Triennial Review of the Criminal Cases Review Commission 2012

Submission on behalf of FACT: Falsely Accused Carers, Teachers & other professionals

INTRODUCTION

This is the submission to the Triennial Review of the CCRC on behalf of the National Committee of FACT: Falsely Accused Carers, Teachers and other professionals. While other members of FACT have been consulted and many of their views incorporated, the following draws particularly on academic and executive discussions about the role of the CCRC, especially:

- discussion at the CCRC Stakeholders Conference, held 28 November 2012;
- essays published by The Justice Gap under the title '*Wrongly Accused: who is responsible for investigating miscarriages of justice*' (Robins, 2012);
- papers by Michael Zander QC, Richard Nobles, and David Jessel, as well as others listed at the end of this document.

Note: A separate submission is being made by the North Wales branch of FACT, which represents people most likely to be implicated in the current reinvestigation of North Wales Care Homes regarding historic allegations; that is, allegations made in the 1990s relating to the 1960s/70s/80s, those allegations having been recently aired again in two BBC Newsnight programmes and newspaper reports. We believe that the submission from North Wales FACT's committee will be broadly complementary to this one, though it may highlight different points and examples.

FACT is a national organisation which campaigns on behalf of falsely accused carers and teachers, and others who are falsely accused in an occupational context, and which has members throughout the United Kingdom. We are also part of an increasing network of local, national and international organisations which campaign for justice for people who have been wrongly accused of child abuse or abuse of vulnerable adults, including many who have been convicted of such offences but maintain their innocence. Over the years, numerous FACT members have made applications to the Criminal Cases Review Commission for their convictions to be reviewed. Some have been successful, but considerably more have not. The CCRC's own publications, 'Memorandum on Child Sexual Abuse Cases' and 'Memorandum on Sexual Offences', do themselves point to some of the complexities and catch22-type barriers that tend to thwart 'real possibility' appeals against such convictions.

FACT does, however, wish to place on record our appreciation of the increasingly important and difficult work they do, with reduced budgets and staff numbers, against a corresponding increase in the applications it receives – and especially in the current political climate when public interest in miscarriages of justice has diminished. Those members of FACT who have successfully applied, and would otherwise still be innocent people despairing in prison, are particularly grateful for the Commission's thorough work on their behalf, resulting in their convictions being quashed by the Court of Appeal.

A category of miscarriages of justice for special pleading

In answering the survey questions, we are selectively focussing on the needs of innocent people falsely accused of sexual or violent abuse of children or adults. In FACT, we support and campaign mainly for those falsely accused *in an occupational context*, but the issues we raise clearly have implications for those falsely accused of similar offences in a domestic or interpersonal context. Part of our argument in the following is that the CCRC might become 'leaner and more effective' by the pre-emptive strategy of focusing more on issues and causes related to particular *categories* of potential miscarriages of justice, with a view to thereby reducing the future time needing to be spent on individual investigations.

We think that appeals against **convictions for sexual/violent abuse against children and vulnerable adults in an occupational context** – in shorthand, FACT cases – *are* such a category. Where these allegations are **'historic'** – that is, the allegations of abuse in childhood are delayed until the complainant is older, sometimes by decades – then the danger of their leading to wrongful conviction is compounded. There are many causal factors which singly or in combination serve to explain why, alongside *true* allegations of actual abuse, there are also *false* allegations of non-existent abuse. Rather than take much space here in summarising those causal factors, we refer the reader to FACT's (2011) briefing document '*Presumed Guilty: the plight of falsely accused carers and teachers'* and also, with particular reference to historic allegations of offences in the North Wales children's homes, to Richard Webster's nine-year study leading to his book *'The Secret of Bryn Estyn: the making of a modern witch hunt'*.

An over-riding consideration worth highlighting here is that, because of the very serious and abhorrent nature of such offences, the accusations and charges are highly likely to be responded to emotionally by all who hear of them - with raised compassion for the complainant and repugnance towards the accused. Such charges are therefore particularly prone to **prejudicial biases** at all stages of the criminal justice process, from the time of the first accusation right through to the ultimate attempt of an elderly person to clear his/her name. The fact that such offences *do* happen, and the offenders can 'get away with it' because there were no witnesses and no proof, makes *false* allegations all the more believable and gives the moral high ground to anyone claiming to be a victim; but also turns minds away from considering other explanations and motivations for those allegations which are false.

We believe that, because of this natural visceral response to such offences, such a prejudicial bias is difficult to avoid, even by impartial CCRC casework managers and investigators. Therefore this submission makes special pleading for such cases to be given some priority within the wider strategic reforms of the CCRC that are to be made.

Following the Waterhouse Tribunal investigating care home abuse (Waterhouse, 2000), growing legal and media concerns surrounding the safety of resulting convictions culminated in 2002 with the Home Affairs Select Committee Report, '*The Conduct of Investigations into Past Cases of Abuse in Children's Homes*', which accepted that police methods of 'trawling' for witnesses and reliance on corroboration by numbers had led to **'a new genre of miscarriage of justice'**. It explained that: 'Set

in the context of a growing compensation culture and a shift in the law of "similar fact" evidence, the risks of effecting a miscarriage of justice in these cases are said to be unusually high'. While this applied to occurrences more than a decade ago, recent events, including the Jimmy Savile scandal, the government's instigation of various inquiries into child abuse, and the tightening of child protection procedures asserting that accusations should be believed, mean that we are now witnessing a proliferation of allegations of historic abuse. While some of these will be true allegations, the conditions are ripe for too many which are mistakenly or deliberately false.

We fully recognise that the purpose of the Triennial Review is to make cuts in expenditure and to economise by reducing or eliminating aspects of the CCRC's work. Therefore, while we naturally hope more will be done to address miscarriages of justice for the category we represent, we have focused where possible on ways that the CCRC might modify its approach and emphasis so as to economise and improve efficiency – in particular, by prioritising conviction over review of sentence on points of law, and by taking a leadership role in carrying out, or commissioning issues-led, or thematic, investigations.

Responses to the given Survey Questions follow.

1. Is there is a continuing need for the following functions of the Commission

(a) review of conviction and/or sentence in cases dealt with on indictment in England and Wales;

(b) review of conviction and/or sentence in cases dealt with on indictment in Northern Ireland;

(c) review of conviction and/or sentence in cases dealt with summarily in England and Wales;

(d) review of conviction and/or sentence in cases dealt with summarily in Northern Ireland;

All the reasons for which the CCRC was set up, following the recommendation of the Royal Commission for Criminal Justice 1993, still apply. There is a huge need for it to continue to perform according to the same broad purpose of independently reviewing possible miscarriages of justice in England and Wales and Northern Ireland. Given that some cuts in the CCRC's workload are essential, then there is especially a continuing need in relation to review of **conviction**.

On behalf of wrongly convicted innocent people who have to endure being stigmatised for the rest of their lives, as something bordering sub-human if the charge was for child abuse, and to live in fear and social exclusion for as long as they remain (so undeservedly) a 'registered sex offender', we would urge the CCRC to prioritise conviction. The same priority should apply for this category of conviction whether the outcome was a custodial sentence or a community sentence, because of the lifelong stigmatisation that applies, as well as the suffering by association that affects their families. That said, given the need for further prioritising or a tiered approach to prioritising, we would wish applications from **serving prisoners** to be put first, given the obvious additional deprivations they and their families are suffering. Further, within this group, in our view, the Commission should especially fast track cases from prisoners who are **sixty years or older, and those with limited life expectancy**.

David Jessel, among others, has argued for a relinquishing of the 'cab-rank principle' in favour of prioritising. Given the doubling of applications to the CCRC during the last year, no-one can disagree with his argument that 'something has to give'. We appreciate that some of the worst injustices do not fit the classic model of 'innocent people wrongly imprisoned', that some people commit crimes in response to extreme circumstances or treatment and therefore that harsh sentences against them should rightly be reviewed as part of the CCRC's remit. However, the principle of dealing with all applications in turn does not allow for discretion regarding **those cases which give rise to most moral and public concern.**

A striking argument has been made by Professor Zander which has a bearing on where cuts and choices might be made. As someone who was a member of the Royal Commission for Criminal Justice (RCCJ), and therefore is in tune with the considerations at that time, he notes that the RCCJ proposals for what became the CCRC were **focussed solely on Crown Court conviction cases**, and he suggests that the RCCJ were unlikely to have agreed to inclusion of sentence-only cases or summary cases. Giving favour generally to the prospect of limiting the CCRC's remit during this time of austerity, Zander suggests:

> 'It may be questionable now whether in the light of the limited resources available that the CCRC should still be dealing with applications from a Magistrates' Court case or indeed routine cases that ask it to review sentence. It may be time to say that the commission should be concentrating on miscarriages from the Crown Court upwards only.'

In responding to these questions about which functions of the CCRC might be excluded or minimised, we are conscious that it is not only a question of <u>what</u> the CCRC investigates but also <u>how</u> it approaches that work. (See also answers to Question 2 concerning the powers of CCRC).

(e) investigation and reporting on matters on direction of the Court of Appeal;

It is absolutely essential to retain this function. First, it is an important way in which the CCRC works constructively with (rather than deferentially to) the Appeal Court. More pragmatically, although such investigations are time consuming in themselves, they can save considerable time further down the line if the investigation helps in the acquittal of an individual who would have subsequently applied to the CCRC had they been convicted: the 'stitch in time saves nine' principle. This would apply especially if the investigation has relevance to other cases which share similar characteristics and therefore yield learning points for subsequent prosecutions and trials. On that basis, the Court of Appeal might be encouraged, through discussion, to require investigations which have wider application beyond the particular cases which give rise to them; in other words, the encouragement of an issues-based approach. This is a way in which the CCRC, and the criminal justice system as a whole, can make significant savings in time and numbers, through the identification of systemic failings that can lead to wrongful prosecution or convictions.

False allegations – whether historical or more recent – are a case in point. These are particularly susceptible to miscarriages of justice resulting from methods of pursuit, investigation and questioning, in which relevant information can be erroneously fed to

potential complainants so that there are similar details in separate testimonies. Over-zealous methods of inquiry became much more likely to result in prejudicial evidence following the serious undermining of 'similar fact evidence' by the 1991 and 1995 amendments. One only has to look at the relevant case law here, and the rulings that removed 'similar fact' safeguards, to see how worrying this type of conviction is. The so-called similar 'facts' are actually allegations, not facts in the sense of something that can be objectively checked. There is therefore no proof, and often other explanations for what has been alleged are feasible. As explained by Richard Webster in his memorandum to the HASC 2002:

> 'In (*DPP v Boardman*, 1975 AC 457) Lord Wilberforce … warned against the danger that, as a result of the extension of the similar fact principle, innocent defendants might find themselves facing a series of grave allegations, all of which were false. He clearly states his own view that the courts should be on their guard against the possibility that a series of false allegations might arise either from collusion or from a process of contamination [...]
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> However, in two crucial House of Lords judgments, delivered in 1991 and 1995, the two safeguards which had been put in place by *Boardman* were both removed [...] these decisions have permitted, and indeed encouraged, the admission of evidence which is both highly unreliable and massively prejudicial, innocent defendants have again and again found themselves facing large numbers of allegations, all of which are false. Again and again, as could readily have been predicted (and as was foreseen in the original exclusionary similar fact principle), juries have convicted on the basis of such evidence.' (Webster, 2002)

Two successful referrals by the CCRC – Sheikh 2004; Joynson 2008 – exemplified such dangers. But these are representative of many others.

(f) investigation and reporting on matters on direction of the Court Martial Appeal Court; No particular observations

(g) review of conviction and/or sentence in cases dealt with by the Court Martial; No particular observations

(h) review of conviction and/or sentence in cases dealt with by the Service Civilian Court; No particular observations

(i) require the appointment of an investigating officer to carry out inquiries on behalf of the CCRC;

The power of the CCRC to appoint an investigating officer (as set out in s.19 of the Court of Appeal Act) most definitely needs to be retained. As well as investigations on a case by case basis, it might be used more economically and expansively to facilitate the investigation of issues that affect groups of cases or types of offences.

Indeed this function might be extended so that it enables the CCRC to delegate and share some of its investigatory functions with other organisations with which it works collaboratively. The clauses of s.19 focus particularly on *police* investigations, but other organisations which have some authority to carry out investigations might be called upon (such as the inspectorates of public bodies, or independent watchdog

organisations such as the IPCC). We also think that the CCRC might make use of specialist lawyers already involved in criminal appeals, particularly if this is under the auspices of a not-for-profit, multi-disciplinary specialist legal centre, such as the Centre for Criminal Appeals (CCA) which is currently being developed (Baird et al, 2012). It would be particularly appropriate for such a body to be affiliated with a University law department.

(j) provision of assistance to the Secretary of State on matters concerning recommendations for exercise of Her Majesty's prerogative of mercy.

We understand that s.16(2), concerning recommendation for the exercise of Her Majesty's prerogative of mercy, has not been used so far by the CCRC. Whether it stays or goes therefore is not going to affect the workload. Michael Zander (2002) suggests this might be a recourse worth using if there are cases where in the CCRC's view the Court of Appeal 'has not been able or has not been willing to do what in justice is required'. But an innocent person may feel that a pardon, whether Royal or otherwise, is further reinforcement of a wrongful guilty verdict. It seems inappropriate and a poor substitute for correcting wrongful conviction.

2. Does the Commission have the right powers to fulfil its functions?

The CRCC certainly needs more powers of investigation in order to access information in the private and voluntary sectors. This has always been the case but in our increasingly privatised criminal justice system and privatised social and health services, the overdue need for this is abundantly evident.

That apart, however, the CCRC arguably has the right powers and terms of reference; but it could make better use of them, and could make some strategic changes of emphasis with a view to pre-empting some of its ongoing work, and could take a greater leadership in tackling generic issues (for example, in the ways suggested below).

(a) Is the 'real possibility test' the right test for the Commission to apply? If not, what would be better?

FACT (2006) has previously supported arguments that criticisms which have been levelled at the CCRC, regarding the limitations of the 'real possibility test' as the main basis for referral, would be alleviated if the CCRC for England, Wales and Northern Ireland adopted the broader 'miscarriage of justice' test which operates in Scotland. Another argument for adopting the Scottish model is that it would make more sense for the test to be applied in both jurisdictions, especially as both are required to operate within a single European Court framework. Suggesting this for the present review however would be contradictory to our proposal that, in order to reduce the remit of the CCRC, review of *conviction* should be prioritised over the review of *sentence,* both of these being covered by the Scottish 'miscarriage of justice' test. Also, such a change would require legislative reform and would be more radical and less straightforward than adopting various proposals for the CCRC to ***make fuller use of its existing powers***. We are now more persuaded by the combined possibility and expediency of these suggestions, such as suggestions put forward by

Michael Zander, David Jessel and others (discussed below). These would be an alternative to going down the path of adopting the Scottish CCRC model, but would still open up the work of the CCRC to some of the changes which critics have proposed

The 'real possibility test' requires that the CCRC must judge that there is at least a reasonable prospect, if referred, of a conviction not being upheld. Obviously this makes sense much of the time and it would be foolish to argue with the practical logic of that limitation – unless a different principle is *also* being brought into play. A full reading of the clauses under section 13 of the Criminal Appeal Act 1995 suggests there is more scope within it than has tended to be applied by the CCRC; indeed, s.13(2) does allow a different principle to be brought into play: that of 'exceptional circumstances'.

Before considering 'exceptional circumstances' though, the first issue to consider is the work which the CCRC does for cases where it is able to access 'fresh evidence' and 'new arguments'. It is clear from statements of gratitude from those who *are* subsequently acquitted, and from their families, how much meticulous work in these cases the CCRC has carried out on their behalf. Also, the accounts given by CCRC commissioners and case managers leave no doubt that a prodigious amount of time is spent once a case is taken on to the next stage of investigation.

Disappointed applicants though, inevitably, think more could have been done for them. Some critiques that have been made of the CCRC's approach to such investigations indicate that there could be a better balance between desktop casework and *other kinds of investigation*. Michael Zander, in his recent paper to the CCRC, wonders 'whether too many cases are despatched, especially at the initial triage, without investigation'. Similarly, David Jessel (2012) argues that 'reaffirming the CCRC's investigatory role' could help to satisfy some of the current criticisms:

> 'There's always a balance in looking at a case between the analytical approach and the investigative approach. I'd claim that the shortage of funds and the mindset of the Commission has skewed that balance towards the analytical at the expense of the investigative. And it's a lot easier to analyse a case onto the reject pile than to investigate a case onto the referral pile.'

On the face of it, this argument implies a greater burden for the CCRC but the examples that Jessel gives – notably, the cases of Warren Blackwell and Mark Cleary – suggest that considerable time in record searching might be spared by a fresh and early emphasis on fieldwork investigation. That could be done with the aid of pro-bono workers who care about miscarriages of justice, though of course it would need to be done within a carefully supervised framework. The argument here seems to be that the powers which the CCRC has to search records while crucial in some cases, amounts to wasted hours in others, and time could be better spent in an alternative kind of search:

> '... 99 times out of a 100 there is nothing [in the records that are searched], and the case is closed. But who knows what a real investigation would reveal – not the interrogation of documents, but talking to friends, neighbours, victims – visiting the scene of the crime, listening to all those forensically inadmissible

whispers which help paint the real picture, instead of the artificially cropped and trimmed composite which forms the evidence at trial.'

Moving on to other aspects of the 'real possibility test', the emphasis that is placed on 'fresh evidence' and 'new arguments' seems to push out consideration of the final clause in s.13, and, more broadly, whether the verdict reached was safe in the first place. Again, Professor Zander's recent paper to the CCRC Stakeholders' Conference, on 28 November, is very enlightening in this regard. He affirms that the Royal Commission for Criminal Justice (RCCJ), of which he was a member, would have agreed with the basic approach of s.13(1) which emphasises the need for fresh evidence or argument. But he also thinks that the Commission would have agreed with **s.13(2)** which allows that ***exceptionally it need not be something new*** (our emphasis).

Furthermore, Zander also observes that the RCCJ had suggested that the Court of Appeal should be readier to act to quash a conviction if it 'had a serious doubt about the verdict' even though there was nothing new and no irregularity at the trial. While strongly endorsing the general value of verdict by the lay jury, Professor Zander acknowledges that **'No one denies that juries do sometimes get it wrong and the question is what then'** (our emphasis). He goes on to argue that, as 'The Court of Appeal is there as a fail/safe protection' [and one might add, so is the CCRC] then 'Where a sufficient argument can be mounted that the scrutiny of the jury's decision is justified the Court should not shirk from that task on the constitutional ground that it must abide by the jury's decision'.

The Court of Appeal's reluctance to consider whether a jury has made the wrong decision is also discussed by Richard Nobles (2012). He notes the paradox that, while from 1907 until 1964 the Court of Appeal was inhibited from quashing jury verdicts because it had no power to order retrials, the introduction of the re-trial power has not removed 'a perceived reluctance to quash convictions on any basis other than an error of law'.

Zander also notes the reluctance of the CCRC to use its 'power to refer the case again – and again' and suggests there has been only one occasion where it has used its power to refer a case a second time: the exercising of 'lurking doubt'. But it seems that, in the face of the real possibility test, doing this has been seen as illogical or antagonistic. As Jessel explains: 'I once asked Lord Rose, the then Vice President of the Court, what he would do if we sent the same case back a second time; he said that that would be "most unwise"...'.

For FACT, the omissions of CCRC in the use of s.13(2) and referral back sometimes based on ' lurking doubt', and the reluctance to consider that juries can get it wrong, **are grave omissions**. The recent research by Professor Cheryl Thomas (2012) into jury decisions is the first research to be based on *real* rather than *simulated* juries. One of her findings is that juries have great difficulty in understanding judges' instructions. It is highly likely therefore that there are other aspects of trials that are complex and difficult for them to understand. The focus of the real possibility test on fresh evidence or new argument is systematically biased against those convicted of child abuse/sexual abuse where the evidence was testimony and precious little else, especially if they are historic cases, all the old records having been destroyed and any

possible defence witnesses untraced, having moved away or changed their surnames. That reliance on 'fresh' and 'new' doesn't allow that juries can be biased by *the very nature of the offence* (the response to child abuse is visceral) and, in the absence of independent forensic evidence, the sympathies and passions of the jury and their inclination to believe one person over another are all that determines the outcome. The 'evidence' considered by the jury is not proof but is a statement which is believed in preference to another.

Therefore we think it is right to make more use of s.13(2) even though fresh evidence and arguments are not being offered. Though it is tucked away under the 'Real Possibility Test', s.13(2) notes that:

> 'Nothing in subsection (1)(b)(i) or (c) shall prevent the making of a reference if it appears to the Commission that there are exceptional circumstances which justify making it.'

As the various points in the present submission have underlined, ***there are exceptional circumstances*** in FACT cases which can lead to their wrongful conviction, then followed by lengthy imprisonment – with prospects for parole not helped by the integrity of maintaining their innocence. The very fact of their innocence means that they cannot genuinely show remorse or express a need for corrective intervention, without lying or faking guilt.

Steven Heaton's research into CCRC cases reveals that most applications are essentially people wanting a re-run of their trial. But, for those trials largely reliant on testimony and where the complainant's testimony was believed over the testimony of the accused, there seems no chance of a referral back for review by the Court of Appeal. The stark rebuttal seems to be 'you've fired your best shots, and the rules of the game say you're not allowed to fire them again' (Jessel, 2012). However, another justification for referring cases back, even though there is no fresh evidence, is that the evidential landscape changes:

> 'Often you can say that had the CPS known what we know now, the trial wouldn't have taken place.[...] there wouldn't have been a jury verdict, because there wouldn't have been a jury, because there wouldn't have been a trial. I'd therefore suggest we expand any new formulation to include this very provision – if the basis of the prosecution case is now fundamentally changed from what it was at trial, a miscarriage of justice has occurred. I believe that that is the best formulation for intractable cases like Susan May's, bogged down in the quagmire of bloodstain evidence, when all around it the whole case has changed.' (Jessel, 2012)

The evidential landscape is looking increasingly worse for FACT cases in our current climate of moral panic about child abuse and paedophiles. But perhaps, with a change of approach from CCRC, that landscape could be reshaped. The best way to save money and to make effective use of limited resources is to be influential in restoring the correct balance in the evidential landscape so that fewer wrongful prosecutions and wrongful convictions arise.

(b) Do the current powers of the Commission need to be extended?

The CCRC clearly needs the additional power, that is available to the Scottish CCRC, to obtain material and disclosure from a *private company or an individual* in addition to existing empowerment to gain information from public bodies. We are aware that the CCRC has been pressing for an extension of its powers in this respect for years, and it seems a surprising omission – and now more than ever in the current era of increasing privatisation and 'big society' community involvement.

Regarding its existing powers to investigate the files of public bodies, a striking point is made by Barrington (2012) in relation to Child Sex Abuse cases. That is: 'It seems a little odd that the commission has the power to find material post trial, which if disclosed at trial might have led to a different verdict and possibly to no prosecution at all. I doubt that there is an easy answer to this, but it must be better to avoid an unfair conviction than put it right some years later'. For an innocent person facing trial the latter suggestion would appear to be a 'no-brainer'.

We strongly agree with Michael Zander that the CCRC and especially the Chairman 'could help to invigorate media concern for miscarriages of justice' and could 'play more of a leadership role in regard to miscarriages of justice' via reports and conferences on key issues and should be 'more vocal about the root causes' of miscarriages of justice. Prof Zander gives failings of defence lawyers as an example. Relevant examples for FACT include police investigation methods, the bias of so-called 'similar fact' evidence, and the confirmatory bias which must result from the practice of referring to claimants of sexual abuse as 'victims', and to the accused as 'offenders', from the point of complaint and throughout the trial process – thereby indicating to juries that the presumption of innocence does not apply in such cases.

3. What should be the future structure of the Commission?

(a) Should it be moved out of central Government?

(b) Does it need to be an Arms Length Body?

(c) Could the function be delivered as part of a Government Department?

(d) Could the function be delivered by a new Executive Agency and what would be the benefits of creating a new Agency?

(e) Could the function be delivered by a new Executive Agency and what would be the benefits of creating a new Agency?

The question of whether the CCRC should be moved out of central Government does not seem to apply to the CCRC because it already is – or should be – 'out of central Government' and independent from the government. For it to be delivered as part of a government department would be to go back to the 'bad old days' of C3, and to defeat the objective and the very idea of setting up the CCRC in the first place, as was proposed by the Royal Commission of Criminal Justice. It is vital for it to remain independent. The question about delivering its function through a new Executive Agency seems to amount to the same thing if this means that it would become an arm of the government executive.

Indeed many would argue that the CCRC is not independent enough and could do more in asserting its independence. The loss of a separate website for the CCRC, and its incorporation into the website of the Ministry of Justice has been unhelpful in this regard. Maintaining a website need not be an expensive undertaking but it would in itself make a statement about the independent status of the CCRC.

(f) Is there any scope to merge the functions with any other body?

Whether it might be merged with another body depends on which body. It too would need to be independent from government and working towards the same purposes. There seems to be some scope for collaborating with appropriate university departments or voluntary organisations which might work with the CCRC on a partnership basis. This would obviously need to be cautiously approached with due consideration to the quality of work which would be undertaken and the resulting economies that might be achieved.

Some interesting suggestions are made in this regard, again, by David Jessel who proposes drawing on the resources of organisations like INUK and other campaigners which might then provide:

> 'a new infantry of investigation, knocking on those doors, taking those statements, leafing through the unused material, pestering for more research on Shaken Baby and so on; getting those stories into the papers, and onto television. That's the way to keep the CCRC on its toes – present them with evidence achieved by digging, to spur them on to do some digging of their own, with the vast statutory powers of investigation they have.'

The developments in setting up a not-for-profit Centre for Criminal Appeals (Baird et al 2012) sound particularly promising as an example of the type of organisation with which the CCRC might collaborate, or which might be commissioned to take on some investigations, in order to economise whilst also increasing effectiveness. Such a collaboration, with this or another such reputable research centre, could facilitate the type of issues-led, or thematic, investigations to which we referred earlier, and as has been proposed by Angus Nurse (2012).

(g) If it should remain an Arms Length Body, should there be changes to the structure and membership of the Commission?

We understand that the majority of the Commissioners are lawyers and that there are no Commissioners with a background in forensic science. The commissioners and its staff should be representative of different disciplines of relevance to reviews: such as forensic science, criminology, practical ethics, and with representation from practitioners in policing, forensic science, psychiatry, and criminal justice/offender management backgrounds.

With regard to legal expertise, the academic team who are developing the Centre for Criminal Appeals (Baird et al, 2012), have identified a lack of defence expertise at the CCRC, noting that the present personnel are predominantly from a 'law enforcement background and, as a result, are not attuned to defence issues and defence investigation methodology'. Although we think it is appropriate for the CCRC to be

non-partisan in its general approach, it is still important for that neutral approach to be also informed by lawyers who are specialists in matters of defence within our adversarial system.

4. Do you have any further comment on the functions or form of the Criminal Cases Review Commission?

In making all the above suggestions, we are keen to also reaffirm the importance and value of the role of the CCRC in identifying evidence and arguments to free the wrongly convicted from imprisonment, and from the purgatory of being an innocent person identified as a sex offender and on a sex offender register. Its recent successes, in referring cases in which the convictions have not been upheld, are particularly to its credit at a time when its resources have been so severely cut.

We appreciate the near impossible task with which the CCRC is faced, especially given the doubling of applications in the last year. Indeed, with regard to the introduction of clearer forms making it easier for less literate people to apply, there is a sense in which the CCRC is increasingly a victim of its own success, with further cuts now having to be made to accommodate those additional applications. That being so, we have tried to focus on ways in which the CCRC might reduce and re-prioritise its remit and adopt ways that could provide a leaner but more effective service, particularly via an issues-led approach which could pre-empt some of the individual based work.

In this respect, we are arguing for special attention to be given to those appealing convictions for child abuse and sexual offences, especially those that arose from historical allegations, and those which were based on testimony and 'similar fact' evidence. We understand that this category of convictions represents a particularly large proportion of the applications to CCRC (Barrington, 2012). The hope is that a systematic review of this category, perhaps in liaison with or commissioned to an external body, could identify factors that contribute to wrongful convictions thereby reducing their occurrence. Such an approach would extend the advisory role of the CCRC within the criminal justice system, as proposed by Angus Nurse (2012) and Michael Zander (2012) among others, and should eventually reduce the number of miscarriages of justice and therefore the number of applications.

Meanwhile such cases remain a substantial category, and one which is set to grow. We therefore urge the review of the CCRC to consider the 'exceptional circumstances' (echoing s.13(2) as discussed above) which apply in making them particularly prone to miscarriages of justice, and to make allowance for this category in any of its considerations for changing its functions and form.

In discussing the early successes of CCRC and also the selection of cases ('low hanging fruit') for the programme Rough Justice, David Jessel writes 'we tended to steer clear of sex cases, especially those involving children – which are by far the largest category of CCRC applications, which, to my mind, represent **the largest cohort of potential miscarriages of justice**, and **which don't often feature in the catalogue of innocence campaigners**.[...] Few of those claiming to have been falsely accused have had success with the CCRC. But some have, some who would otherwise

still be wrongfully convicted. **I am sure the CCRC has missed some**.' (Our emphasis).

Recent events surrounding disclosures about Jimmy Savile, and the Newsnight programmes that followed Steven Messham's claims about uninvestigated paedophile rings back in the 1970s and 1980s, have led to a febrile atmosphere in which child protection measures, media stories and developments affecting police forces are combining to make the likelihood of many more such miscarriages of justice. One has only to note the wording of the 'Home Secretary's Statement on Historic Allegations of Child Abuse in North Wales', issued on 6th November 2012, to foresee a likely increase in false allegations and wrongful convictions of this kind:

> 'The government is treating these allegations with the utmost seriousness. Child abuse is a hateful, abhorrent and disgusting crime, and **we must not allow these allegations to go unanswered**, and I therefore urge anybody who has information relating to these allegations to go to the police. [...] I believe the whole House will also be united in sending this message to victims of child abuse. If you have suffered and you go to the police about what you have been through, **those of us in positions of authority and responsibility will not shirk our duty to support you. We must do everything in our power to do everything we can to help you**, and everything we can to get to the bottom of these terrible allegations.' (Our emphasis)

The extent of pity and attention, not to mention possible compensation, that is now extended to those who were (believed to be) victims of abuse in their childhood is such that there is real danger that any minor impropriety on the part of adults, will now be exaggerated and blown into something considerably worse, and that completely bogus claims will be made. Child abuse is abhorrent and no doubt these new measures will result in some rightful prosecutions; and everyone should be pleased about those. But what about collateral damage? We now again face the scenario which applied following the great children's homes panic that led to the Waterhouse Tribunal, in which 'A police investigation which was intended to safeguard the lives of innocent children had become a powerful instrument for destroying the lives of innocent adults.' (Webster, 2005, p.489).

Summary of main points

Our key recommendations are that the CCRC:

- Should trim down its remit by focusing primarily on review of Crown Court Conviction cases (as was envisaged by the RCCJ which proposed the setting up of the CCRC).

- Should establish a tiered prioritising approach so that some crucial aspects of all its present work can be retained, but according to criteria that is agreed and reviewed by a steering committee.

- Should work collaboratively with other organisations to carry out more fieldwork investigation to attain fresh evidence, thereby in some cases cutting down some of the need for laborious record searching.

- In deciding whether to refer cases to the Court of Appeal, should make fuller use of s.13 which, aside from the requirement for fresh evidence or new argument, allows in s.13(2) that *exceptionally it need not be something new*.

- Should, in exceptional circumstances, such as when the evidential landscape has changed or where there is a 'lurking doubt' that a jury might have reached the wrong decision, make fuller use of its power to refer cases again, and again.

- Should take more of an issues-led approach, investigating systemic and generic aspects, with a view to reducing the amount of exhaustive case-by-case investigations.

- Should assume more of a leadership role in seeking to identify causes of types of miscarriages with a view to pre-empting their occurrence.

- Towards the above, should commission or work collaboratively with research and quasi-judicial centres, such as the Centre for Criminal Appeals.

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Submission prepared by
Dr Ros Burnett
Research and Information Consultant to FACT (www.FACTuk.org)
and Senior Research Associate, Centre for Criminology, University of Oxford
Email: ros.burnett@crim.ox.ac.uk