**Response to Call for Evidence by the Commission on Justice in Wales**

**Submitted by Swansea Miscarriage of Justice Project**

**28 June 2018**

1. The Miscarriage of Justice Project is a project run by the Swansea University Legal Centre, which is located within the Hillary Rodham Clinton School of Law, at Swansea University. It is our policy to only give assistance to clients at the post-conviction stage when they have exhausted all their appeals and there is potentially some doubt over the safety of the conviction. We only work on cases where there are some *prima facie* grounds for thinking that the client may be factually innocent.

2. The project has been running since March 2017 and in that time has worked on two cases referred to us by Inside Justice and the Centre for Criminal Appeals. Our referral partners support us with expertise we can draw on from practising solicitors and barristers; forensic scientists of various specialisms; specialists with expertise in police investigations; and journalists. So far, the project has given experience to over seventy students.

3. This submission is relevant to the *Criminal justice, including policing, probation and prisons* work stream.

4. Mark George QC has recently described the criminal justice system in England and Wales as a "perfect storm" for miscarriages of justice. He provided three reasons. Firstly, that changes in the law have undercut the defence rights at trial; secondly, a culture shift towards believing the victim; and thirdly, huge funding cuts. The recent disclosure scandals in cases such as Liam Allan have also exposed deep rooted systemic flaws. With this backdrop, there is certainly a strong case for reviewing the provision of criminal justice in Wales.

5. Our experience with the Project has shown that there are significant and growing concerns surrounding the effectiveness of the criminal appeal system in England and Wales. This is particularly so with regard to the Criminal Cases Review Commission (CCRC) as there is mounting evidence that this body is struggling to cope with the volume of cases it receives, and concerns have been widely expressed that it is not properly addressing the problem of wrongful conviction

6. The number of cases that the CCRC refers to the Court of Appeal is at an all-time low. Between 2016 and 2017 the CCRC referred only 0.77% of cases they received, which was 12 cases out of 1,563 cases considered. In the previous year (2015-2016) the referral rate was just over 1% higher but this still only meant that 33 out of 1797 were referred (1.84%). Historically, in years prior to this, the CCRC have had a referral rate of around 3% of cases. However, even this has been cited as comparably low with the referral rate from the Scottish CCRC, which was reported to refer approximately 7% of cases in 2015.[1] The most recent statistics on the SCCRC website suggest that from 1st April 2015-31st March 2016 they received 150 applications. It is certainly arguable that, even taking into account the substantially different resources that will be allocated for the CCRC and SCCRC, the latter's case load is significantly more manageable as a basis for approaching case reviews.

[1] Justice Select Committee's Twelfth Report of Session 2014-15: Criminal Cases Review Commission p.8

7. There has also been criticism of the types of cases the CCRC in England and Wales are prioritising, and questions have been raised over whether the commission is boosting its referral rate by concentrating its efforts on investigating less serious convictions. This has raised potential concerns that they are directing much needed resources away from their investigation into serious convictions. Evidence given to the Justice Select Committee (JSC) in 2015 questioned whether the CCRC ought to have a narrower remit as it currently deals with both conviction and sentence appeals from the Magistrates Court and the Crown Court. It was recommended that the CCRC should exercise discretion over whether to consider appeals from magistrates' courts or sentence appeals. However, the recommendations of the JSC 2015 were never acted upon and it could be argued that the CCRC continues to focus its concentration on relatively minor convictions. Of the 12 convictions referred to the Court of Appeal in 2016/2017, three of those could be seen as more 'minor' convictions, including one for failure to provide information as to the identity of a driver and two for cultivation of cannabis; a further two referred were sentence appeals. The remaining seven referred involved: three convictions for murder, two convictions for rape, one of sexual assault, and one for possession of a Class A drug with intent to supply. It is not suggested that sentence appeals or appeals from the Magistrates Court are any less important, but there is no doubt that investigations into cases involving serious convictions require significant resource, and it is questionable whether the Commission is adequately using its resources in serious cases.

8. Therefore, it is suggested that consideration might be given to whether a separate body to deal with post-conviction appeals might be called for in Wales. As indicated above, Scotland has its own Criminal Cases Review Commission, which does not appear to attract the same level of criticism as the CCRC for England and Wales. Clearly, there is a fundamental difference in that Scotland has its own court system and thus a separate body is necessary, whereas in the current structure, criminal appeals from Wales will still be referred to the Court of Appeal for England and Wales. However, arguably, the potential for creating an independent Welsh equivalent of the CCRC should not be disregarded simply because the receiving court would be the same.

9. As indicated above, the CCRC in England Wales dealt with over 1,500 cases last year, and over 1,700 the previous year. There is no question that resources are stretched at the Commission. In their 2016/2017 report, the CCRC explained that they had reduced the waiting time for a substantive review (from application to allocation) from 55 weeks to 48 weeks for liberty cases and from 30 weeks to 22 weeks for those in custody.[2] This is just the waiting time to have the case reviewed, and from experience, case reviews usually take somewhere between 1-3 years. Therefore, there is certainly a case for considering whether a Welsh equivalent of the Criminal Cases Review Commission might have a role to play in streamlining the post-conviction appeal process for Welsh appellants, thereby providing better access to justice.

10. When considering whether a Welsh equivalent of the CCRC might be established, it is worth thinking about what form this might take. There has been significant criticism of the statutory test for referrals applied by the CCRC in England and Wales. Section 13 Criminal Appeal Act 1995 stipulates that the CCRC can refer a case to the Court of Appeal when they

[2] https://s3-eu-west-2.amazonaws.com/ccrc-prod-storage-1jdn5d1f6iq1l/uploads/2015/01/1096_WLT_Criminal-Cases-Review-AR_WebAccessibleM-1.pdf p.12 accessed on 28 June 2018

think it is a "real possibility" that the conviction, verdict or sentence would not be upheld were the reference made. There has been academic criticism directed at the test for undermining the independence of the CCRC and preventing them from challenging the court.[3] There has been a preference expressed for the Scottish CCRC statutory test, which allows them to refer cases where they conclude that "a miscarriage of justice may have occurred."[4] This does however mirror the test also applied by the High Court in Scotland[5] and therefore, in this sense, operates on a similar basis to the CCRC's test by utilising the approach of court where the reference is made.

11. In 2015 the Justice Select Committee recommended no change to the current test for the CCRC in England and Wales but did conclude that the CCRC "should be willing to err on the side of making a referral."[6] They also commented that "The Commission should definitely never fear disagreeing with, or being rebuked by, the Court of Appeal. If a bolder approach leads to five more failed appeals but one additional miscarriage being corrected, then that is of clear benefit."[7] It is often argued in defence of the "real possibility" test that there is no point encouraging the Commission to refer cases that will inevitably fail and thus there needs to be some congruence between the tests applied by the CCRC and the Court of Appeal. However, arguably, even if the CCRC statutory test mirrored that of the Court of Appeal by asking whether they thought the conviction might be "unsafe," this would still potentially enable more flexibility than by directly requiring the commission to second-guess the Court of Appeal's decision making. Thus, if a Welsh equivalent CCRC was under consideration, there ought to be discussion of whether a different statutory referral test might be more appropriate, although it is recognised that this might be difficult to sanction.

12. **Therefore, it is recommended that there is consideration given to whether the current criminal appeal structure in England and Wales is providing sufficient access to justice for Welsh appellants. The possibility of creating a Welsh CCRC is put forward.** Although criticisms of the current CCRC formation have been raised, arguably there would still be benefits to creating a Welsh jurisdiction CCRC even if it must exist in the same form. Provided it was appropriately resourced, there would be significant benefit to removing Welsh appellants from the jurisdiction of the current CCRC in having the potential to reduce waiting times and to concentrate resources on cases as is deemed appropriate.

13. **We support calls which have previously been made jointly by the Centre for Criminal Appeals and the Cardiff Innocence Project for an independent disclosure agency.**[8] In the first fifteen months of running the project we are already experiencing delays in getting documentation from the Crown Prosecution Service which is an unnecessary cost to the taxpayer and wasteful of our time. University projects of this nature usually have incomplete documentation. In one case, there was, on the basis of the documentation we had, a body of evidence to suggest that an important document had not been disclosed at trial. There was lengthy correspondence between ourselves and the Crown Prosecution Service

[3] See for example, M Naughton, 'The Importance of Innocence for the Criminal Justice System.' in Naughton, M. (ed.) The Criminal Cases Review Commission – Hope for the Innocent? (Palgrave Macmillan 2009)
[4] http://www.sccrc.co.uk/legislative-framework
[5] Justice Select Committee's Twelfth Report of Session 2014-15: Criminal Cases Review Commission. p.8
[6] Justice Select Committee's Twelfth Report of Session 2014-15: Criminal Cases Review Commission p.12
[7] Justice Select Committee's Twelfth Report of Session 2014-15: Criminal Cases Review Commission p.12
[8] Open Justice Initiative http://www.criminalappeals.org.uk/open-justice/

before we had the document released to us, which had, in fact, been disclosed at trial. This could have been avoided.

14. Recent high-profile cases in the media, such as the case of Liam Allan, have shown huge failings in disclosure at the pre-trial stage. As there must be some doubt about the scale of the problem and whether or not the problem is confined to sex offence cases an independent disclosure agency will restore public confidence in the disclosure system at pre and post-trial stages.

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