PROCEDURE FOR OVERTURNING CONVICTIONS
PROPOSALS

The Current System – Multiple Stages of Review

What happens currently has evolved piecemeal with actions taken by individual actors. The main stages are:

1. POL carries out an internal document search.
2. POL writes to each SPM that it can identify, offering access to documentation (at least 3 rounds of writing out have occurred).
3. The independent criminal panel (of Counsel managed by Peters & Peters) reviews the available evidence and determines whether, in an individual case, there are grounds for overturning a conviction.
4. POL writes to the SPM indicating its decision, that it will or will not contest a case.
5. POL passes the file and its conclusions to the CCRC.

6. The CCRC may itself initiate work on a case, whether or not it is referred to it by POL or by an individual SPM. It reviews the evidence, and typically attempts to contact the SPM, and to obtain all available evidence, from whatever source, and to urge that the SPM initiates action.
7. The SPM should initiate action – but a significant number do not.
8. CCRC considers the totality of the evidence, including any new evidence obtained from the SPM or any other source. [*How often does new evidence arise?*]
9. CCRC decides if the criteria for referral to CACD are met.
10. POL considers its response to a either an appeal instigated by an individual SPM, or referred by the CCRC, to decide if it will support or object.
11. If the conviction was in the Magistrates' Court, the case is referred to the Crown Court, where, once the case had been referred by the CCRC, the burden of proof is effectively reversed in favour of the postmaster. POL invariably offers no evidence in cases where it decides not to hold a retrial, and the conviction is automatically quashed.
12. If the conviction was in the Crown Court, the referral is to the Court of Appeal Civil Division, where the decision is a matter for the CACD, after hearing argument.
    a. In the CACD, the legal criterion is whether the conviction is 'unsafe'. The CACD has clarified this in two broad ways, which some lawyers consider to raise inconsistencies:
    b. In *Hamilton*, it said that a case that involved 'Horizon evidence' will be quashed. However, the HCAB considers that this criterion is now too limiting in view of evidence that has emerged from the Inquiry and other sources. There is something of a procedural difficulty in how to present such generic evidence to CACD without risking an incomplete picture being presented and risking further emotional damage to victims if their case is raised but not overturned.
    c. In a directions hearing in *Allen & Others* (19 July 2021), and again in its judgment in the case of *White & Others* [2022] EWCA Crim 435, CACD indicated that the normal rules of criminal appeals apply, namely that the *burden* of overturning cases *remains with the postmaster, and that the Post Office should not concede such appeals*.
    d. POL's Review Team believe that they and POL are subject to a *duty to assist the Court* and, if they refused to do so, would be failing in this duty and could be found in contempt of court. Thus, if POL was nonetheless to try to concede a case that it did not consider to pass the 'public interest test', CACD would be unlikely to accept this – and the postmaster would have to go through the stress of a potentially unsuccessful appeal.

Problems with the System: Procedural

a) Some cases never reach review by POL or CCRC, or later by POL (Stages 3, 8 and 10). The principal reasons for this are: an absence of evidence; no positive step taken by the individual SPM; burden of proof is considered to rest with the appellant.
b) A significant number of SPMs do not respond to contact, especially from POL, or do not initiate action necessary to trigger the referral process. So their cases are not pursued.

c) A certain level of duplication, and hence cost, in that a case can be reviewed by both POL's team and the CCRC (and then CACD), and then possibly POL again if the CCRC has assembled new evidence. Each body applies its own criteria to each case. This raises the question: can this not just be done once, or at least done more efficiently?
d) The basic argument here is that the CCRC argues that it often has more evidence than POL has at its initial review, because CCRC sees the response by the SPM. If there is fresh evidence (such as an explanation for why an SPM felt forced into making an incorrect admission or false plea), then POL still has to review the case *again* in order to decide if it is going to acceded or object.
e) It is relevant that the SPM community have little or no trust in POL, and hence have little trust in the state or its system in which the flawed original prosecutor still plays a part in arguing that some SPMs are still guilty, when others do not agree that.
f) The counter argument is that POL feels constrained to make a decision each case, in order to satisfy its duty to CACD.

Problems with the System: Legal

g) The different bodies apply different tests, which can lead to different decisions in the same case. The Court of Appeal's test is whether a conviction is *unsafe* (and has defined a 'Horizon test', where Horizon computer evidence was essential to the case); the CCRC's test is whether there is a 'real possibility' that new evidence or argument will lead to a successful appeal; the POL applies the Code for Crown Prosecutors test of whether there is a *realistic prospect of conviction* and *the retrial was in the public interest*. [This has the consequence (addressed by the HCAB elsewhere) that those whose convictions are overturned only on the latter ground (not in the public interest to retry) are considered to be eligible to compensation that is appreciably lower than those whose convictions are overturned on the first ground.]

Problems with the System: Absence of Trust

The basic public policy point is that a body that has held the office of instituting prosecutions on behalf of the state, yet been found to be systemically failing in its performance of its functions, resulting in unjust convictions on an industrial scale, should not play any further role in objecting to any appeals rectifying such injustice.

There are the further points about speed, cost saving, and the effective achievement of justice in the absence of the changes envisaged here.

There is also the point that, as time goes on, the state and the CACD are subject to increasing criticism and diminishing public trust when evaluated against the public perception, based on increasing evidence, that miscarriages of justice involving large numbers of individuals are not being overturned, and are unlikely to be overturned.

Potential Rationalisations

Three basic points arise:

A. The current system has inherent duplications that appear unnecessary and give rise to a sequence of barriers, as well as to cost.
B. POL's ongoing involvement does not build trust in the legal system. The number of SPMs who have declined to engage (with POL, CCRC or otherwise) remains considerable.
C. It is assumed that CACD requires POL and its lawyers to review a take a stance on each case, so as to assist the court. Has that assumption been tested? is it correct and/or could it be changed? Yet does this not duplicate the role of the CCRC in its independent review of the safety of cases?

Proposal: A simplified system

1. POL carries out an internal document search, and passes all documentation to CCRC.
2. CCRC carries out its independent investigation. This includes CCRC, assisted by trusted intermediaries (such as the Victims Commissioner), contacting an SPM and encouraging him/her to engage and provide their story.
3. If CCRC decides that the criteria are met, it refers a case to CACD.

4. CACD considers the case, as presented by CCRC.

The basic features of this revised, simplified system are:

A. POL would drop out, save in relation to providing evidence.
B. Cases would be referred to CACD either after appeals by individuals or by CCRC.
C. CACD would still perform the function of collecting evidence and presenting cases to the CACD.
D. This would preserve an element of adversarial debate in decision-making. But in Post Office cases, it ought to be much simplified and subject to streamlining.
E. A wider range of systemic evidence could be presented to CACD as a preliminary stage to hearing individual appeals. This case management approach would mirror that of the civil courts, such as the approach of Fraser J in *Bates v Post Office* of dividing the issues into 5 judgments, or the similar issue-based approach of Williams J in running the Public Inquiry).
F. Of course, legislation could state that all Post Office convictions should be presumed to be unsafe (absent convincing evidence of deliberate wrongdoing).

Current barriers/actions to adopting this approach

1. POL would cease its internal analysis (stages 1-4, and 10), thereby rationalising its activities and cost. That can be achieved by a decision by POL.

2. Under the current system, one could proceed by continuing to encourage SPMs to indicate assent to an appeal, and particularly to tell their story so as to refute existing evidence of guilt, such as confessions/pleas. Various public statements have been encouraging SPMs to come forward, and contact either lawyers, CCRC or POL. The HCAB has tried to contact the Victims Commissioner in taking a role here. However, a significant number of SPMs do not wish to take any action.

3. CCRC should investigate whether or an individual has made an application. The problem, here appears to be a conflict of interpretation between the law applying to the CCRC's criteria for referral and to the CACD's remit. The considerations are:
    a. The CCRC does appear to have the ability to *refer* a case to the CACD under section 14 of the Criminal Appeals Act 1995 irrespective of assent by an individual (CCRC's letter to HCAB of 28 Sept, page 3 here).
    b. However, the CCRC sees no point in doing this as there it perceives that there is no possibility that the Court would hear the appeal.
    c. The reason stated by the CCRC is that CCRC is required to conclude that there is a 'real possibility' that new evidence or argument will lead to a successful appeal,[1] and they find it difficult to see how the 'real possibility test' can be passed in a case where an individual does not wish to participate in the appeal process.
    d. CACD has confirmed that the 'reasonable possibility' test is a relatively low one.[2]
    e. The may be an argument that the Court would not hear an appeal without the appellant arising from the wording of section 1 of the Criminal Appeal Act 1968: "Subject to …. *a person convicted* of an offence on indictment may appeal to the Court of Appeal against his conviction" [emphasis added].
    f. However, that argument faces the difficulty that the power in s14 of the 1995 Act allowing "A reference [by CCRC to the Court] … without an application having been … made [by or on behalf of the person to whom it relates]." would be rendered pointless by that interpretation of section 1 of the 1968 Act.
    g. In my view, there is no impediment to the CCRC referring a case, in which there does appear to be a real possibility of the conviction not being upheld, *with or without* any assent by the individual. The public policy reasons for doing this are strong. A responsible state

[1] Criminal Appeal Act 1995, s 13(1)(a).
[2] *R v CCRC ex parte Pearson* [1999] 3 All ER 498, especially Bingham LCJ at para 12.

should take active steps to rectify injustice, especially in which it has itself been involved in creating.

4. As a long stop, legislation could clarify that the CCRC may refer an individual to CACD itself.

5. Would CACD hold POL or its lawyers in contempt if it failed to take part in an appeal, or indicate whether it assented or opposed an appeal? In the current circumstances, this does not appear to be a strong consideration. As a long stop, CACD could be asked to issue a clarification. It controls its own procedure.

The need for urgency

The overriding consideration here is that, if no effective changes are made, the palpably unjust convictions of several hundred individuals appear likely to be maintained – and that constitutes a major affront in a civilised state.

Technically, it is clear that changes need to be made in the ecosystem. The traditional mechanisms for investigating, appealing and overturning convictions are based on the assumption that only individual cases need to be processed. However, the Post Office story involves systemic issues that affect multiple cases. This raises major challenges to the current system. Broadly, two functions are needed: investigation and considered decision. Other public systems have developed procedures that are capable of performing these two functions in a more effective and efficient manner than continuing to rely on processing individual cases. For example, where systemic breaches of regulatory law are raised by a corporation, regulatory authority will investigate all relevant facts and make decisions based on all relevant facts. In the Post Office situation, some facts first came to light as a result of two civil judgments, which were part of a process of five intended stages, but which were stopped, as a result of settlement and costs considerations, before comprehensive fact finding was completed. More comprehensive fact-finding is currently being conducted by the Public Inquiry. This may lead to further enforcement consequences involving other public bodies. Reviewing convictions is currently ongoing, but on an individual piecemeal basis, before all facts are available, and involving three different institutions, as described above. The problem is that comprehensive procedures, such as the Inquiry, take time, as does review of the appeals process by the Law Commission and subsequent reform by Parliament. The victims of this injustice have suffered for too long already, and time is running out. Things need to be changed swiftly.

Prof Christopher Hodges OBE
Chair, Horizon Compensation Advisory Board
29 December 2023