The Challenges of Historical Allegations of Past Sexual Abuse from the perspective of the Criminal Cases Review Commission (CCRC)

A paper by John Weeden CB – CCRC Commissioner.

Miscarriages of justice, in the sense of an innocent person being convicted, will always exist. No system of criminal justice is sophisticated enough to ensure that all errors are picked up either at trial or by a single appeal, however hard you try. Nearly 1000 people a year write to us to say they have been wrongly convicted or sentenced; undoubtedly some have been, and undoubtedly some are simply trying it on, as they have nothing to lose. Our role at the CCRC is to try to find the genuine miscarriages and to refer them back to the appeal court. In cases of historic sexual abuse our job is that much more difficult.

For those of you who may not be entirely familiar with the background to the Criminal Cases Review Commission, and I make no apology for explaining where we come from and what we do as we regularly encounter lawyers who know nothing about us, we rose from the ashes of the Birmingham 6 and Guildford 4 cases in the mid 1990s. Lord Runciman was appointed to lead a Royal Commission to investigate what had gone wrong and to make recommendations. He found that that the Home Secretary could not properly be the right person to decide on whether cases should be referred back - after all he was responsible for the police! The small Home Office department then dealing with such cases had been notoriously slow and only referred 4 or 5 cases a year for a further appeal. It was reactive only to points put to it. It did not go out to investigate or consciously look for grounds of appeal.

The CCRC was set up by statute, the Criminal Appeal Act 1995, as a Non Departmental Public Body, and started work in April 1997, inheriting over 200

outstanding cases from the Home office. Our jurisdiction covers England, Wales and Northern Ireland. There is a Scottish CCRC and a Norwegian one, but no others. We have the statutory power to refer cases back to the Court of Appeal. The Court then has to hear the case. We have no power ourselves to quash convictions or reduce sentences – we are simply a gateway, the last chance saloon – to get back to the appeal court again. We are not even a party to the proceedings in the appeal court after a referral; it is for the individual and his legal team to argue the case. There is no option for the Court to refuse leave on the grounds that we have identified, but if the appellant wants to argue additional points on which we have not referred the case, the leave of the court is required. Our job is done when we refer.

We have an average of 900 to 1000 applications a year and have now dealt with nearly 11000 cases. But we refer only a small amount, 4% to 5%. About 70% of the cases we do send back to the Court of Appeal will be successful from the individual's viewpoint. This figure has been remarkably constant year on year and we think that is probably about right, but some people argue that the rate should be lower and that we should refer more.

The CCRC is funded by the Ministry of Justice (to the tune of less than £8m per annum, which we think is pretty good value), although our budget has been cut year on year and will continue to be so. Ironically, a few hundred thousand pounds more would virtually eliminate our backlog. We are located in Birmingham, physically away from the Ministry of Justice and the Home Office in London. There is no question of any influence from any government department in any of the casework we do.

There are 11 Commissioners and 90 staff. Commissioners make all the decisions and cases are investigated by case review managers, or "CRMs": a decision to turn a case down can be made by a single Commissioner, a decision to refer a case must be made by a committee of at least 3 Commissioners. A vital part of our armoury is the wide power to obtain material as part of our investigations under section 17 of the

Act. We have the right to obtain any document held by a public body. Of course, we may want to see the defence files and our applicant will normally give us permission to do so, but in addition we can use our special powers to obtain the full police files with any Holmes disks, the prosecutor's files, the Crown Court and the Court of Appeal files, any social services files relating to complainants in sex cases, and indeed copies of the complainant's claims for compensation from the Criminal Injuries Compensation Authority or the local authority responsible for a Care Home. We can get details of any previous or subsequent complaints made to the police by the witnesses in question, and check on any criminal records.

We cannot yet obtain information held by private bodies, such as private companies (or in this context privately run Care Homes), but we are hoping in due course to obtain the legal right to do so, probably on the basis of having to apply for a judge's order, which is what the Scottish CCRC can do already. We also have the statutory power to instigate a special police investigation, under our general control, when it is important that serving police officers carry out the interviews – such as when a caution is required.

The "test" we apply when deciding whether or not to refer a case is also in the statute – we have to be satisfied <u>that there is a real possibility that the conviction will be overturned or the sentence reduced</u>. As the Court of Appeal have commented, not very helpfully, this standard is somewhere between a bare possibility and a racing certainty! Our test is to predict the decision of another body, the appeal court, whose test in turn is simply the "safety" of the conviction. And the statute requires there to be new evidence or new argument which was not used at trial or at the first appeal. It is no use submitting appeal grounds to us all over again. We can also deal with cases which have never been appealed, but on those occasions we are obliged to find exceptional circumstances, as well as new evidence or argument, before we can refer.

Historic Care Home cases have, inevitably, thrown up particular problems for us. As we know, such cases by definition involve complainants, by the time of trial in their 30s and 40s, telling the court about sexual abuse in the Homes when they were still children, some not even teenagers. The difficulty for the defendants, at least for those who are innocent (and who are usually in their 60s or 70s and retired, often after a lifetime of work devoted to looking after children), is that there is usually little evidence they can rely on to show that the complainants are wrong. Sometimes the defendant cannot even remember the child in question: often colleagues of the time who might have been able to assist have died and the varied records of the home, which might have shown when staff were on leave or when a particular trip took place, have been long since destroyed under standard destruction policies. Additionally, the majority of complainants, all of whom had had by definition a poor start to their lives, already have numerous previous convictions as adults, often including convictions for dishonesty. Usually the previous record of the complainant has been before the jury and where juries have convicted despite knowing of the potential unreliability of the complainants, perhaps ironically it can make it that much harder for the CCRC to find sufficiently compelling evidence to reach that real possibility.

Inevitably, because of their sexual nature, virtually all the incidents giving rise to the charges occur in a private setting. The most important evidence of all will be from the complainant and the defendant – who is to be believed? If the complainant is convincing, and the defendant can do little more than deny it, the jury may well convict despite knowing of the complainant's previous convictions and the defendant's good character. I hope the jury are right most of time; just because you have had an underprivileged upbringing and have previous convictions does not for one moment mean that you were not abused and, where they have occurred, these are particularly unpleasant crimes. And of course, as the Court of Appeal regularly reminds us, the jury had the great advantage of seeing and hearing the witnesses give evidence.

Furthermore it is commonplace, in care homes cases, for there to be more than one complainant alleging abuse against a single defendant, often several of them. Their evidence is usually allowed to be treated as similar fact evidence, and this can be a powerful tool for the prosecution and may sometimes be the final part of the jigsaw that convinces a jury that a defendant's denials just cannot be true. The defence will allege collusion and this is a matter on which the jury will be directed by the judge. If it can be shown that there was no chance of collusion the case is much stronger, for obvious reasons.

Now in some of the earlier cases investigated it has been possible to show, usually in the form of letters written to potential witnesses by the police, that compensation may have been mentioned before a witness statement is made, and this immediately casts doubt on the reliability of that witness's evidence. However, as we have heard, police procedures were tightened up with the ACPO guidelines and there is usually no evidence from the police side that compensation was discussed before a statement was made. Indeed the police are warned, quite properly, not to enter in to any such discussions.

This brings me on to police evidence gathering techniques, or the much criticised "trawling". It is obvious to me that if police receive a complaint they are under a duty to visit others who were there at the time, whether they are dealing with a Care Home or domestic setting. It is perfectly understandable that this sometimes produces further complaints and that they too should be followed up. But what do the police actually say to the complainant when they take the statement? Do they convince the witness, either deliberately or otherwise, that they can remember certain events that happened to them when they did not? Or that they <u>do</u> remember seeing another child in tears on a particular occasion. Worse still – is the possibility of compensation mentioned improperly to encourage a complaint in the first place - or the exaggeration of an incident? We normally cannot know, for if these possibilities are put at trial in cross-examination, they are likely to be denied by those involved. The issue has to be decided on the available evidence.

An example of where things may well have gone wrong is in a case we dealt with a few years ago. A 40 page statement of complaint was made in relation to one man over several sessions with the police interviewer, and yet a year later the same person made more serious allegations against another carer at the same home. The second man had not been mentioned in the first statement until two further police visits to the complainant had been made. Now quite how had the police talked to her about that second statement? Had they led her along, convinced her it must have happened? Or was the woman in question genuinely reluctant to talk about issues that had scarred her for life, and gently persuaded by sympathetic police officers to make sure that her abusers were brought to trial? We shall never know, but it would have been very helpful to have some kind of independent record of those various interviews.

I know that it has been suggested that the only solution would be for an audio, or even a video, recording of the statement taking to be made. After all, if the complaint had been made when the individual was still a child, rather than thirty years later, then a video would have been used. Such recordings, in historical cases, obviously would give some assurance that the matter was dealt with fairly. But could such steps be justified? There would obviously be greater expense and inconvenience to the police if this was done for all historical care home and domestic sexual abuse cases, and it might well put a witness off dealing with such a sensitive subject at all if there is a need to visit a police recording suite. Even if such procedures were introduced it would not be a perfect system as it would still be open to abuse through off-camera discussions, and there would be an obvious difference in treatment of other witnesses of historic but non-sexual incidents who would, presumably, not be subject to the same rules. I regret that I cannot see it being a realistic aspiration.

Further difficulties in investigating Care Home cases arise from the fact that children were often moved between homes, sometimes to different counties, and to

different police districts. This has meant that in some cases there have been two police forces and two police operations dealing with the same complainant where abuse has been alleged at more than one home. This is not always known by the defence at the time of trial but we can pick this up. Information about other complaints can sometimes be very helpful if the accounts of abuse against different carers in different homes have particular signs of similarity as to method or place that might indicate invention. We always check the police files from both Operations for such information. This can involve sifting through a great deal of material.

As for guidance from the Court of Appeal, this is of course crucial to us at the Commission as our only role is to predict what the Court would do if we referred the case. Over the last few years the guidance has not always been easy to interpret, making it that much more difficult for us to apply our real possibility test. The case of *B*, or *Bell* [2003] EWCA Crim 319, in 2003 gave us hope that there would always be a possibility of the Court being prepared to overturn a conviction even if nothing specific could be found wrong with the trial process, effectively a lurking doubt test. However subsequent judgments such as *Mansoor* [2003] EWCA Crim 1280 and *Hooper* [2003] EWCA Crim 2427 reined in that concept. Further judgments in the last 5 years - *Burke* [2005] EWCA Crim 29, *Sheikh* [2006] EWCA Crim 2625 and most recently *Joynson* [2008] EWCA Crim 3049 - have, in my view at least, made it fair to say that the legal position is now much clearer – in a nutshell:

1. Where prejudice caused by delay was ameliorated by suitable directions to the jury then the conviction is safe.
2. Missing documents, even if they might have been useful, cannot be said to result in an unsafe verdict unless they can be shown, without speculation, to go directly to a matter in issue.
3. Each case is fact specific and requires close scrutiny. It may be the case that the quashing of convictions relating to one complainant may have a knock-on effect on the credibility of other complainants who may have been regarded as less credible.

That does not mean of course that each case in the future will fit neatly in to a "Yes" or "No" box because each is very dependent on its specific facts. But it does mean that if we consider that there is a reasonable argument that it could fit in to the "Yes" box then we will refer.

As regards submissions from Solicitors, in care home cases and domestic cases the majority of applicants are represented – although our general average is that well under half of applicants have a Solicitor. Good, focused submissions can be very useful to us and may well alert us to issues that are not immediately apparent at an early stage, although we hope that we would pick up all the arguments even where the applicant is unrepresented. However, not all Solicitors actually make submissions on behalf of their clients – time and again some just act as a postbox for an application from their lay client. Such applications can be lengthy and rambling and cause unnecessary work. They cry out for a succinct submission from the Solicitor. Whether or not these problems are caused by funding difficulties I cannot say.

A further plea is that any who do make submissions on behalf of their clients do so before we start investigating a case. There has been a tendency for some Solicitors to forward their arguments part way through our investigations, or worse still after receipt of a provisional Statement of Reasons. It may be that part of the reason is that some years ago we could take a year or two before we reached a case in the queue and there was accordingly no rush. But our queues have come down substantially now and most cases are allocated for investigation within a few months of receipt. Any late submissions are very counter-productive as we may have to revisit various agencies to check issues that could have been covered first time round, and they directly lengthen the time spent on a case and delay other applicants in the queue even more.

Everyone in the CCRC is committed to finding Miscarriages of Justice. However, it must be remembered that any referral must be within the framework set out for us

in the Criminal Appeal Act which ties us in directly to the Court of Appeal's own tests. We look for new evidence and argument and then we have to assess whether we think there is a real possibility that the Court of Appeal would find the conviction unsafe, or the sentence too high. We are always delighted when we are able to refer a case.