The Shifting Landscape of Post-Conviction Review in New Zealand: reflections on the prospects for a Criminal Cases Review Commission

Carolyn Hoyle[1]

[1] Professor of Criminology, Centre for Criminology, University of Oxford, UK. ORCiD: 0000-0002-6352-5790. @CarolynHoyle1 Carolyn.Hoyle@crim.ox.ac.uk

Abstract

Concerns about the lack of integrity in the criminal process, and resulting miscarriages of justice, dented public confidence in the New Zealand justice system and its limited post-conviction review procedures. In turn, this generated an appetite for a Criminal Cases Review Commission, modelled on the English and Scottish Commissions. This article draws on evidence from the English Commission to consider the prospects for the New Zealand Commission given its proposed investigative powers, its criteria for referring cases to the appeal court, and its remit beyond casework. It argues that while it is assumed that the New Zealand Commission will have more liberal powers to refer cases back to the appeal court than its sister Commission in England, evidence suggests that its decisions will be similarly restricted by the Court's statutory obligations and its evolving jurisprudence.

Keywords
Criminal Cases Review Commission, Court of Appeal, post-conviction review, wrongful convictions.

Introduction

In September 2018, the New Zealand Justice Minister introduced a Bill[2] aimed at changing the landscape of post-conviction review by establishing a Criminal Cases Review Commission (CCRC) to 'provide a mechanism for addressing miscarriages of justice' (Little 2018; New Zealand Law Society 2018). On 16 November 2019, the Bill received Royal Assent and the Criminal Cases Review Commission Act (the Act) will come into force on 1 July 2020. Key clauses of the Act suggest that in many regards the New Zealand CCRC ((NZ)CCRC) will be similar to the Commissions of England, Wales and Northern Ireland ((E)CCRC) and Scotland ((S)CCRC). This article draws on findings from the first major study of the (E)CCRC (see, Hoyle and Sato 2019) to consider the prospects and pitfalls for the (NZ)CCRC.

The (E)CCRC was established by a Royal Commission on Criminal Justice that was announced in 1991 following a series of high profile wrongful convictions that suggested the criminal justice system was deeply flawed and unacceptably prone to error, creating a need to restore public confidence in the criminal justice system, and that post-conviction review procedures were inadequate (Royal Commission on Criminal Justice, 1993, 6). In 1993, it made 352 recommendations to increase the chances of the conviction of guilty persons *and* to reduce the risks of unsafe convictions through enhanced protections of suspects and increased powers for criminal justice agencies. Recommendation no. 331–to set up a new authority to correct possible miscarriages of justice–led to the establishment of the (E)CCRC in 1997 by Article 8 of the Criminal Appeal Act 1995.[3] The (E)CCRC reviews possible wrongful convictions in England, Wales, and Northern Ireland, typically following the exhaustion of

[2] For information on how the Bill progressed to Royal Assent, see https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_80426/criminal-cases-review-commission-bill
[3] The S(CCRC) was established in 1999 by the Crime and Punishment (Scotland) Act 1997.

first instance appeals[4], and refers back to the Court of Appeal ('the Court') [5] cases in which it considers there to be a 'real possibility' that the Court will deem the conviction to be unsafe.

In other countries, wrongful convictions have occasioned analogous concerns about under-resourced legal representatives, insufficiently probative or flawed forensic science, judges' mistakes, or ineffective appeals processes. Accordingly, measures have been established to review cases that have slipped through the safety net of procedural protections and appellate processes. Some jurisdictions within the United States have relied on innocence projects[6]. Others, like Canada, make use of executive power[7], while Scotland and Norway[8], have looked to the (E)CCRC as a model to emulate. Other jurisdictions, particularly certain states in America (Schehr and Weathered 2004) and Australia (Dioso-Villa 2014, 374) have considered establishing commissions like the (E)CCRC.

The South Australian Criminal Cases Review Commission Bill 2010 sought to establish a Commission with similar terms of reference and powers of investigation to the (E)CCRC. In 2012, the Parliament of South Australia Legislative Review Committee reported on its enquiry into the Bill, recommending against its establishment both in South Australia and at a national level because of the importance of the principle of finality. Instead, the Committee endorsed amendments to the law to allow people at any time to appeal against a conviction for serious offences if the Court is satisfied that the conviction is tainted, and where there is fresh and compelling evidence in relation to the offence which may cast reasonable doubt on the guilt of the convicted person (South Australian Legislative Review Committee, 2012).

In 2013, South Australia introduced such legislation[9] to allow a second or subsequent appeal on the basis that the Full Court is satisfied that there is fresh and compelling evidence that should be considered or that there was a substantial miscarriage of justice. (Tasmania

[4] An appeal should have been determined, or leave to appeal against it refused, before an application to the Commission (s.13(1)(c) Criminal Appeal Act 1995), though 13(2) allows the Commission to review cases before direct appeal, and to make a reference 'if it appears to the Commission that there are exceptional circumstances which justify making it'. In practice, this happens in a significant minority of cases; see Hoyle and Sato (2019, ch.6).

[5] The jurisdiction of the Commission extends to the magistrates' court, for which a referral would be to the Crown Court, though most of its applications relate to convictions from the Crown Court.

[6] The only US institution somewhat comparable to the (E)CCRC is the North Carolina Innocence Inquiry Commission. Established in 2006, it receives applications from those who have been convicted of a felony in a North Carolina State Court. It has considerable investigatory powers that volunteer-led innocence projects lack (e.g., it can compel testimony and issue subpoenas) but it has a mandate restricted to claims of proven factual innocence, with evidence not previously heard at trial or appeal and therefore few cases are successful (Wolitz 2010).

[7] In Canada, the Criminal Conviction Review Group must report directly to the Minister of Justice, who decides if the case should be referred back to the Court of Appeal (Campbell and Denov 2012), leading to criticism that the review process lacks transparency and independence (Saguil and Sanguil 2007).

[8] The Norwegian CCRC was established in 2004, following an infamous miscarriage of justice (the *Liland* case). It has the same powers and remit as the (E)CCRC and (S)CCRC, though it enjoys fewer resources than the former, given its much smaller caseload (barely over 100 applications a year, compared to approximately 1400 to the (E)CCRC)); see Grøndahl & Stridbeck (2016).

[9] Statutes Amendment (Appeals) Act 2013 (SA) enacting s 353A of the Criminal Law Consolidation Act 1935 (SA).

enacted similar legislation in 2015[10] (Sangha 2015) and in October 2019, the Attorney-General in the state of Victoria introduced a bill to Parliament to allow the same (Mills 2019)). However, there is no assistance for convicted persons who believe themselves to be innocent, as there is in England (Roach 2015, 415–19), and it would be difficult for a wrongfully convicted prisoner, with limited resources to discharge this burden (Hamer and Edmond 2013). Not surprisingly, in the two years following the South Australian legislation, there were only two convictions overturned and, in both cases, the Full Court ordered that a new trial be held following the quashing of the original convictions (Roach 2015, 417).

The movement to establish a CCRC for New Zealand

Particularly egregious wrongful convictions are almost invariably the impetus for systemic change in criminal justice systems and New Zealand is no exception. Peter Ellis' conviction for child sexual abuse motivated considerable support for the establishment of a CCRC and brought about changes to the way that children's evidence is gathered and used in court. Ellis was convicted in 1993 at a time when the city of Christchurch was in the grip of mass hysteria over fears about satanic child abuse that cast suspicion on men in teaching and child-care roles.[11] In the case of Ellis, the criminal justice system failed at each and every stage–including three court hearings and four petitions for mercy–shining a bright light on systemic flaws. Indeed, an inquiry into his convictions and failed appeals delivered a series of recommendations including the establishment of an independent body to review wrongful convictions (Francis 2007a, 2007b). Not surprisingly, the case is discussed by many of those who gave evidence to the Select Committee in considering the New Zealand Bill to establish a CCRC.

Before the Act that establishes the (NZ)CCRC, New Zealand had no independent, dedicated institution to consider possible wrongful convictions. Those who believed their convictions to be unsafe could apply for a Royal Prerogative of Mercy. Decisions about whether to issue a pardon were made by the executive following little investigation by the Justice Ministry. The process relied almost exclusively on reviews of submitted paperwork conducted by bureaucrats, without expertise or transparency.[12] Not surprisingly, most applications were declined, including those of Peter Ellis. Furthermore, as Malcolm Birdling (2018) pointed out in his submission to the NZ Bill, apparently meritorious cases were rejected and there was some evidence that well-resourced applicants were able to secure an advantage, particularly if they were able to fund competent legal advice.

A former High Court judge, Sir Thomas Thorp, established a review in 2003–4 to compare New Zealand's post-conviction review procedures with those of Scotland and England, recommending the establishment of a similar CCRC.[13] He studied the (S)CCRC again in 2010 and concluded that Scottish procedures had identified and corrected many more

[10] Criminal Code Act 1924 (Tas) s 402A inserted by Criminal Code Amendment (Second and Subsequent Appeal for Fresh and Compelling Evidence) Act 2015 (Tas).
[11] Similar moral panics emerged in the UK (see, Webster, 1998; Burnett, Hoyle & Speechley, 2017).
[12] Crimes Act 1961, s.406.
[13] Like others, Thorp was motivated by grave concerns about the safety of high-profile convictions, not least those of Peter Ellis (see, Gilbert, 2018).

miscarriages than would be possible under the New Zealand system. He recommended that New Zealand establish an independent commission, maintaining that fears of it overwhelming the courts had not been borne out by the Scottish experience (Taylor 2013).

His recommendation met with resistance from the government on the basis that there were already robust safeguards in place to protect citizens from wrongful convictions. Yet, the matter would not rest. Indeed, Thorp insisted in 2014 that it was 'inevitable' that a CCRC would be established in New Zealand (Vaughan 2019). In 2016, a Supreme Court judge, Justice William Young, referred to the English CCRC as a model to emulate, and opposition parties and the Police Association supported calls for a similar commission (Wesley-Smith 2016). Journalists visited the (E)CCRC and the (S)CCRC, publishing broadly positive accounts of both organisations (see, e.g., White 2016), but particularly the (S)CCRC, given the similar population base.[14] Notwithstanding, the National Party remained unpersuaded (Vaughan 2019). New Zealand had to wait for a new administration.

New Zealand's new coalition government (Labour-New Zealand First-Green) finally introduced the Criminal Cases Review Commission Bill in September 2018 and submissions to the Justice Select Committee, following its first reading, demonstrated the support it enjoyed from key legal institutions, human rights groups and academics. For example, the New Zealand Law Society asserted that a CCRC would enhance public confidence in the criminal justice system through its independence and transparency of decision making. The organisation best placed to pronounce on this matter – the New Zealand Public Interest Project[15] – offered strong support. With only the New Zealand National party opposed to the Bill, it was always 'likely—indeed, certain—to pass'.[16] Now it has received Royal Assent, this article considers what are the prospects, and the pitfalls, for the (NZ)CCRC?

Before we turn to the English Commission, it is worth pausing to reflect on the similarities and differences between the two countries and their justice systems.[17] First, in relation to resources, New Zealand has a very small population–under 5 million people, compared to nearly 68 million in the UK–and only approximately one twentieth of the convictions on indictment of the UK. There is therefore much less scope for wrongful convictions and the numbers of cases that the (NZ)CCRC will have to investigate will be tiny compared to the (E)CCRC.

[14] In 2019 the population of New Zealand is approximately 4.78 million, and the population of Scotland is approximately 5.25 million.

[15] Established in 2013, the Project provides independent reviews of potential miscarriages of justice: http://www.nzpip.nz.

[16] Criminal Cases Review Commission Bill–Second Reading at https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb_20191022_20191022_28

[17] Given the main focus on the (E)CCRC here, it is unnecessary to include Scotland in this comparison. That said, the Scottish legal system is different from those of New Zealand and England, Wales and Northern Ireland in a few respects. For example, it has different disclosure rules and the defence must use its powers of 'precognition' to allow it to question key witnesses to comprehend the case for the prosecution, though there are limits to precognitions during the trial (Birdling, 2011). This has some implications for the Commission's right to compel witnesses to provide evidence to the Commissions, referred to below.

Both countries have a common legal tradition with fairly similar rules of substantive criminal law and criminal procedure. Appeal rights in summary matters in both countries are almost identical, with the right to bring appeals on factual grounds without the identification of errors in law. In both, those convicted of summary offences are better able to have their convictions reviewed than those convicted of indictable offences. Notwithstanding, successful appeals are very low in both countries.

There are a number of barriers to appeals in the English system that are not present in New Zealand, where, for example, appellants are not at risk of increased sentences by the appeal court. Furthermore, appeals out of time are much more likely to be considered in New Zealand, whereas the English Court of Appeal must be persuaded that there are exceptional circumstances before hearing such cases. The New Zealand criminal appeal system for indictable offences is much more accessible and appeal rights are more generous than in England and, partly in consequence, almost twice as many people seek leave to appeal in New Zealand as in England and Wales, though the numbers are relatively very small. Furthermore, New Zealand offers much greater scope for *further* appeals if new information is discovered. As Birdling (2018) points out, in New Zealand most technical errors in procedure are likely to be picked up during the standard appeal process. Hence, there is arguably an even greater impetus for the NZ system to focus limited resources on those more complex cases where investigative resources will be needed.

The differences in the appeal processes, and in the number of cases, suggest that the (NZ)CCRC will have less pressure on it than its counterpart in England but this should not impact greatly on the how the two commissions operate or on the way that cases are investigated, not least as neither system provides adequate protection against errors made by appeal courts.

Lessons from the English CCRC

What follows is not a comprehensive analysis of the Act, but consideration of some of its proposals where experiences at the (E)CCRC and, to a lesser extent, the (S)CCRC allow for reflections on the potential and pitfalls of the (NZ)CCRC. It considers its proposed investigative powers, its criteria for referring cases back to the Court of Appeal, and its remit beyond casework.

This discussion draws on a four-year empirical study of the (E)CCRC aimed at understanding what influences the identification of potentially unsafe convictions among hundreds of applications, how caseworkers investigate and construct cases for the Court, and the Commission's relationships with applicants and other criminal justice institutions.

Mai Sato and I conducted in-depth analysis of the 146 cases in our sample, reviewing all material in the case files, and interviewing staff about investigations, as well as the working practices and culture of the Commission. We also analysed the Commission's many Casework Guidance Notes—internal policy guidelines that prescribe how staff should proceed at each stage of investigations in various types of cases or situations. Our quantitative data included: analysis of initial decision making on all applications to the

Commission over a ten-year period from 2005–2014; data on every request for records from public bodies from 2011–2013; and a survey of caseworkers' investigatory practices.[18] We also interviewed members of the (S)CCRC on differences between the two organisations (Hoyle and Sato 2019).

Investigative powers

A key rationale of Commissions is to have greater powers than legal representatives. If the (E)CCRC refers a case to the Court, it is obliged to hear it. The New Zealand Bill provides for the same power. But the (E)CCRC and (S)CCRC have further unique powers which benefit applicants; most notably, the right to require statutory and other bodies to provide material in their possession that could generate evidence to assist investigations. Data from public bodies that might have probative value includes: files from the police, social services, courts, and prisons; DNA or other forensic evidence; information about compensation claims; or medical records. And since July 2016, similar material can be sought from private bodies and individuals.[19]

This power distinguishes the Commission from applicants, legal representatives or campaign groups, who typically will not have access to material that may reveal proof of non-disclosure, police malpractice, false allegations made by complainants, or exculpatory forensic evidence. Indeed, a few years ago, the UK Supreme Court heard a challenge on the refusal of the police to release material evidence (a rape victim's clothing) for further DNA testing to the legal representative of a man wishing to appeal his conviction. The Court found that there already existed a reliable 'safety net… in the CCRC' and that therefore other bodies or individuals did not require these powers.[20] Hence, in England, the Commission remains the only dependable route to securing evidence that might challenge the safety of a conviction.

There, while there is a legal duty to obey section 17 orders, the only consequence for non-compliance is a resource-intensive judicial review. The (S)CCRC has the authority[21] to apply to the sheriff (a judge) to request a precognition on oath[22] of any person who has refused to make a statement to the Commission where it believes that the person may have information required for the purposes of carrying out its function. Furthermore, it may apply to the High Court for an order to obtain documents or other materials where it believes that a person or public body has possession or control of materials which may assist in the exercise of any of its functions.[23]

[18] See Hoyle and Sato (2019, ch.2) for full discussion of aims and methods.
[19] Criminal Appeal Act 1995, s.17. The extension of s.17 powers to private bodies and individuals was introduced under s.18A of the Criminal Appeal Act 1995, which was inserted by the Criminal Cases Review Commission (Information) Act 2016.
[20] R v Nunn [2014] UKSC 37, para.39.
[21] Under s.1941 of the 1995 Act
[22] Under Scots law, precognition is the practice of taking a factual statement from witnesses after indictment or claim but before trial; see note 17.
[23] Under s.194 of the Crime and Punishment (Scotland) Act 1997.

Clauses 31-33 of the NZ Act suggest comparable powers to request information from other bodies where data is considered relevant to an investigation. However, it affords the (NZ)CCRC, like the (S)CCRC, greater powers to insist on the material they request; to issue a written notice *requiring* compliance with the notice and even requiring a person to appear before the Commission to be examined on oath or affirmation. Should such a person fail to comply, without reasonable cause, Clause 38 would allow the (NZ)CCRC to apply to the District Court for orders against the person and the District Court may direct that person to comply and/or require them to produce documents or provide other information for the purposes of determining an application. Clearly, those responsible for drafting the Act were somewhat influenced by the Scottish model.

On the face of it, it seems sensible to ensure legal consequences for non-compliance and in a small jurisdiction these procedures will not likely be common. However, they may not be necessary. In his submission to the Justice Select Committee, Malcolm Birdling (2018) supports these broad investigative powers, but expresses concern about the invasive power to compel an individual to give evidence on oath. He points out that this might make sense in the rather different criminal justice system of Scotland, but in New Zealand such powers should be subject to judicial supervision. Perhaps more importantly, our study of the (E)CCRC suggests that such powers are superfluous as most requests for information are met with positive responses and the (NZ)CCRC could adopt less antagonistic and swifter means of securing compliance.

(E)CCRC requests for data are not invariably fruitful. Some organizations ignore requests, others fail to locate files, while a few claim that the data are too sensitive to release. We analysed responses over three years from 2011 to 2013, when the Commission made 7,317 'section 17 requests' across 59 percent of their 3,990 new applications, with a mean average of 4.9 requests per case (the maximum for a case was 28). The Commission was able to preserve or obtain material for over 85 percent of requests. The availability of material, however, differed considerably by institution, with courts being most compliant, followed by police forces; local authorities, such as social services, were the least compliant. This ranking of external bodies by positive response rate was correlated with the frequency of the section 17 requests, with requests most frequently directed at courts. These findings suggest that in most cases, legal solutions for non-compliance are unnecessary.

That said, not all requests are satisfied *promptly*. The mean average waiting time for section 17 requests to *obtain* material is 33 days, but the mode average (the most frequent length of waiting period) is six days. The gap between the mean average and the mode tells us that the distribution of waiting time is skewed; indeed, the longest waiting period was 1,000 days. But again, as most requests are complied with in less than a week, recourse to legal processes is unwarranted, given that the Commission gives public bodies 28 days to respond to such requests. For those requests not met in a timely fashion, the (E)CCRC engages in a series of extensions that inevitably delay investigations. Scottish commissioners are not so tolerant; their policy gives two weeks for public bodies to respond, with a reminder providing only a one-week extension, before threats of legal action. Without recourse to legal coercion, the English Commission takes a more lenient approach to securing compliance, tolerating delays.

Faced with non-cooperation or delayed response, the (NZ)CCRC too could resort to legal measures. Equally, there are ways of securing timely compliance without coercion by taking advantage of normative, rather than instrumental strategies, using social norms to encourage people to do the right thing. Adopting descriptive norms (Cialdini 1988; Schultz et al. 2007, 430), the (NZ)CCRC could provide institutions with information about what is normal behaviour among similar bodies in other jurisdictions. This approach exploits the fact that people are social beings and norms provide a standard from which they typically do not like to deviate (Schultz et al. 2007, 430). Hence, in communication with external bodies, reminding them of their duty to provide information to help with a fair and just response to applicants satisfies an injunctive norm, but also, applying a descriptive norm, the (NZ)CCRC could make clear that the (E)CCRC normally receives material within a week, communicating a standard from which organisations may not wish to deviate.

The power to direct police-led enquiries

In its submission to the Justice Select Committee, the NZ Criminal Bar Association suggests that the (NZ)CCRC should be granted an additional power–which the (E)CCRC enjoys and uses to good effect–of being able to direct police-led enquiries during investigations.

By way of example, in 2012, following a referral from the (E)CCRC, the Court of Appeal quashed the conviction of Sam Hallam, who spent seven years in prison, wrongfully convicted of murder (*R v Hallam*[24]). Using its powers under section 19 of the Criminal Appeal Act 1995, the Commission had required Thames Valley Police service to scrutinise the original investigation by the Metropolitan Police. Thames Valley's report made a significant contribution to the Statement of Reasons for the referral, revealing the unreliability of witness evidence, non-disclosure of evidence concerning an alternative suspect, and the failure to investigate mobile phone evidence that could have provided Hallam with an alibi. The Court in its judgment praised Thames Valley Police for their work on the case, expressing guarded criticism of the defence and of Metropolitan police for their original investigation.

Our analysis revealed that the (E)CCRC instructs officers to carry out three types of investigation. The first requires the appointment of an investigating officer from an external police force in relation to potential misconduct by the original investigating force; the officer is typically from a different police force to ensure impartiality. The second requires the investigating officer to examine the truthfulness of evidence given by witnesses; the third is consideration of a possible alternative suspect. *Hallam* began as the first type of investigation. However, the investigating force went beyond the question of misconduct and assisted with the gathering of evidence on witness veracity as well as an alternative suspect, demonstrating the potential of cooperative investigations with external bodies that have additional powers and expertise.

The (E)CCRC is discerning in exercising its discretion to use its section 19 powers. Between its establishment in 1997 and 2012, it appointed an investigating officer in just 44 cases.

[24] *R v Hallam* [2012] EWCA Crim 1158.

However, such cases were more likely to lead to a referral; indeed, our data revealed that the Commission's decision to use these powers indicated that the case was already considered to be meritorious. With so few cases requiring additional investigatory resources, providing the (NZ)CCRC with this power will probably be of great assistance without proving onerous to the police.

Grounds for referring cases to the Court of Appeal

The most critical consideration in designing a new commission is the statutory grounds for referring a case back to the Court of Appeal. Under the NZ Act (Clause 17), the (NZ)CCRC 'may refer a conviction or sentence to the appeal court if the Commission, after reviewing the conviction or sentence, considers that it is in the interests of justice to do so.' As with the English and Scottish Commissions, when referring a case to the Court, the (NZ)CCRC must provide 'a statement of its reasons for the referral' (Clause 19) and the Court will be obliged to hear and determine the case (Clause 20).

In adopting the language of the Scottish referral test–'in the interests of justice', the NZ Act appears to depart from the (E)CCRC's 'Real Possibility Test', which has been heavily criticised (see, e.g., Naughton 2009). That test, laid out in section 13(1) of the Criminal Appeal Act 1995, requires that the Commission considers, before making a referral, that there is 'new' evidence or argument—for example, on a point of law—not previously raised at trial or appeal, that raises a *real possibility* that the Court will quash the conviction (though under 'exceptional circumstances' the Commission can refer a case without new evidence[25]). Furthermore, if the evidence is fresh, there must be a reasonable explanation for the failure to adduce the evidence at trial if it had been available to the defence at the time. And of course, the evidence must also be capable of belief, capable of forming a ground for allowing the appeal.

In turn, the English Court must consider that it is 'necessary or expedient in the interests of justice' to receive the new evidence within the criteria set out in section 23 of the 1968 Criminal Appeal Act and shall allow an appeal against conviction only if it thinks that the conviction is unsafe. Hence, meeting the real possibility test requires the (E)CCRC to assess whether the Court is likely to find the fresh evidence compelling and therefore the conviction unsafe. Given that Commissions have no independent power to quash convictions, their statutory grounds for referral 'provide strong prima facie evidence of an essentially dependent position' (Duff 2009, 701); deterred from making referrals that would fail, they could be seen as a filter for the Court (James 2000).

However, it is not clear that the NZ Act provides for a significantly more liberal referral test that would avoid the restrictions imposed on the (E)CCRC, given the mandatory conditions set out in sub-clauses 17(2)(a)-(c):

17(2) In deciding whether to refer a conviction or sentence, the Commission must have regard to—

[25] Cf. note 4.

(a) whether the eligible person has exercised their rights of appeal against the conviction or sentence; and
(b) the extent to which the application relates to argument, evidence, information, or a question of law raised or dealt with in proceedings relating to the conviction or sentence; and
(c) the prospects of the court allowing the appeal; and
(d) any other matter that the Commission considers relevant.

These conditions must restrict the 'interests of justice' test in a similar way to the English legislation. They too will shape reviews by encouraging second-guessing of the approach of the Court. Indeed, they are at least suggestive of a similar predictive test given that the (NZ)CCRC must consider the 'prospects of the court allowing the appeal' and the requirement to produce 'fresh' evidence or argument, though clause 17(2)(b) is somewhat unclear on this matter. With that in mind, it may be helpful to consider how the English test works in practice.

In deciding on new evidence and whether it gives rise to a real possibility that the Court will find the conviction to be unsafe, the (E)CCRC must consider not only the legislation, but subsequent guidance from the Court of Appeal and other courts. Guidance—provided through judgments and occasional reprimands from the Court[26]—is reviewed regularly within the Commission and reproduced with analysis in Casework Guidance Notes, in Statements of Reasons, and in formal and informal communications within the Commission. These are the routine ways in which Commission staff make sense of evolving interpretations of the law (Hawkins 2002) and choose whether or not to refer a case to the Court.

For example, the first challenge to the (E)CCRC's decision *not* to refer a conviction (in the case of *Pearson*[27]) led to an important judgment which elucidated their role in deciding whether cases meet the real possibility test, having a lasting impact on the Commission's decision-making. With *Pearson* in mind, the Casework Guidance Note on the real possibility test makes clear that, in second-guessing the Court, the (E)CCRC must be cognisant of the Court's decisions in previous cases. This nexus between the Court's prior decisions and the Commission's current decision making, created by section 13 of the Criminal Appeal Act 1995, is the focus of much critical attention: put crudely, if the Court is wrong in its analysis or judgment, the Commission is obliged to sustain erroneous jurisprudence. The boldness of this claim should not be underestimated, given expectations that the Commission be independent of both state and judiciary.

While the (E)CCRC must consider the Court's approach to its own safety test in deciding whether a conviction meets the real possibility test, and how readily the Court will accept new evidence, the Court, in turn, must consider what the jury might have made of the fresh evidence had it been available at trial (the 'jury impact test'). This inevitable 'second-guessing' suggests deference to the Court, but also Court deference to the jury, given its

[26] For example, the Court has sought to place limitations on the Commission in relation to referrals on 'lurking doubt', where there is no new evidence, and very old cases. Furthermore, it has reprimanded the Commission for certain referrals based on a change of law.
[27] *R v Criminal Cases Review Commission ex p Pearso*n [1999] 3 All ER 498.

adherence to the principles of judicial finality and 'jury sovereignty' (Malleson 1994, 164). The English Court has long harboured a deeply felt reluctance to overturn convictions on fresh evidence (Malleson 1993) because of deference to the jury (Royal Commission on Criminal Justice 1993, Chapter 10, para:3), now more than ever (Roberts 2017).

While Commissioners claim to be independent of the Court, and point for evidence to judgments that rebuke them for audacious referrals, our research showed that they sometimes await judgments in cases that raise analogous issues before deciding whether new evidence is likely to be persuasive to the Court. Learning from past judgments to identify evidence likely to be accepted by the Court, and perhaps excluding material not proven to be persuasive in past cases, demonstrates a pragmatic use of limited resources. However, if the Court is becoming less receptive to fresh evidence, this approach affords no opportunities for the Commission to correct that.

The (S)CCRC appears to have broader, more flexible criteria for referrals. It can refer a conviction and/or sentence back to the Court if it believes 'a miscarriage of justice may have occurred'[28] and if it believes 'it is in the interests of justice that a reference should be made'[29]. There is no explicit requirement of the (S)CCRC to second-guess the Court, though in practice many regard its test as similar to the English test (see, e.g., Duff 2009, 702). The reference to a 'miscarriage of justice' in the Scottish test is a reference to the sole ground of appeal against conviction or sentence in Scots law, and in past judgments the High Court has made clear that the Commission is obliged to apply the Court's correct legal test in making referral decisions. There is no evidence that the Scottish Commission disregards the likely attitude of the Court in making referrals. Furthermore, the Court's grounds for allowing an appeal are similar to those in England, including that there is fresh evidence that could not have been heard at the original trial. This raises a question about the level of independence of the (S)CCRC from the Court.

Peter Duff, a legal scholar and one-time commissioner at the (S)CCRC, makes a persuasive case for its independence from the Court with regards to decisions *not* to refer a case, even if the conviction would likely be quashed. Yet his analysis of judgments shows that 'the closed nature of the legal system impinges heavily upon the Commission as regards referrals' (Duff 2009, 708-714). As in England, the Scottish Court does not approve of the Commission breaking free of a purely legal framework and has asserted that it should conform 'to the legal rules governing the evaluation of fresh evidence' (Duff 2009, 712-13). Members of the SCCRC also scrutinise the evolving jurisprudence from their appeal courts in order to establish which cases are likely to be successful if referred. They too know that 'legal communications can only be created by reference to prior legal communications' (Nobles and Schiff 2004, 223). Duff concludes that the appeal courts in *both* Scotland and England see themselves as exercising an authoritative and exclusive jurisdiction over the determination of what constitutes a 'miscarriage of justice' (Duff 2009, 718). Furthermore, the Scottish Court, like its sister Court in England, is highly deferential to the jury's verdict (Ashworth and Redmayne 2005, 344-353), restraining somewhat the apparent independence of the (S)CCRC to choose when it is in the interests of justice to refer a case.

[28] Crime and Punishment (Scotland) Act 1997, Article 25(1), 194C(a).
[29] Article 25(1), 194C(b).

It would seem that despite different tests, the (S)CCRC is not so dissimilar to the (E)CCRC as both must have their referrals carefully appraised by the appeal courts which will uphold convictions that do not meet their stringent criteria. Hence New Zealand's rejection of the English 'Real Possibility Test' in favour of an 'interests of justice' test, may prove to be more symbolic than a real distinction. While some critics of the NZ Act worry that 'in the interests of justice' is an insufficiently low threshold, and will 'open floodgates', particularly in historic abuse cases (Vaughan 2019), our research suggests that it is more likely to be constrained in its referrals.

The English Court's restrictions on admissibility of evidence (under its section 23 provisions) meant that some potentially unsafe convictions in our sample of cases were not referred because of the (E)CCRC's requirements to be mindful of the Court's fresh evidence test. Nevertheless, just as the real possibility test was clarified over time by the evolving jurisprudence, so too will the courts in New Zealand put down markers on what is acceptable. It is important that the (NZ)CCRC be assertive in testing the limits of their independence from the Court. By making bold or repeat referrals in difficult cases, they will help to shape jurisprudence, given the Court's obligations to hear all referrals made by the Commission. There is no mention in the Act of the number of times the (NZ)CCRC can refer a case if the Court has previously upheld a conviction following a referral. It can be assumed, therefore, that like the (E)CCRC, it can refer a case as many times as it likes, and the Court will be obliged to grant a full appeal in each case, even if unimpressed by the Commission's obstinacy.

Of course, if Commissions regularly refer cases that do not present evidence of unsafety, Courts would issue rebukes, to the detriment of good relationships, and would, in any event, uphold the convictions. Balanced against these pitfalls is the potential to shift Courts' thinking in certain borderline cases, to the benefit of those applicants and others in similar cases. The line between a bold referral and an unconvincing case—the place at which the real possibility or the interests of justice tests are met—can be unclear, and the (NZ)CCRC must find its own path. In the absence of fresh evidence, the (E)CCRC can 'in exceptional circumstances' refer a case back to the Court. Some commissioners felt that it should be prepared to do so on occasion. As one explained,

> '… even if we . . . don't think that there's a real possibility that the Court would quash, on the basis of the rules, of the game that has got to be played, and we nevertheless have doubts about whether or not there's been a miscarriage, . . . we ought … in exceptional circumstances, to make a contrarian reference, . . . which then compels the Court to look again and justify the original decision or not.'

If commissions were prepared to push at the boundaries of their referral tests, and make bolder, sometimes 'contrarian' referrals, and if Courts were more inclined to be receptive to fresh evidence, and less deferential to the jury and the principle of finality, few would likely complain about restrictions imposed by the referral tests.

The wider remit of the Commission

As with the (E)CCRC, the Act that establishes the (NZ)CCRC proposed that 'the primary function of the Commission is to investigate and review convictions and sentences and

decide whether to refer them to the appeal court' (Clause 11). However, Clause 12 enables it to initiate and conduct inquiries into matters of a general nature that it identifies in the course of reviewing convictions or sentences and that it considers may be related to cases involving a miscarriage of justice or has the potential to give rise to such cases, if it is thought to be in the public interest. Furthermore, Clause 13 requires the Commission to promote public awareness and understanding of the Commission's functions. This met with approval in some submissions to the Justice Select Committee, though others expressed concern that such a role requires a different skill set and that such activities might prove a distraction from the primary function of reviewing wrongful convictions.

The English and Scottish commissions have a very similar remit. While they have no legal *obligation* to conduct engagement activities to improve trust in the criminal justice system, they are better positioned than other bodies as they see flaws across the justice process. The (E)CCRC occasionally investigates categories of cases proactively when reviews suggest that forensic science or expertise has evolved, and there is potential for identifying other similar wrongful convictions. For example, it reviewed previously closed murder and sexual assault cases following improvements in DNA testing. It also invited some of those previously convicted of murdering their own infants to reapply to the Commission in light of the Court's response to new expert evidence on the evolving science of intentional head injuries.[30] However, beyond casework focused reviews, the Commission rarely engages directly with other criminal justice institutions, preferring to let its detailed Annual Reports raise systemic concerns.

Its recent approach to the wrongful conviction of asylum seekers and others who had entered the UK without appropriate documents proved to be an exception to the Commission's typical reserve. Following erroneous legal advice, these applicants had pled guilty, despite a clear defence in law, and had been wrongly prosecuted and convicted in the magistrates' courts. After a number of successful referrals to the Court, the (E)CCRC recognised a pattern of systemic flaws and engaged robustly and somewhat successfully with defence and prosecution lawyers as well as with the UK Border Agency. Engagement aimed at persuading these agencies to respond effectively to the wrongfully convicted but also to try to prevent further miscarriages of justice (Sato, Hoyle, and Speechley 2017). Responses to the Commission's campaign to raise awareness of 'asylum cases' were positive, suggesting it is in a unique position to feed back into the justice system.

More recently, the (E)CCRC carried out an internal review of non-disclosure of potentially exculpatory evidence by the prosecution service, re-analysing 306 rape cases considered by the Commission between April 2016 and March 2018 (CCRC 2019). The ensuing report, published in 2019, and guidance note for applicants who consider disclosure to be an issue in their case, were aimed at systemic learning and assisting applicants.

While the Commission is first and foremost a casework organization, and currently has insufficient resources to go far beyond this, it is well placed to provide evidence of failings across the justice system and to hold to account agencies that have erred. Commissions should not shy away from this role, as was acknowledged in England by the Royal

[30] In *R v Cannings* ([2004], 2Cr App R 7).

Commission on Criminal Justice (1993, 184–5). Moreover, such approaches can encourage further particular applications, revealing that engagement and investigations are not mutually exclusive functions.

Another mechanism for promoting public awareness of the Commission's functions, as set out in clause 13 of the NZ Act could be the Statements of Reasons for referring or not referring cases back to the Court. Section 23 of the Criminal Appeal Act 1968 prohibits the (E)CCRC from publishing its Statements of Reasons, precluding other criminal justice institutions and the general public from learning the valuable lessons of their investigations. While Court judgments often refer to specific failings in the criminal process, if these have not directly caused the conviction to be unsafe, they may not be discussed in the published judgment. Besides, valuable information in the Statements of Reasons on the vast majority of cases that are not referred to the Court is never in the public domain though these too may describe systemic errors.

Of course, these statements contain information that applicants may not wish to be publicly available—including inculpatory evidence—and confidential information on witnesses and others. Hence, their permission would to be needed for publication, with opportunities for limited redaction. Nonetheless, publication of these statements could serve as Commissions' reflections on the health of criminal justice. It is interesting, therefore, to note that the NZ Act includes a provision (at Clause 26(2)) 'to make its decision [about whether or not to refer], and the reasons or a summary of the reasons, publicly available in the manner that the Commission considers appropriate.' This suggests that the (NZ)CCRC will be able to make use of this valuable evidence on the systemic sources of wrongful convictions to educate other criminal justice agencies as well as the public.

Conclusion

Concerns about the lack of integrity in the criminal process, and resulting miscarriages of justice, dented public confidence in the New Zealand justice system and generated interest in the introduction of a CCRC (New Zealand Law Society 2016). At the same time, comparison of the New Zealand Royal Prerogative of Mercy system with the (E)CCRC established that the New Zealand procedures were 'manifestly deficient' (Birdling 2011, 227). With the aim of restoring public confidence, various submissions to the Justice Select Committee that considered the Act made a strong case for a (NZ)CCRC to ensure that decisions about whether to refer a case back to the appeal court are transparent and made by an impartial body, not by the executive. They were unequivocal that 'an independent CCRC offers considerable improvements over the current New Zealand processes' (Birdling 2018, para. 44). Organisations such as the Wellington Howard League and the New Zealand Criminal Bar Association supported the Act not only because many miscarriages of justice are uncovered only after the standard appeals process has been exhausted, but because the previous Royal Prerogative of Mercy process was deficient, leaving many suitable cases without recourse to a second appeal.

After a few years in operation, the NZ(CCRC) should open its doors–and its files–to independent academic scrutiny in order that those organisations and individuals that

supported its establishment can tell if it has realised its goals. In the meantime, this article has drawn on a rigorous empirical study of the English Commission to consider the prospects for the (NZ)CCRC. It has considered the proposed investigative powers of the (NZ)CCRC; its criteria for referring cases back to the appeal court; and its wider remit beyond casework.

It has argued that while the proposed powers of investigation are reasonably wide, the (NZ)CCRC could benefit from an additional power to appoint external investigatory bodies, such as the police, to carry out supervised inquiries on matters beyond the Commission's expertise and authority. Conversely, the (NZ)CCRC might not need its proposed legal powers to compel other agencies to cooperate with its requests for data as most will likely comply voluntarily and there are, in any event, normative strategies to encourage compliance.

It was suggested that though the grounds for referring a case back to the appeal court in the NZ Act–the 'interests of justice' test–appear to be less restrictive than the English 'Real Possibility Test', the (NZ)CCRC will nonetheless be bound by similar conditions in relation to the applicant having exhausted his rights of appeal, fresh evidence or argument, and the prospect of the Court allowing the appeal. In other words, the (NZ)CCRC has also been placed in a position of deference to the Court and will therefore need to second-guess its response to referrals. In doing so, it should aim to be bold, to push at the boundaries of the test in meritorious cases.

Finally, while the primary function of the (NZ)CCRC must be to investigate potential wrongful convictions, a strong case has been made for its unique role in wider learning. It must be sufficiently well-resourced to hold the justice system to account when it errs, particularly when faults or transgressions reveal systemic shortcomings. The fault lines of an imperfect justice system established the rationale for the (NZ)CCRC. It should make a clear commitment to tackle them.

Funding
This research was supported by the Leverhulme Trust [RPG-2013-170]; and the University of Oxford John Fell Fund [103/926 2011 & 122/684 2013].

Acknowledgments
The author is grateful to Dr Mai Sato for research assistance.

Declaration of Conflicting Interests
The author declares no potential conflict of interest with respect to the research, authorship and/or publication of this article.

References

Ashworth, A. 1998. *The Criminal Process*. 2nd ed. Oxford: Oxford University Press.

Ashworth, A. and Redmayne, M. 2005. *The Criminal Process* 3rd ed. Oxford: Oxford University Press.

Birdling, M. 2011. “Correction of Miscarriages of Justice in New Zealand and England.” PhD diss., University of Oxford.

Birdling, M. 2018. “Submission on the CCRC Bill” https://www.parliament.nz/resource/en-NZ/52SCJU_EVI_80426_JU65544/46138d2b862f205dfe1cd1c77af139443239c13d

Burnett, R., Hoyle, C. & Speechley, N-E. 2017. ‘The Context and Impact of Being Wrongly Accused of Abuse in Occupations of Trust’. *The Howard Journal of Crime and Justice*, vol. 56. No. 2, pp. 176-197.

Campbell, K. and Denov, M. 2012. “When Justice Fails: Wrongful Convictions in Canada.” In *Criminal Justice in Canada*. Edited by J.V. Roberts and M.G. Grossman, 252-68. Toronto: Nelson Education.

Cialdini, R.B. 1988. *Influence: Science and Practice*. 2nd ed. Glenview, IL: Scott, Foresman.

CCRC (2019) “Report on Phase 2 of the CCRC Disclosure Review” https://s3-eu-west-2.amazonaws.com/ccrc-prod-storage-1jdn5d1f6iq1l/uploads/2019/07/CCRC-2242989-v1-CCRC-2232838-v3-JH_formatted_draft_disclosure_report.pdf

Dioso-Villa, Rl. 2014. “Out of Grace: Inequity in Post-Exoneration Remedies for Wrongful Conviction.” *University of New South Wales Law Journal* 37 (1): 349–75.

Dolor, S. 2019 Law Society supports Criminal Cases Review Commission, *NZ Lawyer*. https://www.nzlawyermagazine.co.nz/news/law-society-supports-criminal-cases-review-commission-262528.aspx?utm_campaign=Social-Media_NZL&utm_content=90925214&utm_medium=social&utm_source=twitter&hss_channel=tw-2302395151

Duff, P. 2009. “Straddling Two Worlds: Reflections of a Retired Criminal Cases Review Commissioner.” *The Modern Law Review* 72 (5): 693–722.

Francis, R. 2007a. ‘New evidence in the Peter Ellis case’, *New Zealand Law Journal*, November, 399.

Francis, R. 2007b. ‘New evidence in the Peter Ellis case’, *New Zealand Law Journal*, November, 439.

Gilbert, J. 2018. “Peter Ellis martyr to deranged prejudice.” *New Zealand Herald*. Retrieved from: https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11989759

Grøndahl, P. and Stridbeck, U. 2016. “When Insanity Has Gone Undiscovered by the Courts: The Practice of the Norwegian Criminal Cases Review Commission in Cases of Doubts about Insanity.” *Criminal Behaviour and Mental Health*, 26 (3), 212–24.

Hamer, D. and Edmond, G. 2013. “Truth or Lies: Overturning Wrongful Convictions. *The Conversation*.” http://theconversation.com/truth-or-lies-overturning-wrongful-convictions-20430

Hawkins, K. 2002. *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency*. Oxford: Oxford University Press.

Home Office. 1994. *Criminal Appeals and the Establishment of a Criminal Cases Review Authority: A Discussion Paper*. London: HMSO

Hoyle, C. and Sato, M. 2019. *Reasons to Doubt: Wrongful Convictions and the Criminal Cases Review Commission*, Oxford: Oxford University Press.

James, A. 2000. “The Criminal Cases Review Commission: Economy, Effectiveness and Justice.” *Criminal Law Review*: 140–53.

Little, A. 2018. “Significant step to correct miscarriages of justice.” https://www.beehive.govt.nz/release/significant-step-correct-miscarriages-justice
Malleson, K. 1993. *Review of the Appeal Process, RCCJ Research Study No 17*. London: HMSO.

Malleson, K. 1994. “Appeals Against Conviction and the Principle of Finality.” *Journal of Law and Society,* 21 (1): 151-64.

Mills, T. 2019. “Crims Will Get ‘Second Right of Appeal’ Under Planned New Laws.” *The Age*. https://www.theage.com.au/national/victoria/attorney-general-unveils-major-changes-to-criminal-appeal-laws-20191016-p5314t.html

Naughton, M, ed. 2009. *The Criminal Cases Review Commission: Hope for the Innocent?* Basingstoke: Palgrave Macmillan.

Naughton, M. 2018. *Tailored Review of the Criminal Cases Review Commission: Call for Evidence*. http://michaeljnaughton.com/wp-content/uploads/2018/01/MOJ-tailored-review-of-the-CCRC-10-January-2018-my-ID-removed.pdf.

New Zealand Law Society. 2016. “Most Convictions Safe, but How to Recognise Those That Aren’t: Justice William Young. *New Zealand Law Society.”* https://www.lawsociety.org.nz/news-and-communications/latest-news/news/most-convictions-safe-but-how-to-recognise-those-that-arent-justice-william-young

New Zealand Law Society. 2018. “Criminal Cases Review Commission Bill Introduced.” https://www.lawsociety.org.nz/news-and-communications/latest-news/news/criminal-cases-review-commission-bill-introduced.

Nobles, R. and Schiff, D. 2004. “A Story of Miscarriage: Law in the Media.” *Journal of Law and Society*, 31: 221-244.

Roach, K. 2015. “Comparative Reflections on Miscarriages of Justice in Australia and Canada.” *Flinders Law Journal*, 17(2): 381–432.

Roberts, S. 2017. “Fresh Evidence and Factual Innocence in the Criminal Division of the Court of Appeal.” *The Journal of Criminal Law*, 81 (4): 303–27.

Royal Commission on Criminal Justice. 1993. *Report*. London: Cm 2263.

Saguil, P.J. and Paul Sanguil, J. 2007. “Improving Wrongful Conviction Review: Lessons from a Comparative Analysis of Continental Criminal Procedure.” *Alberta Law Review*, 45: 117–36.

Sangha, B. 2015. “The Statutory Right to Second or Subsequent Criminal Appeals in South Australia and Tasmania, *Flinders Law Journal*, 17, 471-513.

Sato, M., Hoyle, C. and Speechley, N-E. 2017. Wrongful Convictions of Refugees and Asylum Seekers: Responses by the Criminal Cases Review Commission.” *Criminal Law Review*, (2): 106–22.

Schehr, R.C. and Weathered, L. 2004. “Should the United States Establish a Criminal Cases Review Commission?” *Judicature*, 88(3): 122–45.

Schultz, P. Wesley, J., Nolan, M., Cialdini, R.B., Goldstein, N.J. and Griskevicius, V. 2007. “The Constructive, Destructive, and Reconstructive Power of Social Norms.” *Psychological Science,* 18(5): 429–34.

South Australian Legislative Review Committee. 2012. *Report of the Legislative Review Committee on its Inquiry into the Criminal Cases Review Commission Bill 2010*.

Taylor, P. 2013. “Time for next Move, Says Ex-Judge.” *New Zealand Herald*. http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11131183.

Vaughan, R. 2019. Top lawyers share views on Criminal Cases Review Commission, ADLS, https://www.adls.org.nz/for-the-profession/news-and-opinion/2019/2/1/top-lawyers-share-views-on-criminal-cases-review-commission/

Webster, R. 1998. *The Great Children’s Home Panic*, Oxford: Orwell Press.

Wesley-Smith, M. 2016. Supreme Court Judge Calls for Criminal Review Body, *Newshub*. https://www.newshub.co.nz/home/new-zealand/2016/10/supreme-court-judge-calls-for-criminal-review-body.html#.WAT4spawyG8.twitter

White, M. 2016. “The Long Walk to Justice.” *The Justice Gap*. https://www.thejusticegap.com/long-walk-justice/

Wolitz, D. 2010. “Innocence Commissions and the Future of Post-Conviction Review.” *Arizona Law Review,* 52(4), 1027–82.