

The Criminal Cases Review Commission: Legal Aid and Legal Representatives

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CCRC Written Response

Introduction:

The Criminal Cases Review Commission ('CCRC') welcomes the publication of Sussex University's research findings "*The Criminal Cases Review Commission: Legal Aid and Legal Representatives*" March 2021 funded by the Economic and Social Research Council, published in May 2021.

The CCRC recognises the importance of independent scrutiny to the CCRC's performance and to the way that it discharges its vital public function, and we are grateful to Sussex University for the detailed consideration that has gone into this research report. Sussex University makes 12 recommendations on which the CCRC has commented below.

The CCRC very much appreciates the opportunity that Sussex University has provided us to reflect on our role and working practices.

Important findings in the research report

The CCRC considers the findings of the research project extremely important and in particular the following conclusions:

- There was considerable evidence to suggest that both the regime and the administration of tests and audits by the LAA was undermining lawyers' efforts to conduct CCRC casework efficiently and in a financially viable way.
- Levels of representation of CCRC applicants, which have previously been recorded at 34%, declined to an average of 23% in the period 2012-2014, and to as low as 10% towards the end of that period.
- Legal practitioners explained that they have been increasingly driven to undertake unremunerated work or to abandon practice in this area altogether.
- The CCRC itself has been faced with poorly expressed and underprepared applications submitted by unrepresented individuals, who have had no advice on the viability of their application. This appears to have increased the already substantial workload of the CCRC.
- Reductions in legal aid funding appear to have had an impact on the commissioning of expert evidence by legal practitioners, to some extent shifting this burden on to the CCRC itself.

These points are particularly concerning given:

- The results suggest an association between legal representation and success of applications to the CCRC.
- There was agreement from all research participants (including legal representatives and CCRC staff) that well-informed and professional representation of CCRC applicants is valuable.

CCRC responses to recommendations made:

1. That legal aid funding rates should be reviewed, with a view to increasing them to more realistic levels in the context of the specialised nature of CCRC casework.

The CCRC agrees with this recommendation.

2. That CCRC further review application-related documents for clarity and utility for both legal representatives and unrepresented applicants.

The CCRC is committed to communicating as clearly and effectively as possible with applicants and their representatives. We keep our communications and decision documents under review and we continue to work with our stakeholders on this.

We strive to ensure that communications are structured and written in a way that is comprehensible to the recipient. For example, we reviewed the layout of our decisions and introduced a Decision Notice which allows us to set out the decision in some cases in a simpler format which is particularly helpful for non-represented applicants. However, properly addressing an applicant's submissions may require a detailed analysis, possibly encompassing complex legal or evidential issues.

We want to ensure that communications are targeted and accessible, bearing in mind the varied audiences for CCRC literature.

3. That the CCRC adopt/publish a clearer policy around the use of experts (and other forms of investigation).

The CCRC has a published Casework Policy on "Experts – Selection and Instruction" on its website. The CCRC are keeping this Policy under review including the circumstances in which it is appropriate to instruct an expert to advise the CCRC and to provide reports, with a view to ensuring that its approach to such matters is clear and comprehensible.

4. That the application of Sufficient Benefit Tests (SBT) in CCRC casework be reviewed to allow lawyers to conduct more sifting work, and to recognise the value of that work in the system generally.

The CCRC agrees with this recommendation.

5. That interim payments (both disbursements and bills) for CCRC casework should be allowed, in order to ease cashflow for firms.

The CCRC agrees with this recommendation.

- 6 & 7. That;

- a) The LAA should review the way in which it audits and assesses CCRC casework, and develop a more dialogic relationship with casework providers, and;
- b) The CCRC review engagement with legal professionals around what investigations are being conducted.

The CCRC agrees with the recommendation that the LAA should review its audits and assessments of CCRC casework.

We will review our engagement with lawyers around the conduct of investigations. We agree that the general direction of the review and associated enquiries (unless they are sensitive) should be set out in regular updates to applicants and representatives. We welcome engagement with applicants and representatives to ensure that we properly understand their submissions. Similarly, the CCRC will consider suggested lines of enquiry and liaise with legal reps and applicants for further information to assist with its enquiries where required. As an independent statutory body, the CCRC is solely accountable for decisions made in the course of a review.

8. That the CCRC review the guidance information available for legal representatives, and consider dialogic seminar style events for greater interaction, openness and engagement.

The CCRC will review the guidance available on its website for lawyers considering making applications to the CCRC to ensure that it is relevant. The CCRC will also offer interactive training events for legal representatives with a view to helping them add maximum value to CCRC applications. We will invite legal representatives who have worked effectively with the CCRC on previous cases to assist in these events.

9. That legal professionals should get involved with any training and engagement events provided by, and in discussion with, the CCRC.

See the previous response. The CCRC will welcome the involvement of legal professionals in these events.

10. For legal professionals and the CCRC to work together in relation to post-conviction disclosure.

The CCRC engages as positively as possible with requests by legal representatives in relation to post-conviction disclosure. However, the level of disclosure the CCRC can make during a review and after that review is finished is limited by statute, case law and legal privilege, particularly where 3rd party material is involved. The CCRC is prevented from using its section 17 powers to facilitate third party access to public body material where it is not persuaded that there are reasonable lines of enquiry (*R v Nunn*). An application to the CCRC cannot be used as a vehicle for individuals to obtain documents and information to which they have no legal right.

However, the CCRC actively seeks to ensure that public bodies such as CPS and Police Forces adhere to their duties under *R v Nunn* to the fullest extent possible.

11. That legal professionals are selective about what information is sent to the CCRC, making sure that grounds are very clearly stated (either on the Easy Read form or by letter), what further investigations are considered necessary, and how that investigation will assist in determining that a RP of referral exists.

The CCRC agrees with this recommendation. The recommended approach is invariably of great assistance in ensuring the efficiency and effectiveness of a review. As noted above, the CCRC welcomes engagement with legal representatives about how best to add value to CCRC applications.

12. The CCRC budget be increased.

The CCRC agrees this recommendation which it notes was also made by the Westminster Commission.

In addition, the CCRC would make the following comments in relation to the report's findings:

The CCRC agrees that a legal representative can add value to an application and can assist the CCRC in providing and obtaining information, in suggesting appropriate lines of enquiry and in ensuring the effectiveness of its communications with the applicant. The CCRC is concerned that the evidence presented by Sussex University suggests that the ability of lawyers to do CCRC work has been undermined by changes to Legal Aid and that there has been a reduction in the number of lawyers willing or able to do CCRC work.

Having said that, legal representation is not essential to the making of applications and the CCRC is keen to continue to encourage applications from applicants and lay representatives (family members, friends or support groups) with or without legal representatives.

The CCRC is of the view that the findings may indicate that those applicants whose cases were suitable for review were more likely to be legally represented. It also notes that the research found that around half of applications made by legally represented applicants in the dataset explored did not make "reasonable or successful" submissions.

The CCRC views this with concern and is keen to explore the ways in which lawyers can add value to applications. Additionally, it may be appropriate for the CCRC to point lawyers to other areas where potential applicants typically need assistance e.g.: helping applicants identify the best route to having their case reviewed (by an application to the CCRC or by seeking leave to appeal out of time?), assisting an applicant in understanding what might constitute new and important evidence in a case or what might indicate that a trial has gone wrong, or facilitating efficient reviews. Where cases are not referred to the appeal courts, lawyers can assist by explaining the outcome to applicants and options thereafter. The CCRC is committed to liaising with lawyers to ensure that legal representation of applicants is as effective as possible.

The CCRC has considered the comments of individual lawyers about decision waiting times. The CCRC acknowledges that in a small number of cases the complex nature of the review may mean that applicants wait a long time for a decision.

The CCRC understands that this is stressful for all involved and that decisions should be reached as soon as is practicable whilst ensuring the quality of a review. However, the CCRC would comment that there is a danger that the experience of particular individuals may not accurately reflect the full picture of all applications to the CCRC. In general, long running cases are not the norm at the CCRC. Recent figures on waiting times are as follows:

- less than 6% of cases over 2 years, over 80% of cases completed within 12 months, average review time less than 36 weeks.

Finally, the CCRC has commented on the recommendations relating to its work made in the Westminster Commission Report, whose findings have been referenced by Sussex University as relevant to its research. These comments have now been published.

Conclusion

The CCRC believes that a reduction in the number of lawyers willing and/or able to take on CCRC work is bad for justice. We take the view that more legal aided applications is better for applicants, better for the CCRC and better for the criminal justice system overall. We would like to thank Sussex University for its detailed independent research on a subject which is of great importance to all concerned with the effectiveness of that system.

CCRC Research Committee June 2021