



Northern Ireland Assembly

**Committee for Justice
Report on the Legislative Consent Memorandum: The
Criminal Cases Review Commission (Information) Bill**

NIA 304/11-16

Session: 2015/2016

Date: 18 February 2016

Introduction

Powers

1. The Committee for Justice is a Statutory Departmental Committee established in accordance with paragraphs 8 and 9 of the Belfast Agreement, section 29 of the Northern Ireland Act 1998 and under Standing Order 46.

The Committee has power to:

- consider and advise on Departmental budgets and annual plans in the context of the overall budget allocation;
- consider relevant secondary legislation and take the Committee stage of primary legislation;
- call for persons and papers;
- initiate inquiries and make reports; and
- consider and advise on any matters brought to the Committee by the Minister of Justice.

The Criminal Cases Review Commission (Information) Bill

2. The Criminal Cases Review Commission (Information) Bill ('the Bill') is a Private Members' Bill presented to Parliament through the ballot procedure on 24 June 2015, and was printed prior to its second reading on 4 December 2015. The Bill's sponsor is Mr William Wragg MP and it enjoys both cross-party and Government support. Further information on the Bill can be found at:

<http://services.parliament.uk/bills/2015-16/criminalcasesreviewcommissioninformation.html>

Purpose of the legislation

3. The Criminal Cases Review Commission (CCRC) is an independent body which investigates potential miscarriages of justice in England, Wales and Northern Ireland and refers appropriate cases to the Court of Appeal. The Commission is also responsible for recommending the use of the Royal Prerogative of Mercy.
4. The Commission has a power to obtain documents or material from public bodies which may assist with its investigation. Section 17(4) of the Criminal Appeal Act 1995 provides that this duty is not affected by any obligation of secrecy, or other limitation on disclosure.
5. The Commission however has no power to obtain material from the private sector and has advised that this has often worked to the disadvantage of applicants, particularly in recent years as responsibility for material once held by public bodies is now frequently entrusted to public sector bodies.
6. The Bill inserts a new section 18A into the Criminal Appeal Act 1995 to enable the CCRC, for the exercise of its functions, to seek an order from the Crown Court

requiring a person (in the private sector) to give the CCRC access to documents or other material in that person's possession or control.

7. As with the power to require material held by public bodies, the new disclosure requirements would apply notwithstanding any obligations of secrecy or other limitation on disclosure (including statutory obligations or limitations). In the first instance the CCRC should attempt to obtain the information voluntarily, before applying to the court for a disclosure order.
8. The change will potentially benefit those who consider they have suffered a miscarriage of justice in Northern Ireland. The change will also impact on private organisations and individuals who are currently not required to co-operate with the Commission's investigation. It is however considered that the number of people likely to be affected will be small in number and there are safeguards to the policy.

Committee for Justice Consideration

9. The need for an extension to the Commission's powers to obtain documents from private organisations and individuals, where it is reasonable to do and under judicial oversight, was first raised with the previous Chairman and Deputy Chairman at a meeting with Commissioners in September 2014. The Department of Justice subsequently undertook a three-month public consultation on proposals to extend the powers of the CCRC, including proposed judicial safeguards.
10. The Department reported back to the Committee on the results of the consultation at its meeting on 17 September 2015 and advised that 10 responses had been received which were largely supportive of the suggested change. The responses also indicated support for the proposed safeguards which were considered to be adequate and proportionate.
11. The importance of protections for private organisations and individuals including consideration of human rights and data protection were highlighted by both the Attorney General for Northern Ireland and the Information Commissioner.
12. With regard to human rights it was indicated that it would be necessary to balance the competing rights and interests of the parties affected by the disclosure including the rights protected by article 8 of the European Convention on Human Rights. It was also noted that, as a "section 6 Human Rights Act public authority", the CCRC itself must form a proper judgement in balancing the relevant rights of third parties. It was felt that a requirement to persuade a Court that disclosure is justified would sufficiently mitigate against the risk that individuals and organisations may provide documents and other material too readily, as they may be under the impression that any refusal to provide the material will inevitably result in a court order compelling them to do so.
13. With regard to compliance with the Data Protection Act (DPA) it was noted that while a number of examples used in the consultation document cited confidentiality as a reason that information is not provided, the DPA does contain a number of exemptions

which allow organisations to disclose personal data that would otherwise be protected. It was considered that creating a legal obligation for private organisations to provide information would strengthen the exemption in 35(1)¹ of the DPA by providing a statutory duty rather than a discretionary obligation.

14. In view of the general support for the proposal, the Department indicated its intent to legislate for this change. Subsequently the Department advised that the Ministry of Justice intended to bring forward the same legislative change in England and Wales through the Criminal Cases Review Commission (Information) Bill introduced in the House of Commons by a Private Member in June 2015. The Department further indicated that, as it would be unable to make the change by way of an Assembly Bill before the end of this mandate, the Minister was seeking the Committee's formal agreement for the Legislative Consent Motion mechanism to be used in this regard. This would enable the introduction of the relevant provisions within the same timeframe as England and Wales.
15. Following consideration of information provided by the Department, on the results of the consultation on proposals to extend the powers of the CCRC, the Committee for Justice agreed that it was content with the Minister's proposal to extend its powers to enable it to obtain documents from private organisations and individuals, and for the legislative change to be made by way of a Legislative Consent Motion.

The Legislative Consent Motion

16. A Legislative Consent Memorandum in respect of the Bill was laid in the Assembly on 27 January 2016 and referred to the Committee for consideration on 28 January.
17. The draft motion, which will be tabled by the Minister of Justice is:

“That this Assembly endorses the principle of the extension to Northern Ireland of the provisions of the Criminal Cases Review Commission (Information) Bill.”

18. The reason provided in the Legislative Consent Memorandum for utilising a LCM instead of an Act of the Assembly is primarily to enable the provisions of the Bill to be in place in Northern Ireland in the same timeframe as England and Wales, as there is no opportunity to legislate for this change in tandem with England and Wales by means of an Assembly Bill.
19. **At its meeting on 4 February, the Committee for Justice agreed that it was content to support the Legislative Consent Motion in relation to the Criminal Cases Review Commission (Information) Bill.**

Appendices

Appendix 1 – Department of Justice Legislative Consent Memorandum: Criminal Cases Review Commission (Information) Bill (January 2016)

¹ <http://www.legislation.gov.uk/ukpga/1998/29/section/35>

Appendix 2 – Criminal Cases Review Commission (Information) Bill and Explanatory Memorandum, as introduced to the House of Commons

Appendix 3 – Department of Justice summary of consultation responses on a proposal to extend the powers of the Criminal Cases Review Commission (September 2015)

Appendix 4 – Department of Justice consultation on a proposal to extend the powers of the Criminal Cases Review Commission to obtain documents from private organisations and individuals (November 2014)

FROM THE OFFICE OF THE JUSTICE MINISTER



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Justice
www.dojni.gov.uk

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18 January 2016

**CRIMINAL CASES REVIEW COMMISSION (INFORMATION) BILL:
LEGISLATIVE CONSENT MEMORANDUM**

I attach a copy of a Legislative Consent Memorandum to be laid in the Assembly under paragraph (2) of Standing Order 42A, in respect of a draft legislative consent motion that I intend to table, proposing that the Assembly endorses the principle of the extension to Northern Ireland of the Criminal Cases Review Commission (Information) Bill. This Bill is a Private Member's Bill. The Bill was presented to Parliament through the ballot procedure on 24 June 2015. There was no debate on the Bill at this first reading. The Bill passed its second reading debate on 4 December 2015 and will now be committed to a public bill committee at a date yet to be announced.

The relevant departmental official within the Department of Justice for any queries in respect of this document is Susan Nicholson (susan.nicholson@dojni.x.gsi.gov.uk).

A handwritten signature in black ink, appearing to read 'D. Ford'.

DAVID FORD MLA
MINISTER OF JUSTICE

Enc

LEGISLATIVE CONSENT MEMORANDUM
CRIMINAL CASES REVIEW COMMISSION
(INFORMATION) BILL

Draft legislative Consent Motion

1. The draft motion, which will be tabled by the Minister of Justice, is:

“That this Assembly endorses the principle of the extension to Northern Ireland of the provisions of the Criminal Cases Review Commission (Information) Bill.”

Background

2. This memorandum has been laid before the Assembly by the Minister of Justice under Standing Order 42A (2). The Criminal Cases Review Commission (Information) Bill is a Private Members’ Bill presented to Parliament through the ballot procedure on 24 June 2015. The Bill was printed just prior to the second reading on 4 December 2015. The Bill’s sponsor is Mr William Wragg MP. It enjoys cross-party and Government support. Further information on the progress of the Bill may be found at:

<http://services.parliament.uk/bills/2015-16/criminalcasesreviewcommissioninformation.html>

Summary of the Bill and its policy objectives

3. The Bill’s provisions would allow the Criminal Cases Review Commission (CCRC) to require the production of documents and other material so that it can obtain them from persons employed or serving in private bodies.
4. The CCRC is an independent public body set up under the Criminal Justice Act 1995 to investigate possible miscarriages of justice in magistrates’ courts and the Crown Courts of England, Wales and Northern Ireland and to refer convictions and sentences to the relevant appeal court for a new appeal. Its jurisdiction was extended by the Armed Forces Act 2006 to cover the Court Martial and the Service Civilian Court.
5. Section 17 of the Criminal Appeals Act 1995 provides for a wide ranging power to obtain documents from public bodies as part of its investigations. Where the CCRC believes that a public body has possession or control of

any material which may assist the CCRC in the exercise of its function, it may require the material to be produced, may take it away or may direct it be preserved without alteration until further direction.

6. There is no corresponding power in relation to documents and other material held by private bodies. The Bill seeks to address this lacuna. The proposed power would enable the CCRC to seek an order from a judge of the Crown Court if necessary requiring a person in the private sector to give the CCRC access to documents or other material in that person's possession or control.

Provisions which deal with a Devolution Matter

7. The Criminal Appeal Act 1995 established the CCRC to investigate possible miscarriages of justice in England, Wales and Northern Ireland. It refers potential miscarriages to the relevant appeal court. Under devolution, the Commission continue to act for both jurisdictions under the sponsorship of the Ministry of Justice and the Department of Justice contributes to the Commission's running costs. The Secretary of State's functions transferred to the Department except where any protected information relevant to national security is involved which cannot be divulged to the Department.
8. This Bill will extend the change to England, Wales and Northern Ireland. The Scottish Criminal Cases Review Commission which is responsible for the investigation of miscarriages of justice in Scotland already has this power.

Reasons for making the Provisions

9. The introduction of these arrangements will be beneficial for those convicted in a criminal court in Northern Ireland. Currently the Commission has a power to obtain information from the public sector. However an investigation by the Commission into a miscarriage of justice can be impeded by the refusal of a private organisation to provide information. Considerations of customer or employee confidentiality are often cited in response to requests for information despite the Commission providing assurances as to how the information would be handled and disclosed.
10. The problem has become more acute in recent years as much of the responsibility for material once held by public bodies is now entrusted to private sector bodies, for example forensic science services in England & Wales, and private schools and clinics. The absence of any compulsion to

assist the Commission may result in the victim of a miscarriage of justice suffering continued imprisonment and the continuing social consequences of having a criminal conviction. In terms of human rights the extension of the Commission's powers will promote a person's right to a fair trial.

Reasons for utilizing the Bill rather than an Act of the Assembly

11. Extending the provisions of the Bill to Northern Ireland would allow the provisions to be in place here in the same timeframe as England and Wales. There would be no opportunity to legislate for this change in tandem with England and Wales by means of an Assembly Bill.

Consultation

12. The Department of Justice held a three month public consultation on the proposed change beginning in December 2014. Ten responses were received to the consultation. Generally respondents were highly supportive of the change. A number highlighted the importance of balancing the competing rights and interests of all the parties affected by the disclosure and a requirement to ensure any powers of the Commission should comply with the Data Protection Act. Overall the safeguards proposed were considered by most respondents to be adequate and proportionate. There would be a facility to seek the consent of the individual first and a choice for them to release material. Where necessary a Court would ensure that private bodies and individuals have the protection required in exceptional cases and the Commission would be required to persuade the Court that disclosure is justified.

Human Rights and Equality

13. The change will potentially benefit those who consider they have suffered a miscarriage of justice in Northern Ireland. Presently the absence of any compulsion to provide information may result in a victim of a miscarriage of justice suffering continued imprisonment or they may fail to have a previous conviction quashed due to a lack of important information from the private sector.
14. The change will also impact on private organisations and individuals who are currently not required to co-operate with the Commission's investigation. The number of people likely to be affected by this is unknown however it is considered to be only a small number. There will however be safeguards in the policy. The Commission would always first

seek to obtain the information voluntarily; any application for an order would be required to be made to the Crown Court under judicial supervision; and this would ensure an open and fair process is in place.

15. It is important that disclosure should be proportionate and justified and in compliance with the third party data protection principle. There is a requirement to balance the competing rights and interest of all the parties affected by the disclosure.

Financial Implications

16. There will be no public expenditure implications for the Northern Ireland devolved administration. In practice it is expected that when the Commission notify a private sector body or individual that they wish to inspect relevant material, a reminder of the statutory power will be sufficient to secure voluntary compliance and only a small number of applications for a court order would be required.
17. No specific entitlement to legal aid funding is proposed for such cases and costs will fall to the parties concerned. This will help to ensure that the Commission are discouraged from making unnecessary applications and also discourages private organisations and individuals from opposing sensible applications for disclosure.

Summary of Regulatory Impact

18. The provisions of this Bill could potentially impact on individuals and businesses in the private sector in Northern Ireland including for example, private clinics and schools, employers, charitable organisations, owners of shops and stores, and the banking sector. Where an organisation holds information, such as employee or customer information, CCTC footage, casefiles or other such information which may assist the Commission's investigation of a potential miscarriage of justice, they may be asked to disclose this information. The Commission would seek the consent of the individual first and they would have a choice whether to release the material or not. Where necessary a Court would provide a judicial oversight in disputed cases.

Engagement to date with the Committee for Justice

18. The Committee for Justice noted the results of the Department's consultation on this proposal at its meeting on 17 September 2015. The Committee agreed that it was content with the proposal to extend the

powers of the Criminal Cases Review Commission to enable it to obtain information from private organisations and individuals and for the legislative change to be made by way of a Legislative Consent Motion.

Conclusion

19. The view of the Minister of Justice is that in the interests of good government the provisions of the Bill should extend to Northern Ireland.

Department of Justice
January 2016

Criminal Cases Review Commission (Information) Bill

EXPLANATORY NOTES

Explanatory notes to the Bill, prepared by the Ministry of Justice with the consent of William Wragg, are published separately as Bill 20—EN.

Criminal Cases Review Commission (Information) Bill

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- 1 Extension of powers to obtain documents and other material
- 2 Extent, commencement and short title

A
B I L L

TO

Extend the Criminal Cases Review Commission's powers to obtain information.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1 Extension of powers to obtain documents and other material

(1) After section 18 of the Criminal Appeal Act 1995 insert—

“18A Obtaining documents etc from those not serving in public bodies

- (1) The Crown Court may, on an application by the Commission, order a person to give the Commission access to a document or other material that is in the person's possession or control. 5
 - (2) The court may make an order only if it thinks that the document or other material may assist the Commission in the exercise of any of their functions.
 - (3) An order under this section may include provision about the manner in which access must be given, including provision allowing the Commission to take away a document or other material or make copies. 10
 - (4) An order under this section may direct the person against whom it is made not to destroy, damage or alter the document or other material before the direction is withdrawn by the court. 15
 - (5) An order under this section may not be made against a person on whom the Commission could impose a requirement under section 17 (person serving in a public body).
 - (6) Subsections (3) and (4) of section 17 apply for the purposes of this section as they apply for the purposes of that section.” 20
- (2) At the end of the heading to section 17 of that Act insert “from those serving in public bodies”.
- (3) In section 25 of that Act (restrictions on onward disclosure without consent)—

- (a) in subsection (1) after “requirement is imposed under section 17” insert “or by an order under section 18A”;
- (b) in subsection (2)(a) after “section 17” insert “or 18A”.

2 Extent, commencement and short title

- (1) This Act extends to England and Wales and Northern Ireland only. 5
- (2) This Act comes into force at the end of the period of two months beginning with the day on which it is passed.
- (3) This Act may be cited as the Criminal Cases Review Commission (Information) Act 2015.

Criminal Cases Review Commission (Information) Bill

A

B I L L

To extend the Criminal Cases Review Commission's powers to obtain information.

*Presented by William Wragg,
supported by John Howell, Mr Peter Bone,
James Davies, Jeremy Corbyn,
John McDonnell, Keith Vaz,
Mr Graham Brady, James Berry,
Dr Liam Fox, Dr Tania Mathias and
Seema Kennedy.*

*Ordered, by The House of Commons,
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Bill 20

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CRIMINAL CASES REVIEW COMMISSION (INFORMATION) BILL

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Criminal Cases Review Commission (Information) Bill as introduced in the House of Commons on 24 June 2015 (Bill 20).

- These Explanatory Notes have been provided by the Ministry of Justice, on behalf of William Wragg MP, the Member in charge of the Bill, in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill. So where a provision of the Bill does not seem to require any explanation or comment, the Notes simply say in relation to it that the provision is self-explanatory.

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Overview of the Bill

1. The Bill will extend the Criminal Cases Review Commission's powers to obtain documents and other material so that they can acquire them from a person who is not employed by or serving in a public body.

Policy background

2. Since 31 March 1997 there has been a Criminal Cases Review Commission ("CCRC") with the power to investigate alleged miscarriages of justice and to refer convictions and sentences to the relevant appeal court for a new appeal. The CCRC took over some functions previously carried out by the Secretary of State. Parliament established the CCRC specifically to be a body independent of Government.
3. Section 17 of the Criminal Appeal Act 1995 gives the CCRC the power to require public bodies to disclose and provide the documents or other material which may assist them in discharging their functions. However, unlike their counterpart in Scotland, the CCRC have no powers to require private organisations and individuals to do so.
4. The move of forensic science services into the private sector, for example, illustrates and highlights the problem. Previously, when the Forensic Science Service was a public body, the CCRC could use their powers to secure disclosure of documents or other material. However, that route no longer exists in relation to forensic evidence and the CCRC have to find other ways of overcoming barriers to disclosure in order to obtain material. This can cause unnecessary delay and wasted resources.
5. The Justice Committee, in its 12th Report of the 2014/15 Session, looking at the Criminal Cases Review Commission, recommended that "it should be a matter of great urgency and priority for the next Government to bring forward legislation to implement the extension of the CCRC's powers so that it can compel material necessary for it to carry out investigations from private bodies through an application to the courts. No new Criminal Justice Bill should be introduced without the inclusion of such a clause. Our successor Committee should monitor the progress of this to ensure that it happens promptly, and should continue to put pressure on the Government if necessary." (Paragraph 50). The Government's Response to this Report refers to the Bill which is the subject of these Explanatory Notes.

Legal background

6. Section 17 of the Criminal Appeal Act 1995 gives the CCRC the power to require public bodies to provide them with the documents or other material needed to discharge their functions, but does not provide for the CCRC to require private organisations and individuals to do so.
7. The Scottish Criminal Cases Review Commission do have power to require "persons" (public or private bodies) to provide documents or other material.

These Explanatory Notes relate to the Criminal Cases Review Commission (Information) Bill as introduced in the House of Commons on 24 June 2015 (Bill 20)

Territorial extent and application

8. The provisions of the Bill will extend to England and Wales and Northern Ireland (in relation to which, the Northern Ireland Assembly has been invited to pass a legislative consent motion).
9. The Bill does not contain any provision which gives rise to the need for a legislative consent motion in the Scottish Parliament or the National Assembly for Wales.

Commentary on provisions of Bill

10. The Bill inserts a new section 18A into the Criminal Appeal Act 1995 to enable the CCRC, for the exercise of their functions, to seek an order from the Crown Court requiring a person (in the private sector) to give the CCRC access to documents or other material in that person's possession or control.
11. As with the power to require material held by public bodies, the new disclosure requirements would apply notwithstanding any obligations of secrecy or other limitation on disclosure (including statutory obligations or limitations). The CCRC should attempt first to obtain the information voluntarily before applying to the court for a disclosure order.

Commencement

12. The provisions of the Bill will commence two months after Royal Assent.

Financial implications of the Bill

13. The Bill has no financial implications.

Parliamentary approval for financial costs or for charges imposed

14. The Bill will not impose any financial costs or charges.

Compatibility with the European Convention on Human Rights

15. As this is a Private Member's Bill, no statement under section 19 of the Human Rights Act 1998 is required. Nevertheless, the Government considers the provisions of the Bill to be compatible with the Convention rights, including the right to respect for private life under Article 8, the right to peaceful enjoyment of possessions under Article 1 of Protocol 1 and the right to a fair trial under Article 6.

Related documents

These Explanatory Notes relate to the Criminal Cases Review Commission (Information) Bill as introduced in the House of Commons on 24 June 2015 (Bill 20)

16. The following documents are relevant to the Bill and can be read via the links provided in the online version of these Notes or using the stated URLs.

- <http://www.legislation.gov.uk/ukpga/1995/35/section/17>
- <http://www.legislation.gov.uk/ukpga/1995/46/section/194I>
- <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/850/850.pdf>
- <http://www.parliament.uk/documents/commons-committees/justice/ccrc-response.pdf>

Annex A - Territorial extent and application

Provision	England	Wales		Scotland		Northern Ireland	
	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Legislative Consent Motion required?	Extends to Scotland?	Legislative Consent Motion required?	Extends to Northern Ireland?	Legislative Consent Motion required?
1	Yes	Yes	No	No	No	Yes	Yes

These Explanatory Notes relate to the Criminal Cases Review Commission (Information) Bill as introduced in the House of Commons on 24 June 2015 (Bill 20)

CRIMINAL CASES REVIEW COMMISSION (INFORMATION) BILL

EXPLANATORY NOTES

These Explanatory Notes relate to the Criminal Cases Review Commission (Information) Bill as introduced in the House of Commons on 24 June 2015 (Bill 20).

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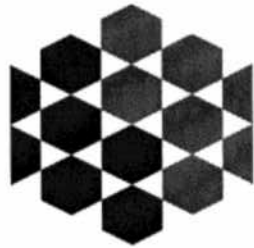
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Department of
Justice

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Consultation on proposal to extend the power of
the Criminal Cases Review Commission to obtain
documents from private organisations and
individuals

Comments are invited and should be made to the following address by
XXXX

Criminal Justice Policy and Legislation Division
Massey House
Stormont Estate
Belfast
BT4 3SX

November 2014

1. Introduction

- 1.1 The Department of Justice is consulting on a proposal to extend the power of the Criminal Cases Review Commission (the Commission) to obtain documents and other material from private organisations and individuals required to support an investigation into a potential miscarriage of justice.
- 1.2 We consider that such a change would benefit applicants who believe they have suffered a miscarriage of justice. The proposal will also impact on private business and individuals.
- 1.3 An equality screening exercise indicates that the change would only impact on a small number of cases and that there would be no adverse impact on any section 75 group. The Commission would always first seek to obtain the information voluntarily; application for an order would be required to be made to the Crown Court.
- 1.4 Your views on this proposal are welcome. This consultation will provide the opportunity to inform our decision on whether to extend this proposed legislative change to Northern Ireland.
- 1.5 The Commission operates in England and Wales and similar change has been proposed by the Ministry of Justice. The Scottish Commission already has such a power to obtain information from the private sector and has highlighted the benefits it brings.

2. The Criminal Cases Review Commission

- 2.1 The Criminal Cases Review Commission (the Commission) was established as an independent body under the Criminal Appeal Act 1995 (the 1995 Act) to investigate potential miscarriages of justice in England, Wales and Northern Ireland and refer appropriate cases to the Court of Appeal.
- 2.2 The Commission is independent and impartial and does not represent the prosecution or the defence. It aims to enhance public confidence in the criminal justice system, to give hope and bring justice to those wrongly convicted and, based on their experience, to contribute to reform and improvements in the law.
- 2.3 Anyone who believes that they have been wrongly convicted of a criminal offence in Northern Ireland may ask the Commission to review their case. The Commission may look at a conviction, or a sentence or both.
- 2.4 In the last five years from April 2009 to March 2014 the Commission has received 189 applications from Northern Ireland and referred 9 cases to the Court of Appeal.
- 2.5 The Commission may also recommend the use of the Royal Prerogative of Mercy.

3. Section 17 powers

- 3.1 The 1995 Act provides the Commission with the power to obtain documents or material from public bodies which may assist the investigation. Section 17(4) provides that this duty is not affected by any obligation of secrecy, or other limitation on disclosure. This means that the Commission may access material of the utmost sensitivity and of the highest security levels.
- 3.2 However the Commission has no power to obtain material from the private sector and the Commission has advised that this may work to the disadvantage of applicants. The problem of obtaining records has been become more acute in recent years following privatisation of the Forensic Science Service and proposed reforms within the NHS in England. Recent statutory data protection trends have reinforced the issue of confidentiality and have affected the voluntary co-operation of private bodies in the provision of information.
- 3.3 The Commission encounters four typical situations which, as a result of its lack of powers in relation to the private sector, operate to the applicant's disadvantage:-
- ◆ Inability to obtain information from a private individual;
 - ◆ Inability to obtain information from a private sector organisation;
 - ◆ Partial information is provided which the Commission is not in a position to scrutinise or verify; and
 - ◆ The information sought is obtained but protracted negotiations within the private sector create lengthy and expensive delays as the material is negotiated.

4. Casework examples

4.1 The difficulties are best illustrated by some examples from cases which have been reviewed by the Commission. The examples provided indicate that the new provision would include such bodies as private schools, clinics, the banking sector, shops and stores, employers and GP's as well as private individuals. As can be seen from these examples, at best it can be an extremely costly and time consuming exercise; and at worst it can mean that a point of investigation remains unresolved and, as a result, a potential miscarriage of justice missed.

4.2 News agencies

Shortly after trial, a newspaper published an interview with a complainant in a rape case. It was important for the Commission to establish whether she entered into negotiations to sell her story prior to giving her evidence. It could be argued that the defence was unfairly deprived of an opportunity to cross-examine regarding her motives for making the allegations. In a case where the conviction rested solely on the complainant's testimony and credibility, this was particularly important. Despite repeated communications with the legal department of the newspaper no response was received and the issue could not be resolved.

4.3 Private clinics

In a Commission review, files held by social services, schools and the NHS were obtained and examined by the Commission under the provisions of section 17. The complainant had been referred to a private sector counselling clinic. Despite lengthy correspondence, access to these private counselling records was denied. The significance of this information in relation to the complainant's credibility and the safety of the applicant's conviction remains unknown.

4.4 Employee details

In a murder conviction, the Commission contacted a high street bank to seek the employment details of a former employee, a witness at trial, as this

information was directly relevant to the credibility of her testimony at trial. After a long correspondence, the police liaison officer for the bank agreed to provide the information requested, although there was no obligation to do so. The decision to co-operate with the Commission, however, was expressed to be only because the employee had left her employment with the bank.

4.5 Private schools

The applicant was convicted of indecently assaulting three former pupils during his employment as a housemaster at a private residential school used to accommodate boys with behavioural and emotional difficulties in local authority care. He was sentenced to three years' imprisonment. The only issue for the jury at trial was the credibility of the complainants. The Commission requested the files on each of the three complainants in order to address issues raised about their credibility. The school declined the request, and the point remains unresolved.

4.6 Charitable organisations

A charitable organisation responsible for the administration of a residential school agreed to provide the complainant pupil's file to the Commission, although it was not obliged to do so. The information in the files showed that the complainant had made demonstrably false allegations of sexual abuse against other men during the same period of time she alleged abuse by the two convicted men. At that time, and subsequently, she made no mention of the two convicted men to the police, and described her stay at the school in glowing terms. There was further material available to show that the complainant was prone to exaggeration. This information led directly to two referrals to the Court of Appeal, and the convictions have been quashed. Had the organisation not co-operated, the review may have taken substantially longer with the possibility of an unsuccessful outcome for the applicant.

Bodies such as the Samaritans, Childline and the National Society for the Prevention of Cruelty to Children often hold vital information relevant to Commission reviews, particularly in cases of intra-family sexual abuse. Such organisations may agree to assist when the consent of the individual

concerned is obtained. If consent is not forthcoming such organisations will generally decline to provide the Commission with information on the basis of confidentiality.

4.7 Information held by experts

Many of the experts who appear as witnesses at trial keep personal notes in addition to their professional notes and reports. Forensic Medical Examiners may receive information or notes from victims of crime during the course of their examinations. Short reports and second-hand accounts within NHS files are generally provided to the Commission as a result of section 17; the original contemporaneous notes of interview recorded by the clinicians are not. This type of information is private rather than public.

4.8 Shops and stores

The applicant, convicted of a serious armed robbery, alleged that the expert "facial mapping" evidence adduced at trial was flawed. The Commission wished to instruct an expert to conduct further tests. The owner refused to provide information about the make and specifications of the CCTV equipment, which the new expert required in order to consider and report on the issue.

4.9 The Banking Sector

In respect of a serious fraud conviction, considerations of customer confidentiality were cited in response to the Commission's requests for information in the banking sector, despite reassurances as to how the information would be handled and disclosed. The assertions made by the applicant could not be proved or disproved.

4.10 Private individuals

The overwhelming majority of private individuals approached by the Commission have agreed to be interviewed however some simply refuse to assist the Commission. Many reasons are given for such refusal. Some individuals do not wish to be involved and are indifferent concerning the outcome of the Commission's investigations. Some may be hostile to the

Commission and some may be reluctant to be seen to talk to the Commission for fear of reprisals.

5. Equality considerations

- 5.1 As a public authority under Section 75 of the Northern Ireland Act 1998, the DOJ is required to have due regard to the need to promote equality of opportunity. This legislation also requires public authorities to identify whether a policy has a differential impact upon relevant groups; the nature and extent of that impact; and whether such impact is justifiable. These obligations are designed to ensure that equality and good relations considerations are made central to government policy development.
- 5.2 We believe that the introduction of these arrangements will be beneficial and will have no adverse effect in Section 75 terms. Currently the Commission's inquiry into a miscarriage of justice can be impeded by the refusal of a private organisation to provide information. The absence of any compulsion to do so may result in the victim of a miscarriage of justice suffering continued imprisonment and the continuing social consequences of having a criminal conviction. In terms of human rights the extension of the Commission's powers will promote a person's right to a fair trial.
- 5.3 In terms of the impact on the civil liberties of private organisations and individuals, any extension to the power of the Commission would include safeguards to ensure that the Commission would always first attempt to obtain any information voluntarily and should they still require the production of documents or material a request would be made under the judicial oversight of the Crown Court.
- 5.4 Appropriate safeguards around the transparency of the court order process and the right to legal representation would also be included in the measure.
- 5.5 It is worthwhile considering the situation of the Scottish Criminal Cases Review Commission which already has power to obtain information from the private sector. The relevant legislation provides that the Scottish Commission may make an application to the High Court for the production of material in

the possession of 'a person or a public body'. In practice, when the Scottish Commission notifies a private sector body or individual that it wishes to inspect relevant material, a reminder of the statutory power to make an application to a court is usually sufficient to secure voluntary compliance. The Scottish Commission advises that very few cases have resulted in the need to make a formal application to court.

- 5.6 We do not therefore consider that an Equality Impact Assessment (EQIA) is required. Our screening form is available on the DOJ website. Comments on our screening assessment and equality conclusions are welcome.

6. Responses

- 6.1 The closing date for responses is xxx. We welcome responses in whatever format respondents find most suitable. Comments are invited to be made to the following address:-

Susan Nicholson
Criminal Justice Policy and Legislation Division
Massey House
Stormont Estate
Belfast
BT4 3SX

Telephone ☎ 028 9016 9586

Text phone ☎ 028 9052 7668

Email: susan.nicholson@dojni.x.gsi.gov.uk

- 6.2 If you have any concerns about the way this consultation process has been handled, you may raise this with the Department's Consultation Co-ordinator at the following address:

Peter Grant
Equality Branch
Central Management Unit
Department of Justice
Castle Buildings
Stormont Estate
Belfast, BT4 3GS

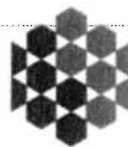
Telephone ☎ 028 9052 8138

Text phone ☎ 028 9052 7668

Email: peter.grant@dojni.x.gsi.gov.uk

6.3 An electronic version of this consultation document is available to download from the Department's website. Hard copies and copies in other formats may be made available on request.

6.4 Responses to this consultation will be shared with the Justice Committee. The Department also intends to publish responses to the consultation (with contact details of private individuals removed prior to publication) and a summary of responses online following completion of the consultation process. Please let us know if you do not wish your response to be published. In any event you should be made aware that the Department's obligation under the Freedom of Information Act may require that any responses not subject to specific exemption would be disclosed to other parties on request.



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Belfast
BT4 3SG
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Our ref: SUB/1029/2015

FROM: TIM LOGAN
DATE: 11 SEPTEMBER 2015
TO: CHRISTINE DARRAH

**PROPOSAL TO EXTEND THE POWERS OF THE CRIMINAL CASES
REVIEW COMMISSION – CONSULTATION RESPONSES AND PROPOSED
NEXT STEPS**

Summary

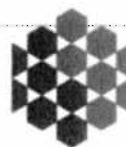
Business Area: Criminal Justice Division.

Issue: To provide a summary of responses to the public consultation on a proposal to extend the powers of the Criminal Cases Review Commission to obtain documents from private organisations and individuals and to seek the Justice Committee's formal agreement to the tabling of a Legislative Consent Motion (LCM) in the Assembly to allow provision for this change to be carried in the Criminal Cases Review Commission (Information) Bill 2015/16.

Restrictions: None.

Action required: For consideration.

Officials attending: Not applicable – written briefing only.



Background

This briefing paper highlights responses received to our consultation paper on a proposal to extend the powers of the Criminal Cases Review Committee ('the Commission') to obtain documents from private organisations and individuals.

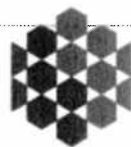
2. The Commission is an independent body which investigates potential miscarriages of justice in England Wales and Northern Ireland and refers appropriate cases to the Court of Appeal. Anyone who believes that they have been wrongly convicted of a criminal offence in Northern Ireland can ask the Commission to review their case. The Commission is also responsible for recommending the use of the Royal Prerogative of Mercy.

3. In the five years from April 2009 to March 2014 the Commission received 189 applications from Northern Ireland and referred nine cases to the Court of Appeal where seven cases have been successful.

Key Issues

4. The Commission has a power to obtain documents or material from public bodies which may assist with their investigation. Section 17(4) of the Criminal Appeal Act 1995 provides that this duty is not affected by any obligation of secrecy, or other limitation on disclosure. However the Commission has no power to obtain material from the private sector and has advised that this has often worked to the disadvantage of applicants.

5. The Commission has long advocated the need for a change to the legislation to introduce this power. The Ministry of Justice in England proposes to introduce this change for England and Wales in the near future. The Scottish Commission already has a power to obtain information from the private sector and has highlighted how the provision of a statutory power to make an application to a court is usually sufficient to secure voluntary compliance.



6. The amendment proposed to section 17 of the Criminal Appeal Act 1995 would allow the Commission to require the production of documents or material from the private sector or individuals, where it is reasonable to do so, under judicial oversight.

7. We received 10 responses to the consultation. The summary of responses paper attached at [annex A](#) provides details of these responses. Six of the respondents were fully supportive of the change and the safeguards proposed were considered by most respondents to be adequate and proportionate.

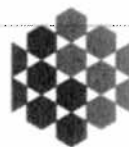
8. Two responses from the Attorney General and the Information Commissioner highlight the importance of protections for private organisations and individuals including consideration of human rights and data protection.

9. The response from the Legal Services Commission asked that a full legal aid impact assessment was completed on any proposals which could give rise to legal aid. There will be no legal aid implications. Based on the Scottish experience it is expected that only a small number of applications for an order would be made to the Crown Court. We would propose no specific entitlement to legal aid funding in such contested cases and would provide that courts apply the general rule that is in place and decide where to attribute costs e.g. the losing party pays costs.

10. One response suggested that consideration should be given for a mediation system to reach agreement. They highlighted that responsibility for court costs could have negative implications for smaller charities and pre court formal mediation would alleviate this potential burden.

Next Steps

11. In view of the general support from the consultation the Department intends to legislate for this change. The Ministry of Justice is taking forward the change in England and Wales and the opportunity exists now to include provision for



Northern Ireland in the Criminal Cases Review Commission (Information) Bill introduced in the House of Commons by a Private Member in June 2015.

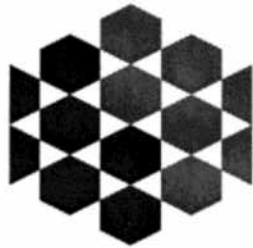
12. The Justice Committee's formal agreement to lay a Legislative Consent Motion in relation to this provision is now sought. This would allow the provision to be in place in Northern Ireland in the same time frame as in England and Wales. If we were to legislate for Northern Ireland via an Assembly Bill we would be unable to do so until the next mandate.

13. The normal Assembly procedure is that a LCM should be laid within 10 days of the introduction of the Bill to which it relates, however OFMDFM Legislative Programme Secretariat has confirmed that there is still time to consider this matter and consult with the Executive Committee. Provided both Committees are content, the LCM could be laid and debated before the Second Reading on 4 December.

14. Responses to the consultation indicate that the work of the Criminal Cases Review Commission is of vital importance and it is important that it has access to all relevant information for their investigations. It is therefore unlikely to be controversial or to attract any adverse attention; however, should the Committee require clarification on any of aspects of the change, officials are happy to provide further information or an oral briefing if that would be helpful.

**TIM LOGAN
DALO**

Enc. – Summary of responses document



Department of
Justice

www.dojni.gov.uk

Summary of Responses
Consultation on proposal to extend the power
of the Criminal Cases Review Commission to
obtain documents from private organisations
and individuals

September 2015

1. Introduction

- 1.1 In December 2014 the Department of Justice published a consultation on a proposal to extend the power of the Criminal Cases Review Commission to obtain documents and other material from private organisations and individuals.
- 1.2 The Criminal Cases Review Commission is an independent body which investigates potential miscarriages of justice in Northern Ireland and refers appropriate cases to the Court of Appeal. Anyone who believes they have suffered a miscarriage of justice can ask the Commission to review their case. Currently the Commission has no power to obtain material for their investigations from the private sector and this has often worked to the disadvantage of applicants.
- 1.3 The consultation paper set out a number of examples where the new provision might be required including such bodies as private schools, clinics, the banking sector, shops and stores, employers and GP's as well as private individuals.
- 1.4 The consultation considered that such a change would benefit applicants who believe they have suffered a miscarriage of justice however we welcomed views on the impact of the proposal to inform our decision on whether to extend this legislative change to Northern Ireland.
- 1.5 We received 10 responses to our proposal. We are grateful to everyone who took time to address the issues in our consultation and who provided thoughtful, high quality suggestions. The organisations who responded are listed in [appendix A](#).

2. Responses

- 2.1 This section sets out respondents' views on the proposal and the Department's response. We received 10 responses to the consultation. Six of the respondents were fully supportive of the change, one had no contrary views to the proposal and one respondent could neither support nor reject the proposal suggesting that each request would require consultation with the person affected and that a process for pre court mediation would be beneficial.
- 2.2 One respondent suggested protections to balance the rights of the parties affected by the disclosure, particularly the rights protected by the European Convention on Human Rights and one highlighted the requirement for compliance with the third data protection principle of the Data Protection Act.
- 2.3 One respondent highlighted that the new power should also extend to commercial companies who provide forensic services and the Department can confirm that such organisations would be included.

Supportive views

- 2.4 Two respondents noted that in cases whereby grave or exceptional matters of public concern are engaged, it is important that the investigative body has access to all relevant information in order to discharge its statutory duties.
- 2.5 One respondent highlighted that the work of the Criminal Cases Review Commission is of vital importance as they enhance public confidence in the criminal justice system. While the lack of this power remains unaddressed, they are frustrated in their ability to gain access to documents from organisations previously in the public sector and thus prevented from pursuing cases with the required pace, rigour and probity that should be at the core of any independent review process.

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- 2.6 Two respondents noted that such provisions are already available to other bodies in Northern Ireland including the Commissioner for Complaints, Financial Services Ombudsman, the Parliamentary Commissioner and the Health and Safety Inspector.

Safeguards

- 2.7 The safeguards proposed were considered by most respondents to be adequate and proportionate. There is a facility to seek consent of the individual and a choice for them to release the material and where necessary the court would ensure that non-public sector bodies will have the protections required in exceptional cases.
- 2.8 One response highlighted that in considering the proposal to extend the power it is necessary to balance the competing rights and interests of the parties affected by the disclosure, perhaps particularly the rights protected by article 8 of the European Convention on Human Rights.
- 2.9 As a section 6 Human Rights Act public authority the Commission itself must form a proper judgment in balancing the possible relevance of perhaps unknown material against the relevant rights of third parties. While it is noted that the Commission would always first attempt to obtain any information voluntarily this may not be of assistance to individuals or bodies who may be unable to share sensitive material about others.
- 2.10 The response highlighted that it would be proper to require the Commission to persuade a Court that a reasonably demanding threshold has been met to justify disclosure. Courts are of course, well placed to carry out the human rights analysis required. Without the interposition of a Court there is a risk that individuals and organisations may provide documents and other material too readily as they may be under the impression that any refusal to provide the material will inevitably result in a court order compelling them to do so.

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- 2.11 One response focused on compliance with the Data Protection Act (DPA). This noted the difficulties in investigating some cases and therefore welcomed the proposal to create a statutory footing for the Commission. They noted that a number of the examples cited confidentiality as a reason that information is not provided and would like to reinforce that the DPA contains a number of exemptions which allows organisations to disclose personal data which would otherwise be protected. However creating a legal obligation for private organisations to provide information would strengthen the exemption in 35(1) by providing a statutory duty rather than a discretionary obligation.
- 2.12 Any powers of the Commission should comply with the DPA; the information must be processed fairly, lawfully and certain conditions must be met. A condition from Schedule 2 must be met and for sensitive material a condition in Schedule 3 is also required. A statutory requirement would allow organisations to provide information satisfying the condition in Schedule 2 (3).
- 2.13 The existing legislation requires a public body to make information available where it is reasonable to do so. The respondent would recommend that any proposal to obtain information from private organisations contains similar qualification to ensure that the disclosure is proportionate and justified and in compliance with the third data protection principle.
- 2.14 One respondent noted that their organisation operated within very clear legislative guidelines in relation to the confidentiality of information of clients and employees. They expressed sensitivity to the potential implications of a loss of trust where sensitive information may no longer remain confidential. They suggested that consideration should be given for a mediation system to reach agreement.

Impact assessments

- 2.15 One respondent had no contrary views to the proposal however, they insisted that a full legal aid impact assessment was completed on any proposals which could give rise to legal aid.
- 2.16 One respondent commented on the consultation document and equality screening highlighting that they were disappointed that copies in other formats 'may' be available on request rather than 'can' be made available. They welcomed the plain language and topical examples but would recommend that a full list of evidence is provided in screening documents. There was no breakdown of applications by section 75 groups. This would have proven useful as there is clear evidence that significant numbers of prisoners in Northern Ireland are disabled or have significant medical problems.
- 2.17 The Department accepts the comments regarding equality screening. Unfortunately there was no further breakdown of applications available, although we would agree that a number of prisoners/ex-prisoners may be disabled or have medical problems. The Department is not aware of any barriers preventing people from making an application to the Commission. The Commission reports that the total number of applications made to them has increased each year since they were established particularly following the introduction of an Easy Read application form in early 2012. Since then applications have increased by 50% to upwards of 1,500 each year from across England, Wales and Northern Ireland.

3. The Way Forward

- 3.1 The Department is grateful to those who took the time to respond to this consultation and for the detailed comments submitted. We welcome the general support for this change and are grateful for the suggestions for additional protections for private organisations and individuals.

- 3.2 The Department will now seek to legislate for this change taking on board the recommendations from respondents to this consultation.

Respondents

We are very grateful to all of the following people and organisations who responded to our consultation:

- ◆ Attorney General's Office
- ◆ Chief Executive of the Bar of Northern Ireland
- ◆ Department of Justice and Equality
- ◆ Disability Action
- ◆ Forensic Science Northern Ireland
- ◆ Information Commissioners Office
- ◆ Legal Services Commission
- ◆ Police Ombudsman
- ◆ Police Service Northern Ireland
- ◆ The Senior Coroner's Office