

The mission of the Criminal Cases Review Commission is to rectify to the fullest extent possible, those miscarriages of justice which persist even after a person has been tried and apparently properly convicted, and even after his or her appeal has been heard and rejected by the appropriate appellate court.

Safeguarding against miscarriages of justice

Leonard Leigh explains the work of the Criminal Cases Review Commission.

The Home Office formerly dealt with alleged miscarriages of justice. Wide dissatisfaction with that system was expressed. The Criminal Cases Unit at the Home Office which dealt with such petitions was small. The establishment of the Commission afforded an opportunity to improve staffing and use modern IT techniques. The Royal Commission on Criminal Justice recommended the establishment of a new authority, independent of government, to assume the functions of the Home Office in miscarriage cases.¹ The resulting Commission came into being on January 1st, 1997 and assumed responsibility for case-work on April 1st, 1997. It has already begun to issue decisions. The Commission inherited a backlog of some 260 cases, some of

considerable complexity. It is now handling about 770 cases and applications are coming in at the rate of five to six per day.

Status and composition

The Commission is a Non-departmental Public Body. It is independent of government in respect of its operational decisions, but the Home Office sets its budget and the Commission is answerable to the Home Office for its efficient operation. The Commission is composed, at present, of a chairman and thirteen commission members (of whom four serve full-time), all chosen according to Nolan criteria.

Commission members come from a variety of very different backgrounds. The Criminal Appeal Act 1995 requires that one-third of the Commission Members be legally qualified and that at least two-thirds of the members have experience of the criminal justice system. That has left room for members to be appointed who have gifts which the Commission requires but who, formerly, had no particular association with criminal justice. The Commission thus counts among its members barristers, three solicitors, a professor of criminal law with some experience of practice at the bar, a former member of the Police Complaints Authority, a former Deputy Assistant Commissioner of the Metropolitan Police, a former director of an ICI subsidiary with a scientific background, two accountants, a psychiatrist, and the Belfast City Coroner. The chairman is himself a scientist with extensive experience on the boards of major British companies and a notable career as a University Vice-Chancellor.

The very composition of the Commission favours a multi-disciplinary approach to cases which often throw up challenges to widely differing disciplines. This helpful diversity of backgrounds is also found among the Commission's caseworkers. The need for essential supporting expertise is met by the appointment of a legal adviser and a police adviser who is not a serving police officer.

The Commission is managed by a relatively small administrative cadre. It has invested heavily in Information Technology recognising that IT, if properly managed, can increase its efficiency substantially. The Commission decided to ensure that its personnel were properly trained and the systems (to the fullest extent possible) operational before undertaking case

management. That policy is an essential precondition to the Commission's success.

Powers and functions

The Commission has power to consider alleged miscarriages of justice arising from England, Wales and Northern Ireland.² Its jurisdiction comprises convictions made both on indictment and summary conviction, and sentences imposed following convictions on indictment. Save in exceptional circumstances the case must first have been to appeal.

The Commission may refer a case to an appellate tribunal or it may determine not to refer a case. It may also refer a finding of not guilty by reason of insanity or a finding that the person was under a disability when he or she did the act, or made the omission charged against them. Not all criminal matters, however, fall within its remit: despite the increasing tendency to assimilate military justice to its civilian counterpart, the Commission has no jurisdiction to entertain alleged miscarriages of justice perpetrated by Service Courts. The Commission has, furthermore, no jurisdiction in relation to variation or rectification of sentences.

Most cases are brought to the Commission by aggrieved persons or their families, and the fact that the convicted person has died is no bar to bringing an application. The Court of Appeal may itself direct that the Commission investigate a particular matter "in such manner as the Commission think fit". This power should prove useful where the Court of Appeal concludes that a case would benefit from further investigation. In such a case the Commission will function as an investigative arm, directly responding to the Court.³ Finally, the Commission may itself determine to inquire into an apparent miscarriage of justice.

In addition the Secretary of State may refer any matter to the Commission for assistance in relation to the Royal Prerogative of Mercy. This power recognises that some cases may no longer be suitable for judicial consideration: witnesses may have died, materials may be fragmentary, files may have been lost. Thus the ultimate safety net has been preserved.

The Commission operates within limits set by respect for the trial process and for the integrity of findings of fact at that stage of the process. It is not intended to usurp the basic fact-finding functions of trial courts at whatever level. Before the Commission can

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refer a case it must conclude that there is a real possibility that the verdict, finding, or sentence would not be upheld if the reference were to be made. This is, of course, an impressionistic formula which directs the Commission to consider the weight of those factors which favour review.

The Commission must base its assessment of real possibility (save in exceptional cases of which flagrantly incompetent advocacy might be one) on an argument or evidence not raised at trial, or on an application for leave to appeal, or on appeal. This does not require that a matter be entirely new: it does require that it present an aspect which was not previously placed before the courts. The Commission is not intended simply to review evidence and arguments which have already been dealt with by the courts.

The Commission’s powers over sentence are more narrowly expressed: the Commission may only refer a sentence where a point of law, or fresh information, emerges. The Commission may well find it difficult to determine when a point of law emerges. There should be no difficulty where the sentence imposed clearly falls outwith an accepted legal principle. A sentence may also be thought to be wrong in law where it is *Wednesbury* unreasonable (as lawyers would describe it) or as one court put it, so harsh and oppressive as to be outwith the sentencer’s powers.⁴ On the other hand, the Commission cannot re-

fer a sentence simply because it believes that the sentence was unduly long.

“Real possibility”

The Commission’s role in relation to “real possibility” requires elucidation. An applicant may present allegedly “new” evidence. Witnesses may come forward who were not led at trial. The Court of Appeal will require an explanation why the evidence was not presented earlier. It will consider the credibility of the witness. It will take account of the dangers of manipulation. The Court of Appeal must consider whether it is in the public interest to admit such evidence. But the Commission also must take a view of these matters: it is the guardian of the gate and the sole avenue by which a person whose appeal had previously been rejected may bring his case again before the Court of Appeal. It would be wrong of the Commission to reject an application where there is real argument about the cogency of evidence or the integrity of witnesses: equally, the Commission, in my opinion, would fail in its duty if it referred cases which it regarded as plainly unmeritorious to the Court of Appeal.

The Commission has power to request reports. It may ask for witnesses to be interviewed and may, indeed, conduct such interviews itself. It can require the appointment of an investigating officer and it may supervise that officer’s investigation of the matter.

It can compel the production of documents from other public bodies and its powers to secure these are not limited by public interest immunity (though it must, in determining whether to disclose such documents to third parties, have regard to the public interest).

Limitations

The Commission, however, lacks two significant powers: first, it cannot take evidence on commission in order to preserve it in the event of a favourable reference to the Court since only the Court of Appeal can do this and then only when an appeal is properly before it, and, secondly, the Commission cannot compel the production of documents from private individuals or organisations. The Commission could not, for example, require the production of documents from The Law Society or The General Medical Council since these are private bodies, albeit bodies exercising regulatory functions in the public interest. The Commission can disclose matters to these bodies in aid of their disciplinary functions. No doubt suitable operational practices will emerge as they have, for example, between the police and the medical profession.

There are practical limitations, to the Commission’s operations. Adequate materials for review are usually available where a case is tried on indictment, provided that the conviction is not an old one. If the case has been to appeal the Court of Appeal’s papers will include the trial judge’s summing up and the Court of Appeal’s decision. It may be possible to supplement the record with counsels’ recollections and notebooks. Sometimes the trial Judge will make available

his notebook. Cases tried on summary conviction present greater problems. No satisfactory method of recording such proceedings exists: at best one has the Clerk’s note and this may be fragmentary. Such notes are usually destroyed after five years. Materials for review may thus be lacking and, in the case of old convictions, it may be impossible to review the matter.

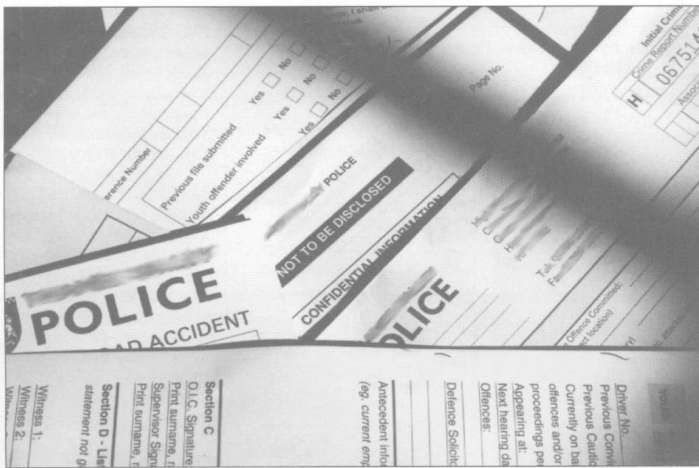
Conclusions

This has been a panoramic survey. Inevitably, I have not been able to develop certain themes. We cannot yet predict what the Commission’s workload will be. Figures compiled by the Home Office afford no certain guide. The Commission has a wider jurisdiction than did the Home Office and we thus do not operate from a common statistical base. Procedural law is in a state of flux. It will be some years before we can develop typologies which will tell us what the common causes of miscarriages may be. These will themselves be somewhat in arrear. Yet it is important in the public interest that the Commission be able to inform developments in public policy from this perspective.

I would stress two further points. The Commission is not an universal solvent of the problems in the criminal justice system: it is a longstop when all else has failed. Wise policy attacks problems which arise throughout the system and particularly in its earliest stages since this is where injustices usually find their root. The second is that within its statutorily determined limits, the Commission is determined to do justice. It will act fairly, thoroughly and efficiently, not in the interest of the applicant or of the government, but in the interests of justice.

Professor Leonard Leigh is a barrister and a Member of the Criminal Cases Review Commission. He writes in his personal capacity and his views are not to be taken as representing those of the Commission.

1. Royal Commission on Criminal Justice, *Report*, Cm. 2263 (1993) pages 180-187.
2. The Scottish system is distinct and a separate Commission will be established to deal with miscarriages of justice there.
3. The Court of Criminal Appeal had power under the Criminal Appeal Act 1907 to appoint an assessor to perform this function but the power was never used and it was abolished in 1968. It has now in effect been reinstated.
4. *Reg. v. Truro Crown Court, ex parte Warren*, [1993] C.O.D. 294.



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