

# WESTMINSTER COMMISSION ON MISCARRIAGES OF JUSTICE

## TRANSCRIPT OF THIRD EVIDENCE SESSION – ACADEMICS

3 September 2019

**Baroness  
Stern**

Apologies that we kept you waiting, but logistics here are highly difficult, but we now have everyone, except that, I am sad to say, we have apologies from my Co-Chair Lord Edward Garnier, who, some of you may have seen through the press, is engaged in another important legal activity today, and for another few days, I imagine. And without saying anything that's politically biased, I think we just wish him well. And I would also like to bring to you apologies from Michelle Nelson, our QC. The jury went out, and they didn't come back, so she could not leave, and she's really sorry to have missed this session but we will get a very good transcript so she can pick up on what she's missed. And I'd like to thank all those who come here as volunteers to sit and listen, and we very much appreciate the fact that you are doing this and being such loyal followers. We have two witnesses this evening, Professor Carolyn Hoyle, and Dr Dennis Eady – both very distinguished academics in this field. And we're not going to do them together, we're going to do, first of all, Professor Hoyle, because she's written a book that we want to talk to her about, and then we're going to do Dr Eady, because he's done a lot of things in Cardiff University Law School that we want to talk about.

And I would like to begin, if I may, by asking Professor Hoyle to very briefly, like, if I gave you four sentences, could you tell us what your book – which is very big, but which I read cover-to-cover – was about, and when it happened?

**Professor  
Carolyn  
Hoyle**

When it happened in terms of when I did the empirical research, do you mean, or when it was published?

**Baroness  
Stern**

Put both in one sentence.



Professor  
Carolyn  
Hoyle

Goodness me. Well first of all, thank you for inviting me here to give evidence. The book was published last year. And it relies on research that took place over, in total, about 10 years, but there were four years of rigorous empirical data collection.

The book sought to explore how the Commission exercises its discretionary powers in making decisions about which of its very many applications each year to refer back to the Court of Appeal. It was a retrospective analysis of decision making, not a prospective analysis, because that would take probably one to two decades. And its main aim, as I say, was to really look at how they make their decisions—in the context of the law they have to work within, in the context of limited resources, and in the context of other structural and cultural variables that have influenced decision making—and refer cases back to the Court of Appeal. So, it involved analysis of 146 cases, in-depth analysis. Those of you who have worked with the Commission know that each and every case generates data of probably about 20 big box files. So, in each case, we looked at all the written information. We also interviewed those people who are making the decisions in those cases, and where cases went to the Court of Appeal, we obviously looked at the judgments, so there was a great deal of empirical data. And an awful lot of just hanging about at the Commission talking to people formally and informally – both Commissioners and Case Review Managers.

The cases go back to about 2000. I think we had two cases that were in just before that date, and we have that cut-off date just simply because we were relying on people's memories, and relying on the data being available. And the cases were across the various types of application to the Commission, with one exception. And that is, we didn't look at the cases which went to the Irish Court of Appeal; for two reasons, really. One is that the Irish court is a different court and its jurisprudence might have evolved differently, and we didn't feel we had the expertise to look at those cases in any depth. But more importantly, those cases were primarily around the Troubles, and I didn't feel that I had the expertise in the history of the Troubles or the politics or criminal justice around the Troubles to do those cases credit. If anybody has an idea about doing a PhD at the Commission, I would love somebody to look at those cases because I think they're really interesting, but my data don't reflect those cases at all. That was more than four sentences...



**Dr Philip Joseph**

Hello, just to introduce myself, I'm Dr Philip Joseph, a consultant forensic psychiatrist at St Mary's Hospital in Paddington, and have been providing psychiatric reports for the courts, including Court of Appeal cases, for the past 35 years or so, and have been involved in some of the miscarriage of justice cases. My question is really just to follow on from the previous question, which is, could you outline your key findings about the CCRC: in particular, those that you think are most relevant to this Commission? So, it's really just an opportunity to bring to our attention, as I say, what you see as the most important findings in your research that would inform us?

**Professor Carolyn Hoyle**

Well, if I was to summarise my overall impression of the Commission, having done many years of research, it is that it's not a perfect organisation.

It has more variability in its responses to cases than I think any of us would like to see; certainly than applicants and their legal representatives would want to see.

It remains still somewhat cautious in its referrals. I might want to come back to that because I think it's a dangerous word to call an organisation cautious, and I say it carefully.

I think it's still sometimes too slow and too ponderous. So, if one wants to consider a balance between thoroughness and efficiency, I'm not sure it's quite got that balance right, although again, you wouldn't want to see too much compromise in terms of thoroughness either. So, we have to be careful with that distinction.

And it has, I think, until recently done insufficient to engage with other stakeholders both inside the criminal justice system and outside of it, in terms of its institutional and organisational learning about what can and does go wrong in the criminal justice system. So, it holds a lot of institutional knowledge, which it has been in the past, at least, reluctant to share through the media; through meetings with campaigners; through working with innocence projects et cetera. So, I think it could do with being a little bit bolder.

That said, there have been criticisms of the Commission that it is 'not fit for purpose'. We've all heard that expression being used. First, that expression is meaningless because if you ask the Commission what its purpose is, if you ask the Court of Appeal what its purpose is, if you ask a campaigner, if you ask an applicant and so on and so forth, they will all have very different answers, so it's a meaningless expression. That said, there are currently, well, my data's slightly out of date, but maybe 480 people who are outside of prison who would



otherwise be inside prison, whose lives have been turned around, somewhat, because of the Commission's work. And it continues to work on a restricted budget – it does not have sufficient funds; it does not have sufficient resources – and does a pretty thorough job of reviewing approximately 1400 applications a year, and making difficult decisions in those cases. So, it does a much better job than its predecessor, C3. And I would hate for this Commission to come to the conclusion that it should be replaced. I think if it needs change, it needs some change from within - I don't think it needs a fundamental restructuring, but that's just my opinion.

**Baroness  
Stern**

Thank you very much. Could I move you us on a little bit, and thank you for that, which I thought was very concise and very helpful, and can we talk about the Court of Appeal, which is another issue that comes up in every discussion about this? And I'll quote from the book: you found, and I quote, 'some evidence of shared deference' towards the Court of Appeal in the CCRC, and you discerned a 'cultural imperative to keep in favour with the Court that seemed to go beyond the legal mandate of efficiency' and 'I think we should be bolder' was a constant refrain from the people you interviewed. I wonder if you could unpack that a bit for us.

What actually is the issue here, because there's a lot of views about what the issue is? And do you have a view about how, if something is wrong, how it would be made a little better?

**Professor  
Carolyn  
Hoyle**

Yes, to some extent, the statement that the Commission is deferential to the Court of Appeal is a truism. It's inevitably so because the 1995 Criminal Appeal Act made it so. So, the Court of Appeal can only quash a conviction if the evidence is capable of belief and if the evidence is fresh, i.e. it's not been before the trial court before or before the Court of Appeal before. And if it is fresh evidence then there has to be a reasonable explanation for the defence's failure to adduce it at court.

So, the Court of Appeal under section 2(1) of the 1968 Act has restrictions on what it can and can't do with cases. The real possibility test, as applied by the 1995 Criminal Appeal Act (section 13), imposes on the Commission a requirement to only refer a case if it thinks there's a real possibility that the court will not uphold the conviction. Now, the real possibility test is a very slippery concept. It looks like it's firmly within the law, but defining it is very, very difficult, and operationalising it is also extremely difficult. And various cases have tried to define that – *Pearson* is one that's cited quite often – but if you think about that definition, it's this idea that it's more than just an



outside chance, but it's not a racing certainty. Well, however one defines these terms is incredibly difficult, and each of us in this room might define those things differently in a set of different circumstances in different cases. So it's difficult, but, the legislation requires the Commission to think before it makes a referral if it can justify, in its Statement of Reasons to the Court of Appeal, that that case meets the real possibility test. Now, when I started my research, and I did a series of scoping interviews, Commissioners would say to me, 'We judge a case on its merits. And we only refer when they meet the real possibility test. And that sounds very 'sorted'. But actually, how you define the merits of the case is a matter of socio-legal interpretation and case construction. And so, they are stuck with this legislative framework, and with making decisions in very difficult cases. So they're obviously going to only refer when they think that it meets that threshold test.

My research suggests some variability in defining when cases meet that threshold test, but nonetheless, that is what they're aiming for. So, institutionally, they are somewhat deferential.

What I also found culturally, though, is that they worried when the Court of Appeal rebuked them. They didn't like that. It's not to say they won't make some referrals that are slightly borderline, but they did not like being rebuked by the Court of Appeal. And a lot of what happens in the Commission in making decisions is reflected in their Casework Guidance Notes. Now, what the Casework Guidance Notes do, and these are not available to the public (the public can see the Formal Memoranda that guide their work, they can't see the Casework Guidance Notes), but we examined them all.

The Casework Guidance Notes, really, are primarily an attempt to interpret evolving jurisprudence for the Court, and the Commissioners and the Case Review Managers, make their decisions about whether to refer according to that evolving jurisprudence as interpreted. Now, if you ask me if there's a way that they could perhaps be a little bolder in their referrals – not massively so, I don't think we're going to see the referral rate increase massively – but I think if we could see it in those grey cases that they themselves already feel uncomfortable with, but think they can't do anything more with. They get stuck around the fresh evidence issue. That's one of the main issues for them. But I think they could make bolder, and more contrarian, referrals back to the Court.

In those cases, often where they have either taken a case to the Court before and the Court has rejected it, I think they can push those cases



back again, and they're very reluctant to do that. Because the Court is only whoever's sitting in the court at the time, and different people will look differently at different cases. But I think they can also maybe be a little bit more careful in interpretation of whether a case meets the real possibility test by having one of the legal representatives, or one of the legally trained Commissioners, review each case where there's not going to be a referral. So, as you probably already know, where there is a referral, a referral can be decided only when a committee of Commissioners and the Case Review Manager makes that decision. So those cases are scrutinised by a group of Commissioners. The decision not to refer is made just by one Commissioner and one Case Review Manager. Sometimes both of those will not be a lawyer, and yet they're interpreting a legal framework and interpreting the prior jurisprudence.

I think those cases would benefit from a final review from a lawyer within the Commission to make sure that there's nothing in there that they couldn't squeeze through on a referral, especially when they feel uncomfortable about it. And, of course, that would take more resources within an overly stretched Commission already. But if they're more intelligent in the way that they handle their reviews – they do smarter reviews, if you like – they would use the expertise of the other Commissioners in other cases where they are needed, so they would use their expertise a little bit more selectively. So a forensic psychiatrist or somebody with training in another authority would perhaps be put on other cases, financial cases or whatever, so they could be a little bit more creative in how they use their limited resources.

But I think that one of the huge challenges going forward for the Commission is, what's happened in the packages paid to Commissioners has resulted in a massive increase in part-time – and I don't mean 50%, I mean often less than that – Commissioners, and I think this is an inefficient way of using the Commission.

So, yes, I think they could have bolder referrals and push back on the Court, especially on the fresh evidence point.

And if they make some of these contrarian referrals, the Court might well shift its own jurisprudence over time. It's not a monolith: it can be educated, and it can be encouraged. And I would like to see that.

**Baroness  
Stern**

Thank you.





Dr Philip  
Joseph

Just briefly, we've heard from the Scottish CCRC because, as you know, they have a different test, and they have probably more referrals than the English CCRC. Do you think the real possibility test is affecting the work of the CCRC in terms of making referrals, or do you think it might be a red herring?

Professor  
Carolyn  
Hoyle

I think it's not the real possibility test, that's the problem, I think it's the 1968 Act on the requirement for fresh evidence. I think that's the problem. Everybody always looks at the real possibility test and they look at the Scottish Commission. The Scottish Commission has tiny numbers, so I really don't think we can compare the numbers across those two Commissions as to what proportion they refer, because when you have very small numbers, even with the English Commission, between 1% and 4% of 1400 cases being referred, and you compare across to a much smaller jurisdiction the comparisons are not meaningful.

So, I don't think it's a problem, the real possibility test, in and of itself, because the Court of Appeal, let's face it, is not about looking for innocence, it's about seeing about the safety of the conviction. And unless you decide that the Commission is a court of law, making decisions on whether to uphold a conviction or not, then you're going to have to have it producing information, and data, and a report for the Court of Appeal. So you have to have it looking at what the Court of Appeal makes its decisions on. So in a sense that test is just there because it's an obvious test. What you need is the Court of Appeal to perhaps look back at the 1968 Act and its fresh evidence requirement and think, 'does it have to interpret that quite as stringently as it is'?

Because that's where the cases get stuck. I've seen, so often, Commissioners at committee meetings that I've sat in on pulling their hair out in frustration because they can't get past the fresh evidence requirement, especially when a case has been to the Court of Appeal before and they've used their best shot, and now they can't use that again, because of the requirement to present fresh evidence. And that's hugely frustrating.

And yet, it might have been that the way it was presented was not very good. It might have been that the Court of Appeal didn't fully *understand* what was being presented, and therefore wasn't persuaded by it.

So all institutions are fallible. All of us make mistakes. All of us misinterpret. The Court of Appeal is not an exception to that. And yet

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it has this test that stops it hearing evidence, or that stops the Commission referring to it. And I think that's challenging.

**Erwin  
James**

I'm Erwin James. I edit Inside Time, the national newspaper for people in prison. The only newspaper in the world of its kind, by the way. But we get loads of letters from people in prison. We don't know who's innocent and who's not, we don't know.

We're very careful when we publish letters from people, because there are victims involved. We don't just publish letters that say 'I'm innocent', because otherwise, we don't just publish that... But we do get loads - we get four or five hundred letters a month from people.

And all those areas of issues about prisoners, we get loads from people who say 'we were wrongfully convicted'. I should have asked this question weeks ago, a month ago, to the CCRC evidence-givers. What strikes me is – are all the commissioner's in the CCRC, are they lawyers? Are they all qualified lawyers?

**Professor  
Carolyn  
Hoyle**

No.

**Erwin  
James**

Now that to me seems odd. People looking at a case where it's a - They've got to be lawyers, surely? I mean, how do you feel about that? They're not – who are they? I know there are laypeople. I know there are some laypeople. I had interaction myself with the CCRC on behalf of another prisoner when I was in prison – I was in prison for a long time. And I found it, some of this stuff, I was... you know, some of it was quite obtuse if I'm honest. Some of this stuff was coming back to me. What are your thoughts about it? Should they be lawyers, should they...?

**Professor  
Carolyn  
Hoyle**

When the Commission was set up, it was set up with an explicit remit that it would be a combination of lawyers and *other* people with different skills: investigative skills, maybe forensic skills, maybe medical skills. And if you look at the kind of cases that come through, some of them rely on scrutiny of the law, and some of them are overturned simply on a matter of law. So a change of law in a sex offence case, for example, might go through.

But a great many of them are about matters that rest on forensic science. And that is a very complicated field. So having somebody





whose specialism is in forensic science, which they are required to have at any one time, is essential.

Having people with a background in finance is quite interesting and quite helpful, too. Not least, don't forget, some of the Commissioners sit on the board, also they have to manage this organisation in the way that any organisation getting money from the government must do – it must be accountable to its funders. So, there are other skill sets there. And then there have been journalists on the Commission before – people like David Jessel – who bring investigative skills to look at the cases in detail.

The extent to which they investigate thoroughly is a separate question, which I'm happy to come on to. So I don't think it's a requirement that there are all lawyers. I think that would be restrictive in terms of their remit and in terms of their investigation. But I do think that, given that this test is a legal test, and it requires people to understand how the jurisprudence has evolved from the court – and very many of their referrals they hold back to see what happens to a similar case in the court, by the way – so looking at the court's jurisprudence is a huge part of what they do. And that sometimes takes certain legal skills to understand why certain arguments have failed or why certain arguments were successful in court. So I think having a combination is fine.

You obliquely referred to communication being somewhat –

**Erwin  
James**

Not always the best. My experience was It was very defensive. Very defensive.

**Professor  
Carolyn  
Hoyle**

Okay. I think that that's a fair point. I think that the Commission, in the past, has communicated with outsiders in a way that could be seen to be defensive. I think there are some within the Commission who are like that and some who aren't – like any organisation, it's a mixture. I *thought* you were referring to the Statements of Reasons that are sent out to applicants, which are sometimes very, very difficult for even lawyers to understand, certainly, or academics to understand.

And having made very real efforts to improve its communication at the application stage by having an Easy Read application form introduced a few years back, I think it now needs to look at how it prepares and presents its Statements of Reasons. And we know this



is a document that might be headed to the Court of Appeal if they're minded to refer. But in most cases it's not headed for the Court of Appeal, it's headed simply for the applicant and his or her legal representative, if they are lucky enough to get one. And most of them these days are not lucky enough.

And that document needs to be thorough, it needs to be detailed, it needs to be accurate. But it needs to be written in a way that is accessible for most people, not for a tiny minority of skilled lawyers. So, I thought you were alluding to that, and I think I've been a little bit critical in the book about Statements of Reasons not being as clear and as easy to read as they should be.

**Erwin  
James**

Well that's a very comprehensive answer, thank you very much indeed, thank you.

**Anne  
Owers**

Anne Owers, currently Chair of the Independent Monitoring Boards in prisons. But I was at JUSTICE when the Criminal Cases Review Commission was set up, for a short period of time I was a Non-Executive Director at the CCRC. I wanted to ask you a bit about the asylum cases you referred to in your report because you say that, actually, they seem to have been brought slightly more enthusiastically than non-asylum cases. And I wondered if you could say why you think that is, but also whether there's any read-across as to how the Commission might deal with non-asylum cases?

**Professor  
Carolyn  
Hoyle**

Yes, that's a good question. I think they did handle these cases differently. They were quite easy to analyse once they'd had two or three cases. So I think in the first and second cases they struggled with understanding, because these were cases where people had been poorly advised by their lawyers to plead guilty when actually they had a defence. And so, as these cases came in, the Commission developed expertise. One Case Review Manager in particular, who took an interest in these cases, quickly developed expertise, and was able to look through the cases quite quickly. And the referrals increased. In fact, from about 2013, quite a significant proportion of the referrals coming through were those cases. So a cynic might look at what they were doing at the time, and some academics have been critical of the Commission at the time, because some academics feel they shouldn't look at cases that come from the magistrates' courts, (and these cases did) because of limited resources.

I don't agree with that position, because a lot of the people who came in with these charges were sent to prison for more than two years for not having correct documents when they came into the UK and lost



any chance thereafter of staying in the country, so most of them were deported fairly soon afterwards – a lot of them were. So, the repercussions of those convictions were quite significant for those people. Once they worked out, though, that these were cases of poor legal defence, it was quite easy to go through these cases quite quickly, hence the number of referrals in quite a short period of time.

But there was also a sense within the Commission of outrage that people at their most vulnerable, perhaps, people who society – this was, politically a time when people were against asylum seekers and immigrants – and there was a rather nasty politics around this particular population. And I think the Commission – a lot of Commissioners, anyway – got behind these applicants in a way because perhaps other applicants were more disparate in their population.

It was easier with this population to see them as a group, a particular group, and to try to fight their corner when they felt that the politics were against them, so these cases started to go through.

But what also happened that you asked about, which was very interesting, is the then Chair of the Commission (Richard Foster) became quite active in engaging with the CPS and with defence lawyers about the errors that had been made. So, both the defence lawyers had made errors, but then the Crown Prosecution Service should not have prosecuted these cases: they should have seen these were heading for a wrongful conviction and should have stopped them in their tracks, but the CPS didn't do that. So he engaged with both of these institutions – defence barristers, and solicitors – and with the CPS.

Defence lawyers came on board pretty quickly and introduced further training, further information for lawyers. The CPS took a little bit more prodding and I'm not sure they ever fully came on board, but they did start that journey. And I think they refused to review all the past cases, to look for other cases where people hadn't applied to the Commission. They refused to do that for resource reasons, and I'm not unsympathetic to that, but that's what the Commission were pushing for. And at the time, I had long conversations with Richard Foster, and with other Commissioners, saying this was a really good example of where the Commission had exercised its wider remit to engage with the wider criminal justice system, to hold it to account for errors made in processing cases, and encourage them to take this as an example of how they might go forward with other types of cases.



And I think in the current climate, it's crucial that they try to find the resources and the motivation to do that, because we have huge cuts in legal aid which will produce further miscarriages of justice in the future. We have police and CPS failures to disclose potentially exculpatory evidence, and we have at the same time a crisis in the forensic science service, with the abolition of the Forensic Science Service in 2010, which was a terrible own goal for the government. And private forensic services are not coping: they're making errors; samples are being lost. We've seen all this in the newspapers. In this climate, with all of that going on, there's no way miscarriages of justice are going to decline. They're going to rise, if anything: a perfect storm of austerity cuts. At that time, the Commission was really well placed to hold the system to account, to say 'this is what our cases show'.

And at the moment, they're precluded by section 23 of the 1995 Act from publishing the Statements of Reasons. They would like to publish the Statements of Reasons. Nearly everyone I spoke to in the Commission has said they would like to be able to do that – with the permission of the applicant, of course, and with the requirement sometimes of redacting certain sections of witness statements that expose other witnesses et cetera. But a Statement of Reasons that's published would be a very good resource for everyone in this room, certainly, but also for police, prosecution, defence lawyers - they would see what goes wrong in these cases.

Anne  
Owers

I think it's an interesting point, actually, because having worked just recently in an organisation that deals with police complaints, the trick is to create the virtuous circle where, when things go wrong, you can feed back into the processes that have happened and that have allowed that to happen. And unless you can create that, you're just a job creation scheme, really, you just keep on finding the same things over and over again, don't you?

Professor  
Carolyn  
Hoyle

Absolutely. And I think if they could publish them, it would also encourage them to be more critical of institutions, failures to uphold justice and due process principles than they are at the moment. At the moment, when they create a Statement of Reasons, primarily they are being quite instrumental in creating a narrative that fits the real possibility test, and if they feel that in this case there was non-disclosure, but that that won't get past the Court of Appeal, because the Court of Appeal requires a nexus between something going wrong - police or CPS procedures - and the wrongful conviction. You



have to establish that nexus, otherwise, they don't care about non-disclosure, or at least they don't care sufficiently.

So the Commission creates the Statement of Reasons that meets the requirements of the real possibility test, because that's the place it's going - it's going to the Court. Now, if they were going to publish those Statements of Reasons, and if there would be systemic learning from that, I think they'd be more inclined to detail the other errors that don't quite meet the threshold, but nonetheless were errors in the process leading up to the conviction, and I think that would be really helpful, again for systemic learning.

**Baroness  
Stern**

Yes. Can I ask you a question about independence? You said in your excellent book that the commission needs a greater willingness to criticise public bodies, and the commission's own paymaster – I assume you're talking about the Ministry of Justice – when justice errs. And I also discovered published at the same time as your book, something called a Tailored Review. I understand that Ministry of Justice officials went into the Commission, analysed the whole way of working in detail, and recommended a lot of very profound changes that *had* to be implemented, that were not recommendations but *had* to be implemented.

And, being not deeply involved in this World, or in anything to do with the [Criminal Cases Review] Commission before this [Westminster] Commission was set up, it struck me that this could not be an independent organisation.

So, I may well be wrong and I hope you'll correct me, is it possible for the CCRC to act as if it were an independent body in these circumstances? And what is your view on the CCRC's independence from government?

**Professor  
Carolyn  
Hoyle**

It wasn't really part of my remit to look at that – so my remit was to look at decision making in the *context* of certain structural or cultural variables. So, I can't really speak with great authority on that matter of independence from government.

**Baroness  
Stern**

I'd be happy for you to speak with medium authority. It would be quite good enough for us.

**Professor  
Carolyn  
Hoyle**

I'm an academic, we don't like to speak unless we can footnote anything at great length...



**Baroness  
Stern**

I know, but I'm encouraging you to do so

**Professor  
Carolyn  
Hoyle**

With medium, with low authority, I can say... I think it's very difficult to be critical of government when government are paying for your organisation, when they are providing your resources. Commissioners have expressed concern about resources in the past. And as I mentioned before, the number of part-time Commissioners at the moment, I think, goes against being an efficient and a thorough organisation – I have no doubt about that. And that is partly an issue of how government has decided to pay Commissioners, and that includes pension, it includes working rates, et cetera.

And, I think, probably - I'm not saying anything about the calibre of the Commissioners at the moment, because many of them are in place since I have stopped doing my research and I simply don't know them. But I think it's likely, ultimately, that this will affect the calibre of the Commissioners. It'll certainly affect their ability to work. And I think that the Commission perhaps does not speak out against those austerity cuts as much as it should. So I had a quick look at Helen Pitcher's response to your questions a few weeks ago, and she made the point that government have provided a bit more money.

Well, that as it may be – I simply do not know – whether they have that, I presume they have, or what they've provided. But I do know that it's been massively under-resourced, that organisation, for many, many years.

And, decisions about how thoroughly, or how to investigate, cases, are made with a mind to a budget. And certainly staff resources – the number of Commissioners and the number of Case Review Managers – is a budget issue. So, can they be truly independent if they can't speak out about something so crucial as funding? Perhaps not.

What would a truly independent organisation look like is a different kind of a question, and I don't know the answer to that. I mean, the CPS isn't independent from government. I simply don't know what that might look like, if one was to say, 'can we create the terms by which the Commission becomes fully independent of government', and how that would work.

**Anne  
Owers**

From experience, I think it is about culture, as much as about statute. If you think of something like my previous organisation, the





Inspectorate of Prisons, I don't think anyone would doubt the current Chief Inspector of Prisons is independent of the Ministry of Justice.

**Professor  
Carolyn  
Hoyle**

Yes.

**Anne  
Owers**

So, it's about creating, and creating corporate sense, and that's why your point about part-time Commissioners is well made in terms of culture, as well as practical application – sorry, I'm acting like a witness.

**Professor  
Carolyn  
Hoyle**

No, thank you, Anne, because I think that, actually, is the point I perhaps should have made. I think it is about the culture. I've always encouraged them to speak out more, and to be more critical of when things go wrong, Such as the terrible cuts to legal aid, and the closing of the Forensic Science Service in December 2010, by Theresa May.

I think these were times that they could have spoken out much more forcefully, and it would be nice if they were encouraged to do so in the future.

**Baroness  
Stern**

Thank you, could I just follow that up by asking you: how do you Encourage them to do that if they are all feeling anxious that they are going to have more cuts in their budget, or be moved even further from London than Birmingham, or whatever punishment could be inflicted on them, if they became more outspoken?

**Professor  
Carolyn  
Hoyle**

Well, when you say 'they', I suppose we're talking about the Chair of the Commission, because somebody has to speak for the Commission. You couldn't have a system where Case Review Managers were constantly running to the press and saying, 'I've got this case and things have gone wrong because I didn't have the money to investigate properly'.

And by the way, I should add, I've never seen in any of my scrutiny of the case records anybody make a statement that they won't do a particular investigation for financial reasons. But it's the context there. They talk about the cost, and they discuss with forensic experts, for example, the cost of expert evidence. So it's there.

**Baroness  
Stern**

Do you think if the Chair was a former High Court judge it would be different?



**Professor  
Carolyn  
Hoyle**

It might be different, but would it be different in a good way?

**Baroness  
Stern**

I mean different independence-wise.

**Professor  
Carolyn  
Hoyle**

Well, I think that there, you have the problem that people are worried about the Commission's deference to the Court of Appeal. And if you have a Chair who was a judge, even if they haven't worked in the Court of Appeal, you might get similar criticisms about independence from the judiciary. I wouldn't want to put a requirement on what the Chair should or should not be.

Though, there have been criticisms of the backgrounds of different chairs in the past. I think the personality of the chair matters. And I think that sometimes, perhaps, Chairs are more willing to speak out critically as they get towards the end of their second term. And again the terms have changed recently, have made the role less attractive, I guess. Yeah, I think it's about character and personality, probably, more than occupational background.

**Dr Philip  
Joseph**

You said earlier the Commission is not perfect, there's too much variability, a bit cautious and deferential. We've covered this a bit, but do you there's something wrong with the way the Commission was set up in the first place?

**Professor  
Carolyn  
Hoyle**

The thing - the criticism of the Commission – that has most upset them from my work over the years has been the variability issue. And I don't know how that could have been avoided in the way it was set up.

We made a commitment, Dr Mai Sato and I, when we were doing our fieldwork, to feed back some of our findings as they emerged.

And the point about variability was, first of all, a qualitative finding from our interviews with Commissioners and Case Review Managers who perceived there to be enormous variability in the way they approach their investigations, in the way they think about the law and in the way they make their decisions. But this was an in-depth, rich qualitative study. We didn't have sufficient numbers, with 146 cases, to really know if the variability was real or just perceived. It shouldn't be any surprise if it's real because there's variability in all criminal justice institutions.



The then Chair, Richard Foster, was concerned himself about variability. So he asked us to do a survey – we added this onto our fieldwork – a survey of the Case Review Managers, about their propensity to do what you might call ‘empirical investigations’: investigations where they go beyond the desk-based investigations, and go out and interview people, they get forensic scientists involved, they go to the scene of the crime, they interview the police, et cetera, et cetera. We wanted to see whether they were consistent in those approaches. And we found some inconsistency that could not be explained by the cases that they had investigated.

So already, we found there were personalities, and characters, and experiences, among the Case Review Managers, that led some to do many more investigations than others.

We also, for the Commission, more worryingly, found enormous variation in the screening process, and again, they have put in place measures to try to prevent this.

So if you take the attrition rate at the Commission, you have about 1400 cases, applications coming in each year. They do thorough reviews of about 54% of those. They simply don't have the resources to thoroughly review them all. So, some of them are screened out quite early on in the application, through a screening system that you could think of as triage, of the type you see if you go to A&E and a nurse will look and decide if you need to see a doctor and be treated.

Now we had a perception from interviewing screening Commissioners that they were doing things quite differently. So, we looked at all the screening over a period of 15 years. We looked at all of those cases that came in and who screened what, in or out. So, if you take screening as a dichotomous variable, you either screen a case in for a full review, or you screen it out, and the applicant gets a letter saying ‘nothing happening here’.

We found vast variability. One screening Commissioner was pushing through about 50% of cases – about half the applications that were screened by him went to full review. Another Commissioner screened in about 4%. And then there was a whole series of people in between. This data caused them enormous anxiety, as you would imagine it would, because we said to them ‘here is very hard, quantitative, empirical data, that is robust, to show variability at that crucial triage stage’.

Now, they *have* put in place, in response to our concerns about that, certain measures. They've got Group Leaders who are sort of



supervisors of the Case Review Managers, somewhere between the Commissioner and a Case Review Manager. And they put in place mechanisms for the Group Leaders to get involved in investigation, in helping the Commissioners, and they also got Case Review Managers a bit more involved in that screening process, so it's a more collaborative process now than it used to be.

Whether that changes things, someone else will have to do the analysis in a few years' time and have a look at the cases since they made these organisational changes. But this was evidence of variability brought about because you had very different Commissioners making different decisions. And some people are actually risk averse, and some people are naturally bold. And this is not to say that the person screening in 54% was right and the person screening in 4% was wrong. That's a different question. But just to say that if people knew, that when their application was going in, they got 'this' Commissioner, they have a really much better chance of getting through to the review stage, than 'this' Commissioner that would cause concern, and that did cause concern.

Now, if you take those data and think about the implications of it, and then you think if you're setting up a Commission, how you avoid that happening, that's not so easy to do. Because you can have more rigorous guidelines on screening. But the problem is, there are already some guidelines and they're fairly rigorous. The problem really is that applications come in with not very much in them. And this goes back to the point I made earlier. If you have a legal representative, or if you have an organisation like APPEAL, or if you have an organisation like the Innocence Project in Cardiff helping you with your application, you've got a much better chance of getting your application into a full review. It doesn't inevitably mean it will be referred – of course it doesn't. But if you get into the review, you've got a chance of being referred. If you don't, you haven't got any chance at all. So, if you have a system now where we're coming up to a vast majority of applicants having no legal representation and coming in with applications which, if you looked at them, you'd say 'nothing doing there', it's really hard to find anything in many of these applications. Some of them simply say 'I'm innocent, I was stitched up'.

Now, some of them will be innocent, but many of them will not, and you really can't tell from a lot of those applications. So again, you've got this other layer of disadvantage, now, with austerity measures. And, I don't know how you would set up an institution like the



commission to screen those cases from the onset in a drastically different way, where there would not be that variation across cases.

**Baroness  
Stern**

Thank you. We're running out of time, regrettably, but Anne Owers has one quick question for you.

**Anne  
Owers**

You talked to quite a lot of CCRC Commissioners and staff members. What was your sense of the morale of people working in the Commission?

**Professor  
Carolyn  
Hoyle**

Well, measuring morale was not one of the questions I had, so I can't I can't speak with great authority – I will speak with small authority. It varied over time and depending on what was happening in the environment. So, when there are well-published criticisms of the Commission, as there has been, on and off, for the past decade, morale does dip because people feel that they're working very hard, under very difficult circumstances. They feel frustrated, and they feel they're just being criticised from outside by people who don't understand what they're doing, and the limitations on what they're doing.

So, there's frustration, for sure. One could turn that around and say they could do a better job of explaining all that, and then communications would be better. So, I think, at times, morale was low. At times there were clashes between Commissioners and Case Review Managers, which again affects the working culture. That said, by and large, it was a reasonably positive environment to be in. I spent a lot of time working at a desk alongside the Case Review Managers, and they got very excited about cases, they're very enthusiastic about cases. Sometimes they get criticised for not caring about the applicants or not caring whether they're innocent or not, but if you see what happens when one of their referrals is successful in the Court of Appeal, and they're watching the television and watching how things might unfold, or they're getting calls from people at the court, they're terribly excited and they're very proud, and morale goes up. Morale goes down when, of course, a case is referred, and it's not, where the conviction is upheld by the Court of Appeal and they feel frustrated because they think that this was a really great case. So, it varies.

**Anne  
Owers**

Do you think, given the volume of cases they do, that you can get case-hardened to the fact that most of these cases won't go anywhere?



**Professor  
Carolyn  
Hoyle**

Probably at screening, yes. I think once you have a Case Review Manager working on a particular case, they get much more involved in it and get to know the case exceptionally well. In the book, I've criticised the organisation for not communicating effectively with applicants. I think they sometimes forget that although they know they're waiting on a report and they can't do anything for two months, that the applicant doesn't know that. So again, I think that the applicant must think that they do nothing, or they don't care, and actually they often do things and they do care, but they're just not communicating that, or they're writing letters instead of picking up the phone, which has always frustrated me greatly. So, I think morale could be higher. But, I think, considering they're working in a strapped criminal justice institution, it's not just as bad as it might be.

**Baroness  
Stern**

Thank you very, very much. I'm sorry we have to draw it to a close, but as you know, time is short, and I know you've got to run away to catch a train.

So on behalf of all of us, can I thank you very much indeed. We really appreciated listening to you, and those who haven't read your book like me may now be prepared to read it, I'm sure they will, because it's a really splendid piece of work, so thank you very much indeed.

**Professor  
Carolyn  
Hoyle**

Thank you – thank you, all of you.

**Baroness  
Stern**

I'm now going to open discussions with Dr Dennis Eady, from the Cardiff University Law School Innocence Project. And he's been doing this sort of thing for over 25 years, and knows an enormous amount, so could I start by asking a question which will also involve you perhaps saying more about what you do, which is, having worked in this field for 25 years – that is, before the CCRC and after – have things changed? Have things changed for the better or for the worse, and do you think it is easier or harder, now, for a person whose conviction is not safe, to get it overturned? Has it got better or has it got worse, in your view, based on your very huge experience?

**Dr Dennis  
Eady**

I think, overall, the situation over whether it's easier or harder now is difficult to say, because it was always hard. Overall, I think the criminal justice situation, and consequently the nature of miscarriages of justice and the extent of miscarriages of justice, is actually far worse than when I started out. I hope it's correlation, rather than a cause.





We've been through a period, whether it's due to the CCRC is another question, because in a sense, if we want to get to the city of justice, we probably wouldn't start with the CCRC. The problem is what we've done over the years, We've lowered the standard of proof consistently, we've knocked out due process safeguards, we've become a much more convictionist kind of society. We've had moral panics around sex offences and joint enterprise. And that bar has got lower and lower and lower in terms of convicting people. At the other end, as we've heard, the Court of Appeal's bar has got higher and higher and higher. And the CCRC is stuck between the rock and the hard place, there.

I feel now, it was the time of the Birmingham Six that got me into all this. And incidentally, I hadn't worked in this area, most of my work was with people with disabilities in the past. But I got involved as a campaigner at that time. So, essentially, I still see myself as a campaigner, although I've been working in the university now for 10 years, but I think there's a greater need now for a Royal Commission than there was in 1991. I think things have got so bad, and so serious.

And while I agreed with 95% of what Carolyn was saying, and I agree it's an excellent study, it worries me that we might come away with a few recommendations for the CCRC to be a bit bolder and so on and so on, which, after all, the Justice Select Committee said in 2015, and the referral rate has plummeted since then. So, I think there's a danger that we might mess around on the periphery of things, which might make them better for a little while. But I think essentially, we've got to be more radical in the approach we take. Having said that, I think the key point that Carolyn made is about this issue of having to have fresh evidence.

If we could get round that, then that opens up any miscarriage of justice, that might then at least have a chance of getting corrected.

**Baroness  
Stern**

Thank you very much, that was remarkably clear and helpful. And I think I would like to reassure you, that while it's very early days, we're not just going to come out with a thing saying they should all be – a bit of this and a bit of that, this is not our agenda at all. So please don't feel anxious about that. I have to hand over to Anne.

**Anne  
Owers**

We raised the issue of the real possibility test with Carolyn, and she said she didn't think that was the major problem. Do you think that it – I think you said before that you think it undermines the objectives of the CCRC. Do you think the test should be changed?



**Dr Dennis Eady** Yes, I do. Yeah. I think it's not going to be *the* solution, but it would help. And I didn't quite understand Carolyn's point, because she said, 'okay, well the real possibility test *is* tied in with the need for new evidence'. However, there is an exceptional circumstances clause in there, which the CCRC have never used. And the only time they use it is to take in cases that haven't had an appeal. That clause could be used to take cases of 'lurking doubt' as it's sometimes called, for want of a better expression.

So, and we come across cases, we could probably, most people in the room, could probably reel off a whole load of classic cases that we know should be referred, and we know should be quashed. And that isn't happening. Some of the case have been referred before the Commission. As Carolyn pointed it out, they're extremely reluctant to refer again. So, the real problem is, I mean, if I was to become Prime Minister, my first act would be to make it a criminal offence to put the words 'real' and 'possibility' together in the same sentence.

Because when you go and have discussions with the Criminal Cases Review Commission, it is so frustrating trying to talk about issues which are essentially about people's lives, I mean, Bob Geldof - people are dying *now*. Miscarriages of justice *do* kill people. And what you get is this kind of bureaucratic response, well, blah blah blah, 'real possibility', 'real possibility'. And I know it's not their fault entirely. What I've been saying to the CCRC for a long time is, 'well, we understand your position. But, please, why don't you go back to the government and say what your position is? Say how stuck you are. Say how problematic the Court of Appeal is.' But unfortunately, there's always been this sort of thing, they seem to accept it. Even when the CCRC gave evidence to the Justice Committee in 2015, it was more or less 'well, everything's really pretty much okay', and it isn't.

**Anne Owers** I think you also said that, irrespective of what the test is, that the CCRC is too cautious in its interpretation of the test. I suppose, if you look at the other point of view, if that *is* the test, if they were less cautious, might they not just be raising false hopes in people whose cases they were referring?

**Dr Dennis Eady** Yeah, we have the same problem with the Innocence Project, when we take on cases. We always say to people, 'look, try and get a lawyer if you can – don't come to us'. You know, even that's a bit disingenuous now, because there's no legal aid, they won't get a lawyer, really. So, and we worry constantly, are we giving people false hope? But, one of our, not one of our clients, but a miscarriage



of justice victim, when I was having that conversation with him said, 'well, look, in my position, false hope is better than no hope.'

**Erwin  
James**

Can I just say, as someone who was in prison for a long time, there's no such thing as false hope. There's only hope.

**Dr Dennis  
Eady**

Yes, well, there's no such thing as a real possibility, there's only ever a possibility [inaudible]. The other point on that is that, if the CCRC were pushing, if they were referring more cases, yes, they might get rejected more and more, but it becomes more public and you can see then what's happening here – that the CCRC are making ethical decisions about cases, they're referring to the Court of Appeal, and they're getting knocked back.

And maybe the media will pick that up and maybe the government will eventually do something about it. So I think, yes, can I give you a quote from Carolyn's book – and this is a Commissioner speaking, 'I've seen three or four cases, probably, over ten years', you haven't been looking very hard, in my opinion, as I've seen a lot more than that in the last ten years, 'where I've been genuinely amazed that the jury has convicted, and I've been, really, a bit upset, that we can't do anything about it.' No, that is not a position. It's not an ethical position, is it? What an appalling position for somebody to be in, for someone to have to sit there and say that. We probably do the same thing at the Innocence Project, at the end of the day, because we can't do anything about it either. It's a terrible situation for people to be in. And at the end of the day, there are innocent people whose cases will not be overturned because of the current system. And there's quite a lot of them. And some of them are very obvious.

The words there 'genuinely amazed the jury have convicted'. We've looked at quite a few cases. Many of our cases are very ambiguous, but you get some which, you look at it, and you think, how on earth did this person get charged, how on earth did they get through the CPS, how on earth did they get past the judge, how did they get through the jury, so they haven't got any *new* evidence because there was no evidence in the first place. There's a classic irony – the less evidence against you, the more difficult it is to challenge.

**Anne  
Owers**

I mean, how *could* you create a system in which, where you looked at it and you just thought, actually, the jury got it wrong. How can you create a system where you can provide redress in that kind of case?

**Dr Dennis  
Eady**

Well, the Court of Appeal have said themselves, at the end of the Justice Select Committee, when the government was going to suggest that there should be, perhaps, some inquiry, possibly some



reform of the Court of Appeal. Lord Judge intervened – because this was *about* the issue of lurking doubt and ‘do you need fresh evidence’ – Lord Judge intervened and said ‘no, you don’t need to reform us’, it’s funny you should say that, really, ‘you don’t need to reform us because we’re quite happy to look at cases where we feel the jury made a decision in defiance of the evidence. We’re quite happy to look at that’. And that, in fact, was the reason that the government then listened to Lord Judge, as opposed to all the democratic process that had gone on before, and said, ‘well, we don’t feel there’s need for any change, because Lord Judge has assured us of this’.

So, I mean, having a system where you could have – lurking doubt is just the only word we have for it, really – situations where there isn’t fresh evidence, but you look at the case and you think, well, the jury’s got it wrong. Juries are not infallible. It’s an absurd act of doublethink we have. We all know that juries make mistakes, will get it wrong. We all know that investigations go wrong. We all know that trial processes are adversarial. The jury doesn’t hear all the evidence, it hears a sort of carefully choreographed two sets of ‘the truth’. So, things will go wrong, and you won’t always be able to find new evidence. We’ve got a number of cases which I’d say fall into that category at the moment. People who have no criminal record, perfectly decent law-abiding people, who are just kind of stitched up through this strange case construction process, and probably the ‘no smoke without fire’, I’d say, kind of syndrome [inaudible]. And there’s nothing you can do about it.

We’re trying to get one, not a CCRC case, but through the courts at the moment, and the lawyers are saying ‘I don’t think this is appeal ready’, but, you know, it’s just *obvious* he didn’t do it.

**Dr Philip Joseph** Just following on from that point, you’ve identified the obstacle of fresh evidence in order to mount another appeal. So just again, I mean, what do you think is the way around this problem? You’ve identified the need to get round the fresh evidence problem. But what do you think, how should that be done, in your view?

**Dr Dennis Eady** Well, I mean, changing the test is a start. It at least gives the right message.

**Baroness Stern** What would it say if you changed it?



**Dr Dennis Eady**

It would say that, you know, exactly what the organisation JUSTICE suggested in 1994, and what the Royal Commission suggested: that there should be an arguable case that there was a miscarriage of justice. And the Royal Commission had said, in fact, that if it was felt there was a miscarriage of justice for *whatever* reason, whether or not there's fresh evidence, the case should be referred. But I think, really, something has to be done to change the approach of the Court of Appeal. And perhaps the only way to do that, as we suggest in our submission, and was in fact suggested by some observers at the time of the Royal Commission, perhaps the CCRC should in fact given more power, rather than less. Perhaps they should be allowed to quash some convictions. If there are convictions which are, like the quote I gave you, where they feel 'this is wrong', where they want to refer it but they can't, they should have the power at least to recommend to the Court of Appeal that it should be quashed, or in fact to quash it themselves. In some ways, the only way to deal with the Court of Appeal, I'm afraid, is to take some of their power away.

Because people have been trying to change the Court of Appeal since about 1907, when it was founded.

**Baroness Stern**

Power to do what?

**Dr Dennis Eady**

Well, their complete control of the situation. The Court of Appeal could hear appeals from people have been rejected by the CCRC when the CCRC are making the decision. I mean, when I come out with ideas, people say, look, this is never gonna happen, and they're probably right. But I think either that or there needs to be some sort of legislative change which actually imposes on the Court of Appeal the obligation to look at cases where there may for whatever reason be a miscarriage of justice, though that's rather vague. The other problem with the Court of Appeal is it's completely, or almost completely, unaccountable. There's no way of – another suggestion perhaps is that there should be an easier access to the Supreme Court as a kind of appeal from the Court of Appeal. At the moment it's only really on very, wider issues, that that happens. So I think there are, what must be looked at are these various options, there are limited options. But in some way or other I think you have to take away the power of the Court of Appeal, to some extent, and to make them more accountable. And if that means giving the CCRC more power, then so be it.

**Baroness Stern**

To whom, the Supreme Court? Accountable to...?



**Dr Dennis  
Eady**

Well, accountable to somebody. At the moment, they're not accountable to anybody, are they. And it could be accountable to, perhaps to an independent body, maybe to the Supreme Court, although that's largely the same thing. So perhaps it's a case of taking some of the responsibility away in terms of appeals. Because their track record isn't very good. I'm pretty cautious of saying this, because they've been very polite about a couple of cases that we've taken to them: they've said nice things about us, and I feel bad about this. But there needs to be some way of getting round this problem, and if that means somebody else doing that part of the job – the only organisation at the moment is the CCRC – then maybe they should have that power to do that.

And perhaps, with that, they would become a different organisation. One that is more concerned about, actually ... because why this all came about, you know, the idea which we were all very excited about, when it came about, was that this would actually prevent miscarriages of justice, at least the obvious ones. Initially, it did try, to some extent, But things have got much, much worse. And the referral rate right now is just shocking. About 1% - a snowball's chance in hell. And we're working with students, both on CCRC and non-CCRC cases. And, I think if we hadn't had a couple of exonerations, which we were fortunate enough to get, I wonder whether we could still keep going, because you can't keep teaching students, 'this is how you make an application', 'this is how you create an appeal', if it doesn't work.

It's like teaching somebody a medical procedure that doesn't work. Even if we didn't go to the fresh evidence thing, one thing that is, I think everybody feels is unfair, even people who, more or less, like the current system, is this thing where you can't use evidence that was available at the time of the trial.

**Erwin  
James**

Can I just say something? I helped somebody in prison who, I was convinced, was innocent. But I found evidence in his boxes of stuff, that clearly showed that it should have been presented at his trial, but it wasn't. When we went to the CCRC, they just wouldn't look at it, because it was available at the time of his trial, it wasn't fresh evidence. But it was evidence that totally undermined the prosecution case. But because it was available at the time of the trial, and for very odd reasons wasn't presented by a lawyer, and I found that really absurd, you know, because it wasn't fresh evidence, it was evidence that was available. But it was evidence that was relevant, and that





undermined the prosecution case. But because it was so many years later, it was actually Vera Baird, actually, who knocked it back.

Isn't that something, that the CCRC should be able to bypass, and say 'what is the evidence that shows this person is innocent or guilty or this conviction is unsafe'. If there's evidence there that was available at the trial but wasn't presented for whatever reason, but now, we can look at it, because we're independent, we can say 'hang on a minute, if this had been presented, it would've undermined the case'. Isn't that a problem in this procedure?

**Dr Dennis Eady** Absolutely. It's appalling, and it's so unfair. And the CCRC, the way they word it is 'you could have used this at the time.' Not 'Your lawyers could have used it' – you could have used it at the time. I like to draw medical analogies with this. It's like you've had an operation. It's not gone very well. So you go, 'this hasn't gone very well, I need some more treatment' – 'oh no, you've had the operation, you've had a competent surgeon, you can't have another one. You could have used this other method, it was available at the time.'

**Erwin James** That's something that we should possibly, I don't know, recommend, or something, something we should highlight, the fact that, for the CCRC, perhaps not the Court of Appeal, but for certainly the CCRC, If there's evidence that demonstrates a conviction is unsafe, regardless of whether it was available at trial or wasn't used, whatever, anything that shows a conviction may be unsafe should be able to be looked at by the CCRC. I'm really pleased that you agree with that, because that's something that's really got me for years.

**Dr Dennis Eady** That's a very good example, and another good example – we have police experts who work with us, and they found some material which, probably no lawyer would ever find, because, you know, it's not their field, and even that, the CCRC said 'well, you could have used that at the time.' Well, they couldn't because no lawyer, you can't mount a defence on the basis that the police investigation is corrupt, it's found out later. It's not available at the time, generally.

**Erwin James** Thank you.

**Dr Philip Joseph** Yes, the next question is, in your written evidence, you criticise the thoroughness of the CCRC investigations, particularly with sex offence cases, and those involving alleged police misconduct. Can you talk us through what you believe to be deficient with those investigations by the CCRC, so sexual offences and police misconduct?



Dr Dennis  
Eady

Sex offences, it often *is* police misconduct, in fact. That's often the issue there. So, sometimes it's issues at trial, issues like missing documents, that sort of thing, and it's very historical. Then there's the issue of credibility checks, which they seem to have, they used to do them automatically, they've stopped doing them, and we suggest they should do that pretty much in every case. Because the only defence a person, if you're accused of something from 20 years ago, you've got no defence at all, really, apart from the credibility of the accuser, who you're not allowed to attack in court. And very rarely are they cross-examined rigorously, so those credibility checks are crucial. Often in the sex offences, it's perhaps the policing, but there's a problem there because often there's so little evidence that there's almost nothing you can do in terms of the investigations with the police, I mean, or not just the police, with other witnesses and experts as well.

I mean, look at this. We've had 14 completed cases with the CCRC. We've got another five with them. In only one of those did they actually do any investigation that we suggested, apart from police investigations. And that was a case called Dwaine George, which was actually referred, and it was quashed. So, in terms of the police investigations, in a few of those, they have, three or four cases they have looked at that, they have gone back to the police. It's always been a little bit, sort of, half-hearted, in a sense. So, documents are missing. A senior investigator's policy file is missing. It's not the on the HOLMES computer. No, everything should be on the HOLMES computer: why isn't it on the HOLMES computer? Well, it's just not there, they can't find it.

You may have seen Louise Shorter's programme *Murder at the Station*. It ends, the last scene is a CCRC Commissioner saying, 'well the CCTV, which might exonerate this guy, has gone missing, so there's nothing we can do about it. It's just not acceptable, is it. And I think, in our Open Justice Charter, which we worked with APPEAL on, we suggested that where key documents go missing, then perhaps that should be a ground of appeal in itself. The other suggestion I have is that police storerooms should not be built on flood plains, because the number of them get flooded is incredible.

The investigation of the police is usually not very thorough, is not very penetrating. They go and talk to them, and they get fobbed off, basically, a lot of time, in my view. And similarly, perhaps, with fair trials and with lawyer incompetence. Those are two things, the police malpractice or anomalies, whatever you want to call it, and lawyer incompetence, are two things that, again, in the book, it is made clear,



those are things that the CCRC, because of the Court of Appeal, is not very keen to refer stuff on.

And they'll only take notice of police malpractice, and lawyer incompetence, if it impacts on the safety of the conviction. Now, how do you know it hasn't? You don't. The police investigations are absolutely crucial. And you can't say that these anomalies would not have impacted on the conviction, or on the safety of the conviction. And I'm not suggesting, you know, because somebody hasn't signed something, more: things are jumbled up, things are missing, things don't make sense, messages are, numbers don't match up with the unused schedule, and so on. And, when you think back to the PACE Act or the old famous cases which were built on confessions in custody, those have largely stopped, now. You don't get much of that now. And the reason you get much of it is partly because of the PACE Act. But it's also because in the early 90s, the Court of Appeal was prepared to do something about it. It was prepared to quash those convictions.

So, the message going back to the police is, 'well, you're not going to get away with this, in the long run.' What we're doing now, we're actually saying to the police, and to lawyers, because in the case of *R v Day*, it actually says incompetence in itself is not sufficient, as to be... imagine that in the medical profession. And the police issues, you know, if you're going to ignore those things and say, okay, there was all this, and all that, but it won't have impacted on the safety of the conviction, then people are just going to carry on doing it. And of course, you don't know that they haven't impacted on safety of the conviction, anyway.

**Dr Philip Joseph**

Then the other question was, really, that you state that the CCRC applicants are left in a Catch-22 situation, because the CCRC will not use its section 17 powers to obtain material unless they're persuaded that the material has a real prospect of affecting the safety of the conviction. Can you just expand on that a little bit, on that Catch-22?

**Dr Dennis Eady**

Yes. Well, to put in the context more widely, the Supreme Court decision in *Nunn, R v Nunn*, was the kind of prevailing thing about post-trial disclosure. And what it says, essentially, is that there's no right to post-trial disclosure. But it also says, if an issue comes to light, then disclosure should be made. Now, an issue doesn't walk through the door and say 'hello, I'm new evidence'. You have to look for it. You have to go on fishing expeditions to catch fish. So there's a Catch-22 there. You can't get disclosure from anybody unless you almost already know what's going to happen with it. And the CCRC,



I think, partly adopted that approach and what *Nunn* also said – I don't know whether they said it naively or cynically – they said, 'well, the CCRC is the body which has the power for disclosure, so you should use them'. But of course, that's another Catch-22, because until you've lost your first appeal, you can't go to the CCRC anyway, so you can't get any evidence to go for your first appeal to get to the CCRC to get the disclosure you needed for your first appeal.

**Erwin James** So, information sharing, Dr Eady, information sharing. I think, something which I think would be critical, is that once your Innocence Project submits an application to the CCRC, how much collaboration is there between you and the CCRC on a case? Does the CCRC take advantage of the manpower that you can offer through your student volunteers? Do they embrace you and say, 'wow, you have extra manpower, let's use these guys, these bright young things'?

**Dr Dennis Eady** No, once it's gone to the CCRC, that's it, really, there's no –

**Erwin James** There's no, sort of, collaboration?

**Dr Dennis Eady** No, none at all. Our police expert has actually offered his services, and they've turned him down. Des Thomas, who would love to give evidence to you.

**Erwin James** That does seem to be a failing, if I'm honest, you'd think they would get all the resources. Resources are limited at the CCRC, we know that from this evidence: surely they would embrace more assistance?

**Dr Dennis Eady** I can see there are complexities with that, particularly with students, but when a police expert is perhaps offering to go and explain more about what he's said in his report then... I think there is a stakeholders' group, and those little things, there is a hint of improvement. I mean, a Case Review Manager has actually agreed to go with me to meet a client, for the first time ever – none of our clients have ever met a Case Review Manager before.

**Erwin James** So, off the back of that, just how much material obtained by the CCRC during the course of the review is shared with you? Are you provided with that? Are you provided with material to assist the CCRC and properly scrutinise what they're doing? Do they sort of share 'we've got this', and -

**Dr Dennis Eady** No.



**Erwin James** 'Can you check that we're doing this right?'

**Dr Dennis Eady** No.

**Erwin James** Nothing?

**Dr Dennis Eady** Not at all. Again, in the stakeholders meeting it was brought up about 'could people, particularly the applicant, be given more information'? What they're given now is no information, in slightly more words. So the letters have been a bit longer but they're not really... they might say, 'we're getting information off so-and-so and so-and-so', but they don't tell you what that information is.

**Erwin James** Thank you very much.

**Baroness Stern** Unless anybody is going to object, I've got one last question to ask. It's very interesting what you've said, actually, about how it's changed, and being reasonably in the older age groups I can see that it was all different 25 years ago. And people actually minded a lot. And there was a lot in the newspapers. And it was felt, shock horror, miscarriages, this great bad thing. And listening to you, I think, I can see that that seems to have gone.

So, can I first of all ask you if you think that's right if actually, there was a different culture about this, and a different public view about this, and that it's no longer regarded as something people are interested in, and that maybe we ought to do something about that? Do you have a comment on that?

**Dr Dennis Eady** Yes, it's an interesting one, because I mean, the advantage of the old system was you could pound away at the Home Secretary with massive publicity and so on until they eventually cracked. But of course, not everybody could do that now. There are simply just too many cases to have that approach. The media, of course, there were great programmes, Trial and Error, and Rough Justice, they're no longer considered serial television. The media is completely splintered, of course, with the internet and so on.



But there are, you know, the Making a Murderer serial, these sort of Netflix-type programmes. And they can be slightly different in that they perhaps slightly less, I mean, if you came away from a Rough Justice programme not believing the person to be innocent, then you're probably pretty insensitive, but you can come away from those still not knowing, so it has sort of changed. And the main thing is, we're aware now that there are so many cases, many of which may or may not be 'meritorious', as they say. But so many cases that the old system just almost wouldn't function now, really.

But it did function for the, a few sort of 'classic' cases, many of which are not now getting the attention they deserve.

Just one other point I'd just like to put on record, which I think would be a positive move, and quite an easy one for the CCRC to take on. And that is to be prepared to review the decision of the single judge. The first stage of the appeal is the single judge, of course. Because, if a person fails at that stage, and doesn't have pro bono lawyers, then they've wiped out everything they've put in at that stage, and the CCRC will not look at it then. The exoneration we had just before Christmas was a classic example of that, because we went to a single judge with a very strong case. The single judge made an outrageous judgment and rejected it all. Fortunately, we had pro bono barristers willing to take it to the full court, who then changed their mind, and it was eventually quashed. Had we not had barristers working for nothing, plus five psychologists, and an innocence project, and so on, two medical experts, all working for nothing. Had we not had that, then he would have failed at the single judge stage, and he would have got absolutely nowhere, because he'd used up all his evidence. The CCRC would have gone 'sorry, the Court of Appeal has rejected all this evidence'.

So that is something that could change overnight, really, and say, look, we're going to look at those issues and be prepared to challenge the single judge decisions.

