KOMMISJONEN FOR
GJENOPPTAKELSE AV STRAFFESAKER

# *Norwegian Criminal Cases Review Commission*

## Annual Report 2010

The Norwegian Criminal Cases Review Commission is an independent body which is responsible for deciding whether convicted persons should have their cases retried in a different court.

**Contents**

# Annual Report 2010 of the Norwegian Criminal Cases Review Commission

The Norwegian Criminal Cases Review Commission (the Commission) is an independent body which is responsible for deciding whether convicted persons should have their cases retried in a different court. The Commission's activities are regulated by chapter 27 of the Norwegian Criminal Procedure Act.

## The composition of the Norwegian Criminal Cases Review Commission

The Commission consists of five permanent members and three alternate members. The chair, vice chair, one of the other members and two of the alternate members must have law degrees or a Master's degree in jurisprudence. The King in Council appoints the chair for a period of seven years and the members for a period of three years.

As at 31 December 2010, the Commission was composed of the following:

| | |
|---|---|
| Chair: | Helen Sæter |
| Vice Chair: | Gunnar K. Hagen, lawyer, Lillehammer |
| Members: | Bjørn Rishovd Rund, director of research at Vestre Viken Health Authority and associate professor at the University of Oslo<br>Birger Arthur Stedal, judge Gulating Court of Appeal<br>Ingrid Bergslid Salvesen, director of education at the University of Tromsø |
| Alternate members: | Ellen Katrine Nyhus, assistant professor at the University of Agder<br>Benedict de Vibe, lawyer, Oslo<br>Trine Løland Gundersen, lawyer with the Municipal Lawyer's Office in Kristiansand |

District Court Judge Helen Sæter was appointed acting chair of the Commission on 10 November 2009. At a Council of State meeting on 26 March 2010, she was appointed chair for the period from 1 April 2010 to 31 March 2017.

Alternate member Gunnar K. Hagen was acting vice chair from 10 November 2009 until he was appointed member/vice chair for the period from 1 March 2010 to 31 August 2012 at a Council of State meeting on 30 April 2010.

Alternate member Ellen Katrine Nyhus was appointed a member as from 16 December 2009 until 28 February 2010 during the absence of the member Ingrid Bergslid Salvesen.

Court of Appeal Judge Vidar Stensland was appointed an alternate member as from 16 December 2009 until a new chair was appointed.

Lawyer Trine Løland Gundersen was appointed an alternate member for the period from 1 June 2010 to 31 May 2013 at a Council of State meeting on 28 May 2010.

**The Norwegian Criminal Cases Review Commission's secretariat**
The Commission's chair is employed full-time as the head of the secretariat. The secretariat otherwise has 11 employees - seven investigating officers with a legal background, two investigating officers with a police background, one office manager and one secretary.

The investigating officers have experience of working for law firms, the courts, the Ministry of Justice and the Police, the Parliamentary Ombudsman, the police, the Institute of Forensic Medicine, the Armed Forces and the Inland Revenue Service.

The secretariat's premises are located in Teatergata 5 in Oslo.

**Gender equality in the Commission**
The Commission is chaired by a woman and the rest of the secretariat consists of seven women and four men, i.e., women make up 63.6% of the employees.

The secretariat's administrative deputy head and office manager are women. This means that all the organisation's management positions are held by women.

All the employees have full-time positions. One of the female employees was on a full-time leave of absence to care for a child until 1 September 2010. Three female employees and one male employee applied for and were granted reduced working hours due to caring for children during the entire or parts of 2010. The secretariat generally makes little use of overtime and normally does not have anti-social working hours.

The Commission's sickness absence rate does not seem to be related to gender differences.

All the employees are urged to give notice of their interest in measures/courses to increase their expertise.

As the above data is not very extensive, it is difficult to see whether there are unintentional or undesirable differences between the sexes. Otherwise, it seems that female employees have a tendency to take slightly longer parental leave and apply for reduced working hours. However, the small number of figures only relate to 2010, so caution should be demonstrated about deducing too much from them. The differences cannot be seen to have led to variations in pay apart from that due to the part-time work.

Planned and implemented measures that promote equality on the basis of gender, ethnicity and impaired functional ability
One vacant job in the secretariat was advertised in 2010, with a deadline for applications of January 2011. When vacant positions are advertised, a diversity declaration is included in the wording of the advertisement.
The attitudes to and measures to combat discrimination, bullying and harassment are stated in the Commission's SHE plan.

**The Commission's financial resources**
Proposition to the Storting no. 1 (2009-2010) for the 2010 budget year contained a budget proposal of NOK 13,761,000. The Proposition stated that amounts granted

for operating expenses were to cover the remuneration to the Commission's members, the salaries of the secretariat's staff and other operating expenses linked to the Commission's secretariat.
The Commission was granted funds in accordance with the budget proposal.

In general about the Norwegian Criminal Cases Review Commission
The Commission is an independent body which is to ensure that the protection afforded by the law is safeguarded when dealing with petitions to review criminal cases. If the Commission decides to review a conviction or court order, the case is to be referred for retrial by a court other than that which imposed the original conviction.

The Commission determines its own working procedures and cannot be instructed as to how to exercise its authority. Members of the Commission may not consider cases for which they are disqualified by reason of prejudice according to the provisions of the Courts of Justice Act. When a petition to review a criminal case is received, the Commission must objectively assess whether the conditions for such a review are present.

A convicted person may apply for a review of a criminal case on which a legally enforceable conviction has been pronounced if:

- There is new evidence or a new circumstance that seems likely to lead to an acquittal, the application of a more lenient penal provision or a substantially more lenient sanction.
- In a case against Norway, an international court or the UN Human Rights Committee has concluded that the decision on or proceedings relating to the convicted person's case conflict with a rule of international law, so that there are grounds for assuming that a retrial of the criminal case will lead to a different result.
- Someone who has had crucial dealings with the case (such as a judge, prosecutor, defence counsel, expert witness or court interpreter) has committed a criminal offence that may have affected the judgment to the detriment of the convicted person.
- A judge or jury member who dealt with the case was disqualified by reason of prejudice and there are reasons to assume that this may have affected the judgment.
- The Supreme Court has departed from a legal interpretation that it has previously adopted and on which the judgment is based.
- There are special circumstances that cast doubt on the correctness of the judgment and weighty considerations indicate that the question of the guilt of the defendant should be re-examined.

The rules governing the review of convictions also apply to court orders that dismiss a case or dismiss an appeal against a conviction. The same applies to decisions that refuse to allow an appeal against a conviction to be heard.

The Commission is obliged to provide guidance to parties that ask to have their cases reviewed. The Commission ensures that the necessary investigation into the case's legal and factual aspects is carried out and may gather information in any way it sees fit. In most cases, direct contact and dialogue will be established with

the convicted person. When there are special grounds for this, the party applying for a case to be reviewed may have a legal representative appointed at public expense.

If a petition is not rejected and is investigated further, the prosecuting authority is to be made aware of the petition and given an opportunity to submit comments. Any victim (or surviving next of kin of a victim) is to be told of the petition. Victims or surviving next of kin are entitled to examine documents and to state their views on the petition in writing, and they may ask to be allowed to make a statement to the Commission. The victim or surviving next of kin must be told of the outcome of the case once the Commission has reached its decision. The Commission may appoint a counsel for the victim/surviving next of kin pursuant to the Norwegian Criminal Procedure Act's normal rules in so far as these are applicable.

Petitions are decided on by the Commission. The Commission's chair/vice chair may reject petitions which, due to their nature, cannot lead to a case being reviewed, which do not stipulate any grounds for reviewing a case in accordance with the law or which clearly cannot succeed.

Should the Commission decide that a case is to be reviewed, the case is to be referred for retrial to a court of equal standing to that which imposed the judgment. If the conviction has been handed down by the Supreme Court, the case is to be retried by the Supreme Court.

**Cases and procedures**

During the year, the Commission held nine all-day meetings lasting for a total of 19 days.

The Commission received 184 petitions to review cases in 2010, compared to 148 in 2009, 157 in 2008, 150 in 2007, 173 in 2006, 140 in 2005 and 232 in 2004.

Of the 184 convicted persons that applied for their cases to be reviewed in 2010, 15 were women and 169 were men.

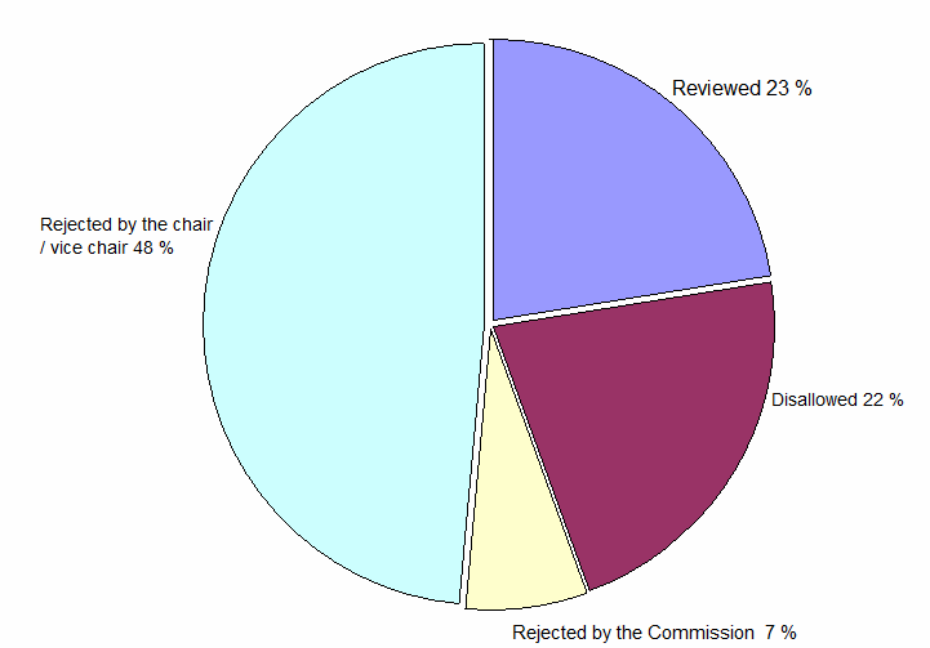
In 2010, a total of 160 cases were concluded, of which 142 were reviewed on their merits. Of these 142 petitions reviewed on their merits, 32 cases were reviewed while 31 petitions were disallowed. The remaining 79 petitions were rejected by the Commission or the chair/vice chair because they clearly could not succeed. There were dissenting votes in one of the 32 cases that were reviewed and in one of the 31 cases where the petitions were disallowed. The decisions to reject the petitions were unanimous.

The other 18 cases that were concluded were dismissed on formal grounds because they did not fall within the Commission's mandate. These were, for example, petitions relating to a review of administrative decisions or penalties/fines that had been agreed to or the reopening of investigations into discontinued prosecutions. In addition, some petitions were submitted by persons that are not permitted by law to submit such petitions (such as victims or the surviving next of kin of victims) or

were withdrawn for various reasons. A complete overview of the number of petitions received and cases concluded in 2010 is shown in the table as follows:

| | Received | Concluded | Reviewed | Disallowed | Rejected by the Commission | Rejected by the chair / vice chair | Dismissed misc / request for info |
|---|---|---|---|---|---|---|---|
| **General** | 7 | 7 | | | | 2 | 5 |
| **Sexual offences** | | 2 | | | 1 | 1 | |
| **Indecent assault** | 22 | 17 | 1 | 2 | | 11 | 3 |
| **Indecent assault on minors** | 14 | 15 | 2 | 2 | 2 | 8 | 1 |
| **Violence, threats** | 1 | 11 | | 8 | 1 | 2 | |
| **Threats** | 6 | 5 | | 1 | 1 | 2 | 1 |
| **Violence** | 38 | 21 | 1 | 2 | 1 | 17 | |
| **Murder** | 8 | 7 | 2 | 2 | | 3 | |
| **Drugs** | 15 | 15 | 5 | 6 | 1 | 3 | |
| **Crimes of gain** | 9 | 15 | 9 | | | 3 | 3 |
| **Theft and embezzlement** | 23 | 5 | 2 | | 1 | 2 | |
| **Fraud, breach of trust, corruption** | 20 | 12 | 4 | 2 | 1 | 2 | 3 |
| **Miscellaneous crimes** | 8 | 10 | 1 | 5 | 1 | 2 | 1 |
| **The Alcohol Act** | | 1 | | | | 1 | |
| **Miscellaneous misdemeanours** | | 5 | 1 | | | 4 | |
| **The Road Traffic Act** | 13 | 10 | 4 | 1 | | 5 | |
| **Discontinued prosecutions** | | 1 | | | | | 1 |
| **Temporary rulings** | | | | | | | |
| **Seizure or extinguishment** | | | | | | | |
| **Inquiries** | | | | | | | |
| **Fines** | | 1 | | | | 1 | |
| **Civil actions** | | | | | | | |
| **Other, concerning professional cases** | | | | | | | |
| **Total** | **184** | **160** | **32** | **31** | **10** | **69** | **18** |

The figure below shows the outcome of the cases reviewed on their merits in 2010:

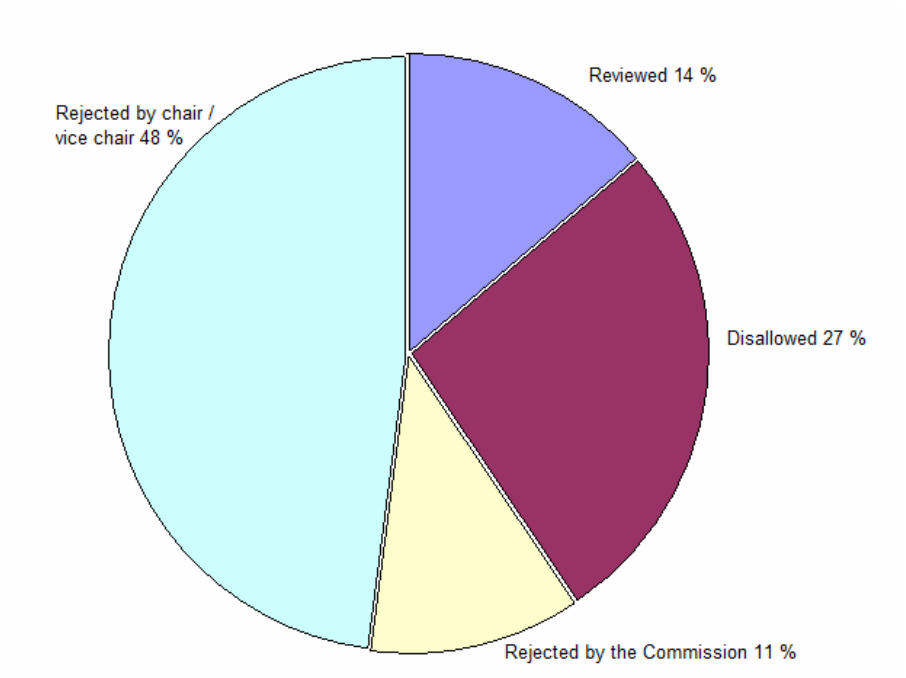



Since it was established on 1 January 2004, the Commission has received a total of 1,184 petitions and 1,045 of these cases have been concluded. A total of 120 cases have been reviewed and 233 have been disallowed. The Commission or chair/vice chair has rejected 518 of the cases because they could clearly not succeed, while the remainder, 174 cases, have been dismissed on formal grounds.

The table showing the total figures for the Commission's first seven years of operation is thus on the next page:

| | Received | Concluded | Reviewed | Disallowed | Rejected by the Commission | Rejected by the | Dismissed misc / request for info |
|---|---|---|---|---|---|---|---|
| **General** | 23 | 22 | | | | 4 | 18 |
| **Sexual offences** | 207 | 186 | 18 | 48 | 20 | 88 | 12 |
| **Violence, threats** | 322 | 279 | 27 | 79 | 27 | 127 | 19 |
| **Drugs** | 135 | 120 | 19 | 33 | 12 | 50 | 6 |
| **Crimes of gain** | 222 | 179 | 38 | 42 | 21 | 59 | 19 |
| **Miscellaneous crimes** | 66 | 61 | 7 | 15 | 9 | 23 | 7 |
| **Miscellaneous misdemeanours** | 122 | 111 | 11 | 16 | 10 | 64 | 10 |
| **Discontinued prosecutions** | 13 | 13 | | | | | 13 |
| **Temporary rulings** | 1 | 1 | | | | | 1 |
| **Seizure or mortification** | 1 | 1 | | | | 1 | |
| **Inquiries** | 31 | 31 | | | 1 | | 30 |
| **Fines** | 6 | 6 | | | | 1 | 5 |
| **Civil actions** | 31 | 31 | | | | 1 | 30 |
| **Other, concerning professional cases** | 4 | 4 | | | | | 4 |
| **Total** | **1184** | **1045** | **120** | **233** | **100** | **418** | **174** |

The figure below shows the outcome of the cases heard on their merits during the 2004-2010 period.

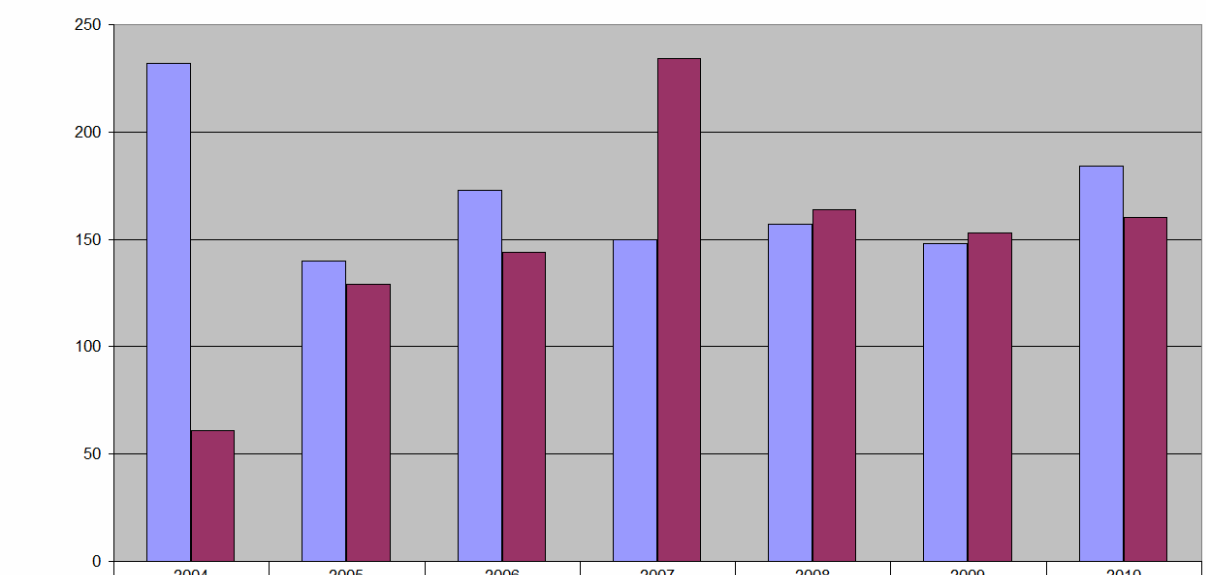


As mentioned above, the Commission may reject petitions that clearly cannot succeed. This decision may also be reached by the Commission's chair or vice chair. The reason for the chair/vice chair being able to reject petitions is primarily that the Commission receives quite a lot of petitions to review cases which are in reality simply "appeals". Therefore, in order to utilise the Commission's overall resources in the best possible way to deal with cases that require further investigation, it is sometimes necessary for the chair and vice chair to exercise their authority to reject petitions that obviously cannot succeed.

The number of cases during the first seven years has been greater than was expected when the Commission was established. The number of petitions to review cases is still higher than that presumed by the legislature but seems to have stabilised. The so-called appeal-filtering cases nonetheless led to an increase in the number of petitions received in 2010. The Commission has received a total of 42 petitions relating to unsubstantiated decisions to refuse to hear an appeal – some of the petitions were received before 2010. Of these, 24 cases have been concluded.

The Commission has an independent duty to investigate, which sometimes requires a lot of work to be carried out in extensive cases. This work utilises a lot of resources but is also one of the main reasons for the creation of the Commission and is thus an important task. Several of the cases the Commission is examining must be expected to still require a lot of investigatory work.

Petitions received and cases concluded 2004-2010:




| | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 |
|---|---|---|---|---|---|---|---|
| Received | 232 | 140 | 173 | 150 | 157 | 148 | 184 |
| Concluded | 61 | 129 | 144 | 234 | 164 | 153 | 160 |

**Appointment of a defence counsel**
The law allows the Commission to appoint a defence counsel for a convicted person when there are special grounds for doing so. A specific assessment of whether or not a defence counsel is to be appointed is conducted in each case. In practice, the Commission appoints a defence counsel when there is reason to assume that the convicted person may be unfit to plead, see section 397, second subsection of the Criminal Procedure Act, see also section 96, last subsection. Otherwise, a defence counsel may be appointed in especially comprehensive or complicated cases or if providing guidance to the convicted person would use a lot of the secretariat's resources. The appointment is in most cases limited to a specific number of hours, for example to provide a more detailed explanation of the petition's legal and factual basis. In 2010, the Commission appointed a defence counsel in 28 cases, while a defence counsel was appointed in 38 cases in 2009 and in 26 cases in 2008.

**Appointment of a counsel for the victim/surviving next of kin – the rights of the victim and victim's surviving next of kin**
As from 1 July 2006, the Commission has been authorised to appoint a counsel for a victim/surviving next of kin pursuant to the rules stated in section 107, et seq, of the Criminal Procedure Act. This has been particularly relevant in connection with interviewing victims in cases of indecent assault/sexual abuse.

In 2008, the Criminal Procedure Act was amended to strengthen the victim's and surviving next of kin's positions in criminal cases. These amendments mean, among other things, that the victim or surviving next of kin has a better opportunity to be heard, receives more information and is entitled to a counsel to a greater extent than before. The Commission appointed a counsel for the victim/surviving next of kin in three cases in 2010, four cases in 2009, and eight cases in 2008.

**Appointment of expert witnesses**
Pursuant to section 398 b, second subsection of the Criminal Procedure Act, the Commission is authorised to appoint expert witnesses in accordance with the rules stated in chapter 11. Since its formation, the Commission has appointed expert witnesses in the fields of forensic medicine, forensic psychiatry, forensic toxicology, photogrammetry, finance, fire technicalities, vehicle knowledge and traditional forensic science, etc. In 2010, the Commission appointed expert witnesses in 16 cases. These were in the fields of forensic medicine, forensic psychiatry, photo techniques and film techniques. Apart from expert witnesses in Norway, the Commission has used expert witnesses from England, Denmark and Sweden.

**New assessment of the Treholt case**
In 2005, Arne Treholt petitioned the Commission for a review of his conviction by Eidsivating Court of Appeal on 20 June 1985. The Commission decided to disallow this petition on 15 December 2008. The book entitled Forfalskningen (The Falsification), which was published at the beginning of September 2010, contained information/allegations stating that the police had fabricated evidence in the Treholt case and that police officers had committed perjury in court.

The book also contained information which indicated that the Commission had previously been shown pictures by the Norwegian Police Security Service which were not the pictures it had asked for. The book's contents aroused a great deal of interest in the media and there were new reports containing information and allegations that the police had been guilty of blameworthy and illegal acts in their investigation into and bringing to trial of the criminal case against Arne Treholt.
The Director General of Public Prosecutions started to investigate the matter himself but decided on 21 September 2010 to ask the Commission to re-examine Treholt's previous petition for a review of the case.
The Director General of Public Prosecutions' request was presented to Arne Treholt, represented by his lawyer Harald Stabell, who had no objections to the Commission re-examining Treholt's previous petition for a review of the case.
The Commission then decided to re-examine Arne Treholt's previous petition for a review of the case. During the autumn of 2010, the Commission took evidence from a number of witnesses and obtained statements from experts in the fields of photo and film techniques. This work will continue in 2011.

## The Commission's other activities, etc.

### Contact with authorities and organisations, etc.

The Commission's chair has informed the Minister of Justice and the Police about the Commission's activities every six months. The chair has also had contact with the Ministry of Justice and the Police's administrative management and has attended the Minister's annual conference for heads of government departments. The chair has also had a meeting with the Director General of Public Prosecutions to discuss general issues relating to the Commission and prosecuting authority when dealing with petitions for the review of criminal cases.

### Comments on consultation documents

In 2010, the Commission commented on a consultation document dated 15 December 2009 that had been sent out by the Ministry of Justice and the Police and concerned a proposal by the Method Control Committee, see Official Norwegian Report (NOU) 2009:15 Skjult informasjon – åpen kontroll (Hidden information – open control). The Commission also commented on a consultation document dated 28 September 2009 that had been sent out by the Courts Administration and concerned a proposal regarding the use of religious and politically related garments and symbols in the courts.

### International work

The collaboration with the criminal cases review commissions in England and Scotland has continued. Representatives of the Commission and secretariat attended a seminar in Birmingham in November 2010, arranged by the English Criminal Cases Review Commission.

**Information activities**
The Commission continued the work of modernising its website in 2010. The objective of this work is to make the website more reader-friendly and to improve access to information on the Commission and its activities. The new website was launched on 1 January 2011.

The Commission's chair and representatives of the secretariat had a meeting with the Lovdata foundation in November 2009 with the aim of publishing the Commission's decisions in Lovdata's database. As from 2010, all the Commission's decisions are published in Lovdata. This applies to both decisions made by the Commission and decisions made by the Commission's chair or vice chair pursuant to section 397, third subsection, third sentence of the Criminal Procedure Act. Over time, all older decisions (2004-2009) will also be incorporated in the database.

**Environmental action plan**
The Commission has established an internal environmental action plan. This plan, which is part of the Green State project, contains measures in the four most important categories that affect the environment – purchases, waste, transport and energy.

The follow-up of the environmental action plan has been included as a separate measure in the Commission's activity plan

**Evaluation of the Commission (user survey)**
When the Commission was established in 2004, it was presumed that a subsequent check would be carried out in order to assess whether or not the statutory amendments had had the presumed effect, see Proposition to the Odelsting no. 70 (2000-2001). It was recommended that those affected by the amendments, i.e. accused persons, defence counsels, judges and representatives of the prosecuting authority, should be subject to questionnaires or in-depth interviews in such a subsequent check. According to the proposal, the Ministry of Justice and the Police was to have the overall responsibility for carrying out this subsequent check.

In the autumn of 2010, the Ministry appointed a working group, led by Professor Ulf Stridbeck of the University of Oslo's Law Faculty, to carry out this subsequent check. In brief, the assignment is to describe the procedural rules in review cases and the Commission's work methods and procedural routines. The working group is also to assess the Commission's and secretariat's manpower and composition.

According to its mandate, the working group is to submit a report to the Ministry on 31 December 2011.

At the same time, a subsequent check was initiated within the Ministry in order to assess other aspects of the Commission's activities, and this is to be carried out by special adviser Georg Fredrik Rieber-Mohn. In short, this work involves assessing the opportunity to bring civil actions concerning the Commission's decisions, the Commission's professional work area, the relationship between section 391, no. 2 and section 392 of

the Criminal Procedure Act and the question of reviewing old cases. According to the mandate, this is to be presented in a report on 1 December 2011.

## Civil actions brought against the Commission

### Appeal-filtering cases

In 2009, the Commission received several petitions for a review of the Court of Appeal's unsubstantiated decisions to refuse to allow appeals against District Court convictions to be heard - the so-called appeal-filtering cases. These are cases in which the Court of Appeal has unanimously decided, on the basis of the written material in the case, to refuse to allow an appeal to be heard with reference to the fact that the court "finds it clear that the appeal will not succeed", without stating any individual grounds based on the facts of the case. Such a procedure has been regarded as being in accordance with section 321, fifth subsection of the Criminal Procedure Act, which stipulates that the appeal-filtering decision is to be made as a court decision. Unlike court orders, there is no duty to state the grounds for court decisions, cf section 53, first subsection of the Criminal Procedure Act. Refer to the further discussion of this issue in the 2009 Annual Report.

The Commission based its decisions on petitions for a review of these cases on the fact that the relevant review provision would be section 392, first subsection of the Criminal Procedure Act, in that the Supreme Court had, in three Grand Chamber decisions in 2008, departed from an interpretation of the law that it had previously adopted. None of the petitions were allowed, and the Commission placed emphasis on the fact that section 392, first subsection of the Criminal Procedure Act is a "may" provision that does not provide an unconditional right to have a case reviewed. The Commission found that a discretionary assessment of whether or not there were sufficient grounds for a review had to be conducted, and that the crucial element would be whether it would appear objectionable if the Court of Appeal's unsubstantiated refusal to hear an appeal was upheld. The Commission assumed that this was in accordance with the then prevailing Supreme Court practice, see especially Rt 2003, page 359.

One of the convicted persons, whose petition for a review had not been allowed in the Commission's decision of 20 August 2009, brought an action against the Commission in Oslo District Court alleging that the Commission's decision was invalid. In its judgment of 16 April 2010, Oslo District Court found in favour of the Commission. The convicted person appealed against the judgment and was allowed to lodge the appeal directly with the Supreme Court's Grand Chamber. In a judgment dated 12 October 2010, the Commission's decision was ruled invalid. The Commission then reached a new decision in accordance with the Supreme Court judgment.

In its judgment, the Supreme Court has drawn up more detailed guidelines for the application of section 392, first subsection of the Criminal Procedure Act to unsubstantiated decisions by the Court of

Appeal to refuse to hear an appeal. In connection with this, the Supreme Court examined the appeals scheme according to the UN Covenant on Civil and Political Rights and the relationship between the national authorities and covenant bodies. The Supreme Court concluded that there are grounds for reviewing a case if

- the Court of Appeal has made an unsubstantiated decision to filter an appeal pursuant to section 321, second subsection of the Criminal Procedure Act, and

- the unsubstantiated refusal to hear the appeal was appealed against to the Supreme Court by the deadline for lodging an appeal, and

- the objection to the filtering decision is linked to factors which can to a large extent be regarded as relating to a lack of any real review or substantiation, and

- no more than five years have elapsed since a final and enforceable conviction, unless there are special circumstances which indicate otherwise, for example that the convicted person is serving the sentence.

The three Grand Chamber decisions in 2008 and the one in 2010 directly apply to the situation where the Court of Appeal refuses to hear a convicted person's appeal against a District Court conviction.

However, a duty to state grounds has also been introduced for the Appeals Selection Committee of the Supreme Court's decisions to refuse to hear an appeal against the Court of Appeal's unsubstantiated convictions in cases where the convicted person has been acquitted by the District Court, see the Appeals Selection Committee's decision of 19 February 2009 (Rt. 2009, page 187). In the Commission's view, the limitation criteria that the Supreme Court Grand Chamber has stipulated in the judgment dated 12 October 2010 must also apply in these cases.

**The Baneheia case**

One of the persons convicted in the so-called Baneheia case who was sentenced in 2002 to a 21-year custodial sentence with a minimum period of 10 years for murder and rape petitioned to have the conviction by the Court of Appeal reviewed in 2008. The Commission decided to disallow the petition on 17 June 2010 in that it did not believe that the conditions for a review of the case were present. The convicted person submitted a new petition to have the case reviewed and the Commission decided to disallow this petition too on 24 September 2010.

In October 2010, the Commission received a notice from the convicted person, alleging that the Commission's two decisions were invalid. A writ of summons and particulars of claim were lodged with Oslo District Court on 30 December 2010.

Refer to the Commission's website for a brief discussion of the decision on the Baneheia case.

## Complaints to the Parliamentary Ombudsman

### Complaints about refusals to review cases

A convicted person whose petition for a review of his case had been dismissed appealed against the Commission's decision to the Parliamentary Ombudsman, in that he maintained he had been convicted on "the wrong grounds".

In his opinion dated 26 April 2010 (the Ombudsman's case number 2010/590), the Ombudsman stated, i.a., the following:

> "The Commission's composition, the special procedural rules that the Commission is subject to and the Commission's independence nonetheless mean that the Ombudsman will have to show restraint in reviewing the merits of the Commission's decisions as to whether a petition for a review of a case is to be allowed or not. It will primarily be the Commission's procedures that the Ombudsman may examine more closely."

The Ombudsman thereafter commented on the individual allegations in the convicted person's complaint and concluded as follows:

> "The examination of the case has not provided grounds for assuming that further investigations by me may reveal errors or defects in the Commission's treatment that may lead to crucial legal criticism by me of the decision not to review the case."

### Access to documents

Two convicted persons petitioned the Commission asking for access to documents relating to a third convicted person's review case. The Commission rejected the request for access with reference to the fact that it dealt with the petitions from the first two convicted persons and the third convicted person as two separate cases. The reason given by the Commission for rejecting the petition was that the right to have access pursuant to section 242 of the Criminal Procedure Act only applied to the case documents, i.e., the underlying common criminal case, and that the provision does not allow a convicted person an unconditional right to have insight into a co-convicted person's review case. Among other things, it was stated that a petition for a review of a case by persons who have been convicted in the same case may be submitted at different times and on different grounds. The intention behind the rule concerning access to criminal case documents during the investigation stage is different from the intention behind the rules concerning access during the review stage, when an individual assessment of whether or not the conditions for a review are present is to be conducted.

The two convicted persons complained to the Parliamentary Ombudsman about the Commission's decision to refuse access. With reference to Supreme Court decisions, it was alleged that the Commission's interpretation of section 242 of the Criminal Procedure Act was wrong and that the two convicted persons were entitled to have access to information in the co-convicted person's review case "simply

because both the petitions for a review relate to the same criminal offence".

The Parliamentary Ombudsman issued his opinion on 22 June 2010 (the Ombudsman's case number 2010/610). The following is an extract of this opinion:

> "My conclusion is that the main rule must be that the convicted persons in the same criminal case will be entitled to have access to the documents in the other co-convicted persons' review cases provided they have themselves applied for a review of the case. However, there is reason to mention that the rule stated in section 242, fourth subsection of the Criminal Procedure Act, according to which the right of access does not apply to "documents relating solely to the affairs of the other suspects", is also similarly applicable at the review stage. The Commission has pointed out that a petition for a review of a case is based on individual grounds and that, on this basis alone, "it must be concluded that the other convicted persons in the case are not entitled to become familiar with the "case documents" in the review case, since these documents only relate to the affairs of the person applying for a review of the case, see section 398, last subsection of the Criminal Procedure Act, see section 242, fourth subsection". The above account shows that I cannot see there are any grounds for drawing this conclusion. However, I do not rule out that the provision may in practice impose a slightly greater restriction on the right of access at the review stage than at the investigation stage. As long as the object of the Commission's investigations are circumstances linked to the original criminal case, however, it will be quite difficult to say that a document "only relates to the affairs of the other [convicted persons']". Accordingly, I have decided that the question of A's access to documents in B's petition for a review of the case cannot be rejected on the basis that the documents are not part of the "case documents". I ask the Criminal Cases Review Commission to review this case once more and to take into account my views on the legal issues raised by the case in the new assessment. I wish to point out that I have not decided whether the petition for access to documents may be rejected on some other grounds."

Following this, the Commission reached a new decision and the convicted persons were given access to documents in the co-convicted person's review case.

**Public examination of witnesses**

In connection with the examination of witnesses in a review case, several media organisations asked the Commission to examine witnesses at sessions which were open to the public in accordance with the rule stated in section 398 a, second subsection of the Criminal Procedure Act, see the fourth subsection. The Commission's decision to conduct the examinations in accordance with the provisions applicable to police interrogations, see section 398 a, fifth subsection of the Criminal Procedure Act, was complained about to the Parliamentary Ombudsman.

In his opinion dated 7 December 2010 (the Ombudsman's case number 2010/2514), the Parliamentary Ombudsman stated the various alternatives that the Commission can use when examining witnesses, see section 398 a and b of the Criminal Procedure Act. He referred to the fact that the preparatory works of section 398 of the Criminal Procedure Act clearly state that the Commission is given a wide scope to itself choose the form of examination within the frameworks set by the Act, and that the interest of obtaining information in the case is a key consideration in this choice. The Ombudsman also referred to the fact that emphasis must be placed on the practical execution of the examinations. The Ombudsman further pointed out that, when choosing the form of examination, emphasis may be placed on the interest of openness in the case investigation process. In conclusion, the Ombudsman stated that:

> "Based on the freedom that section 398, first subsection, third sentence of the Criminal Procedure Act gives the Commission to choose the examination method, however, the Commission's more detailed assessment and weighing up of the relevant interests are matters that I can only to a limited extent review. Following an examination of the case, it is difficult to see that further investigations may provide a basis for crucial judicial criticism of the Commission's decision regarding the choice of examination form."

**Relevant decisions**

In this chapter, abbreviated versions are given of all the cases where the Commission has allowed a petition for a review. However, petitions that have been allowed solely because it has later been proven that the convicted person may have been unfit to plead when the offence of which he/she has been convicted took place are not stated here. The reason for this is that these cases do not normally raise any issues of a special legal or fundamental nature and are therefore of little general interest. In 2010, the Commission decided on a number of petitions to review decisions not to allow an appeal, see that stated above. These are also not stated in this chapter.

The abbreviated versions of all the cases in which the Commission has allowed a petition are published on the Commission's website, www.gjenopptakelse.no.

**27.01.2010 (2009 0096) - Drugs - section 391 no. 3 (new circumstances)**

A man was convicted by the District Court in 2009 of contravening section 162, first subsection of the Norwegian Penal Code by illegally storing a bottle of a liquid mixture containing GBL and GHB. This liquid equalled just under half a litre. The District Court sentenced him to a 15-day suspended sentence and a fine of NOK 10,000. The Court of Appeal refused to hear the convicted person's appeal against the assessment of the evidence relating to the question of guilt and procedure, since it found it obvious that the appeal would not succeed.

The convicted person petitioned for the case to be reviewed on the grounds that, in a later decision, the Supreme Court had ruled that GBL

was not a derivative of GHB and was thus not covered by the derivatives provision in the Drugs Regulations. This meant that GBL was also not to be regarded as a drug pursuant to section 162 of the Penal Code.

The Commission asked the Norwegian National Criminal Investigation Service (Kripos) to analyse the seized liquid mixture once again. The laboratory report showed, among other things, that the result of the analysis indicated that the mixture had initially consisted of GBL dissolved in water and that, over time, a balance reaction had taken place so that around 1/3 of the GBL had been converted into GHB. Such a balance reaction would normally take a few days. The text messages in the case seem to show, among other things, that the process of making the liquid mixture had started sometime after 4.13 pm, while the mixture was seized by the police at 10 am on the next day. The prosecuting authority thus found that doubt could be raised as to whether the liquid had actually contained GHB when it was seized, and it supported the petition to review the case.

The Commission found that the conditions for a review of the case pursuant to section 391, no. 3 of the Criminal Procedure Act were present. The fact that the Supreme Court had in a later conviction found that the storage of GBL was not covered by section 162 of the Penal Code, together with the uncertainty that had arisen regarding the bottle's contents at the time of seizure, were new circumstances which seemed likely to lead to an acquittal.

The Commission unanimously decided to allow the petition to review the case.

**04.03.2010 (2009 0090) Drugs - section 393 no. 2 (new information) – a review of the case to the detriment of the person charged**

A man was acquitted by the District Court of storing 29 kg of marijuana in 2007. The court found that there were reasonable grounds to suspect the man of dealing in the drug but that the evidence was insufficient for a conviction.

The prosecuting authority petitioned for the case to be reviewed in 2009. It was alleged that there was new information in the case - that there was a new witness. This witness had left Norway shortly after the seizure and was not arrested in Sweden until February 2009. The witness explained that he had participated in the drugs activities to which the charge referred and that the person who was acquitted had been a key person in these activities. The witness was later convicted based on a plea of guilty for his involvement in the drugs case.

The prosecuting authority also alleged that there was communication surveillance linking the acquitted person to a large drugs network.

The Commission found that the conditions for reviewing the case to the detriment of the person charged in accordance with section 393, no. 2 were present. Emphasis was placed on the fact that the new witness's statement was new information which strengthened and confirmed the circumstances that already linked the accused to the matter and which indicated he was guilty of the act that he had been acquitted of.

The Commission unanimously decided to allow the prosecuting authority's petition to review the case.

**16.06.2010 (2010 0014) Drugs - section 391 no. 3 (new circumstances)**
A woman was convicted by the District Court in 2008 of, among other things, contravening section 162, first and second subsection of the Penal Code by illegally storing 7,500 pills containing phenazepam and reselling 4,700 of these. The conviction was a judgment entered on a plea of guilty and the District Court sentenced her to imprisonment for eight months, of which two months were suspended. The convicted person appealed against the sentence. Since she had committed new criminal offences, which she had also admitted, before the appeal hearing, the Court of Appeal included these and adjudicated on them. She was sentenced to imprisonment for 10 months, of which four months were suspended.

The convicted person petitioned for her case to be reviewed, referring to the fact that, in a later decision, Frostating Court of Appeal had found that phenazepam was not a derivative of a substance on the drugs list and thus could not be regarded as being covered by the derivative alternative in the Drugs Regulations. This meant that phenazepam was also not to be regarded as a drug pursuant to section 162 of the Penal Code. The Court of Appeal's conviction was later upheld by the Supreme Court.

The Commission found that the conditions for reviewing the case pursuant to section 391, no. 3 of the Criminal Procedure Act were present. The fact that, in a later conviction, the Supreme Court had found that phenazepam was not to be regarded as a drug pursuant to section 162 of the Penal Code when the offence took place was a new circumstance that seemed likely to lead to an acquittal.

The Commission unanimously decided to allow the petition to review the case.

**30.09.2010 (2009 0029) False charges. Insurance fraud - section 391 no. 3 (new evidence) – dissenting votes**
A woman was convicted of, among other things, contravening section 171, no. 1 of the Penal Code in 1998 by making a formal complaint about attacks on her family and the family's property, as well as of contravening section 272, first subsection of the Penal Code, see the third subsection, concerning insurance fraud. A new witness came forward and explained that he had committed/participated in the attacks on the family and that the attacks were thus real. The prosecuting authority alleged that the witness was not credible. The majority of the Commission's members found that there was a reasonable chance that the new witness statement, if it had been submitted during the woman's trial, would have led to her acquittal for the relevant indictment counts. The minority of the Commission's members did not believe the new witness was credible.

The Commission decided to allow the petition, see section 391, no. 3 of the Criminal Procedure Act (dissenting votes 3-2).

**20.10.2010 (2010 0065) Drugs - section 391 no. 3 (new Supreme Court judgment – new circumstance)**
In 2009, a man was convicted of contravening section 162, first subsection of the Penal Code by illegally buying, among other things, around 350 pills containing the active narcotic ingredient phenazepam and of reselling 300 of these pills. A new Supreme Court judgment stipulated that phenazepam was not covered by the derivative alternative in the Drugs Regulations and was thus not a drug according to section 162 of the Penal Code. In the Commission's view, the Supreme Court judgment was a new circumstance that seemed likely to lead to acquittal on one of the charges, see section 391, no. 3 of the Criminal Procedure Act.

The Commission unanimously decided to allow the petition to review the case.

Postal address: Postboks 8026 Dep, NO-0030 Oslo
Visiting address: Teatergt. 5
Tel: +47 22 99 13 70
Fax: +47 22 99 13 71
E-mail: post@gjenopptakelse.no

Website: www.gjenopptakelse.no