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INQUIRY

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Challenging Convictions for Historical Sexual Offences

by Mark Barlow, Barrister at Garden Court North Chambers (Manchester) and the Northern Ireland Bar

Mark Barlow

Introduction

Historic sexual offences are the most difficult of all miscarriage of justice cases for not only are they challenging, demanding and highly sensitive, they are also highly emotionally and politically charged. The legal profession and media have, over the years, highlighted growing concerns over convictions resulting from historic allegations. Over the same period the law has significantly changed and many have argued that individuals can no longer be guaranteed a fair trial. Such allegations create enormous challenges for the criminal justice process and will continue to trouble the Court of Appeal and the Criminal Cases Review Commission (CCRC) in the years ahead.

Lessons Learned?

In 1991 the Orkney Child Abuse Scandal rocked the nation and social workers removed a large number of children from their parents based upon allegations of satanic and ritualistic abuse. A combination of the scandalous nature of the allegations and their sheer number led to draconian actions being taken and families devastated as a result. But serious errors had been made and the allegations were ultimately said to have been false, leading to Inquiry into the Removal of the Children – The Clyde Report.

The Clyde Report led to a number of far reaching recommendations to ensure the safety of the process in child abuse allegations. In particular it was recommended:

"Where allegations are made by a child regarding sexual abuse those allegations should be treated seriously, should not be necessarily accepted as true but should be examined and tested by whatever means are available before they are used as the basis for action." (1)

In the 1990's and early 2000's attention turned to various residential institutions with allegations of sexual abuse made against carers and teachers. During the period between January 1998 and May 2001, 34 of the 43 police forces in England and Wales were involved in the investigation of child abuse in children's homes and other institutions. (2) Growing legal and media concerns surrounding the safety of resulting convictions culminated in 2002 with the Home Affairs Select Committee Report "The Conduct of Investigations into past cases of abuse in Children's Homes." (3)

The Committee, which included Mr. David Cameron MP (Conservative, Witney) considered the conduct of these historic investigations and accepted that a new gene of miscarriages of justice has arisen from the over-enthusiastic pursuit of those allegations. In a detailed report the Committee considered the broad range of views and opinions presented to them and a number of important recommendations were made, some of which still remain outstanding today. However the real significance of their Report was the acceptance that those investigations did contribute to miscarriages and that police practices in the conduct of the investigation needed attention.

These scandals reinforce the dangers that exist where a modern day witch-hunt takes hold. It was a phrase coined by the now deceased author Richard Webster in his book "The Secrets of Bryn Estyn" who noted the danger of the witch-hunt that can follow:

"There can or at least there should be no doubt that child sexual abuse is one of the most serious problems of our age, and that it is more widespread than most people are prepared to accept. But onto this palpable and disturbing reality we too have projected a fantasy. According to this fantasy those who sexually abuse children are seen not simply as human beings who have committed criminal acts but as the ultimate incarnations of darkness, evil and cruelty. So powerful has this fantasy become and so

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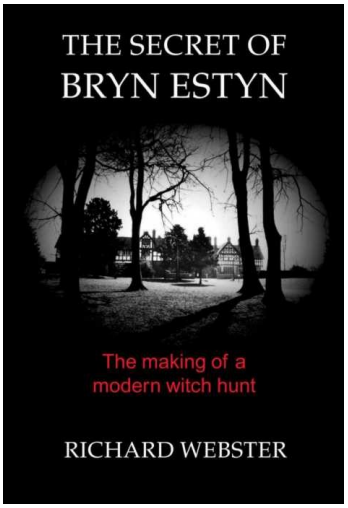
urgent is our need to rid the world of anyone who might conceivably be a pedophile that the requirement for evidence has all but disappeared. It is for this reason that the innocent are almost as likely to be arraigned as the guilty." (4)



The Secret of Bryn Estyn by Richard Webster

Current Context

The dangers associated with historic offences of sexual abuse are not new and can impact upon all aspects of our society, be it domestic, care homes, schools, voluntary organisations, clergy, teachers and celebrities. The recent high profile publicity surrounding Jimmy Savile and the resulting police Operation Yewtree serves to remind us of the emotive issues that surround childhood sexual abuse.

The media frenzy that followed the allegation of former Bryn Estyn resident, Steve Messham, that he was abused by a high profile politician reminds us all of the ease with which wholly unreliable allegations can be made and the impact of such false allegations being made against innocent individuals. The political sensitivity of such accusations led to a trial by media, forcing a Government response with the ordering of an investigation into the original Waterhouse Inquiry.

There is no doubt that child abuse occurs and society's natural reaction to such abuse is for the conviction of the offenders. However, societal and technological changes, particularly around communications mean we now live in a society where the presumption of innocence no longer exists and trial by media has ensured that those accused of such crimes, will never receive a fair trial. The understandable need to protect children ignores the dangers associated with historic allegations. In many such cases, there is no independent corroborating evidence and simply rests upon word against word. Cases involving multiple complainants create additional difficulties, through guilt by association, with issues of contamination and collusion complicating the issues before the jury. This can result in complaints being upheld that are either untrue or potentially malicious in nature, providing a fertile ground for miscarriages to happen.

Reviewing Convictions

In reviewing these convictions, a detailed understanding and appreciation of the criminal law and appeal procedures is required, together with a comprehensive knowledge of both the Prosecution and Defence cases at the trial. Attention to detail and a full appreciation of all the issues are essential. Never forget that an appeal can never be a rerun of the original trial. There is only one test upon which any application can be made - whether the convictions are safe.

This short article can never hope to comprehensively deal with all the issues that may arise in any review. To assist in the process an aide-mémoire is attached **(p. 4—5)** that sets out the core areas that commonly arise within historic cases.

Whichever grounds you identify, they must be able to show that the resulting convictions are now unsafe. It may be that inadmissible and highly prejudicial material was placed before the jury, for example, inadmissible evidence such as the demeanor of the complainant or evidence of bad character. Or, that such evidence was challenged but the judge was wrong in law by allowing its admission. Such complaints fall within the 'material irregularity' category.

The summing up is always the foundation upon which you should start your review of the safety of the resulting convictions although, by the time the case reaches the Innocence Network UK, the legal teams should already have explored such areas. Whilst there can never be a blueprint in regard to summing up, in historic cases, the requirement that the summing up should be fair and tailored towards the Defendant, may have been destroyed by a lack of direction by the judge on important legal issues. It may even be unbalanced and bias against the accused. This is a complex and extensive area of criminal practice and in historic cases there are clear examples in the case law that can assist in highlighting possible areas to explore. Cases such as R v Joynson [2008] EWCA Crim 3049, R v MM [2007] EWCA Crim 1558, R v Breeze [2009] EWCA Crim 255, R v Sheikh [2006] EWCA Crim 2625 and R v S et al [2012] EWCA Crim 1433 clearly shows how the Court operates when dealing with such difficult case.

An area that frequently arises is fresh evidence, the admission of which is regulated by Section 23 Criminal Appeal Act 1968 and a full and detailed understanding of its interpretation and operation is required. In many such cases, the applicant will simply not understand what fresh evidence means and this will require careful explanation. In essence, it is evidence that is admissible, relevant, credible and shows that the conviction is now unsafe. It may be fresh expert opinion evidence in relation to medical findings or forensic evidence such as DNA. If such material was available and could have been discovered at the time of the trial, it will never be fresh evidence. It is only in the most exceptional of cases that the Court would allow in evidence that was known at the time of the trial or readily discoverable. In many such cases it is

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where a fault on the part of the legal team can be established as being the cause for it not being presented to the jury. However, for fresh evidence to succeed, it must demonstrate that the convictions are now unsafe. In historic cases, fresh evidence is very rare to be fresh expert opinion, since most cases rest upon the issue of credibility of the witnesses and where there is no expert forensic evidence available.

Another common theme is complaints made in respect of representation at trial. This is a difficult area, requiring a waiver of legal privilege from the client. It is important to identify both the specific complaints and their credibility. R v Day [2003] EWCA Crim 1060 states that the single test is safety. You must be able to show that the alleged incompetence led to identifiable errors or irregularities in the trial and which rendered the process unfair or unsafe.

One feature that always exists in historic cases is abuse of process given the delay in bringing procedures and a clear understanding of these principles is essential in conducting any review. The recent Court of Appeal decision in CPS v F [2011] EWCA Crim 1844 has reaffirmed the proper test that should be applied whenever this issue arises. The earlier decision in R v MacKreth [2009] EWCA Crim 1849 demonstrates the application of abuse of process within the context of historic care home cases. Cases such as R v Sheikh [2006] and R v Joynson [2008] demonstrate where the Courts are willing to hold that no fair trial was possible where important evidence was no longer available due to delay. The right to a fair trial is central to the trial process and many of these cases are decided upon their own facts. When the issue as to whether the opportunity arose to enable the abuse to happen and where credible evidence would have been available at that time, then the Courts are willing to accept that the trial process was unfair and resulting convictions are unsafe. It is an important area and should always be considered when review any convictions.

The last area concerns the process of the police investigation and issues of disclosure, for with many miscarriages the successful appeal rests upon a material non-disclosure by the Prosecution. Many have argued that the changes in disclosure have been instrumental in ensuring miscarriages and therefore it is an area that you must look at extremely carefully. Never assume that material has been disclosed. Whilst reviewing the conduct of the investigation you may undercover such non-disclosure by the police. In cases that are referred to the CCRC it is important to request that the Commission conducts a review of all the unused material in the possession of the Prosecution.

In complex and large police investigations the issues of contamination or collusion must also be at the forefront of your conviction challenge and needs careful exploration. A forensic study of possible contamination needs to follow a series of steps. Firstly, establish whether the police worked to a protocol in dealing with their investigation, and then prepare a schedule setting out the key dates when statements were taken, or when the police first spoke to witnesses. Try to establish the main police investigators, the people they each will have dealt with and the possible contact both between and within these groups. The dangers of accidental contamination must be central to any such review and a useful analogy is to think of the bee, flying from one flower to another collecting pollen, but each time also leaving some behind. Remember, the strength of any conviction in a multiple complainant case is the number of complainants. If you can undermine the strengths of that argument by evidence of contamination, you shall be heading in the right direction to demonstrate that the police investigation created prejudice to a fair process. The important thing is to understand in such complex cases the unfairness can start way before the matter comes to trial.

Finally, once you have identified your grounds of appeal, the key decision is where to submit the application. In many cases there will have already been an unsuccessful appeal application before the Court of Appeal, therefore the only route is the CCRC. You cannot reargue the grounds that have already been decided by the Court of Appeal, the Commission may be willing to relook at previous argued points, but only if there is a different angle to be taken. The important point here is that your grounds have clarity, are properly presented and all the relevant material is attached. If you are asking the Commission to use their powers to reinvestigate then you need to specify exactly what you are requesting. Presentation is everything and if the Commission or the Court does not have the material required, then they cannot make a decision.

Conclusion

To be involved in the overturning of a miscarriage of justice is a fantastic feeling and for many lawyers it is a career highlight. However, it is also a salutary reminder that our criminal justice system can be flawed, as it is a system that relies on people and sometimes people are unreliable. For those privileged to have experienced the quashing of a conviction it provides the motivation to carry on through the many cases that are not successful and it is always the cases where convictions are not quashed that you remember. The important point is that for those who inhabit the nightmare world of being falsely convicted, the work that you are doing provides hope that the truth will one day emerge. The very nature of historic sexual offences cases means the difficulties will always be there, all that you can do is to try to get the key to the cell door. I

Notes
(1) Clyde Report Page 353 Recommendations 88.
(2) Commons Hansard, 1 November 2001, col. 853 – 856 w (John Denham MP)
(3) Fourth Report of Session 2001 - 02
(4) The Secret of Bryn Estyn: The Making of a Modern Witch Hunt at p 537. ISBN: 978 09515922 67

Aide-mémoire by Mark Barlow

An Overview of Investigating Miscarriages of Justice – Historic Allegations

Most difficult of all miscarriages:

Demanding and highly sensitive

Highly emotive and distressing

Keep an open mind at all times

Requires all your legal skills

These types of cases cover all aspects of Society - Domestic, Care Homes, Schools, Voluntary Organisations, Clergy, Teachers and Celebrities.

You must have:

Full knowledge of both Crown's and Defence case at trial

Full knowledge of what actually happened at the trial

Transcript of the summing up

Full understanding of the law and judgements in the area of historic allegations

Knowledge re sentencing practice

Remember the only basis that a conviction will be overturned is that it is unsafe.

Whatever grounds you may have identified have to establish that it resulted in an unsafe conviction.

This requires being able to identify the strengths and weakness of the all the evidence

and to be able to overcome the strengths of any prosecution.

Common Areas

- Material irregularity during trial
- Poor Representation
- Misdirection on law or unfair summing up
- Points missed by everyone
- Fresh evidence

Helpful References

Rook & Ward on Sexual Offences

Archbold or Blackstone

Crown Court Bench Book

Stages of Investigation

Stage 1

- Obtain all the Prosecution papers
- Obtain all the Defence papers, written instructions, expert reports, witness statements, previous advices from trial Counsel and all advices on appeal
- Obtain the transcript of the summing up
- Obtain the transcripts of the evidence or any legal rulings

Stage 2

- Establish what the applicant is now saying about his trial
- Identify any complaints re legal representation
- Identify if there is any fresh evidence within meaning of s 23 Criminal Appeal Act 1968
- Remember no appeal can be a retrial

Stage 3

Identify your key areas – whether it is:

- Defect in trial process
- Defect in representation
- Defect in summing up
- Fresh evidence

What further work is required?

Stage 4

Divide the team and give specific tasks to each:

- Material irregularity at trial
- Legal representation/complaints
- Legal arguments
- Summing up
- Fresh evidence

Aide-mémoire by Mark Barlow (cont.)

Common Areas associated with Miscarriages of Justice cases

Police Investigation/CPS disclosure

- Establish how investigation started
- Schedule of significant dates/events
- Disclosure issues
- Third party – SSD records etc.

Material irregularity during trial

- Inadmissible or prejudicial evidence placed before jury
- Legal rulings wrong in law
- Juries

Summing Up

Complex area of law – must show direction was wrong in law, insufficient on facts of trial, was bias against Defendant.

That the defect renders the convictions unsafe.

- Delay direction and Good character. R v Percival The Times July 20, 1998; R v H [1998] 2 Cr App R 161;
- Bad character/reprehensible behaviour/Cross admissibility/Separate consideration R v H [2011] EWCA Crim 2344
- Complaint evidence s 120 CJA 2003
- Distress evidence R v Venn [2002] EWCA Crim 236; R v Keast [1998] Cr L R 748
- Assumptions direction R v MM [2007] EWCA Crim 1558; R v D [2008] EWCA Crim 2557, R v Breeze [2009] EWCA Crim 255.
- Contamination see s 107 CJA 2003
- Young memories R v JH & TG [2005] EWCA Crim 1828; R v JCWS & MW [2006] EWCA Crim 1404
- Makanjuola warnings

Poor Representation

- Need to obtain waiver of legal privilege
- Identify the actual complaints
- Protocol by CA
- R v Day [2003] EWCA Crim 1060 – test is the single test of safety. Must show incompetence led to identifiable errors or irregularities in the trial which themselves rendered the process unfair or unsafe.

Fresh Evidence

See s 23 Criminal Appeal Act 1968

- Must be credible, reliable and admissible. Further not available at the time of the trial.
- Expert Fresh evidence. See R v S et al [2012] EWCA Crim 1433

Abuse of Process – Delay Cases

- AG Reference No 1 of 1990 [1992] 1QB 630
- CPS v F [2011] EWCA Crim 1844
- R v MacKreth [2009] EWCA Crim 1849
-

Missing records:

- R v Sheikh [2006] EWCA Crim 2625
- R v Joynson [2008] EWCA Crim 3049
- R v Burke [2005] EWCA Crim 29
- R v Robson [2006] EWCA Crim 2754
- R v Wake [2008] EWCA Crim 1329
- R v Gillam [2008] EWCA Crim 1744

Right to fair trial

Finally...

Having conducted the full review, identify the grounds upon which you can establish that the resulting convictions are unsafe

Establish where you are going i.e. Court of Appeal or Criminal Cases Review Commission

Ensure that your application is properly presented, with the necessary Forms, Advice and Grounds of Appeal. Paginated bundles with index including all relevant material and case law. Presentation is everything!

Remember if they do not have the supporting material they cannot make a decision.

Spotlight: Louise Taylor

On the 31 October 2012, Louise Taylor, a former member of the University of Bristol Innocence Project, completed a sponsored half marathon in London for the INUK and successfully raised a total of £540 through JustGiving. Louise is presently studying on the LPC at the College of Law, Bloomsbury London.

How would you describe your experience with the University of Bristol Innocence Project (UoBIP)?

I found working with the UoBIP both challenging and rewarding. Although something of a time commitment, the combination of academic study, lectures from experts and victims of wrongful convictions, films and group discussions was an excellent, thoroughly interesting and engaging way to learn about the structural injustices build into the criminal justice system. As to the actual casework, it was fantastic aged just 19 to be able to have experience of working with a real case both in terms of exposure to real life law in action, and that I was able at such an early stage in my legal career to begin my commitment to pro bono work.

What have you learnt/gained from your experience with the UoBIP?

I learnt generally about the importance of hard work, team effort and the frustrating and (sometimes) insurmountable barriers people face in gaining access to justice in the UK. Perhaps less obviously, UoBIP and the amazing people I met along the way including Michael and Gabe and many victims of wrongful convictions themselves, have deepened my commitment to what I believe in and the strength and determination to continue to pursue my own goals and ambitions.

What inspired you to do this sponsored run for INUK?

Having been a part of the UoBIP for all three years I was at Bristol, I remain extremely passionate about the work that INUK does. Although I have not been involved actively since leaving Bristol, I have continued to follow INUK's work. When I decided to do the half marathon, I knew it was going to be for INUK for three reasons. The first is that I believe whole heartedly in the work it does, with a view to helping people who have no-one else to help them. The second is that I think the work that INUK does needs to be given a bigger profile, where few people are even aware of the problems with the criminal justice system. The third is that I am aware of that INUK has limited funding and wanted to make a contribution.

How did you train for the half marathon?

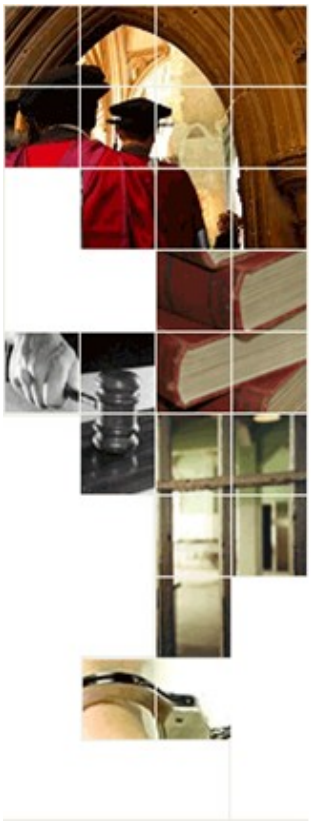
I trained by running 3 to 4 times a week. Having only started running last September, I am proud of my achievement in getting to this level. Whilst my speed is still extremely novice, it is something I intend to continue to do and to improve on.

What have you been doing since graduating from the University of Bristol?

Since graduating from Bristol, I had a year out where I worked to save to go travelling around Central and South America. I also took some Spanish classes whilst saving. During my travels, to name but a few of the wonderful things I did, I learnt how to scuba dive, climbed an active volcano, and trekked to Machu Picchu. On my return I moved to London to commence an LLM at the LSE in Public International Law (having gained some graduate funding). I am now completing the LPC which is, needless to say, not quite as fascinating as my Masters. I am also working part time to help fund the cost of my studies, have been appointed student director of the Amnesty International Letter Writing Campaign at the College of Law and intend to start a role as a paralegal at a CAB near to where I live after Christmas.

What are your future career plans?

I intend to work in the area of employment law or/and professional and clinical negligence. My long term goal is to work on behalf of international group claims against multinational corporations (i.e. indigenous land rights), in corporate accountability actions and human rights. My pro bono experiences so far, and notably my time at UoBIP; has ensured that I will always maintain a strong commitment to working either pro bono, full time or both, to protect access to justice and equality for vulnerable people in society, both within the UK and internationally. I



Innocence Network UK (INUK)

‘Educating to overturn and prevent the wrongful conviction of innocent people.’

Spring Conference for Innocence Projects

Date: Friday, 22 March 2013

Venue: White and Case LLP, 5 Old Broad Street, London, EC2N 1DW

Organised by:

Hosted by:

For booking information, go to: www.innocencenetwork.org.uk/events

Criminal Cases Review Commission (CCRC) Triennial Review

The Criminal Cases Review Commission was established by the Criminal Appeal Act 1995. It was established in 1997. The Commission is an independent body set up to review possible miscarriages of justice in England, Wales and Northern Ireland and to refer appropriate cases to the appeal courts.

As part of its Triennial Review Programme, the Ministry of Justice conducted a review on the continuing need for the functions and the form of the Criminal Cases Review Commission, and its statutory powers to perform these functions. The Review was held between the 19 October 2012 and 14 December 2012 and sought evidence from a wide range of bodies in response to two principle aims stated by Cabinet Office:

- To provide a robust challenge of the continuing need for individual Non-Departmental Public Bodies (NDPBs) – both their functions and their form; and
- Where it is agreed that a particular body should remain as an NDPB, to review the control and governance arrangements in place to ensure that the public body is complying with recognised principles of good corporate governance.

The following details the submissions of the **Innocence Network UK** and the **University of Sheffield Innocence Project.**

Extract of the Survey Response to the Triennial Review by Dr Michael Naughton and Gabe Tan, Innocence Network UK

The CCRC's Functions

Is there a continuing need for CCRC to review conviction and/or sentence in cases dealt with on indictment in England, Wales and Northern Ireland?

The CCRC should continue to review convictions. However, as a body that was established in response to notorious miscarriages of justice cases involving the conviction of individuals believed to be factually innocent (e.g. the Birmingham Six, Guildford Four, Maguire Seven etc.), we do not think that the CCRC should be using its scarce and diminishing resources on dealing with sentences.

In particular, the CCRC's limited resources are not well spent when they only result in minor variations in the appellant's sentence. For instance, in 2009, the Court of Appeal heard the sentence appeal of Stephen McCurry (1) who was sentenced to 10 years imprisonment in 2004 for supplying 5,600 ecstasy tablets. McCurry's sentence was referred back to the Court of Appeal by the CCRC when new analysis showed that the purity of the tablets was around 40 to 50 per cent lower than what was posited at trial. The Court of Appeal held that whilst the sentence received by McCurry might have been a little shorter had the correct purity of the drugs been known, it would not result in a significant reduction due to other factors, such as the fact that McCurry was a wholesaler dealing with substantial quantities of drugs and that he had a previous conviction for dealing with lorry loads of cannabis. (2) The CCRC's referral of McCurry's sentence, therefore, resulted in only a one year deduction from the 10-year sentence he was originally given.

In a similar case in 2008, the Court of Appeal heard the sentence appeal of Darren Cullen (3) who was convicted in 2004 of the murder a young, epileptic man. The murder was described by the Court of Appeal as 'prolonged and severe'. (4) The victim died as a result of serious head injuries after he was hit, stamped on and attacked using a snooker cue and a cricket bat. In view of the level of violence, Cullen was originally sentenced to life with a minimum term of 16 years.

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The CCRC referred the minimum sentence received by Cullen to the Court of Appeal on grounds of new psychiatric evidence which suggested that he might have suffered from a type of depressive illness at the time of the murder. Taking the new psychiatric evidence into account, the Court of Appeal deducted one year off Cullen's minimum sentence, amending his tariff from 16 to 15 years.

Most of the CCRC's sentence referral relates to sentence miscalculations. Whilst it is acknowledged that such miscalculations should be rectified, it is questionable whether this should be part of the role of the CCRC.

At present, the Attorney General deals with sentences thought to be too lenient. In 2011-12, the Attorney General referred 98 potentially unduly lenient sentences pursuant to section 36 of the Criminal Justice Act 1988. Of those cases dealt with by the full Court, 73 resulted in an increase in sentence. A possible idea to remove sentences appeals from the remit of the CCRC would be to amalgamate all sentence appeals, whether on the basis that they are argued to be too lenient or too harsh, within the overall portfolio of the Attorney General's authorities.

Is there a continuing need for CCRC to review conviction and/or sentence in cases dealt with summarily in England, Wales and Northern Ireland?

The CCRC should continue to review convictions but not to sentence. In addition, less priority should be given to summary convictions, with applications involving convictions for serious offences where the applicant is serving long term custodial sentences being prioritised. The CCRC's assistance with summary offences (such as parking tickets and convictions under the Dangerous Dogs Act, such as Dino the German Shepherd dog) whilst the cases of alleged innocent victims of wrongful conviction languish in prison, can, arguably, be seen by alleged victims of wrongful convictions and the public, alike, as discrediting the CCRC.

Is there a continuing need for CCRC to investigate and report on matters on direction of the Court of Appeal?

Yes.

Is there a continuing need for CCRC to require the appointment of an investigating officer to carry out inquiries on behalf of the CCRC;

Yes. This function is particularly important in serious alleged miscarriages of justice involving allegations of police misconduct.

Is there a continuing need for the provision of assistance to the Secretary of State on matters concerning recommendations for exercise of Her Majesty's prerogative of mercy.

Yes. In addition, under s.16 of the Criminal Appeal Act 1995, the CCRC also has the power to refer a conviction to the Secretary of State to consider exercising the Royal Prerogative of Mercy. This power, however, has never been used. We would recommend that the CCRC should consider utilising this power more often than it presently does, especially in cases where the Court of Appeal refuses to overturn the conviction of a clearly innocent applicant for procedural as opposed to evidential reasons.

The CCRC's Powers

Is the 'real possibility test' under s.13 of the Criminal Appeal Act 1995 the right test for the Commission to apply? If not, what would be better?

The "real possibility test" has drastically shaped the function of the CCRC. It has rendered the CCRC a gatekeeper of the Court of Appeal, where its decision making process is underpinned by the question of whether the Court of Appeal will overturn the verdict. A consequence of this is that the CCRC may be unable to refer convictions of those who might be innocent if it is felt to be unlikely that the Court of Appeal will quash them. This occurs, for instance, when the evidence that supports an applicant's innocence was or could have been available at the time of the original trial and, hence, does not constitute the sort of new evidence that the Court of Appeal requires to overturn a conviction. In the last 15 years, there have been a growing number of such 'cases for concern', which were deemed by the CCRC to not fulfil the real possibility test. In March 2012, INUK published a Dossier of Cases, containing 44 cases where the applicant has

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been refused a referral at least once by the CCRC, primarily because evidence support their innocence is not new. (Available on the INUK website.)

This fails to take into account how juries could make mistakes in their decisions and lawyers could fail to adduce supporting evidence due to tactical errors or pure oversight, problems that were identified by the Royal Commission on Criminal Justice and were supposed to be dealt with by the new body – the CCRC.

At the same time, under the present referral criteria, the CCRC will refer the convictions of the clearly guilty if it thinks that the Court of Appeal might quash it on a technicality. In the joint-appeals of *R v Clarke* and *R v McDaid*, for instance, the CCRC referred their convictions for GBH back to the Court of Appeal solely on the ground that the bill of indictment was not signed by a proper officer of the court. There was no dispute as to the reliability of the evidence that underpinned their convictions. The attack was violent and clearly pre-meditated. Clarke, McDaid, along with a group of unidentified men, attacked the victim with knifes and machetes. Both of his hands were almost severed as a result of the attack. Their appeals were initially dismissed by the Court of Appeal (5) but subsequently allowed by the House of Lords on the basis that the absence of a signature on their indictment invalidated their trial and hence their convictions. (6)

Other forms of non-innocence referrals also include 'change of law' cases where convictions are referred on grounds of new developments in case law or legislation that calls for an examination of whether the relevant criminal law had been correctly applied. In the case of Joseph Fletcher (7), the appellant was convicted of 6 counts of indecent assault against under-age girls and an additional count of indecent assault based on a full act of sexual intercourse. At trial, over two years after the original charges were made, the additional count of indecent assault was added to the indictment as an alternative to a count of rape. The CCRC referred Fletcher's conviction solely for the additional count back to the Court of Appeal in light of the House of Lord's decision in the separate appeal of *R v J* (8), which held that the prosecution of defendants based exclusively on an act of intercourse should be prohibited when the 12-month time limit has past. The Court of Appeal quashed Fletcher's conviction for the additional count, holding that the 12-month time limit in *R v J* would apply in instances where the count of indecent assault was added to the indictment as an alternative to the charge of rape.

Overall, the 'real possibility' test under s.13 of the Criminal Appeal Act 1995 needs to be replaced with a different test that allows the CCRC more independence from the Court of Appeal. This independence from the Court of Appeal should apply both in its review of alleged miscarriages of justice, and, in its consideration on whether to refer a case back to the Court of Appeal.

We would suggest a new test along of lines of that recently implemented by the South Australian Parliament, where convictions should be referred if there is "compelling evidence in relation to the offence which may cast reasonable doubt on the guilt of the convicted person." (9)

Evidence would be considered ***compelling*** if—

(i) it is reliable; and

(ii) it is substantial; and

(iii) it is highly probative in the context of the issues in dispute at the trial of the offence. (10)

The CCRC should also be looser in its interpretation of what constitutes new evidence. New evidence should be widened to include all evidence not heard by the jury and less regard should be given to the reasons why the evidence was not adduced.

We also believe that there should also be an additional 'interest of justice' test, which the Scottish CCRC currently applies. For example, the CCRC should have the discretion under the 'interest of justice' test to not refer cases back to the Court of Appeal where the applicant is clearly guilty but may have grounds of appeal due to some unintentional breach of process. Similarly, this will also give the CCRC the discretion to not refer cases where the applicant has, subsequent to the conviction that s/he is disputing, been convicted further serious offences.

CCRC TRIENNIAL REVIEW

Do the current powers of the CCRC under s.17 of the Criminal Appeal Act 1995 need to be extended?

The CCRC's powers under s.17 need to be extended to both private bodies and individuals. This is particularly important in the review of convictions for historical abuse cases, where private bodies such as schools and charities may hold crucial information and records.

In addition, the CCRC should utilise its existing powers to undertake more fieldwork investigations, such as crime scene visits and re-interviewing of witnesses, particularly in complex, serious cases. Whilst it is accepted that this would require an increase in the CCRC's resources, the resource implications could be addressed by refining the CCRC's intake to sharpen its focus. For instance, sentences or cases based on points of law or legal technicalities that have no bearing on the applicant's possible innocence could be excluded from the CCRC's remit altogether. Such a refinement can contribute to more rigorous investigations on potentially genuine innocence cases.

The CCRC's Structure

What should be the future structure of the Commission?

The CCRC should remain an Arms Length Body that is independent from Government. This is crucial especially in light of the historical context that led to the establishment of the CCRC i.e. concerns that the Home Secretary was not referring meritorious cases back to the Court of Appeal for political as opposed to legal reasons. The Royal Commission on Criminal Justice thought it vital that the new body, the CCRC, should be independent of Government and of the courts.

In addition to retaining its independence from Government, it is crucial that the CCRC also functions independently from the Court of Appeal by changing the existing 'real possibility test'. Its investigations and decision making process need to be focused on whether or not an applicant may be innocent, as opposed to second-guessing whether the Court of Appeal will quash the conviction. This will help to ensure that only convictions of potentially genuine innocent applicants will be referred and reduce the instances of applicants who are clearly guilty receiving a referral.

In addition, although the Criminal Appeal Act 1995 specified that only a third of staff at the CCRC need to be lawyers, most Commissioners and Case Review Managers were former practising lawyers. We feel that this has an impact on the nature of CCRC reviews, which are overtly legalistic as opposed to a factual investigation of whether an applicant may be innocent. There is a need for more diversity in terms of the composition of Commissioners and Case Review Managers. Specifically, it should consider recruiting former forensic scientists, investigative journalists and academics as Commissioners and Case Review Managers, which could help to promote a more factual investigative culture.

Finally, the CCRC is presently housed in the same building as the Crown Prosecution Service. Its present Chair, Mr Richard Foster, also used to be the Chief Executive of the Crown Prosecution Service. Whilst we are not claiming that this has influenced the CCRC's impartiality in any way, it is highly important that the CCRC's public image of independence and impartiality is preserved and its present location and Chair may cause this to be compromised. I

Notes

(1) R v McCurry [2009] EWCA Crim 227.

(2) ibid, paragraph 5.

(3) R v Cullen [2008] EWCA Crim 2274.

(4) ibid, paragraph 4.

(5) R v Clarke and McDaid [2006] EWCA Crim 1196.

(6) R v Clarke and R v McDaid [2008] UKHL 8.

(7) Fletcher's appeal was heard jointly with Steven Cottrell. However, Cottrell's appeal was not heard by way of referral by the CCRC but as an application for leave to appeal out of time. See R v Cottrell and Fletcher [2007] EWCA Crim 2016.

(8) R v J [2004] UKHL 42.

(9) On the 18th July 2012 the South Australian Legislative Review Committee on the CCRC Bill Reported that it would not be recommending that a CCRC-style body be established in South Australia. Instead, of the seven recommendations, Recommendation 3 was for a new statu-

CCRC TRIENNIAL REVIEW

tory right for certain qualifying offences to provide that a person may be allowed at any time to appeal against a conviction for serious offences if the court is satisfied that: (i) the conviction is tainted; (ii) where there is fresh and compelling evidence in relation to the offence which may cast reasonable doubt on the guilt of the convicted person. See Parliament of South Australia (2012) 'Report of the Legislative Committee on its inquiry into the Criminal Cases Review Commission Bill 2010': LC GP 119-B: the Hon Ann Bressington MLC.

(10) Ibid at p.18.

WRITTEN EVIDENCE FOR THE CCRC TRIENNIAL REVIEW SUBMITTED BY DR CLAIRE MCGOURLAY AND DR ANDREW GREEN, UNIVERSITY OF SHEFFIELD INNOCENCE PROJECT

Introduction

The Innocence Project (IP) of the University of Sheffield, School of Law was established in 2007 and consists of 46 students directed by Dr Claire McGourlay, Senior Lecturer in the School of Law, assisted by Dr Andrew Green as a visiting scholar and assistant director. Dr Green has 22 years experience of working on miscarriages of justice cases and Dr McGourlay 20. Currently the IP is working on five cases involving seven clients who have been convicted of serious crimes and who continue to maintain their innocence. Four of these clients have previously made applications to the CCRC, which have been refused.

The Sheffield IP is submitting this written evidence as an independent project which is a member of the Innocence Network UK, established in 2004. This Network and its member projects have accumulated extensive experience of case review, research and investigation.

Following the Ministry of Justice's call for evidence for the forthcoming Triennial Review, Sheffield IP has consulted its student members. Three of them have researched the CCRC's record of work and met with CCRC staff. The IP has carefully examined applications made to the CCRC by its current clients, and the options which appear to be open to its clients may lead to new applications and what work the CCRC could be asked to do which could produce fresh evidence, which in turn could indicate that the convictions concerned are unsafe.

Our findings

The CCRC can work very well as an independent reviewing body. We are confident that the CCRC should remain separate from Central Government, since this constitutionally helps it to better perform its functions. Complete impartiality enables the CCRC to consistently work to a high standard which is both accessible and transparent to applicants and those who assist with their cases. It is important that applicants continue to feel as though they can apply to a body which is not a part of Central Government. The CCRC would not enjoy the confidence of applicants were they to feel as though the merits of their cases would not be fully considered, because of the possibility of political influences on any government department.

The CCRC has recently become more accessible to applicants. The new easy read application forms are an exam-

ple which shows a greater understanding of need in that it recognises that a large proportion of those who may need the help of the CCRC may be semi-literate. This broadening scope of accessibility is possibly a reason for the rapid growth in the number of applications made to the Commission.

We realise that an increasing work load is a problem currently facing the CCRC, which has already been forced to reduce its staff numbers. We understand that it is reluctant to compromise on the quality of its work. We are worried that this may lead to either an extended waiting period for review, or some sort of rationing system under which many miscarriages of justice may remain so indefinitely. It would be a great shame to narrow the scope of work carried out by the CCRC by, for example, ceasing to review appeals from magistrates' courts to Crown Courts or only looking at cases once. Fresh evidence can appear at any time and at any level within the criminal justice system. Miscarriages of justice concerning summary or triable either way offences, of which people are convicted in the Magistrates Court, can have a devastating impact upon the lives of those convicted and their families. In addition if cases were only looked at once IP would have no role to play as often cases that we are looking at have already been through at least 1 CCRC application. The initial application to the CCRC might also be ill advised or submitted without help from a knowledgeable third party.

The University of Sheffield, School of Law runs its IP both in order to help people who have no other source of assistance in challenging their convictions, and to provide clinical legal experience for its students. This secondary function has proved to be of great value to students, who have gained much knowledge of, and insight into the workings of, the criminal process, as well as skills in case management and relating to clients. If as a result of our work we are able to discover fresh evidence or argument that could be put before the Court of Appeal, this can only be done by way of applications to the CCRC. Our clinical legal education function depends therefore on the continued viability of the CCRC as a review body.

Our recommendations

We believe that the CCRC needs an *increased* budget so that it can cope with the greater demand it is experiencing and so that it can conduct high quality reviews of applicants' cases.

We realise that in the current economic climate it may not yet be possible to restore the CCRC's original level of funding. In light of this, it is important that the CCRC remains open to trying alternative means by which it can ultimately achieve its purpose.

Following initial discussions with CCRC representatives, we recommend that the CCRC should establish a closer relationship with Innocence Projects, which are now mature and well supported organisations. Innocence Projects are able to complement the work of the CCRC by contributing resources, particularly the energy and commitment of large numbers of undergraduate and postgraduate students. Such a co-operative relationship has the potential to save the Commission both time and money, whilst simultaneously making justice more accessible to applicants. I

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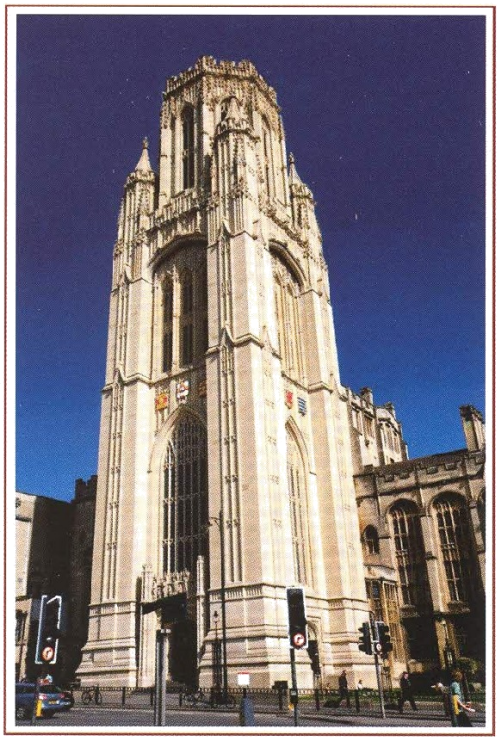

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The Story of Penny Beerntsen

By Georgina Quinton Smith, University of Sheffield Innocence Project

Having Penny Beerntsen tell her story gives a completely different perception on the occurrence of miscarriages of justice. Her emotionally mind blowing case is enlightening of how wrongful convictions can happen and much can be learnt as a result of what occurred in her case and the errors made.

Penny Beerntsen


Steven Avery

Ultimately, Penny misidentified her assailant, which played a significant role in his arrest and ultimate conviction for a crime that he did not commit. Penny was jogging along a Wisconsin beach in July 1985 when she was attacked, beaten and sexually assaulted. Although the man appeared from behind a fallen tree, Penny states that the thoughts running through her head were that she should take a good look at the man, for if she survived the horrific experience she wanted to make sure he was imprisoned. Fortunately, she did survive and at the hospital in between the medical investigations, Penny was questioned on her attacker so a composite sketch could be created. As Penny was describing the man, unbeknown to her, the investigator already had a name in her head of whom the description of the individual sounded like, a man named Steven Avery who was known to be beating his wife and was on bail for an alleged assault. The artist creating the composite sketch was also told Steven Avery's name before he started drawing. Penny remembers looking at the sketch and being unsatisfied with it, one of the features was not quite right compared to her memory of the man, but she wanted to be left alone and so she stated it was a reasonable likeness.

Based on the sketch (and the fact that Steven Avery was already a suspect in the Sheriff's Office's minds) a photo line up was created. Penny assumed from questioning the Sheriff that the suspect's photo was within the nine, and indeed it was, the picture of Steven Avery was there. Looking back and based on new information on memory, Penny wishes things had been done differently. Research shows that if potential suspect's photos are shown one at a time to a victim there is less likely to be an identification but there is also less likely to be a *wrongful* identification. Penny herself said that looking at the nine photos knowing the suspect was one of them was like a multiple choice test where you pick the one most likely to be right, instead of a definite yes or no. Penny picked Steven Avery's photo. Penny also identified Steven Avery at the physical line up, he was the only individual to have featured in both the photo and actual line up, and, as this was the second time Penny had seen his face and he did resemble the composite sketch created based on her description of her attacker, Penny states she got a gut reaction on seeing him. As a result, Steven Avery was arrested and charged with the crime.

Again, with hindsight Penny spoke about how she realised that strands of her memory had become intertwined when identifying her attacker. Research shows that memory declines at a rapid pace and the more Steven Avery's face and name were shown and spoken to her, the more certain she became that he was indeed her attacker. She stated a memory expert at Steven's trial had said that because of the way memory works "even a person who says they are 100% right can actually be 100% wrong." This is very interesting when looking at cases of those claiming innocence to crimes, for even if they have been identified by an eyewitness or the victim themselves, they may still in fact have been wrongfully convicted and the eyewitness may indeed be wrong.

Steven Avery was pronounced guilty on 14th December 1985 and given a thirty-two year sentence, despite an alibi he held which sixteen witnesses accounted for. While Steven Avery was imprisoned he consistently

The Story of Penny Beerntsen

maintained his innocence in the crime against Penny and this meant that he could not be granted parole.

In 2001, DNA testing had progressed rapidly and Steven Avery was granted another DNA test with his case being worked on by the Wisconsin Innocence Project. Penny stated when this happened she fell apart, she thought the nightmare of her attack would never end. Worse was yet to come however when the DNA came back showing that her attacker was actually not Steven Avery. Penny stated this day was worse than the day she had been attacked, "if I spent every minute of every day apologising to Steven it would not be enough." After spending eighteen years in prison for the crime against Penny that he did not commit, Steven Avery was exonerated. Penny states that she found the most difficult thing of all was learning to forgive herself.

The DNA in fact matched Gregory Allen, another suspect the police were originally investigating and he actually matched the original description provided by Penny much better than Steven Avery did. Penny was devastated that the wrong man had spent eighteen years in prison while her actual attacker was free to harm others, and in this time he had assaulted at least ten other women. The interesting thing about memory however, is that when she saw a picture of Gregory Allen, Penny's memory was so contaminated that she felt as though she had never seen him although proven to be her attacker. Certainty develops over time and Penny will say she latched onto a piece of information that appeared to fit the theory of the crime as we all tend to do.

Although Steven Avery was exonerated for the crime, and Penny subsequently met him to apologise, Penny's story does not have a happy ending. In 2007, Steven Avery was convicted of the murder and sexual assault of Teresa Halbach and he was given a life sentence of imprisonment as a result. Although she is still a victim, Penny wrongly partially blames herself for Teresa's death, stating that perhaps if she had not helped to wrongfully convict Steven, he would not have gone on to commit a murder.

Penny's story is an incredibly powerful, emotional one that gives a completely different perspective on how wrongful convictions can occur. Lessons ought to be learnt from it along with new research and information about the phenomenon of eyewitness misidentification that have emerged to prevent the wrongful conviction of the innocent. I

Acknowledgment

Many thanks to Penny Beerntsen for sharing her story to the Center on Wrongful Convictions, Chicago, in June 2011.

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News

INQUIRY in print!

From this issue onwards, INQUIRY will be available in printed copies and distributed to prison libraries across England and Wales. INUK would like to thank White and Case LLP, in particular, Samantha Hudson, for undertaking the printing of INQUIRY on a pro bono basis. The aim of putting INQUIRY in print is to make its useful contents accessible to prisoners. If you are a prison librarian and would like copies of INQUIRY for your library, please contact Ms Gabe Tan at Gabe.Tan@bristol.ac.uk.

WHITE & CASE

Welcome

INUK is pleased to announce the addition of two new member innocence projects at the University of Bedfordshire and the University of Sussex respectively. The University of Bedfordshire Innocence Project will be directed by Dr Shane Sullivan and the University of Sussex Innocence Project will be directed by Professor Richard Vogler. Welcome on board!

INUK 7th Annual Conference for Innocence Projects

The INUK 7th Annual Conference for Innocence Projects took place between the 23-24 November 2012. Sponsored by LexisNexis and hosted by Norton Rose LLP in London, the event was attended by around 200 staff and students from INUK's member innocence projects. Speakers at the conference included Peter Wilcock QC (Tooks Chambers), Mark Barlow (Garden Court North), Ms Julie Allard (Forensic Context), Professor Tim Valentine (Goldsmith University, London), Professor Paul Roberts (University of Nottingham), Sue Caddick (sister of Eddie Gilfoyle) and Michael O'Brien (Cardiff Newsagent Three). INUK would like to thank all speakers and attendees for their enthusiastic participation, which contributed to making the conference a success.

Audiences at the INUK Conference at Norton Rose LLP

Events

PILNet Workshop

Dr Michael Naughton, Founder and Director of INUK, will be speaking at the **PILNet (The Global Network for Public Interest Law) Workshop** titled 'Building More Just Societies through Public Interest Law: Strategies and Challenges'. Hosted by **BPP Law School in Holborn**, the workshop will be held on **Thursday, 7 February 2013, between 2-5 pm**. To RSVP, please e-mail probono@bpp.com.

Victims' Voices

The **BPP Law School Innocence Project** will be hosting its first **Victims' Voices** speaker series to explore the harmful consequences on individuals and families when the criminal justice system gets it wrong. The event will be held on **Wednesday, 13 February 2013, at 6 pm at BPP Law School in Holborn**. Speakers include Sue Caddick, sister of alleged victim of wrongful conviction Eddie Gilfoyle and solicitor Matt Foot from Birnberg and Pierce. The event is free but reservation is essential. Please RSVP to Innocence@my.bpp.com by 10 February 2013.

News

Sue and Paul Caddick will also be speaking to the **University of Plymouth Innocence Project** on the **18 February 2013** and the **University of Bristol Innocence Project** on the **20 February 2013**.

'Someone to Blame'

Sam Hallam

In conjunction with the University of Southampton Innocence Project, the Nuffield Youth Theatre is putting on **'Someone to Blame'**, a piece of verbatim theatre that tells the story of **Sam Hallam** who overturned his conviction for the murder of Essayas Kassahun in 2012 after serving 7 years in prison. Written by Tess Berry Hart, the play will be shown on three nights – **Thursday to Saturday, 14th, 15th and 16th March 2013** to all-age audiences. There will be a post show Q & A talk each night, which will feature Sue and Paul Caddick, Michael Naughton and Gabe Tan from the Innocence Network UK, Dr Jamie McLean, Director of the University of Southampton Innocence Project, Brian Thornton, Director of the University of Winchester Innocence Project, Dr Damian Carney and Marika Henneberg, Directors of the University of Portsmouth Innocence Project.

INUK Spring Conference for Innocence Projects

The INUK Spring Conference for Innocence Projects will be hosted by **White and Case LLP** in London on **Friday, 22 March 2013 from 1 pm to 7 pm**. For more information, please go to www.innocencenetwork.org.uk/events.

Case Statistics

Total number of enquiries for assistance: **1191**

Total number of applications assessed/under assessment by INUK: **616**

Total number of cases deemed eligible for full investigation: **220**

Total number of cases referred to member innocence projects for full investigation: **108**

Total number of cases on the waiting list: **112**

Total number of cases referred to the CCRC/SCCRC: **12**

Total number of referrals to the Court of Appeal: **3**

(Statistics as of 30 January 2013)

Applying for Casework Assistance

If you think that you have been wrongly convicted and would like to seek assistance from the INUK, please write to us to request a copy of our Guidance for New Applicants and Preliminary Questionnaire at the following address:

Innocence Network UK, University of Bristol Law School, Wills Memorial Building, Queens Rd, Bristol BS8 1RJ

Alternatively, our Guidance for New Applicants and Preliminary Questionnaire can be downloaded from: www.innocencenetwork.org.uk/contact.

Please note that we are generally unable to assist applicants who have not exhausted the normal appeals process.

All assistance by INUK member innocence projects are given on a pro bono basis.

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CALL FOR SUBMISSIONS

INQUIRY welcomes submissions for any of the following categories:

1) Feature Articles on any issue relating to wrongful convictions and/or innocence project work (no more than 2,000 words).

2) Reviews of books, articles or films on the subject of wrongful convictions and/or innocence projects (no more than 1,000 words).

3) Innocence Project News from Members (no more than 250 words)

4) Research Updates (no more than 250 words)

5) Student articles on any issue relating to wrongful convictions and/or innocence project work (no more than 1,000 words).

Please note: all submissions from students must be from member innocence projects and must be vetted and sent via their staff director.

DEADLINES & SCHEDULES FOR 2013

Next Issue

The deadline for the submissions for all of the above categories is 15 April 2013

INSTRUCTIONS

All submissions and expressions of interest should be sent by e-mail with INQUIRY in the subject line to:

innocence-network@bristol.ac.uk

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