



# **Parliament of South Australia**

## **Report of the**

### **LEGISLATIVE REVIEW COMMITTEE**

### **ON ITS INQUIRY INTO THE**

### **CRIMINAL CASES REVIEW COMMISSION BILL 2010**

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**SECOND SESSION FIFTY SECOND PARLIAMENT**

# THE LEGISLATIVE REVIEW COMMITTEE

## Parliament of South Australia

52<sup>nd</sup> Parliament, 2<sup>nd</sup> Session

### Committee Membership

Hon. Gerry Kandelaars (Presiding Member)	ALP
Hon. John Darley MLC	Independent
Hon. Stephen Wade MLC	Liberal
Ms Gay Thompson MP	ALP
Mr Alan Sibbons MP	ALP
Mr John Gardner MP	Liberal

### Functions of the Legislative Review Committee

Section 12, *Parliamentary Committees Act 1991*

The functions of the Legislative Review Committee are—

- (a) to inquire into, consider and report on such of the following matters as are referred to it under this Act:
  - (i) any matter concerned with legal, constitutional or parliamentary reform or with the administration of justice but excluding any matter concerned with joint standing orders of Parliament or the standing orders or rules of practice of either House;
  - (ii) any Act or subordinate legislation, or part of any Act or subordinate legislation, in respect of which provision has been made for its expiry at some future time and whether it should be allowed to expire or continue in force with or without modification or be replaced by new provisions;
  - (iii) any matter concerned with inter-governmental relations;
- (b) to inquire into, consider and report on subordinate legislation referred to it by the *Subordinate Legislation Act 1978*;
- (c) to perform such other functions as are imposed on the Committee under this or any other Act or by resolution of both Houses.

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## **LIST OF ABBREVIATIONS**

CCRC	Criminal Cases Review Commission
DNA	Deoxyribonucleic acid
DPP	Department of Public Prosecutions
FSSA	Forensic Science SA
ICCPR	International Covenant on Civil and Political Rights
NATA	National Association of Testing Authorities (Forensic Science)
NCCRC	Norwegian Criminal Cases Review Commission
NCIIC	North Carolina Innocence Investigation Commission
NIFS	National Institute of Forensic Science
SAPOL	South Australia Police
SCCRC	Scottish Criminal Cases Review Commission
UK CCRC	United Kingdom Criminal Cases Review Commission (covering cases in England, Wales and Northern Ireland)
UNHCR	United Nations Human Rights Committee

## EXECUTIVE SUMMARY

The Legislative Review Committee received a reference from the Legislative Council directing that it inquire and report into the Criminal Cases Review Commission Bill 2010, alternative approaches to rectifying issues with the prerogative of mercy, the possibility of establishing a national criminal cases review commission and any other related matter. The Inquiry was introduced in response to concerns about the limited opportunity and statutory rights available to a person who believes that they should not have been convicted of an offence.

Currently, a person has a right of appeal against their conviction on limited grounds provided by statute: namely a wrong decision on a question of law, on grounds that the verdict was unreasonable or could not be supported having regard to the evidence, or that there was a miscarriage of justice. The court has determined that it will not reconsider evidence already adduced at the trial, and will not allow an appeal simply because it disagrees with the decision of a jury. Fresh evidence will only be admitted if it is relevant and admissible. A convicted person has no right to a further appeal on any grounds after this one right of appeal has been exhausted; this is known as the principle of finality.

The Australian Human Rights Commission submitted that the lack of ability of the courts to fully rehear a matter may contravene Australia's obligations under Article 14 of the International Covenant on Civil and Political Rights. A person acquitted of an offence may be tried again where the acquittal was tainted or where fresh and compelling evidence comes to light; however there is no opportunity for a retrial or review of a person convicted of an offence on these same grounds.

The only other option for a person wanting to challenge their conviction is to petition the Governor for a pardon in the exercise of the prerogative of mercy. This is an entirely discretionary exercise of power by the Governor and does not result in a conviction being quashed. Petitions to the Governor from convicted persons are usually referred to the Attorney-General under section 369 of the *Criminal Law Consolidation Act 1935*. Again, there is no time limit or direction as to any investigations or limitations on the Attorney-General in considering petitions for mercy that may be referred to a court. Several witnesses to the Inquiry expressed their dissatisfaction with section 369, that the section lacked structure and certainty, the involvement of the Attorney-General made the decision too political, and was rarely, if ever used to the benefit of a convicted person.

The Committee heard evidence about the nature of the adversarial trial and the propensity of wrongful convictions to occur as a result of the presentation of forensic evidence. Witnesses and submissions expressed concern that the changing nature of forensic science and the development of new technologies may allow evidence to be retested, the results of which may show that a convicted person is innocent. Apart from the nature of forensic evidence itself, concerns were also expressed about the method in which scientific expert evidence is adduced at trial. Submissions outlined that forensic evidence may be misunderstood or misused due to the question and answer format in which it is adduced, or because the evidence is too complex for a jury to understand; further, there was no formal

opportunity for a jury to ask questions and seek clarification if they did not understand certain matters.

Establishing a Criminal Cases Review Commission is seen as providing convicted persons the opportunity to have any claims about the safety of their conviction investigated by an independent body, and referred to the court for the quashing of their conviction if they concluded that there was a reasonable possibility that the conviction would be overturned. The Criminal Cases Review Commission Bill 2010 aimed to set up such a body in South Australia, similar to that established in the UK. It provided for a five member Commission, with membership including legal practitioners and those with particular knowledge of the criminal justice system.

Under the Bill, the Commission would have the power to investigate applications on behalf of persons convicted of both summary and indictable offences and sentences. The Commission's terms of reference under the Bill are threefold: firstly they must consider that there is a real possibility of the conviction or sentence not being upheld; secondly, this must be as a result of an argument, evidence or information not raised in the original proceedings; and thirdly, that an appeal against the conviction or sentence must already have been refused by the court.

The Bill provides the Commission with a number of powers of investigation, including the appointment of an investigating officer to assist them, and provision to assist the Attorney-General in the exercise of powers under section 369 of the *Criminal Law Consolidation Act 1935*, and the court if they seek the Commission's assistance with an appeal. Concerns were expressed in submissions about the operation of such a Commission, including the scope to hear new evidence, its consideration of the outcome of the trial rather than a person's innocence, and the lack of provision for informing and engaging victims of crime.

The Committee investigated and heard evidence about the way in which CCRCs in other jurisdictions operated, and also other methods of post conviction review. The United Kingdom, Scotland and Norway all have criminal cases review commissions. North Carolina has an Innocence Inquiry Commission which forms part of the courts. Canada has statutory provisions for a further right of appeal against a conviction to the Federal Attorney General, who undertakes a review and then refers the matter back to the court for hearing. The Committee also considered a national approach to post conviction review in Australia.

New South Wales has been the only Australian jurisdiction to address post conviction review in any way. They have an extended statutory appeals section, whereby a person can apply to the court, the Attorney-General or the Governor for a review of their conviction. They have also established a DNA Review Panel which is a panel of experts who can organise the testing of DNA evidence where an applicant is of the view that such evidence may prove their innocence.

The Committee received 29 submissions and heard evidence from eight witnesses. In light of the Committee's investigations and the evidence it heard, it recommends the following:

#### **RECOMMENDATION 1**

**That a Criminal Cases Review Commission not be established in South Australia at this time.**

#### **RECOMMENDATION 2**

**The Committee does not recommend that the Attorney-General pursue the establishment of a Criminal Cases Review Commission at a national level.**

#### **RECOMMENDATION 3**

**That Part 11 of the *Criminal Law Consolidation Act 1935* be amended to provide that a person may be allowed at any time to appeal against a conviction for serious offences if the court is satisfied that:**

- **the conviction is tainted;**
- **where there is fresh and compelling evidence in relation to the offence which may cast reasonable doubt on the guilt of the convicted person.**

#### **RECOMMENDATION 4**

**That the Attorney-General liaise with the courts in undertaking a review of the process of discovery and presentation of scientific evidence in criminal trials, and in particular considers:**

- **amendments to legislation to allow certain expert evidence to be agreed by prosecution and defence;**
- **amendments to legislation and/or court rules which allow the jury and/or judge in a criminal trial the opportunity to ask questions of expert witnesses.**

#### **RECOMMENDATION 5**

**That the Attorney-General considers establishing a Forensic Science Review Panel to enable the testing or re-testing of forensic evidence which may cast reasonable doubt on the guilt of a convicted person, and for these results to be referred to the Court of Criminal Appeal.**

#### **RECOMMENDATION 6**

**That the Commissioner for Victims' Rights, and victims of crime (if they request), be:**

- **notified of any post conviction review to be undertaken under any Act;**
- **able to make submissions to any such a review proceedings, either through written submission, or through representation by the Commissioner for Victims' Rights;**
- **entitled to information about the progress of such a review.**

#### **RECOMMENDATION 7**

**That the Attorney-General consider amendments to relevant legislation to provide that a person granted a pardon for a conviction should be eligible to have their conviction quashed.**



## 1. TERMS OF REFERENCE

On 10 November 2010, Independent Member of the Legislative Council, the Hon. Ann Bressington introduced the Criminal Cases Review Commission Bill 2010. The Bill was modelled on the legislation which established the Criminal Cases Review Commission in the United Kingdom. In her second reading speech, the Hon. Ann Bressington summed up the purpose of the Bill as follows:

Modelled on the commission established in the United Kingdom in 1997, a South Australian criminal cases review commission would be independent of government and the judiciary and be empowered to impartially review and investigate claims of wrongful conviction and refer substantiated cases back to the Full Court. A criminal cases review commission would do nothing to advance the case of those who are guilty of crimes for which they were convicted following a fair trial. However, it will provide a non-politicised process by which those who allege a miscarriage of justice can have their claims investigated and, if warranted, put back before the courts.<sup>1</sup>

On 8 June 2011 the Bill was referred to the Legislative Review Committee for inquiry and report. On 22 June 2011 a number of other matters were referred to the Committee for its consideration along with the Bill. The terms of reference for the Inquiry are:

1. That the Criminal Cases Review Commission Bill 2010 be withdrawn and referred to the Legislative Review Committee for inquiry and report.
2. Requests the Legislative Review Committee, in its inquiry on the Criminal Cases Review Commission Bill 2010 to also consider and report on:
  - a) alternative approaches to rectifying any identified issues with the reprieve offered by section 369 of the *Criminal Law Consolidation Act 1935* and the prerogative of mercy;
  - b) the possibility of the establishment of a national Criminal Cases Review Commission as an alternative to a state based Criminal Cases Review Commission; and
  - c) any other related matter.

A copy of the Bill can be found at Appendix 3 to the Report.

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<sup>1</sup> South Australian Parliamentary Debates, Legislative Council, 10 November 2010, p. 1424.

## 2. THE CRIMINAL JUSTICE SYSTEM

When a crime is committed, the police will commence an investigation, gathering evidence and interviewing witnesses and potential suspects. When the police believe they have enough evidence to warrant a charge against someone, a charge is laid. In some cases, police will prosecute; in others, information is passed to the Director of Public Prosecutions and a decision is made as to whether to proceed with the charges against the accused.

The accused person is then indicted, and required to enter a plea to the offence or offences with which they have been charged. If they plead guilty, they are then sentenced by the court. If they plead not guilty, they are committed to trial either by judge and jury or by judge alone. Indictable offences are generally heard in either the District or Supreme Court, while summary offences are dealt with in the Magistrates Court.

The defendant is entitled to the presumption of innocence. That is, they are taken to be innocent until proven guilty beyond a reasonable doubt. The onus is on the prosecution to prove an accused guilty beyond reasonable doubt. The defence's role is to counteract any assertions put by the prosecution, and to adduce evidence in his or her defence. The judge will sum up the case and instruct the jury as to the legal rules they should apply to the evidence.<sup>2</sup>

The South Australian legal system can be described as 'adversarial'; namely that there is a prosecution and a defence lawyer who put their version of events to a judge and/or jury by calling witnesses and adducing evidence through a question and answer format.

It is the role of the jury to adduce the facts of the case based on the presentations of the prosecution and defence, and then to come to a verdict of guilty or not guilty. A verdict of guilty will result in a conviction. A verdict of not guilty will result in an acquittal. Subject to an appeal, once a conviction or an acquittal has been given, this is the final word and there is no opportunity for further investigation or argument.

A person who has been acquitted of an offence is not the equivalent of a finding of innocence. The criminal justice process is concerned with guilt or non guilt as a matter of probability, tested by the standard of beyond reasonable doubt.<sup>3</sup>

Once a person has been convicted of an offence, there are only two avenues by which they can have their conviction reviewed: an appeal to the Court of Criminal Appeal, or an application to the Governor for the exercise of the prerogative of mercy. On appeal, a court is concerned with the safety of the conviction, and not a person's guilt or innocence. Once a Court of Appeal has delivered its finding, the decision is said to be 'perfected' and the court has determined it has no jurisdiction to vary its perfected decision.<sup>4</sup>

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<sup>2</sup> Summary based on information in Brett, Waller and Williams, *Criminal Law Text and Cases*, Eighth Edition, Butterworths, 1997, Chapter 2.

<sup>3</sup> Griffith, G. and Roth L, "DNA Evidence, Wrongful Conviction and Wrongful Acquittals," *NSW Parliamentary Library Research Service*, No. 11/06, p. 20.

<sup>4</sup> Sangha, Roach and Moles, *Forensic Investigations and Miscarriages of Justice*, Irwin Law Inc, 2010, p. 139.

Each step in the criminal justice process involves a great deal of discretion; the discretion of the police in deciding which matters to investigate and making the arrest; the discretion of the prosecutors in determining what charges to lay; the judge or jury's discretion in finding a person guilty or not guilty; the court's discretion in admitting evidence and determining sentence once a verdict is determined.<sup>5</sup> Any system involving variable elements is subject to error; the criminal justice system is no exception. Sometimes errors are made, and there are limited opportunities once a conviction has been recorded for those errors to be investigated and redressed.

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<sup>5</sup> Brett, Waller and Williams, *Criminal Law Text and Cases*, Eighth edition, Butterworths 1997, pp. 21 and 23.

### 3. APPEALS AND POST APPEAL REVIEW

Once a person has been convicted and sentenced, they have a statutory right of appeal to a superior court. If they are convicted and sentenced in the Magistrates Court a right of appeal lies to the Supreme Court. If they are convicted and sentenced in the District or Supreme Court they have a right of appeal to the Court of Criminal Appeal. The Court of Criminal Appeal consists of the Full Court of the Supreme Court being three judges of the Supreme Court.<sup>6</sup>

The right to an appeal is a statutory remedy, and not a common law remedy. Before the enactment of the *Criminal Appeals Act* in 1924, a convicted person had no right to appeal or have their conviction reviewed on any grounds.<sup>7</sup>

#### 3.1 The appeals process

Appeals can be against the conviction or the sentence. Part 11 of the *Criminal Law Consolidation Act 1935* deals with appellate proceedings. Appeals are not concerned with a person's guilt or innocence. The High Court expressed the role of the Court of Criminal Appeal as follows:

The function of the Court of Criminal Appeal is not to find facts, but to give legal effect to the findings of fact that the jury have expressly made or which are necessarily involved in the verdict of guilty which they have returned.<sup>8</sup>

An appeal against conviction must be lodged within 21 days of the conviction being handed down by the court, unless the court grants special permission.<sup>9</sup>

#### 3.2 Grounds for appeal

Under section 352 of the *Criminal Law Consolidation Act 1935*, a person can appeal in the following circumstances:

- on a question of law alone;<sup>10</sup>
- on any other ground with the permission of the Full Court or on the certificate of the court of trial that it is a fit case for appeal;<sup>11</sup>
- appeal on sentence on any ground with the permission of the Full Court (other than a sentence fixed by law) including a decision of the court to defer sentencing.<sup>12</sup>

There is also an opportunity for the defendant to appeal on an issue antecedent to the trial that is adverse to the defendant before the commencement or completion of the trial.<sup>13</sup> The

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<sup>6</sup> This process was outlined in more detail in the evidence from Mr Bönig, Legislative Review Committee Hansard, 2 May 2012 at [84].

<sup>7</sup> See the discussion of Lander J in *Police v Cadd* (1997) 69 SASR 150.

<sup>8</sup> *Spies v The Queen* (2000) 201 CLR 603 at 621 per Gaudron, McHugh, Gummow and Hayne JJ as quoted in Ross, D. *Crime*, Lawbook Co. 2002, at [1.3310], p. 69.

<sup>9</sup> Rule 4A, *Supreme Court Criminal Appeal Rules 1996*.

<sup>10</sup> Section 352(1)(a)(i).

<sup>11</sup> Section 352(1)(a)(ii).

<sup>12</sup> Section 352(1)(a)(iii).

<sup>13</sup> Section 352(1)(b).

Director of Public Prosecutions may also appeal the conviction or sentence on a number of grounds.<sup>14</sup>

Section 356 outlines the jurisdiction of the Full Court to hear appeals:

All jurisdiction and authority under any other Act in relation to questions of law arising in criminal trials which are vested in the judges of the Supreme Court or the Full Court of the Supreme Court as constituted by the *Supreme Court Act 1935* shall be vested in the Full Court for the purposes of this Act.

Section 353 (1) provides the following direction to the court in relation to an appeal against conviction:

The Full Court on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is **unreasonable or cannot be supported having regard to the evidence**, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a **wrong decision on any question of law**, or that on any ground there was a **miscarriage of justice**, and in any other case shall dismiss the appeal; but the Full Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, **dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred**. [Emphasis added].

In summary, there are three grounds on which a court may set aside a jury verdict of guilty:

- 1) that the verdict is unreasonable or cannot be supported having regard to the evidence;
- 2) a wrong decision has been made on a question of law;
- 3) a miscarriage of justice has occurred.

### 3.3 Unreasonableness of verdict

The High Court has formulated its own test to determine appeals on the grounds of unreasonableness or verdicts not being supported having regard to the evidence, if the conviction was unsafe or dangerous. They make clear that the role of the jury must not be usurped in the appeals process:

To say that the Court of Criminal Appeal thinks that it was unsafe or dangerous to convict, is another way of saying that the Court of Criminal Appeal thinks that a reasonable jury should have entertained such a doubt...**The responsibility of deciding upon the verdict, whether of conviction or acquittal, lies with the jury and we can see no justification, in the absence of express statutory provisions leading to a different result, for an appellate tribunal to usurp the function of the jury and disturb a verdict of conviction simply because it disagrees with the jury's conclusion...** the trial is by jury, and (absent other sources of error) the jury's verdict should not be interfered with unless the Court of Criminal Appeal concludes that a **reasonable jury ought to have had a reasonable doubt**. [Emphasis added].<sup>15</sup>

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<sup>14</sup> See sections 352(1)(ab), 352(1)(b) and 353(2a).

<sup>15</sup> *Chamberlain v R* (No. 2) 153 CLR 521 at 534 per Gibbs CJ and Mason J.

In essence, the court in deciding whether a conviction is unreasonable has to consider whether a reasonable jury ought to have had a reasonable doubt, based on the evidence. It is not sufficient to show that the evidence at trial was open to criticism.<sup>16</sup>

### 3.4 Miscarriage of justice

The miscarriage of justice grounds in section 353 are wider than the unreasonableness test discussed above. The court must be satisfied that no reasonable jury, properly directed, could have failed to return a verdict of guilty on the evidence before it had it applied itself to its task in a proper manner, making in favour of the accused the presumption of innocence and bearing in mind the necessity that the charge be proved beyond all reasonable doubt.<sup>17</sup>

The court has determined that the miscarriage of justice ground leaves it open for the court to consider the substantial possibility that the jury may have been mistaken or misled in regards to evidence.<sup>18</sup> It is possible for the Court of Criminal Appeal to overturn a conviction on the basis of miscarriage of justice, even if a defendant has pleaded guilty.<sup>19</sup>

### 3.5 New evidence and fresh evidence

In hearing appeals, the court generally considers the trial process and whether it was fair and could have resulted in a miscarriage of justice. Its role is not to re-hear the entire case as heard by the jury and make a fresh decision. It has drawn a distinction as to what types of evidence it will hear during an appeals process.

This distinction is between what the court terms ‘new evidence’ and ‘fresh evidence’. The definition of both these terms was outlined most recently by the Supreme Court of New South Wales in *Wood v R*:

“New evidence” is evidence that was available and not adduced at the trial. “Fresh evidence” is evidence which either did not exist at the time of the trial or, if it did, could not then have been discovered by an accused exercising due diligence.”<sup>20</sup>

Fresh evidence also needs to be relevant and otherwise admissible.<sup>21</sup> The ultimate question is whether there would be a miscarriage of justice if the evidence were not allowed to be presented.<sup>22</sup> A court will only allow an appeal on the grounds of a miscarriage of justice on the basis of ‘fresh evidence’. However, the court notes that ‘great latitude’ should be extended to the convicted person in determining what evidence by reasonable diligence could have been available.<sup>23</sup>

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<sup>16</sup> Lunn, *Criminal Law South Australia* [7045.2(1)] p. 5296.

<sup>17</sup> Lunn, *Criminal Law South Australia* [7045.4(1)] p. 5303.

<sup>18</sup> *Morris v R* (1987) 163 CLR 454 as cited in Lunn, *Criminal Law South Australia* [7045.4(1)] p. 5303. Further examples are cited at p. 5305.

<sup>19</sup> See discussion in Ross, D, *Crime*, Lawbook Co. 2002 at [1.3330], pp. 71-2.

<sup>20</sup> *Wood v R* [2012] NSWCCA 21 at 707 per McClellan CJ.

<sup>21</sup> See for a recent example *R v Parenzee* (2007) 101 SASR 456 where fresh evidence was adduced that the HIV virus did not exist.

<sup>22</sup> Lunn, *Criminal Law South Australia*, [7075.3(1)], p. 5336.

<sup>23</sup> *Wood v R* [2012] NSWCCA 21 at 709 and 710 per McClellan CJ.

### 3.6 Court's power to investigate

Although the court limits itself to receiving fresh evidence on appeal, it has a range of statutory powers to receive new evidence and investigate matters under its consideration. Section 359 of the *Criminal Law Consolidation Act 1935* provides that the Full Court on hearing an appeal, may receive new evidence, examine witnesses and order the production of documents if it thinks it necessary or expedient in the interests of justice:

For the purposes of this Act, the Full Court may, if it thinks it necessary or expedient in the interests of justice—

- (a) **order the production of any document**, exhibit or other thing connected with the proceedings, the production of which appears to it necessary for the determination of the case; and
- (b) **order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court**, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in the manner provided by rules of court before any judge of the Supreme Court or before any officer of the Supreme Court or justice of the peace or other person appointed by the Full Court for the purpose, and allow the admission of any depositions so taken as evidence before the Full Court; and
- (c) **receive the evidence, if tendered, of any witness** (including the appellant) who is a competent but not compellable witness and, if the appellant consents, of the husband or wife of the appellant in cases where the evidence of the husband or wife could not have been given at the trial except with such consent; and
- (d) where any question arising on the appeal involves prolonged examination of documents or accounts or any scientific or local investigation which cannot, in the opinion of the Full Court, conveniently be conducted before the Court, **order the reference of the question in the manner provided by rules of court for inquiry and report to a special commissioner appointed by the Court and act on the report of any such commissioner** so far as it thinks fit to adopt it; and
- (e) **appoint any person with special expert knowledge to act as assessor to the Full Court** in any case where it appears to the Court that such special knowledge is required for the proper determination of the case; and
- (f) **exercise in relation to the proceedings of the Court any other powers** which may for the time being be exercised by the Supreme Court on appeals or applications in civil matters; and
- (g) issue any warrants necessary for enforcing the orders or sentences of the Court,

but in no case shall any sentence be increased by reason of, or in consideration of, any evidence that was not given at the trial. [Emphasis added].

The court, in applying this section, has made clear that these supplementary powers are to assist the court in hearing an appeal and *“does not confer upon the Full Court some species of inquisitorial power that is to be exercised at large, disengaged from the appeals process.”*<sup>24</sup>

### 3.7 Allowing or dismissing the appeal

Section 353(2) provides that the Court of Appeal can either enter a verdict of acquittal or order a new trial if it allows the appeal:

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<sup>24</sup> *Re Van Beelen* (1974) 9 SASR 163 at 186.

Subject to the special provisions of this Act, the Full Court shall, if it allows an appeal against conviction, quash the conviction and either direct a judgment and verdict of acquittal to be entered or direct a new trial.

Section 353(4) and (5) outline the requirements on the court regarding appeals on sentence:

- (4) Subject to subsection (5), on an appeal against sentence, the Full Court must—
  - (a) if it thinks that a different sentence should have been passed—
    - (i) quash the sentence passed at the trial and substitute such other sentence as the Court thinks ought to have been passed (whether more or less severe); or
    - (ii) quash the sentence passed at the trial and remit the matter to the court of trial for resentencing; or
  - (b) in any other case—dismiss the appeal.
- (5) The Full Court must not increase the severity of a sentence on an appeal by the convicted person except to extend the non-parole period where the Court passes a shorter sentence.

### 3.8 Appeals statistics

In 2010-11, there were 159 appeals instituted in the Court of Criminal Appeal with 106 matters going through to hearing.<sup>25</sup>

The Director of Public Prosecutions reported that in the last financial year (2010-11) that there were 46 appeals against conviction; 29 of these (63%) were dismissed and 15 retrials were ordered (32%).<sup>26</sup>

### 3.9 The principle of finality

A court has no right to hear another appeal after the appellate process has been completed, even if new evidence is found. This is known as the 'principle of finality'. This principle was outlined in the High Court case of *R v Edwards* (No. 2) [1931] SASR 376:

When an appeal has once been fully heard and disposed of, that is, in my opinion, an end of the matter so far as appeal is concerned, and the prisoner cannot continue to appeal from time to time thereafter, whenever a new point occurs to him or to his legal advisers or whenever a new fact is alleged to have come to light.<sup>27</sup>

It is said that once a decision of the court has been 'perfected', (that is, it has been decided and the decision entered on the court files), the court has no jurisdiction to reconsider or reopen its decision.<sup>28</sup> This is the case even if the interests of justice require it.<sup>29</sup>

<sup>25</sup> Courts Administration Authority Annual Report 2010-11, p. 9.

<sup>26</sup> Director of Public Prosecutions Annual Report 2010-11, p. 17.

<sup>27</sup> As quoted in *R v Keogh* [2007] SASR 226 at [51] per Doyle CJ.

<sup>28</sup> Sangha, Roach and Moles, *Forensic Investigations and Miscarriages of Justice*, Irwin Law Inc, 2010, p. 139.

<sup>29</sup> See *Burrell v The Queen* [2008] HCA 34 per Kirby J at [37]. In *Burrell*, the NSW Court of Appeal rejected an appeal which was based on an incorrect factual basis (namely that a document represented facts from the prosecution when it was actually a submission from the defendant). The High Court held that the Court had no jurisdiction to recall and reissue its judgment to correct the error. As quoted in Sangha, Roach and Moles, *Forensic Investigations and Miscarriages of Justice*, Irwin Law Inc, 2010, p. 139.



The courts recognise that even where there may be flaws in a judicial determination, there must be finality in the process, and that this may preference justice over truth:

Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth... and these are cases where the law insists on finality.<sup>30</sup>

Further, the High Court has determined that the delivery of a verdict is a role which lies solely with the jury:

The responsibility of deciding upon the verdict, whether of conviction or acquittal, lies with the jury and we can see no justification, in the absence of express statutory provisions leading to a different result, for an appellate tribunal to usurp the function of the jury and disturb a verdict of conviction simply because it disagrees with the jury's conclusion.<sup>31</sup>

### **3.10 Limitation on rules relating to double jeopardy**

Part 10 of the *Criminal Law Consolidation Act 1935* allows a person to be tried a second time for an offence of which they have been acquitted in certain limited circumstances. These provisions provide an exception to the so called double jeopardy rule, that a person should not be tried more than once for the same offence based on the same information. It has been argued that these provisions provide an exception to the principle of finality.<sup>32</sup>

The double jeopardy limitations apply only to certain offences, those being:

- Category A offences, which include:
  - murder, manslaughter and attempted manslaughter;
  - aggravated offences of rape;
  - aggravated offences of robbery;
  - certain offences of trafficking, manufacturing and selling controlled drugs under the *Controlled Substances Act 1984*;
- any other offence for which the offender is liable to be imprisoned for life or at least 15 years.<sup>33</sup>

The applications under all these sections are to be made by the Director of Public Prosecutions. Provision is also made to allow a police officer to apply to the Director of Public Prosecutions to authorise further investigations on such matters.<sup>34</sup>

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<sup>30</sup> Lord Wilberforce, *The Amptill Peerage* [1977] AC 547 at 569 as quoted in *R v Carroll* (2002) 213 CLR 635 at 643 per Gleeson CJ, and Hayne J.

<sup>31</sup> *Chamberlain v R* (No. 2) (1984) 153 CLR 521 at 534 per Gibbs CJ and Mason J.

<sup>32</sup> Griffith, G. and Roth L, "DNA Evidence, Wrongful Conviction and Wrongful Acquittals," *NSW Parliamentary Library Research Service*, No. 11/06, p. 45.

<sup>33</sup> Section 331 *Criminal Law Consolidation Act 1935*.

<sup>34</sup> Section 335 *Criminal Law Consolidation Act 1935*.

### **3.10.1 Tainted acquittal**

Section 336 provides that the Full Court of the Supreme Court may order that a person be retried for the same offence if the court is satisfied that the acquittal was tainted and that the new trial would be fair having regard to the circumstances. The circumstances to be regarded in determining the likelihood that the new trial would be fair include:

- (i) the length of time since the relevant offence is alleged to have occurred; and
- (ii) whether there has been any failure on the part of the police or prosecution to act with reasonable diligence or expedition with respect to the making of the application; and
- (iii) any other matter that the court considers relevant.<sup>35</sup>

A tainted acquittal is defined as follows:

For the purposes of this Part, if at the trial of an offence a person is acquitted of the offence, the acquittal will be **tainted** if—

- (a) the person or another person has been convicted (whether in this State or in another jurisdiction) of an administration of justice offence in connection with the trial resulting in the acquittal; and
- (b) it is more likely than not that, had it not been for the commission of the administration of justice offence, the person would have been convicted of the offence at the trial.<sup>36</sup>

### **3.10.2 Fresh and compelling evidence**

Section 337 provides that the Full Court may order a person acquitted of a Category A offence to be retried if satisfied that there is fresh and compelling evidence and it is likely that the new trial would be fair having regard to the circumstances. Fresh and compelling evidence is defined as follows:

- (1) For the purposes of this Part, evidence relating to an offence of which a person is acquitted is—

- (a) **fresh** if—

- (i) it was not adduced at the trial of the offence; and
    - (ii) it could not, even with the exercise of reasonable diligence have been adduced at the trial; and

- (b) **compelling** if—

- (i) it is reliable; and
    - (ii) it is substantial; and
    - (iii) it is highly probative in the context of the issues in dispute at the trial of the offence.

- (1) Evidence that would be admissible on a retrial under this Part is not precluded from being fresh or compelling just because it would not have been admissible in the earlier trial of the offence resulting in the relevant acquittal.<sup>37</sup>

### **3.10.3 Administration of justice offences**

Section 338 of the Act provides that:

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<sup>35</sup> Section 336(1)(b) *Criminal Law Consolidation Act 1935*.

<sup>36</sup> Section 333 *Criminal Law Consolidation Act 1935*.

<sup>37</sup> Section 332 *Criminal Law Consolidation Act 1935*.

- (1) The Full Court may, on application by the Director of Public Prosecutions, order a person who has been acquitted of an indictable offence to be tried for an administration of justice offence that is related to the offence of which the person has been acquitted if the Court is satisfied that—
  - (a) there is fresh evidence against the acquitted person in relation to the administration of justice offence; and
  - (b) in the circumstances, it is likely that a trial would be fair having regard to—
    - (i) the length of time since the administration of justice offence is alleged to have occurred; and
    - (ii) whether there has been any failure on the part of the police or prosecution to act with reasonable diligence or expedition with respect to the making of the application; and
    - (iii) any other matter that the Court considers relevant.

On the basis of this charge and conviction, an application could be made under section 336 for a retrial on grounds of a tainted acquittal.

### 3.11 Appeals to the High Court

The High Court has determined it has no power to receive fresh evidence in a criminal appeal.<sup>38</sup>

### 3.12 The prerogative of mercy

After a convicted person has exhausted their appeal rights, the only other option available is the prerogative of mercy.

The prerogative of mercy is a process whereby a convicted person may personally petition the Governor (representing Her Majesty the Queen) to pardon them. Historically, the power to pardon was a privilege to be exercised by the sovereign alone; however in modern times, it is almost always exercised with the advice of the Executive.

A pardon is not an acquittal and does not eliminate the conviction itself—it only clears the person from all consequences of the offence. The Court of Appeal is the only body with the power to remove a conviction. As Kirby J stated in *Eastman v DPP*:

At common law the pardon “is in no sense equivalent to an acquittal. It contains no notion that the man to whom the pardon is extended never did in fact commit the crime, but merely from the date of the pardon gives him a new credit and capacity.” In England it has been held that at common law, “the effect of a free pardon is such as, in the words of the pardon itself, to remove from the subject of the pardon, ‘all pains penalties and punishments whatsoever that from the said conviction may ensue,’ but not to eliminate the conviction itself”. **This type of outcome is not the outcome which a person convicted of a crime and claiming to be innocent would desire.** [Emphasis added].<sup>39</sup>

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<sup>38</sup> *Mickelberg v The Queen* (1989) 167 CLR 259.

<sup>39</sup> *Eastman v DPP (ACT)* (2003) 214 CLR 318 350 as quoted in Sangha, Roach and Moles, p. 146.

After a pardon has been granted, there must be an appeal if the conviction itself is to be set aside.<sup>40</sup> This only applies to convictions for state offences. Persons convicted of federal offences have their convictions quashed automatically once they receive a pardon.<sup>41</sup> Section 84 of the New South Wales *Crimes (Appeal and Review) Act 2001* provides that the court may quash a conviction in respect of which a free pardon under the prerogative of mercy has been granted. The section operates in respect of provisions under their Act for applications for an inquiry into a conviction by the Supreme Court or the Attorney General.<sup>42</sup>

### **3.13 Section 369 – references to the Attorney-General on prerogative of mercy**

In South Australia, the prerogative of mercy is exercised by the Governor. The usual process in receiving a request for pardon is for the Governor to seek the advice of the Attorney-General. Section 369 of the *Criminal Law Consolidation Act* provides the Attorney-General with the power to refer such advice to the Full Court of the Supreme Court for their consideration. Section 369 provides:

Nothing in this Part affects the prerogative of mercy but the Attorney-General, on the consideration of any petition for the exercise of Her Majesty's mercy having reference to the conviction of a person on information or to the sentence passed on a person so convicted, may, if he thinks fit, at any time, either—

- (a) refer the whole case to the Full Court, and the case shall then be heard and determined by that Court as in the case of an appeal by a person convicted; or
- (b) if he desires the assistance of the judges of the Supreme Court on any point arising in the case with a view to the determination of the petition, refer that point to those judges for their opinion and those judges, or any three of them, shall consider the point so referred and furnish the Attorney-General with their opinion accordingly.

The section has been interpreted to mean that the Attorney-General can only refer a matter after the ordinary appellate process has been concluded.<sup>43</sup>

If the Attorney-General refers a matter to the Court of Criminal Appeal under section 369 then the court sits in its capacity as an appeal court and must deal with the matter and apply the same legal principles as if it were an appeal.<sup>44</sup> However, unlike an ordinary appeal, the court must consider the whole case; namely, it must take into account fresh and new evidence.<sup>45</sup> Again, the court cannot substitute its own decision for the jury's verdict, but must consider whether a jury could possibly have reached that decision.<sup>46</sup>

Once the court has heard the matter, it may exercise its powers as it would under a normal appeal and either dismiss the application, quash the conviction or order a retrial. The court

<sup>40</sup> Ross, D, *Crime*, at [16.140], p. 725.

<sup>41</sup> Sections 85ZM, 85ZR, 85ZS *Crimes Act 1914* (Cth).

<sup>42</sup> For further details of the operation of the New South Wales provisions see Chapter 8.1 of the Report.

<sup>43</sup> Submission, Borick, Harding & Scales, p. 34.

<sup>44</sup> See discussion in Ross, D, *Crime*, Lawbook Co. 2002 at 13.1470 pp. 680-681. In South Australia, this is covered by Rule 19 of the *Supreme Court Criminal Appeal Rules 1996*. See also *Ratten v The Queen* (1974) 131 CLR 510 at 514 per Barwick CJ.

<sup>45</sup> As decided by the High Court in *Mallard v R* (2005) 224 CLR 125.

<sup>46</sup> See explanation in Lunn, *Criminal Law* at [7125.2], p. 5365.

may hear matters under section 369(a) not just on conviction, but on sentence, and can also consider a matter after the death of a convicted person.<sup>47</sup>

The Attorney-General's decision to review a conviction under this section is not able to be judicially reviewed.<sup>48</sup>

### **3.14 Royal Commissions**

A Royal Commission is the highest form of inquiry held on matters of public importance. It is a public inquiry process appointed at the discretion of the Executive, as instigated by the Governor (or Governor-General in the Commonwealth jurisdiction) on behalf of the Crown. Some of the reasons behind using Royal Commissions to investigate crime are that they are independent of the Executive, that existing law enforcement mechanisms are inadequate, and they are useful for exposing criminal activity or revealing the truth.<sup>49</sup>

In South Australia, the holding of a Royal Commission is governed by the *Royal Commissions Act 1917*. Several Royal Commissions have been held into criminal convictions, resulting in significant errors being revealed and convicted persons being released from prison, such as in the case of Edward Splatt.<sup>50</sup>

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<sup>47</sup> Lunn, *Criminal Law* at [7125.2], p. 5366.

<sup>48</sup> *Von Einem v Griffin and Anor* (1998) 72 SASR 110.

<sup>49</sup> Donaghue, Stephen, *Royal Commissions and Permanent Commissions of Inquiry*, Butterworths, 2001, p. 16.

<sup>50</sup> See Submission, Mann, p. 1.

## 4. THE NEED FOR A CRIMINAL CASE REVIEW BODY

There are a variety of factors which give rise to miscarriages of justice or wrongful convictions; however, there are few avenues by which these may be redressed. Some submissions to the Inquiry were critical of the current mechanisms available to convicted persons to have their cases investigated or evidence re-tested if such a process could cast doubt on their conviction. Submissions were critical of current appeal mechanisms, the operation of the royal prerogative of mercy and section 369 investigations undertaken by the Attorney-General as being too difficult to establish, expensive and lacking independence. They submitted that Royal Commissions were rare and an expensive way of reviewing criminal cases. The submission from the Australian Human Rights Commission cast doubt on whether South Australia's current appeals system complies with international legal obligations under the International Covenant on Civil and Political Rights.

Witnesses further identified several factors in a criminal trial which may result in a miscarriage of justice, such as incompetent or unsatisfactory advocacy by lawyers, improper police investigations, false confessions, false eyewitness identification, or the presentation of evidence, and in particular forensic evidence.<sup>51</sup>

### 4.1 Effectiveness of Royal Commissions

As outlined previously in this Report, the setting up of a Royal Commission is at the discretion of the Executive. Many submissions noted the difficulties of establishing a Royal Commission, and that they are relatively rare.

Mr Tom Mann authored the book *Flawed Forensics: the Splatt Case and Stewart Cockburn*. Mr Splatt was convicted of the murder of Mrs Rosa Simper in 1977. He always maintained his innocence and was vindicated when a Royal Commission found that the conviction was unsafe and ordered that Mr Splatt be released. In his submission, he noted the many difficulties encountered in seeking a post conviction review such as a Royal Commission:

In each case, the process, however, has been time-consuming, tortuous, legally demanding, and very costly, such as with the establishment of a Royal Commission; in addition, it causes undue mental distress to all concerned. The process often involves third parties to an extraordinary level, such as the galvanising of public opinion, petitions and media backing to circumvent the constraints and rigidity of our legal system.<sup>52</sup>

The Committee received a joint submission from Mr Kevin Borick QC, Dr Harry Harding and Mr Philip Scales AM. Mr Borick is a barrister who has appeared for defendants in several criminal trials and appeals. He co-founded the Criminal Lawyers Association with Mr Scales, also a solicitor. Dr Harding is a forensic scientist who established the Forensic Biology Laboratory in Adelaide in 1975, and has given expert evidence in many criminal trials.<sup>53</sup>

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<sup>51</sup> For a thorough overview of these factors see Weathered, L, "Investigating Innocence: the emerging role of innocence projects in the correction of wrongful conviction in Australia", *Griffith Law Review* (2003) vol 12 No. 1, pp. 64-90, and in the UK: Zellick, G, "The causes of miscarriages of justice", *Medico-Legal Journal* (2010) vol 78 Part 1, pp. 11-20.

<sup>52</sup> Submission, Mann, p. 1.

<sup>53</sup> Submission, Borick, Harding & Scales, p. vi.

Their submission made reference to three criminal cases which have been the subject of Royal Commissions both in South Australia and the Northern Territory: Stuart (SA), Chamberlain (NT) and Splatt (SA). They noted the common features between these cases, and that it took “*significant and extensive agitation by the media to achieve the setting up of the Royal Commission*”.<sup>54</sup> They further noted that:

Royal Commissions, however, are only set up if the government so chooses; and that choice is often driven by political expediency, usually as the result of public agitation and pressure. That is, it is a political process.<sup>55</sup>

Similarly, the Law Council of Australia noted in their policy statement on a Commonwealth Criminal Cases Review Commission that Royal Commissions are “*an expensive and necessarily a very rare occurrence*”.<sup>56</sup>

#### 4.2 United Nations International Covenant on Civil and Political Rights

Australia is a signatory to the International Covenant on Civil and Political Rights (ICCPR). Article 14(1) of the Covenant provides:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, **everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law**. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children. [Emphasis added].

Article 14(5) states:

Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

The Australian Human Rights Commission indicated their support of the formation of a body to review potential miscarriages of justice. They also expressed concern that the current system of criminal appeals in South Australia:

may not adequately meet Australia’s obligations under the ICCPR in relation to the procedural aspects of the right to a fair trial.<sup>57</sup>

The Commission went on to note that:

More particularly, the Commission has concerns that the current system of criminal appeals does not provide an adequate process for a person who has been wrongfully

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<sup>54</sup> Submission Borick, Harding & Scales, p. 19.

<sup>55</sup> Submission, Borick, Harding & Scales, p. 4.

<sup>56</sup> Law Council of Australia, Policy Statement on a Commonwealth Criminal Cases Review Commission, p. 2, [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uuid=00668B57-DAC1-C8F3-02CD-B61E40BE233C&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=00668B57-DAC1-C8F3-02CD-B61E40BE233C&siteName=lca), accessed 2 May 2012.

<sup>57</sup> Submission, Australian Human Rights Commission, p. 3.

convicted or who has been the subject of a gross miscarriage of justice to challenge their conviction.<sup>58</sup>

The Commission submitted that Article 14(5) provides for procedural protections for a convicted person which include:

- The right to a review of conviction and sentence on law and facts;
- The right to introduce fresh evidence;
- The right to a statement of reasons.

They submitted therefore, that:

Article 14(5) does not impose on States an obligation to provide more than one level of appeal. However, where the law does so, a convicted person is entitled to have effective access to each level of appeal with the procedural protections of article 14 applying equally at each level of appeal.<sup>59</sup>

Based on this interpretation, there is a concern that appeal proceedings which are limited to questions of law (such as are contained in section 353 of the South Australian *Criminal Law Consolidation Act 1935*) violate Article 14(5).

The Law Society of SA, in a supplementary submission to the Committee, agreed with the view expressed by the Australian Human Rights Commission in that our current appeal system does not meet Australia's obligations under the International Covenant on Civil and Political Rights.<sup>60</sup>

The Attorney-General disagreed with the views outlined by the Australian Human Rights Commission. In a supplementary submission to the Committee, the Attorney-General noted that South Australia's appeal procedure "*mirrors that widely employed throughout Australia and the Commonwealth*". He also noted the limited application of the ICCPR in Australian domestic law.<sup>61</sup>

The ICCPR does not have legal effect in Australian domestic law unless legislation is passed which encompasses its terms and conditions. However, treaties and international conventions are binding under international law; this means that where a statute is ambiguous, rules of statutory interpretation require that a domestic law be interpreted to be in conformity with its provisions.<sup>62</sup>

Dr Bob Moles and Ms Bibi Sangha made a very detailed submission to the Inquiry as the co-founders of the Networked Knowledge Project. Dr Moles is a former associate professor in law. Ms Bibi Sangha is a senior lecturer in law at Flinders University of South Australia. Both have published several books and articles regarding miscarriages of justice in the legal system. They submitted that the High Court has held that statutes (both Commonwealth

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<sup>58</sup> Submission, Australian Human Rights Commission, p. 3.

<sup>59</sup> Submission, Australian Human Rights Commission, p. 4.

<sup>60</sup> Supplementary Submission, Law Society of SA, p. 1.

<sup>61</sup> Supplementary Submission, Attorney-General, p. 1.

<sup>62</sup> See Harrington, Joanna, "The Role for Parliaments in Treaty-Making", in *The Fluid State: International Law and National Legal Systems*, Federation Press, 2005, p.36.



and State) should be interpreted and applied, so far as its language permits, to be in conformity with the established rules of international law.<sup>63</sup> They further outlined the obligation to promote and observe the rights set out in the ICCPR, and advocated support for a CCRC on this basis. They submitted that it is the new information which may come to light after an unsuccessful appeal which renders a trial unfair that triggers the provision in the covenant to the right to challenge a conviction in court:

We have explained that where a person in Australia finds out after their trial and unsuccessful appeal that their trial was not fair, they do not have any effective remedy. This means that each person considering this issue in South Australia has a moral obligation under the ICCPR to either approve the CCRC Bill, or to take some other effective action to ensure that people who have not had a fair trial do have an effective remedy.

We say that where new information comes to light (after an unsuccessful appeal), and which renders a trial manifestly unfair, that triggers the ICCPR provision to then challenge the conviction *in court*.<sup>64</sup>

#### **4.3 Issues identified with section 369 of the *Criminal Law Consolidation Act 1935***

Several submissions criticised the operation of section 369 of the *Criminal Law Consolidation Act 1935*. Such criticism included that section 369 is ultimately a political exercise of power, which may not be in the interests of justice. Further, there are no time limits or other provision for reasons for the Attorney-General's decision, and that there is no judicial review of such a decision. The first term of reference for the Inquiry asks this Committee to consider and report on alternative approaches to rectifying any identified issues with the reprieve offered by section 369 and the prerogative of mercy.

Mr Mann, in his submission, emphasised the importance of having an independent means of addressing potential miscarriages of justice, and the risk of other factors having an influence on a decision made under section 369:

The least we can offer those who are wrongfully convicted for crimes they did not commit, is to provide an independent means of addressing a miscarriage of justice. At present, that cannot happen through the arbitrary decision of one person, usually, the attorney-general, who is more likely to be influenced by other factors, such as public sentiment, political pressure, cost, vested interest, and maintaining the status quo.<sup>65</sup>

The submission from Messrs Borick, Harding and Scales stated that there is no time limit on a response from the Attorney-General, and that he is not obliged to provide any reasons for his decision.<sup>66</sup> A section 369 application does not allow a direct referral to the court for a review, and is linked to the prerogative of mercy. They submitted that there is no way for a person to directly apply for their case to be reviewed by the court, as it has to be by way of a petition for mercy, even "*when it is not mercy that is sought*", but rather a review of their case.<sup>67</sup> In evidence, Mr Scales indicated that it would be preferable for any post conviction

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<sup>63</sup> *Kartinyeri v Commonwealth* (1998) 195 CLR 337 as quoted in Submission, Moles and Sangha, pp. 23-24.

<sup>64</sup> Submission, Moles and Sangha, pp. 24-25.

<sup>65</sup> Submission, Mann, p. 1.

<sup>66</sup> Submission, Borick, Harding & Scales, p. 41.

<sup>67</sup> Submission, Borick, Harding & Scales, p. 42.

review to be conducted by an independent body to avoid conflicts of interest whether perceived or otherwise.<sup>68</sup>

Ms Barbara Etter is an Integrity and Justice Consultant based in Tasmania. She is a former CEO of the Tasmanian Integrity Commission, and now works in reviewing cases on behalf of convicted persons. Her submission raised concerns about the potential for decisions to refer a matter to the courts to be politicised:

The Attorney-General is not necessarily the best decision maker in this process. Such a decision should be an objective and impartial one and based on the evidence alone.<sup>69</sup>

The Australian Human Rights Commission commented in their submission on the procedure of petitioning the Governor for a pardon, and the power of the Attorney-General to refer these cases to the Court of Criminal Appeal. They referred to the decision of the South Australian Supreme Court in *Von Einem v Griffin* which found that the decision to refer a petition to the court is not subject to judicial review. They pointed out that this is not the case for Commonwealth criminal offences, as found by the High Court in the case of *Martens v Commonwealth*. They noted that the:

UNHCR [United Nations Human Rights Committee] has found that there is a right to reasons and to a written judgement in an appeal and in a decision to refuse leave to appeal. A decision to dismiss an appeal without providing written reasons is a violation of the right guaranteed by Article 14(5).<sup>70</sup>

The Law Council of Australia, in their policy statement on a Commonwealth Criminal Cases Review Commission, outlined that a decision to refer a matter the subject of the prerogative of mercy not only relies solely on the decision of the Executive Government, but is limited to the material submitted by the petitioner. The Executive and even the courts on appeal do not conduct their own inquiry:

The result is that post-conviction the entire burden, including the financial burden, of identifying, locating, obtaining and analysing further evidence rest entirely with the convicted person. He or she has no particular power or authority to compel the production of information, interview witnesses or conduct scientific testing on relevant materials.<sup>71</sup>

Further, they outlined that the Executive is not the appropriate ‘gatekeeper’ for such inquiries into convictions as:

- i. Further and renewed judicial consideration of certain cases may expose fault on the part of executive agencies, such as the police force; and
- ii. There is a significant risk that the government will only exercise its discretion to refer a matter where there is community pressure for the referral. Persons convicted of certain types of offences, such as child sex offences, are unlikely to be able to garner such support even where the evidence of a miscarriage of justice in their case is relatively compelling. In all cases, the result is likely to be that a

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<sup>68</sup> See Legislative Review Committee Hansard, 4 April 2012 at [54].

<sup>69</sup> Submission, Etter, p. 2.

<sup>70</sup> Submission, Australian Human Rights Commission, pp. 6-7. *Von Einem v Griffin* (1998) 72 SASR 110. *Martens v Commonwealth* (2009) 174 FCR 114.

<sup>71</sup> Law Council of Australia, Policy Statement on a Commonwealth Criminal Cases Review Commission, p. 2.

convicted person, in addition to gathering evidence to support the referral, will also be compelled to engage in a public relations campaign in order to build the type of community support which might help persuade the relevant Minister to refer the matter.<sup>72</sup>

Mr Ralph Bönig, President of the Law Society of South Australia gave evidence to the Committee. He noted in evidence, that section 369 is rarely used, and does not have the level of independence that a proposed CCRC would have:

It is a very convoluted process and it is a process that ultimately is also at the whim of the Crown Solicitor's Office who are the advisers ultimately to the Governor on the matter. It probably does not have the level of independence for some people that a commission of this nature would have.<sup>73</sup>

#### **4.4 Individual submissions**

The Committee received several submissions from convicted persons, their family, friends and advocates who called for a criminal cases review body. All these submissions outlined in great detail flaws in the trial process, mostly in relation to the presentation of forensic evidence and flawed police investigations which would warrant a criminal cases review commission. The submissions related to convictions in various jurisdictions.

The submission of Dr Bob Moles and Ms Bibi Sangha, as well as that from Messrs Borick, Harding and Scales outlined a number of cases in South Australia that may be worthy of a post conviction review given the nature and presentation of scientific evidence presented at trial.<sup>74</sup> Dr Moles submitted copies of his books '*A State of Injustice*' and '*Losing their Grip: the case of Henry Keogh*', which outline in detail cases where he submits a miscarriage of justice has occurred, mainly on the basis of the presentation of forensic evidence.

Submissions called for an independent body to undertake an exploration of all factors relating to a conviction; the tenor of these submissions can be summarised succinctly in a comment made by the President of the Law Society of South Australia, Mr Ralph Bönig in evidence:

While there is no doubt at all that the stats show that around the world there are people who have been wrongly convicted, I think it is time for an independent organisation outside the courts system where these people can possibly go to if necessary; and if it is only one person a year then I think that is something the community deserves because that one person is obviously in gaol when they should not be there, and that has an enormous flow-on effect on their life and their family's life.<sup>75</sup>

#### **4.5 Issues arising from trial - forensic evidence**

Submissions to the Inquiry identified several features of the trial process which may increase the propensity for miscarriages of justice. Most centred on the presentation of scientific evidence. In some cases the evidence may be too complex for juries to properly

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<sup>72</sup> Law Council of Australia, Policy Statement on a Commonwealth Criminal Cases Review Commission, p. 3.

<sup>73</sup> Legislative Review Committee Hansard, 2 May 2012 at [102].

<sup>74</sup> See Submission, Moles and Sangha pp. 28-45 for examples. Further examples appear in Submission, Borick, Harding & Scales, pp. 16-25.

<sup>75</sup> Legislative Review Committee Hansard, 2 May 2012 at [93].

understand; in others, the changing nature of science allows new testing and evidence to be adduced that may cast doubt over a person's conviction. The submissions also raised concern about the adducing of scientific evidence in an adversarial trial through questions and answers—that this may not be the best method of giving evidence, and may cause confusion. There was also concern expressed about the validity of the basis of scientific evidence. Submissions noted the need for a system in which these issues could be raised and resolved, especially if they could lead to the overturning of a person's conviction.

#### **4.5.1 Reliability of forensic evidence**

The submission of Dr Moles and Ms Sangha outlined in detail several cases where they allege that expert evidence was led in several cases by a forensic scientist who was not properly qualified, and who gave evidence based on a lack of understanding of the relevant scientific issues.<sup>76</sup> Some of these included:

- evidence about the time of death based on the content of a victim's stomach, which has now proved to have no scientific basis;<sup>77</sup>
- adducing a time of death of a frozen body based on a formula alleged to have no scientific validation;<sup>78</sup>
- the questionable basis of a determination of death from drowning in several cases.<sup>79</sup>

The submission from Messrs Borick, Harding and Scales also expressed a concern that in some cases, relevant evidence is not discovered or disclosed, or there are concerns about the presentation of scientific evidence.<sup>80</sup> They outlined several cases which cast doubt over the basis on which scientific evidence may rest, and criticised the system of peer review and the ability of forensic scientists to present such evidence accurately at trial. Their view was that the Supreme Court in South Australia has determined that:

expert witnesses have a discretion as to what scientific test results they will disclose to a Court. Experts can now decide the issue of relevance at a trial. If the expert gets it wrong and that fact is not discovered until years after the trial and appellate process has concluded, then there is no judicial remedy.<sup>81</sup>

And:

No matter what flaws are exposed in the evidence presented to a jury by an expert witness, it is of no account if the jury has accepted the flawed evidence.<sup>82</sup>

They concluded that the danger of this finding is that *"expert witnesses can say whatever they like without regard to the actual facts"*.<sup>83</sup>

Dr Moles, in evidence, outlined the three requirements governing expert witnesses; that is an expert must be:

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<sup>76</sup> Submission, Moles and Sangha, p. 29.

<sup>77</sup> Submission, Moles and Sangha, p. 31.

<sup>78</sup> Submission, Moles and Sangha, p. 33.

<sup>79</sup> Submission, Moles and Sangha, p. 35 and p. 40.

<sup>80</sup> Submission, Borick, Harding & Scales, p. 26.

<sup>81</sup> *James v Keogh* [2008] SASC 156 referenced in Submission, Borick, Harding & Scales, p. 5.

<sup>82</sup> *Medical Board of SA v Manock* [2009] SAMPCT 2 referenced in Submission, Borick, Harding & Scales, p. 5.

<sup>83</sup> Submission, Borick, Harding & Scales, p. 30.

- (1) suitably qualified;
- (2) the evidence given must be relevant and probative;
- (3) the opinion and the facts or assumptions presupposed by that opinion must be established before the court on the basis of admissible evidence.<sup>84</sup>

It is on this last ground that Dr Moles considered has caused the most miscarriages of justice.<sup>85</sup> In his written submission, he expressed concern about the reliability of the expertise of those giving scientific evidence:

Opinions have been expressed without proper inquiry or substantiation of the basis for the opinion, and also without proper inquiry as to whether the person expressing the opinion is in fact an 'expert'. This is a factor common to many of the miscarriages of justice which have occurred in Australia, Britain and Canada.<sup>86</sup>

#### **4.5.2 Forensic Science SA**

Forensic Science SA is the body responsible for undertaking most of the forensic testing presented in criminal trials in South Australia. Professor Ross Vining is the Director of Forensic Science SA. In evidence to the Committee he outlined that all forensic science is done by either SAPOL or Forensic Science SA. SAPOL do ballistics, fingerprints and tool mark examination, and FSSA testing covers four major areas: biology (DNA testing), pathology, toxicology and chemical and materials.<sup>87</sup>

Professor Vining, in evidence, assured the Committee of the independence of Forensic Science SA both as an institution and in relation to the evidence of its scientists, and that their services are used by SAPOL, the prosecution and in some cases defence counsel:

I am delighted to say that certainly Forensic Science SA is completely independent of law enforcement and of prosecutors. We are part of the Attorney-General's Department but effectively act as a very independent agency within there. Nobody tells us what results we should analyse or what we should find, so I think that's a very healthy way for things to be.<sup>88</sup>

And further:

We are not there to support the prosecution case; we are not there to support the defence case. We are there to provide free, unbiased advice.

We are there to serve both sides but, most typically, we get called by the prosecution. Now, we are willing and certainly able to advise defence, and we quite frequently actually get defence counsel wanting to understand the nature and strength of the evidence against the accused, and we will brief them to the best of our ability, and that briefing is confidential.<sup>89</sup>

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<sup>84</sup> Legislative Review Committee Hansard, 28 March 12 at [16].

<sup>85</sup> Legislative Review Committee Hansard, 28 March 12 at [16].

<sup>86</sup> Submission, Moles and Sangha, p. 14.

<sup>87</sup> Legislative Review Committee Hansard, 13 June 2012 at [112].

<sup>88</sup> Legislative Review Committee Hansard, 13 June 2012 at [112].

<sup>89</sup> Legislative Review Committee Hansard, 13 June 2012 at [113].

Professor Vining outlined in some detail the process of peer review before a final report is presented, and also the process of challenging alternative interpretations of evidence in court:

Every report that goes out, before it goes out, is subject to a peer review, where another scientist who hasn't been involved with the case goes through all of the report and reviews the evidence to make sure they believe that's a sound opinion.<sup>90</sup>

He made clear that any dissenting report (that is, where a Forensic Science SA scientist does not agree with the conclusion of a fellow scientist) is provided to both the prosecution and defence.<sup>91</sup> He also outlined the philosophy amongst Forensic Science SA scientists regarding the unbiased presentation of their evidence:

As you get on to some of the edges of science then different experts will have subtly and sometimes more than subtly different interpretation of that evidence. We stress to our scientist all the time that they are not part of the prosecution team and say, 'Don't ever feel that you're part of the team and your team has got to win.' Similarly if you are for the defence, you are there to help the courts get to the truth.<sup>92</sup>

Dr Harding, a former employee of Forensic Science SA, submitted that *"forensic science should be quite independent and it should be open and available to both the prosecution and the defence"*.<sup>93</sup> He outlined his strong view regarding the need for independence of scientists giving evidence:

People working in those organisations [forensic science organisations] should feel free, must feel free, to actually go and respect the oath when they give their evidence. Those are the results that they have determined and that's what they think they mean. If other information comes up, be prepared to accept that they might actually have the interpretation wrong or they may not have worked to the appropriate standard, and so forth. Let the courts do their work by giving the courts the proper evidence in an impartial and very effective comprehensive way.<sup>94</sup>

Dr William Tilstone is a Member of the Royal College of Pathologists and a professor of forensic science. He was the first director of the South Australian State Forensic Science (now Forensic Science SA) between 1984 and 1996. He is currently a forensic consultant in the United Kingdom, and has worked in the area of forensic science and, in particular, forensics at crime scenes in several jurisdictions including Europe, the UK and the USA. Dr Tilstone outlined in his submission the principles which assure the reliability and presentation of forensic evidence. He outlined that the use of forensic science in crime scene examination and laboratory testing is covered by training and accreditation, but does not encompass forensic pathology or dentistry:

The principles that assure reliability in these [crime scene examination and laboratory testing] are known: the use of techniques that have been validated, and the application of these techniques by personnel whose competency has been established by education, training and testing. These principles are covered by accreditation

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<sup>90</sup> Legislative Review Committee Hansard, 13 June 2012 at [124].

<sup>91</sup> Legislative Review Committee Hansard, 13 June 2012 at [122].

<sup>92</sup> Legislative Review Committee Hansard, 13 June 2012 at [118].

<sup>93</sup> Legislative Review Committee Hansard, 4 April 2012 at [59].

<sup>94</sup> Legislative Review Committee Hansard, 4 April 2012 at [75].

programs such as that for forensic testing offered Australia-wide by the National Association of Testing Authorities (NATA).

Unfortunately NATA's forensic accreditation program does not cover all areas of forensic science, and in particular, does not encompass forensic pathology or dentistry.<sup>95</sup>

Dr Tilstone also indicated that if the experts are from a National Association of Testing Authorities accredited body, their evidence is required to be peer reviewed. In some cases, it may not be possible for an expert to be peer reviewed if their area of expertise is arcane.<sup>96</sup>

Professor Vining, in evidence, outlined in detail the qualifications that each of his forensic scientists must have in order to work at Forensic Science SA, and the minimum experience and qualifications before they qualify as an expert able to give evidence in court:

Typically, we employ people who have degrees, and who, increasingly, have PhDs in forensic science and related topics. Once they become a staff member with us they will typically go through a process, and it is rare that it takes less than two years of work with us before they will be signed off as a reporting scientist. After two years, they will only be dealing with usually that the simpler cases; perhaps after five years they might be then dealing with more complex cases. One of our experts would have to have a degree in a relevant field of science, whether that is biology, chemistry or toxicology; they probably have a master's, they may have a PhD, and they will have two to five years' direct experience with us. That would be typical. It's rare that any of our experts would have less than that.<sup>97</sup>

He further outlined in evidence the types of inquiries that lawyers should undertake before appointing a scientific expert to give evidence:

**'Look at the qualifications of a person. Look to see if they have actually practised in the field.'** First of all, you have to look at the science and ask, **'Is there a fundamental foundation for the science involved?'** In DNA, it's absolutely firm, rock solid, but in some areas of forensic science—for example, people talk about bite marks; the science is pretty dodgy. This might be something in theory where you could produce a good result, but has technology been developed which enables the promise of the science to be realised? Certainly, in DNA it is there; we have very good systems for doing it. That's the second element. The third element is: **are you looking at an organisation that has the equipment and the staff and the systems in place to actually deliver on the promise of the science and technology?** That will tell you whether this organisation is capable of delivering a good result. Then you have to ask: if I look at the expert who is now talking about this to me, can I trust their testimony? You look at all these things—their qualifications, their background—and then look to see if they are being paid to barrack for one side or the other. Can you trust them? Are they capable of interpreting it, and then are they interpreting it correctly for you? [Emphasis added].<sup>98</sup>

#### ***4.5.3 Presentation and complexity of forensic evidence***

There were three main areas of concern identified by witnesses regarding the presentation of scientific evidence to a jury. The first was the process of eliciting scientific evidence in the

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<sup>95</sup> Submission, Tilstone, p.2.

<sup>96</sup> Submission, Tilstone, p. 4.

<sup>97</sup> Legislative Review Committee Hansard, 13 June 2012 at [163].

<sup>98</sup> Legislative Review Committee Hansard, 13 June 2012 at [163].

adversarial system by questions and answers from lawyers. Many witnesses considered this process to be less than ideal, and that key points may be missed which may have cast doubt on a person's guilt or innocence. The second was that juries may not be able to understand such complex information and apply it accurately to the standard of beyond reasonable doubt. The third was the so-called 'CSI effect'; that jury members may give scientific evidence more weight because they consider it to be conclusive, based on their experience in watching forensic science on television shows.

Dr Moles, in evidence, identified that there should be more caution around the presentation of scientific evidence, given the manner in which such evidence is adduced in an adversarial trial, and that juries can often be confused by scientific evidence presented:

I think that juries are very often confused by the scientific evidence that is given. I think that very often the scientific evidence, when it is given through the adversarial process of question and answer, leads to a very confused understanding of that evidence in the minds of the lawyers and the judges ... But certainly, yes, there should be much more caution around the scientific evidence that is given and much more clarity about what it means.<sup>99</sup>

Mr Bönig, in evidence, indicated that this role of the lawyer in asking questions in order to elicit information is the key to a jury understanding the issues:

I think that's the role of the lawyers in the system. It's the role of the lawyers to ask the questions at a level such that the answers and information are brought out on a logical piece-by-piece basis. ... the role of the lawyers and the court process is to ensure that it comes out in a way that the jurors and the rest of the people involved in the process can understand. I don't think there's any way that we can dumb down expert reports or dumb down expert evidence to ease its understanding.<sup>100</sup>

However, he did acknowledge the "*massive complexity in criminal trials*" in modern times, and the need for a body such as a CCRC to handle potential miscarriages of justice that may occur as a result:

You then have a jury that sits there and has to listen to this material day in and day out and absorb it, and some of it is quite complicated and complex. But that is the system and I don't think we can go back from that system now. One way to address it is for a commission of this sort, maybe, if at the end of the day there has been a true miscarriage of justice to deal with it. You would hope that, at the end of the day, with a prosecution and a defence and a judge summing up, the balancing act does occur at the trial phase, but sometimes it doesn't.<sup>101</sup>

Mr Borick, in evidence, pointed to the fact that even lawyers may be confused by scientific evidence, and the particular propensity for mistakes to be made in the area of presentation of scientific evidence:

Lawyers are not trained in the scientific process; they don't have science degrees. It has been my experience that you have to learn on a case-by-case basis. You go out and try to find an expert and you learn, but you make mistakes...the criminal justice system is run by humans, it is a human system, and it's going to make mistakes and

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<sup>99</sup> Legislative Review Committee Hansard, 28 March 2012 at [15].

<sup>100</sup> Legislative Review Committee Hansard, 2 May 2012 at [100].

<sup>101</sup> Legislative Review Committee Hansard, 2 May 2012 at [97].



mistakes will particularly occur in the scientific area, and that is why we need the protection of a way out instead of the political process.<sup>102</sup>

#### **4.5.4 Weight given to scientific evidence and the CSI effect**

Dr Tilstone outlined in his submission the propensity for misunderstanding and misinterpretation both by members of the public and the legal profession as to what forensic evidence can show:

It is a concern that there is a fundamental lack of understanding in the general public (that is to say, the jury pool) and indeed in the legal community of what forensic evidence can and cannot do, exacerbated by the current popularity of entirely unrealistic TV shows such as CSI.<sup>103</sup>

The result of the so-called 'CSI effect' is that juries, and sometimes legal advocates, place undue weight on forensic evidence and tend to treat it as conclusive, rather than as one aspect to be weighed along with other evidence presented at trial.<sup>104</sup>

Dr Tilstone submitted that forensic evidence, in and of itself, cannot prove anything conclusively:

In essence, forensic evidence cannot prove anything, but merely either supports some position or possible reconstruction of events, or occasionally, shows that the postulated explanation could not be true. However, defence and prosecution – frequently aided and abetted by the bench – are reluctant to accept conditional answers and continually press for a 'yes' or 'no'. **Even DNA cannot provide absolute proof of anything.** [Emphasis added].<sup>105</sup>

The most recent New South Wales DNA Review Panel Annual Report outlined the significance of scientific evidence in assisting to identify the guilty and the innocent, but urged caution in considering DNA evidence in context:

It is, however, important to remember that while testing and profiling techniques have continued to develop over the past two decades, DNA evidence is not infallible and must always be carefully considered in the context of the entirety of the evidence of any given case.<sup>106</sup>

In explaining the various outcomes of the testing of a DNA profile, the Panel noted that even where a DNA match is found, this cannot be said to be unequivocally conclusive:

When two samples match this indicates that the two samples may have come from the same source. It cannot be said to be unequivocally conclusive as DNA profiling only looks at a number of specific sites as opposed to the whole molecule, but it is extremely powerful evidence that the samples have a common donor.<sup>107</sup>

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<sup>102</sup> Legislative Review Committee Hansard, 4 April 2012 at [57].

<sup>103</sup> Submission, Tilstone, p. 1.

<sup>104</sup> For further information on the CSI effect on criminal trials see Wise, Jenny, "Providing the CSI Treatment: Criminal Justice Practitioners and the CSI effect", *Current Issues in Criminal Justice*, vol 21 no. 3, March 2009 383. Also Cornwall, Deborah, "Courts' use of forensic evidence called into question" *ABC News Online*, <http://www.abc.net.au/news/2012-05-03/courts-use-of-forensic-evidence-called-into-question/3989860>, accessed 2 July 2012.

<sup>105</sup> Submission, Tilstone, p. 1.

<sup>106</sup> DNA Review Panel Annual Report, 2010-2011, p. 6.

<sup>107</sup> DNA Review Panel Annual Report, 2010-2011, p. 12.

#### 4.5.5 Jury questions on expert evidence

Dr Tilstone suggested that both the prosecution and defence can be subject to bias, and that if there is to be a balanced presentation of clearly understood scientific evidence then the means of presentation has to be reviewed. He cited the example of the system in Malta where he was working on a murder case where the main evidence was forensic. Dr Tilstone outlined that the Maltese system is a mixture of inquisitorial and adversarial, and while his evidence was elicited in the usual way of examination in chief, cross examination and re-examination, there was a further process whereby the judge and jury could ask questions:

On conclusion of the questioning by the defence there is a **formal additional process, in which the judge asks questions, and then polls each juror inviting them to do likewise**. Which they did, and the questions that they asked made it clear they were aware of what the critical points in the forensic evidence were, but were unclear or uncertain in their understanding of what had been done, and the basis on which my conclusions were made. **The process allowed them to clarify and understand in a way that the partisan presentation by the lawyers would not.** [Emphasis added].<sup>108</sup>

Mr Bönig, in evidence, suggested that jurors should be encouraged to ask questions regarding the presentation of forensic evidence:

I think we have to ensure that the jurors and whoever else is involved in the process are best able to understand it, and maybe there should be more encouragement to jurors to ask questions.<sup>109</sup>

He maintained, however, that it is the primary role of the lawyers in the system to ensure that evidence is brought out and presented in a way that people can understand.

Professor Vining, in evidence, said that he would “*strongly support*” any opportunity for the trial judge or the jury to question forensic science experts giving evidence at trial.<sup>110</sup>

#### 4.5.6 Agreed expert evidence

Dr Moles, in evidence suggested that there should be more collaboration around scientific evidence and that the adversarial process of question and answer can sometimes lead to a confused understanding of the evidence:

I think that suitable changes could be brought about whereby the scientific experts could get together beforehand and either issue a joint written report which could be submitted, or else they could give their evidence by way of a statement about the relevant principles other than it being brought out of them by the process of question and answer.<sup>111</sup>

Professor Vining made a similar suggestion to Dr Moles, in his evidence. He considered that it was unreasonable to expect a jury who have no scientific training to remember such complex evidence and evaluate it, and suggested of having an agreed statement of scientific evidence in court to avoid confusing the jury:

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<sup>108</sup> Submission, Tilstone, p. 2.

<sup>109</sup> Legislative Review Committee Hansard, 2 May 2012 at [100].

<sup>110</sup> Legislative Review Committee Hansard, 13 June 2012 at [121].

<sup>111</sup> Legislative Review Committee Hansard, 28 March 2012 at [15].

I think one of the best things to do is to force the situation where the defence expert and the prosecution expert actually confer and present the jury with the bits they agree on and the bits they disagree on... I just think it's unreasonable to have one expert talking in great detail, often for a day or more than a day, and people who aren't scientifically trained have to try to remember all the things they said, and then the next day put that together and try to work out 'Now, which bits did they actually disagree on?' I just think that is unreasonable.<sup>112</sup>

He also pointed to the propensity for experts to 'barrack' for one side over the other:

It worries me a bit that the way our adversarial system is set up defence experts profit from having extreme views—the more extreme the more likely they are to succeed as a defence expert. I don't think justice is served by that approach.<sup>113</sup>

Mr Bönig, in evidence, also raised the issue of 'professional barrackers', in the context of answering a question about whether or not Forensic Science SA should form part of the courts:

The downside to that is, over my years practising in medico-legal defence, you do find that there then tends to be a team of people who become professional barrackers, and they become professional experts, they know the tricks and niceties of the court system, and so on, and it is refreshing, occasionally, to get a new expert into the area. So, although there is merit in trying to confine the process, as you are suggesting, in one way or another, we do need to be careful that we don't just have a panel of professional barrackers. Also, sometimes, I think experts are asked to go to the very edge of their expertise and, if we have a panel or a limited pool, or whatever, we may be short-changing an area of developing knowledge by not getting someone from outside.<sup>114</sup>

One of the solutions proffered by Professor Vining to the presentation of scientific evidence was to have an agreed statement for expert evidence presented at trial, such that:

the two experts had to effectively present together and emphasise their points of agreement and their points of disagreement.<sup>115</sup>

Section 285BC of the *Criminal Law Consolidation Act 1935* provides a process whereby the defence must notify the prosecution if they are to adduce expert evidence in the trial of indictable offences. Such a notice must set out the name and qualifications of the expert, as well as the general nature of the evidence and what it tends to establish:

- (1) If a defendant is to be tried or sentenced for an indictable offence, and expert evidence is to be introduced for the defence, written notice of intention to introduce the evidence must be given to the Director of Public Prosecutions—
  - (a) in the case of trial, on or before the date of the first directions hearing, and, in the case of sentence, at least 28 days before the date appointed for submissions on sentence; or
  - (b) if the evidence does not become available to the defence until later—as soon as practicable after it becomes available to the defence.

<sup>112</sup> Legislative Review Committee Hansard, 13 June 2012 at [159] and [161].

<sup>113</sup> Legislative Review Committee Hansard, 13 June 2012 at [161].

<sup>114</sup> Legislative Review Committee Hansard, 2 May 2012 at [98].

<sup>115</sup> Legislative Review Committee Hansard, 13 June 2012 at [161].

- (2) The notice—
  - (a) must set out the name and qualifications of the expert; and
  - (b) must describe the general nature of the evidence and what it tends to establish.

Section 285BC(6) provides for the application of leave to adjourn a case to allow a reasonable opportunity to obtain expert advice on the defence evidence. The section does not, however, refer to the prosecution and does not have a provision for any of evidence to be agreed before trial. Section 285BA provides that the prosecution may serve a notice on the defence to admit specified facts. Section 285BB provides that the prosecution must give notice of its intention to introduce certain types of evidence, such as evidence regarding the mental competence of the defendant, duress, provocation and intoxication; however, there is no provision for the provision of information regarding expert evidence, including expert forensic evidence.

#### **4.5.7 Science vs law**

Sometimes it is not only the qualifications and opinions of forensic scientists and its presentation in court that may lead to a miscarriage of justice, but the very nature of science itself. Professor Vining, in evidence, made a number of general observations about the interaction between science and the law, and the difficulty of law being an examination of the facts, and forensic science which is an area which is constantly changing and evolving:

I don't think that science and the law are very good bedfellows. Science is effectively a search for truth that you can never get to. You only ever get to opinion, and best opinion on the day, whereas the law is a search for, 'What is the truth today? I want yes or no, guilt or no guilt.' It sometimes ends up being a competition about who has the best debater on the day. Sometimes, not often, but sometimes it seems to devolve into pointscoring, of asking, 'Can I score a point?' <sup>116</sup>

As I say to scientists, 'I expect you sometimes to change your opinion. If the facts change, you have to change your opinion.' I don't want people who say, 'Well, that's what I thought to start with, and I'm not changing my mind.' It is anathema to a scientist; as material changes, your view should change. <sup>117</sup>

In explaining the independence and structure of Forensic Science SA, Professor Vining drew attention to the difficulty of the defence engaging the services of Forensic Science SA. He gave an example of receiving a request for testing on behalf of the defence which resulted in results which pointed very strongly to the guilt of the person who had been charged. Because the work was done on behalf of the defence and not SAPOL or the DPP, he was not able to reveal this to the courts, and indicated that even to hint that a question should be asked would be inappropriate. Professor Vining indicated that he had “*great difficulty with that*”:

As a scientist, I see my role as to help the courts get to the truth, and this is a fundamental conflict between the role of the scientist and the role of the court, where

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<sup>116</sup> Legislative Review Committee Hansard, 13 June 2012 at [121].

<sup>117</sup> Legislative Review Committee Hansard, 13 June 2012 at [126].

the court sees a very clear distinction between defence activity and the activity of the prosecutors, and I have great difficulty with that.<sup>118</sup>

And that:

If our system is there to discover the truth, then that is a flaw in it.<sup>119</sup>

In evidence, Dr Harry Harding referred to the UK case of *R v Dobson* as an example where advances in technology gave rise to the need to reopen a case.<sup>120</sup> Mr Dobson had formerly been acquitted of murder, and new scientific evidence regarding blood and fibres led to his retrial and eventual conviction:

So, we can see that in a criminal case it is not only the discovery, for example, of information that a witness has either knowingly or otherwise given false or misleading evidence to the jury that can make it necessary for a case to be revisited by the court if justice is to be truly done; it can and it will happen because of changes and advances in science and technology and the further understanding thereof. We can understand these days that this will from here on always be the case, so we should realise that courts need to be provided with and are able to operate in an environment that allows for an can cope with this.<sup>121</sup>

Dr Harding also indicated that one of the main problems with the legal system is the principle of finality, namely that:

There is no right to bring to a court new or fresh evidence once the present trial and appellate process have been completed.<sup>122</sup>

Mr Bönig, in evidence, identified developments in forensic science as an area giving rise to a number of convictions being set aside:

One of the common [areas] is the advancement of DNA and the introduction of DNA evidence, where you now are able to go back and test DNA that was taken at a crime scene but not able to be tested. Alternatively, an area that is quite evolving is where scientific evidence which today may have a sound and sensible basis and may be accepted in the scientific community, in five years' time, because of advancement in science, the theory behind that may now not be as definitive as it should be. It is such an evolving field that a conviction based on scientific evidence today may well not be a sound conviction in five years' time if the theory underpinning that evidence has been brought into question.<sup>123</sup>

Messrs Borick, Harding and Scales in their submission stated that opinions can change over time as the result of a better understanding of research or the accumulation of more data.<sup>124</sup> They outlined several cases where scientific evidence had not been presented as it should, or the basis on which the science was based can now be shown not to be reliable. On this basis, they argue for an independent body to take account of these variables:

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<sup>118</sup> Legislative Review Committee Hansard, 13 June 2012 at [113].

<sup>119</sup> Legislative Review Committee Hansard, 13 June 2012 at [114].

<sup>120</sup> *R v Dobson* [2011] 1 WLR 3230. Also referred to in Supplementary Submission, Borick, Harding & Scales, p.1.

<sup>121</sup> Legislative Review Committee Hansard, 4 April 2012 at [38].

<sup>122</sup> Legislative Review Committee Hansard, 4 April 2012 at [38].

<sup>123</sup> Legislative Review Committee Hansard, 2 May 2012 at [85].

<sup>124</sup> Submission, Borick, Harding & Scales, p. 12.

There really can be no better argument for the establishment in this State of a body such as a CCRC which has the power to review a case in which it is subsequently found that for whatever reason the original facts were wrong or have changed, or the opinion concerning the facts have changed, and refer the case back to the Full Court for judicial determination. It is imperative that we have such a safeguard in our criminal justice system.<sup>125</sup>

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<sup>125</sup> Submission, Borick, Harding & Scales, pp. 27-28.

## 5. CRIMINAL CASES REVIEW COMMISSION BILL 2010

On 10 November 2010, Independent Member of the Legislative Council, the Hon. Ann Bressington introduced the Criminal Cases Review Commission Bill 2010 into the Legislative Council of the South Australian Parliament. The Bill was modelled on the legislation which established the Criminal Cases Review Commission in the United Kingdom.<sup>126</sup> The broad aim of the Commission under the Bill is to examine in detail applications which raise questions about the safety of criminal convictions, to make recommendations and then pass this information on to a court of appeal for an appeal hearing to decide whether the conviction should stand.

On 8 June 2011 the Bill was withdrawn from the Legislative Council and referred to the Legislative Review Committee for inquiry and report. The examination of the Bill forms the first term of reference for this Inquiry. A copy of the Bill is attached as Appendix 3.

The Committee received detailed submissions on the various clauses of the Bill which outline some issues regarding the scope and interpretation of clauses, and how these may be remedied.

### 5.1 Establishment and Constitution of the Commission – Clauses 4 -10

Clause 4 of the Bill establishes the CCRC as an independent statutory authority. It is to consist of five members appointed by the Governor. At least two members of the Commission must be legal practitioners of not less than 10 years standing.<sup>127</sup> At least three of the members must have knowledge or experience of any aspect of the criminal justice system.<sup>128</sup> Their exact expertise is not specified.

Members can be appointed for a term of five years and are eligible for reappointment for another term, but must not hold office for a continuous period longer than 10 years.<sup>129</sup>

The Commission is to appoint a presiding member who has a deliberative and a casting vote. Decisions of the Commission must be passed by a majority of members.<sup>130</sup> The Commission is to determine its own procedures.<sup>131</sup>

Clause 10 provides that the Commission may be assisted by employees in the public service who are assigned to the Commission by the Minister; they may also use the equipment and facilities of that public service administrative unit with the agreement of the responsible Minister.

South Australia Police, in their submission, expressed concern that the Bill provides that only two commissioners must have a legal background. They were of the view that if the

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<sup>126</sup> In this Report, 'United Kingdom' refers to England, Wales and Northern Ireland. Scotland has its own CCRC.

<sup>127</sup> Clause 4(6).

<sup>128</sup> Clause 4(7).

<sup>129</sup> Clauses 5(1) and 5(2).

<sup>130</sup> Clauses 9(3) and 9(4).

<sup>131</sup> Clause 9(8).

Commission would be conducting complex case review without staff, all commissioners should be legal practitioners with wide experience:

While a broad range of views and experience is valuable in a corporate governance or oversight role, the Bill actually creates Commissioners as practitioners who are responsible for conducting case review without staff. Matters falling within scope will be legally complex, and the role of a Commissioner is **only appropriate for a respected legal practitioner with experience in both prosecuting and defending criminal matters**, rather than people with more general ‘criminal justice’ qualifications. [Emphasis added].<sup>132</sup>

OARS Community Transitions is an organisation that assists in the support and rehabilitation of offenders. They submitted that the membership of the Commission should comprise a person or persons with knowledge and experience of the treatment of offenders.<sup>133</sup>

The submission from Messrs Borick, Harding and Scales raised a concern that there is no requirement in this section for the members of the Commission not to come from South Australia. They submitted that:

This should be a requirement given the small size and close-knit nature of the community in South Australia.<sup>134</sup>

Mr Scales, in evidence, further elaborated on this concern, and submitted that consideration be given to employing independent interstate representatives:

To have a South Australian matter referred to and determined by people having no affiliations with South Australia would help to overcome problems experienced in the past.<sup>135</sup>

The submission from Ms Barbara Etter expressed concern that there is no role statement or object and objectives section which sets out the purpose and function of the Commission. As a former CEO of the Tasmanian Integrity Commission, she submitted that it was useful to have an objectives section, as well as a ‘functions and powers’ section.<sup>136</sup>

## **5.2 Types of offences able to be referred – clauses 11 and 12**

The Bill allows both summary (clause 11) and indictable offences (clause 12), as well as supervision orders made against a person who is found to be mentally unfit to stand trial to be referred for review to the Commission.

Many submissions expressed concern that the terms of reference of the Commission were too broad, and should be confined to a consideration of convictions only, and not extend to sentences. Further, some submissions outlined that only convictions for serious offences should be considered by the Commission and not summary offences as provided for in clause 11.

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<sup>132</sup> Submission, SAPOL, p. 2.

<sup>133</sup> Submission, OARS Community Transitions, p. 1.

<sup>134</sup> Submission Borick, Harding & Scales, p. 46.

<sup>135</sup> Legislative Review Committee Hansard, 4 April 12 at [38].

<sup>136</sup> Submission, Etter, p. 2.



The Law Society of South Australia submitted that the CCRC should only deal with serious offending. They pointed to the fact that the overwhelming majority of criminal matters are dealt with summarily and are not serious, (that is, they do not attract a term of imprisonment); they expressed concern about the “*potentially substantial*” volume of work that may be referred to the CCRC under the broad jurisdiction provided for in the Bill.<sup>137</sup>

South Australia Police expressed their concern that summary matters which attract small penalties are included within the Commission’s scope under the Bill:

It is questionable whether there is significant public interest in scouring the records of courts and the police for allegedly-wrongful summary convictions that have already been upheld on appeal.<sup>138</sup>

They also questioned the impact on police and Commission resources in considering such matters:

Summary matter form the overwhelming majority of criminal matters, and inclusion of summary convictions in the review process would impact disproportionately on SAPOL as well as the proposed Commission.<sup>139</sup>

Dr Moles and Ms Sangha in their supplementary submission suggested that summary offences and sentences may be exempted from the Bill to allow for the CCRC to apply its resources to more serious matters.<sup>140</sup>

#### **5.2.1 Hearing of appeals referred from the commission**

References from the Commission to either the Supreme Court (in the case of indictable offences) or the District Court (in the case of summary offences) are to be treated as an appeal by the relevant court. The Commission’s reasons for making the reference will be taken to be the grounds of appeal.<sup>141</sup>

Many submissions noted that the usual forum for the appeal of convictions and/or sentences is the Court of Criminal Appeal, and that any appeal provision in the Bill should provide for an appeal to be heard by the Court of Criminal Appeal.

The Chief Justice of the Supreme Court, the Hon. John Doyle made a submission to the inquiry. His submission was made after discussions with, and the agreement of the Chief Judge of the District Court and the Chief Magistrate. He submitted that the reference in clause 12 to appeals from the Magistrates Court to the District and Supreme Courts is inappropriate:

Appeals against convictions in the Magistrates Court lie to the Supreme Court. Logically, a reference relating to such a conviction should also be to the Supreme Court. In our opinion it would be appropriate if such reference were to the Full Court of the Supreme Court. It would be inappropriate to depart from the existing pattern, and to legislate in the manner proposed in clause 12.<sup>142</sup>

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<sup>137</sup> Submission, Law Society of SA, p. 2.

<sup>138</sup> Submission, SAPOL, p. 1.

<sup>139</sup> Submission, SAPOL, p. 1.

<sup>140</sup> Supplementary Submission, Moles and Sangha, p. 3.

<sup>141</sup> Clause 11(2)(b).

<sup>142</sup> Submission, Chief Justice Doyle, p. 1.

The Law Society of South Australia made a similar point in their submission, that all appeals from the Commission should be to the Court of Criminal Appeal, and that it would be “*incongruous*” for a single judge of the Supreme Court to entertain a referral.<sup>143</sup> They further submitted that the District Court does not have a general appellate jurisdiction, and it would therefore be:

totally inappropriate for the District Court to preside over appeals in circumstances where appeal rights have been exhausted at a superior level.<sup>144</sup>

Similarly, the submission from the South Australian Bar Association noted that the terminology used in clause 11(5) regarding special leave to appeal would not be applicable to the District Court as it is:

not a concept known to the District Court in its criminal jurisdiction.<sup>145</sup>

They further noted their concern regarding the terminology ‘special leave to appeal’ in clause 11(5). They queried whether special leave is intended to be determined upon different criteria than that for ordinary leave. They submitted that an amendment regarding leave to appeal be contained in an amendment to the *Criminal Law Consolidation Act 1935*.<sup>146</sup> Similarly, the Law Society of South Australia submitted that the term ‘special leave’ be replaced with ‘permission’ to reflect changes in statutory terminology implemented in the last five years.<sup>147</sup>

### **5.2.2 What constitutes a conviction or related conviction?**

Clause 11(3) provides that any related conviction is to be considered at the same time as a reference on a conviction. Clause 3(2) defines ‘related conviction’ as convictions of the same person by the same court on the same day. The Law Society of South Australia indicated in their submission that the definition of related conviction should be amended to include any conviction that is connected to the original conviction (which might have been heard on a different day) to ensure that any miscarriage of justice that may flow to this related conviction.<sup>148</sup> They also recommended that conduct giving rise to *separate* convictions should be related (for the purpose of the Bill) if the conduct is:

in some way connected or otherwise the impugned conviction has some bearing on another conviction(s). This will occur, for example where the fact of the impugned conviction may lead to a finding of guilt of another offence(s).<sup>149</sup>

They went further to say that:

Where the related conviction may not have occurred but for the impugned conviction then it too should also be referred by the CCRC because the miscarriage of justice would flow to the related conviction.<sup>150</sup>

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<sup>143</sup> Submission, Law Society of SA, p. 3.

<sup>144</sup> Submission, Law Society of SA, p. 4.

<sup>145</sup> Submission, SA Bar Association, p. 1.

<sup>146</sup> Submission, SA Bar Association, p. 1.

<sup>147</sup> Submission, Law Society of SA, p. 3.

<sup>148</sup> Submission, Law Society of SA, p. 6.

<sup>149</sup> Submission, Law Society of SA, p. 6.

<sup>150</sup> Submission, Law Society of SA, p. 6.

### 5.3 Terms of Reference – clause 13

Clause 13 outlines the conditions for the Commission making a reference. There are three criteria which must be fulfilled. Clause 13 provides:

- (1) A reference of a conviction, sentence or declaration must not be made under this Part unless-
- (a) The commission considers there is a **real possibility that the conviction, sentence or declaration would not be upheld** were the reference to be made;
  - and**
  - (b) the commission so considers **because of an argument, evidence or information not raised in the proceedings** which led to the conviction, sentence or declaration or on any appeal or application for leave to appeal against the conviction, sentence, or declaration; **and**
  - (c) **An appeal** against the conviction, sentence or declaration has been determined or leave to appeal against it **has been refused**. [Emphasis added].

#### 5.3.1 The real possibility test

The first criterion to be satisfied is that there be a real possibility that the conviction, sentence or declaration would not be upheld. Section 13 of the *Criminal Appeal Act 1995 (UK)* which establishes the UK CCRC has a test in identical terms, and is commonly referred to as the ‘real possibility test’.

Dr Michal Naughton is a senior lecturer in law from the University of Bristol, and the founder and Director of the Innocence Network UK. He made a submission outlining his views on the Bill, based on his experience of the UK CCRC. He viewed the duplication of clause 13(1) of the Bill from the UK Act as a “*major problem*”.<sup>151</sup> He argued that the real possibility test compromises the CCRC’s independence in that:

If the CCRC refers a conviction, and the conviction is upheld by the Court of Appeal, the CCRC will not refer other similar convictions despite real doubts that the applicant might be innocent.<sup>152</sup>

Messrs Borick, Harding and Scales, in their submission, criticised the real possibility test, stating that it puts the emphasis on the conviction rather than the trial process, “*and comes close to pre-empting the function of the court*”.<sup>153</sup>

Dr Moles, in evidence, was supportive of the real possibility test:

It seems to me that it would be irrational to be sending cases back to the Court of Criminal Appeal if you thought that you didn’t have sufficient grounds to have a conviction overturned.<sup>154</sup>

#### 5.3.2 An argument, evidence or information not raised in proceedings

The second criterion to be satisfied requires that the Commission considers that there is a real possibility of the appeal being upheld as a result of an argument, evidence or

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<sup>151</sup> Submission, Naughton, p. 3.

<sup>152</sup> Submission, Naughton, p. 3.

<sup>153</sup> Submission, Borick, Harding & Scales, p. 38.

<sup>154</sup> Legislative Review Committee Hansard, 28 March 2012 at [20].

information not raised in previous proceedings. The Law Society of South Australia criticised the limitation in 13(1)(b) as infringing on the domain of the appeals courts:

Clause 13(1)(b) as currently drafted would permit the CCRC to consider a matter where an argument, evidence or information is not raised in the proceedings that led to the conviction. This could occur for many reasons including a tactical decision by the defendant or an error in judgment. In our view, it would be **most inappropriate for a defendant to continue to agitate a matter after it has been finally disposed of in such circumstances... errors made during the course of criminal proceedings by a court or any party, including the accused, are properly the sole domain of our current appellate system** of criminal review and should remain so. [Emphasis added].<sup>155</sup>

Mr Bönig, in evidence, concluded that the test in the Bill was not appropriate for a commission as opposed to a court process, as the test would:

include material that was available and even possibly heard and introduced in evidence during the trial process.<sup>156</sup>

He also raised the possibility that the test could allow for the Commission to review cases where there had been a change in the law from that which applied at the time of the offence, and that this was *"not desirable"*.<sup>157</sup>

The Law Society of South Australia considered the terms contained in clause 13(1)(b) to be too broad. They argued that the reference should be limited to evidence which could not reasonably have been available at the time which becomes available after the proceedings which could reveal a substantial miscarriage of justice.<sup>158</sup>

Alternatively, Dr Naughton, in his submission, argued for a wider interpretation of clause 13(1)(b). He noted that the UK CCRC has been criticised for its narrow interpretation of what constitutes fresh evidence or argument.<sup>159</sup> Another consequence of both the real possibility and new evidence tests is that the CCRC:

refers cases of guilty individuals on a breaches or abuses of process if it is felt that the case meets the Court of Appeals criteria.<sup>160</sup>

He recommended that a wide interpretation of what constitutes fresh evidence for the purpose of clause 13(1)(b) be adopted:

It is recommended that the proposed South Australian CCRC if it is to be established adopt a wide interpretation of what constitutes 'fresh evidence' in the interests of justice to include all evidence not raised, regardless of whether or not it was or could have been available at trial or first appeal.<sup>161</sup>

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<sup>155</sup> Submission, Law Society of SA, p. 4.

<sup>156</sup> Legislative Review Committee Hansard, 2 May 2012 at [85].

<sup>157</sup> Legislative Review Committee Hansard, 2 May 2012 at [87].

<sup>158</sup> Submission, Law Society of SA, p. 4.

<sup>159</sup> Submission, Naughton, p. 3.

<sup>160</sup> Submission, Naughton, p. 4.

<sup>161</sup> Submission, Naughton, p.4.

### 5.3.3 Appeal must already have been refused

The third criterion for references provides that an appeal against the conviction must have already been refused. The convicted person must therefore have already exhausted all their avenues of appeal before the Commission will take on a matter and refer it back to the court for further consideration.

Mr Bönig, in evidence, submitted that the CCRC should not be used as an opportunity for a third avenue for appeal for people to *“continue to ventilate their innocence”*:

A commission, if it is established, needs to be very confined in terms of the types of matters that it will take on board, otherwise we are creating another avenue of appeal and we are probably undermining, to some extent, the role of the courts and the process of hearing, making decisions and dealing with appeals.<sup>162</sup>

### 5.4 Who can make a reference? - clause 14

An application for a review of a conviction or sentence can be made on application of any person, or on the Commission’s own motion. Clause 14(1) states that a reference can be made after an application has been made *“by or on behalf of the person to whom it relates”*, or in the case of a Commission reference, *“without an application having been so made”*. It appears that any person may make a request for a reference, even without the convicted person’s knowledge or consent.

The Law Society of South Australia submitted that any reference to a CCRC should not be made without the consent of the defendant; they go further to submit that:

Indeed we are not entirely comfortable with the CCRC taking on a matter except on the application of the defendant.<sup>163</sup>

Further in evidence, Mr Bönig indicated that having a defendant’s consent is analogous to the lawyer-client relationship, in that a lawyer cannot do anything, including applying for an appeal, without the agreement of the defendant:

If you want to appeal, it is not the lawyer's choice as to whether or not you appeal. The lawyer gives the advice. It is the person who has been found guilty; it is the client's choice as to whether or not you appeal. I do not think anyone should be embarking upon advocating on anyone else's behalf unless that person wishes that to occur.<sup>164</sup>

The South Australian Bar Association also noted that a person’s consent should be obtained if they are to be the subject of an application before a CCRC.<sup>165</sup>

In response to questions regarding the defendant not being informed, Dr Moles and Ms Sangha submitted that it is assumed that the convicted person must be consulted, as they would need to authorise the appeal referred to in the real possibility test in Clause 13:

An appeal can only proceed if the convicted person is prepared to authorise the appeal to proceed. Without that the CCRC would be unlikely to make the referral, or

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<sup>162</sup> Legislative Review Committee Hansard, 2 May 2012 at [83].

<sup>163</sup> Submission, Law Society of SA, p. 5.

<sup>164</sup> Legislative Review Committee Hansard 2 May 2012 at [104].

<sup>165</sup> Submission, SA Bar Association, p. 1.

indeed to conduct an investigation. That is because it wouldn't have in place the necessary conditions to satisfy the statutory requirement of a reasonable prospect of a successful appeal.<sup>166</sup>

They also raised the need for special considerations when the convicted person is deceased, and the need for an 'approved person' who would be asked to confirm a willingness to proceed.<sup>167</sup>

Further, in response to a question as to whether the convicted person should be interviewed as part of any investigation, Dr Moles and Ms Sangha suggested that it may stretch the resources of a CCRC to do so in every case, and it may not even be necessary if sufficient written information is supplied:

To conduct interviews with all applicants...would stretch even the most generous human resources and budgets beyond tolerable limits. The sensible approach is to consider each application on its merits. One would expect the CCRC to consider at each stage of the investigation the issues involved and the extent to which a personal interview with the applicant would assist to resolve any doubts which might exist.<sup>168</sup>

### **5.5 Investigations pursuant to the direction of the court – clause 15**

Clause 14(3) provides that the Commission may also refer a matter to the court for an opinion. In referring a matter to the court, the Commission must give reasons and provide a copy of this statement to a person who is likely to be a party to the proceedings.<sup>169</sup> If the Commission decides not to refer a matter they must give a statement of reasons for their decision to the person making the application.<sup>170</sup>

Conversely, under clause 15 the court can direct the Commission to investigate a matter. The Bill also creates a new section 368 of the *Criminal Law Consolidation Act 1935* allowing the Full Court to direct the CCRC to investigate a matter if it is relevant to the determination of a case and ought to be resolved before an appeal case is determined.

The Law Society of South Australia stated that it was uncomfortable with the court being given investigative powers such as those under proposed section 368 and clause 15:

It is unlike a court to have such a function. With it, it looks less like a court and more like an inquisitorial body with an investigative arm (the CCRC). The institutional integrity of the Court may be questioned.<sup>171</sup>

Ms Etter submitted that clause 15(1) should contain a reference to new section 368 to make it clear that the two are related.<sup>172</sup> The Borick, Harding and Scales submission further pointed to the relationship between existing section 359 (which gives powers of investigation to the courts) and clause 15, and that a reference should be made to the CCRC in section 359.

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<sup>166</sup> Supplementary Submission, Moles and Sangha, p. 1.

<sup>167</sup> Supplementary Submission, Moles and Sangha, p. 2.

<sup>168</sup> Supplementary Submission, Moles and Sangha, p. 2.

<sup>169</sup> Clause 14(5).

<sup>170</sup> Clause 14 (6).

<sup>171</sup> Submission, Law Society of SA, p. 6.

<sup>172</sup> Submission, Etter, p. 3.

Clause 15(2) provides that where it is investigating a matter referred by a court under this section, and it appears that another relevant matter arises, the Commission has the power to investigate that related matter. The clause also specifies the reporting requirements to the court, including details of the investigation, statements and opinions.<sup>173</sup>

### **5.6 Assistance with prerogative of mercy - clause 16**

Clause 16(1) provides that the Attorney-General may also refer a matter to the Commission in regard to whether or not the Governor should exercise the prerogative of mercy. This is in addition to the Attorney-General's reference of a matter to the courts for determination under section 369 of the *Criminal Law Consolidation Act 1935*.

The clause provides that if the Commission considers the matter and gives a conclusion, then the Attorney-General must treat the Commission's statement as conclusive of the matter referred. Conversely, under clause 16(2), if the Commission in any case considers it appropriate for the exercise of the prerogative of mercy, then they are to provide the Attorney-General with the reasons for that opinion. The Bill makes clear by the inclusion of this section that the CCRC is neither to replace the prerogative of mercy, nor the Attorney-General powers of referral to the court under the existing section 369.

The Borick, Harding and Scales submission assumed that upon the establishment of a CCRC, the reference to the court for further appeal would be made through the CCRC and not through current section 369(1).<sup>174</sup> They suggested that section 369 would be amended to only allow the Attorney-General to seek assistance from the court on a point in the petition, and not to refer the entire case to the court for consideration. They considered it more appropriate that clause 16(2) appear in clause 14 to say that if the CCRC decides not to make a reference, but rather thinks it appropriate for the applicant to petition for mercy, it should advise the applicant of that fact.<sup>175</sup>

Dr Naughton, in an article he included along with his submission, outlined the history of the equivalent provision in the UK CCRC legislation. He referred to the findings of the Royal Commission on Criminal Justice which lead to the establishment of the UK CCRC, and explained the reason behind retaining the royal prerogative:

In further recognition of the limits of the Court of Appeal under the existing criteria (fresh evidence and safety) in overturning the convictions of innocent victims of miscarriages of justice, the RCCJ recommended that the Free Pardon under the Royal Prerogative of Mercy remain an available route for factually innocent victims of wrongful conviction to obtain justice.<sup>176</sup>

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<sup>173</sup> Clauses 15(4)-15(6).

<sup>174</sup> Submission, Borick, Harding & Scales, p. 53.

<sup>175</sup> Submission, Borick, Harding & Scales, p. 54.

<sup>176</sup> Naughton, Michael, "The Criminal Cases Review Commission: Innocence versus Safety and the Integrity of the Criminal Justice System", *Criminal Law Quarterly*, vol 58, p. 220.

He further noted that the UK CCRC has not referred a conviction for consideration under this part since its inception.<sup>177</sup>

### **5.7 Obtaining further information - clause 17**

Clause 17(1) provides that the Commission has the power to obtain documents and other material from a public body or an officer of a public body which may assist them in the exercise of any of their functions. Clause 17(3) gives the Commission power to issue a notice specifying that material not be destroyed, that it be produced and also gives the power to allow them to take a copy of such information.

It is an offence for a person not to comply with a direction from the Commission under clause 17, with a maximum penalty of a fine of \$10 000. The Law Society of South Australia submitted that this penalty for non compliance was insufficient, and should include imprisonment of at least two years. Their reason for recommending an increased penalty was that:

Non-compliance may frustrate the work of the CCRC and cause a matter not to be referred on the basis of insufficient evidence. A defendant may, therefore, lose a legitimate chance of highlighting a miscarriage of justice (leading to an acquittal etc). The consequence of non-compliance for a defendant are therefore grave.<sup>178</sup>

They further submitted that the Bill should contain a clause empowering the court to order compliance with an order of the Commission under this section.<sup>179</sup>

The South Australian Bar Association also submitted that clause 17 should be expanded to include:

a positive duty on the public body in question to retain and preserve the document or other material referred to in the notice.

They also submitted that there should be provision for the commission to take a sample of any material referred to in a notice.<sup>180</sup>

Clause 17(5) provides that a person or body must comply with a request for information notwithstanding any other limitation on disclosure, including by virtue of statute.<sup>181</sup> The South Australian Bar Association queried the extent of this clause, and whether it may abrogate legal professional privilege. They agreed that the Commission's power to obtain information should not be limited by such privilege, and submitted that the clause be altered to make this clear:

If it is intended that these sections abrogate legal professional privilege, then we consider that this should be expressly stated. Further, we consider that such should be the express intention of these sections. It may be important, for example, for the

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<sup>177</sup> Naughton, Michael, "The Criminal Cases Review Commission: Innocence versus Safety and the Integrity of the Criminal Justice System", *Criminal Law Quarterly*, vol 58, p. 221.

<sup>178</sup> Submission, Law Society of SA, p. 7.

<sup>179</sup> Submission, Law Society of SA, p. 7.

<sup>180</sup> Submission, SA Bar Association, p. 1.

<sup>181</sup> Clause 17(5).



Court to know what were an applicant's instructions to his or her legal representatives at a particular point of proceedings.<sup>182</sup>

### 5.8 Investigating officers – clauses 18 -20

Under clause 18, the Commission has the power to require the appointment of an investigating officer to assist them in relation to any case. The Commission has the power to order any person serving in a public body (that being a government agency, a person employed by a statutory authority for a public purpose or a council) to be an investigating officer.

Clauses 18(2)-(4) permit the Commission to apply to the Commissioner of Police requiring a police officer to be appointed as an investigating officer, who may or may not have investigated the original case. The clause also allows the appointment of any other person serving in a public body to be appointed as an investigating officer. It also gives the Commission power to order that a particular case be investigated by police, even if that case has not been investigated before.

Clause 19 sets out the requirements for the conduct of such investigating officers, including:

- conducting such inquiries as the Commission may direct;
- be permitted to undertake such inquiries by the public body they belong to;
- allowing the Commission to supervise the investigating officer;
- preparing a report of his or her findings and submitting a copy both to the Commission and the person by whom they were appointed (ie. the relevant person in the public body).<sup>183</sup>

Clause 19(4) provides that the Commission may appoint more than one investigating officer.

The Law Society of South Australia was concerned that clause 19 is at odds with the mandatory nature of the provisions in clause 18:

Clause 19(2), as drafted, does not appear to make sense. To make sense of it, it seems that it should be in mandatory terms. That is, the word "may" should be replaced by "shall" (as it is in the *Criminal Appeal Act 1995*). Clause 19(1) provides that a person appointed as the investigating officer by the CCRC must undertake certain inquiries. Clause 19(2) is directed to that person's employer and provides that the employer "may" permit the person to act as directed by the CCRC. This is at odds with the mandatory nature of cl 18 and 19(1). It appears to only make sense if the person's employer is compelled to permit the person to undertake the inquiries as directed.<sup>184</sup>

The submission from Messrs Borick, Harding and Scales suggested that clause 19 be amended to provide that the investigating officer not be from the same body that did the initial work on the case the Commission is investigating.<sup>185</sup> Clause 18(6) provides that the Commission may direct that a person or public body not be selected, so the commission does have some discretion in this regard.

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<sup>182</sup> Submission, SA Bar Association, p. 2.

<sup>183</sup> Clauses 19(1), 19(2), 19(3), 19(5).

<sup>184</sup> Submission, Law Society of SA, p. 7.

<sup>185</sup> Submission, Borick, Harding & Scales, pp. 55 and 61.

Ms Etter, in her submission, expressed a similar concern that *“great care should be taken in getting police to investigate police.”* She went on to suggest that the use of interstate police should be considered.<sup>186</sup>

SAPOL expressed concern in their submission that investigating officers would come almost exclusively from SAPOL ranks. They suggested that the role of investigating officers would be better suited to the officers of the new anti-corruption commission.<sup>187</sup>

Clause 20 provides that the power of the Commission to order the appointment of investigating officers does not derogate from its power to take any other steps to assist them in their investigations.

### **5.9 Disclosure of information – clauses 21-23**

Clause 21 prevents the disclosure of information by a member or employee of the Commission or an investigating officer, except in the following circumstances outlined in clause 22:

- for the purpose of any criminal, disciplinary or civil proceedings;
- in order to assist with an application by the Attorney-General for compensation for a miscarriage of justice;
- to other Commission officers or an investigating officer;
- in statements or in accordance with functions prescribed in the Bill;
- when authorised by the Attorney-General in writing;
- when authorised by the Commission;
- for the purpose of investigating an offence or deciding whether to prosecute an offence so long as disclosure is not prevented by an obligation of secrecy or other limitation on disclosure.

Any authorisation by the Attorney General will only be in effect if a copy of such authorisation is laid before each House of Parliament, and neither House resolves to disallow the authorisation within 14 sitting days of it being laid before the House.<sup>188</sup>

Under clause 23, a person can require that the Commission not disclose information without that person’s prior consent. However, a person cannot withhold consent unless it is reasonable for them to do so, or they are prevented by an obligation of secrecy or other limit on disclosure (such as legal professional privilege).

### **5.10 Reporting Requirements – clause 24**

Under clause 24, the Commission may report to the Attorney-General on any matter relating to the administration of the Act or the criminal justice system in South Australia either:

- of its own motion;
- at the request of the Attorney-General;

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<sup>186</sup> Submission, Etter, p. 3.

<sup>187</sup> Submission, SAPOL, p. 2.

<sup>188</sup> Clause 22(5).

- at the request of a House or Committee of the Parliament.

A copy of such a report must be tabled in each House of Parliament within 12 sitting days of it being received by the Attorney-General.

### **5.11 Amendments to other Acts and exemptions**

The Bill amends the *Bail Act 1985* to allow a person to be eligible for bail if their case is being reviewed by the CCRC. As stated previously, the Bill also creates a new section 368 of the *Criminal Law Consolidation Act 1935*, allowing the Full Court to direct the CCRC to investigate a matter if a matter is relevant to the determination of a case and ought to be resolved before an appeal case is determined.

Clause 25 exempts the Commission from the application of the *Freedom of Information Act 1991* and the *State Records Act 1997*.

### **5.12 Judicial Review of decisions of the Commission**

Many submissions commented on whether the decisions of the CCRC should be subject to judicial review. The Law Society of South Australia submitted that decisions of the CCRC should be neither appealable nor reviewable:

Consistent with the principle of finality, and in the context of the defendant having exhausted his [or her] appeal rights, we recommend that the decision of the CCRC not be subject to review. The Bill should be amended to deal with this issue.<sup>189</sup>

Conversely, the submission from Dr Moles and Ms Sangha recommended that CCRC decisions be subject to judicial review, as they are in the UK. They outlined several examples of CCRC cases which have been reviewed, and conclude that:

The possibility of judicial review, like the possibility for re-applications, provide safeguards that the CCRC may deny a meritorious application.<sup>190</sup>

The submission from Borick, Harding and Scales also recommended that the CCRC decisions be subject to judicial review.<sup>191</sup>

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<sup>189</sup> Submission, Law Society of SA, p. 8.

<sup>190</sup> Submission, Moles and Sangha, p. 57.

<sup>191</sup> Submission, Borick, Harding & Scales, p. 59.

## 6. CRITICISMS OF THE CRIMINAL CASES REVIEW COMMISSION

The Committee received a number of submissions expressing concern about the general scope of a CCRC and whether it is a suitable model for post conviction review.

### 6.1 Innocence vs unsafe conviction

Dr Michael Naughton submitted that the CCRC is not interested in innocence and is only there to handle new evidence or argument that may cast doubt on the safety of an original decision; it does not rectify the errors of the criminal justice system.

In an article which Dr Naughton included along with his submission, he outlined that the question of factual guilt or innocence should have priority over procedural justice. He is of the view that the system currently does not function in this way. He expressed broader concerns about the role of the criminal justice system in preferring the rule of law over factual innocence:

This view of how the criminal justice system should operate prioritizes the question of factual guilt or innocence over procedural justice. It also expresses the lay perspective on what would constitute a miscarriage of justice: it is either the wrongful conviction of the factually innocent or the acquittal of the factually guilty.<sup>192</sup>

He further submitted that:

The CCRC, then, is best viewed as a bolt-on quality control mechanism to the existing criminal appeals system that works to ensure that the decisions of the Court of Appeal meet with its own rules and procedures in the global interests of upholding its [the Court of Appeal's] vision of criminal justice system integrity; it seeks to determine whether convictions are lawful, not whether they are just in the lay sense of factual innocence and guilt.<sup>193</sup>

Dr Naughton is supportive of a two pronged innocence-focused approach:

An interrogation of the process that [lead] to the conviction (police investigation and prosecutorial conduct, for instance) and the evidence that is claimed to prove that the alleged innocent victim is factually guilty whilst, simultaneously, seeking ways to determine whether the claim of innocence by the alleged victim can be validated.<sup>194</sup>

The difficulty in referring to innocence as opposed to a wrongful conviction is that it undermines the fundamental principle underlying the criminal trial process of innocent until proven guilty. This was discussed by Mr Scales in evidence:

I'm not sure that the CCRC will be in a position to make an assessment as to whether someone is innocent. I think that it may only be able to receive submissions and evidence which might indicate that a decision on the face of it is quite possibly or probably unsafe or unsatisfactory.<sup>195</sup>

<sup>192</sup> Naughton, Michael, "The Criminal Cases Review Commission: Innocence Versus Safety and the Integrity of the Criminal Justice System", *Criminal Law Quarterly*, vol 58, April 2012, p. 213.

<sup>193</sup> Naughton, Michael, "The Criminal Cases Review Commission: Innocence Versus Safety and the Integrity of the Criminal Justice System", *Criminal Law Quarterly*, vol 58, April 2012, p. 222.

<sup>194</sup> Submission, Naughton, p. 6.

<sup>195</sup> Legislative Review Committee Hansard, 4 April 2012 at [67].

And further by Mr Borick:

‘Innocence’ is a difficult word because all you really have is the presumption of innocence, and an accused person takes that into court with him or her. Once a conviction is recorded through the trial process the presumption goes, and when you go to the appeal process it is swung back onto you—you are guilty—and in a sense you have got to prove that you’re not. As a practising lawyer defending people, guilt or innocence is not the issue. My job is to ensure a fair trial.<sup>196</sup>

Dr Moles, in evidence, expressed the view that the CCRC is concerned about innocent people being wrongly convicted, and that their concern for innocence is expressed in terms of wrongful convictions due to the history of the presumption of innocence:

The important thing to bear in mind is that, for example, for a legal official to actually express a personal opinion about the guilt or innocence of a person is contrary to law. If a legal official does that, they could be up on charges of professional misconduct... as a prosecutor, for example, you must never express your personal opinion about whether somebody is guilty or innocent—that is the role of the jury.

Therefore, the role of people like a CCRC is not to actually say they think that somebody is innocent or guilty—that would be quite wrong. What they should say is, ‘Did the jury have a fair opportunity to assess the question of guilt or innocence? Was there some defect in the way in which the matter was put to the jury?’ If you review all of that process and you find it was gone through perfectly well—they had all of the relevant evidence, none of the evidence was misleading—then you accept the verdict of the jury. It is not for anybody else to come along and say, ‘I think the person is innocent.’<sup>197</sup>

## 6.2 Application of the fresh evidence rule

Submissions expressed differing views as to the scope of a CCRC to consider evidence which was available at the time of the original criminal trial. Their arguments expressed varying views as to whether a CCRC should consider all evidence available at trial, or be limited to considering fresh evidence only.

Dr Naughton was critical of the UK CCRC’s narrow interpretation of what constitutes fresh evidence/argument for the purpose of a review. He submitted:

If evidence supporting the defence/the appellants claim of innocence was available but was not produced at trial either by reason of omission, or, tactical decision by trial counsel, such evidence will not, generally, constitute the kind of fresh evidence or argument required by the CCRC.<sup>198</sup>

He was concerned that the UK CCRC is a body which only conducts a ‘desktop review’, appraising the arguments of applicants first by the fresh evidence test and then by the real possibility test, rather than an investigatory body. He further submitted that the real possibility test has the consequence of the CCRC referring cases of *“guilty individuals on a breaches or abuses of process if it is felt that the case meets the Court of Appeal’s*

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<sup>196</sup> Legislative Review Committee Hansard 4 April 2012 at [67].

<sup>197</sup> Legislative Review Committee Hansard 28 March 2012 at [17].

<sup>198</sup> Submission, Naughton, p. 4.

*criteria*".<sup>199</sup> He therefore recommended that a wider interpretation of what constitutes 'fresh evidence' be adopted which:

includes all evidence not raised, regardless of whether or not it was or could have been available at trial or first appeal.<sup>200</sup>

Contrary to the submission of Dr Naughton, the Law Society of South Australia advocated for a narrower test, and submitted that a CCRC should be limited to considering only fresh evidence which could not reasonably have been available at the time of the original trial:

We suggest that the CCRC should only consider those matters where it emerges that new evidence, or evidence which could not reasonably have been available at the time, becomes available after the proceedings and which bears on the original finding or the fairness of the original proceedings and which could reveal a substantial miscarriage of justice (ie. a guilty finding of an innocent defendant or a manifestly unjust sentence).<sup>201</sup>

They outlined a number of reasons for limiting the scope of the CCRC in this manner, which included not allowing a defendant another avenue to agitate his or her case. They submitted that this would not only undermine the criminal justice system, but would also have implications for victims, the courts, and the community. They went further to outline that the principle of finality is fundamental, and that there must be an end point to criminal proceedings:

It is important for all, including the victims and the defendants, that there be an end point to proceedings...the consequences of being found guilty of a serious offence(s) are significant. There is therefore great motivation for a defendant to "shake the tree" as often as possible to see what falls out. It is important that the CCRC is not permitted to be used in this way.<sup>202</sup>

In evidence, Mr Bönig further expanded on this view. He indicated that in general, the sorts of cases that were overturned were as a result of evidence not made available at the time, or where there have been developments in scientific evidence.<sup>203</sup> He was careful to point out that matters falling within the 'new evidence' test proposed by the Law Society of South Australia are:

not the sorts of things that an appeal court would even have before them because they are not matters that are available at the time that the court process is being heard and being ventilated.<sup>204</sup>

The test set out in clause 13 of the Bill could potentially include material that was available at the time of the original trial; Mr Bönig was of the view that review on this basis would properly fall within the purview of the appeals court:

The test proposed by the Hon. Ann Bressington really would include material that was available and even possibly heard and introduced in evidence during the trial process.

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<sup>199</sup> Submission, Naughton, p.4.

<sup>200</sup> Submission, Naughton, p. 4.

<sup>201</sup> Submission, Law Society of SA, p. 2.

<sup>202</sup> Submission, Law Society of SA, p. 2.

<sup>203</sup> Legislative Review Committee Hansard, 2 May 2012 at [85].

<sup>204</sup> Legislative Review Committee Hansard, 2 May 2012 at [85].

That is for the appeal court then to decide whether or not that evidence was properly introduced or given sufficient weight. We just don't see the Bressington test, if I can call it that, being appropriate for a commission as opposed to a court process.<sup>205</sup>

### 6.3 Victims' rights in post conviction review

The Committee heard evidence from several witnesses regarding the possible effects of a post conviction review on victims of crime. The Commissioner for Victims' Rights, Mr Michael O'Connell, gave evidence about the place of victims in the criminal justice system. He was of the view that a post conviction review would have a negative impact on a victim's ability to cope with the consequences of crime, as well as have consequences for any victims of crime compensation claims.

There is no provision in the Bill for the notification of victims of any review undertaken by the Commission. Mr O'Connell expressed the view that any proposed criminal case review process should engage victims, and give them a right to have representation:

where they were going to be affected by a particular piece of evidence ... [or] decision that was going to be made.<sup>206</sup>

He further stressed the importance of engaging victims in any criminal case review process, and that any lack of transparency or engagement with victims may be its undoing:

If you were to have a criminal case review process, the lack of transparency and the lack of engagement with victims would be two of the things which I would suggest to you that, over a period of time, would be its undoing, just because of public disquiet.<sup>207</sup>

He outlined that victims can register with the Parole Board and with forensic Mental Health to be kept informed of the progress of a convicted person.<sup>208</sup> Further, he submitted that there are many victims who want to be kept informed and may wish to be advised if a criminal case review were to be undertaken.<sup>209</sup> However, he identifies that this may be difficult as in many instances, victims may have moved on, or even "*assumed a new identity to protect themselves*".<sup>210</sup> He was also in favour of victims' representation in any criminal case review.<sup>211</sup>

Mr O'Connell submitted that the establishment of a CCRC would continue the inequity and unfairness to victims:

It would largely be perceived as being another mechanism to continue what many victims find intolerable or reprehensible about the way our justice system operates now.<sup>212</sup>

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<sup>205</sup> Legislative Review Committee Hansard, 2 May 2012 at [85].

<sup>206</sup> Legislative Review Committee Hansard, 28 March 2012 at [32].

<sup>207</sup> Legislative Review Committee Hansard, 28 March 2012 at [27].

<sup>208</sup> Legislative Review Committee Hansard, 28 March 2012 at [25].

<sup>209</sup> Legislative Review Committee Hansard, 28 March 2012 at [30].

<sup>210</sup> Legislative Review Committee Hansard, 28 March 2012 at [25].

<sup>211</sup> See discussion at Legislative Review Committee Hansard, 28 March 2012 at [26] and [32].

<sup>212</sup> Legislative Review Committee Hansard, 28 March 2012 at [32].

He further submitted that if there were a mechanism to deal with issues of miscarriages of justice, that this should encompass the ‘other side of the coin’, namely a review process where an application could be made to investigate a person who has been acquitted where there is fresh and compelling evidence to the contrary. He referred to the legislation in place to address the exception to the rule of double jeopardy, and was of the view that it would be more acceptable and fairer to extend rights in this forum rather than establishing a CCRC:

If the parliament was prepared to revisit that whole issue and say, ‘We think that there is room to use what we know about DNA technology to not only show that people are innocent but also that people are guilty,’ then we can use that to initiate a process. I am of the view that that would be more acceptable, that would be fairer, that would be more equitable.<sup>213</sup>

Mr Borick, in evidence, suggested that victims of crime should also have the right to take matters to a criminal cases review body, and that it would be an “*extremely important step*” if such a body would have the power to look after victims of miscarriages of justice.<sup>214</sup> Mr Scales also indicated that in any post conviction review “*all relevant matters should be taken into account, including the interests of the victims*”.<sup>215</sup>

Currently, a victim has a right, on request, to be notified of the outcome of any appeal or release of an offender.<sup>216</sup>

#### **6.4 Finality for victims of crime**

Mr O’Connell, in evidence, outlined the importance of the principle of finality for victims of crime, and that it is more difficult to assist a victim to cope with their circumstances in the absence of an end point to litigation:

The issue of finality gives a milestone upon which you can build. If you don’t have that issue of finality for victims and their families, then effectively it is like an elastic band, you just keep stretching and stretching the process.<sup>217</sup>

The submission from the OARS Community Transitions also noted that the current Bill makes no mention of the impact the Bill may have on victims of crime, and were of the view that:

The Commissioner for Victims should be empowered to engage with victim/s in a manner consistent with the role of that Office to reduce the likelihood of negative victim impact.<sup>218</sup>

Similarly, the submission from the Law Society of South Australia mentioned the importance of having an end point to litigation, especially considering the impact on victims, and pointed to the operation of the principle of finality in the appellate jurisdiction as an example:

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<sup>213</sup> Legislative Review Committee Hansard, 28 March 2012 at [33].

<sup>214</sup> Legislative Review Committee Hansard, 4 April 2012 at [49].

<sup>215</sup> Legislative Review Committee Hansard, 4 April 2012 at [66]. See also Submission, Borick, Harding & Scales, p. 16.

<sup>216</sup> Sections 8(1)(f) and 8 (1)(h) *Victims of Crime Act 2001*.

<sup>217</sup> Legislative Review Committee Hansard, 28 March 2012 at [35].

<sup>218</sup> Submission, OARS Community Transitions, p. 2.



The fundamental principle of finality of litigation applies no less to the criminal jurisdiction as it does in the civil. **It is important for all, including the victims and the defendants, that there be an end point to proceedings.** It is for this reason that time limits rightfully apply in the appellate jurisdiction and that a person should not be at liberty to further litigate his/her matter after having exhausted all avenues of appeal. [Emphasis added].<sup>219</sup>

## 6.5 Effect on Victims of Crime Compensation

Mr O'Connell also raised the difficulties that may result for a victim in seeking victims of crime compensation should the outcome of a criminal trial be challenged. In evidence, he explained that the statutory scheme for victim's compensation has two burdens of proof: the first is an obligation to prove the offence beyond reasonable doubt and the second is to prove any injury which forms the basis of the claim on the balance of probabilities.<sup>220</sup> A claim must be proved beyond reasonable doubt in proceedings before a court, or admitted in statutory proceedings.<sup>221</sup> If there is no finality then Mr O'Connell was concerned about the delay in settling victims' compensation claims.<sup>222</sup>

The only other option for a victim seeking compensation is an application to the Attorney-General for an ex gratia payment under section 27 of the *Victims of Crime Act 2001*. Mr O'Connell submitted that if there is no finality in the process of conviction, the Attorney may be put in a position where if he grants a compensation payment, the decision may appear to be contrary to the court's decision.<sup>223</sup> He further submitted:

If compensation was paid on the basis of a conviction in a criminal court that was later undone, then the Attorney-General of the day has to determine whether or not he or she is going to seek recovery of the moneys that have already been paid to the victim, and that creates another political ... dilemma for the Attorney-General of the day. You could end up putting a considerable burden on whoever is the Attorney-General of the day in terms of how he or she administers that scheme as it currently operates.<sup>224</sup>

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<sup>219</sup> Submission, Law Society of SA, p. 2.

<sup>220</sup> Legislative Review Committee Hansard, 28 March 2012 at [24].

<sup>221</sup> See section 22 *Victims of Crime Act 2001*.

<sup>222</sup> Legislative Review Committee Hansard, 28 March 2012 at [24].

<sup>223</sup> Legislative Review Committee Hansard, 28 March 2012 at [24].

<sup>224</sup> Legislative Review Committee Hansard, 28 March 2012 at [24].

## 7. CRIMINAL CASES REVIEW COMMISSIONS IN OTHER JURISDICTIONS

In response to concerns regarding the safety of convictions, and the inability of courts to reopen appeals, several overseas jurisdictions have established formal criminal case review bodies.

### 7.1 United Kingdom Criminal Cases Review Commission

The Criminal Cases Review Commission in the United Kingdom (UK CCRC) was established in 1997 as a result of the Royal Commission on Criminal Justice which explored the wrongful conviction of the so called Guildford Four and the Birmingham Six – people who were convicted based on connections to terrorist acts carried out by the Irish Republican Army.

Prior to the establishment of the UK CCRC, the *Criminal Appeal Act 1968* (UK) provided that the Home Secretary could order an investigation of alleged miscarriages of justice and refer them to the Court of Criminal Appeal. This power was similar to that contained in section 359 of the *Criminal Law Consolidation Act 1935* (SA). The Royal Commission found that successive Home Secretaries were failing to refer miscarriages of justice on political grounds.<sup>225</sup>

The UK CCRC is an 11 member body which reviews convictions in England, Wales and Northern Ireland. It is established in Chapter 35 Part II of the *Criminal Appeal Act 1995* (UK). Section 13 of the Act sets out the conditions that need to be satisfied in order for the UK CCRC to make a reference of a matter to the court, and provides:

- (1) A reference of a conviction, verdict, finding or sentence shall not be made under any of sections 9 to 12 unless—
  - (a) the Commission considers that there is a **real possibility that the conviction, verdict finding or sentence would not be upheld were there reference to be made,**
  - (b) the Commission so consider
    - (i) in the case of a conviction, verdict or finding, **because of an argument, or evidence, not raised in the proceedings** which led to it or on any appeal or application for leave to appeal against it, or
    - (ii) in the case of a sentence because of an argument on a point of law, or information, not so raised, and
  - (c) an appeal against the conviction, verdict, finding or sentence has been determined or leave to appeal against it has been refused. [Emphasis added].<sup>226</sup>

This provision is very similar to that contained in the Criminal Cases Review Commission Bill 2010.

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<sup>225</sup> Summary based on Naughton, Michael with Gabe Tan, *Claims of Innocence: An introduction to wrongful convictions and how they might be challenged*, University of Bristol, 2010, p. 28.

<sup>226</sup> Section 13 *Criminal Appeal Act 1995* (UK).

The UK CCRC must also have regard to any benefit which would accrue either to the applicant or the criminal justice system if the case were referred. The UK CCRC considers a number of factors in making a reference, including:

- the seriousness of the offence;
- the nature and severity of the sentence;
- age of the conviction;
- any impact on the applicant;
- other factors in the public interest.<sup>227</sup>

### **7.1.1 Process of review - Stage 1**

Once an application has been made, it is assessed for eligibility. A letter is sent to the applicant along with a question and answer leaflet. The case is then assessed according to the terms of reference of the Commission. If the Commission decides that a case it is not suitable for review, a letter is sent to the applicant allowing 28 days for further submissions. If no such submissions are received, the Commissioner will close the case and notify the applicant. An applicant may re-apply, and the Commission will determine whether any new information has been raised which warrants a further review. Where possible, a reapplication is assigned to a commissioner who took no part in the original review.<sup>228</sup>

Some cases are categorised as No Reviewable Grounds (NRG). Cases are categorised as NRG if:

- the application only repeats issues raised and considered at trial or appeal;
- when it does not contain any submission;
- the application presents no plausible basis for referring the case;
- where a review is not possible because the evidence upon which the conviction was based and/or the facts upon which the sentence was based cannot be determined because key documents and relevant files are missing and there is no reasonable prospect of establishing these matters by other means.<sup>229</sup>

When the UK CCRC determines that a case is suitable for review, it is allocated to a case reviewer and given a particular category: A, B, C or D:

- Category A cases may raise only one or two straightforward issues and would normally pass to the decision-making stage within eight weeks;
- Category B cases are more involved and raise more complex issues and usually progress to the decision making stage within 22 weeks;
- Category C cases are more time consuming, involving extensive and complex issues requiring off-site inquiries and the involvement of other agencies. A commissioner will be assigned to such cases to help plan and execute the review. A letter is sent to

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<sup>227</sup> CCRC Formal Memorandum – Discretion in Referrals, p. 2, <http://www.justice.gov.uk/downloads/about/criminal-cases-review/policies-and-procedures/casework/discretion-referrals.pdf>, accessed 6 July 2012.

<sup>228</sup> Criminal Cases Review Commission Annual Report and Accounts 2009/10, p. 80.

<sup>229</sup> Criminal Cases Review Commission Annual Report and Accounts 2009/10, p. 81.

the applicant within 4 weeks, setting out the Commission's understanding of the issues, seeking clarification and confirmation of issues where necessary;<sup>230</sup>

- Category D cases are the larger cases and generally involve the appointing of an investigating officer. They will be referred directly to the Director of Casework who will determine the most suitable pathway for review.<sup>231</sup>

### **7.1.2 Stage 2 – The Review**

An applicant is generally required to communicate with the UK CCRC in writing—legal advice is available to assist them in responding to their requests. The UK CCRC may request to meet with an applicant in person depending on the circumstances.<sup>232</sup>

The UK CCRC may also seek the services of an expert required to review a case. They can also question witnesses. A witness who gave evidence at trial will not normally be interviewed unless there is reason to believe they have some new information, or their credibility has been called into question.<sup>233</sup> Jurors may also be interviewed by the UK CCRC.<sup>234</sup>

### **7.1.3 Stage 3 - Exceptional circumstances**

Even if the UK CCRC is not satisfied that there is a real possibility of not upholding the sentence, they can still refer a matter if *“it appears to the Commission that there are exceptional circumstances which justify”* making a reference.<sup>235</sup> Such circumstances may include:

- information that the applicant could not reasonably be expected to discover or present;
- if an applicant has a mental illness or disability placing them at a disadvantage in securing legal representation and/or pursuing an appeal;
- applicants who have been prevented from appealing as a result of threats.<sup>236</sup>

### **7.1.4 – Stage 4 - Statement of Reasons**

Once a review is complete, the information is presented to either a single commissioner or a committee of at least three commissioners, none of whom would have been involved in the initial stages of the investigation. If they decide there are grounds for referral, a final Statement of Reasons will be issued and the case sent to the Court of Appeal.

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<sup>230</sup> CCRC Formal Memorandum: Communicating with Applicants, p. 2, <http://www.justice.gov.uk/downloads/about/criminal-cases-review/policies-and-procedures/casework/communicating-applicants.pdf>, accessed 6 July 2012.

<sup>231</sup> Criminal Cases Review Commission Annual Report and Accounts 2009/10, p. 81.

<sup>232</sup> CCRC Formal Memorandum: Communicating with Applicants, p. 4.

<sup>233</sup> CCRC Formal Memorandum – Interviewing, p. 2, <http://www.justice.gov.uk/downloads/about/criminal-cases-review/policies-and-procedures/casework/interviewing.pdf>, accessed 6 July 2012.

<sup>234</sup> CCRC Formal Memorandum – Interviewing-Interviewing Jurors, p. 1, <http://www.justice.gov.uk/downloads/about/criminal-cases-review/policies-and-procedures/casework/interviewing-jurors.pdf>, accessed 6 July 2012.

<sup>235</sup> Section 13(2) *Criminal Appeal Act 1995* (UK).

<sup>236</sup> CCRC Formal Memorandum – Exceptional Circumstances, p. 6, [http://www.justice.gov.uk/downloads/about/criminal-cases-review/policies-and-procedures/casework/CCRC-1479042-v1-PDF\\_VERSION\\_OF\\_EXECP\\_CIRCS\\_FM\\_FOR\\_WEBSITE.pdf](http://www.justice.gov.uk/downloads/about/criminal-cases-review/policies-and-procedures/casework/CCRC-1479042-v1-PDF_VERSION_OF_EXECP_CIRCS_FM_FOR_WEBSITE.pdf), accessed 6 July 2012.

If the decision is that there are no grounds for referral, a provisional Statement of Reasons is issued and sent to the applicant. The applicant will then be given 20 working days to respond to this. If a response is received, the Commission will consider this before making a final decision and issuing a final Statement of Reason. The case will then be closed.<sup>237</sup>

The UK CCRC's decisions are subject to judicial review.

### **7.1.5 Statistics**

In its last Annual Report (2010/11) the UK CCRC reported the following:

- There were 933 applications to the Commission;
- As at 31 March 2011 there were 366 cases under review, 119 were awaiting allocation and 163 were newly arrived;
- 22 references to the court were made;
- 34 referral cases reached court – in 20 of these convictions were quashed or sentences amended;<sup>238</sup>
- It had an annual operating budget of £6.3 million.<sup>239</sup>

### **7.2 Scottish Criminal Cases Review Commission**

Scotland has enacted legislation to establish its own Criminal Cases Review Commission, with different terms of reference to that of its English counterpart. The Scottish CCRC (SCCRC), is established under the *Criminal Procedure (Scotland) Act 1995* as an independent body to review and investigate cases where it is alleged a miscarriage of justice may have occurred regarding a conviction or a sentence imposed by a Scottish court for a summary or indictable offence.<sup>240</sup> References from the SCCRC are heard and determined by the Scottish High Court (which is the equivalent of the Supreme Court of South Australia) as an appeal.

The Act requires that the SCCRC is to have no fewer than three members, and that at least one third of the members shall be legally qualified with at least 10 years of experience.<sup>241</sup> At least two thirds of the members must have knowledge or experience of the criminal justice system.<sup>242</sup> The SCCRC currently has nine members.<sup>243</sup> A case may be referred if the SCCRC believes that:

- a miscarriage of justice may have occurred and;
- that it is in the interests of justice that a reference be made.<sup>244</sup>

These terms of reference are quite different to those of the UK CCRC which requires a reasonable possibility of conviction being overturned. The SCCRC terms of reference are

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<sup>237</sup> From <http://www.justice.gov.uk/about/criminal-cases-review-commission/forms-and-how-to-apply/how-we-deal-with-applications>, accessed 6 July 2012.

<sup>238</sup> Criminal Cases Review Commission Annual Report and Accounts 2010/11, p. 7.

<sup>239</sup> Criminal Cases Review Commission Annual Report and Accounts 2010/11, p. 27.

<sup>240</sup> Information from [www.sccrc.org.uk](http://www.sccrc.org.uk) accessed 6 July 2012.

<sup>241</sup> Section 194A(5) *Criminal Procedure (Scotland) Act 1995* c.46.

<sup>242</sup> Section 194A(6) *Criminal Procedure (Scotland) Act 1995* c.46.

<sup>243</sup> A biography of current members and staff of the SCCRC can be found at <http://www.sccrc.org.uk/management.aspx>, accessed 6 July 2012.

<sup>244</sup> Section 194C, *Criminal Procedure (Scotland) Act 1995* c.46.

more akin to the consideration contained in section 353(1) of the *Criminal Law Consolidation Act 1935* (SA) which allows the court to set aside a conviction on the grounds that there was a miscarriage of justice. The SCCRC applies the same test as its court of appeal in referring cases.<sup>245</sup>

The SCCRC is not obliged to refer a case where it believes a miscarriage of justice has occurred, and has a broad discretion in this regard.<sup>246</sup> In considering making a reference on these grounds, the Commission must have regard to the need for finality and certainty in the determination of criminal proceedings.<sup>247</sup>

It is not necessary for a person to have previously appealed against their conviction or sentence in order to apply to the SCCRC. The Commission is also able to review previous applications which it has already reviewed—there is no limit on the number of times a conviction can be reviewed. It can also issue posthumous reviews.<sup>248</sup>

The Scottish courts have determined that the SCCRC is not restricted to considering the issues raised by an applicant, but can undertake its own independent investigations; it has in the past referred matters to the court which did not form part of the original application.<sup>249</sup>

The SCCRC has broader investigation powers than the UK CCRC. Their powers include:

- obtaining a warrant to call a person to give information and evidence before the Commission;<sup>250</sup>
- obtain documents from any person, not just public bodies;<sup>251</sup>
- power to request information from abroad.<sup>252</sup>

The SCCRC is required to issue a statement of reasons for each of its decisions, even those decisions not to refer a case.<sup>253</sup>

In the 2010/11 financial year, the SCCRC received a total of 168 requests for review. Of these:

- it concluded 141 cases;
- 10 cases on conviction were determined by the court—seven unsuccessful, three successful;<sup>254</sup>
- four referrals were pending determination by the court.<sup>255</sup>

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<sup>245</sup> See Roach, K, "The Role of Innocence Commissions: Error Discovery, Systemic Reform, or Both?" *Chicago-Kent Law Review*, vol 85 No. 1, 2010, p. 98.

<sup>246</sup> Scottish Criminal Cases Review Commission 10<sup>th</sup> Anniversary Research Final Report, 30 April 2009, p.10, [www.sccrc.org.uk/ViewFile.aspx?id=393](http://www.sccrc.org.uk/ViewFile.aspx?id=393), accessed 18 May 2012.

<sup>247</sup> Section 194C(2) *Criminal Procedure (Scotland) Act 1995* c.46.

<sup>248</sup> Scottish CCRC Frequently Asked Questions, <http://www.sccrc.org.uk/frequentlyaskedquestions.aspx> accessed on 21 June 2012.

<sup>249</sup> Scottish Criminal Cases Review Commission 10<sup>th</sup> Anniversary Research Final Report, 30 April 2009, p.11.

<sup>250</sup> Section 194F *Criminal Procedure (Scotland) Act 1995* c.46.

<sup>251</sup> Section 194I *Criminal Procedure (Scotland) Act 1995* c.46.

<sup>252</sup> Section 194IA *Criminal Procedure (Scotland) Act 1995* c.46.

<sup>253</sup> Section 194B(1) *Criminal Procedure (Scotland) Act 1995* c.46.

<sup>254</sup> Annual Report, Scottish Criminal Cases Review Commission 2010-11, pp. 17-20.

Some of the main grounds for referral in conviction cases since the SCCRC's inception in 1999 include errors with the presentation of evidence, as outlined in the following table:<sup>256</sup>

Main Ground of Referral	Frequency of Ground	% of Referred Cases
<b>Error in Law:</b>	<b>15</b>	<b>26</b>
Insufficient Evidence	10	17
Evidence: Wrongful Admission	2	3
Evidence: Wrongful Exclusion	2	3
Refusal of No Case to Answer Submission	2	3
Miscellaneous	1	2
<b>Irregular Proceedings:</b>	<b>8</b>	<b>14</b>
Conduct of Judge	2	3
Conduct of Jury	2	3
Conduct of Prosecutor	1	2
Other	3	5
<b>Misdirection:</b>	<b>9</b>	<b>16</b>
On Evidence: Omission, Value, Weight	6	10
On Law: Corroboration	2	3
On Law: Other	2	3
<b>Other:</b>	<b>33</b>	<b>58</b>
Evidence not heard at Original Proceedings	23	40
Failure to Disclose	10	17
Defective Representation	9	16
Unreasonable Verdict	3	5
Lurking Doubt	1	2

Since its inception in 1999 and to 31 May 2012 the SCCRC has:

- received 1537 applications and concluded 1466;
- referred 108 cases to the High Court of which 90 have been determined, 58 resulted in a successful appeal, 32 unsuccessful.<sup>257</sup>

The SSCRC had a net operating cost in 2010-2011 of just over £1 million.<sup>258</sup>

### 7.3 Norwegian Criminal Cases Review Commission

The Norwegian Criminal Cases Review Commission (NCCRC) was established in 2004, and is based on the CCRC model adopted in the UK.<sup>259</sup> The NCCRC determines reviews in much the same manner as other CCRC's—it consists of five permanent members and three deputy members, of which three must be lawyers. The Chairperson of the NCCRC is appointed for seven years and the members for three years. Appointments are made by the King in

<sup>255</sup> Annual Report, Scottish Criminal Cases Review Commission 2010-11, p.22.

<sup>256</sup> Annual Report, Scottish Criminal Cases Review Commission 2010-11, p. 13.

<sup>257</sup> Scottish Criminal Cases Review Commission website [www.sccrc.org.uk/casestatistics.aspx](http://www.sccrc.org.uk/casestatistics.aspx), accessed 6 July 2012.

<sup>258</sup> Annual Report, Scottish Criminal Cases Review Commission 2010-11, p. 42.

<sup>259</sup> CCRC UK Press Release: "Norwegian Delegation Visits Commission", 23 June 2004, [www.ccrc.gov.uk/NewsArchive/news\\_280.htm](http://www.ccrc.gov.uk/NewsArchive/news_280.htm), accessed 14 March 2012.

Council (the Executive).<sup>260</sup> The NCCRC Secretariat employs eleven people – seven investigating officers with a legal background, two investigating officers with a police background, one office manager and one secretary:

The investigating officers have experience of working for law firms, the courts, the Ministry of Justice and the Police, the Parliamentary Ombudsman for Public Administration, the police, the Institute of Forensic Medicine, the Armed Forces and the Norwegian Inland Revenue Service.<sup>261</sup>

The NCCRC may conduct a review if:

- there is new evidence or new circumstances that may by lead to acquittal or a considerably lighter sentence;
- the decision or the proceedings of the convicted person's case are contrary to international law and there are grounds to assume that a reopening of the criminal case will lead to a different result;
- someone who has played an important role in the case (prosecuting counsel, judge, expert, defence counsel, witness) has committed a criminal offence that may have affected the conviction/sentence to the disadvantage of the convicted person.<sup>262</sup>
- a judge or jury member who dealt with the case was disqualified by reason of prejudice and there are reasons to assume that this may have affected the judgment;
- the Supreme Court has departed from a legal interpretation that it has previously adopted and on which the judgment is based;
- there are special circumstances that cast doubt on the correctness of the judgment of weighty considerations which indicate that the question of the guilt of the defendant should be re-examined.<sup>263</sup>

The NCCRC has the power to seek new information and examine cases. When a referral is made, it is referred to a court other than that which imposed the conviction or sentence.<sup>264</sup> They review any criminal case with a legally enforceable judgement. It has the power to call witnesses, including the convicted person, nominate experts, and also to direct prosecuting authorities to undertake investigations.<sup>265</sup> The Commission determines its own procedures, and members may not consider cases for which they are disqualified by reason of prejudice. In some cases a petitioning person may have a legal representative appointed at public expense.<sup>266</sup>

Victims have a right to be informed and involved in any review conducted by the NCCRC. Victims or their next of kin are to be told of the petition, are entitled to examine documents and to state their views on the petition in writing, and they may ask to be allowed to make a

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<sup>260</sup> Norwegian Criminal Cases Review Commission Annual Report 2010, p. 3.

<sup>261</sup> Norwegian Criminal Cases Review Commission Annual Report 2010, p. 2.

<sup>262</sup> Kommissjonen For Gjenopptakelse Av Straffesaker, Frequently Asked Questions, <http://www.gjenopptakelse.no/index.php?id=33#c64>, accessed 6 July 2012.

<sup>263</sup> Norwegian Criminal Cases Review Commission Annual Report 2010, p. 5.

<sup>264</sup> Kommissjonen For Gjenopptakelse Av Straffesaker, Frequently Asked Questions, <http://www.gjenopptakelse.no/index.php?id=33#c64>, accessed 6 July 2012.

<sup>265</sup> <http://www.gjenopptakelse.no/index.php?id=32>, accessed 6 July 2012.

<sup>266</sup> Norwegian Criminal Cases Review Commission Annual Report 2010, p. 4.



statement to the Commission. They must be notified of the outcome of the case once it has been determined. The Commission may appoint a counsel for the victim where appropriate.<sup>267</sup> This is done most often in indecent assault and sexual abuse cases. The Commission appointed counsel for the victim/victim's next of kin in three cases in 2010.<sup>268</sup>

The NCCRC received 184 applications in 2010 compared to 148 petitions in 2009. Of these 184, 142 were reviewed and 32 were allowed.<sup>269</sup> Since its inception in 2004, it has received 1 184 petitions, with a total of 120 successful reviews.<sup>270</sup> The Commission appointed expert witnesses in 16 cases.<sup>271</sup>

The number of petitions rejected reflects cases which are simply appeals which do not require further investigation, and also cases which in the Commission's view cannot succeed.<sup>272</sup> The NCCRC reports to the Minister of Justice every six months.<sup>273</sup>

#### **7.4 North Carolina Innocence Inquiry Commission**

The first jurisdiction in North America to institute a formal commission to hear wrongful convictions was North Carolina. In 2006 the North Carolina Innocence Inquiry Commission was instituted. It consists of eight members appointed by the Chief Justices of the North Carolina Supreme Court. Membership must include:

- a superior court judge (Chair of the Commission);
- a prosecuting attorney;
- a victim advocate;
- a defence attorney;
- a sheriff;
- a person who is not an attorney or employed by the judiciary;
- two other members.<sup>274</sup>

Alternate Commission members are also appointed to take the place of those members who may have a conflict of interest, scheduling conflict or who cannot sit for any other reason.<sup>275</sup> The statute also states that the appointing authority should make a:

good faith effort to appoint members with different perspectives of the justice system and also consider geographical location, gender and racial diversity in making the appointments.<sup>276</sup>

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<sup>267</sup> Norwegian Criminal Cases Review Commission Annual Report 2009, p. 4.

<sup>268</sup> Norwegian Criminal Cases Review Commission Annual Report 2010, p. 11.

<sup>269</sup> Norwegian Criminal Cases Review Commission Annual Report 2010, p. 8.

<sup>270</sup> Norwegian Criminal Cases Review Commission Annual Report 2010, p. 9.

<sup>271</sup> Norwegian Criminal Cases Review Commission Annual Report 2010, p. 11.

<sup>272</sup> Norwegian Criminal Cases Review Commission Annual Report 2010, p. 10.

<sup>273</sup> Norwegian Criminal Cases Review Commission Annual Report 2010, p. 12.

<sup>274</sup> Article 92, Article 92 sections 15A-1463(a) & (c) North Carolina General Statutes as referenced in Roach, K, "The Role of Innocence Commissions: Error Discovery, Systemic Reform, or Both?" *Chicago-Kent Law Review*, vol 85 No. 1, 2010, p. 100.

<sup>275</sup> Article 92, section 15A-1463(b) North Carolina General Statutes, [http://www.ncleg.net/EnactedLegislation/Statutes/HTML/ByArticle/Chapter\\_15A/Article\\_92.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_15A/Article_92.html), accessed 27 June 2012.

<sup>276</sup> Article 92, 15A-1463(b) North Carolina General Statutes.

The NCIC is very different from the Criminal Case Review models found in the UK and Scotland: it is an independent commission which comes under the Judicial Department, with administrative support provided by the Administrative Office of the Courts, and its membership determined by a member of the judiciary.<sup>277</sup> Those on the NCIC receive no remuneration.<sup>278</sup> It is limited to hearing claims of factual innocence. 'Claim of factual innocence' is defined as:

A claim on behalf of a living person convicted of a felony in the General Court of justice of the State of North Carolina, ***asserting the complete innocence of any criminal responsibility*** for the felony for which the person was convicted and for any other reduced level of criminal responsibility relating to the crime, and for which there is ***some credible, verifiable evidence of innocence that has not previously been presented at trial or considered at a hearing*** granted through postconviction [sic] relief. [Emphasis added].<sup>279</sup>

So the test is threefold, as the claim:

- must be on behalf of a living person convicted of a felony;
- asserting their complete innocence;
- for which there is some credible verifiable evidence that has not been previously presented at trial or considered at a hearing.

The NIIC employs a Director who must be an attorney. The Director assists the Commission in developing rules and standards for cases, coordinating investigations, maintaining records and preparing reports. The Director is able to employ other staff to assist the Commission in the performance of its duties.<sup>280</sup>

Any person may refer a case to the Commission, but the Commission cannot consider a claim if the convicted person is deceased. When an application is received, the Commission determines whether it fits within the statutory criteria. If so, a preliminary review to gather information is undertaken. The case then moves into an investigation stage, and the applicant is required to enter into a signed agreement to waive procedural rights and privileges and cooperate fully with the Commission. The applicant has the right to legal counsel before entering into such an agreement.<sup>281</sup> If the Commission determines that there is sufficient evidence of factual innocence to merit judicial review, a panel of three judges then sits to hear all the new evidence and can make an order for release.<sup>282</sup> The three judge hearings operate in the same way as an appeal to the court, with prosecution and defence representatives.

The North Carolina statute provides that the Commission will notify any victims in the case and explain the inquiry process to them. In addition, the victim has the right to present his or her views and concerns throughout the investigation.<sup>283</sup> The NCIC also has general

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<sup>277</sup> Article 92, 15A-1462 North Carolina General Statutes.

<sup>278</sup> Article 92, 15A-1464(b) North Carolina General Statutes.

<sup>279</sup> Article 92, s 15A-1460 (1) North Carolina General Statutes.

<sup>280</sup> Article 92, s 15A-1465 (a) and (b) North Carolina General Statutes.

<sup>281</sup> Article 92, s 15A-1467(b) North Carolina General Statutes.

<sup>282</sup> Article 92, 15A-1469(a) North Carolina General Statutes.

<sup>283</sup> Article 92, s 15A-1467(c) North Carolina General Statutes.

powers to compel the attendance of witnesses and the production of evidence.<sup>284</sup> There is no right to any further review of the panel's decision.<sup>285</sup>

In its last annual report, the NCIIC reported that it received 314 new claims of innocence in 2010, an increase on its average of 225 in previous years.<sup>286</sup> Since its inception, it has reviewed 850 claims. Of these, only three cases have moved through a hearing. The first claim was denied, the second was closed and the third resulted in an exoneration. North Carolina has a population of approximately nine million people. It has capital punishment.

The NCIIC reports that it was able to confirm two convictions through the discovery of DNA evidence and located missing evidence in seven cases.<sup>287</sup> In one case, the Commission discovered a systemic problem with police destroying evidence in violation of a statute. The NCIIC is able to work with agencies to implement systemic reform, as well as review cases. They had a total estimated running cost of US\$294 894 in 2011-12.<sup>288</sup>

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<sup>284</sup> Article 92 s 15A-1467(d) North Carolina General Statutes.

<sup>285</sup> Article 92 s15A-1470 North Carolina General Statute.

<sup>286</sup> North Carolina Innocence Inquiry Commission Annual Report 2011-12, p. 3.

<sup>287</sup> North Carolina Innocence Inquiry Commission Annual Report 2011-12, p. 4.

<sup>288</sup> Appendix C, North Carolina Innocence Inquiry Commission Annual Report 2011-12.

## 8. ALTERNATIVES TO CRIMINAL CASES REVIEW COMMISSION

Many jurisdictions have implemented statutory models for post conviction review other than criminal cases review commissions. Some have amended their existing appeals provisions, or established limited conviction review such as New South Wales with its DNA Review Panel. Other jurisdictions, such as Canada, have provision for a review conducted by a person outside the jurisdiction, namely the Federal Attorney-General.

Some submissions to the Inquiry were supportive of strengthening other areas in order to avoid miscarriages of justice, such as allowing another appeal if fresh and compelling evidence can be found, or reforming the manner in which scientific evidence is produced.

The terms of reference to the Inquiry required the Committee to consider the possibility of establishing a national CCRC as an alternative to a state-based CCRC.

### 8.1 New South Wales appeals and review provisions

The New South Wales *Crimes (Appeal and Review) Act 2001* contains provisions which allow a convicted person to petition for a review of their case in several forums. These provisions are not linked to the exercise of the prerogative of mercy (which still remains). They afford a convicted person another opportunity to have their case reviewed and referred to the court of criminal appeal after all formal appeal avenues have been exhausted. New South Wales is the only jurisdiction in Australia to have such a provision.

#### 8.1.1 Petition to Governor

Section 76 provides that a person may petition for the review of a conviction, sentence or a petition for pardon. In considering this petition, the Governor may direct that an inquiry be conducted by a judicial officer into a conviction or sentence; alternatively, the Minister may refer the case to the Court of Criminal Appeal or ask the court for an opinion.<sup>289</sup> This section is qualified by the following:

Action under subsection (1) may only be taken if it appears that there is a doubt or question as to the convicted person's guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case.<sup>290</sup>

A petition may be refused if the matter has already been dealt with either during the hearing of the conviction, on review or appeal, or where appeal proceedings have lapsed, or if the Governor or Minister is "*not satisfied that there are special facts or special circumstances that justify the taking of further action*".<sup>291</sup> The Minister must report to the Supreme Court as to what action has been taken in relation to petitions.<sup>292</sup>

#### 8.1.2 Application to Supreme Court

Section 78 allows a convicted person (or a person on their behalf) to make an application to the Supreme Court for an inquiry into a conviction or sentence. The Supreme Court may

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<sup>289</sup> Section 77(1) *Crimes (Appeal and Review) Act 2001* (NSW).

<sup>290</sup> Section 77(2) *Crimes (Appeal and Review) Act 2001* (NSW).

<sup>291</sup> Sections 77(3)(a) and 77(3)(b) *Crimes (Appeal and Review) Act 2001* (NSW).

<sup>292</sup> Section 77(4) *Crimes (Appeal and Review) Act 2001* (NSW).

then direct that an inquiry be held, either by one judicial officer, or by reference of the matter to the Court of Criminal Appeal. The review can only be undertaken if:

It appears that there is a doubt or question as to the convicted person's guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case.<sup>293</sup>

Again, the court may refuse to deal with an application if the matters have already been dealt with in an appeal or review.<sup>294</sup> It must also notify the Minister if it receives such an application, and what action it has taken.<sup>295</sup>

### **8.1.3 Inquiry Proceedings**

Proceedings for review under section 76 and 78 are not judicial proceedings;<sup>296</sup> they are to be conducted by a judicial officer who is to be accorded the same powers, authorities, protections and immunities as a commissioner under the *Royal Commissions Act 1923* (NSW).<sup>297</sup>

Once an inquiry is completed, the judicial officer must report on the result of the inquiry and send copies to the Governor or the Chief Justice of the Supreme Court, depending on who directed the inquiry.<sup>298</sup> The judicial officer may also refer the matter to the Court of Criminal Appeal for consideration of the question as to whether the conviction should be quashed, or for a review of the sentence.

Both the Governor and the Supreme Court retain an absolute discretion to refuse to deal with a petition.<sup>299</sup>

### **8.1.4 Views on New South Wales appeal and review provisions**

The submission from the Australian Human Rights Commission outlined the alternative approach adopted by New South Wales as an option that this Committee may consider in addressing the issues of concern they identified in their submission. They summarised the ability of a person in New South Wales to petition for a review of a conviction or sentence or the exercise of the Governor's pardoning power, or apply directly to the Supreme Court for an inquiry into a conviction or sentence.<sup>300</sup>

In evidence, Dr Moles expressed his reservations about any post conviction review involving the Attorney-General. In response to a question regarding the acceptability of a model similar to that in New South Wales, Dr Moles remarked:

No, we don't think that that would be acceptable, because we feel that we need two things. First of all, we need independence. And it has to be said that if an Attorney-General is reviewing the matter, then the Attorney-General clearly has the

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<sup>293</sup> Section 79(2) *Crimes (Appeal and Review) Act 2001* (NSW).

<sup>294</sup> Section 79(3) *Crimes (Appeal and Review) Act 2001* (NSW).

<sup>295</sup> Sections 78(2) and 79(5) *Crimes (Appeal and Review) Act 2001* (NSW).

<sup>296</sup> Section 79(4) *Crimes (Appeal and Review) Act 2001* (NSW).

<sup>297</sup> Section 81 *Crimes (Appeal and Review) Act 2001* (NSW).

<sup>298</sup> Section 82(1) *Crimes (Appeal and Review) Act 2001* (NSW).

<sup>299</sup> Section 79(3) *Crimes (Appeal and Review) Act 2001* (NSW).

<sup>300</sup> Submission, Australian Human Rights Commission, p. 7.

responsibility for police, forensic services and other people who may well have been involved in the investigation of the crime or, indeed, the prosecution of the crime through the prosecutor's office. **To ask the same person to review those processes I think presents a difficulty, of course.** If it were instead referred to an independent body that can both investigate and evaluate, of course, that would be much more appropriate.[Emphasis added].<sup>301</sup>

The Law Council of Australia, in their policy paper on a Commonwealth Criminal Cases Review Commission, expressed concern about the operation of the New South Wales provisions. They were of the view that the test requiring the Governor or the court to be satisfied that *"there is a doubt or question as to the convicted person's guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case"* creates confusion. They were concerned about the risk that the test may create an *"inappropriate procedural hurdle"*.<sup>302</sup> Further, they submitted that the provisions in general blur the lines between the prerogative of mercy and the extraordinary appeal process. They concluded that a national CCRC is much more preferable:

These [NSW] provisions are intended to be utilised in cases where a matter has already been finally disposed of by the courts. They are intended to provide a safety net in extraordinary cases, without creating the impression that a verdict or sentence of the court may be subject to ongoing questioning, review and revision. For that reason, it is preferable that an independent, objective, statutory body, which is removed from the trial process and the court system, conducts the inquiry into whether and when a matter should be able to be referred back to the appeal court. **The court should not become involved in a matter, and a person should not be seen to have access once more to the courts to re-agitate his or her case, until an independent determination has been made that it is indeed a case where the principle of finality must be set aside in order to avert a likely miscarriage of justice.** [Emphasis added].<sup>303</sup>

## 8.2 DNA Review Panel

### 8.2.1 New South Wales Innocence Panel

The only Australian jurisdiction to attempt to legislatively address miscarriages of justice in a manner outside the court system has been New South Wales. In August 2000, the New South Wales Government announced the establishment of an Innocence Panel. The Panel was an administrative body established by statute and answerable to the Minister of Police. Its role was to receive applications from persons who claim to have been wrongfully convicted, and to organise DNA testing and analysis to assist in proving their innocence. Initially, the panel only accepted applications from those convicted of serious offences, with priority given to those who were currently serving a sentence.<sup>304</sup> Up to 13 July 2003, the Panel received 13 applications; in only two cases were items found and in only one case was a DNA profile found on analysis.<sup>305</sup>

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<sup>301</sup> Legislative Review Committee Hansard, 28 March 2012 at [10].

<sup>302</sup> Law Council of Australia, Policy Statement on a Commonwealth Criminal Cases Review Commission, p.5, [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uuid=00668B57-DAC1-C8F3-02CD-B61E40BE233C&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=00668B57-DAC1-C8F3-02CD-B61E40BE233C&siteName=lca), accessed 2 May 2012.

<sup>303</sup> Law Council of Australia, Policy Statement on a Commonwealth Criminal Cases Review Commission, p.5.

<sup>304</sup> DNA Review Panel Annual Report 2010-11, pp. 23-24.

<sup>305</sup> DNA Review Panel Annual Report 2010-11, p. 23.

In August 2003 the Panel was disbanded due to concerns regarding privacy and their powers, as well as the lack of sufficient checks and balances to protect victims of crime.<sup>306</sup> Other issues of concern raised in a review of the Panel after it was disbanded included the fact that the Panel could not be objective, as it sat within the Minister for Police's portfolio, conflict of interest in involving the same laboratory retesting its samples, and the limited role of the Panel in only determining cases where DNA evidence was in question.<sup>307</sup>

### **8.2.2 DNA Review Panel**

The DNA Review Panel was established in 2006, after the disbanding of the New South Wales Innocence Panel. A convicted person may apply to the Panel if their claim of innocence might be affected by DNA information.<sup>308</sup> The role of the Panel is much narrower than that of other post conviction review bodies, in that it does not conduct a review of the trial and/or investigation which led to the conviction; rather, it acts as a facilitator to obtain DNA testing of evidence on behalf of a person which may go some way to proving their innocence.

The Panel is to consist of (at least) six members, being:

- a former judicial officer;
- a nominee of the Premier to represent victims of crime;
- the Director-General of the Attorney-General's Department or a nominee;
- the Senior Public Defender or a nominee;
- the Director of Public Prosecutions or a nominee;
- a former police officer nominated by the Commissioner of Police.<sup>309</sup>

The Minister may also appoint deputy members of the Panel.<sup>310</sup>

Section 91(1) of the Act specifies that the functions of the DNA Review Panel are:

- (a) To consider any application under this Division from an eligible convicted person and to assess whether the person's claim of innocence will be affected by DNA information obtained from biological material specified in the application,
- (b) To arrange, if appropriate, searches for that biological material and the DNA testing of that biological material,
- (c) To refer, if appropriate, a case to the Court of Criminal Appeal under this Division for review of a conviction following the receipt of DNA test results,
- (d) To make reports and recommendations to the Minister on systems, policies and strategies for using DNA technology to assist in the assessment of claims of innocence (including an annual report of its work and activities, and of statistical information relating to the applications it received).

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<sup>306</sup> DNA Review Panel Annual Report 2010-2011 p. 24. See also Gibbs, Stephen, "Appeal panel shut down after Balding killer's action", *Sydney Morning Herald*, 12 August 2003, <http://www.smh.com.au/articles/2003/08/11/1060588324273.html>, accessed 6 March 2012.

<sup>307</sup> Griffith, G. and Roth L, "DNA Evidence, Wrongful Conviction and Wrongful Acquittals," *NSW Parliamentary Library Research Service*, No. 11/06, p. 34.

<sup>308</sup> Section 89(2) *Crimes (Appeal and Review) Act 2001* (NSW).

<sup>309</sup> Section 90(3) *Crimes (Appeal and Review) Act 2001* (NSW).

<sup>310</sup> Clause 4, Schedule 2, *Crimes (Appeal and Review) Act 2001* (NSW).

A convicted person is only eligible to apply for a review if they were convicted of a relevant offence (being an offence punishable by life imprisonment or 20 years or more, or in special circumstances determined by the Panel) prior to 19 September 2006.<sup>311</sup> In its most recent annual report, the Panel recommends that the limitation on only hearing convictions prior to 2006, should be removed. The Report provides:

Underlying this approach is the Panel's awareness that DNA testing is a continually evolving science and technological procedure, with significant advance being made all the time.<sup>312</sup>

Further, it has recommended that the definition of 'relevant offence' be changed from an offence punishable imprisonment for 20 years or more, to 14 years or more. They expressed the view that the 14 year limitation would be:

a reasonable and appropriate balance between the Panel's consideration of serious matters attracting lengthy custodial sentences; and not requiring police to retain exhibits beyond conviction and appeal to all custodial offenders.<sup>313</sup>

Initially, on receiving an application, the Panel will meet, review and decide whether to proceed. They will then collect and analyse court file, trial transcripts, remarks on sentence and any other relevant documents. They will then produce a summary of the case. This is to undertake an analysis to determine whether the DNA testing requested would be relevant.<sup>314</sup>

The Panel will ascertain whether there are any registered victims of the crime and notify them if the Panel accepts the application.<sup>315</sup> They then apply to the police to locate the requested item; it is then sent for testing to the Division of Analytical Laboratories.<sup>316</sup> The Panel may seek assistance from other experts, the Commissioner of Police or a public authority regarding the DNA material.<sup>317</sup> Once it has considered a matter, the DNA Review Panel may refer the matter to the Court of Criminal Appeal for consideration of the question of whether the conviction should be set aside:

if the Panel is of the opinion that there is a reasonable doubt as to the guilt of the convicted person.<sup>318</sup>

The matter then progresses through the court in the same way as a normal appeal.

The Panel must have regard to the consequences for victims and the need to maintain public confidence in the administration of justice and the public interest.<sup>319</sup> They must also notify both the applicant and any registered victims of the offence should the matter

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<sup>311</sup> Section 89 *Crimes (Appeal and Review) Act 2001* (NSW).

<sup>312</sup> DNA Review Panel Annual Report, 2010-2011, p. 33.

<sup>313</sup> DNA Review Panel Annual Report, 2010-2011, p. 33.

<sup>314</sup> DNA Review Panel Annual Report, 2010-2011, p.30.

<sup>315</sup> DNA Review Panel Annual Report, 2010-2011, p. 30.

<sup>316</sup> DNA Review Panel Annual Report, 2010-2011, p. 30.

<sup>317</sup> Sections 91(3) and (4) *Crimes (Appeal and Review) Act 2001* (NSW).

<sup>318</sup> Section 94(1) *Crimes (Appeal and Review) Act 2001* (NSW).

<sup>319</sup> Section 91(2) *Crimes (Appeal and Review) Act 2001*(NSW).



proceed to the appeals court.<sup>320</sup> The Act also provides a definitive list of those who may be informed of an application and its progress. These include:

- the applicant;
- the registered victims of the offence concerned;
- the Commissioner of Police;
- the Police Integrity Commission;
- the Independent Commission Against Corruption;
- the Commissioner of Corrective Services;
- the Director General of Juvenile Justice;
- the Minister or Chief Justice.<sup>321</sup>

Since its inception, the Panel has considered 29 applications. In the 2010-2011 financial year it received 10 applications and has 5 applications pending. There have been no referrals to the Court of Criminal Appeal.<sup>322</sup> The nature and outcomes of applications as at June 2011 are summarised in the following table:<sup>323</sup>

Nature of convictions of applicants	
Murder	14
Manslaughter	1
Sexual intercourse without consent/sexual assault	10
Grievous bodily harm	3
Attempted murder	1
Outcomes in completed cases	
Results of testing did not assist applicant	5
DNA evidence would not assist the claim of innocence	9
Application from outside jurisdiction	1
Application not sufficiently detailed for consideration	1
Application out of time (outside of Panel's statutory powers)	5
Evidence could not be tested (unable to be provided)	1
Panel unable to assist applicant	1
Search outcomes	
No. of cases where searches for items have been sought	7
No. of cases where search for item is pending	1
Testing outcomes	
No. of cases where items have been tested	6
No. of cases where testing is pending	1
DNA analysis outcomes	
No. of cases where a DNA profile was obtained	4
No. of cases where a DNA analysis is pending	1

### 8.2.3 Views on DNA Review Panel

In evidence, Professor Ross Vining indicated that he was a member of the original New South Wales Innocence Panel which was disbanded. He provided an analysis of the positive elements of the Panel, and in particular of providing an opportunity for a convicted person to have evidence re-tested. He outlined that the cases he considered while on the Panel

<sup>320</sup> Section 95(1) *Crimes (Appeal and Review) Act 2001* (NSW).

<sup>321</sup> Section 95(1) *Crimes (Appeal and Review) Act 2001* (NSW).

<sup>322</sup> DNA Review Panel Annual Report, 2010-2011, p. 32.

<sup>323</sup> DNA Review Panel Annual Report, 2010-2011, pp. 31-32.

either lacked substance, or even if the evidence existed (in some cases it was destroyed), it would not have changed the view of a jury:

We had quite a few applications. We looked at them and, in many cases, there was no substance to it. It was just, 'I'm innocent. I want you to show that I'm innocent.' There was no substance. In a few cases, people had outlandish ideas of evidence that might exist but we could see no evidence that it had ever existed. In other cases, there were key items where they no longer existed because it was a fair while ago, and in that era once all avenues for appeal had been exhausted, the evidence items were destroyed, so it didn't exist. In other cases the evidence items existed, but even if DNA was found, as per the person's claim, you could not see how that would change the view of a jury. So, after about a year and many meetings and looking at many applications, there was really no substance to any of the applications that could be investigated.<sup>324</sup>

He remarked that in essence, the Panel had a “*good structure*”;<sup>325</sup> he went on in evidence to submit that he would like to see a similar body established in South Australia, given that he regularly gets requests from prisoners asking for a reanalysis of evidence in their cases:

We reasonably regularly get requests from prisoners in South Australian gaols asking me, as Director of Forensic Science SA, to reanalyse key items out of their cases. This puts us in a very awkward position. I don't own that evidence; the evidence is owned by SAPOL. I cannot do anything with it without being asked to do that, effectively. These cases are closed from the viewpoint of the South Australian justice system. I look at it and, if there was a case that I looked at and thought, 'Gosh, I really think this could change it', then I guess I would need to appeal to the Attorney. What would I do? I don't have such a case before me at the moment, but I think it is an unreasonable situation that the director of the forensic science laboratories has to be making these non-scientific judgements of whether we should reanalyse this material from years ago.<sup>326</sup>

Mr Bönig, in evidence, indicated that although he was not aware of the specifics of the operation of the Panel, he thought it would be of benefit:

Anything that can ensure the correct methodology, testing, up-to-date methodology, appropriate procedures (in that there is not cross contamination) and all those things have occurred is a benefit, and anything that ensures that that occurs outside of the court system without the costs and complexities and everything of a court system is of benefit.<sup>327</sup>

### 8.3 Canada – Federal criminal conviction review

The appeals legislation in the Canada is similar to that which applies in South Australia. In Canada, a convicted person has the right to appeal against a conviction of an indictable offence. The Court of Appeal may allow the appeal if it is of the opinion that:

- (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
- (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
- (iii) on any ground there was a miscarriage of justice.<sup>328</sup>

<sup>324</sup> Legislative Review Committee Hansard, 13 June 2012 at [130].

<sup>325</sup> Legislative Review Committee Hansard, 13 June 2012 at [130].

<sup>326</sup> Legislative Review Committee Hansard, 13 June 2012 at [131].

<sup>327</sup> Legislative Review Committee Hansard, 2 May 2012 at [98].

<sup>328</sup> Section 686 Criminal Code, RSC 1985 c. C 46 (Canada).

In 2002, Canada extended its legislative provisions for post conviction review in order to address concerns about wrongful convictions. The response was seen as a compromise between a CCRC style body and the existing prerogative of mercy provisions.<sup>329</sup> Unlike Australia, where each state has their own criminal legislation, Canada has a Criminal Code which contains most of the criminal law offences which apply uniformly in all Canadian provinces, but are administered by each province individually.<sup>330</sup>

Since 2002, the Federal Minister for Justice has had the power under the Canadian Criminal Code to review a conviction. Section 696.1(1) of the Code provides that an application may be made by or on behalf of a person convicted of an offence for ministerial review on grounds of a miscarriage of justice.

The Criminal Code provides that a person who has been convicted of an offence under a federal law or regulation (either indictable or summary) and has exhausted all appeal rights may apply to have a conviction review.<sup>331</sup> Section 696.1(2) of the Code gives the Federal Minister for Justice power to conduct the investigation.

Section 696.1(3) allows this power to be delegated to a judicial officer to conduct the inquiry, which is the usual practice. Once the review has been conducted, the Minister may either:

- order a new trial;
- refer the matter to the court of criminal appeal;
- dismiss the application.<sup>332</sup>

In considering an application and making a decision, the Code provides that the Minister shall take into account all matters that the Minister considers relevant including:

- (a) whether the application is supported by new matters of significance that were not considered by the courts or previously considered by the Minister in an application in relation to the same conviction or finding under Part XXIV;
- (b) the relevance and reliability of information that is presented in connection with the application; and
- (c) the fact that an application under this Part is not intended to serve as a further appeal and any remedy available on such an application is an extraordinary remedy.<sup>333</sup>

The review application must be based on “new and significant” information:

Information will be considered new if the courts did not examine it during your trial or appeal or if you became aware of it after all court proceedings were over. Information is significant if:

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<sup>329</sup> Weathered, L, “Does Australia Need a Specific Institution to Correct Wrongful Convictions?”, *The Australian and New Zealand Journal of Criminology*, vol 40 No. 2, 2007, p. 183.

<sup>330</sup> See discussion in Weathered, L, “Does Australia Need a Specific Institution to Correct Wrongful Convictions?”, *The Australian and New Zealand Journal of Criminology*, vol 40 No. 2, 2007, p. 184.

<sup>331</sup> “Applying for a Conviction Review”, Department of Justice, Canada, p. 1, <http://www.justice.gc.ca/eng/pi/ccr-rc/app-dem/index.html>, accessed 6 July 2012.

<sup>332</sup> Criminal Code, RSC 1985 c. C 46 section 696.3 (3).

<sup>333</sup> Criminal Code, RSC 1985 c. C 46 section 696.4.

- It is reasonably capable of belief;
- It is relevant to the issue of guilt; and
- It could have affected the verdict if it had been presented at trial.<sup>334</sup>

The Minister need only be satisfied that based on this information a miscarriage of justice is likely to have occurred. This is quite different from the ‘real possibility’ test as applied by the UK CCRC and envisaged in the Criminal Cases Review Commission Bill 2010.

### **8.3.1 Process of investigation**

The Criminal Conviction Review Group is a separate unit from the Department of Justice, which consists of lawyers who assess and investigate each application, and provide advice to the Minister on what action to take.<sup>335</sup> If a matter referred was prosecuted by the Minister, the review will be conducted by lawyers outside this group.<sup>336</sup> The Criminal Conviction Review Group determines whether the application is reliable and relevant. The investigation may involve the following:

- interviewing witnesses;
- carrying out scientific tests;
- obtaining other assessments from forensic and social science specialists;
- consulting police, defence lawyers and prosecutors involved in the original prosecution;
- obtaining other relevant personal information and documents.<sup>337</sup>

An investigation report will then be prepared, and the applicant has the opportunity to provide further comments before the matter proceeds to the Minister for decision.<sup>338</sup>

### **8.3.2 Statistics**

The Federal Minister has reported that since the commencement of the provisions and to 2009 he had made decisions on 83 cases. 61 cases were closed on the grounds that there were no grounds for further investigations. 12 were referred back to the courts and 10 were dismissed.<sup>339</sup> From 2009-2011 there were 23 applications, 19 assessments with one application being referred to the court and two matters dismissed.<sup>340</sup>

### **8.3.3 Views on Canadian criminal conviction review**

In discussing a national approach to post conviction review, submissions to the Inquiry discussed the pros and cons of the Canadian system of post conviction review. In evidence, Dr Moles called this the “*midway position*”.<sup>341</sup> In a supplementary submission to the Committee, Dr Moles and Ms Sangha noted the power of the Canadian Minister for Justice

<sup>334</sup> “Applying for a Conviction Review”, Department of Justice Canada, p. 2.

<sup>335</sup> Annual Report 2011 Minister of Justice (Canada), [www.justice.gc.ca/eng/pi/ccr-rc/rep11-rap11/p2.html](http://www.justice.gc.ca/eng/pi/ccr-rc/rep11-rap11/p2.html), accessed 21 June 2012.

<sup>336</sup> “Applying for a Conviction Review”, Department of Justice Canada, p. 2.

<sup>337</sup> “Applying for a Conviction Review”, Department of Justice Canada, p. 3.

<sup>338</sup> The process for application is contained in sections 696.1 to 696.6 of the Criminal Code (Canada) Part XXI.1

<sup>339</sup> Minister of Justice (Canada) Annual Report 2009, <http://www.justice.gc.ca/eng/pi/ccr-rc/rep09-rap09/p5.html#s3>, accessed 5 March 2012.

<sup>340</sup> Submission, Criminal Cases Review Group, Statistics provided to the Committee, 8 March 2012.

<sup>341</sup> Legislative Review Committee Hansard, 28 March 2012 at [11].

to refer cases directly to the Supreme Court of Canada, or to re-open cases where there is a reasonable basis to conclude that a miscarriage of justice likely occurred. They also outlined broad powers and factors to which the Minister may have regard in making such a decision.<sup>342</sup>

Mr Bönig, in answer to a question regarding the viability of the Canadian model, remarked that there may be a disadvantage in having a review conducted in a different jurisdiction to the one in which the matter arose:

There is probably value in knowing your own home oval, so to speak. You know the players in the field, you know the way the courts work...I am not so sure that the outside body would have the same feel.<sup>343</sup>

Mr Bönig also pointed out the advantage of the complete independence of a review conducted outside the jurisdiction where the conviction arose. In both instances, he pointed to a jurisdictional issue which may arise if such a system is adopted in Australia; a federal conviction body may make a recommendation, only to have a state court say they don't have the jurisdiction to accept that finding:

I do not know what the Canadian political system is, but the High Court at the moment and the states are very partisan about where their boundaries are and who controls what at the moment. I would not want the possibility of setting up a system, having someone present a cogent case and having a commission say 'Yes, we think it is arguable, it should be overturned', and having a state court then say, 'Well, we don't have the jurisdiction,'...I am nervous about that approach.<sup>344</sup>

#### **8.4 A national Criminal Cases Review Commission**

One of the difficulties in envisaging a national scheme of post conviction review is that each jurisdiction in Australia has a different criminal law. Queensland, Western Australia, Tasmania and the territories each have a criminal code; South Australia, Victoria and New South Wales have a combination of statutory and common law crimes.<sup>345</sup> There have been attempts to develop a national model criminal code; however, this would depend on individual states adopting the same code, as the Federal Government does not have the constitutional power to legislate for criminal matters. The *Crimes Act 1914* (Cth) and the *Criminal Code Act 1995* (Cth) provide for offences and penalties for contravention of federal law.

Several submissions pointed to the benefits of a national CCRC over a state-based model. Mr Scales, in evidence, indicated his preference for a national CCRC in that it would overcome issues of allegiance to particular stakeholders or others who have an interest in the outcome who work within that particular jurisdiction:

to have somebody who doesn't have those sorts of affiliations would obviously be a better scenario and overcome any problem that might exist in that area.<sup>346</sup>

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<sup>342</sup> Supplementary Submission, Moles and Sangha, p. 3.

<sup>343</sup> Legislative Review Committee Hansard, 2 May 2012 at [96].

<sup>344</sup> Legislative Review Committee Hansard, 2 May 2012 at [96].

<sup>345</sup> Brett, Waller and Williams, *Criminal Law Texts and Cases*, Eighth edition, Butterworths 1997, p. 7.

<sup>346</sup> Legislative Review Committee Hansard, 4 April 2012 at [51].

Mr Hugh Selby, an academic from the Australian National University College of Law, submitted that even though the standards of criminal offences and penalties vary, that the standard of justice should be uniform within one nation.<sup>347</sup>

The Law Society of South Australia in their submission indicated that the Law Council of Australia is currently considering its position in relation to a national CCRC. However, the Law Society of South Australia did not favour a national CCRC at the expense of a state CCRC:

On the assumption that a National CCRC will only be concerned with Commonwealth Crime, or State crime with a Federal aspect, we believe that its scope would not extend far enough given that the overwhelming majority of prosecutions in this State are for state offences.<sup>348</sup>

In evidence, Mr Bönig outlined some of the practical difficulties with establishing a national CCRC. In response to a question as to whether or not a commonwealth/state cooperative body could be established to deal with both commonwealth and state appeals, he noted that there may be difficulties in getting all states to 'sign up' to the agreement in the first instance. He then went on to elaborate on the jurisdictional difficulties with having such a body and queried whether such a body would be able to refer matters back to a state court:

I am not sure that, if we had a national body, even if there was cooperation with all the states, there would then be the requisite referral of powers to this body, and I am not sure that our state court would necessarily want to be under the direction of a federal body to rehear or reopen a matter, and it raises jurisdictional issues as to the independence of the state court from federal matters, and so on.<sup>349</sup>

Mr Bönig also referred to the recent policy statement issued by the Law Council of Australia, which recommended that a Commonwealth Criminal Cases Review Commission should be established to consider applications for review for Commonwealth offences.<sup>350</sup> The Law Council endorsed the use of the real possibility test by any commission as well as the powers to access and obtain further information. They noted that the commission should be confined to reviewing cases dealt with on indictment, and that the commission should not replace the prerogative of mercy.<sup>351</sup>

In a supplementary submission to the Committee, Dr Moles and Ms Sangha pointed out that in order to set up a CCRC between two or more states, there would need to be matching legislation to support the set-up and funding of that body:

The important matter would be that the CCRC have a legislated authority to investigate and to have access to information and make referrals to the appeal court in each state which supports it.<sup>352</sup>

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<sup>347</sup> Submission, Selby, p. 1.

<sup>348</sup> Submission, Law Society of SA, p. 2.

<sup>349</sup> Legislative Review Committee Hansard, 2 May 2012 at [95].

<sup>350</sup> Legislative Review Committee Hansard, 2 May 2012 at [94].

<sup>351</sup> Law Council of Australia, Policy Statement on a Commonwealth Criminal Cases Review Commission, p. 3, [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uuid=00668B57-DAC1-C8F3-02CD-B61E40BE233C&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=00668B57-DAC1-C8F3-02CD-B61E40BE233C&siteName=lca), accessed 2 May 2012.

<sup>352</sup> Supplementary Submission, Moles and Sangha, p. 3.

Dr Tilstone, in his submission, noted that there is “*considerable uniformity*” between the states in regards to forensic evidence, and a national review of such evidence could be facilitated. He suggested that the National Institute of Forensic Science (NIFS) may be a body which could undertake such investigations:

In regard to forensic evidence, there exists considerable uniformity between the States, Territories and Commonwealth, and review of the impact of new scientific evidence and of specific issues in cases could well be conducted. There would be no need to establish any new body, as NIFS ... already exists and has shown itself to be an effective and valuable resource. I recommend that the Committee encourage the recognition of NIFS as a national forensic arbitration resource.<sup>353</sup>

The National Institute of Forensic Science is funded jointly by the Commonwealth and State governments. It assists with the coordination of forensic science services between jurisdictions, conducts training programs and coordinates quality assurance programs. It does not provide forensic testing or appraisals.<sup>354</sup>

### **8.5 Review on basis of tainted convictions and fresh and compelling evidence**

Chapter 3.9 of this Report outlines the so-called exceptions to the principle of double jeopardy contained in Part 10 of the *Criminal Law Consolidation Act 1935*. The provisions allow the Director of Public Prosecutions to order the arrest and retrial of a person acquitted of certain serious criminal charges on the basis of a ‘tainted acquittal’ or where fresh and compelling evidence has been discovered. It has been argued that a convicted person should have the opportunity to apply for a further appeal in the case of a so-called ‘tainted conviction’ or where fresh and compelling evidence comes to light which brings a conviction into question.

Just as these provisions provide one opportunity for a retrial of an acquitted person, many witnesses argued that a convicted person should be afforded at least one opportunity where fresh and compelling evidence can be adduced which may lead to their conviction being overturned.

Michael O’Connell submitted in evidence that it would be more acceptable to have a conviction review as part of the double jeopardy exceptions:

If the parliament was prepared to revisit that whole issue and say ‘We think that there is room to use what we know about DNA technology to not only show that people are innocent but also that people are guilty’ then we can use that to initiate a process.<sup>355</sup>

He saw this as being more favourable than setting up a separate system of giving a person another opportunity to appeal their conviction, when victims already perceive that the system is already biased towards protecting the accused.<sup>356</sup>

In response to questions regarding the possibility of a second appeal on the basis of fresh and compelling evidence, Mr Bönig accepted that this would be an appropriate ground for

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<sup>353</sup> Submission, Tilstone, p. 5.

<sup>354</sup> [http://www.nifs.com.au/NIFS/NIFS\\_frame.html?about.asp&1](http://www.nifs.com.au/NIFS/NIFS_frame.html?about.asp&1), accessed 6 July 2012.

<sup>355</sup> Legislative Review Committee Hansard, 28 March 2012 at [33].

<sup>356</sup> Legislative Review Committee Hansard, 28 March 2012 at [33].

another appeal. He raised this in the context of a discussion of the recent New South Wales Supreme Court decision in *Wood v R*, where new scientific evidence discredited that presented at the trial.<sup>357</sup>

The Committee received a submission from the South Australian Attorney-General which indicated that although the Government did not support the establishment of a Criminal Cases Review Commission, he is:

open to consider changes to section 369 of the *Criminal Law Consolidation Act 1935* and whether it is compatible with contemporary requirements.<sup>358</sup>

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<sup>357</sup> Legislative Review Committee Hansard, 2 May 2012 at [92]. *Wood v R* [2012] NSWCCA 21.

<sup>358</sup> Submission, Attorney-General, p. 1.



## 9. FINDINGS AND RECOMMENDATIONS

### **RECOMMENDATION 1 – That a Criminal Cases Review Commission not be established in South Australia at this time.**

The Committee has considered the Criminal Cases Review Commission Bill 2010 and its provisions, as well as models of post conviction review in other jurisdictions. The Committee agrees that there is a need for some form of post conviction review; however, it does not recommend that a Criminal Cases Review Commission as outlined in the Bill should be established at this time.

The Committee is concerned that a permanent CCRC would not be an adequate use of resources given the size of this jurisdiction and the number of matters it would review. It is of the view that reforms should be addressed through amendments to existing legislation, rather than through establishing a CCRC. However, the Committee considers that current mechanisms for the consideration of potential wrongful convictions are in need of reform.

### **RECOMMENDATION 2**

**The Committee does not recommend that the Attorney-General pursue the establishment of a Criminal Cases Review Commission at a national level.**

The Committee has considered the national criminal cases review model as required by the Inquiry Terms of Reference. It is of the view that there may be jurisdictional issues with a national body directing a state court.

The Committee is also mindful of the need for all states to consent to participate in such a scheme, and that there would be difficulties for a national commission applying different laws, caused by the lack of uniformity of the criminal law throughout Australia.

In light of this, the Committee does not recommend that the Attorney-General pursue the establishment of a CCRC at a national level.

### **RECOMMENDATION 3**

**That Part 11 of the *Criminal Law Consolidation Act 1935* be amended to provide that a person may be allowed at any time to appeal against a conviction for serious offences if the court is satisfied that:**

- **the conviction is tainted;**
- **where there is fresh and compelling evidence in relation to the offence which may cast reasonable doubt on the guilt of the convicted person.**

Currently, under Part 11 of the *Criminal Law Consolidation Act 1935*, a convicted person only has one right of appeal against their conviction which must be exercised within weeks of their verdict being handed down. The court has set a very high threshold as to the types of fresh evidence it will admit, and has indicated its reluctance to hear another appeal after a judgement has been finalised. There is currently no forum for a convicted person to raise

new evidence which may come to light due to advances in scientific testing, new witnesses, or even where there may have been errors in the original trial.

The only other option available to a convicted person is the prerogative of mercy, and the reference of the matter to the Attorney-General for consideration and possible reference back to the Court of Criminal Appeal. The Committee notes that the prerogative of mercy and section 369 is rarely used; further, section 369 does not contain any timeframe or structure around the Attorney-General's review process, and lacks transparency.

The principle of finality provides that once a conviction is recorded and the one statutory right of appeal has been exercised, there is no mechanism for a person to have their conviction re-examined on any grounds. The Committee agrees that the principle of finality is needed to maintain the integrity of the justice system, to provide certainty in the community and for victims of crime, and should only be abrogated in exceptional circumstances.

The Committee notes the submission of the Australian Human Rights Commission that South Australia's current appeal mechanism may contravene Article 14 of the International Covenant on Civil and Political Rights. Although the Committee accepts that our current appeals legislation cannot be challenged on this basis, it is keen to ensure that South Australian law complies as far as possible with Australia's international obligations under the ICCPR.

The Committee considered the provisions contained in sections 76-79 of the New South Wales *Crimes (Appeal and Review) Act 2001*. These provisions operate as an adjunct to the prerogative of mercy; the Committee would prefer investigations and decisions regarding convictions to be dealt with by a court.

Sections 331-338 of the *Criminal Law Consolidation Act 1935* provide for the retrial of a person who has been acquitted of certain offences where the acquittal is tainted, or where there is fresh and compelling evidence against the acquitted person. The Committee found these provisions, which provide exceptions to the double jeopardy rule, to be useful in modelling proposed legislation allowing an appeal where there has been a tainted conviction.

The Committee is of the view that these provisions should apply equally to the benefit of a person who has been convicted of such offences. A person's conviction may be tainted due to another person being found guilty of an administration of justice offence (such as perjury, fabricating evidence, harassing or threatening jurors). Similarly, doubt may be cast on their conviction if fresh and compelling evidence can be found which was not made available or could not have been made available at the time of the trial.

The Committee therefore recommends that the appeal provisions contained in Part 11 of the *Criminal Law Consolidation Act 1935* be amended to include a further right of appeal by a convicted person at any time with the leave of the court on the basis of a tainted conviction, or where there is fresh and compelling evidence which may cast reasonable

doubt over guilt of the convicted person. The same definition of ‘tainted acquittal’ and ‘fresh and compelling evidence’ contained in sections 333 and 337 (respectively) of the *Criminal Law Consolidation Act 1935* should be applied. The provision should include the ability of the court to order a new trial if it sees fit.

The Committee is of the view that the principle of finality is applied by the court and should only be disturbed by the court in these exceptional and limited circumstances. Any further right of appeal should be at the discretion of the court.

The Committee recommends that this opportunity for a second appeal and/or trial should only be afforded to those convicted of serious offences with penalties of 15 years or more imprisonment, as well as those listed as Category A offences under section 331 of the *Criminal Law Consolidation Act 1935* as outlined in Chapter 3.9 of the Report.

#### **RECOMMENDATION 4**

**That the Attorney-General liaise with the courts in undertaking a review of the process of discovery and presentation of scientific evidence in criminal trials, and in particular considers:**

- **amendments to legislation to allow certain expert evidence to be agreed by prosecution and defence;**
- **amendments to legislation and/or court rules which allow the jury and/or judge in a criminal trial the opportunity to ask questions of expert witnesses.**

Many of the submissions to the Inquiry raised concerns that the presentation of scientific evidence during a trial has led directly to wrongful convictions, and that it is only when a specialist review body such as a CCRC investigates these matters that such errors can be corrected.

Further, many witnesses expressed concern about the manner in which scientific evidence is elucidated at trial through the adversarial process of questions and answers from legal advocates. The Committee is concerned that in the presentation of complex scientific evidence to juries, key points may be missed due to the manner in which the evidence is adduced and presented.

The Committee would like to stress that this is in no way a criticism of the scientific experts or even legal advocates, but simply a consequence of the operation of our adversarial system. It was encouraged by the evidence given by Professor Vining in particular regarding the independence of Forensic Science SA, and that it provides a high quality service to both the prosecution and the defence.

The Committee is of the view that if the process by which scientific and forensic evidence were more rigorously controlled, the propensity for wrongful convictions would be greatly reduced. The Committee therefore recommends that the Attorney-General liaises with the courts in undertaking a review of all current rules and procedures for the admission of expert evidence in criminal trials.

The Committee would like to see the presentation of prosecution and defence expert evidence simplified and agreed between both parties if possible, instead of presented in an adversarial way as is currently the case. The Committee notes that under section 285BC of the *Criminal Law Consolidation Act 1935* a defendant must give written notice of its intent to introduce expert evidence. The Committee recommends that this section be extended to provide for agreed expert evidence between prosecution and defence, similar to the notice to admit procedure in section 285B of the *Criminal Law Consolidation Act 1935*. This would allow those parts of scientific evidence, in particular, which are not in contention to be agreed and presented to the jury as such. It is hoped that this agreed evidence will streamline arguments about expert evidence, and limit argument in court to the differences in expert testimony.

The Committee was also concerned to hear in evidence the propensity for jurors to misunderstand scientific expert evidence; it also noted the so-called ‘CSI effect’ where some jury members may place more weight on DNA evidence than they ought. In addition to any agreed expert evidence provisions, the Committee also recommends that there be an opportunity for jurors or the judge to ask questions and seek clarification from expert witnesses during the trial. This would alleviate the concerns expressed in evidence regarding propensity of juries to miss key points due to the presentation and elucidation of evidence through questions and answers. This recommendation will provide a formal mechanism whereby juries may raise concerns regarding expert evidence.

The Committee envisages that after hearing expert evidence, the jury or judge (if trial is by judge alone) be allowed the opportunity to retire and consider any questions they might have regarding the evidence. These questions could then be put to the expert either through the judge or the jury foreman in a manner and form to be agreed by the courts.

#### **RECOMMENDATION 5**

**That the Attorney-General considers establishing a Forensic Science Review Panel to enable the testing or re-testing of forensic evidence which may cast reasonable doubt on the guilt of a convicted person, and for these results to be referred to the Court of Criminal Appeal.**

The Committee notes that the area of scientific evidence is one which has given rise to the most concern regarding the safety of convictions. This is due to the changing nature of opinions about the basis and reliability of science, and the rapid development of new technologies for the testing of evidence. Given the fluidity in the area of scientific research and development, the Committee is of the view that the legal system should allow for a further opportunity for a person to have evidence tested if it may reveal new information that casts reasonable doubt on the guilt of a convicted person.

Even if a convicted person believes that evidence exists that may tend to exonerate them, there is no formal way they can have access to such information or have their case re-investigated. The Committee was concerned to hear evidence from Forensic Science SA that they receive regular requests from prisoners asking for further testing of evidence, but they

have no power to do so, or to direct the prisoner to any other body. The Committee is of the view that there should be some provision for such an investigation to occur.

The Committee considers the New South Wales DNA Review Panel to be a model worthy of consideration in providing an opportunity for a convicted person to have access to evidence and testing that may result in the overturning of their conviction. The Committee notes that the DNA Review Panel is limited to considering convictions occurring after 2006, and to the testing of DNA evidence only. The Committee considers that these two limitations should not apply to any such body in South Australia. Evidence to the Committee has demonstrated that forensic evidence encompasses more than just DNA; it extends to toxicology, pathology and testing of other chemicals and materials, all of which could equally cast doubt over the safety of a person's conviction.

The Committee recommends that a Forensic Science Review Panel be established in South Australia. It would have membership similar to the DNA Review Panel. The Panel would not be a permanent body, but meet regularly as required. It should have membership with representation from the following:

- two legal practitioners of no less than 10 years standing, one of whom is to be the Chair of the Panel;
- Commissioner for Victims Rights, or a nominee who represents the rights of victims;
- Director of Forensic Science SA or a nominee from Forensic Science SA;
- Director of Public Prosecutions or nominee;
- Commissioner of Police or nominee.

The legislation should also include a provision to appoint members where a permanent member has a conflict of interest, similar to the power in the legislation establishing the North Carolina Innocence Inquiry Commission, outlined at 7.4 of this Report.

The functions and powers of the Panel should be based on those contained in section 91 of the *Crimes (Appeal and Review) Act 2001* (NSW) which establishes the powers and functions of the New South Wales DNA Review Panel. The functions of the Forensic Science Review Panel should be:

- to consider any application from an eligible convicted person and to assess whether information obtained from material specified in the application will cast reasonable doubt over that person's conviction;
- to arrange, if appropriate, searches for material and the forensic testing of that material,
- to refer, if appropriate, a case to the Court of Criminal Appeal for review of a conviction following the receipt of forensic test results,
- to make reports and recommendations to the Minister on systems, policies and strategies for using forensic science technology to assist in the assessment of claims which cast doubt over a conviction (including an annual report of its work and activities, and of statistical information relating to the applications it received).

In exercising its functions, the Panel should have regard to the following:

- the interests of and the consequences for any registered victim of the offence to which the application to the Panel relates;
- the need to maintain public confidence in the administration of criminal justice in the State;
- the public interest;
- any other relevant matter.

The Panel should have the power to engage persons to provide expert assistance in the exercise of their functions, including the power to obtain information and documents in the possession of public authorities (such as SAPOL and the courts).

An application to the Panel should be in writing by the convicted person or with that person's written consent. The Committee would like to see a similar provision in this legislation to that which applies to the North Carolina Innocence Inquiry Commission, whereby a convicted person must give an assurance in writing that they will cooperate fully and genuinely believe that the information will cast doubt over their conviction. Only persons convicted of indictable offences should be able to apply to the Panel for a review.

Any application should specify reference to forensic material, new forensic science or testing which may cast doubt over the guilt of the convicted person. The Panel would then arrange searches and testing of the material if it is satisfied that the material exists, and may cast reasonable doubt over that person's conviction. Such material may include forensic material or DNA profiles kept on DNA database system pursuant to the *Criminal Law (Forensic Procedures) Act 2007*.

The Panel should have appropriate powers of investigation, including the power to obtain relevant documents and samples from the South Australia Police and the courts, and the power to call its own experts if required, similar to the provisions in section 91(4) and 91(5) of the *Crimes (Appeal and Review) Act 2001*. A report should be prepared with respect to each application setting out the reasons for or against proceeding.

The Panel would then refer the new material, if any, to the Court of Criminal Appeal. The Committee agrees that similar provisions to those in sections 93-96 of the *Crimes (Appeal and Review) Act 2001* (NSW) should apply to the Forensic Science Review Panel, which provides:

- That the Panel may defer or refuse consideration of applications;
- That the Panel may refer matters to the Court of Criminal Appeal;
- That the Panel notify registered victims and other specified individuals, but otherwise must not disclose any information regarding applications;
- That the police and/or Forensic Science SA should retain material in their possession or control which may be relevant to future proceedings of the Panel.

The Panel should also have the power to make reports and recommendations to the Attorney-General regarding changes to legislation, policies and strategies as a result of their findings, similar to section 91(d) of the *Crimes (Appeal and Review) Act 2001* (NSW).

#### **RECOMMENDATION 6**

**That the Commissioner for Victims' Rights, and victims of crime (if they request), be:**

- **notified of any post conviction review to be undertaken under any Act;**
- **able to make submissions to any such a review proceedings, either through written submission, or through representation by the Commissioner for Victims' Rights;**
- **entitled to information about the progress of such a review.**

Evidence from those with concerns about post conviction review, as well as those in favour of such review, agreed that victims should be afforded the opportunity to at least be informed if such a review is to take place.

The Committee notes that there is a victim representative on the New South Wales DNA Review Panel. Further, section 91(2) of the *Crimes (Appeal and Review) Act 2001* (NSW) provides that the Panel, in making decisions, must have regard to the interests and consequences for victims, and section 95(1)(a) provides that the Panel must notify the registered victim of the offence concerned of any application. The Norwegian Criminal Cases Review Commission also has provision for the notification and representation of victims to any review they undertake.

The Committee recommends that victims of crime of a relevant offence be notified and kept informed of any post conviction review measures introduced as a result of this Inquiry if they so request. The Committee understands that a victim is able to register to be kept informed of the progress of a convicted person, and that this register be used as the basis for notification of any post conviction review. It also recommends that victims be able to make submissions to such reviews, either in writing, or through the advocacy of the Commissioner for Victims' Rights.

The Committee is mindful of the effect of any post conviction appeal or review on victims of crime, and is concerned to ensure that they are not only informed, but that any approach to victims is made sensitively. It therefore recommends that the Commissioner for Victims Rights also be informed of any such review so that the Commissioner may advocate on behalf of the victim and assist them if required.

#### **RECOMMENDATION 7**

**That the Attorney-General consider amendments to relevant legislation to provide that a person granted a pardon for a conviction should be eligible to have their conviction quashed.**

A pardon granted as a result of the exercise of the prerogative of mercy does not quash a conviction, but rather excuses the convicted person from the consequences of their conviction, namely a term of imprisonment. Under section 85ZR(1) of the *Crimes Act 1914* (Cth), a person who is granted a royal pardon for a Commonwealth or Territory offence is to be treated as if they had never been convicted. The Committee notes that section 84 of the *Crimes (Appeal and Review) Act 2001* (NSW) also provides that the court may quash a conviction in respect of which a free pardon has been granted.

Many witnesses to the Inquiry were critical of the operation of the prerogative of mercy, submitting that it was entirely discretionary, and if granted, did not actually result in a conviction being quashed. The Committee recommends that there be a mechanism in South Australian legislation to allow for a conviction to be quashed, or to be considered quashed if a convicted person is granted a pardon.

.....  
**HON. GERRY KANDELAARS**  
**PRESIDING MEMBER**



## **APPENDIX 1 – LIST OF SUBMISSIONS RECEIVED**

The Committee received submissions from the following individuals and organisations:

1. Dr Bob Such MP, Member for Fisher (22 June 2011).
2. Mr Evan Whitton (5 October 2011).
3. Hon. John Doyle, Chief Justice of the Supreme Court (24 October 2011).
4. Mr Brett Williams (4 November 2011).
5. Mr Brenton Hill (11 November 2011).
6. Mr Tom Mann (18 November 2011).
7. Ms Mary Cotter (21 November 2011).
8. Ms Beverley Goode (12 November 2011).
9. Mr Hugh Selby, ANU College of Law (23 November 2011).
10. Mr Peter Scally, Associate professor of Radiology, Royal Brisbane and Women's Hospital (23 November 2011).
11. Mr Kevin Borick QC, Dr Harry Harding and Mr Philip Scales AM (24 November 2011).
12. Ms Amy Sparshott (21 November 2011).
13. Mrs Jacqueline Schmidt (24 November 2011).
14. Mr Mark Livesey QC, South Australian Bar Association (25 November 2011).
15. Ms Courtney Wells (25 November 2011).
16. Ms Danielle Noble, Australian Human Rights Commission (25 November 2011).
17. Mr Graham Archer (25 November 2011).
18. Mr Leigh Garrett CEO, OARS Community Transitions (30 November 2011).
19. Mr Tony Kerin, Australian Lawyers Alliance (12 December 2011).
20. Ms Christine Greer (21 December 2011).
21. Commissioner Malcolm Hyde, Commissioner of Police (23 December 2011).
22. Mr Ralph Bönig, Law Society of South Australia (4 January 2012, Supplementary Submission 25 May 2012).
23. Criminal Cases Review Group, Canada (8 March 2012).
24. Dr Michael Naughton, Innocence Network UK, Bristol University (7 February 2012, Supplementary Submission 28 March 2012).
25. Dr Bob Moles and Ms Bibi Sangha, Networked Knowledge (25 November 2011, Answers to Questions on Notice, 4 April 2012, Supplementary Submission 11 April 2012).
26. Mr Michael O'Connell, Commissioner for Victims' Rights, South Australia (22 February 2012).
27. Hon. John Rau, Attorney General, South Australia (14 March 2012, Supplementary Submission 9 June 2012).
28. Ms Barbara Etter, Integrity and Justice Consultant (19 March 2012).
29. Dr William Tilstone, Forensic Consultant (7 June 2012).

## **APPENDIX 2 – LIST OF EVIDENCE RECEIVED**

The Committee heard evidence from the following individuals:

### **Wednesday 28 March 2012**

- Dr Bob Moles and Ms Bibi Sangha, Networked Knowledge.
- Mr Michael O’Connell, Commissioner for Victim’s Rights.

### **Wednesday 4 April 2012**

- Mr Kevin Borick QC, Dr Harry Harding, Mr Philip Scales AM.

### **Wednesday 2 May 2012**

- Mr Ralph Bönig, President, Law Society of South Australia.

### **Wednesday 13 June 2012**

- Professor Ross Vining, Director, Forensic Science SA.

**Legislative Council—No 59**

As introduced and read a first time, 10 November 2010

South Australia

**Criminal Cases Review Commission Bill 2010**

A BILL FOR

An Act to provide for the establishment of a Criminal Cases Review Commission and for the reference of matters by that Commission to appellate courts; to make related amendments to the *Bail Act 1985* and the *Criminal Law Consolidation Act 1935*; and for other purposes.

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#### Part 2—Amendment of *Criminal Law Consolidation Act 1935*

- 2 Insertion of section 368
    - 368 Power to order investigations
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**The Parliament of South Australia enacts as follows:**

**Part 1—Preliminary**

**1—Short title**

This Act may be cited as the *Criminal Cases Review Commission Act 2010*.

**2—Commencement**

This Act will come into operation on a day to be fixed by proclamation.

**3—Interpretation**

- (1) In this Act, unless the contrary intention appears—

***appropriate person***, in relation to a public body, means—

- (a) the principal officer of the public body; or
- (b) an officer of the public body who has been designated by the principal officer of the body as an appropriate person for the purposes of this Act;

***Commission*** means the Criminal Cases Review Commission established under Part 2;

***Court*** means the Supreme Court;

***principal officer***, in relation to a public body, means—

- (a) if the body consists of a single person (including a corporation sole but not any other body corporate)—that person;
- (b) if the body consists of an unincorporated board or committee—the presiding officer;
- (c) in any other case—the chief executive officer of the agency or a person designated by the regulations as principal officer of the body;

***public body*** means—

- (a) a Minister of the Crown; or
- (b) a person who holds an office established by an Act; or
- (c) an administrative unit under the *Public Sector Management Act 1995*; or
- (d) South Australia Police; or
- (e) any incorporated or unincorporated body—
  - (i) established for a public purpose by an Act; or
  - (ii) established for a public purpose under an Act (other than an Act providing for the incorporation of companies or associations, co-operatives, societies or other voluntary organisations); or
  - (iii) established or subject to control or direction by the Governor, a Minister of the Crown or any instrumentality or agency of the Crown or a council (whether or not established by or under an Act or an enactment); or
- (f) a person or body declared by the regulations to be a public body.

- (2) For the purposes of this Act, convictions are *related* if they are convictions of the same person by the same court on the same day.

## Part 2—The Commission

### 4—The Commission

- (1) The *Criminal Cases Review Commission* is established.
- (2) The Commission—
  - (a) is a body corporate; and
  - (b) has perpetual succession and a common seal; and
  - (c) is capable of suing and being sued in its corporate name; and
  - (d) has all the powers of a natural person that are capable of being exercised by a body corporate; and
  - (e) has the functions and powers assigned or conferred by or under this Act or any other Act.
- (3) If a document appears to bear the common seal of the Commission, it will be presumed, in the absence of proof to the contrary, that the common seal of the Commission was duly affixed to the document.
- (4) The Commission is not an agent or instrumentality of the Crown and the Commission's property is not to be regarded as property of, or held on behalf of, the Crown.
- (5) The Commission will consist of 5 members appointed by the Governor.
- (6) At least 2 of the members of the Commission must be persons who are legal practitioners of not less than 10 years standing.
- (7) At least 3 of the members of the Commission must be persons who have knowledge or experience of any aspect of the criminal justice system (including, in particular, the investigation of offences and the treatment of offenders).

### 5—Terms and conditions of membership

- (1) A member of the Commission will be appointed on conditions determined by the Governor and for a term, not exceeding 5 years, specified in the instrument of appointment and subject to subsection (2), at the expiration of a term of appointment, is eligible for reappointment.
- (2) No person may hold office as a member of the Commission for a continuous period which is longer than 10 years.
- (3) The Governor may appoint a suitable person to be the deputy of a member of the Commission and the deputy may act as a member of the Commission during any period of absence of the member.
- (4) The Governor may remove a member of the Commission from office—
  - (a) for breach of, or non-compliance with, a condition of appointment; or
  - (b) for misconduct; or
  - (c) for failure or incapacity to carry out official duties satisfactorily.

- (5) The office of a member of the Commission becomes vacant if the member—
- (a) dies; or
  - (b) completes a term of office and is not reappointed; or
  - (c) resigns by written notice to the Minister; or
  - (d) is removed from office under subsection (4).
- (6) If a casual vacancy occurs in the office of a member, the Governor may appoint a suitable person to fill the vacancy, and that person will hold office for the balance of the term of his or her predecessor.

## **6—Presiding member**

The Governor must appoint a member of the Commission (the *presiding member*) to preside at meetings of the Commission.

## **7—Vacancies or defects in appointment of members**

An act or proceeding of the Commission is not invalid by reason only of a vacancy in its membership or a defect in the appointment of a member.

## **8—Remuneration**

A member of the Commission is entitled to remuneration, allowances and expenses determined by the Governor.

## **9—Commission's procedures**

- (1) A quorum of the Commission consists of 3 members.
- (2) A meeting of the Commission will be chaired by the presiding member or, in his or her absence, the members present at a meeting of the Commission must choose 1 of their number to preside at the meeting.
- (3) A decision carried by a majority of the votes cast by members of the Commission at a meeting is a decision of the Commission.
- (4) Each member present at a meeting of the Commission has 1 vote on any question arising for decision and the member presiding at the meeting may exercise a casting vote if the votes are equal.
- (5) A conference by telephone or other electronic means between the members of the Commission will, for the purposes of this section, be taken to be a meeting of the Commission at which the participating members are present if—
  - (a) notice of the conference is given to all members in the manner determined by the Commission for the purpose; and
  - (b) each participating member is capable of communicating with every other participating member during the conference.
- (6) A proposed resolution of the Commission becomes a valid decision of the Commission despite the fact that it is not voted on at a meeting of the Commission if—
  - (a) notice of the proposed resolution is given to all members of the Commission in accordance with procedures determined by the Commission; and
  - (b) a majority of the members express concurrence in the proposed resolution by letter, telegram, telex, fax, email or other written communication setting out the terms of the resolution.

- (7) The Commission must have accurate minutes kept of its meetings.
- (8) Subject to this Act, the Commission may determine its own procedures.

## **10—Staff**

- (1) The Commission may, in the performance of its functions under this Act, be assisted by employees in the Public Service who are assigned to the staff of the Commission by the Minister.
- (2) The Commission may, by agreement with the Minister responsible for an administrative unit of the Public Service, make use of the services of the staff, equipment or facilities of that administrative unit.

## **Part 3—References to court**

### **11—References of indictable offences**

- (1) If a person has been convicted of an indictable offence, the Commission—
  - (a) may at any time refer the conviction to the Court; and
  - (b) whether or not the conviction is referred to the Court—may at any time refer to the Court any sentence (not being a sentence fixed by law) imposed on, or in subsequent proceedings relating to, the conviction.
- (2) A reference under subsection (1) has effect as follows:
  - (a) a reference of a person's conviction will be treated for all purposes as an appeal by the person against the conviction;
  - (b) a reference of a sentence imposed on, or in subsequent proceedings relating to, a person's conviction of an indictable offence will be treated for all purposes as an appeal by the person against—
    - (i) the sentence; and
    - (ii) any other sentence (not being a sentence fixed by law) imposed on, or in subsequent proceedings relating to, the conviction or any related conviction,

(and the Commission's reasons for making the reference will be taken to be the grounds of the appeal unless the Court grants special leave to appeal on other grounds).
- (3) On a reference under subsection (1) of a person's conviction, the Commission may give notice to the Court that any related conviction specified in the notice is to be treated as referred to the Court under this section.
- (4) If a person has been declared liable to supervision under Part 8A of the *Criminal Law Consolidation Act 1935* in relation to an indictable offence, the Commission may at any time refer the declaration to the Court.
- (5) A reference under subsection (4) will be treated for all purposes as an appeal by the person against the declaration (and the Commission's reasons for making the reference will be taken to be the grounds of the appeal unless the Court grants special leave to appeal on other grounds).



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## **12—References of summary cases**

- (1) Where a person has been convicted of a summary offence by the Magistrates Court, the Commission—
  - (a) may at any time refer the conviction to the District Court; and
  - (b) (whether or not they refer the conviction) may at any time refer to the District Court any sentence imposed on, or in subsequent proceedings relating to, the conviction.
- (2) A reference under subsection (1) has effect as follows:
  - (a) a reference of a person's conviction will be treated for all purposes as an appeal by the person against the conviction;
  - (b) a reference of a sentence imposed on, or in subsequent proceedings relating to, a person's conviction will be treated for all purposes as an appeal by the person against—
    - (i) the sentence; and
    - (ii) any other sentence imposed on, or in subsequent proceedings relating to, the conviction or any related conviction,

(and the Commission's reasons for making the reference will be taken to be the grounds of the appeal unless the Court grants special leave to appeal on other grounds).
- (3) On a reference under subsection (1) of a person's conviction the Commission may give notice to the District Court that any related conviction specified in the notice is to be treated as referred to the District Court under this section.
- (4) On a reference under subsection (1), the District Court may not award any punishment more severe than that awarded by the court whose decision is referred.

## **13—Conditions for making of references**

- (1) A reference of a conviction, sentence or declaration must not be made under this Part unless—
  - (a) the Commission considers that there is a real possibility that the conviction, sentence or declaration would not be upheld were the reference to be made; and
  - (b) the Commission so considers because of an argument, evidence or information not raised in the proceedings which led to the conviction, sentence or declaration or on any appeal or application for leave to appeal against the conviction, sentence or declaration; and
  - (c) an appeal against the conviction, sentence or declaration has been determined or leave to appeal against it has been refused.
- (2) Nothing in subsection (1)(b) or (c) prevents the making of a reference if it appears to the Commission that there are exceptional circumstances which justify making it.

## **14—Further provisions about references**

- (1) A reference of a conviction, sentence or declaration may be made under this Part either after an application has been made by or on behalf of the person to whom it relates or without an application having been so made.

- (2) In considering whether to make a reference of a conviction, sentence or declaration under this Part, the Commission must have regard to—
  - (a) any application or representations made to the Commission by or on behalf of the person to whom it relates; and
  - (b) any other representations made to the Commission in relation to it; and
  - (c) any other matters which appear to the Commission to be relevant.
- (3) In considering whether to make a reference to a court under this Part, the Commission may at any time refer any point on which they desire the assistance of the court to the court for the court's opinion on it, and on a reference under this subsection the court must consider the point referred and furnish the Commission with the court's opinion on the point.
- (4) A reference under subsection (3) may be dealt with by the court in chambers and without notice to any other person.
- (5) If the Commission makes a reference under this Part, the Commission must—
  - (a) give to the court to which the reference is made a statement of the Commission's reasons for making the reference; and
  - (b) send a copy of the statement to every person who appears to the Commission to be likely to be a party to any proceedings on the appeal arising from the reference.
- (6) In every case in which—
  - (a) an application has been made to the Commission by or on behalf of any person for the reference under this Part of any conviction, sentence or declaration; but
  - (b) the Commission decide not to make a reference of the conviction, sentence or declaration,

the Commission must give a statement of the reasons for their decision to the person who made the application (and may give such a statement to such other persons as the Commission thinks fit).

## Part 4—Investigations and assistance

### 15—Investigations pursuant to direction of Court

- (1) Where a direction is given by the Court, the Commission must investigate the matter specified in the direction in such manner as the Commission think fit.
- (2) Where, in investigating a matter specified in such a direction, it appears to the Commission that—
  - (a) another matter (a *related matter*) which is relevant to the determination of the case by the Court ought, if possible, to be resolved before the case is determined by that Court; and
  - (b) an investigation of the related matter is likely to result in the Court's being able to resolve it,

the Commission may also investigate the related matter.

- (3) The Commission must—
  - (a) keep the Court informed as to the progress of the investigation of any matter specified in a direction; and
  - (b) if the Commission decides to investigate any related matter, notify the Court of the decision and keep the Court informed as to the progress of the investigation.
- (4) The Commission must report to the Court on the investigation of any matter specified in a direction when—
  - (a) they complete the investigation of that matter and of any related matter investigated by them; or
  - (b) they are directed to do so by the Court,whichever happens first.
- (5) A report under subsection (4) must include details of any inquiries made by or for the Commission in the investigation of the matter specified in the direction or any related matter investigated by them.
- (6) Such a report must be accompanied—
  - (a) by any statements and opinions received by the Commission in the investigation of the matter specified in the direction or any related matter investigated by them; and
  - (b) subject to subsection (7), by any reports so received.
- (7) Such a report need not be accompanied by any reports submitted to the Commission under section 19(5) by an investigating officer.

## **16—Assistance in connection with prerogative of mercy**

- (1) If the Attorney-General refers to the Commission any matter which arises in the consideration of whether the Governor should exercise the prerogative of mercy in relation to a conviction and on which the Attorney-General desires their assistance, the Commission must—
  - (a) consider the matter referred; and
  - (b) give to the Attorney-General a statement of their conclusions on it,and the Attorney-General must, in considering whether so to recommend, treat the Commission's statement as conclusive of the matter referred.
- (2) Where in any case the Commission are of the opinion that the Governor should consider whether to exercise the prerogative of mercy in relation to the case they must give the Attorney-General the reasons for that opinion.

## **Part 5—Supplementary powers**

### **17—Power to obtain documents etc**

- (1) This section applies if the Commission believes that—
  - (a) a public body, or an officer of a public body, has possession or control of a document or other material which may assist the Commission in the exercise of any of their functions; and
  - (b) it is reasonable, in the circumstances, to exercise powers under this section.

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- (2) Without limiting subsection (1), the documents and other material covered by this section include, in particular, any document or other material obtained or created during any investigation or proceedings relating to—
- (a) the case in relation to which the Commission's function is being or may be exercised; or
  - (b) any other case which may be in any way connected with that case (whether or not any function of the Commission could be exercised in relation to that other case).
- (3) If this section applies, the Commission may issue to the appropriate person for the public body 1 or more of the following notices:
- (a) a notice specifying that the document or other material must not be destroyed, damaged or altered before the notice is withdrawn by the Commission;
  - (b) a notice directing the appropriate person to produce the document or other material to the Commission, or to give the Commission access to the document or other material, in a manner and at a time specified in the notice;
  - (c) a notice directing the appropriate person to allow the Commission to take away the document or other material or to make and take away a copy of it in such form as they think appropriate.
- (4) An appropriate person who refuses or fails, without reasonable excuse, to comply with a notice issued to the person under this section is guilty of an offence.
- Maximum penalty: \$10 000.
- (5) The duty to comply with a requirement under this section is not affected by any obligation of secrecy or other limitation on disclosure (including any such obligation or limitation imposed by or by virtue of an enactment) which would otherwise prevent the production of the document or other material to the Commission or the giving of access to it to the Commission.

## **18—Power to require appointment of investigating officers**

- (1) The Commission may, if it believes that inquiries should be made to assist the Commission in the exercise of functions in relation to any case, require the appointment of an investigating officer to carry out the inquiries.
- (2) Where any offence to which the case relates was investigated by persons serving in a public body, a requirement under this section may be imposed—
- (a) on the person who is the appropriate person in relation to the public body; or
  - (b) where the public body has ceased to exist, on the Commissioner of Police or on the person who is the appropriate person in relation to any public body which appears to the Commission to have functions which consist of or include functions similar to any of those of the public body which has ceased to exist.
- (3) Where no offence to which the case relates was investigated by persons serving in a public body, a requirement under this section may be imposed on the Commissioner of Police.
- (4) A requirement under this section imposed on the Commissioner of Police may be a requirement to appoint a police officer as investigating officer.

- (5) A requirement under this section imposed on a person who is the appropriate person in relation to a public body (other than the Commissioner of Police) may be—
  - (a) a requirement to appoint a person serving in the public body; or
  - (b) a requirement to appoint a police officer, or an officer of another public body having functions which consist of or include the investigation of offences, selected by the appropriate person.
- (6) The Commission may direct—
  - (a) that a person may not be appointed; or
  - (b) that a public body may not be selected,under subsection (4) or (5) without the approval of the Commission.
- (7) Where an appointment is made under this section by the person who is the appropriate person in relation to any public body, that person must inform the Commission of the appointment and if the Commission are not satisfied with the person appointed they may direct that—
  - (a) the person who is the appropriate person in relation to the public body must, as soon as is reasonably practicable, select another person and notify the Commission of the proposal to appoint the other person; and
  - (b) the other person must not be appointed without the approval of the Commission.

## **19—Inquiries by investigating officers**

- (1) A person appointed as the investigating officer in relation to a case must undertake such inquiries as the Commission may from time to time reasonably direct the person to undertake in relation to the case.
- (2) A person appointed as an investigating officer may be permitted to act as such by the person who is the appropriate person in relation to the public body in which the person is serving.
- (3) The Commission may take any steps which they consider appropriate for supervising the undertaking of inquiries by an investigating officer.
- (4) The Commission may at any time direct that a person appointed as the investigating officer in relation to a case ceases to act as such, but the making of such a direction does not prevent the Commission from imposing a requirement under section 18 to appoint another investigating officer in relation to the case.
- (5) When a person appointed as the investigating officer in relation to a case has completed the inquiries which the person has been directed by the Commission to undertake in relation to the case, the person must—
  - (a) prepare a report of his or her findings; and
  - (b) submit it to the Commission; and
  - (c) send a copy of it to the person by whom he or she was appointed.
- (6) When a person appointed as the investigating officer in relation to a case submits to the Commission a report of his or her findings, the person must also submit to them any statements, opinions and reports received by the person in connection with the inquiries which he or she was directed to undertake in relation to the case.

## **20—Other powers**

Nothing in this Part derogates from the power of the Commission to take any other steps which they consider appropriate for assisting them in the exercise of any of their functions including, in particular—

- (a) undertaking, or arranging for others to undertake, inquiries; and
- (b) obtaining, or arranging for others to obtain, statements, opinions and reports.

## **Part 6—Disclosure of information**

### **21—Offence of disclosure**

- (1) A person who is or has been a member or employee of the Commission must not disclose any information obtained by the Commission in the exercise of any of their functions unless the disclosure of the information is excepted from this section by section 22.
- (2) A person who is or has been an investigating officer must not disclose any information obtained by the person in his or her inquiries unless the disclosure of the information is excepted from this section by section 22.
- (3) A member of the Commission must not authorise—
  - (a) the disclosure by an employee of the Commission of any information obtained by the Commission in the exercise of any of their functions; or
  - (b) the disclosure by an investigating officer of any information obtained by the officer in his or her inquiries.
- (4) A person who contravenes this section is guilty of an offence.  
Maximum penalty: \$10 000 or imprisonment for 1 year.

### **22—Exceptions from obligations of non-disclosure**

- (1) The disclosure of information, or the authorisation of the disclosure of information, is excepted from section 21 by this section if the information is disclosed, or is authorised to be disclosed—
  - (a) for the purposes of any criminal, disciplinary or civil proceedings; or
  - (b) in order to assist in dealing with an application made to the Attorney-General for compensation for a miscarriage of justice; or
  - (c) by a person who is a member or an employee of the Commission either to another person who is a member or an employee of the Commission or to an investigating officer; or
  - (d) by an investigating officer to a member or an employee of the Commission; or
  - (e) in any statement or report authorised or required by this Act; or
  - (f) in or in connection with the exercise of any function under this Act; or
  - (g) in any circumstances in which the disclosure of information is authorised, in writing, by the Attorney-General.
- (2) The disclosure of information is also excepted from section 21 by this section if the information is disclosed by an employee of the Commission, or an investigating officer, who is authorised to disclose the information by a member of the Commission.

- (3) The disclosure of information, or the authorisation of the disclosure of information, is also excepted from section 21 by this section if the information is disclosed, or is authorised to be disclosed, for the purposes of—
- (a) the investigation of an offence; or
  - (b) deciding whether to prosecute a person for an offence,
- unless the disclosure is or would be prevented by an obligation of secrecy or other limitation on disclosure (including any such obligation or limitation imposed by or by virtue of an enactment) arising otherwise than under that section.
- (4) If the disclosure of information is excepted from section 21 by subsection (1) or (2), the disclosure of the information is not prevented by any obligation of secrecy or other limitation on disclosure (including any such obligation or limitation imposed by or by virtue of an enactment) arising otherwise than under that section.
- (5) An authorisation of the Attorney-General under subsection (1)(g) is of no effect unless—
- (a) a copy of the authorisation has been laid before each House of Parliament; and
  - (b) neither House has resolved, in pursuance of a notice of motion given within 14 sitting days (which need not fall within the same session of Parliament) after the authorisation was laid before the House, to disallow the authorisation.

## **23—Consent to disclosure**

- (1) Where a person on whom a requirement is imposed under section 17 notifies the Commission that any information contained in any document or other material to which the requirement relates is not to be disclosed by the Commission without the person's prior consent, the Commission must not disclose the information without such consent.
- (2) Such consent may not be withheld unless—
- (a) apart from section 17—the person would have been prevented by any obligation of secrecy or other limitation on disclosure from disclosing the information to the Commission; and
  - (b) it is reasonable for the person to withhold his consent to disclosure of the information by the Commission.
- (3) An obligation of secrecy or other limitation on disclosure which applies to a person only where disclosure is not authorised by another person will not be taken for the purposes of subsection (2)(a) to prevent the disclosure by the person of information to the Commission unless—
- (a) reasonable steps have been taken to obtain the authorisation of the other person; or
  - (b) such authorisation could not reasonably be expected to be obtained.

## **Part 7—Miscellaneous**

### **24—Reports to Attorney-General**

- (1) The Commission may report to the Attorney-General on any matter related to the administration of this Act or the criminal justice system in this State.
- (2) A report may be made by the Commission under this section of its own motion or at the request of the Attorney-General or a House or Committee of the Parliament.

- (3) The Attorney-General must, within 12 sitting days after receiving a report prepared under this section, cause a copy of the report to be tabled in each House of Parliament.

## **25—*State Records Act 1997* and *Freedom of Information Act 1991* not to apply**

- (1) The *State Records Act 1997* does not apply to information obtained by the Commission under this Act.
- (2) Information obtained by the Commission under this Act is not liable to disclosure under the *Freedom of Information Act 1991*.

## **26—Regulations**

- (1) The Governor may make such regulations as are contemplated by, or necessary or expedient for the purposes of, this Act.
- (2) The regulations may—
- (a) be of general application or vary in their application according to prescribed factors;
  - (b) provide that a matter or thing in respect of which regulations may be made is to be determined according to the discretion of the Minister or the Commission.

## **Schedule 1—Related amendments**

### **Part 1—Amendment of *Bail Act 1985***

#### **1—Amendment of section 4—Eligibility for bail**

- (1) Section 4(1)(c)—after "reviewed" insert:
- (other than by the Criminal Cases Review Commission established under the *Criminal Cases Review Commission Act 2010*)
- (2) Section 4(1)—after paragraph (c) insert:
- (ca) a person who is the subject of a referral to a court under the *Criminal Cases Review Commission Act 2010*;

### **Part 2—Amendment of *Criminal Law Consolidation Act 1935***

#### **2—Insertion of section 368**

After section 367 insert:

#### **368—Power to order investigations**

- (1) On an appeal against conviction, the Full Court may, by notice in writing, direct the Criminal Cases Review Commission to investigate and report to the Court on any matter specified in the notice if it appears to the Court that—
- (a) the matter is relevant to the determination of the case and ought, if possible, to be resolved before the case is determined; and
  - (b) an investigation of the matter by the Commission is likely to result in the Court being able to resolve it; and



- (c) the matter cannot be resolved by the Court without an investigation by the Commission.
- (2) Copies of a direction under this section must be made available to the appellant and the respondent.
- (3) Where the Commission have reported to the Court on any matter which they have been directed under this section to investigate, the Court—
  - (a) must notify the appellant and the respondent that the Commission have reported; and
  - (b) may make available to the appellant and the respondent the report of the Commission and any statements, opinions and reports which accompanied it.