

**CORRECTION OF MISCARRIAGES OF
JUSTICE IN NEW ZEALAND
AND ENGLAND**

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ST CATHERINE'S COLLEGE**

DOCTOR OF PHILOSOPHY

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100000 WORDS

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ABSTRACT

This thesis sets out to provide a deep analysis of the mechanisms for review of convictions in New Zealand and England after initial appeal rights are exhausted, and to identify the key areas of similarity and difference between these systems, the reasons for these differences, and their implications.

The appeal systems in each jurisdiction are briefly examined, alongside the pressures and restrictions on their functioning. Particular attention is paid to the options for appeal out of time, and for revisiting appeal decisions if new material comes to light.

The main discussion is of the specialist procedures for review of suspect convictions in each jurisdiction: the Royal Prerogative of Mercy process carried out by the New Zealand Ministry of Justice and the work of the English Criminal Cases Review Commission. This discussion presents the results of empirical research carried out by the author utilising the files of each of these bodies. It investigates the legal context in which each body functions, and provides an account of how each body functions in practice, by examining the circumstances in which each body will contemplate referring a matter back to an appeal court and the means by which a determination is made as to whether to do so in an individual case. In addition it examines the various factors (legal and non-legal) which impact on their work.

Finally, the key features of the two systems are contrasted, with a discussion of the areas of similarity and difference, as well as the possible implications of these, in particular for reform of the New Zealand processes.

FOR REBECCA

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CHAPTER ONE - INTRODUCTION

1 Introduction: Criminal Justice in ‘Crisis’

Gone are the days when it was assumed that Western criminal procedures were foolproof, or that errors were so infrequent that they could be safely ignored.¹ A number of very public exonerations in several jurisdictions have put lie to Judge Learned Hand’s oft-cited claim that ‘the ghost of the innocent man convicted’ haunting criminal procedure was ‘an unreal dream’.²

In the United Kingdom, public and political interest in the subject was piqued by the efforts of investigative reporters during the 1980s, notably by those connected with a primetime show on the BBC’s flagship channel dedicated to uncovering suspected miscarriages of justice.³ Towards the end of the 1980s, this rising concern crystallised around three groups of individuals⁴ convicted in the 1970s for terrorist activity related to ‘the troubles’ in Northern Ireland. Those convicted entered the public consciousness collectively as members of the ‘Guildford Four’, ‘Birmingham Six’ and ‘Maguire Seven’ following a flurry of media coverage,⁵ a number of mass-marketed books,⁶ and, later, a

¹ See B MacFarlane, ‘Convicting the Innocent: A Triple Failure of the Justice System’ (2006) 31 Manitoba LJ 403 for an extended discussion of the emergence of concern about failures in the criminal trial process in a number of common law jurisdictions. The rise of general public concern about such matters may be earlier than even that suggested in that article – see BL Berger, ‘Criminal Appeals as Jury Control: An Anglo-Canadian Historical Perspective on the Rise of Criminal Appeals’ (2005) 10 Can Crim L Rev 1.

² *United States v Garsson* 291 Fed 646 (SDNY 1923) 649; MacFarlane (n 1) 405.

³ ‘Rough Justice’, a series which ran until 2007 and spawned two mass-marketed books: M Young and P Hill, *Rough justice* (British Broadcasting Corp., London 1983) and P Hill, M Young and T Sargent, *More rough justice* (Penguin, Harmondsworth 1985).

⁴ A further case involved a single individual who was convicted, and later acquitted, of murdering twelve people in a series of IRA bombings on the basis of misleading testimony - *R v Ward* [1993] 1 WLR 619 (CA).

⁵ The media reporting of these matters is analysed in R Nobles and D Schiff, *Understanding Miscarriages of Justice : Law, the Media, and the Inevitability of Crisis* (Oxford University Press, Oxford 2000) ch 4.

⁶ Notably, C Mullin, *Error of judgement : the Birmingham bombings* (Chatto & Windus, London 1986); R Kee, *Trial and error : the Maguires, the Guildford pub bombings and British justice* (Hamish Hamilton,

film.⁷ The eventual quashing of their convictions, and the emergence of a number of further questionable convictions, led both the media⁸ and prominent academics⁹ to diagnose the criminal justice system as being in a state of crisis.

This phenomenon was (and is) not unique to the United Kingdom. In New Zealand, the watershed was the pardoning of convicted murderer Arthur Allan Thomas following an inquiry prompted by allegations made by English investigative writer David Yallop.¹⁰ A Royal Commission of Inquiry subsequently found that crucial evidence in the case had been planted by police.¹¹ In Canada, concern about miscarriages of justice developed after a number of convictions were found to be unsafe by a series of commissions of inquiry.¹² In Australia,¹³ the cause célèbre was that of Lindy Chamberlain, whose conviction for the murder of her daughter was upheld on a number of occasions – including by the High Court of Australia,¹⁴ before being quashed several years later.¹⁵ This case has been the subject of books,¹⁶ a popular film¹⁷ and even an opera.¹⁸

London 1986); B Woffinden, *Miscarriages of justice* (Hodder & Stoughton, London 1987); G Conlon, *Proved innocent : the story of Gerry Conlon of the Guildford Four* (Hamish Hamilton, London 1990).

⁷ *In the Name of the Father* (Universal Pictures, United Kingdom, 1994).

⁸ See the sources cited in Nobles and Schiff, *Understanding Miscarriages of Justice* (n 5) 117-149.

⁹ See, eg, the declaratory title of the 1994 collection M McConville and L Bridges (eds), *Criminal justice in crisis* (Elgar, Aldershot 1994).

¹⁰ DA Yallop, *Beyond reasonable doubt?* (Hodder & Stoughton, London 1978).

¹¹ Royal Commission to Inquire into the Circumstances of the Convictions of Arthur Allan Thomas, *Report* (New Zealand Government Printer, Wellington 1980).

¹² See MacFarlane (n 1) 421-431. The Supreme Court of Canada reflected on this in 2001, stating that 'The possibility of miscarriages of justice in murder cases has long been recognized... but our state of knowledge of the scope of this potential problem has grown to unanticipated and unprecedented proportions in [recent years]' – *United States v Burns* [2001] 1 SCR 283 para 95.

¹³ See generally L Weathered, 'Pardon Me: Current Avenues for the Correction of Wrongful Conviction in Australia' (2005) 17 *Current Issues in Criminal Justice* 203; J Langdon and P Wilson, 'When Justice Fails: A Follow-up Examination of Serious Criminal Cases since 1985' (2005) 17 *Current Issues in Criminal Justice* 179.

¹⁴ Albeit in a split decision: *Chamberlain v R (No 2)* [1984] HCA 7; (1984) 153 CLR 521.

¹⁵ *Chamberlain, Re Conviction of* [1988] NTSC 64.

¹⁶ Most notably J Bryson, *Evil angels* (Viking, Ringwood 1985).

¹⁷ *A Cry in the Dark* (Warner Brothers, Australia, 1988).

¹⁸ "Lindy" the Opera premiered at the Sydney Opera House on 29 October 2002.

The increase in public concern has led to attempts to craft an official response by various means,¹⁹ and the development of a number of mechanisms to remedy perceived deficiencies with the outcomes of current criminal procedures. The subject has also become a focal point of academic debate concerning the criminal justice system. In England, this was most evident in the debate which surrounded the proceedings and findings of the Runciman Royal Commission, the inquiry established to investigate the ‘crisis’.²⁰ A similar level of academic and public debate has sprouted around the work of the bodies which were established on the recommendation of the Runciman Commission (and its Scottish counterpart)²¹ to replace the existing machinery for reviewing potentially flawed convictions: The English Criminal Cases Review Commission (CCRC) and the Scottish Criminal Cases Review Commission.²² Again, such debates are not unique to the United Kingdom. The conviction review process in Canada was examined in the early 1990s, and again in 1998 following the emergence of further high profile alleged miscarriages of justice.²³ Official consideration was given to the adoption of a body akin to the English CCRC, although this was ultimately rejected in favour of minor reform of the existing procedures.²⁴ In New Zealand, amidst ongoing public concern regarding a

¹⁹ The approaches taken across a number of jurisdictions are detailed in MacFarlane (n 1) and T Thorp, *Miscarriages of Justice* (Legal Research Foundation, Auckland 2005) at 11ff.

²⁰ The literature is too voluminous to list exhaustively, but the two edited collections *McConville and Bridges* (n 9) and C Walker and K Starmer, *Justice in error* (Blackstone, London 1993) provide a good cross-section of the debates.

²¹ Sutherland Committee, *Report by the Committee on Criminal Appeals and Miscarriages of Justice Procedures* (Cm 3245, 1996).

²² The academic debate is discussed in chapter five below, for an analysis of public debate, see P Mason, 'Press and Release: UK News Coverage of the CCRC Since 1996' in M Naughton (ed) *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave MacMillan, Basingstoke 2009). Since the publication of that piece, a number of further critical pieces have appeared in the media - see eg J Doward, 'Innocent People 'Left Behind Bars' by Review Board' *The Observer* (29 May 2011, London), J Robins, 'Losing its appeal: is it time to say goodbye to the CCRC?' *The Times* (March 10 2011, London), B Woffinden, 'The Criminal Cases Review Commission has failed' *The Guardian* (November 30 2010, London) and J Robins, 'Proving the innocent not guilty' *The Times* (21 January 2010, London).

²³ See Department of Justice, *Applications For Ministerial Review - Miscarriages Of Justice Annual Report 2003* (Ottawa 2003) and P Braiden and J Brockman, 'Remedying Wrongful Convictions Through Applications To The Minister Of Justice Under Section 690 Of The Criminal Code' (1999) 17 Windsor YB Access to Just 3.

²⁴ The current process is prescribed by the Criminal Code of Canada ss 696.1 to 696.6.

number of high profile cases, there have been periodic calls for institutional reform.²⁵

The subject of miscarriages of justice is therefore of widespread concern. The present study investigates the responses in two jurisdictions: New Zealand, and England and Wales.²⁶ These make for useful comparators, as New Zealand's criminal law and criminal procedure has, since the early days of colonisation, followed the English model.²⁷ This broad pattern has continued to the present day, with New Zealand often following England's lead with developments in both substantive criminal law and criminal procedure.²⁸ However, while it is true that the English appeal system has had a 'significant influence' on the development of appeals elsewhere in the Commonwealth,²⁹ there has always been divergence between the English and New Zealand systems of appeal.³⁰ This divergence can also be seen in post-appeal mechanisms, as suspected miscarriages of justice in New Zealand are reviewed not by an independent body such as the CCRC, but instead by officials in the Ministry of Justice who advise the Governor-General as to whether to take action under the Royal Prerogative of Mercy (**RPM**).

The identification of a number of perceived deficiencies in the RPM process has prompted a push for New Zealand to follow England's lead. A 2003 Report

²⁵ Such calls are longstanding, C Withnall, 'Reform of the Criminal Justice System - A View from the Coalface' (1998) 9 Otago L Rev 355 370 notes that this matter was discussed at the New Zealand Law Society's Triennial Conference in 1980.

²⁶ Due to the differences in criminal and appeal procedure and personnel between England and Wales and Northern Ireland, the latter has been excluded for the purpose of comparison.

²⁷ See PC Stenning, *The Modern Prosecution Process in New Zealand* (Victoria University Press, Wellington 2008) ch 3.

²⁸ The frequency with which this occurs has led some commentators to ponder the question 'If Britain were to jump off a bridge...', see J Richardson, 'A Just Outcome: Losing Sight of the Purpose of Criminal Procedure' [2011] JCCL 105, 107.

²⁹ B Sangha, K Roach and R Moles, *Forensic Investigations and Miscarriages of Justice* (Irwin Law, Toronto 2010) 55 makes this point in relation to the Canadian and Australian appeal systems.

³⁰ This divergence has existed for over a century, as while England established a Court of Criminal Appeal in 1907, New Zealand did not follow suit until 1945, for reasons explored in J Finn, 'John James Meike and the Problem of the Wrongly Convicted' (2010) 41 VUWLR 519.

commissioned by the Ministry of Justice presented an independent review body along the lines of the CCRC as an option for reform,³¹ a suggestion which was endorsed in an influential independent research paper prepared by a retired High Court judge.³² Such proposals have been endorsed by a wide cross-section of interested parties, including the Chief Justice, Crown Law Office, the New Zealand Law Society, the Auckland District Law Society, the Criminal Bar Association, the Justice and Electoral Select Committee, and numerous political parties.³³ New Zealand's independent law reform body, the Law Commission has also singled the area out as worthy of future investigation.³⁴ While, as of September 2010, reform of the RPM process was not on the Ministry of Justice's workplan,³⁵ the subject is still of considerable public and academic interest.³⁶ It is this push which has prompted the research contained in this thesis.

The study is deliberately limited to these two jurisdictions, in order to minimise the risk of cultural misunderstandings which can arise from attempting to compare too many jurisdictions, and the associated risk of having only a shallow and incomplete

³¹ New Zealand Ministry of Justice, *The Royal Prerogative of Mercy - A Review of New Zealand Practice* (Wellington 2003).

³² Thorp (n 19).

³³ See S Mount, 'A Criminal Cases Review Commission for New Zealand' (Criminal Law Symposium 2008) 112-113 and the sources cited therein.

³⁴ G Palmer, 'The Law Reform Enterprise in New Zealand' (2006) 32 *Commonwealth Law Bulletin* 373, 380.

³⁵ Response by Ministry of Justice to request under the Official Information Act 1982 by author, dated 8 September 2010.

³⁶ Eg ATH Smith, 'Fifty Years of Criminal Appeals in the Permanent Court of Appeal' in R Bigwood (ed) *The Permanent New Zealand Court of Appeal: Essays on the First 50 Years* (Hart, Oxford 2009) 96-97; S Mount, 'A Criminal Cases Review Commission for New Zealand' [2009] *NZ Law Rev* 455. The subject was recently the cover-story of New Zealand's largest selling current affairs monthly: M White, 'Guilty Until Proven Innocent' *North and South* (Auckland, December 2010) and received extensive coverage in the New Zealand media during the visit of former CCRC chairperson Professor Graham Zellick for a speaking tour as New Zealand Law Foundation Visiting Fellow in late 2010.

understanding of the functioning of each system.³⁷ As noted above, the former problem poses minimal difficulties for this research, as the two jurisdictions are not only from the same legal tradition and legal family, but also have broadly similar bodies of substantive criminal law and criminal procedure.³⁸ As to the latter, by limiting discussion to two jurisdictions, it is possible to examine in detail the ways in which alleged miscarriages of justice are dealt with, both in positive law and in practice.³⁹

2 The Scope of the Present Work

One important purpose of comparative inquiry is to allow an evaluation of 'the efficacy of a given solution or approach to a legal problem in terms of that particular jurisdiction's cultural, economic, political and legal background'.⁴⁰ The present work is motivated by a desire to contribute to the reform debate in New Zealand. Those who advocate the adoption of an English-style commission do so as they view it as a solution to the 'problem' of miscarriages of justice. Thus, one overall aim of comparative work in this area must be to contribute to the evaluation of whether this is indeed the case. However, as the following section will detail, it is not possible to complete this evaluation within the constraints of the present thesis for two main reasons: the lack of agreement about the scope of the 'problem', and the absence of sufficient information about one of the most significant aspects of both systems, the workings of the appeal courts themselves.

³⁷ See P De Cruz, *Comparative law in a changing world* (3rd edn Routledge-Cavendish, Abingdon 2007) ch 7; L Lazarus, *Contrasting prisoners' rights : a comparative examination of Germany and England* (Oxford University Press, Oxford 2004) ch 1.

³⁸ For this reason, familiarity with the broader constitutional and cultural backgrounds is assumed, although significant features are identified and explained where relevant and important to the specific subject under examination.

³⁹ The distinction between positive law and practice recognises that a focus on 'strict law' can overlook extra-legal factors which influence the state of the law, or the response to the problems within any given jurisdiction - see Lazarus (n 37) ch 1.

⁴⁰ De Cruz (n 37) 224.

(a) The Ambiguity of the 'Problem'

While the term ‘miscarriage of justice’ carries both considerable rhetorical power, and a high level of public salience, it does not carry a precise meaning, nor are the circumstances in which it is invoked consistent. The terms ‘miscarriage of justice’ and ‘wrongful conviction’ have become, to some extent, placeholders. Their meanings are often assumed, but only rarely expressed. This is troublesome, as the absence of an accepted benchmark (or benchmarks) makes evaluation of these mechanisms extremely difficult.⁴¹ A definition which concluded, for example, that violation of criminal process rights during the trial process itself amounts to a miscarriage of justice, would likely lead to markedly different conclusions than one which required affirmative proof of factual innocence.⁴²

Writing in the wake of the Runciman Commission’s report, Steven Greer argued that almost no academic consideration had been given to precisely what a miscarriage of justice is.⁴³ While it is accurate to say that this area is *under*-theorised (especially considering the importance of the topic), it is not entirely *un*-theorised. Indeed there are now a large number of academic treatments which offer an equally large number of conflicting perspectives on what a miscarriage of justice is, or is not.⁴⁴ Some have argued for ‘intuitive’ or minimalist definitions.⁴⁵ Others have attempted to craft a

⁴¹ See in this regard S Greer, ‘Miscarriages of Justice Reconsidered’ (1994) 57 MLR 58, 59.

⁴² A sense of the possible range of distinctions, and consequences of these can be seen in the Supreme Court decisions in *R. (on the application of Adams) v Secretary of State for Justice* [2011] UKSC 18 where there was considerable disagreement as to what amounted to a ‘miscarriage of justice’ for the purposes of a statutory compensation provision.

⁴³ Greer (n 41) 58.

⁴⁴ This is perhaps inevitable, due to the fact that the term is capable of being defined in ‘nearly... whatever way one wishes’ Nobles and Schiff, *Understanding Miscarriages of Justice* (n 5) 14.

⁴⁵ Such approaches typically focus on situations which individuals find intuitively unjust - paradigmatically, where a factually innocent person has been convicted of a crime. This is particularly evident in media discussion, see Nobles and Schiff, *Understanding Miscarriages of Justice* (n 5) ch 4, but this is often implicitly or expressly assumed in more academic treatments, eg MacFarlane (n 1) most

behemoth definition of the term.⁴⁶ Still others have argued for more radical definitions to serve particular purposes.⁴⁷

Each of the approaches suggested to date pose real problems which mean that it is not possible to alight on an established definition as a defensible and complete starting point for normative assessment.⁴⁸ This is not to say that this problem is insoluble. One potential approach is to adopt a functional definition by focussing on what it is that the appeal and post-appeal systems in the jurisdictions under review are seeking to detect and correct, assessing the normative justification for these choices, and then sketch out a definition of miscarriage of justice, within the context of a modern liberal criminal justice system, for the purpose of analysing attempts to remedy miscarriages once they have already arisen.⁴⁹ However, this is itself an involved and detailed exercise and not possible within the constraints of the present thesis.

Without resolving this thorny definitional issue, it is necessary to establish, in broad terms, what is being considered for the purposes of this thesis. Therefore, some qualifications are necessary. First, consideration is limited to the review of convictions, rather than sentences. This ought not to be viewed as a rejection of the notion that a

evidently at 483 and CR Huff, 'What Can We Learn from Other Nations About the Problem of Wrongful Convictions?' (2002) 86 *Judicature* 92. This was also the approach of the Runciman Royal Commission – see M McConville and L Bridges, 'Keeping Faith with their own Convictions: The Royal Commission on Criminal Justice' in M McConville and L Bridges (eds), *Criminal justice in crisis* (Elgar, Aldershot 1994) 11, fn23; R Nobles and D Schiff, 'Optimism Writ Large: A Critique of the Runciman Commission on Criminal Justice' in M McConville and L Bridges (eds), *Criminal justice in crisis* (Elgar, Aldershot 1994).

⁴⁶ Eg C Walker, 'Miscarriages of Justice in Principle and Practice' in C Walker and K Starmer (eds), *Miscarriages of Justice: A Review of Justice in Error* (Blackstone Press, London 1999); T Anderson, 'Miscarriages: What is the Problem?' (1993) 5 *Current Issues in Criminal Justice* 72; Greer (n 41).

⁴⁷ Eg M Naughton, *Rethinking miscarriages of justice : beyond the tip of the iceberg* (Palgrave Macmillan, Basingstoke 2007).

⁴⁸ These are explored in M Birdling, 'Miscarriages of Justice: A Definition' (MPhil thesis, University of Oxford, 2008).

⁴⁹ This is the approach developed and advocated in *ibid*.

disproportionate sentence for an offence could be viewed as a miscarriage of justice.⁵⁰ Similarly excluded are the myriad low-level criminal justice interventions which, while not resulting in convictions, can still blight the lives of those to whom they are directed,⁵¹ as well as situations where a factually guilty person walks free.⁵² This does not mean that significant injustices cannot be occasioned in cases which do not conclude in convictions, but rather that the considerations are different – most significantly in terms of what is required by way of investigation and remedy. The primary reason for the focus on convictions in this thesis, therefore, is that these problems are distinct (and treated as such by the bodies under review), and are therefore treated separately for purely practical

⁵⁰ In this regard, the notion that only punishment of a level of severity proportionate to the gravity of the offence can be justified is generally accepted by both retributive (eg A Von Hirsch and A Ashworth, *Proportionate sentencing : exploring the principles* (Oxford University Press, Oxford 2005)) and consequentialist theorists: eg Bentham's oft cited exhortation that '[e]very particle of real punishment that is produced more than what is necessary for the production of the requisite quantity of apparent punishment, is just so much misery run to waste' - J Bentham and E Dumont, *The Rationale of Punishment* (R. Heward, London 1830) 29 and more latterly M Bagaric, *Punishment and sentencing : a rational approach* (Cavendish, London 2001) ch 10.

⁵¹ Cf M Brogden, 'Gatekeeping and the Seamless Web of the Criminal Justice Process' in M McConville and L Bridges (eds), *Criminal justice in crisis* (Elgar, Aldershot 1994) 152-154 and Anderson (n 46) 73-74.

⁵² Many argue that the latter situation is equivalent or nearly equivalent to the conviction of an individual who ought not to be convicted. Former Prime Minister Tony Blair went even further in a key speech in June 2002 and stated that 'It is perhaps the biggest miscarriage of justice in today's system when the guilty walk away unpunished' – Rt Hon Tony Blair 'Re-balancing of criminal justice system' (18 June 2002) London. See also *R v Stirland* [1944] AC 315 324; Royal Commission on Criminal Justice, *The Royal Commission on Criminal Justice : Report* (Cm 2263, 1993) 1-2; D Givelber, 'Lost Innocence: Speculation and Data about the Acquitted' (2005) 42 Am Crim L Rev 1167. Attempts have been made to provide a principled justification for the distinction, based eg on the presumption of innocence - such as N Lacey, 'Missing the Wood... Pragmatism vs Theory in the Royal Commission' in M McConville and L Bridges (eds), *Criminal justice in crisis* (Elgar, Aldershot 1994) 34 and similarly Naughton *Rethinking Miscarriages of Justice* (n 47). However this presupposes the primacy of this presumption, which is (to say the least) questionable: see eg V Tadros and S Tierney, 'The Presumption of Innocence and the Human Rights Act' (2004) 67 MLR 402; A Ashworth and M Blake, 'The Presumption of Innocence in English Criminal Law' [1996] Crim LR 306. Others have attempted to provide a consequentialist justification, eg Lord Devlin, *The Criminal Prosecution in England* (Oxford University Press, London 1960) 113, which is similarly contentious: J Reiman and E Van Den Haag, 'On the common saying that it is better that ten guilty persons escape than that one innocent suffer: pro and con' in EF Paul, FD Miller and J Paul (eds), *Crime, culpability, and remedy* (Basil Blackwell, Oxford 1990) 242; V Halvorsen, 'Is it better that ten guilty persons go free than that one innocent person be convicted?' [2004] Criminal Justice Ethics 3.

reasons.⁵³

Second, consideration is given to convictions for both indictable and summary offences. Many accounts of miscarriages of justice focus exclusively on serious, indictable crimes.⁵⁴ To some extent these reflect resourcing concerns,⁵⁵ but more commonly reflect a conclusion that problems with comparatively minor offences can safely be put to one side as they are less important, both individually and in aggregate, than those which arise in the area of serious indictable crime.⁵⁶ This is most obvious in the United States academic literature, which is dominated by discussion of miscarriages of justice as they arise in a death penalty context.⁵⁷ However, when one considers that the vast majority of convictions are for comparatively minor offences, following a summary proceeding with lowered procedural safeguards, the justification for adopting this assumption becomes considerably less convincing.⁵⁸ Further, there is an observable

⁵³ See Thorp (n 19) 4 which reached the same conclusion in respect of so called 'wrongful acquittals', 'principally because the correction of such an error would involve quite different expertise and considerations than the correction of an unjust conviction'. A further justification for this focus may be that the act of convicting someone of a criminal offence is significant irrespective of the level of punishment warranted or inflicted – it carries 'a formal and solemn pronouncement of the moral condemnation of the community' *in addition* to the threat of punishment: HM Hart, 'The Aims of the Criminal Law' (1958) 23 *Law and Contemporary Problems* 401, 405 quoted in ALT Choo, *Abuse of process and judicial stays of criminal proceedings* (Clarendon Oxford 1993) 11; see similarly J Horder, *Excusing crime* (Oxford University Press, Oxford 2004) 144. This point is, however, left open for present purposes.

⁵⁴ RG Hammond, 'The New Miscarriages of Justice' (2006) 14 *Waikato LR* 12, 12.

⁵⁵ See H Quirk, 'Identifying Miscarriages of Justice: Why Innocence in the UK is not the Answer' (2007) 70 *MLR* 759, 772.

⁵⁶ In some instances this is rendered explicit – see P Howden, 'Judging Errors of Judgment: Accountability, Independence and Vulnerability in a Post-Appellate Conviction Review Process' (2002) 21 *Windsor YB Access Just* 569 598-599 and also the Runciman Royal Commission which saw the fact that the high profile miscarriages which prompted its formation related to convictions for serious crimes as providing reason for its attentions to be directed at this area – McConville and Bridges (n 45) 10.

⁵⁷ See notably the contributions to SD Westervelt and JA Humphrey, *Wrongly convicted : perspectives on failed justice* (Rutgers University Press, New Brunswick 2001); J Dwyer, P Neufeld and B Scheck, *Actual innocence : five days to execution and other dispatches from the wrongly convicted* (1st edn Doubleday, New York 2000); S Gross, 'Lost Lives: Miscarriages of Justice in Capital Cases' (1998) 61 *Law & Contemp Probs* 125.

⁵⁸ McConville and Bridges (n 56) 12; A Ashworth and M Redmayne, *The Criminal Process* (4th edn Oxford University Press, Oxford 2010) 326-327; L Bridges, 'Normalising Injustice: The Royal Commission on Criminal Justice' (1994) 21 *J of Law and Society* 20, 22; P Darbyshire, 'An Essay on the Importance and Neglect of the Magistracy' [1997] *Crim LR* 627; Naughton *Rethinking Miscarriages of Justice* (n 47) 46; Walker 203-204; D Dixon, 'Police Investigative Procedures: Changing Legal and Political Contexts of

trend towards having an ever greater proportion of criminal offences heard summarily.⁵⁹ Even if this was not the case, the fact remains that, irrespective of the objective level of seriousness attributed to the offence, if a conviction ought not to have occurred there is still no justification for the imposition of censure or sanction, no matter how minimal – an especially pressing concern when one bears in mind that the effects of a conviction for even a minor offence can be considerable for the individual concerned.⁶⁰ Given this, the facilities for review of convictions for both indictable and summary offences will be considered. However, partly as a consequence of the sidelining of summary convictions in previous studies, and partly due to the low appeal rate from summary convictions, there is a dearth of material upon which to draw.⁶¹ As such, discussion is centred around the facilities for review of indictable convictions, with relevant differences flagged up where these arise.

(b) The Need for Further Research

The second barrier to a complete evaluation is that the required evidential base is currently incomplete. As chapters three and five will argue, the post-appeal systems in England and New Zealand are interconnected with the functioning of the appeal courts

Policing Practices' in C Walker and K Starmer (eds), *Miscarriages of Justice: A Review of Justice in Error* (Blackstone Press, London 1999) 81; Quirk (n 55) 769; R Auld, *Review of the criminal courts of England and Wales : report* (Stationery Office, London 2001) 94, noting that Magistrates' Courts deal with over 95% of all prosecuted crime, and that 91% of that work is handled by lay magistrates.

⁵⁹ See in England Criminal Law Act 1977, s 15, Criminal Justice Act 1988, ss 37, 39, Criminal Procedure and Investigations Act 1996, s 49; J Jackson, 'Trial Procedures' in C Walker and K Starmer (eds), *Miscarriages of Justice: A Review of Justice in Error* (Blackstone Press, London 1999) 184-186; *Review of the Criminal Courts of England and Wales* (n 58) 213-214. The same trend is observable in New Zealand, evidenced most recently by the Criminal Procedure (Reform and Modernisation) Bill currently proceeding through Parliament - see J Richardson, 'A Just Outcome: Losing Sight of the Purpose of Criminal Procedure' [2011] JCCL 105, 109.

⁶⁰ For example, by blighting a young person's career prospects - Brogden (n 51) 153 or by barring individuals from participation 'in activities of intrinsic worth to their pursuit of an autonomous life' - J Horder, 'Strict Liability, Statutory Construction, And The Spirit Of Liberty' (2002) 118 LQR 458, 459. Also, any criminal conviction almost invariably carries with it a degree of social stigma – see N Walker, *Punishment, danger and stigma : the morality of criminal justice* (Blackwell, Oxford 1980) ch 7.

⁶¹ See K Kerrigan, 'Miscarriage of justice in the magistrates' court: the forgotten power of the Criminal Cases Review Commission' [2006] Crim LR 124.

themselves at a number of levels. Neither the CCRC nor the New Zealand RPM process directly results in a conviction being quashed, but rather in the reference of the suspect conviction back to the appeal courts for reconsideration.⁶² An important consequence of this is that the post-appeal bodies rely on the grounds of appeal as developed by the appeal courts, and filter both evidence and argument in light of these tests. This has an influence at every stage of the process: from receipt, through investigation and final determination of an application. Further, the post-appeal bodies in both jurisdictions are, absent exceptional circumstances, prohibited from referring a matter that has already been considered by the appeal courts back for reconsideration.

It is therefore impossible to judge the success of each post-appeal system independent of the functioning of the appeal courts themselves. If the appeal courts adopt a narrow view of their jurisdiction, or are regularly making errors when they initially consider appeals against conviction, the post-appeal body may find that its scope for correction of flawed convictions is significantly limited, even though that body may be otherwise well equipped to deal with them. To give an important example, the discovery of 'fresh evidence' can result in a referral in both jurisdictions, but chapter five argues that while the CCRC is clearly well equipped to discover and assess such evidence, the extent to which it does so in practice is constrained by the appeal court's restrictions on raising fresh evidence during an appeal.

While chapters two and four provide an overview of the main features and limitations of the appeal systems in each jurisdiction, this is necessarily limited. To gain an accurate picture of the system as a whole, it is necessary to have a detailed

⁶² Other than in truly exceptional situations, discussed below, where the grant of a royal pardon may be recommended.

understanding of the contours of the available grounds of appeal and their application, and their success in detecting and remedying the situations considered miscarriages of justice. This cannot simply be a matter of comparing the text of the relevant grounds, or even their exposition in guideline judgments, as evidence suggests that there can be a considerable disconnect between the expression of appeal grounds and their practical application.⁶³ There is a slender body of empirical work about the functioning of the grounds of appeal in England, but this is entirely absent in New Zealand. More detailed work is required in respect of both jurisdictions before a proper evaluation could be conducted, and this is a task which is simply not possible within the constraints of the present thesis. The appeal chapters do not, therefore, deal at length with the scope or application of appeal grounds in each jurisdiction and this in turn means that the thesis does not contain a full evaluation of each system.

3 Outline and Methodology

Recognising these constraints, the aim of this thesis is more modest. It aims to contribute to the comparative enquiry outlined above, without completing it. It does so by providing a deep analysis of the mechanisms for review of convictions in both jurisdictions after initial appeal rights are exhausted, and, in the final chapter, discussing the key areas of similarity and difference between these systems, the reasons for these differences, and their implications.

The dominant focus is on the work of the English CCRC and the New Zealand RPM processes. However, in order to put the work of the post-appeal bodies into

⁶³ See K Malleon, *Research Study 17: Review of the Appeal Process* (HMSO, London 1993) and Nobles and Schiff, *Understanding Miscarriages of Justice* (n 5) ch 3.

context, chapters two and four provide an overview of the appeal systems in each jurisdiction, and the pressures and restrictions on their functioning. With respect to the standard appeal processes, the key matters for analysis are the scope of standard appeal rights, and the barriers to their exercise. These are compared in order to identify the extent of the task facing the post-appeal mechanisms. In this regard, it will be argued that the existence of significant barriers to the exercise of appeal rights in England mean that the CCRC is faced with a considerably larger number of 'routine' applications than any comparable New Zealand body would be likely to face.

For the reasons explained above, discussion of the available appeal grounds is limited to that necessary to put the role of the post-appeal bodies in context. Despite this general limitation, the approach to certain categories of case are considered - in particular, fresh evidence cases. This is because of the significance these cases have assumed in the work of the respective bodies and the light they shine on the interrelationship between the appeal courts and post-appeal bodies.

Additionally, as material indicating a potential miscarriage of justice may not come to light until some time after trial, particular attention is paid to the availability of appeal courts at a later stage - whether or not appeal rights have been previously exercised.

Chapters three and five make up the main body of this work, examining the New Zealand RPM and English CCRC processes respectively. While there is now a body of academic discussion about aspects of the CCRC, there is a paucity of empirical work on

its investigative and decision making processes.⁶⁴ There is markedly less academic discussion about the New Zealand RPM process, and only one previous attempt at empirical study of its internal processes.⁶⁵ The internal processes are of particular importance, as these determine which cases are reviewed, to what extent, and when (and in what circumstances) this can lead to a case being referred to a court for reconsideration.

In order to investigate the New Zealand RPM process, an application to the New Zealand Ministry of Justice was made under New Zealand's freedom of information legislation⁶⁶ to review the files relating to all non-extant applications for the exercise of the RPM made during the years 1998-2008. This application was approved by the Ministry's Chief Legal Counsel, subject to the provision of appropriate undertakings to protect the privacy of applicants and other identifiable individuals.⁶⁷ As a result, the author attended the Ministry's offices in Wellington, New Zealand in January and February 2009 and reviewed these files. The Ministry did not maintain a dedicated database or list of all applications which were made throughout the period.⁶⁸ Instead, an official performed a search of the Ministry's file system for files with the reference code associated with RPM applications. The author was provided with a list of these files, and given access to all files which were non-current. A small number of the files which were

⁶⁴ The notable exceptions being J Hodgson and J Horne, 'The extent and impact of legal representation on applications to the Criminal Cases Review Commission' (Warwick University School of Law, 2009) and WE O'Brian Jr, 'Fresh Expert Evidence in CCRC Cases' (2011) 22 KLJ 1 which discuss these matters as part of their consideration of discrete aspects of the CCRC's activities.

⁶⁵ By retired High Court judge Sir Thomas Thorp: Thorp (n 19).

⁶⁶ Official Information Act 1982.

⁶⁷ In consequence, each file is identified in references by an anonymised cipher with the prefix 'NZ', and any reference to the facts or circumstances of a case or application which may reveal information not in the public domain has been excised or generalised.

⁶⁸ Although a table of incoming applications has been kept since 2002.

returned were not, in truth, applications for the exercise of the Royal Prerogative, and these are excluded.⁶⁹ With two exceptions, all applications sought review of convictions, rather than sentence.⁷⁰ There were a total of 66 relevant files. This number was too small to allow detailed quantitative analysis to be undertaken. Instead, the files were retrieved from storage in their entirety and each document therein was carefully reviewed and analysed in order to build a picture of the Ministry's approach to applications.

A broadly similar methodology was followed in respect of the CCRC. The primary source material is a review of a sample of the CCRC's files conducted by the author during June, July and August 2009 following the grant of permission by the CCRC's Research Committee. However, because of the number of cases considered by the CCRC (approximately 1000 per year), it was not feasible to consider, as in New Zealand, all cases considered over a set period, and it was instead necessary to take samples. In order to ensure that a representative range of applications were considered, three separate samples were drawn. The first was a random sample of 25 cases from each of the years 2007, 2006, 2005 and 2004, a total of 100 files.⁷¹ A random sample was selected in order to build a picture of the work usually carried out by the CCRC. In order to examine in more detail the approach taken to cases in which a referral is seriously

⁶⁹ For example, these files included requests that the Governor General exercise the RPM to intervene in a civil dispute, or a family court matter.

⁷⁰ NZ30 (which resulted in a referral) and NZ50.

⁷¹ 2007 was selected as the start year in order to ensure that hits on uncompleted reviews did not skew the sample towards less complex or intensive cases. In the event, only one hit related to an uncompleted review at the time the sample was drawn; the review of this case was completed within the currency of the research, enabling it to be returned to and included in the research. Applications received by the Commission are assigned a number based on the order they are received – the sample was drawn by randomly selecting 25 numbers between 1 and the total number of applications for any given year – the corresponding files were reviewed. Where applications were made in respect of sentence only, they were ignored and replaced by a further file, again selected at random in the above manner. The files from this sample are identified in references by an anonymised cipher with the prefix 'G'.

contemplated, two further samples of 25 cases each were drawn from applications which were referred back to the appeal court for reconsideration, and from applications which were considered by a committee of commissioners (rather than by a single commissioner) but did not result in a referral.⁷² These samples were also drawn randomly from qualifying applications made during the same time period as for the general sample – from 2004 until 2007. Only cases from England and Wales were considered. The cases drawn were vetted by a legal advisor at the CCRC to discern if any contained security sensitive material. None did. The author was granted access to the CCRC's document management system which contained scanned copies of all correspondence received and sent, along with all electronic material related to each application. As with the New Zealand data, this was analysed carefully in order to build a full picture of the CCRC's activities. No identifying personal data was recorded, and the files are referred to by a unique identifier.

This information is supplemented by the available primary⁷³ and secondary material, and by data obtained pursuant to requests of relevant public bodies under freedom of information legislation.⁷⁴ This material is drawn together in chapters three and five to provide a detailed account of the most significant features of the New Zealand RPM and CCRC processes as they relate to the review and referral of potentially suspect convictions. This is necessarily a lengthy and involved exercise, as there has been very little previous empirical study of the functioning of either the English CCRC or the New Zealand RPM processes. The purpose of these sections is to outline the crucial aspects of

⁷² The files from these samples are identified in references by an anonymised cipher with the prefix 'S' (if they resulted in a referral) or R (if they did not).

⁷³ Notably internal guidance documents.

⁷⁴ In England, the Freedom of Information Act 2000; in New Zealand, the Official Information Act 1982.

each system: how cases are received, assessed, investigated and actioned. Care is taken not artificially to limit the matters considered, although a number of common questions are asked about both systems: how each body conceives of its role is analysed, as well as the factors (legal and non-legal) which impact on their ability to carry out these functions.

These chapters examine the legal context in which each body functions, but focus primarily on providing an account of how each body functions in practice. The circumstances in which each body will contemplate referring a matter back to an appeal court are examined, as are the means by which a determination is made as to whether to do so in an individual case. In this regard, the passage of an application from receipt to determination is explained, and in doing so the various factors which impact on the prospect of a successful referral are considered. Particular attention is paid to the extent to which each body is either proactive or reactive, follows appeal courts' guidance and/or exercises independent judgement. Also considered is the constitution of each body, in terms of decision makers, staff and investigative resources.

As the intention is to provide a full explanation of the functioning of each body, it is only possible to provide critical examination of certain key features, rather than extending this to every aspect of the process. A lack of critical comment about a particular aspect ought not to be taken as a tacit approval of it. Due to the paucity of secondary materials, certain parts of this work are necessarily descriptive, as these provide the building blocks for discussion in subsequent chapters. In addition, certain matters are emphasised or discussed at length in relation to one jurisdiction, but to a much lesser extent in relation to the other. For the most part this is a function of

differences between the two jurisdictions which will be explored in the final chapter.

As an overall evaluation of each system by reference to normative criteria is not possible, the final chapter instead compares the key features of the two systems, identifying the areas of similarity and difference, the reasons for key differences as well as the implications of these, in particular for any reform of the New Zealand processes.

CHAPTER TWO - NEW ZEALAND CRIMINAL APPEALS

4 Introduction

The next two chapters examine the mechanisms which exist for the correction of miscarriages of justice in New Zealand. This chapter surveys the appeals processes, as well as the practical effectiveness of these. Regretfully, there is very little scholarship regarding the criminal appeals process in New Zealand,¹ and in particular a lack of critical scholarship of the kind which has emerged in England.² While it is important that the absence of such work is not mistaken for proof of an absence of problems with the current New Zealand arrangements, the discussion below suggests that many of the factors which have provoked concern with the English process are absent, or present to a lesser degree, in New Zealand. However, in view of the absence of empirical research, many of the conclusions below are tentative and there is a pressing need for further research in this area.

As well as the appeal structure described below, it should also be noted that in indictable matters, pre-trial appeals against various decisions are available (with the leave of the court), and erroneous decisions in relation to matters such as the admissibility of evidence are often corrected via this process before a trial commences.³ The availability

¹ Indeed, there is little academic work regarding the criminal process generally. The only comprehensive academic work is the now two decade old WC Hodge and MW Doyle, *Criminal procedure in New Zealand* (3d edn Law Book Co, Sydney 1991), although there are two regularly updated practitioners' texts which deal with aspects of the subject: B Robertson (ed), *Adams on Criminal Law* (Looseleaf edn Thomson Brookers, Wellington 2011) and G Turkington, *Garrow and Turkington's Criminal Law in New Zealand* (Looseleaf edn LexisNexis, Wellington 2009). In addition, the New Zealand Law Commission has produced periodic studies on aspects of the system, which are quoted where relevant. Aspects of the New Zealand Criminal Justice system as a whole are considered in the collection J Toime and W Brookbanks (eds), *Criminal Justice in New Zealand* (LexisNexis, Wellington 2007).

² This was also lamented by T Thorp, *Miscarriages of Justice* (Legal Research Foundation, Auckland 2005) 64.

³ The power is found in Crimes Act 1961, s 379A and the leave criteria discussed in *R v Leonard* [2008] 2 NZLR 218 (CA) [13]-[25]. Onward appeals to the Supreme Court, with leave, are also permitted: Crimes Act 1961, s 379AB, although not against a refusal to grant leave: *Taylor v R* [2009] NZSC 69. There is no

of such a course provides a proverbial fence at the top of the cliff, by which potential miscarriages can be avoided prior to conviction.

Further, in addition to the appeal as of right, it remains possible for a defendant in both the summary and indictable jurisdictions to make use of an alternative procedure, whereby the trial judge can be requested to state a case on a question of law arising out of the proceedings for the attention of the appropriate appeal court.⁴ This possibility is only noted, and not considered in detail, as the general appeal rights discussed below are wider and, in consequence, use of the case stated procedure by defendants is extremely rare.⁵

There is a notable absence of disincentives to appeal. In neither the summary nor indictable jurisdictions do appeal courts have the power on an appeal against conviction alone to increase the sentence imposed on an offender, or to dictate that time spent in custody awaiting appeal not count towards the term.⁶ While appeal courts do have a power to vary the sentence upwards on an appeal by an offender against sentence, in the absence of a specific sentence appeal by the Crown it has never done so in the indictable jurisdiction and only very rarely in the summary jurisdiction.⁷

In the indictable jurisdiction, this lack of disincentives is augmented by the wide

equivalent power in summary proceedings, and pre-trial appeals are not therefore generally available: *Black v Fulcher* [1988] 1 NZLR 417 (CA) 420. In 2009, 58 such appeals were heard compared to 170 appeals against conviction: New Zealand Court of Appeal, *Discontinuance of Court of Appeal Annual Reports* (Press Release 2010).

⁴ In indictable matters, the Court of Appeal: Crimes Act 1961, s 380 (onwards appeals are thereafter possible to the Supreme Court: Supreme Court Act 2003, s 10). For summary matters, the High Court: Summary Proceedings Act 1957, s 107 (with onwards appeals to the Court of Appeal).

⁵ See *Adams on Criminal Law* (n 1) CA380.04; Hodge and Doyle (n 1) 218-219. The power is instead almost exclusively used by prosecutors, who can by this route challenge a proceeding which led to acquittal, and, if successful, see the defendant retried, *R v Gwaze* [2010] 3 NZLR 734 (SC).

⁶ There is no power under New Zealand law to impose the latter condition, unless the appellant is released on bail, in which case the time at liberty does not count as part of the term of imprisonment - Bail Act 2000, ss 46 and 70(3). With respect to the former, appellate courts' powers to do so can be found in s385(3) of the Crimes Act 1961 (indictable) and s121(3)(b)(i) of the Summary Proceedings Act 1957 (summary), both of which only apply where there is an appeal against sentence.

⁷ G Hall, *Sentencing Law and Practice* (LexisNexis, Wellington 2004) 5.4.12.

availability of state funding for impecunious appellants. Legal aid is available for appeals - subject to a means test - in respect of offences carrying a maximum sentence of more than six months imprisonment, or where it is otherwise in the interests of justice.⁸ The criteria are such that legal aid is much more readily granted in the indictable jurisdiction than in the summary jurisdiction, and in indictable appeals, most appellants are legally aided.⁹ Grants of legal aid for appeals to the Court of Appeal or Supreme Court have been targeted for 'active management', and as such are vetted by a one of a small team of grants officers, with most being referred to one or more 'specialist advisers' (either senior in-house lawyers, or other senior legal aid lawyers) for a determination as to whether the appeal has any prospect of success.¹⁰ While 89% of all applications for criminal legal aid are successful, detailed statistics for approvals in appeal cases are not provided, so it is difficult to judge how many putative appeals are filtered in this way.¹¹ There is a related lack of research as to the effectiveness of legal aid targeting in New Zealand, but there has been at least one instance where a refusal to fund expert reports prior to trial resulted in a conviction which was later overturned.¹²

Due to the way statistics regarding the number of convictions are gathered in New Zealand, it is difficult to determine accurately the appeal rate in either summary or indictable jurisdiction.¹³ However, an approximate figure can be determined. In 2009,

⁸ Legal Services Act 2000, s 8. The 'interests of justice' test requires consideration of the factors laid out in s 8(2), including the strength of the grounds of appeal.

⁹ In 2009, 376 grants of legal aid were made for criminal appeals to the Court of Appeal, when the Court heard a total of 422 criminal appeals in that year: New Zealand Court of Appeal, *Discontinuance of Court of Appeal Annual Reports* (Press Release 2010) 2 and Legal Services Agency, *Annual Report 2009* (Wellington 2009) 72.

¹⁰ Legal Aid Review, *Transforming the Legal Aid System: Final Report and Recommendations* (Ministry of Justice, Wellington 2009) para 455; This practice was confirmed by email with one such specialist adviser, senior criminal practitioner Greg King (email to author, 18 March 2011). By way of contrast, grants of legal aid for appeals in the summary jurisdiction, are less rigorously policed, with up to ten hours preparation time is provided for, in addition to the hearing time: Legal Services Agency, *Provider Information Pack: Criminal Law Proceedings* (Wellington 2009) 24.

¹¹ Legal Services Agency, *Annual Report 2010* (Wellington 2010) 86.

¹² See *Brown v Attorney-General* [2005] 2 NZLR 405 (CA).

¹³ Specific statistics in relation to appeal rates are not kept, and nor are statistics routinely broken down in relation to indictable and summary offending. The process used by the Ministry of Justice for the

4800 individuals were convicted of an indictable offence in the New Zealand courts (in 2008, the figure was considerably lower, at 4124).¹⁴ In 2009, 176 appeals against indictable convictions were heard (in 2008, the figure was higher at 191).¹⁵ This gives an approximate appeal rate (in relation to indictable offending) of 3.7% for 2009, and 4.63% for 2008.¹⁶

In the summary jurisdiction, in 2009, 99492 individuals were convicted (in 2008, this figure was also considerably lower, at 92586).¹⁷ In 2009, 295 appeals against conviction were filed in the High Court (in 2008, the figure was lower, at 279).¹⁸ This gives an approximate appeal rate for both years of only 0.3%. There is a complete absence of empirical study of appeals in summary matters in New Zealand, but this strikingly low rate of appeal invites the same inference that has been drawn in the same context in England, that many appellants who may have valid grounds choose not to appeal.¹⁹ One likely explanation for the low rate, given the lack of structural disincentives, is the relative difficulty in obtaining legal aid to appeal in summary matters, although this hypothesis remains untested.

collection of such statistics is detailed in Statistics New Zealand, *Review of Crime and Criminal Justice Statistics* (Wellington 2009) 127. Records of convictions are aggregated by 'offence type', and such categories include both indictable and summary offences - for example, the 'illicit drug offences' category includes both commercial importation and dealing and convictions for personal use. As District Courts hear both indictable and summary matters, it is not possible to use this mechanism to filter results.

¹⁴ Response by New Zealand Ministry of Justice to request under the Official Information Act 1982 by author, dated 3 March 2011.

¹⁵ Where an individual is convicted of multiple counts relating to the same offending, the appeals are heard together and counted as one appeal. These figure includes cases which were reserved at the end of the year, but excludes decisions carried over from the previous year: New Zealand Court of Appeal, *Discontinuance of Court of Appeal Annual Reports* (Press Release 2010) 2; New Zealand Court of Appeal, *Court of Appeal Report for 2008* (Wellington 2009) 10.

¹⁶ There are numerous factors which mean these figures are imprecise, for example, they will include some individuals who have obtained leave to appeal against historical convictions out of time.

¹⁷ Response by New Zealand Ministry of Justice to request under the Official Information Act 1982 by author, dated 3 March 2011.

¹⁸ Response by New Zealand Ministry of Justice to request under the Official Information Act 1982 by author, dated 26 May 2011.

¹⁹ See A Ashworth and M Redmayne, *The Criminal Process* (4th edn Oxford University Press, Oxford 2010) 376; K Malleeson and S Roberts, 'Streamlining and clarifying the appellate process' [2002] Crim LR 272, 274.

5 The Appeal System

(a) Appeals in Indictable Matters

Appeal rights in indictable proceedings are generous. All persons convicted on indictment²⁰ are entitled to an appeal as of right to the Court of Appeal, either on questions of fact or law.²¹ The Privy Council has held that the legislation governing this right requires the preparation of written cases on appeal,²² usually followed by an oral hearing.²³ While it is possible in tightly circumscribed circumstances for an appeal to be determined 'on the papers', this is only used in a handful of cases each year.²⁴ The strength of the right to appeal was recently underscored by the Supreme Court in its criticism of the Court of Appeal for dismissing an appeal due to the appellant's failure to provide grounds of appeal despite repeated requests and missed deadlines.²⁵ In that case, the Supreme Court emphasised the extent of the task required of the Court of Appeal in

²⁰ This includes both conviction following a verdict of guilt, and following a guilty plea – Crimes Act 1961, s 3.

²¹ This has been the case since 15 August 1991: Crimes Act 1961, s 383; New Zealand Bill of Rights Act 1990, s 25(h). Previously, leave of the court was required for appeals on questions of fact, or on mixed questions of fact and law. For a discussion of the background and impact of this change, see ATH Smith, 'Fifty Years of Criminal Appeals in the Permanent Court of Appeal' in R Bigwood (ed) *The Permanent New Zealand Court of Appeal: Essays on the First 50 Years* (Hart, Oxford 2009) 83-87. In exceptional cases, appeals may lie directly to the Supreme Court, if that Court grants leave for such a course: Crimes Act 1961, s 383(1) and Supreme Court Act 2003, ss 13 and 14.

²² This is a bundle of documents which must be prepared by the Court's registry staff containing a copy of the trial transcript, along with the judge's summing up and any other relevant documents or exhibits - see Crimes Act 1961, s 392.

²³ *R v Taito* [2003] 3 NZLR 577 (PC).

²⁴ In 2009, two appeals against conviction were determined in this manner, both of which were successful. While the number of cases determined on the papers has in the past been higher, this low number is in keeping with the pattern in recent years (in 2008 there were 4, 2 of which were successful; in 2007, there were 5, 3 of which were successful; in 2006 there were 3, all of which were unsuccessful): Hon Justice Hammond, 'Discontinuance of Court of Appeal Annual Reports' *New Zealand Lawyer* (Auckland 16 April 2010); New Zealand Court of Appeal, *Court of Appeal Report for 2008* (Wellington 2009), New Zealand Court of Appeal, *Court of Appeal Report for 2007* (Wellington 2008), New Zealand Court of Appeal, *Court of Appeal Report for 2006* (Wellington 2007).

²⁵ In *Petryszick v R* [2011] 1 NZLR 153 (SC). The Privy Council was in 2004 replaced as New Zealand's final court of appeal - the details and transitional arrangements are discussed below - see text to n 116.

every case:²⁶

... In particular, to the extent relevant to the grounds of appeal, the Court will need to consider the transcript of the trial and the Judge's summing up... The Court may be brief in rejecting grounds of appeal which are clearly unsubstantiated on the material before the Court. But it is necessary for it to demonstrate that it has addressed the substance of the appeal, as s 385(1) requires...

The Grounds

The possible grounds of appeal are exhaustively listed in section 385(1) of the Crimes Act 1961. These grounds, and the accompanying 'proviso', bear a close similarity to those governing appeals to the English Court of Appeal prior to the 1995, when they were replaced.²⁷ While the general scope for argument is clear, the latitude accorded to the courts by the somewhat elastic language has been noted.²⁸ Further, the absence of detailed study of the practical application of these grounds by the courts mean that it is not possible to provide a full account of the treatment of these grounds in practice. With this important caveat, the following section surveys the available grounds.

The first ground – that the verdict is unreasonable or cannot be supported having regard to the evidence – has been the subject of an authoritative recent judgment from the Supreme Court, which unanimously held that the appeal court was required to conduct a

²⁶ Ibid [35].

²⁷ By the Criminal Appeal Act 1995 (UK).

²⁸ Smith, 'Fifty Years of Criminal Appeals in the Permanent Court of Appeal' (n 21) 87-90; RG Hammond, 'The New Miscarriages of Justice' (2006) 14 Waikato LR 1.

qualitative review of the evidence, as:²⁹

... a verdict will be unreasonable if, having regard to all the evidence, the jury could not reasonably have been satisfied to the required standard that the accused was guilty.

The Supreme Court further endorsed a number of conclusions from an earlier Court of Appeal decision,³⁰ which emphasise the primacy of the jury's fact-finding role,³¹ and limit the role of the appellate Court to 'a review function'.³² The Court also endorsed the Court of Appeal's rejection of the so-called 'lurking doubt' test, which would have permitted an appeal court to quash a conviction even if none of the specific grounds of appeal could be made out.³³ The Supreme Court were of the view that a 'lurking doubt' ground was not supported by the New Zealand statutory language,³⁴ and was in any undesirable as it 'invites an approach which is instinctive rather than analytical'.³⁵ As the Supreme Court is now the final appeal court for New Zealand, this must be seen as settling the New Zealand position on this question, which had been muddled by the Privy

²⁹ *Owen v R* [2008] 2 NZLR 37 (SC) [17]. The previous leading authority was *R v Ramage* [1985] 1 NZLR 392 (CA), which stated that an appeal was to be allowed 'if the Court is of the opinion that a jury acting reasonably must have entertained a reasonable doubt as to the guilt of the [appellant]', although as the Supreme Court noted '[s]omewhat different articulations of the test ... have been employed in the Court of Appeal in the 23 years since that case was decided. In some cases the differences can be viewed as semantic but in others they are capable of suggesting substantive variations' (at [2]).

³⁰ *R v Munro* [2008] NZLR 87 (CA).

³¹ While not covered by the decision, it appears likely that the same reasoning would apply with respect to cases tried on indictment, but by judge alone – see *Adams on Criminal Law* (n 1) at 385.02, and the authorities cited therein.

³² *Owen v R* (n 29) [13].

³³ *R v Munro* (n 30) [45] although Hammond J, in a partially dissenting judgment, argued that there ought to be 'a residual safety valve, of a relatively innominate character, and by whatever name it is called, in our law on miscarriages of justice' [247]. In any event, the lurking doubt approach had not previously gained a foothold in New Zealand – W Young, 'The role of the courts in correcting miscarriages of justice' (NZLRF Miscarriages of Justice Symposium 2010).

³⁴ The Court drew a distinction between the language of the Crimes Act 1961 and the Criminal Appeal Act 1968, s 2(1)(a) against which the 'lurking doubt' test developed in England. The use of text in this way provides an interesting counterpoint to R Nobles and D Schiff, *Understanding Miscarriages of Justice : Law, the Media, and the Inevitability of Crisis* (Oxford University Press, Oxford 2000) 53-55, although as Nobles and Schiff note at 71-74, the 'lurking doubt' standard has been seldom applied in England.

³⁵ *Owen v R* (n 29) [17].

Council's apparent application of such a standard, on appeal from the New Zealand Court of Appeal, in *Bain v R*.³⁶

The second ground, where the conviction was based on a wrong decision on a question of law, includes situations where a conviction followed from flawed decisions given during the course of the trial (including admissibility decisions) as well as faulty jury directions.³⁷

The third ground, that 'on any ground there was a miscarriage of justice' is a residual one, the breadth of which was recently noted by the Supreme Court which held that it:³⁸

... is properly used in situations which do not comfortably fit within the other paragraphs, often where... inadmissible evidence has been admitted. It can potentially apply to anything falling outside the other paragraphs which has gone wrong with the substance or process of the case and has not been cured or become irrelevant to the verdict. That can include something which has occurred either before or during the trial. It includes prosecutorial or juror misconduct and failures of any kind by the Judge which cannot accurately be described as a wrong decision on any question of law. It must also be taken to include situations where admissible defence evidence is wrongly excluded or where after the trial fresh and cogent evidence comes to notice and casts doubt on the guilty verdict.

The ground does not capture every error at trial – and appeal courts have been instructed

³⁶ *Bain v R* [2007] UKPC 33 - see Smith, 'Fifty Years of Criminal Appeals in the Permanent Court of Appeal' (n 21) 91-94. The Privy Council appears to have subsequently deferred to the NZSC on this matter, see text to n 120.

³⁷ *Adams on Criminal Law* (n 1), para CA385.06 and the authorities cited therein.

³⁸ *R v Matenga* [2009] 3 NZLR 145 (SC) [11].

by the Supreme Court to ‘put to one side and disregard those irregularities which plainly could not, either singly or collectively, have affected the result of the trial and therefore cannot properly be called miscarriages’.³⁹

The final ground, that the trial was a nullity, arises only rarely, and has been the subject of little judicial discussion.⁴⁰ However, it appears clear that the error must be fundamental, as in *R v O (No 2)*,⁴¹ where a conviction was overturned following a trial in a court which did not have jurisdiction to try it, or in *R v Fonotia*,⁴² where two counts on an indictment did not disclose a criminal offence.

The Proviso

Of considerable significance to how these provisions are applied is the operation of the so called ‘proviso’, which gives the Court of Appeal the power to ‘dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred’, even if the grounds of appeal are otherwise made out.⁴³ While, on its face, it appears that this is applicable to all grounds of appeal, the Supreme Court has held that it is inapplicable to appeals on the first or fourth grounds, as an unreasonable verdict, or conviction following a trial which was a nullity, must always constitute a substantial miscarriage.⁴⁴ Thus it is

³⁹ Ibid [30] cf the Australian position, whereby *all* errors are to be considered within the ambit of the provision, with materiality falling for consideration at the proviso stage - *Weiss v R* [2005] HCA 81 .

⁴⁰ *Adams on Criminal Law* (n 1) CA385.18.

⁴¹ *R v O (No 2)* [1999] 1 NZLR 326 (CA), see similarly *R v Blows* Unreported, CA103/95, 31 August 1995 (CA).

⁴² *R v Fonotia* [2007] NZCA 188 (CA). While these counts were quashed under the Court’s inherent jurisdiction, as the nullities came to the Court’s attention in the course of an appeal against sentence by the Solicitor-General, it is clear from the Court’s reasons that the same approach would apply on a standard appeal against conviction.

⁴³ Crimes Act 1961, s 385(1).

⁴⁴ *R v Matenga* (n 38) [9]; *Owen v R* (n 29). In respect of the nullity ground, this can be contrasted with the approach taken by the courts in previous decades – in particular *Re Kestle (No 2)* [1980] 2 NZLR 353 (CA) (approved and applied in *R v Loumoli* [1995] 2 NZLR 656 (CA)), which stated at 359 that ‘the enactment of (d) in such a way as to make it subject to the proviso represents a perceptive piece of realism by Parliament. If necessary it is a legislative encouragement to approach technical defects in a practical way.’

only in respect of appeals on the second⁴⁵ and third grounds which can be refused by reference to the proviso. The Supreme Court, in its recent decision in *R v Matenga*, laid out authoritative guidance altering the previous approach (which focussed on impact the change may have had on a jury)⁴⁶ and instead permitted the appeal court to dismiss an appeal if it was satisfied of guilt:⁴⁷

While the jury is in general terms the arbiter of guilt in our system of criminal justice, the very existence of the proviso demonstrates that Parliament intended the Judges sitting on the appeal to be the ultimate arbiters of guilt in circumstances in which the proviso applies. The general rule that guilt is determined by a jury rather than by Judges does, however, mean that the proviso should be applied only if there is no room for doubt about the guilt of the appellant...

With specific regard to appeals under the third ground, but in terms which appear equally apt to those under the second, the Supreme Court has held that a ‘substantial’ miscarriage ‘is one which in substance, that is, in reality, affected the result of the trial’.⁴⁸ The question for the appellate court is therefore ‘whether the appellate court considers a guilty verdict was inevitable on the basis of the whole of the admissible evidence (including any new evidence).’⁴⁹ The threshold is high, and requires the court to review all of the relevant evidence and to take account of ‘the disadvantage it may well have in making an

⁴⁵ The Supreme Court has also expressed its concern that the availability of the proviso in such cases rests on a linguistically strained interpretation of the Crimes Act, but left the jurisdiction to do so undisturbed as ‘it has long been accepted that... the proviso can be applied in relation to an error of law falling within its scope. If it were otherwise, different approaches might be required as between paras (b) and (c) which would add an additional complication to what is already a troublesome provision.’ - *R v Matenga* (n 38) [11].

⁴⁶ *R v McI* [1998] 1 NZLR 696 (CA).

⁴⁷ *R v Matenga* (n 38) [29].

⁴⁸ *Ibid* fn 39.

⁴⁹ *Ibid* [28]. The court must also be satisfied that the trial was fair, in terms of the guarantee provided in the New Zealand Bill of Rights Act 1990, s 25(a) – see *Sungsuwan v R* [2006] 1 NZLR 730 (SC) [6].

assessment of the honesty and reliability of witnesses on the sole basis of the transcript of the oral evidence.⁵⁰

Fresh Evidence

The proviso has a particularly important role to play in appeals bought on the basis of evidence which was not presented at trial ('fresh evidence' appeals). Appeal courts have wide powers to receive evidence on appeal.⁵¹ An authoritative statement of the courts' approach to the admission of fresh evidence in general appeals to date was given by Richardson J in *R v Crime Appeal (CA60/88)*:⁵²

The overriding test must be the interests of justice... In general the evidence must be new or fresh in the sense that it was not available at the trial and be relevantly credible and of a nature that, if given with the other evidence adduced, might reasonably have led the jury to return a different verdict...

Drawing on this, the Court of Appeal in *R v Bain* spoke of a 'three screen' approach to such cases. The first two screens are the freshness and credibility criteria. The third is the influence such evidence may have had on the jury.⁵³ If the new evidence does not pass either of the first two (admissibility) screens, then the inquiry ends.⁵⁴ If it is admitted, the court then moves to consider 'whether its existence demonstrates there has

⁵⁰ *R v Matenga* (n 38) [31] – [32].

⁵¹ Crimes Act 1961, s 389.

⁵² *R v Crime Appeal (CA60/88)* (1988) 3 CRNZ 512 (CA) 513. The Court of Appeal in *R v Bain* [2004] 1 NZLR 638 (CA) at [21] suggested that while '[s]lightly different verbal formulations have been adopted from time to time ... the broad general effect has remained consistent.' This was approved by the Privy Council in *Bain v R* (n 36) and the Supreme Court recently declined leave to a case seeking to revisit it (*Noble v R* [2010] NZSC 85) on the basis that the approach 'is consistent with that followed in comparable jurisdictions'.

⁵³ *R v Bain* (n 52) [26].

⁵⁴ *Ibid* [24]; for criticism of the rigidity of these criteria, see Hammond (n 28) 8-9.

been a miscarriage of justice in the sense of there being a real risk that a miscarriage of justice has occurred on account of the new evidence not being before the jury which convicted the appellant'.⁵⁵ Such a risk will be acknowledged - according to *R v Bain* if 'the new evidence, when considered alongside the evidence given at the trial, might reasonably have led the jury to return a verdict of not guilty'.⁵⁶ This stage is said to subsume the 'proviso'.⁵⁷

While the leading practitioner's guide still cites this as the position,⁵⁸ it must be considered highly likely that the last aspect - the 'jury impact' test - has also been modified significantly by the Supreme Court decision in *R v Matenga*, described above.⁵⁹ This means that it is no longer the case, as the President of the Court of Appeal stated in *R v Haig* that 'the question is whether the trial jury (or perhaps a notional reasonable jury) might reasonably have come to a different verdict had the fresh evidence been before it'.⁶⁰ It is instead: does the appeal court consider (having reviewed all the admissible evidence) that 'the guilty verdict was inevitable, in the sense of being the only reasonably possible verdict, on that evidence'.⁶¹ While this distinction may seem overly abstract and

⁵⁵ Ibid [24].

⁵⁶ Ibid [24]. *R v Dougherty* [1996] 3 NZLR 257 (CA) 265. In an earlier decision, the Court of Appeal seemed to set the bar slightly lower: *Re Farmer* [1991] 3 NZLR 450 (CA) 456: 'while we do not overlook the criticisms [the Crown] made of the new material, we do not feel that a jury confronted with it might not give the accused the benefit of the doubt... Accordingly we think it would be unsafe to let the conviction stand'. Similarly, the Court in *Re Appelgren* [1991] 1 NZLR 431 (CA) quashed a conviction on a reference due to fresh evidence which 'the defence could have made some possibly significant use of' (at 433) – see to similar effect *R v Wickliffe (No 2)* [1987] 1 NZLR 55 (CA) 59.

⁵⁷ *R v Bain* (n 52) [27].

⁵⁸ *Adams on Criminal Law* (n 1) CA389.02.

⁵⁹ The Supreme Court was not explicit on this point, but it seems tolerably clear from paras [11] and [28] of its decision that its prescribed approach to the proviso also covers 'fresh evidence' appeals. The Court of Appeal has not subsequently had cause to consider the point, with the fresh evidence appeals it has considered since *R v Matenga* (n 38) being dismissed on the basis of insufficient credibility or freshness.

⁶⁰ *R v Haig* (2006) 22 CRNZ 814 (CA) [55]. Arguably the 'might reasonably' rider suggests a higher standard than that suggested by Cooke P in *R v Wickliffe (No 2)* (n 56) 61-62 where a conviction was quashed where the Court could not 'go quite as far as to say that this claim could not have left a reasonable doubt in the minds of a jury.' In any event, the Court in *Haig* was applying the previous guidance from *R v Bain* (n 52) [25], where the approach was endorsed by the Privy Council on appeal, although it did not appear to have been the subject of any significant challenge by either party: *Bain v R* (n 36) at [36], [38], and see the commentary in J Rowan, 'Bain v R (Case Note)' [2007] NZLJ 180.

⁶¹ *R v Matenga* (n 38) [31].

technical, and in most cases will result in the same conclusion,⁶² its importance was captured by Cooke P in *R v Wickliffe*, when he said of the former approach that: 'New Zealand law gives the benefit of any reasonable doubt to the accused and entrusts the ultimate finding to a lay jury, who may prefer a less analytical approach than that of Judges'.⁶³ One practical example is *Bain v R*, where the Privy Council allowed an appeal where the Court of Appeal had previously dismissed it, partially on the basis that it had overstepped these bounds, arrogating to itself a substantive evaluative role, concluding that '[w]here issues have not been fully and fairly considered by a trial jury, determination of guilt is not the task of appellate courts'.⁶⁴ In the Privy Council's view, while the Court of Appeal had directed itself properly as to the correct approach, it had failed to follow it and instead engaged in a lengthy evidential tangle, eventually concluding that the impugned conviction was safe when it ought to have recognised that a jury may have concluded differently.⁶⁵ To use Cooke P's language, the Court of Appeal had utilised an analytical approach of the type beloved by judges, rather than asking how a lay jury may have viewed the new evidence. As *R v Matenga* explicitly mandates the analytical approach, it must be considered extremely likely that the ultimate conclusion in *Bain v R* would now be different.⁶⁶

Burden of Proof

The question of where the burden of proof lies on appeals has not been authoritatively settled, and there is dispute amongst commentators as to whether the onus lies with the

⁶² As noted in *R v Haig* (n 60) [60].

⁶³ *R v Wickliffe (No 2)* (n 56) 61-62.

⁶⁴ *Bain v R* (n 36) [113], [115], [119]. One senior criminal lawyer suggested that this decision ought to serve 'as a reminder to counsel and appellate Courts of the need for continuing role evaluation' - J Rowan, 'Bain v R (Case Note)' [2007] NZLJ 180 (n 60).

⁶⁵ As it transpired, the appellant, David Bain, was re-tried and acquitted by the jury, 'David Bain Not Guilty' *The Dominion Post* (Wellington 6 June 2009).

⁶⁶ See D Mathias, 'Fair trials and conviction appeals' (4 February 2011) NZ Lawyer 18.

appellant to establish a miscarriage of justice, or on the Crown to negative it.⁶⁷ Perhaps the best reading of the position is that as the Court of Appeal must be of the requisite opinion in order for its powers under section 385 to be triggered, the burden must (and, in practice, does) fall to the appellant to convince the court to come to such a view.⁶⁸ If use of the proviso is contemplated, again as a matter of practice, the burden shifts to the Crown.⁶⁹

(b) Appeals in Summary Matters

There is also a comprehensive system of appeals in summary matters. Where matters are heard by a District Court judge, the appeal is to the High Court (a superior court), and where they are heard by a Community Magistrate, the appeal lies to the District Court (an inferior court).⁷⁰

General appeals against conviction are said to be by way of rehearing. However, some caution is required here. It does not mean ('unless the circumstances can truly be categorised as special') that the appeal court will rehear the evidence.⁷¹ Instead, the appeal court will receive a transcript of the evidence heard in the lower court, although it has full powers to re-hear the evidence or receive any additional evidence.⁷² The

⁶⁷ Sir Thomas Thorp argues that such an onus is inconsistent with principle and authority - Thorp (n 2) 65, whereas ATH Smith argues that principle and authority point in precisely the opposite direction - Smith, 'Fifty Years of Criminal Appeals in the Permanent Court of Appeal' (n 21) 94-96.

⁶⁸ Smith, 'Fifty Years of Criminal Appeals in the Permanent Court of Appeal' (n 21) 94-96.

⁶⁹ New Zealand's deputy solicitor general accepted this in oral argument in *R v Matenga* (n 38) - see the hearing transcript at 60-61: 'the Crown has for years, forever probably, accepted the burden of persuasion and in my submission it should continue to do so'.

⁷⁰ Summary Proceedings Act 1957, s 114A.

⁷¹ SG Erber and others, *Brookers Summary Proceedings* (Looseleaf edn Brookers, Wellington 2011) SA119.05, discussing the longstanding rule in *Burnett v Police* [1966] NZLR 830 (SC). An example of circumstances where a rehearing did take place is *Jones v Police*, cited by Erber, where the transcript was based on tapes which were largely inaudible.

⁷² Summary Proceedings Act 1957, s 119. The rules governing the receipt of fresh evidence are materially identical to those in indictable proceedings, see *Brookers Summary Proceedings* (n 71) SA119.06 and the authorities discussed therein.

consequence of this is that the onus is not on the Crown to prove guilt for a second time, but rather on the appellant to convince the appellate court that it ought to differ from the trial court's decision.⁷³ While appeals are difficult to mount where an appellant entered a guilty plea, there is no jurisdictional bar, and the overriding consideration is whether a miscarriage of justice may have occurred.⁷⁴

Onwards appeals on questions of law are possible (with leave), although these are for the purpose of clarifying the law rather than correcting miscarriages of justice.⁷⁵

(c) Appeals Out of Time

There is an appeal as of right in both indictable and summary matters, providing an appeal is filed within time.⁷⁶ However, as the material capable of demonstrating that a miscarriage of justice has occurred often comes to light some time after conviction, it is important to consider the circumstances in which a court will exercise its discretion to allow an appeal to proceed outside this timeframe.⁷⁷

There is no statutory guidance as to the approach which is to be taken, but the Court of Appeal's consistent position is that laid out in *R v Knight*, which emphasises the societal interest in finality, but nonetheless acknowledges that:⁷⁸

The overall interests of justice in a particular case may call for balancing

⁷³ *Brookers Summary Proceedings* (n 71) SA121.05.

⁷⁴ *Ibid* SA115.11 citing *R v Stretch* [1982] 1 NZLR 225 (CA).

⁷⁵ Summary Proceedings Act 1957, ss 144, 144A, 144B. Generally, these must raise a matter of general or public importance, but in cases of demonstrable (not simply asserted) injustice, it is possible for this requirement to be relaxed, but not so as to permit appeals purely on factual grounds: *R v Slater* [1997] 1 NZLR 211 (CA); *Pierson v New Zealand Food Safety Authority* [2010] NZCA 118.

⁷⁶ Currently 28 days from the date of conviction (or sentence, if later): Crimes Act 1961, s 388(1); Summary Proceedings Act 1957, s 116.

⁷⁷ Crimes Act 1961, s 388(2) (indictable); Summary Proceedings Act 1957, s 123 (summary).

⁷⁸ *R v Knight* [1998] 1 NZLR 583 (CA) 587-589, affirmed in *R v Lee* [2006] 3 NZLR 42 (CA) [102]. Internal citations omitted.

the wider interest of society in the finality of decisions against the interests of the individual appellant in having the conviction reviewed. Also relevant is "the respect which is traditionally shown for the liberty of the subject"...

Where lateness is explained by reason of a recent change in the law affording grounds for appeal, an applicant has long been required to 'demonstrate some special feature or features particular to the case that lead to the conclusion that in all the circumstances justice requires that leave be given.'⁷⁹

These decisions may make the position seem starker than it actually is. Even in change of law cases the overall test remains that of the interests of justice, and the Court of Appeal has stated that other factors, such as 'the strength of the proposed appeal and the practical utility of the remedy sought, the length of the delay and the reasons for delay... and the absence of prejudice to the Crown' may require that leave be granted.⁸⁰ The Court of Appeal has subsequently stated that leave will readily be granted when the appeal is of obvious merit, meaning that the court will grapple with the substantive merits of the appeal before making a determination on leave.⁸¹

In the past, the restrictive approach to leave to appeal out of time in change of law cases was in part necessitated by the need to ensure equality of treatment between those

⁷⁹ *Stowers v Auckland City Council* (Unreported, CA 67/82, 2 September 1983) approved by *R v Knight* (n 78) 587.

⁸⁰ In *R v Lee* (n 78) [128] leave to appeal some years out of time was granted by a bench of five judges, in part on the basis that 'there is also a strong public interest in ensuring that trials are fair and perceived to be fair, and that they are conducted in accordance with the law, as that ensures confidence is maintained in the criminal justice system'.

⁸¹ Eg *R v Latifi* [2007] NZCA 372 [4]; *R v Slavich* [2008] NZCA 116 [14]. This practice was specifically acknowledged in *R v Tohu* [2008] NZCA 89 [25]: 'While the Court is not required as a matter of law to hear argument on the merits before determining whether to grant an extension of time... it is common for it to do so'.

who appealed timeously and those who did not:⁸²

... to allow a belated appeal following an interpretive change in the applicable law necessarily disadvantages those whose appeals, on whatever grounds, were brought within time and dismissed and who are barred from further recourse to the Courts unless they can obtain a rare reference to this Court by the Governor-General in Council under s 406(a) of the Crimes Act 1961.

While the Court of Appeal has not subsequently revisited this aspect of its reasoning, it appears that this poses less of a problem since the establishment of the Supreme Court than it did previously, as this provides a means of challenge for those who have exhausted their first appeal rights.⁸³

In the summary jurisdiction, identical considerations apply, although even less emphasis is placed on finality, and more on the fact that 'the discretion is given essentially for the purpose of avoiding miscarriages of justice'.⁸⁴

(d) Second Appeals

It is also necessary to consider the circumstances in which an appeal court may be willing to re-visit a decision dismissing an appeal if it appears to have been in error, or if new material comes to light. It is highly unusual for the Court of Appeal to entertain such

⁸² *R v Knight* (n 78) 587.

⁸³ Further, the Supreme Court has demonstrated a willingness to intervene in such circumstances, see text to n 110. In addition, the second appeal jurisdiction, discussed in the following section also post-dates the Court of Appeal's previous discussion, and also lessens the impact of this objection.

⁸⁴ See *Tuake v NZ Police* Unreported CRI 2009-404-93, 17 June 2009 (HC) [16], which surveys existing practice. As a matter of practice, the substantive appeal is often heard at the same time as the leave application, and a decision on both is delivered at the same time - eg *O'Brien v Police* Unreported, CRI-2008-488-000019, 5 May 2008 (HC).

applications, holding consistently that once an appeal has been heard and finally determined⁸⁵ it can – absent exceptional circumstances⁸⁶ – only properly become seized of the matter again pursuant to a reference under section 406 of the Crimes Act 1961.⁸⁷ This is because the relevant legislation does not explicitly provide the courts with such jurisdiction, a block which, until recently seemed insurmountable by those seeking to have the Court of Appeal revisit the question of their convictions.⁸⁸

However, in the past decade the Court of Appeal has proved increasingly willing to overcome the jurisdictional block and reconsider its previous decisions. In large part, this is a consequence of developments following the Privy Council’s 2002 determination in *R v Taito* that the working practices of the Court of Appeal were unlawful in that, in cases involving indigent appellants seeking legal aid, an unlawful process was followed resulting in ‘appeals’ which failed to meet the minimum standards required by law.⁸⁹ It was estimated that 1500 appellants were in this position.⁹⁰

Before the Privy Council delivered its judgment, the New Zealand Parliament enacted the Crimes (Criminal Appeals) Amendment Act 2001, which retrospectively validated appeals which had been determined in the same way as those before the Privy Council in *R v Taito*,⁹¹ and provided a procedure for obtaining (with leave) a rehearing

⁸⁵ This includes cases where an appeal has been lodged, but subsequently abandoned – see the discussion in *Department of Corrections v P* Unreported, CRI2006-419-51, 3 July 2008 (HC) at [15] and *R v Bridgeman* Unreported, CA87/04, 10 November 2005 (CA). It does, however, require the formal step of entry into the criminal register of the Court – *R v Nakhla (No 2)* [1974] 1 NZLR 453 (CA).

⁸⁶ This qualification is necessary following the decision of the Court in *R v Smith* [2003] 3 NZLR 617 (CA), discussed below.

⁸⁷ *Re Appलगren* (n 56) 432. The reference power is considered in detail in the following chapter.

⁸⁸ *R v Pellikan* [1959] NZLR 1319 (CA), *R v Wickliffe* [1986] 1 NZLR 4 (CA). This remains the position in Australia: *Burrell v R* (2008) 238 CLR 218 (HCA).

⁸⁹ *R v Taito* (n 23).

⁹⁰ *R v Smith* (n 86) [3].

⁹¹ Crimes (Criminal Appeals) Amendment Act 2001, s 13. The cases before the Privy Council were exempted from the effects of this legislation, and those cases themselves were remitted by the Privy Council to the Court of Appeal, which then heard the substantive appeals – see eg *R v Jessop* [2006] BCL 201 (CA), *R v Taito* [2005] BCL 267 (CA).

before the Court of Appeal.⁹² The procedure requires a single judge of the Court of Appeal to be satisfied that the putative appellant's first appeal suffered from one of the identified procedural flaws, and that 'there is an arguable case that a miscarriage of justice has occurred'.⁹³ Where leave is granted, the Court is to hear the appeal 'as if it were an original appeal or application'.⁹⁴ This statutory procedure for obtaining a second hearing remains extant, and may be utilised by those who qualify.⁹⁵

In the event, the legislation was insufficient. The Privy Council decision identified errors which went much further than those retrospectively cured by the 2001 legislation. As a result, the Court of Appeal was prompted to explore, in the case of *R v Smith*,⁹⁶ the extent to which it may, in its inherent jurisdiction, revisit appeals against conviction. While the Crown resisted such a development on the basis that the Court was *functus officio*, and could only become seized of the dispute by means of a Governor-General's reference or by leave under the 2001 Act,⁹⁷ the Court concluded that 'appellants whose appeals had been dealt with in this Court under the same procedure as that applying to the *Taito* appellants could seek a rehearing by simply writing a letter to this Court'.⁹⁸ This jurisdiction has been relied upon in a number of similar cases.⁹⁹

⁹² Crimes (Criminal Appeals) Amendment Act 2001, ss 14-15. This rehearing power was not present in the Bill as introduced, but was added by the Parliamentary Select Committee considering the Bill, which 'expressed some unease about accepting assurances that no miscarriage of justice was likely to have resulted from the Court's former practice' - *R v Smith* (n 86) [23].

⁹³ Crimes (Criminal Appeals) Amendment Act 2001, s 15(4). The Select Committee which considered the Bill considered that these requirements were necessary so as to limit potentially unmeritorious applications - *R v Smith* (n 86) [23].

⁹⁴ Crimes (Criminal Appeals) Amendment Act 2001 s 16.

⁹⁵ Ie those whose original appeals suffered from the deficiencies referred to in the legislation, even if they were not within the category of appellants considered by the Privy Council in *Taito: R v Parker* [2009] NZCA 467 [4].

⁹⁶ *R v Smith* (n 86).

⁹⁷ *Ibid* [2].

⁹⁸ *R v Manawatu* Unreported, CA111/05; CA112/05, 10 November 2006 (CA) [3].

⁹⁹ See, eg *ibid*; *R v Greer* Unreported, CA161/03, 20 November 2007 (CA); *R v Terry* Unreported, CA154/05, 23 March 2006 (CA); *R v Smith* Unreported, CA200/05, 17 October 2005 (CA); *R v Federici* Unreported, CA394/04, 16 June 2005 (CA).

It is apparent that this principle is not limited in its application to the specific position of those whose first appeals suffered from the deficiencies identified in *R v Taito*. In subsequent cases, the Court of Appeal has accepted that there was a general jurisdiction to entertain a 'second' appeal to the Court, but that this only arose if the Court was satisfied that there was a 'fundamental error in procedure', 'no alternative effective remedy available' and a 'substantial miscarriage of justice would result if the error is not corrected.'¹⁰⁰ The Court's determination as to whether these criteria are satisfied is final, and is not subject to appeal to the Supreme Court.¹⁰¹

The Court has also applied this test to applications to reinstate abandoned appeals,¹⁰² and the Supreme Court has hinted that it might be proper for the Court of Appeal to re-open cases where an appellant is able to demonstrate that a miscarriage of justice may have arisen, but was unable to do so at the time of a leave hearing before the Supreme Court.¹⁰³

In conclusion, there has been a loosening in the Court of Appeal's attitude towards second appeals, which provides at least the possibility of that court re-opening a conviction in cases of demonstrable miscarriage of justice. While at present there has been an insufficient testing of the boundaries of this jurisdiction to examine whether this may evolve into an effective means of redress for alleged miscarriages of justice, the *R v Taito* experience suggests that, were another systemic problem to be revealed, the *R v Smith* jurisdiction may be utilised in order to quickly and efficiently redress the

¹⁰⁰ *R v De Mey* Unreported, CA44/05, 28 April 2005 (CA) [4]; *R v Palmer (No 3)* [2007] NZCA 350 (CA) [9].

¹⁰¹ *De Mey v R* [2005] NZSC 27 (SC).

¹⁰² See *R v Bridgeman* (n 85) [7]-[10]; *R v Curtis* Unreported, CA288/04, 17 February 2005 (CA). These decisions set aside the more restrictive position from *R v MacKay* [1980] 2 NZLR 490 (CA) which, following *R v Medway* [1976] QB 779 (CA), required a putative appellant to satisfy the Court that the original abandonment was a nullity.

¹⁰³ *R v Samy* [2007] NZSC 98 (SC) at [11], although it was suggested that an appellant would need to demonstrate that there were 'exceptional circumstances' warranting such a step.

deficiencies without the intervention of the Governor-General. It also now seems clear that this procedure is available in the summary jurisdiction, and on the same grounds.¹⁰⁴

6 The Supreme Court and Privy Council

(a) The Supreme Court

Where the Court of Appeal has determined an appeal against conviction, a further appeal lies, with leave, to the Supreme Court.¹⁰⁵ Leave may only be granted if a point of general public importance is involved or a serious miscarriage of justice may have occurred.¹⁰⁶ On average five applications for leave to appeal from the Court of Appeal's dismissal of a conviction appeal are made each month.¹⁰⁷

The Supreme Court has made clear from its inception that leave will 'rarely if ever' be granted on the ground of general public importance where the alleged error lies in the application of settled law to the facts of particular cases, or in cases regarding the application of judicial discretion.¹⁰⁸ Putative appellants wishing to raise matters of this nature must, therefore, satisfy the Court that a serious miscarriage of justice may have occurred. This is not an impossible test, and the Court has shown a willingness to allow appeals on this ground even when the only basis for doing so is disagreement with the

¹⁰⁴ *Smaill v Police (No 2)* Unreported, CRI-2010-412-16, 5 August 2010 (HC) [6] 'implicit in this Court's statutory jurisdiction under the Summary Proceedings Act is the power to reopen its decision in exceptional circumstances when required by the interests of justice'. Prior to *R v Smith* (n 86) this position appeared in doubt, compare *Spencer v Police* Unreported AP224/94 19 October 1994 (HC) and *Tapara v Police* (1988) 3 CRNZ 346 (HC).

¹⁰⁵ Crimes Act 1961, s 383A(1).

¹⁰⁶ Supreme Court Act 2003, s 13.

¹⁰⁷ This is the average monthly figure from October 2008 - October 2010: Ministry of Justice, *Supreme Court Workload – October 2010* (Wellington 2010).

¹⁰⁸ *Adams on Criminal Law* (n 1) CA383A.01; *R v Tranter* Unreported, SCCRI 7/2004, 12 October 2004 (SC); *T v R* [2006] NZSC 27 (SC).

Court of Appeal's application of settled law to facts.¹⁰⁹ Further, appeals may succeed on this ground if there has been a change in the law subsequent to the Court of Appeal's judgment.¹¹⁰

In any event, by its nature an assessment of whether the serious miscarriage of justice ground may be satisfied for leave purposes requires an assessment of the correctness of the Court of Appeal's decision, and it is evident that the Supreme Court does take care to do so.¹¹¹ While obtaining leave to bring a substantive appeal is difficult,¹¹² it should be noted that leave applications are determined by a court of at least two (usually three) Supreme Court judges. Although an oral hearing is not usually held,¹¹³ written submissions are provided, legal aid is available, and written reasons for the refusal of leave are provided.¹¹⁴

The Supreme Court has not yet had directly to grapple with the question of whether or to what extent it will hear appeals on the basis of fresh evidence. It was suggested to the Court in the course of an application for leave that such cases ought more appropriately be dealt with under the Royal Prerogative process.¹¹⁵ In the event, the Court found it unnecessary to consider the issue as leave was declined on other grounds. However, the Court seemed to signal that the issue would fall for consideration at a future

¹⁰⁹ See eg *Stewart v R* [2009] NZSC 53.

¹¹⁰ See eg *Wong v R* [2008] NZSC 29.

¹¹¹ This is clear from a review of the Court's leave decisions, which when refusing leave invariably consider and endorse the Court of Appeal's decision on the key points or explain why the proposed grounds are otherwise inarguable. For two recent examples, see *Sullivan v R* [2010] NZSC 151 [7]: 'The Court of Appeal was correct to find that there was no error in the directions'; *Muller v R* [2010] NZSC 156 [4]: '[the Court of Appeal's] assessment is plainly correct'.

¹¹² In the year July 2009-2010, 50 applications were received, and leave was granted in only 8 cases, with 4 appeals being allowed and one decision reserved at the end of the period: New Zealand Crown Law Office, *Annual Report for the Year Ending 30 June 2010* (Wellington 2010) 6.

¹¹³ This is evident from a review of the Supreme Court's monthly workload statistics, see Ministry of Justice, *Supreme Court Workload* (Wellington 2010).

¹¹⁴ Supreme Court Act 2003, s 16; Supreme Court Rules 2004, r 20.

¹¹⁵ *R v Aram* [2007] NZSC 97.

date.

(b) The Privy Council

The Supreme Court came into existence in 2004. As part of the transitional arrangements, appeal rights were preserved for those whose first appeals were heard prior to its creation.¹¹⁶ Thus for a substantial proportion of those convicted before 2004, the possibility of an appeal to its predecessor, the Judicial Committee of the Privy Council, is of ongoing relevance, and it is therefore worthy of consideration, although this will be of gradually less importance over time.

For most of its history, the possibility of appeal to the Privy Council was remote, and played no meaningful role in the appeal system.¹¹⁷ However, from 1990 until 2008, leave to appeal was granted on seven occasions, in comparison with five during the preceding 150 years.¹¹⁸ In some of these cases the Privy Council has - whether intentionally or not - applied appeal principles (particularly in relation to fresh evidence) which are not entirely in keeping with the usual practice of New Zealand's domestic

¹¹⁶ Prospectively, the jurisdiction of the Privy Council to hear appeals of any kind from the New Zealand courts was removed by the Supreme Court Act 2003, ss 42 and 49. However, the jurisdiction of the Privy Council in respect of appeals from decisions of the New Zealand Court of Appeal made before 1 January 2004 was specifically preserved by ss 52(1)(b)(i) and 50(1)(c)(i) of that Act, which require the proceedings to be determined 'as if sections 42 and 49 had not been enacted.' Thus for cases caught by the transitional provisions, the Privy Council retains its former jurisdiction, originating in the Royal Prerogative, and subsequently 'affirmed and regulated' by the Judicial Committee Acts of 1833 and 1844 (the material provisions of which were in force in New Zealand by virtue of the Imperial Laws Application Act 1988, s 3; see generally *Woolworths (NZ) Ltd v Wynne* [1952] NZLR 496 (CA)).

¹¹⁷ The Privy Council's statement in *Nadan v R* [1926] AC 482 (PC) that the 'settled practice of the Board' was to refuse to intervene unless it could be shown that a 'substantial and grave injustice' had occurred was seen as imposing a significant barrier to New Zealand criminal appeals to the Privy Council, as expressed in practitioners' guides, eg Sir FB Adams, *Criminal Law and Practice in New Zealand* (2nd edn Sweet & Maxwell, Wellington 1971) 897; and Hodge and Doyle (n 1) 228-229 which added that 'in view of the expenses involved... it is not considered a realistic alternative for the average appellant'.

¹¹⁸ Office of the Attorney General, *Replacing the Privy Council: A New Supreme Court* (Wellington 2002) Appendix E, and the cases cited in Smith, 'Fifty Years of Criminal Appeals in the Permanent Court of Appeal' (n 21) fn 11 along with *R v Barlow* [2009] UKPC 30. Office of the Attorney General 80 lists an additional seven cases where special leave was sought but refused, although this cannot be considered exhaustive as Privy Council practice has not always been to give reasons when refusing leave.

courts.¹¹⁹ However, the circumstances in which the Privy Council may consider it appropriate to depart from settled New Zealand practice would seem limited in light of its most recent decision on a New Zealand criminal matter, in *R v Barlow*.¹²⁰ While that decision was reserved, the New Zealand Supreme Court released a decision materially altering the test to be applied,¹²¹ and signalling a clear departure from the Privy Council's approach in its previous decision in *Bain v R*. The Privy Council, while asserting that it was making no comment on the correctness of the Supreme Court's decision, deferred to the Supreme Court on the point and applied its new test.¹²² This deference is consistent with the Privy Council's longstanding approach in civil matters,¹²³ and it can be assumed that the scope for substantive changes in the law governing criminal appeals at the hands of the Privy Council is now limited.

However, the scope for error correction remains. The Privy Council has demonstrated that it is prepared to entertain appeals in 'fresh evidence' cases, even if an appeal on other grounds had been dismissed over a decade previously and an application for the exercise of the Royal Prerogative of Mercy concerning the same subject matter had already been rejected.¹²⁴

¹¹⁹ See the discussion of *Bain v R* in Smith, 'Fifty Years of Criminal Appeals in the Permanent Court of Appeal' (n 21) at 91-94, and also the dramatic intervention in *R v Taito* - see text to n 89.

¹²⁰ *R v Barlow* [2009] UKPC 30 (n 118).

¹²¹ See text to n 47.

¹²² *R v Barlow* (n 118) [21].

¹²³ See *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).

¹²⁴ In *R v Barlow* (n 118) the Crown's contention that the Privy Council had no such jurisdiction was rejected, with the Board stating that it had 'no doubt' that it possessed jurisdiction and that 'if their Lordships were to conclude that the new evidence did indeed show that there had been a miscarriage of justice' there was no way that the 'Governor-General's decision... could justify the Board withholding the remedy for that miscarriage to which Mr Barlow would otherwise be entitled'. This reflects a change of the Privy Council's approach to the subject of criminal appeals generally (from whatever jurisdiction), as to which see K Keith, 'The Interplay with the Judicial Committee of the Privy Council' in L Blom-Cooper, B Dickson and G Drewry (eds), *The Judicial House of Lords 1876-2009* (OUP, Oxford 2009) 334-336.

Further petitions to the Privy Council appear to be in train,¹²⁵ and as the transitional provisions are likely to remain extant indefinitely, this forum will remain relevant for appellants who had exhausted domestic appeal rights prior to 2004.

7 Conclusion

Those convicted of both summary and indictable criminal offences in New Zealand benefit from wide rights of appeal, augmented (in the indictable jurisdiction, at least) by access to public funding and unhindered by obvious disincentives. It is also apparent that the courts are receptive to claims from those who claim to have suffered a miscarriage of justice even at some remove from the original trial, either by entertaining an application for leave to appeal out of time, or by means of an appeal to the Supreme Court or Privy Council. It is against this backdrop that the New Zealand post-appeal mechanisms operate, and it is to these which the next chapter turns.

¹²⁵ In the high profile Ellis and Lundy cases, see, 'QC criticises Power's inquiry stand' *The Press* (Christchurch October 15 2009) 3, and M White, *The Lundy Murders: What the Jury Didn't Hear* (North and South, Auckland February 2009).

CHAPTER THREE - NEW ZEALAND POST-APPEAL MECHANISMS

This chapter considers the possibilities for challenging convictions outside of the standard appeal processes in New Zealand. Some extraordinary avenues of challenge are considered, such as the possibility for commissions of inquiry or statutory pardons, however the focus is on the primary means of post-appeal challenge: an application for exercise of the Royal Prerogative of Mercy (**RPM**).

8 The Royal Prerogative of Mercy

Authority to exercise the RPM is vested in the Governor-General of New Zealand by virtue of the Letters Patent Constituting the Office of Governor-General.¹ This confers broad authority on the Governor-General to: '[g]rant, to any person concerned in the commission of any offence for which he may be tried in any court in New Zealand ... or to any person convicted of any offence in any such court, a pardon, either free or subject to lawful conditions'.² This power is supplemented by section 406 of the Crimes Act 1961, which allows the Governor-General to either refer the entire matter to the relevant appeal court for fresh consideration, or to seek the Court of Appeal's opinion on matters arising in an application. By convention, the Governor-General acts on the advice of the Minister of Justice,³ and for all practical purposes the substantive task of reviewing and advising on petitions falls to officials in the Ministry of Justice.

¹ Formally, it is a delegation of power from the Sovereign which is, in turn, authorised by a prerogative power - *Burt v Governor-General* [1989] 3 NZLR 64 (HC) 69. The Sovereign could, therefore, exercise the power personally, a fact which is recognised in the Crimes Act 1961, s 407 (which deals with the effects of a free pardon). In practice, this has never occurred, and it may be that to do so would be in breach of a constitutional convention, see NJ Miners, 'The Governor, The Secretary of State, and The Prerogative of Mercy' (1987) 17 HKLJ 77. For background to the transplant of the Royal prerogatives to New Zealand see N Cox, 'The Royal Prerogative in the Realms' (2007) 33 Commonwealth Law Bulletin 611, and for a discussion of the desirability of this being placed on a statutory footing, see BV Harris, 'Replacement of the Royal Prerogative in New Zealand' (2009) 23 NZULR 285, 311-312.

² Letters Patent Constituting the Office of Governor-General of New Zealand (SR 1983/225), cl XI(a). Provision is also made for remission or respite of execution of sentence.

³ See n 79 and accompanying text.

(a) History and Extent of the Prerogative of Mercy

The roots of the RPM can be traced back to the earliest legal codes – including the Code of Hammurabi.⁴ In England, the monarch enjoyed the prerogative from the seventh century, although this was not always uncontested, with rival pardoning powers frequently exercised by other loci of power.⁵ As the RPM involves the Executive interfering with convictions and punishments flowing from a judicial process, its uses have long been a subject of debate. Central to these debates have been the notion of ‘mercy’, a somewhat contestable philosophical concept,⁶ but which – as generally understood – describes a quality which nobody has a *right* to.⁷ The question of when (if ever) it was appropriate for the Executive to pardon convicted offenders is one which exercised many of the prominent philosophers of the Enlightenment, although it then fell into ‘relative philosophical obscurity’.⁸ This debate re-ignited towards the close of the 20th century, especially in the United States, where executive powers of mercy remain extant.⁹ Use of these powers in United States jurisdictions has sharply declined in recent decades, seemingly due to a hesitance to resort to unreviewable discretions in a climate of

⁴ KD Moore, *Pardons : justice, mercy, and the public interest* (Oxford University Press, New York 1997) 15 - 17.

⁵ Ibid Ch 1; WF Duker, 'The President's Power to Pardon: A Constitutional History' (1977) 18 Wm & Mary L Rev 475, 476-497.

⁶ See, notably, JG Murphy and J Hampton, *Forgiveness and mercy* (Cambridge University Press, Cambridge 1988); CAA Johnson, 'Entitled to Clemency: Mercy in the Criminal Law' (1991) 10 Law & Philosophy 109.

⁷ GT Trotter, 'Justice, Politics and the Royal Prerogative of Mercy: Examining the Self-Defence Review' (2000-2001) 26 Queen's LJ 339, 346.

⁸ Moore *Pardons* (n 4) 6-7, ch 2.

⁹ Sparked, perhaps, by some prominent exercises of the Presidential pardon power - MJ Rozell, 'The Presidential Pardon Power: A Bibliographic Essay' (1988-1989) 5 J L & Pol 459; Moore *Pardons* (n 4) and the sources cited in Johnson (n 6) n 1.

penal populism which demands administrative accountability.¹⁰

A similar decline is evident in New Zealand, where there is to this day no legal impediment to the continued exercise of the RPM for ‘merciful’ purposes,¹¹ and there are examples of such uses in the recent past.¹² However, this power now appears to have been disclaimed, except in respect of sentence.¹³ One possible explanation for this development is that, after the death penalty was abolished,¹⁴ the pressing need for the application of mercy disappeared.¹⁵ Another is that, in 1945, the precursor to the section 406 reference power was introduced. This power, it will be argued below, has come to define the process.¹⁶

For whatever reason, the power to pardon for merciful reasons has clearly fallen into disuse, and applications requesting that the RPM be exercised on this basis are summarily rejected.¹⁷ Calling what remains the ‘Royal Prerogative of Mercy’ might, therefore, be misleading. It has been suggested that a more fitting label might be the ‘Prerogative of Correcting Judicial Mistakes’,¹⁸ however as will be argued below, this too

¹⁰ See RE Barkow, ‘The Ascent of the Administrative State and the Decline of Mercy’ (2008) 121 Harv L Rev; MC Love, ‘Fear of Forgiving: Rule and Discretion in the Theory and Practice of Pardoning’ (2000-2001) 13 Fed Sent R 125.

¹¹ Crimes Act 1961, s 406 explicitly preserves the RPM in its entirety.

¹² Two such examples from the 1940s and 1950s are given in CH Rolph, *The Queen’s pardon* (Cassell, London 1978) 126.

¹³ The Ministry’s internal guidance accordingly states that: ‘Notwithstanding its title, exercise of the Royal Prerogative of Mercy is now confined to miscarriages of justice; it is not employed to set aside convictions on merciful grounds’: New Zealand Ministry of Justice, *Royal Prerogative of Mercy Procedures Guide* (Wellington 2007) (Sample Passages), this passage also appeared in the formal advice to the Minister in NZ20. It appears that the RPM may still be exercised to reduce sentences on ‘compelling compassionate grounds’, but this would only rarely occur: T Thorp, *Miscarriages of Justice* (Legal Research Foundation, Auckland 2005) 52.

¹⁴ Capital punishment was abolished for most crimes with the passage of the Crimes Act 1961, and finally abolished in its entirety by the Abolition of the Death Penalty Act 1989.

¹⁵ C Strange, ‘Mercy for Murderers? A Historical Perspective on the Royal Prerogative of Mercy’ (2001) 64 Sask L Rev 559 makes a strong argument that this explains a similar phenomenon in Canada.

¹⁶ The original provision was found in the Criminal Appeal Act 1945. See *R v Collie* [1997] 3 NZLR 653 (CA) 665-666 for discussion of this.

¹⁷ Eg NZ20.

¹⁸ A term used by WC Hodge, ‘The Prerogative of Pardon’ [1980] NZLJ 163 in a related context; see also Trotter (n 7) 347.

may be misleading as in practice its exercise is tightly circumscribed by constitutional convention so as to limit its ability to inquire into judicial errors.

Whatever may be said about the label, exercise of the RPM is increasingly sought after, with the number of applications growing from only two or three per year in the early 1990s, to between ten and fifteen per year at present.¹⁹

9 The Remedies: Pardon or Reference

The RPM process can yield one of two substantive remedies: the exercise of either the prerogative power to pardon, or of the statutory power to refer the conviction or sentence (or a question relating to it) to the relevant appeal court.²⁰

(a) Pardon

The precise effect of a pardon can vary, depending on its terms. However, the primary effect is that prescribed by section 407 of the Crimes Act 1961:

...that person shall be deemed never to have committed that offence...

Provided that the granting of a free pardon shall not affect anything lawfully done or the consequences of anything unlawfully done before it is granted.

Consistent with the move away from 'mercy' as the reason for action, the Court of Appeal

¹⁹ Thorp (n 13) 50.

²⁰ The High Court, in respect of summary convictions, the Court of Appeal in respect of convictions on indictment. The Court of Appeal has emphasised that the power to refer, vested by statute in the 'Governor General in Council' is distinct from the power to pardon, which is vested (by the Letters Patent establishing his or her office) in the Governor-General: *Burt v Governor-General* [1992] 3 NZLR 672 (CA) 676; M Hardie-Boys, 'Nodding Automaton?' (Some Reflections on the Office of the Governor General) (2002) 8 Canterbury L Rev 425, 433. While as a matter of law this is clearly correct, the process for consideration is identical in both instances, as will be discussed below.

has acknowledged that the effect of section 407 is that 'it can no longer be said that the pardon may imply that the Executive accepts that he committed the offence but is forgiving him'.²¹ As such, unless the text of the pardon provides otherwise, a pardoned individual can never again be charged with the offence of which they were pardoned.²² Despite this, the act of pardoning does not of itself go as far as a declaration that the person involved did not, in fact, commit the crime,²³ or is absolved of moral guilt for it.²⁴ The text of the pardon could explicitly provide for such an outcome though, as the legal effect of a pardon is almost entirely dependent on the terms of the pardon itself.²⁵

As a matter of practice it is entirely doubtful whether the power to pardon presently has any real existence outside the statutory reference process. Pardons have been granted by the Governor-General on only three occasions in recent New Zealand history. With the exception of the 1992 pardon of Mokomoko, a chief of Te Whakatohea tribe hanged at Mount Eden gaol for murder in 1866 at the height of the New Zealand wars, the last time this occurred was in 1979.²⁶ In none of the cases examined was any meaningful consideration given to this option by the Ministry. It is most unlikely that this will change when one considers the test applied:²⁷

A pardon is usually entertained only where there is compelling evidence

²¹ *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252 (CA) 274.

²² *Ibid* 274.

²³ *Re Royal Commission on Thomas Case (No 1)* [1980] 1 NZLR 602 (HC) 621; cf ATH Smith, 'The Prerogative of Mercy' [1983] PL 398, 418-419.

²⁴ Cf the United States authorities cited in DT Kobin, 'The Quality of Mercy Strained: Wrestling the Pardoning Power from the King' (1991) 69 Tex L Rev 569, 576.

²⁵ Smith 'The Prerogative of Mercy' (n 23) 419.

²⁶ See n 28. In addition, there are two recent instances of pardons by Act of Parliament: see text to n 266.

²⁷ NZ4 (formal advice to Minister); the former Chief Justice, conducting a Ministerial Inquiry (see text to n 282) surveyed past New Zealand practice surrounding the issue of pardons and endorsed this approach: Sir Thomas Eichelbaum, *Report into the Peter Ellis Case* (Wellington 2001) 116-118. A similar linguistic mismatch to that regarding the notion of 'mercy' therefore obtains with regard to the notion of 'pardoning' an individual. While the implication is that the individual is being forgiven for something which they have done, this is certainly not the case if the grant of a pardon is effectively conditional on the existence of evidence which suggests that they ought to have been found not guilty in the first place; see J Burnside, 'Pardoning and Mercy' (1993) 8 Denning LJ 13.

that a person was wrongly convicted – that is in cases where no reasonable jury, apprised of all the relevant evidence, could have found the accused guilty...

The stringency of the present test can be clearly seen when one compares it to that applied in the last non-historical New Zealand case to result in a pardon in 1979, where a pardon was granted on the basis that ‘there is real doubt whether it can properly be contended that the case... was proved beyond reasonable doubt’.²⁸ The present test, applied in all cases where a pardon is sought, is a clear departure from this and focuses not on the sufficiency of evidence at trial but instead on the present state of knowledge. This is because it is now considered that the proper approach, where the fault is with the evidence at trial, is to refer the matter to the appeal court which can then, if appropriate, order a retrial.²⁹ This is an adjunct of what is now a strong constitutional convention, discussed in detail below, to the effect that the Executive will not lightly interfere with a judicial process which has resulted in a conviction. This means that, save for a truly exceptional case, a pardon will not be a realistic possibility, and the RPM review process is instead directed towards determining whether to exercise the power of reference to the courts.

(b) The Primacy of Section 406

²⁸ This followed the receipt of a report from a Queen's Counsel to this effect. The background is summarised in *Re Royal Commission on Thomas Case* (n 21) 255. Following the pardon, a Royal Commission was established to inquire into the case: Royal Commission to Inquire into the Circumstances of the Convictions of Arthur Allan Thomas *Report* (New Zealand Government Printer, Wellington 1980). This matter remains a cause celebre in New Zealand, with a national newspaper in 2010 launching a campaign to have the case re-opened: see eg, ‘Top Kiwis back new Crewe probe’ *New Zealand Herald* (Auckland October 21 2010).

²⁹ *Report into the Peter Ellis Case* (n 27) 117: ‘[if a section 406(a) reference is successful] the usual result is a re-trial, meaning that the new evidence on which the Petition was founded will be subjected the scrutiny of a hearing. A full pardon, on the other hand, is an exceptional (and, of course, final) remedy, granted sparingly.’

Thus, far from being a 'statutory adjunct', as a 2003 review conducted for the Ministry of Justice described it,³⁰ the reference power defines and drives the whole RPM process. As with the decline of the use of the RPM for merciful reasons, there is no legal requirement for this to be so. On its terms, section 406 of the Crimes Act 1961 is expressed to provide two permissive and discretionary powers intended to provide support for, but not override, the prerogative powers.³¹ It is certainly not the case as is often assumed or asserted – even by the Governor-General's office – that the statutory reference provision is the source of the power to exercise the RPM.³²

The first power, provided by section 406(a), allows the reference of convictions to the appropriate appeal court. The second, provided by section 406(b), allows the Governor-General to seek the assistance of the Court of Appeal on some matter(s) relating to the conviction. In the case of the former, the decision on whether to overturn the conviction ultimately rests with the court, in the latter, it remains with the Governor-General.

The practical effect of the pre-eminence of the section 406 processes must be acknowledged, as it is inconsistent with claims that are often made from the RPM process, for example by the Ministry of Justice itself, which has claimed that: 'the Royal Prerogative of Mercy is an important safeguard in our criminal justice system... It is an exercise of clemency that acknowledges that the judicial process with its reliance on rules

³⁰ New Zealand Ministry of Justice, *The Royal Prerogative of Mercy - A Review of New Zealand Practice* (Wellington 2003).

³¹ The section itself is prefaced with a statement that 'Nothing in this Act shall affect the prerogative of mercy'. Parliamentary discussion at the time the power was first enacted gives no suggestion that that it was to have any wide ranging effect. The debate, such as it was, at (1945) 268 NZPD 786-789 and (1945) 272 NZPD 58 instead centred around whether there would be any temporal restrictions on applications and whether the power should be vested in the Attorney-General, rather than the Governor-General.

³² Eg NZ20, where a letter from the Governor General to a petitioner stated 'Section 406 of the Crimes Act under which the Governor General has the power to consider exercising her prerogative of mercy applies only to a conviction for the commission of a crime or a sentence imposed by the Court'.

of evidence and procedure can occasionally be fallible.³³ To this end, it is often suggested that the nature of the RPM means that it is 'inappropriate to impose rigid limits upon its exercise'.³⁴ However, by effectively collapsing the RPM and section 406 reference processes into one, the risk arises that such 'rigid limits' will emerge. The following sections argue that this has in fact occurred, although the courts have left the Executive with scope for adopting a more flexible approach.

(c) 406(a)

Section 406(a), if exercised, results in the case being remitted to the High Court (in the case of summary convictions) or to the Court of Appeal (in the case of indictable convictions). The court is then directed to hear and determine the reference as though it were an ordinary appeal against conviction or sentence.³⁵ In this sense, the Governor-General's role is complete when a referral under para (a) is made, and the final decision rests with the court.³⁶ During the period under review (1998-2008), seven cases were referred back to the courts under section 406(a). Six resulted in the conviction being quashed, and in one case the conviction was upheld.

In most respects references are treated in the same way as a standard appeal. The Court of Appeal has held that the statutory injunction to deal with references under 406(a) as in the case of an appeal against conviction 'gives the Court access to all incidental statutory provisions to which it could have recourse' in dealing with a standard appeal.³⁷ Thus, the Court of Appeal has held that while there is jurisdiction to grant bail

³³ New Zealand Ministry of Justice *A Review of New Zealand Practice* (n 30); see also *Burt v Governor-General* (n 20) 681.

³⁴ See Thorp (n 13) 2.

³⁵ See *R v Thomas* [1978] 2 NZLR 1 (PC) 5.

³⁶ See *R v Collie* (n 16) 666: 's 406(a) clearly envisages that the Court of Appeal is to make the effective decision on the reference'.

³⁷ *Ibid* 666.

pending a hearing of a reference, the test is identical to that which obtains on a standard criminal appeal.³⁸ Similarly, references are now subject to the same case management procedures as standard criminal appeals.³⁹

Further, decisions attract standard onward appeal rights. Decisions made on references to the High Court under section 406(a) are subject to appeal (with leave) to the Court of Appeal⁴⁰ and thence to the Supreme Court,⁴¹ or in exceptional circumstances, directly to the Supreme Court.⁴² Decisions made on references to the Court of Appeal are subject to appeal (again with leave) to the Supreme Court.⁴³ These rights are more than theoretical, as in one recent case a conviction was upheld by the Court of Appeal following a reference, but was quashed on appeal.⁴⁴

Another similarity with standard criminal appeals is that, even if successful, the petitioner will be liable to be re-tried for the offence, rather than pardoned. The Court of Appeal has stated that an appellate court on a successful 406(a) reference will 'almost invariably' order a re-trial as 'the decision whether or not to prosecute is the responsibility of the Solicitor-General, not the Court'.⁴⁵ This has been endorsed by the Privy Council

³⁸ Viz, that it is 'unusual and only to be granted in exceptional circumstances' - *Moananui v R* (1984) 1 CRNZ 231 (CA); *Ellis v R* [1998] 3 NZLR 555 (CA) 560; *R v Appलगren* Unreported, CA132/94, 9 June 1994 (CA). In circumstances where it was accepted that there was a 'real likelihood' that the 406(a) reference may be determined in favour of the petitioner, bail has been granted on terms: *P v R* Unreported, CA140/05, 25 May 2005 (CA).

³⁹ For example, on several occasions a reference has been determined by a divisional court consisting of one permanent Court of Appeal judge and two High Court judges *B v R* Unreported, CA236/02, 2 September 2002 (CA); *R v Palmer* Unreported, CA373/02, 9 December 2002 (CA). This stands in contrast to the practice in previous decades where references were routinely heard by full courts of five permanent judges.

⁴⁰ Crimes Act 1961, s 406A(1).

⁴¹ Crimes Act 1961, s 406A(3).

⁴² Crimes Act 1961, s 406A(4).

⁴³ Crimes Act 1961, s 406A(2).

⁴⁴ Although this was heard by the Privy Council, as the Court of Appeal decision predated the establishment of the Supreme Court: *Bain v R* [2007] UKPC 33.

⁴⁵ *P v R (Substantive)* Unreported, CA140/05, 24 August 2005 (CA) [8], [12]. See also *R v Palmer* (n 39); *B v R* (n 39); *R v Dougherty* [1996] 3 NZLR 257 (CA); *Re Appलगren* [1991] 1 NZLR 431 (CA) 433; *R v P* Unreported, CA202/05, 11 April 2006 (CA) [49]. Although, the Privy Council has hinted that the proposed

on the basis that '[w]here issues have not been fully and fairly considered by a trial jury, determination of guilt is not the task of appellate courts.'⁴⁶ This is not an absolute rule, and where it is evident that the effluxion of time (especially if this was due to executive delay in dealing with the petition) has resulted in the unavailability of key witnesses and the petitioner having substantially served any sentence of imprisonment, a retrial may be considered undesirable, and all future proceedings stayed.⁴⁷

The corollary of the requirement to treat references as standard criminal appeals is that the Court of Appeal will not engage in a more wider ranging enquiry into systemic matters, as it was invited to do in one case, as if the reference was:⁴⁸

not approached on a principled basis, there is a risk that the appellate process will be subverted. There may be matters which are worthy of, and could properly be addressed by, a commission of inquiry, but the Court cannot undertake that kind of function under the guise of an appeal under the Crimes Act 1961.

Thus, references do, for the most part, proceed in the same way as standard appeals. However, there are two significant ways in which they differ.

Grounds Limited to Terms of Reference

The first is that the petitioner is not free to submit appeal grounds of their choosing. The Court of Appeal has held that its role is limited to considering the grounds detailed in the

trial court for a retrial is a 'far more suitable' venue for determining whether such a re-trial would be an abuse of process: *R v Bain (Stay)* [2009] UKPC 4 at [7].

⁴⁶ *Bain v R* (n 44) [119].

⁴⁷ *R v Haig* (2006) 22 CRNZ 814 (CA) [109] – [111]. See, similarly, *R v Wickliffe (No 2)* [1987] 1 NZLR 55 (CA) 62 and *Hedges v Police* [2010] NZHC 1571.

⁴⁸ *R v Ellis* [2000] 1 NZLR 513 (CA) [28] and [57]. For a discussion of the availability of these other options, see text to n 277.

Order in Council governing the reference, and does not permit the petitioner to file additional evidence or grounds outside the terms of the reference.⁴⁹ As a consequence, recent practice is that the reasons for the reference are specified in a schedule to the relevant Order in Council.⁵⁰ This rule obtains even where the Crown does not object (or even agrees) to the appellant advancing wider grounds before the appeal court.⁵¹

While this restriction remains binding, and guides current practice, the rule has subsequently been undermined by the Court of Appeal, which has described it as 'not entirely unproblematic'.⁵² Indeed, it appears that it is only in 2001 that this hardened into a rule, and the practice of the Governor-General providing detailed terms of reference appears to be a consequence not of a legal requirement, but instead of a 1963 decision where the Court of Appeal intimated that in future cases it would 'be greatly assisted by being given information in each case of the considerations which have caused the Executive Council to refer the matter once again *generally* to the Court of Appeal'.⁵³

Thus, there is scope and an apparent willingness to revisit this rule were it to create acute difficulties in an individual case. However, while this restriction remains in

⁴⁹ *Ellis v R* (n 38); *R v Ellis* (n 48).

⁵⁰ *R v P* (n 45) [45]. Both the petitioner and the Crown Law Office are provided with an opportunity to comment on the text of the Order before it is promulgated, see text to n 227 below.

⁵¹ In *R v P* (n 45), the Crown's submissions to the Court of Appeal were that 'no jurisdictional objection is taken to these additional points being raised before this Court. The question of jurisdiction is of course one for the Court, but it is respectfully noted that the Court may consider it to be in the interests of justice and or in the interests of finality to rule on the additional points raised' ([22]), the Court however concluded that this concession was of no moment, as if jurisdiction was lacking this could not be cured by the Crown not taking the point ([46]).

⁵² *R v Haig* (n 47) at 51, noting that 'a rather different approach' was taken by the High Court of Australia in *Mallard v R* (2005) 222 ALR 236 (HCA). In another case from the same year, the Court did not rule out the possibility of exceptions being made, but suggested that it was 'far from clear' that this was possible - *R v P* (n 45) [47]. Similarly in *B v R* (n 39), the Court somewhat delphically prefaced its discussion of the fact that written submissions for the appellant went further than the matters specifically referred to the Court, and dealt with matters which had been the subject of a previous, unsuccessful, application for the prerogative of mercy, with the statement that 'the court on a referral of this nature will not operate within an inflexible straight-jacket' ([5]).

⁵³ *R v Morgan* [1963] NZLR 593 (CA) 595-596, emphasis added.

place, the framing of the terms of reference will be of critical importance to petitioners.⁵⁴

Lower Threshold?

The second difference is that the appeal court may apply a looser procedure or threshold than it would to a standard appeal, although whether it will actually do so in any given case is difficult to predict.

The starting point (and in most cases, the end point) is that the same substantive tests are to be applied as would obtain on a standard appeal.⁵⁵ The Court of Appeal has in the past stated that this is because ‘it is still necessary if the overall interests of justice are to be met, to apply established rules and principles’ as ‘[t]o do otherwise would be to make unacceptable inroads into the due and consistent administration of justice’.⁵⁶

However, in a number of cases, the Court of Appeal has suggested that these are ‘not always applied with rigidity if there is reason to think that to do so might lead to injustice, or the appearance of injustice’.⁵⁷ In at least one case this has made a

⁵⁴ In *R v P* (n 45) the petitioner sought to challenge the exclusion of a ground by way of judicial review, although this was settled by the Crown agreeing to allow the ground to be argued. In other cases, this has prompted petitioners to press the Governor General for wider terms of reference, as in *R v Ellis* (n 48).

⁵⁵ *Re Kestle (No 2)* [1980] 2 NZLR 353 (CA) 361. Generally, the relevant tests will be those relating to fresh evidence - the Privy Council in *Bain v R* (n 44) described these as ‘well-settled principles’ at [34]. In *R v Ellis* (n 48) [19], this parity of approach was said to be required as ‘the function of the Court, indeed its only jurisdiction, is to treat [a] reference as an appeal brought pursuant to the Crimes Act 1961’. In *R v Bain* [2004] 1 NZLR 638 (CA) [18] – [20], Tipping J suggested that this approach was applied in the earlier case of *R v Dick* [1973] 2 NZLR 669 (CA) however, there the Court seemed to approach the question from the opposite direction – that, on a s 406(a) reference ‘the Court feels it right to take, in appropriate circumstances, a less strict view than it would take if the proceeding before it were an ordinary criminal appeal...’

⁵⁶ *R v Ellis* (n 48) [19].

⁵⁷ *R v Collie* (n 16) 657; *R v Haig* (n 47) [53], which notes that ‘The freshness and credibility criteria are generally less rigorously applied in cases which come to the Court via s 406(a)’; and *R v Dick* (n 55). See also the extrajudicial comments of New Zealand Supreme Court justice W Young, ‘The role of the courts in correcting miscarriages of justice’ (NZLRF Miscarriages of Justice Symposium 2010) [53] and Court of Appeal justice RG Hammond, ‘The New Miscarriages of Justice’ (2006) 14 Waikato LR 1, 9; Smith ‘The Prerogative of Mercy’ (n 23) 405-406 notes that a similar practice was applied by the English Courts when they regularly considered references in RPM cases.

determinative difference, resulting in the application of a lower threshold to the question of whether trial counsel incompetence required a conviction to be quashed. The Court emphasised that it was not overruling the existing rules which continued to obtain with respect to general appeals, but rather that the reference 'must be placed in its own context, and with full regard to the court's present function under s 406'.⁵⁸

Given the low throughput of references, and inconsistent approach, it is difficult to draw any clear conclusions on whether this is a general feature of references and if it is, what the limits of this flexibility may be.⁵⁹ This is frustrating, as it is a matter which cries out for resolution. It is of particular importance as, for reasons discussed below, the Ministry considers that it is bound by constitutional conventions which restrict its freedom of manoeuvre in the field of RPM.⁶⁰ This is based on a view that it is improper for the Executive to interfere with judicial functions. However, by adopting a lower standard on references on the basis that the court must take account of the fact that the Executive was moved to make a reference, this suggests a judicial acceptance that the Executive may have a broader competence than it suspects.

An alternative explanation is that adopting a lower standard on references is a tidy way of achieving what the court perceives to be a just result on the facts of an individual case without the risk of unpicking the settled rules applicable to general appeals.

In either case, the Ministry could legitimately claim a degree of freedom of

⁵⁸ *R v Sims* Unreported, CA489/97, 19 December 1997 (CA). The Court had earlier stated that: 'it is important to bear in mind that... a s 406 reference [is] made following detailed consideration of an application for the exercise of the Crown's mercy' and 'does not come before this court in the form of an appeal as of right, but as a consequence of material being placed before the Governor-General of sufficient cogency to warrant a re-consideration of the appellant's conviction.'

⁵⁹ Thorp (n 13) 64 suggests that this may be limited to 'less egregious departures' from rules of practice, a standard which is similarly inexact.

⁶⁰ While the Ministry's advice usually notes the Court's acknowledgment of 'the special character of cases referred to the Court under that section' (eg NZ2) it continues to consider applications on the basis of standard appeal tests, see text to n 182 and following.

movement in assessing whether there is merit in referring a conviction, and need not focus unduly on whether a matter complies strictly with appeal rules. However, the effect of this should not be overstated. The Ministry is, on any view, constrained (while the section 406 process is at the fore) by the need to identify grounds of reference cognisable by an appeal court by reference to standard appeal grounds. There is nothing to suggest that the Court of Appeal has altered its earlier expressed request that references 'respect the role of an appellate Court and... not include matters more appropriate for consideration by a commission of inquiry'.⁶¹ Thus, while there may be some slackness in the rope, the Ministry is still tethered to the Court of Appeal's standard appeal tests.

(d) 406(b)

The Governor-General is not restricted to referring the entire matter to the relevant court. Section 406(b) provides a separate power, whereby a specific question or series of questions may be referred to the Court of Appeal for answer. The Court will then report back to the Governor-General, who retains what has been described as 'a residual discretion to determine the response to be given to the petition after receiving the opinion'.⁶² Legally, this might be stating the point too softly. An opinion provided under 406(b) is not subject to appeal,⁶³ and the Privy Council has described the effect of such an opinion in the following terms: ⁶⁴

...no one but the Governor-General himself has the ultimate power to deal with such an application. Its exercise by any other person or body being unconstitutional, the reference of "any point in the case" to the Court of

⁶¹ *Ellis v R* (n 38) 559.

⁶² B Robertson (ed), *Adams on Criminal Law* (Looseleaf edn Thomson Brookers, Wellington 2011) CA406.1.

⁶³ *R v Thomas* (n 35).

⁶⁴ *Ibid* 5, 8.

Appeal is merely in order to obtain its "opinion" thereon. When its labours are over the Court of Appeal is required to furnish that opinion to the Governor-General so that he, and he alone, may determine whether the application for the exercise of the prerogative of mercy is to be granted or refused... The wording of s 406(b) of the Crimes Act 1961 is such that no power or duty of determination binding upon the Governor-General was entrusted to the Court of Appeal. The Opinion they expressed impinged upon no legal right of the petitioner, nor did it place any fetter upon the exercise by the Governor-General of the royal prerogative of mercy.

The 406(b) power is very seldom utilised, and the Ministry's internal guidance notes that 'the use of section 406(b) is so infrequent that it is not possible to crystallise criteria for its use'.⁶⁵ The sole use of the 406(b) power in the past quarter century was in the *Bain* case, where the Court of Appeal was asked whether, in light of its answers to the other factual questions posed, 'there a possibility that there has been a miscarriage of justice that would warrant the question of the applicant's convictions being referred to the Court of Appeal under section 406(a) of the Crimes Act 1961?'.⁶⁶

In that case, which centred on fresh evidence, the Court of Appeal applied the same test as it would for admission of such evidence on a substantive 406(a) application, with one important difference. There is no statutory obligation for the Court to treat the matter as though it were a standard appeal, and the matter is instead governed by the terms of reference. As the terms of reference did not require that the fresh evidence

⁶⁵ New Zealand Ministry of Justice *Royal Prerogative Procedures Guide* (n 13) 38.

⁶⁶ *A Reference under s406(b) Crimes Act 1961: David Cullen Bain* Unreported, CA18/02, 17 December 2002 (CA) [6]. In dealing with this, the Court stated that it approached the matter on 'a basis not dissimilar to an application for leave to appeal but of course applying the criteria expressed or inherent in the terms of reference' ([13]). Use for such a purpose - ie discerning if there is a basis for a reference of the case as a whole - appears to have been the main (if not the sole) basis on which the cognate power was exercised in England prior to 1995, see R Pattenden, *English Criminal Appeals 1844-1994 : Appeals Against Conviction and Sentence in England and Wales* (Clarendon, Oxford 1996) 361-362.

would be admissible on standard appeal principles, the court felt free to disregard them.⁶⁷

It is conceivable, therefore, that an opinion may be sought under section 406(b) in circumstances where there is compelling evidence in existence which would be inadmissible under usual appeal rules (such that a reference under section 406(a) would be unlikely to be successful) with a view to issuing a pardon if the court's opinion was supportive.⁶⁸ However this remains a hypothetical possibility, and given the courts' recent practice of relaxing admissibility rules on a section 406(a) application and the reluctance to issue pardons absent demonstrable innocence, it may remain so.

10 Boundaries and Cross-Branch Communication

As there is no formal means of communication between the courts and those advising on RPM applications, the courts have, on occasion, offered (in the course of judgments) their views on the proper approach.⁶⁹ It is evident that these statements are taken seriously, and given effect by the Ministry. Two examples can be seen above.⁷⁰ A further, important intervention was the Court of Appeal's insistence that it not be 'called upon to re-adjudicate upon any ground of appeal that has already been heard and disposed of on the merits, unless a new matter has come to light which makes a reconsideration of the ground necessary or desirable'.⁷¹ On a more detailed level, the Court of Appeal has suggested that it was desirable that the advice of an experienced criminal trial barrister be

⁶⁷ *A Reference under s406(b) Crimes Act 1961: David Cullen Bain* (n 66) [9].

⁶⁸ This appears to have been what the Court of Appeal foreshadowed in *R v Morgan* (n 53) 596.

⁶⁹ Cf the former English position, where there was an established practice of consultation between the Home Office and the Lord Chief Justice, although this was criticised for its secretive and ex parte nature - see Smith 'The Prerogative of Mercy' (n 23) 406; Pattenden (n 66) 360.

⁷⁰ The requirement for the terms of reference to be clearly identified (see text to n 53) and the requirement to keep these terms to those cognisable by an appeal court (see text to n 48).

⁷¹ *R v Ellis* (n 48) [13], citing *R v Morgan* (n 53) 596. The Court of Appeal in *R v Morgan* suggested that if the Governor-General did wish the Court of Appeal to revisit such matters, the correct course would be a reference under s 406(b). The Ministry's concern to ensure that this is complied with can be seen below (see text to n 166).

obtained before a case is referred on the basis of concerns relating to counsel competence,⁷² and the Ministry's internal guidance now identifies allegations of counsel incompetence as a factor which may warrant engaging independent counsel (usually a Queen's Counsel).⁷³

Outside the bounds of such statements, the courts are careful not to intrude on the RPM process until a reference is made. Indeed, in what could be described as an endorsement of the current process, the Court of Appeal in 1992 stated that the process had 'become an integral element in the criminal justice system, a constitutional safeguard against mistakes' and that '[a] more formalised system could stimulate unmeritorious applications'.⁷⁴ The Court made much of the fact that New Zealand had not endured a 'crisis' such as that prompted by the high profile English miscarriages of justice, and took this as evidence that there was no need for reform.⁷⁵

A further aspect of this non-interference is that despite the numerous situations in which putative appellants have sought appellate intervention in circumstances where the courts considers themselves without jurisdiction, in no case has a court taken the positive step of inviting a reference from the Governor-General. In one case, the Court of Appeal reasoned that 'to go as far as to request or invite a reference by the Governor-General in Council would be to go beyond our normal province. Also it could convey a suggestion of prejudgment by this Court of the merits of the present case.'⁷⁶ A Full Court of the High Court recently endorsed this approach, reasoning that notwithstanding

⁷² *R v Sims* (n 58). Earlier, in *Burt v Governor-General* (n 20) 862 the Court had expressed its understanding that 'the current practice is that independent lawyers of standing are appointed to investigate petitions that may have substance.'

⁷³ New Zealand Ministry of Justice *Royal Prerogative Procedures Guide* (n 13) 21.

⁷⁴ *Burt v Governor-General* (n 20) 681.

⁷⁵ *Ibid* 682-683.

⁷⁶ *R v Wickliffe* [1986] 1 NZLR 4 (CA) 14.

developments regarding the justiciability of the exercise of prerogative powers, the Court of Appeal's 'careful avoidance of unnecessary incursion on the province of the Executive affords guidance of continuing application'.⁷⁷

The Executive, for its part, has taken the view that it is improper directly to ask the courts for guidance about the future exercise of the RPM when making referrals. This emerged from a policy discussion during the drafting of grounds of reference, where officials at the Ministry of Justice considered asking the Court of Appeal to comment on the appropriate test to be applied in future cases, but this was rejected as 'while the Court of Appeal might make observations on the test that the Executive relies on, it is not at the end of the day a matter of law for the Court to determine'.⁷⁸

11 The Executive Role: Assessment and Decision

The preceding section has addressed how a reference is approached once it has been made. The following section deals with the prior matter of how a petition seeking either a reference or a pardon is assessed.

(a) The Governing Conventions

The procedure is governed dominantly by constitutional convention. Operationally, perhaps the most important such convention is that 'In determining whether to exercise the Royal Prerogative of Mercy... the Governor-General acts on the advice of the Minister of Justice and does not exercise a personal discretion'.⁷⁹ This convention

⁷⁷ *Attorney-General v Palmer (Vexatious Litigant: Interim Order)* [2005] NZAR 46 (HC) [30].

⁷⁸ NZ52. The Ministry's reasoning was based on the need to retain sufficient flexibility to ensure the RPM can meet the exigencies of every case, and on the assertion that Crimes Act 1961, s 406(a) does not provide the Court with jurisdiction to consider the appropriate test for referral.

⁷⁹ NZ24 (Advice to Minister); Prior to 1983, this was pursuant to the Royal Instructions of 11 May 1917, cl VII of which required the Governor-General to obtain the advice of the Executive Council in respect of pardons in capital cases, and 'in other cases' that of 'one, at least, of his Ministers', although these

appears to be universally followed. This research spans the terms of three Governors-General, all of whom had previously held judicial office. On only one occasion did a Governor-General act other than as a passive recipient of advice. On that single occasion, the Governor General's office responded to advice from the Minister of Justice with a request for clarification cast in the following terms:⁸⁰

[The Governor-General] has informed me that [they have] one concern regarding this case. [The Governor-General] would therefore be grateful to receive a clarification on one point... While [the Governor-General] recognises that the sworn affidavit does not specifically retract the allegation, he wondered whether it would not be desirable for someone to speak to the [affiant] concerning the affidavit so that the Ministry can record her views on the matter.

The Ministry undertook the requested work, and adjusted the report accordingly, although this did not alter the substance of the advice. Further, the Minister wrote to the Governor-General to explain the practical problems if the work requested were carried out routinely:

I understand that officials did not approach the complainant in the first instance about the affidavit evidence as it was the view of the Ministry

instructions were silent as to what would occur if the Governor-General were to disagree with the advice tendered – Sir Denis Blundell, 'Some Reflections upon the office of Governor-General in New Zealand' (1980) 10 VUWLR 197, 200. *Re Royal Commission on Thomas Case (No 1)* (n 23) contains a summary of the then extant powers at 616-617. The requirement to act on Ministerial advice in the New Zealand context dates to 1867: PA Joseph, *Constitutional and Administrative Law in New Zealand* (3rd edn Brookers, Wellington 2007) 4.4.5. These provisions were not replicated in the 1983 letters patent which replaced the 1917 Instructions. In *Burt v Governor-General* (n 20) 674, Cooke P suggested that the requirement remained, either by 'convention or common law rule'. Presumably, the common law rule referred to is that 'the Crown generally can act only through Ministers or other officers who... take legal responsibility for its actions' - FM Brookfield, 'Constitutional Law (Update)' [1989] NZ Recent L Rev 217, 224. For the English position, see Smith 'The Prerogative of Mercy' (n 23) 426.

⁸⁰ NZ48.

that the onus was on the petitioner to provide a proper evidentiary basis for the petition. There are obvious practical difficulties with the suggestion that the Ministry should investigate every hearsay allegation relied upon to support an application for the exercise of the RPM....

That this was the only instance of such an intervention suggests that the convention is strong. That this is so has been particularly important given that most recent New Zealand Governors-General have been retired senior judges.⁸¹ Because of the small size of the jurisdiction (and corresponding small pool of senior judges from which Governors General are selected) the potential for conflicts of interest is apparent, and there is no formal system for recusal of the vice-regal role in such instances. This problem has arisen on at least one occasion, where an individual petitioned the High Court for a writ of habeas corpus on the basis that recourse to the RPM process was impossible, as the Governor-General had, in her former role, been the trial judge. The judge refused to hear the application on the basis that it would be inappropriate to do so, as an application for the RPM was the proper route, and that the conflict of interest 'did not cause any impediment to an application ... because, in such cases, the Governor General acts purely on advice.'⁸²

The effect of this convention is that decisions on petitions are made by the Minister of Justice, an elected politician with responsibility for the justice system as a

⁸¹ This development was prompted by the increased importance of the role following the adoption of proportional representation in 1996 and the associated tendency for minority governments – see G McLean, *The Governors: New Zealand's Governors and Governors-General* (Otago University Press, Otago 2006) 336. However, this may now be changing, as in 2011, the Queen appointed a former Chief of the NZ Defence Force as the next Governor-General: Buckingham Palace 'Appointment of new Governor-General of New Zealand' (Press Release, 7 March 2011).

⁸² *Palmer v R* Unreported, M.753-SW01, 1 June 2001 (HC) [8]. In the event, one of the grounds on which this petition eventually succeeded was that the trial judge erred in refusing to allow cross-examination relating to the complainant's prior sexual history - *R v Palmer (No 2)* Unreported, CA202/05, 11 April 2006 (CA) [39].

whole.⁸³ This creates an obvious potential for bias – both actual and apparent. Any suggestion of actual bias has been rejected by those involved with the process, notably by two senior former Ministry of Justice officials, Val Sim⁸⁴ and Dr Warren Young,⁸⁵ in a 2006 paper which argued that there is nothing ‘to suggest that Ministers have been overtly swayed by political considerations’.⁸⁶ There is much to support this view. In the cases reviewed, the Minister invariably followed the advice of officials. In only one case was it evident from the file that the Minister sought to review any of the source material personally.⁸⁷ Further, the advice provided to the Governor-General during the period examined was, without exception, identical to that provided to the Minister by his or her officials. Indeed, the Ministry’s report is usually either appended to the advice, or incorporated entirely.

Given this, it could be argued that it is also a constitutional convention that the Minister of Justice will not exercise a personal discretion in the process, although it is not clear whether it is viewed this way by those involved.⁸⁸ Even if this has not yet reached the status of constitutional convention, that Ministers have an entirely hands-off role in the process is clearly evident as a matter of practical reality, as the Minister made clear to

⁸³ Although for times in the past, an associate minister has been delegated responsibility for RPM applications, as was the case in NZ7.

⁸⁴ Formerly Chief Legal Counsel at the Ministry of Justice.

⁸⁵ Formerly Deputy Secretary for Justice, with responsibility for criminal law, criminal justice and crime prevention.

⁸⁶ W Young and V Sim, 'Criticisms of the Royal Prerogative Process and the Need for Reform' (NZLRF Miscarriages of Justice Conference 2006) [13].

⁸⁷ NZ62, where the Minister requested copies of the trial judge’s summing up and sentencing notes. In respect of the remaining applications, the Ministry’s advice was simply stamped ‘approved’ by the Minister and signed. It is possible that the Minister otherwise communicated with officials regarding applications, but there was nothing in the files reviewed to suggest this was so.

⁸⁸ This is a crucial question, as one of the key indicia of a constitutional convention is that the actors involved consider themselves bound by it: I Jennings, *The Law and the Constitution* (5th edn University of London Press, London 1959) 136.

one petitioner who was critical of his lack of personal involvement:⁸⁹

I do not review the complete Ministry file compiled by the Ministry in considering a RPM application. It would be impracticable for me to do so. It is the Ministry's job to assemble and assess the relevant information and provide a full report on it to me which I consider, alongside the application itself.

The result of this chain of delegations in practice is that when applications are received by the Governor-General, they are immediately referred to the Minister of Justice for formal advice. The Minister, in turn, refers them to officials at the Ministry of Justice for review. For all practical purposes therefore, the substantive task of reviewing and advising on petitions falls to officials in the Ministry of Justice.

While there is nothing to indicate actual bias in the process, the risk of apparent bias, or simply of petitioners feeling that their grievance has not been given a fair hearing, is more difficult to mitigate.⁹⁰ This is particularly so given the high political profile which reviews can obtain. Some matters inevitably become causes célèbres attracting considerable media attention, and the Ministry is then involved in briefing the Minister as to how to respond.⁹¹ In such cases, media outlets may seek disclosure of the RPM files under freedom of information legislation.⁹² In others, applicants have threatened to go to the media if certain steps are not taken.⁹³ The political risks are acute, as the conventions and working practices surrounding the exercise of the RPM are

⁸⁹ NZ24.

⁹⁰ Then Justice Minister Phil Goff acknowledged this in a 2004 interview: 'It opens up the possibility that a Minister of Justice ... could be subject to pressure from public opinion in a way that would lead him or her not to be impartial or equitable' A Young, 'Goff plans tougher pardon rules' *New Zealand Herald* (Auckland 3 January 2004).

⁹¹ Eg NZ33 and NZ10.

⁹² Eg NZ10.

⁹³ Eg NZ35.

not widely appreciated. As one former Minister of Justice observed, 'There is a bit of a misconception among some supporters of some people who have been convicted that the minister should be able to waltz in and all the minister needs is "the courage" to pardon or to refer to the Court of Appeal.'⁹⁴

The Minister of Justice is not the only political actor with a role in this process. Other Members of Parliament may also lobby the Minister or make representations or inquiries.⁹⁵ As the Minister is responsible to Parliament, this may include responding to Parliamentary questions regarding the conduct of investigations.⁹⁶ Creditably, such discourse appears to be conducted reasonably. For example, one opposition MP wrote to the Minister requesting permission to approach a QC conducting a peer review,⁹⁷ but accepted the Minister's response that it could be construed as improper political interference with a legal process.⁹⁸ While this is so, in high profile cases the political pressure on Ministers to act can be immense.⁹⁹

⁹⁴ Goff, quoted in Young (n 90). This perception is sometimes fuelled by senior practitioners in their dealings with the media - eg, 'Ellis's lawyer seeks talks with Clark' *The Dominion* (Wellington December 3 1999). Such misconceptions were evident in NZ22 where issue was taken with the fact the Governor-General (who was perceived to be independent) was not personally reviewing their application, but rather staff at the Ministry of Justice and NZ1 where the Minister rejected a request to conduct a personal review on the basis that it would be constitutionally improper for this to occur (and similarly NZ11).

⁹⁵ NZ14 (opposition MP made numerous objections to way inquiry and peer review conducted), NZ33 (MP asked Parliamentary question regarding petition); NZ48 (Government MP made enquiries of Minister regarding conduct of review); NZ51 and NZ59 (shadow Minister of Justice involved).

⁹⁶ As in NZ16 and NZ33.

⁹⁷ The role of peer reviewers is discussed below (see text to n 119 and following).

⁹⁸ NZ15.

⁹⁹ See, eg the statements in the following front page stories in national newspapers, 'Goff rebuffs Ellis petition' *The Dominion Post* (Wellington 10 June 2003): 'A petition signed by former Labour prime ministers David Lange and Mike Moore, plus lawyers, writers and media people, has been circulating Parliament, attracting signatures across the political spectrum.'; and, 'Waugh to seek mercy on Goff's advice' *The Dominion* (Wellington November 16 2000): 'Mr Waugh's supporters include several Government ministers, including Police Minister George Hawkins, and Government and Opposition MPs, according to a submission to the Government demanding an independent inquiry'. The focus on the Minister as a politician rather than a constitutional officer is evident in most media reporting - eg, 'Wake up Phil Goff and smell the injustice' *Sunday Star-Times* (Auckland August 10 2003). Similarly, in such high profile cases, members of the public will frequently write to the Minister (or, indeed, the Prime Minister) to protest the applicant's innocence.

Additionally, decisions to refer are subject to Cabinet approval.¹⁰⁰ However, it seems that this is more of a rubber stamp rather than a further hurdle. Indeed, Cabinet consideration occurs after the petitioner has been informed by the Governor General that their case is to be referred, as was noted by a memorandum from the then Minister of Justice to the Prime Minister requesting that such a matter be considered urgently:¹⁰¹

Cabinet is required to approve the submission of an order to the Executive Council referring cases back to the Court of Appeal. In the past Cabinet has considered references...directly... This is partly due to the confidential nature of the subject matter and the unique nature of the approval that is required. It is important to this matter to be resolved as soon as possible because the Governor-General has informed [the petitioner] that his application for mercy has been granted and that the question of his conviction will be referred to the Court of Appeal

Thus while there is nothing to suggest any overt political influence in the process, the risk of less overt influence remains. Further, even the most scrupulous of ethical practices cannot dispel the appearance of bias caused by the fact that the decision maker is the lead minister in respect of the justice system as a whole¹⁰² and is accountable to both Parliament and the electorate for any flaws which may be unearthed.

(b) The Ministry's Personnel

The Ministry does not have a unit which is dedicated to conducting RPM reviews, nor

¹⁰⁰ This is because the referral power in Crimes Act 1961, s 406 is vested in the Executive Council. This means that the standard process for Cabinet papers must also be complied with: New Zealand Cabinet Office, *Cabinet Manual* (Government Printers, Wellington 2008).

¹⁰¹ NZ3, a similar note can be found in NZ38.

¹⁰² Responsibility for the detection, investigation and prosecution of crime lies with the Minister (and Commissioner) of Police and the Attorney-General.

does it employ any staff who are specifically dedicated to this task.¹⁰³ For the most part, the substantive review of RPM applications is carried out by the Ministry's general legal advisers.¹⁰⁴

In recent years, a number of routine reviews have been carried out by a former Ministry staff member in practice at the independent bar,¹⁰⁵ who currently performs the role of 'Royal Prerogative Special Counsel', with various responsibilities for the functioning of the RPM process.¹⁰⁶ While the Special Counsel is independent from the Ministry in the sense that he is not a Ministry employee, the ties between him and the Ministry are such that any distinction between the role he fulfils and that fulfilled by Ministry employees when conducting reviews is of little practical consequence. The same process is followed during reviews, including oversight by Ministry managers.¹⁰⁷

The lack of dedicated staff has prompted the criticism that the officials who conduct reviews lack the required expertise and experience.¹⁰⁸ This point emerged strongly from a 2003 review of the Ministry's practice, where the 'small pool of experience' in the RPM area and 'regular changes in staffing' were identified as weaknesses.¹⁰⁹

Sim and Young argued that this ought not to be overstated, as there is no reason to question the legal ability of the officials who carry out the work, and 'their draft reports

¹⁰³ The role of 'Royal Prerogative Manager' is currently performed by the Ministry's Manager, Ministerial Advice - New Zealand Ministry of Justice *Royal Prerogative Procedures Guide* (n 13) 5.

¹⁰⁴ Ibid 6. There is now a degree of specialisation, in that only one of the two teams in the Ministry's Office of Legal Counsel conducts RPM work, and RPM work is conducted by practising solicitors within this team.

¹⁰⁵ Eg NZ6, NZ20, NZ23, NZ54.

¹⁰⁶ New Zealand Ministry of Justice *Royal Prerogative Procedures Guide* (n 13) 5.

¹⁰⁷ Ibid.

¹⁰⁸ Eg, 'Goff defends officials' advice to reject trio's plea for pardon' *The Dominion* (Wellington May 3 2000).

¹⁰⁹ New Zealand Ministry of Justice, *Royal Prerogative of Mercy: Practices and Procedures in the Ministry of Justice* (Wellington 2003) 12.

are always reviewed and signed by managers who have typically had significant practical experience in the criminal process'.¹¹⁰ While, as of 2012, it is no longer the case that the reviewing and signing managers have such experience, to some extent the concerns raised in the 2003 review have been mitigated by the creation of more centralised guidance (including a 38 page procedures guide), accompanied by increased managerial oversight of the process. Case plans are now agreed before a review commences, involving the identification of the issues raised and the proposed methodology for dealing with the petition.¹¹¹ Before the Ministry's advice is submitted to the Minister for decision, it will be reviewed by the Chief Legal Advisor, who signs the advice. The Chief Legal Advisor often has significant involvement, particularly in respect of complex and high profile applications.¹¹² Further, where inexperienced reviewers conduct reviews, there was evidence of multiple drafts and peer review by more experienced colleagues.¹¹³

It is evident that the procedures guide is heavily relied upon. Most files reviewed contained notes made from it, or photocopied passages with relevant parts highlighted.¹¹⁴ Passages from the periodically updated procedures guide are frequently pasted verbatim into reports.¹¹⁵ However, it is also apparent that the policies laid down in the procedures manual are not always closely followed.¹¹⁶

While these developments are promising in that they promote consistency in

¹¹⁰ Young and Sim (n 86) [18].

¹¹¹ Although these vary in their thoroughness, with a particularly thorough example being evident in NZ4, and more cursory examples present in other cases.

¹¹² Although there are examples of such involvement in more mundane cases, such as NZ5, relating to a summary offence, where the Chief Legal advisor was active in responding to correspondence from the petitioner, as well as in reviewing multiple drafts of advice. Cf New Zealand Ministry of Justice *Royal Prerogative Procedures Guide* (n 13) 5.

¹¹³ Eg NZ29.

¹¹⁴ Eg NZ7.

¹¹⁵ This is apparent in virtually all reports reviewed, and to this end the procedures guide contains as an appendix 'sample passages' for inclusion in formal reports.

¹¹⁶ For example, with regard to communications with applicants, see text to n 242.

approach, there remains an evident problem caused by the low throughput of cases making it difficult for institutional knowledge or expertise to build up.¹¹⁷ Sim and Young again argue that the '[t]he significance of this should not be overstated, since in practice many difficult and high profile cases have been contracted out to, or peer reviewed by, a senior counsel or a retired High Court judge'.¹¹⁸ Whether this can truly be said to ameliorate these problems is considered in the following section.

(c) Independent Counsel / Peer Review

The decision to appoint independent counsel to conduct the substantive review of a particular application, or to peer review the Ministry's draft advice will usually be made in consultation with the Minister.¹¹⁹

As a preliminary point, it should be noted that this is quite different to the situation, discussed above, where the Ministry contracts out routine reviews to a former staff member now in practice in the independent bar. In one case, this barrister was retained to conduct an ostensibly independent peer review of the Ministry's advice. In this case, the advice to the Governor General was prefaced with the statement that:¹²⁰

The Ministry engaged [the barrister] to conduct a peer review of the Ministry's advice on the petitioner's first application and to assess his second application. ... We have carefully reviewed [the barrister's] report and consider that it is robust.

¹¹⁷ For example, NZ30 and NZ50 both involved applications for exercise of the RPM in respect of sentence but not conviction – in both cases, the files and advice to Ministers noted that such an approach was novel, and each attempted (from scratch) to discern principles which ought to apply to its use. Young and Sim (n 86) acknowledge this problem at [18].

¹¹⁸ Young and Sim (n 86) [18], although they go on to note that experience in NZ and overseas suggests that 'not all applications require the involvement of a QC, an experienced criminal barrister or even someone with previous courtroom experience'.

¹¹⁹ New Zealand Ministry of Justice *Royal Prerogative Procedures Guide* (n 13) 22.

¹²⁰ NZ19.

While there was nothing to indicate that the investigation conducted was anything other than thorough and professional, an issue of apparent bias must arise given that the reason for referral is often an allegation of bad faith on behalf of the Ministry, and such barristers will be reliant to at least some extent on the Ministry for continuing instructions. Further, this barrister played a large part in authoring the guidelines followed by the Ministry. As this was the only instance of such a review occurring in the period examined, it would appear that this was an unusual case, and for the reasons surveyed above, it ought not to recur.

Putting this unusual situation to one side, the counsel engaged are senior – usually a Queen’s Counsel, but in particularly high profile cases a retired High Court judge may be instructed.¹²¹ The main reasons for appointing counsel for the purposes of peer review are that an application has a high public profile, or is otherwise complicated.¹²² Consideration will be given to appointing counsel to conduct the substantive review where there is an identified lack of expertise within the Ministry, for example, where trial counsel incompetence is alleged,¹²³ or where ‘assessment of a key witness’s credibility is required, particularly if done by personal interview’.¹²⁴ These practices seem to be the result of an endorsement of past appointments by the Court of Appeal.¹²⁵ However, this may not mean that the outside counsel will conduct the entire review, and they may be brought in to carry out discrete tasks – in particular, interviewing witnesses.¹²⁶ Additionally, consideration will be given to appointing external counsel where a fresh

¹²¹ Eg NZ26, NZ10, NZ58.

¹²² New Zealand Ministry of Justice *Royal Prerogative Procedures Guide* (n 13) 21. This occurs only in the minority of applications, and is not the ‘invariable practice’ as Crown counsel advised the Privy Council in *R v Barlow* [2009] UKPC 30 [4].

¹²³ Eg NZ59: ‘As the main focus of the petition is on the conduct of the trial by defence counsel, the Ministry of Justice has sought advice from experienced trial counsel’.

¹²⁴ New Zealand Ministry of Justice *Royal Prerogative Procedures Guide* (n 13) 21.

¹²⁵ See text to n 72.

¹²⁶ Eg NZ65 (QC re-interviewed complainant where retraction alleged).

application challenges the Ministry's previous advice to decline an application.¹²⁷ These are not fixed categories, however, and on one occasion external counsel was appointed following receipt of an application for judicial review.¹²⁸

Considering the weight which is put on the involvement of external counsel in the process,¹²⁹ it is necessary to consider the relationship between such reviewers and the Ministry. As professional relationships, these are governed by letters of instruction. These are not standard, and vary in their terms. In a peer review case, the reviewer is usually instructed to conduct a review on the basis of the material before them, and a characteristic letter of instruction in such a case asks the reviewer to consider:¹³⁰

(1) Whether the Ministry's report deals adequately with the issues raised in the petition, and if not what issues require further investigation and analysis; (2) Whether you agree with the Ministry's conclusions on the relevant issues; and (3) Whether you agree with the Ministry's overall conclusions...

However, this is not invariable practice, and sometimes the reviewer is instructed to both consider the matters raised and make any further inquiries he or she considers necessary,

¹²⁷ New Zealand Ministry of Justice *Royal Prerogative Procedures Guide* (n 13) 21. Eg NZ13, which was reviewed by a QC following an accusation that the Ministry of Justice had acted corruptly, and NZ19 where this was reviewed following an allegation of bad faith and predetermination. Although understandably this course is by no means automatic, eg NZ24 where non-specific and abusive accusations of corruption were made, and were met with a robust response.

¹²⁸ NZ38.

¹²⁹ Both to fill gaps in expertise, as suggested by Young and Sim (n 86) [18] and to reassure the public that the process followed is independent - eg 'The petition had been referred... to a QC... for full, independent advice', 'Goff takes stand against slow mercy plea system' *The Press* (Christchurch May 26 2003); 'Justice Minister Phil Goff asked former High Court judge Sir Thomas Thorp to conduct an independent review...', 'Back to court for Wanganui ex-top cop case' *The Evening Post* (Wellington June 21 2002); 'The report was independently reviewed by retired High Court judge Robert Fisher', 'Barlow's plea for pardon rejected' *The Dominion Post* (Wellington October 18 2006).

¹³⁰ NZ10.

including conducting interviews.¹³¹

Where external counsel are retained to conduct substantive reviews, the terms of reference are usually wider – for example, in one case a retired judge was asked to:¹³²

conduct such investigations as he considers necessary to assess whether there may have been a miscarriage of justice... if there may have been a miscarriage of justice, to advise whether this is an appropriate case for the exercise of the RPM.. . if he considers that this is an appropriate case for the exercise of the RPM, to advise whether this is an appropriate case for a pardon or for a referral to the courts under s 406(a) or (b) of the Crimes Act 1961... To make further recommendations as to any further inquiry that may be desirable in the light of his findings

External counsel are not asked to approach these matters from first principles, but are instead provided with materials which 'set out the approach that has been settled and adopted by the Ministry and successive Ministers of Justice'.¹³³ They are also provided with guidance as to the approach to take, as in one letter of instruction which attached advice received in a similar case.¹³⁴

We enclose the latter document to give you an example of the approach adopted by a previous reviewer of Ministry advice that the Ministry found quite useful. As you will note, [the QC] conducted the review by considering all relevant materials provided... by the Ministry and having

¹³¹ NZ38 of NZ26, where reviewing counsel noted that they were specifically instructed not to conduct further inquiries.

¹³² NZ58.

¹³³ NZ10.

¹³⁴ NZ10. The letter of instruction further stated that 'When you have had an initial opportunity to review the documents, I would be grateful to have a short discussion on how you propose to approach the review'.

regard to the relevant case law relating to principles applicable to applications for the exercise of the Royal Prerogative. [the QC] then noted the documentation that [he or she] did not review, made specific comments on the draft advice of the Ministry, which was set out in a Schedule, and indicated [their] view on the correctness of the conclusion reached by the Ministry on the application. I commend this approach for your consideration.

Not all peer reviewers are willing to accept these constraints. On one occasion, a reviewing QC disagreed with the Ministry's approach and argued that a lower standard for referral ought to be applied. In the Minister's advice to the Governor-General, it was argued that this was in part caused by a misunderstanding on the QC's part about the Ministry's processes, but that:¹³⁵

Notwithstanding this misunderstanding, it is clear that [the QC] favours a different and lower standard for reference of a case back to the courts... [The QC] argues that a "low standard" is appropriate when considering the exercise of the Royal Prerogative. His proposed test is "whether it is reasonably arguable that the evidence is fresh and whether the evidence is arguably capable of pointing to an outcome which might reasonably lead the jury to a different verdict". The focus is on whether the case is arguable rather than on the cogency of the evidence... I would have reservations about applying this test in future applications. The Royal Prerogative is an extraordinary remedy. It is the constitutional safeguard against miscarriages of justice. It is not merely a further right of appeal. That being the case some rigour needs to be applied to the analysis. That

¹³⁵ NZ52.

has to date required Her Excellency's advisers to consider the cogency of fresh evidence at least to the extent of assessing whether the evidence is capable of pointing to a likely miscarriage

The report went on to note substantive differences between the Ministry and the QC regarding the assessment of the various pieces of evidence. The Minister advised that it was inappropriate to 'choose' between the reviewing QC's report and that of the Ministry, but that the appropriate course of action was to refer the matter to the Court of Appeal. In the event, the matter was referred to the Court of Appeal and the conviction was quashed.

In other cases, the process is more collaborative. A draft copy of the reviewer's comments (and covering letters) are sometimes even provided in 'track changes' format for the Ministry's comment.¹³⁶ On occasion, the Ministry will go back to the reviewer for reassurance on points of concern.¹³⁷ On the one hand, it could be argued that this represents a desirable, dialectic, style of review, which enhances the robustness of the finished product. On the other, it may be argued that it has the potential to undermine the confidence-enhancing function of the involvement of independent counsel of standing. This tension is evident in one case where there was a clear difference of opinion between the reviewing QC and the Ministry regarding the disposition of an application.¹³⁸ The QC's original report concluded that 'My opinion is, that this is without doubt a proper case for the Governor-General to exercise the prerogative of mercy... there is a sufficient foundation for an appeal which competently argued, in my opinion has an excellent chance of success'. The Ministry met with the QC, and held discussions, after which the

¹³⁶ Eg NZ10 (in this case, the substantive changes recommended were incorporated entirely into the final report).

¹³⁷ Eg NZ10 where the reviewer at the Ministry emailed the external counsel seeking reassurance following 'a minor crisis of confidence' regarding aspects of the final report.

¹³⁸ NZ59.

QC issued a revised report which watered down some of his previous comments, but concluded that ‘I am troubled by this matter... It plainly is material that has a bearing on the case, and perhaps ever so finely, the case does suggest that perhaps it should be reviewed by a court and the petition perhaps allowed. I would like to discuss this matter with you again’. It is unclear from the file if there were further discussions with the QC, but the advice to the Minister (issued less than two weeks later) indicated that the QC agreed with the Ministry’s report, and recommended that the application be refused. The advice to the Minister made no mention of the QC’s misgivings, or initial strong views regarding the desirability of a referral.

In addition to such disagreements regarding the correct approach, it is apparent that some reviewers are more demanding than others in terms of what degree of investigative work is appropriate. In one instance, it was evident that the reviewer had gone back to the Ministry repeatedly to request that further research work be carried out.¹³⁹

Overall, therefore, the operation of the external review process is inconsistent, depending in particular on the terms of instruction and the working style of the particular reviewer instructed. As public confidence in the outcome is one of the main reasons behind the involvement of external counsel, and the independence of peer reviewers is often questioned by applicants or interested parties,¹⁴⁰ it is of concern that the process for appointing external counsel (and the terms of such appointments) is somewhat opaque. There is no published guidance explaining the criteria for appointments, and the decision as to who to retain is made by the Ministry’s Chief Legal Counsel as required. While the pool of qualified candidates - suitably experienced Queen’s Counsel or retired High Court

¹³⁹ NZ26.

¹⁴⁰ This was particularly evident from the correspondence in NZ16 and NZ38.

Judges - is quite small, it is evident that the Ministry generally appoints the same individuals repeatedly. While there are sound practical reasons for doing so, given the desire to retain a pool of individuals with experience and skill in dealing with RPM applications, the continued retention of particular reviewers detracts somewhat from the credence which can be awarded to claims of independence.¹⁴¹ Similarly concerning in this regard is that while external counsel's reports are normally either made public or provided to the petitioner, on occasion they will be withheld.¹⁴²

(d) Applications

The initial problem faced by Ministry staff approaching petitions for the exercise of the RPM is that, while some applications are detailed, lengthy documents which have been painstakingly prepared by counsel,¹⁴³ most are prepared personally by petitioners without assistance.¹⁴⁴ Many exhibit an extremely poor command of English. The consequence is that Ministry staff are left to translate barely comprehensible concerns and complaints into a legally cognisable form which can then be examined as part of the RPM process.¹⁴⁵ Where this is not possible, the result has in the past been a time consuming bureaucratic

¹⁴¹ It should be noted that the reviewers involved are senior practitioners who, from a review of the administrative correspondence with the Ministry, have pressing demands on their time. As such, it is unlikely that the possibility of further instructions from the Ministry would prompt them to alter the substance of their advice. The threat is rather that the Ministry might be perceived as favouring those individuals who share the Ministry's views as to the scope and limits of the RPM process.

¹⁴² As in NZ38 (where legal professional privilege was cited) and NZ58 (on the basis of a more generalised assertion of confidentiality). Correspondence between the Ministry and another peer reviewer indicated that the reason for disclosure is that 'in most high profile cases it is generally considered prudent to disclose the advice, or there will be the impression that we are hiding something (eg, that we acted contrary to our peer reviewer's advice'. Disclosure and natural justice are considered in greater detail below - see text to n 241 and following.

¹⁴³ Eg NZ25, which ran to almost 200 pages; NZ46.

¹⁴⁴ The consequences of this for individual applicants are considered below - see text to n 228 and following.

¹⁴⁵ Frustration at this is evident in NZ24, where the report to the Minister stated that 'The petitioner has not set out a straightforward list of grounds on which his petition rests. There are a range of statements, allegations, and submissions to be found in his hand-written application and in supporting papers he provided. We have, from these materials, endeavoured to distil and crystallise his concerns'; and similarly NZ44 and NZ53.

exercise whereby reports were prepared for the Minister (and thence to the Governor-General),¹⁴⁶ suggesting that the applicant be offered an opportunity to re-draft their application. A recent innovation is a process whereby if it is apparent that an application received by the Governor-General may require further clarification, submissions or evidence, the Governor-General's office can seek advice from the Ministry prior to accepting the application.

There is little scope for the Ministry themselves to assist applicants, with requests for further assistance met with a recommendation to seek legal advice.¹⁴⁷ However, tentative steps have been made towards providing more clarity about the process and its limitations and requirements. In late 2009 a standardised application form was developed, and is now available to potential applicants. This appears to have been modelled on that provided by the English CCRC, and solicits the same key pieces of information.¹⁴⁸ While it is too soon to judge the impact of this, it would seem highly unlikely that it alone will solve the problem.

(e) Screening / Reapplications

The first stage which all applications for the RPM go through is a screening process with the modest aim of making a 'quick check on the application to see if it meets the basic eligibility requirements'.¹⁴⁹ These requirements are not particularly stringent. What is required is a 'specific submission that a miscarriage of justice has occurred in the applicant's case' and there must be 'information or argument offered in support of that submission'.¹⁵⁰ The effect of this on the cases reviewed was limited, apart from a small

¹⁴⁶ As in NZ1 and NZ31.

¹⁴⁷ Eg NZ40.

¹⁴⁸ This might act to counter one of the frequent deficiencies in applications, namely a lack of specificity.

¹⁴⁹ New Zealand Ministry of Justice *Royal Prerogative Procedures Guide* (n 13) 8.

¹⁵⁰ Ibid 16.

number of applications which were manifestly inadmissible,¹⁵¹ and one which did not raise any coherent grounds.¹⁵²

A further purpose of the screening process is to ensure that applicants have (other than in exceptional cases) exhausted their appeal rights.¹⁵³ Thus, if an applicant has extant appeal rights to the Court of Appeal,¹⁵⁴ the Ministry's general policy is that no application for RPM will be considered.¹⁵⁵

The Governor-General's powers under the Royal Prerogative of Mercy, as vested in his office by the Letters Patent, are broad. However, advice from successive Ministers of Justice has been that exercise of those powers is generally not entertained where an applicant has not exhausted his or her rights of appeal. This reflects the general principle that the Court, and not the Executive branch of Government, is the proper forum for reconsideration of a person's criminal conviction and sentence...

While this can result in a summary rejection of a petition,¹⁵⁶ this is far from an absolute rule.¹⁵⁷ In some cases, a detailed review takes place even though an applicant has not previously appealed at all.¹⁵⁸ It is usually difficult to discern precisely why an individual

¹⁵¹ Eg NZ32, which related to a civil and not criminal order. See similarly NZ37. Perhaps because of the apparently innominate nature of the RPM jurisdiction, applications often traverse numerous extraneous matters, which are then referred to the appropriate body (eg NZ7, relating to allegations of mistreatment in prison which were referred to the Prison inspectorate).

¹⁵² NZ1, where the application consisted largely of generalised accusations, and the application was rejected on the basis that the grounds for application were not clearly identified.

¹⁵³ New Zealand Ministry of Justice *Royal Prerogative Procedures Guide* (n 13) 16.

¹⁵⁴ The Ministry's current practice is that because of the limited grounds on which the Supreme Court will grant leave to hear a criminal appeal, petitioners will not be required exhaust Supreme Court appeal rights.

¹⁵⁵ NZ5 (Advice to Minister); similarly NZ7 and NZ29.

¹⁵⁶ Eg NZ42, where exercise of the RPM was sought immediately after conviction, where appeal rights had not been exhausted.

¹⁵⁷ See NZ58, where the Minister was advised that 'There is no requirement that an applicant exhaust his or her avenues of appeal before applying for the Royal Prerogative. However, it has been Ministry practice to defer consideration of a petition until appeal rights have been pursued.'

¹⁵⁸ Eg NZ17, NZ29 (where the report to the Minister noted that 'for completeness' the Ministry had reviewed the sentencing notes, trial judge's summing up, transcript of evidence at trial and judgments on

has applied for the exercise of the RPM without exhausting appeal rights, as this information is not specifically requested.¹⁵⁹

Due to the nature of the process, the Governor-General must be open to re-applications, and many applicants can aptly be described as ‘repeat customers’.¹⁶⁰ Unless these applications are manifestly inadmissible, each requires the tendering of formal advice, dealing with the grounds raised in some detail, a fact lamented in prefatory comments in one application, the sixth by the applicant concerned:¹⁶¹

On each of the five previous applications, the Ministry conducted a thorough review of the issues raised and each time, in its report, the Ministry advised that the application had failed to provide fresh evidence capable of pointing to a likely miscarriage of justice. Accordingly, the Ministry has, on five separate occasions, recommended that [the] application be declined.

The importance of remaining open to re-applications, even on the same grounds which have already been rejected, can be seen by one such case, which resulted in a referral and quashing of a serious conviction by the Court of Appeal.¹⁶² Moreover, sometimes re-

preliminary matters). In NZ40, the application was treated as if legal remedies had been exhausted because nearly fifty years had passed since the time of the original conviction, and there was little chance of a Court granting leave to appeal out of time. In NZ54 this occurred as the petitioner was ‘distinctly uncomfortable with the legal process, felt discouraged by her discussions with other lawyers, and was not sure what to do next. In the circumstances, we considered that it would be no less expedient to proceed with consideration of the petitioner’s application’.

¹⁵⁹ Cf NZ29 where it is clear from a response from a petitioner’s counsel that they had not appealed due to the cost of doing so.

¹⁶⁰ Usually in relation to the same matter, but often in relation to a range of matters, civil or criminal, covering a wide temporal period, as in NZ51 where an applicant also applied in relation to an employment dispute.

¹⁶¹ NZ66 (Advice to Minister).

¹⁶² NZ52, see also NZ3 where a second petition on slightly different grounds was successful; there are also examples to be found outside the timeframe considered, such as Ross Appelgren’s murder conviction which was the subject of two references in somewhat unusual circumstances – a first reference resulted in his conviction being quashed, but he was re-convicted following a re-trial. An appeal against his re-conviction was refused (*R v Appelgren* (1992) 9 CRNZ 628 (CA)), but a further reference was made by the

applications are made after further investigative work, and thus raise issues that have not previously been considered.¹⁶³

Thus, the screening which is conducted is quite cursory. There is no apparent attempt to triage applications (save for the process whereby the Governor-General's office may seek advice prior to accepting an application), and while applications from those detained are prioritised, the same approach is followed with respect to applications in respect of summary and indictable convictions.¹⁶⁴

(f) The Substantive Task

The substantive task for the Ministry is to determine whether to recommend either the grant of a pardon, or that the matter be referred back to the relevant court under either section 406(a) or (b) of the Crimes Act 1961. As the grant of a pardon is a remote and most unlikely possibility, the Ministry considers each petition through the lens of whether a referral under section 406 ought to be made. The key question therefore becomes: in what circumstances will a referral be contemplated?

The wording of section 406 confers a broad discretion regarding when such a reference is appropriate. However, the Ministry takes the view that this does not mean the power is unfettered, and considers that it is circumscribed by constitutional convention. In particular, care is taken to ensure that the Executive is not perceived as interfering with judicial functions. This results in some considerable limitations on the

Governor-General following subsequent developments - *R v Appelgren* Unreported Minute, CA132/94, 18 November 1994 (CA); a similar series of events occurred in the case of Arthur Allan Thomas, see Royal Commission to Inquire into the Circumstances of the Convictions of Arthur Allan Thomas (n 28).

¹⁶³ Eg NZ59.

¹⁶⁴ Eg. NZ4, NZ5, NZ6 and NZ19 where considerable time was spent investigating legal issues raised in an application relating to summary convictions, including in one case obtaining an expert opinion. This represents a principled decision by the Ministry that a potential miscarriage of justice is serious irrespective of whether it relates to a summary or indictable matter.

reach of the process.

Correcting Appellate Errors

Perhaps the most significant consequence of the reluctance to interfere with the judicial process is that, where the grounds raised on a petition are identical to those already ventilated before the Court of Appeal, an application will generally be dismissed in short order.¹⁶⁵ The constitutional considerations which lead to this constraint are clear from the advice tendered to Ministers in such cases - for example:¹⁶⁶

In essence, the applicant has invited Her Excellency to assess the same material and arguments considered by the Court of Appeal and substitute her view of the appellant's case for the decision reached by the Court. This is not the purpose of the prerogative of mercy and there can be no justification for the Executive to interfere with the Court's decision where there is no new material or argument presented to support a claim that there has been a miscarriage of justice.. For that reason alone, we have set aside without further consideration all the issues raised on appeal...

The Ministry takes particular care in this regard, and may also exclude matters which have already been raised before the appeal court, even if they were not explicitly dealt with in the court's judgment.¹⁶⁷

Though [the Appeal Court judge] does not in his judgment traverse the specific points raised by [the Petitioner], his decision to dismiss the appeal

¹⁶⁵ For the Court of Appeal's view on this matter, see text to n 71.

¹⁶⁶ NZ9 (Advice to Minister); another common formulation, is that in NZ6 (Advice to Minister): 'it is important to emphasise that the prerogative of mercy does not operate as another right of appeal or as a vehicle for an applicant to relitigate matters that have been properly determined by the courts'.

¹⁶⁷ NZ6 (Advice to Minister).

must be regarded as having dealt with these matters...

The concern appears directed towards not being seen to be second guessing the courts. Thus, while the Ministry still considers it relevant that particular matters could have been ventilated before the appeal court, but were not because an appeal was abandoned, it has in the past applied this constraint with considerably less stringency:¹⁶⁸

In applying the criteria, we have had to consider how to approach some issues raised in the petition that, but for the petitioner's decision to abandon his appeal, could have been raised and determined at that appeal. The [RPM] is not an alternative vehicle for a convicted person to raise issues about his or her conviction that are properly the subject of an appeal. While these issues raised by the petitioner probably fail the "fresh evidence" principle for the exercise of the [RPM] because the petitioner had an opportunity to argue them before the Court of Appeal, for completeness we have also considered whether the issues have any merit.

The constitutional constraint is not entirely absolute, as the Minister is invariably advised that a court could be asked to re-examine a case if 'some new matter has come to light which makes a reconsideration of the ground necessary or desirable'.¹⁶⁹ This does leave the door open to reconsideration in some circumstances, however the Ministry's practice is that this is reserved for exceptional circumstances:¹⁷⁰

It is neither necessary, nor appropriate for us to comment on [the

¹⁶⁸ Eg NZ38 (Advice to Minister). However, as a result of the Court of Appeal's recent widening of the grounds on which it will permit an abandoned appeal to be resurrected (see text to n 102 in ch 2), the Ministry will now, consistent with its concern not to trespass into the courts' domain, require an applicant to seek to have the abandonment set aside and the appeal heard.

¹⁶⁹ This is the usual wording, eg NZ9 (Advice to Minister).

¹⁷⁰ NZ28 (Advice to Minister); and similarly NZ31.

Petitioner's] view that the Court of Appeal decision was wrong. The circumstances would need to be exceptional to justify overruling a Court of Appeal decision by issue of a free pardon in the absence of cogent and compelling evidence... Nor is it appropriate for the Governor-General to refer a question that has already been explicitly decided by the Court of Appeal back to that Court under section 406(a) of the Crimes Act 1961 unless some "new matter has come to light which in the opinion of the Executive Council makes a reconsideration of a ground of appeal necessary or desirable"

Thus, an exception has been made where the appeal court process was manifestly deficient.¹⁷¹ There is also some evidence that criticisms of appeal court decisions are considered to at least some extent during the examination of other 'fresh' matters.¹⁷² However, the effect of this should not be overstated. As Sim and Young admit:¹⁷³

In practice, there is also a reluctance... to consider the extent to which the rules and procedures of the court may have resulted in a miscarriage of justice or to revisit decisions of the Courts on matters of evidence and procedure.

This is said to be 'understandable and appropriate', as the rules 'have been developed to ensure a fair and efficient process', and any deficiencies ought not be redressed by grafting 'an inquisitorial process run by the Executive onto the tail end of the adversarial

¹⁷¹ NZ8 (Advice to Minister): 'The petitioner's appeal was on the papers, legal aid having been refused and the petitioner being neither represented nor present. The Privy Council found, in *Taito v R*, that the process by which such appeals were carried out was not authorised by, and did not comply with, the appeals legislation... In light of the issues surrounding the petitioner's appeal, we have considered his submissions as if they had not been previously dealt with by the Court of Appeal.'

¹⁷² Eg NZ9, where the advice to the Minister noted that 'Nevertheless having reviewed the relevant files, the Ministry reports that [the Petitioner's] criticisms of the Court of Appeal decision are without foundation'.

¹⁷³ Young and Sim (n 86) [8].

process'.¹⁷⁴ This reluctance was manifested in one application made on the basis of alleged procedural errors by the Court of Appeal, where the advice to the Minister was that it was unclear if there would be jurisdiction to make such a reference.¹⁷⁵

It should be stressed that we are not aware of a case involving procedural irregularities having been referred back to the Court of Appeal under section 406(a) of the Crimes Act. Simultaneously, however, it is certainly the case that criminal appeals from the Court of Appeal to the Judicial Committee of the Privy Council are possible on the grounds of incorrect practice or procedure. However, the scope for such appeals has been kept within narrow limits...

The wider availability, since 2004, of further appeals to the New Zealand Supreme Court may have the effect of hardening such views.

Requirement for fresh evidence

The consequence of this reluctance to re-examine grounds which were, or could have been, raised before an appeal court is one of the most common criticisms of the extant process. This criticism is that petitions can only gain traction if the petitioner is able to provide fresh evidence, and that this 'makes a nonsense' of the claim that the process is an effective 'safeguard against mistakes'.¹⁷⁶ Sim and Young, have argued that this criticism is¹⁷⁷

¹⁷⁴ Ibid [9].

¹⁷⁵ NZ51 (Advice to Minister), in that case no definitive conclusion was reached as 'even assuming' that jurisdiction existed, the substantive grounds were considered unmeritorious.

¹⁷⁶ See, most prominently, L Hood, *A City Possessed : the Christchurch Civic Crèche case* (Longacre Press, Dunedin 2001) 581-591.

¹⁷⁷ Young and Sim (n 86) [5] – [6].

at best overstated and at worst without foundation... [t]here is no requirement that there be fresh evidence; the overriding consideration is whether there is a real risk of an injustice. Arguably, this approach is not significantly different from, and certainly not narrower than, that taken by the Criminal Cases Review Commissions... in England and Scotland

However, they go on:

In practice, of course, the fact that the person reviewing the application has a serious doubt about proof of a conviction is not regarded as sufficient to warrant a referral back to the Court of Appeal. As the Governor-General's website makes clear, a case will normally be re-opened "only when new information comes to light that for some reason was not able to be examined by the court process, and it is convincing enough to raise real doubt about the reliability of the person's conviction." That does place a significant limitation upon those who simply assert that the fact-finder incorrectly assessed the evidence and got it wrong.

Sim and Young again justify this on the basis of constitutional principle: disagreement about verdicts are not uncommon, but (and providing a proper process had been followed) for the Executive to substitute its views about guilt for those of the judicial fact-finder without a differing factual foundation would be improper.¹⁷⁸

A review of the Ministry's approach to applications suggests that it is not correct to say that this factor is overstated. Fresh evidence is almost always required – as the

¹⁷⁸ Ibid [9].

Ministry's RPM manual makes clear, and as applicants are told by the Ministry.¹⁷⁹ The notable exception is in cases where there is an allegation that the standard of trial representation was so inadequate as to render the trial unfair. It appears that the reason why this ground is singled out for examination is that the Court of Appeal has itself confirmed its availability.¹⁸⁰ Another potential exception is cases where the original proceedings were a nullity, but this was not noticed until a later date.¹⁸¹

The test

The next question is - what kind of fresh evidence is required to trigger a reference? The Ministry's approach, now recorded in its internal procedures guide, is directed towards what a court would look for on a reference, and the courts' likely approach to the issues arising on each application are scrutinised in detail.¹⁸² As Smith pointed out in respect of the pre-1995 English system, at a pragmatic level this is entirely sensible, as 'there is not much point making a reference to a court that is unwilling to act on it'.¹⁸³ If this is followed through to its logical conclusion, the Ministry's task is essentially predictive, and the relevant question is: if a reference were made, how likely is it that the court would quash the conviction?

¹⁷⁹ New Zealand Ministry of Justice *Royal Prerogative Procedures Guide* (n 13) 34: 'While the categories of miscarriages of justice are not fixed, there are essentially two key criteria that are applied in determining whether a case should be reopened... First, the evidence raised by a petitioner must normally be "fresh evidence" not available to the applicant at the time of trial'. See also NZ54, where the Ministry wrote to the petitioner, reminding them that it was 'important to note' that fresh evidence was usually necessary, and that 'because we do not have any documentation clearly setting out the fresh evidence on which you are relying... it is extremely difficult for us to assess the merits of your application' (and similarly NZ9 and NZ47).

¹⁸⁰ In NZ59, the advice to the Minister noted that the Court of Appeal had previously 'examined the question of whether a reference under section 406 of the Crimes Act 1961 is available on an alternative ground to that of "fresh evidence" namely where allegations relating to the conduct of defence counsel are made', and indicated that it was prepared to consider such cases.

¹⁸¹ This was the subject of a recent successful reference in *Hedges v Police* [2010] NZHC 1571 (n 47).

¹⁸² This is evident in all cases, but there are some particularly detailed examples - eg NZ17 and NZ22.

¹⁸³ Smith 'The Prerogative of Mercy' (n 23) 407.

If this is correct, then the resolution to the question posed above regarding the stringency with which appeal tests ought to be applied on a reference presents itself.¹⁸⁴ If the Ministry's role is solely predictive, it makes little sense for courts to adopt a lower standard on references than that which it applies on normal appeals. The Ministry is not exercising any independent judgment on whether or not a conviction is unsatisfactory, other than assessing how the court is likely to approach the matter in terms of its extant tests. Thus, it is something of a nonsense to say, as the Court of Appeal sometimes does, that a lower standard ought to be applied by virtue of the fact that the matter is before the court 'following detailed consideration of an application for the exercise of the Crown's mercy' and 'as a consequence of material being placed before the Governor-General of sufficient cogency to warrant a reconsideration of the appellant's conviction'.¹⁸⁵

If, however, the Ministry is not simply performing a predictive task, but instead making an independent assessment of whether a conviction is sound based on criteria independent of those employed by the courts, the logic behind the adoption of a lower standard would be more compelling.

As a matter of practice, the answer is clear: the Ministry's view is that it is not its role to exercise independent judgment on the question of whether a miscarriage of justice has occurred (as this is a question for the court to determine), but rather to assess an application to determine if there is a case which is 'sufficiently strong that it could be entertained' by the court.¹⁸⁶ In deciding whether this threshold test is met, the Ministry

¹⁸⁴ See text to n 59.

¹⁸⁵ *R v Sims* (n 58). That this is the basis on which a lower threshold is justified is also evident in *R v Morgan* (n 53) which in turn refers to the then English practice, as discussed in *R v Sparkes* [1956] 1 WLR 505. However, as Smith 'The Prerogative of Mercy' (n 23) notes at 406, the criteria applied by the English courts at the time were opaque, due to the standard practice of ex parte, undocumented consultation between the Home Office and the Lord Chief Justice prior to references being made.

¹⁸⁶ New Zealand Ministry of Justice *Royal Prerogative Procedures Guide* (n 13) 34 (emphasis in original). This formula is the one usually employed in advice to the Minister, although there are slight variations, eg NZ22, which framed the 'key issue in assessing this application for the RPM' as 'whether there is a real, as opposed to a speculative, risk of an unsafe verdict'.

directs itself according to the courts' standard appeal tests and recent practice. The task is predictive.

The next question is: how strictly is this test applied? In the terms expressed above, it does not seem particularly stringent, and does not imply, for example, that it be likely that the Court *would* quash the conviction. However, from a review of its practical implementation it is clear that the threshold is both high and strictly policed. This is evidenced by the number of applications which are rejected on the basis of a conclusion that the evidence relied upon would not be received by the appeal court.¹⁸⁷

The advice tendered to Ministers in cases involving fresh evidence usually follows a set formula, faithfully reciting the Court of Appeal's position on such matters in some detail. Initially stating that the evidence raised by a petitioner must be:¹⁸⁸

“fresh” in the sense that it [was] not available at the time of trial, or must otherwise be of such a nature that it would give rise to grounds for a normal appeal. Second, that evidence must be so compelling that it is capable of pointing to a likely miscarriage of justice. By ‘compelling’ we have generally taken the view that the material must be of sufficient weight and cogency to justify re-opening the applicant's case by means of a referral to the Court of Appeal.

¹⁸⁷ For one particularly striking example, see NZ59, where there was disagreement between a QC conducting a peer review and the Ministry on this particular issue, which, as the QC emphasised was 'the major problem this petition has to overcome'. The QC concluded that the court may adopt a flexible approach and admit the evidence, but the Ministry disagreed and recommended that no reference be made. Despite the general strictness, there is some evidence that where grounds justifying a reference have been identified, a subsidiary ground may be included in the terms of reference even if it would not itself justify a reference, in order that the petitioner may raise them before the court - eg NZ26, where the reviewing QC stated that while the Court of Appeal were highly unlikely to accept a particular argument, it ought to form part of the terms of reference.

¹⁸⁸ NZ3 (Advice to Minister).

While the advice (and the procedures guide) notes that these tests can give way in 'an exceptional case', or in 'the interests of justice' the 'general approach' of the courts is emphasised – ie that the evidence must be credible, cogent, and of such a nature that, if given with the other evidence adduced, might reasonably have led the jury to return a different verdict.¹⁸⁹ In no case examined was any detailed consideration given to whether a reference ought to be made on the basis of the interests of justice test.

Thus, usual rules of evidence will be applied to 'fresh' evidence, and a reference will be declined if it would be unlikely to be received by the appeal court.¹⁹⁰ However, apparently inadmissible evidence which is submitted is not always rejected out of hand – steps are often taken (including soliciting representations from representatives) to discern if it could be presented in an admissible format.¹⁹¹ The Ministry will also take steps to verify that evidence submitted is truly fresh¹⁹² or capable of belief.¹⁹³ Where relevant, the Court of Appeal's approach to particular species of evidence is considered.¹⁹⁴ This invariably involves the Ministry making credibility assessments, or assessments on the likely impact of evidence.¹⁹⁵ As the admissibility of the proposed fresh evidence is central to the likely success or otherwise of any reference, a decision on these gateway questions is often determinative of an application as a whole.

¹⁸⁹ New Zealand Ministry of Justice *Royal Prerogative Procedures Guide* (n 13) 35.

¹⁹⁰ In cases where there is particular difficulty it is evident that extensive legal research is carried out on this point: eg NZ28 and NZ59.

¹⁹¹ Eg NZ26, where the peer reviewer concluded they could not: 'dismiss counsel for the petitioner's contention that much of the material... could be reformatted into evidence which would have been admissible at trial'.

¹⁹² Usually by seeking a waiver of privilege so that enquiries can be made of trial counsel, eg NZ35; NZ44, NZ54; a firm line is usually taken in this regard eg NZ26.

¹⁹³ Eg NZ15 where the Ministry asked Police to re-interview a complainant who made statement retracting evidence, before concluding that the statement was unreliable and could not be given any weight; and also NZ35 where the Ministry conducted inquiries to see if evidence alleging an alibi could be corroborated. The views of Police and prosecutors in this regard were also sought in NZ11 (re DNA evidence not led at trial), and NZ54.

¹⁹⁴ For example, retractions, as in NZ15; and NZ48 where an internal memorandum was prepared on the basis of the Court's approach to such cases.

¹⁹⁵ Eg NZ34, where it was accepted that the evidence was fresh and credible, but insufficiently cogent to conclude that there was a 'real risk' that a miscarriage of justice had occurred.

In cases where the basis of a petition is not fresh evidence, it is also clear that the Ministry takes care to direct itself according to the appeal court's approach to such issues, and the ultimate decision regarding whether to recommend a referral is based on an assessment of how the court would treat the question if it were raised in a standard appeal.¹⁹⁶

(g) Investigative Process

The RPM process is entirely reactive. Neither the Ministry nor the Governor-General will ever take steps to solicit applications from individuals,¹⁹⁷ nor will the Ministry attempt to identify and investigate grounds outside the four corners of a petition.¹⁹⁸ Further, the determination of the scope of an application (and the issues which fall for consideration) occurs almost exclusively on the papers. On only one occasion in the cases examined did the Ministry meet in person with a petitioner in this regard.¹⁹⁹

The investigative process is also extremely limited. The Ministry will not routinely conduct enquiries, or seek out expert reports, even if this matter is raised by an applicant.²⁰⁰ The obligation is thus on the petitioner to provide, in documentary form, the

¹⁹⁶ New Zealand Ministry of Justice *Royal Prerogative Procedures Guide* (n 13) 35. A characteristic example of the application of this is NZ11, where extensive research was taken on the principles underlying counsel competence as a ground of appeal.

¹⁹⁷ Young and Sim (n 86) [17]; Thorp (n 13) 51. However, when the Ministry or the Minister receives correspondence from individuals claiming to have been wrongfully convicted, they are provided with general information about the RPM process.

¹⁹⁸ This was considered in NZ14, where the Ministry's position was endorsed by the reviewing QC. This reflects a concern that to take a more active role would be to transform the Ministry into an advocate or champion for applications. However, it is apparent that where an obvious defect with a conviction is identified, as in *Hedges v Police* [2010] NZHC 1571, this will not be ignored.

¹⁹⁹ NZ53 - the petitioner repeatedly requested a meeting so that he could disclose confidential information he claimed he could not commit to paper for privacy reasons. Senior officials were consulted, and the file notes that an exception was made as he was unrepresented, inarticulate and 'ill-equipped to convey his arguments on paper'. The RPM Manager was insistent that the exceptionality of this case be recorded on file, so as not to set an 'undesirable precedent'.

²⁰⁰ Eg NZ18. In NZ26 an external reviewer recommended that the Ministry instruct a new expert in order to determine whether an expanded reference ought to be made. The Ministry considered that this was problematic and ultimately inappropriate as the parties may want to cross examine such a witness, and the Ministry would not be a party to the reference.

material on which it wishes the Ministry to act, and the reasons why it is said to justify a reference.

In most cases, information gathering by the Ministry is limited to obtaining the court file from the appropriate court. Police files will be obtained in some, but not all cases. 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.²⁰¹ Where allegations of counsel incompetence or trial irregularity are made, for example, the Ministry will review the relevant parts of the trial record to establish if these can be substantiated, and if not then specifically rebut the allegations made by reference to contradictory passages on the record.²⁰² The same occurs where it is alleged that a non-disclosed interview statement, or post-trial statement from a witness conflicts with the evidence given at trial.²⁰³

The question of whether the Ministry should have a more active investigative role was considered as part of a 2003 review of the Ministry's procedures. The conclusion was that if 'the arrangements for reviewing alleged miscarriages of justice are placed on a more formal footing... the likelihood is that the responsible authority will assume more of an investigative role' but that '[i]n the meantime, the Ministry must continue to operate under the current conventions'.²⁰⁴ The Ministry's view is that these conventions require it to take an 'essentially advisory' role, whereby it considers the material submitted by a petitioner and then provides an opinion; 'the onus is on the applicant to make out a case

²⁰¹ Occasionally there are difficulties in obtaining them, meaning that alternative sources need to be found - eg NZ17 (where these were obtained directly from the trial judge) and NZ27 (from the prosecutor). In NZ40, they could not be found (although this related to a forty year old case).

²⁰² Eg NZ27, NZ39, NZ46 (where the directions concerned were compared with specimen directions approved by the Court of Appeal).

²⁰³ Eg NZ44, where the Ministry went through the trial transcript in detail, compiling a table comparing the evidence given at trial with that provided in an interview.

²⁰⁴ New Zealand Ministry of Justice *Practices and Procedures in the Ministry of Justice* (n 109) 29.

for the exercise of the [RPM]'.²⁰⁵

However, consistent with this view of the constitutional constraints under with the RPM process operates, the Ministry will occasionally conduct further enquiries, usually to verify that matters raised in a petition are meritorious.²⁰⁶ This is particularly evident in terms of verifying whether fresh evidence submitted by an applicant would satisfy the courts' admissibility tests, as discussed above. Further examples are where police malfeasance is alleged, where the relevant police file may be searched.²⁰⁷ Similarly, if counsel incompetence is alleged, trial counsel will be approached for comment;²⁰⁸ this ground is taken seriously, with detailed legal research sometimes being conducted to see if a particular step at trial was realistic.²⁰⁹

Where a witness is said to be capable of giving relevant evidence, steps are occasionally taken to ascertain what that evidence would be,²¹⁰ or to assess its veracity.²¹¹ However, there is a strong reluctance to interview witnesses unless some convincing prima facie evidence is presented – particularly where vulnerable witnesses are concerned.²¹²

Another constraint on the Ministry taking a more active investigative role is a lack of capacity and complete absence of formal powers. As the Ministry's procedure guide notes, 'the Ministry of Justice is not an investigatory body and does not have investigative

²⁰⁵ Ibid 29. As the then Minister of Justice put it in 2000, the role is 'to assess the evidence that was presented in the petition, in the same way the Court of Appeal doesn't investigate, but looks at points of law put before it': 'Goff defends officials' advice to reject trio's plea for pardon' *The Dominion* (Wellington May 3 2000).

²⁰⁶ New Zealand Ministry of Justice *Practices and Procedures in the Ministry of Justice* (n 109) 29; New Zealand Ministry of Justice *Royal Prerogative Procedures Guide* (n 13) 20.

²⁰⁷ As in NZ16.

²⁰⁸ Eg NZ8; NZ11; NZ46; NZ59.

²⁰⁹ Eg NZ17 (availability of severance).

²¹⁰ Eg NZ8, NZ44.

²¹¹ NZ15 (contacted witnesses to retraction to assess if genuine); NZ66.

²¹² This was particularly evident from the notes in NZ44 and NZ48 (alleged retraction in sexual case).

expertise'.²¹³ To this end, the Ministry has in a number of recent cases instructed senior counsel to conduct interviews.²¹⁴ However, the Ministry does not possess any powers of compulsion. While co-operation can often be obtained by consent, where this is not the case it can cause real difficulties.²¹⁵

In some cases Police, who do possess the required expertise and powers, will be asked to conduct enquiries – for example, where there is strong prima facie grounds for believing that a complainant has retracted evidence given at trial.²¹⁶ In such cases, the Commissioner of Police will be contacted by the Ministry, and asked to make arrangements.²¹⁷ The Police will then provide a written report to the Ministry, and it seems that the Ministry can, at least to some extent, direct the extent of such inquiries.²¹⁸

The Police have involvement in other cases as well. Where extensive criticism is made of the Police investigation, the matter will be referred to the Police for comment. In one case this prompted the Police to - without consultation with the Ministry – conduct investigations in relation to matters raised in a petition, including re-interviewing the complainant.²¹⁹

As New Zealand has a unified Police force, this means that in such cases the

²¹³ New Zealand Ministry of Justice *Royal Prerogative Procedures Guide* (n 13) 20.

²¹⁴ Ibid 21, eg NZ65 (QC re-interviewed complainant where retraction alleged).

²¹⁵ NZ28 (new witnesses and complainant either refused to be interviewed by QC acting for Ministry or did not reply to such requests); NZ38 (QC conducting review engaged in protracted correspondence with telecommunications provider's legal advisers re: ability to release data). One retired High Court judge, who acted as a peer reviewer for the Ministry of Justice on a number of occasions, has noted that when an unresolved factual issue came to light during the course of a review, 'it was often difficult to obtain the further evidence needed to do so' - Sir Thomas Thorp, 'Opening Remarks' (Legal Research Foundation Conference - Miscarriages of Justice 2006) 1.

²¹⁶ As in NZ15; NZ33.

²¹⁷ NZ15; NZ33.

²¹⁸ Eg NZ15, where the Ministry specifically requested that the complainant be re-interviewed despite indications from the Police that this was unnecessary.

²¹⁹ In NZ28, counsel for the applicant then alleged Police had put pressure on witnesses to change the sworn evidence they had provided as part of the petition, although this allegation was rejected by the Minister.

Police will be investigating themselves. For example, one petition involved an allegation of an inappropriate relationship between the complainant in a sexual case and the investigating police officer. The Commissioner of Police was tasked with conducting an investigation into this matter, and when the response was that the allegations were without substance, the petition was rejected as there was 'no reliable evidence' on which to justify a referral.²²⁰

While it is impossible to comment on whether the investigations which were made in the cases examined were conducted fully and properly, the dangers inherent in the Police conducting investigations into alleged wrongdoing by other members of the force were explored in the course of a recent commission of inquiry called after a series of official cover-ups of police misconduct were exposed.²²¹ The body charged with investigating complaints against the Police, the Independent Police Conduct Authority (IPCA) was in 2003 given an independent investigative capacity because of such concerns.²²² While the IPCA does not currently have a formal role in the RPM process, the commission of inquiry's reflections on the importance of the IPCA's involvement in handling complaints against the police are apposite in the present context:²²³

The existence of... an independent body to investigate or review complaints against the police is another essential element in ensuring confidence in the complaints system because it helps to overcome the perception, which is still held by some complainants, that the police will not accept a complaint against a colleague and/or will not adequately

²²⁰ NZ33.

²²¹ Commission of Inquiry into Police Conduct, *Report* (Wellington 2007) chapter 3. The defence bar's perception of the extent of this problem was forcefully put by one prominent criminal QC in C Withnall, 'Reform of the Criminal Justice System - A View from the Coalface' (1998) 9 Otago L Rev 355, 367-369.

²²² Ibid chapter 4. Most of the investigative work is still carried out by the Police themselves, but is overseen or reviewed by the IPCA.

²²³ *Report of the Commission of Inquiry into Police Conduct* (n 221) 4.74.

investigate such a complaint.

(h) The Work Product

The work product of the Ministry's review is a document containing formal advice to the Minister, which in turn forms the basis for the Minister's formal advice to the Governor-General. The content and detail of such reports varies with the complexity of the petition itself. In simple cases, it can be a very short letter. In controversial or difficult cases, this can be a detailed report which goes through several substantive iterations and considerable liaison with external peer reviewers before being presented to the Minister.²²⁴

When a reference to the Court of Appeal is recommended, the advice is supplemented by a draft Order in Council drafted by the Parliamentary Counsel's Office. As the Court of Appeal is limited to consideration of grounds specified in the Order, the precise terms assume some significance.²²⁵ For these grounds to be widened, a further petition must be lodged, which is then considered in the usual way (with consequent delays).²²⁶ Given their importance, draft copies of the wording are sent to the petitioner for comment, which in turn can solicit further argument or evidence aimed at widening the terms of reference.²²⁷

12 Fairness: Equality, Natural Justice and Judicial Review

The following section examines a number of discrete, but related, issues surrounding the fairness of the RPM process.

²²⁴ Eg NZ10.

²²⁵ See text to n 49 and below.

²²⁶ Eg NZ26 (which eventually resulted in the appointment of a QC to consider the matter).

²²⁷ Eg NZ38, where the further material was considered by the Ministry and a peer reviewer, but did not result in widening of the terms.

(a) Equality: Role of Lawyers

One concern with the fact that the RPM process has become so legalistic is that well resourced applicants may be able to secure an advantage, particularly if they have the ability to fund competent legal advice. While it was not always possible to tell with precision when, and to what extent, a petitioner had benefitted from legal advice in the applications examined, there was only clear evidence of such professional involvement in around one third of the petitions examined. In other cases, applicants were either represented by interested lay people,²²⁸ or represented themselves.

As Sir Thomas Thorp has previously noted, there is 'a marked difference in quality between professionally prepared petitions and the rest'.²²⁹ As applications are assessed on the basis of the material and grounds submitted in a petition, this cannot but influence the potential for an application to succeed.²³⁰ However, the mere presence of a lawyer is not a guarantee of quality. Many files evidenced a lack of understanding amongst counsel of the Ministry's processes. In one case, for example, appeal counsel told the Ministry that he had advised a petitioner to abandon his appeal to the Court of Appeal and instead concentrate on gathering fresh evidence for a RPM application when the best such a step could practically achieve for his client would be a reference to the Court of Appeal.²³¹ Similarly, even where counsel are instructed, they are not always active. In one case, despite repeated attempts over a period of months to elicit further

²²⁸ Eg a prison chaplain (NZ8), prison volunteer (NZ17) or family member (NZ1, NZ3, NZ27, NZ49).

²²⁹ Thorp (n 13) 54. Thorp suggested that approximately half of the petitions he reviewed in 2004 were prepared by legal advisors.

²³⁰ Further, where a lawyer is involved the Ministry will often seek representations as to, for example, admissibility of evidence (as in NZ59) which most lay applicants would be unable to meaningfully respond to.

²³¹ NZ53.

information relating to a petition, no response was forthcoming.²³²

Even with these caveats, the involvement of competent counsel is of significance. Given the investigative constraints identified above, it is relatively common for those petitioners who are advised by experienced practitioners to retain private investigators to find fresh evidence, often at considerable expense.²³³ However, the ability of petitioners to take this step is dependent on them having the means to both instruct a lawyer to identify areas which warrant investigation, and to fund that investigation.²³⁴ The problems this poses for impecunious applicants can be seen in once case where an applicant applied in relation to a half-century old conviction. The Ministry wrote to the applicant advising him of the type of information which would be required in order for his application to be progressed, and suggesting that he seek legal assistance with gathering it, concluding emphatically that: 'You need to provide us with credible, reliable evidence that could be used in court to support this submission. Without such evidence, there is no basis for considering whether your application for the Royal Prerogative of Mercy has substance'. It was evident from the file that the petitioner tried in vain to obtain affordable representation, but was unable to.²³⁵ His petition was not taken any further.

It seems clear that a lack of public funding is behind the low level of

²³² NZ9. These may be contrasted with cases where counsel are extremely active, following up on delay and providing additional material periodically during the course of a review as in NZ10.

²³³ This was present in a number of cases, but was particularly significant in NZ17; NZ28; NZ53; and NZ59.

²³⁴ In NZ17, the applicant indicated that he had exhausted his funds on a private detective's report, meaning he could not afford to retain counsel to represent him on the petition itself.

²³⁵ NZ40. The file also contained medical evidence to the effect that the petitioner was under a particular disadvantage in furthering the application himself.

representation.²³⁶ However, it might be expected that more individuals will be legally represented following a 2006 decision of the High Court which overturned the previous understanding that that legal aid was unavailable for RPM applications on the basis that it ‘would be at odds with the purpose of the Act in promoting access to justice’ if ‘potential access’ to ‘an important safeguard, and an important component of [New Zealand’s] criminal justice system was limited by the unavailability of legal aid’.²³⁷ Following this decision, applications for the RPM fall within standard criminal legal aid rules, and as a consequence impecunious applicants may seek assistance.²³⁸ Applications are determined on a case-by-case basis, with the lawyer concerned required to justify the necessity for both the time likely to be taken, and any expert reports or other material that is likely to be needed.²³⁹ As these changes largely post-date the files examined, the practical impact of this change is impossible to judge, although it should be noted that even if legal aid is available, this will not necessarily extend to funding expert reports, or the retention of private detectives, which may be required to yield fresh evidence.²⁴⁰

(b) Natural Justice

The opacity of many aspects of the RPM process has been commented on above. In an attempt to counter this, the Ministry has made efforts, since a review of its procedures in 2003, to improve communication with petitioners. The Ministry's procedures guide recommends that applicants be provided with information at key stages of the review, as well as receiving periodic process reports during a review and where specific information

²³⁶ See Thorp (n 13) 54.

²³⁷ *Yash v Legal Aid Review Panel* (2006) 18 PRNZ 320 (HC) [16].

²³⁸ Specifically, within what is now the Legal Services Act 2011, s 6 (which is to the same effect as the previous provision in the Legal Services Act 2000): Response from the Legal Services Agency to request under the Official Information Act 1982 by author dated 26 November 2010.

²³⁹ Response from the Legal Services Agency to request under the Official Information Act 1982 by author dated 2 December 2010.

²⁴⁰ The facts of *Brown v Attorney-General* [2005] 2 NZLR 405 (CA) demonstrate the limitations of the legal aid regime with regard to obtaining such evidence during substantive proceedings.

is required.²⁴¹ While this generally does occur, in many cases this is manifestly deficient – for example, in one case, post-rejection correspondence from a petitioner complained that she had received no information of the process to be followed prior to the rejection of her petition, a point that the Minister acknowledged.²⁴²

Where the guidelines as to communication are followed, applicants are put in a position to make representations on developments as they occur. However, this does not extend to the substance of the advice itself, as drafts of the advice to be presented to the Minister are not provided to the applicant for comment. This is a conscious choice by the Ministry. A 2003 consultation document noted that while it was 'doubtful if there is any obligation on the Ministry to disclose the basis of its advice and recommendation before it is considered by either the Minister or the Governor-General... it would be consistent with natural justice principles to do so in each case.'²⁴³ A subsequent review of procedures conducted by the Ministry noted this and reasoned that:²⁴⁴

On the one hand, it would add an additional stage to the consideration of most applications. The benefit is that the Ministry would have its advice tested before completion. There would be additional assurance for the Minister of Justice and the public at large that the applicant's arguments have been comprehensively considered. On the other hand, it would be unfortunate if such a penultimate phase was ever regarded as an opportunity to delay or contest publicly the process of finalising advice adverse to an applicant.

²⁴¹ New Zealand Ministry of Justice *Practices and Procedures in the Ministry of Justice* (n 109) 31-32.

²⁴² NZ39.

²⁴³ New Zealand Ministry of Justice, *The Royal Prerogative of Mercy - A Review of New Zealand Practice* (Wellington 2003) 23.

²⁴⁴ New Zealand Ministry of Justice *Practices and Procedures in the Ministry of Justice* (n 109) 33.

The issue was essentially parked, with the reviewer concluding that while such a procedure might be appropriate for any new body established to review suspected miscarriages of justice, '[i]t may not... be appropriate in the meantime for the Ministry to develop a policy of disclosing in full draft advice to the Minister'.²⁴⁵ This reluctance to provide an opportunity to comment on draft advice remains Ministry policy.²⁴⁶

The effect of this is tempered somewhat by the fact that an unsuccessful applicant may make further representations to the Governor-General, who will in turn request further advice from the Minister. The consequence of this is that these representations will be considered, and a report prepared.²⁴⁷ The Ministry will not, however, engage in direct dialogue with petitioners once it has tendered its formal advice, with attempts to do so met with the rejoinder that 'it would be inappropriate... to continue a separate dialogue with an applicant after completing my advice and after the Governor-General has made his decision'.²⁴⁸

(c) Disclosure

Related to this is the question of to what extent disclosure of information gathered or produced by the Ministry during the RPM process can be compelled. While the applicant will always be provided with a copy of the Ministry's advice with the letter from the Governor-General advising the outcome of the application, the Ministry's files will often contain a significant amount of further information. Such information is of obvious

²⁴⁵ Ibid 33.

²⁴⁶ In an email response to the Minister's office in NZ10, the Chief Legal Advisor added to the concerns identified above that 'if the applicant were permitted as a matter of course to seek submissions on the Ministry's draft advice then the Ministry would properly need to seek submissions from Crown counsel as well. This would delay the provision of advice to the Minister.' However, this was said to be unproblematic as the RPM was 'not inherently a consultative process', and was rather 'similar to a court process to the extent that judges do not seek submissions on draft judgments'.

²⁴⁷ As in NZ24; NZ39.

²⁴⁸ NZ40 (Letter to Petitioner).

interest to applicants, in that it may provide support for subsequent attempts to overturn their conviction. This matter is partially governed by statute, and disclosure may be required under the Privacy Act 1993 (in respect of requests by the applicant) or the Official Information Act 1982 (where the request is made by a third party), although each provide a number of grounds on which disclosure can be resisted.²⁴⁹ Redactions are often made to protect personal privacy, and this can limit the extent of disclosure considerably.²⁵⁰ Disclosure is occasionally resisted on other grounds - for example, in respect of material held or created by external reviewers on the basis of legal professional privilege,²⁵¹ or more generalised confidentiality obligations.²⁵² In another case, disclosure was resisted on the curious (and, given the purely mechanical role played by the Governor-General, spurious) ground of the need to maintain 'the constitutional convention protecting the confidentiality of communications between Ministers and the Sovereign's representative'.²⁵³ Overall, disclosure rights are patchy, and subject to considerable restrictions - particularly where the privacy of third parties is involved.

(d) Judicial Review

For the reasons surveyed above, there are several areas in which the Ministry might be thought susceptible to challenge on administrative law grounds. However, perhaps due to its uncertain availability, judicial review plays almost no role in the RPM process.

²⁴⁹ Third party requests are usually made by the media, eg NZ14, where a third party requested disclosure of the full file, and various pieces of information were disclosed, but others withheld to protect personal privacy.

²⁵⁰ As in NZ16; in NZ58 there was considerable correspondence with affected persons regarding the extent of disclosure.

²⁵¹ Eg NZ38.

²⁵² Eg NZ58 (Letter to Petitioner): 'The information you seek was obtained by me as part of the enquiry which the Minister of Justice asked me to make... It was received by me on the basis that it would be used solely for the purposes of that enquiry and the consequent report to the Minister, and I am sure it would not be in accordance with that arrangement that I volunteer the information to you (or anyone else) for some other purpose.'

²⁵³ NZ24.

The uncertainty stems from the fact that whilst the landmark *GCHQ* case laid the foundations for judicial review of exercises of royal prerogatives a quarter of a century ago,²⁵⁴ there is still no clarity as to whether, or in which circumstances, a New Zealand court would be willing to exercise such a power in respect of the RPM. The last direct authority on the point is a 1992 Court of Appeal decision which concluded that, following the *GCHQ* decision, the fact that a prerogative power was in play did not render the process immune from review, and that the question was rather one of justiciability.²⁵⁵ Despite this, the Court proceeded to impose a further barrier to review – holding that courts should only exercise such a review power if it could be demonstrated that there was a practical need for it in a New Zealand context. Expressing confidence in the robustness of the New Zealand practices, the Court of Appeal concluded that:²⁵⁶

If there were good reason to believe that injustices as revealed by some English cases are occurring or likely to occur in New Zealand under our present system, we would be disposed to favour any form of increased judicial review that could help to prevent this. But we are not satisfied that there is good reason. The existing safeguards are considerable and there is no real evidence that they are not working.

... Bearing in mind the safeguards there appears to be no reason to think that the balance currently struck in New Zealand is wrong. In particular no pressing reason has been made out for altering the practice regarding the Royal prerogative of mercy. While accepting that it is inevitably the duty of the Court to extend the scope of common law review if justice so requires, we are not satisfied that in this field justice does so require, at

²⁵⁴ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL).

²⁵⁵ *Burt v Governor-General* (n 20). See also the commentary in GDS Taylor, 'Administrative Law (Update)' [1992] NZ Recent L Rev 335, 335.

²⁵⁶ *Burt v Governor-General* (n 20) 682, 683.

any rate at present.

In no subsequent case has a New Zealand court directly considered the issue. A Full Court of the High Court felt it unnecessary to venture an opinion on the matter in a 2002 case.²⁵⁷ In a more recent case, an application for judicial review of a refusal to exercise the prerogative of mercy in a civil proceeding was struck out on the basis that it had no prospect of success,²⁵⁸ but no reference was made to RPM decisions as a class being inapt for judicial review.²⁵⁹

There is considerable inconsistency in the courts' approach to this question in jurisdictions outside New Zealand.²⁶⁰ The Judicial Committee of the Privy Council has considered this question in three cases on appeal from jurisdictions other than New Zealand.²⁶¹ It is only in the last of these decisions, *Lewis v Attorney-General of Jamaica*, handed down in 2001, that a majority of the Privy Council found decisions made under the prerogative of mercy to be reviewable over a forceful dissent from Lord Hoffmann.²⁶² None of these decisions would be binding on the New Zealand Supreme Court, which would ultimately determine the matter. Further, the majority in *Lewis* were clearly moved by the fact that this was a capital case,²⁶³ providing ample ground for a New

²⁵⁷ *Bain v Governor General* Unreported, CP166/01, 9 May 2002 (HC). The Court did, however, determine the question of whether a reference made under s 406(b) was *intra vires* the Governor-General.

²⁵⁸ The prerogative of mercy being limited to criminal proceedings.

²⁵⁹ *Reid v Governor-General* [2005] NZAR 249 (HC).

²⁶⁰ See BV Harris, 'Judicial Review, Justiciability and the Prerogative of Mercy' (2003) 62 Cambridge LJ 631, 631: 'In a series of decisions in different common law jurisdictions over the last seventeen years the law has moved from the non-availability of judicial review, to recognising the potential for review, then back to denying the potential, and finally... to accepting again its potential availability'.

²⁶¹ *de Freitas v Benny* [1976] AC 239 (PC), *Reckley v Minister of Public Safety and Immigration (No. 2)* [1996] AC 527 (PC) and *Lewis v Attorney-General of Jamaica* [2001] 2 AC 50 (PC).

²⁶² See JA Coutts, 'Lewis v Attorney-General of Jamaica (comment)' (2001) 65 J Crim L 221 for discussion.

²⁶³ See NH Andrews, 'Prerogative and Precedent: The Privy Council on Death Row' (2001) 60 Cambridge LJ 1, 2; Harris 'Judicial Review, Justiciability and the Prerogative of Mercy' (n 260), 646, 658, and note *Lewis v Attorney-General of Jamaica* (n 261) at 87.

Zealand court to distinguish it.²⁶⁴

It is also unclear whether the criminal procedure rights contained in the New Zealand Bill of Rights Act 1990 extend to cover RPM applications, although the judicial indications to date suggest that they do not.²⁶⁵ However, if this were to change, the possibilities for challenge would multiply.

13 Extraordinary Measures

There are other, extraordinary, measures for the correction of suspect convictions. The most drastic is by means of an Act of Parliament. The only recent examples are the Te Runanga o Ngati Awa Act 1988 and the Pardon For Soldiers of the Great War Act 2000.²⁶⁶ The former statute granted ‘full pardon’ to all ‘persons of Ngati Awa descent who were arrested, tried, and labelled as rebels’ during the New Zealand wars of the 1860s.²⁶⁷ By means of the latter statute, New Zealand became the first country to grant pardons to soldiers executed for mutiny during the First World War. The key provisions pardon five men who were executed while suffering from what would now be termed Post Traumatic Stress Disorder.²⁶⁸ This statute began life as a bill introduced by a single MP, before being referred to a Parliamentary select committee, who in turn retained a

²⁶⁴ There is much to be said on both sides of the debate – see C Gelber, ‘Reckley (No 2) and the Prerogative of Mercy: Act of Grace or Constitutional Safeguard?’ (1997) 60 Mod L Rev 572; Harris ‘Judicial Review, Justiciability and the Prerogative of Mercy’ (n 260); BV Harris, ‘Judicial Review of the Prerogative of Mercy’ [1991] PL 386.

²⁶⁵ In *Palmer v Superintendent of Auckland Prison* Unreported, M.1023-AS/01, 17 December 2001 (HC) [22] it was suggested (obiter) that ‘[o]n a very liberal interpretation’ of the provisions this may be possible, but did not investigate the issue in any detail; *Paul v Attorney-General* [2009] NZAR 405 (HC) [36] held to the contrary that while the ‘exercise of the prerogative is, without doubt, an important part of New Zealand’s constitutional arrangements. That does not make it, however, the exercise of a right of appeal so as to engage s 25(h) of the New Zealand Bill of Rights Act 1990’. Cf A Butler and P Butler, *The New Zealand Bill of Rights Act : a commentary* (LexisNexis, Wellington 2005) 5.5.8, which argues that the process should be subject to the Act.

²⁶⁶ A much older example is the Meikle Acquittal Act 1908, as to the truly unusual circumstances surrounding which, see J Finn, ‘John James Meike and the Problem of the Wrongly Convicted’ (2010) 41 VUWLR 519.

²⁶⁷ Te Runanga o Ngati Awa Act 1988, s 11.

²⁶⁸ Pardon for Soldiers of the Great War Act 2000, ss 5-9.

retired High Court judge to investigate the issues raised.²⁶⁹ The judge was unable to conclude that a miscarriage of justice had occurred due to a lack of evidence, but nonetheless advised that it was within the competence of Parliament to pardon by means of legislation, notwithstanding that doing so in the absence of a sufficient evidential foundation would 'break new ground'.²⁷⁰ After taking further legal advice, the select committee recommended that the Bill be passed, albeit with amendments to ensure that no compensation was payable, and to remove any reference to military justice, lest it set a precedent for other potentially controversial cases.²⁷¹

It is apparent that the possibility of redress by means of legislation is reserved for highly unusual cases. While individuals have in recent times petitioned Parliament regarding their convictions, these have been rejected on the basis that:²⁷²

First, the quashing of a conviction would require special legislation and would threaten the relationship of mutual respect and restraint between Parliament and the courts. Secondly, to initiate an inquiry may compromise the credibility of the judicial system and the people involved. Thirdly, avenues already exist for legal action to be taken against the Crown...

The courts, too, have shown a reluctance to develop collateral means of challenge to suspect convictions, regarding the availability of the appeals and RPM processes as obviating the need for it to do so. For example, in declining an application to review further factual material on an application to recall its dismissal of an appeal, the Court of

²⁶⁹ G Hook, 'WWI Pardons' [2001] NZLJ 83.

²⁷⁰ Ibid 83.

²⁷¹ Ibid.

²⁷² Justice and Law Reform Select Committee *Report on 1996/732 Petition of Douglas and Christine Sandra Banks and Lorraine Banks-Foster* (6 September 1999).

Appeal described the RPM process as a ‘backstop ... if, through whatever circumstances, some new or additional matter not raised on an appeal does require appellate consideration’.²⁷³ A similar response has met attempts to challenge convictions by means of an application for a writ of habeas corpus, now the subject of an express statutory prohibition.²⁷⁴ This reliance on the RPM process has withstood challenges under the New Zealand Bill of Rights Act 1990,²⁷⁵ and attempts to challenge convictions other than by way of the RPM or appeals processes can leave the putative challenger liable of being declared a vexatious litigant.²⁷⁶

There have been, on occasion, official inquiries into suspected or alleged miscarriages of justice.²⁷⁷ The only recent example is that in the Peter Ellis case, which had already been before the Court of Appeal on a section 406(a) reference, during the

²⁷³ *R v Beckham* Unreported, CA351/01, 30 September 2002 (CA) [11].

²⁷⁴ Habeas Corpus Act 2001, s 14(2)(a); *Tranter v Attorney-General* Unreported, CA142/06, 27 July 2006 (CA). This prohibition existed even prior to the passage of the 2001 Act, with courts insisting that the RPM process be followed instead - *Edwards v Superintendent of Tongariro Prison* Unreported, M50/02, 9 September 2002 (HC) [6]-[7]; *Re Kestle* [1980] 2 NZLR 337 (SC).

²⁷⁵ *R v Clifton* Unreported, CA398/03, 9 March 2005 (CA) [5] rejected an argument that the New Zealand Bill of Rights Act 1990 required a wider interpretation of the power to arrest a judgment on the basis that the remedy, if any, must lie in section 406.

²⁷⁶ Under s 88B of the Judicature Act 1908. See *Attorney-General v Palmer (Vexatious Litigant: Interim Order)* (n 77), where the convicted individual sought to use various creative legal mechanisms to challenge his convictions. While the High Court was insistent that this behaviour was improper, the making of a final order debarring him from instituting further proceedings was delayed, on the basis that if then extant processes demonstrated that ‘the conventional processes have in fact miscarried and that [the Applicant’s] recourse to unorthodox procedures has resulted in correction of miscarriage, that would be a factor relevant to the exercise of discretion.’ ([148]). This rider was prescient, as the litigant concerned was eventually successful in having certain of his convictions quashed following a fresh application for a reference to the Court of Appeal under section 406 - *R v Palmer (No 2)* (n 82). The evidence justifying this reference was obtained through one of the impugned processes. In the result, the Court declined to make an order declaring him to be a vexatious litigant: *Attorney-General v Palmer (Final Judgment)* Unreported, CIV-2003-404-588, 7 September 2006 (HC). This did not, however, affect the Court’s earlier decision (in the interim judgment) that the ‘unconventional’ proceedings were themselves vexatious, and thus ‘legally unjustifiable’ ([30] – [31]).

²⁷⁷ These can take various forms - from Parliamentary inquiries, as in *Report by Sir Guy Powles and Mr LG Sinclair on the Atenai Saifiti Case* [1972] A6A AJHR 3 which resulted in the pardon of an individual convicted of offending during the riot; Royal Commissions of Inquiry, as in Royal Commission to Inquire into the Circumstances of the Convictions of Arthur Allan Thomas (n 28) and Ministerial inquiries, as in the Ellis case, discussed below. Each type of inquiry differs in terms of its powers, privileges and level of formality, as detailed in Department of Internal Affairs, *Setting up and running Commissions of Inquiry* (Wellington 2001).

course of which the Court had declared itself unqualified to conduct an investigation into systemic flaws in the investigation of child sexual abuse claims alleged by the applicant.²⁷⁸ Following public outcry, and a change of government, the new Minister of Justice sought advice from his Cabinet colleagues and officials regarding the options for an inquiry into the case.²⁷⁹ The result was that a Ministerial inquiry was considered most suitable, as an official's inquiry would not command public confidence,²⁸⁰ and a commission of inquiry would involve undue delay and cost.²⁸¹ The Minister accordingly appointed a retired Chief Justice to conduct an inquiry, during which he was to consult with experts regarding the risks of contamination of children's evidence in sexual abuse cases.²⁸² The conduct of the inquiry has been subject to criticism, in particular the fact that the retired judge was assisted by the same officials who assessed Mr Ellis's RPM application.²⁸³

The resulting report concluded that the criticisms fell short 'by a distinct margin', that the convictions were safe and that having had 'the most thorough examination possible' the case 'should now be allowed to rest'.²⁸⁴ This did not occur, and two years later Parliament was presented with a petition calling for a Royal Commission of Inquiry signed by 'two former Prime Ministers, four former Cabinet ministers, 26 MPs, a retired High Court Judge, a retired District Court Judge, 12 law professors, 12 Queen's Counsel,

²⁷⁸ See text to n 48. The course of the Ministerial inquiry is summarised in R Francis, 'New evidence in the Ellis case (Part Two)' [2007] NZLJ 439.

²⁷⁹ R Francis, 'New evidence in the Ellis case (Part One)' [2007] NZLJ 399; Francis 'New evidence in the Ellis case (Part Two)' (n 278).

²⁸⁰ Francis 'New evidence in the Ellis case (Part One)' (n 279).

²⁸¹ Francis 'New evidence in the Ellis case (Part Two)' (n 278) 439.

²⁸² This occurred over the objection (in Cabinet) of the Attorney-General, who argued that appointing such a body would be seen as 'casting doubt' on the criminal justice system - Francis 'New evidence in the Ellis case (Part One)' (n 279).

²⁸³ Francis 'New evidence in the Ellis case (Part Two)' (n 278) is particularly critical of the officials' role in limiting the scope of the inquiry and the selection of experts who would provide evidence.

²⁸⁴ *Report into the Peter Ellis Case* (n 27) 120-121.

psychology professors, professors from other disciplines, lawyers, child protection workers, psychologists, social workers, therapists and counsellors'.²⁸⁵ This resulted in an inquiry by a Parliamentary committee into the handling of the earlier inquiry, which issued a series of recommendations (one of which that a body akin to the CCRC be established), but did not call for a further inquiry.²⁸⁶ These calls have periodically resurfaced, most recently resulting in a refusal by the new Minister of Justice ('after a careful and comprehensive examination of the case, and consultation with... Cabinet colleagues'), in 2009 to establish a Commission of Inquiry. The stated reason was that 'It simply would not be appropriate for the Executive to establish a Commission of Inquiry while Mr Ellis still has remaining appeal rights.'²⁸⁷

Documents released under the Official Information Act 1982 reveal that the Minister of Justice's decision followed legal advice from the Government's lawyers, the Crown Law Office, to the effect that a commission of inquiry would be unconstitutional (and arguably unlawful) even if all appeal rights had been exhausted - at least while the conviction was extant.²⁸⁸ This is because such a commission would 'go beyond the constitutionally recognised function of the Executive, and encroach directly on the authority and function of the courts'. While these are entirely debatable propositions,²⁸⁹ the conclusion was robustly supported by the Ministry of Justice in their advice to the Minister on the subject.²⁹⁰ If this is accepted by subsequent Ministers, then it is possible that the unavailability of public inquiries into extant convictions will also harden into a constitutional convention. Even if such a convention does not emerge, the general

²⁸⁵ Francis 'New evidence in the Ellis case (Part Two)' (n 278) 443.

²⁸⁶ *Report of the Justice and Electoral Committee into Petition 2002/55 and Petition 2002/70* (Wellington 2005). One MP dissented, arguing that a Royal Commission ought to be held.

²⁸⁷ Hon Simon Power, *No Commission of Inquiry into Peter Ellis case* (14 October 2009).

²⁸⁸ Crown Law Office, *Proposed Commission of Inquiry: The Christchurch Creche Conviction* (29 April 2009).

²⁸⁹ The basis for distinguishing the precedents - domestic and international - in particular are questionable.

²⁹⁰ New Zealand Ministry of Justice, *Commission of Inquiry - Mr Peter Ellis* (11 May 2009).

position is entirely clear: the RPM process, and in particular the reference process under section 406(a) is the primary, if not the sole, means by which convictions may be questioned outside the appeals process.

14 Conclusion

With the exception of truly extraordinary cases, alleged miscarriages of justice in New Zealand stand to be remedied (if at all) by the appeals and RPM processes which have been discussed in detail in the previous two chapters. The interrelationships between the two, along with other significant features will be returned to in the final chapter, where these will be examined by reference to the English processes.

CHAPTER FOUR - ENGLISH CRIMINAL APPEALS

15 Introduction

The next two chapters survey the avenues for review and correction of miscarriages of justice in England and Wales. This chapter examines the workings of the English appeals systems, and the following chapter examines the work of the Criminal Cases Review Commission, the body tasked since 1997 with investigating and referring suspect convictions back to the courts for re-examination.

16 The Appeal System

Trials of summary matters¹ occur in the magistrates' courts, and those of indictable matters in the Crown Court. The available appeal and review processes differ markedly in respect of each.² What is common to both is the multiplicity of avenues of appeal. These can be found scattered across ten separate Acts of Parliament, forming a scheme which Spencer has described as 'almost impenetrable... over-complicated, and seriously muddled'.³

These do not for the most part extend to pre-trial appeals by the defence. In indictable matters, pre-trial appeals are available to the defence only in a very restricted category of cases, where the judge considers that 'the trial is likely to be of such length, or of such seriousness, that substantial benefits are likely to accrue' from the holding of a preparatory hearing to determine potentially contentious matters before the

¹ Including offences which are 'triable either-way' but which are heard in the magistrates' courts.

² In addition, these separate appeal processes each follow 'their own philosophy, and... set of internal rules': JR Spencer, 'Does our present criminal appeal system make sense?' [2006] Crim LR 677, 680. Reforms have been proposed affecting both sets of arrangements, although there is no sign of steps to implement them, for a discussion of these, see K Malleon and S Roberts, 'Streamlining and clarifying the appellate process' [2002] Crim LR 272.

³ Spencer 'Does our present criminal appeal system make sense?' (n 2) 680.

commencement of the trial.⁴ Even if such a hearing is held, appeals are only possible where a pure question of law arises and leave is only granted in a very limited number of cases.⁵ This limited possibility for pre-trial review does not obtain in summary proceedings, as there is no jurisdiction to challenge decisions of a Magistrate's Court until the conclusion of a trial, either by way of case stated or judicial review.⁶

Thus, appeals against interlocutory decisions which raise the risk of an unsafe conviction are only available after conviction. The following sections examine the available options for appeals against conviction in the indictable and summary jurisdictions respectively.

17 Appeals in Indictable Matters

Those convicted on indictment may appeal, with leave, to the Court of Appeal.⁷ Criminal appeals are heard by a division of the Court, the Court of Appeal (Criminal Division).⁸ The Court exercises a purely statutory jurisdiction, and has long held that the powers granted by statute cannot be supplemented by reliance on any inherent jurisdiction the Court may possess.⁹

⁴ Criminal Procedure and Investigations Act 1996, s 29; in cases of serious fraud similar, but potentially more expansive, provision is made by Criminal Justice Act 1987, s 7. Part 9 of the Criminal Justice Act 2003, introduces a more extensive regime of pre-trial appeals by the prosecution, although parts of this are not yet in force.

⁵ Criminal Procedure and Investigations Act 1996, s 31; Criminal Justice Act 1987, s.9(11). That pre-trial appeals are available in only 'a few, very limited, circumstances' was recently emphasised by the Court of Appeal in *R v I-I & Ors* [2010] 1 WLR 1125 (CA) [21].

⁶ *Streames v Copping* [1985] QB 920 (Div Ct); *Hoar-Stevens v Richmond Magistrates' Court* [2003] EWHC 2660 (Admin). However, it has been suggested that judicial review may be available against a refusal to order an adjournment where 'there are no facts to be found before a point can be authoritatively resolved': B Barnes (ed), *Archbold Magistrate's Court Criminal Practice* (Sweet & Maxwell, London 2009) 569.

⁷ Criminal Appeal Act 1961, s 1.

⁸ Senior Courts Act 1981, ss 53, 55.

⁹ *R v Collins (Herbert)* [1970] 1 QB 710 (CA). Appeals are the only option for review of convictions on indictment, as judicial review is unavailable: P Taylor, *Taylor on appeals* (Sweet & Maxwell, London 2000) 4-004.

Appeals by those who have entered guilty pleas are possible,¹⁰ although such appeals face significant barriers if 'the applicant was fit to plead; knew what he was doing; intended to make the pleas he did; [or] pleaded guilty without equivocation after receiving expert advice'.¹¹

That the Court of Appeal (Criminal Division) is overworked is well known, and the Court is running at or above its capacity to hear appeals given its current resources.¹² The overwork has consequences on the quality of review received by both applications for leave to appeal, and for those cases which are heard by the Full Court. As Lord Justice Auld's 2001 review of English criminal courts (**the Auld Report**) noted, a number of problems are caused by this:¹³

...The first is that working at such speed gives the judges of the Court little time to focus on anything but the application of the law to the particular facts before them... It is thus difficult for them to apply and develop the law in a principled and consistent manner...

Second, the performance of the judges of the Court of Appeal, in their obvious familiarity with the facts and issues of law in the cases before them, and in the speed with which they despatch them, often suggests to those in court that they have made up their minds before hearing argument

¹⁰ This has not always been the case, and prior to 1977 the statutory scheme was held to prevent such appeals, as remains the case for summary offences: see R Pattenden, *English Criminal Appeals 1844-1994 : Appeals Against Conviction and Sentence in England and Wales* (Clarendon, Oxford 1996) 169-174.

¹¹ *R v Lee* [1984] 1 WLR 578 (CA) 583; PJ Richardson (ed), *Archbold : criminal pleading, evidence and practice* (2011 edn Sweet & Maxwell, London 2011) 7-46b.

¹² R Auld, *Review of the criminal courts of England and Wales : report* (Stationery Office, London 2001) [80]. The Lord Chief Justice's foreword to Court of Appeal Criminal Division, *Review of the Legal Year 2009/2010* (London 2010) notes that resources have been diverted from elsewhere to enable more sitting days to be accommodated, but adds that this 'does not come without a price in the form of increased pressures elsewhere'.

¹³ *Review of the Criminal Courts of England and Wales* (n 12) [84]-[86].

in the matter...

Third, the Court, as it is presently constituted and in the volume of its work, is plainly overloaded...

Spencer argues that, in addition to these, the overwork means that the goal of the leave process, discussed in detail in the following section, becomes triage - declining to hear appeals likely to raise difficult factual issues which would require a significant amount of time to deal with.¹⁴

The judges are assisted by a sizable administrative unit, the Criminal Appeal Office, which consists of 30 lawyers and 88 administrative staff. This body acts as a further filter, as in addition to its administrative role, the Office will construct a summary of the case under appeal for judges.¹⁵ The importance of such documentation for narrowing the issues to be explored at any hearing should not be understated, given the limited time available for preparation, hearing and consideration of an appeal.¹⁶ Thus, the importance of ensuring grounds are properly articulated in the written case presented to the Court is clear. However, it should be noted that the Office is not an entirely passive recipient of advocacy, and does at least to some extent review the documentation for grounds of appeal not raised by appellants.¹⁷

¹⁴ Spencer 'Does our present criminal appeal system make sense?' (n 2) 693-694.

¹⁵ *Consolidated Criminal Practice Direction* II.18. In the case of self-represented appellants, this can take the form of translating rambling grounds into a legally cognisable form, as in *R v Iddon* [2010] EWCA Crim 2202 [5].

¹⁶ K Malleon, 'Decision-making in the Court of Appeal: the burden of proof in an inquisitorial process' [1997] IJEP 175 emphasises the singular importance of the preparatory stage in 'influencing the final decision on appeal'.

¹⁷ From Court of Appeal Criminal Division, *Review of the Legal Year 2009/2010* (n 12) 2.5, it is clear that this is a frequent occurrence in respect of appeals against sentence, but the incidence of this in conviction appeals is evident in a number of recent cases - for example, *R v Hodgson* [2009] 1 WLR 1070 (CA) where the Criminal Appeal Office actively solicited an appeal against conviction on grounds it identified where the original appeal was only against sentence; *R v Hill* [2010] EWCA Crim 2999 where the Court noted 'counsel has previously indicated that the point.. only came to light when drawn to his attention by the

In 2008, 188 appeals against conviction were ultimately successful (10% of those seeking leave).¹⁸ As Ashworth and Redmayne note, it is difficult to draw conclusions from this figure: 'there is no telling whether or not 10 per cent is a reasonable overall success rate'.¹⁹ However the fact that this success rate has remained relatively constant over time suggests that the Court of Appeal may not have heeded the advice of the Runciman Commission to pay less deference to jury verdicts when hearing appeals.²⁰ The following sections discuss the appeal process, and possible grounds, before examining the obstacles to bringing and succeeding in an appeal.

(a) Leave Requirement

Leave of the Court of Appeal is required for all appeals, save in the rare situation where the trial judge certifies that it is a fit case for appeal.²¹ The threshold for the grant of leave is whether the appeal is 'reasonably arguable', sometimes put as whether the Court feels there is a need to hear the prosecution on the merits.²² This is not an easy threshold to pass. In 2008, only 23% of leave applications were granted, either by the single judge or by the full court.²³ Almost invariably the leave decision is made by a 'single judge',

Criminal Appeal Office'; *R v F* [2010] EWCA Crim 3096 (where a ground identified by the Office resulted in two convictions being quashed); and *R v Oudji* [2007] EWCA Crim 41 where the Crown chose not to oppose an appeal once the Office identified that the trial court did not have jurisdiction to try the offence under appeal.

¹⁸ A Ashworth and M Redmayne, *The Criminal Process* (4th edn Oxford University Press, Oxford 2010) 375. The statistics for the previous five years are comparable.

¹⁹ Ibid 376, although cf Court of Appeal Criminal Division, *Review of the Legal Year 2009/2010* (n 12) 1.7, which suggests the senior judiciary is satisfied that this rate 'clearly demonstrates good reason for confidence in the criminal justice system'.

²⁰ Ashworth and Redmayne (n 18) 379.

²¹ Criminal Appeal Act 1968, s 1. The sparingness with which trial judges are instructed to so certify is underscored by the *Consolidated Criminal Practice Direction* part IV, 50.4; Prior to 1995 it was possible to appeal on points of law without leave, but this right no longer exists: Spencer 'Does our present criminal appeal system make sense?' (n 2) n 8. Where leave is granted, but only on limited grounds, further leave is required in order to argue additional grounds: *R v Jackson* [1998] Crim LR 835 (CA).

²² *Review of the Criminal Courts of England and Wales* (n 12) ch 12, para 73.

²³ Ashworth and Redmayne (n 18) 375.

working under great pressure.²⁴ Reasons are usually cursory, consisting of either one or two paragraphs at most.²⁵ There remains the possibility to renew an application for leave to appeal before a panel of two or three judges sitting in open court,²⁶ although legal aid is seldom available for representation on renewal applications.²⁷ Of 1588 applications for leave to appeal against conviction (representing 2.5% of all convictions in the Crown Court), leave was granted by a single judge in only 212 cases (13%); 400 (51%) of those who were refused leave by a single judge renewed their application before the full court, and 146 of such applications were successful (33%).²⁸

Given the workload pressures discussed above, there is little likelihood of any substantive change in the leave process, which was endorsed by the Auld Report as 'an essential and invaluable filter to the work of the Full Court'.²⁹

(b) The Unified Ground

Since 1995, there has been a single ground of appeal in indictable matters: that the conviction is unsafe.³⁰ As to the general scope of the ground, in an early and

²⁴ This will be a High Court judge from the Queen's Bench division, and not a permanent Court of Appeal judge. Auld's *Review of the Criminal Courts of England and Wales* (n 12) ch12, para 73-74 emphasises the pressure under which this work is conducted: 'The judges are required to do this work out of normal court sitting hours and in addition to their preparatory work for each day's sitting... the norm is that they do them in the evenings, sometimes over the weekend and during vacation periods.' See also K Malleson, 'Miscarriages of justice and the accessibility of the Court of Appeal' [1991] Crim LR 323, 331-332.

²⁵ Taylor (n 9) 7-048.

²⁶ Supreme Court Act 1981, s 55(4). Increasingly, such decisions will be made by a court consisting of two High Court judges: Court of Appeal Criminal Division, *Review of the Legal Year 2009/2010* (n 12) 1.14.

²⁷ A Sanders, R Young and M Burton, *Criminal Justice* (4th edn OUP, Oxford 2010) 623. One consequence of this is that oral argument on a renewal application is unusual. Further, 'where counsel does not appear, renewed applications for leave to appeal are often placed in a "non-counsel list". Such hearings then simply involve the calling on of the case followed by one of the court giving judgment in the case': A Hooper and DC Ormerod, *Blackstone's criminal practice 2011* (20th edn Oxford University Press, Oxford 2010) D26.8.

²⁸ Ashworth and Redmayne (n 18) 375. The statistics for the previous five years are comparable.

²⁹ *Review of the Criminal Courts of England and Wales* (n 12) ch 12, para 74.

³⁰ Criminal Appeal Act 1968, s 2(1)(a) (as amended by Criminal Appeal Act 1995, s 2(1)). An exhaustive overview of the available sub-grounds is not possible in the space available. For this, see Taylor (n 9) chapters 7 and 8, although even this discussion, which runs to over 100 pages, disclaims that it 'does not purport to be an exhaustive list of all available grounds'.

authoritative judgment, Lord Bingham CJ held that:³¹

The new provision... is plainly intended to concentrate attention on one question: whether, in the light of any arguments raised or evidence adduced on appeal, the Court of Appeal considers a conviction unsafe. If the Court is satisfied, despite any misdirection of law or any irregularity in the conduct of the trial or any fresh evidence, that the conviction is safe, the Court will dismiss the appeal. But if, for whatever reason, the Court concludes that the appellant was wrongly convicted of the offence charged, or is left in doubt whether the appellant was rightly convicted of that offence or not, then it must of necessity consider the conviction unsafe. The Court is then subject to a binding duty to allow the appeal.

The move to a single ground of appeal prompted some uncertainty regarding whether the safety criterion excluded appeals which raised pure 'due process' or 'abuse of process' arguments, although it is now settled that appeals are available on such grounds.³² Less clear, however, is what level of severity such errors must reach before a conviction will be held to be unsafe.³³

It also remains possible for the Court to allow an appeal where it has a 'lurking doubt' about the safety of the conviction, but is unable to articulate a precise reason for

³¹ *R v Graham* [1997] 1 Cr App R 302 (CA).

³² *R v Chalkley* [1998] 2 Cr App R 79 (CA) suggested that due process errors may not be sufficient although following *R v Togher and Others* [2001] 3 All ER 464 (CA) and *R v H (Peter)* [2002] EWCA Crim 730 this debate seems to have been resolved in appellants' favour, see Ashworth and Redmayne (n 18) 385-389.

³³ This problem was presaged in Professor Zander's Note of Dissent to the Runciman Royal Commission's proposal for a sole ground of appeal: Royal Commission on Criminal Justice, *The Royal Commission on Criminal Justice : Report* (Cm 2263, 1993) 223, paras 62-72; see A Clarke, 'Safety or supervision? The unified ground of appeal and its consequences in the law of abuse of process and exclusion of evidence' [1999] Crim LR 108; JR Spencer, 'Quashing Convictions for Procedural Irregularities' [2007] Crim LR 835, 841-842; N Taylor and D Ormerod, 'Mind the gaps: safety, fairness and moral legitimacy' [2004] Crim LR 266; and I Dennis, 'Fair Trials and Safe Convictions' [2003] Current Legal Problems 211, 211-213.

this.³⁴ As a matter of practice, the 'lurking doubt' principle is seldom deployed and 'very rarely provides a ground of appeal on its own'.³⁵

The burden, although not expressly provided by statute, as a matter of practice lies on the appellant to identify the relevant errors and convince the Court that they render the conviction unsafe.³⁶

(c) Fresh Evidence Cases

A longstanding concern with the English appeal process relates to the Court of Appeal's reluctance to consider arguments based on evidence which was not before the trial court.³⁷ The power to admit such evidence is provided by statute, and applies where the Court, after considering a list of prescribed factors, thinks 'it necessary or expedient in the interests of justice'.³⁸ The discretion this leaves to the Court is considerable, and in practice the Court's approach is conditioned by a general scepticism.³⁹

The Court does not need to rely on the evidence provided by the parties - it possesses a power to request that the Criminal Cases Review Commission conduct investigations on its behalf.⁴⁰ This power, exercised twelve times in 2009,⁴¹ has resulted

³⁴ Despite suggestions by the Court of Appeal in *R v F* [1999] Crim LR 306 that this ground was no longer available following the move to a unified ground, the research of S Roberts, 'The Royal Commission on Criminal Justice and Factual Innocence: remedying wrongful convictions in the Court of Appeal' (2004) 1 JUSTICE Journal 86 notes that this ground is still used by the Court. See further LH Leigh, 'Lurking doubt and the safety of convictions' [2006] Crim LR 809.

³⁵ The results of Roberts 'The Royal Commission on Criminal Justice and Factual Innocence' (n 34), a 2002 survey of the Court of Appeal's practice, suggests that this ground is being deployed less often than in was in the early 1990s.

³⁶ Spencer 'Does our present criminal appeal system make sense?' (n 2) 681; although it has been suggested that this is better viewed as akin to an evidentiary burden, whereby once the deficiencies in the conviction are established, the onus shifts to the Crown to demonstrate safety: Malleon 'Decision-making in the Court of Appeal' (n 16), 183-185.

³⁷ This was the subject of criticism in Royal Commission on Criminal Justice (n 33) para 51-63.

³⁸ Criminal Appeal Act 1968, s 23.

³⁹ See Ashworth and Redmayne (n 18) 384-385 and text to n 103 in ch 5.

⁴⁰ Criminal Appeal Act 1995, s 15.

⁴¹ Criminal Cases Review Commission, *Annual Report and Accounts 2009-2010* (2010) 27.

in investigations into allegations of jury tampering,⁴² the cogency of fresh evidence⁴³ and allegations of retractions of trial evidence.⁴⁴

Once the fresh evidence is admitted, the Court must determine whether it requires the conviction to be quashed. The ultimate question is whether the new evidence renders the conviction unsafe, however there is disagreement about whether this question ought to be approached from the viewpoint of the judges themselves, or instead by attempting to discern the impact the evidence may have had on a jury. The analysis of this issue is, in terms of authority, governed by the majority decision of the House of Lords in *R v Pendleton*,⁴⁵ although the failure of this decision to provide clear guidance has been the cause of some confusion.⁴⁶ While the approach selected can be significant in some cases, as Ashworth and Redmayne conclude, 'there is probably a reasonable degree of consistency' in the Court of Appeal's approach: in clear cases, the Court will decide the appeal based on its own view, whereas in more difficult cases, the case will be viewed through the prism of the notional jury.⁴⁷

While the Royal Commission on Criminal Justice urged the Court of Appeal to take a broader view of its power to consider and allow appeals on the basis of fresh evidence,⁴⁸ evidence about the Court's subsequent performance is mixed. A 2002 study of the Court of Appeal's approach to such cases by Stephanie Roberts suggests that the Court is more willing to grant leave in cases involving fresh evidence than it was in the

⁴² Eg *R v Thompson and others* [2011] 1 WLR 200 (CA).

⁴³ Eg *R v Azam & Ors* [2006] EWCA Crim 161.

⁴⁴ Criminal Cases Review Commission *Annual Report 2009-2010* (n 41) 27.

⁴⁵ *R v Pendleton* [2001] UKHL 66, [2002] 1 WLR 72 (HL).

⁴⁶ Not least for the Criminal Cases Review Commission, see text to n 121 in ch 5. For a fuller discussion, see Ashworth and Redmayne (n 18) 380-385. An application for leave to the Supreme Court requesting further guidance was rejected by the Court of Appeal as not raising a point of general public importance: CJS Knight, 'Second criminal appeals and the requirement of certification' (2011) 127 LQR 188, 189.

⁴⁷ Ashworth and Redmayne (n 18) 383.

⁴⁸ Royal Commission on Criminal Justice (n 33) para 56.

early 1990s,⁴⁹ although this may not signify an increased willingness to allow appeals on this basis, as the Court will often grant leave without making a final determination on the admissibility issue.⁵⁰ Indeed, a further conclusion of Roberts' research was that fresh evidence was ultimately less successful as a ground of appeal in 2002 than in 1990.⁵¹

18 Appeals in Summary Matters

With respect to summary convictions, appeals to the Crown Court, by way of rehearing, are allowed as of right.⁵² In such appeals, the evidence is reheard in full, and the burden lies on the prosecution to prove the appellant's guilt for a second time.⁵³ This means that an appeal may succeed on purely factual grounds. The exception to this is where the putative appellant entered a guilty plea - in such circumstances an appeal lies to the Crown Court against sentence only,⁵⁴ unless it can be demonstrated that there was not a unequivocal, voluntary, guilty plea.⁵⁵ The likely reason for this restriction is practical: if a rehearing were available to the 90% of defendants in magistrates' courts who enter guilty pleas, the resourcing consequences would be immense.⁵⁶ The consequence is that

⁴⁹ Roberts 'The Royal Commission on Criminal Justice and Factual Innocence' (n 34) 91 cf the earlier work of K Malleon, *Research Study 17: Review of the Appeal Process* (HMSO, London 1993).

⁵⁰ Ashworth and Redmayne (n 18) 379.

⁵¹ Roberts 'The Royal Commission on Criminal Justice and Factual Innocence' (n 34) 94; see also L Elks, 'R v Stock (Case Comment)' (2008) 9 Arch News 3; Sanders, Young and Burton *Criminal Justice* (n 27) 11.3.2.3 and, more circumspectly, Ashworth and Redmayne (n 18) 384-385, who also suggest that the Court of Appeal's extreme scepticism regarding fresh evidence cases remains.

⁵² Magistrates' Courts Act 1980, s 108(1)(b). Proposals to introduce a leave stage have attracted critical comment: Malleon and Roberts (n 2) 273-275.

⁵³ This occurs in practice, although not expressly required by the statute, as Spencer 'Does our present criminal appeal system make sense?' (n 2) 681 notes.

⁵⁴ Magistrates' Courts Act 1980, s 108(1)(a).

⁵⁵ In such cases, an application to vacate the guilty plea must instead be made, although these will succeed only in very rare cases where it can be established that the defendant did not appreciate the elements of the offence to which he was pleading guilty, or that the plea was involuntary: *Revitt and others v DPP* [2006] 1 WLR 3172 (Admin). This is most unlikely to cover situations where a guilty plea was entered for tactical reasons, or after 'forceful' persuasion from counsel: Ashworth and Redmayne (n 18) 373. The leading practitioners' guide suggests that the scope for such argument is very narrow indeed: see Barnes (ed) *Archbold Magistrate's Court Criminal Practice* (n 6) 558. Recent statistics are unavailable, but Sanders, Young and Burton *Criminal Justice* (n 27) 614 points out that in the last year for which they are (1996) only 35 cases were remitted on this basis.

⁵⁶ Pattenden (n 10) 216.

a sizable number of would-be appellants are excluded from the appeal process, with flow-on effects for the CCRC, as discussed below.⁵⁷

Crown Court appeals are heard by a panel consisting of a judge⁵⁸ sitting with between two and four magistrates.⁵⁹ The judge's decision on questions of law is binding on the magistrates, but in respect of factual matters, the magistrates may outvote the judge.⁶⁰ The appeals are heard in open court, and reasons for decisions must be provided.⁶¹ As Crown Courts are located throughout England and Wales, these appeals are heard locally, and the court system currently has sufficient capacity to entertain the volume of appeals filed.⁶²

There is a notable absence of empirical work about appeals in the Crown Court, so it is difficult to draw conclusions about its effectiveness.⁶³ However, in 2008 5915 appeals against conviction were heard (0.73% of those found guilty in the magistrates' courts), and 39% of these were successful.⁶⁴ Given the low rate of appeal, the clear inference is that many appellants who may have valid grounds choose not to appeal.⁶⁵

In addition to appeals to the Crown Court, appeals on questions of law are possible by way of case stated to the Administrative Court.⁶⁶ In such cases, the magistrates who heard the substantive matter will provide a statement of the facts as

⁵⁷ See text to n 199 in ch 5.

⁵⁸ Either a High Court, Circuit judge or recorder: Supreme Court Act 1981, s 74.

⁵⁹ Ibid, s 74 (the magistrates must not have been involved with the original hearing).

⁶⁰ Pattenden (n 10) 218 (and the authorities cited therein).

⁶¹ *R v Kingston Crown Court Ex p B (A Juvenile)* (2000) 164 JP 633 (QB).

⁶² Spencer 'Does our present criminal appeal system make sense?' (n 2) 692.

⁶³ That this is an 'under-researched area of the criminal process' is lamented in Ashworth and Redmayne (n 18) 376 and Sanders, Young and Burton *Criminal Justice* (n 27) 620-621.

⁶⁴ The figures are from Ministry of Justice, *Judicial and Court Statistics 2008* (London 2009) 6.10 and Crown Prosecution Service, *Annual Report and Resource Accounts 2008-2009* (London 2009) appendix B.

⁶⁵ Ashworth and Redmayne (n 18) 376; Malleson and Roberts (n 2) 274 argue that the alternative explanation, that the system is over 99% accurate, defies belief.

⁶⁶ Magistrates' Courts Act 1980, s 111.

found, together with a summary of their legal conclusions, and the appeal proceeds on the basis of these.⁶⁷ Similarly, as an inferior court, the decisions of magistrates courts are subject to judicial review,⁶⁸ and such applications are also heard by the Administrative Court. While important in terms of settling the law, or dealing with cases where magistrates' courts have proceeded without jurisdiction, these routes are resorted to far less often than the Crown Court appeal route.⁶⁹ In 2008, for example, there were only 72 appeals by way of case stated from magistrates' courts.⁷⁰

Onward appeals are possible, and in the case of general appeals, these are more extensive than those awarded to individuals convicted of indictable offences, a point which Spencer has noted with bemusement.⁷¹

The overall picture remains as stated by Pattenden in 1996: 'The defendant who is convicted in a magistrates' court, with the important exception of a defendant who pleads guilty but is in fact innocent, has on paper extensive and satisfactory rights of appeal'.⁷²

⁶⁷ Ashworth and Redmayne (n 18) 371.

⁶⁸ Including against a decision to refuse to state a case for the opinion of the Administrative Court: *Sunworld Ltd v Hammersmith and Fulham London Borough Council* [2000] 1 WLR 2102 (QB). The grounds for review are the same as for all public law challenges, and are discussed in Taylor (n 9) 112-133.

⁶⁹ Pattenden (n 10) 229-241 provides an overview of the relevant considerations facing putative appellants. Crown Court appeals are often favoured because of the ability to rehear factual matters. The case stated procedure allows for authoritative determinations of legal matters. Recourse to judicial review is discouraged where the case stated procedure is available: Barnes (ed) *Archbold Magistrate's Court Criminal Practice* (n 6) 569, and eligibility for legal aid is assessed on the considerably more restrictive civil basis: Pattenden (n 10) 226.

⁷⁰ Ministry of Justice, *Judicial and Court Statistics 2008* (n 64) 16, of which half were successful. The number of applications for judicial review of magistrates' court proceedings are not available, however a total of 298 applications for permission to apply for judicial review in criminal matters (including review of criminal matters in the Crown Court) were received in 2009: Ministry of Justice 27.

⁷¹ A summary conviction may be appealed to the Crown Court and thence to the Administrative Court and thereafter the Supreme Court (three appeals), whereas only two tiers of appeal are available in respect of indictable convictions - Spencer 'Does our present criminal appeal system make sense?' (n 2) 680. For details of the procedures and limits of such appeals, see *Blackstone's Criminal Practice* (n 27) D28.30-28.31. Ashworth and Redmayne (n 18) 371, fn 3 notes that the Law Commission has recommended that such appeals instead be heard by the Court of Appeal (Criminal Division), although this change has not yet been brought forward. With regard to appeals by way of case stated or applications for judicial review, appeals lie to the Supreme Court: Administration of Justice Act 1960, s 1 - the limitations on this are discussed below (see text to n 109).

⁷² Pattenden (n 10) 241.

The various factors which hinder the exercise of these rights are discussed below. In addition to these, the limitations of the re-hearings themselves should be noted,⁷³ although there is a need for further research before a meaningful examination of their overall efficacy can be conducted.

19 Barriers to Appeals

The avenues of appeal discussed above must be understood in light of the various barriers, legal and practical, to their exercise.⁷⁴ Most of the empirical research in this regard is geared towards indictable proceedings, although it has been pointed out that the various factors which contribute to low rates of appeal are equally (if not more) applicable in the summary jurisdiction.⁷⁵ Two particularly important barriers are considered below, and their continued importance (combined, in indictable matters, with the leave requirements discussed above) suggests that Malleeson's 1991 observation that '[t]he process of getting to the Court of Appeal is such that the cost, trouble and effort involved are enough to deter all but the most committed' remains true to this day.⁷⁶

(a) Legal Aid

The first barrier is the difficulty in obtaining legal aid to cover the costs of representation on an appeal. In summary matters, applicants must apply for a fresh grant of legal aid if they require public funding for their appeal. This involves a fresh assessment of whether

⁷³ These include the fact that this work is not prioritised by defence lawyers, and tends to get allocated to relatively inexperienced practitioners: Sanders, Young and Burton *Criminal Justice* (n 27) 615.

⁷⁴ As Ashworth and Redmayne (n 18) 372 point out, to do otherwise would be to provide a one-dimensional account of the system. As Malleeson and Roberts (n 2) 282 put it 'The danger that cases which need to be reviewed are not currently being heard is one which is easy to overlook because most of those cases will never be known about.'

⁷⁵ Malleeson and Roberts (n 2) 280.

⁷⁶ Malleeson 'Miscarriages of justice and the accessibility of the Court of Appeal' (n 24) 328.

a grant of legal aid is in the interests of justice.⁷⁷ While most applications are granted, some two fifths of appellants do not apply.⁷⁸ The reasons for this are unclear, but it is reasonable to assume that a sizeable proportion would have been advised that they were unlikely to satisfy the test, and still others may be deterred by the potential of a cost recovery order.⁷⁹

In indictable matters, it is the responsibility of trial counsel to advise on the prospects of appeal. A 'final view' must be provided to the putative appellant immediately following trial, and if the advice is negative, it is necessary to make a fresh application for legal aid if a second opinion is sought.⁸⁰ When contemplating appeal grounds, counsel are subject to a professional duty not to:⁸¹

settle or sign grounds unless they are reasonable, have some real prospect of success and are such that he is prepared to argue them before the Court. Counsel should not settle grounds he cannot support because he is 'instructed' to do so by a defendant.

The consequence of this is to create an additional filter (at least in the case of impecunious appellants), before leave to appeal is even sought, operated by trial counsel.⁸²

(b) Increased Sentences and Loss of Time Rules

⁷⁷ Legal Services Commission, *Criminal Legal Aid Manual* (London 2010) 22. For a discussion of the definition and application of this test, see Sanders, Young and Burton *Criminal Justice* (n 27) 9.2.2.

⁷⁸ Sanders, Young and Burton *Criminal Justice* (n 27) 614-615.

⁷⁹ *Ibid.*

⁸⁰ *Practice Direction (Costs in Criminal Proceedings)* Unreported, July 30 2010, Senior Courts (Lord Judge CJ) part 8.

⁸¹ Her Majesty's Court Service, *A Guide to Commencing Proceedings in the Court of Appeal Criminal Division* (London 2008) A2-6. This mirrors professional guidance issued by the Bar Council in 1995, and approved by *R v Doherty & McGregor* [1997] 2 Cr App R 218 (CA).

⁸² See Sanders, Young and Burton *Criminal Justice* (n 27) 622.

It is also necessary to consider the disincentives to exercising appeal rights. These can be considerable. In summary matters, the Crown Court on appeal has the power to increase the appellant's sentence.⁸³ There is no empirical evidence of how often this power is used. Although it has been suggested that while it is not used very often,⁸⁴ 'from time to time, Crown Courts make spectacular use of it',⁸⁵ and the power is well known.⁸⁶ The consequence is that this is likely to act as a psychological barrier to the exercise of appeal rights in at least some cases, although precisely how many is impossible to say.⁸⁷

The Court of Appeal no longer has a specific power to increase sentences.⁸⁸ However, the same effect can usually be achieved by the application of so-called time loss rules. Due to the workload issues described above, criminal appeals usually take quite some time to be heard. As sentences are not put on hold pending the outcome of an appeal, in cases where a custodial sentence is imposed, the applicant will remain in custody. While this time ordinarily counts towards the time served, the Court of Appeal has the power to order that it not be,⁸⁹ so that 'the time served is treated as an additional punishment for wasting the court's time'.⁹⁰ In an effort to reduce the number of unmeritorious appeals being brought, the Court of Appeal has in recent years signalled

⁸³ Supreme Court Act 1981, s 48(4). This power expressly does not apply where a matter is before the Crown Court on a reference from the CCRC: Criminal Appeal Act 1995, s 11(6). There is no equivalent power in appeals by way of case stated, although Pattenden (n 10) 219-220 notes that there have been accusations that magistrates' courts use their power to issue 'recognisances' which impose financial penalties if an appeal is not prosecuted expeditiously to pressure appellants into not exercising their rights. However, as Pattenden notes there is no reliable basis on which to gauge how widespread this practice is.

⁸⁴ Pattenden (n 10) 219.

⁸⁵ Spencer 'Does our present criminal appeal system make sense?' (n 2) 682.

⁸⁶ Pattenden (n 10) 219.

⁸⁷ This is also evident from a number of applications to the CCRC, where applicants did not exercise appeal rights due to a fear of receiving a higher sentence: see text to n 159 in ch 5. This operates in conjunction with the Crown Court's power to re-open costs decisions, which can result in the imposition of costs orders of magnitude higher than those in the magistrates' courts: Sanders, Young and Burton *Criminal Justice* (n 27) 614-615.

⁸⁸ This power was removed from the Court of Appeal in 1966: Spencer 'Does our present criminal appeal system make sense?' (n 2) 681.

⁸⁹ Criminal Appeal Act 1968, s 29.

⁹⁰ Ashworth and Redmayne (n 18) 373.

that this power should be exercised more frequently.⁹¹ This is made clear to putative appellants, as the Court of Appeal has noted:⁹²

The form on which an application for leave to appeal is initially made contains a very clear printed warning in bold letters above the place for signature that if the single judge or the court is of the opinion that the application for leave is plainly without merit, an order may be made that time spent in custody as an appellant will not count towards sentence.

... A further warning to the same effect was contained in the form by which the applicant elected to renew his application. [Its] terms could not be clearer. They read:

“I understand that if an application is renewed after being refused by a judge, and the court comes to the conclusion that there is no justification for the renewal, the court may direct that some or all of the time spent in custody as an applicant shall not count towards sentence (a loss of time order).”

The power, and the warnings about its potential effect, are clearly intended to impose a psychological barrier to both those seeking leave to appeal, and those contemplating renewing an application before the Full Court. While there has been no recent empirical study of this power’s use, past research suggests the impact can be significant.⁹³

20 Appeals Out of Time

The discussion above has concentrated on appeals filed within time. However, material capable of demonstrating that a miscarriage of justice has occurred often comes to light some time after conviction, so the approach to appeals filed outside these time limits can

⁹¹ *R v Fortean* [2009] EWCA Crim 437 [10]-[17]. Significantly, this warning is emphasised in the ubiquitous practitioners’ text, *Archbold* (n 11) at 7-228.

⁹² *R v Fortean* (n 91) [13]-[14].

⁹³ Ashworth and Redmayne (n 18) 374 notes that when the court’s intention to use this power was announced by way of a practice direction in 1970, the number of appeals was halved, see in this regard M Zander, ‘Legal Advice and Criminal Appeals: A Survey of Prisoners, Prisons and Lawyers’ [1972] Crim LR 132.

be crucial.⁹⁴

In indictable matters, appeals must be lodged within 28 days, although the Court has a power to extend this.⁹⁵ This power is restrictively exercised, on the basis that finality is accorded paramount importance.⁹⁶ As *Archbold* advises practitioners: 'Substantial grounds must be given for the delay before the court will exercise its power to extend the time allowed for giving the appropriate notice, and the longer the delay the more onerous will be this duty'.⁹⁷ While there have been occasional, exceptional, cases where the Court of Appeal has demonstrated a willingness to examine the merits of such cases in the absence of such an explanation, this has been couched in terms demonstrating anxiety not to set a precedent - for example *R v King*.⁹⁸

Without in any way wishing to suggest a general willingness of this Court to grant extensions of time, let alone extensions of the length here sought, we consider that on the special and unusual facts of this case it is preferable to consider the substantial question whether an injustice may have been done.

Where the explanation for the delay is that appeal grounds have only subsequently come to light due to a change in the law, particular problems emerge. These are discussed in detail below.⁹⁹

⁹⁴ This includes situations where leave has been refused by a single judge, and a renewal application is considered out of time, as it has been 'firmly and consistently laid down that that power will not be exercised unless there is some good and reasonable excuse for the applicant having failed to act within the prescribed period': *R v Sullivan* (1972) 56 Cr App R 541 (CA); *Archbold* (n 11) 7-234.

⁹⁵ Criminal Appeal Act 1968, s 18.

⁹⁶ Sanders, Young and Burton *Criminal Justice* (n 27) 11.3.1.3.

⁹⁷ *Archbold* (n 11) 7-182.

⁹⁸ *R v King* [2000] 2 Cr App R 391 (CA) 403, a decision of Lord Bingham CJ, as he then was. In that case it was also apparent that the possibility, if leave was denied, of a reference by the Criminal Cases Review Commission was an important consideration in the Court's decision to examine the merits of the dispute.

⁹⁹ See text to n 127, ch 5 and below.

In the summary jurisdiction, appeals to the Crown Court must be filed within 21 days, although the Crown Court may grant an extension.¹⁰⁰ These are very seldom granted, with the Crown Court's insistence on promptness enhanced by the fact that the appeal is by way of re-hearing, and carries the risk 'that the memories of witnesses will have faded, and that witnesses who were reluctant to give evidence at the first hearing will refuse to do so when the case comes on again.'¹⁰¹ The consequence is that in the reported cases the length of delay in requests for extensions can be measured in days or weeks, rather than months, let alone years. The time limits for appealing by way of case stated are strict, and there is no jurisdiction to extend the time for filing.¹⁰²

21 Second Appeals

Where appeal rights have been exercised, there is very little scope for having the matter re-heard by the appeal court without the intercession of the CCRC. The Court of Appeal has consistently held that it does not possess jurisdiction to consider a second application for leave to appeal if an appeal in respect of the same conviction has already been determined.¹⁰³ The only exception to this is where the initial appeal was a nullity, in which case the appeal may be re-listed.¹⁰⁴ There is little guidance as to what would be sufficient to trigger this exception, although it seems clear that it must be something exceptional.¹⁰⁵ It also seems that the jurisdiction to re-list even in those limited

¹⁰⁰ Criminal Procedure Rules 2010, r 63.9(a).

¹⁰¹ For this and a discussion of other considerations relevant to the exercise of the power, see *Regina (Birmingham City Council) v Crown Court at Birmingham* [2010] 1 WLR 1287 (QB) 1296.

¹⁰² *Michael v Gowland* [1977] 1 WLR 296 (Fam).

¹⁰³ *R v Pinfold* [1988] QB 462 (CA). This is strictly interpreted so that if an appeal is adjourned part heard, but certain grounds have been disposed of, the Court will consider that it lacks jurisdiction to revisit those earlier grounds when the hearing resumes, even if new and material Supreme Court authority is issued in the interim, as in *R v Siedlaczek* [2006] EWCA Crim 2443 [16].

¹⁰⁴ *R v Pinfold* (n 103) 464.

¹⁰⁵ One example which the Court of Appeal suggested (obiter) may be covered was the highly unusual case of *R v Laming* [1990] 90 Cr App R 450 (CA) where the sole ground on the first appeal was whether the trial was a nullity (the Court possessing jurisdiction independent of the empowering statute to consider such a ground). Of potentially broader application is where (as was suggested in *Pinfold*) the nullity arises because 'owing to some defect in the procedure the appellant has on the first appeal being dismissed

circumstances would be absent where a subsequent appeal had been considered and rejected by the Supreme Court.¹⁰⁶ Similarly, where an application for leave to appeal to the Supreme Court has been determined, the Court of Appeal is of the view that it does not possess jurisdiction to consider a further application for leave regardless of whether this raises new grounds.¹⁰⁷

These restrictions were endorsed by the Royal Commission on Criminal Justice, which was 'firmly of the view' that putative second appellants ought first to make application to the CCRC.¹⁰⁸

22 The Supreme Court and Europe

The Supreme Court is now the final court of appeal in England and Wales, replacing the House of Lords.¹⁰⁹ While the Supreme Court has jurisdiction to hear appeals in both the summary and indictable jurisdictions, these appeal rights are of use in limited circumstances only. This is a consequence of the strict leave requirements, which require that the intermediate appeal court¹¹⁰ certify that 'a point of law of general public importance' arises and that 'the point is one which ought to be considered by the Supreme

suffered an injustice', however a review of cases where a re-listing on this basis has been refused underscores the exceptionality, with the Court of Appeal treating such attempts coolly - eg: 'If this case were to be relisted it would simply be because counsel has had second thoughts and in order to allow him to argue a point not taken when the appeal was fully heard' *R v Hamadi* [2009] 1 WLR 2517 (CA) [27]-[28]; 'We cannot see that this change... comes anywhere near a reason to re-list' *R v Rowan* [2007] EWCA Crim 1624 [30]; The unavailability of a trial transcript due to a refusal by the Court to order one could not amount to a 'procedural or administrative decision': *R v Wood* (Unreported, Court of Appeal Criminal Division, 9 November 2000).

¹⁰⁶ *R v Berry* [1991] 1 WLR 125 (CA) 133.

¹⁰⁷ *R v Ashdown* [1974] 1 WLR 270 (CA) 273, which stated that the existence of jurisdiction to do so would open 'alarming prospects'; this was affirmed by *R v Tang* [1995] Crim LR 813 (CA).

¹⁰⁸ Royal Commission on Criminal Justice (n 33) 177.

¹⁰⁹ Previously extant appeal rights to the House of Lords have been replaced by rights of appeal to the Supreme Court: Constitutional Reform Act 2005, sch 9 cl 13, 16.

¹¹⁰ The Court of Appeal or the Divisional Court, as the case may be.

Court'.¹¹¹

The appeal court's determination on the former question is final, and is not subject to appeal, although if the first question is answered in the affirmative, but leave is nonetheless refused, an application may be made directly to the Supreme Court.¹¹² As a matter of practice, leave is often the subject of oral argument at the conclusion of the Court of Appeal (or Divisional Court) hearing, but this is not inevitable, and the Court of Appeal's longstanding position is that 'in a case where there does not seem to be any point of law of general public importance the court will deal with the matter on the papers without granting legal aid or leave to be present'.¹¹³ The effect of this is, to paraphrase the Bar Council's submissions to the Runciman Commission: 'to allow the Court of Appeal to forbid an unsuccessful appellant even to petition the [Supreme Court] for leave'.¹¹⁴ While the Runciman Commission recommended the abolition of the certification requirement,¹¹⁵ this was retained even after the establishment of the Supreme Court, and there is no imminent prospect of this changing.¹¹⁶

The requirement that the question be of general importance 'rules out, *inter alia*,

¹¹¹ Criminal Appeal Act 1968, s 33; Administration of Justice Act 1960, s 1. This was a relaxation of the previous position, which required that the issue be of 'exceptional' public importance: ATH Smith, 'Criminal Appeals in the House of Lords' [1984] MLR 133, 133. For a discussion of the criteria employed to determine if these requirements have been fulfilled, see *ibid* at 138-139.

¹¹² Nor are reasons usually provided: *R. v Cooper and McMahon* (1975) 61 Cr App R 215 (CA); *R v Tang* (n 107). Attempts to challenge the finality of the Court of Appeal's decision on the grounds of bias have been rejected: *R v Dunn* [2010] EWCA Crim 1823.

¹¹³ *R v Daines* [1961] 1 WLR 52 (CA); affirmed by *R v Steele and others* [2007] 1 WLR 222 (CA) [5].

¹¹⁴ Quoted in Pattenden (n 10) 315.

¹¹⁵ Royal Commission on Criminal Justice (n 33) para 79.

¹¹⁶ See C Walker, 'Appeal to Supreme Court (Case Comment)' [2011] Crim LR 229, 231. For criticism of the current position, see Knight (n 46) and L Blom-Cooper, 'The House of Lords and the English Court of Appeal' in L Blom-Cooper, B Dickson and G Drewry (eds), *The Judicial House of Lords 1876-2009* (OUP, Oxford 2009).

appeals... about the soundness of the jury's verdict'.¹¹⁷ The consequence is that the correction of miscarriages of justice in individual cases is an incidental effect of the Supreme Court's primary function of clarifying and settling the law, possible only where 'they arise from a mistaken ruling on the law and do not require a close examination of the facts'.¹¹⁸ This, compounded by the strict time period for appealing,¹¹⁹ mean that the Supreme Court is seldom available as a venue for contesting suspect convictions.

There are also collateral means of challenging a conviction. One is to bring a case to the European Court of Human Rights (**ECHR**). Due to the particular nature of that court's jurisdiction, applications must be premised on alleged violations of rights contained in the European Convention on Human Rights rather than as to innocence, and, if a violation is found, relief will not extend to an order that the conviction be quashed.¹²⁰ Thus, even if a violation is found, it will be necessary to seek, by means of the domestic procedures described elsewhere in this chapter, to have the conviction set aside on the basis that the breach renders the conviction unsafe in terms of the standard appeal test.¹²¹ The difficulties with this are evident from the case of James Dowsett, who obtained a unanimous declaration from the ECHR that his right to a fair trial had been violated by prosecution non-disclosure. When the CCRC refused to refer the matter to the Court of Appeal, he unsuccessfully challenged this by means of judicial review, with Laws LJ concluding that the CCRC's conclusion that there was no real possibility of an appeal

¹¹⁷ Pattenden (n 10) 314-315.

¹¹⁸ Ibid 319. Smith 'Criminal Appeals in the House of Lords' (n 111) 139 states the position more starkly: 'In this country... miscarriages of justice, should they occur, are matters for the Court of Appeal and the Executive'.

¹¹⁹ 28 days from the date on which the Court of Appeal gives reasons for its decision: Criminal Appeal Act 1968, s 34.

¹²⁰ For detailed discussion of these matters, see B Emmerson, A Ashworth and A Macdonald, *Human rights and criminal justice* (2nd edn Sweet & Maxwell, London 2007).

¹²¹ The current state of the law is that not every violation of the right to a fair trial renders a conviction unsafe: see Taylor and Ormerod (n 33).

succeeding was 'beyond the reach of sensible challenge'.¹²²

With the expansion of the European Union's competences, and the creation of the European Charter of Fundamental Rights, there is an expanded possibility for challenges to reach the Court of Justice of the European Union, either on the basis that a conviction was contrary to substantive European law, or followed a procedure which did not accord with European fundamental rights law.¹²³ However, this possibility would arise only in a very narrow set of cases, and, procedurally, can only reach the Court following a reference by domestic courts during a substantive appeal.¹²⁴ As a result, it is likely to be of practical consequence in only a very narrow set of circumstances.

23 The Royal Prerogative of Mercy

The Royal Prerogative of Mercy remains available as an extraordinary remedy, but is unlikely to be of importance for those seeking to have their convictions quashed except in extremely rare situations. The prerogative, exercised by the Queen on advice of the Justice Secretary, allows the grant of a free pardon, a conditional pardon (whereby the penalty is removed on condition that a lesser sentence is served), or remission of sentence.¹²⁵ A pardon does not vitiate the conviction, which remains (and can be challenged by way of appeal), but instead relieves the petitioner of the 'pains and penalties' which the conviction may entail.¹²⁶

With the advent of the Criminal Cases Review Commission, its use seems likely to be confined to truly exceptional cases – for example, where evidence is inadmissible or

¹²² *Dowsett v Criminal Cases Review Commission* [2007] EWHC 1923 (Admin) [23].

¹²³ Although this is not a new phenomenon, and dates back to the UK's accession to the then EC in 1972, see *Pattenden* (n 10) 344-345, and eg *Henn & Darby v DPP* [1981] AC 850 (ECJ).

¹²⁴ *Blackstone's Criminal Practice* (n 27) D29.4.

¹²⁵ *Taylor* (n 9) 13-001; *R (Shields) v Secretary of State for Justice* [2010] QB 150 (Admin).

¹²⁶ *Taylor* (n 9) 13-003.

unsuitable for public disclosure, or in respect of convictions imposed in other jurisdictions.¹²⁷ Even where this is the case, the longstanding policy (approved by the courts) is that its use is 'reserved for cases where it can be established that the convicted person was morally and technically innocent'.¹²⁸ To this end, the Justice Secretary has the power to obtain the assistance of the Criminal Cases Review Commission when considering whether to recommend the exercise of the prerogative.¹²⁹ A 2009 review by the Ministry of Justice concluded that the fact that this facility has never been called upon 'lends further support to the view that the Royal Prerogative of Mercy will only be used very rarely' to quash convictions.¹³⁰ Indeed, the Justice Secretary will only very exceptionally even consider an application for a pardon, with the usual practice being to refer such individuals to the CCRC.¹³¹

From time to time people write to the Department seeking to have their convictions quashed. Sometimes they specifically ask for a free pardon, sometimes they do not. A record is not kept of the number of such letters received because rather than being considered under the RPM the correspondents are advised to apply to the CCRC...

¹²⁷ Ibid 13-002. See the discussion of May P in *R (Shields) v Secretary of State for Justice* (n 125) at [32]-[33]; GR Rubin, 'Posthumous pardons, the Home Office and the Timothy Evans case' [2007] Crim LR 41 and H Quirk, 'Prisoners, pardons and politics' [2009] Crim LR 648. The CCRC has the power, under Criminal Appeal Act 1995, s 16(2), to recommend the exercise of the RPM in respect of cases before it, but this has never been exercised in respect of a conviction, suggesting that the CCRC also considers the scope for exercise of the RPM to be narrow. This is criticised in M Naughton and G Tan, *Claims of Innocence* (University of Bristol, Bristol 2010) 32.

¹²⁸ *R v Secretary of State for the Home Department, Ex parte Bentley* [1994] QB 349 (Admin) 364; *R (Shields) v Secretary of State for Justice* (n 125).

¹²⁹ Criminal Appeal Act 1995, s 16(1) – where the Commission provides such assistance the Justice Secretary is bound to 'treat the Commission's statement as conclusive of the matter referred.' This power has not to date been exercised, although the Commission has provided cognate assistance in respect of a request relating to Jersey which falls outside the Commission's statutory authority - Criminal Cases Review Commission, *Annual Report and Accounts 2007-2008* (2008) 18.

¹³⁰ Ministry of Justice, *Review of the Executive Royal Prerogative Powers: Final Report* (London 2009) para 62.

¹³¹ Response by Ministry of Justice to request by author under the Freedom of Information Act 2000 dated 22 March 2011. In the period 2008-2011, the Ministry of Justice has only dealt substantively with one application, relating to an individual convicted of attempted murder in Bulgaria, who was pardoned. As of March 2011, it was dealing with only one outstanding application, in respect of the infamous 1910 murder conviction of Dr Crippen.

24 Conclusion

Those convicted of criminal offending in England enjoy generous appeal rights in the summary jurisdiction, although these are seldom exercised. By way of contrast, the possibilities for appeal in the indictable jurisdiction are limited, with a number of obstacles placed in the way of those seeking to overturn their convictions either in a first or subsequent appeal. As collateral means of challenge such as the exercise of the Royal Prerogative of Mercy or appeal to a European court cannot usually provide a meaningful remedy, outside the standard appeal system, the only realistic option for an individual who has claimed to have suffered a miscarriage of justice is an application to the CCRC. It is to the workings of this body which the next chapter turns.

CHAPTER FIVE - THE CRIMINAL CASES REVIEW COMMISSION

25 Introduction

This chapter investigates the work of the Criminal Cases Review Commission (CCRC), the body responsible for the review of alleged miscarriages of justice in England, Wales and Northern Ireland.¹ It briefly reviews the circumstances of the CCRC's establishment and its key structural features before moving to address the extent and exercise of its jurisdiction to review and refer suspect convictions. Specific attention is paid to the impact of resource constraints, case management processes which have been adopted to make the CCRC's task manageable and the influence of these on its wider role. Also considered are the CCRC's investigative tools and strategies, decision making processes and its susceptibility to review.

The CCRC has jurisdiction to review all criminal convictions – both summary and indictable. However, applications in respect of summary convictions comprise only 6% of the total number of applications.² In consequence, the focus in this chapter is on indictable matters, but two matters stand out for comment regarding the CCRC's approach to summary convictions. The first relates to the referral test, and this is considered below.³ The second is that the cases sampled revealed no obvious distinction in terms of the level of scrutiny given to applications depending on the seriousness of the offence concerned. Indeed, in some summary cases, penalised only by a fine or a community punishment order, the CCRC commissioned expert reports,⁴ or interviewed

¹ Due to the differences in criminal and appeal procedure and personnel between England and Wales and Northern Ireland, cases from the Northern Irish jurisdiction have been excluded for the purpose of comparison.

² K Kerrigan, 'Miscarriage of justice in the magistrates' court: the forgotten power of the Criminal Cases Review Commission' [2006] Crim LR 124, 126-127.

³ See text to n 145 and following.

⁴ Eg R11.

potential witnesses.⁵ This is in spite of the fact that references in such cases often generate derisory media attention.⁶

26 The Creation, Composition and Jurisdiction of the Commission

Until 1997, suspected miscarriages of justice in England were dealt with by a small unit within the Home Office.⁷ This unit advised the Home Secretary on the exercise of their power to refer suspect cases to the Court of Appeal,⁸ or to recommend the exercise of the Royal Prerogative of Mercy. However, following a number of high profile miscarriages of justice, and the subsequent report of the Runciman Royal Commission, the establishment of an independent review body was recommended.⁹ While unique at the time, this model has now been replicated in Scotland and Norway,¹⁰ and similar bodies have been proposed elsewhere.¹¹

The CCRC was established by the Criminal Appeal Act 1995, and consists of at least eleven commissioners, appointed by the Queen on recommendation of the Prime

⁵ In S19, a case where the offender was punished by a community punishment order, the CCRC conducted extensive enquiries, including interviews, as well as identifying an independent ground on which the applicant's conviction was referred.

⁶ See Criminal Cases Review Commission, *Annual Report and Accounts 2004-2005* (2005) 17.

⁷ In 1995, this unit had 25 staff members - R Nobles and D Schiff, 'The Criminal Cases Review Commission: Reporting Success?' (2001) 64 MLR 280, 282 n17.

⁸ Criminal Appeal Act 1968, s 17.

⁹ Royal Commission on Criminal Justice, *The Royal Commission on Criminal Justice : Report* (Cm 2263, 1993) ch 11; this was a move which was welcomed by campaigning groups - L Elks, *Righting miscarriages of justice? : ten years of the Criminal Cases Review Commission* (JUSTICE, London 2008) 14-15.

¹⁰ The Norwegian Criminal Cases Review Commission, established by an amendment to Chapter 27 of the Norwegian Criminal Procedure Act, came into existence on 1 January 2004. The Scottish Criminal Cases Review Commission was established in 1999, and its first ten years are discussed in J Chalmers and F Leverick, 'The Scottish Criminal Cases Review Commission and its Referrals to the Appeal Court: the First 10 Years' [2010] Crim LR 608.

¹¹ See, eg the glowing review of the Commission in CH Brants, *Criminal Cases Review Commission in England and Wales* (Willem Pompe Instituut voor Strafrechtswetenschappen, Utrecht 2006) 3 which was prompted by such a suggestion from the Dutch Minister of Justice; L Griffin, 'Correcting Injustice: Studying How The United Kingdom And The United States Review Claims Of Innocence' (2009) 41 U Tol L Rev 107, 152; L Weathered, 'Does Australia Need a Specific Institution to Correct Wrongful Convictions?' (2007) 40 Aust & NZ J Crim 179.

Minister, one of whom is appointed to serve as chair.¹² Appointments are for a five year term, renewable once.¹³ In a deliberate attempt to ‘strike a balance between legal expertise and detachment from the legal system’,¹⁴ legal qualifications are not a requirement for appointment, although at least one third of commissioners must be legally qualified, at least two thirds must have ‘knowledge or experience of any aspect of the criminal justice system’ and at least one must have ‘knowledge or experience of any aspect of the criminal justice system in Northern Ireland’.¹⁵ While the relative composition of the CCRC has changed over time, there remains a mix of backgrounds, so as to ensure that the commissioners do not ‘necessarily think and act exactly as practising lawyers would’.¹⁶

(a) The Commission’s Personnel

Most review work is carried out by employed ‘Case Review Managers’ (“**CRMs**”).¹⁷ CRMs come from a range of professional backgrounds. Some have had previous involvement with the criminal justice system as former solicitors, police officers or probation officers, whereas others come from areas such as social work, trading standards

¹² Criminal Appeal Act 1995, s 8 and sch 1, cl 1; Commissioners may serve either full or part time – Schedule 1, cl 2. As at 31 March 2010, there were 10 commissioners, one below the statutory minimum, a situation which is likely to remain ‘for the time being in order to save money’: Criminal Cases Review Commission, *Annual Report and Accounts 2009-2010* (2010) 16. The previous average number of commissioners was 16 - Criminal Cases Review Commission, *Annual Report and Accounts 2008-2009* (2009) 16. The Chair’s role is largely managerial, but they also serve as the Commission’s public face and as a conduit for communication with the Government – see Home Office and Office for Criminal Justice Reform, *Management Statement for the Criminal Cases Review Commission* (2006) 3.4.2–3.4.6.

¹³ Criminal Appeal Act 1995, sch 1, cl 2.

¹⁴ P Duff, ‘Straddling Two Worlds: Reflections of a Retired Criminal Cases Review Commissioner’ (2009) 72 MLR 693, 700.

¹⁵ Criminal Appeal Act 1995, s 8. ‘Legally qualified’ is defined to encompass those who have practised as a barrister or solicitor in England and Wales or Northern Ireland for at least ten years.

¹⁶ Duff ‘Straddling Two Worlds’ (n 14) 700.

¹⁷ On occasion commissioners personally conduct reviews, although they do not then make the ultimate decision regarding referral (Eg G99; R4; R6). As of 31 March 2009, there were 40.86 FTE CRMs. Due to funding pressures, this number is much reduced from the 46.75 FTE who were employed in March 2007 - Criminal Cases Review Commission *Annual Report and Accounts 2008-2009* (n 12) 16. Historical data about staffing numbers is provided at Criminal Cases Review Commission, *Annual Report and Accounts 2005-2006* (2006) 51.

or the private sector.¹⁸ Each CRM's expertise is taken into account when allocating cases, with a legally qualified CRM assigned if an application raises potentially contentious points of law,¹⁹ and more experienced investigators assigned where problematic factual issues are involved.²⁰

The CCRC also employs a small number²¹ of legal and investigations advisers who are consulted in certain circumstances.²² Investigations advisers are former police officers who participate in case planning conferences, and also advise on an as-needed basis where, for example, interviews are to be conducted,²³ or difficult evidential inquiries need to be made.²⁴ In such difficult investigations, an investigations adviser will often be intimately involved in the casework.²⁵

Legal advisers are often asked to advise on contentious points of law arising during a review,²⁶ including on the extent of the CCRC's jurisdiction.²⁷ They are also frequently asked to review draft decisions, particularly when they are prepared by a non-legally trained CRM. Legal advisers have a secondary role in terms of defending the

¹⁸ Criminal Cases Review Commission, *Work In Detail (CRM Job Description)* (2005) 5.

¹⁹ Eg G56; G70; S14.

²⁰ Eg G88; G94.

²¹ As of February 2010, two of each.

²² Sometimes CCRC procedure will require that either or both are consulted before certain steps are taken—see Criminal Cases Review Commission, *Formal Memorandum: Legal And Investigations Advisers – Guidance On Use* (Version 3) para 6. Further, they can be deeply involved where a CRM lacks the relevant expertise to deal with a particular matter, as in R5.

²³ In some cases, an investigations advisor's involvement is required by CCRC policy, eg where jurors are to be interviewed (as in G42; R21): Criminal Cases Review Commission, *Formal Memorandum: Interviewing Jurors*, para 8.

²⁴ Eg G72 (locating two witnesses in a sensitive case); R8; R15 (investigation of alibi); S10 (what standard police practice on certain matters were in the 1970s); R5 (negotiating with public bodies to obtain information which is subject to public interest immunity).

²⁵ Eg S10 where an investigations advisor was involved from an early stage, and together with the CRM made a detailed plan for the required investigations.

²⁶ For example, G70 (adequacy of jury directions in light of change of law regarding provocation); G76 (adequacy of conspiracy direction); G82 (adequacy of jury directions); R2 (conditions for admissibility of fresh evidence); R8 (effect of amendments to law of evidence).

²⁷ Eg S16, where concern arose as to whether the CCRC had jurisdiction to make a determination on a particular conviction.

CCRC's decisions from challenge by way of judicial review. Sometimes these two functions are combined, and the legal adviser will be asked to review a draft decision with the explicit purpose of identifying and reducing exposure to judicial review.²⁸

The commissioners themselves are collegial, and commissioners with expertise in a particular area will often have input into cases that they are not directly involved in. For example, a commissioner with expertise in mental health issues may be asked for advice when such matters arise in applications,²⁹ or one with criminal trial experience when matters arise as to trial strategy.³⁰

(b) Independence

The Criminal Appeal Act 1995 declares the CCRC's independence from the Crown.³¹ In English public sector terms, it is an 'Executive Non-Departmental Public Body', meaning that it receives its funding as a 'grant-in-aid' from the Ministry of Justice, and the Lord Chancellor and Justice Secretary are accountable to Parliament in respect of its operation.³² In practice, this means that the CCRC is independent in the sense that it is not subject to political interference or influence in its consideration of individual cases, but that it is subject to political influence in terms of its strategic direction and funding. The latter is most obvious in terms of the periodic reviews of the CCRC's operational efficiency, a fact which led the then chairperson to comment in one Annual Report that

²⁸ For example, R10; The impact of judicial review on the CCRC's practices generally is discussed below, see text to n 419 and following.

²⁹ Eg S14; S21.

³⁰ Eg S8; S21.

³¹ Criminal Appeal Act 1995, s 8(2).

³² In respect of Northern Irish cases, this responsibility falls to the Secretary of State for Northern Ireland. Financial provision for the CCRC (and the CCRC's responsibilities with respect to the funding received) is governed by Home Office and Office for Criminal Justice Reform, *Financial Memorandum for the Criminal Cases Review Commission* (2006); the relevant ministers' responsibilities are limited to resourcing and strategic, rather than operational, issues, as outlined in Home Office and Office for Criminal Justice Reform, *Management Statement for the Criminal Cases Review Commission* (2006) at 3.1.

‘[t]o say we are suffering seriously from review fatigue would be a mild response’.³³

There is periodic conflict surrounding the extent of proposed measures, especially where these are likely to have a significant adverse effect on caseworking.³⁴

Resourcing aside, there is no evidence of overt political interference in operational matters. This is striking, as that the CCRC’s work takes place against a backdrop of considerable public and political interest is evident from the circumstances which led to its creation, and continues to hold true today.³⁵ While politicians will occasionally make representations on behalf of constituents, these are met with a polite response explaining the CCRC’s general policies.³⁶ There was no indication in any of the files reviewed that correspondence from MPs resulted in any preferential treatment. The same is true where MPs themselves assisted with the making of an application,³⁷ or where applications have evident public³⁸ or media support.³⁹

(c) Wider Role

The CCRC has a number of statutory functions: the Court of Appeal can request that the CCRC investigate matters arising during appeals before it,⁴⁰ and the Secretary of State for

³³ Criminal Cases Review Commission, *Annual Report and Accounts 2006-2007* (2007) 6; see also Elks *Righting Miscarriages of Justice* (n 9) 335.

³⁴ See eg Criminal Cases Review Commission, *Annual Report and Accounts 2007-2008* (2008) 4; the impact of resourcing decisions on caseworking is considered in detail below, see text to n 174 and following.

³⁵ See, R Nobles and D Schiff, *Understanding Miscarriages of Justice: Law, the Media, and the Inevitability of Crisis* (Oxford University Press, Oxford 2000) and P Mason, 'Press and Release: UK News Coverage of the CCRC Since 1996' in M Naughton (ed) *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave MacMillan, Basingstoke 2009).

³⁶ G23, G71, R3, R8, S1.

³⁷ Eg R10.

³⁸ Eg G24 where the application was accompanied by a petition indicating widespread public support.

³⁹ Eg G74; R8.

⁴⁰ Either on a reference or direct appeal - Criminal Appeal Act 1995, s 15, Criminal Appeal Act 1968, s 23A. In 2004 this jurisdiction was expanded to include applications for leave to appeal, resulting in a considerable increase in the number of requests – for example, in 2006-2007 11 such requests were received compared with only 17 (in total) in the previous nine years - Criminal Cases Review Commission *Annual Report and Accounts 2006-2007* (n 33) 19-20.

Justice may do likewise in respect of applications for exercise of the Royal Prerogative of Mercy.⁴¹ Further, the CCRC may, of its own motion, recommend the exercise of the prerogative.⁴² However these additional functions are very much ancillary to the CCRC's core task – that of considering applications from individuals who consider they have been wrongfully convicted, or sentenced.⁴³

27 Jurisdiction: Real Possibility and Exceptionality

How the CCRC approaches this core task is central to the present inquiry, and central to this are the CCRC's statutory limitations. The CCRC was never intended to have the power to quash convictions itself.⁴⁴ Instead, the Criminal Appeal Act 1995 gives the CCRC power to refer the conviction of any person convicted either on indictment or summarily in England, Wales or Northern Ireland to the relevant appellate court.⁴⁵ The qualifying condition for making such a referral is set out in section 13 of the Act, which provides that no reference shall be made unless: 'the Commission consider that there is a real possibility that the conviction... would not be upheld were the reference to be made'. Absent exceptional circumstances, an appeal against conviction must have been refused by the relevant court, and the 'real possibility' must arise 'because of an argument, or evidence, not raised in the proceedings which led to it or on any appeal or application for leave to appeal against it.'⁴⁶

It should be noted at this juncture that the CCRC is not limited to reviewing cases

⁴¹ See n 129 in ch 4.

⁴² Criminal Appeal Act 1995, s 16. This power has to date not been exercised in respect of a conviction, see Criminal Cases Review Commission *Annual Report and Accounts 2007-2008* (n 34) 18; and n 127 in ch 4.

⁴³ While the CCRC also has the power to refer sentences it considers excessive, this aspect of the CCRC's work is outside the scope of the present investigation.

⁴⁴ Royal Commission on Criminal Justice (n 9) para 11.15.

⁴⁵ Criminal Appeal Act 1995, ss 9-12. The CCRC in 2009 gained similar powers in respect to convictions imposed by military courts (Criminal Appeal Act 1995 ss 12A and 12B), but these are not considered here.

⁴⁶ Criminal Appeal Act 1995, s 13.

where factual innocence is claimed.⁴⁷ By linking the CCRC's jurisdiction to the Criminal Appeal Act's test of safety,⁴⁸ the CCRC is instead directed to also consider broader questions of trial fairness, as well as applications made on the grounds of abuse of process – in respect of the latter, the matter of factual guilt is considered irrelevant, and is entirely disregarded.⁴⁹

(a) New Grounds or Exceptional Circumstances

One clear limitation on the jurisdiction of the CCRC is that 'exceptional circumstances' are required before a referral can be made if the applicant has not previously appealed to the relevant court or if they rely on argument or evidence which has already been raised before the trial or appeal court.⁵⁰ The dismissal of an application by a single judge at the leave stage is sufficient to trigger this restriction, and a great deal of cases are rejected as a consequence. The CCRC's position, as expressed in a characteristic excerpt from a statement of reasons is that:⁵¹

...a great many applications are not renewed before the Full Court for a variety of reasons and the scheme for granting leave is based upon the premise that the Single Judge will consider the relevant issues...

⁴⁷ See S Roberts and L Weathered, 'Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission' (2009) 29 OJLS 43.

⁴⁸ See text to n 30 in ch 4.

⁴⁹ S6; S20. The decision making committees in these cases also considered that in abuse of process cases it would be inappropriate for the CCRC's discretion not to refer to be exercised on the basis of factual guilt.

⁵⁰ Criminal Appeal Act 1995, s 13(1)(b)(i). This includes situations where leave was granted to appeal on a ground, but where this was not argued at the substantive hearing, as in R21 (committee minutes): 'the abandonment of an issue on appeal had the same effect as an issue that had been determined on appeal ... unless counsel had been negligent in the abandonment...' The ultimate arbiter of whether the 'exceptional circumstances' criterion is satisfied will be the court itself, which has set a very high bar - see *R v Thomas* [2002] EWCA Crim 941 [74]-[75], and the discussion at Elks *Righting Miscarriages of Justice* (n 9) 124-131. In practice, no cases have been referred on the explicit basis that exceptional circumstances required a referral in the absence of new argument, although this was arguably implicit in one referral: WE O'Brian Jr, 'Fresh Expert Evidence in CCRC Cases' (2011) 22 KLJ 1, 2.

⁵¹ G99.

Thus, the CCRC will be careful to exclude grounds which have already been considered by the Court of Appeal – either on a leave application or substantively. This includes situations where the Court of Appeal refused an application for leave to appeal out of time for, as the CCRC explained to one applicant:⁵²

It is not for the Commission to adjudicate upon the correctness of the decisions of the Court of Appeal. The Commission assumes that the Court both knows the law and applies it appropriately... The Court of Appeal must be taken to have considered the prospects of success of the appeal in the instant case... further.... refusal of an extension of time would prima facie constitute a refusal of leave to appeal...

The consequences of this are important to grasp. As a former chair of the CCRC has noted in another context, '[t]he court works under great pressure; it must call on a large number of judges, many of them not specialists in criminal law; and the standards of advocacy may not always give the court the assistance it needs'.⁵³ As such, the risk of single judges making erroneous decisions under pressure must be acknowledged, as must the disincentives for applicants to renew leave applications before the Full Court.⁵⁴

This requirement thus places some real limitations on the CCRC's role. If a single judge (or, indeed, a Full Court) has, perhaps due to pressure of work, missed an imperfectly framed but nonetheless meritorious ground of appeal, absent exceptional grounds the CCRC will be powerless to act.⁵⁵ In one case, a commissioner commented

⁵² G46 (final statement of reasons).

⁵³ G Zellick, 'The Criminal Cases Review Commission and the Court of Appeal: the Commission's perspective' [2005] Crim LR 937, 938. For elaboration on the leave process see text to n 21 in ch 4.

⁵⁴ See text to n 88 in ch 4.

⁵⁵ Further, if an applicant abandoned an appeal, the grounds of that original appeal will be treated by the Commission as having been 'determined' by the Court, thus necessitating 'exceptional circumstances' to justify referral to the Court on those grounds, as in G90.

that an application concerned ‘one of the tackiest convictions I have ever seen, with one of the most slippery [Court of Appeal] judgments I have ever read’.⁵⁶ Yet, as no ‘exceptional circumstances’ could be found, the fact that the Court of Appeal had already considered the issues raised foreclosed the possibility for a referral. The CCRC’s powerlessness in such a situation is evident in a subsequent email from the commissioner to the CRM stating that ‘I still hate this case to bits – especially [the Court of Appeal’s] repulsive judgment, but you have done all that is possible.’

(b) The Substantive Task: Assessing Real Possibility

Another significant feature is the statutory requirement that a referral only be made where there is a ‘real possibility’ of the conviction being quashed.⁵⁷ The term is not defined in the statute, but the canonical interpretation is that of Lord Bingham CJ in the early case of *Pearson*, where its imprecision was acknowledged, but it was nonetheless said to:⁵⁸

plainly denote... a contingency which, in the Commission's judgment, is more than an outside chance or a bare possibility, but which may be less than a probability or a likelihood or a racing certainty. The Commission must judge that there is at least a reasonable prospect of a conviction, if referred, not being upheld.

This looseness of definition prompts the question: is the statutory test essentially predictive, in that the CCRC is tasked with asking – is there a real possibility that this current Court of Appeal, given its recent history and decisions, would quash this conviction? Or is it normative, in that it is instead tasked with asking: is there a real

⁵⁶ G36.

⁵⁷ Criminal Appeal Act 1995, s 13(1)(a).

⁵⁸ *R v Criminal Cases Review Commission Ex p Pearson* [1999] 3 All ER 498 (QB) 505.

possibility that a hypothetical (or ideal) Court of Appeal, properly apprised of the relevant law and facts, would quash this conviction?⁵⁹ Both interpretations acknowledge that in consequence of its statutory jurisdiction the CCRC must operate in terms of legal ‘communications’,⁶⁰ but approach this task from quite different angles. The *Pearson* decision does not provide a clear answer – indeed it seems to provide support for both approaches, stating on the one hand that it is for the CCRC to:⁶¹

...try to predict the response of the Court of Appeal if the case were referred... It could only make that prediction by paying attention to what the Court of Appeal had said and done in similar cases on earlier occasions.

But also that:

It could not rationally predict the response of the Court of Appeal without making its own assessment, with specific reference to the materials in this case, of the considerations to which the Court of Appeal would be obliged to have regard and of how it would be likely to exercise its discretion. If one wants to predict what a reasonable person, on given facts and subject to a measure of guidance, would decide, there is no rational way to approach that task otherwise than by considering what, on the same facts and subject to the same guidance, one would decide oneself. That is not to

⁵⁹ Duff has argued that the Scottish Criminal Cases Review Commission (which does not have the same statutory restriction on making references) would adopt something akin to the later approach in appropriate cases – see Duff ‘Straddling Two Worlds’ (n 14) 718; although cf Chalmers and Leverick (n 10). Similarly, one (then serving) English commissioner made a nod in this direction in D Kyle, ‘Correcting Miscarriages Of Justice: The Role Of The Criminal Cases Review Commission’ (2004) 52 Drake L Rev 657 665-666.

⁶⁰ Ie, the flaws identified must be legally cognisable rather merely resonating with public notions of what is or is not just – Nobles and Schiff, *Understanding Miscarriages of Justice* (n 35) 215-228; Roberts and Weathered (n 47) 58.

⁶¹ *R v Criminal Cases Review Commission Ex p Pearson* (n 58) 520-521.

usurp the decision of that other person but to set about predicting his decision in a rational way.

It is often assumed that the predictive approach is correct, evinced by the discussion about the appropriate probability value to associate with ‘real possibility’.⁶² Indeed, the CCRC – for reporting purposes – uses as one of its ‘key performance indicators’ the proportion of referrals which result in a successful appeal, on the basis that this is ‘a measure of [the CCRC’s] interpretation of the "real possibility" test’.⁶³ If the CCRC is correct, and the success rate of references is a good metric,⁶⁴ of 29 referrals made in 2008/2009, appeals were successful in 22 cases (75.9%).⁶⁵

Thus, to external audiences, it seems that the CCRC is adhering to the predictive view of its role. In routine cases, this is an entirely accurate reflection of its internal practices, and the primacy of the Court of Appeal’s approach is clear. A review of minutes of decision making committee meetings reveals that care is taken to proceed according to the Court of Appeal’s position on the matters under review.⁶⁶ Where Court of Appeal⁶⁷ guidance on a particular matter is imminent, a final decision will usually be deferred to allow it to be taken into account,⁶⁸ on one occasion resulting in a decision not to refer an application (which had been made but not yet communicated to the applicant)

⁶² See eg K Kerrigan, ‘Real Possibility or Fat Chance?’ in M Naughton (ed) *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave MacMillan, Basingstoke 2009) 170-172.

⁶³ Criminal Cases Review Commission *Annual Report and Accounts 2008-2009* (n 12) 70; Criminal Cases Review Commission *Annual Report and Accounts 2007-2008* (n 34) 15.

⁶⁴ As to which, see R Nobles and D Schiff, ‘After Ten Years: An Investment in Justice’ in M Naughton (ed) *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave MacMillan, Basingstoke 2009) 158-159.

⁶⁵ Criminal Cases Review Commission *Annual Report and Accounts 2008-2009* (n 12) 6, 19.

⁶⁶ For example, in R7, a decision making committee reconvened after having made a preliminary decision to consider whether a recent Court of Appeal decision was of any moment either as to their substantive decision or as to the approach followed.

⁶⁷ Or, more rarely, Supreme Court (or formerly, House of Lords), as in S4 and S7.

⁶⁸ Eg R16 and R19.

being reversed.⁶⁹

Sometimes, there are more specific indications of a real possibility of success, which the CCRC will consider. One common example is where the Court of Appeal has previously quashed the convictions of co-defendants or defendants in related cases.⁷⁰ Another is where the respondent to the appeal is unlikely to resist it. Sometimes this is inferred from the approach taken in similar cases.⁷¹ Occasionally, the Crown Prosecution Service (or relevant prosecutor) will indicate in advance of a referral decision being made that it would not oppose any appeal to the Court of Appeal.⁷² In both instances, the CCRC is not making its own view of the objective merits of a decision, as is clear from one such referral statement:⁷³

The Commission relies entirely and solely on the Crown Prosecution Service's assessment of the significance of this evidence in the context of the other evidence relied upon by the Crown [at trial].

If a purely predictive approach were followed, as such indications are reliable predictors of the likely outcome of a referral, one might expect these to be solicited as a matter of course. However, this only exceptionally occurs,⁷⁴ with such a request being considered generally inappropriate.⁷⁵

⁶⁹ S7, where a new House of Lords decision was released, giving rise to a real possibility.

⁷⁰ Eg S18, where the a co-defendant's conviction had already been quashed following a reference, and the decision making committee's minutes note 'that it was unlikely that the Court of Appeal would do a *volte face*'.

⁷¹ Eg S9 and S13, where the decision making committee considered it highly relevant that in other related cases the appeals were not resisted.

⁷² G52; S11.

⁷³ S11. This practice has been approved by the Court of Appeal, see Chalmers and Leverick (n 10) [43].

⁷⁴ In S11, this occurred, although in perhaps unique circumstances where the Court of Appeal's Criminal Appeal Office was keen to expedite a reference.

⁷⁵ In S18, the decision making committee, having already identified a strong *prima facie* case for referral concluded that seeking the CPS's views might be counterproductive, and that 'it was not, in any case, the Crown's decision but the Court of Appeal's'.

Raising further complications are situations where there are no clear legal principles governing the potential referral ground,⁷⁶ or conflicting Court of Appeal decisions.⁷⁷ It has been argued that the CCRC ought readily to make references in such cases, lest it usurp the function of the Court of Appeal.⁷⁸ Where raised, such arguments are dealt with in short order, with the CCRC maintaining that it is required to conduct the predictive exercise, as the following excerpt from a Final Statement of Reasons makes plain:⁷⁹

[The Applicant] suggested that it is inappropriate for the Commission to interpret the law... The Commission's express statutory power is in fact to determine whether it considers that there is a real possibility that the Court of Appeal would quash a conviction – a task which inherently involves a prediction of the Court of Appeal's approach to new... legal arguments.

The CCRC attempts to predict how the Court of Appeal might receive the proposed argument, drawing on the materials on which the Court would be likely to draw, and paying heed to the Court's general scepticism in certain areas.⁸⁰ In consequence, referrals are not generally made where (although arguable, or in the CCRC's view desirable) it is unlikely that the Court of Appeal would develop the law so as to provide an applicant with a ground of appeal.⁸¹ Intriguingly however the CCRC has shown a willingness to depart from this where, while it is apparent that a particular argument will

⁷⁶ In one case (S9), it was suggested that a referral may be made in a borderline case so as to give the Court of Appeal an opportunity to indicate where it 'might draw the line', although the decision making committee minutes make no record of whether this motivated the referral.

⁷⁷ Eg G41 and G56.

⁷⁸ P Taylor, *Taylor on appeals* (Sweet & Maxwell, London 2000) 11-010.

⁷⁹ G78.

⁸⁰ Eg S20, where a considerable amount of material, including academic writings, and tangentially relevant case law was drawn on when making a referral on a novel abuse of process ground.

⁸¹ Eg R7, where the final statement of reasons records that 'the Commission is not persuaded that the Court of Appeal would readily extend the *Weekes* line of authorities to cover this situation'.

not find favour in the Court of Appeal, it might if it were to reach the Supreme Court.⁸² This is significant, when one bears in mind that some appeals on reference from the CCRC have been rejected by the Court of Appeal, only to be allowed by what was then the House of Lords.⁸³ While one could argue that this reasoning is entirely in keeping with a predictive approach, the impact of the possibility of an onward appeal must be very slight on such an analysis when one considers the small number of cases which are granted such appeals.⁸⁴ It is suggested, therefore, that where the CCRC adopts such reasoning it is instead reaching towards a more normative approach.

The position is complicated still further where an existing higher source of authority can be appealed to, for example where the Supreme Court has issued ambiguous guidance.⁸⁵ Such a situation arose on several occasions in the sample drawn, and it is possible to find support for both approaches in the CCRC's response. The predictive approach can be seen in one case where ambiguous House of Lords guidance, on one view, afforded the applicant a strong ground of appeal.⁸⁶ The decision making committee considered the arguments in detail at a meeting and, in the result, the final statement of reasons contained a detailed analysis of the conflicting views (supported by a consideration of the academic commentary) and concluded that the argument did not avail the applicant. Here, while extensive work was done to determine the normative

⁸² Eg S16, where there was much discussion about how the Court of Appeal was unlikely to be attracted by the meritorious, but 'technical', argument proposed.

⁸³ Eg *R v Kennedy* [2008] 1 AC 269 (HL); *R v Clarke & McDaid* [2008] 1 WLR 338 (HL). This was commented on in the Chairperson's foreword to Criminal Cases Review Commission *Annual Report and Accounts 2007-2008* (n 34), where the House of Lords' decisions were presented as 'in effect affirming the Commission's understanding of the law and illustrating the inherent difficulty in predicting, as the statutory test requires us to do, how *the courts* will decide the cases we review' (emphasis added).

⁸⁴ See text to n 109 in ch 4 and following.

⁸⁵ Similarly, if the European Court of Human Rights had taken a position on an issue suggesting a ground of appeal might be open, but where this had not been determined by English Courts – eg R18. However, the Administrative Court has confirmed that the CCRC is not bound to refer a case even where the European Court of Human Rights has found a violation of the particular applicant's right to a fair trial, if it is satisfied that there is no real possibility of an appeal being allowed – *Dowsett v Criminal Cases Review Commission* [2007] EWHC 1923 (Admin).

⁸⁶ R8, where this was presented in a memorandum to the decision making committee.

merits of the argument, it is apparent from the records of the committee discussion that the motivating concern was whether the argument would be accepted by the Court of Appeal.

This is complicated still further where the ambiguous guidance has spawned conflicting Court of Appeal decisions concerning its application. The CCRC might take a view as to the proper interpretation of the Supreme Court decision, such that it would not afford an applicant a referable point, whereas one of the conflicting Court of Appeal decisions would. In such cases, a predictive approach would almost certainly suggest that the statutory test was satisfied – the Court of Appeal has allowed appeals on this basis in the recent past, thus there must be a real possibility of them doing so again.⁸⁷ However, if a normative approach was taken, then it would not be – the Supreme Court decision, on its proper interpretation, precludes the Court of Appeal from allowing the appeal on this ground, therefore there is no real possibility of success. In its preliminary statement of reasons in one such case, a decision making committee expressed the view that, on its proper interpretation, the decision was unhelpful to the applicant.⁸⁸ The applicant's representatives disputed this, pointing to the contrary Court of Appeal decision. The committee, while acknowledging the conflicting decision, held firm. This perhaps suggests less concern with whether the Court of Appeal might potentially accept the argument (a contention supported by the inconsistent Court of Appeal decisions), than whether one of the conflicting decisions was more correct than the other.

⁸⁷ Prior to committee deliberations on an application which raised such issues (R18), a legal advisor remarked in a memorandum to the CRM that 'If the Court has set itself up with two distinct strands of reasoning, it will sooner or later have to declare one of them to be right and the other wrong, or else it will have to find a way of reconciling them. [It] seems to me it is part of our job to give it the opportunity to do so, for the sake of clarity. In assessing "real possibility" we would surely be justified in adopting the line of authority that is the more favourable to the applicant, unless and until the Court declares it to be a judicial aberration.' The committee minutes suggest that this reasoning was (at least implicitly) accepted, but in the event the application was declined on other grounds.

⁸⁸ R3.

While illustrative of the issues, these examples are an insufficient basis on which to draw firm conclusions about the CCRC's approach. However, the position is clearer if one asks the more pointed question: what if the CCRC desires to make a reference, but binding authority stands in the way of the conviction being quashed. Could there ever truly be a 'real possibility' in such circumstances? On the predictive approach, the answer must be 'no', at least unless there are strong indications that the court is likely to overturn the inconsistent authority. However, on the normative approach one might expect referrals to occur more frequently. The CCRC now has a formal memorandum which permits the making of referrals in such cases.⁸⁹ The justification for such a policy is the Court of Appeal's power to overrule its past decisions,⁹⁰ and that '[t]he Commission would be failing in its duty if it did not contemplate referral in appropriate circumstances'.⁹¹ It is arguable that this is agnostic between the predictive and normative approach – especially considering that the memorandum concludes with the reminder that 'Even if the Court does not itself overrule, there is the possibility of a further appeal to the House of Lords if the Court certifies accordingly.'⁹² However, when one considers the critical passage from the memorandum, it seems that the CCRC is indicating a willingness to refer for normative reasons, while being careful to couch this in terms of the 'real possibility' test:⁹³

In normal circumstances, a conviction secured in accordance with Court of Appeal authority will be regarded as safe, but the Commission should be willing to entertain the possibility that an authority is so badly reasoned,

⁸⁹ Criminal Cases Review Commission, *Formal Memorandum: Referral of a Case Notwithstanding Binding Court of Appeal Authority* (Version 1).

⁹⁰ The Memorandum cites *R v Rowe* [2007] EWCA Crim 635 as a recent example: Criminal Cases Review Commission, *Formal Memorandum: Referral of a Case Notwithstanding Binding Court of Appeal Authority* (Version 1) para 2.

⁹¹ *Ibid*, para 5.

⁹² *Ibid*, para 8, the policy pre-dates the creation of the Supreme Court.

⁹³ *Ibid*, para 3.

contrary to principle or superseded by contemporary understanding and legal policy that it might be overruled by the Court. The Court may also overrule a decision reached per incuriam (in error), where there has been no proper argument or where it conflicts with an earlier decision. (Some of these grounds overlap.) In all these circumstances, the Commission should be willing to make a reference based on the normal “real possibility” test. Such a conviction may otherwise not find its way to the Court and injustice will be perpetuated.

The guidance emphasises that referrals in such cases are likely to be rare, and are to be carefully handled.⁹⁴ This is borne out by the fact that in none of the cases in the sample was this course contemplated, even where the CCRC clearly thought the Court of Appeal’s reasoning manifestly deficient.⁹⁵ The infrequency with which this occurs is also likely to be amplified by the fact that those who might fall into this category will likely fall into the ‘no appeal’ category, or have had leave denied by a single judge.⁹⁶ The consequence of this is that the CCRC’s filtering mechanisms make it most unlikely that any such cases will ever be considered by a decision making committee.⁹⁷

Fresh Evidence Cases

The predictive nature of the CCRC’s role is even more clearly to the fore in ‘fresh evidence’ cases. These are cases where it is alleged that there is evidence, not before the

⁹⁴ The Chairperson is to be informed at an early stage if such a step is contemplated, and special care when drafting the statement of reasons is cautioned, noting that it ‘will need to argue the point fully and carefully, citing academic, judicial or other criticism of the decision as appropriate.’ – *ibid* para 5.

⁹⁵ Nor was exercise of the Royal Prerogative of Mercy contemplated, an option which is also at the CCRC’s disposal: Criminal Appeal Act 1995, s 16; P Duff, ‘Criminal Cases Review Commissions and “deference” to the courts: the evaluation of evidence and evidentiary rules’ [2001] Crim LR 341 351-355.

⁹⁶ This is acknowledged in the policy itself: Criminal Cases Review Commission, *Formal Memorandum: Referral of a Case Notwithstanding Binding Court of Appeal Authority* (Version 1) para 6.

⁹⁷ These mechanisms are discussed in detail below, see text to n 180 and following.

trial jury, which shows that an applicant was convicted on a ‘misleading, incomplete, or simply wrong view of the relevant facts’.⁹⁸ While the Court of Appeal’s reluctance to entertain applications raising fresh evidence was one of the key motivations behind the CCRC’s establishment,⁹⁹ the link between the CCRC’s approach to such cases, and that likely to be taken by the Court of Appeal on any referral is clear.¹⁰⁰

When considering whether to make a referral, the CCRC asks – as a preliminary question – whether the Court of Appeal would consider it necessary and expedient in the interests of justice to receive the fresh evidence.¹⁰¹ In many cases, this will be dispositive. This involves a consideration of how the Court of Appeal would apply the test in section 23(2) of the Criminal Appeal Act 1968, which provides that when considering whether to receive any evidence, it must ‘have regard in particular’ to (as well as whether it affords a ground for allowing the appeal) whether the evidence is capable of belief, would have been admissible at trial, and whether there is a reasonable explanation for the failure to adduce the evidence at an earlier stage. The fact that the general principles may yield to the requirements of justice in an individual case, makes this calculation particularly difficult.¹⁰²

The CCRC’s approach is conditioned by the Court of Appeal’s general scepticism¹⁰³ – for example, towards applicants raising a defence not relied on at trial,¹⁰⁴

⁹⁸ Elks *Righting Miscarriages of Justice* (n 9) 52.

⁹⁹ See Royal Commission on Criminal Justice (n 9) ch 10-11; JUSTICE, *Remedying Miscarriages of Justice* (JUSTICE, London 1994).

¹⁰⁰ Cf Elks *Righting Miscarriages of Justice* (n 9) 57-58, who suggests that the CCRC ought to (and, in practice do) take a wider view of the fresh evidence test, with C Malone, ‘Only the Freshest Will Do’ in M Naughton (ed) *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave MacMillan, Basingstoke 2009) who argues that the CCRC’s approach is actually more restrictive than that of the Court.

¹⁰¹ See *R v Criminal Cases Review Commission Ex p Pearson* (n 58) 506.

¹⁰² A Ashworth and M Redmayne, *The Criminal Process* (4th edn Oxford University Press, Oxford 2010) 378-379.

¹⁰³ While the statutory test applies to appeals to the Court of Appeal, and not to appeals to the Crown Court (which are by way of rehearing), the CCRC applies this test by analogy in summary cases, see n 147.

¹⁰⁴ Eg G70 (statement of reasons) which summarises the Court of Appeal’s decisions on this point and states ‘Under these circumstances, the Commission does not find that there is any real possibility that the

post-trial changes in the applicant's account of what occurred;¹⁰⁵ psychiatric evidence based on potentially self-serving statements from an applicant;¹⁰⁶ or indeed fresh expert evidence generally.¹⁰⁷ Similarly, where an application is based on a later admission by a co-defendant or accomplice that they were solely responsible or that the applicant was otherwise innocent, the CCRC mirrors the Court of Appeal's cynicism when approaching such applications.¹⁰⁸

In the preponderance of cases, therefore, referrals are refused in such cases as the evidence is not likely to be considered cogent¹⁰⁹ or 'fresh', as it could have been obtained at an earlier stage in proceedings.¹¹⁰ An applicant can surmount the latter obstacle if it can be established that there is a reasonable explanation for such failure to adduce. Sometimes such an explanation is obvious – most obviously where the new evidence is only available due to technological advances in forensic testing.¹¹¹ However, in other cases it can be much more difficult to demonstrate.

This does not mean that such evidence is not taken seriously. The CCRC will often take steps to ascertain whether there is any prospect that the Court of Appeal's admissibility requirements can be met. For example, if an application is based on a

Court of Appeal would see this as a suitable case in which to receive evidence with a view to considering provocation as a defence'; and similarly G74; G76; R7.

¹⁰⁵ Eg G78.

¹⁰⁶ Eg R7.

¹⁰⁷ Reference is invariably made to *R v Jones (Steven Martin)* [1997] 1 Cr App R 86 (CA); eg R4 and R7 (final statement of reasons). This is also noted by O'Brian (n 50) 6.

¹⁰⁸ In R1, R2 and R8, case committee minutes reveal that this consideration loomed large. Noting that the Court of Appeal has stated that such applications are to be approached with extreme care, requiring 'strong argument' to persuade them that such evidence is capable of belief, the committee went item by item through the evidence in support of the claim. Any inconsistencies are likely to result in a conclusion that the Court of Appeal would not find it capable of belief. This extends to cases where accomplices were not called at trial for tactical reasons (notably that they were unlikely to give favourable evidence which would incriminate themselves).

¹⁰⁹ Most commonly in witness retraction cases, eg G72.

¹¹⁰ Eg G70 (factors leading to a later diagnosis of mental illness were known prior to trial); G74 (suggestion that suffering from PTSD at material time).

¹¹¹ Eg S8 (LCN-DNA testing).

suggestion that a co-defendant is willing to give exculpatory evidence, the co-defendant may be approached to ascertain whether they are willing to provide such evidence, and if so, what its content will be.¹¹² However, the level of consistency and cogency required from the new material in order to prompt a reference is formidable - as was explained in one statement of reasons:¹¹³

Had [the co-defendant] met with the Commission and given a full account of his assertions which dealt with [the inadequacies identified by the Commission] and had [the co-defendant] been prepared to make a statement or give evidence about this in court, the Commission might (depending on the nature of the account) have been able to conclude that there was a real possibility that the Court of Appeal would receive such evidence and conclude it rendered the conviction unsafe. But in the circumstances the Commission does not consider that the Court of Appeal would be willing to rely on documentary or third-party evidence of [the co-defendant's] partial account. Unless tested by cross-examination the best that can be said about [the co-defendant's] accounts is that they are *prima facie* incapable of belief

As the CCRC does not have the power to compel a witness to answer questions under oath, it is required to make a (frequently speculative) prediction as to the quality of evidence which might be provided on any referral.¹¹⁴ Another statement of reasons considering a referral in a similar situation (where exculpatory evidence was available in

¹¹² Eg R2 where the responsible commissioner noted that this was necessary so that 'This evidence, its admissibility and likely impact could then be considered.'

¹¹³ R8.

¹¹⁴ Cf Duff 'Criminal Cases Review Commissions and "deference" to the courts' (n 95) 346 which argues that it is inevitable and desirable that the CCRC make such an evaluation, but that it is 'sensible that this should not be terribly exacting and, in practice, the Commission does operate with a "low threshold of credibility"'.

the form of a hearsay statement from a co-defendant) demonstrates the difficulty which an applicant faces:¹¹⁵

[The Applicant's solicitors] suggest that the Commission should refer a case on the hypothetical possibility that [the co-accused] would have evidence favourable to the defence, that the Court would hear him, and that he would be treated as a witness of truth... The problems with this suggestion are obvious... It is not disputed that, if the conviction were referred [counsel may seek to call the co-accused] and that [the co-accused] might give an account exculpating [the applicant], but the Commission cannot refer a conviction on so speculative a basis.

Perhaps the most frequent criticism of the CCRC process is that too many applications are dismissed because of a mechanistic application of these criteria.¹¹⁶ Thus, it is important to note that these requirements are *not always* strictly applied where it is apparent that the fresh evidence is compelling.¹¹⁷ The CCRC will often spend a considerable amount of time discerning if the admissibility criteria are met.¹¹⁸ Where a referral is considered a strong possibility, the case records in the sampled cases indicate

¹¹⁵ G98

¹¹⁶ This is a constant theme, for example, in the contributions to M Naughton, *The Criminal Cases Review Commission : hope for the innocent?* (Palgrave Macmillan, Basingstoke 2009).

¹¹⁷ Eg in S24 and S1, the statements of reasons for referral both noted that 'The Court of Appeal, for the purposes of deciding whether it is necessary and expedient in the interests of justice to receive new evidence, has a somewhat wider discretion than the trial court'. However, this will not be the case if the fresh evidence is not of sufficient *prima facie* merit, eg R2, where the CCRC concluded that in light of earlier conclusions on availability and cogency, 'the Commission does not consider that the overriding 'interests of justice' test requires any additional consideration'.

¹¹⁸ Eg S24, where a case record note records a discussion between an investigations advisor and CRM where it was 'agreed that the obstacles in the way of a reference are considerable... Nevertheless, we have not reached the stage where there is no possibility of a reference, and there remain some steps which it is proper for us to take' and R17, where detailed further investigations were made where a decision making committee 'acknowledged that if the new evidence now submitted... had been available at the time of trial it may have made a difference to the jury's verdict' but 'doubt remains over its veracity'.

that particular care is taken.¹¹⁹ However, in some cases, these limitations lead to the conflict between the concepts of 'factual innocence' and 'unsafe conviction' being rendered transparent – as in the statement of reasons in one such case:¹²⁰

The Commission at this stage is confronted by the need to reconcile two principles established by authorities of the Court of Appeal. The first is the principle ... that the “trial is not a tactical game” and that defendants are in general bound by the forensic consequences of decisions deliberately made at trial... However, the Court of Appeal has sometimes been prepared to exercise its discretion ... [such that] the general principle... may yield to the requirements of justice in the individual case.

...

The difficulty for the Commission is that [the applicant], being fit to plead, and having the advice of solicitors and counsel who (the Commission is satisfied) presided on [the applicant] the unwisdom of his position, chose to put up a lying defence to the jury. He did this having apparently come to the view ... that he had the benefit of a ‘safety net’ as diminished responsibility would still be available to him ... The Commission considers that [the Applicant’s] personality provides an explanation for the position taken at trial, but is not persuaded that it is a reasonable explanation.

The *Pendleton* Exercise

¹¹⁹ This appears to be motivated by a wish not to refer a case which subsequently proved to be weak before the Court: see, eg the note on the file in S24 that 'The Court of Appeal would expect us to take reasonable steps to see all directly relevant witnesses'.

¹²⁰ R7.

In cases where it is satisfied that the evidence would be received by the court, the CCRC then has to determine whether it is likely to afford a ground of appeal, a matter which is governed by the majority decision of the House of Lords in *R v Pendleton*.¹²¹ The difficulties posed by the unclear application of this decision were noted in the previous chapter, mostly centring around how to apply Lord Bingham's indication that 'in a case of difficulty' the Court of Appeal ought to ask 'whether the evidence, if given at trial, might reasonably have affected the trial jury to convict', and if this was so, 'the conviction must be thought to be unsafe'.¹²²

A common rejoinder from applicants where a referral is refused in a fresh evidence case is that the CCRC has incorrectly applied the law, usually by failing to apply this 'jury impact' test. There is considerable controversy as to whether this ought to be the primary test, or whether it is reserved for difficult cases where the Court of Appeal cannot itself form a clear view as to the safety of the conviction.¹²³ Here too the predictive approach has prevailed, with the current practice being to anticipate that the Court of Appeal will be slow to find a case sufficiently difficult as to require recourse to the jury impact test.¹²⁴ Thus, before settling on whether or not to apply the jury impact test, the CCRC asks a prior question: how 'difficult' is the Court of Appeal likely to find this case? In cases where it is concluded that the threshold is not passed, the statements

¹²¹ *R v Pendleton* [2001] UKHL 66, [2002] 1 WLR 72 (HL).

¹²² *Ibid* [19]; see n 46 in ch 4.

¹²³ The latter interpretation has been criticised for usurping the role of the jury by providing 'the Court of Appeal with a wide margin of factual appreciation in deciding the significance of the fresh evidence to the jury's finding of guilt' - H Blaxland and P Wilcock, 'Fresh evidence in criminal appeals - Pendleton revisited' [2006] Arch News 4. There is also conflicting authority, see in particular the dissenting judgments in *Dial v Trinidad and Tobago* [2005] 1 WLR 1660 (PC).

¹²⁴ This is clear from the approach taken to the assessment of such cases, eg R17 (statement of reasons) which concluded: 'The Commission is doubtful whether in the circumstances the Court of Appeal in assessing the "new" evidence in the context of the remainder of the evidence would consider this a "case of any difficulty"'. Cf Elks *Righting Miscarriages of Justice* (n 9) 68-71, who argues that 'the Commission has not adopted any formal position on this matter', but 'may have become more timid' as a result of the Court of Appeal's 'difficult case' threshold. Elks also notes an extra-judicial communication from Judge LJ to the Chair of the CCRC urging a restrictive approach to fresh evidence cases.

of reasons give close, analytical, item-by-item scrutiny to the impact of the new evidence on the key issues at trial, in the same way the Court of Appeal would be likely to on appeal. This can be contrasted with the somewhat looser standard applied in cases where the ‘difficult case’ threshold is passed – see, for example, the following statement from a referral statement:¹²⁵

The Commission believes there clearly remains a significant suspicion regarding [the applicant]... However, the Commission considers that, in applying the test of how the jury might have approached the case in light of the information which is now known, as outlined in *R v Pendleton*... it is far from certain that convictions ... would have inevitably been returned.

Overall, while the CCRC was tasked with mitigating the Court of Appeal’s reluctance to quash convictions on the basis of fresh evidence, the predictive nature of its role means that it applies the Court’s restrictive approach to both admissibility and assessment. This also has an impact at an earlier stage, when considering whether particular investigative steps ought to be carried out, as discussed in detail below.¹²⁶

Change of Law Cases

Another challenging class of applications evincing the impact of the predictive approach are those involving a ‘change of law’, that is where applicants were ‘convicted on the basis of laws since developed and reinterpreted, the earlier interpretation now being declared incorrect, assert that their convictions are unjust’.¹²⁷ This can arise due to either a change in the substantive law – for example, the test for provocation,¹²⁸ or due to

¹²⁵ S5.

¹²⁶ See text to n 305 and following.

¹²⁷ S Cooper, ‘Appeals, referrals and substantial injustice’ [2009] Crim LR 152, 155.

¹²⁸ G70, G99 (in these cases, *R v Smith (Morgan)* [2001] 1 AC 146 (HL) was overruled while the application was under consideration, neutralising the issue).

changing understandings of trial fairness or other procedural requirements.¹²⁹ In the former situation, the risk is that an applicant was convicted on a flawed basis – ie they had a defence, did not have the requisite mens rea, or their actions did not constitute the actus reus of the crime.¹³⁰ In the latter, the risk is rather that an individual was convicted following a process which would now be considered unsatisfactory.

In respect of the latter, the CCRC clearly follows a predictive approach by following the Court of Appeal's repeated injunction¹³¹ to make an 'allowance' where contemporary, if not current, standards of fairness were applied, assessing the gravity of the errors against the weight of the prosecution evidence against the applicant.¹³²

However, there is an additional complication with respect to both types of case. The Court of Appeal's longstanding approach to applications for leave to appeal out of time in change of law cases is that 'substantial injustice' must be demonstrated – a higher standard than merely demonstrating that the appeal was likely to be allowed.¹³³ However, as the change of law ground would (almost by definition) not have been available at the time of the original appeal, applicants who had exhausted their appeal rights at an early stage by arguing other grounds or abandoning an appeal could (until the changes discussed below) apply to the CCRC, and were subject solely to the standard 'real possibility' test, which was concerned with the outcome of the substantive appeal

¹²⁹ For example, a change in the jury directions which ought to have been given as in *R v Bentley (Deceased)* [2001] 1 Cr App R 21 (CA).

¹³⁰ See Cooper 'Appeals, referrals and substantial injustice' (n 127), 161.

¹³¹ See eg *R v Hussain* [2005] EWCA Crim 31 [24]-[28].

¹³² For example, R3 (while jury directions were deficient, not so deficient as to render conviction unsafe), R8 (absence of good character and lies directions immaterial).

¹³³ See eg *R v Mitchell* (1977) 65 Cr App R 185 (CA). For a critical examination of this requirement and its background see Cooper 'Appeals, referrals and substantial injustice' (n 127). The Court of Appeal polices this requirement vigorously, and applies it even in circumstances where it is arguable that the law has not changed at all, but rather where an approach which had prevailed for a short period had been corrected, as in *R v Tierney & Tym* [2009] EWCA Crim 2220 [25]-[26].

as leave was not required.¹³⁴

This led to the first major conflict between the Court of Appeal and the CCRC.¹³⁵ Initially, this was resolved by the CCRC (at the Court of Appeal's instigation) amending its policy, so that as of August 2007, the 'substantial injustice' test was applied when deciding whether to exercise its discretion not to refer an otherwise referable case.¹³⁶ This cannot be explained by reference to the predictive nature of the CCRC's role. Indeed, the Administrative Court had confirmed that there was no obligation on the CCRC to condition its approach by reference to the Court of Appeal's leave criteria.¹³⁷ Rather, this is perhaps best seen as a conciliatory move by the CCRC towards a Court of Appeal which was clearly unhappy with the previous approach.¹³⁸

Whatever this debate reveals about the relationship between the Court and the CCRC, the practical effect is now of largely historical interest. As a result of legislation passed at the instigation of the judiciary, the Court of Appeal now has the power to dismiss an appeal following a reference 'if the only ground for allowing it would be that there has been a development in the law since the date of conviction...and ... if the reference had not been made, but ... the appellant had made...an application for an extension of time within which to seek leave to appeal on the ground of the development

¹³⁴ However, if the applicant had not originally appealed, but subsequently did and was rejected, exceptional circumstances would be required, as in R19.

¹³⁵ See R Nobles and D Schiff, 'Absurd asymmetry - a comment on *R. v Cottrell* and *BM v Scottish Criminal Cases Review Commission*' (2008) 71 MLR 464; Cooper 'Appeals, referrals and substantial injustice' (n 127) and *R (Director of Revenue and Customs Prosecutions) v CCRC* [2006] EWHC 3064; [2007] 1 Cr App R 30 (Admin) [57].

¹³⁶ This change came in a revised formal memorandum dealing with the CCRC's discretion not to refer a case, a topic which is discussed in detail below, see text to n 369.

¹³⁷ *R (Director of Revenue and Customs Prosecutions) v CCRC* (n 135), a decision described by the CCRC's chairperson as 'A resounding affirmation of the Commission's independence' - *Criminal Cases Review Commission Annual Report and Accounts 2006-2007* (n 33) 4. Cf *R v Cottrell & Fletcher* [2007] 1 WLR 3262 (CA) [56].

¹³⁸ *R v Cottrell & Fletcher* (n 137) [47]; Elks *Righting Miscarriages of Justice* (n 9) 174.

in the law, the court would not think it appropriate to grant the application...'.¹³⁹ The substantial injustice test is now relevant to the assessment of 'real possibility', rather than at the later, discretion, stage, as noted by the CCRC in a recent statement of reasons.¹⁴⁰ Thus the effect of the legislative amendment is that – on the predictive view - the CCRC now *lacks the power* to refer a conviction which is acknowledged to be unsafe where the Court is likely to invoke s 16C, that is, where 'substantial injustice' cannot be demonstrated.

What, then, amounts to 'substantial injustice'? The main indicator, for both the Court of Appeal¹⁴¹ and the CCRC is whether the quashing of the conviction would result a lower overall sentence being imposed.¹⁴² However, this is not an absolute rule,¹⁴³ and the Court of Appeal's lack of consistency of approach is often commented upon.¹⁴⁴

The Test in Summary Cases

It has been argued that the referral test ought to be applied differently in respect of summary and indictable convictions, as references in summary cases lie to the Crown Court, where appeals proceed by way of re-hearing rather than appeal.¹⁴⁵ The fact that a

¹³⁹ Criminal Appeal Act 1968, s 16C, introduced by Criminal Justice and Immigration Act 2008. The legislative history of this amendment is discussed in Cooper 'Appeals, referrals and substantial injustice' (n 127) 163-164.

¹⁴⁰ R19.

¹⁴¹ See Cooper 'Appeals, referrals and substantial injustice' (n 127) 160.

¹⁴² Eg R16 where a referral was not made in circumstances where the applicant had been sentenced on a concurrent basis, and would not have received a lower overall sentence had the errant counts been omitted as 'no benefit would be gained by [the applicant] in terms of his reputation or standing in the community if the convictions in question were quashed.'

¹⁴³ In S7 a committee decided to make a referral as there would still be a tangible benefit 'in terms of the totality of his convictions and his criminal record' as all but two of a string of convictions could be quashed 'altering the whole balance of the case'.

¹⁴⁴ In *R (Director of Revenue and Customs Prosecutions) v CCRC* (n 135) the Administrative Court noted 'a discernible unpredictability in its application' ([34]). See also Cooper 'Appeals, referrals and substantial injustice' (n 127) 158-161. The CCRC has not accepted that this lack of consistency can itself amount to an 'exceptional circumstance' justifying a referral, eg R19.

¹⁴⁵ See Kerrigan 'Miscarriage of Justice in the Magistrates' Court' (n 2) 132-134.

rehearing imposes on the Crown a burden to again establish guilt beyond reasonable doubt suggests that a 'real possibility' ought to be easier to establish.¹⁴⁶ In practice, however, it is apparent that the CCRC looks for factors which impact of the safety of the original conviction itself (in the sense that the Court of Appeal might be likely to overturn the conviction were it an indictable matter) rather than the likelihood of a rehearing resulting in a different verdict.¹⁴⁷ Thus, the referral decision is approached in the same way as for indictable matters.¹⁴⁸

(c) Exceptional or Routine?

While the CCRC was established to deal with exceptional cases, it faces a dilemma. On the one hand, it has scarce resources and is required to ration these so that it can deal effectively with meritorious cases. On the other, it needs to ensure that it is receptive to all-comers, lest it dissuade meritorious applicants from coming forward.

The user-friendliness of the application process is discussed below, and is demonstrably successful in attracting a large number of applications.¹⁴⁹ However, the vast majority of these do not result in referrals. In 2008-2009, 918 applications for review were received,¹⁵⁰ and 39 referrals were made.¹⁵¹ A sizable proportion of the

¹⁴⁶ A Sanders, R Young and M Burton, *Criminal Justice* (4th edn OUP, Oxford 2010) 645-646. R Nobles and D Schiff, 'The Criminal Cases Review Commission: establishing a workable relationship with the Court of Appeal' [2005] Crim LR 173 take this further, and note that due to the effluxion of time, and inevitable loss or disposal of evidence, the Crown will often find it impossible to prove guilt at a rehearing.

¹⁴⁷ Eg G31, G55, R11 (where the screening commissioner explicitly noted that a fresh evidence issue ought to be considered through the lens of the s23 requirements which would apply to an indictable appeal) and S20. This practice was acknowledged by Elks *Righting Miscarriages of Justice* (n 9) 262-263, 272.

¹⁴⁸ The legal basis for this is not identified by the CCRC, but it has been suggested that this is an example of the CCRC's discretion not to refer all cases which meet the referral test: Kerrigan 'Miscarriage of Justice in the Magistrates' Court' (n 2) 582. Legislative reform has been suggested by Sanders, Young and Burton *Criminal Justice* (n 146) 646.

¹⁴⁹ See text to n 439 and following.

¹⁵⁰ Criminal Cases Review Commission *Annual Report and Accounts 2008-2009* (n 12) 4.

¹⁵¹ This amounted to 4% of completed cases, compared with 3.5% the previous year, and a long term average of 3.9% - *ibid* 6, 18-19.

unsuccessful applications - two thirds of those in the general sample¹⁵² - are made within six months of conviction or dismissal of their appeal against conviction.¹⁵³ Similarly, approximately a quarter of all applications are made by applicants who have not exhausted their appeal rights.¹⁵⁴ Both statistics are striking, and it worthwhile probing the reasons behind them.

As to what prompts applicants to apply to the CCRC where they have not exhausted their appeal rights, some clues can be garnered from a review of completed application forms.¹⁵⁵ While the answers provided must be treated with at least a degree of scepticism,¹⁵⁶ some tendencies are evident. By far the most common reason given is that trial counsel advised that there were no grounds.¹⁵⁷ This is of significance, as a putative appellant who proceeds in the face of negative advice runs the risk of an order that time spent in custody pending the outcome of the appeal will be ignored for the

¹⁵² Of 100 applications in the initial sample, 33 related to cases where appeal proceedings ended longer than six months previously (or where there was no appeal, the applicant was convicted more than six months previously). This included re-applications, many of which were themselves made initially within six months of the original processes finishing. The reverse was true in the case of the specific samples (i.e. those which had made it to the committee stage), where only 14 out of 50 applications were made within six months.

¹⁵³ While the appeal process is still in train, or the time limit for appealing has not yet expired, any application will be rejected administratively - Criminal Cases Review Commission *Formal Memorandum: The Decision Making Process* (Version 6) para 6.

¹⁵⁴ This is clear from the tables in J Hodgson and J Horne, 'The extent and impact of legal representation on applications to the Criminal Cases Review Commission' (Warwick University School of Law, 2009) 45.

¹⁵⁵ The relevant question reads: 'If you have not appealed, we cannot normally consider your case ... Please say below why you have not appealed. If you have a legal adviser, you should contact him or her before you fill in this section.' In cases where an appeal was made against sentence but not against conviction, applicants do not usually mention the reason why the appeal was mounted on that basis only. To this extent, there is a gap in the data.

¹⁵⁶ Not least because this question is asked to assist in the assessment of whether there are exceptional circumstances. Thus an astute applicant could tailor the response to emphasise that these exist. Corroborating evidence is only occasionally provided, eg G89, where a copy of counsel's advice was available which stated: 'I suggest that [the applicant] accepts the advice given and does not put himself in peril for what he described to me as a matter of principle', providing support for his claim he was fearful of an increased sentence if he appealed.

¹⁵⁷ While this is usually stated in the simple form 'barrister advised no grounds', in some cases, it is explicitly stated that such advice was interpreted by applicants as meaning that the appeal process was legally unavailable (as opposed to being closed as a matter of practical reality): eg G60 and G95. In this regard, the CCRC's practice of advising applicants – in plain English – of their out-of-time appeal options is notable.

purpose of computing sentence length.¹⁵⁸ Indeed, fear of adverse consequences from appealing is also commonly given as a reason for not appealing.¹⁵⁹ As one consequence of a negative advice will be the termination of any representation order, this is linked to the next most common reason given for not appealing, a lack of resources to instruct counsel,¹⁶⁰ or to carry out the research the applicant considers necessary to properly pursue an appeal.¹⁶¹ Another frequent complaint is of the quality of trial representation, often extending to an assertion that trial solicitors or counsel failed adequately to investigate possible appeal grounds,¹⁶² or communicate timeously about appeal prospects.¹⁶³ General communication difficulties whilst imprisoned are occasionally given as a reason,¹⁶⁴ as are more specific personal difficulties.¹⁶⁵ The conclusion which can be drawn from this is that the CCRC will often be the first port of call due to (perceived or actual) limitations or flaws with the appeal process itself.

Of those who have already had an appeal rejected, only seldom is the reason for such a speedy application given – for example, where there are suspicions that documents exist which have not been disclosed during the appeal process.¹⁶⁶ For the most part no explanation is given, and the application relies on grounds already rejected by the appeal court. It seems, therefore, that for these applicants the CCRC functions as a further tier

¹⁵⁸ See *R v Hart & Ors* [2007] 1 Cr App R 31 (CA) applying Criminal Appeal Act 1968, s 29. For detail, see the text to n 88 in ch 4.

¹⁵⁹ Eg G25 ('did not want to make matters worse'); G47 (counsel advised the sentence could be increased); G87 (fear of increased sentence aggravated by apprehension he was being discriminated against on basis of his sexual orientation); G89 (counsel advised that would be in peril of higher sentence on appeal); G100.

¹⁶⁰ Eg G83 (trial counsel had advised no grounds for appeal, and while the applicant had located a QC who was willing to act, her solicitor advised there were no funds to appoint one); G99 (renewal application abandoned when advised legal aid funding unavailable).

¹⁶¹ Eg G6 (lack of resources to investigate potentially exculpatory CCTV evidence) and similarly G19.

¹⁶² This is a frequent complaint, but a typical expression of such concern is the statement from the application form in G95 that 'I did not find [the trial solicitor's advice that there were no grounds of appeal] helpful and feel she has done nothing to help or even looked into my case'.

¹⁶³ Eg G21; G44.

¹⁶⁴ Eg G26 (who applied immediately upon release).

¹⁶⁵ Eg G6 (bereavement).

¹⁶⁶ Eg S7.

of appeal.¹⁶⁷ From the applicants' perspective, it is easy to see how such an opportunity is welcome. It provides a cost-free (at point of delivery) opportunity to have their case considered by at least one, and potentially a panel of, eminent and experienced individuals. Furthermore, it does not carry the risks and disincentives of the appeal process.

This is of concern if one views the CCRC's role as the correction of 'exceptional' cases as it appears that, to a great extent, the work of the CCRC is now to conduct a review of routine cases.

Another inevitable consequence of the CCRC's accessibility is that it is very common for unsuccessful applicants to re-apply.¹⁶⁸ In keeping with the need to be receptive to all applications, unsuccessful applicants are advised that it is possible to submit a fresh application if they obtain further evidence or raise new arguments.¹⁶⁹ Reapplications are time consuming, as they are determined by entirely different personnel to the initial applications,¹⁷⁰ and while they are usually rejected after a summary review, it is not a purely mechanical exercise.¹⁷¹ Further, it is not an invariable rule – in

¹⁶⁷ This is particularly evident where an applicant makes an omnibus application in respect of a series of disparate convictions, or serial applicants who make a number of separate applications about separate convictions eg G43, G45.

¹⁶⁸ 21 of the 100 applications considered in the first sample were reapplications, 7 of which were by applicants who had previously applied on more than one occasion. 9 of the 50 cases in the remaining samples were reapplications, 3 of whom had applied on more than one occasion. The 2006 Annual Report (the latest which contained an analysis of these matters) noted that as of that date 571 re-applications had been accepted since the CCRC's inception, resulting in 32 referrals (although this figure does not include those applications which were refused summarily as not raising new grounds): *Criminal Cases Review Commission Annual Report and Accounts 2005-2006* (n 17) 26.

¹⁶⁹ This is a feature of almost all refusal statements. Similarly, if applicants submit further correspondence following the final determination not to refer, they will either be advised to submit a fresh application, or the material will be treated as though it were a formal re-application – eg R17.

¹⁷⁰ Eg G6 and R17. The importance of this can be seen in S10, where the decision making committee on a reapplication expressed (in their minutes) concern at the way the previous application was dismissed when a fresh reading revealed 'considerably more in support of the application than was recognised'.

¹⁷¹ This involves reviewing the final statement of reasons from the previous application, and if necessary, other material from that file eg G70. On occasion a legal advisor is consulted (eg G72). However, dismissal after a brief review of the original file is more usual, as in G6; G16; G31; G32; G39; G64. The 2006 Annual Report, the latest report which contains this particular statistic, noted that 73 re-applications

circumstances where the CCRC's approach had changed (for example, following a critical judicial decision) reapplications might be accepted on the same ground.¹⁷² The importance of being receptive to re-applications is apparent when one considers the number of occasions on which the CCRC has referred a conviction on a reapplication on grounds it had previously dismissed, even in the absence of new material.¹⁷³

28 Resourcing: Workload, Categorisation and Triage

Whatever one's view of the CCRC's role, this accessibility and high throughput of cases has obvious resource implications. The CCRC has repeatedly expressed its adamantness that resource concerns do not affect the intensity of review.¹⁷⁴ To some extent this is borne out by the ethos of 'it will take as long as it takes' which pervades its work. This is particularly evident at the decision making stage. It is not uncommon for decision making committee dates to be pushed back either to allow further work to be carried out, or for fear that pressure of work will mean that insufficient consideration would be given to an application.¹⁷⁵ However, this perhaps obscures a number of resource-driven systemic features which have obvious impacts on the CCRC's ability to conduct full reviews of all cases before it.¹⁷⁶

were rejected in this way during that year, with 36 being accepted (which is almost identical which that which obtained the previous year) - Criminal Cases Review Commission *Annual Report and Accounts 2005-2006* (n 17) 26.

¹⁷² Eg S14, where a referral was made on a ground previously dismissed. The referral statement noted that 'the Commission now considers that the reasoning which led it to [the previous] conclusion, and the conclusion itself, may have been erroneous.'

¹⁷³ See S10 (discussed in n 170), S14 (discussed in n 172) and S17, where a reapplication was only accepted after judicial review was threatened, but resulted in a referral, as the decision making committee took a 'different view ... as to the importance of [the fresh] evidence in the context of the case as a whole'.

¹⁷⁴ Eg Criminal Cases Review Commission *Annual Report and Accounts 2007-2008* (n 34) 4; Criminal Cases Review Commission *Annual Report and Accounts 2006-2007* (n 33) 5.

¹⁷⁵ Eg, S8 where this occurred several times.

¹⁷⁶ These will likely become pronounced as a consequence of over four consecutive years of real-term budget cuts, which have for example, resulted in a reduction in the number of commissioners appointed - Criminal Cases Review Commission, *Annual Report and Accounts 2009-2010* (2010) 7, 19.

(a) Screening and Triage

The most obvious of these features is the screening process. In the early years of the CCRC's work, applicants faced lengthy delays before their applications would be considered.¹⁷⁷ In a bid to reduce such delays strict case management procedures, including a screening process, were introduced with the consequence that delays have reduced considerably.¹⁷⁸ These processes, and the triaging of resources inherent in them, are therefore an integral part of the CCRC's functioning, and has important consequences in terms of the amount of investigative attention that an application receives. As only 45% of all applications are allocated for substantive review,¹⁷⁹ the screening process warrants detailed consideration.

As a first step in this process, when an application is first received by the CCRC it is placed into one of three categories: cases where there are no reviewable grounds; cases where the application has not previously been the subject of an appeal to the appropriate court; and cases which require a review.¹⁸⁰ Before making the categorisation decision,

¹⁷⁷ Criminal Cases Review Commission, *Annual Report and Accounts 1998-1999* (1999) 14-15.

¹⁷⁸ The Criminal Cases Review Commission *Annual Report and Accounts 2008-2009* (n 12) 4 reports that whereas average the delay before the commencement of complex reviews in 2005 was 20 months, this has been reduced to 20 weeks, and the backlog of cases halved over the same period. While budgetary considerations were also relevant to the decision to implement these reforms, it is apparent that the need to reduce delays was the dominant consideration (see the discussion at Criminal Cases Review Commission *Annual Report and Accounts 2005-2006* (n 17) 5). However the Chairperson's foreword to the 2009 Annual Report alludes to the likely need for such triage to get stricter still, as funding is reduced – Criminal Cases Review Commission *Annual Report and Accounts 2008-2009* (n 12) 4-5, 16-17 and a lengthening of waiting times has already become evident - Criminal Cases Review Commission, *Annual Report and Accounts 2009-2010* (2010) 19-20.

¹⁷⁹ Hodgson and Horne (n 154) 7; and see Nobles and Schiff 'The Criminal Cases Review Commission: Reporting Success?' (n 7) 289-290, commenting on the initial implementation of a screening policy.

¹⁸⁰ Criminal Cases Review Commission *Formal Memorandum: The Decision Making Process* (Version 6); Hodgson and Horne (n 154) 7 reviewed the CCRC's statistics and noted that: 'Some 40% of applications are rejected without investigation either as ineligible (because they are re-applications on the same grounds as a previous unsuccessful application or because the CCRC has no jurisdiction) or because the applicant has not exhausted his or her right to appeal (and there are no exceptional circumstances).' A further 14% fall into the 'no reviewable grounds' category.

the key documentation will be obtained and reviewed by a 'screening commissioner',¹⁸¹ including a copy of the summing up if this is not otherwise available,¹⁸² and the relevant court or prosecution file.¹⁸³ While it is not possible to ascertain precisely from the record the level of scrutiny which is given to this documentation, it is apparent from the case records and statements of reasons that these are, at least to some degree, reviewed for any apparent errors (even if these are not affirmatively raised in the application).¹⁸⁴ Further, in particular categories of cases known to raise troublesome issues, certain preliminary enquiries are taken as a matter of course.¹⁸⁵ These steps are of some importance in cases where an applicant is unable to express themselves cogently in writing, as even obvious grounds of appeal may otherwise be missed.¹⁸⁶ However, this is not to say that a detailed, searching review of the case of the type which might be expected from an advocate instructed by the applicant is conducted. The onus is squarely on the applicant to explain, at least in general terms, the grounds on which their application rests.¹⁸⁷

¹⁸¹ Not all commissioners are involved in the screening process, and of the small number who are, most are legally qualified.

¹⁸² The Court of Appeal will order a transcript as a matter of course when there is an application for leave to appeal against conviction: Her Majesty's Court Service, *A Guide to Commencing Proceedings in the Court of Appeal Criminal Division* (London 2008) at A4-1. If there is no transcript available, the CCRC obtains one at its own cost.

¹⁸³ This is obtained by use of the CCRC's powers under Criminal Appeal Act 1995, s 17, as to which see text to n 250 and following.

¹⁸⁴ This is apparent in all cases reviewed where the decision was made by the screening commissioner, however some go into greater detail, usually where there are unusual features - for example G17, where the applicant in regard to a 12 year old murder conviction was unrepresented, and the screening commissioner explicitly noted that the jury directions were 'unassailable, both fair and legally correct' and that he was 'unable to envisage what possible material there might be that could have an exculpatory impact when the evidence that there was is examined'; similarly in G67 a rape case where a generalised allegation of an unfair trial was made, the commissioner noted that in his view the judge correctly directed the jury as to the law and fairly summarised the evidence.

¹⁸⁵ See eg Criminal Cases Review Commission *Formal Memorandum on Sexual Cases* (Version 1).

¹⁸⁶ Eg G44 where the application form was completed in barely comprehensible English such that it was difficult to ascertain the grounds of the application.

¹⁸⁷ Eg G26, where the application form was silent as to the grounds for the application, other than an indication that the applicant suffered from mental illness. The Crown Court file was requested by the screening commissioner and reviewed, after which the application was rejected on the basis that the applicant entered a guilty plea at trial and had not explained why this was now resiled from. No further enquiries were made. There is also concern amongst at least some commissioners and CCRC staff about the potential discriminatory effect of this - see Hodgson and Horne (n 154) 25-26.

If, after this cursory review, the screening commissioner considers that an application presents no reviewable grounds¹⁸⁸ a provisional letter rejecting the application will be issued, and the applicant will have twenty-eight days to make representations in response.¹⁸⁹ After this time, the provisional view is either confirmed (in which case the application is rejected) or the application is allocated to a review track.¹⁹⁰

(b) No Appeal Cases

This same process obtains in respect of cases where there has not previously been an appeal, where the screening commissioner is also tasked with determining whether the statutory requirement that there be 'exceptional circumstances' warranting the making of a reference where there has not previously been an appeal is met.¹⁹¹ The commissioner's answer, in the vast majority of 'no appeal' cases, is that it is not. The consequence is that they are dealt with summarily (in the way described above) on the basis that the grounds raised could be put directly before the appeal court (usually in the form of an application for leave to appeal out of time) without the CCRC's intercession.¹⁹²

What, then, might lead a screening commissioner to conclude that further investigation is necessary? The most common situation is where it is apparent that exercise of its powers is necessary to gather evidence in support of an appeal,¹⁹³ or where

¹⁸⁸ A non-exhaustive definition of such situations is provided in Criminal Cases Review Commission *Formal Memorandum: The Decision Making Process* (Version 6) para 5.

¹⁸⁹ See text to n 391 below for discussion of this process.

¹⁹⁰ Criminal Cases Review Commission *Formal Memorandum: The Decision Making Process* (Version 6) para 8.

¹⁹¹ Criminal Appeal Act 1995, s 13(1)(c). Cases where an appeal was filed, but later abandoned, are treated as though there has been an appeal, as in G90.

¹⁹² Even S3, which resulted in a referral, was initially met with such a response. This prompted the applicant to seek legal advice, which resulted in the formation of the grounds which were to lead to the referral. As to whether the option of seeking leave to appeal out of time represents a meaningful alternative for applicants, see text to n 94 in ch 4 and following.

¹⁹³ Eg S2 (involving checks on the records of a complainant in a sexual case); and similarly G41; S3; S17; S20.

there is demonstrable error by the applicant's solicitors or counsel in failing to bring an appeal.¹⁹⁴ However the bar for establishing the latter is set very high. Far more commonly, adverse advice from trial counsel will be treated as an almost conclusive reason for rejection without any detailed review of its reasonableness.¹⁹⁵ For example, in one typical statement of reasons, an applicant was advised that:¹⁹⁶

In providing such advice your counsel will have done so in accordance with his professional duty both to you and to the court. If there are no arguable grounds of appeal it would have been a breach of that professional duty to advise you that there were. Legal aid terminates once counsel has advised that there are no grounds for appeal. The fact that counsel has given you a negative advice does not amount to exceptional circumstances as performance of their professional duty is to be expected in all cases rather than to be regarded as exceptional.

This means that the initial screening decision is, in many cases, in effect made by trial counsel. Given the pressures under which defence counsel work, and the limited public

¹⁹⁴ In S17 this was accepted as an exceptional circumstance after a Law Society adjudicator had determined that this amounted to a professional failure. In S18 and S21 counsel error which was apparent from the record was accepted as an exceptional circumstance.

¹⁹⁵ Counsel's advice on appeal is in the class of documents which applicants are requested to include with the application form, and where it is not attached, this is often queried with the applicant. Eg G41 (where the advice in question was ten years old), G47 (where this is quoted from extensively in the final statement of reasons) and S7 where the screening commissioner noted that counsel's advice on appeal 'indicates in the strongest possible terms that there is nothing in the non-disclosure point'. Conversely, when an application appends positive advice from counsel about the merits of an application (a rare situation), this evidently influences the screening decision too, as in S1. However, reliance on counsel is not absolute, especially once the screening stage has been passed. In one case where a ground of application related to the alleged existence of documents in a confidential file a committee considered that it should not be assumed that counsel had conducted this task in a full and proper fashion and that the CCRC ought to review the files afresh (S7), although this case involved historical sexual abuse, which may explain the cautious approach.

¹⁹⁶ G13.

funding available, this is of concern.¹⁹⁷

Apart from these situations, it is hard to discern the precise factors which lead to cases being dealt with in more detail – but, as with the general approach taken to screening cases, it is apparent that the screening commissioner’s instinct (albeit informed by experience) plays a not inconsiderable role. In one case the decision to allocate a no-appeal case for review was questioned by a case planning committee some time later. The Commissioner’s original note stated that they were ‘...not prepared to deal with this... as a no appeal case... [the applicant] protests her innocence and, in a case where the conviction rests of confession evidence like this, I think a careful review is required before the Commission reaches a decision...’. Asked for elaboration on the reasons for his decision, the Commissioner stated that it was:¹⁹⁸

Difficult to clarify reasoning which looks pretty clear to me ... I suppose I might have added that I can’t for the life of me think of how [the applicant] could successfully get an appeal off the ground off her own bat. I suspect I was also influenced by my last quick turn down of a no appeal case where [the] conviction rested on potentially dodgy confession evidence which came back to us and, after [a lengthy investigation], resulted in referral and subsequent appeal

¹⁹⁷ See classically M McConville and others, *Standing accused : the organisation and practices of criminal defence lawyers in Britain* (Clarendon Press, Oxford 1994). These problems are likely to be exacerbated by recent cuts to public funding for criminal defence, see A Edwards, ‘Developments in legal aid funding’ [2009] Arch News 8; A Edwards, ‘Do the defence matter?’ (2010) 14 E&P 119.

¹⁹⁸ S21. In that case, the committee accepted that the fragile mental state of the applicant meant that she was unable to prepare an appeal without the CCRC’s assistance, and this amounted to an exceptional circumstance. See also G68, a no-appeal case which the screening commissioner flagged for substantive review, as while the representations ‘were not entirely convincing... there is enough here to get me worried’. This resulted in extensive investigative work being undertaken. Commissioners and staff members spoken to by Hodgson and Horne (n 154) 25-26 also noted the importance of intuition in this process.

(c) Guilty Plea Cases

A particular subset of no-appeal cases is those where the applicant entered a guilty plea. As the rate of guilty pleas in magistrates' courts exceeds 90 percent, and that in the Crown Court approaches 75 percent, this warrants close attention.¹⁹⁹ This is particularly so once one considers the various pressures on defendants which may cause them to 'believe there is a risk that they may not obtain an acquittal and it might appear best to "cut their losses"' by entering a guilty plea despite their innocence.²⁰⁰ While it is not possible to quantify the extent to which this occurs in practice, a 1993 study suggested that over ten percent of those who entered guilty pleas in the Crown Court professed innocence,²⁰¹ and earlier studies put this figure even higher.²⁰²

As such, it is unsurprising that a significant number of applications to the CCRC involve an allegation that a false guilty plea was entered. These usually involve an assertion that an applicant was wrongly advised (or pressured) to plead guilty by counsel,²⁰³ or entered a false guilty plea to obtain the benefit of an advance sentence indication.²⁰⁴ Another common basis for applications in guilty plea cases is mental

¹⁹⁹ Ashworth and Redmayne (n 102) 293-295; As there is no right of appeal following a guilty plea in the summary jurisdiction (see text to n 54 in ch 4), the CCRC will usually be the only possibility for redress in such cases. In this regard, the CCRC's view is that: 'that the question of whether or not a plea should be set aside is similar irrespective of the forum of the appeal, notwithstanding that a different process may be applicable in determining the ultimate outcome of the appeal' (S20). This appears sensible, as the Crown Court's approach on such referrals is similar to that of the Court of Appeal: Elks *Righting Miscarriages of Justice* (n 9) 331.

²⁰⁰ Ashworth and Redmayne (n 102) 317.

²⁰¹ M Zander and P Henderson, *Crown Court study* (H.M.S.O, London 1993) 138-142.

²⁰² See P Darbyshire, 'The mischief of plea bargaining and sentencing rewards' [2000] Crim LR 895, 901-904. Further, as Ashworth and Redmayne (n 102) 310 note, if one includes situations where an applicant might have an arguable defence to the charge, this figure might be significantly higher.

²⁰³ Eg G10, G29; G32; G89. This is consistent with the findings of Zander and Henderson (n 201) at 63; see also P Tague, 'Barristers' selfish incentives in counselling defendants over the choice of plea' [2007] Crim LR 3.

²⁰⁴ Eg G28; G32 (although in this case, the applicant accepted guilt of some offending, but asserted that the agreed statement of facts was a work of fiction which resulted in a sentence of EPP); G40; G100 (applicant was illiterate; but a reference was rejected as '[d]eciding to enter a guilty plea for "tactical" reasons (in

incapacity at the time of plea.²⁰⁵ There are also a smattering of less common reasons.²⁰⁶

The CCRC's response to these applications is clearly predictive, and is conditioned by the Court of Appeal's extremely sceptical view of applications to set aside a guilty plea, as can be seen in one characteristic rejection statement:²⁰⁷

As the Lord Chief Justice said in *Goodyear*, 'The defendant is personally and exclusively responsible for his plea.' So, like those other life decisions, an adult has to accept that, once made, a decision as to plea cannot be un-made just because it turns out to have been regrettable. Your plea was your voluntary plea entered after advice from counsel and following an enquiry of the Judge by counsel, made at your request. You provide no evidence that your plea was anything other than a voluntary plea. You did not at any stage seek to vacate... that plea. There is not the remotest possibility that the Court of Appeal would find your conviction unsafe.

Again, the onus is squarely on the applicant to provide evidence that they satisfy the Court of Appeal's criteria, and in the absence of this, the application will be dealt with in short order.

order to get a lower sentence, for example) is still an admission of the offence...'). As to the dangers posed by such advance indications see Ashworth and Redmayne (n 102) 303.

²⁰⁵ Either due to longstanding problems as in G33 and R10, or transient features as in G29 (stress caused by family bereavement).

²⁰⁶ Eg G43 (applicant alleged acting as police informant and entered guilty plea to protect cover), G86 (more generalised allegation of duress).

²⁰⁷ G28; similar statements were made in a number of other cases, but cf G40, where the screening commissioner went to the unusual step of obtaining transcripts of the sentencing hearing to investigate the applicant's assertion that a misleading sentence indication was given to the effect that a non-custodial sentence would follow from a guilty plea. This would certainly appear to be the exception rather than the rule in such cases, and the case record in that case evinces concern about whether to take this step given the high cost of obtaining the transcripts.

(d) Cases for Substantive Review

For all other cases (ie those which will be substantively reviewed), there is a second triage whereby the screening commissioner will determine what case management track an application will be allocated to.²⁰⁸ There are currently four case management tracks, each with a different target time within which a draft decision is to be prepared, and different review ‘pathway’.²⁰⁹ The categorisation exercise assumes considerable importance in terms of the time it takes for an application to be reviewed, as well as the level of attention it receives.²¹⁰ More straightforward cases are allocated quickly, with an expectation that they will move to decision speedily.²¹¹ More difficult cases, conversely, are allocated to a queue, which means it can take a lengthy period of time for an investigation to begin.²¹² The emphasis placed on the timeous progress of applications within each category is clear from the prominence the relevant statistics assume in the CCRC's annual reports.²¹³ There are internal processes for monitoring the time taken to deal with each application by reference to each category’s benchmarks, and infractions are policed rigorously.²¹⁴

Another consequence of constrained resources is that communication with

²⁰⁸ Criminal Cases Review Commission, *Formal Memorandum: Case Categorisation* (Version 2). Requests for priority within a given category are considered by against a published policy - Criminal Cases Review Commission, *Formal Memorandum - Priority Ranking and Ordering of Cases* (Version 6) para 1.

²⁰⁹ Criminal Cases Review Commission, *Formal Memorandum: Case Categorisation* (Version 2), appendix 2; Criminal Cases Review Commission, *Formal Memorandum: Casework Pathways* (Version 1).

²¹⁰ See text to n 297 and following.

²¹¹ The target date for allocation of category A cases was (as of March 2009) five months, a target which was almost met in the year 2008-2009, see Criminal Cases Review Commission *Annual Report and Accounts 2008-2009* (n 12), 17.

²¹² Such cases are split into separate queues depending on whether the application is in custody or at liberty. For category B cases, the target dates for allocation as of March 2009 were nine months (in custody) and 21 months (at liberty). For category C cases, these were 16 months (in custody) and 28 months (at liberty). These targets were all met in the year 2008-2009 – *ibid*, 17.

²¹³ See *ibid* 16-17 where such matters comprised four out of eight ‘key performance indicators’; it is also of some importance to applicants, as in S22 where the categorisation decision resulted in an application for judicial review.

²¹⁴ Cases which significantly exceed the benchmarked time are liable to be re-categorised, and returned to the queue for the new category, with attendant delays - eg R9, R17, S10, G71.

applicants is almost exclusively at arm's-length. Face to face meetings are only rarely held, and usually only where an unrepresented applicant is not able to properly express themselves in writing, or to ensure that grounds of review are not being 'held back'.²¹⁵ This reluctance is controversial, but is defended as necessary to conserve resources.²¹⁶

29 A Reactive Process?

Resourcing constraints also have wider implications. This can be seen through an examination of two superficially unrelated matters - when applications ought to be solicited, and when applicants ought to be permitted to withdraw their applications. It is suggested that such constraints, when considered alongside the CCRC's statutory limitations, indicate that the CCRC is forced to operate in a reactive, applicant driven, fashion rather than taking a more inquisitorial role.²¹⁷ However, once the investigative process begins, inquisitorial features become more evident, although these too are subject to resource constraints.

(a) Soliciting Applications

While the CCRC has a power to investigate and refer cases of its own motion, the practical effectiveness of this is reduced by the fact that the resulting appeal must be pursued by the applicant.²¹⁸ This is reflected in the CCRC's policy that it is not an

²¹⁵ Eg G68 (to clarify basis of applicant's concerns about solicitors' and counsel competence) and R21, where it was suspected that the applicant's representative might have been circumspect about raising certain grounds for which the LSC had refused him funding to investigate. See also CCRC, *Formal Memorandum Communicating with Applicants* (Version 5) para 19-21.

²¹⁶ The then Chair, in evidence to the Home Affairs Select Committee commented in 2006 that while 'It may be that simply as a matter of good process we should... it would require an investment of resource and of case working capacity that would undoubtedly impact on our ability to review and conclude cases.' – Home Affairs Select Committee, Examination of Professor Graham Zellick, 10 October 2006.

²¹⁷ Cf one commissioner's 2000 statement that 'The Commission decided early that it would be proactive and not reactive': LH Leigh, 'Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission' (2000) 38 *Alta L Rev* 365, 370.

²¹⁸ Criminal Appeal Act 1968, s 1(1). The exception to this is in respect of deceased applicants, where the CCRC instead asks whether the Court of Appeal would be likely to grant approval to a close relative to

effective use of scarce resources to pursue cases unless there is a clear wish on the part of the convicted person to proceed.²¹⁹

Generally, this also obtains where an investigation in an individual case reveals systemic issues, or otherwise suggests that further convictions may be unsafe.²²⁰ By way of exception, in some circumstances applications are solicited,²²¹ although uncertainty about when this may be appropriate has vexed some decision making committees.²²² It is certainly not a widespread practice, and one of the few examples, following from the Sally Clark and Angela Cannings cases, was at the instigation of the Attorney General rather than of the CCRC's own-motion.²²³

The CCRC, therefore, relies on applicants self-selecting, as such individuals are most likely to progress their own appeals if a referral is made. The CCRC also relies on active communication from applicants throughout the process, and for similar reasons

conduct an appeal pursuant to Criminal Appeal Act 1968, s44A (as in R2 and S25); see also Criminal Cases Review Commission, *Formal Memorandum Non-Cooperation Cases, Withdrawn Applications And Deceased Applicants* (Version 7) para 25. Even this narrow exception is controversial, both externally: Nobles and Schiff 'Establishing a workable relationship with the Court of Appeal' (n 146) 179-181 and internally, as in S25, where several commissioners suggested that consideration ought to be given to exercising discretion not to refer in such cases, before concluding that this was inappropriate.

²¹⁹ Criminal Cases Review Commission, *Formal Memorandum Review In The Absence Of A Formal Application* (Version 2) para 5. Consistent with this, re-applications are occasionally sought from unsuccessful applicants if there has been a change in the law which suggests there may be a prospect of success, as in G2.

²²⁰ Eg, due to a discredited expert (G38) or informant (G52), or malfeasance by the investigatory agencies (S9).

²²¹ The Director of Casework may decide that this is appropriate in a particular case: Criminal Cases Review Commission, *Formal Memorandum: Contacting Co-Defendants and Other Potential Applicants* (Version 2); see also Criminal Cases Review Commission, *Formal Memorandum Review In The Absence Of A Formal Application* (Version 2) para 4.

²²² As in S9, S18.

²²³ For the background, see T Ward, 'Experts, Juries, and Witch-Hunts: From Fitzjames Stephen to Angela Cannings' (2004) 31 J Law & Soc 369. It was initially suggested that 258 cases might be involved – see Lord Goldsmith, Statement, 656 H.L. Debs., cols. 907-908 (20 January 2004). In the event twenty-eight were considered to raise referable points – see C Walker and C McCartney, 'Criminal Justice and Miscarriages of Justice in England and Wales' in CR Huff and K M (eds), *Wrongful Conviction: International Perspectives on Miscarriages of Justice* (Temple University Press, Philadelphia 2008) 190-192. More recently, a review of similar cases following the quashing of Sean Hodgson's murder conviction was the result of a meeting with the Director of Public Prosecutions to discuss its 'desirability', *Commission statement on the quashing of Sean Hodgson's conviction* (Press Release, 18 March 2009).

reviews will be closed where applicants become incommunicado.²²⁴

The decision to target the CCRC's resources in this way makes perfect sense *if* a limited view of its role is taken. However, as the then chairperson noted, the Clark and Cannings review 'illustrates graphically [the CCRC's] role not only in facilitating the correction of individual miscarriages of justice but also in restoring public confidence in the criminal justice system when it has been compromised'.²²⁵ The own-motion power clearly means that the CCRC has the jurisdiction to be more pro-active about this secondary role by investigating potential systemic issues as they appear, but the effect of resourcing considerations means that at present it is only able to perform this function reactively.²²⁶

(b) Withdrawing Applications

Where an applicant seeks to withdraw an application while an investigation is ongoing, CCRC policy again emphasises the importance of an applicant's involvement if any referral is to result in a successful appeal.²²⁷ The effect of this is to give primacy to the individual applicant's wishes, although the policy does note that where there are

²²⁴ Although steps are taken to attempt to find new contact details, including by use of the CCRC's formal powers – see Criminal Cases Review Commission *Formal Memorandum Non-Cooperation Cases, Withdrawn Applications And Deceased Applicants* (Version 7), para 7-8. In G80 an application which had been allocated for a detailed review was discontinued when the applicant (a foreign national) was deported at the conclusion of his sentence, and did not remain in contact with the CCRC even though there was nothing here to indicate that the applicant's continued involvement was necessary for the review to move to a conclusion.

²²⁵ Criminal Cases Review Commission *Annual Report and Accounts 2004-2005* (n 6) 8. The importance of this aspect of the Commission's work is also emphasised in the writings of other former commissioners – eg Kyle (n 59) 675; LH Leigh, 'The Criminal Cases Review Commission: Seven Years On' (2004) 22 *The Barrister* 6; and Elks *Righting Miscarriages of Justice* (n 9) 348.

²²⁶ To this end, the CCRC's 'outreach' work is directed towards general awareness raising – for example, in prisons, see Criminal Cases Review Commission *Annual Report and Accounts 2005-2006* (n 17) 43-44 (the application in G38 was prompted by such an exercise), or through liaison with relevant professional bodies – Criminal Cases Review Commission *Annual Report and Accounts 2006-2007* (n 33) 35. Plans to conduct more wide-ranging activities were recently shelved due to a public sector marketing embargo: Criminal Cases Review Commission, *Annual Report and Accounts 2009-2010* (2010) 42.

²²⁷ Criminal Cases Review Commission *Formal Memorandum Non-Cooperation Cases, Withdrawn Applications And Deceased Applicants* (Version 7), para 17-19.

‘significant legal or public interest issues in the application’, an applicant may be requested to consider such matters before confirming the request for withdrawal.²²⁸

The potential for such deference to an applicant’s wishes to result in miscarriages of justice going unchecked is clearest where applicants request that their applications be withdrawn due to difficulties (perceived or actual) caused by maintaining innocence during the parole process.²²⁹ The CCRC’s policy was formed against the backdrop of one such case where an applicant sought to withdraw an application which alleged prosecutorial corruption.²³⁰ The initial response was to refuse to close the investigation on the basis that the CCRC had an overriding responsibility to the criminal justice system as a whole, which would not be served if the allegation was not fully investigated. This became the subject of considerable internal debate, with different views taken as to the weighting which ought to be accorded to the individual applicant’s wishes. While in that case the application proceeded to decision after a full investigation, under the current policy this would no longer occur. This can be seen in a later case where, following a request for clarification of the grounds on which his application was based, an applicant responded by stating that he did not now want his conviction reviewed as he had admitted guilt to facilitate a parole application.²³¹ The statement of reasons in that case records the CCRC’s position as follows:

The Commission is mindful that... for the purposes of a parole application,

²²⁸ Ibid, para 22.

²²⁹ The problems in this regard are well documented – see M Naughton, ‘Why the Failure of the Prison Service and the Parole Board to Acknowledge Wrongful Imprisonment is Untenable’ (2005) 44 Howard J Crim J 1, 10; M Naughton, ‘Factual Innocence versus Legal Guilt’ [2008] Prison Service J 32; A Samuels, ‘In Denial of Murder: No Parole’ (2003) 42 Howard J Crim J 176; M Naughton, ‘Does the NOMS Risk Assessment Bubble Have to Burst for Prisoners Who May be Innocent to Make Progress?’ (2009) 48 Howard J Crim J 357.

²³⁰ G94.

²³¹ R12. The letter intimates that he was told by other prisoners that he would not get parole or progress through the system if he did not admit guilt, and feared that ‘if I review my conviction now this plea of guilt will be used against me’.

an inmate might feel under some pressure to admit an offence for which they genuinely feel they have been wrongly convicted... For this reason the Commission wrote again to [the applicant] to clarify his position. Clearly a genuine admission of guilt... would be incompatible with some of the submissions that he had raised with the Commission. On the other hand if [the applicant] claimed that the admission was a matter of expediency the Commission would further investigate all issues that appeared to have merit.

The CCRC did take steps to verify if the admission of guilt was genuine, or simply a device to advance through the parole process. To this end, the applicant was advised by letter that:

The Commission do not routinely contact the Parole Board so the fact that the Commission is reviewing your conviction should of itself have no impact on any decision of the parole board with regard to your parole. Equally the Commission will not take into account when reviewing your case that you have admitted your guilt to the prison authorities if it is satisfied that such admissions are untrue.

While whether such a statement could ever be sufficient to counteract received prison wisdom regarding the parole process is highly doubtful, the applicant returned a pro forma response, indicating that he had made a genuine admission of guilt. As a result, submissions which were inconsistent with this admission (significantly, the existence of a new alibi witness) were not investigated. Even in the absence of this, the CCRC were of the view that there were material trial errors which could provide the basis for a referral. However, it also considered that the Court of Appeal would likely also receive evidence

proffered by the Crown as to the applicant's later admission, and that this would result in a finding that the conviction was safe.²³² It is impossible to gauge whether the admission of guilt here was genuine, but in the circumstances it appears extremely unlikely that it would have been made were it not for the imperative of the parole process. Were it not made, the matter would have been referred to the Court of Appeal, on the basis that there was a real possibility that the conviction would be found to be unsafe.

(c) Inculpatory Evidence

The need to target resources efficiently means that considerable autonomy is given to applicants with regard to the commencement and termination of applications. However, this does not mean that the investigative and decision making process itself is party-driven. On the contrary, it possesses many inquisitorial features, in keeping with the CCRC's clearly and frequently articulated view is that its independence means that it does 'not represent the defence or prosecution, police, judiciary or any other part of the criminal justice system.'²³³

One example of this is the approach taken to fresh inculpatory evidence uncovered during a review. Such material is considered as part of the 'real possibility' calculus.²³⁴ Indeed, it can be determinative. In one case, the trial judge apparently erred by failing to issue a good character direction. The CCRC's investigation revealed the

²³² The decision making committee noted that the admission was clear and unequivocal, was not coerced, and noted that there was no privilege between the CCRC and the applicant: 'The committee acknowledged that it was a voluntary admission, and felt that the confession must be admissible. It was therefore concluded that the admission of guilt must form part of the Commission's reasoning and decision-making...'

²³³ Criminal Cases Review Commission *Annual Report and Accounts 2008-2009* (n 12) 8; see Duff 'Criminal Cases Review Commissions and "deference" to the courts' (n 95) 346-347 and JS Hodgson, 'The Future of Adversarial Criminal Justice in 21st Century Britain' (2010) 35 NC J Intl L & Com Reg 319, 354-360.

²³⁴ Such an approach was endorsed by Duff 'Criminal Cases Review Commissions and "deference" to the courts' (n 95) 346-347.

existence of a disqualifying conviction which was not known to the trial court, meaning the issue could not be pursued.²³⁵

Further, on occasion forensic work will be carried out with an eye to discovering if inculpatory evidence exists. In one case, low count number DNA testing (unavailable at the time of trial) was carried out on certain items to see if the victim could be tied to the applicant, which would seriously undermine his position before the CCRC.²³⁶ As well as exhibiting an inquisitorial mindset, the motivation behind conducting such testing is in part resource based. The CCRC is anticipating the kind of work that the Crown would do in advance of an appeal, which informs the decision as to whether there is a real possibility that an appeal would succeed.²³⁷ To this end, a simple forensic test which yields determinative inculpatory evidence may obviate the need for further (costly and time consuming) investigation.²³⁸

An interesting question is what happens where the evidence uncovered would not be admissible on any referral and could not, therefore, influence the 'real possibility' calculus? Duff gave the hypothetical example of a case where exculpatory evidence was unearthed during an investigation, but, following a waiver of privilege, the applicant's trial counsel disclosed that the applicant admitted his or her guilt after trial.²³⁹ Duff went on to suggest that while the CCRC may be tempted to use its discretion not to refer in

²³⁵ R2; the discovery of inculpatory material in R21 and S6 also resulted in avenues of investigation being closed.

²³⁶ R1; similarly R17.

²³⁷ This is evidently successful, as it is 'quite rare for the prosecution to contest the essential findings of Commission experts in cases that are referred': O'Brian (n 50) 9.

²³⁸ Such reasoning is clear from the record in R17; The CCRC also has a set of policies to ensure that the costs of obtaining expert opinion are minimised – see Criminal Cases Review Commission, *Formal Memorandum: Experts - Selection And Instruction* (Version 7) para 13-14. This seems to take matters one step further than that discussed by Duff in 'Criminal Cases Review Commissions and "deference" to the courts' (n 95) 348-349, which concluded that it was justified for the CCRC to decline to make a reference in such circumstances. However, Duff's argument seems equally relevant to this situation, if the CCRC's view is that, no matter what the investigation may reveal, a referral would be hopeless because of the inculpatory evidence.

²³⁹ Duff 'Criminal Cases Review Commissions and "deference" to the courts' (n 95) 355-357.

such a case,²⁴⁰ this would be tempered by the threat of judicial review were it to give any weight to such evidence in terms of the standard referral test. This precise scenario occurred in one of the cases sampled, although this only came to light after a preliminary decision to refuse the application had already been made.²⁴¹ The decision making committee, accepting advice from the legal advisor that it would not be bound to disclose this information unless the committee relied on it or it assisted the applicant making his best case, decided that it 'would not be appropriate to take this into account, not least because [the applicant] had not had an opportunity to comment on it. The provisional decision... had been taken without knowledge of this (and was reaffirmed while ignoring it)'. While this is too slight of a basis to determine what the CCRC's practice would be in a case where a referral was a strong possibility, it tends to suggest that Duff's analysis is accurate.

(d) Independent Grounds

Further evidence of the inquisitorial side of the CCRC's work is the fact that during the substantive review process consideration is not limited to grounds submitted by the applicant. Indeed, it is common for further grounds to be identified and investigated during the review process.²⁴² These can be significant: in the period 2005-2007, 15% of all referrals were based entirely on issues not identified by the applicant or their representatives.²⁴³

²⁴⁰ The topic of discretion not to refer is discussed below, see text to n 369.

²⁴¹ R23.

²⁴² Eg G82 (adequacy of jury directions); R1 (factual matters arising from application rather than entirely new material); R2 (admission of co-defendant's plea and terms in which it was conveyed to the jury, and adequacy of good character direction); R8 (availability of DNA evidence due to technological advances); R12 (errors in summing up); and numerous other cases including S1 (where the ground was identified during a section 19 inquiry, see text to n 279), S2, S7, S9 and S19, where the new grounds resulted in referrals.

²⁴³ Hodgson and Horne (n 154) 4, 14.

It is evident that these grounds are usually identified due to the build up of institutional knowledge; many issues recur, for example a failure to put lesser, alternative, charges to the jury.²⁴⁴ Another common source of additional grounds is a change in the law during the currency of the review.²⁴⁵ In one case additional grounds were identified by the CCRC at a very late stage, after a provisional decision not to refer had been made, prompting the decision to be reversed.²⁴⁶

The identification and investigation of independent grounds certainly indicates that the CCRC's role is not limited to an investigation of the grounds submitted by an applicant. However, resourcing decisions cast a shadow here too: the identification of further grounds almost invariably occurs during the substantive review process, and not at the screening stage.²⁴⁷ This underscores the singular importance of the screening process. If an application is summarily rejected, meritorious arguments or avenues of inquiry which may exist, but not have been identified (or may only have come to light as a result of more detailed investigation) will go unexplored.²⁴⁸

30 The Commission's Investigative Powers and Advantages

Whatever conclusions one reaches about the extent of limitations placed on the CCRC by the 'real possibility' criterion, it is clear that at the core of the CCRC is its investigative role. The CCRC has wide powers of investigation, and ample room for action, as noted

²⁴⁴ In R16 this ground was identified by the CRM and resulted in the application being determined by a committee; in R21 this occurred because the ground arose during consideration of the co-defendant's application. In S19 this resulted in a referral.

²⁴⁵ Eg S2 (following changes in the test for provocation).

²⁴⁶ S7.

²⁴⁷ Usually, these are identified by as part of the review itself, but this matter is also a standing agenda item at case planning conferences (see Criminal Cases Review Commission, *Formal Memorandum: Case Planning Committees* (Version 5) para 12(vii)), and in some cases ultimately referable matters emerge only at the decision making stage - eg S24.

²⁴⁸ As Hodgson and Horne (n 154) 14, 25 note, this is particularly concerning when one considers that most summarily rejected applications involve unrepresented applicants. For further discussion of this issue, see text to n 454 and following.

by Nobles and Schiff.²⁴⁹

Even if investigations are limited to matters that create a ‘real possibility’ of a successful referral, the process of investigation is potentially open-ended. The Commission can look into the process by which the police and the prosecution generated their case, to see if there has been a procedural irregularity or evidence that has been overlooked. In addition, it can commission new tests, or follow up new lines of enquiry that were not apparent at the time of the original trial.

The CCRC has a number of tools at its disposal while conducting investigations. Some are provided by statute, some are attributable to resourcing, and some are simply a function of the esteem in which the CCRC is held by those from whom it requests information.

(a) Section 17 Powers

Practically speaking, the most significant power of the CCRC is that provided by section 17 of the Criminal Appeal Act 1995, under which it can compel the production of material under the ‘possession or control’ of a public body which ‘may assist the Commission in the exercise of any of their functions’.²⁵⁰ This is a broad power, of wide application.²⁵¹ Even in routine applications, this power is used to obtain police and prosecution files,²⁵² and the range of public bodies from which requirements are made are numerous, with the powers being regularly exercised to obtain material from local

²⁴⁹ Nobles and Schiff ‘The Criminal Cases Review Commission: Reporting Success?’ (n 7) 288.

²⁵⁰ Criminal Appeal Act 1995, s 17(1). There are inevitable disagreements with subject bodies regarding the scope of this power, which were particularly evident in R10, R14 and R15. To counter this, the CCRC has taken steps to educate public sector bodies about the power – see Elks *Righting Miscarriages of Justice* (n 9) 21.

²⁵¹ See generally Kyle (n 59) 668.

²⁵² As part of the screening process, see text to n 183.

authorities (including social service departments), NHS trusts, the Criminal Injuries Compensation Authority, prisons, the Identity and Passport Service and the Department of Work and Pensions.

This power opens up avenues of investigation which are unavailable to private individuals, and in consequence applicants often assert that their use is necessary in order for proper appeal grounds to be formulated.²⁵³ In cases where a conviction rests on the credibility of a single witness, for example, evidence of inconsistent statements given to prison authorities, social services or for the purposes of a criminal compensation claim, will be unobtainable by the applicant directly, but all of these can be obtained under section 17.²⁵⁴ Indeed, on occasion appeal proceedings are abandoned in order to allow an application to the CCRC so that these enquiries might be carried out.²⁵⁵ The power also allows access to various government databases, which can be invaluable in tracking down witnesses who are difficult to find,²⁵⁶ or to obtain sensitive information (eg regarding informants).²⁵⁷

The breadth of this power poses evident problems for personal privacy.²⁵⁸ This is particularly acute in cases involving sexual offending. On the one hand the complainant

²⁵³ Eg G6, where forensic and police records were requested by an applicant to assist with his reapplication to the CCRC; G8 where this was said to be necessary due to allegations of police malfeasance (similarly, S7). The difficulties that 'Innocence Projects' have in obtaining such documentation without the CCRC's intercession are noted in J Price and D Eady, 'Innocence projects, the CCRC and the Court of Appeal: breaching the barriers?' (2010) 9 Arch Rev 6, 7.

²⁵⁴ Such checks are common, eg R16 (complainant's medical records sought to see if pattern of false complaints); S1 (Department of Work and Pensions records reviewed to check for evidence of fraud by complainant).

²⁵⁵ Eg R14, where a renewal application was abandoned in circumstances where the appeal grounds could not be substantiated without access to confidential medical, social services and Criminal Injuries Compensation Authority files; S7 where after a court ordered review of confidential files turned up nothing helpful, the appeal was abandoned and an application was made to the CCRC on the same day.

²⁵⁶ Eg R2 where a witness was located by a search of DSS records (and whose anger at having been located was recorded on the file, as he had evidently taken steps to 'disappear').

²⁵⁷ As in S5.

²⁵⁸ It is not unusual, for example, for NHS trusts to object to the release of medical records on privacy and Human Rights Act 1998 grounds.

has extreme privacy interests, whereas on the other, credibility is often a critical issue, and as such access to personal records assumes considerable importance. In recognition of this, the CCRC attempts to strike a balance: section 17 powers will usually be exercised to review the complainant's records for any evidence of false complaints²⁵⁹ but compelling grounds are required to justify obtaining medical records.²⁶⁰

(b) Investigating Officers

Another significant power is that the CCRC may, where it believes 'that inquiries should be made... in relation to any case... require the appointment of an investigating officer to carry out the inquiries' ('**section 19 investigations**').²⁶¹ To date, all such appointments have been of police officers,²⁶² although if the offence was originally investigated by another public body, the appointment may also be of a person employed by that body, or another appropriate investigator (who may or may not be a police officer).²⁶³ Provision is made for the appointment of investigating officers from an outside force in appropriate cases.²⁶⁴

While the empowering provision is broad, the CCRC's policy is that such

²⁵⁹ Indeed, this is the default position in cases of child sex abuse or historical abuse as: 'Unless a check is made the Commission may not discover, for example, that the complainant has made what is known to be a false allegation of sexual abuse post trial or appeal' – see Criminal Cases Review Commission *Formal Memorandum on Sexual Cases* (Version 1) at para 8.

²⁶⁰ See *ibid* at 19. Eg G50 (detailed discussion regarding why the complainants' medical records would only be obtained if there was specific information which suggested they submitted to an intimate examination of a type likely to yield exculpatory evidence).

²⁶¹ Criminal Appeal Act 1995, s 19(1).

²⁶² Criminal Cases Review Commission, *Formal Memorandum: Section 19 Requirements To Appoint An Investigating Officer* (Version 4) para 1. The CCRC usually requests that the officer be of a certain level of seniority, eg R1 where a Superintendent was appointed, and in turn appointed a Detective Inspector to carry out the investigations. This model – a senior investigating officer, with more junior staff running the file from day-to-day is the usual one, as is evident from R15 and S6.

²⁶³ Criminal Appeal Act 1995 s 19(5).

²⁶⁴ The criteria for which are laid out in Criminal Cases Review Commission, *Formal Memorandum: Section 19 Requirements To Appoint An Investigating Officer* (Version 4) para 4. This occurred in S1 and S6, where there was *prima facie* evidence of malfeasance by the force concerned.

appointments are an extraordinary step,²⁶⁵ underscored by the fact that the decision to appoint an investigating officer must be made by a committee of commissioners.²⁶⁶ Usually this step is taken after preliminary investigation to determine if the matters raised in the application are robust enough to warrant further investigation,²⁶⁷ or where an investigation turns up evidence suggesting the criminality of a third party.²⁶⁸ The latter is the usual motivation for an appointment, particularly where further criminal charges are possible.²⁶⁹ In such inquiries, the investigating officer fulfils multiple roles – as well as investigating a suspected miscarriage of justice, they may also be required to conduct a parallel criminal inquiry, whereby third parties can be arrested, interviewed under caution, and considered for prosecution.²⁷⁰

An investigating officer is required to ‘undertake such inquiries as the Commission may from time to time reasonably direct him to undertake in relation to the case’.²⁷¹ The CCRC is, in turn, empowered to ‘take any steps which they consider appropriate’ for the supervision of these inquiries,²⁷² and a process for doing so is specified.²⁷³ This is not to say that the CCRC is always satisfied with the functioning of section 19 investigations. In particular, file notes reveal frequent frustration with the time

²⁶⁵ In its first ten years, the CCRC made only 33 appointments under Criminal Appeal Act 1995, s 19. This is particularly striking by comparison with the Home Office’s former practice; as it maintained no investigative capacity, the Police were relied on more heavily: Elks *Righting Miscarriages of Justice* (n 9) 22-23.

²⁶⁶ Criminal Cases Review Commission, *Formal Memorandum: Section 19 Requirements To Appoint An Investigating Officer* (Version 4), para 1. After a committee has agreed, in principle, to such an appointment, there is consultation with the relevant police force, after which the decision is reconsidered – para 5-6.

²⁶⁷ As in R1, S1 (preliminary interviews conducted).

²⁶⁸ As in R15 (fingerprint testing ordered by the CCRC returned a positive match for a third party).

²⁶⁹ This is evident from the records of R1, R15 and S1.

²⁷⁰ As in R1 and R15; see Criminal Cases Review Commission, *Formal Memorandum: Section 19 Requirements To Appoint An Investigating Officer* (Version 4) para 21-22.

²⁷¹ Criminal Appeal Act 1995 s 20(1).

²⁷² Criminal Appeal Act 1995 s 20(4).

²⁷³ Criminal Cases Review Commission, *Formal Memorandum: Section 19 Requirements To Appoint An Investigating Officer* (Version 4) para 22; including the identification of further avenues of inquiry, as in R1.

taken to complete investigations and make reports,²⁷⁴ or with the quality of the reports themselves.²⁷⁵ Elks suggests that fault for this lies at the door of the police forces themselves, for imposing too many competing priorities on investigating officers.²⁷⁶

The work product of a section 19 investigation is a formal written report.²⁷⁷ These reports inevitably play a significant (if not always determinative) part in the ultimate disposition of the application concerned.²⁷⁸ While (perhaps for the resourcing reasons identified above) the reports are usually confined to the particular matters referred to in the terms of reference, in at least one case, a section 19 investigation has resulted in the identification of a new ground of appeal which had not previously been considered, resulting in a referral to the Court of Appeal.²⁷⁹ Further, section 19 investigations can also turn up inculpatory material, which will then fall for consideration at the decision making stage.²⁸⁰

(c) Other Investigative Advantages

The most obvious gap in the CCRC's powers is its inability to require private bodies to provide material to assist an investigation.²⁸¹ This, exacerbated by a 'process of creeping privatisation' in crucial sectors,²⁸² and recurring uncertainty about whether certain

²⁷⁴ In S6 there was a delay of some six years and in R15, concerns were raised about the evidence-gathering methods employed. This was also evident in R1.

²⁷⁵ R1.

²⁷⁶ Elks *Righting Miscarriages of Justice* (n 9) 23.

²⁷⁷ This is required by Criminal Appeal Act 1995, s 20(6).

²⁷⁸ At least one applicant has expressed concern that the CCRC must not 'blindly accept as true any evidence which the police see fit to submit'. The CCRC, for its part, contended that it had evaluated the evidence in line with the statutory question: would the Court of Appeal accept it (R15).

²⁷⁹ S1.

²⁸⁰ Eg S6; see text to n 234.

²⁸¹ Cf Scotland, where private bodies are subject to the same disclosure obligations as public bodies: Criminal Procedure (Scotland) Act 1995, s 194I. The CCRC has lobbied for a similar power, but to date this has not been forthcoming – Elks 21; Criminal Cases Review Commission *Annual Report and Accounts 2006-2007* (n 33) 24; Criminal Cases Review Commission *Annual Report and Accounts 2004-2005* (n 6) 34.

²⁸² Particularly telecommunications – see Leigh 'The Criminal Cases Review Commission: Seven Years On' (n 225) 6.

entities are or are not ‘public bodies’, causes difficulties for investigations.²⁸³ To some extent these difficulties are mitigated by the fact that, even outside its formal powers, the CCRC, as an independent body, is able to obtain co-operation or assistance which would simply be unavailable to a potential applicant acting alone.²⁸⁴ This is not a complete answer however. Difficulties have arisen in some cases where private bodies are prohibited from²⁸⁵ or otherwise unwilling to make disclosure.²⁸⁶ Often this is for fear of legal consequences which might flow from disclosure which is not compelled by law.²⁸⁷

Other investigative advantages include the ability to call upon the Police (without appointing an investigating officer),²⁸⁸ and, in appropriate cases, Interpol or foreign police or investigative bodies for assistance.²⁸⁹ Also, where applicants are encountering difficulties in obtaining evidence, the CCRC's involvement can often allow these to be overcome – for example, by interceding directly with prison authorities so as to allow an

²⁸³ The term is defined in Criminal Appeal Act 1995, s 22(1) as including any police force, government department, local authority or ‘other body constituted for purposes of the public service, local government or the administration of justice’ and ‘any other body whose members are appointed by Her Majesty, any Minister or any government department or whose revenues consist wholly or mainly of money provided by Parliament’. Elks *Righting Miscarriages of Justice* (n 9) at 21 notes the problems that this raises in respect of historical abuse cases in care homes, where privately run homes resist disclosure on the basis that they are not ‘public bodies’.

²⁸⁴ Criminal Appeal Act 1995, s 21 provides that the express powers are ‘without prejudice to the taking by the Commission of any steps which they consider appropriate’. Eg R17, where the CCRC was able to convince a private body to conduct time consuming and expensive searches of records.

²⁸⁵ For example, because the information is subject to a duty of confidentiality as in R8.

²⁸⁶ Eg. S8 where the CCRC was unable to convince an organisation to release material to a third party for forensic testing.

²⁸⁷ Elks notes that this has posed particular problems in the case of historic abuse cases in private homes – Elks *Righting Miscarriages of Justice* (n 9) 21 and ch 9. The CCRC has also publicly noted the problems in obtaining assistance from telecommunications companies following the passage of the Regulation of Investigatory Powers Act 2000 - Criminal Cases Review Commission *Annual Report and Accounts 2004-2005* (n 6) 34.

²⁸⁸ The Police are occasionally called upon for assistance without making a section 19 appointment, although absent this step there is no power to *require* the Police to assist – see Criminal Cases Review Commission, *Formal Memorandum: Police Assistance in Case Review* (Version 2) para 14. For example, in S10 Police assisted in locating witnesses.

²⁸⁹ Eg R6 where Interpol and the US FBI assisted in locating a witness. However, this is not to say that the CCRC is able to make use of existing mutual assistance procedures, the practical consequences of which were lamented in Criminal Cases Review Commission *Annual Report and Accounts 2004-2005* (n 6) 34.

applicant to be interviewed by an expert witness.²⁹⁰

Further, given the CCRC's independent position, it is not uncommon for members of the public to contact it directly with information regarding investigations.²⁹¹ Similarly, the CCRC's experience is such that it can undertake delicate inquiries of vulnerable witnesses otherwise unwilling to give evidence.²⁹² Extraordinarily a situation may arise where a potential witness seeks immunity from prosecution before agreeing to speak with the CCRC. While the CCRC does not itself have the power to offer such immunity, there is precedent for the Crown Prosecution Service to agree that not to use any inculpatory information provided to the CCRC against the person who provided it.²⁹³

Also important is that the CCRC is able to fund various investigative steps which would simply be beyond the means of impecunious applicants. This is perhaps most notable with regard to obtaining expert evidence, but includes a range of other situations.²⁹⁴ For example, where an interview is deemed necessary for the purpose of an inquiry, the CCRC can meet witness costs, including transport and compensation for work missed,²⁹⁵ or the costs of legal advice where issues of self-incrimination may arise.²⁹⁶

31 Substantive Review Process

The initial categorisation decision attains importance again at the time of substantive

²⁹⁰ S21.

²⁹¹ This is often unhelpful information, but occasionally results in matters which add to the investigation, as in S15.

²⁹² For example, in one case, a witness was initially reluctant to speak to the CCRC as they felt 'burned' by their past experience of discussing the case with an investigative journalist.

²⁹³ This occurred in one case in the sample where, after discussion with solicitors, the witness declined to speak to the CCRC unless full immunity was granted; the matter is also discussed in Criminal Cases Review Commission, *Formal Memorandum: Interviewing* (Version 4) 8.

²⁹⁴ Elks *Righting Miscarriages of Justice* (n 9) 77.

²⁹⁵ Eg R3 (flights and loss of earnings).

²⁹⁶ R8.

review. Once an application has been allocated for review, the process which is followed varies depends according to the category it was allocated to.

Category A reviews are the least detailed. No formal case plan is prepared, cases are expected to proceed to draft decision within fifteen weeks, and the review usually consists of an on-the-papers review of the material submitted by the applicant together with any material requested by the screening commissioner.²⁹⁷ Unless potentially referable matters are identified, this review results in the preparation of a draft preliminary statement of reasons which addresses the points raised by the applicant, explaining why these cannot form the basis for a referral.²⁹⁸

The discussion in the following section is therefore largely of category B or C cases, where investigations are lengthier – often considerably so. It is not unusual for even straightforward cases to take some years to progress. The reasons for this are legion, although commonly stem from lengthy delays in obtaining key pieces of evidence, or locating witnesses.²⁹⁹

(a) Investigative Strategies

A diverse range of investigative strategies are employed, the breadth of which make it impossible to describe in depth.³⁰⁰ With this caveat, some themes can be highlighted.

²⁹⁷ See Criminal Cases Review Commission, *Formal Memorandum: Casework Pathways* (Version 1), para 10-11. This material usually consists of the CPS and (if applicable) appeal court records. The timeframes for such reviews was recently increased – see Criminal Cases Review Commission, *Annual Report and Accounts 2009-2010* (2010) 21.

²⁹⁸ For discussion of the preliminary statement of reasons process, see text to n 391 and following.

²⁹⁹ Eg in S2 an initial 18 month delay caused by repeated changes in the applicant's representation was followed by a two year delay in gaining permission from the Home Office to transfer the applicant (a serving prisoner) to a facility where the required psychiatric testing could occur.

³⁰⁰ As Kyle (n 59) 667 put it, case reviewers 'have a free hand to do whatever the circumstances of each case require'.

As an initial step, a case plan listing the intended investigative steps will be prepared and agreed.³⁰¹ One outcome of this process is a further triage, whereby those issues considered capable of affecting the safety of the conviction will be investigated, and those which are not are sidelined.³⁰² Institutional knowledge plays a considerable role, and as a consequence protocols exist to guide investigations where recurrent issues are likely to arise.³⁰³ In cases which raise more unique issues, a degree of lateral thinking is often used, which can result in unusual sources being approached.³⁰⁴

However, perhaps the most dominant consideration during the investigation process is whether the particular step would assist the predictive task - ie would the Court of Appeal be likely to accept any new evidence or material which might be unearthed by taking a particular investigative step. If the answer is negative, the step cannot contribute to establishing a real possibility of success on appeal, and will not be undertaken.³⁰⁵

In large part, this too can be seen as a question of efficient resource allocation, as is particularly evident when considering whether to commission fresh forensic testing or expert reports. The CCRC's application, when making referral decisions, of the Court of Appeal's restrictive approach to the admission of fresh evidence was discussed above.³⁰⁶ One consequence of this is that when determining whether a proposed investigative step

³⁰¹ Criminal Cases Review Commission, *Formal Memorandum: Case Planning Committees* (Version 5) para 5, 12.

³⁰² Usually this occurs internally, although on occasion this is the basis of explicit discussion/consultation with the applicant, for example in R4, where the CCRC met with the applicant's representatives to identify suitable issues for investigation.

³⁰³ For example, with sexual offence cases where certain investigations are carried out as a matter of course: see Criminal Cases Review Commission *Formal Memorandum on Sexual Cases* (Version 1) and similarly with accusations of police misconduct, see Criminal Cases Review Commission, *Formal Memorandum: Police Complaints and Discipline Records* (Version 3).

³⁰⁴ For example journalists who have investigated matters related to issues in the case, as in R8.

³⁰⁵ Nobles and Schiff 'The Criminal Cases Review Commission: Reporting Success?' (n 7) 287 predicted that such a response would be the necessary consequence of the decision in *R v Criminal Cases Review Commission Ex p Pearson* (n 58). For criticism of the CCRC's approach, see M Naughton and G Tan, 'The right to access DNA testing by alleged innocent victims of wrongful convictions in the United Kingdom' (2010) 14 E&P 326.

³⁰⁶ See text to n 98.

may provide material which could form the basis for a referral, preliminary questions such as why this evidence was not available, or pursued, at trial are often resolved prior to the decision to take such steps.³⁰⁷ Where other expert evidence was presented at trial, or where this did not occur for tactical reasons, the CCRC will usually decline to commission expert reports, due to the Court of Appeal's 'consistently expressed view... that in the generality of cases, the expert case should be put at trial and not enhanced at appeal.'³⁰⁸ However, this does not apply where the state of expert knowledge is alleged to have moved on since trial,³⁰⁹ or where there is concern that the expert evidence at trial was not sufficiently robustly prepared or defended.³¹⁰

This reluctance occasionally prompts applicants to seek expert evidence at their own expense, usually submitted to the CCRC with a request that further reports be obtained.³¹¹ While this raises apparent equality issues, as few applicants will be in a financial position to fund such steps, the practical impact of this is probably low,³¹² as while such material is considered, it seldom results in further testing being carried out.³¹³

The same general considerations are evident in the consideration of requests to interview witnesses, or to use the CCRC's formal powers to obtain particular pieces of

³⁰⁷ Eg G70 (fresh report would not be admitted as could have been obtained prior to trial); G96 (forensic work could have been carried out prior to trial, but a tactical decision was made not to do so); similarly, G14 and R4. In S18, as a preliminary step, the CCRC conducted detailed legal research regarding the Court of Appeal's attitude towards a particular species of psychological evidence. For criticism of this restrictive approach (both by the Court and the CCRC) see O'Brian (n 50).

³⁰⁸ R4 (letter to applicant).

³⁰⁹ Eg R11 where preliminary expert opinion was sought to determine if this was the case.

³¹⁰ Eg R4. In such cases, the instructed expert is asked to direct their response towards the matters relevant to how the Court of Appeal would be likely to exercise its discretion to receive improved expert evidence.

³¹¹ As in G70; G96, G41.

³¹² Although it is impossible to discern with any certainty. This was also the conclusion reached by Hodgson and Horne (n 154) at 27-28.

³¹³ Eg in G41 a further report was not obtained as the 'expert' evidence concerned matters within a jury's collective experience, which would not be received by the Court of Appeal. However, this does mean that more time is spent considering the issue, as in G96 where this included meeting informally with potential experts to ascertain the degree of support a further report might provide to the applicant's case, and R11 where expert opinion was sought to determine the validity of an expert report submitted by the applicant.

evidence. The initial burden falls on the applicant to provide a firm statement of the evidence which might be obtained and how it might render the conviction unsafe.³¹⁴ Even then, such investigative steps are unlikely to be taken if the resulting evidence would, in any event, be unlikely to be received by the Court of Appeal.³¹⁵ As with expert evidence, where the evidence was available at trial but was not used for tactical reasons, the CCRC will refuse to investigate this as the Court of Appeal would be unlikely to receive it.³¹⁶ It is not inconceivable that this could lead to important evidence going uncovered.³¹⁷

These are not invariable practices, and there is an element of discretion and judgement involved. In some cases where the application is thought to have some merit, the evidence in question will be investigated to facilitate a judgment as to whether the Court of Appeal will receive it.³¹⁸ This often results in a large amount of background research being carried out.³¹⁹ In many cases, it is clear that work was carried out simply because of the reviewer's view of the *prima facie* strength of the application – in one case where the reviewer noted 'unease' about a conviction, forensic work was requested on

³¹⁴ Eg G66 (the applicant was given several opportunities to elaborate on these both before and after the preliminary statement of reasons was issued); R6 (generalised allegation of misfeasance by investigating authorities not pursued as no supporting evidence); R3 (nothing to suggest particular named individuals would be able to provide useful evidence if interviewed).

³¹⁵ For example, due to unreliability, as in G66 (fresh evidence from co-defendant unlikely to be admitted); and G72 (witnesses who wish to retract evidence at trial will only be interviewed if strong indicia of truthfulness).

³¹⁶ Eg S2; S15.

³¹⁷ For example in G60 the applicant's claim of a Police 'fit up' was raised prior to trial, but was not pursued at trial for fear of triggering the admission of damning bad character evidence. One of the CCRC's investigations advisors suggested that the CCRC's powers under section 17 could be used to obtain a copy of the relevant officer's disciplinary record, but this was not pursued as it was concluded that the Court of Appeal would conclude that the allegation ought to have been raised at trial. This however, ignores the fact that the tactical balance may have been reversed if there was a prior history of misconduct by the officer.

³¹⁸ Eg R6, where the evidence of a witness was unavailable at trial, but known to the defence prior to an appeal. The witness was interviewed to ascertain if the evidence was different in character to that he could have provided at the appeal stage.

³¹⁹ Eg G101 which involved lengthy discussions between a legal advisor, commissioner and CRM about the potential value of re-interviewing the complainants in a historical sexual abuse case; R15 where detailed background work was carried out to see if there were any discrepancies between the accounts previously provided by a witness before a decision was made to interview them. This is even more detailed where jury issues are involved, as in R21 and S15.

the basis that it ‘*may* disclose something corroborative of the defence case, or that undermines the prosecution case’, even though this was not a strong prospect.³²⁰

(b) Availability of Trial Transcripts and Forensic Material

One recurring investigative issue is the unavailability of trial transcripts, either because they have been destroyed or due to the cost of transcription. This is of considerable practical importance due to the primacy placed on the trial court as finders of fact. Thus, the ability to demonstrate that an error was made by a trial judge, evidence was presented inaccurately, or that counsel was manifestly incompetent, will rest on the ability to review the trial transcript.

No formal record is made of proceedings before magistrates’ courts.³²¹ In the Crown Court, recordings are usually made by a transcribing company contracted by the Ministry of Justice for this purpose. These are not transcribed as a matter of course, and this only occurs where somebody applies, and agrees to pay a commercial fee, for this service. The transcribing companies have an effective monopoly on the provision of transcripts, as it is a contempt of court for anybody other than the official reporter to make a recording of proceedings without the leave of the court.³²² Due to the expense of obtaining such transcripts, they are not usually obtained unless an appeal is contemplated, and even then, this is normally limited to a ‘short transcript’ of the summing up and key

³²⁰ R13; and similarly R4, where a new report was requested after an initial refusal to do so, with a note on the case record recording that: ‘I have reflected [on] whether my tentative conclusions may not have been too harsh. It is arguable that this is a classic case where the adversarial process may have served the truth badly.’

³²¹ Justices’ clerks may keep their own notes of evidence, but there is no obligation for these to be provided unless a legally aided appellant appeals to the Crown Court: B Barnes (ed), *Archbold Magistrate’s Court Criminal Practice* (Sweet & Maxwell, London 2009) 560-561, although it has been judicially suggested that requests in other circumstances ought to be treated sympathetically: *R v Clerk to Highbury Corner Justices* [1986] 1 WLR 1266 (QB).

³²² Contempt of Court Act 1981, s 9.

rulings.³²³

Certain core documents are obtained by the CCRC as a matter of course. These include the transcript of the summing up and appeal documentation, along with any relevant evidential rulings.³²⁴ While an applicant can (if the recording is still available) order a full transcript at their own expense, the CCRC will seldom do so, and only where it is essential for the review, and there is a strong prospect of referral.³²⁵ Requests for the transcription of the full trial record will usually be rejected summarily.³²⁶ The CCRC's reluctance to seek transcripts or tapes obtains even in cases where the applicant raises as a ground matters which could be definitively determined only by reference to the transcript – for example, an allegation that the trial judge, in summing up, misrepresented the evidence. In one such case, the CCRC defended its actions thus:³²⁷

It is a fundamental principle of any criminal trial that consideration of evidential issues is the function of the jury. The trial judge's comments regarding the evidence during his summing-up are, therefore, intended only as a reminder of the evidence given in court... As to the suggestion that the trial judge related matters that were not spoken of by witnesses,

³²³ The leading practitioners' text PJ Richardson (ed), *Archbold : criminal pleading, evidence and practice* (2011 edn Sweet & Maxwell, London 2011) 7-241 advises that anything further is 'rarely necessary'.

³²⁴ The Court of Appeal file, if available, will usually contain such documents where there has been a previous application for leave to appeal against conviction – see Her Majesty's Court Service (n 182) at A4-1. If there has been no previous appeal, the CCRC will seek to obtain these from alternative sources, including paying for commercial transcription if necessary: Criminal Cases Review Commission, *Formal Memorandum: Court Of Appeal Papers - Alternative Sources* (Version 1).

³²⁵ In S1, the CCRC agreed to order, at a cost of £1000, a full transcription of trial evidence in an indecent assault case which showed a strong potential for referral.

³²⁶ In G23, the Chair wrote in response to such a request from an applicant's MP that: 'It is certainly not our role to use our powers merely to provide material which an applicant is otherwise unable to secure'. This mirrors the practice of the Court of Appeal, as the Criminal Procedure Rules 2010, r 68.3(2) requires appellants to specify which transcripts are required, and Her Majesty's Court Service (n 182) at A4-2 warns against requesting 'unnecessary' documents, a point reinforced by practitioners' texts, such as A Hooper and DC Ormerod, *Blackstone's criminal practice* 2011 (20th edn Oxford University Press, Oxford 2010) at D26.10.

³²⁷ G37 (statement of reasons).

the Commission does not consider that this submission can be correct. If such an event had occurred, the Commission has no doubt that either defence counsel or Crown counsel would have taken issue.

Again, this demonstrates considerable deference to trial counsel and assumes (without investigation) that significant abnormalities would have been picked up at the time.³²⁸

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:³²⁹

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.

It is notable that this is problematic not solely in decades-old cases, but in relatively recent cases,³³⁰ as well as in an alarming number of slightly older cases involving serious offences.³³¹

³²⁸ The potential pitfalls of such an approach were discussed above, see n 197 and accompanying text.

³²⁹ G19.

³³⁰ The applicant in G44 was convicted of serious sexual offending five years before his application to the CCRC. As he did not appeal at the time, no transcript of the summing up was taken, nor was the tape available. The same occurred in G56, relating to a seven year old murder conviction where an appeal had been heard by the Court of Appeal, but a transcript of the summing up still could not be obtained.

³³¹ G61 (decades-old murder conviction where Police, Court of Appeal and Defence files all destroyed); G62 (late-80s rape conviction; no transcripts, and court, prosecution and police files all unavailable); G99 (mid-90s murder conviction; summing up unavailable for most of the review. It was only the insistence of a

In such cases, the CCRC is left to piece together what the evidence at trial *may* have been from other sources.³³² These attempts are usually exacting, and impose a not inconsiderable burden on the CCRC's time.³³³ Even where such an exercise is successful, there is at best a patchy record of proceedings at trial. This is a situation that sits ill with a system which places such importance on the trial, whereby the accurate reconstruction of its progress is crucial for the proper determination of the issues raised in many applications.³³⁴

This problem is not confined to trial documentation. The unavailability of forensic material for testing or review is a common problem in decades-old cases, but it has also arisen in a number of relatively recent cases concerning serious offending.³³⁵ In such cases, there is no basis on which a fresh evidence application can proceed to the Court of Appeal, so a reference on this basis is not possible.³³⁶ Apart from advocating for

commissioner that resulted in further searches being undertaken, during which a copy was fortuitously found on the Court of Appeal file); R7 and R8 (early 90s murder convictions; no trial transcript available); G43 (Police files which might corroborate the applicant's contention that he was acting as an informant at the material time had been destroyed).

³³² This is such a frequent occurrence that the CCRC has a formal policy regarding potential alternative sources of such information: Criminal Cases Review Commission, *Formal Memorandum: Court Of Appeal Papers - Alternative Sources* (Version 1).

³³³ Eg in R15 the CCRC engaged in somewhat protracted negotiation with a trial judge to obtain his personal notes from a trial. In G43, such efforts included visiting the relevant Police force's archives to review the files in situ.

³³⁴ Eg, G61 involved an allegation that a confession was obtained by oppression. It was unclear whether any application to this effect was raised at trial, but the absence of any evidence to this effect led to an inference being drawn that no such application was made, and that therefore a tactical decision was made not to do so. In G62, the application was entirely based on various alleged trial errors, however as no documentation was available, the application was rejected as there was no prospect of the CCRC being able to make any enquiries of any sort; in R7 it was impossible to tell if expert evidence was before the trial jury or not; R8 contained several allegations of trial irregularities which the CCRC concluded could not be considered in the absence of a trial transcript.

³³⁵ Eg R1 and R8 (murder convictions from late and early 90s respectively; material not retained so unavailable for DNA testing). In S1 exhibits were unavailable for testing in respect of a three-year old indecent assault case.

³³⁶ Eg G16 (allegation that fresh linguistic testing would reveal that a Police interview was fabricated could not be tested as interview transcript from 1982 destroyed); R3 (decades old murder conviction; forensic evidence unavailable, meaning that a suggestion that re-testing using new technology would yield exculpatory evidence could not be explored). The unavailability of material for testing was also significant in R11. In G69 CICA records had been destroyed, so a rape complainant's files could not be checked in accordance with standard CCRC practice.

better retention practices, there is little that the CCRC can do in this regard. However, it is notable that the CCRC is empowered to, and as a matter of course does, issue notices requiring public bodies to preserve material which is likely to be necessary for the purposes of review.³³⁷ As the time between screening and review can be considerable, the importance of this power for ensuring evidence is preserved cannot be overstated.

32 Decision Making

Once the investigative phase is complete, an application will move to a decision making footing. The Criminal Appeal Act 1995 gives the CCRC considerable autonomy to prescribe its own processes in this regard.³³⁸

The first decision is whether the determination is to be made by a single commissioner, or a committee of three or more commissioners. This is a crucial decision, as only a committee has the power to make a referral,³³⁹ although there are a number of further reasons why, due to the complexity or importance of the issues raised, a committee may make the final decision.³⁴⁰

The initial recommendation as to the mode of disposition of a case is with the CRM.³⁴¹ If they are of the view that the application ought to be refused and there are no issues which require the attention of a committee, the matter is passed to a single

³³⁷ This occurs as part of the screening process: Criminal Cases Review Commission, *Formal Memorandum: Case Categorisation* (Version 2). In all cases this involves the court documents, but also includes such other material as the screening commissioner specifies as relevant.

³³⁸ Criminal Appeal Act 1995, sch 1, cl 6(1).

³³⁹ Criminal Appeal Act 1995, sch 1, cl 6(2)(a).

³⁴⁰ Criminal Cases Review Commission *Formal Memorandum: The Decision Making Process* (Version 6) para 33. Additionally, on at least one occasion, a decision has been allocated to a committee for determination because of a perceived threat of judicial review – R17.

³⁴¹ CRMs often seek informal input when making this determination – for example, from a legal adviser if a matter raises contentious legal issues as in G70.

commissioner for decision.³⁴² The single commissioner must then determine whether ‘all reasonable enquiries have been made’; and whether ‘on the material currently available there is no real possibility that an appeal court would not uphold the conviction’.³⁴³ If the commissioner is so satisfied, a preliminary rejection is issued.³⁴⁴ If they are not, they can request that it be reallocated to a committee for determination, or ask for further investigative work to be carried out.³⁴⁵ The former usually occurs where there remain doubts about the factual correctness of the conviction despite the absence of grounds capable of founding a reference.³⁴⁶ Such situations are rare, however, and in the vast majority of cases, the commissioner does make the ultimate decision.³⁴⁷

(a) Committee Procedure and Practice

Decision making committees almost invariably consist of the statutory minimum three commissioners,³⁴⁸ usually including one who is legally qualified.³⁴⁹ A specific commissioner may be requested to sit on a committee due to the need for their particular expertise.³⁵⁰

³⁴² Criminal Cases Review Commission *Formal Memorandum: The Decision Making Process* (Version 6) para 13 – the CRM can also indicate whether there are any reasons why a particular commissioner ought not to be involved in the decision making process.

³⁴³ Ibid para 16.

³⁴⁴ For discussion of the preliminary statement of reasons process, see text to n 391 and following.

³⁴⁵ Criminal Cases Review Commission *Formal Memorandum: The Decision Making Process* (Version 6) paras 17, 22.

³⁴⁶ Eg R4 where the case record notes: ‘Personally, I disagree with the jury’s verdict and consider that this conviction should not have been made. Bearing this in mind, I have asked for a case committee, in case deliberations lead to a different view on the strength of the referral case’, and similarly R14.

³⁴⁷ Only one in ten substantive reviews results in a determination by a committee: Hodgson and Horne (n 154) 7-8.

³⁴⁸ Criminal Cases Review Commission *Formal Memorandum: The Decision Making Process* (Version 6) para 23; One exception is where a referral is contemplated notwithstanding binding contrary Court of Appeal authority, where five commissioners will make the decision so as to ‘indicate to the Court that the decision has not been made lightly and that the Commission considers it an unusual and exceptional course of action.’ Another is where the CCRC wishes to address a recurring issue in an authoritative way, as in R19, see n 363.

³⁴⁹ In terms of the legal qualification requirements in Criminal Appeal Act 1995, s 8(5): Criminal Cases Review Commission, *Formal Memorandum: The Decision Making Process* (Version 6) para 23.

³⁵⁰ Eg S21.

One of the commissioners will act as ‘lead commissioner’, who together with the case reviewer will create an agenda for the meeting and agree on a dossier of papers for distribution to committee members.³⁵¹ This dossier will include a draft of a preliminary statement of reasons which will usually, but not always,³⁵² contain the CRM’s recommendation as to the ultimate disposition of the case.³⁵³ Occasionally, where the recommendation is for a referral to be refused, this will be accompanied by an expression of concern about the possible factual innocence of the applicant,³⁵⁴ or vice versa.³⁵⁵ However, there can be no question of committees merely rubber stamping such recommendations when one considers the frequency with which they are rejected.³⁵⁶

Committees meet to consider applications in person, and discuss – item by item – the issues for determination. While sometimes matters are disposed of after a single meeting, this is unusual, and such meetings are often lengthy.³⁵⁷ Minutes are taken, and offer a record of the decisions reached but not an account of who said what, nor (with few exceptions) do they record the extent to which there was dissent.³⁵⁸ Clarification on items of interest is sometimes sought from experts.³⁵⁹ Further, committees will often ask

³⁵¹ Criminal Cases Review Commission *Formal Memorandum: The Decision Making Process* (Version 6) para 26.

³⁵² Eg R2, where the memorandum to the committee stated: ‘I consider that [the required] kind of jury-like factual evaluation is best suited to a committee decision.’

³⁵³ This may also indicate the view of other members of CCRC staff, eg in R7 this noted that another commissioner who had been involved with the case and who had expertise in the area concerned agreed with the CRM’s view (although this was not, ultimately, accepted by the committee).

³⁵⁴ Eg R4, R13.

³⁵⁵ Eg S8, where the covering memo notes that the draft had been ‘written up as a referral and that is my draft decision. This is not, in my opinion, cut and dried and I expect some debate around the issue.’

³⁵⁶ This usually results in a refusal to refer a case. Eg R1, where the committee took a different view from the CRM as to whether the Court of Appeal would admit certain pieces of evidence, with the consequence that a referral was refused; and similarly R7; R18; R20. This is often accompanied by an expression of regret. However, occasionally this works the other way, eg S10 where a committee decided to refer on a larger number of grounds than recommended by the CRM.

³⁵⁷ In R6, for example, a single meeting spanned two days whereas in S8 where there was a single issue for determination, the deliberations lasted half a day.

³⁵⁸ In S17, the minutes note a dissenting opinion regarding the width of the reference to be made and in S20 a difference of opinion regarding the test which the court was likely to employ was noted.

³⁵⁹ Eg S15, where the committee as a whole met with the scientists who had undertaken the retesting on which the potential referral rested and S21 where the committee deferred a decision so it could meet with

for further enquiries to be undertaken,³⁶⁰ and once a committee is seized of a matter, it is the committee as a whole who make decisions on the progress of any subsequent investigation.³⁶¹

No representative of the applicant is present at any stage, save in very exceptional circumstances where it is considered ‘necessary to enable the case committee to understand the issues in the case and/or because the issues in the case are of such complexity that the case committee does not think it fair to expect them to be developed fully and coherently in writing’.³⁶²

(b) Precedent

While steps are taken to ensure consistency in decision making there is no general system of precedent.³⁶³ Indeed, given the limitations on disclosure of the CCRC’s determinations, significant natural justice issues would arise if this were otherwise.

As such, the fact that a co-defendant (whose trial suffered similar alleged deficiencies) has already had their conviction referred by the CCRC does not

an expert ‘to answer points of concern arising from his report which might be issues the Crown would pursue on appeal which the Commission should address in its reasoning’.

³⁶⁰ Eg R16, R17; sometimes over the objection of the CRM, as in S8 where the CRM and the committee engaged in a battle of wills regarding whether a particular line of enquiry ought to be followed up. The CRM’s concern was that the enquiry would make the CCRC appear ‘amateurish’ to the Police force to whom the enquiry would be addressed. The committee’s view prevailed, and the enquiry was made.

³⁶¹ This was the cause of some friction in S5 where one commissioner requested that additional enquiries be made where the other committee members felt this unnecessary.

³⁶² R8 (committee minutes); Criminal Cases Review Commission *Formal Memorandum: The Decision Making Process* (Version 6) para 38-42.

³⁶³ The only clear example of this from the cases sampled was where the apparent conflict between the CCRC and the Court of Appeal’s approach to change of law cases was conclusively addressed in R19. The intention for that committee to authoritatively consider and determine the CCRC’s position is apparent from the case records of other cases proceeding to decision at the same time which were put on hold pending the outcome of its deliberations. A similar step was contemplated in S19. In only one other case in the sample was there an attempt to utilise a precedent-style approach – this was in a memorandum to a decision making committee noting that issues of the type discussed do ‘not appear to have found favour when [they have] previously been considered in committee’, referring to the particular determinations where the argument was rejected. There was no record of the committee placing any reliance on this (R2).

automatically result in a referral in the linked case, as a committee's decision in one such case makes plain:³⁶⁴

The Committee decided that it was not bound by [the decision to refer in the linked case] as there was no doctrine of precedent binding on case committees... The Committee agreed that it should not be swayed by the earlier decision... if it took the view that either the Court of Appeal's approach had changed or there were significant differences between the two cases.

Despite this, applications relating to recurring or common issues can often proceed from application to decision quickly, as less investigative work is necessary.³⁶⁵ It is usual for the same committee members to make the determination on a group of linked cases, or in cases which raise the same issues.³⁶⁶ While this may raise questions of bias or predetermination,³⁶⁷ it is apparent that on at least one occasion a committee was prepared to reach a contrary conclusion in linked cases, to the extent that it acknowledged that it (an identically comprised committee) may have been in error in the previous case.³⁶⁸

(c) Discretion Not to Refer

The CCRC retains the discretion not to refer even in cases where it is satisfied that there

³⁶⁴ R21. The committee minutes in that case also record that the previous referral may have been in error.

³⁶⁵ For example, G52 and S9 proceeded from application to decision in six months.

³⁶⁶ Eg R16, and S19 ('to avoid duplication of input'). In S4 the same committee considered the position of five similarly situated applicants. In S9 four similarly situated applications were determined by a committee which had previously made determinations on a number of similar applications. As to the process to be followed, the committee minutes in S9 noted that 'It was agreed that the format used in considering the ... previous applications should be used as a template for approaching the ... current applications, although each application would be treated individually and on its own facts'.

³⁶⁷ For a discussion of these concerns as they relate to judicial officers, see P Butler, 'The Assignment of Cases to Judges' (2003) 1 NZJPIL 83.

³⁶⁸ R21 (the error was in the original applicant's favour).

is a real possibility that the conviction would be overturned.³⁶⁹ The discretion, although wide, falls to be exercised in accordance with standard administrative law principles and on the basis of a published policy.³⁷⁰ The primary criterion is ‘whether any benefit would accrue either to the applicant or to the criminal justice system if the case were referred’.³⁷¹ The most obvious indicia of ‘benefit’ are related to a reduction in sentence (if the applicant is a serving prisoner) or effect on the applicant’s financial position, but this can also include ‘self-respect and standing in one’s family or the community’.³⁷² Where the exercise of this discretion is contemplated, the CCRC will make enquiries to discern the potential practical impact of a successful referral.³⁷³

The practical effect on the individual applicant is not the sole relevant consideration. Various other matters, including ‘the public interest in correction of an injustice’ also fall for consideration.³⁷⁴ In one case, where the trial judge erred in failing to leave a lesser charge to the jury, a referral was made notwithstanding that the Court of Appeal might substitute an alternative conviction as ‘[t]he public interest is that defendants should only be convicted of offences which they are proved to have committed and are not "over-convicted"’.³⁷⁵

The reverse situation, where a referral would amount to an ‘affront to justice’, is

³⁶⁹ The statutory referral power is couched in permissive, not mandatory, terms: Criminal Appeal Act 1995, s 9(1)(a); confirmed by *R v Clark* [2002] 1 Cr App R 14 (CA) para 3; *R v Smith (Wallace Duncan) (No 4)* [2004] QB 1418 (CA) para 5.

³⁷⁰ Criminal Cases Review Commission *Formal Memorandum: Discretion in Referrals* (Version 8). The exercise of this discretion is amenable to judicial review, as to which see text to n 419 and following.

³⁷¹ Criminal Cases Review Commission, *Formal Memorandum: Discretion in Referrals* (Version 8) para 6.

³⁷² *Ibid.*

³⁷³ For example S19, where the likely outcome was the substitution of conviction for lesser offenses, detailed enquiries were made of the applicant’s professional regulatory body to discern the impact of this. While the body involved indicated that this would make no difference, the CCRC decided to refer anyway, as the lesser conviction ‘could potentially be viewed as attracting less social stigma’ and ‘may also be viewed in a different light by employers in any future employment’; similar investigations were made in S10 and R11.

³⁷⁴ Criminal Cases Review Commission *Formal Memorandum: Discretion in Referrals* (Version 8) para 9.

³⁷⁵ S19.

also listed in the CCRC's policy as a potential reason for exercising discretion not to refer.³⁷⁶ However, the exercise of discretion in such cases seems reserved for extreme cases, and the CCRC's general approach in cases where a conviction is tainted by a technical error, but factual guilt is not impugned is conditioned by the fact that '[i]n the absence of exceptional circumstances, the Commission provides a last resort for those seeking to challenge their convictions', meaning that it will generally be inappropriate to exercise discretion not to refer.³⁷⁷

Thus, while not often exercised, the CCRC's discretion means that suspect convictions may be permitted to stand.³⁷⁸ The existence and exercise of this discretion is also motivated by resourcing concerns, although not for the most part those of the CCRC, as the decision on exercising discretion is usually made at the conclusion of an investigation.³⁷⁹ It would appear to instead be motivated by a concern not to trouble the appeal courts with matters the CCRC does not consider to be of any real importance.

(d) The Statement of Reasons

³⁷⁶ Criminal Cases Review Commission *Formal Memorandum: Discretion in Referrals* (Version 8) para 11, giving the perhaps extreme example of an applicant who 'complains with some justification of a serious irregularity or abuse of process, but admits his guilt publicly and sensationally for payment in a national newspaper'.

³⁷⁷ S16 (statement of reasons). Support for this approach can be drawn from *R v Clarke & McDaid* [2008] 1 WLR 338 (HL) [17]: 'Technicality is always distasteful when it appears to contradict the merits of a case. But the duty of the court is to apply the law, which is sometimes technical, and it may be thought that if the state exercises its coercive power to put a citizen on trial for serious crime a certain degree of formality is not out of place.' For a critical discussion of the broader issues involved, see Duff 'Criminal Cases Review Commissions and "deference" to the courts' (n 95) 357-361.

³⁷⁸ Eg in S7, a committee decided to exercise its discretion not to refer an applicant's convictions for buggery and indecent assault in circumstances where the lead charges (rape) were unaffected (although after additional grounds came to light this decision was reversed). The basis for the decision was that while '[the applicant] might have personal reasons for not wishing to have a conviction for buggery on his criminal record... even if the counts related to [this complainant] were removed, there would still be a large number of remaining offences of a broadly similar nature'.

³⁷⁹ Although there is scope for the decision to be made at an earlier stage of the proceedings, to determine whether it is worthwhile conducting any investigations. In S10 (concerning a historical murder conviction) this occurred, and submissions were sought from the applicant's representatives on the point; cf R20 where the applicant contended that his murder trial (for which he had served a life sentence) was flawed as provocation was not left to the jury, but the responsible commissioner and CRM concluded that this was not an appropriate case for a preliminary determination.

The work-product of the CCRC's investigations is a 'statement of reasons'. The CCRC is required to issue such a statement in respect of all applications, although the audience is different depending on the outcome: in non-referral cases, the statement is directed at the applicant, whereas in referral cases the statement is addressed to the appeal court.³⁸⁰

This difference assumes some importance following the passage (at the instigation of the senior judiciary) in 2003 of legislation requiring leave of the Court of Appeal before grounds other than those which formed the basis for the referral can be argued on a reference.³⁸¹ In consequence, referral statements go through in detail the matters which form the basis of the referral, and the matters which were investigated but which did not form the basis for the referral.³⁸²

It is apparent that the CCRC adopts a generous approach to the inclusion of peripheral grounds of reference, with the prevailing attitude summed up by one committee's conclusion that while 'The Commission would not be able to refer on this matter alone as it is not a particularly strong point ... the Commission would not wish to bar counsel from arguing this'.³⁸³ The 2003 legislation also appears to have resulted in a change in the CCRC's investigative practices. Previously, where a strong ground of reference was identified, the CCRC usually declined to investigate other grounds raised in the application, lest it delay a referral.³⁸⁴ However, it appears that, aware of the potential consequences of a limited referral, this additional work is now usually carried

³⁸⁰ Criminal Appeal Act 1995, ss 14(4) and (6).

³⁸¹ Criminal Justice Act 2003, s 315. For background, see Nobles and Schiff 'Establishing a workable relationship with the Court of Appeal' (n 146), 177.

³⁸² This level of detail is understandable, as it would be open for an applicant to seek a pre-reference judicial review of the breadth of a reference. It appears that the decision to include a discussion of all grounds considered in statements of reasons was controversial within the CCRC: see Leigh 'Correcting Miscarriages of Justice' (n 217) 374.

³⁸³ S7 (Committee Minutes); the statements of reasons in S10, S17, S18 and S24 contain similar statements.

³⁸⁴ Eg S1 and S2.

out.³⁸⁵

The compilation of statements of reasons in cases which were the subject of a substantive review is taken very seriously by the CCRC, with a lengthy drafting and revision process. Where the decision was made by a committee, statements are subject to (often considerable) amendment in order to accurately reflect their deliberations, and address matters of concern. This can involve several iterations, and it is clear that the finished product represent the committee's views, rather than merely those of the CRM.³⁸⁶

When an application is determined by the screening commissioner, the style of the statement of reasons differs, instead taking the form of a letter to the applicant summarising in brief form the background, grounds of the application, and the reasons why the matter is not being pursued. The letter is written in the first person and utilises personal pronouns, rather than the more objective style taken in substantive statements of reasons.³⁸⁷ Applicants are advised of the limitations of the CCRC's jurisdiction – in particular that its purpose is not to allow for a re-run of the trial, and that it can act only where new evidence or argument are in existence or if there are exceptional

³⁸⁵ In the cases examined, the case records reveal that even when a strong referable ground is identified further work is undertaken to provide a full answer to the other grounds raised – eg S5, S15 and S23. However, this does not appear to chime with CCRC policy. The Criminal Cases Review Commission, *Formal Memorandum: Section 315 Criminal Justice Act 2003* (Version 3) states that the 'starting presumption' remains that the reference should be made as soon as a real possibility is identified, listing in detail the reasons why this may or may not be departed from in individual cases. Similarly, the commissioners spoken to by Hodgson and Horne (n 154) at 33-35 argued that the legislative change made no difference.

³⁸⁶ For example, in R6, the committee met three times after further representations were received in response to an initial decision. The minutes of the final meeting records that the final statement 'should incorporate the deliberations of the case committee in this and the previous two meetings, and be circulated to members. Members would consider the revised draft in the light of all of [the applicant's] submissions and submit proposed changes electronically.' This spawned some lengthy exchanges, all of which were folded into the finished product.

³⁸⁷ This appears designed to assist the applicant in understanding why the matter has not been proceeded with - see text to n 438 and following.

circumstances. A representative statement of the advice given to applicants is that.³⁸⁸

It is important to stress the limited role of the Commission in law. Our task is not to form a judgment on whether you are innocent or guilty. The points which you have raised in your more recent submissions have been matters that were considered at trial or were arguable by the defence at the time of trial.

If appeal rights have not been exhausted, applicants are also advised that it remains open to them to apply directly to the appropriate court.³⁸⁹

33 Natural Justice

Perhaps because of the spectre of judicial review, the CCRC pays close regard to the requirements of natural justice in all facets of its work. This is most obvious with respect to the treatment of applicants, but is also visible with respect to third parties, for example where trial counsel negligence is alleged, such allegations will be put for comment.³⁹⁰

(a) Provisional Statement of Reasons

Prior to making a final determination to refuse an application (or to refer on only limited grounds), the CCRC will issue a provisional statement of reasons containing a full account of the reasons for declining to make a referral. Applicants are then afforded an opportunity to make representations before a final decision is made.³⁹¹ This is

³⁸⁸ G6.

³⁸⁹ Very occasionally, this will prompt applicants to withdraw their applications before they reach a final decision stage and instead appeal directly, eg G63.

³⁹⁰ Eg G68.

³⁹¹ Currently applicants have twenty working days to make further representations in category A/B cases and forty working days for category C cases: Criminal Cases Review Commission, *Formal Memorandum: Extensions for Further Submissions* (Version 6).

particularly important given the CCRC's reluctance to disclose documentation to applicants or their representatives before a preliminary statement is issued.³⁹²

That natural justice is the primary reason for this process is evident from the CCRC's general refusal to consider matters raised for the first time in further representations.³⁹³ However, there is evidence that the process is not infrequently used to flush out further particulars from applicants where the initial grounds are overly vague.³⁹⁴

Frequently no response is received. While this might be taken as passive acceptance of the outcome, in some cases it is apparent that the lack of response may be due to literacy or capacity issues or because the applicant is a serving prisoner without access to the necessary resources.³⁹⁵ Where representations are received, these are considered by the decision maker, and the responses to the points raised are discussed in the final statement of reasons. In practice, in most cases where further representations are made, these are merely a restatement of points already made or a criticism of the limited scope of the investigation.³⁹⁶ Less frequently, they result in the submission of further information,³⁹⁷ argument,³⁹⁸ or even expert reports.³⁹⁹ Rarely, applicants either signal their acceptance of the conclusions reached, or at least affirmatively acknowledge that

³⁹² Criminal Cases Review Commission, *Formal Memorandum: Disclosure by the Commission* (Version 1). Eg R8 and R13, where the applicants' representatives engaged in repeated attempts to have expert reports disclosed earlier so that they could make representations in response to any issues raised therein, but were refused.

³⁹³ Ibid paras 6-7. Where this occurs, the CCRC can require an applicant to submit a fresh application (with attendant delays).

³⁹⁴ For example, G85, where the case record includes a note from the screening commissioner that 'He is unspecific in his issues on the application form. I would do a provisional [rejection]... challenging him to say what new evidence or argument he wishes to put forward'.

³⁹⁵ For example G72 was a reapplication which followed from a rejection after a failure to provide a response to a provisional statement of reasons. The screening commissioner noted that the likely reason for this was the applicant's apparent literacy problems. Hodgson and Horne (n 154) 32-33 noted that the commissioners and staff they interviewed were concerned by this. As to the particular difficulties faced by serving prisoners, see J Atkins and P Quinn, 'Public funding for CCRC applications' (2000) 150 NLJ 798.

³⁹⁶ G56 is a representative example.

³⁹⁷ Eg G22; G69.

³⁹⁸ Eg G70; G71; R3 (including argument about the CCRC's conclusions as to the applicable law).

³⁹⁹ Eg G24; G70; R17.

there is no basis on which they can be challenged.⁴⁰⁰

As to the ultimate results of the process, usually the preliminary decision will be confirmed without any further action. On occasion factual errors are corrected while not altering the overall analysis.⁴⁰¹ Sometimes, the representations can convince the CCRC to conduct further work,⁴⁰² reconsider matters earlier discounted,⁴⁰³ or otherwise change its approach to the case,⁴⁰⁴ occasionally resulting in a referral.⁴⁰⁵

(b) Disclosure

As a result of its investigative functions, the CCRC frequently obtains material of interest to applicants as well as third parties. Consideration of how far disclosure of this material ought to go occurs against the backdrop of a statutory prohibition on the disclosure of any information obtained by the CCRC in the exercise of its functions, unless it falls within a specified exception.⁴⁰⁶ This means that disclosure to third parties is highly restricted.⁴⁰⁷ The general approach to disclosure to applicants is somewhat broader, with the guiding

⁴⁰⁰ G41; G62; G87 (after the rejection explained how the applicant's argument was irrelevant as the legal elements of the offence were satisfied even on his account, the applicant stated that he accepted the explanation provided and wished to withdraw his application).

⁴⁰¹ G11 (on the potentially significant matter of whether there were two eyewitnesses or three); G21 (clarification of which counts the application was made in respect of); and also in G74 and R6.

⁴⁰² Eg G7 (obtained and reviewed further materials from Police using section 17 powers, and reviewed further elements of trial evidence); R7 (questioned trial counsel); R15 (ordered forensic testing); S2 (reversed earlier decision not to commission further expert report).

⁴⁰³ Eg G24; G47 (the application form erroneously suggested the applicant had pleaded guilty, once this error was corrected, further documentation was obtained and the application reassessed).

⁴⁰⁴ In R7 the application was initially dealt with summarily on the basis that it raised nothing new. Further representations prompted the commissioner involved to seek a second opinion, which resulted in further work being carried out, and eventually in the matter being referred to a decision making committee. In R15, while not rejected summarily, after some preliminary work, a preliminary rejection was issued. The further representations resulted in the appointment of an investigating officer and eventual decision by committee.

⁴⁰⁵ Eg S2 (see n 402) and S24, where a preliminary rejection issued by a single commissioner prompted the applicant to come forward with two further witnesses, which in turn resulted in a reallocation to a committee, and a referral.

⁴⁰⁶ Criminal Appeal Act 1995, s 23 (the exceptions are provided in s 24).

⁴⁰⁷ See Criminal Cases Review Commission *Formal Memorandum: Disclosure by the Commission* (Version 1) para 11.

principle being that:⁴⁰⁸

...sufficient disclosure should be given to enable the petitioner properly to present his best case. That can only be done if he adequately appreciates the nature and extent of the evidence elicited by the... inquiries.

This guiding principle is supplemented by a lengthy formal memorandum providing detailed guidance as to the application of this guiding principle in concrete situations.⁴⁰⁹ The practical result of the duty is that a great deal of information can be disclosed to applicants, even where a referral is not made – for example, physical evidence obtained during the investigative process⁴¹⁰ as well as any expert reports.⁴¹¹

However, considerable limitations remain. Section 25 of the Criminal Appeal Act 1995 permits public bodies which are required to provide information to the CCRC to place a restriction on further disclosure without prior consent.⁴¹² It is not uncommon for there to be significant differences of opinion about what amounts to a good reason for refusing disclosure, or its appropriate scope,⁴¹³ although the CCRC maintains that it has

⁴⁰⁸ *R v Secretary of State for the Home Department ex parte Hickey & Ors* [1995] 1 WLR 734 (Div Ct) affirmed by *Davis v Criminal Cases Review Commission* [2009] EWHC 1641 (Div Ct) [9].

⁴⁰⁹ Criminal Cases Review Commission *Formal Memorandum: Disclosure by the Commission* (Version 1). This runs to 25 pages.

⁴¹⁰ Eg G14 (CCTV footage).

⁴¹¹ Eg R4.

⁴¹² Although the power to refuse consent is subject to restrictions: Criminal Appeal Act 1995, s 25(2); Criminal Cases Review Commission *Formal Memorandum: Disclosure by the Commission* (Version 1) para 27 contains a non-exhaustive list of the factors relevant to the reasonableness of such a determination. In one case in the sample, this was used to restrict the disclosure of 'internal correspondence' between the Crown Prosecution Service and the Attorney-General's department regarding an applicant's case. In another (S8) this was used to resist the release of information regarding enquires made of a trial witness. In S13 it was used to redact operational material. Even where the section is not explicitly invoked by a public body when sensitive information is provided, the CCRC's policy is to 'approach its consideration of whether the information should be disclosed on the basis that section 25 has in fact been raised'.

⁴¹³ Eg S15: '[the committee] concluded that Commission disclosure should not be restricted by commercial confidentiality'. In R8 and S7 such disagreement delayed a referral from being finalised.

the ultimate competence to determine whether information is or is not disclosable.⁴¹⁴ For similar reasons, reports from investigating officers under a section 19 appointment are usually redacted for disclosure purposes.⁴¹⁵ Where a referral is made in reliance on confidential information, a confidential annex will be appended to the statement of reasons, with limited circulation.⁴¹⁶

(c) Judicial Review and Internal Complaints Process

Those who are dissatisfied with the CCRC's processes have two avenues for redress: an internal administrative review procedure and an application for judicial review in the Administrative Court.

The internal 'complaints' process established by the CCRC received 59 complaints relating to 52 cases in 2008-2009, up from 38 complaints relating to 33 cases in 2007-2008, 74% of which were made following the rejection of an application.⁴¹⁷ Post-application complaints are seldom upheld, as the process is limited to ensuring that correct procedures were followed, and does not operate as a means of reviewing the substantive decision reached on an application.⁴¹⁸

As a statutory body, the CCRC is amenable to judicial review.⁴¹⁹ In 2008-2009

⁴¹⁴ Criminal Cases Review Commission *Formal Memorandum: Disclosure by the Commission* (Version 1) para 30-31, subject to giving the body appropriate notice so that it could, if wished, take appropriate court action.

⁴¹⁵ Eg R15, where this because the subject of complaint by the applicant's representatives. The CCRC's view was that it was not obligated to disclose the full contents as they had not been used in making its determination on the application.

⁴¹⁶ Eg S1, where the referring committee decided that the complainant's medical records were to be disclosed to the CPS and Court only as 'The Statement of Reasons gave sufficient details of the material to allow the defence to make an application for further disclosure should this become necessary during the appeal process', and similarly S7.

⁴¹⁷ Criminal Cases Review Commission *Annual Report and Accounts 2008-2009* (n 12) 25.

⁴¹⁸ Criminal Cases Review Commission, *Formal Memorandum: Complaints Procedure* (Version 7) para 1.3.

⁴¹⁹ Such proceedings must generally be brought within three months of the decision under challenge: Civil Procedure Rules 1998, r 54.5.

year there were 21 applications for review, compared with 30 in 2007-2008, the majority of which were challenges to decisions not to refer a case.⁴²⁰ These applications continue to be made in spite of the difficulty of even gaining leave to bring such challenges, as recently confirmed by Scott Baker LJ, who emphasised 'the very high threshold that has to be crossed to persuade this court that a decision by the Criminal Cases Review Commission not to refer a case to the Court of Appeal (Criminal Division) is unlawful'.⁴²¹

In still more cases, applicants will threaten that judicial review will follow if an application⁴²² or interlocutory matter⁴²³ is not resolved in their favour. Despite the evident judicial deference, the threat of judicial review is of demonstrable concern to the CCRC at various material times during (and indeed after) the review process. Further, the number of successful judicial review applications is one of the CCRC's 'key performance indicators' for reporting purposes.⁴²⁴

To some extent this can be understood as a quality control indicator.⁴²⁵ The results of judicial review judgments are carefully analysed, and feed into the decision making process,⁴²⁶ and this can mean that, on a reapplication, the CCRC will re-examine its past decisions.⁴²⁷ However, it seems that the dominant concern is the expense of defending judicial review applications, a matter which has a not inconsiderable effect on

⁴²⁰ Criminal Cases Review Commission *Annual Report and Accounts 2008-2009* (n 12) 24.

⁴²¹ *R (Cleeland) v CCRC* [2009] EWHC 474 (Admin) [48]. No such challenges were successful in the year 2008/2009 - Criminal Cases Review Commission *Annual Report and Accounts 2008-2009* (n 12) 24, in 2006/2007 no applicant was successful in even obtaining leave to bring judicial review proceedings: Criminal Cases Review Commission *Annual Report and Accounts 2006-2007* (n 33) 21 (although one prosecuting body was successful in obtaining leave to bring proceedings *against* a referral decision).

⁴²² G14 (in a telephone call following a preliminary rejection, recorded on the case log).

⁴²³ G23 (disclosure of documents); S22 and R15 (prioritisation requests).

⁴²⁴ See Criminal Cases Review Commission *Annual Report and Accounts 2008-2009* (n 12) 69.

⁴²⁵ To this end, lay applicants are frequently advised of the possibility for judicial review where they have expressed disquiet about decisions – eg G6, G23, G31, S22.

⁴²⁶ Eg in S2, the statement of reasons stated: 'It is... tempting for the Commission to conclude that... there is insufficient evidence that the first limb of the provocation test is satisfied. However, this would be to ignore ... the observations of the Administrative Court in the case of *R(Farnell) v CCRC*... in light of [which], the Commission is not able to conclude that it could properly find an absence of real possibility...'.
⁴²⁷ Eg S14.

the CCRC's operations, as its 2007 Annual Report noted:⁴²⁸

Whilst the Commission plans financially for a number of potential judicial reviews in each financial year, we are susceptible always to significant challenge by way of judicial review of our work which can, even when they are totally devoid of merit, be both disruptive to our casework as well as a huge drain on resources.

In consequence, the CCRC adopts a defensive approach at various stages of its work – from deciding whether to take certain investigative steps,⁴²⁹ to whether to re-open an application.⁴³⁰ Previous guidance from the Administrative Court is treated as binding when it comes to making referral decisions,⁴³¹ and at least one memorandum to a final decision making committee explicitly warned of the judicial review risk if a referral was declined.⁴³²

⁴²⁸ Criminal Cases Review Commission *Annual Report and Accounts 2006-2007* (n 33) 23; this is a recurrent complaint see eg Criminal Cases Review Commission *Annual Report and Accounts 2004-2005* (n 6) 8.

⁴²⁹ For example, G50 and S2, where investigatory steps (in S2, forensic testing) were pursued even though these were considered unnecessary as there was a fear that an actionable legitimate expectation may have been created as to how the case would be handled. In another case, a decision making commissioner was replaced with another, apparently motivated by the fact that (as recorded in the case record) the solicitor acting for the applicant had 'in the past caught the Commission out on procedural points'. In numerous cases, advice was sought from a legal advisor as to the defensibility of various decisions were they to be challenged, eg G72, G74.

⁴³⁰ G48; in another case the case record notes that in view of 'an express or implied threat of JR proceedings, [the previous lead commissioner] took the view that nothing could be lost by allowing the matter to proceed by way of a reapplication'; in another (S17) the CCRC initially insisted that it stood by its decision, but then reversed its position once it received notification of judicial review proceedings. One Annual Report also notes that two cases were re-opened following the issue of proceedings for judicial review: Criminal Cases Review Commission *Annual Report and Accounts 2005-2006* (n 17) 28. These are not always devoid of merit: in S17 such a reconsideration led to a referral. Further Hodgson and Horne (n 154) 33 noted that two of the referrals in their sample were the result of actual or threatened judicial review, although one commissioner they interviewed denied that threats of judicial review played any role in the CCRC's decision making.

⁴³¹ Eg in S2, the CCRC was at pains to point out in its statement of reasons that it was 'tempted' to refuse to make a referral, but felt compelled to do so by a previous judgment of the Administrative Court.

⁴³² S21. While this case was referred, it is impossible to tell from the documentation whether the threat of judicial review was a material consideration.

This defensiveness is also evident in the approach to disclosure of CCRC processes.⁴³³ While the CCRC's formal memoranda⁴³⁴ are freely available, internal 'legal briefing papers', which contain often critical guidance for caseworkers, are not routinely disclosed.⁴³⁵ This is at least partially motivated by a fear that if these were released, decisions would be challenged on the basis that the relevant guidance was not followed, or that the guidance was flawed. While this is understandable in light of the cost of defending such challenges, whether it is defensible as a matter of good administration is highly questionable.

Similarly, the CCRC takes a prudential approach to potential conflicts of interest.⁴³⁶ This extends to all cases where apparent bias might be thought to exist. For example, in one case it became apparent that a member of a decision making committee had made a screening decision in respect of an earlier application by the same applicant; although the committee had proceeded to decision, the decision was vitiated, and a new committee was convened to consider the matter afresh.⁴³⁷

34 A Therapeutic Role?

While the resource limitations on the CCRC's role have been discussed in some detail, it should be noted that this does not entirely prevent it from taking a wider view of its caseworking functions. Most obviously, there is an evident therapeutic or

⁴³³ The CCRC is subject to the Freedom of Information Act 2000.

⁴³⁴ These are documents which record casework guidance issued by the Commission's Casework Operations Group – see Criminal Cases Review Commission, *Formal Memorandum: The Formal Memorandum System* (Version 5).

⁴³⁵ In R10 there was a lengthy discussion by decision making commissioners about whether to disclose such a briefing paper relating to the issue of discretion (which was not then covered by a published policy), concluding with a decision to withhold it.

⁴³⁶ See Criminal Cases Review Commission *Annual Report and Accounts 2008-2009* (n 12) 13; Criminal Cases Review Commission, *Code of Best Practice for Commissioners* (2006) paras 8-9, 18-26, and the appended Criminal Cases Review Commission, *Rules of Conduct for Commissioners to Report Conflicts of Interest* (2006).

⁴³⁷ R10 (this was disclosed to the applicant).

communicative role, whereby the CCRC attempts to assist applicants with the process, and, if unsuccessful, with understanding the reason why their application cannot proceed, or at least feel as though their concerns have been heard and understood.⁴³⁸ This role is present to varying degrees at all stages of the process. The application process itself is extremely user-friendly, with a readily available, plain English, application form⁴³⁹ explaining what information and documentation is required.⁴⁴⁰ Further, there are facilities to enable pre-application discussion with applicants or their representatives. The CCRC has a free advice line, whereby callers with questions about potential applications are put through to a caseworker who can advise as to the appropriate process and steps which should be taken.⁴⁴¹ However, resource limitations certainly restrict the extent of such advice.⁴⁴²

This role manifests itself in other parts of the CCRC's caseworking, in a way which suggests that this is part of its institutional culture. The consistent presence of a single caseworker during the investigation process means that there is constant contact (including frequent written correspondence and often lengthy telephone calls)⁴⁴³ and it is apparent that applicants often form close attachments, with case records noting, for example, the receipt of Christmas cards from some unsuccessful applicants even years after their file was closed.

⁴³⁸ Although another possible explanation is that this has the more functional purpose of deterring re-applications on the same grounds, as suggested by the then Chair in evidence to the Home Affairs Select Committee in 2004 – see Home Affairs Select Committee, *Examination of Professor Graham Zellick* (27 January 2004).

⁴³⁹ The form carries the 'Crystal Mark' logo, signifying that it has been approved by the 'Plain English Campaign' organisation. Although this is a standardised form, its use is not mandatory – Criminal Cases Review Commission, *Formal Memorandum Review In The Absence Of A Formal Application* (Version 2), para 3.

⁴⁴⁰ Specifically, Advice on Appeal, Grounds of Appeal, and any relevant judgments.

⁴⁴¹ More than 600 calls were logged in 2009-2010: Criminal Cases Review Commission, *Annual Report and Accounts 2009-2010* (2010) 37.

⁴⁴² Eg G6 where a putative applicant was advised by a commissioner that it was not the CCRC's role, 'nor indeed would we have the funds or resources to allow us to' assist in the preparation of an application; to similar effect were comments to the applicant in G13.

⁴⁴³ A careful record of such communications is retained, and the CCRC's policy in this regard is laid out in Criminal Cases Review Commission, *Formal Memorandum: Communicating with Applicants* (Version 5).

Also notable is the care with which the reasons for rejection are explained to applicants. Where an applicant appears particularly exercised about some aspect of their conviction, a CRM will often take particular care to write up the refusal to address these concerns in detail.⁴⁴⁴

Further, it is apparent that forensic work has on occasion been carried out in circumstances where the results would be irrelevant to the referral decision, for the purpose of reassuring the applicant that their concerns have been taken seriously and investigated, thus prompting closure.⁴⁴⁵

However, the reach of this is bounded. Applicants frequently request meetings with the CCRC in order to make oral representations. While these are sometimes held in circumstances which offer a ‘clear “pastoral” benefit’ but no direct assistance to caseworking,⁴⁴⁶ such requests are usually rejected on the basis that the opportunity to make representations on the provisional statement of reasons is sufficient.⁴⁴⁷

35 Victims

The CCRC’s relationship with victims is informed by the Code of Practice for Victims, which imposes certain obligations.⁴⁴⁸ The CCRC has adopted a formal policy which provides guidance on matters such as whether to contact victims at the commencement

⁴⁴⁴ For example, in G45, the screening commissioner noted on the case record that while ‘tempted to do it as a simple... case ... I think it would be better written up in a bit more detail to properly answer the issues raised in a way that hopefully the applicant ... will understand, if not agree with.’ Similarly, R13: ‘given the importance which [the applicant] clearly ascribes to the issue, it now appears to the Commission that it will be helpful to provide him with a full response’.

⁴⁴⁵ Eg G14 (where fingerprint testing was carried out at a late stage to ascertain if a submission made by the applicant was factually accurate); something similar can be seen in G78.

⁴⁴⁶ R14 (from the case record).

⁴⁴⁷ Criminal Cases Review Commission *Formal Memorandum: The Decision Making Process* (Version 6) para 38-42.

⁴⁴⁸ Domestic Violence, Crime and Victims Act 2004 (Victims' Code of Practice) Order 2006.

of, or during, a review and how such contact is to be arranged.⁴⁴⁹ While generally victims are not informed that a review is in progress,⁴⁵⁰ they are always informed of a referral, and the CCRC takes steps to ensure such notification occurs before a public announcement is made.⁴⁵¹

Victims occasionally contact the CCRC while a review is extant. On occasion, they provide information about the case under review, however no information is disclosed to them about the nature of the investigations taking place.⁴⁵² Victims will frequently express worry about repercussions if it becomes known that they have communicated with the CCRC, so this fact will not usually be disclosed to applicants. Similarly, where a review is ongoing and is likely to attract publicity, victims are usually informed so that they will find out through official channels. Particular care is taken where the ground of referral itself casts doubt on the credibility of the victim.⁴⁵³

36 The Role of Advocates

Applications may be made ‘by or on behalf of the person to whom it relates or without an application having been so made.’⁴⁵⁴ They are, for the most part, submitted by the applicant in person, rather than legal representatives,⁴⁵⁵ but the CCRC’s policy is ‘to

⁴⁴⁹ Criminal Cases Review Commission, *Formal Memorandum: Victims of Crime* (Version 6).

⁴⁵⁰ Criminal Cases Review Commission *Annual Report and Accounts 2008-2009* (n 12) 9.

⁴⁵¹ Criminal Cases Review Commission, *Formal Memorandum: Victims of Crime* (Version 6) para 8-9. In cases where there is significant media interest, particular care is taken to ensure that victims are notified before the matter becomes reported in the press (eg S15).

⁴⁵² In one case, the victim’s family members contacted CCRC and then conducted varying investigations of their own accord (including retaining the services of a private investigator), the fruits of which they provided to the CCRC.

⁴⁵³ As in S2.

⁴⁵⁴ Criminal Appeal Act 1995, s 14(1).

⁴⁵⁵ It is difficult to quantify the precise extent of representation in the samples, as frequently application forms will indicate that an applicant is represented by solicitors, but the solicitors will subsequently indicate that while they represented an applicant at trial, they no longer do so. Hodgson and Horne (n 154) 8-9, 11 also noted this problem and after further analysis estimated that around one third of all applicants are legally represented.

encourage constructive and effective representation in order that an applicant may be assisted to put forward his/her best case'.⁴⁵⁶ As well as solicitors and barristers, applicants are occasionally represented by family members,⁴⁵⁷ Members of Parliament,⁴⁵⁸ lay advocates⁴⁵⁹ and campaigning organisations.⁴⁶⁰

Legal aid is available for applications to the CCRC, although the threshold test has been criticised for being considerably more onerous than the CCRC's own screening test.⁴⁶¹ Further, the level of funding and payment terms are such that many solicitors refuse to conduct publicly funded CCRC work.⁴⁶² Even where solicitors are willing to act, the restrictions on the level of funding are significant, both in regard to the amount of time which is funded, and on the restrictions on the funding of any expert reports, advice from counsel or similar which may be required.⁴⁶³ Ultimately, the solicitors will bear the risk that such expenses may be disallowed once a claim is submitted.⁴⁶⁴ As claims for reimbursement may not be made until the application is concluded, the solicitor may carry this risk (and the expense) for several years.⁴⁶⁵

While the influence of lawyers on the process is difficult to gauge precisely,⁴⁶⁶ a

⁴⁵⁶ Criminal Cases Review Commission, *Formal Memorandum: Applicants Representatives - Inadequate Representation* (Version 1), para 1; although cf Hodgson and Horne (n 154) 20-21, which suggests that this may not be universally applied by Commission staff.

⁴⁵⁷ Eg G45; G95; G100; R10.

⁴⁵⁸ Eg R10.

⁴⁵⁹ Eg S14, where the applicant was represented by a layperson who had decided to advertise in prison periodicals offering to assist (on a voluntary basis) those who alleged they had been wrongfully convicted.

⁴⁶⁰ Eg S15. 'Innocence projects', long a feature of the US criminal justice system, are also becoming a feature of English law schools, and may be expected to play a larger role in assisting with applications to the CCRC, however none played any obvious role in any of the cases sampled - see generally M Naughton, 'Wrongful Convictions and Innocence Projects in the UK: Help, Hope and Education' [2006] Web JCLI 3.

⁴⁶¹ Hodgson and Horne (n 154) 35; S Bird, 'The Inadequacy of Legal Aid' in M Naughton (ed) *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave MacMillan, Basingstoke 2009).

⁴⁶² Hodgson and Horne (n 154) 36-38; Bird (n 461).

⁴⁶³ The practical problems posed by the unavailability of funding for expert reports or testing are noted by Price and Eady (n 253) 7.

⁴⁶⁴ Bird (n 461) 146.

⁴⁶⁵ Ibid 138.

⁴⁶⁶ Due to the inquisitorial features identified above, the absence of professional representation ought, at least to some extent, be mitigated by the CCRC's own investigations, although this is not a complete

dedicated and detailed study of this issue conducted by Professor Jacqueline Hodgson and Juliet Horne of the University of Warwick law school concluded that legally represented applicants have a significantly greater chance of both passing the screening stage and of having their conviction referred.⁴⁶⁷ While at least some of this effect must be explained by the lawyers themselves filtering out the weaker cases,⁴⁶⁸ a significant cause is likely to be the higher quality of submissions made by represented applicants.⁴⁶⁹

It is apparent that applicants frequently seek legal advice only after their application was been subject of a preliminary decision not to refer.⁴⁷⁰ While in many cases this amounts to no more than a repackaging of the original submissions, albeit in perhaps clearer prose,⁴⁷¹ this can sometimes cause further grounds to be put forward.⁴⁷² Similarly, a final rejection of an application occasionally prompts the retention of new legal advisers, resulting in a resubmission containing more background information or supporting evidence so as to overcome the reasons a previous application failed.⁴⁷³

answer, as to which see Hodgson (n 233) 354-360. Further, not all legal advisers are actively involved during the review process: Hodgson and Horne (n 154) 9-10, 24; in some cases this inactivity is at the explicit request of the applicant, in order to save on costs, eg R6, in others this is due to relative degrees of competence or simply differing views as to what the appropriate level of involvement in the process is.

⁴⁶⁷ Hodgson and Horne (n 154) 42.

⁴⁶⁸ Legal aid rules mean that solicitors 'should reject a case following initial screening if there is no reasonable prospect that it will meet the CCRC referral criteria': Bird (n 461) 140. Legal Services Commission rules state that this initial screening should normally take less than two hours: Criminal Cases Review Commission, *Notes For Legal Representatives*.

⁴⁶⁹ Hodgson and Horne (n 154) 42. The 'screening' processes adopted by some solicitors are described at 29, which notes the potential for even meritorious applications to be screened out.

⁴⁷⁰ Eg G6; G54; G88; S3; in G71 new advisors were sought.

⁴⁷¹ Eg G6.

⁴⁷² Eg S3, where this resulted in the identification of grounds which ultimately led to a referral.

⁴⁷³ Eg S10, where the applicant's new solicitors contacted the CCRC to obtain copies of the relevant documentation from the previous applications before seeking evidence to overcome the barriers which those applications met. Hodgson and Horne (n 154) note a similar situation at 16.

CHAPTER SIX - COMPARISONS AND CONCLUSIONS

37 Introduction

The introductory chapter of this thesis outlined a significant challenge facing the criminal justice systems of a number of jurisdictions: concern at the presence of unresolved 'miscarriages of justice'. Essentially, the concern is that there is a sizable number of individuals who have been convicted of crimes when they ought not to have been - although there is considerable dispute in both academic and popular accounts as to how broadly this category ought to be drawn.

The preceding chapters have examined two different systems for the identification and remedy of suspect convictions. The aim of this final chapter is to highlight the key areas of similarity and difference between these systems, and to identify the reasons for these differences as well as their policy implications, in particular for the oft-mooted reforms of the New Zealand post-appeal process. The English experience is particularly relevant here, as the identification of a number of perceived deficiencies in the RPM process has prompted a push for New Zealand to create a review body along the lines of the CCRC.¹ The two jurisdictions are also apt for comparison, as although they stem from a common legal tradition, with broadly similar rules of substantive criminal law and criminal procedure, they have taken substantially different approaches to both appeal and post-appeal review of convictions.²

This chapter begins by considering the wider constitutional setting of the post-

¹ See text to n 31 in ch 1.

² See text to n 27 in ch 1.

appeal bodies in the two jurisdictions, addressing the question of whether the constitutional position of the New Zealand Ministry of Justice presents an insuperable barrier to a wider role in the investigation of miscarriages of justice in the absence of wider structural reforms. After concluding that it does not, the appeal systems in each jurisdiction are compared. It is argued that as appeal courts and post-appeal bodies are interlinked in a number of critical ways, the differences between the appeal systems in each jurisdiction have important implications for the functioning and design of post-appeal bodies. In particular, it is argued that the fact that the New Zealand criminal appeal system is considerably more accessible - both initially and at some remove from trial - is a matter of significance to the necessary or appropriate role of a post appeal body.

The chapter then turns to consider the issues posed by the inquisitorial features of both post-appeal processes, arguing that these do not remove the need for the applicant's involvement at critical stages of the review process, a matter which means the availability of competent legal representation remains important. Finally, the investigative processes and powers of the post-appeal bodies in each jurisdiction are considered, and it is argued that while for various reasons New Zealand could not fully replicate the CCRC's investigative machinery, with appropriate adaptations a New Zealand post-appeal body (of whatever form) could and should have a wider investigative role.

Before turning to these substantive matters, a few general points stand out for comment. The first is that cutting across almost all of these matters is the obvious issue of size. England and Wales' population of 54 million people dwarfs New Zealand's four million. In 2008, 4124 individuals were convicted on indictment in New Zealand,

compared with 76,708 in the Crown Court in England and Wales.³ In the summary jurisdiction, the respective figures were 92,586 and 810,605.⁴ The result is that there is a considerably lower number of potential cases for both appeal and post-appeal mechanisms to consider in New Zealand. This has some significant consequences. For example, New Zealand's appeal courts are able to extend detailed and individual scrutiny to all applications of which they are seized without this leading to sclerosis in other avenues of their work.⁵ In contrast, the English system is able to obtain economies of scale which would simply not be possible in New Zealand. The consequences of this difference will be examined in detail below, but as this represents an enduring distinction between the two systems, the discussion below must take a realistic view of the prospects for transplant of the English experience to New Zealand (and vice versa).⁶ However this does not mean that New Zealand cannot benefit from the English experience, and the next section argues that certain of the CCRC's features and functions could be adopted in New Zealand (with appropriate adaptations) without wholesale institutional change.

It is also important not to lose sight of the fact that while sharing many commonalities, there remain significant and material differences between the legal cultures of England and New Zealand. Indeed, many of the other important distinctions presented and discussed below may be explained by legal differences underscored by the differing judicial pressures and cultures in each jurisdiction. For example, New Zealand

³ Response by New Zealand Ministry of Justice to request under the Official Information Act 1982 by author, dated 3 March 2011; Ministry of Justice, *Judicial and Court Statistics 2008* (London 2009) tab 6.6, 6.7.

⁴ Response by New Zealand Ministry of Justice to request under the Official Information Act 1982 by author, dated 3 March 2011; Crown Prosecution Service, *Annual Report and Resource Accounts 2008-2009* (London 2009) appendix B.

⁵ See text to n 52 and following.

⁶ S Mount, 'A Criminal Cases Review Commission for New Zealand' [2009] NZ Law Rev 455, 461-462 points out that Scotland, with only a slightly larger population to New Zealand has an independent criminal cases review commission, and that there is good reason to suspect that similar results could be expected were a body along these lines to be transplanted to New Zealand. As the present study has not examined the many factors which may impact on this comparison, it is not possible to comment in detail on this.

judges have, however tentatively, expressed a willingness to take a less legalistic approach to references.⁷ In contrast the English Court of Appeal treats references which do not appear to satisfy its usual appeal tests with hostility.⁸ This suggests the New Zealand courts are more receptive to attempts to redress miscarriages of justice. This receptiveness is even more evident where appellants seek to re-visit appeals before the same appeal court, where New Zealand courts find a jurisdiction to do so in a way that English courts have considered closed.⁹ While these matters can be explained at least in part by legal differences, it is suggested that these ought also to be considered manifestations of the differing pressures under which the judges in each jurisdiction are working: a court which is groaning under the weight of work is unlikely to facilitate any change that will increase this burden still further.

Also notable is the extent to which similar features have emerged in each jurisdiction, but for different reasons. In particular, many of the restrictions on the New Zealand RPM process have arisen as a result of concerns about breaching the constitutional principle of separation of powers, whereas similar restrictions have been placed on the activities of the independent CCRC in order to preserve scarce resources.

38 The Constitutional Setting

One of the recurring themes in the discussion presented below is the extent to which the New Zealand Ministry of Justice, due to its membership of the executive branch of government, considers that it is constrained by constitutional convention from undertaking many of the roles which the CCRC, an independent body, is able to fulfil.

⁷ See text to n 57 in ch 3.

⁸ Evidenced most clearly by the Court of Appeal's response to the differential approach adopted in respect of change of law cases, see text to n 135 in ch 5.

⁹ See text to n 49 and following.

The English Home Office felt that it was constrained by the same conventions prior to the establishment of the CCRC, and it was a desire to change this which led to the establishment of the CCRC as an independent body in 1995.¹⁰ Many in New Zealand have assumed that it would be necessary to establish a CCRC-style body in order for current practice to change, with an official review of the Ministry's functioning in 2003 concluding that any fundamental changes to the RPM process could only occur following substantive structural reform.¹¹ If this is correct, and the limitations imposed by constitutional convention are the inevitable consequence of the current New Zealand institutional arrangements, then structural reform may be a necessary part of any reform aimed at changing current practice. To establish if this is so, it is necessary to ask why the fact that reviews are carried out by the Executive in New Zealand has given rise to the restrictive constitutional conventions, and whether there are steps short of the creation of an independent body which could address the concerns which underlie them.

If it is the case that the concerns underlying the conventions can be addressed without the establishment of an independent body, it is entirely possible for the

¹⁰ The pre-1995 position of the UK Home Office was that constitutional propriety required it to take a passive role when investigating claims of miscarriage of justice: Home Office, *Memorandum on the Royal Prerogative of Mercy* (HMSO, London 1970) [421]. Fidelity to this principle was such that in 1993 the Runciman Commission concluded that 'The scrupulous observance of constitutional principles has meant a reluctance on the part of the Home Office to inquire deeply enough into cases put to it and, given the constitutional background, we do not think this is likely to change significantly in future.' Royal Commission on Criminal Justice, *The Royal Commission on Criminal Justice : Report* (Cm 2263, 1993) 182. Similar difficulties were identified by the Sutherland Committee, which investigated this matter in Scotland: Sutherland Committee, *Report by the Committee on Criminal Appeals and Miscarriages of Justice Procedures* (Cm 3245, 1996). The Runciman Commission's conclusions echoed the earlier conclusion of the report of Sir John May into the Maguire case, which concluded that while the legal framework conferred a seemingly unfettered discretion to the Home Secretary, 'in practice he and the civil servants advising him on these matters operate within strict self-imposed limits': Rt Hon Sir John May, *HC296: Second Report on the Maguire Case* (HMSO, London 1992) 10.3. See also R Nobles and D Schiff, 'The Criminal Cases Review Commission: Reporting Success?' (2001) 64 MLR 280, 283.

¹¹ New Zealand Ministry of Justice, *Royal Prerogative of Mercy: Practices and Procedures in the Ministry of Justice* (Wellington 2003) 29.

conventions to evolve to accommodate a wider role for the Executive. This is because of the nature of constitutional conventions: they are not judicially enforceable laws, but instead matters of constitutional practice fettered for their flexibility and ability to change in view of changing circumstances.¹² The New Zealand constitutional conventions could change either organically or following an affirmative move by the political actors concerned. Whether such a change is possible or desirable in the absence of wider reform in large part depends on whether the values underlying the constitutional convention require the maintenance of the status quo.

(a) Separation of Powers

The basis for the New Zealand constitutional convention is a concern about executive interference with a judicial process; that is, fear of breaching the constitutional principle of separation of powers.¹³ There is considerable debate amongst public lawyers about the proper extent or scope of the principle of separation of powers, but the consensus is that some 'friction' between the various branches of government is necessary in order that constitutional objectives are achieved effectively and efficiently.¹⁴ The limited involvement of the Executive in exceptional cases where a miscarriage of justice may have occurred could be seen as one such example where the 'friction' is beneficial. Indeed, such a check on judicial power is a manifestation of the ultimate interest protected by the principle in this context: securing to individuals a right to a fair trial by

¹² For discussion of the nature and malleability of constitutional conventions, see AW Bradley and KD Ewing, *Constitutional and administrative law* (15th edn Longman, Harlow 2010) 23-24; and G Marshall, *Constitutional conventions: the rules and forms of political accountability* (Clarendon, Oxford 1984).

¹³ New Zealand Ministry of Justice, *Royal Prerogative of Mercy Procedures Guide* (Wellington 2007) 33-34. See also New Zealand Ministry of Justice, *The Royal Prerogative of Mercy - A Review of New Zealand Practice* (Wellington 2003).

¹⁴ See NW Barber, 'Prelude to the Separation of Powers' (2001) 60 CLJ 59; E Barendt, 'Separation of Powers and Constitutional Government' [1995] PL 599.

an independent and impartial tribunal. However, this can only be so if the Executive can be seen to be acting transparently and openly. If the process is opaque, the risk is of a perception of arbitrary executive interference.¹⁵ In part this risk is mitigated in both New Zealand and England by leaving the final decision (save for the case of pardons) to the courts. In England this is the result of a conscious decision by Parliament; in New Zealand this has been a more organic development.¹⁶

Admittedly, leaving the final decision to the courts is not a complete answer to the separation of powers concerns. There is still executive interference with a judicial process in the sense that the appeal courts are being compelled to revisit an issue which would otherwise be final. The risk inherent in a model where there is some 'friction' present is that a politicised executive allows irrelevant considerations to interfere with a judicial process, resulting in partial application of the criminal law. The risk is perhaps greatest at the investigative stage. The New Zealand Ministry of Justice may, due to the heightened public profile of a particular case, decide to take a 'belt and braces' approach to a review in cases where such intensity may not be warranted by the *prima facie* strength of the application or, conversely, the Ministry may refuse to do so for fear that the findings may de-legitimise the criminal justice system as a whole.

However, there are steps which could be taken, short of creating an independent body, to address the separation of powers concerns, and therefore allow a wider role for the Executive within the current constitutional constraints. In particular, the Ministry of Justice could introduce a transparent administrative process to consider applications.

¹⁵ See RE Barkow, 'The Ascent of the Administrative State and the Decline of Mercy' (2008) 121 Harv L Rev, MC Love, 'Fear of Forgiving: Rule and Discretion in the Theory and Practice of Pardoning' (2000-2001) 13 Fed Sent R 125 and H Quirk, 'Prisoners, pardons and politics' [2009] Crim LR 648, 651.

¹⁶ See text to n 29 in ch 3 and following (New Zealand) and text to n 44 in ch 5 and following (England).

Such a process, if not entirely public, could award generous rights of disclosure to applicants, which would assist considerably. The following subsection argues that the current New Zealand procedures are manifestly deficient, and that many of the features which have made the CCRC successful in this regard could be adopted in New Zealand even if an independent body was not established.

(b) Transparency and Judicial Oversight

As chapter three detailed, New Zealand's RPM processes are opaque and not clearly open to scrutiny. While significant steps have been made towards formalising New Zealand's RPM procedures in recent years, their application is still patchy.¹⁷ The Ministry's procedures guide is not publically available, and the internal procedures are not well known outside of the Ministry. The appointment of external reviewers, and the conduct of such reviews, are open to allegations of partiality due to the current lack of transparency.¹⁸ These failures are exacerbated by a lack of meaningful judicial oversight. Indeed, doubt remains over the extent to which the RPM process is subject to judicial review.¹⁹

All of this stands in contrast to the practices of the English CCRC. That the CCRC is subject to judicial oversight is clear. While the Administrative Court accords considerable deference to the CCRC with regard to substantive decisions on the merits of an application, this does not extend to excusing procedural failures - for example, a failure to comply with natural justice requirements.²⁰ The effect of this on the CCRC's working practices is obvious. Casework is conducted according to clear, publicly

¹⁷ See text to n 116 in ch 3 and following.

¹⁸ See text to n 140 in ch 3 and following.

¹⁹ See text to n 254 in ch 3 and following.

²⁰ See text to n 419 in ch 5 and following.

available, policies (often formed after consultation with stakeholders). There is a culture of keeping meticulous notes of all key decisions and discussions. Case record documents are extensive – often running to dozens of pages of notes recording investigatory steps, phone calls, and discussions. This requirement is underscored by operational policies,²¹ and the CCRC's casework is subject to audit (both internal and external).²² The result is that there is, in effect, a clearly recorded audit trail of the application of the CCRC's screening, investigation and decision-making processes in each individual case. This is supplemented by disclosure obligations, which are taken seriously.²³

The susceptibility to judicial review carries inevitable resourcing consequences, and has resulted in a sometimes defensive attitude by the CCRC. However, it also renders the decision making process, and the presence of any external or improper influence on it, transparent and open to challenge.

The adoption of a similar regime in New Zealand would go a long way towards addressing the concerns underscoring the current restrictive conventions. Additionally, the transparency of the process could be further enhanced by taking steps to ensure the independence and robustness of the peer review process. The deficiencies in the current process could be corrected by the adoption of a transparent appointment process so that those appointed to conduct, supervise or scrutinise reviews by the Ministry are clearly seen to be independent and not subject to actual or apparent influence from the Ministry.²⁴

²¹ Eg Criminal Cases Review Commission, *Formal Memorandum: Case Documentation* (Version 1) ; Criminal Cases Review Commission, *Formal Memorandum: Legal And Investigations Advisers – Guidance On Use* (Version 3) para 10ff.

²² Criminal Cases Review Commission, *Formal Memorandum: Case Documentation* (Version 1) para 1.

²³ See text to n 408 in ch 5 and following.

²⁴ See text to n 140 in ch 3 and following.

Such steps would also do much to take the political heat out of the decision-making process. At present, media reporting of the RPM process in New Zealand does not reflect the limited role played by the Minister.²⁵ While Ministers have done well to stay above the fray to date, a more transparent and public process would ensure that the independence of the process is maintained.

(c) Conclusion

The creation of a wider investigative role for the New Zealand Ministry of Justice, even in the absence of structural reform, is not necessarily incompatible with constitutional principle. If New Zealand were to establish a more transparent and accountable RPM process in line with the steps proposed above, the separation of powers based objection to the Ministry taking a wider and more active investigative role would be much reduced, and, if challenged, the Ministry could defend its actions as a manifestation, rather than a breach, of the principle of separation of powers.

This is not to overlook the advantages which stem from the creation of a standalone body, particularly in terms of signalling clearly the new body's independence, as is the case with the CCRC.²⁶ Such demonstrable independence brings practical, as well as reputational, benefits - for example the increased willingness of vulnerable or difficult witnesses to volunteer evidence or material in spite of past difficulties with the justice system.²⁷ However, if the creation of an independent body is considered undesirable by policymakers (for whatever reason) that need not stand in the way of reform of the RPM process in line with the recommendations made elsewhere in this

²⁵ See text to n 94 in ch 3.

²⁶ See text to n 31 in ch 5.

²⁷ See text to n291 in ch 5.

chapter.

Further, if the steps suggested above are taken, the consequences of leaving post-appeal review in the hands of a government department should not be overstated. By enhancing the transparency and oversight of the process, the scope for arbitrary executive interference can be significantly reduced if not removed entirely. Additionally, what emerges from a review of the CCRC's activities is that merely creating an independent body will not of itself change the relationship with the appeal courts, nor will it necessarily result in a more active or inquisitorial system of investigation. These depend not on the nominal status of the body, but rather on its mandate, powers, and the level and quality of resources allocated. These are matters which are discussed in detail below.

39 The Appeal Courts

The standard appeal processes are of central importance to the correction of miscarriages of justice in both jurisdictions. This is for two main reasons. The first is that the standard appeals process is the main means by which miscarriages of justice are identified and corrected. The better that the appeal system accomplishes this task, the easier the task for post-appeal mechanisms. The second is that in both systems the post-appeal mechanisms leave the final decision on whether or not to quash a conviction to the appeal courts. As a consequence the appeal grounds, and their application by the appeal courts, are crucial to the functioning of the system as a whole. Both of these factors mean that one must pay attention to differences between appeal systems when considering the role and effectiveness of post-appeal bodies.

The available grounds of appeal are broadly similar in both jurisdictions, with

appeals raising procedural errors being easier to mount than factual challenges.²⁸ However, there is a substantial gap in existing research as to how the appeal courts handle these grounds in practice. To the extent that such evidence is available, it suggests a disjoint between the expression of the available appeal grounds and their practical application.²⁹ It is for this reason, as explained in the introduction, that it is not possible to conduct a comprehensive audit of the success or failure of each institution without also having a full understanding of how the appeal courts apply these grounds in practice.

With this significant caveat, taking the appeal grounds as a constant, several important matters can still be considered, beginning with an examination of how expansive standard appeal rights are, and thus how much work is left for post-appeal mechanisms.

(a) Appeal Rights

Summary Matters

Superficially, appeal rights in summary matters in both jurisdictions are almost identical, with appeals by way of rehearing allowed as of right. This means that appeals may be brought on purely factual grounds, and do not rely on the identification of any arguable

²⁸ The exception is the 'lurking doubt' ground, which is accepted in England, but rejected in New Zealand. The practical effect of this difference was doubted by the then Court of Appeal President (writing extrajudicially) in W Young, 'The role of the courts in correcting miscarriages of justice' (NZLRF Miscarriages of Justice Symposium 2010) [38].

²⁹ K Malleon, *Research Study 17: Review of the Appeal Process* (HMSO, London 1993) 14; see also R Nobles and D Schiff, *Understanding Miscarriages of Justice : Law, the Media, and the Inevitability of Crisis* (Oxford University Press, Oxford 2000) ch 3.

error of law. There are, however, two key distinctions.

The first is attributable to the different interpretation of the concept of a 'rehearing' in the two jurisdictions. In England, the evidence is heard afresh before the Crown Court, and the onus is on the Crown to prove guilt for a second time, resulting in an appeal right which is 'the most generous in terms of resources that it is possible to devise'.³⁰ In New Zealand, this is not the case, as the rehearing is almost exclusively by reference to the record from the trial court, with the onus on the appellant to identify errors justifying the quashing of the conviction.³¹ The second key difference is that in New Zealand appeals against conviction are possible (although difficult to mount) where an appellant has entered a guilty plea, whereas in England this is only possible where it can be established that the plea was involuntary.³²

While these important differences must be acknowledged, it is clear that, with the exception of those who entered guilty pleas in England, in both jurisdictions those convicted of summary offences are in a better position - on paper - with regard to having miscarriages remedied through the standard appeal system than if they were convicted of indictable offences, the limitations on which are discussed below.³³ Despite this, appeal rates in both jurisdictions are strikingly low, at less than 1%.³⁴

³⁰ JR Spencer, 'Does our present criminal appeal system make sense?' [2006] Crim LR 677, 681.

³¹ See text to n 71 in ch 2.

³² See text to n 74 in ch 2 and cf text to n 54 in ch 4.

³³ This is a situation which Spencer has described as perverse: 'to those who are convicted of minor offences we give the most generous rights of appeal imaginable, and to those who are convicted of serious offences, and liable to be punished accordingly, we give a narrow and restrictive one': Spencer 'Does our present criminal appeal system make sense?' (n 30) 684.

³⁴ Text to n 17 in ch 2; text to n 64 in ch 4.

Appeals in Indictable Matters

The differences between the two systems are more pronounced in respect of indictable appeals, with standard appeal rights much more extensive in New Zealand than in England. This is evidenced by the availability of pre-trial appeals, the level of funding and lack of leave requirements for standard post-conviction appeals, and the willingness to consider second and onwards appeals, even years out of time.

The provision in New Zealand law for pre-trial appeals by the defence provides a means of challenging flawed decisions as to admissibility of evidence, or other significant pre-trial rulings, before a conviction is entered. The absence of such a mechanism in England means that would-be appellants must wait until the conclusion of their trial, and then appeal.³⁵ While the possibility for pre-trial appeal provides added protection against miscarriages of justice in New Zealand, its impact should not be overstated. The system of pre-trial appeals is not comprehensive, as it is not possible, for example, to appeal against a determination that there is no case to answer.³⁶ Similarly, in neither jurisdiction are pre-trial appeals available against a refusal to grant a stay on the ground of abuse of process.³⁷

It is in the context of standard post-conviction appeals that the differences in access to appeal courts are the most marked, as a consequence of a number of barriers

³⁵ The absence of such a right in England has been lamented by Spencer 'Does our present criminal appeal system make sense?' (n 30) 691 and K Malleon and S Roberts, 'Streamlining and clarifying the appellate process' [2002] Crim LR 272, 279.

³⁶ *R v S* [2008] NZCA 382 ; the absence of such a right in England was criticised by Malleon and Roberts (n 35) 279.

³⁷ ALT Choo, *Abuse of process and judicial stays of criminal proceedings* (2nd edn OUP, Oxford 2008) 171; in New Zealand the absence of a pre-trial appeal right was confirmed in *R v Bailey* Unreported, CA46/05, 25 May 2005 with which the Supreme Court agreed in its leave decision in *McGrath v R* [2005] NZSC 50.

and disincentives which are present in England, but largely absent in New Zealand. Appeals against conviction in New Zealand are in substance risk-free for appellants, who are not at jeopardy of an increased sentence.³⁸ In contrast, unsuccessful appellants in England are at jeopardy of spending longer in custody.³⁹ The English Court of Appeal's strict leave requirement acts as a barrier for would-be appellants, and takes the pressure off the appeal court, as the leave determination is made by a single judge, usually from a lower court.⁴⁰ By contrast, timeously filed appeals against conviction are, in New Zealand, accorded a substantive hearing as of right.⁴¹ Even if filed significantly out of time, the test adopted by New Zealand Court of Appeal requires it to grapple with the substantive merits of the proposed appeal before declining to hear it, whereas the English Court of Appeal has insisted that this would occur only in exceptional cases, with the focus instead falling on whether the would-be appellant had fulfilled its 'onerous' duty of providing sufficient justification for the delay.⁴²

In terms of uptake, the percentage of those convicted who seek to appeal indictable convictions in New Zealand, at approximately 4%, is higher than that in England, where approximately 2.5% of those convicted seek leave to appeal.⁴³ While it is not possible to conclude that this is the consequence of the relative lack of obstacles in New Zealand, this must at least be a contributing factor, as evidenced by the number of would-be appellants in England who instead apply directly to the CCRC citing fear of

³⁸ See text to n 6 in ch 2.

³⁹ See text to n 88 in ch 4.

⁴⁰ See text to n 21 in ch 4.

⁴¹ See text to n 21 in ch 2.

⁴² See text to n 77 in ch 2; text to n 95 in ch 4.

⁴³ See text to n 16 in ch 2; text to n 28 in ch 4.

adverse consequences from appealing.⁴⁴ The flow-on consequences of this are discussed below.

What is clearer is the significance of the absence of a leave requirement in New Zealand. This means, with the exception of the small number of appellants who voluntarily abandon their appeals, all who seek to appeal their indictable convictions within time in New Zealand will have their substantive appeals heard: that is, approximately 4% of all convicted individuals.⁴⁵ By contrast, in England, the leave process means that only 23% of the 2.5% of convicted individuals seeking leave (less than 0.6% of those convicted) will actually have their substantive appeal heard by the Court of Appeal.⁴⁶ In the absence of detailed empirical work, the impact on meritorious applicants is difficult to judge accurately, although the level of error in the leave process can be seen by the frequency by which decisions made by a single judge are subsequently overturned on renewal.⁴⁷ This has knock-on consequences for the CCRC process: as a declination of leave by a single judge is treated as a substantive determination on the appeal, the CCRC will not revisit these issues, and any errors made in this process are therefore effectively beyond review - a matter of some concern which is returned to below.⁴⁸

⁴⁴ See text to n 191 in ch 5.

⁴⁵ Those who originally filed an appeal but subsequently abandoned it, or where the appeal was dismissed due to lack of jurisdiction were not included in the figures used to determine the appeal rate, as these are recorded separately by the Court of Appeal statistics - the figures therefore relate to substantive appeals heard: New Zealand Court of Appeal, *Discontinuance of Court of Appeal Annual Reports* (Press Release 2010) 2; New Zealand Court of Appeal, *Court of Appeal Report for 2008* (Wellington 2009) 10.

⁴⁶ See text to n 28 in ch 4.

⁴⁷ Approximately 1/3 of cases where a renewed application for leave is sought are successful: see text to n 28 in ch 4.

⁴⁸ See text to n 52 in ch 5, and text to n 95 below and following.

(b) Second and Onward Appeals

The New Zealand appeal system is also more responsive than its English counterpart in other ways, notably by allowing for appeals to be revisited and by providing broad onward appeal rights. Practically, it is the latter which is of the most importance, but the former is also of interest.

New Zealand courts have shown an increasing willingness, in appropriate cases, to re-open their own 'final' decisions.⁴⁹ The English Court of Appeal, however, takes a firm view that once an appeal has been 'determined' it is *functus officio* and can only become properly seized of the matter again by reference from the CCRC.⁵⁰ When one considers how rarely decisions are re-opened in New Zealand, the significance of this should not be exaggerated. If an application was of such apparent strength that the New Zealand courts would be minded to re-open a previously final decision, it is likely that it too would satisfy the screening and referral requirements of the CCRC. The main consequence for individual applicants is therefore that the lack of jurisdiction in England means that the involvement of the CCRC is necessary, with attendant delays.⁵¹

More significant is the greater availability of onwards appeals in New Zealand. In

⁴⁹ See text to n 85 in ch 2.

⁵⁰ This includes cases where leave to appeal was refused, or an appeal was abandoned - eg S12, where leave to appeal was refused, but shortly thereafter a co-defendant's conviction was overturned on the basis of evidence unearthed following a court-ordered investigation. The matter was referred to a Court of Appeal judge, who gave a direction that the matter had been finally determined and that '[a]ny further steps will have to be made through the medium of the CCRC'.

⁵¹ R Pattenden, *English Criminal Appeals 1844-1994 : Appeals Against Conviction and Sentence in England and Wales* (Clarendon, Oxford 1996) 85 notes this problem with reference to the pre-1995 English procedures. However, it is apparent that in extreme cases, steps can be taken to facilitate a speedy reference, for example, in one of the cases examined, conclusively exculpatory DNA evidence emerged but an appeal to the Court of Appeal foundered when it became apparent that leave to appeal on the basis of alleged trial errors had been denied shortly after trial. The Criminal Appeal Office then became actively involved in chasing the CCRC make an urgent referral so as to allow the Court of Appeal to quash the conviction (S11).

England, appeals to the Supreme Court are extremely difficult to mount, and almost impossible where the ground is factual.⁵² In New Zealand, by way of contrast, the ability to mount appeals on such a basis is specifically provided for by statute.⁵³ This is the case even if the appeals are substantially out of time, and some of New Zealand's most notable alleged miscarriages of justice in recent years have been ventilated, many years out of time, before appellate courts.⁵⁴

In consequence, in New Zealand there is a choice of remedy for those who allege they are victims of a miscarriage of justice, but have already had a first appeal rejected, or are seeking leave to appeal after a substantial length of time: they can pursue the RPM route, or seek redress directly from the courts. In England, the possibilities for review of convictions by the appeal courts in such circumstances are extremely limited, with the would-be appellants instead required to seek a reference from the CCRC.

(c) Conclusion on Appeal Systems

For practical purposes, the main conclusion to be drawn from this is that, in respect of indictable matters, New Zealand offers considerably greater access to appeal courts, both immediately after conviction, and subsequently if new matters come to light. This raises two questions: first, why is this so? And second, what are the consequences for post-appeal bodies?

⁵² See text to n 109 in ch 4.

⁵³ See text to n 105 in ch 2.

⁵⁴ Eg *R v Barlow* [2009] UKPC 30; *R v Howse* [2006] 1 NZLR 433 (PC).

Explaining the Differences

The restrictive approach to standard post-conviction appeals in England appears to be the result of workload pressures which are present in both jurisdictions.⁵⁵ In New Zealand, the present response is not to restrict demand, but instead to increase judicial resources to meet it. This has been achieved by appointing more Court of Appeal judges, and making increased use of divisional courts.⁵⁶ Such solutions are not favoured in England: a significant increase in the number of judges hearing criminal appeals was deemed by the Auld Report to be an inappropriate response,⁵⁷ and there is little scope for increasing the use of divisional courts.⁵⁸ In the absence of such steps, there seems little scope to increase the available judicial resources in England. The Auld Report suggested that the burden could be eased if the Court of Appeal were to sit more frequently in regional divisions, rather than centrally in London.⁵⁹ The New Zealand Court of Appeal functions in this way, hearing a large proportion of criminal appeals in divisional courts in regional centres, which allows it to draw upon the judicial and administrative resources of regional courts.⁶⁰ However, even if such limited change were to occur in England, it seems most

⁵⁵ In England, these are longstanding, see K Malleon, 'Miscarriages of justice and the accessibility of the Court of Appeal' [1991] Crim LR 323, 331, describing the same problems lamented by the Lord Chief Justice in the foreword to Court of Appeal Criminal Division, *Review of the Legal Year 2009/2010* (London 2010). In New Zealand, this is more recent, and arose as a consequence of *R v Taito* [2003] 3 NZLR 577 (PC), as lamented by the Court of Appeal in New Zealand Court of Appeal, *Court of Appeal Report for 2001* (Wellington 2002) 7.

⁵⁶ Most recently by the Judicature (Judicial Matters) Amendment Act 2010, which increased the maximum number of judges from 8 to 9. Until 2006, the maximum was 7. In 2001, 285 cases were heard by divisional courts; in 2009 there were 375: New Zealand Court of Appeal, *Court of Appeal Report for 2001* (Wellington 2002), 8 and New Zealand Court of Appeal, *Discontinuance of Court of Appeal Annual Reports* (Press Release 2010) 3. For a discussion of the creation of divisional courts, see ATH Smith, 'Fifty Years of Criminal Appeals in the Permanent Court of Appeal' in R Bigwood (ed) *The Permanent New Zealand Court of Appeal: Essays on the First 50 Years* (Hart, Oxford 2009) 82.

⁵⁷ R Auld, *Review of the criminal courts of England and Wales : report* (Stationery Office, London 2001) ch 12, para 81.

⁵⁸ Divisional courts already deal with much routine criminal work in England, although the Auld Report recommended this be taken further, with High Court (and not Court of Appeal) judges presiding in straightforward cases: *ibid*, para 94.

⁵⁹ *Ibid*, para 92; see Spencer 'Does our present criminal appeal system make sense?' (n 30) 694 for discussion.

⁶⁰ New Zealand Court of Appeal, *Court of Appeal Report for 2008* (Wellington 2009) 9.

unlikely that this would result in wider appeal rights, rather than serving only to relieve the strain on the current system.

New Zealand has, therefore, taken a number of steps to increase the available judicial resources in response to workload pressures; although this should not be taken to suggest that this is the consequence of an indigenous legal culture which is inherently more receptive to criminal appeals. Indeed, until it was declared unlawful by the Privy Council in 2001, the New Zealand Court of Appeal's workload was regulated by a *de facto* leave system constructed by the judges of the Court themselves. The Court of Appeal's registrar was provided with the statutory power to grant (or refuse) legal aid, however this decision was in practice made by a single judge after a cursory review of the papers. A refusal following this cursory review was in most cases determinative of the appeal as a whole and resulted in its *ex parte* dismissal, without a formal hearing.⁶¹ Smith has suggested that it was this 'legal aid filter' which enabled the Court's workload to be manageable once the previous *de jure* leave requirement was removed in 1991.⁶² Indeed, the legal aid filter process seems to have been used as a workload limiting device even prior to this.⁶³ This may explain why, as the Law Commission noted in 1989, the then extant statutory leave requirement was 'not applied as a filtering device', with the Court of Appeal instead hearing the substance of the appeal before making its determination on leave.⁶⁴ The result, as one senior judge noted was that 'very little time saving' was achieved as 'The Judges have been required to read the whole file, in case

⁶¹ See *R v Taito* (n 55); Smith, 'Fifty Years of Criminal Appeals in the Permanent Court of Appeal' (n 56) 83ff; and T Gault, 'Whose Day in Court is it Anyway?' (2002) 33 VUWLR 631 634.

⁶² Smith, 'Fifty Years of Criminal Appeals in the Permanent Court of Appeal' (n 56) 83ff.

⁶³ See Gault (n 61) 634, which notes that this system had obtained for 'at least 60, and probably upwards of 80 years'.

⁶⁴ New Zealand Law Commission, *The Structure of the Courts* (Wellington 1989) para 386, a conclusion echoed by WC Hodge and MW Doyle, *Criminal procedure in New Zealand* (3d edn Law Book Co, Sydney 1991) 220. The Law Commission recommended the abolition of the leave requirement, noting that past concerns about increased workload were not compelling, as 'the volume and the nature of the work is now known and within reason and can be predicted'.

leave should be granted, and in the course of argument, the merits of the appeal have been fully canvassed in any event.⁶⁵ Favours the *de facto* legal aid filter over the *de jure* leave requirement as a workload limitation device had the particularly pernicious consequence that indigent appellants were disproportionately affected. While there has been no study of how many unsatisfactory convictions went unremedied as a result of this practice, there are examples of appeals which were dismissed under the *ex-parte* procedure, but were ultimately successful when a full hearing was held after the legal aid filter was declared unlawful by the Privy Council.⁶⁶

Thus until quite recently, access to appeal courts in New Zealand was limited. Further, it was not the domestic legal institutions which led to these barriers being removed. Change came at the instigation of a Privy Council panel of five senior judges who were also responsible for the oversight of the English Court of Appeal, in their capacity as members of the Appellate Committee of the House of Lords (now the Supreme Court),⁶⁷ and which overturned existing New Zealand authority in order to do so.⁶⁸ The fact that, until it was compelled to do otherwise by a decision of the London-based Privy Council, New Zealand operated an appeal system which rationed access by means of a legal aid filter suggests that the explanation for the present expansive rights of appeal is less cultural than legal. This further suggests that wide appeal rights are not an immutable feature of the New Zealand legal landscape; indeed, there have been suggestions that consideration be given to resurrecting a leave requirement in New

⁶⁵ Gault (n 61) 642-643.

⁶⁶ There has been no detailed review of the number of such cases, but two examples are *R v Craig* Unreported, CA355/03, 17 June 2004 and *R v Palmer* Unreported, CA109/02, 6 October 2005.

⁶⁷ Lord Bingham of Cornhill, Lord Steyn, Lord Hope of Craighead, Lord Hutton and Lord Rodger of Earlsferry.

⁶⁸ *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385 (CA), which upheld the legal aid filter process.

Zealand.⁶⁹

Putting this to one side, it is clear that at present the standard appeal arrangements in New Zealand are at the insistence of the Privy Council more open than that the English courts have considered necessary under English law.⁷⁰ In light of the immense workload pressures on the English Court of Appeal, the reluctance to increase the supply of judicial resources to reduce this pressure, and with no immediate prospect of an external body demanding enhanced appeal rights, any similar change in England seems unlikely unless prompted by legislation.⁷¹

In terms of onwards appeal rights, New Zealand appellants' right of access to the Privy Council was a historical accident, but its expansive jurisdiction in criminal matters has been carried over to its indigenous replacement. The immediate reason for the present situation is therefore also legal: the New Zealand Supreme Court's empowering statute explicitly provides this jurisdiction, whereas the English Supreme Court's empowering statute severely restricts it. However, this is not a complete explanation, as the reason for the restrictiveness of the English legislation is undoubtedly practical. As

⁶⁹ Eg by former Court of Appeal President and Supreme Court judge Gault (n 61) 642; this was also examined by Smith, 'Fifty Years of Criminal Appeals in the Permanent Court of Appeal' (n 56) 83ff.

⁷⁰ A fact which was evidently of irritation to the senior New Zealand judiciary - see the extrajudicial comments of Gault (n 61) 635. Smith, 'Fifty Years of Criminal Appeals in the Permanent Court of Appeal' (n 56) 86 however makes the point that the Privy Council was merely applying the extant New Zealand statutory scheme, and this could be altered by legislation.

⁷¹ For a discussion of the elasticity with which the 'right to appeal' in European human rights law is defined and applied, see S Trechsel, *Human rights in criminal proceedings* (Oxford University Press, Oxford 2005) 365-368: 'In fact, the Explanatory Report to the Protocol states that the various forms of appeal, even a request for leave to appeal, are all sufficient to satisfy the demands of the Protocol. This is a rather restrictive interpretation of the right to appeal, particularly in view of the fact that the leave-to-appeal proceedings may actually prevent the operation of the very right that they are supposed to satisfy.' Further, the English loss of time rules were specifically approved in *Monnell and Morris v United Kingdom* (1987) 10 EHRR 205 (ECtHR).

Pattenden notes:⁷²

The fact is that the [Supreme Court] cannot give its attention to every question of general public importance. If it did it would soon succumb to the kind of pressure that makes life in the CACD and the Divisional Court scarcely tolerable for the judges of those courts and makes a truly thorough survey of the law often impossible.

To which, it should be added, that *a fortiori*, it could not turn its attention to every allegation of an individual miscarriage of justice. The New Zealand Supreme Court, sitting in a smaller jurisdiction with a fraction of the caseload, is simply not subjected to the same pressures. It is not realistic, therefore, to suggest that the New Zealand practice in this regard could be transplanted to England - at least not without significant structural reform to the Supreme Court itself.

Consequences for Post-Appeal Bodies

The scope of ordinary appeal rights has inevitable consequences for the operation of post-appeal bodies. Put simply, the more limited initial appeal rights are, the greater the task for the post-appeal body. To put it another way, if appeal rights are restricted, the extraordinary can become the ordinary very quickly. This is readily apparent when one examines the workings of the CCRC.

As surveyed above, the appeal system is considerably more accessible in New Zealand, and appeal rates are also higher. This may go some way to explaining the low rate of applications for the exercise of the RPM in New Zealand, compared to that in England.⁷³ In England, the various barriers to accessing the appeal courts mean that the

⁷² Pattenden (n 51) 320, the original refers to the 'House of Lords', but the point applies equally to its replacement.

⁷³ Another possibility is that there is simply a lower underlying rate of miscarriage, which would be difficult to prove or disprove, but seems unlikely to provide a complete explanation, as noted by Thorp (n

CCRC is often the only accessible and risk-free means by which an individual can have their conviction reviewed. The consequence is that a significant amount of the CCRC's time and resources is spent reviewing applications which have not been substantively reviewed by an appeal court, often within a very short space of time following conviction.

The CCRC's response to this burden has been to screen applications in an attempt to divert limited investigative resources to the most hopeful cases.⁷⁴ This means that the expression and identification of grounds of inquiry at an early stage assumes considerable importance.⁷⁵ The risk is that, because of the weight of 'ordinary' or routine cases the CCRC is compelled to examine, extraordinary cases may fall through the cracks as fruitful avenues of inquiry are missed. This is particularly acute where an applicant relies on factual innocence rather than a trial defect discernable from the record. As Spencer has noted in a related context, on-the-papers screening 'lends itself quite well to the detection of procedural and legal errors, but much less well to dealing with the problem that the trial court, without breaking any of the rules, just reached the wrong result'.⁷⁶ An assessment of to what extent this occurs in practice is beyond the scope of the present research, although Hodgson and Horne's research suggests that professionally assisted applicants stand a better chance of vaulting the screening hurdle.⁷⁷ This raises significant issues regarding equality and access to justice, which are discussed in detail below.⁷⁸

At present, the New Zealand RPM machinery does not face the problem of a large

126) 51. In any event, additional factors such as publicity and public confidence in the process which have never been examined empirically would also be relevant, as noted by Mount 'A Criminal Cases Review Commission for New Zealand' (n 6) 473-475.

⁷⁴ See text to n 174 in ch 5 and following.

⁷⁵ See text to n 152 in ch 5.

⁷⁶ Spencer 'Does our present criminal appeal system make sense?' (n 30) 684. Although even technical errors will not always be readily apparent, and further investigation will often be required here too, as was the case in G93 and S16.

⁷⁷ Hodgson and Horne (n 127) 5.4.

⁷⁸ See text to n 125.

number of 'non appeal' cases.⁷⁹ This may change were the Ministry of Justice to be given a wider mandate, or were an independent body to be established in New Zealand, as it would perhaps inevitably attract a greater number of applications. However, due to the wider availability of standard appeal rights, it would not have to deal (as the CCRC does) with a large number of applicants who have been frozen out of the standard appeal system. Further, in light of the New Zealand courts' receptive attitude to appeals out of time, any such body would be justified in taking a robust attitude when dealing with applicants who had not previously appealed.

Such an approach would assist any New Zealand body to avoid the resourcing problems faced by the CCRC and ensure that limited investigative resources are targeted towards the exceptional cases for which they are intended and best suited, while allowing more routine cases to be dealt with by means of the standard appeals system. The effectiveness of this division of labour could be further enhanced by the adoption of a statutory power, along the lines of that possessed by the English Court of Appeal, to request assistance from the post-appeal body where detailed factual investigations become necessary during the course of a standard appeal.⁸⁰

40 The Scope for Referral

The appeal courts have a significant role to play even after the standard appeal process is complete. This is because, absent the largely hypothetical possibility of a pardon, the result of a successful application to either the CCRC or for the exercise of the RPM is a referral back to the appeal court. One critical question for each jurisdiction is therefore: to what extent are post-appeal bodies to be permitted to require the judiciary to revisit

⁷⁹ While a small number of applicants in New Zealand apply shortly after their convictions are dismissed by the appeal courts, raising the same grounds, these are dismissed summarily: see text to n 165 in ch 3 and following.

⁸⁰ See text of fn 40 in ch 4.

(and possibly vitiate) an otherwise final judicial process? Another is: does this provide sufficient protection in cases of appellate error?

(a) The Referral Test

Perhaps *the* defining feature of the relationship between the appeal court and the post-appeal body are the tests that the latter employs to determine whether to refer a case to the former. There are several aspects to this. The first question is, what types of miscarriages of justice may lead to a referral? The second and related question is, what is the threshold for referral? Another is in what circumstances may a referral be made where the appeal court has already considered (or has been deemed to have considered) the relevant point. These matters are of such importance not only because they govern the ultimate question of whether a matter is sent back to the appeal court for reconsideration, but also because of their influence on decisions earlier in the process - in particular whether to commence a substantive review or conduct particular investigations.

Available Grounds

Turning to the first question, in both jurisdictions referrals are only possible where the miscarriage of justice complained of is of a type which might be considered by the relevant appeal court. In England, the CCRC has approached its statutory mandate as requiring it to consider the full range of available appeal grounds. Thus, it will investigate and pursue claims of miscarriages of justice where the Court of Appeal may ultimately allow an appeal against conviction on any ground. In consequence, referrals can be, and are, often made on 'technical' grounds unrelated to factual innocence. This cuts to the core of the debate regarding what ought to qualify as a 'miscarriage of justice', foreshadowed in the introductory chapter, and has accordingly been the subject of some

controversy.⁸¹ Given the phrasing of the 'real possibility' test, the only means by which the CCRC could narrow its frame of reference to cases where factual innocence is in issue is by exercising its discretion not to pursue or refer such cases. As a matter of practice the CCRC has decided that this is not appropriate.⁸²

The RPM process in New Zealand is also linked to matters which an appeal court might consider, as a consequence of the effective abandonment of the pardon jurisdiction in favour of the statutory reference process.

As the CCRC's experience demonstrates, even where referrals may only be made on the basis of standard appeal grounds, there is still scope for referrals on a wide range of grounds. However, in practice, rather than entertaining arguments on the full range of available appeal grounds, the New Zealand Ministry of Justice has restricted its gaze towards applications raising new factual material which might be considered by an appeal court. This restriction has been justified on the basis that taking a wider view of the available grounds would amount to an unjustified interference by the Executive with a judicial process.⁸³ Consistent with this, references will exceptionally be considered on other grounds where the appeal courts have previously expressed a willingness to consider them - most notably where there is an allegation of counsel incompetence.⁸⁴ The ability of the RPM process to adapt in this way demonstrates why there is no practical reason why New Zealand's restrictive approach should continue. Conventions are by their nature malleable, and the available categories may widen further still. As a reactive process, such avenues of challenge will only become apparent if applicants seek the exercise of the RPM on wider grounds, and the Ministry responds favourably. For

⁸¹ See text to n 41 in ch 1, and more specifically H Quirk, 'Identifying Miscarriages of Justice: Why Innocence in the UK is not the Answer' (2007) 70 MLR 759; M Naughton, *Rethinking miscarriages of justice : beyond the tip of the iceberg* (Palgrave Macmillan, Basingstoke 2007) 14-15.

⁸² See text to n 376 in ch 5.

⁸³ See text to n 176 in ch 3 and following.

⁸⁴ Ibid.

the reasons discussed above, separation of powers concerns alone ought not to stand in the way of entertaining applications raising the full range of matters which an appeal court might consider.⁸⁵

However, linking post-appeal bodies' referral powers to grounds cognisable by appeal courts has resulted in an inevitable 'lawyerisation' of the process which has been controversial in both jurisdictions. In New Zealand, a number of applicants have expressed their displeasure at the concerns raised about their convictions in their RPM applications being translated into a legally cognisable form so as to allow analysis by reference to standard appeal tests.⁸⁶ Similarly, political pressure is often placed on Ministers to act in circumstances where there is public unease about a conviction, even if this is of a somewhat innominate nature.⁸⁷ In England, this same process has led to the frequently aired criticism that the CCRC is not fulfilling its purpose, but is instead too focussed on legal technicality.⁸⁸ It is difficult to see such criticisms disappearing, as so long as standard appeal courts make the final decision on quashing convictions, it is inevitable the post-appeal bodies will be guided by those courts' practices when contemplating referrals.

The Threshold for Referral

Turning to the threshold for referral, the reference power in both jurisdictions is exercised by reference to the likelihood of success in the appeal court. In England, this is the result of statutory imposition and reflects the reality that, on referrals, the Court of Appeal has unwaveringly applied normal appeal principles, and, in the case of change of law cases,

⁸⁵ See text to n 13.

⁸⁶ A characteristic example of such complaints are those in NZ22.

⁸⁷ See text to n 94 in ch 3.

⁸⁸ This is the common thread running through the contributions to M Naughton (ed) *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave MacMillan, Basingstoke 2009).

gone so far as to lobby for legislative reform to ensure that this remains the case.⁸⁹ The CCRC therefore views its task as predictive. In New Zealand, a similar approach has evolved as a matter of convention, with the test usually articulated as requiring an assessment of whether there was material which was sufficiently strong that it *could* be entertained by a court.⁹⁰ In practice, the approach followed is almost identical to that in England, in that the Ministry of Justice tries to ascertain how the relevant appeal court would approach the matter were a reference made.⁹¹ In doing so, both the CCRC and the New Zealand authorities strictly follow the guidance of appeal courts.

That this convention is so strong in New Zealand is of interest, as, unlike their English counterparts, New Zealand judges have signalled a willingness to adopt a lower threshold on a reference, suggesting that it is not inevitable that the referral test be simply predictive.⁹² Thus, if the RPM process were to evolve, for example, in a way that references were contemplated even where there was doubt as to the admissibility of 'fresh' evidence, it is not inevitable that this would be met with a hostile response from the courts. Indeed, the contrary may prove to be the case.

Some have expressed scepticism regarding the influence of the precise terms of the test adopted for referrals, arguing that deference to appeal courts will inevitably mean that a restrictive approach is taken.⁹³ However, it is clear from the files reviewed that post-appeal bodies do grapple seriously with the question of when referrals are

⁸⁹ L Elks, *Righting miscarriages of justice? : ten years of the Criminal Cases Review Commission* (JUSTICE, London 2008) ch 5 traces the Court of Appeal's treatment of referrals in fresh evidence cases, and at 68-71 notes an extraordinary exchange between a senior Court of Appeal judge and the Chair of the CCRC, released following a Freedom of Information Act request, where the Court's concern that the CCRC was not following the Court's approach strictly enough was expressed.

⁹⁰ See text to n 182 in ch 3.

⁹¹ Ibid.

⁹² Although the extent of this is unclear, see text to n 57 in ch 3.

⁹³ Eg R Nobles and D Schiff, 'Criminal Appeal Act 1995: The Semantics of Jurisdiction' (1996) 59 MLR 573.

appropriate based on the likelihood of success before the appeal court.⁹⁴ Given this, if the referral test were relaxed, more referrals could reasonably be expected in borderline cases.

A lower test for referrals would also alter the approach taken to steps further up the chain. Questions such as whether to conduct a substantive investigation, or whether to take particular investigative steps, are all viewed through the lens of whether the inquiries could result in a ground of reference, and considerable work is done to ascertain if this is the case. If the test were relaxed, it would be realistic to expect a consequent increase in the rate at which such questions were answered in the affirmative. The practical impact of this would (at present) be greatest in respect of the CCRC, given the much greater investigatory role this body has. Indeed, given the prominence of the screening process in limiting the workload of the CCRC, a relaxation of the referral test would have possibly dramatic consequences in terms of resourcing. Thus, the 'real possibility' test serves not only as a limiting device on the appeal court's time and resources, but also on those of the CCRC itself.

Overall, a lower standard for references in either jurisdiction could be expected to result in both more investigative steps being taken and more referrals being made - providing the post-appeal bodies were adequately resourced to do so. Whether this would ultimately result in more convictions being quashed is another matter altogether, and would in large part depend on whether the bodies' respective decision making processes are at present accurately rejecting applications, or declining to take investigative steps, where these stand no chance of success, something which it is

⁹⁴ This was most clearly obvious in England, see text to n 66 in ch 5 and following, but also clear in New Zealand, see text to n 182 in ch 3 and also the applications discussed at n 135 and n 187 in ch 3 - in both of these applications there was disagreement between reviewing counsel and the Ministry about the appropriate standard, and the clear implication is that if the lower standard were adopted, referrals would have been made.

difficult to assess on the basis of current evidence.

(b) Revisiting Appeal Decisions

Another crucial aspect of the 'test' is the extent to which issues or argument already considered (or deemed to have been considered) by an appeal court can form the basis for a reference. In New Zealand, due to the Ministry of Justice's understanding of the constitutional conventions it operates under, a referral on a ground already substantively rejected by the courts would be almost unthinkable.⁹⁵ The English statutory scheme specifically precludes references in such cases other than in 'exceptional' circumstances, a restriction which is actively policed by the Court of Appeal.⁹⁶

While this reluctance to look behind appeal court decisions can in part be explained as a consequence of the doctrine of separation of powers, for the reasons surveyed above this need not stand in the way of reform, were this considered practically desirable.⁹⁷ Further, any justification for deference to decisions by appeal courts is considerably less strong where the matter had received either no, or only cursory, judicial attention. This is recognised in New Zealand, where the Ministry of Justice considers that it is appropriate to investigate appeal grounds which were abandoned or not substantively considered by the relevant court.⁹⁸ This can be contrasted with the CCRC process, where this restriction is treated as extending to cases where the relevant ground was dismissed without reasons at the leave stage by a single judge.⁹⁹

⁹⁵ See text to n 165 in ch 3.

⁹⁶ See text to n 50 in ch 5.

⁹⁷ See text to n 13.

⁹⁸ Eg NZ38, where the Court of Appeal's refusal to reinstate an abandoned appeal was considered 'as indicative rather than determinative of whether the petition grounds are capable of pointing to a likely miscarriage of justice'.

⁹⁹ The limitations of the leave process were considered above, see text to n 21 in ch 4 and text to n 53 in ch 5.

Given the fragility of the separation of powers justification, it is necessary to consider the fact that there is another, very practical, explanation for the decision to restrict post-appeal bodies' mandates in this way. Allowing review of errors by the appeal courts would effectively amount to the creation of a further tier of appeal - or, in the case of the English single judge process, allow review of decisions by a single judge when the standard appeal system had been deliberately constructed to disincentivise this.¹⁰⁰ Indeed, unless a restriction on the ability to reapply was added, the consequence could be a seemingly endless reanalysis of the same issues. Even if such a restriction were put in place, the resourcing consequences would be immense. The policy implications are discussed in the following section.

(c) Conclusion

Neither system provides much by way of protection against errors made by appeal courts, which are essentially presumed to have made correct decisions on all matters, at both the macro and the micro level. At the macro level, this means that (within the governing statutory framework) it is for the appeal courts to determine the boundaries within which allegations of miscarriage can be investigated. If an alleged miscarriage fits within an established appeal ground, and the practice of the court is such that an appeal on this basis may be considered, there is the possibility of referral. If, however, a miscarriage of justice is alleged on a ground not recognised by the appeal court, or on the basis of evidence which is unlikely to be admitted or ultimately accepted by the court, the post-appeal bodies consider themselves powerless to act. It is for this reason that further research (of the type discussed in the introduction) regarding the functioning of the standard appeal processes is necessary - a well resourced and well functioning post-appeal system may still be woefully ineffectual at remedying 'miscarriages of justice'

¹⁰⁰ See, eg, the discussion of the loss of time rules at text to n 92 in ch 4.

unless one is content to restrict the definition of 'miscarriages of justice' to matters which might lead an appeal court to overturn a conviction.

At the micro level, this means that where a court has considered the application of its established tests in an individual case, this will not, save an exceptional case, be second-guessed by the post-appeal body. In New Zealand, due to the absence of a leave requirement and wide availability of legal aid, this at least comes with certain guarantees that the appeal court would have considered the issues in question. However, in England, the fact that the declination of leave by a single judge working under considerable pressure is sufficient to trigger the restriction raises very real concerns about the justification for the assumption.¹⁰¹

Any change to these practices so as to permit renewed scrutiny of grounds which have already been rejected would have considerable resourcing implications.¹⁰² Whether this additional expense is justified depends in large part on the extent to which one is willing to tolerate error in the criminal justice system. This is a question which itself admits of no easy answers, and is linked with foundational debates about the nature of (and basis for) criminal censure and sanction. Thus, while Dworkin has argued that an individual does not possess a pre-existing moral right to any particular standard of criminal procedure,¹⁰³ Duff contests that a retributivist must accept 'reasonable safeguards against mistaken convictions' as 'a feature of any human system of punishment'.¹⁰⁴ A consequentialist may or may not agree, although any such right 'must

¹⁰¹ The deficiencies and problems with the single judge process are discussed in detail in ch 4 - see text to fn 23.

¹⁰² Indeed, it was the consequences of this which led to the instigation of the screening procedure, see text to n 149 in ch 5 and following.

¹⁰³ R Dworkin, 'Principle, Policy, Procedure' in C Tapper (ed) *Crime, Proof and Punishment : Essays in Memory of Sir Rupert Cross* (Butterworth London 1981) 87-89.

¹⁰⁴ RA Duff, 'In Defence of One Type of Retributivism: A Reply to Bagaric and Amarasekara' (2000) 24 *Melb U L Rev* 411, 424. See similarly, M Plaxton, 'Are Wrongful Convictions Wrong? The Reasonable Doubt Standard and the Role of Innocence in Criminal Procedure' (2002) 46 *Crim LQ* 407 which argues that there is a baseline beneath which a system of criminal procedure cannot fall.

be derivative from, contingent on, the fact that recognising such a right will serve the consequentialist ends of the criminal justice system'.¹⁰⁵ In any event, there are limits on the extent of the protection offered to the potentially wrongfully convicted individual; there can be no absolute right to all resources necessary to eliminate any risk of a flawed conviction.¹⁰⁶ Further, no system of justice can divine truth in all cases.¹⁰⁷ Thus, even if a polity decided to devote all of its resources (forgoing all other social goods) to the goal of ensuring those convicted of a crime had every opportunity to demonstrate their innocence, and therefore allocated unlimited resources to providing endless avenues of appeal, it would still be impossible to identify every situation where an innocent person had been convicted. In a more practical sense, such a society would never exist – at least not without significant technological developments. The level of resources which would have to be expended to even approximate that level of certainty would be prohibitive.

Given this, the processes by which convictions are achieved and reviewed are always going to be the result of a trade-off between competing interests – those of convicting the guilty, protecting the innocent, and pursuing the myriad other social goods which devoting resources to the functioning of a criminal justice system diverts funds away from. As such, there will always be debate as to how extensive safeguards against miscarriages of justice ought to be, and variation between jurisdictions.¹⁰⁸

¹⁰⁵ A Duff, *Punishment, Communication and Community* (Oxford University Press, Oxford 2001) 10.

¹⁰⁶ See A Ashworth, *The Criminal Process : an Evaluative Study* (2nd edn Oxford University Press, Oxford 1998) 50-52.

¹⁰⁷ S Greer, 'Miscarriages of Justice Reconsidered' (1994) 57 MLR 58, 74; N Lacey, 'Missing the Wood... Pragmatism vs Theory in the Royal Commission' in M McConville and L Bridges (eds) *Criminal Justice in Crisis* (Elgar Aldershot 1994) 33; A Sanders, 'Thinking About Criminal Justice' in M McConville and L Bridges (eds) *Criminal Justice in Crisis* (Elgar Aldershot 1994) 142. This reflects the fact that the criminal process is not 'a laboratory in which technicians generate truth in a test-tube': A Hall, 'It Couldn't Happen Today' in M McConville and L Bridges (eds), *Criminal justice in crisis* (Elgar, Aldershot 1994) 314; see generally G Williams, *The proof of guilt : a study of the English criminal trial* (3rd edn Stevens, London 1963) 183-190 and H Jung, 'Nothing but the Truth? Some facts, impressions and confessions about truth in criminal procedure' in A Duff and others (eds), *The trial on trial* (Hart, Oxford 2004).

¹⁰⁸ See L Griffin, 'The Correction of Wrongful Convictions: A Comparative Perspective' (2001) 16 Am U Int'l L Rev 1241, 1243-1245.

Thus, the question of whether or not to permit the re-visiting of appeal decisions ultimately requires a policy decision in each jurisdiction. However these decisions ought not to be made in the abstract. Highly relevant to their answer in the present context are the significant differences between New Zealand and England in terms of the availability, uptake and intensity of appellate review identified above, which indicate that the scope for error in the English appeal system is considerably higher than in New Zealand.

41 The Impact of Inquisitorial Features

As chapters three and five have detailed, the CCRC and RPM processes are to a certain extent inquisitorial. Both the CCRC and the New Zealand Ministry of Justice are independent in that they act 'on behalf of neither the applicant nor the prosecution'; further, each independently 'decides on the lines of inquiry, conducts... investigations, and makes a judgment about whether to refer the case back to the Court of Appeal'.¹⁰⁹ The CCRC can (and does) conduct wide-ranging investigations during the course of which it gathers and acts on both exculpatory and inculpatory evidence.¹¹⁰ While the scope of investigations are considerably narrower, similar features are evident in the RPM process, and the next section argues that these should be expanded.¹¹¹

These features are not accidental. As Hodgson notes in relation to the CCRC, giving post-appeal bodies a more inquisitorial role represents an 'acknowledgement of the need for something non-adversarial to investigate effectively the errors of the adversarial process'.¹¹² This begs the question of how successful an inquisitorial process grafted onto the end of a predominantly adversarial trial and appeal process can really be at achieving

¹⁰⁹ JS Hodgson, 'The Future of Adversarial Criminal Justice in 21st Century Britain' (2010) 35 NC J Intl L & Com Reg 319, 355-361.

¹¹⁰ See text to n 233 in ch 5.

¹¹¹ See text to n 206 in ch 3 and text to n 133 below.

¹¹² Hodgson (n 109) 355-361.

this aim. This section argues that the prospects for success are limited by the impact of the screening process and the close interconnection between post-appeal bodies and the standard appeal system. It is argued that these findings have important consequences in terms of the role of the individual applicant, particularly in terms of what is required in order to achieve equality and access to justice.

(a) Limitations

The Screening Process

The first limitation is that it is only in a small number of cases that either body will actively investigate a case for features which may indicate that a miscarriage of justice has occurred. They are not, as in the French pre-trial system, starting with a blank canvas, and attempting to discern if there is a basis for the imposition of criminal liability.¹¹³ Instead, post-appeal bodies start from the other end, and begin by posing the question: is there any reason to think that if we investigated this case, the conviction may be overturned? To find the answer to this question, in both jurisdictions, applications are subject to a initial triage which is essentially evaluative - reviewing the cogency of the grounds advanced by an applicant to determine if they are of sufficient *prima facie* merit to justify a deeper investigation.¹¹⁴

Thus, in respect of both the CCRC and RPM processes, the ability of the applicant to identify convincing grounds of review at an early stage is of high importance. In

¹¹³ Hodgson (n 109) 355-361, for a detailed examination of the French system, see J Hodgson, *French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France* (Hart, Oxford 2005).

¹¹⁴ See text to n 198 in ch 3 and text to n 184 in ch 5.

England, this is the consequence of a formal screening process.¹¹⁵ While the CCRC's screening commissioners will search for identifiable and apparent grounds of inquiry, even if not advanced by the petitioner, the scope for this is limited.¹¹⁶ In New Zealand, the Ministry of Justice is careful to deal only with the grounds identified by the applicant, and views it as constitutionally improper to take a more active role in discovering further potential grounds at this stage.¹¹⁷ This means that while there is no formal screening process, if an application discloses no grounds for review, an application will be refused in short order.

The Adversarial Backdrop

The second limitation is that the extent to which post-appeal bodies can direct their own investigations is limited by the fact that - as discussed in the previous sections - they will not normally look beyond decisions reached by the standard appeal system. This is significant, as the role of the appeal courts in both jurisdictions is not inquisitorial, but instead unabashedly adversarial in that its task is to adjudicate on the grounds of appeal raised by the appellant along with any response by the Crown.¹¹⁸ Thus, the ability of the post-appeal bodies to, by means of its own investigations, remedy deficiencies or shortcomings in the adversarial appeal system is limited. This is compounded by the fact that if an applicant is successful before the post-appeal body, the result in both jurisdictions is that their case is referred to an appeal court, and the procedure again

¹¹⁵ See text to n 180 in ch 5 and following.

¹¹⁶ See text to n 184 in ch 5 and following.

¹¹⁷ See text to n 198 in ch 3 and following.

¹¹⁸ For discussion of the adversarial model of criminal justice in the modern English criminal justice, see A Sanders, R Young and M Burton, *Criminal Justice* (4th edn OUP, Oxford 2010) 1.3 and Hodgson (n 109).

becomes fully adversarial.¹¹⁹

(b) Consequences

The role of the parties

Thus, while possessing inquisitorial features, the post-appeal bodies in both jurisdictions operate in the shadow of largely adversarial criminal trial and appeal processes. This is of considerable moment in terms of determining what the appropriate role for applicants (and their lawyers) ought to be during the post-appeal review process.

The CCRC's experience here is instructive. Its systems for ensuring comprehensible and frequent communication with applicants are demonstrably successful.¹²⁰ More than this, the CCRC engages with applicants and/or their representatives prior to the final determination of an application in a way which transcends window-dressing and has the capacity to materially impact the outcome of an application.¹²¹ This contrasts starkly with the practices of the New Zealand Ministry of Justice, under which the role of the applicant during the RPM process is very limited. After submitting their application they may receive information about the progress of their application from the Ministry, but they otherwise have no input into the process unless or until a reference is made.¹²²

Given the nature of the processes, the CCRC's approach is more appropriate for reasons of both practice and principle. As Hodgson notes, as the CCRC is not set in

¹¹⁹ Hodgson (n 109) 355-361.

¹²⁰ See text to n 438 in ch 5.

¹²¹ See text to n 391 in ch 5.

¹²² See text to n 241 in ch 3.

opposition to the applicant, full involvement of the type which would be expected during a fully adversarial process would be inappropriate.¹²³ However, if unsuccessful, the application will be rejected, and the applicant, for reasons of natural justice alone, ought to be entitled to make representations aimed at correcting any misapprehension under which the decision maker may be operating, pointing out any omissions from the investigation, or to provide information which the applicant may not have initially anticipated the importance of.¹²⁴ These factors apply equally in situations where referrals are contemplated. Once a referral is made, the process again becomes adversarial - although the autonomy of the applicant is in both jurisdictions qualified to the extent that he or she is unable to raise grounds not explicitly referred by the post-appeal body. The applicant therefore has a profound interest in ensuring that all referrable issues are identified and fully dealt with.

The Importance of Representation

Once one acknowledges that the processes require a level of involvement and input from the applicant, the necessary corollary is that this input needs to be facilitated if access to justice is to be achieved. As the criminal appeal (and post-appeal) systems 'operate with a fair degree of complexity, technicality and jargon', this requires the availability of competent legal assistance.¹²⁵

This is of acute importance at the stage of preparing an application. Given the

¹²³ Hodgson (n 109) 355-361.

¹²⁴ As often happens during the CCRC preliminary statement process - see text to n 391 in ch 5. Additionally, Hodgson (n 109) 355-361 notes that applicants' lawyers, as experienced criminal practitioners, may be able to bring to bear a perspective which the CCRC is missing.

¹²⁵ See generally, A Ashworth, 'Legal Aid, Human Rights and Criminal Justice' in R Young and D Wall (eds), *Access to Criminal Justice* (Blackstone, London 1996) (the quote is from 56-57).

necessity for the application to identify the particular grounds of concern, as Thorp notes, 'it is clearly vital' that it 'be prepared by someone capable of identifying and specifying the issues requiring review (a task beyond the great majority of petitioners)'.¹²⁶ The consequences for those who are unable to obtain competent assistance in preparing their applications is clear from recent research by Hodgson and Horne, which concluded that legally represented applicants to the CCRC fare considerably better in passing this initial, screening, stage.¹²⁷

In New Zealand, the difficulties faced by unrepresented applicants extend beyond the screening stage as lawyers who are experienced with the RPM process are aware of its restricted scope, and submit with their applications expert reports or fresh evidence gathered by private investigators retained by the petitioner. As legal aid funding will not extend to retaining private investigators to conduct 'fishing expeditions' to trawl for fresh evidence, this raises very real equality issues, as private investigators can be adept at obtaining relevant evidence, which although often rejected on the basis that it is insufficiently fresh, will often prompt the Ministry to take a closer look.¹²⁸ The adoption of a more active investigative role in New Zealand (as advocated below) would assist in reducing this problem. Horne and Hodgson's research in respect of the CCRC indicates that once the screening stage has been passed, and the process takes on a more inquisitorial hue, whether an applicant is or is not represented is less important.¹²⁹

¹²⁶ T Thorp, *Miscarriages of Justice* (Legal Research Foundation, Auckland 2005) 65-66.

¹²⁷ J Hodgson and J Horne, 'The extent and impact of legal representation on applications to the Criminal Cases Review Commission' (Warwick University School of Law, 2009).

¹²⁸ In NZ28, the evidence gathered was of such strength that a QC was appointed to review the case, as was the case in NZ59. In NZ17 and NZ53, a large amount of material was gathered, but was rejected on the basis that it was insufficiently fresh.

¹²⁹ Hodgson and Horne, 17.4.

However, this would not entirely solve the problem. The same research has demonstrated that in a significant proportion of cases, competent solicitors are able to have a determinative impact on an application, even after the screening process is completed.¹³⁰

For these reasons, it would seem that adequately funding legal advice for those seeking to access the post-appeal system is essential if equality of access is to be achieved. While equality concerns alone provide sufficient justification, there are reasons to believe that extending access to legal aid may result in a more cost-effective post-appeal process. Above, it was concluded that much of the CCRC's time is spent dealing with applications from unrepresented individuals in circumstances where legal aid was unavailable for appeals, and in consequence these were not prosecuted.¹³¹ The grounds for such applications are usually expressed in a desultory way, meaning that considerable time is expended trying to reduce these to a legally cognisable form. A similar phenomenon can be observed in respect of self-represented applications in New Zealand. In light of the time and effort expended on dealing with these unassisted claims, one may question whether, in addition to equality issues, the restrictions on legal aid are in fact a false economy, as was argued by one former senior New Zealand judge with respect to the appeal process as a whole.¹³²

42 Investigations

¹³⁰ Hodgson and Horne, 17.4.

¹³¹ See text to n 191 in ch 5 and following.

¹³² I Richardson, 'The Courts and Access to Justice ' (2000) 31 VUWLR 163, 170. Although this is a debatable point: cf A James, N Taylor and C Walker, 'The Criminal Cases Review Commission: economy, effectiveness and justice' [2000] Crim LR 140, 148.

As noted in the previous section, both the CCRC and New Zealand Ministry of Justice may take investigative steps during the course of a substantive review. However, there is a wide gulf between the two bodies in terms of the extent to which they will become involved in actively driving such investigations.

This gulf extends not only to whether steps will be taken to uncover fresh evidence relating to the alleged offence, but also to examining whether there is a basis (not identified by the applicant) on which an appeal may be brought, for example, on the grounds of counsel incompetence or abuse of process. Errors of the latter kind are often discernable from the record and do not require further investigative steps. The CCRC is proactive about scrutinising files for evidence of such errors, and, if these are significant enough, making referrals on this basis,¹³³ although the New Zealand Ministry of Justice is of the view that such an approach is constitutionally inappropriate.¹³⁴

More generally, such constitutional concerns mean that the extent of investigations conducted as a part of the RPM process is extremely limited.¹³⁵ The Ministry of Justice will not of its own motion take steps to uncover fresh evidence, although some enquiries may be conducted if an application has established that there is sufficient foundation for this. There is thus something akin to an enhanced evidentiary burden on an applicant to provide sufficient material to prompt the Ministry to undertake the further work.¹³⁶

¹³³ See text to n 242 in ch 5.

¹³⁴ See text to n 198 in ch 3.

¹³⁵ See text to n 205 in ch 3.

¹³⁶ See text to n 206 in ch 3.

In England, however, investigations can be very wide-ranging and lengthy.¹³⁷ Due to a mix of statutory powers, institutional experience and capacity, the CCRC is able to undertake investigative steps which are simply beyond the capabilities of a convicted individual. Any reform of New Zealand's post-appeal system which is serious about addressing miscarriages of justice must give consideration to how a similar machinery could be accommodated. Further, if the steps proposed earlier in this chapter are taken, there is no reason in principle why separation of powers concerns ought to preclude a wider investigative role for the New Zealand Ministry of Justice, even if a policy decision is taken not to establish an independent standalone body.

The following section examines how, although it would not be practically possible to match the investigative resources of the CCRC, a New Zealand post-appeal body could - with appropriate adaptations - develop procedures to allow for such independent investigations to be carried out.

(a) Capacity

As investigations into suspected miscarriages of justice can be lengthy, difficult and resource-intensive, the matter of institutional capacity to conduct these is crucial. In this regard, the New Zealand Ministry of Justice currently lacks the personnel and expertise to undertake a more active investigative role than it currently has. RPM work is conducted by the Ministry of Justice's legal advisers. Senior officials have acknowledged that these advisers 'have themselves generally lacked significant practical criminal law experience,

¹³⁷ See text to n 249 in ch 5.

and have dealt with too few cases to build up significant expertise'.¹³⁸ Nor do these officials have any investigative experience. This may be contrasted with the CCRC, where its case review managers are drawn from a wide variety of professional backgrounds, with the common thread being that they have a skill set which lends itself to conducting investigations into the various matters which may arise in applications, be they legal or factual.¹³⁹

Within the constraints which the New Zealand RPM process currently operates under, the status quo may perhaps be defensible. If its task is simply to dispassionately review the material provided by applicants, there is no necessity for those conducting reviews to have an investigative aptitude. However, if (as is desirable) a wider role were anticipated, then the matter of staffing will require attention in order to ensure that its staff possess the skills and experience necessary to conduct or manage what are often extremely complicated investigations.

It would not be possible to replicate the same variety of experience and expertise enjoyed by the CCRC, as the inevitably larger throughput of cases in England means that economies of scale develop. The English CCRC is able to employ a team of commissioners and CRMs with a variety of skills, along with a number of specialised legal and investigations advisors, and an administrative apparatus to support it in the knowledge that it will be operating at full (or indeed, over) capacity. As it would be impractical for any New Zealand body to replicate this structure, it would need to be less

¹³⁸ W Young and V Sim, 'Criticisms of the Royal Prerogative Process and the Need for Reform' (NZLRF Miscarriages of Justice Conference 2006) [18], although they go on to argue that experience in NZ and overseas suggests that 'not all applications require the involvement of a QC, an experienced criminal barrister or even someone with previous courtroom experience'.

¹³⁹ See text to n 17 in ch 5.

ambitious about the range of skills possessed by its staff. This means that it will be necessary to obtain skills and services from external sources where necessary.

This raises the related question of the ability to call on external specialist bodies or skilled persons to assist in the conduct of investigations. In England, there are powers to require the police (or another appropriate body or person) to conduct investigations, including from a different police force to that which conducted the original investigation. While this has not been a trouble free process, it has had a decisive impact on a number of cases.¹⁴⁰ While no equivalent formal power exists in New Zealand, the Ministry of Justice has been able to call on the police to conduct investigations on its behalf where necessary. In practice, the process operates in much the same way as in England. It may be the case that, even if a wider investigatory role were to be given to the Ministry of Justice (or successor body), this co-operation would continue without the necessity for an explicit statutory authorisation. However, absent a statutory power there would be nothing to compel the Police to accede to these requests. It is for this reason, and that discussed in the next paragraph, that the creation of such a power would be desirable.

A further reason why it would be highly desirable for the relationship between the Police and the New Zealand post-appeal to be governed by statute is that, unlike in England, there is no possibility for review by an independent force due to the fact that New Zealand has only one, unitary, police force. This poses real legitimacy problems for investigations where police misconduct is alleged.¹⁴¹ The creation of a statutory power modelled on section 19 of the Criminal Appeal Act 1995 giving the post-appeal body the explicit power to influence or direct inquiries by the Police, would alter the balance of power between the Police and the post-appeal body by confirming that the Police's

¹⁴⁰ See text to n 261 in ch 5.

¹⁴¹ See text to n 220 in ch 3.

involvement was a matter of obligation.¹⁴²

There are additional advantages which flow from the CCRC's large throughput of cases. In particular, the CCRC has developed a formidable institutional memory. This is in part informal, with the sharing of information and expertise between caseworkers, assisted by a central document management system, whereby caseworkers can draw upon the findings of earlier investigations in related cases. It is also increasingly formalised, with a comprehensive system of memoranda and briefing notes recording and distilling institutional experience and best practice.

In New Zealand, because of the low throughput of cases and lack of a dedicated team, and arguably also because of the looseness of current accountability mechanisms, a much more atomised structure exists. The consequence is that institutional memory is concentrated in a few key individuals, who are then called upon to oversee the work of others. This is particularly so where external counsel are involved, and disparities of approach are often clearly evident, including on the pivotal issue of the standard for making a reference.¹⁴³

Again, given the considerably lower throughput of cases, it would not be realistic to expect that New Zealand could replicate the English experience. However, it is apparent that the present processes in New Zealand are not adept at allowing recurring issues to be identified, often requiring wheels to be periodically re-invented.¹⁴⁴ As such,

¹⁴² See text to n 261 in ch 5; In addition to this, other indigenous solutions may be possible, for example, the involvement of the Independent Police Conduct Authority, which has expertise in investigating incidents of Police misconduct, including the supervision of investigations carried out by the Police force. Established by the Independent Police Conduct Authority Act 1988, this body too has been criticised for being insufficiently independent from the Police, eg SP McGonigle, 'Police Complaints, Privacy, And Officers' Rights' [1998] NZLJ 153, although recent reforms, notably those in the Independent Police Conduct Authority Amendment Act 2007 have sought to enhance its standing.

¹⁴³ See text to n 135 in ch 3.

¹⁴⁴ See n 117 in ch 3.

reflection and engagement with the CCRC's documentation, information-sharing and collaborative processes would seem a sensible way forward.

(b) Powers

Related to the question of capacity is the matter of what powers are necessary in order for investigations to be conducted effectively. The ability to call on external investigators was touched on above, but in addition to this, the CCRC has an affirmative statutory power to require the disclosure of documents by public bodies in order to assist it in its investigations. This is frequently exercised and opens avenues of enquiry that are closed to private individuals.¹⁴⁵ No equivalent powers exist in New Zealand. While the Ministry is often able to obtain the required material by consent, this is not always possible, and at least one external reviewer has expressed exasperation at the difficulties he faced in this regard.¹⁴⁶ To the extent that such difficulties are not widespread, this may again be down to the limited scope of reviews and investigations at present. As the documentary material currently sought is largely limited to police and court records, working relationships with a small number of bodies can ensure the required access. However, were a wider view taken as to the Ministry's role, and the scope and frequency of investigations widened, the absence of express powers would be more likely to cause problems. This is particularly so given the various legal restrictions on disclosure of personal information which could only be overcome by specific lawful authority.¹⁴⁷

Indeed, the experience in England is that difficulties can arise even though strong statutory powers to require the provision of documents are present. Public authorities often object to requests to provide information – particularly sensitive personal

¹⁴⁵ The extent and use of this power is discussed in detail above – see text to n 253 in ch 5.

¹⁴⁶ See n 215 in ch 3.

¹⁴⁷ Arising, for example, under the Privacy Act 1993, which prevents disclosure of personal information, as well as due to other statutory or common law duties of confidence.

information,¹⁴⁸ or where they consider that certain categories of information ought to exempt.¹⁴⁹ The presence of a statutory power compelling disclosure has therefore been essential to obtain important information in many cases.¹⁵⁰ Further difficulties are caused by the fact that these powers do not extend to documents held by private individuals, and investigations in a number of cases have been hindered by this.¹⁵¹

Overall, given the presence in both jurisdictions of legal and practical limits on what information can be obtained through voluntary co-operation, the extent of powers to compel the provision of information and assistance has very real consequences for the possible extent of investigations. Therefore, if a wider investigatory role was contemplated for a New Zealand post-appeal body, significant advantages would flow from putting such powers on a statutory footing.

43 A Wider Role?

A further question is whether a post-appeal body can, or should, have a wider role than merely investigating the specific individual applications before them. Post-appeal bodies are not in the same position as appeal courts which, by their nature, are limited to dealing with discrete issues arising on the cases before them. The matters which lead a post-appeal body to determine that an individual conviction may represent a miscarriage of justice not infrequently suggest the existence of systemic or widespread failings, meaning that a number of other convictions are also suspect.

¹⁴⁸ A recurring issue in the is objections by NHS trusts to the release of medical records on privacy grounds.

¹⁴⁹ The Home Office, for example, consistently refused to accept that the power extended to cover material obtained pursuant to the Regulation of Investigatory Powers Act 2000, see Elks (n 89) 20-21.

¹⁵⁰ Eg R14, where the material was only released after an explanation of how the CCRC's powers trumped conflicting legal duties of confidence; R15 where a judge objected to a request to provide his handwritten notes from a trial. Elks (n 89) 21 describes the steps taken to ensure that local bodies are aware of the disclosure obligations.

¹⁵¹ See text to n 281 in ch 5.

When it was established, it was envisaged that the CCRC would be pro-active in this regard. It has a demonstrated ability to do so, where called upon, but its capacity to deal with these matters is severely handicapped by a lack of resources.¹⁵² The most visible manifestation of this is the adoption of a policy that the CCRC will not routinely solicit applications from potentially affected individuals.

In New Zealand, too, there is a reluctance by the Ministry of Justice to engage with systemic issues as part of the RPM process. However, this is not attributable to a lack of resources, but rather due to constitutional concerns about its limited role. In one highly publicised case, this reluctance was the subject of intense criticism, as the RPM process was said to be inapt to deal with systemic issues which ought instead to be considered by a commission of inquiry with wide terms of reference (which could only be established by the Government).¹⁵³ Similarly, the New Zealand Ministry of Justice considers that it is not its role to solicit applications.¹⁵⁴ This means that, were a systemic issue to be identified, it would still be incumbent on affected individuals to apply personally for the exercise of the RPM.

Thus, in New Zealand, the failure to engage with systemic issues potentially affecting a large number of convictions is due to the perceived limitations of the current institutional machinery. If the process were reformed to encompass a wider investigative role, as suggested above, this alone would not pose a barrier. However inadequacy of resources might. In England, the machinery has a demonstrated capability to take action

¹⁵² See text to n 217 in ch 5 and following; Nor does the CCRC routinely engage in lobbying for more systemic changes to the criminal justice system, K Roach, 'The Role Of Innocence Commissions: Error Discovery, Systemic Reform Or Both?' (2010) 85 Chi Kent L Rev 89, 112-119.

¹⁵³ See text to n 277 in ch 3.

¹⁵⁴ See text to n 197 in ch 3.

- at least where the issues have been identified and brought to its attention. The failure to do more is a consequence of insufficiency of resources. If a wider role for a post-appeal body is desired, therefore, the English experience suggests that this aim should be made explicit, and the body funded accordingly.

The question of such whether a wider role is appropriate depends on how narrowly one conceives of the overall role of a post-appeal body. If one is content to assume that those who are victims of miscarriages of justice will self-identify, and seek the intercession of the post-appeal body, then this would be unnecessary. Further, it may well be counter-productive, were the post-appeal body to be perceived by bodies on whom it relies for co-operation and assistance as a crusading body. However, if a wider view is taken of a post-appeal body's role, then the ability and willingness to act on information in its possession to unearth and rectify other miscarriages of justice may be essential. As one former chairperson of the CCRC noted, a review of a large number of potentially suspect convictions in light of two prominent cases 'illustrates graphically [the CCRC's] role not only in facilitating the correction of individual miscarriages of justice but also in restoring public confidence in the criminal justice system when it has been compromised'.¹⁵⁵

44 Conclusion

This thesis set out to provide a deep analysis of the mechanisms for review of convictions in New Zealand and England after initial appeal rights are exhausted, and to identify the

¹⁵⁵ Criminal Cases Review Commission *Annual Report and Accounts 2004-2005* (n 6) 8. The importance of this aspect of the Commission's work is also emphasised in the writings of other former commissioners - eg Kyle (n 59) 675; Leigh; and Elks *Righting Miscarriages of Justice* (n 9) 348.

key areas of similarity and difference between these systems, the reasons for these differences, and their implications.

Chapters two and four provided an overview of the appeal systems in each jurisdiction, and the pressures and restrictions on their functioning. Chapters three and five examined the New Zealand RPM and English CCRC processes respectively, drawing on empirical research carried out by the author. These chapters examined the legal context in which each body functions, but focussed on providing an account of how each body functions in practice, by examining the circumstances in which each body will contemplate referring a matter back to an appeal court and the means by which a determination is made as to whether to do so in an individual case. In addition it examined the various factors (legal and non-legal) which impact on their functioning.

This final chapter has examined the key features of the two systems, identifying the areas of similarity and difference, as well as the possible implications of these. In terms of similarities, the critical importance of the standard appeal system to the functioning and success of the post-appeal body in each jurisdiction was highlighted, as were the equality issues arising from the party-driven nature of much of the process. It has also been argued that a number of the differences are significant, notably the differing constitutional positions and resource pressures on the post-appeal systems in each jurisdiction, the consequences of the greater accessibility of the appeal courts in New Zealand and the wider investigative role of the CCRC.

These findings have also given rise to a number of recommendations directed at proposals for reform in New Zealand. It has been argued that while there are advantages

to establishing an independent review body, this is not a necessary precondition for reform, as if steps are taken to enhance the transparency and accountability of the RPM process, it would be possible for a wider investigative role to be accommodated within the current institutional framework. While New Zealand could not fully replicate the CCRC's investigative machinery, with appropriate adaptations a New Zealand post-appeal body (of whatever form) could and should have a wider investigative role. This would perhaps inevitably result in a higher number of applications for review, but the greater accessibility of the New Zealand criminal appeal system means that any new body could justifiably take a robust attitude towards routine applications so as to allow resources to be targeted at exceptional cases. This recommendation recognises that any post appeal body is most unlikely to be fully inquisitorial, and that the applicants will themselves play an important role in the process. This means that adequate and accessible legal representation for applicants is essential if access to justice is to be ensured.

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