

[Review by Professor Richard Nobles, Queen Mary University. British Journal of Criminology \(forthcoming\).](#)

Carolyn Hoyle and Mai Sato, *Reasons to Doubt: Wrongful Convictions and the Criminal Cases Review Commission* (OUP 2019).

The Criminal Cases Review Commission (CCRC) has, since 1997, taken over the role formerly executed by C3, a small staff of civil servants working within the Home Office, of identifying convictions to be referred to the Court of Appeal, Criminal division (CACD), for a review of their safety.¹ In carrying out this role, the CCRC has been the subject of considerable scrutiny and often criticism from academics, legal practitioners, and journalists but, as the authors note in their Preface: ‘none founded on empirical research’. This book, based on the findings of a four-year empirical study of decision-making and the use of discretion within the Commission, seeks to fill that lacuna.

The empirical work that underpins the book gives the reader access to much material normally outside the public domain. The first of these is the CCRC’s numerous internal casework guidance notes which seek to instruct CCRC staff (Commissioners, Case Review Managers and Group Leaders) in the exercise of their discretion when making the many different decisions that arise in connection with an application by an offender to have their conviction referred on appeal to the CACD: whether to allocate the application to a case worker for investigation or reject it without further action; whether to undertake only a review of documentation or to commission forensic testing or interview witnesses; whether to ask third parties to disclose confidential information which may undermine the credibility of a complainant; what to look for in particular categories of cases; etc. Whilst formal memoranda are published on the CCRC web pages, these internal guidance notes are not. They provide the authors with a rich source of information about how these various decisions are reached, and how both process and outcome have evolved over time in response to a number of internal and external factors. The authors also conducted interviews with CCRC staff at all levels, sampled case files and, at one stage, in response to the CCRC’s own concern with inconsistencies in their selection of cases for more than documentary investigations, conducted an online survey of staff views.

In presenting their findings, the authors rely heavily on the conceptual frameworks for the analysis of discretion developed by Keith Hawkins² and Chun Wei Choo.³ The former distinguishes between internal formal factors that structure decisions (‘the field’) and external factors (‘the surround’). These two in turn organise how CCRC staff approach a decision (their ‘frame’), reducing but not eliminating the subjective factors (prior experience, personal values, status within the organisation) which also operate. Choo’s work assists the authors to describe how a consensus over these constraints develops within the CCRC, beginning with impressions and empirical observations (‘sense making’), which is then converted from tacit to explicit knowledge (‘knowledge creation’) through dialogue between CCRC staff (including saving cases to a data base) and the production of guidance notes and formal memoranda. Using these conceptual frameworks to organise empirical findings, the authors take us beyond what they refer to as the positivist view of discretion – the idea that everything that is inside the statutory authority of an organisation is an option available to those

¹ The CCRC is also empowered to refer sentences for review, and cases to the Home Secretary for pardons. These other roles are not examined.

² In particular, *Law as a Last Resort: Prosecution Decision-Making in a Regulatory Agency* (OUP 2002).

³ *The Knowing Organisation: How Organisations Use Information to Construct Meaning, Create Knowledge, and Make Decisions* (2nd edn. OUP 2005).

who make its decisions. In the case of the CCRC, the statutory authority is simply an end point – to only refer cases that have a ‘real possibility’⁴ of resulting in the CACD quashing an ‘unsafe’ conviction. But how, from the approximately 1,400 applications received each year, most from convicted offenders lacking legal assistance, are the few referrals (currently 0.8%) selected? To select only those cases that meet this standard through examination of the material provided within the CCRC’s application form (even with its new user-friendly format) would not meet this institution’s role as an investigative body. But to investigate every case for every possibility of a successful appeal is simply not affordable, particularly within the CCRC’s current (and much reduced)⁵ budget.

I cannot do justice here to the wealth of information and insight provided, what we learn from this book about the manner in which the CCRC decides which cases to investigate, and how to conduct those investigations. But I can give a flavour of its value by reference to some general themes. First, we have confirmation of the CCRC’s concern with criticism of it, in their various forms. Firstly, and most importantly, criticism from the CACD for referring cases that the Court sees as lacking merit or which rely on condemnation of institutional practices within the police and the CPS (which, if accepted, would invariably have implications for large numbers of other convictions). This criticism, and its anticipation, feeds into the numerous internal guidance notes. As a result all CCRC staff know not to try to overturn convictions based on forensic evidence by seeking opinions from more qualified experts than were used at trial, restricting the employment of such ‘bigger’ experts to situations where general opinion within the relevant scientific community has altered in a manner which makes the original evidence seem unreliable. Reference to systemic police or CPS malpractice/failures is something which can form a useful addition to a reference which includes other grounds, but is likely to antagonise the CACD if included as one of the referral grounds (as this will force the CACD to address the possibility of systemic failures, and the implications for numerous other convictions). A second sensitivity is to the criticism implied by a successful judicial review of a decision not to investigate or refer. The CCRC tends to avoid this criticism by routinely re-considering cases whenever judicial review is commenced or even threatened, and by constructing its provisional decisions (supposedly addressed to offenders who require user-friendly application forms) as detailed legal justifications likely to pass judicial scrutiny. Another criticism that concerns the CCRC is any accusation that it is being inconsistent in its decisions. The guidance notes are intended to address this, even to the paradoxical extent of a guidance note on the role to be played by ‘gut instinct’. Another response has been the move away from decisions made by individual Commissioners, to more team-based decisions. The notable examples here are of refusals to refer no longer being made by single Commissioners, but in discussion between the case worker, group leader and other Commissioners; and whereas the screening out of cases to be rejected without further investigation was formerly allocated to particular Commissioners, it is now shared out evenly.

A second general finding is of how CCRC staff internalise the need to reconcile open possibilities of investigation with the need to operate within its budget. The requirement to make ‘efficient’ decisions is understood in terms of the costs of delay to other more ‘meritorious’ applications if resources are squandered on investigations which have a much lower likelihood of identifying grounds which will convince the CACD. Rationing is articulated as the avoidance of greater injustice.

⁴ Criminal Appeal Act 1995 S13(1)(a).

⁵ ‘The Chair of the commission has confirmed that for every £10 that his predecessor spent on a case ten years ago, he now has just £4.’ (Quoted at p.18 of this book)

A third interesting finding is of how the CCRC decide which applications to reject without further investigation. Here we see both an expansion and a shrinking of what might be expected from a reading of their statutory authority. Under the Criminal Appeal Act 1995 s13(1)(c) a referral cannot be made where an applicant has not previously appealed to the CACD or applied for leave to appeal, unless there are 'exceptional circumstances'. Around 40% of applications are from persons who have not exhausted their right to make these appeals/applications for leave. Rather than reject these cases wholesale or require them to show grounds that would satisfy the CACD's standard of the exceptional, CCRC staff accept them for investigation on a quite routine basis. They ask themselves whether the application requires the kind of investigation that would not occur if the applicant were to commence a normal appeal or application for leave. Here many of the handicaps faced by prisoners seeking to challenge their convictions through the normal route (such as the inability of solicitors to obtain information from private and public bodies, or to interview under caution) are treated as reasons not to reject applications outright, but to begin an investigation. If the investigation subsequently produces what would ordinarily be considered strong grounds for appeal (fresh evidence not produced at the trial for reasons that are deemed reasonable) the CACD is not expected to throw out the case for not being sufficiently 'exceptional', since this would then only result in the case being represented as a normal appeal. In effect, this results in cases that, looking to the CCRC's statutory authority, might be thought unlikely to be investigated, routinely being allocated to a case worker for investigation.⁶

This book is essential reading for those interested in miscarriages of justice and the ability of the CCRC to provide a remedy through investigation and referral to the CACD. Whilst it may not end academic criticism of the CCRC, it will at least ensure that such criticism is more empirically informed and thereby much sounder.

⁶ It is complicated to work out who would be better off by applying to the CCRC without a normal first appeal. On the one hand, within the CCRC, first appeal cases avoid immediate rejection at the screening stage, being allocated to a case worker for at least some investigation. On the other hand, the CCRC avoids antagonising the CACD by re-presenting arguments previously rejected at a failed appeal or application for leave, so subsequent applications have to find new grounds to justify a referral.