstances, an expectation that the Court of Appeal, if they were not prepared to quash, would order a retrial—or at the very least always give a very detailed set of reasoning as to why not—and/or that the CCRC itself might have some sort of reserve power either to request or, perhaps, require a retrial where it judged it appropriate to do so. Those are both very interesting issues and they would benefit from further consideration.

I go back to the point I made before. What is at the heart of our system? The heart of our system is that the burden of proof is on the prosecution, and the level of proof is beyond reasonable doubt. The jury has to be sure, and the decision is taken by the jury and nobody else. Any changes which would impact on the primacy of the jury verdict need very careful consideration. Let me give you one example of the sort of problem that people might want to talk about. As soon as you had an additional test of that kind, I have no doubt at all that many, many thousands of people would say, “I fall into that category, so I would now like my case to be considered or”—if we had already considered it—“reconsidered against that new test.”

Q119 Chair: Aren't the arguments for a retrial normally based on a fault in the trial process, and would it not amount to saying, “We want a different jury to try it”, which is opening a very wide gateway, is it not?

Richard Foster: Yes, it would be.

Q120 Chair: But if the suggestion that Mr Llwyd has just mentioned were followed but only took the form of an additional ground of referral for you to use, would that make any difference to the way in which the Court of Appeal would see these matters, and why would it make a difference?

Richard Foster: You touch on the nub of the problem, which is that whatever basis we have for referring cases, and however much you widen the gate, if you don't have a mechanism for encouraging, persuading and making the Court of Appeal change its approach, then all you are doing is setting cases up to fail.

I should have said earlier—forgive me as I forgot to say it—that when we are making a referral we need to think not just very carefully about the basis for the referral, but we need to think also about the position of the victim. There are victims, in the case of murders, which are about 25% of our referrals. The next 12% are rapes. In cases of that kind, to make a referral where you don't think that there's a real possibility that the conviction might be quashed is an extremely serious thing to do. You are disturbing the lives of a large number of people, so it does need very careful consideration. It is an interesting idea.

Mr Llwyd: But surely you would not refer unless you did have a genuine belief that it could be overturned.

Richard Foster: Yes. We would have that belief, but unless the Court of Appeal were operating on the same basis, the fact that we have that belief would not necessarily get us very far.

Q121 Chair: We are all familiar with the distress of families who have lost a family member through a murder. Would it not be rather dangerous to take the view that if there is a serious possibility that somebody who has languished in prison for many years, in the belief that he had committed a murder, had actually not committed that murder, harsh though it is, the family distress cannot be a source of veto on re-opening the matter?

Richard Foster: Yes, I absolutely think that. If you think there has been a miscarriage and if you think there is a real possibility, or however you phrase it, then you should, and we would, always refer. I am simply making the point that you need to weigh, quite carefully, the impact that decisions of this kind may have on others.

Could I make one other point? A lot of this debate proceeds on the almost unspoken assumption that there are obvious cases of miscarriages of justice, obvious cases of lurking doubt, where if only people would see sense and refer that case, or if only the Court of Appeal took a slightly different view, then a wrongful conviction would be quashed. Our experience is that it is extraordinarily difficult, if not impossible, to judge from the outside a situation of that kind, and in particular many of the cases which have attracted huge support as "obvious miscarriages" turn out not to be. The most celebrated case was Hanratty, where testing showed his DNA on the handkerchief which surrounded the knife, the murder weapon. Another much more recent case was that of Simon Hall, which the commission referred, and we were very strongly criticised for not re-referring it. Simon Hall eventually confessed, shortly before committing suicide, to having committed that murder. That does not mean to say, incidentally, that that is knock-down proof that he did it, because we get examples of false confessions as well, but it rather shifts the

perception that this is an obvious case for a miscarriage of justice and why doesn't the Court of Appeal see the sense of that? Equally, the other way, we get cases where there is no such common belief. A recent one was Warren Blackwell, who was convicted of a particularly brutal sexual assault. So great was the concern about it that the Attorney-General of the day referred it as an unduly lenient sentence. The sentence was, if my memory serves, increased. Our investigation showed that that was a shocking miscarriage of justice. So the notion that you can look and all thinking men agree that this is an obvious error is not borne out by our experience.

Q122 Andy McDonald: Good afternoon. Dr McCartney told the Committee that the question of why innocent people are ending up in prison is not being addressed. She said: "That is the biggest disappointment of mine, that we are not learning about the criminal justice process. There is no feedback loop." What actions are you currently taking to feed back into the criminal justice system on the causes of miscarriages of justice, and could you be doing more to take a leadership role in this area?

Richard Foster: We have done some things. We could do more. The big problem for us—we are not hesitant about being outspoken or anything like that—is that we are a casework organisation absolutely under the cosh on resources. Every hour that I divert from dealing with casework with queues of the kind I have described is something that needs to be weighed very carefully indeed.

Let me, however, give you one or two examples of things we have done. I mentioned to the Committee the last time I was here asylum and immigration seekers who had been wrongly advised to plead guilty when they had a statutory defence. These are people coming from some of the worst parts of the world, fleeing in fear of their lives, who have been prosecuted because they didn't have a passport or a proper identity document, often when they were coming from countries where the British Government did not even recognise the legitimate passport-issuing authority, so by definition they could not have had a passport. They have a statutory defence. These people were wrongly advised by their defence lawyers, wrongly prosecuted and wrongly convicted. To date, we have dealt with 26 such cases and 22 of those convictions have been quashed. We have another 26 cases in the pipeline. The most recent cases were at the latter end of last year, so the convictions are very recent indeed, and they were of three refugees from Syria. What have we done about that? I've met with the DPP, we've talked about it, we've written to the DPP, we have contacted every asylum and immigration organisation that we can think of, we have put articles in the *Law Society Gazette* and we are running a workshop in two weeks' time for the Crown Prosecution Service and others concerned. That is an example of the sort of thing that we can do. I would like to do a lot more.

Q123 Andy McDonald: If you had some funding, would you be happy to conduct some research?

Richard Foster: Absolutely.

Karen Kneller: We also do a lot of work more generally. We attend lots of conferences and events. You asked about training. We go out and we do our own training. Our investigation adviser, with one of our case review managers, has gone out and provided training to senior police officers, feeding back the issues and problems that we find. An awful lot of that work is going on. Every time they are out of the office, they are not

working on a case. Yes, we would love to do more. People want us to do more, but it comes back to funding.

Q124 Andy McDonald: What do you expect your work load to be like in the coming years? You have already said that the majority of cases are murder and rape. Is that the sort of profile you expect from the years ahead, or are there going to be any changes? What is your view?

Richard Foster: We have gone from an annual average of 900 or so applications to around 1,500, and 90% of the applications to us are from the Crown courts, so they are of the most serious kind; 95% of our referrals are from the Crown court. There are two groups that we think are seriously under-represented in our case load at the moment, which we are doing more work around. That is young people and people with mental problems. I would expect our work load to increase for those reasons alone. There is then, of course, the wider issue of cuts across the criminal justice system, to the CPS, in legal aid and so on and so forth, which no doubt will work their way through and have an impact on the system and, in due course, that will show through into our work load.

Karen Kneller: Of course, if our test is widened, we are likely to see a significant increase there, too.

Q125 Andy McDonald: Do you have the power to refer cases to the Secretary of State for application of the royal prerogative of mercy? If so, why have you not used this power?

Richard Foster: We have the power. It can operate in two ways. First, the Secretary of State can refer a case to us and ask for our views. If we give those views, then they are determinative. That is to say, the Secretary of State has actually got to do what we say. He does not have to seek our views, but he can, and if he does they are determinative. He never has. The only recent case which a Secretary of State, that was Jack Straw, has decided was that of Michael Shields, which was a royal prerogative case, because Michael Shields had been convicted in a foreign jurisdiction—Bulgaria—and had then been transferred as a prisoner to this country. So there is no mechanism in this country for reviewing his conviction. Many people thought the conviction was unsafe. Jack Straw eventually recommended a royal pardon. On the back of that, he also said that he thought in future cases of that kind might better be dealt with not by a Minister but by ourselves. There was a review that looked into that, but I don't know what happened to that review. We have never had an application to us under our general powers. We do have the power to recommend the exercise of the royal prerogative when nobody else has come to us about it, and we have done that in one case so far. There is another current case where we may conclude that that is an appropriate solution.

When the Royal Commission, the Runciman Commission, looked at this, they said in terms—and I know this may be slightly at odds with evidence you have heard earlier, but I can let the Committee have the reference—that they did not think it would be right for this commission, us, to recommend the exercise of the royal prerogative if the courts had considered a verdict and decided not to quash. So they actually said that they did not think it would be right, in those circumstances. They said that they thought the only circumstances in which we should exercise the use of the royal prerogative would be where it was a case that, for one reason or another, the Court of Appeal could not consider. In fact, the current case I mentioned to you may be one like that, because it is such an old

case that there may be nobody of standing who would be recognised by the Court of Appeal.

Q126 Chair: So you have never considered, and would not have thought it right to consider, in a case where you were firmly of the view that the jury was wrong but had none of the other grounds that would meet the Court of Appeal's case, referring a case for the prerogative of mercy in those circumstances.

Richard Foster: Where we genuinely think that there has been a miscarriage, because the jury got it wrong or for whatever other reason, we will find a way of referring it to the Court of Appeal. If I am absolutely frank, this is the power under section 13(2) of our legislation and people ask why we have never referred under 13(2). Section 13(1) is the one that says for the real possibility test there must be something new. Section 13(2) says, "Never mind about 13(1), you can still refer exceptionally if you want to." Why have we never exercised that power? It is because we have always managed to find something new in addition to lurking doubt, concerns about the jury and all the rest of it, which we have added in when we have referred the case to the Court of Appeal, in effect as a peg for the Court of Appeal to hang their hats on. It makes it easier for them.

Q127 Chair: Did you say that were you to make such a recommendation the Secretary of State would have no discretion about what his advice to the sovereign was on the exercise of the prerogative?

Richard Foster: Not quite. If the Secretary of State seeks our advice and we give it—

Chair: In those circumstances, if it emanated from you in the first place, it is discretionary.

Richard Foster: If it came from us in the first place, no, they would not be bound. Then, of course, you would be in the position where we had referred a case to the Court of Appeal, they had decided not to quash, we had then recommended to a Minister, notwithstanding a court's decision, that he recommend to the sovereign that the sovereign exercises the royal prerogative. You would be a better judge than I, but that would be a difficult position to put a Minister in.

Q128 Chair: Do you think that there are problems or dangers in that course?

Richard Foster: Yes. The reason why we were set up was precisely to move away from a position in which, as happened when the Home Office used to deal with these matters, the Executive would exercise a direct influence over the courts. That would be a real constitutional concern.

Q129 John McDonnell: Can I just go back to a point of detail? Earlier you said with regard to the resourcing issue that there is an eight-month wait for those in custody and 13 months for those outside.

Richard Foster: On average, yes.

Q130 John McDonnell: Has that changed over time?

Richard Foster: It has gone up and come back down again because of the changes that we have made. That is on average. For those in custody, even if you joined the queue tomorrow, it will still only be eight months, but if you are at liberty and you join the queue tomorrow, it will probably be two years, unless there are grounds for prioritising your case.

Q131 John McDonnell: You said when you were before us previously that for a million pounds you could clear the backlog. Do you stand by that?

Richard Foster: I stand by that. A million pounds is 0.1% of the Ministry of Justice's £9 billion budget, so it is a very small percentage. It is the same amount as one Tomahawk missile. I don't know how many Tomahawk missiles the Royal Navy has, but if they could manage with one fewer, we could clear our queues.

John McDonnell: I believe that you have just given us a missile. Thank you very much.

Chair: I seem to have heard that line of argument before from various directions. Thank you very much indeed. We are very grateful to you, Mr Foster and Miss Kneller.

Examination of Witnesses

Witnesses: **Rt Hon Mike Penning MP**, Minister of State for Policing, Criminal Justice and Victims, and **Stephen Muers**, Director for Sentencing and Rehabilitation, Ministry of Justice, gave evidence.

Chair: Welcome, Mr Penning. Thank you for being here early, which means we can crack on.

Mike Penning: You are very welcome. Shall I ask Stephen to introduce himself?

Chair: By all means.

Stephen Muers: I am Stephen Muers, the director of criminal justice policy at the Ministry of Justice.

Chair: Thank you very much. As you know, we have been looking at the Criminal Cases Review Commission for some weeks and we have had a whole series of evidence sessions, the one that we have just had being with the chair and chief executive of the commission. I am going to ask Mr Corbyn to begin.

Q132 Jeremy Corbyn: Thanks very much for coming. It is nice to see you both here. The first question is a really easy one for you. The CCRC's budget has been cut by £0.6 million and the work load has gone up 74%. All the indications are that the work load is likely to increase partly because of the general campaign for people to get their cases reviewed, which is, of course, what they are entitled to do. Do you have any comment on this, because it must lead to problems in the administration and staffing at the commission?

Mike Penning: I will begin and Stephen can comment, by all means, if he wants to. Yes, there have been cuts. This is a difficult austerity period. We have made cuts across Government. The cuts that they have experienced here are not as deep, for want of a better word, as those that have been made in the Ministry of Justice as a whole. I am confident, and it will be up to the chief executive and the chairman—you heard the evidence—that they can do the job that we are asking them to do. That is an important thing.

Jeremy Corbyn: But they are being asked to make a saving of £1.15 million between this financial year and next. That is massive, considering that their budget is less than £6 million. That is a huge cut with this very big increase in work load. What we are picking up is excessive delays in dealing, often, with what are, apparently, very meritorious cases. We appreciate that they are making themselves as efficient as they possibly can, but this is a massive demand upon them.

Mike Penning: We have asked for a massive demand across Government, apart from the protected Departments, because of the difficult financial situation we are in, and we are still working our way out of that financial position. As I said, all Departments have had to cut, and arm's length bodies are no exception to that. We are, as I said a moment ago, confident that they can do the job that we are asking them to do.

Q133 Jeremy Corbyn: What can you predict for them for the future funding after 2016? There is a difficulty here. While, yes, of course, you are responsible for spending all across the piece, nobody else is having this increase in work load by that comparison. The prison population certainly is not going up by 74%; other cases are not going up by that; yet you have this massive increase of people exercising their rights. Is that not something that you are concerned about?

Mike Penning: Of course I want people to exercise their rights, but I am also quite determined that we need to continue with the austerity measures that we have in place so that Departments can live within their budgets. As we want to get ourselves into a better financial position, then this is exactly what we have to do. I know colleagues across the House don't necessarily agree with that, but the Government's job is to get the economy back on track so we can get investment into different areas.

Q134 Andy McDonald: Minister, everyone who has submitted evidence to us and mentioned the proposed extension of the CCRC's section 17 powers to cover private bodies has supported it, including the Ministry of Justice. That has been an issue now for 15 years or so. Your excuse for not implementing that extension is because you have not been able to secure its inclusion in a suitable legislative vehicle. We have been told in this inquiry that that failure is "totally ridiculous" as all it needs is one extra clause in a Criminal Justice Bill "and there will always be criminal justice Bills". Is it a ridiculous failure and can you explain why it has not been done?

Mike Penning: No, I don't think it is ridiculous. I accept that doing this has been looked at under previous Administrations. Under this Administration, we are determined to bring it forward. We want them to have the powers. It is not as simple—and Stephen will probably want to come in here—as needing one extra clause. If I am wrong, Stephen will tell me. At the end of the day, we want to bring it forward but we don't have a primary legislative vehicle at the moment to do so, but we are quite determined in the next Parliament to do so.

Q135 Andy McDonald: We have had the Anti-social Behaviour, Crime and Policing Act 2014, and we have the Criminal Justice and Courts Bill currently going through Parliament. One piece of legislation is still extant, so why can't we consider that as a legislative vehicle?

Stephen Muers: As with all Bills, there is a long, long list of different measures that need to get into them. Ultimately, Ministers take that judgment. As you know, there is always a process of working out which measures can fit into a Bill. There is always a list of things we want to do, including this measure. On this occasion, it has not been possible to find space. As the Minister said, the Government remain committed to do this.

Mike Penning: Having been in five Departments in four-and-a-half years, we have been criticised before for adding in things to Bills, and the process you go through when you are bidding for primary legislation time is that you commit to other Departments as best you can that you keep it as tight as possible, so that the legislation gets through.

Q136 Chair: But that is never what happens in criminal justice Bills, is it?

Mike Penning: I know that, Sir Alan, but that is what we try and do. As you know, I have not been here an awful long time, but it is a priority for the Government. We want to do it. It is not a case of not wanting to do it.

Q137 Andy McDonald: Why isn't there an opportunity now? Is it one clause? Is it terrifically complicated to do this? Is it beyond the wit of draftsmen to put this into the Bill currently going through?

Stephen Muers: It is not an enormously complex piece of legislation. Equally, it is not a sentence either. It is between the two. Clearly, Bills are currently going through the House, there is a certain timetable and there is a certain set of things that they need to get done in the remaining time of the Parliament. It is unlikely that we could get it into a Bill that is currently before the House.

Q138 Andy McDonald: What about the Serious Crime Bill? Could it not be put into that?

Mike Penning: As Stephen said, I don't think we will have an opportunity to get it into the Bill that has come before the House.

Q139 Chair: Have you looked at the clause in John Hemming's private Member's Bill which covers this?

Mike Penning: Yes, we have.

Q140 Chair: Have you examined that clause and decided whether it is satisfactory?

Stephen Muers: Yes. It is roughly in the right direction. It is roughly what you would need.

Andy McDonald: If it is roughly what we need—

Mike Penning: It needs time. Private Members' Bills tend not to have that, as we know. Because of the way that private Members' Bills work in the parliamentary system, it means they get into a queue and if something comes up at Report, it gets backed. It could be amended, of course, if it gets time to come through.

Q141 Andy McDonald: If it is a good idea, if it is well expressed and it is not far from what we want, why can't we just take it and put it into one of the Bills that is available to us? It sounds like a solution. If there is a genuine desire to make progress on this issue, why don't we grab that opportunity and put it in the Bill?

Mike Penning: Because the business managers have decided that there will not be time to put it into another Bill. It would not be right to do it. Both of those Bills have been scrutinised extensively in both Houses. We have had a degree of ping-pong on them. If John's Bill is successful, I think we will support that coming through, subject to some amendments.

Q142 Chair: Are you willing to have another look at this and perhaps have another go?

Mike Penning: Of course. We continue to look at it.

Chair: That phrase "continue to look at it" is something I hear Ministers say so often.

Mike Penning: Sir Alan, I have sat in for more bids for more legislation than many, and I have not always been successful. It is difficult at times.

John McDonnell: This is like men from the Ministry. It has been 15 years to get the draft of, possibly, two clauses into a Bill, and within that 15 years there must have been 20 pieces of legislation, possibly 30. This is bizarre.

Mike Penning: I can't be blamed for that.

Chair: Not all of which can be blamed on you.

Mike Penning: That is a point I was going to make, Sir Alan.

Q143 John McDonnell: But there is a collective wisdom within the Department itself and there is a collective failure here, is there not?

Mike Penning: I don't think there is a collective failure. You have to prioritise the legislation that you want to bring through.

Q144 Mr Llwyd: Isn't that exactly the point, though? If I may just enlighten the Committee, I introduced a ten-minute rule Bill in February to bring in coercive control under the domestic violence legislation. Thankfully, that was tacked on to the Serious Crime Bill, by the Government. It went through the Committee stage last week and it is going to become law. Really, this should also be a priority, should it not?

Mike Penning: If I can get it tacked on, Sir Alan, I will. I will look at it again, but we are right at the tail end of a Parliament, and it is going to be difficult. If I can, we will.

Chair: Thank you very much indeed. I think Mr McDonnell wanted to come back on the earlier budget.

Q145 John McDonnell: It would be really useful for us to have any information that you have about the comparability of the treatment of the CCRC and other parts of the Ministry of Justice—it is not just about what has happened with regard to austerity over the last four years—as to what has happened over the last decade, which is about inflation-proof freezing

of their budgets as well as a round of cuts. It has meant that, on the argument that they have put forward, what they were doing for £10 they now have £4 to do it. That seems a proportion which is considerably worse than any other part of Government. In fact, they argue that it is worse than any other part of Government in terms of cuts.

The other issue is that they are looking for consistency of budgeting. What seems to have happened is that an assessment takes place of their budget and then, because they are struggling, another £500,000 is found here or there. So again, they are not only concerned about the quantum of what they are getting and how that has been whittled down over time, but the fact that their budget is never properly assessed and they live from year to year on the basis of the extension of additional moneys, which then fails to enable them to plan their budgets properly and recruit accordingly.

Mike Penning: On the first question, we will write to the Committee and give an assessment as to how other agencies in particular have been dealt with. The Department as a whole has experienced really large cuts, which they have had to deal with as we have gone through the last four-and-a-half years.

Q146 Mr Llwyd: The triennial review showed that one of the most controversial aspects of the CCRC is the “real possibility” test. Would there be merit in altering the test so as to refocus the CCRC on investigating whether a miscarriage of justice has occurred, rather than, in truth, anticipating the Court of Appeal throughout its investigations?

Stephen Muers: I will say something on this one. The triennial review evidence showed that there were genuine differences of view on this point. There are strong arguments in both directions. Our perspective is that it is not clear how changing the test would deliver better results, given that, ultimately, the Court of Appeal has to make a decision about whether to uphold or overturn a conviction. The alternative of not having a “real possibility” test implies that the commission would be referring cases where there was not a real possibility of the Court of Appeal overturning them, which seems a slightly strange position to get into, given the attendant costs, the impact on victims and so on that you might get from that. We are open-minded. If someone came up with a brilliant alternative that was clearly better and commanded a widespread consensus, then clearly we would have a look at it, but I have not seen one yet that is generally agreed to be a better option.

Q147 Mr Llwyd: Following on from that, we have been told throughout this inquiry, by several witnesses, of the issues lying with the Court of Appeal and its unwillingness, apparently, to interfere with jury verdicts. The Royal Commission on Criminal Justice, as you may know, recommended that the grounds for appeal should be changed to “whether the conviction is or may be unsafe”, and that, as part of that change, “it should be made clear that the Court of Appeal should quash a conviction, notwithstanding that the jury reached their verdict having heard all the relevant evidence and without any error of law or material irregularity having occurred, if, after reviewing the case, the court concludes that the verdict is or may be unsafe.” Why were these changes watered down to only altering the grounds for appeal to “whether the conviction is unsafe”? Is it time to look at this again?

Stephen Muers: On the first point, as to why the recommendation of the Royal Commission was altered in its implementation, neither the Minister nor I are, probably, well qualified to explain what happened nearly 20 years ago. We are probably not in a position to say why that decision was made. In terms of whether we should look at it

again, in my experience, it is not something that has been raised with us by a lot of people or I have not seen any strong arguments as to why we should re-visit that. If such arguments were put forward, we could have a look at it.

Mike Penning: Sir Alan, it is an interesting point, from the evidence that you have been picking up, which is good, because that is exactly what is happening, but we have not been getting that. When I looked at the figures as to what had been sent back to the Court of Appeal—because they don't make a decision: it goes back to the Court of Appeal, quite rightly, for them to make a decision—it is 70% where the Court of Appeal have agreed with what was sent back to them. While we could always look at things, and we will continue to keep it under review, such evidence to this Committee, in this particular case, is not something that we have been picking up, certainly not as I looked into the evidence before I came to see the Committee today. I asked my legal advisers whether they had been pushed on a particular area, and we haven't.

Q148 Chair: It is only fair to say that earlier this afternoon we heard on behalf of the commission the argument that if they think the test is met, even if there are not those features which the Court of Appeal would normally rely on to quash the verdict, they do submit them. We know that the Court of Appeal is very reluctant, if not completely unwilling, to interfere with the verdict of a jury if there is no fault in the court process and no evidence of the jury being tampered with or anything of that kind. We know that there is a belief that this would be a very fundamental change in our court system.

Stephen Muers: I do not think it is our place to second-guess the way the Court of Appeal approaches these things. That is clearly for them to do and for the commission, as you say, to exercise its discretion as to what to refer and on what basis, as the independent body rather than for us to second-guess their choices.

Mike Penning: Going back to your original point of us keeping it under review, the answer is yes. Subject to what the Committee submit in their report, that would be part of our continual review.

Q149 Mr Llwyd: Should the CCRC be able to refer cases on the basis that it has a serious doubt about the correctness of the verdict? Surely any verdict about which both the CCRC and the Court of Appeal have serious doubts should not be allowed to stand.

Stephen Muers: I may not be understanding the question aright. Is that different from the real possibility test? Are you suggesting that that is something that is different from the real possibility test?

Chair: The real possibility test is a test for the commission. The serious doubt test in this argument is a test for the Court of Appeal.

Mike Penning: Yes.

Stephen Muers: As I say, it is probably not for us to get into exactly how the Court of Appeal exercises its jurisprudence because that is clearly something that evolves through the senior judiciary rather than through Ministers sitting here and telling them. The CCRC's role is set out in statute as is the real possibility test. As I said, I haven't seen a better option so far.

Mike Penning: Especially for a non-legally trained Minister.

Q150 Mr Llwyd: During our deliberations we have heard several times about going behind the jury decision and so on. Do you consider that section 8 of the Contempt of Court Act 1981 should be amended to allow for strictly controlled and anonymised research into jury verdicts on the way they work?

Mike Penning: I have not seen any reason, as yet, to do so, but if evidence has come before the Committee about that, then we will look at that.

Q151 Mr Llwyd: I have one final question. Why has the use of the royal prerogative of mercy fallen so sharply since the creation of the CCRC? Would the Ministry be open to references to the Secretary of State from the CCRC for the exercise of the royal prerogative?

Stephen Muers: We are clearly open to any such references, and the CCRC has the power to make them. We have only ever had one, I believe. I would have to check the exact number. It is certainly very low. It is a judgment for the commission to make as to whether they think it is appropriate to refer to the Secretary of State.

Mike Penning: They have the power to do so.

Stephen Muers: We would then consider, very seriously, any such recommendation that we got from the commission.

Mike Penning: It is very much for them. They have the power to refer.

Mr Llwyd: I realise that they have the power. My question implied that they have the power. I am interested in that answer. I am sure that they will be, too.

Q152 Chair: Would you have any worries if they exercised that power about the political pressures that would then be on the Secretary of State?

Mike Penning: No. Secretaries of State and, sometimes, Ministers of State have to make decisions when cases are referred to them. Decisions did not have to be made by Ministers very often. So no, I wouldn't have concerns about that. That's why it sits there. If there was a huge use of it, we would all sit back and take another look to see what was going on. It is there, not as a last resort, but it is there and it is available for them to use should they wish to do so.

Mr Llwyd: In exceptional cases.

Mike Penning: In exceptional cases. It is there for them to use if they wish to do so.

Of course, they hardly, if at all, opted to use it. That is their decision.

Q153 John Howell: In terms of feedback to ensure that the criminal justice system functions as effectively as possible, what is the relationship between the Ministry and the CCRC? What do you do to each other, if I can put it that way?

Mike Penning: That's a very interesting way of putting it. Stephen will give you a more legalistic view of this. They are an arm's length body. I am the Minister responsible through the Secretary of State. They have an opportunity, literally, to come and see me

and talk to me about any of their concerns and vice versa. They are independent, and because they are independent—that is what it says on the tin—that is how they should operate. At the end of the day, they are, like all agencies or quangos, responsible to Ministers.

Stephen Muers: In terms of your point about feedback in the system, we have a constant dialogue with CCRC about all sorts of things, including issues that have been raised by the Committee today, but also about specific problems that come out of specific cases or lessons from the system. That is not just with the Ministry of Justice. The CCRC is also in touch with the other criminal justice agencies, such as the CPS, the police and so on. Much of what comes out will be as much for others to take on board as the Ministry. There is potential for a relationship which works quite well.

Mike Penning: Technically, I am the sponsoring Minister. That is the correct terminology.

Q154 John Howell: What scope is there for increasing the functions of the CCRC to include taking advantage of its unique position to comment, and to undertake research, on issues within the criminal justice system?

Stephen Muers: There is a choice to be made here about whether the CCRC is the right body to do that kind of function. We have heard about the work load pressures and the budget pressures that the commission is under. Making sure that the core business is done properly has to be the first duty. Then, clearly, there are lots of people who can do research into the criminal justice system, academic bodies, think-tanks and so on. Whether the CCRC would add a lot to that, I am not sure. It is something we could think about, but there is clearly a resourcing question that comes tied in with it.

John Howell: But it does have a unique position in terms of the understanding that it has of the issues involved that could usefully be used in this way.

Stephen Muers: Yes; and the CCRC does talk, for example, to academics who work in this field and feed into their research and so on. That may be a better way to do it rather than the CCRC commissioning research itself. I don't know.

Mike Penning: It is something that the academics are particularly interested in, for obvious reasons. I know that evidence has been given to the Committee as to whether the work they are doing and the decisions they are coming out with are right. That is a right academic rigour. As Stephen has alluded to, immediately I suggest that, I will be put under further pressure on funding. I don't necessarily feel why they should be the initiator of that rather than being a part of some of the information that is coming out.

Q155 John Howell: Let me take you on to one other issue, and that is the impact of the legal aid cuts. There has been a suggestion that the cuts to legal aid will lead to a higher level of miscarriages of justice. First of all, do you recognise that and is that your view of it? Secondly, what are you doing to work with the CCRC to explore that possibility and ensure that they are in a good position to be able to handle them?

Mike Penning: Any future comments on that would have to be evidence based, so I don't accept that because I don't see where the evidence base is for that assumption by whoever put that to the Committee. As we go forward, they will be able to see whether that is the

sort of situation that is occurring and we can learn from that. It is much too early, I would have thought, to have any indication. People have assumptions, and they are their personal concerns about the cuts to legal aid. How that reflects across the criminal justice system—it is much too early to make that sort of assumption.

Chair: Thank you for your help this afternoon. You have agreed to write to us on the point that was raised a little earlier in the debate. If there are no further points, we are grateful to you for your help this afternoon. We will be reporting on this subject in some weeks' time, although I will not give a precise estimate. Thank you very much, indeed.

Mike Penning: Thank you, Sir Alan. You are welcome, as always.