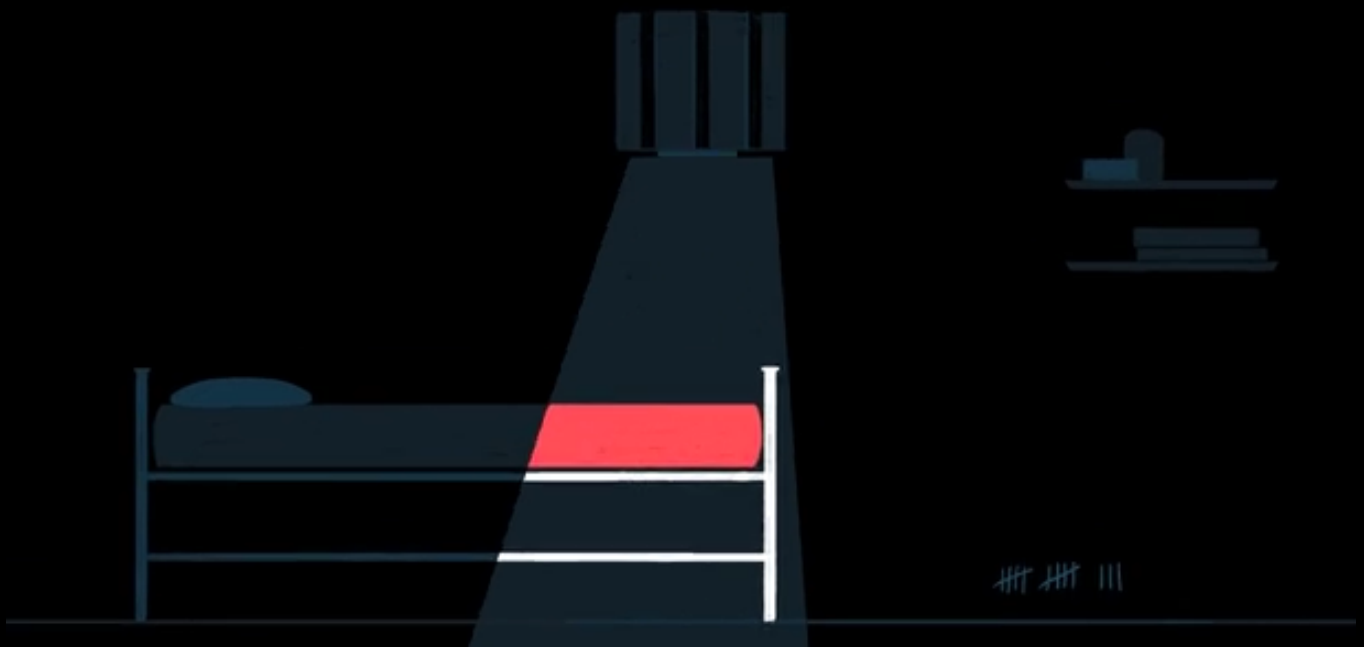


Destroying the Evidence

The case for retaining trial audio recordings
and providing trial transcripts



About

The Centre for Criminal Appeals (working name “APPEAL”) is a non-profit law practice committed to fighting miscarriages of justice and demanding reform. We provide investigation and legal advocacy for victims of unsafe convictions and unfair sentences who cannot afford to pay for a lawyer themselves. We use individual cases as leverage for system-wide criminal justice reform by educating the media, parliament, criminal justice policy makers, the legal profession and the public about how and why miscarriages of justice occur and what needs to change to stop them.

Contact

James Burley, Investigator, james@appeal.org.uk

Charlotte Threipland, Communications and Policy Lead, charlotte@appeal.org.uk

www.appeal.org.uk
@we_are_APPEAL

Destroying the Evidence, Publication date: 16 September 2021

CONTENTS

SUMMARY	3
WHAT'S THE PROBLEM?	4
Destruction of audio recordings and court documents	4
Miscarriages of justice are much harder to identify:.....	4
It makes the job of the Court of Appeal more difficult:	4
The cost of obtaining trial transcripts	5
The scale of the problem:.....	6
A brief comparative view:	6
WHAT NEEDS TO BE DONE?.....	6
THE POSITIVE IMPACTS OF REFORM	7

SUMMARY

Digital trial audio recordings and court documents are being prematurely destroyed in England and Wales under the current Crown Court Record Retention and Disposition Schedule ('RRDS') devised by HM Courts and Tribunals Service ('HMCTS'). This greatly diminishes access to justice for the wrongly convicted and hinders the work of appeal lawyers, the Criminal Cases Review Commission ('CCRC') and Court of Appeal Criminal Division ('CACD'). The RRDS specifies that digital trial audio recordings are retained for just seven years, whereas a precise record of trial proceedings may be required several decades after an individual's conviction.

Even where trial audio recordings have been retained, transcripts can be prohibitively expensive for appeal lawyers and unrepresented appellants to obtain. Potential efficiencies offered by deployment of automated speech-to-text technology are not being applied to make transcripts accessible to those who need them.

“Digital trial audio recordings are retained for just seven years”

The problem of the unavailability of trial transcripts and other court records has recently been acknowledged by the Vice-President of the CACD, the Westminster Commission on Miscarriages of Justice and the CCRC.

We recommend that retention policies are amended so that trial audio recordings are held for at least as long as a convicted person is in custody. We also recommend making use of modern technologies for the production of trial transcripts to make them more affordable for both the court and defendants. Finally, all defendants eligible for legal aid should be given a statutory right to be furnished with a full transcript of their trial at the public's expense.

WHAT'S THE PROBLEM?

Destruction of audio recordings and court documents



Miscarriages of justice are much harder to identify:

At APPEAL, we are frequently prevented from finding out exactly what individual experts or witnesses said in proceedings because trial audio recordings have been destroyed. This can hinder our ability to challenge an unsafe conviction.

In a thesis by barrister Malcolm Birdling, he describes an example where the CCRC was unable to review a potential miscarriage of justice case because no sufficient record of the applicant's trial existed:

Case Study: key witness testimony

While investigating one criminal conviction, we established that two crucial prosecution witnesses had undisclosed criminal histories. However, because the audio recordings of those two witnesses' trial evidence had been destroyed, it has not been possible to conduct a detailed analysis of exactly how those criminal histories could have been deployed in cross-examination to undermine their credibility.

"In cases where the CCRC is minded to obtain transcripts, the frequency with which they are nonetheless unavailable (due to loss or destruction in accordance with data retention policies) is lamentable. This can have fatal consequences for an investigation – as was made plain in a decision letter to an applicant in the following terms:

'I am afraid I have to tell you quite bluntly that there is no possibility that the Commission will be able to refer your convictions... Your trial took place over seventeen years ago, and there is no chance at all that sufficient legal documentation will have survived for the Commission to obtain any evidence robust enough to form the basis of a referral.'"¹



It makes the job of the Court of Appeal more difficult:

Lord Justice Fulford described the unsafe 'Shrewsbury 24' convictions as "the clearest example as to why injustice might result when a routine date is set for the deletion and destruction of the papers that founded criminal proceedings (the statements, exhibits, transcripts, grounds of appeal etc.)". He explained that "the absence of relevant court records can make the task of this court markedly difficult when assessing – which is not an uncommon event – whether a historical conviction is safe."²

¹ The section entitled 'Availability of Trial Transcripts and Forensic Material' in barrister Malcolm Birdling's 2012 thesis (pp. 197-201), available here: <https://ora.ox.ac.uk/objects/uuid:2dae4513-4fd2-40cd-bb6a-dbba696d6d7f>.

² *R v Warren & others (Shrewsbury 24)* [2021] EWCA Crim 413, <https://www.bailii.org/ew/cases/EWCA/Crim/2021/413.html>

Case Study: expert testimony

In one APPEAL case, we uncovered new data that undermined the contents of reports produced for trial by a prosecution expert witness. However, the audio recordings of that expert's testimony were not available, meaning it could not be subject to line-by-line scrutiny in view of the new evidence.

Fulford proposed a reconsideration of the HMCTS Record Retention and Disposition Schedule dated 19 August 2020: "Given most, if not all, of the materials in criminal cases are now presented in digital format, with the ability to store them in a compressed format, we suggest that there should be consideration as to whether the present regimen for retaining and deleting digital files is appropriate".

The cost of obtaining trial transcripts

In relation to the cost of obtaining transcripts, appeal lawyers report that quotations given by the transcription firms contracted with Crown Courts can amount to thousands of pounds for a full trial transcript.

"The cost of a full trial transcript can amount to thousands of pounds"

Secondly, if a client is eligible for legal aid, the Legal Aid Agency will only usually approve funding for a transcript of the judge's summing up – which can only ever offer a limited summary of the trial evidence.

Case Study: transcription costs for a disabled appellant

We represent a man with borderline intellectual functioning who represented himself at his trial. To understand what happened at court and assess the fairness of his trial, we needed a transcript of the court proceedings, which lasted over 60 hours. At the hourly rate of £157.74 provided by a contracted transcription company, this would have cost over £10,000 including VAT. To avoid this prohibitive cost, we instead had to pay over £1000 to get the audio recordings digitized and provided to us, then rely on volunteers to produce transcripts of the proceedings. We were fortunate to have voluntary assistance but it would simply not be possible for most law firms and individuals.

Finally, unrepresented convicted individuals applying for a transcript of all or part of their trial to be produced at public expense using HMCTS's EX105 form rarely, if ever, have their application granted. This data is not held centrally by the MOJ so is difficult to track, however,

in response to a Freedom of Information Act (FOIA) request sent by APPEAL, the MOJ confirmed that between June 2017 and June 2018 Central Criminal Court and Bolton Crown Court received no EX105 applications, and Exeter Crown Court received one, which was refused.³ It was not possible to obtain data for additional courts without exceeding the cost limit specified within FOIA.



The scale of the problem:

In 2019/20, the CCRC received 1,334 applications and around 90% of applicants were unrepresented (and thus unable to access legal aid for trial transcripts). In 2019/20, the Court of Appeal Criminal Division received 2,510 applications for leave to appeal against conviction.

Although there is no way of knowing how many individuals were unable to launch appeal or CCRC applications because of not having a transcript of their trial, these figures make clear that thousands of people seek to challenge their convictions each year and are thus potentially affected.

When screening new requests for legal assistance, APPEAL is frequently hindered by the lack of availability of any trial transcripts.



A brief comparative view:

In the United States, a person convicted of a felony has a right to a complete transcript of the trial proceedings, and this has been the case since 1956. Indeed, the unavailability of a trial transcript forms the basis for reversing a conviction⁴. The Louisiana Supreme Court has said “Without a complete record from which a transcript for appeal may be prepared, a defendant’s right of appellate review is rendered meaningless.”⁵

Malcolm Birdling reports in his thesis that: “Full trial transcripts are produced as a matter of course in New Zealand courts, and considerable use is made of the trial record in responding to petitions.” The same is true in Western Australia where a defendant is provided with one full transcript free of charge, without needing to request it⁶.

WHAT NEEDS TO BE DONE?

We propose three recommendations.

1. As Lord Justice Fulford has called for, the RRDS must be reconsidered. We agree with the Westminster Commission on Miscarriages of Justice’s recommendation, supported by the CCRC, that it be amended so that trial audio recordings are held for at least as long as a convicted person is in custody.

³ Freedom of Information Act (FOIA) Request –180924002, provided 10th October 2018

⁴ See *U.S. v. Atilus*, 425 F.2d 816 (5 Cir.1970) and *Hardy v. U.S.*, 375 U.S. 277, 84 S.Ct. 424, 11 L.Ed.2d 331 (1964)

⁵ *State v. Ford*, 338 So. 2d 107 (La. 1976)

⁶ See <https://www.supremecourt.wa.gov.au/T/transcripts.aspx>

2. The way that trial transcripts are produced should be modernised through use of speech-to-text technology. This would increase efficiency and lower the cost of transcripts.
3. Finally, where an individual seeking to challenge their conviction cannot afford a transcript of their trial, a statutory right to be furnished with a full transcript at the public's expense should be introduced.

THE POSITIVE IMPACTS OF REFORM

Positive impacts of our proposed reforms include:

1. Addressing a problem identified by the Vice-President of the Court of Appeal Criminal Division, Westminster Commission on Miscarriages of Justice and CCRC;
2. Making markedly more efficient the work of appeal lawyers, appeal judges and the CCRC;
3. Increasing access to justice for the wrongly convicted and unfairly sentenced;
4. Modernising the criminal justice system to bring it in line with jurisdictions such as New Zealand, where transcripts are produced as a matter of course;
5. Improving transparency in relation to Crown Court proceedings; and
6. Savings on the costs of producing transcripts through improved use of speech-to-text technology.

Further reading

Lord Justice Fulford's comments in his post-script to the Shrewsbury 24 judgment (*R v Warren and others* [2021] EWCA Crim 413, paras. 101-3)

The Westminster Commission on Miscarriages of Justice, *In the Interest of Justice: An inquiry into the Criminal Cases Review Commission*, 5 March 2021, pp. 51-52 and 71

The CCRC's official response to recommendation 17 of the Westminster Commission's report⁷.

Malcolm Birdling's 2012 thesis, the section entitled 'Availability of Trial Transcripts and Forensic Material' in barrister (p 93, pp. 197-201),⁸

⁷ Available here: <https://ccrc.gov.uk/ccrc-releases-official-response-to-the-westminster-commission-report/>

⁸ Available here: <https://ora.ox.ac.uk/objects/uuid:2dae4513-4fd2-40cd-bb6a-dbba696d6d7f>