

# CRIMINAL CASES REVIEW COMMISSION

## Background

Our long term referral rate (average from 1997 to current) is around 3.3%.

In 2010/11, concerns started to develop within the organisation about the referral rate for that year, which was 2.32%. We reported in our Annual Report: "Referral numbers for 2010/11 are low, but there are a number of good reasons for this and, while not complacent, the Commission does not see this as a cause for concern." At that time, the reasons included:

Fall in sentence-only referrals

- Fewer multi-handed cases
- No referrals of cases from Northern Ireland
- Lack of 'batch' referrals such as Operation Brandfield, West Mids Police Serious Crime Squad or Flying Squad Rigg Approach

Subsequently, in January 2012, we introduced the Easy Read application form and, as a result, application numbers grew significantly.

The referral rate increased very slightly in 2011/12 to 2.5%. It then fell to what was, at that time, an all time low of 1.6% in 2012/13 and we put that down to the fact of the Easy Read application increasing the 'pool'. The following two years (2013/14 and 2014/15) were a little higher, at 2.7% and 2.2%.

In June 2016, when our referral rate was 1.8%, some work was done to explore why, but it was not the lowest referral rate and previous experience had shown a good degree of year on year fluctuation.

In 2016/17, the referral rate was 0.77%. It is appropriate for us to ask ourselves questions about that and whether we should be doing anything differently (and if so what).

## Illustrative table

The table attached demonstrates annual referral rates in a little more context and highlights some of the themes that have come and gone over the years. For illustration only, I have made some adjustments to show how easily such small percentages are influenced by particular 'passing' themes, the number of sentence only referrals and also Northern Ireland cases.

I've regarded what I call 'passing' themes as those which tend to last for a few years and then drift away, either because of:

- (i) The Court of Appeal refining its approach, impacting on real possibility, e.g. the asylum cases post *R v Nori and YY* in March 2016 and/or
- (ii) Through exhausting relevant cases, e.g. Rigg Approach and Operation Brandfield cases.

The numbers could clearly be adjusted in all sorts of ways. I included Northern Irish referrals as an illustration for two reasons:

- (i) In 2008/09 we had a 'batch' of 9 Northern Irish referrals
- (ii) In mid-2016, we adjusted our approach to exceptional circumstances in the absence of a previous appeal in Northern Irish cases to make it more consistent with other 'no appeal' cases

Year	Apps	Closures	Referrals	Referrals as % of closures	Sentence Only	Themes	Illustration of the impact of the <i>themes</i> <sup>1</sup> and <i>co-defendants</i> :  adjusted <sup>2</sup> % of referrals	Illustration of the impact of sentence-only cases, the <i>themes</i> <sup>1</sup> and <i>co-defendants</i> :  adjusted <sup>2</sup> % of referrals	Illustration of the impact of sentence-only cases, NI cases, the <i>themes</i> <sup>1</sup> and <i>co-defendants</i> :  adjusted <sup>2</sup> % of referrals
2006/07	1051	968	38	3.93	8	<ul style="list-style-type: none"> <li>• 4 'credibility' sex cases</li> <li>• 1 'new medical evidence' sex case</li> <li>• 6 change of law money laundering</li> <li>• 11 Operation Brandfield</li> <li>• 1 Northern Ireland</li> <li>• 2 co-defendants</li> <li>• 2 co-defendants</li> </ul>	1.9	1	0.96
2007/08	984	1087	28	2.58	5	<ul style="list-style-type: none"> <li>• 1 asylum case</li> <li>• 4 'credibility' sex cases</li> <li>• 2 co-defendants</li> <li>• 3 co-defendants</li> <li>• 2 co-defendants</li> </ul>	2.1	1.67	1.67

<sup>1</sup> I've left in the 'credibility' sex cases as we do still see those occasionally, but far less often than we did

<sup>2</sup> Based on an assumption that those applications did not arrive at all

<b>2008/09</b>	919	941	39	<b>4.14</b>	6	<ul style="list-style-type: none"> <li>• 1 'credibility' sex case</li> <li>• 1 'new medical evidence' sex case</li> <li>• 9 Northern Ireland cases (5 co-defendants)</li> <li>• 3 co-defendants</li> <li>• 2 co-defendants</li> <li>• 2 co-defendants</li> </ul>	<b>3.2</b>	<b>2.59</b>	<b>2</b>
<b>2009/10</b>	932	892	31	<b>3.48</b>	6	<ul style="list-style-type: none"> <li>• 2 'credibility' sex cases</li> <li>• 4 'new medical evidence' sex cases</li> <li>• 3 Northern Ireland cases</li> </ul>	<b>3</b>	<b>2.7</b>	<b>2.39</b>
<b>2010/11</b>	933	947	22	<b>2.32</b>	3	<ul style="list-style-type: none"> <li>• 3 asylum cases</li> <li>• 4 'credibility' sex cases</li> <li>• 2 'new medical evidence' sex cases</li> <li>• 2 co-defendants</li> </ul>	<b>1.7</b>	<b>1.39</b>	<b>1.39</b>
<b>2011/12</b>	1140	878	22	<b>2.5</b>	2	<ul style="list-style-type: none"> <li>• 5 asylum cases</li> <li>• 4 'credibility' sex cases</li> <li>• 2 'new medical evidence' sex cases</li> <li>• 2 Northern Ireland cases (co-defendants)</li> </ul>	<b>1.6</b>	<b>1.38</b>	<b>1.27</b>
<b>2012/13</b>	1625	1269	21	<b>1.6</b>	5	<ul style="list-style-type: none"> <li>• 4 asylum cases</li> <li>• 1 'credibility' sex case</li> <li>• 1 victim of human trafficking case</li> </ul>	<b>1.27</b>	<b>0.87</b>	<b>0.87</b>

<b>2013/14</b>	1470	1131	31	<b>2.7</b>	4	<ul style="list-style-type: none"> <li>• 10 asylum cases</li> <li>• 6 'credibility' sex cases</li> <li>• 1 'credibility' and 'new medical evidence' sex case</li> <li>• 1 victim of human trafficking case</li> <li>• 1 Northern Ireland case</li> <li>• 3 co-defendants</li> <li>• 2 co-defendants</li> </ul>	<b>1.52</b>	<b>1.17</b>	<b>1.08</b>
<b>2014/15</b>	1599	1632	36	<b>2.2</b>	3	<ul style="list-style-type: none"> <li>• 12 asylum cases</li> <li>• 2 'credibility' sex cases</li> <li>• 1 'new medical evidence' sex case</li> <li>• 2 victim of human trafficking cases</li> <li>• 3 Northern Ireland cases</li> <li>• 3 co-defendants</li> <li>• 2 co-defendants</li> </ul>	<b>1.14</b>	<b>0.95</b>	<b>0.76</b>
<b>2015/16</b>	1480	1797	33	<b>1.8</b>	8	<ul style="list-style-type: none"> <li>• 9 asylum cases</li> <li>• 1 Northern Ireland cases</li> <li>• 3 linked referrals (2 co-defendants; 1 linked by issue)</li> </ul>	<b>1.23</b>	<b>0.79</b>	<b>0.73</b>
<b>2016/17</b>	1397	1563	12	<b>0.77</b>	2	<ul style="list-style-type: none"> <li>• 2 victim of human trafficking cases</li> </ul>	<b>0.64</b>	<b>0.5</b>	<b>0.5</b>

## **Understanding and analysing the referral rate**

Even with the adjusted figures, the referral rate for 2016/17 was still comparatively low, but not that significantly when seen in the light of factoring out the Northern Irish referrals.

### **Sex offence 'credibility' cases:**

I have not 'factored out' any of the sex offence cases referred on the basis (wholly or partly) of credibility issues. We still, very, occasionally refer this type of case (including one case in December 2017), but they are much rarer than they were due to changed approaches both of the Court of Appeal and by us. Whilst we regularly had around 2-4 referrals of this type a year, in both 2015/16 and 2016/17 we had *none*. That may change, of course, in light of current concerns in the public domain regarding the quality of investigations and disclosure in cases of this type.

### **Lack of a current theme:**

The impact of themes is clearly demonstrated in the table. Over the years, themes have included, for example:

- Sex offence changed understanding of the significance of medical findings cases
- Shaken baby and SIDS cases
- Operation Brandfield (HMRC controlled deliveries of drugs) cases
- West Midlands Police Serious Crime Squad cases
- Flying Squad Rigg Approach cases
- Northern Ireland Youth Confession cases
- 'Asylum' cases – convictions for immigration offences when the individual had a defence in law

Whilst themes will, no doubt, continue to ebb and flow over the lifetime of the CCRC, at the moment there is no clear theme of this type.

### **Absence of the 'right' cases coming to us to start with:**

One third of our applicants had legal representation in the past. Now it is a quarter. We know, from the Warwick University research (Hodgson and Horne) that legal representation can be a significant factor in identifying a wrongful conviction. Cases which have legal representation have a better chance of referral, and those which were associated to legal firms which submitted the CCRC most frequently further increased the chances of referral. All of that needs to be interpreted through an understanding of the role of a legal representative – especially in filtering out unmeritorious cases before they ever get to us. Good legal representatives undoubtedly have a very important role in CCRC applications. We are concerned that the position with criminal Legal Aid is having an impact on the willingness of individuals and firms to do pro bono work in potential miscarriage of justice cases and whether conditions are acting as barriers to new representatives securing funding post-conviction, in which the trial representatives' advice on appeal (which may or may not be good quality) is a key factor.

We have done a lot of work to put potential victims of miscarriages of justice into a position whereby they can apply to us easily without the help of a legal representative and to inform potential applicants about what we can and

cannot do. My concern, however, is that the work that good legal representatives used to do routinely in identifying worrying cases and ensuring that applications were made to us in respect of them, that is now happening to a reduced extent. There may well be miscarriage cases that are not coming to our attention because the 'miscarriage' legal representatives are not there any more to pick them up, act on them and bring them to our attention, despite our outreach work to potential applicants.

**Change in approach by investigators and prosecutor:** prioritisation of resources potentially leading to fewer 'borderline' cases are being pursued through the courts, leaving less room for doubt in the safety of any convictions that are pursued, absent any fundamental new evidence..

**Impact of internal work pressures:**

Over the last 3-4 years, we have increased the focus on timeliness and more disciplined case planning and analysis; and moved from a pull to a push allocation system. There is a risk that the increased emphasis on allocations and closure of cases impacts negatively, either consciously or unconsciously, on borderline decisions whether to do further work. There are safeguards in place, however, to reduce the risk of that happening in practice. Case Review Managers' practice is to discuss potential lines of enquiry that are borderline with their Group Leader and, if both agree that the work should not be done, then to flag up the issue for a Single Commissioner to specifically consider at decision making stage.

That said, there is a reduced possibility of us stumbling across what we might call 'chance referrals' – I mean those where we discover a referral point quite by accident when looking through vast files of paper either for nothing in particular (on the basis that if you look hard enough, often enough, something's bound to turn up). It now seems likely that we might find some miscarriages by looking harder at disclosure and work is in hand to inform how we might best approach that in a proportionate way. However, this realisation is not because of a change to our working practices but because of more and more evidence in support of disclosure as an enduring problem within the CJS, i.e. an intelligence-led approach.

There has always been, and always will be, a *risk* that we will miss a miscarriage of justice. Our task is to manage that. We know that we have missed cases in the past, through cases that we have referred when we have looked at them again subsequently, and we also know that, in some cases, we have taken too long to find the miscarriage of justice and act on it.

**Impact of a low ‘success rate’<sup>3</sup>:**

Whilst the ‘success rate’ of our referrals is not directly relevant to the ‘referral rate’, a low ‘success rate’ may well cause us to take a more cautious approach to the real possibility test given the predictive nature of our test. From 2006/07 to 2014/15 inclusive, the ‘success rate’ of our referrals ranged between 61% and 77%. In 2015/16, it fell to 53% and again to 41% in 2016/17.

During the course of 2015 and 2016, we also received some direct criticism from the Court of Appeal in relation to a number of the referrals heard in those two years. In addition, in that same period the Court decided *Johnson* (the first application of *Jogee*), taking an approach which limits the numbers that might ‘benefit’ from *Jogee*. In all of that context, the place where the real possibility bar ‘sat’ was bound to be seen in a different light in our reviews and decision making.

Analysis of this has taken place on two substantive occasions at Board level and the issues are understood and being applied in casework. In addition, Statements of Reasons for referral cases are being read by either the Chief Executive or Director of Casework Operations before despatch, to bring the benefit of ‘fresh eyes’ to the final document.

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<sup>3</sup> I use the term ‘success’ to describe a referred case which resulted in the conviction being quashed or the sentence being amended

## Current controls

- A key control is the fact that no case (other than those that are plainly ineligible) can be dismissed through involvement of a single person. At least two, often three (or more) people will have had substantive involvement in the case.
- Decision makers have involvement in both referrals and non-referrals. Involvement in referrals provides a useful context for SC non-referral work and helps to manage the risk of anyone being fixed in a 'no' mindset.
- A proportion of the smaller cases, which are dealt with more swiftly, are subjected to a quality assurance exercise. This is currently done either by the Chief Executive or Director of Casework Operations.
- The CCRC's intranet (ShARK) provides easy access to our knowledge management system, including casework policy and guidance, but also referrals and non-referrals by committee. Experience and other knowledge is shared on a regular basis using the 'Share' facility, which can be interrogated (including by theme and tag).
- Regular training is provided in respect of topical issues, with 'Knowledge Cafes' providing discussion forums for matters of interest, be they expert topics or practical guidance. In addition, a Commissioner provides a regular detailed 'round up' of key decisions from the Court of Appeal that might provide insight into where real possibility lies.
- 'Commissioner College' brings Commissioners together on a 6-monthly basis to discuss thematic case studies for sharing of knowledge and experience and to enhance consistency of decision making.
- Case Review Managers are encouraged to discuss case issues on an ad hoc basis to benefit from others' experience and perspectives. To enhance that, Case Review Managers and Commissioners have a wide variety of backgrounds.
- Media monitoring provides some insight into topical issues in the criminal justice system.
- Ongoing liaison with external stakeholders, including professional bodies, lawyers and campaign groups provides another source of access to information about the contemporary criminal justice system.

## Research on predictors of Wrongful Convictions

In September 2014, Bill Schmidt completed his PhD: Predictors of Wrongful Convictions. He describes the dissertation as examining “the risk factors associated with the occurrence of a wrongful conviction.” He adds: “Specifically, the thesis consists of several quantitative, case-control studies of convictions reviewed by the Criminal Cases Review Commission”.

In my view, there are three important factors that we should be cognisant about - that Bill’s research:

1. Was biased towards considering single count murder conviction cases. This was the sole type of case considered in the pilot sample. Other cases were sampled in the research in other contexts. Risk factors vary across types of offence – see extract of Bill’s findings, below.
2. Considered cases decided by the CCRC between 1997 and 2010. It therefore includes the longstanding miscarriage cases transferred from the Home Office to the CCRC and a substantial number of pre-PACE and Northern Irish Troubles cases, which in my view involve very significant risks unlikely to be repeated nowadays. Bill noted: “Discovery of wrongful convictions likely do not remain static as times goes on, given that the criminal justice system itself – being a dynamic institution – changes over time.” As I have already observed, I think we need to be *very* careful not to assume that more contemporary cases involve the same risk factors. Most importantly, we need to be constantly on the ‘look out’ for new risk factors. A lot has changed in the Criminal Justice System recently since The Rt. Hon. Sir Brian Leveson’s Review of Efficiency at the start of 2015.
3. Involved cases that reached the CCRC and focussed particularly on those which the CCRC *recognised* as *potential* miscarriages. Two observations spring from this: (i) a greater proportion of miscarriages of justice are decided directly by the appeal courts, without ever reaching the CCRC and might put a different ‘light’ on the significance of the risk factors and (ii) the research is only as good as our recognitions of potential miscarriages at the relevant time - if we made unknown errors, then our reliance on the research risks compounding those errors.

The ‘top three’ risk factors identified overall by Bill were as follows [the words in square brackets are mine]:

- 1) Legal error [but the scope of the sample period is relevant and note the Court’s contemporary approach in, for example, *Johnson and others*]
- 2) Faulty scientific evidence [the scope of the sample period is relevant to this too]
- 3) Police misconduct [but note my observation above re: pre-PACE and Northern Irish Troubles cases]

Other significant risk factors were [the words in square brackets are mine]:

- Conviction pre 1997 [note my comments regarding cases transferred from the Home Office]
- Absence of guilty plea [fits with the Courts' approach in being reluctant to overturn guilty pleas and may also indicate cases that were inherently more potentially 'winnable' from the outset]
- Identification of a financial incentive that undermined a witness' credibility – possible connection with informants
- Crime committed in Northern Ireland and terrorism-related [associated with particular investigation tactics, which are not regarded as appropriate now]
- Conviction after re-trial [the fact of a re-trial is likely to suggest something inherently problematic with the case]
- Prosecution advancing multiple theories to explain commission [likely to be inherently problematic due to lack of clear evidence]
- False confessions to the police [may correlate to some degree with police misconduct and Northern Irish Troubles cases]

In respect of *murder* convictions, results showed the most important predictors of a wrongful conviction were:

- Police misconduct [again note my observation above re: pre-PACE and Northern Irish Troubles cases]
- Defendant suffering from a mental illness [there is an enhanced relevance in murder cases because of the partial defences]
- Victim being a non-family member [potential overlap with multiple theories issue?]

Risk factors vary according to the offence:

- Multiple people involved in the criminal act, unless a murder conviction
- Crime against a stranger in violent offence cases, excepting for homicide and sexual cases where the opposite was true
- Fresh evidence had most effect for a referral on violent, sexual and homicide cases, opposite effect in drugs cases
- Eyewitness error favoured a referral in violent offences, but not sexual offences

*Actions:-*

- 2) *Compile cautious Guidance on ShARK in relation to risk factors.*
- 3) *Hold training/discussion sessions for Casework.*

## **Understanding and analysing what we should be looking for in reviews now**

This is where, in my view, we need to do more work. The 'actions' proposed below are steps that we can take, proportionately, to mitigate the risk.

We need to be very cautious about looking only for the same types of miscarriage of justice that have happened in the past. We also need to inform ourselves of the 'live' risks in the criminal justice system today.

*Actions:-*

- 4) In the background, I am liaising with organisations such as the Criminal Appeal Lawyers Association (CALA) and the local 'criminal' contingent of the Law Society and Bar to tap into their knowledge. I will continue to expand our access to knowledge and information.*
- 5) I am also working with, for example, the CPS in respect of the Met-investigated sex cases, Radox and the Special Demonstration Squad cases.*

In the meantime, these are some of the 'live' issues arising in the Criminal Justice System today. We need to keep these in mind when investigating and analysing.

### **Disclosure:**

We know from the recent Joint Inspection on disclosure that there are serious problems in the criminal justice system in this respect. The recently published report by HMIC and HMICPS makes for stark reading. It's important to note that the inspection was specific to 'volume crime' and excluded cases dealt with by the CPS Complex Case Unit (because of the notable improvements made in respect of disclosure by that Unit). Its observations include:

“1.3: The inspection found that police scheduling (the process for recording details of both sensitive and non-sensitive material) is routinely poor, while revelation by police to the prosecutor of material that may undermine the prosecution case or assist the defence case is rare. Prosecutors fail to challenge poor quality schedules and in turn provide little or no input to the police. Neither party is managing sensitive material effectively and prosecutors are failing to manage ongoing disclosure....

1.4: ... Above all, there needs to be a cultural shift that approaches the concept of disclosure differently, that sees it as key to the prosecution process where both agencies add value, rather than an administrative function...”

We also now know of high profile sex offence cases where there were investigative and/or disclosure failures or other issues leading to late disclosure of highly relevant material. Some issues in that respect arise from standard software and search terms used to search voluminous electronic information.

It appears (from anecdotal evidence that I obtained from local members of the Law Society) that the disclosure problems are being compounded within the Court System. Where late disclosure takes place, practitioners are struggling to persuade magistrates, and some members of the judiciary, to adjourn for even short periods to enable the defence to consider the late disclosure.

There is a potential additional theme – involving disclosure in private prosecutions for fraud, which are apparently increasingly being brought because of the lack of police interest/resource to investigate fraud allegations.

*Actions:-*

- 6) Our legal team are leading on guidance and training for everyone in casework, which includes compiling check lists of factors to consider in reviewing cases, to put everyone in the best position to investigate disclosure issues well and proportionately – with support in place to boost understanding and consistency on a case by case basis. The theme running through this approach is proactive investigation in the right cases. A ‘sampling’ approach is being considered (both in terms of sample cases and, in large cases, sampling of disclosure). Intelligent ‘check lists’ are being finalised and casework staff have received substantive training on disclosure recently, with follow up discussion sessions in progress now.*
- 7) Our Head of Legal will be continuing to liaise with HMIC and HMCPSI in relation to potential miscarriage of justice cases discovered during their joint inspection on disclosure.*
- 8) I am liaising with the CPS.*
- 9) Once we have two anticipated judgments in respect of the private prosecutions issue, we can consider what action is necessary in that respect.*

**Impact of the early guilty plea scheme:**

In multiple defendant cases there is a (perceived) growth in inconsistent plea scenarios, coming from combination of one or some defendants (at the lower end of the criminality) pleading early on a basis that accords with the evidence, and the CPS then later accepting pleas from those more culpable on a basis that defies clear evidence, simply to avoid the resource required for a trial. Sentencing then occurs on an unjust basis. NB we have referred at least one case in the recent past on the basis of inconsistent pleas.

Another issue (perceived to be) arising is that early pleas are based on the police case summary, which not infrequently turns out to be inaccurate (through later disclosure). At first blush, it may seem entirely reasonable to expect a defendant to know if he 'did it' or not. We know, however, that in many types of offence the accurate facts can sometimes support a legal defence (which the defendant would not necessarily be cognisant of, e.g. the 'asylum' cases).

*Action:-*

*10) Make sure that all Casework are aware of these issues and that they are appropriately weighed-in to decision making during reviews.*

**Litigants in person and expectations on defendants:**

We know that the proportion of our applicants who are unrepresented has increased from two-thirds to three-quarters. We also know (from the Court of Appeal Criminal Division's 2016 Annual Report) that unrepresented applicants to the Court of Appeal also continue to increase in number. The Law Society also reported in 2016 that the number of unrepresented defendants in the criminal courts is increasing. Members of the local Law Society also perceive that there is growth in expectation by those on the bench that a defendant can and should answer directly to the bench at plea hearings, regardless of what opportunity their legal representative has had to take instructions and advise. Whilst the nature of the elements of some offences are straightforward and the defendant knows what they did and didn't do, we know that elements of an offence and legal defences can be complex.

The impact of the changes to Legal Aid in the criminal law arena is something being looked at by Sussex University as a result of a call for research issued by our Research Committee, but the outcome of that will not be known for quite some time.

*Action:-*

*11) Make sure that all Casework is aware and keeps in mind when assessing the realities pertinent to the safety of convictions on an individual basis.*

**Sally Berlin  
Director of Casework Operations  
29 March 2018**