WALKING IN CIRCLES:

Why the Criminal Cases Review Commission Proposal Does Not Break the Circularity in Addressing Miscarriages of Justice

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I Introduction

The criminal justice system operates to convict the guilty and to prevent convictions of the innocent.[1] The safeguards in place that ensure errors are rare and access to justice is available, have traditionally been considered sufficient due to firm beliefs about the system's capacity to get it right.[2] However, the innocent are still convicted for crimes they did not commit. Little attention has been paid to these issues in New Zealand because wrongful convictions are typically considered to be something which more often happens overseas, because they are generally more publicised and exhibit greater public concern. Also New Zealand courts have not yet been forced to confront the reality of these errors, nor been under the same scrutiny as other jurisdictions.[3]

Even though the New Zealand criminal justice system has protections in place to prevent innocent people from being convicted, a significant part of the criminal justice system involves human decision making.[4] This necessarily lends itself to error on some occasions including but not limited to, eyewitness errors, false accusations and police and prosecutorial misconduct.[5] The safeguards in place, such as the abilty to appeal against conviction and the Royal prerogative of mercy, minimise these issues and address the errors when they arise, however practical use of these processes is limited. This means many miscarriages of justice may go unaddressed even though the victim of the miscarriage of justice's rights are severely impacted.

This has facilitated discussion about whether a Criminal Cases Review Commission ("CCRC") would be a valuable addition to the New Zealand criminal justice system, in the hopes it will better address any miscarriages of justice that occur. These concerns have began to be addressed through the CCRC Bill 2018.

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[1] Herbert L. Packer *The Limits of Criminal Sanction* (Stanford University Press, Stanford, 1968) at 165.

[2] Simon Mount "A Criminal Cases Review Commission for New Zealand" (2009) 3 N.Z. L. Rev. 455 at 459.

[3] William Young "The Role of the Court in Correcting Miscarriages of Justice" (2010) 16 Canterbury L. Rev. 256 at 266.

[4] Mount, above n 2, at 457.

[5] See page 22 of this dissertation for a more detailed listing of some of the causes of miscarriages of justice or Simon Mount "A Criminal Cases Review Commission for New Zealand" (2009) 3 N.Z. L. Rev. 455 at 457 – 458.

The CCRC Bill was introduced on 27 September 2018 and establishes a new, independent Crown entity. The Bill was produced in response to concerns of experts and members of the wider public about our systems for identifying and remedying miscarriages of justice.[6] These concerns have been outlined in earlier reports including Neville Trendle's 2003 report entitled The Royal Prerogative of Mercy: A Review of New Zealand Practice[7] and Sir Thomas Thorp's 2005 report entitled Miscarriages of Justice.[8] Both reports proposed the creation of an independent board or body to combat the issue of miscarriages of justice.

The successes of overseas jurisdictions in implementing a CCRC have also influenced the decision to create a Commission for New Zealand.[9] Similar bodies have existed in England, Wales and Northern Ireland for 22 years, and in Scotland for the last 20 years.

The CCRC Bill is to replace the power the Governor General has under section 406 of the Crimes Act 1961.[10] Currently the Bill is at the Select Committee stage with the report due on 17 October 2019.

This dissertation has two purposes. First, to analyse the current appeal and post-appeal processes within the criminal justice system that address miscarriages of justice and the redress that is currently available, including the proposed CCRC. Secondly, it recommends improvements to the proposed CCRC.

The first part of this dissertation will discuss the current processes that address miscarriages of justice and identify the issues that exist, namely the circularity that exists in the current processes. This will include appeals against conviction and the Royal prerogative of mercy.[11]

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[6] (16 October 2018) 733 NZPD (CCRC Bill – First Reading, Hon Andrew Little) at 7329.

[7] Neville Trendle "The Royal Prerogative of Mercy: A Review of New Zealand Practice"(2003) Peter Ellis Org <www.peterellis.org.nz>.

[8] Sir Thomas Thorp *Miscarriages of Justice* (Legal Research Foundation, Auckland, 2005) at 53.

[9] NZPD, above n 6, at 7329.

[10] At 7331.

[11] The Royal prerogative of mercy is not considered an appeal process, however it does refer a case back to an appellate court to be heard under the same grounds as an appeal against conviction. Therefore, for the purposes of considering the values behind the mechanism in this dissertation, it will be referred to as an appeal.

This part will then consider these processes against criminal justice theory in relation to appeals to see if they fulfil key values within New Zealand's criminal justice system.

The second part of this dissertation will discuss the remedies available when a miscarriage of justice is identified. This will include the redress available for successful appeals against conviction and the Royal prerogative of mercy, but will primarily focus on compensation for wrongful conviction and imprisonment because this is the most tangible form of redress available to someone suffering a miscarriage of justice.

The third part will then discuss the CCRC proposal in detail and elaborate on the value the Commission may add to the criminal justice system. This part will then consider whether the proposal resolves the key issues with the current process in determining miscarriages of justice as identified in the first part, primarily the circularity these processes establish.

The final part of this dissertation will consist of two recommendations to address the circularity promoted by the current processes and proposal. Firstly, how the proposed CCRC should be structured to have decision-making power and secondly, how the Criminal Procedure Act 2011 ("CPA") may be amended to improve how miscarriages of justice involving factual innocence are addressed within the criminal justice system upon establishment of the CCRC proposal.

A main challenge in writing this dissertation has been the limited research and academic work in the area of appeals and the principles behind them. This has required large amounts of abstract thinking about this area of law. There is also very limited work in the area of CCRCs and how they support the values of the criminal justice system. However, this is also part of the contribution of this dissertation, in that it outlines and discusses appeals and criminal justice values in relative depth and contributes to an area of current law reform.

A Definitions of Key Terminology

For the purposes of this dissertation three key terms need to be defined.

1 Factual innocence

"Factual" or "actual innocence" is the conviction of someone who did not commit the crime in question because it was perpetrated by another or no crime was ever committed.[12] Factual innocence is typically very difficult to establish conclusively.[13] In comparison, legal innocence is when someone should not under the rules of the legal system in question, have been convicted (which may include cases of factual innocence or factual guilt where conviction should not have occurred due to a procedural irregularity).[14]

2 Miscarriage of justice

For the purposes of this dissertation, "miscarriage of justice" will refer to the popular meaning of the term, being a false attribution of guilt onto someone who was factually innocent and had not committed the attributed crime. This is because there is a greater gap in the law with dealing with these issues, compared to errors of law, errors that may occur at trial and other procedural errors. These errors are within the Judiciary's scope of knowledge and competence, so they are more satisfactorily dealt with due to their experience with process issues rather than issues of outcome.[15] The term "wrongful conviction" will be used interchangeably with "miscarriage of justice" to refer to someone that has been convicted or sentenced but is actually factually innocent.

3 Fresh evidence

"Fresh evidence" will be defined as statements or facts of which a party was unaware and could not have become aware by reasonable diligence when preparing the case,[16] for the purposes of this dissertation.

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[12] Fiona Leverick, Kathryn Campbell and Isla Callander "Post Conviction Review: Questions of Innocence, Independence, and Necessity" (2017) 47 Stanton L. Rev. 45 at 49.

[13] At 50.

[14] At 50.

[15] See generally page 13 of this dissertation for further discussion of this point.

[16] Peter Spiller *New Zealand Law Dictionary* (9th ed, LexisNexis, Wellington, 2019) at 126.

Fresh evidence must be demonstrated as sufficiently fresh and sufficiently credible to be admissible at appeal.[17] If the evidence could with reasonable diligence have been called at trial, it will not qualify as sufficiently fresh.[18] However, the overriding criterion is whether admission would serve the interests of justice.[19] The priority given to preserving the finality of cases means those accused of crimes must deploy their best case at trial after diligent preparation, otherwise new trials could be obtained on the basis that further evidence was available.[20]

In some circumstances significant evidence may not be called. The stronger this evidence is for the accused the greater chance a miscarriage of justice may occur if not admitted, therefore the court may be more inclined to consider it sufficiently fresh or may remove that as a requirement.[21] If the evidence might lead a reasonable jury to have returned a different verdict, a miscarriage of justice will be shown.[22] Typically the requirement that evidence be fresh is of less importance where scientific evidence is involved,[23] but all species of new evidence must be submitted to the same test for admission.[24]

[17] *R v Bain* [2004] 1 NZLR 638 (CA) at [22].
[18] At [22].
[19] At [22].
[20] At [22].
[21] At [22].
[22] At [103].
[23] *Lundy v R* [2014] 2 NZLR 273 at [121].
[24] At [126].

II New Zealand's Current Arrangement for Identifying Miscarriages of Justice

The criminal justice system in New Zealand has two main mechanisms for addressing miscarriages of justice. These mechanisms include appeals against conviction under section 232 of the CPA and the Royal prerogative of mercy in conjunction with section 406 of the Crimes Act 1961. These processes are vital safeguards within New Zealand's criminal justice system, however the issues that arise in their practical function may ultimately compromise the effectiveness of the criminal justice values they aim to secure. Because these processes do not adequately address the issue of identifying miscarriages of justice, a CCRC has been proposed and is currently being considered by the Select Committee.

This Part firstly inquires into the current mechanisms that are available in New Zealand to address miscarriages of justice and secondly, inquires into what the appeals processes are for and the values behind appeals. This Part will argue that these processes do not adequately contribute to the values that appeals protect, especially in regards to miscarriages of justice because they create a circular process which fails uphold the due process based rights of the defendant and address the fundamental issues with miscarriages of justice.

A Appeals Against Conviction

Appeals against conviction are addressed by section 232 of the CPA. This is the most important section in the appeal structure[25] because it consolidates the grounds of appeal against conviction for all criminal proceedings.[26] Appeals against conviction are the first way someone suffering a miscarriage of justice may have their wrongful conviction addressed, however the process is not entirely suitable to rectify these issues because wrongful convictions still go unaddressed. This has created an area in the law that could be significantly improved by establishing a CCRC.

[25] Christopher Corns and Douglas Ewen *Criminal Appeals and Reviews in New Zealand* (Thompson Reuters, Wellington 2019) at 429.

[26] Simon France (ed) *Adams on Criminal Law – Criminal Procedure* (online ed, Brookers) at [CPA232.01].

The right to appeal against conviction applies to guilty pleas, as per section 232(5) of the CPA and convictions following trial. To commence an appeal under this section, an appellant must file a notice of appeal to the first appeal court or alternatively, a notice of leave to appeal to the Supreme Court.[27] This must be filed within 20 working days after the start of the sentence for the conviction the appellant wishes to appeal against (this time may be extended in some circumstances).[28] If the appeal is heard at the District Court or High Court it must be dealt with by way of hearing involving oral submissions, and if at the Court of Appeal or Supreme Court there is a presumption of an oral hearing.[29]

To successfully appeal against conviction, the appellate court must be satisfied that one of the following grounds is made out, (a) in a jury trial that the jury's verdict was unreasonable, (b) in a judge alone trial that the judge erred in their assessment of the evidence causing a miscarriage of justice, or (c) in any case, a miscarriage of justice has occurred.[30]

The first two grounds of appeal, section 232(2)(a) and (b), are relatively narrow in their scope, so section 232(c) is the primary ground through which most appeals are advanced.[31] In determining whether a miscarriage of justice has occurred for any reason, there must be an error, irregularity or occurrence in relation to or affecting the trial that has created a real risk the outcome of the trial was affected, resulted in an unfair trial, or a trial that was a nullity.[32]

When assessing whether there was a real risk the outcome of the trial was affected the court looks not at the magnitude of the error, occurrence or irregularity, but the effect on the outcome. This is quite broad (and likely to be the broadest ground for appeals against conviction), but the appellant must specify the error, irregularity or occurrence and then show in consequence why there was a real risk the outcome was affected. The effect must be more

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[27] Ian Murray *Laws of New Zealand* Criminal Procedure (online ed) at [437].

[28] At [437].

[29] France, above n 26, at [CPA232.15].

[30] Murray, above n 27, at [437].

[31] France, above n 26, at [CPA232.04].

[32] Criminal Procedure Act 2011, s 232(4)(a) – (b).

than inconsequential, inevitable or immaterial and the fact-finder must be affected.[33] This is a large burden to place on the appellant, especially as this ground is likely to be restricted to the issues recognised in case law[34] making it more difficult to establish what may be expected from the wording of the section. This is beneficial to secure certainty and finality in cases but restricts the convicted person's rights to redress potential errors and injustices, potentially compromising due process rights.

In regards to an unfair trial, more than a real risk of unfairness is required and the risk needs to be more than trivial.[35] This assessment looks at the process rather than the outcome and whether there was a real risk the facts were not determined impartially.[36] This ground is difficult to establish because a very large error is probably required.[37]

The last ground, the trial was a nullity, is a very narrow and rare ground to successfully appeal on.[38] There is little case law to indicate how this may be used to appeal, but it places a large burden on the appellant to show there was a fundamental procedural error that is not saved by any statutory provision (because proving this requires specification of complex requirements).[39]

When considering an appeal, the court has an obligation to reach its own assessment on the merits of a case but must be cautious where factual findings of the trial judge require a credibility assessment. These findings should not be reversed unless there is a compelling reason to do so or exceptional circumstances.[40] Failing to assess the trial judge's factual findings could be problematic because any errors that may arise could very easily go

[33] Jeremy Finn and Don Mathias *Criminal Procedure in New Zealand* (2nd ed, Thomson Reuters, Wellington 2015) at 215.
[34] At 215.
[35] At 218.
[36] At 218.
[37] At 218.
[38] At 220.
[39] At 220. See generally Jeremy Finn and Don Mathias *Criminal Procedure in New Zealand* (2nd ed, Thomson Reuters, Wellington 2015) at 220 for a further explanation of the requirements the appellant has to fulfil to establish this ground.
[40] Ian Murray *A Practical Guide to Criminal Procedure in New Zealand* (LexisNexis, Wellington, 2013) at 215.

unaddressed due to the lack of assessment. This leaves the due process rights of the defendant not vindicated with no accountability for how the error or injustice may have occurred.

An appeal against conviction after a guilty plea will rarely succeed if the defendant received competent and correct legal advice before entering the plea.[41] To succeed, the defendant must show in effect that a miscarriage of justice will result if the conviction is not overturned.[42] There are three broad categories where an appeal may be successful in these circumstances, the defendant did not appreciate the nature of the charge, the defendant could not have been guilty on the facts, or the decision was induced by a ruling that embodied a wrong decision of law.[43] The categories in which an appeal against conviction may be successful in these circumstances are narrow so they are hard to apply to general cases and typically require extraordinary circumstances for an appeal after a guilty plea to succeed. This limits the opportunity to appeal in these circumstances, for example when a defendant falsely confessed but there is little in the way of fresh evidence to prove the confession was false.

This system practically works, though it is not as effective as it could be due to the fact that miscarriages of justice still occur without being addressed or vindicated. Often at the appellate level, judges do not detect what have later found to be miscarriages of justice.[44] This is partially because judges tend to focus of process and may not be well equipped to identify innocence compared to guilt.[45] Reasons for this include that appellate judges tend to largely focus on process (partially due to the design and operation of the criminal justice system), they consider it disabling for the jury if appeals were a norm due to the public confidence in that process

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[41] *R v Stretch* [1982] 1 NZLR 255 (CA).

[42] *R v Le Page* [2005] 2 NZLR 845 (CA) at [16].

[43] At [17] – [19]. This list of categories is not necessarily complete, and more may be adopted if necessary as stated *Wilson v R* [2015] NZSC 189 at [104]. Some other categories include the defendant pleaded guilty on the basis of incorrect advice on the non - availability of certain defences or outcomes *R v Merrilees* [2009] NZCA 59, the appellants ability to determine whether or not to plead guilty was affected by a permanent impairment or lack of capacity by ill health or other circumstances *Gardiner v Levin District Court* HC Palmerston North CIV-2006-454-630, 24 November 2006; *Leeder v Christchurch District Court* [2005] NZAR 18 (HC), there was impropriety in the conduct of the proceedings or by the prosecution or misconduct by the police sufficient to grant a stay *Wilson v R* [2015] NZSC 189, or the court failed to provide an opportunity to vacate the guilty plea when entering a substituted sentence different to that when the plea was made.

[44] Young, above n 3, at 270.

[45] At 270.

and they are susceptible to becoming case hardened.[46] Utilising narrow and hard to reach tests with restrained approaches and prioritising procedural and systemic considerations increases the risk of miscarriages of justice going undetected within the criminal justice system, and possibly helps establish these issues. These issues create room for a CCRC to be established to create a system that addresses the issues of miscarriages of justice involving factual innocence effectively.

B The Royal Prerogative of Mercy

The Royal prerogative of mercy is a process to identify and remediate miscarriages of justice within New Zealand's criminal justice system by providing a special avenue for criminal cases to be reopened where a person may have been wrongly convicted or sentenced.[47] It is an important constitutional safeguard in New Zealand's criminal justice system[48] because it is a mechanism of last resort to identify and correct miscarriages of justice.[49]

The prerogative is very limited in its application, so it is not entirely suitable or practical to provide the remedies it makes available. This is partially because of the discretionary nature of the process and the limited evidence that is accepted for the purposes of these applications. The primary reason the practical application of the prerogative is limited is because the Court of Appeal is unwilling to hear cases on issues they have already determined,[50] which means there are very narrow circumstances in which an application for a miscarriage of justice may be heard, so this is the only available recourse after exhausting all statutory rights to appeal.[51] The impracticality and unsuitability of the prerogative means that it is extremely difficult for miscarriages of justice to be adequately addressed. Like with appeals against conviction, this dissertation argues these issues create room for improvement where a CCRC would be a valuable addition in the criminal justice system.

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[46] At 270.

[47] Stephanie Bishop and others *Garrow and Turkington's Criminal Law in New Zealand* (online ed, LexisNexis) at [CRI406.2].

[48] New Zealand Government "The Royal Prerogative of Mercy" (2019) The Office of the Governor General <www.gg.govt.nz>.

[49] Corns and Ewen, above n 25, at 624.

[50] At 12.

[51] At 172.

This power is exercised by the Governor General (on the Minister of Justice's advice) by virtue of a delegation in the Letters Patent constituting the Office of the Governor General of New Zealand.[52] The prerogative does not operate as another right of appeal and cannot be used to repeat arguments that were unsuccessful in the courts or to re-examine facts already considered by a judge or jury.[53] Therefore, the remedy is only practically useable when there is fresh evidence that throws doubt on the conviction or sentence.[54] This provides minimal opportunity for those suffering a miscarriage of justice to get past this hurdle due to strict requirements as to what counts as fresh evidence and because it is difficult to obtain in some cases.[55] The prerogative is not normally successful if the ordinary rights of appeal have not been exhausted.[56]

When the prerogative of mercy is sought, the process is as follows. First, the applicant has to complete the required application form, which is then referred to the Minister of Justice by the Governor General with a request for formal advice.[57] The Minister's office then asks officials at the Ministry of Justice to assess the application.[58] This involves reviewing the information and submissions provided in the application.[59] The Ministry may gather further information and make further inquiries or appoint an independent lawyer to help consider an application.[60]

At the end of this process, the Ministry reports on the application to the Minister of Justice, who then decides what advice to give to the Governor General.[61] When deciding whether to recommend referring the question to the Court of Appeal the Minister of Justice must consider the likelihood of the appeal succeeding. This requires consideration of the principles which

[52] At [CRI406.2].
[53] New Zealand Government, above, n 48.
[54] Corns and Ewen, above, n 25, at 624.
[55] Young, above n 3, at 261. See generally pages 8 – 9 of this dissertation for further explanation of the requirements to admit fresh evidence.
[56] Bishop, above n 47, at [CRI406.4].
[57] New Zealand Government, above, n 48.
[58] New Zealand Government, above, n 48.
[59]New Zealand Government, above, n 48.
[60]New Zealand Government, above, n 48.
[61]New Zealand Government, above, n 48.

underpin appeals to the Court of Appeal based on new or fresh evidence.[62] The Governor General considers this advice and their decision, and any further steps that are required are advised to the applicant.[63] The decision to exercise the prerogative is purely discretionary,[64] which raises issues of consistency, equality of treatment and fairness in the determination of any application.

Under Article II of the Letters Patent Constituting the Office of the Governor General, the Governor General may decide to grant a pardon (which is extremely rare),[65] grant a respite or grant a remit if the application is successful,[66] or alternatively use the power to refer the case to the court under section 406 of the Crimes Act 1961. Referral is what normally occurs when there appears to be a miscarriage of justice[67] or if there is new evidence.[68]

When a matter is referred to the relevant appellate court, the application must be heard or determined by the Court as if were a conventional appeal against conviction or sentence based on new or fresh evidence.[69] Normally applications for the exercise of the prerogative are referred in this way.[70] The court is not being called upon to re-adjudicate upon grounds of appeal that have already been heard or disposed of unless new matters or evidence comes to light that requires such reconsideration.[71] When the question of conviction or sentence is referred under section 406(1)(a) of the Crimes Act 1961, section 229 and section 232 of the CPA, which determine the outcome of appeals against conviction regularly, are imported.[72]

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[62] Corns and Ewen, above n 25, at 625. See generally pages 8 – 9 of this dissertation for description of the principles that determine the admissibility of fresh evidence.

[63] Bishop, above n 47, at [CRI406.3].

[64] Corns and Ewen, above n 25, at 173.

[65] New Zealand Government, above, n 48.

[66] See generally page 29 – 30 of this dissertation for further explanation of the forms of redress available under the Royal prerogative of mercy.

[67] New Zealand Government, above, n 48.

[68] Murray, above n 27, at [475].

[69] Corns and Ewen, above n 25, at 627.

[70] New Zealand Government, above, n 48.

[71] New Zealand Government, above, n 48.

[72] Bishop, above n 47, at [CRI406.4].

The CPA does not confer two rights of appeal to the Court of Appeal and once a final judgment has been delivered by the Court of Appeal, any further recourse is only available by leave of the Supreme Court.[73] The courts have emphasised their unwillingness to adjudicate on grounds that have already been disposed of on the merits (as the court is otherwise unable to go into the case again without recognising second appeals to the same court)[74] and will only allow referrals where new matters have come to light.[75] This is because the court has no jurisdiction to hear a second application for leave to appeal against conviction or sentence when one such application has already been heard and dismissed.[76] Therefore, it is unlikely that the Court of Appeal will hear a case where there has been a miscarriage of justice unless there is fresh evidence or other grounds that have not already been disposed of. Again, there are no guidelines as to how and when an application is to be referred under the section.[77] This means many opportunities to address the rights of those suffering a miscarriage of justice may go unaddressed in the pursuit of finality due to strict thresholds, compromising their due process rights and potentially allowing for abuses of process.

The Governor General may also refer a point to the Court of Appeal for their opinion under section 406(1)(b) of the Crimes Act 1961. This alternative is best used when no new matters or evidence has come to light which makes full reconsideration unnecessary or desirable and the appellant has exercised all their rights to appeal.[78] The Court informs the Governor General but the outcome of the application is for the Governor General to determine alone. This referral does not amount to a right of rehearing.[79]

The prerogative is considered to be an important constitutional safeguard, however in practice it does not have a significant effect on, or large role to play within the criminal justice system because it does not provide any 'new' opportunity for an application to be considered outside of the framework the case has already been applied to. When the court deals with a case on

[73] *Lyon v R* [2019] NZCA 311 at [16].
[74] At [16].
[75] Bishop, above n 47, at [CRI406.4].
[76] Murray, above, n 27, at [475].
[77] Corns and Ewen, above n 25, at 173.
[78] Murray, above n 27, at [476].
[79] Bishop, above n 47, at [CRI406.4].

the Governor General's behalf the argument falls back on the appeals process outlined in the CPA.[80] This is inefficient procedurally because it increases the costs used in determining applications and referrals and the time required to hear each case. For most cases, to demonstrating a wrongful conviction is almost entirely dependent on fresh evidence turning up after the trial has occurred.[81] These cases are very limited, or the cases where a miscarriage of justice may have occurred have little potential for something new to emerge. The rules for introducing new evidence are also very restrictive.[82] Therefore, victims of wrongful convictions may have no means to address the mistake, especially because the pardon is predominantly used now only in respect of sentences,[83] which will only address a small amount of those who are wrongfully convicted.

The prerogative is also very stringently applied. Between 1996 and 2003 there were 63 applications for the pardon.[84] Decisions were made in 47 cases with seven deferred to the Court of Appeal.[85] No pardons were granted in this period and 38 applications were declined.[86] Low rates of application and low rates of success tend to suggest the prerogative operates well in New Zealand.[87] However, this may also be because few people apply for the prerogative due to its inherent flaws and lack of public confidence in the criminal justice system.

Minority groups are also underrepresented in these statistics and rates of application are significantly lower than Pākehā.[88] Following the methodology provided by Sir Thomas Thorp in his 2005 report entitled Miscarriages of Justice and the information provided by a recent Official Information Act request,[89] if Māori and Pacific Islanders applied for the prerogative at the same rate as Pākehā, during the period from January 1995 to December 2018 there

[80] Young, above n 3, at 257.

[81] At 261.

[82] At 267. See generally pages 8 – 9 of this dissertation for further explanation of the requirements for admissibility of fresh evidence.

[83] Corns and Ewen, above n 25, at 623.

[84] Trendle, above n 7.

[85] Trendle, above n 7.

[86] Trendle, above n 7.

[87] At 637

[88] Thorp, above n 8, at 53.

[89] "Number and Ethnicity of Royal Prerogative of Mercy Applicants" (25 September 2019) 77804 (obtained under Official Information Act 1982 Request to the Ministry of Justice).

should have been approximately 114 applications for the prerogative from these groups compared to the 12 that actually occurred.[90]

The actions taken by the Ministry when assessing these applications also leaves room for improvement. The Minister of Justice, who is an elected politician advises the Governor General, which raises issues about political influence affecting the outcome of applications.[91] There is no direct solicitation of applications by the Ministry of Justice or the Governor General,[92] and assessing prerogative applications is often fitted around other priorities officials have, so they are dealt with on an ad hoc basis.[93] The process is non-transparent with little information available to the public (which can lend to abuses of process and discretion to ensure finality and certainty), and the Ministry's role is considered to be advisory rather than investigative.[94] This places a large burden on the applicant to compile large amounts of information in a thorough and comprehensive manner, often without access to legal assistance.

These issues suggest the prerogative is more of a decorative safeguard, rather than something that actually provides a material and accessible protection within the criminal justice system. Replacing this power with the CCRC would help ease these issues so long as the Commission actually addresses the fundamental issues the prerogative has and removed the circularity in the current processes.

C Justifications and Purposes Behind the Appeals Process

This part discusses the purpose and the justifications of appeals in relation to appeals against conviction and the Royal prerogative of mercy. The purpose and justifications are relevant to illustrate why the processes this dissertation discusses, including the CCRC proposal, may not completely achieve the purpose and values of the appellate system and why the recommendations this dissertation makes may achieve the purpose and values of appeals more effectively.

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[90] See Appendix II on pages 57 – 59 of this dissertation for the methodology and calculation of this statistic.

[91] Malcolm Birdling "Correcting Miscarriages of Justice" (2013) 2013 NZLJ 413 at 413.

[92] At 413.

[93] Mount, above n 2, at 471.

[94] At 471.

Appeals are the primary means to fulfil the New Zealand Bill of Rights Act 1990 ("NZBORA") obligation to provide the defendant an opportunity to have a conviction and sentence appealed.[95] Appeals are the main mechanism for an aggrieved person to challenge an unfair trial that resulted in an erroneous outcome, to avoid miscarriages of justice and to correct errors of law and ensure there is access to justice.[96] Appeals ensure correct decisions are made, ensure lower courts and public authorities are supervised and help develop consistency and uniformity in the Judiciary's operation.[97] This is important to have a fair and accountable criminal justice system.

Appeals against conviction and the prerogative of mercy serve this purpose. They demonstrate to the community that mechanisms are in place to ensure trials are fair (as required by the NZBORA)[98] which legitimises the criminal justice system[99] by allowing criminal defendants the opportunity to access a fair process that permits a review of their conviction or sentence.[100] This is essential for ensuring justice is done in each case and there is equality in treatment by the criminal justice system.[101] Correcting errors and ensuring that correct decisions are made are a crucial means of upholding the criminal justice system and deterring abuses of power by police, prosecution and trial judges.[102]

The Roman legal scholar, Justinian, suggested appeals had a private and public aspect. The private aspect provides private accountability to individuals.[103] This guarantees an individual's rights were evaluated and executed on the correct understanding of the law.[104] The public

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95 New Zealand Bill of Rights Act 1990, s 25(h).

96 Corns and Ewen, above n 25, at 4 – 6.

97 At 4 – 6.

98 New Zealand Bill of Rights Act, s 25(a).

99 Christopher Corns and Gregor Urbas "Criminal Appeals 1907 – 2007: Issues and Perspectives" (2008) 26 Law Context: A Socio-Legal Journal. 1 at 6.

100 Peter D. Marshall "A Comparative Analysis of the Right to Appeal" (2011) 22 Duke J. Comp. & Int'l L. 1 at 3.

101 At 3.

102 Andrew Sanders, Richard Young and Mandy Burton *Criminal Justice* (4th ed, Oxford University Press, Oxford, 2010) at 23.

103 Courts and Tribunals Judiciary "The Right to Appeal" (2019) <www.judiciary.uk>.

104 Ivor Richardson "The Courts and Access to Justice" (2000) 31 Victoria U. Wellington L. Rev. 163 at 164.

aspect corrects mistakes, which maintains and enhances confidence in the criminal justice system and provides guidance on future cases to facilitate certainty and the rule of law.[105] This creates consistency in approaches and in the administration of justice which harmonises the law.[106] Public confidence in the criminal justice system increases when miscarriages of justice do not occur and when courts dispense their function consistently and fairly.[107]

The right to appeal and the right to have errors of law and incorrect decisions rectified is a significant purpose of appeals and is a fundamental feature of a fair, accountable criminal justice system. Having a system of appeals and other methods of post-appeal review serves individual and broader public interests, and the interests of the legal and criminal justice system as a whole by upholding the rule of law.[108]

D Criminal Justice Theory Behind Appeals

The purpose and justifications of the appeals system suggest the main values supporting appeals against conviction, the Royal prerogative of mercy and the CCRC proposal. This section outlines the particular value-based considerations underlying the purpose of the appeals system and explains each of these points in individual detail. The value-based considerations that will be discussed include firstly, protecting individual rights (such as the defendant's right to a fair trial and victim rights), secondly, to detect and hold actors accountable for abuses of power and ensure there is equality of treatment, and thirdly, to protect certainty, finality and efficiency.

These values do conflict to some extent and require balancing of the due process values including protecting individual rights, accountability for abuses of power and equality of treatment against the crime control values of respect for certainty, finality and efficiency because each set of contrasting values promotes confidence in the criminal justice system in different ways.[109] No process is likely to be able to balance these values perfectly and the focus

[105] Courts and Tribunals Judiciary, above n 103.
[106] Richardson, above n 104, at 168.
[107] Marshall, above n 100, at 3.
[108] Corns and Ewen, above n 25, at 6.
[109] *Lyon v R,* above n 73, at [13].

on some tends to come at the expense of others. Consequently, the goals behind these mechanisms typically arise from general public or political conceptions of what the appeals processes should be doing and aiming to achieve.

1 Protection of individual rights of the defendant and victim

Appeals protect rights, primarily the individual rights of the defendant[110] and the rights of the victim. The individual rights of defendants that are protected include the right to a fair trial (which is fundamental and affirmed in the NZBORA) and access to justice. Allowing appeals and other methods of addressing miscarriages of justice means due process rights of the accused are protected by guaranteeing there are ways to correct mistakes and other impositions against their rights that may occur at trial or even in the stages before. These mistakes may include but are not limited to, issues with police or media conduct, inaccurate lay witnesses or flawed methodology used by expert witnesses, trial judges that may misdirect juries or make errors of law, juries that may misunderstand the law or evidence or make decisions based on irrelevant information, or the accused themselves may harm their position by falsely confessing.[111]

Addressing miscarriages of justice by allowing appeals ensures the understandings of the law are correct and consistent, which upholds the rule of law and facilitates the defendants understanding and knowledge of their position in law. This is critical for upholding the moral integrity of the criminal justice system by ensuring basic rights are respected. Infringements on the right to a fair trial and other due process rights encroach severely on individuals, so these infringements should be sufficient for an appeal to occur and a remedy to be received, regardless of the values that constrain the right to appeal. Protection of these rights is important to ensure the integrity of the criminal justice system. These rights demand an appeal if a miscarriage of justice occurs due to abuse of due process rights or allegations of error that

[110] Mount, above n 2, at 456.

[111] At 457. See Simon Mount "A Criminal Cases Review Commission for New Zealand" (2009) N.Z. L. Rev. 455 at 457 – 458 for a more detailed listing of some of the potential causes of miscarriages of justice at the stages before and during trial.

may lead to a wrongful conviction, which are encroachments a legitimate system should not accept.

The rights of victims are also protected by appeals. Even though complainants are not parties in criminal cases, finality is important for closure and recovery.[112] Arguably narrow thresholds for appeals and fewer appeals in general means victims feel like they have had their cases heard and finalised efficiently, which offers closure swiftly and reduces any re-traumatisation and distress from re-opening a case.[113]

However, a stronger argument is based on the interests victims have in preventing miscarriages of justice. For example, miscarriages of justice harm the victim, wider society and the defendant because the correct offender has not been held accountable.[114] Victims have a greater interest in preventing miscarriages of justice because the actual offender is more likely to be identified. Allowing an appeal may prevent further harm to the defendant and there is a greater chance the harm can be addressed by the State imposing a punishment on the person who should be held accountable.

The identity of the perpetrator may not always be at issue in criminal appeals. For instance there may be insufficient evidence or breaches of the suspect's rights during the investigation. In these circumstances the victim is more likely to have a greater interest in the suspect's appeal being unsuccessful so their individual interest in emotional redress for the crime is obtained. However, the overriding interest of the victim should be enforcement of their public interest in being subject to a fair and accountable justice system where due process rights are upheld.

Even though victims of crimes do have some interests that are protected by appeals, it is important to remember that criminal proceedings are between the offender and the state, not the individual victim. The victim's individual interest is not typically a core concern of the

[112] *Lyon v R*, above n 73, at [12].

[113] Sanders, Young and Burton, above n 102, at 44.

[114] At 45.

criminal law.[115] Because the harm is against the state, there disconnection between the victim's perceptions of justice, what the courts can accomplish and what the courts may objectively decide in criminal cases,[116] so their interests and their personal and emotional responses cannot be of such high importance that the fundamental principles of the criminal justice system are not upheld.

2 Accountability for abuses of power and equality of treatment

Appeals ensure there is accountability for abuses of power and that consistency and equality of treatment are protected. Upholding due process based rights allows accountability of those involved in these processes because these rights inherently try to protect against abuses of power. Appeals deter abuses of power by police, prosecution and trial judges by recognising any errors or abuses made by those in positions of power and presenting opportunity to rectify them. If there is an abuse of power by someone in a significant position in the pre-trial and trial processes, this abuse typically will be acknowledged by the appellate court and rectified, deterring similar actions occurring in the future but also acknowledging the abuse that occurred.

The criminal justice system places a lot of trust in the good faith of those holding these roles, so there should be some oversight and ability to address their errors. It can be argued that this should be restricted to methods of discipline outside the appeals system.[117] However, if police or prosecutorial conduct affects the rights of a defendant and causes a miscarriage of justice the remedy should be something that impacts the defendant and has more immediate and tangible consequences. If the appeals system could not look into these errors then there is no way to ensure that the wrong is remedied and there is no way for the defendant to practicably see any consequences that may occur, or rectification of the impact the error has had on them.

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[115] Peter Sankoff, "Is Three Really A Crowd – Evaluating the Use of Victim Impact Statements under New Zealand's Revamped Sentencing Regime" (2007) 2007 N.Z L. Rev. 459 at 461.

[116] At 462.

[117] Sanders, Young and Burton, above n 102, at 610. Compare to Herbert L. Packer *The Limits of Criminal Sanction* (Stanford University Press, Stanford, 1968) at 167 where he argues the criminal justice process is viewed as the most appropriate forum for correcting abuses under a due process based view because it maintains pressure to induce conformity of action.

Enforcing accountability and equality means there is consistency in the treatment of all defendants, encouragement of law-abiding behaviour by criminal justice actors[118] and fair, transparent processes for correcting miscarriages of justice.

3 Certainty, finality and efficiency

Certainty, finality and efficiency are fundamental values that are protected by the appeals system. Allowing more appeals, which the CCRC proposal could facilitate, is in conflict with these values. If appeals were the normality then certainty, efficiency and finality would be undermined.[119]

Certainty is a key value of the appeals system. This is because those impacted by trial decisions expect their outcomes to be correct, but also anyone relying on the decision in the future (for precedent, research or use by self-litigants for example) should be confident in the outcome having these qualities. Certainty in the criminal justice system lends itself to predictability, which is important for the rule of law, but also for finality. If there is certainty, decisions can be considered correct in their outcomes and final.

Finality is important to ensure the effectiveness and efficiency of the criminal justice system, but also to conserve resources, encourage efficient behaviour by defence counsel, deter crime[120] (which is arguably the most important function of the criminal justice system),[121] ensures justice is done to the parties involved and means judgments are otherwise final for those who are entitled to rely on these judgments.[122] Because crime is high and resources are limited there needs to be little opportunity for challenge so convictions can be made to uphold confidence in the performance of the system.[123] This means that to uphold certainty and finality in the law there can be little room for challenge in appeals. If the system and its processes were not final, then there would be a lot of wasted expense (in terms of time and

[118] At 613.
[119] At 610.
[120] At 21.
[121] Packer, above n 1, at 158.
[122] *Lyon v R*, above n 73, at [10].
[123] Sanders, Young and Burton, above n 102, at 22.

money), there may be a lower standard of representation (because there is less incentive to make sure there are no errors during trial), and reduced knowledge of what is to occur upon breaking the law for the general public.[124] This aligns with the idea that our processes should aim to avoid errors and ascertain the truth so finality and certainty can be achieved. At some stage there needs to be a final conclusion to criminal proceedings for the benefit of parties, witnesses, the courts and the public.[125]

Arguably these values should take precedence over due process based values so grounds of appeal remain narrow and focused on whether an obvious error has occurred.[126] The requirement of access to justice and other due process values protected by appeals need to be balanced with values like finality.[127] Finality and certainty are important to ensure that the appeal system is not abused and resources are used appropriately for meritorious claims, however these values come at the expense of the defendant who is the person primarily harmed when a miscarriage of justice occurs. Recourse at the expense of finality is necessary in situations where wrongful convictions occur because the rights of the person convicted should be pre-eminent in these situations.[128]

E How do these Values Relate to the Processes this Dissertation Examines?

Appeals against conviction and the Royal prerogative of mercy address the justifications for having appeals and the values behind appeals and post-appeal methods of review. Appeals against conviction and the prerogative fulfil the obligations the state has under section 25 of the NZBORA by allowing challenges to the trial and appeal outcome by providing opportunity for errors to be corrected and redressed, which creates consistency and uniformity in the law. This ensures individual interests in the outcome of cases are validated, but also the public interest in having a system that follows the rule of law and upholds the rights of its citizens.

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[124] Andrew Chongseh Kim "Beyond Finality: How Making Criminal Judgments Less Final can Further the Interests of Finality" Utah L. Rev. 561 (2013) 561 at 564.
[125] Corns and Ewen, above n 25, at 11.
[126] Sanders, Young and Burton, above n 102, at 610.
[127] Corns and Ewen, above n 25, at 12.
[128] *Lyon v R*, above n 73, at [14].

The current mechanisms that are in place enforce certainty and finality in the law, but compromise other due process values due to the lack of second appeals to the same court, the narrow and high threshold tests and the large burden placed on the applicant (especially when applying for the prerogative). These processes do not adequately contribute to some of the important values behind appeals or those which support the correction of wrongful convictions, and are not completely fit for the purpose they try to achieve. This is because they manifest a circular process where those suffering from a miscarriage of justice are subject to the same criteria in each step taken to have their wrongful conviction addressed and may even enable the occurrence of wrongful convictions.

III How Miscarriages of Justice are Addressed in New Zealand when they are Identified

When a miscarriage of justice is identified, either through an appeal against conviction or through the Royal prerogative of mercy, various forms of redress are available to mitigate the wrongful conviction. The forms of redress include those available for successful appeals against conviction and the remedies available for a successful application for the exercise of the prerogative of mercy, as well as release from prison or cancellation of the sentence if the individual is still subject to one. Alternatively, a miscarriage of justice may be addressed by compensation for wrongful conviction and imprisonment. This is the only way someone that has been wrongfully convicted can receive tangible redress, however the process in determining its award is fundamentally flawed.

The way miscarriages of justice are addressed can be improved to ensure there are material remedies available for those that have suffered a wrongful conviction. This part of this dissertation will firstly identify the redress available for appeals against conviction and the Royal prerogative of mercy. Secondly, this part will then address compensation for wrongful conviction and imprisonment, the issues with this process and why it should be included within the CCRC's powers.

A Redress for Appeals Against Conviction

If an appeal against conviction is successful under section 232 of the CPA the court has a variety of powers to address the conviction. Under section 233(2) to (3) of the Act the Court must set aside the conviction and either, (a) direct that a judgment or acquittal be entered, (b) direct that a new trial be held, (c) exercise the powers under section 234, (d) exercise the powers under section 235(2) or (e) make any other order that justice requires.[129] The court may also exercise the powers under section 236 of the Act.[130] The breadth of these powers is to accommodate all the circumstances that may arise on a conviction appeal.[131]

[129] Criminal Procedure Act, s 233.

[130] Section 233.

[131] Corns and Ewen, above n 25, at 481.

Under section 234 a conviction or sentence for a different offence may be substituted. If a person was found guilty of an offence at trial and the first appeal court allows the convicted person's appeal against conviction for that offence, the court may direct a judgment of a conviction for a different offence (including an offence that the trial court could have substituted for the initial offence), or if the court is satisfied the facts admitted by the convicted person for the initial offence support a conviction of a different offence may, if the convicted person agrees, direct a judgment of conviction for the alternative offence be entered.[132]

Section 235 of the Act allows the court to acquit a convicted person if they should have been acquitted at trial on account of insanity at the time of the offence.[133] Finally, the court may confirm or substitute a sentence for another offence under section 236 of the CPA. If the first appeal court allows a convicted person's appeal against conviction for one offence the court may confirm the trial court's sentence for the offence they imposed, substitute any sentence that is allowed by law or remit the proceeding to the court that imposed the initial sentence to confirm the sentence or substitute with any sentence allowed by law.[134]

B Redress for the Royal Prerogative of Mercy

When the prerogative is awarded the Governor General may grant a pardon, grant a respite or grant a remit as per the Letters Patent Constituting the Office of the Governor General of New Zealand.

The Governor General may grant a full pardon, or a pardon subject to lawful conditions.[135] The effect of a full pardon is to clear the applicant from all consequences of the offence it is awarded for, so the applicant is deemed never to have committed the offence.[136] Granting of a free pardon does not affect anything lawfully done or the consequences or anything unlawfully done before it is granted.[137] A person granted a free pardon may never be charged

[132] Criminal Procedure Act, s 234.

[133] Section 235.

[134] Section 236.

[135] Letters Patent Constituting the Office of the Governor General of New Zealand (SR 1983/225), cl 11(a).

[136] Murray, above n 27, at [475].

[137] Crimes Act 1961, s 407.

in any court with the crime for which the pardon is granted. When a person is granted a free pardon, it cannot be said that the pardon may imply the Executive accepts the applicant committed the offence but is forgiving that person.[138] Therefore a pardon does not place any accountability on the State.

Alternatively, the Governor General may grant a respite. A respite may be granted for an indefinite or specified period against the execution of any sentence passed on the applicant in any court of New Zealand.[139] This is basically a grant of relief from the sentence.

The last option available to the Governor General is to grant a remit. This may be subject to lawful conditions and may be granted against the whole or part of any sentence, or of any penalty or forfeiture otherwise due on account of any offence in respect of which the applicant has been convicted by any court in New Zealand.[140] This effectively amounts to cancellation of the sentence, penalty or forfeiture.

Even though these remedies are available to the Governor General, they are rarely awarded in response to a miscarriage of justice. As discussed previously, the Royal prerogative of mercy is typically awarded in response to sentences rather than convictions.[141]

C Compensation for Wrongful Conviction and Imprisonment

Determining how to place value on subjective non-pecuniary losses that impact people differently, and adequately calculating pecuniary losses that arise when someone is wrongfully convicted or imprisoned is a difficult task. Once a wrongful conviction has been found and quashed, as a matter of law the accused should not have been convicted.[142] In some cases, the convicted person will be factually innocent and in such cases the prosecution should never

[138] *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252 (CA) at 253.

[139] Letters Patent, above n 135, at cl 11(b).

[140] Clause 11(c).

[141] Corns and Ewen, above n 25, at 623.

[142] At 631.

have been commenced against them.[143] This raises questions as to whether this person should be compensated by the State.

There is no legal right to compensation for wrongful conviction and imprisonment in New Zealand because article 14 (6) of the International Covenant of Civil and Political Rights ("ICCPR") was not acceded to.[144] This is why the right to compensation is not included within the NZBORA or any other statute in New Zealand.[145] However, the Government has discretion to compensate someone wrongfully convicted and imprisoned by making an ex gratia payment.[146] In exercising the discretion to determine compensation, Cabinet has created guidelines to assist in determining this.

The process starts with the applicant writing to the Minister of Justice seeking compensation.[147] The Ministry of Justice initially assesses each claim.[148] Claims meriting further assessment are referred by the Minister of Justice to a Queen's Counsel ("QC") for advice.[149] The QC then reports to the Minister on the merits of the claim.[150] If the QC is satisfied that the applicant is innocent on the balance of probabilities, the QC will recommend an appropriate amount of compensation in line with the guidelines.[151] Cabinet makes the final decision on recommendation of the Minister.[152] To be eligible for compensation, claimants must have been imprisoned and have served all or part of their sentence, and been subsequently pardoned or had their conviction quashed.[153]

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143 At 631.

144 At 631. See generally page 54 of this dissertation for the reservation the New Zealand Government entered against this article.

145 At 632.

146 Ministry of Justice "Backgrounder: Compensation for Wrongful Conviction and Imprisonment" (May 2015) <www.justice.govt.nz>.

147 Ministry of Justice, above n 146.

148 Ministry of Justice, above n 146. See generally Appendix III on page 60 of this dissertation for a diagrammatic version of the compensation process.

149 Ministry of Justice, above n 146.

150 Ministry of Justice, above n 146.

151 Ministry of Justice, above n 146.

152 Ministry of Justice, above n 146.

153 Ministry of Justice, above n 146.

Claims either fall within the guidelines or outside of the guidelines. If the applicant is eligible for compensation under the Cabinet guidelines the Ministry will go on to advise the Minister whether the claim merits further assessment.[154] If so, the Minister will then appoint a QC to assess the claim further, who will advise on whether the applicant has established innocence on the balance of probabilities.[155] If this is established, the Minister may seek advice from the QC on the amount of compensation that should be made available in line with the Cabinet guidelines.[156] The Minister then makes recommendations to Cabinet, which decides on payment and the quantum of compensation.[157] If the Ministry does not advise the claim merits further assessment or the QC does not find innocence on the balance of probabilities then the application will fail, and the Minister will write to the applicant declining compensation.[158]

If the applicant is not eligible under the Cabinet guidelines, there is still discretion to compensate in extraordinary circumstances.[159] The Minister will decide if the claim will be considered further, and if so, by whom.[160] The applicant must then establish innocence on the balance of probabilities and that there are extraordinary circumstances so that it is in the interests of justice that compensation be paid.[161] If the advice is in favour of compensation, the Minister may seek advice on the amount of compensation taking into account the Cabinet guidelines.[162] The Minister then makes recommendations to Cabinet, which decides on payment and the quantum of compensation.[163] If the applicant cannot establish innocence or extraordinary circumstances, the application will fail and the Minister will write to the applicant declining compensation.[164]

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[154] Ministry of Justice, above n 146.
[155] Ministry of Justice, above n 146.
[156] Ministry of Justice, above n 146.
[157] Ministry of Justice, above n 146.
[158] Ministry of Justice, above n 146.
[159] Ministry of Justice, above n 146.
[160] Ministry of Justice, above n 146.
[161] Ministry of Justice, above n 146.
[162] Ministry of Justice, above n 146.
[163] Ministry of Justice, above n 146.
[164] Ministry of Justice, above n 146.

If the application is successful and Cabinet decides compensation is available, there are three kinds of compensation available as contemplated by the guidelines. First, payments for non-pecuniary losses following conviction (such as loss of liberty or emotional harm) that is based on a starting figure of $100,000 for each year in custody, payments for pecuniary losses following conviction (including loss of livelihood and future earnings) and a public apology or statement of innocence (which are rarely given).[165]

This process is problematic because Cabinet has overriding discretion to make a decision on whether compensation is ultimately awarded. The process reserves Cabinet's discretion by using vague, unclear and non-descriptive wording (like 'merits further assessment' and 'extraordinary circumstances') and allows Cabinet to treat the recommendations they receive as suggestions. The process itself is barely articulated or displayed publicly, so it could easily become political in nature or abusive and unfair in the use of discretion, causing lack of public confidence in the process.

This could be one reason why there have only been 27 applications for compensation between 1998 and 2016.[166] There is no way to review these decisions, so there is little accountability in the process.[167] Compensation itself is well known to be awarded at a reduced value than what it should be when calculated correctly and it does not imply any fault on behalf of the state unless a public apology is included.[168] Therefore there is financial assistance, but little to address the wrong that actually occurred, or accountability for the mistake in general. The flaws in this process give rise to an opportunity to reform the compensation process so the award of compensation becomes fairer, with improved methods to calculate quantum.

Compensation for wrongful conviction and imprisonment is an important form of redress available to those that have suffered a miscarriage of justice because it is tangible and substantially addresses the wrongful conviction, compared to the forms of redress available for appeals against conviction and the prerogative of mercy. Even though compensation is an

[165] Ministry of Justice, above n 146.
[166] Corns and Ewen, above n 25, at 144.
[167] At 144.
[168] At 144.

important form of redress, it is not widely used, likely because of a variety of reasons including the lack of accountability and transparency in the process, the large amounts of discretion available to Cabinet and because any quantum award is typically at a reduced value. The issues with compensation could be solved by including the process within the CCRC's powers or amending the CPA to allow judges to determine compensation upon recommendation of the CCRC.

D Why are these Forms of Redress Inadequate to Address Miscarriages of Justice?

These forms of redress do not adequately address miscarriages of justice because the circumstances in which tangible redress is awarded is very rare. The redress available for appeals against conviction and the Royal prerogative of mercy only establish that a person should not have been convicted of the particular defence as a matter of law.[169] This fails to provide any real remedy to the person who was suffering the miscarriage.

Compensation for wrongful conviction and imprisonment may provide tangible redress to those that suffered a miscarriage of justice but were factually innocent. The issue with this form of redress is its award is rare due to the discretionary nature of the process and the discretionary quantum determination of any award. This creates an area that could be improved to ensure the process is transparent and the quantum is fair.

Inadequately remedying miscarriages of justice conflicts with the due process values of the criminal justice system. This is because the miscarriage of justice is not corrected in a meaningful way to the victim of the wrongful conviction and barely acknowledges the infringement on their rights. The lack of acknowledgement can further reduce individual and public confidence in the criminal justice system, and the wider legal system more generally. The discretionary nature of compensation for wrongful conviction and imprisonment in particular does not ensure the victim of the miscarriage of justice is treated with equality, nor assists their knowledge of their rights in law.

[169] At 631.

Compensation is very closely related to reviews of miscarriages of justice, especially where factual innocence is involved. The nature of compensation being a remedy for miscarriages of justice involving factual innocence suggests it should be included in the CCRC proposal, or the CPA should be amended to include a provision specific to compensation, to create a transparent, fair and comprehensive body that deals with issues of factual innocence, but also the issues in how miscarriages of justice are addressed.

IV The Criminal Cases Review Commission Proposal

Our systems for identifying and remedying miscarriages of justice have raised concerns by experts and members of the wider public.[170] In response to this and based on the successes of overseas jurisdictions, Parliament introduced the CCRC Bill 2018 on the 27th of September 2018. The Bill establishes a new independent Crown entity to review convictions and sentences. The Bill is currently at the Select Committee stage with the report due on the 17th October 2019 (this report was due earlier in the year, however it has been pushed back multiple times to this date). This part of this dissertation will discuss the CCRC Bill 2018 and what it proposes to do, but also will raise some fundamental issues with the proposition especially in relation to how the proposal enforces the circularity at issue in the current processes that address miscarriages of justice.

The CCRC Bill 2018 will establish a new, independent Crown entity consisting of at least three but no more than seven commissioners, with at least one third of the commissioners being legally qualified and two thirds of commissioners having a background in the criminal justice system.[171] Operating as a Crown Entity means that the Commission can be independent from Ministers, the courts, and relevant State sector organisations. The appointment of commissioners will also take into consideration the desirability of diversity and an understanding of Te Ao Māori in particular.[172] Having a diverse membership with a varied skill set is to enable the Commission to have the necessary mix of skills and experience for its decision making and governance.[173]

The primary function of the Commission will be to review convictions and sentences and decide whether to refer them to the appropriate appeal court.[174] The Commission will be able to receive applications from any living convicted person (or their representative).[175] The

[170] NZPD, above n 6 at 7329.

[171] Criminal Cases Review Commission Bill 2018 (106- 1), cl 9.

[172] NZPD, above n 6, at 7329.

[173] At 7329.

[174] Criminal Cases Review Commission Bill, cl 11.

[175] Clause 21.

Commission is also able when in the public interest, to make initial inquiries on its own initiative on behalf of someone that may be wrongfully convicted, though it must seek the consent of the individual concerned to proceed to a full investigation.[176] Investigations will be thorough and will involve examining large quantities of relevant files, interviewing applicants or witnesses, forensic testing or instruction of experts.[177] The investigatory role should help to remove some of the burden that currently rests on applicants and reduce the need to have access to legal assistance.

If the Commission finds evidence of a matter that may be causing or contributing to miscarriages of justice when investigating a case, it will be able to launch a thematic inquiry into these issues.[178] The intent of this power is to add a quasi-preventive function to the Commission's work. The Commission also is required to promote public knowledge and understanding of its functions[179] which will be important to engage with potential applicants, especially Māori and Pacific peoples due to their disproportionately low rates of engagement with the prerogative of mercy.[180]

The most important function of the Commission is the power to refer cases back to the courts for a fresh appeal. Clause 17 of the Bill provides this power and states the Commission can refer convictions or sentences to the appropriate appeal court if after reviewing the application, it considers referral is in the interests of justice.[181] In deciding whether to refer, the Commission must have regard to a number of points, (a) whether the convicted person has already exercised their rights to appeal against conviction or sentence, (b) the extent to which the application relates to argument, evidence, information, or a question of law previously raised or dealt with in the proceedings relating to the conviction or sentence, (c) the prospects of the court allowing the appeal and (d) any other matter that the Commission might consider relevant.[182] Decisions made by the Commission cannot be appealed, making this the final

[176] Clause 27.

[177] NZPD, above n 6, at 7330.

[178] Criminal Cases Review Commission Bill, cl 12.

[179] Clause 13.

[180] NZPD, above n 6, at 7329.

[181] Criminal Cases Review Commission Bill, cl 17.

[182] Clause 17.

chance for a potential miscarriage of justice to be considered[183] which preserves the value of finality. When an application is referred, the appeal court[184] is required to hear the matter as if it were an appeal against the conviction or sentence.[185]

There are benefits in imposing a Commission like this. The predominant benefits include the investigatory expertise the Commission would develop and increased transparency and independence in addressing miscarriages of justice. There would also be a reduced burden on applicants, especially those that are unrepresented[186] or with cost barriers otherwise preventing an application, and the successful experience of overseas jurisdictions which would hopefully be similar to New Zealand if the Commission is imposed. The Commission should also address the underrepresentation of Māori and Pacific Islanders by creating a process they may have more confidence in and knowledge of, to increase their engagement and rates of application. The Commission is will help address more miscarriages of justice compared to the current processes (based off the experience of overseas jurisdictions), however the Commission's primary function is flawed because the actual issues that must be addressed in relation to miscarriages of justice have not been fundamentally analysed.

The Commission's main function is to act as a referral body back to the relevant appellate court, which will typically be the Court of Appeal. This is problematic because this is currently how the prerogative is primarily used under section 406 of the Crimes Act 1961, where the courts have established they do not look into cases that have already been heard unless there is fresh evidence or other grounds that have not already been disposed of. This is unlikely to be fulfilled by applicants, therefore no new opportunity is provided by the Commission for applicants to have their cases heard because there is no new framework to aid the court's assessment of the applications.

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[183] Corns and Ewen, above n 25, at 13.

[184] Clause 18 of the Criminal Cases Review Commission Bill determines which appellate court is the relevant court for a particular case. However, the relevant court is likely to be the Court of Appeal because most applicants will have exhausted all their rights to appeal before applying to the Commission.

[185] Criminal Cases Review Commission Bill, cl 20.

[186] Thorp, above n 8, at 53.

Allowing the courts to apply the same criteria in determining applications, with no new and specific grounds to consider, means they will continue to use a process based approach because this is where their expertise is,[187] especially under section 232 of the CPA, which does not address the issue of actual innocence being unaccounted for. Referring applications back to the court creates a very circular process, resulting in applications going back to the courts after the rights to appeal are exhausted even though they do not look at second appeals to the same court.[188] This is a waste of resources, especially time and money, it creates an undue burden on the applicant because they have to go through very similar processes multiple times, all requiring substantial amounts of information gathering. Few people suffering miscarriages of justice have the funds to pay for professional assistance[189] which also increases the burden on the applicant.

When the Commission decides whether to refer a case to the courts, a noteworthy consideration is the prospects of the court allowing the appeal as under clause 17(2)(c) of the Bill. If proper consideration was given to this point, few cases could be referred for the reasons discussed above. The new criteria proposed by the Commission may encourage more people to apply, however their cases are unlikely to be adequately identified, assessed or redressed at all under this framework, essentially amounting to a false promise which could further reduce confidence in the criminal justice system.

A CCRC would undoubtedly benefit the criminal justice system, but its proposed design leaves much to be desired. The Bill creates an illogical piece of proposed legislation that is circular and does not create any new or different opportunity for appeal, which wastes resources. If a Commission is to be introduced, it should be done correctly and should add value to the criminal justice system and enhance the confidence in it.

These issues are likely to have arisen in the formulation of this Bill because when creating the proposal the issue was not correctly identified and defined. The Bill was also based off the

[187] Young, above n 3, at 270.

[188] See Appendix I on page 56 of this dissertation for a diagrammatic version of the current and proposed appeals processes for dealing with miscarriages of justice.

[189] Thorp, above n 8, at 54.

successes of overseas jurisdictions which have different contexts to New Zealand and may not necessarily fit within our current judicial and appeal system. It also appears the creation of this Bill may have been rushed to push through the policy objectives and promises made during the election process, so it was not necessarily carefully thought out. Regardless of why the Bill was created in this way, there is significant room for improvement in its composition if it is to be a valuable addition to the criminal justice system and if it is to identify and address miscarriages of justice effectively.

A How Does the Criminal Cases Review Commission Proposal Address the Values of the Criminal Justice System?

This dissertation argues that establishing a CCRC adds to the flaws in the current processes by manifesting a circular process which does not address the issue it tries to solve, namely identifying and addressing miscarriages of justice. Additionally, this proposal does not adequately contribute to some of the important values behind appeals, is not completely fit for the purpose it tries to achieve and makes little contribution to the criminal justice system any more than the processes currently in place.

This is because there is no greater protection of the individual rights of the defendant or increased access to justice. Nothing suggests that referral back to the Court of Appeal or other relevant appellate court, evaluating applications off the same criteria, will increase the correction of errors. The proposal fails to increase the certainty of the law because the proposed process to address miscarriages of justice enforces circularity and is unclear. Finality also takes longer to achieve because there are many steps, based on criteria that may have been unsuccessful at earlier stages of the appellate process, necessary to have miscarriages of justice addressed which increases the time for a decision to be finalised.

If the due process values of the defendant are balanced to be more important than the requirements of finality in cases of miscarriages of justice, then this creates room for these processes to be improved. To uphold the due process values and purposes that appeals protect, the CCRC proposal needs to be reconsidered to remove the circularity that it and the

current processes enable to ensure it will be a valuable addition to New Zealand's criminal justice system.

V The Recommendations

This part of this dissertation looks at how the flaws discussed in the previous parts can be improved and provides recommendations on how this may be achieved.

The CCRC will benefit New Zealand's criminal justice system, however if its structure and expected application was re-examined it could be of much greater value and practical use. The main issue with the proposed legislation is that it creates a circular process where majority of all applications will go back to the Court of Appeal for reconsideration under section 232 of the CPA, even though successive appeals to the same court are barred in New Zealand.[190]

If the Commission acts solely as a referral body when assessing applications it will not address the issues it seeks to solve in any meaningful way. This is because miscarriages of justice may remain unaddressed if applicants have been unsuccessful at the appellate level and the proposal takes applicants back to a court they have already dealt with, without different criteria to consider the application under. This does not support the values of the criminal justice system and will lead to reduced confidence in the legal system.

Compensation for wrongful conviction and imprisonment is closely related to the CCRC proposal because it is the most tangible form of redress available for those that have suffered a wrongful conviction. However, this is a fundamentally flawed mechanism due to the large amount of discretion Cabinet has in determining whether compensation may be awarded and the lack of accountability and transparency in the process.[191] Compensation fails to address the infringement of rights on the person who suffered the wrongful conviction because there is rarely accountability for the error and because the quantum of any award is often based on political concerns. Due to the close link between compensation as a remedy and the Commission's function of identifying miscarriages of justice, it is logical include compensation within the Commission's function to create a more comprehensive and practical body.

[190] *Lyon v R,* above n 73, at [16].

[191] Corns and Ewen, above n 25, at 144.

The issues with these processes suggest features that can be improved to create a comprehensive, practical and functional entity. The main aspects that can be improved are the circular nature of the appeal and post-appeal processes and the lack of transparency and discretionary (or even political) nature of compensation for wrongful conviction and imprisonment.

To improve these issues this dissertation firstly recommends that the CCRC is not a referral body. Instead, the Commission should be a body with decision-making powers to determine all decisions relevant to its applications, including the outcome of each application and whether compensation is awarded. The second recommendation suggested by this dissertation is amending the CPA to provide the courts new criteria to consider CCRC applications under (similar to section 232 of the CPA) and to provide a new section or sections that address compensation for wrongful conviction and imprisonment that the court may use if deemed relevant to the application by the CCRC.

A Recommendation One: Restructuring the Criminal Cases Review Commission

This dissertation argues the current structure of the CCRC needs to be adjusted to provide the Commission wider decision-making powers. The structure of the Commission needs to change so miscarriages of justice are adequately identified and addressed, especially where factual innocence is involved because appeals and post-appeal reviews do not sufficiently account for this.

To be successful, the Commission needs to remedy the circular appeal and post-appeal processes that identify miscarriages of justice, and create a process to determine compensation that is less discretionary and more transparent. To remediate the current flaws in the way miscarriages of justice are addressed the Commission will require greater powers than the referral abilities it is proposed to have. The CCRC should be a comprehensive investigative entity that makes all the decisions regarding its applications, including the outcome of applications (rather than just referring them to the relevant court) and whether compensation should be awarded. This will ensure the issue of circularity is solved because the Commission will act as the final opportunity for miscarriages of justice to be reviewed. The CCRC should

also be able to determine how any successful application is redressed, including whether any of the current forms of redress apply or whether compensation should be awarded.

1 What features must this recommendation address to be successful?

Providing broader decision-making powers to the Commission will increase its ability to solve the current flaws in the appeals and prerogative process, as well as issues regarding redress and the award of compensation. In terms of appeals, allowing the Commission to make all decisions will mean miscarriages of justice are more adequately addressed, with factual innocence accounted for because the process based approach taken by the courts will not be applicable and ingrained into the Commission. This is because the Commission will not be restricted by the narrow legislative tests and precedent like the court, and the education and background of commissioners will be different to that of the Judiciary and Executive.

The Commission will have investigative powers which will reduce the burden on the applicant like the current proposal, but will also allow the Commission to develop expertise in identifying innocence. This will mean the Commission will be more involved in cases because it has the power to determine the outcomes of applications and whether any redress may be awarded. This will allow to Commission to have a better understanding of the applicants, how the law may apply to their circumstances and how valuable material redress may be.

Making the Commission the final decision-making body will ensure the circularity that currently exists in the final appeals system is broken. A more practicable and logical procedure will then exist for determining miscarriages of justice, and resources will be conserved. Rather than cases being referred back to the Court of Appeal multiple times, applicants can utilise the Commission as a last alternative, after going through the appellate system, that reaches a result based on new criteria their cases have not already been applied to. This structure will remove the issue of appellate courts not hearing the same case twice and will allow a wider range of applications to be heard, potentially identifying and addressing more miscarriages of justice than the current processes and what the proposal would achieve.

Allowing the CCRC to determine applications for compensation means the process will be less political and discretionary. This is because the Commission will be an independent body that does not have the same interests as Cabinet. Therefore, determining the quantum of compensation will be fairer to applicants and may account for their losses more sufficiently than the current process. Compensation is a natural addition to a Commission that can determine the outcome of applications because it is an important remedy that offers real and practicable redress, that should be more available to those that have been wrongfully convicted and had their rights seriously infringed.

The process to determine CCRC applications will be transparent because it will not involve referrals to courts and influence from the Ministry of Justice, or completing multiple applications and requests for the conviction to be reconsidered. There will be less discretion and political influence in assessing the outcomes of the applications because the process to determine these outcomes will be more public and made by an independent body. These improvements are likely to increase the confidence in the criminal justice system and consequently applications from those suffering from a miscarriage of justice. If the Commission was structured as recommended it will be a more successful addition to New Zealand's legal system because it will have the benefits previously discussed and will acknowledge the purposes and values of the criminal justice system in an improved manner.

2 What issues are raised by this recommendation?

Structuring the Commission as recommended does raise arguments against providing the Commission a wider decision-making power. Giving the CCRC decision-making power over how applications are addressed and whether compensation is awarded removes jurisdiction from the Judiciary and the Executive branches of the Government.

The main issue that arises with this recommendation is the Judiciary's ability to correct errors is reduced and Cabinet's ability to determine compensation for wrongful conviction and imprisonment is removed from their administration and placed within the competency of the Commission. This may be considered an encroachment on the separation of powers because these reserved abilities are being taken and given to a body external from the Government,

without the same checks and balances. Giving these powers to the Commission as recommended places a large amount of power with a Crown entity, which do not normally entertain powers this broad. Therefore, decision-making capabilities may be considered excessive for the purpose.

Removing the courts ability to assess applications and giving this power to the Commission will remove the court's ability to correct errors and identify miscarriages of justice. This does minimise the court's role in this area, however they will retain the ability to address appeals against conviction under section 232 of the CPA where they can identify and correct miscarriages of justice at an earlier stage, compared to the Commission doing the same identification and correction at a later, or the final stage. This does reserve an area for the court's involvement in correcting and identifying miscarriages of justice in New Zealand's legal system but limits it to an area where the courts have competency and experience.

Even though this recommendation is novel and may raise some political questions, the requirements of access to justice and the rights of the victim suffering the miscarriage of justice should be pre-eminent in these situations. The Commission will be a body with more expertise and a greater ability to address miscarriages of justice in a fair, informed and equality focused manner. These interests should outweigh the political concerns in structuring the Commission like recommended due to the benefits it would achieve and the confidence it would instil in the criminal justice system.

If a CCRC is to be introduced to New Zealand it should be done correctly, with powers that are suitable for the country's context and that solve the current flaws in how miscarriages of justice are addressed. To solve these issues the Commission should have decision-making powers in addition to what the proposal currently suggests, to ensure that factual innocence is addressed and those suffering a miscarriage of justice are fairly compensated for the severe impact on their rights.

B Recommendation Two: Amending the Criminal Procedure Act 2011

The second recommendation made by this dissertation is that the CPA should be amended to address the circularity of the current proposal. If the proposed structure of the CCRC cannot be changed like in Recommendation One, then the CPA should be amended to ensure miscarriages of justice are adequately addressed, especially where factual innocence is involved.

If the CCRC is to be a successful addition into New Zealand's criminal justice system, the circularity in the current processes needs to be removed and the processes, including compensation must be more transparent, with less discretionary based criterion. This recommendation will slightly widen the powers the Bill has allocated to the CCRC proposal, but will not go so far as to give the Commission decision-making powers.

To address the issues that have been identified in this dissertation, the CPA should be amended to include a new section that creates new criterion for the courts to consider whether applications will be successful, rather than utilising section 232 of the CPA. Furthermore, the CPA should be amended to include a section that provides the courts a method to determine whether compensation for wrongful conviction and imprisonment should be awarded and if so, at what quantum. The section regarding compensation will be applied if the Commission decides an application may require compensation and then refers this to the court to determine under the new section.

1 What features must this recommendation address to be successful?

Amending the CPA will resolve the circularity in the current process and proposal, as well as the issues with transparency and discretion in determining compensation for wrongful conviction and imprisonment.

Adding a section similar to section 232 of the CPA, that provides new and specific criteria for the courts to determine the outcome of Commission applications, will prevent the circularity that exists in the current processes and that will be enforced by the current proposal. This will remove the issue of appellate courts not hearing the same case twice, because there will be new grounds for consideration which will allow a wider range of applications to be heard and

remedied compared to the current process. Even though cases will still be referred back to the Court of Appeal, applications will be considered based on criteria different to that of appeals and fit for the purpose of determining the outcome of these applications, rather than applications being heard and determined based on criteria they have already been subject to. An addition like this will create a more logical procedure to determine these applications, that addresses the issues of miscarriages of justice and ensures that the CCRC will be a valuable addition to the criminal justice system.

Amending the Act like recommended will allow the court to determine applications based on new criteria specifically created to address issues of actual innocence. This will allow the court to develop experience and expertise in identifying miscarriages of justice and innocence more generally, and also a better understanding of the effects of miscarriages of justice. This will be beneficial because it will improve the lack of expertise and education that currently exists in this area.[192] This will fit within the courts more processed based approach because statutory criteria will be used, but will still account for miscarriages of justice and factual innocence more appropriately than the current process. This recommendation also maintains the courts role in correcting errors and remedying miscarriages of justice more so than Recommendation One.

Amending the CPA as suggested will improve how compensation for wrongful conviction and imprisonment is addressed in the criminal justice system. This recommendation suggests that the CCRC, when referring an application to be determined by the courts, can recommend whether compensation may be relevant to the application. The court can then use new criteria in the CPA to decide whether compensation will be awarded and at what amount.

This will largely improve how compensation is currently determined by Cabinet. Compensation for wrongful conviction and imprisonment is the most tangible remedy for those that have suffered a miscarriage of justice, so it should be included in the Commission's powers. Including a section for courts to utilise under the CPA will mean the process is independent, less discretionary and more transparent. The courts do not have the same political interests in compensation like Cabinet does, so this will be fairer to the applicant and

[192] Young, above n 3, at 270.

will account for the impact on their rights and other losses more than the current process and proposal. Making compensation statutorily determined means the process will be completely transparent, which is likely to increase the confidence of the criminal justice system and therefore the amount of applications and remedies given.

This recommendation will ensure that the CCRC is a valuable and successful addition to New Zealand's criminal justice system because it will resolve many of the issues that currently exist within the post-appeal review process and the proposal itself. Amending the CPA will preserve the courts role in correcting these errors but will ensure that the process is not circular, that actual innocence is accounted for and compensation is determined with transparency and without unfair discretion. Solving these issues will mean the Commission can incite greater confidence in the criminal justice system.

2 What issues are raised by this recommendation?

If the CPA was to be amended like recommended, some issues are raised specifically in relation to statutorily determining compensation for wrongful conviction and imprisonment. This is because a specific role of the Executive will be placed with the Judiciary, potentially impacting the separation of powers in our Government and because it will increase the accountability of the State.

Amending the CPA to include new criterion to assess Commission applications under does not raise much issue, however the addition of criterion to determine whether compensation is awarded and at what quantum raises political questions. Traditionally this is not an area of judicial competency, so allowing the courts to determine the issue of compensation encroaches on an Executive role essentially removing this from their administration. Compared to the first recommendation, this is more palatable because the Judiciary has many checks and balances in place to ensure it acts within its power and the ability to determine compensation is not been given to a body completely external to the Government.

This recommendation also has the potential to make the State accountable for miscarriages of justice. The discretionary nature of the current method to determine compensation, with no

requirement to provide an apology for the victim of the miscarriage of justice, ensures the State is only accountable in some circumstances, typically where an especially bad miscarriage of justice has occurred. This recommendation will make compensation and apologies more available to victims of miscarriages of justice, which will increase the State's accountability to these individuals.

However, compensation for wrongful conviction and imprisonment is an extremely flawed process and miscarriages of justice severely impact those subject to a wrongful conviction. On balance, the benefits that can be achieved by this recommendation are more important than maintaining the current process and proposal. This recommendation ensures that the rights of the victim of the miscarriage of justice are pre-eminent, there is increased access to justice and the issue of circularity and issues with compensation for wrongful conviction and imprisonment are addressed.

C How do these Recommendations Achieve the Goals and Values of the Criminal Justice System?

Compared to the proposal provided by the CCRC Bill, this dissertation argues these recommendations achieve the values of the criminal justice system in a more purposeful manner. This is because the recommendations ensure incorrect decisions are identified, corrected and redressed, decision making is more uniform and consistent, the individual rights of defendants are enhanced, equality of treatment is increased, and the principle of finality is supported. These recommendations also adhere more consistently to international law in relation to compensation for wrongful conviction and imprisonment.

1 Identifying, correcting and redressing incorrect decisions

Correcting errors by allowing appeals and ensuring correct decisions are made is a crucial means of upholding the criminal justice system.[193] The proposal and recommendations will both ensure that a fundamental purpose of appeals, to correct incorrect decisions, is achieved, but the recommendation will do so to a greater extent. This is because there will be a greater

[193] Sanders, Young and Burton, above n 102, at 22 – 24.

focus on actual innocence, so more miscarriages of justice can be identified and corrected appropriately. Correcting more miscarriages of justice means abuses of power are accounted for,[194] ensures that the law is being interpreted accurately and ensures the supervisory role of the courts is operating consistently.[195] This is essential for public confidence in the legal system.

Establishing a comprehensive body like in the first recommendation or amending the CPA like in the second recommendation, ensures that once the miscarriage of justice is corrected appropriate redress is awarded to the victim of the wrongful conviction. This is crucial to maintain and enhance confidence in the criminal justice system, ensure there is private accountability (which is an essential aspect of appeals)[196] to those suffering from a wrongful conviction and that these people have greater access to justice. These recommendations are better placed to achieve the purpose of appeals in correcting and rectifying errors.

2 Consistency and uniformity of the law

The first recommendation will improve the consistency and uniformity of the law in post-appeal reviews. The courts must dispense their function consistently and uniformly to ensure there is confidence in the criminal justice system[197] but the Prerogative of mercy and compensation for wrongful conviction and imprisonment are both discretionary, potentially political and non-transparent processes.

Structuring the Commission like how the first recommendation suggests will improve the consistency and uniformity in determining whether a wrongful conviction occurred and whether compensation is awarded. This is because the Commission will be disconnected from the Judiciary and Cabinet so they can develop independent and transparent methodology to determine applications and the award of redress, that can be consistently applied without external influence.

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[194] At 23.

[195] Corns and Ewen, above n 25, at 4 – 6.

[196] Courts and Tribunals Judiciary, above n 103.

[197] Marshall, above n 100, at 3.

The second recommendation also has the potential to increase the consistency and uniformity of the law. By providing specific criteria applicable to Commission applications for the court to utilise, will facilitate the development of expertise in this area of law by providing a clear statutory process that can be consistently and uniformly followed by the relevant court in all aspects of addressing wrongful convictions.

Improving the consistency and uniformity of the law means there will be increased equality of treatment in determining these applications and the award of redress. This will support these specific values behind appeals, which will improve the confidence in the criminal justice system more substantially than the Bill's proposal.

3 Protecting the individual rights of the defendant and equality of treatment

The individual rights of the defendant are an important value-based consideration supported by appeals. The recommendations support these rights more effectively in comparison to the current proposal, because both recommendations provide material and financial redress to the victim of the wrongful conviction, which gives them private accountability and a tangible remedy. The recommendations also ensure all applicants are treated equally from the first stages involving applications, to the last stages involving redress.

This may be achieved by the proposal, but could be improved as suggested by the recommendations to enforce equality of treatment in all stages of rectifying the miscarriage of justice, including determining whether compensation may be awarded. Accounting for the individual rights of the defendant and ensuring there is equality of treatment upholds the moral integrity of the criminal justice system as well as the interests the general public has in having a fair, equality-based and accountable justice system where due process rights are upheld.

4 Finality in the criminal justice system

This recommendation also enforces finality in the criminal justice system. The CCRC's decisions will not be appealable.[198] Even though the CCRC allows cases to be reopened, this serves the interests of finality by making the Commission the last available option for any sort of redress for those suffering from a miscarriage of justice. However, implementing either recommendation could enforce the interests of finality even further.

This is because both recommendations remove the circularity of the process, which reduces the instances where an applicant has to go back to the courts. Therefore, finality of cases will be achieved sooner with this recommendation. The general principle that multiple appeals to the same court are not permitted, which is a principle in the interests of finality,[199] is acknowledged by these recommendations because the first recommendation gives all decision-making power to the Commission and the amending the CPA provides new grounds for applications to be considered under that are not necessarily appeals based. These recommendations prevent applications being referred back to the appellate court and being considered under the same criteria, which essentially amounts to another appeal to the same court. Preventing this and allowing the Commission to make all relevant decisions regarding applications or amending the CPA furthers this principle and therefore furthers the interests of finality in the criminal justice system.

5 The International Covenant on Civil and Political Rights

The ICCPR was adopted and opened for signature, ratification and accession on 16 December 1966 by General Assembly resolution 2200A (XXI).[200] The Covenant entered into force on 23 March 1976 and New Zealand ratified the ICCPR on 28 December 1978.[201] Article 14 (6) of this Covenant provides that compensation is available to victims of wrongful convictions when they have been pardoned on the ground that a new or newly discovered fact shows there

[198] Corns and Ewen, above n 25, at 13. There is no provision in the Criminal Cases Review Commission Bill 2018 that recognizes such an appeal, however judicial review will be available.

[199] At 12.

[200] Ministry of Justice "Constitutional Issues and Human Rights" (11 May 2018) justice.govt.nz <www.justice.govt.nz>.

[201] Ministry of Justice, above n 200.

has been a miscarriage of justice, so long as non-disclosure of the unknown fact is not attributable to the victim of the miscarriage of justice.[202] This affirms the right to compensation for victims of miscarriages of justice in these circumstances.

The New Zealand Government reserved the right not to apply article 14 (6) to the extent that it was not satisfied by the existing system for ex gratia payments to persons who suffer as a result of a miscarriage of justice.[203] This clearly shows concern about the current method to determine compensation for wrongful conviction and imprisonment. The recommendations this dissertation proposes address the prevalent concerns in this process, and if either is implemented there would be better adherence to the ICCPR which would show New Zealand's Government is committed to addressing and rectifying miscarriages of justice.

[202] International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 14 (6). Article 14 (6) of the Covenant provides, "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

[203] Ministry of Justice, above n 200.

VI Conclusion

The New Zealand Government is currently considering the CCRC Bill 2018. This is due to concerns about the operation of the safeguards which are currently in place to identify and address miscarriages of justice. The Bill will establish a CCRC for New Zealand to look into miscarriages of justice and act as a referral body to the relevant appellate court. This will also replace section 406 of the Crimes Act 1961. A CCRC for New Zealand will undoubtedly be a beneficial addition to the criminal justice system and improve how miscarriages of justice are currently addressed, but the proposal still leaves much to be desired. The main problems that are enforced by the proposal include issues in identifying miscarriages of justice based on factual innocence, failure to address the circularity in the current processes, and failure to provide appropriate remedies to those whom suffered a wrongful conviction.

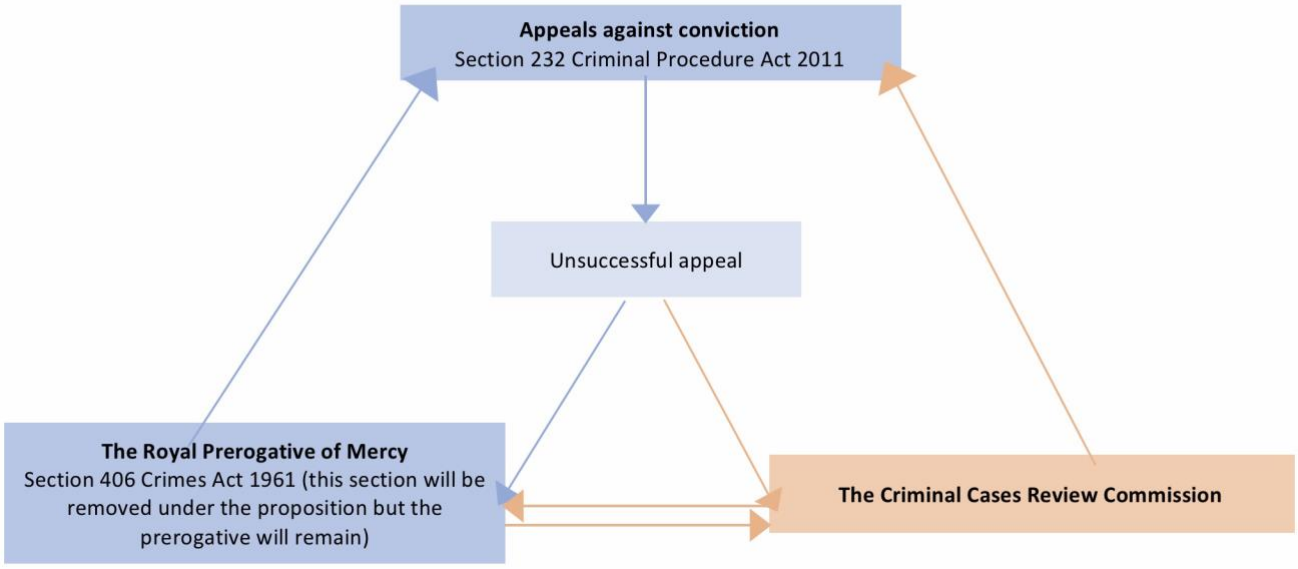
In response to these issues, this dissertation suggested two recommendations to improve the CCRC proposal. First, granting the CCRC wider decision-making powers which will include the abilty to determine the outcome of applications the Commission receives, and whether compensation may be awarded upon a successful application. Secondly, amendment to the CPA by including a new section for the courts to utilise when assessing the outcome of applications to the CCRC that have been referred back to them after going through the appellate process, and a new section to allow the court to determine whether compensation for wrongful conviction and imprisonment should be awarded upon recommendation by the Commission.

Either recommendation would address the issues in identifying miscarriages of justice, the circularity that the current processes and the proposal maintain, and will enable a more transparent and fair determination of compensation for wrongful conviction and imprisonment. The recommendations would also improve the proposal's ability to achieve finality and adherence to international law. Adopting either of the recommendations this dissertation makes will result in a CCRC that is much more effective than what is proposed in the CCRC Bill 2018 because it will address the fundamental issues that arise in cases involving miscarriages of justice with factual innocence and will increase the confidence in the criminal justice system and the legal system as a whole.

Appendix I

New Zealand's Current and Proposed Appeals Process

(Current process in blue and proposed process in both blue and orange)



Appendix II

Analysis of the Ethnicity of New Zealand Applicants for the Exercise of the Prerogative of Mercy During the Period from January 1995 to December 2018

This calculation is made using the formula provided in Sir Thomas Thorp's 2005 report entitled Miscarriages of Justice).[204]

Number of applicants analyzed

Total applications for prerogative relief received from January 1995 to December 2018 (Based on an Official Information Act request to the Ministry of Justice): **170**[205]

This presumptively excludes the files actively under review therefore not available for analysis and other files that may be totally missing or only represented by a few pages.

Ethnic breakdown of applicants

Details of ethnicity were made available for **84** applicants. This information was based on Sir Thomas Thorp's 2005 report entitled Miscarriages of Justice and an Official Information Act request[206] received from the Ministry of Justice. Using the same ethnic breakdown as the Department of Corrections, the ethnic breakdown of applicants for prerogative relief was:

Māori (including those that identify as part Māori): 9 = **11%**
Pacific Islander: 3 = **4%**
Pākehā: 57 = **68%**
Other: 13 = **15%**
Not recorded: 2 = **2%**
Total: 84 = **100%**

[204] Thorp, above n 8, at 93 – 94.
[205] Ministry of Justice, above n 89.
[206] Ministry of Justice, above n 89.

Ethnic breakdown of prison inmates

Taken from the Department of Corrections Prison Facts and Statistics – December 2018 the ethnic breakdown of applications for 2018 was:[207]

Māori: **51%**
Pacific Islander: **11%**
Pākehā: **31%**
Other: **5%**
Not recorded: **2%**
Total: **100%**

As Sir Thomas Thorp discusses, there are no factors suggesting Māori and Pacific Islanders are less likely to be affected by miscarriages of justice than Pākehā, rather it is likely to be the other way around as Māori and Pacific Islanders are less likely to be able to pay for the best legal advice, and more likely to have difficulty communicating and instructing counsel.[208]

Presuming that Māori and Pacific Islanders are equally affected by miscarriages of justice, their use of the of the opportunity to apply for the prerogative similar to that currently exercised by Pākehā inmates would increase the number of applications as follows:[209]

> If the Pākehā 31% of the New Zealand prison population produced 57 applications for the prerogative from January 1995 to December 2018. Proportionate use (in that period) by the 62% of inmates identified as Māori or Pacific Islander would have generated **114** applications:
>
> $$\frac{62}{31} x \frac{57}{1} = 114$$

[207] Department of Corrections "Prison Facts and Statistics – December 2018" (2018) Ara Poutama Aoetearoa Department of Corrections <www.corrections.govt.nz>.
[208] Thorp, above n 8, at 94.
[209] At 98.

This should be compared to the 12 actual applications for prerogative relief made by Māori and Pacific inmates between January 1995 to December 2018 and noted above in "Ethnic Breakdown of Applicants" above.

Appendix III

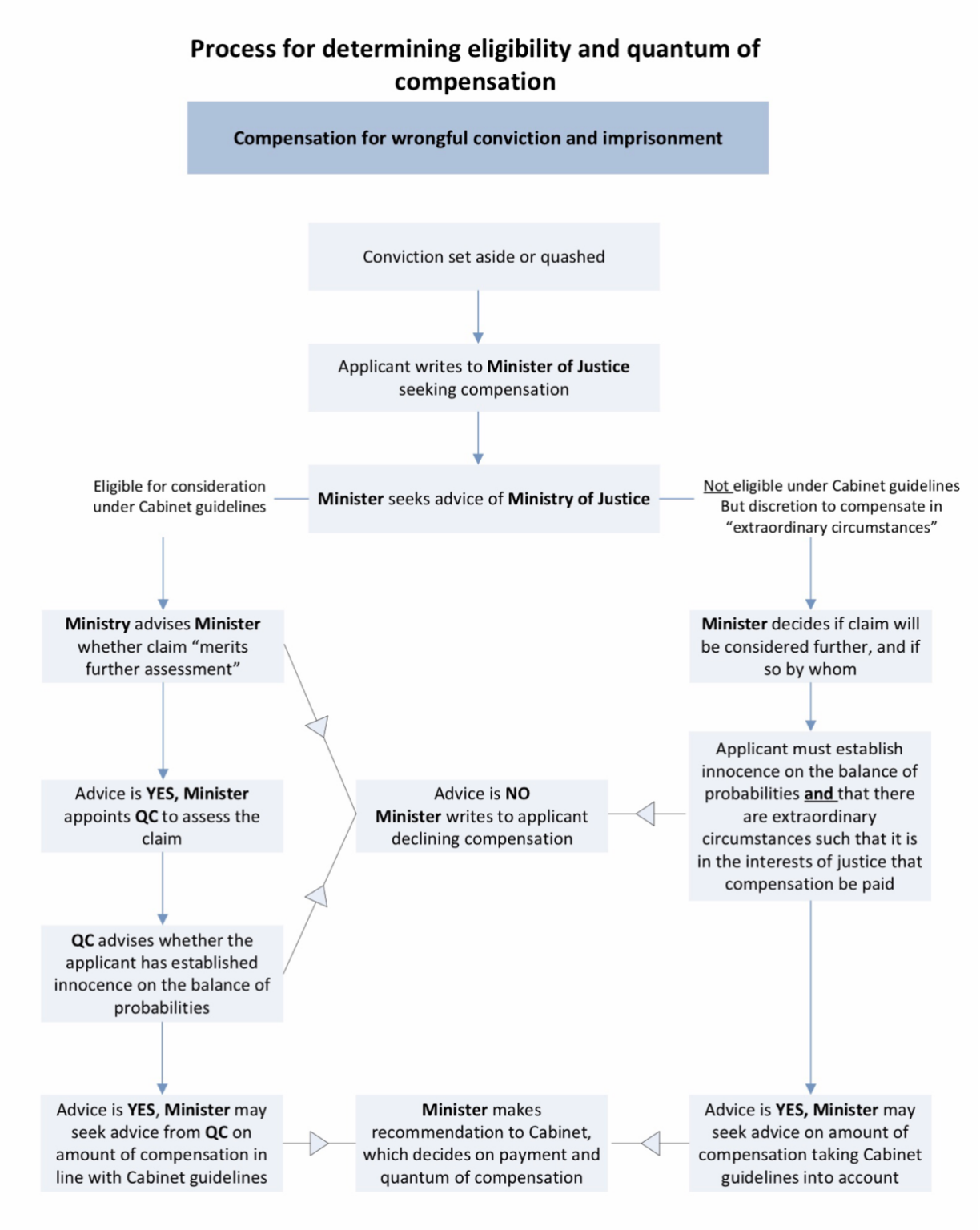


Diagram obtained from Ministry of Justice "Backgrounder: Compensation for Wrongful Conviction and Imprisonment" (May 2015) <www.justice.govt.nz>.

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