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**Criminal Cases Review Commissions: a comparative overview**

**Abstract**

*Purpose*-This article seeks to provide an overview of the varying approaches to incorporating criminal cases review commissions in commonwealth countries.

*Methodology/Approach*-The arguments put forward in this article are a work in progress. However, the main arguments are supported by analysis of the key legislation of the commonwealth countries as well as international commentaries.

*Findings*- The article discusses the shortcomings in the national criminal justice systems that led to the need for the establishment of criminal cases review commissions. It will be argued that despite the establishment of varying forms of review mechanisms miscarriages of justice are still rife. This is in part due to the fact that humans making and deciding cases will never be perfect. This is further hindered but what could be seen as the lack of political will in some instances to rectify failings which are created by a climate of pressure to criminalize. It is also shown that oversight of the criminal cases review commissions are not sufficiently independent from the institutions that they are reviewing leading to a deficit in transparency as well as lack of trust from the public.

*Value*-This ongoing research included in this paper will contribute to a growing body of work on the need to develop effective & efficient criminal cases review commissions. The article aims to contribute to the conversation on the need to find effective measures to curb the tide of innocent individuals becoming the victims of miscarriages of justice.

**Keywords:** Rule of law- miscarriages of justice - forensic evidence - fair trials - criminal cases review commissions - New Zealand - Canada

**Introduction:U.K. Criminal Cases Review Commission**

The reform of the U.K. criminal justice system was assailed by a series of wrongful convictions in the 1970s mainly all related to terrorist crimes. The commission was necessary as it was not appropriate for the Home Office to review cases because of questions of independence. If there is a great public outcry there is often a greater risk of a miscarriage of justice. The Commission being established coincided in with the convictions being quashed in the high profile case of the Birmingham Six in 1990. The 1970s was a dark period in the criminal justice of the United Kingdom. This period of history saw an episode of terrorist attacks (the Guildford Four, Maguire Seven and the Birmingham Six) which resulted in convictions being quashed.<sup>1</sup> The 1980s saw and increased pressure to establish an independent review body. Important procedural safeguards were absent. Prior to PACE 1984 which came into force on the 1st of January 1986 there was no requirement for the police to record interviews. This was obviously problematic because lots of convictions are based upon the fact that the police said that the suspect had confessed.

<sup>1</sup>Blind Justice: Miscarriages of Justice in Twentieth-Century Britain?John J. Eddleston, Bibliofile Publishers (July 23, 2012)

This under regulated practice was evident in the case of Judith Ward which was decided in 1992.<sup>2</sup> At the time of her case the prosecution also had no real obligations to disclose material which was capable of undermining their case. As a result of her cases reforms were introduced which brought about changes in the law as to how the prosecution ought to disclose material. The facts of the Judith Ward case<sup>3</sup> was that a coach was bombed on the 4th of February 1974 12 people were killed including 2 children. At the time of her arrest she was found to be sleeping rough. She made claims to be a lieutenant in the IRA. During her arrest and questioning she made 28 statements all full of inconsistencies and contrary statements but the police only released portions of them to both the defence and the jury so it appeared that they were getting the whole full story in one coherent very long consistent statement. It later came to light that she was diagnosed with a personality disorder which had become a full blown mental illness.<sup>4</sup> She was released from prison on the 11th of May 1992. According to the Waller Committee which was set up in the wake of miscarriages of justice identified the top five causes of miscarriages of justice<sup>5</sup> include the following aspects:

1. wrongful identification
2. false confession
3. perjury by a co-accused or other witnesses
4. police misconduct, usually in the acceleration of a 'verbal confession' which, it is claimed, was never made, or the planting of incriminating evidence
5. bad trial tactics<sup>6</sup>

The Criminal Appeal Act 1995 established the Criminal Cases Review Commission (The Commission) was established on the 1st of April 1997. The Commission has a dual function when it examines the effectiveness of the criminal justice system. The Commission has two primary aspects of the criminal justice system that they are concerned with:

1. the conviction of the guilty
2. acquittal of the innocent

It is these two aspects that drive the motivation of the Commission's work since its establishment.<sup>7</sup> The Commission must be independent in order to govern the relationship between the commission-court-jury. Any new evidence is to be reviewed by the Commission which has to be looked at through the lens, "of whether or not the Court of Appeal would be prepared to receive it."<sup>8</sup> In order for a referral of a case to survive referral to the Commission they must focus on "whether the evidence and the arguments available are sufficient to give rise to the real possibility that the Court

<sup>2</sup>Miscarriages of Justice: A Systems Approach, Richard Nobles and David Schiff, 58 Mod. L. Rev. 299 (1995)

<sup>3</sup>R. v. Judith Ward (1993) 96 Cr.App.R. 1

<sup>4</sup>R. v. Judith Ward (1993) 96 Cr.App.R. 1

<sup>5</sup>Miscarriages of Criminal Justice Reconsidered Steven Greer The Modern Law Review, Vol. 57, No. 1 (Jan., 1994), pp. 58-74

<sup>6</sup>Miscarriages of Criminal Justice Reconsidered Steven Greer The Modern Law Review, Vol. 57, No. 1 (Jan., 1994), pp. 58-74

<sup>7</sup>Righting Miscarriages of Justice? Ten Years of the Criminal Cases Review Commission, Laurie Elks, a JUSTICE Publication, (2008) pp.11-13

<sup>8</sup>Righting Miscarriages of Justice? Ten Years of the Criminal Cases Review Commission, Laurie Elks, a JUSTICE Publication, (2008) pp 14-15

of Appeal-ever respectful of the jury’s role-will quash the conviction.”<sup>9</sup>

Section 13 of the Criminal Appeal Act 1995 makes one reference to “miscarriages of justice” when the Commission is reviewing Crown Court convictions they have to do so from the perspective of there is a “real possibility” that the Court of Appeal would quash the conviction as unsafe.<sup>10</sup>

The case of Andrew Adams illustrates the obstacles that the defendant must overcome to have their case heard before the Commission. In 2007 Andrew Adams was cleared of the “revenge murder” Mr Jack Royal (a 58 year old science teacher) after spending 14 years in jail despite the fact that there was no forensic evidence that linked him to the crime scene<sup>11</sup>. Andrew Adams was a very successful former aircraft engineer known for his love of fast cars and women.<sup>12</sup>

What was the connection between Andrew Adams and Mr Jack Royal? Andrew Adams’s girlfriend’s brother had been murdered (in a knife street fight) and Mr Jack Royal had been cleared of his murder when he successfully argued self-defense. It was suggested by the prosecution that his girlfriend had requested the murder of Mr Jack Royal as a sort of birthday present.<sup>13</sup> A key figure in the case Andrew Adams, was the evidence given by Kevin Thompson, a school friend of Andrew Adams who told police that he , “had collected Mr Adams and a friend, John Hands, from a hotel car park where Mr Adams had boasted: I blew his head off. On May 18 1993, a jury acquitted Mr Hands of murder but convicted Mr Adams, who cried to them: Do you realise what you’ve done?”<sup>14</sup>

It took the Criminal Cases Review Commission (CCRC)<sup>15</sup> three further years to investigate the case due to backlogs but once they did they found alarming and concerning irregularities.

The judges sitting in the case, Lord Justice Gage, Mr Justice Silber and Mr Justice Treacy found that Andrew Adams had indeed been failed by the criminal justice system and his own legal treatment through the conduct of the case. They also found that all of the elements taken together had, “the cumulative effect of being “sufficient to render the verdict unsafe.””<sup>16</sup> Adams was successfully in his appeal because he showed that he had received incompetent legal assistance in that three key pieces of unused evidence made available by the prosecution. It was these actions combined which resulted in him not being able to have a fair trial. However, his bid to get

<sup>9</sup>Righting Miscarriages of Justice? Ten Years of the Criminal Cases Review Commission, Laurie Elks, a JUSTICE Publication, (2008) p 65

<sup>10</sup>Criminal Appeal Act 1995: The Semantics of Jurisdiction David Schiff, Richard Nobles *The Modern Law Review*, Vol. 59, No. 4 (Jul., 1996), pp. 573-581; Investigating and reviewing possible miscarriages of justice - the Criminal Appeal Bill [Bill 57 of 1994/95] Research Paper 95/29 3 March 1995

<sup>11</sup><https://www.independent.co.uk/news/uk/crime/man-cleared-of-revenge-murder-after-14-years-in-jail-431906.html>

<sup>12</sup><https://www.independent.co.uk/news/uk/crime/man-cleared-of-revenge-murder-after-14-years-in-jail-431906.html>

<sup>13</sup><https://www.independent.co.uk/news/uk/crime/man-cleared-of-revenge-murder-after-14-years-in-jail-431906.html>

<sup>14</sup><https://www.independent.co.uk/news/uk/crime/man-cleared-of-revenge-murder-after-14-years-in-jail-431906.html>

<sup>15</sup>The Criminal Cases Review Commission (“CCRC”) is an independent body set up under the Criminal Appeal Act 1995. It is responsible for independently reviewing suspected and alleged miscarriages of criminal justice in England, Wales and Northern Ireland. It is based in Birmingham and is funded by the Ministry of Justice. The CCRC considers whether, as a result of new evidence or argument, there is a real possibility that a conviction and/or sentence would not be upheld were a reference to be made. New evidence or argument is argument or evidence which has not been raised during the trial or on appeal. Applicants should usually have appealed first. A case can be referred in the absence of new evidence or argument or an earlier appeal only if there are “exceptional circumstances”.

<sup>16</sup><https://www.independent.co.uk/news/uk/crime/man-cleared-of-revenge-murder-after-14-years-in-jail-431906.html>

compensation was not successful as the court held that the evidence was not new or fresh evidence.<sup>17</sup> His conviction was quashed when judges concluded that this trial had been biased.<sup>18</sup>

The Supreme Court has ruled that a new test will be used now when assessing if individuals who have had their convictions overturned due to miscarriages of justice can obtain compensation: The court said a miscarriage of justice was when a new fact showed evidence was so undermined that no conviction could possibly be based upon it.<sup>19</sup> This new test is intended to ensure that defendants, “are not precluded from obtaining compensation because they cannot “prove their innocence beyond reasonable doubt.”<sup>20</sup>

To date, people who have been wrongfully convicted have been entitled to compensation only if they can show there has been a miscarriage of justice.”<sup>21</sup> Under this new provision Andrew Adams sought to seek compensation again. However, the Supreme Court unanimously, rejected Andrew Adams’s application because the justices held that, “even if the evidence which led to the quashing of his conviction had been available at his trial, a “reasonable jury might not have convicted the defendant.”<sup>22</sup> A Ministry of Justice spokesman said: We welcome the decision of Supreme Court to dismiss the appeal of Andrew Adams and confirm that our decision not to pay compensation was correct.”

A deeply problematic standard as who is getting to decide that they are “innocent enough” to warrant compensation?<sup>23</sup> Also it breaches the presumption of innocence contained in Article 6 (2) of the European Convention on Human Rights (ECHR).<sup>24</sup>

The CCRC reviews cases of alleged or suspected miscarriage of justice with a view to referring them back to the appeal courts if it believes there is a real possibility the conviction will not be upheld. But it is not so much concerned with investigating cases to seek the truth of an alleged wrongful conviction as it is with reviewing cases for fresh evidence or argument that suggests a conviction is technically unsafe in law.<sup>25</sup>

As such, the CCRC is often helpless to refer the cases of factually innocent victims of wrongful conviction if they do not meet the required criteria. If it turns up evidence indicating an applicant’s innocence that was available at the original trial, for instance, it may not constitute grounds for a referral. The CCRC, therefore, cannot refer cases back to the appeal courts in the interests of justice as popularly understood, failing to do what the public thought that it was set up to do.<sup>26</sup> Although DNA exonerations are commonplace in the US, the same can hardly be said for the UK. Attempts

<sup>17</sup>[http://news.bbc.co.uk/2/hi/uk\\_news/england/tyne/7869878.stm](http://news.bbc.co.uk/2/hi/uk_news/england/tyne/7869878.stm)

<sup>18</sup><https://www.independent.co.uk/news/uk/crime/man-cleared-of-revenge-murder-after-14-years-in-jail-431906.html>

<sup>19</sup><https://www.bbc.com/news/uk-13356120>

<sup>20</sup><https://www.bbc.com/news/uk-13356120>

<sup>21</sup><https://www.bbc.com/news/uk-13356120>

<sup>22</sup><https://www.bbc.com/news/uk-13356120>; Green, A. (2012). Challenging the Refusal to Investigate Evidence Neglected by Trial Lawyers. In: Naughton, M. (eds) The Criminal Cases Review Commission. Palgrave Macmillan, London

<sup>23</sup><https://www.thejusticegap.com/victimised-twice-over-once-by-the-court-and-then-by-government/>

<sup>24</sup><https://www.thejusticegap.com/victimised-twice-over-once-by-the-court-and-then-by-government/>

<sup>25</sup><https://www.theguardian.com/uk/2009/may/08/innocence-network>

<sup>26</sup><https://www.theguardian.com/uk/2009/may/08/innocence-network>

to get biological samples tested face financial costs that most prisoners and their families cannot afford, as well as the reluctance of the CCRC and the Forensic Science Service to embrace new testing techniques routinely used in the US and elsewhere.<sup>27</sup>

One possible obstacle to the CCRC being able to refer cases to the Court of Appeal is section 13 of the Criminal Appeal Act 1995 which dictates that the CCRC can only refer cases to the Court of Appeal where it feels there is a ‘real possibility’ that the conviction will be overturned.<sup>28</sup>

Then, in deciding whether the ‘real possibility’ test has been met, the CCRC must also consider s.23 of the Criminal Appeal Act 1968<sup>29</sup>, which requires that evidence admissible in the Court of Appeal must be ‘fresh’, understood generally as evidence or argument that was not or could not have been available at the time of the original trial.

In consequence, CCRC reviews are for the most part mere desktop considerations of whether such ‘fresh’ evidence may now exist that was not or could not be available at the time of the original trial or previous failed appeal that has a good chance of overturning the conviction.<sup>30</sup>

Such an approach sees the CCRC reject alleged innocent victims of wrongful convictions if it is not felt that they have ‘fresh’ evidence or that they will fulfil the ‘real possibility’ test.

It means that CCRC reviews can, and do, overlook and positively exclude lines of inquiry that may prove an applicant’s claim of innocence if it is not felt that such investigations would discover material that would meet the ‘fresh’ evidence and/or ‘real possibility’ criteria.<sup>31</sup>

### **New Zealand’s approach to Criminal Cases Review Commission**

The case of Teina Pora<sup>32</sup> is known as one of New Zealand’s most notorious cases.<sup>33</sup> The case centered on the false confession given by Pora. The police had no firm leads for a year.<sup>34</sup> Pora was wrongly convicted twice of the murder, rape & aggravated burglary of Susan Burdett in March 1992. He was 16 at the time of the crime. In March 1992 he was arrested for an unrelated crime of a stolen vehicle. It was during that police interview he gave statements (in the absence of a lawyer or parent) that were widely inconsistent but led the police to believe that he was responsible for the offences against Susan Burdett. The statements that he made were considered to be a

<sup>27</sup><https://www.theguardian.com/uk/2009/may/08/innocence-network>

<sup>28</sup>Green, A. (2012). Challenging the Refusal to Investigate Evidence Neglected by Trial Lawyers. In: Naughton, M. (eds) *The Criminal Cases Review Commission*. Palgrave Macmillan, London; *The Innocent and the Criminal Justice System: A Sociological Analysis of Miscarriages of Justice* By Michael Naughton, Palgrave Macmillan 2013

<sup>29</sup><https://www.legislation.gov.uk/ukpga/1968/19/section/23>

<sup>30</sup>Naughton, M. (2012 [2009]) (Editor) ‘The Criminal Cases Review Commission: Hope for the Innocent?’. Palgrave Macmillan.

<sup>31</sup>Naughton, M. (2013) ‘The Innocent and the Criminal Justice System: A Sociological Analysis of Miscarriages of Justice’. Palgrave Macmillan. Click here for more information on the book.

Naughton, M. (2012 [2007]) ‘Rethinking Miscarriages of Justice: Beyond the Tip of the Iceberg’. Palgrave Macmillan.

<sup>32</sup>*Pora v R* [2015] UKPC 9

<sup>33</sup>A Way to Reduce Indigenous Overrepresentation: Prevent False Guilty Plea Wrongful Convictions, Amanda Carling 64 *Crim. L.Q.* 415 (2017)

<sup>34</sup>[https://www.nzherald.co.nz/nz/innocent-man-in-jail-20-years/DNZ5RQCEEMKQKZT6CYBWECOYE/?c\\_id=1&objectid=10806944](https://www.nzherald.co.nz/nz/innocent-man-in-jail-20-years/DNZ5RQCEEMKQKZT6CYBWECOYE/?c_id=1&objectid=10806944)

confession, there was no physical, forensic or eyewitness evidence which could connect him to the crime. His first conviction in 1994 was quashed when DNA evidence showed that Malcolm Rewa a serial rapist committed the crime of rape but he was not convicted of her murder. Teina was retried in 2000, at this trial the judge did not allow the evidence of Rewa & the prosecution relied upon the confession again. In May 2013 Teina submitted an application for leave to appeal to the Privy Council in London (which at the time was the last court of appeal for a former British colony). In 2014 he was granted the right to appeal to the Privy Council. Two months after the appeal to the Privy Council had been submitted he was released on parole, then in 2015 his conviction was quashed. No retrial was ordered as it was submitted by the Prosecution that it would not be in the public interest to do so. In delivering their judgment, Lord Kerr stated:

“Lord Kerr said while delivering the decision that evidence from two medical experts that Mr Pora suffered from a form of fetal alcohol spectrum disorder - and in their opinion that could explain why he made what is now believed to be false confessions - was a big factor in the outcome.”<sup>35</sup>

Teina Pora spent 21 years in prison before his conviction was quashed by the privy council. A retrial was not ordered in his case.<sup>36</sup> The New Zealand Government was ordered to pay just over \$2.5 million in compensation.<sup>37</sup>

### **Te Kāhui Tātari Ture | Criminal Cases Review Commission**

The Criminal Cases Review Commission Bill was introduced in the New Zealand Parliament in 2018 and passed its final reading in 2019. The Parliament in 2020 established by legislation their own model of the CCRC.<sup>38</sup> The CCRC has been accepting applications since the 1st of July 2020. The CCRC replaces the role of the Governor-General in exercising the Royal Prerogative of Mercy.<sup>39</sup> The Chief Commissioner of the CCRC is Mr Colin Carruthers QC, who was appointed from 1 February 2020 for an 18-month term.<sup>40</sup> Before the establishment of the Commission the final option available was to apply for the Royal Prerogative of Mercy.<sup>41</sup> You would have to apply to the Governor-General who then refers it to the Minister of Justice the decision is then made to have the case either reheard at the Court of Appeal or grant a pardon. New Zealand took a while

<sup>35</sup>[https://www.nzherald.co.nz/nz/malcolm-rewa-faces-very-rare-trial-after-teina-poras-murder-convictions-quashed/IVMZPK7QOUSOPRIZHGSXWYSBM4/?c\\_id=1&objectid=11411722](https://www.nzherald.co.nz/nz/malcolm-rewa-faces-very-rare-trial-after-teina-poras-murder-convictions-quashed/IVMZPK7QOUSOPRIZHGSXWYSBM4/?c_id=1&objectid=11411722); Ian Freckelton (QC) (2016) Fetal Alcohol Spectrum Disorders, Expert Evidence and the Unreliability of Admissions during Police Interviews, *Psychiatry, Psychology and Law*, 23:2, 173-183

<sup>36</sup><https://www.lawsociety.org.nz/news/legal-news/teina-pora-gets-another-1million-dollars/>

<sup>37</sup>Rodney Hansen “Report for Minister of Justice on Compensation Claim by Teina Anthony Pora” (23 March 2016) at 8-13

<sup>38</sup>Miscarriages of Justice in Australia: Unfinished Business by Michael Kirby *Global Journal of Management and Business Research: G Interdisciplinary*, Volume 21 Issue 3 Version 1.0 Year 2021; Stephanie Roberts, Lynne Weathered, *Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission*, *Oxford Journal of Legal Studies*, Volume 29, Issue 1, Spring 2009, Pages 43–70

<sup>39</sup>Miscarriages of Justice in Australia: Unfinished Business by Michael Kirby *Global Journal of Management and Business Research: G Interdisciplinary*, Volume 21 Issue 3 Version 1.0 Year 2021

<sup>40</sup>Miscarriages of Justice in Australia: Unfinished Business by Michael Kirby *Global Journal of Management and Business Research: G Interdisciplinary*, Volume 21 Issue 3 Version 1.0 Year 2021

<sup>41</sup><https://www.thejusticegap.com/justice-at-last-new-zealand-finally-launches-its-miscarriage-of-justice-watchdog/>

to establish a CCRC despite calls for the need to.<sup>42</sup> The CCRC has the power to compel individuals to disclose documents and to give evidence. Additionally, the body has the ability to review and monitor those shortcomings which it believes lead to continual wrongful convictions. Although the CCRC does not determine innocence it can refer cases back to the courts if it is 'in the interests of justice to do so.'<sup>43</sup> Criticism of the CCRC is that the individuals who fill its ranks are not impartial and lack the requisite experience in order to know how to handle wrongful conviction cases.<sup>44</sup>

### ***Canada: wrongful convictions & the creation of a Criminal Cases Review Commission***

Canada under the leadership of Prime Minister Justin Trudeau & the Minister of Justice & Attorney-General David Lametti, announced in March 2021 that public consultations were being led by Honourable Harry LaForme, former justice of the Ontario Court of Appeal & Honourable Juanita Westmoreland-Traoré, former judge of the Court of Quebec into the establishment of a criminal cases review commission in Canada.<sup>45</sup> The two judges carried out people-facing open consultations on the creation of a Canadian Criminal Cases Review Commission.<sup>46</sup> Once the consultation was completed the report was submitted to the Minister of Justice with their findings, recommendations & advice for the establishment of a Criminal Cases Review Commission.<sup>47</sup> Consultations were held from June to September 2021, these consultations were held with interested consultations & members of Criminal Cases Review Commission's abroad.<sup>48</sup> In December 2021 the consultation report was published. In March 2021, based upon the report, the Minister of Justice opened a public consultation. In February 2022, the Criminal Cases Review Commission final report was published with the new name being proposed as, A Miscarriages of Justice Commission.<sup>49</sup>

The logo chosen for the Criminal Cases Review Commission's website is particularly symbolic. On its website it describes the significance & meaning:

“Our logo of the Phoenix against the Canadian Maple Leaf was designed and donated by Lynn Walma Design Solutions. The myth of the beautiful Phoenix is that, after bursting into flames, it rises from the ashes, thereby representing rebirth and new hope. It is our intention that the criminal cases review consultations will similarly provide hope to those whose lives have been impacted by miscarriages of justices in Canada's criminal justice

<sup>42</sup>Carolyn Hoyle (2020) The shifting landscape of post-conviction review in New Zealand: reflections on the prospects for the Criminal Cases Review Commission, *Current Issues in Criminal Justice*, 32:2, 208-223

<sup>43</sup><https://www.thejusticegap.com/justice-at-last-new-zealand-finally-launches-its-miscarriage-of-justice-watchdog/>

<sup>44</sup><https://www.thejusticegap.com/justice-at-last-new-zealand-finally-launches-its-miscarriage-of-justice-watchdog/>; *Reasons to Doubt: Wrongful Convictions and the Criminal Cases Review Commission* By Carolyn Hoyle, Mai Sato Oxford University Press, 2019

<sup>45</sup><https://www.canada.ca/en/departement-justice/news/2021/03/minister-of-justice-and-attorney-general-of-canada-takes-important-step-toward-creation-of-an-independent-criminal-case-review-commission.html>; Report A Miscarriages of Justice Commission Hon. Harry LaForme and Hon. Juanita Westmoreland-Traoré.

<sup>46</sup><https://www.canada.ca/en/departement-justice/news/2021/03/minister-of-justice-and-attorney-general-of-canada-takes-important-step-toward-creation-of-an-independent-criminal-case-review-commission.html>

<sup>47</sup><https://www.canada.ca/en/departement-justice/news/2021/03/minister-of-justice-and-attorney-general-of-canada-takes-important-step-toward-creation-of-an-independent-criminal-case-review-commission.html>

<sup>48</sup><https://can-ccrc-consult.ca/home-ccrc>

<sup>49</sup><https://can-ccrc-consult.ca/home-ccrc>

system.”<sup>50</sup>

Both of the judges selected to oversee the consultation process for the Criminal Cases Review Commission, were selected to be representative of the minority groups which are over represented in Canadian prisons.<sup>51</sup> Under the “Who we are” section of the Commission’s web page they define themselves as representing the:

“Diverse communities are calling out the deep rooted, systemic injustice that exists in society and their voices are joined by voices from the broad Canadian society demanding change. The specific needs of women, young people and those who experience diverse forms of discrimination must be addressed. A process aimed at improving fairness and justice for all Canadians must have a criminal justice system that is attentive to these realities.”<sup>52</sup>

The need for the introduction of a new system in Canada is due to the fact that once you have exhausted your appeals your only other option is to apply to the justice minister to have your case reviewed. This is a particularly slow system which has resulted in only a few cases being sent back for new trials when miscarriages of justice were found to have likely to have occurred.<sup>53</sup> What is particularly telling is that 20 cases have been sent back by the justice system since 2002. All of the cases involved men and only one Indigenous man and one Black man. The report felt that these statistics do not accurately reflect the fact that those who are most likely to suffer miscarriages of justice are Indigenous and Black people in Canada’s prisons and the fact that very few were represented in bringing cases of appeal to the justice minister further illustrated the need to reform the system.<sup>54</sup>

### **The potential role of a Criminal Cases Review Commission in Australia**

Australia, like many of the former British colonies adopted the English criminal justice system. Australia became the store house for Britain’s criminals after the American revolution when they refused to accept anymore British criminals.<sup>55</sup> So the system that the Australian’s inherited was one that was harsh and punitive, there were no appeal mechanisms set in place to begin with. There were heavy sentences handed down as a means by which to deter people from committing crimes.<sup>56</sup> Some reforms were made in Britain to allow the defendant the opportunity to challenge and even appeal in limited circumstances such if they were facing executions most of these reforms were copied into the Australian system.<sup>57</sup> Interestingly the common law on crime remained the

<sup>50</sup><https://can-ccrc-consult.ca/who-we-are-ccrc>

<sup>51</sup><https://can-ccrc-consult.ca/who-we-are-ccrc>

<sup>52</sup><https://can-ccrc-consult.ca/home-ccrc>

<sup>53</sup>FORENSIC SCIENCE AND MISCARRIAGES OF JUSTICE: SOME LESSONS FROM COMPARATIVE EXPERIENCE Kent Roach *Jurimetrics*, Vol. 50, No. 1 (FALL 2009), pp. 67-92

<sup>54</sup>A Crisis of Conscience: Miscarriages of Justice and Indigenous Defendants in Canada, Malini Vijaykumar, *51 U.B.C. L. Rev.* 161 (2018); Wrongful Convictions: Preventing Miscarriages of Justice Some Case Studies Donald J. Sorochn, *41 Tex. Tech L. Rev.* 93 (2008-2009)

<sup>55</sup>Miscarriages of Justice in Australia: Unfinished Business by Michael Kirby *Global Journal of Management and Business Research: G Interdisciplinary*, Volume 21 Issue 3 Version 1.0 Year 2021

<sup>56</sup>Miscarriages of Justice in Australia: Unfinished Business by Michael Kirby *Global Journal of Management and Business Research: G Interdisciplinary*, Volume 21 Issue 3 Version 1.0 Year 2021

<sup>57</sup>Miscarriages of Justice in Australia: Unfinished Business by Michael Kirby *Global Journal of Management and Business Research: G Interdisciplinary*, Volume 21 Issue 3 Version 1.0 Year 2021



predominant source in New South Wales, Victoria & South Australia while Queensland, Western Australia, & Tasmania started to adopt their own criminal code.<sup>58</sup> Michael Kirby notes that this division had an impact upon the way in which the criminal law developed in Australia and what trends it tended to follow:

“Against this background, it will be no surprise that, at the time of Australia’s federation and political independence, decisions had been taken, copying the United States Constitution and not that of Canada, to leave the bulk of the criminal law as the responsibility of the States and Territories; and not of the Federal Parliament. No national criminal code was adopted. Issues of evidence in criminal trials, criminal procedures and substantive criminal law were thus left to the sub- national jurisdictions concerned. This was another impediment to substantial reform. Because crime was basically regarded as a local matter, change to the law was commonly viewed as controversial. The criminal law was not readily susceptible to change.”<sup>59</sup>

In 1907 Britain enacted the Criminal Appeal Act which was very controversial and not well received at the time because many feared that it would undermine the finality of jury verdicts and encourage people to abuse the process of appeal. It was also argued that the mechanism of pardon, as an act of mercy was a sufficient mechanism to address potential miscarriages of justice. Despite these reservations the Act became law in 1907 and was followed in Australia with a final appellate court being established which was subject to the Privy Council.<sup>60</sup>

In Australia there have been several high profile cases where miscarriages of justice have been uncovered. Supporters of the establishment of a CCRC in Australia use the catalog of cases as evidence of the fact that there is indeed a need for an independent body to review cases. Australia has toyed with the idea of establishing a CCRC but none of them have come to fruition. The reason for this is said to be because of cost and need as well as, ‘the initiative to permit a further right of appeal in limited criminal cases.’<sup>61</sup> It is argued by Michael Kirby that Australia is not immune from the possibilities of miscarriages of justice that in New Zealand, Canada & the UK. That the miscarriages of justice cases that have occurred in Australia have illustrated that there is need to reform the system, that there is, ‘a gap in Australian criminal law and practice and in our institutional arrangements that is not being met.’<sup>62</sup> Michael Kirby argues that there is ‘disharmony’ between the high standards set out by the High Court of Australia in the case of *Pell v The Queen*<sup>63</sup> and what the politicians and legislatures as well as citizens are willing to tolerate.<sup>64</sup>

<sup>58</sup>Miscarriages of Justice in Australia: Unfinished Business by Michael Kirby Global Journal of Management and Business Research: G Interdisciplinary, Volume 21 Issue 3 Version 1.0 Year 2021

<sup>59</sup>Miscarriages of Justice in Australia: Unfinished Business by Michael Kirby Global Journal of Management and Business Research: G Interdisciplinary, Volume 21 Issue 3 Version 1.0 Year 2021

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<sup>61</sup>Miscarriages of Justice in Australia: Unfinished Business by Michael Kirby Global Journal of Management and Business Research: G Interdisciplinary, Volume 21 Issue 3 Version 1.0 Year 2021

<sup>62</sup>Miscarriages of Justice in Australia: Unfinished Business by Michael Kirby Global Journal of Management and Business Research: G Interdisciplinary, Volume 21 Issue 3 Version 1.0 Year 2021

<sup>63</sup>High Court of Australia, Case No M112/2019;[2019] VSCA 186

<sup>64</sup>Miscarriages of Justice in Australia: Unfinished Business by Michael Kirby Global Journal of Management and Business Research: G Interdisciplinary, Volume 21 Issue 3 Version 1.0 Year 2021

Below are listed a few cases which illustrate the fact that Australia is not immune from the tragedy of miscarriages of justice

1. The Chamberlain case: was televised made into a film in which Meryl Streep starred and won an oscar in 1989 for her role in the film. The case involved a couple who had gone camping with their baby daughter Azaria. It was reported by the mother, Mrs Lindy Chamberlain that her daughter had been grabbed from the tent by a dingo. The first inquest accepted her version of events but this was followed by a murder charge which resulted in her conviction.<sup>65</sup> This was followed by a second inquest, several appeals, the involvement of the royal commission, which then resulted in her acquittal and a third inquest where the coroner who acquitted her and issued an apology to the Chamberlain family. The case ended in 2011.<sup>66</sup>
2. The Mallard case: This case garnered a lot of media attention. It concerned the murder of a jeweler in Perth. The trial lasted 10 days in which it became evident that Mr Mallard had an unusual personality (it later transpired that he suffered from schizophrenia) During his police interrogation he made several comments and suggestions of how the murder might have taken place.<sup>67</sup> It later came to light that the questioning of the police was not fair and reliable these mistakes were not corrected by the prosecution.<sup>68</sup> The jury returned a guilty verdict this was appealed and upheld by the Court of Criminal Appeal of Australia. He was refused special leave to appeal to the High Court of Australia. The reason for the refusal was that Mr Mallard argued that him being denied the right to a polygraph test resulted in the miscarriage of justice. However, the judges held that the results of such evidence is not reliable and would not have significantly impacted the outcome of the verdict of the jury. A petition of mercy was made to the Attorney-General who again referred the case to the Criminal Court of Appeal who dismissed the appeal. But this time special leave to appeal to the High Court of Australia was granted because the evidence had been gone over with fine comb to reveal that the timeline that had been argued by the prosecution was impossible, based upon other objective evidence, that Mr Mallard could not have possibly committed the offences. His conviction was quashed. It was eventually concluded that the murder had been committed by another prisoner.<sup>69</sup>
3. The case of Cardinal Pell: trial concerned alleged historical offences of sexual abuse. The case attracted worldwide media attention after a jury in 2018 convicted him of the offences. The alleged offences occurred in 1996, he went on trial 22 years later.<sup>70</sup> He started his

<sup>65</sup>Staines, D. (2006), *A Legal Trauma, a Public Trauma: Lindy Chamberlain and the Chamberlain Case*, Sarat, A. (Ed.) *Studies in Law, Politics and Society* (Studies in Law, Politics, and Society, Vol. 38), Emerald Group Publishing Limited, Bingley, pp. 153-172

<sup>66</sup>Miscarriages of Justice in Australia: Unfinished Business by Michael Kirby *Global Journal of Management and Business Research: G Interdisciplinary*, Volume 21 Issue 3 Version 1.0 Year 2021

<sup>67</sup>Tracey Green (2012) *The future of investigative interviewing: lessons for Australia*, *Australian Journal of Forensic Sciences*, 44:1, 31-43

<sup>68</sup>Police practice and false confessions: A search for the implementation of investigative interviewing in Australia, Lisanne Adam and Celine van Golde, *Alternative Law Journal* 2020, Vol. 45(1) 52–59

<sup>69</sup>Miscarriages of Justice in Australia: Unfinished Business by Michael Kirby *Global Journal of Management and Business Research: G Interdisciplinary*, Volume 21 Issue 3 Version 1.0 Year 2021

<sup>70</sup>Gleeson, K. (2020). *Reckoning with denial and complicity: Child sexual abuse and the case of Cardinal George Pell*. *International Journal for Crime, Justice and Social Democracy*, 9(4), 31–44.

prison sentence and immediately lodged an appeal which was dismissed he sought special leave to appeal to the High Court of Australia in 2020 the court delivered an unanimous decision setting aside the conviction and acquitting in favour of the Cardinal Pell.<sup>71</sup> In reaching its conclusion, the Court relied on, and applied, a passage from the earlier decision in *Chamberlain v The Queen* [No.2]“Making full allowance for the advantages enjoyed by the jury, there is a significant possibility in relation to [the] charges... that an innocent person has been convicted.”<sup>72</sup>

It is yet to be seen what the fallout of these cases will be on the appeal process in Australia.<sup>73</sup> In Australia there has been the prevalent view that there should only be the right to one appeal: “The usual reason given for favouring a limitation to one appeal (which is not expressly spelt out, in terms, in the statute) was that an appellate court “should not attempt to enlarge its jurisdiction beyond what Parliament has chosen to give”.<sup>74</sup> This is an interpretative approach that Australia has thus far chosen to take concerning the language of the 1907 Act. The Act simply states that a person ‘may appeal’.<sup>75</sup> Concerning multiple appeals the High Court has taken the following position:

’The High Court of Australia does enjoy a statutory power to remit a matter before it to another court to consider admitting fresh evidence and then to refer the matter back to the High Court for final determination. That power still exists. However, it has seldom been exercised.’<sup>76</sup>

The Australian Human Rights Commission received a submission that the current role of the attorney-general is not impartial when it comes to reviewing cases. The submission also included the argument that the current situation did not guarantee the right to a fair trial.<sup>77</sup> Australia is a party to the International Covenant on Civil and Political Rights Article 14.5 as well as its second protocol which states that persons who have been adversely affected enjoy the right to communicate to the Human Rights Committee. Interestingly the HRC pointed out that the measures currently used by Australia to hear and determine appeals would not meet the standards as required and set out by the ICCPR:

’ICCPR requires that such rights be determined by competent ‘judicial’ authorities, applying established legal rules in a ‘fair and public hearing’. An ‘unfettered’ executive discretion would not conform to the requirements of the Covenant. It was not a ‘judicial’

<sup>71</sup>Hodge, J. (2020). The scapegoating of Cardinal Pell. *Quadrant*, 64(6), 26–31.

<sup>72</sup>Miscarriages of Justice in Australia: Unfinished Business by Michael Kirby *Global Journal of Management and Business Research: G Interdisciplinary*, Volume 21 Issue 3 Version 1.0 Year 2021

<sup>73</sup>Miscarriages of Justice. Joseph Friedman. *LSJ Online*, <https://lsj.com.au/articles/miscarriages-of-justice/>

<sup>74</sup>Miscarriages of Justice in Australia: Unfinished Business by Michael Kirby *Global Journal of Management and Business Research: G Interdisciplinary*, Volume 21 Issue 3 Version 1.0 Year 2021

<sup>75</sup>Miscarriages of Justice in Australia: Unfinished Business by Michael Kirby *Global Journal of Management and Business Research: G Interdisciplinary*, Volume 21 Issue 3 Version 1.0 Year 2021

<sup>76</sup>Miscarriages of Justice in Australia: Unfinished Business by Michael Kirby *Global Journal of Management and Business Research: G Interdisciplinary*, Volume 21 Issue 3 Version 1.0 Year 2021

<sup>77</sup>Irving case prompts review of redress options for miscarriages of justice. Ben Smee. *The Guardian*. <https://www.theguardian.com/australia-news/2023/jan/21/irving-case-prompts-review-of-redress-options-for-miscarriages-of-justice>

decision. It took place behind closed doors.<sup>78</sup>

## Conclusions

The criminal justice system is supposed to convict suspects beyond all reasonable doubt. However, the role of the jury is significantly/severely hampered when the prosecution, police or even expert witnesses cover up or misrepresent evidence. The jury are also guided by the judge in the way in which they sum up evidence. All of these factors work together to present the jury with a situation whereby they deliver a verdict which goes down in the history books as a miscarriage of justice.

In Canada there has been a prevalent problem of forensic pathologists who were not trained properly in the fields that they were giving evidence in. There is also the catch of the legislation in Australia of only allowing a convicted person the right to appeal once. Once that opportunity has been used unsuccessfully you could attempt to petition the Attorney General to send the case back to be reviewed by the courts. This is a last stitch attempt which is solely at the mercy of the Attorney General who has discretion to reject or accept.<sup>79</sup>

In the jurisdictions discussed (New Zealand, Australia, Canada, & the United Kingdom) all have mechanisms in place to ensure that their criminal justice systems avoid miscarriages of justice. The aim is to ensure that only those go to prison who beyond all reasonable doubt have committed the crime with which they are charged. However, there are still significant systemic institutional barriers which prevent individuals from being able to redress the injustices that they have suffered. As identified in both New Zealand and Canada there are significant race and ethnic discrimination factors which play into unhelpful stereotypes that pervade and persist in society about what constitutes the perfect criminal. Each of the countries, apart from Australia, mentioned have their own unique issues which have led to the establishment of a Criminal Cases Review Commissions which are themselves not infallible. As a continuing part of the research will be to delve deeper into the blind spots which continue to persist in the perpetuation of miscarriages of justice and whether in fact the CCRC's contribute to or are in some part further entrench institutional barriers to justice.

<sup>78</sup>Miscarriages of Justice in Australia: Unfinished Business by Michael Kirby Global Journal of Management and Business Research: G Interdisciplinary, Volume 21 Issue 3 Version 1.0 Year 2021

<sup>79</sup><https://lsj.com.au/articles/miscarriages-of-justice/>