
OPINION PIECE – Criminal Cases Review

1. No criminal justice system is, or can be, foolproof. Investigators, jurors, judges and lawyers are human, and mistakes are inevitable. The consequences of these mistakes can be devastating, especially for individuals convicted of crimes of which they are innocent. Any credible criminal justice system must recognise this unavoidable scope for error, and have procedures to identify and fix mistakes when they do occur. Only then can the public have confidence that the system is doing what it should: convicting the guilty, and acquitting the innocent.
2. What our experience, and a number of recent high profile New Zealand cases, demonstrate is that our current procedures are inadequate. In particular, at present, whether a flawed conviction is remedied depends almost entirely on the resources of the individual concerned or the kindness of strangers. If public confidence in our system is to be maintained, this needs to change. It is time that New Zealand established its own independent and impartial criminal cases review body with the power to investigate and refer suspect convictions to the courts for further consideration.
3. This would put us in line with a growing number of countries, including Scotland and Norway whose populations are of a similar size to ours, which have well established processes whereby an individual who believes they have been the victim of a miscarriage of justice can ask such an independent body, a Criminal Cases Review Commission to look at their case. The Criminal Cases Review Commission will conduct an initial review, and, if they consider that the case merits further attention, investigate the allegations, which, if substantiated, it will refer to the Court of Appeal for consideration. If the Court of Appeal accepts that the conviction is unsafe, a re-trial will be ordered. This is the right balance. Final decisions about whether to overturn a conviction are properly for the Court of Appeal, and the final decision about guilt is for a jury at a re-trial.
4. Where the current New Zealand processes are lacking is that without a Criminal Cases Review Commission, individuals are reliant on the goodwill of friends, family and often strangers to help them secure justice. Without determined and indefatigable backers, it is simply impossible to make any progress. This is because the Ministry of Justice does not consider that it is its role to take an active role in investigating alleged miscarriages of justice, legal aid only very rarely available, and where (as will be the case in respect of most serious miscarriages of justice) the individual is in prison, it can be simply impossible to get anywhere. Further, even if an individual is able to make progress, they will be pitted against the vast resources of the Crown Law Office. This leads to the entirely unsatisfactory situation where, without legal aid, an appellant is forced to fight a most formidable opponent with their hands tied behind their back.
5. Establishing a Criminal Cases Review Commission would redress this imbalance. However, it is worth noting that the experience of Criminal Cases Review Commissions abroad demonstrates that these bodies do not exist to be

advocates for either the prosecution or the defence - instead they impartially gather and review the evidence both for and against the prisoner. This means that if a case is referred to the Court of Appeal, the Court will be presented with the full picture. For those who fear that the criminal trial process has become a highly ritualised game, this should be a welcome tonic.

6. The overseas experience also demonstrates that a Criminal Cases Review Commission need not be costly, and that it would not be a gravy train for lawyers. A robust triage process can separate cases which warrant further attention from those which do not. Investigative resources can therefore be targeted at the cases which require it most.
7. An independent Criminal Cases Review Commission would also mean that the decision as to whether or not to refer a case for further consideration by the Court of Appeal would be made by an impartial body, and not (as at present) by civil servants at the Ministry of Justice, and ultimately the Minister of Justice. The limitations and lack of transparency in the current process are identical to those which led a Royal Commission in the United Kingdom to declare that similar procedures there were not fit for purpose, and which led to the establishment of the English Criminal Cases Review Commission. The logic is compelling: decisions about guilt or innocence should be made by judges and juries following a transparent process, and not by politicians behind closed doors.
8. The importance of a criminal justice system which the public can have confidence in should be self-evident. Despite occasional suggestions for reform in New Zealand, the question of whether to establish a Criminal Cases Review Commission has always been left for another day. It cannot be put off any longer. Any further delay risks a crisis of public confidence in the criminal justice system which would be in nobody's interests.

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