HOW A WATCHDOG LOST ITS BITE

At the end of last year, the Future Justice Project hosted a meeting of leading figures from the miscarriage of justice world - some had campaigned for the radical reform that led to the establishment of the Criminal Cases Review Commission and others worked for the watchdog in its early days. Jon Robins reports

By JON ROBINS

Photographs: All pictures by Andy Aitchison

From L to R: Ralph Barrington, Laurie Elks, David Jessel, Steve Heaton, Jim Nichol and Sharon Persaud

The Criminal Cases Review Commission opened its doors more than 27 years ago to fix the damage in public confidence to a justice system shaken by scandals such as the Birmingham Six, Guildford Four, Cardiff Three and Stefan Kisko. The acquittal of Andrew Malkinson last year has put the body under more scrutiny than any other time since the 'bad old days' of the 1980s.

'There has been a growing groundswell of opinion from committed and serious-minded people who worked for years at the CCRC in its early days, and others who dealt with it, that the organization has seriously lost its way,' commented Glyn Maddock, FJP →

CONTRIBUTORS

David Jessel (chair): journalist, former presenter of BBC's *Rough Justice* and Channel Four's *Trial & Error*, and ex CCRC commissioner

Ralph Barrington: former head of investigations at the CCRC, previously head of Essex CID

Laurie Elks: a founding CCRC commissioner with a background in commercial law

Dr Steve Heaton: retired academic from the University of East Anglia whose PhD research drew on unprecedented access to CCRC files

Glyn Maddocks KC: criminal appeals lawyer who has acted in many miscarriage cases including Tony Stock, Oliver Campbell and Paul Blackburn and director of the Future Justice Project

Campbell Malone: a solicitor who spent 40 years in practice before retiring in 2010. He represented high profile miscarriage cases including Eddie Gilfoyle, Suzanne Holdsworth and Stefan Kisko

Alexandra Marks: former CCRC commissioner who joined the group after a 27-year career in commercial law

Glenn Mathieson: former case review manager at the CCRC who

now specialises in professional regulation

Jim Nichol: a solicitor well known for his miscarriage of justice work including the Bridgewater Four, M25 Three, and Colin Wallace

Dr Sharon Persaud: former CCRC commissioner who joined the commission after a long career as a solicitor in criminal defence work

David James Smith: previously CCRC commissioner and Sunday Times magazine journalist

Professor Michael Zander KC: emeritus professor of law at the London School of Economics and original member of the 1993 Royal Commission on Criminal Justice (absent)

director and criminal appeals specialist. 'The reasons for the decline of the CCRC are complex and haven't been well understood. Any serious attempt to "fix the problem" needs to be informed by an understanding of what the CCRC was set up to do in the first place, why it was such a pioneering and radical innovation and how it's been neutered over the years. We convened this unprecedented roundtable event to assist the ongoing reviews.'

The event took place at the offices of the international commercial law firm Simpson Thacher Bartlett and was chaired by the veteran journalist and former CCRC commissioner David Jessel. He once described the establishment of the CCRC, willed into being through the efforts of families and campaigners, as 'the nationalisation of zeal'. Jessel presented both the BBC's pioneering investigative programme *Rough Justice* and Channel Four's *Trial & Error* before joining the commission for a decade in 2000.

'What we need to do is find out whether Andrew Malkinson was an outlier,' he began. 'Mistakes happen, we all know that. That's why we're in the miscarriage of justice business – with the best will in the world, things slip through the net; but how much of what happened was the inevitable outcome of the system as it is now?'

Concerns about the CCRC came into a sharp focus in 2016 and 2017 when the number of referrals collapsed - 12 and 13 for the two years respectively. As a result of the collapsing referral rate, the Labour MP Barry Sheerman and Tory peer Sir Bob Neill set up the All-Party Parliamentary Group on Miscarriages of Justice. The APPG established a Westminster Commission investigation into the CCRC chaired by Lord Edward Garnier and Baroness Vivien Stern which reported in 2021.

The academic Dr Steve Heaton, whose PhD research looked at the CCRC's referrals, argued that the total figure of referrals was indeed misleading. Instead, he advised commentators to look behind the headline numbers. If they did, he argued they would realise how 'rare' a CCRC referral was outside of discrete categories (see page 39). 'If you take out those, you have virtually got no referrals - just a couple a year,' he said. 'It's a really, really tiny number.'

David Jessel queried the value of injecting more money into an unreformed CCRC. 'Are we going to be giving more money to enable it down more cases more quickly? If so, I don't see the point.'

The 2021 Westminster Commission investigation concluded that of all the parts of our cash-strapped 'broken' justice system, the 'safety net' organisation had borne the brunt of austerity. The CCRC received less than £6m in 2019 compared to more than £9m in 2004 and its workload had more than doubled since 2010.

Emerging from the ashes

The CCRC began its work in April 1997 based in Birmingham in recognition of the six innocent Irishmen wrongly convicted more than 20 years previously. It replaced a shadowy Home Office unit known only as C3.

Laurie Elks, a commercial lawyer by background and one of the first CCRC commissioners, recalled spending a day at C3 going through the old files before the new watchdog was launched. 'Political accountability was a terrible problem,' he recalled. 'If a minister felt he was politically exposed, then they made an effort. If not, they didn't.'

As two of the small number of lawyers prepared to take on these difficult cases, Jim Nichol and Campbell Malone had regular dealings with C3 and then the early CCRC. What did they hope for from the fledgling commission? 'Independence,' replied Malone. 'That was absolutely the reason why the commission was set up.'

'Proactivity,' answered Jim Nichol. 'You wanted them to do something. Campbell and myself, we had no resources. We did this work for nothing. The solicitors' green form (legal aid)

Thanks to Simpson Thacher Bartlett for hosting the CCRC roundtable

87,982
Prison population at February 2024

33
Average no. of applications a year referred by the CCRC to the Court of Appeal over its first 20 years

1,400
No. of people who typically apply to the CCRC every year

25
No. of cases referred back to the courts by the CCRC last year

12
No. of cases were referred in 2016 (less than 1% of total applications)

70%
Typically seven out of ten referrals successful (i.e., overturned by the Court of Appeal)

scheme was a waste of time. We wanted the commission to look at this stuff, put some resource and effort behind it.'

The case of Stefan Kisko

Campbell Malone pointed out that C3 might have 'had no resources but, at its head, was a political figure'. In other words, if a Home Secretary was sympathetic - or sensitive to public criticism over their inaction - a case might get traction. He recalled his experience on Stefan Kisko. 'We had the bizarre situation of putting together a dossier which consisted of a lot of new evidence including a critique of the trial lawyer who on the day we finalised the draft became the Home Secretary.'

What were their impressions of the CCRC in its early days? The new watchdog was 'striking in the independence of its approach and the pride it took in the importance of its work', reckoned Malone.

'It was obvious when visiting the commission that the whole staff from the chair downwards worked collectively in a collegiate atmosphere.'

The solicitor added that there were 'obviously' times when he disagreed with decisions and he 'often found them overly cautious' in their approach to referrals. 'But I always respected the decision-making process and the integrity of it,' he said.

'When the commission started the place bubbled,' Jim Nichol remembered. 'It didn't matter that they were in Birmingham. You never came across a young person who wanted to be a lawyer who didn't say they wanted to do miscarriages of justice.'

However, the solicitor recalled being invited to talk to the Commission when there was an early crisis in confidence. He received a call from a commissioner who said that the case review managers were demoralised because of the enormity of the challenge.

'The CCRC has had 30,000 cases since it started, and 29,000 have been rejected,' he said.

'I don't know how you keep the morale up in that situation. Speaking for myself doing miscarriage of justice work, I don't think I could have done it day in day out.'

Early days

There was no blueprint for a public body created to correct miscarriages of justice. The CCRC was the first of its kind in the world. For the first 10 years, Laurie Elks said the CCRC was 'working out how to do the job'. 'The CCRC didn't know what it was doing,' he added. The challenge for the new body was identifying those cases with merit against the inherited backlog and a new deluge of applicants from prisons. 'You'd have a thousand applications a year, and 50 to 100 would merit serious investigation. The question is: how do you weed out that 900 to 950?'

The number of applications shot up by 50% approximately ten years ago when the commission introduced an easy-read application form for prisoners with literacy issues. It remains consistently about 1,500 a year to this day. It is free to apply to the CCRC and there is no limit on the number of re-applications that can be made, although applicants with nothing new to say might be screened out at the triage stage.

That screening process was 'fine-tuned again and again', according to Elks. This led to 'a two-speed' approach. 'Those that made it through the sift, were very frequently handled with great depth and perception,' he said. 'And those that fell at the first hurdle were pretty much doomed.'

Elks said he had 'a lot of a lot of reservations about the way that developed'. 'And I think the Malkinson case has everything to do to do with that,' he added. The CCRC rejected applications from Malkinson in 2012 and 2020.

This initial triage had in the CCRC's early days been overseen by the same three experienced commissioners – 'they didn't want to rotate,' added Elks. The post-2013 commissioners pointed out that the vital role had been deputised to team leaders for the case workers known as case review managers or CRMs.

Glenn Mathieson spanned the two periods over his 13 years as a CRM at the CCRC joining in 2003. 'One of the strengths of the commission when I was there was that you did have your head,' he said. In other words, a CRM had a degree of autonomy. Mathieson argued that the CCRC changed over the years. 'It's perhaps turned into a body that assesses submissions rather than taking a holistic look at a case and asking: "How do I feel about this? What might need probing and then following those?"'

Dr Heaton said that when he was conducting his CCRC research he was 'struck by the relationship between CRMs and commissioners'.

'I've worked in a number of organisations and I've never seen a level of relationship where very senior people - including very senior case review managers - have very little power of decision-making and I thought that was an interesting source of tension.' The academic described the subsequent move to one day-a-week commissioners as 'a really retrograde step' (see later).

The cracks begin to show

Ten years in and the head of the watchdog first spoke out about the impact of underfunding. In 2007, the watchdog was facing cuts of £300,000 a year for the next three years; and the then CCRC director, Professor Graham Zellick reported that staff were 'frustrated… angry and dispirited' in the annual report.

The commission's relationship with the Court of Appeal was also proving difficult. As Laurie Elks noted in a 10-year review published by JUSTICE, the court soon 'wearied' of the watchdog's referrals and had not hesitated to administer the odd 'prefectorial ticking off' when it considered the Commission had 'overreached'.

In 2010 some critics began to write the commission off as (to quote journalist Bob Woffinden in a Guardian article published that year) an 'experiment that failed'. The academic Dr Michael Naughton, founder of the university Innocent Project movement, reckoned that the commission was hamstrung by the 'statutory straitjacket' of the Criminal Appeal Act 1995 which required cases only with the 'real possibility' of the conviction being overturned to be referred to the Court of Appeal.

Critics argue the statutory 'real possibility' test means that the CCRC has no option other than to 'second guess' the Appeal judges – and so a conservative Court of Appeal inevitably leads to more conservative referral decisions by the CCRC.

Michael Zander was a member of the original Royal Commission on Criminal Justice which recommended setting up a CCRC-style body. He argues that there is nothing wrong with the 'real possibility' test: 'The problem is the Court of Appeal which, since 1907 when it was established, has refused to recognise that its role, given by the legislature, includes being sometimes asked to review jury verdicts, even though there is no new evidence.'

The court's 'deference to the sanctity of the jury's verdict' is 'constitutionally wrong', according to Zander: 'Juries do sometimes go wrong.' Zander said that there were various proposals including those of the 1993 royal commission 'aimed at getting the Court to act as the original framers intended'. 'In vain. The court remained unmoved. I am pessimistic as to the prospects of the Law Commission doing better.' The Law Commission is presently reviewing the criminal appeals process following the recommendation of the 2021 Westminster Commission report.

↑ Photograph Campbell Malone

A clean bill of health

Dr Stephen Heaton examined 404 CCRC case files in a study looking at its effectiveness since it started until 2011. He reported that nine out of 10 applications to the CCRC had no prospects of even being looked at by the body. Of the total number of applications, some 3.5% were referred to the Court of Appeal. The academic focused on 147 cases where the CCRC did not refer and identified 26 where there was concern of a potential miscarriage of justice (dubbed by one commentator to be the 'Birmingham 26'). Of that number, Dr Heaton concluded that the CCRC was right not to refer them based on the 'real possibility' test.

Dr Heaton told the roundtable that the CCRC relied on his research which, as he put it, 'mainly blamed the Court of Appeal', to indicate 'a clean bill of health'.

Until, as he put it, 'I asked them to stop doing that in 2016/2017.'

'The overall performance of the →

Photograph ↑
Sharon Persaud

Court of Appeal is a significant obstacle to addressing miscarriages of justice,' Heaton wrote in evidence submitted to the House of Commons' justice committee. The academic blamed the problem, in part, on the Court's 'atomistic' approach, looking at fresh evidence affecting the safety of a conviction in an isolated fashion; rather than a 'holistic' review of the entirety of a case.

The same point was made by Laurie Elks in his 2010 review of the CCRC. In an analysis of the Court of Appeal's treatment of the Tony Stock case, he said it had been Stock's misfortune that the case against him 'unravelled by degrees'. Using the analogy of an onion, he observed that at each sitting the court weighed up 'the peelings' (i.e., the new evidence) and in effect 'snorted: "That's not much compared with the towering weight of the verdict of the jury who were certain of Mr Stock's guilt."'

Tony Stock's case has been to the Court of Appeal on four separate occasions – including in 1996 when an armed robber went to court to explain how he, as the leading member of an East End crime gang, committed the robbery and had never met Tony Stock. Glyn Maddocks pointed out that a third application on behalf of Tony Stock has been with the CCRC for the last seven years.

According to the solicitor who has represented Stock's family for over 20 years, the case illustrated a fundamental problem with the criminal appeals process: 'the Court of Appeal's lack of willingness to engage with, or even recognise, the problem'. The Stock case was the first case that the CCRC referred to the Court of Appeal a second time and remains just one of two cases that has had a second referral. 'A statistic that tells its own story about the willingness of the CCRC to stand up the Court of Appeal,' Maddocks noted.

Bringing the CCRC back inhouse?

Alexandra Marks, David James Smith and Sharon Persaud joined the CCRC as commissioners in 2013 under the chairmanship of Richard Foster CBE. As former chief executive of the Crown Prosecution Service, Foster was an unlikely appointment to head up a justice watchdog when he joined in 2008.

The much-prized independence of the CCRC as originally conceived resided in the power of its 11 commissioners as required by its founding statute. For a case to be sent back to the Court of Appeal, it needs the backing of three commissioners. According to Alexandra Marks, there was 'a great reduction in the amount of commissioner hours' during Foster's tenure. This coincided with a time when the group's already dire financial problems worsened.

'It's a bit like feeding a donkey less each day. You get away with it for quite a long time, then suddenly the donkey dies,' she said. 'Commissioners were to some extent regarded as a bit of a nuisance, internally. Also, the Ministry of Justice was on the CCRC's back.'

The House of Commons' justice committee in 2015 offered the CCRC a lukewarm assessment. The commission was doing 'reasonably well' but it was urged to be 'less cautious'. 'If a bolder approach leads to five more failed appeals but one additional miscarriage being corrected, then that is of clear benefit,' the MPs said.

It was under Foster's chairmanship that a decision was taken in Whitehall to bring the CCRC under closer control. In 2020, the high court recognised a period of 'political interference' by the Ministry of Justice. Lord Justice Fulford and Mrs Justice Whipple were considering the case of a convicted armed robber whose application to the CCRC had been rejected. His lawyers had argued that the commission's relationship with the MoJ was 'dysfunctional' and that it was not sufficiently free from government control to be independent.

Fulford and Whipple rejected Warner's case; but they agreed with his lawyers' analysis for a two-year period (2016 to 2018) that the 'relationship between the CCRC and the MoJ was very poor during this period, even dysfunctional'. 'The poverty of this relationship undoubtedly tested the CCRC's ability to remain independent of MoJ, and to be seen to be so,' the court said.

The episode that most alarmed the court concerned the treatment of 'commissioner X'. A briefing for the justice minister suggested X's re-appointment be refused as they were 'amongst the cadre of commissioners seeking to resist further changes to governance/working arrangements'. Such advice was 'not appropriate', the court found: 'This was political interference.'

From the start of the CCRC in 1997 until 2012, commissioners were appointed for five-year terms on a full-time or near full-time basis on respectable salaries (£93,796 in 2013) plus a pension. By 2021, almost all of a new generation of commissioners had been appointed on minimum one-day-a-week contracts for three-year terms (Marks, Smith and Persaud had since left).

Commissioners no longer received a pension and are paid on a £358 daily rate significantly less than the basic judicial rate (e.g., £502 a day for a judge in the first-tier tribunal) on which the initial salaries were based.

'It was the beginning of the end in terms of undermining the independence of the Commission and the commissioners,' Alexandra Marks told the roundtable. Glenn Mathieson said that it was 'notable' that the commissioners now were 'not of the same gravitas' as when he joined the organisation.

Sharon Persaud, who was a defence lawyer by background, said that the CCRC was already heading in the wrong direction when she came on board. 'It had become intensely introspective and preoccupied with its own processes,' she said.

'The Commission has never grasped where it sits at the centre of the world of miscarriages, campaigning journalists, the Court of Appeal, the defence community,' she said. '… It has a public function. It can't be all things to all people, and it shouldn't be; but what it should do is understand where it sits in relationship to these things.'

Persaud described the dynamic between case review managers and the commissioners as 'fractious'. 'I think the recruitment of the case review managers and commissioners was erratic at best,' she added.

KPI culture

Glenn Mathieson noticed a shift in the culture of the organisation as the CCRC became fixated on hitting KPIs (key performance indicators). The CCRC reviews its performance against seven KPIs mainly relating to its ability to hit deadlines and, in particular, close cases.

When Mathieson joined, he said that there was 'a conscious effort to recruit people that were independent-minded and had the sort of personality to stand up for themselves'; but an emphasis on closing cases down became increasingly dominant. As he put it: 'A combination of recruiting more passive-minded people, the kind of management structure and a target-driven culture had a dampening effect.'

David James Smith pointed out that the CCRC was struggling with a growing backlog - a three-year waiting list of unresolved cases. 'The danger, of course, as always is that you make the wrong decisions in the wrong cases,' he said. 'Caseloads were well into double figures for case review managers and there was this pressure from the group leaders to close the cases down to move on. I was always worried about who was making decisions as to which ones would be investigated. People were deskbound and weren't looking for opportunities to go out and investigate.'

Smith noted a 'bunker mentality' at the CCRC; its default stance to criticism was to 'draw in the reins'. 'It became very inward-looking and that was unhealthy,' he said. 'My view is that the more corporatized the commission became the less independent, it became.'

The legal aid crisis

When first established in 1997, the CCRC told the world that it stood outside the adversarial legal process and that it didn't require or encourage applicants to be legally represented. However, it quickly became obvious that those applicants supported by lawyers fared markedly better.

According to a 2008 study, more than eight out of 10 of represented applicants (82%) got their cases past first 'screening' stage compared to only half of unrepresented applicants.

'Now, that is beyond a coincidence, isn't it?' Alexandra Marks said. 'Applications are often doomed because the submissions are self-penned and →

utterly irrelevant.' The CCRC now reports that now 95% of applicants are from people without legal representation.

The second major determinant of success with the CCRC (alongside having a decent lawyer) was an effective publicity campaign, according to Alexandra Marks. The CCRC has always insisted that it would not be persuaded by campaigns – that said, it referred two high profile cases in quick succession – Marine A/ Sergeant Blackman and Ched Evans.

As Marks commented: 'It's deeply dispiriting when you get cases that you think are very deserving, but haven't got a public profile being turned down and other cases where you think: "Um, really"?'

Looking for a champion

A criticism of the CCRC in recent years is that its investigators have become increasingly deskbound. Last year, Jacob Rees-Mogg opened the CCRC's new 'office hub'. One of Rees-Mogg's last acts as minister for government efficiency was to issue a directive that all civil servants must return to work. Curiously, the CCRC introduced a 'remote first' policy - now staff are only expected to be physically present in its new office for ten to 12 days a year.

Glenn Mathieson said: 'I can't imagine having worked in that environment doing that role, I just don't think it's possible to work remotely.'

'I've got one word that I want to share: "ethos",' commented Ralph Barrington. 'When everybody was working together, there was a kind of spirit that we were all trying to do the job properly - whether that's true or not, obviously depends on the case and the individual.'

'It seems to me that the problem with the CCRC today is that it doesn't have a champion,' David Jessel said. 'When it was set up it had its own invisible champion - a body of people, journalists, right-thinking people, parliamentarians - who thought that miscarriages of justice were a stain on our system.'

David James Smith argued that that the CCRC 'never needed a champion more' than in the weeks following the Malkinson debacle. Whilst the present chair, Helen Pitcher declined press interviews.

Referrals in relation to a conviction in the Crown Court are quite a small number, rare one might say. I was surprised to see just how few of those referrals have been successful

That vacuum inevitably led to questions about Pitcher's leadership. As media commentators reflected public outrage about the treatment of Andrew Malkinson over the summer, the Guardian published a photograph of the CCRC chair in Montenegro 'barefoot outside a mussels bar' promoting her 'holiday home business'. The Daily Telegraph reported that she 'had eight other jobs'.

Pitcher's business interests came to light in a session before the House of Commons' justice committee at the start of 2022 when MPs signed off a new part time job as chair of the Judicial Appointments Commission. Helen Pitcher did not put her name forward for the JAC role. She was identified as the preferred candidate by a panel of judges including the head of the criminal courts, the then Lord Chief Justice Lord Burnett of Maldon.

One of her first jobs was to oversee the replacement for Lord Burnett. The JAC was set up by New Labour in 2006 to replace the old and discredited 'tap on the shoulder' mode of judicial appointment. 'It's vital that the CCRC is independent and seen to be independent. None of this helps,' said Glyn Maddocks.

'Shouldn't the CCRC be its own champion?' said Jim Nicol. 'Should the CCRC not be fighting its own corner. If there is an adverse decision, why not go public? It gets all the bad publicity dash - not get some of the good publicity.'

Arguably, the one job that the CCRC does well in the criminal justice system is as a scapegoat deflecting attention away from other areas long overdue proper scrutiny - not least, the Court of Appeal and the Ministry of Justice. ●

Quote ↑
Steve Heaton

IN EIGHT YEARS, THE CCRC HAS REFERRED 227 CASES

YEAR	APPLICATIONS	RUNNING TOTAL	CASES COMPLETED	RUNNING TOTAL	TOTAL CASES REFERRED	CASES REFERRED AS % OF CASES COMPLETED
2015/16	1480	1480	1797	1797	33	1.84%
2016/17	1397	2877	1563	3360	12	0.77%
2017/18	1439	4316	1538	4898	19	1.24%
2018/19	1371	5687	1449	6347	13	0.90%
2019/20	1334	7021	1453	7800	29	2.00%
2020/21	1142	8163	1109	8909	70	6.31%
2021/22	1198	9361	1183	10092	26	2.20%
2022/23	1424	10785	1275	11367	25	1.96%
					227	2.00%

THE TABLE BELOW FOCUSES ON REFERRALS TO THE COURT OF APPEAL

YEAR	COURT OF APPEAL	NOTES	UPHELD	QUASHED	PENDING
2015/16	17	7 ASYLUM CASES	8	2	
2016/17	8		6	2	
2017/18	8	5 DOWNGRADED TO LESSER OFFENCE	2	1	
2018/19	8		7	1	
2019/20	16	4 OVAL, 8 SHREWSBURY	3	1	
2020/21	60	43 POST OFFICE, 6 SHREWSBURY, 3 STOCKWELL	0	4	4
2021/22	5	1 POST OFFICE, 1 SHREWSBURY, 1 STOCKWELL	0	1	1
2022/23	9		0	4	5

BREAKING DOWN THE STATS

Dr. Heaton argues the referral rate is not a reliable indicator of CCRC performance.

The 227 can be broken down by reference to 'group referrals': 64 are 'Post Office' cases; nine relate to DS Ridgeway; and 15 are 'Shrewsbury' cases concerning convictions for trade union activities in the 1970s (see PROOF 5).

Other 'group' referrals include convictions of anti-apartheid protestors and asylum seekers. In most group referrals (e.g., PO & Shrewsbury), the CCRC did not 'uncover' the miscarriage of justice. If you take away the group referrals that leaves 78 cases over eight years.

Of the 227 referrals, 131 were to the Court of Appeal - *see second table*. Dr Heaton omits from upheld/ quashed cases identified in 'notes' because he reasons the group referrals 'distort the statistics'

Tables compiled by Dr Steve Heaton