Comments from the Committee on the Administration of Justice (CAJ) on the Criminal Cases Review Authority

CAJ welcomes prospect of change, but is concerned about proposed system

1. CAJ welcomes the government's acknowledgement that the present system for investigating allegations of miscarriages of justice is inadequate. CAJ has long called for the replacement of the present procedure of ministerial discretion to refer cases to the Court of Appeal, with an independent investigation body. However the CAJ is seriously concerned that the Criminal Cases Review Authority as proposed by the government would be unworkable and fundamentally flawed.

Lack of government commitment to consultation

2. The Committee notes with concern that the proposals were issued on 2nd June 1994 for response by 15th July 1994. In order to establish the most effective procedure, a consultation period of more than six weeks including the July holiday, would be appropriate. This appears to show a lack of commitment on the part of the government to full consultation in achieving the optimum system.

CAJ responds to combined proposals

3. The proposals for Northern Ireland have followed those for England and Wales, which were circulated for response by 31st May 1994. This paper sets out CAJ's views on the combined effect of these proposals.

CAJ welcomes government concern to have speedy enquiries

4. CAJ welcomes the government's concern that the Authority should be able to deal with allegations of miscarriages without delay and believes that all possible steps should be taken to reduce the trauma suffered by victims and their families.

Other safeguards needed for justice as well as new authority

5. The government has stated that it would be a failure of the system if a substantial number of cases were to be brought to the Authority. It would certainly be satisfactory for there to be few or even no allegations of miscarriages of justice.
However, the CAJ considers that this can only be achieved by more radical reform of the criminal justice system. Specifically, there are numerous pieces of legislation, upon which the CAJ has commented elsewhere, which frequently contribute to allegations of miscarriages of justice. These include the deferral of access to legal advice for suspects under police interrogation, the lower standard for the

admissibility of confession evidence, exclusion of lay visitors from interrogation centres, removal of the right to silence and trial in non-jury Diplock courts. The CAJ believes that it is unrealistic to expect the Criminal Cases Review Authority to have a small workload without changes being made on these wider issues.

6. Initially the CCRA will be faced with a backlog of cases. It would not, therefore, be an indication of failure for the Authority to deal with a number of cases in the first few month of its existence.

Composition and Structure of CCRA

CCRA for Northern Ireland Essential

7. CAJ notes the 4 possible models set out at paragraph 12 of the NIO consultation paper and would urge the government to establish a fully independent CCRA for NI.

8. The only disadvantage of the model cited by the government is that of size. There are numerous public and private bodies operating exclusively in NI without impediment of their size. Examples include the Equal Opportunities Commission, NIACRO, the Ombudsman, prisons and above all, the courts themselves. The specialist needs of the jurisdiction have warranted the specific function of each of these bodies and this would be essential for the CCRA in NI.

9. The CAJ would wish to hear what if any estimates have been made by the government as to the probable volume of applications in NI to the CCRA. CAJ ask for this information in the context of the Secretary of State's extraordinary comments of 2nd of June 1994 that there 'have been few such miscarriages in NI...'

10. SACHR say that 10-20 cases are referred to the Secretary of State each year. CAJ currently has files of at least 40 alleged miscarriages in NI. Amnesty International have repeatedly documented cases of concern in NI. Courts in the USA and the Irish Republic have been reluctant to extradite suspects because of concerns as to the fairness of trials here. Television journalists have highlighted the miscarriages in several cases, such as those of the Casement Accused. The UN Committee Against Torture has also expressed concern at the lack of effective safeguards to protect detainees.

11. The NIO consultation document (at paragraph 10) refers to there having been only one major reference to the Court of Appeal in recent years. This begs the question as to what may be deemed to be a 'minor' reference to the Court of Appeal, and merely confirms the extreme inadequacy of the present referral system, which the government has agreed is in need of reform.

12. The CAJ therefore believes that the suggestions of a single Reviewer or ad-hoc Commissioner of cases are completely unrealistic. It is derisory to consider that a CCRA could operate without a permanent and fully funded staff and office.

13. The advantage claimed by the government for this 'reviewer' proposal is that such a person would develop experience in a range of cases. The CAJ would hope that persons to be appointed to the CCRA will already have considerable relevant

experience. The CAJ would strongly endorse the acknowledgement of the drawback of this model over that of a multi-member body.

14. The third possibility of appointing Commissioners to consider individual cases on an 'ad-hoc' basis is totally impractical, given the likely number of complaints of miscarriages, and fails to overcome the problems of ministerial involvement which have led to proposals for reform.

15. The fourth possibility of a CCRA for England and Wales having additional responsibility for Northern Ireland fails to provide for the particular needs of this jurisdiction. Northern Ireland has a distinct legal structure, including its own Court of Appeal, legislation is often different, the criminal process operates in a distinct cultural, historical and political context, and is geographically separated from England and Wales. These circumstances combine to make a UK wide CCRA unlikely to be able to meet the needs of Northern Ireland. The inclusion of this proposal in the discussion document indicates a disappointing lack of commitment to justice in Northern Ireland.

16. It is imperative that a CCRA for Northern Ireland be established.

CCRA members should have range of relevant experience

17. The CAJ welcomes the government's view that members of the CCRA should be a mixture of lay people and lawyers. It is essential that the Authority comprise people with experience of the issues relevant to the organisation's objectives. The Authority members should be persons committed to creating a body dedicated to exposing truth, without reluctance to question practices in the criminal justice system. The panel will, therefore need to comprise persons with experience in the field, but avoiding an imbalance of persons with close and long-standing connections with the criminal justice system, and will need to include people who have experienced miscarriages of justice, as well as representatives of relevant groups such as NIACRO etc.

Appointment to CCRA should be public and on merit

18. In order that the appointment to the Authority be made on merit, a range of defined positions, including that of a full-time chairperson, should be publicly advertised.

CCRA must employ appropriate numbers of staff with relevant skills

19. Along with the appointment of competent Authority members, the CCRA will require a permanent staff of a size and quality commensurate to its purpose. Unless the CCRA is adequately funded, it will not be able to fulfil its intended function. This is a matter of some concern, given the current climate of government reluctance to expend public funds. The recent experience of chaos in the establishment of some public bodies with completely inadequate staffing levels, such as the Disability Living Branch of the Benefits Agency illustrates this problem.

Justice requires full commitment

20. The CAJ calls on the government to give meaningful commitment to the correction of miscarriages of justice by providing the necessary funds for a properly staffed CCRA for NI.

CCRA remit, powers and procedure

CCRA should have a proactive role

21. The CAJ believes that it would be both appropriate and necessary for the CCRA to have power to initiate investigations of its own volition, in any circumstances which appear to the Authority to warrant enquiry. This would allow, for example, review by the CCRA of practices which have been of concern in a series of cases, whether or not miscarriages of justice resulted in those instances.

CCRA must have effective powers

22. In order that the CCRA be able to carry out its work effectively it will need to have powers similar to those of the Serious Fraud Office. The CAJ would concur with the view of LIBERTY that investigation officers of the CCRA should have the same statutory powers as police constables, with the exception of the power of arrest.

23. The CAJ is concerned that the effectiveness of the CCRA might be impeded where its investigation officers are prevented from examining relevant documents through the issue of Public Interests Immunity Certificates. In view of the difficulties caused by the use of PII Certificates in criminal proceedings, as investigated by the Scott inquiry, it is essential that PII Certificates be subject to scrutiny by the CCRA. The CAJ therefore recommends that an identified member of the Authority have power to consider material made the subject of PII Certificates. This member of the Authority should then have power to refer the case directly to the Court of Appeal, if s/he considers this appropriate.

Relevant material must be preserved

24. The CAJ support the view of LIBERTY that consideration should be given to procedures for storing and preserving trial transcripts and police records.

Applications to CCRA

25. Government proposals do not detail the system to be introduced for making applications to the CCRA. The CAJ would wish to see this procedure being as open as possible to facilitate access to the CCRA since complainants are likely to include persons who are unrepresented, who are illiterate and who are in custody. There should be no required form and preliminary investigations should be initiated on receipt by the CCRA of a complaint whether by telephone, letter or otherwise.

CAJ welcomes investigatory approach

26. The CAJ endorses the proposal that the CCRA operate on an investigatory rather than adversarial model. Experience of previous cases in which miscarriages of justice have been shown to have taken place shows that a pro-active and persistent approach is necessary in order that all relevant matters be examined.

Need for independent investigations

27. The CAJ notes with disappointment and concern the proposal that investigations for the CCRA be carried out by the police. This would be completely inappropriate, and, if implemented, would cause the CCRA to fail in its purpose of being independent. This aspect of the proposals for England and Wales has been strongly opposed by LIBERTY and the CAJ endorses the reasons given by LIBERTY for their view that investigations should be carried out by CCRA staff committed to exposing miscarriages of justice within an organisation whose ethos is one of dedication to this objective.

Cheap investigations will not expose the truth

28. The government objects to the establishment of a permanent investigation unit in the CCRA on grounds of costs (paragraph 60). This indicates that budgetary issues have overridden concern for discovery of the truth . This cannot lead to the setting up of a body in which the public can have confidence. The experience of all those involved in exposing miscarriages of justice which have now been acknowledged, shows that these processes are arduous and extremely time-consuming. Corners cannot be cut in vindicating the innocent.

CCRA Investigation team can be commensurate to its caseload

29. A further argument cited by the government against the CCRA carrying out investigations itself is said to be difficulty in establishing a unit of optimum size as the demand for investigations is likely to fluctuate. The CAJ considers that this is an entirely ill-founded point. The need for accurate assessment of likely workload is a matter for every public and commercial undertaking and such forecasts should be made in advance of setting up the CCRA, taking account of the probability that there will be more work in the first few than in subsequent years, allowing for the backlog of cases requiring investigation. Thereafter the CCRA should be able to match staffing levels to case load much as courts, police and lawyers do, with the employment of temporary staff in the event of absolutely unforeseen circumstances. It is thoroughly illogical to use this notional problem as justification for using police to investigate complaints, as a fluctuation in case volume would equally create difficulty for officers on secondment or for the forces from which further officers might be recruited.

Using police would not be cheaper

30. The government suggestion that seconded police officers carry out investigations for the CCRA appears to be intended to minimise the costs of the new Authority. Such an attempt to get justice on the cheap is an insult to those who have suffered miscarriages of justice and will not bring about good practice. Furthermore this approach would merely impose costs on police forces, already complaining of severe underfunding.

Police skills are not those most needed to investigate miscarriages

31. The CAJ does not consider the skills and experience of police officers to be the most relevant nor the only skills needed for proper investigation of allegations. The Authority will need to employ staff, and on occasion retain specialists with a range of abilities, including lawyers, forensic scientists, psychologists, engineers, accountants and other experts. There is ample example of such multi-disciplinary bodies working successfully, such as the Serious Fraud Office, Inland Revenue and the recently established Prison Ombudsman.

Knowledge of police methods is not essential to investigations

32. The government's claim that knowledge of police procedures would be essential to those investigating complaints is unjustified. While this area of expertise would be one of many relevant to the body as a whole, there are many other areas of specialism which would be relevant. Training in police methods would be a straightforward matter which could be provided for CCRA staff, where appropriate. This may be more effective than the employment of police officers themselves, who may be so familiar with practices, that they may have difficulty in identifying faults.

Self-investigation cannot be independent

33. Furthermore, the proposal to have investigations carried out by the police fails to take account of the fact that allegations of police misconduct form the basis of a substantial number of alleged miscarriage cases. The police would therefore be in positions of conflicting interest as investigators of allegations against themselves. It would not be realistic to expect officers to be enthusiastic and persistent in exposing their own, their colleagues' or superiors' failings. The full arguments on this point have been set out in the CAJ publication "A fresh look at complaints against the police" (December 1993).

Conflict where allegations made against the police

34. The government even contemplate police investigation of alleged miscarriages where there is also a formal complaint about police conduct, (paragraph 68). This appears to the CAJ to be an unrealistic approach and one which cannot hope to attract public confidence to the work of the CCRA.

Speed and economy cannot justify injustice

35. The suggestion that CCRA investigations be carried out by the police force which originally investigated a case, shows that the government has failed to appreciate the vital distinction between investigation of criminal offences and investigations of alleged miscarriages of justice. While such a self investigation may well be cheap and quick, as claimed by the government, it is likely to compound any faults of the original process and is highly unlikely to result in exposing faults in the criminal police investigation.

Lack of public confidence in the RUC

36. The particular circumstances in NI make the proposal for police to carry out CCRA investigations especially inappropriate, since the RUC is mistrusted by a significant proportion of the population. The RUC is 92% Protestant and is perceived as unsympathetic by many Catholics. The ongoing violence in NI results in the police being armed and frequently accompanied by armed soldiers. They are not, therefore, able to carry out discreet investigations, such as confidential visits to private homes, in areas in which their safety is threatened.

Investigation of the RUC by other police forces has not been successful

37. The government proposals allow for the possibility of outside police forces being called in to carry out investigations in some circumstances. SACHR have commented "the experience of outside police forces conducting investigations in Northern Ireland has not proved to be particularly happy". This view understates the reality that outside forces have been unsuccessful in investigating allegations against the RUC, and that this proposal is unworkable. Following the Stalker/Sampson inquiry an undertaking was given by the RUC Chief Constable that outside police forces would be called in to investigate deaths caused by the RUC. This, however, has not happened.

In summary, where miscarriages are alleged to have resulted from police misconduct, it is not appropriate for the police themselves to carry out investigations. Where parts of the criminal justice system, other than the police, are alleged to be at fault, investigation should be by the appropriate specialists, which will not necessarily be the police. The CCRA cannot be effective unless it is independent, adequately funded and can conduct its own investigations.

Complainants to be kept informed

38. CAJ welcomes the government commitment (at paragraph 71) that complainants should be kept informed of the progress of the investigation of their case. CAJ would wish to go further and set a target for the time within which investigations will normally be completed. This could be subject to extensions with reasons for the delay being given to the complainant.

Disclosure is essential for justice to be seen to be done

39. The CAJ is concerned that the proposals (paragraph 72) anticipate that the investigation reports be confidential and not disclosed to the complainant. Such a system would compound the lack of public confidence in the criminal justice system and cannot be justified in ordinary circumstances.

Defined exceptions where authorised

40. Where the protection of personal safety requires that some information be restricted, this should be possible on the approval of an identified member of the Authority, deciding in accordance with publicly stated criteria. Other than this exception it is essential that complainants and their representatives should see the conclusions of the Authority's investigations, and then have an opportunity to make further submissions to the CCRA, before a decision is made on referral to the Court of Appeal. Legal Aid must be made available for this purpose (see below).

CCRA decisions must be reasoned

41. Having considered the report from its investigators and having considered the submissions from the complainant or his/her representatives, the CCRA or a panel of its members, should decide whether to refer for further investigation, refer to the Court of Appeal or to refuse to refer the case. CAJ welcomes the proposal that complainants to the CCRA should be given full and reasoned explanation of any decision not to refer a case to the Court of Appeal. The CAJ however, is concerned by the qualification of this principle, indicated by the phrase, "so far as possible". It is essential for such a process to be effective that full reasons be given for the decisions of the CCRA in all circumstances, without exception.

Grounds for referral of convictions to crown court or court of appeal

42. The CAJ welcomes the proposal that the CCRA criteria for referral to the Crown Court (in cases tried by Magistrates) and to the Court of Appeal (in cases tried by the Crown Court) should be broadly stated as the existence of grounds for doubting the safety of the conviction and where it would be right for the court to be given an opportunity to reconsider the conviction.

43. The CAJ also endorses the proposal that a non-exhaustive list of relevant factors for consideration by the CCRA should be publicly stated.

Wrong sentences also to be referred

44. The CAJ agrees that allegedly excessive, (and not allegedly unduly lenient) sentences should also be capable of referral by the CCRA to the Court of Appeal.

CCRA decisions should be given without delay

45. Complainants should not have the stress of their circumstances prolonged where this can be avoided. It would, therefore, be constructive for CCRA decisions to be issued within a specified time from the receipt of the complainant's submissions on the investigation report. CAJ consider that a month would be an appropriate maximum length of time for this.

Challenges to decisions of the CCRA

46. Where the CCRA declines to investigate further and/or declines to refer a case to the Court of Appeal, the complainant should have a right to request a review of this decision, without having to state reasons or seek leave. This review should be heard by a panel of three of the most senior members of the CCRA, on hearing oral and or written submissions from the complainant. This process should be completed within specified time limits and as quickly as possible.

Legal aid for complainants is essential

47. The particular vulnerabilities of potential victims of miscarriages must be appreciated in order to assess the need for representation of complainants. It has been the experience of those involved in "miscarriage" cases that many prisoners who maintain that they have been wrongfully convicted are not literate and do not have the intellectual abilities to conduct their own representation.

48. The need for representation is all the greater as many "miscarriage" cases involve highly complex and technical evidence and law, which it would be unrealistic for many lay persons to argue.

49. As well as this complexity, many "miscarriage" cases have entailed examination of a massive volume of documents, necessitating very lengthy perusal.

50. While some of these functions of complainants' representatives will be relevant during and after the CCRA investigation, defence lawyers may have to carry out a huge amount of work in order to establish the grounds for an independent investigation of their client's case. Justice cannot be done unless access to such representation is made available to all those in need.

51. These factors combine with the basic requirements of a fair hearing, to make the granting of full legal aid to complainants an essential component of an effective system for investigation of allegations of miscarriages of justice. The government proposal for use of the Green Form scheme for Advice and Assistance is completely inadequate as this cannot cover representation and is limited to only 2 hours of a solicitor's time, unless the Law Society grants an extension.

CCRA should not have an appellate function

52. CAJ agrees with the government's view that there is a need for a fully independent body for investigations of allegations of miscarriages of justice, which should not compromise the appellate jurisdiction of the Court of Appeal. The internal

appeal process for CCRA decisions described above would not conflict with this approach.

53. Once the CCRA has investigated and decides to refer a case to the Court of Appeal, CAJ agrees that the case should be dealt with like any other appeal and that the CCRA would have no further role after referral.

54. There should be no requirement to grant leave to appeal in order for cases referred by the CCRA to the Court of Appeal to be heard.

Judicial review must be available against CCRA

55. The government has sought views on the relationship between Judicial Review and the CCRA. As a public body the CCRA will inevitably be subject to the scrutiny of the High Court and this is entirely appropriate. The High Court has repeatedly asserted its role as administrative and not appellate. In this way the CCRA would only be challengeable through Judicial Review if it acts improperly. In the absence of a Bill of Rights, access to Judicial Review is a necessary and minimum level of accountability for public bodies.

56. As has been pointed out by LIBERTY, an attempt to exclude the CCRA from the jurisdiction of the High Court under Judicial Review would be unconstitutional in itself.

Grounds for Appeal

57. CAJ views the proposed amendments to Section 2 of the Criminal Appeal (NI) Act 1980 as significant improvements to the grounds for appeal. The proposed new single ground that a conviction "is or may be unsafe" is to be welcomed as a simplification and clarification of the law.

Powers of the court of appeal on errors at trial

58. Following the Royal Commission recommendation, the proposals (at paragraph 11) would require the Court of Appeal to allow appeals where an error at trial caused a miscarriage of justice. Further definition of the terminology would be appropriate in this context.

59. Where the Court of Appeal consider that an error at trial may have caused a miscarriage they will be required to order a retrial, if possible. Where a retrial is not considered possible, the Court of Appeal will have discretion to allow or to dismiss the appeal. The CAJ is concerned that this would appear to allow the sustaining of a conviction which has been shown to be doubtful. The impossibility or impracticability of a retrial is not the fault of the defendant and s/he should not be penalised because of it. Convictions which are shown to be based on error at trial should be quashed, unless a retrial can readily be held.

60. While CAJ agrees that the Crown's view on the practicality of a retrial may be a relevant factor, (paragraph 16), CAJ is concerned that the relevant factors should be

defined and that they should not include matters such as inconvenience and expense, to the detriment of the defendant.

61. Where the Court of Appeal find an error at trial but conclude that it did not cause a miscarriage of justice, the Court of Appeal is to dismiss the appeal. This is unsatisfactory in several ways. Firstly, as mentioned above, there is a need for miscarriage to be defined. Secondly, the criteria and reasoning for the Court of Appeal decision should be given, rather than the bald statement that no miscarriage was caused by the error. Thirdly, scope should exist for action to be taken to correct or prevent repetition of the error in some such circumstances, for example the issuing of Court of Appeal guidelines, or referral of an issue to the CCRA.

Continued scope for allowing appeals without fresh evidence

62. The CAJ agrees that it is appropriate for the Court of Appeal to retain its power to allow appeals where there is no fresh evidence. However, the reluctance of the Secretary of State to refer cases has made this a rarity in NI. It is to be hoped that the new system will result in use of this ground where appropriate.

New criteria for admissibility of fresh evidence on appeal

63. CAJ is concerned by the proposal that the Court of Appeal should continue to be able to exclude even new evidence, if there is no reasonable explanation for the failure to deploy the evidence at trial. Take the example of a person who covered up for another person and then later tells the truth. Will this be held to be a reasonable explanation?

64. This issue is connected with that of cases in which the defendant's representatives are at fault. Obviously, no defendant should be penalised for the incompetence of his/her advocates.

65. While the proposed amendment of the test on admissibility of new evidence, (from "likely to be believed" to "capable of belief" (at paragraph 15)), is to be welcomed as an improvement, the test still allows the Court of Appeal to decide matters which should be the preserve of a jury. The CAJ notes the government's concern with the primacy of the jury as the arbiter of fact and repeats its call for an end to the non-jury Diplock courts.

Defendants should have benefit of doubt

66. The CAJ would urge the government to reconsider the proposal that the Court of Appeal should have discretion to uphold convictions in cases without fresh evidence, where a retrial has been shown to be desirable but not practical. The government asserts that this fits more logically with other categories of cases. This factor is irrelevant and is completely outweighed by the illogicality of the proposal itself. Furthermore, the government is flouting the recommendations of the Royal Commission on this point. It cannot be right for a conviction which warrants retrial to be sustained. No defendant should be penalised because of the impracticality of a retrial, once doubt as to the safety of the conviction has been shown.

Court of Appeal power to refer to CCRA

67. CAJ considers that the CCRA should accept referrals from a range of quarters, including any relevant court.

Appropriate levels of compensation are essential

68. The CAJ calls on the government to establish an accountable body, equipped with trained specialist staff and publicly defined criteria for the assessment of compensation for victims of miscarriages of justice. It is incumbent on the state which has been responsible for any unjust deprivation of liberty to act with speed and openness in providing compensation for those affected. Payments should be non-discretionary and reasons should be given for decisions. Legal Aid must be available for the making of representations on compensation.

New power for magistrates review

69. In addition to the CCRA proposals the government is proposing a new procedure for application to the Magistrates Court for review of a conviction where an error can be shown. Where the conviction was by guilty plea, and the Magistrate declines to review the conviction, the case will then be tried summarily. It is proposed that, where the case was originally tried summarily and review is not granted by the Magistrate, the case will be referred to the Crown Court for review. The CAJ welcomes this new system, alongside access to the CCRA, as being beneficial to victims of miscarriages of justice at a summary level.

70. Considerable further detail of this system will be necessary, such as confirmation that Criminal Legal Aid will be available for defendants seeking review, and definition of the criteria for reviews by the Crown Court and by Magistrates.

71. It is particularly important that this procedure be combined with the CCRA process in NI, given that Magistrates in NI sit alone and are professional judges, reaching decisions on facts.

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